

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

_____)	PSD Appeal Nos. 08-03 to 08-06
In re:)	
)	Motion of New Mexico Building and
Desert Rock Energy Company, LLC)	Construction Trades Council for Leave to
)	file a Brief as <i>Amicus Curiae</i> in Opposition
PSD Permit No. AZP 04-01)	to Petitions for Review
_____)	

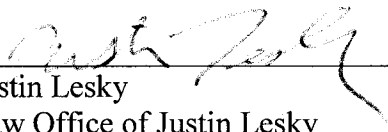
Pursuant to 40 C.F.R. § 124.19 and the Environmental Appeals Board Practice Manual, the New Mexico Building and Construction Trades Council ("NMBCTC") respectfully moves this Board for leave to file the accompanying brief as *amicus curiae* opposing the petitions for review. NMBCTC has an interest in this proceeding because its members will construct the power plant that is the subject of the PSD permit challenged here. It agrees with EPA Region 9, the Diné Power Authority, and Desert Rock Energy Company, LLC, that PSD Permit Number AZP 04-01 was properly issued. For the reasons stated in the brief accompanying this motion, as well as in the responses filed by the above-mentioned parties, NMBCTC respectfully requests that the Board deny the petitions.

NMBCTC is an alliance of craft unions that provide the most highly skilled and highly productive construction labor in New Mexico. NMBCTC and its affiliated member unions demonstrate a concerted commitment to world class skills development and training, coupled with a twenty-first century labor/management model that is founded upon principles of performance, pride, cooperation, and partnership.

NMBCTC urges the Board to reject Petitioners' effort to block or delay construction of this much needed power plant, which has already spent almost five years in the permitting process and will have the most stringent emissions limits of any coal-fired power plant in the

country. In particular, unless and until Congress or EPA takes further action to establish an appropriate framework for regulating carbon dioxide, any effort to mandate the inclusion of emissions limits for carbon dioxide in PSD permits, as Petitioners urge, would create large administrative burdens, cause costly construction delays, impose substantial costs on small sources and consumers, and harm the Navajo and national economies – without achieving any meaningful reduction in worldwide emissions of greenhouse gases. For these reasons, as well as those explained by the parties defending this PSD permit, Region 9 correctly concluded that the permit should not include carbon dioxide limits. NMBCTC respectfully requests that the EAB review the enclosed *amicus* brief and consider it when issuing a decision in this matter.

Respectfully submitted this 8th day of January, 2009.



Justin Lesky
Law Office of Justin Lesky
8210 La Mirada Place NE Suite 600
Albuquerque, NM 87109

Counsel for NMBCTC

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

_____)	PSD Appeal Nos. 08-03 to 08-06
In re:)	
)	Brief of New Mexico Building and
Desert Rock Energy Company, LLC)	Construction Trades Council as <i>Amicus Curiae</i>
)	in Opposition to Petitions for Review
PSD Permit No. AZP 04-01)	
_____)	

INTRODUCTION

The New Mexico Building and Construction Trades Council (“NMBCTC”) is an alliance of craft unions that provide the most highly skilled and highly productive construction labor in New Mexico. Its members will construct the power plant that is the subject of the PSD permit challenged here. This project will provide good-paying, middle-class, blue-collar jobs, that are very much needed in this country’s, and indeed much of the world’s, current economic climate. Moreover, NMBCTC members are involved in a variety of construction projects—both large and small—that will face untenable delays and compliance costs if this Board rules that, under the current regulatory framework, PSD permits must include emissions limits for carbon dioxide.

As the EPA Administrator has explained, the regulation of carbon dioxide and other greenhouse gases under the Clean Air Act “could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.” Advance Notice of Proposed Rulemaking (“ANPR”) at 5 (EPA-HQ-OAR-2008-0318 (July 11, 2008), available at <http://www.epa.gov/climatechange/anpr.html>; 73 Fed. Reg. 44,354 (July 20, 2008)). The “inevitabl[e] result” would be “a very complicated, time-consuming and, likely, convoluted set of regulations” that would reach even relatively small stationary sources like “large homes [and] schools” and would have a “potentially damaging

effect on jobs and the U.S. economy.” *Id.* at 5-6. Unless and until Congress or EPA takes further action to establish an appropriate framework for regulating carbon dioxide, this Board should reject any effort to require that PSD permits include emission limits for carbon dioxide.

BACKGROUND

NMBCTC favors environmentally responsible development that will provide jobs and meet the power growth needs of the Navajo Nation, the Four Corners area of Arizona, Colorado, New Mexico, and Utah, and the desert Southwest. The Desert Rock Facility—a 1,500 MW mine mouth power plant being developed by Sithe Global Power, Desert Rock Energy Company, and the Diné Power Authority (an enterprise of the Navajo Nation)—is such a development. It is designed to burn low BTU, low sulfur subbituminous Navajo coal. The plant will be located within the Navajo Nation in Northwestern New Mexico at an elevation of 5,415 feet. It will be one of the most efficient plants in the United States, with two supercritical pulverized coal-fired boilers operating at an expected heat rate of 8,700 Btu/kWh.

The plant will have the most stringent permit requirements of any coal-fired power plant in the country. Advanced pollution control technology will allow the plant to operate up to 10 times more cleanly than nearby plants for key pollutants, and the project will also pay for emission controls at nearby facilities that would otherwise not be installed. The plant will also use dry cooling to reduce water consumption by 80 percent.

The developers of the project have been good partners for the environment and economy of the region. They have committed to work with labor and Native Americans, provided additional pollution reductions beyond the already strict permit limits, and forged an economic development agreement with the Navajo Nation that will provide significant future revenues.

The regulatory process that the Desert Rock project must complete under the Clean Air Act has already dragged on for many years. The Navajo Nation, the Diné Power Authority, and the project developers began working with EPA in 2003 to obtain the necessary permits. They submitted a PSD permit application in February 2004, EPA Region 9 issued a proposed permit for public comment in July 2006, and it issued the final permit challenged here in July 2008. These petitions followed.

ARGUMENT

In its seminal decision regarding the PSD permitting program, the D.C. Circuit observed that Congress's intention was to target large facilities that are primarily responsible for emitting deleterious pollutants and are "financially able to bear the substantial regulatory costs imposed by the PSD provisions," while also protecting permitting authorities from undue administrative burdens. *Alabama Power v. Costle*, 636 F.2d 323, 353-54 (D.C. Cir. 1980); ANPR at 507-08. If the Clean Air Act and its associated regulations were interpreted to require that PSD permits include emissions limits for carbon dioxide (as Petitioners urge), the dramatically increased administrative burdens would cause construction permitting to grind to a halt, and substantial costs would be imposed on small facilities and consumers.

In addition, carbon dioxide limits would negatively affect the economic development of the Navajo Nation and the United States without significantly reducing worldwide emissions. Recognizing these and other problems with mandating reductions in domestic emissions of greenhouse gases, the EPA Administrator has interpreted existing regulations not to require them. The Board should do likewise.

A. The administrative burdens of imposing carbon dioxide limits would produce costly construction delays.

If carbon dioxide and other greenhouse gases become regulated for PSD purposes, EPA estimates that permitting authorities would experience a more than tenfold increase in demand because permits would be required for new construction or modification of many sources not previously covered by the Clean Air Act. ANPR at 479-80, 483, 512. These construction projects will have to be put on hold while EPA goes through a “time-consuming” rulemaking process to adopt a “very complicated” set of regulations concerning greenhouse gas emissions. *Id.* at 5.

Even after the regulations are complete, “requiring PSD permits for numerous smaller [greenhouse gas] sources and modifications not previously included in the program” would only “magnify” existing concerns regarding the “costs, uncertainty, and construction delays” that have arisen from EPA’s case-by-case approach to the complex PSD permitting process. ANPR at 488, 490. If the permit system is overwhelmed and cannot keep up with the significantly increased demand for new pre-construction permits, “construction could be delayed on a large number of projects.” *Id.* at 512. To say the least, this is a costly and “very inefficient way to address the challenges of climate change.” *Id.* at 488.

B. Carbon dioxide limits would impose substantial costs on small sources and consumers.

Not only would regulating carbon dioxide through the Clean Air Act “prove inordinately burdensome,” that burden would fall heavily on smaller emissions sources. ANPR, Letter from Council of Economic Advisers and Office of Science and Technology Policy (“CEA Letter”), at 5. For example, permits could be required for construction or modification of large single family homes, small businesses, schools, shopping centers, apartments, hotels, and hospitals. ANPR at

58, 61. “This could lead to EPA exercising de facto zoning authority through thousands of what formerly were local or private decisions, impacting the construction of . . . commercial and residential development.” ANPR, Letter from Secretaries of Agriculture, Commerce, Transportation, and Energy, at 2.

Permitting smaller sources is inefficient because “the environmental benefit of each permit is generally less than what results from permitting a larger source,” yet “there are still administrative costs borne by the source and permitting authority.” ANPR at 483. Furthermore, as the D.C. Circuit observed in *Alabama Power*, the legislative history shows that Congress did not envision that the PSD program would cover large numbers of smaller sources because they are less able to bear the substantial regulatory costs. 636 F.2d at 353-34; ANPR at 507-09. Because limiting carbon dioxide through the PSD program would sweep in many smaller sources, the Board should not impose such a limit.

C. Unilateral domestic carbon dioxide limits would negatively impact the Navajo and national economies without significantly reducing worldwide emissions.

Regardless of whether granting these petitions would threaten the viability of the project or merely result in more cost and delay, the inevitable result will be harm to the Navajo Nation, which conceived this project to ensure that “Navajo coal, water, land and labor will stay on the Navajo Nation to produce revenue for the Navajo people.” AR 29, at 2. In the four years it will take to construct the project, more than 1,000 good-paying jobs will be filled by a significant number of Navajo union workers. The project will also create more than 400 permanent jobs, which will provide real long-term lifestyle improvement to a Navajo workforce that currently suffers nearly 50% unemployment. The developers of the project have also entered into an

economic development agreement that will provide significant future revenues to the Navajo Nation.

Moreover, the desert Southwest has a burgeoning population, a growing economy, and a steadily-increasing need for reliable and affordable electricity. At the same time, the Navajo Nation has vast natural resources that can help to meet those power needs and provide substantial benefits for the Nation and its members. The Navajo Nation has estimated that, every month this project is delayed, it loses \$5 million in direct benefits that would otherwise be used to improve the quality of life for the Navajo people.

Imposing limits on carbon dioxide emissions may also have harmful consequences for the national economy, and those limits are unlikely to reduce global emissions significantly. Coal is used to generate about half of the national electricity supply, and limits on carbon dioxide emissions could force generators to cut electricity production and make a drastic shift toward more costly and lower-emission fuels like natural gas. These events would dramatically increase the electricity prices paid by consumers, possibly as much as 79% by 2030. ANPR at 37-38 & n.4. Such price increases would be regressive, placing a greater burden on lower-income households.¹ Substantial increases in energy prices would also reduce production and employment in key energy-intensive manufacturing industries, causing the gross domestic product to fall.² Furthermore, these price increases give producers an economic incentive to shift

¹ Congressional Budget Office, *Shifting the Cost Burden of a Carbon Cap-and-Trade Program*, at ix (July 2003). See also *Clean Power Act: Hearings on S. 556 Before S. Comm. on Env't & Pub. Works*, 107th Cong. 757 (2002) (statement of J. Thomas Mullen, President & CEO, Catholic Charities Health and Human Services) (testifying that "conversion to natural gas from coal would have a devastating effect on the people of Ohio and our country, particularly the poor and elderly," and citing study that 23% of Americans already have difficulty in paying their utilities).

² ANPR at 38, 51. See also Energy Information Administration, U.S. Dep't of Energy, *What Does the Kyoto Protocol Mean to U.S. Energy Markets and the U.S. Economy* (Oct. 1998)

their operations to other countries that do not limit emissions, thereby reducing the impact that U.S. domestic emissions limits can have in reducing global concentrations of greenhouse gases. ANPR, CEA Letter, at 5; ANPR at 48.

D. Congress and the EPA Administrator have correctly chosen not to regulate carbon dioxide emissions in the manner advocated by Petitioners.

For these reasons and many others, Congress has consistently rejected legislation mandating unilateral domestic reductions of carbon dioxide emissions.³ Instead, it has pursued several other options, including funding research and technology development, directing executive agencies to find nonregulatory ways to reduce emissions, and requiring monitoring of emissions.⁴ On December 18, 2008, EPA Administrator Stephen Johnson interpreted existing PSD regulations under the Clean Air Act not to limit pollutants that, like carbon dioxide, are subject only to monitoring or reporting requirements. The Board should respect those policy choices and decline to interpret the CAA to require carbon dioxide emissions limits in PSD permits.

CONCLUSION

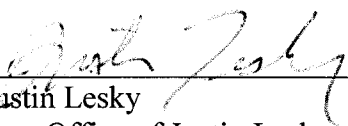
For the reasons set forth above, as well as those explained by the parties defending this PSD permit, Region 9 correctly concluded that the permit should not include carbon dioxide limits. NMBCTC respectfully requests that the Board deny the petitions.

Respectfully submitted this 8th day of January, 2009.

(projecting losses of between \$102 billion and \$437 billion in 2010 gross domestic product from emissions reductions proposed by the Kyoto Protocol).

³ See, e.g., Climate Stewardship Act of 2005, S. Amdt. 826, 109th Cong. (2005); Climate Stewardship Act of 2003, S. 139, 109th Cong. (2003); H.R. 5966, 101st Cong. (1990); S. 1224, 101st Cong. (1989).

⁴ See, e.g., 42 U.S.C. §§ 7403, 13385, 15801; 1990 Amendments to the Clean Air Act, Pub. L. No. 101-549, § 821(a), 104 Stat. 2399, 2699 (1990).


Justin Lesky
Law Office of Justin Lesky
8210 La Mirada Place NE Suite 600
Albuquerque, NM 87109

Counsel for NMBCTC

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2009, the original Brief of New Mexico Building and Construction Trades Council as *Amicus Curiae* in Opposition to Petitions for Review, as well as a Motion for Leave to File the Brief, were hand delivered to:

Clerk, Environmental Appeals Board
U.S. Environmental Protection Agency
Colorado Building
1341 G Street, N.W., Suite 600
Washington, DC 20005

Copies of these documents were also submitted through the Board's electronic submission system.

I further certify that copies of the Brief and Motion were served by United States First Class Mail on the following persons:

Nicholas Persampieri
Earthjustice
1400 Glenarm Place, #300
Denver, CO 80202

John Barth
P.O. Box 409
Hygiene, CO 80533

Patrice Simms
Natural Resources Defense Council
1200 New York Avenue NW, Suite 400
Washington, D.C. 20005

Kevin Lynch
Environmental Defense Fund
Climate and Air Program
2334 N. Broadway
Boulder, CO 80304

Ann Brewster Weeks
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108

Deborah Jordan
Director, Air Division (Attn: AIR-3)
EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105-3901

Brian Doster
U.S. Environmental Protection Agency
Office of the General Counsel
1200 Pennsylvania Avenue, N.W.
Washington, DC 40460

Seth T. Cohen
Assistant Attorney General
Office of the Attorney General of New Mexico
Water, Environment and Utilities Division
P.O. Drawer 1508
Sante Fe, NM 87504-1508

