

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

<u>IN THE MATTER OF:</u>)	PSD Appeal No. 07-01
<u>CHRISTIAN COUNTY</u>)	
<u>GENERATION, LLC</u>)	

MOTION FOR LEAVE TO FILE REPLY BRIEF

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MOTION FOR LEAVE TO FILE REPLY BRIEF

Petitioners hereby move for leave to file the attached reply brief. Good cause exists for this motion.

On June 5, 2007 the Illinois Environmental Protection Agency (“IEPA”) issued a PSD permit for Christian County Generation, LLC to construct a new coal fired power plant in Christian County, Illinois. On July 7, 2007 Petitioner filed a timely Petition for Review challenging various provisions of the PSD permit. On August 16, 2007 Christian County Generation, LLC filed an intervenor brief in the matter. IEPA filed its response on August 24, 2007, and at the Board’s request, EPA’s Office of General Counsel filed a brief on September 24, 2007. In their briefs IEPA, EPA, and the Applicant argue that Sierra Club has waived its right to raise the issue of whether a carbon dioxide BACT limit is required, and that even if the issue has been raised properly that IEPA lacks authority to include a carbon dioxide limit in the Christian County PSD permit.

For the following reasons good cause exists to grant Petitioner’s request to file the attached reply brief in this case. First, because the carbon dioxide BACT issue was not reasonable ascertainable at the close of the public comment period Sierra Club may raise the issue for the first time in its Petition. Following the close of the public comment period the Supreme Court handed down a landmark decision holding that carbon dioxide is a pollutant. *See Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). Prior to this time EPA had firmly held that carbon dioxide was not a pollutant, and the only court to review EPA’s conclusion had agreed with the agency that carbon dioxide did not fit under the Act’s definition of a “pollutant.” Therefore even though Sierra Club did not raise this

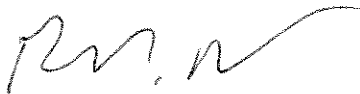
issue until it filed its petition, because of the intervening *Massachusetts* decision this issue has been properly preserved for this Board's review.

Second, EPA has put forward for the first time its interpretation of how the agency interprets its obligations under the PSD program, in the wake of *Massachusetts v. EPA*'s holding that carbon dioxide is a Clean Air Act "pollutant." The attached reply brief is the first time Petitioner has had an opportunity to respond to EPA's argument. Moreover, Sierra Club's response disagreeing with EPA's arguments should aid the Board in resolving this dispute.

Third, in asserting that an agency may not include a carbon dioxide BACT limit in a PSD permit, EPA and IEPA both rely on a single 1993 guidance memo that has never been subject to any notice and comment rulemaking or other legal review. In its reply brief Sierra Club explains why the memo is inconsistent with the Act and EPA's own regulations.

Finally, regarding timing – because this motion is filed eight days before oral argument is scheduled, if the Board grants Sierra Club leave to file the attached reply brief it should not in anyway compromise the Board's interest in the prompt resolution of this PSD appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "B. Nilles", with a stylized flourish at the end.

Bruce Nilles

On behalf of Petitioner Sierra Club

Dated this 8th day of October, 2007

