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March 19, 2008

VIA FEDERAL EXPRESS

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
Colorado Building
1341 G Street, NW
Suite 600
Washington, D.C. 20005

RE: PSD Appeal No. 07-03
In Re: Deseret Power Electric Cooperative
Our File No. – CNPH:005

Dear Ms. Durr:

Enclosed please find an original and six copies of the BRIEF OF *AMICI CURIAE* CONOCOPHILLIPS COMPANY and WRB REFINING LLC for filing in the above-referenced matter. Please file the original and five copies and return a file-stamped copy to me in the enclosed self-addressed stamped envelope.

Thank you for your assistance. Please feel free to contact me if you have any questions regarding the enclosed.

Sincerely,

Katherine D. Hodge

KDH:plt
enclosures
pc: Donna H. Carvalho, Esq. (via U.S. Mail; w/enclosure)

CNPH:005/ConocoPhillips Appeal/Clerk Ltr – Amicus Brief

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

IN THE MATTER OF:	)	
	)	
Deseret Power Electric Cooperative	)	**PSD Appeal No. 07-03**
	)	
PSD Permit No. PSD-OU-0002-04.00	)	

BRIEF OF *AMICI CURIAE* CONOCOPHILLIPS COMPANY AND WRB REFINING LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

FEDERAL REGULATIONS

PRELIMINARY STATEMENT

Amici curiae ConocoPhillips Company and WRB Refining LLC ("*Amici*") submit this brief in support of EPA and in response to the Environmental Appeal Board's ("Board's") November 21, 2007 order granting review of Sierra Club's first issue and establishing a briefing schedule for additional briefs by Sierra Club, Deseret and the Region, and any other interest party (as modified by the Board's February 12, 2008 and February 20, 2008 Orders). *Amici* are petroleum companies that own and/or operate various refineries in the United States, including specifically the Wood River Refinery in Roxana, Illinois. At the time of this filing, the Prevention of Significant Deterioration ("PSD") approval for *Amici's* Wood River Facility Coker and Refinery Expansion ("CORE") project is also subject to a petition for review before the Board. One of the issues involved in the Wood River case is whether Best Available Control Technology ("BACT") is required for carbon dioxide ("CO_2") emissions at that facility.[1] In this brief, *Amici* demonstrate that the requirements for PSD permitting under Title I Part C Subpart 1 of the Clean Air Act, 42 U.S.C. §§ 7470-79 (2007), do not currently apply to greenhouse gas ("GHG") including CO_2 emissions. Further, *Amici* wish to ensure that the Board is aware of the real and severe problems that the regulators and the regulated community, including *Amici*, will face if BACT and other PSD permitting requirements are imposed on an *ad hoc*, localized basis at facilities which emit CO_2.

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[1] As noted in various documents filed in *In re ConocoPhillips Company*, PSD Appeal 07-02, it is *Amici's* position both that the CO_2 issue was not properly preserved for review in the ConocoPhillips' case and that CO_2 is not a regulated pollutant. As the issue preservation concern is the same as that presented and recently ruled upon in *In re Christian County Generation*, PSD Appeal 07-01, *Amici* anticipate a similar ruling in its case imminently.

ARGUMENT

I. EPA HAS DISCRETION TO INTERPRET THE PSD REQUIREMENTS OF THE CLEAN AIR ACT, AND THE BOARD SHOULD DEFER TO EPA'S INTERPRETATIONS.

Sierra Club claims that the Prevention of Significant Deterioration ("PSD") permit at issue in this case (the "Bonanza PSD Permit") is defective because it does not contain a BACT emission limit for CO_2. Sierra Club Br. at 4; *id.* at 1. Sierra Club argues that a BACT emission limit is required both because the U.S. Supreme Court found in *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007) that "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,'" (Sierra Club Br. at 4; *id.* at 1) and because Section 165 of the Clean Air Act requires that a PSD permit include a BACT emission limit "for each pollutant **subject to regulation under this chapter** emitted from, or which results from the facility. Clean Air Act, 42 U.S.C. § 7475(a)(4) (2007). (Emphasis added.)

Sierra Club erroneously believes that CO_2 is already a "regulated pollutant" under the Clean Air Act because of the Massachusetts ruling and certain existing CO_2 monitoring and reporting requirements that have been promulgated pursuant to Section 821 of the Clean Air Act Amendments. Clean Air Act, 42 U. S. C. 7651k note, Pub.L.101-549 (2007). Sierra Club's conclusions are simply wrong and deference to EPA's own interpretations should be given.

A. The Supreme Court Ruling in Massachusetts v. EPA Does Not Automatically Render CO_2 a Regulated Pollutant for PSD Purposes.

Assertions by Sierra Club and its *amici curiae* that the Supreme Court's decision last year in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), requires EPA to impose BACT limits on CO_2 emissions are spurious. The Supreme Court in *Massachusetts* did not, as Petitioners imply, hold that EPA can or must regulate CO_2 and other greenhouse gas emissions under all or any of the various Clean Air Act sections that authorize EPA regulatory action. The

Supreme Court's decision addresses only whether EPA has the authority — if specific statutory criteria are met — to regulate CO_2 and other greenhouse gas emissions from new motor vehicles under Section 202(a)(1) of the Act. Clean Air Act, 42 U.S.C. § 7521(a)(1) (2007), *construed in Massachusetts*, 127 S.Ct. at 1462 ("we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.").[2]

Similarly, Sierra Club's assertion that the Supreme Court's determination that the Clean Air Act definition of "air pollutant" is broad enough to encompass CO_2 and other greenhouse gases means that EPA is required to apply BACT to CO_2 emissions is a gross mischaracterization of the effect of *Massachusetts*. The Supreme Court did not construe the meaning of "air pollutant" in order to delineate the scope of regulatory authority under provisions of the Act other than Section 202(a)(1); rather, the issue before the Court was "whether § 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles." *Massachusetts*, 127 S.Ct. at 1459. (Emphasis added.)

Moreover, **this** Board rejected arguments that the decision in the Massachusetts case, standing alone, necessarily required the imposition of BACT controls in its recent decision in *In re Christian County, LLC*, PSD Appeal No. 07-01. Further, as noted by the Board in that case, Sierra Club had acknowledged that the Massachusetts ruling did not resolve all issues necessary to determine whether PSD program elements would apply to CO_2 emissions:

> Here, the interpretation of federal law announced by the Supreme Court in its Massachusetts decision, standing alone, does not compel application of a CO_2 BACT limit in the present case. Indeed, Sierra Club acknowledges that the Court's conclusion that CO_2 is an air pollutant under the Clean Air Act does not resolve

[2] Even with respect to greenhouse gas emissions from motor vehicles, the Supreme Court did not hold that EPA was required, under Section 202(a)(1) of the Act, to regulate such emissions or even to decide whether to regulate them. Clean Air Act, 42 U.S.C. § 7521(a)(1) (2007), *construed in Massachusetts*, 127 S.Ct. at 1463 (holding, "we need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding").

> all issues necessary to determine whether the PSD permit issued to CCG must contain a CO_2 BACT emissions limit. Specifically, Sierra Club notes that only air pollutants that are "subject to regulation" and emitted by the Facility in amounts exceeding the applicable "significance level" must be controlled by a BACT limit. Petition at 6. Whether CO_2 is a pollutant subject to regulation under the Clean Air Act remains a matter of considerable dispute."

In re Christian County, PSD 07-01 at 17 (Jan. 28, 2008).

B. Carbon Dioxide is NOT a "Pollutant Subject to Regulation" under the Clean Air Act.

It is undisputed that EPA's PSD regulations provide that BACT is required at major sources for "any pollutant that otherwise is subject to regulation under Act." 40 C.F.R. § 52.21(b)(50)(iv) (2007). Sierra Club and its *Amici* assert that a BACT emission limit for CO_2 emissions is required in **this** case because CO_2 is already "subject to regulation" under the Clean Air Act. *See* Sierra Club Br. at 5; Utah and Western Non-Governmental Organizations Br. at 10-11; National Parks Motion and Br. at 11; and States of New York, California, Connecticut, Delaware, Maine, Massachusetts, Rhode Island and Vermont Br. at 10 -11. In all but the combined States' brief, this assertion is premised on the idea that because Section 821(a) of the Clean Air Act Amendments of 1990, 42 U. S. C. 7651k note, Pub.L.101-549 (1990), requires EPA to promulgate regulations to require power plants to report CO_2 emissions and EPA has required this reporting since 1993, CO_2 emissions are already "subject to regulation" under the Clean Air Act.

Sierra Club's assertion is simply wrong for several reasons. First, EPA has long taken the position espoused in its response brief in this action and other public statements that "subject to regulation" means being subject to a statutory or regulatory provision that requires actual control of emissions not monitoring as mandated in Section 821. Second, assuming only for the sake of argument, that monitoring rules are somehow "regulation" for control purposes, the

requirements of Section 821 are not actually part of the Clean Air Act. Clean Air Act Amendments of 1990, 42 U.S.C. §7651k note, Pub.L.101-549 (1990).

1. EPA's Interpretation of Section 165 is Correct and Entitled to Deference.

EPA did not require a BACT determination for CO_2 emissions in the Bonanza PSD Permit because CO_2 does not meet the definition of a "regulated NSR pollutant." In EPA's Response to Public Comments for the Deseret Permit, EPA succinctly notes:

> The Clean Air Act and EPA's regulations require PSD permits to contain emissions limitations for "each pollutant subject to regulation" under the Act. In defining those PSD permit requirements, EPA has historically interpreted the term "subject to regulation under the Act" to describe pollutants that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant. In 2002, EPA codified this approach for implementing PSD by defining the term "regulated NSR pollutant" and clarifying that Best Available Control Technology is required "for each regulated NSR pollutant that [a major source] would have the potential to emit in significant amounts. EPA's implementing regulations note that BACT is required for "any pollutant that otherwise is subject to regulation under Act.
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> * * *
>
> EPA continues to interpret the phrase 'subject to regulation under the Act' to refer to pollutants that are subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant. Because EPA has not established a NAAQS or NSPS for CO_2, classified CO_2 as a Title VI substance, or otherwise regulated CO2 under any other provision of the Act, CO_2 is not currently a "regulated NSR pollutant" as defined by EPA regulations.

US EPA Region 8, Response to Public Comments on Draft Air Pollution Control Prevention of Significant Deterioration ("PSD") Permit to Construct for Deseret Power Electric Cooperative (Exhibit 2) at 6. (Citations omitted.)

EPA has substantial discretion and flexibility to interpret its own regulations, including the PSD provisions of the Clean Air Act. *See, e.g., New York v. United States EPA*, 413 F3d. 3, 23-24 (D.C. Cir. 2005), *rehearing denied* 431 F.3d 801; *Alabama Power Co. v. Costle*, 606 F.2d 1068, 1077 (D.C. Cir. 1979) (describing the "flexibility" and "latitude" EPA has in fashioning

PSD regulations); *Envtl. Def. v. Duke Energy Corp.*, 127 S.Ct. 1423, 1433-34 (2007) (legislative history does not suggest Congress "had details of regulatory implementation in mind when it imposed PSD requirements on modified sources"). As discussed in more detail below, EPA's interpretation is reasonable and consistent with the statutory language, and, therefore, must be upheld. In reviewing an agency's understanding of its own regulations, a reviewing court's "task is not to decide which among several competing interpretations best serves the regulatory purpose," but rather to apply the agency's interpretation "unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *see Capital Network Systems, Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994).

EPA's position is neither new nor novel. As noted in EPA's response, EPA has interpreted the phrase "subject to regulation" to describe only those pollutants subject to regulations requiring actual control of emissions for nearly 30 years. In 1978, EPA provided guidance that listed the pollutants subject to BACT requirements. 43 Fed. Reg. 26, 388, 26, 397 (June 19, 1978). This list was reiterated in 1996 as EPA sought to implement the 1990 Amendments. 61 Fed. Reg. 38,250, 38, 309-10 (July 23, 1996). EPA's consistently stated interpretation was formally codified in 2002. 67 Fed. Reg. 80,186, 80,240 (Dec. 31, 2002), 40 C.F.R. 51 and 52. In each of these instances, the pollutants listed were always subject to some rule which limited or otherwise curtailed the particular emissions of a particular pollutant or category of pollutants. The codified definition references pollutants regulated in three principal program areas:

1. Pollutants for which the Administrator has established National Ambient Air Quality Standards ("NAAQS");
2. Pollutants subject to New Source Performance Standards ("NSPS"); and

3. Class I or II substance under Title VI of the Act.

Id. Obviously, CO_2 emissions do not fall within any of these categories.

EPA has consistently expressed and defended its interpretation publicly, most recently in both this case and *In re Christian County*, PSD 07-01, where it noted both in its brief and in an oral hearing that its continuing position that the phrase "subject to regulation" to describe only those pollutants subject to regulations requiring actual control of emissions.

Moreover, it is entirely reasonable for EPA to conclude that CO_2 is not a "regulated NSR pollutant." As explained in EPA's response, it is EPA's position that pollutants "subject to regulation" are those pollutants that are subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant. The common meaning of "regulation" of pollutant emissions means a restriction or limitation on that pollutant, not simply a requirement to keep track of its emissions. To "regulate" is to "govern or direct according to rule," "to fix or adjust the time, amount, degree, or rate of, etc.," "to bring order, method, or uniformity to, etc." *Merriam-Webster Online Dictionary (2008)* available at http://www.merriam-webster.com/cgi-bin/mwwood.pl. Similarly, *Black's Law Dictionary* defines "regulation" as "[t]he act or process of controlling by rule or restriction. BLACK'S LAW DICTIONARY 1311 (8th Ed. 1999). Mere monitoring and reporting of emissions does not fit within any of the types of activities understood to constitute "regulation" of those emissions in the ordinary meaning of that term.[3] An agency's interpretation of a statute should focus first on the ordinary, dictionary meaning of the terms used. *See, e.g., MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 225-27, 114 S.Ct. 2223, 2229 (1994).

[3] Sierra Club references definitions of "a regulation," *Cf.* Sierra Club Br. at 12-13, but the statute refers not to "a regulation" but to "regulation under." 42 U.S.C. § 7475(a)(4) (2007). For that usage, it is the first meaning of "regulation" that is relevant: "a regulating or being regulated."

As noted in the Deseret Motion to Participate and Request for Oral Argument, the context and operation of Section 165 also confirm EPA's interpretation. *In re Deseret Power Electric Cooperative*, PSD 07-03, Deseret Motion to Participate and Request for Oral Argument, at 4-5. The plain and ordinary meaning of the term "regulation" in "subject to regulation" contemplates, as a pre-requisite, a clear legislative expression of intent elsewhere in the Act to control emissions and to take a different approach leads to the perverse and incongruous consequence where BACT is required for CO_2 emissions or other air pollutants where there is no mandate by law or regulation to control those emissions through any technology or other means. Sierra Club also argues that if Congress had wanted EPA to consider "subject to regulation" to mean only subject to an emission limit or standard it would have used those terms. (Sierra Club Petition at 8). This argument fails to recognize or address the fact that the Clean Air Act includes a wide variety of control measures such as "performance standards," Clean Air Act § 111(a)(1); 42 U.S.C. § 7411(a)(1) (2007), design standards, "equipment standards," "work practice standards," or operational standards." *Id.* at § 7411(h)(1). The Deseret Motion to Participate and Request for Oral Argument Brief is dispositive on the fact that the term "regulation" refers to a variety of actions that EPA could take, all which are designed to **control** or otherwise reduce emissions and *Amici* direct the Board's attention to that discussion. Deseret Motion at 7-8.

2. The Provisions of Public Law 821 are not part of the Clean Air Act.

Sierra Club asserts that CO_2 "has been regulated under the Clean Air Act since 1993, when EPA adopted regulations implementing Section 821 [of Public Law 101-549] that require monitoring, recordkeeping and recording of CO_2 emissions of certain covered sources." Sierra Club Br. at 6. (Citations omitted.) In its response, EPA correctly points out that regulations

requiring monitoring and reporting of CO_2 emissions that were authorized by Section 821(a) do not constitute "regulation under" the Clean Air Act. EPA Response to Petition for Review, at 7-12. This fact is apparent on the face of the statute. Public Law 101-549, the Clean Air Act Amendments of 1990, does not constitute the Clean Air Act, rather, it contains amendments to the Clean Air Act. It also contains provisions, however, that are not amendments to the Clean Air Act, including Section 821 (which authorizes EPA to require monitoring and reporting of CO_2 emissions from specific sources). Title VII of Pub. L. 101-549, entitled "Miscellaneous Provisions," contains some sections that specifically state that they amend the Clean Air Act, and others, such as Section 821, that do not contain any amendatory language and do not add new sections to the Clean Air Act or repeal existing ones. *Compare, e.g.*, Pub. L. 101-549 Sections 801, 803, 812, 816, 822 (101 Stat. 2685, 2689, 2691, 2695, 2699) *with* Sections 808, 811, 815, 820, 821 (101 Stat. 2690, 2693, 2699). Nothing Sierra Club or its *amici* have said or can say contradicts the plain language of Pub. L. 101-549: Section 821 did not amend, and therefore does not authorize "regulation under," [the Public Law 101-549] that require monitoring, recordkeeping and recording of CO_2 emissions of certain covered sources." Sierra Club Br. at 6. (Citations omitted.)

In its response, EPA further notes that the drafters of Section 821 did not express any intent to require emissions controls on CO_2 under the PSD program. EPA Response at 18. EPA specifically notes that Congressman Cooper (one of the two authors of the Section 821 language), stated that his "amendment would not force any reductions now." *Id.* (Citations omitted.)

II. CLIMATE CHANGE CONCERNS ARE GLOBAL IN NATURE AND EPA'S INTERPRETATION SHOULD BE UPHELD AS A POLICY MATTER TO ALLOW FOR DEVELOPMENT OF A COMPREHENSIVE REGULATORY PROGRAM AND TO AVOID DRASTIC UNINTENDED CONSEQUENCES.

Even if it were not clear from a legal standpoint that CO_2 is not currently a regulated pollutant under the Clean Air Act, and that this petition should be denied on that basis alone, there are policy and practical reasons the Board should support EPA's interpretation. First, given the global nature of the greenhouse gas issue, it should not be addressed on an *ad hoc*, piecemeal basis with localized, litigation based regulations. Second, a finding that BACT limits are currently required for CO_2 emissions at major sources will subject hundreds of previously unregulated facilities to PSD permitting at a tremendous cost in Agency and industry resources.

A. Given the Global Nature of the Greenhouse Gas Issue, It Should be Addressed in a Comprehensive Fashion, and not on an *Ad Hoc*, Piecemeal Basis.

Important policy considerations of a national nature are involved in this matter. Rejecting EPA's interpretation would result in CO_2 emission controls being imposed haphazardly and individually through litigation. This is not, and has not been, EPA's preferred policy approach. As noted in the November 2007 testimony of Stephen L. Johnson, EPA Administrator, before the United States House of Representatives Committee on Oversight and Government Reform:

> Global climate change is an enormously complex issue that deserves thoughtful consideration and requires more than a one size fits all solution.
>
> * * *
>
> Developing such technologies and policies is not something that can be accomplished overnight, rather it requires – and deserves – a deliberate process, one that involves a range of stakeholders. While [EPA] continues to grapple with how best to address the challenge of global climate change, the Agency also has a legal responsibility to continue processing PSD preconstruction permit applications such as that submitted over three years ago by Deseret Power. Testimony of Stephen L. Johnson, Administrator, U.S. EPA before the Committee

On Oversight and Government Reform, U. S. House of Representatives, November 8, 2007 at 11.

* * *

> Just as the challenge of global climate change requires a coordinated effort among many nations, it also requires that we avoid a piecemeal approach to regulation. Given the complexity of issues involved, it would be premature to attempt to address climate change in a single PSD permitting action, particularly when carbon dioxide is not yet a regulated pollutant.

Id. at 10.

Administrator Johnson reiterated this concern in March, 2008 when he published the Agency's decision to deny the California Air Resources Board's ("CARB") request for a waiver of the Clean Air Act's prohibition on adopting and enforcing CARB's emission standard for 2009 and later model year vehicles. In the Federal Register notice issued March 6, 2008, the Administrator noted:

> As the previous section indicates, global climate change is a substantial and critical challenge for the environment. There is little question that the conditions brought about as a result of global climate change are serious, whether reviewing the issue as a global, national or state-specific issue..... While I find that the conditions related to global climate change in California are substantial, **they are not sufficiently different from conditions in the nation as a whole to justify separate state standards**.

73 Fed. Reg. 12,156, 12,168 (March 6, 2008). (Emphasis added.)

EPA has consistently and correctly taken the position, for legal and policy reasons, that global climate change should not be addressed on a localized basis. To do so is inappropriate and inefficient to address a national concern. Yet that is what Petitioner is doing in this case. Essentially, Petitioner is asking the Board to ignore EPA's thirty-year old interpretation and recklessly proceed ahead of Congress and EPA — both of which are currently considering how best to regulate CO_2 — and impose the Petitioner's own version of CO_2 regulation on a plant-by-plant, PSD permitting basis.

Amici's own experiences highlight the very practical issues which arise from Petitioner's attempt to regulate a global issue on a case-by-case basis. *Amici* applied for its permit in 2006 and was issued a state permit and PSD approval on July 19, 2007. A petition requesting review on several PSD approval issues, including whether a BACT limit for CO_2 was required, was filed by the same Petitioner as in this case. While *Amici* believe that the issue was not properly preserved for appeal in the ConocoPhillips case, and is a non-issue for all the reasons presented in this case, *Amici* nonetheless have been delayed from proceeding with the project while review is ongoing. *In re ConocoPhillips Company*, PSD Appeal No. 07-02, Supplement to Motion for Expedited Consideration at 5.

One very real impact that is not unique to A*mici* is that there is no certainty as to when and if *Amici* will be able to proceed with this project. While *Amici* or other similarly situated permittees await confirmation that they were properly issued a PSD approval, they and other individual permittees are basically forced to play a game of regulatory "Russian Roulette" as to whether they can get their permit without it being challenged on the CO_2 issue and/or as to the ultimate outcome of such a challenge . Based on the following cases, it now appears, that where you plan to locate your facility, and not a comprehensive national program designed for the specific purpose of addressing greenhouse gas emissions, determines whether you must include a BACT limit for CO_2 emissions and ultimately install yet-to-be-developed controls that your competitors may or may not have to install.

To wit: In the fall of 2007, Sunflower Electric Company was denied an air permit by the Kansas Department of Health and Environment for not addressing CO_2 and greenhouse

emissions.[4] Sunflower appealed its permit denial and that appeal is currently before the Kansas Supreme Court. While the judiciary prepares to review the permit denial, the Kansas legislature has enacted legislation that would grant Sunflower its permit.[5]

On the other hand, permittees in Georgia and Montana can currently proceed with permits in those states without addressing CO_2 and greenhouse emissions. In both of those jurisdictions, judicial rulings were issued after the Massachusetts ruling in January of this year stating that CO_2 is not currently a regulated pollutant for the purposes of BACT. *See Friends of the Chattahoochee, Inc. and Sierra Club v. Dr. Carol A. Couch, et. al,* 2007 Ga. Env. LEXIS 60 (Ga. OSAH 2007) and Transcript, Board hearing 1-11-08, Montana Board of Environmental Review at http://www.deq.state.mt.us/ber/index.asp.This Board's agreement that CO_2 is not a regulated pollutant consistent with EPA's longstanding interpretation and policy preference would alleviate much of the uncertainty permittees now face and would help preclude the perverse outcome that whether a CO_2 BACT limit is required is strictly a matter of geography.

Additionally, as noted in ConocoPhillips' Supplement to Motion For Expedited Consideration, in *In re ConocoPhillips*, PSD 07-02, ConocoPhillips was considering and did delay the beginning of its refinery turnaround due to the continued delay and uncertainty of the PSD appeal process. As noted in ConocoPhillips' Original Motion to Participate and for Expedited Consideration in that case, the Facility originally planned a turnaround for early

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[4] Kansas denied the permit based on a state public health issue and not PSD/BACT. *See* Public Health — Air Quality Control — Action to Protect Health or Environment; Authority to Deny, Modify or Stay Issuance of an Air Quality Permit, Kansas Attorney General Opinion, No. 2007-31 (Sept. 24, 2007) *available at* http://ksag.washburnlaw.edu/opinions/2007/2007-031.htm.

[5] Joe Blubaugh, KDHE Denies Sunflower Electric Air Quality Permit, Kansas Department of Health and Environment, Oct. 18, 2007, http://www.kdheks.gov/press_room.htm; David Klepper, Kansas Senate Sends Coal Plant Bill to Sebelius, THE KANSAS CITY STAR, March 6, 2008, available at http://www.kansascity.com/115/v-print/story/520755.html.

February 2008, during which necessary refurbishment and maintenance of certain processing units would take place. These turnarounds are generally planned on a four-to five-year cycle and are important to maintain operational efficiency and continue to ensure safe operations. The turnaround was delayed until March as a direct result of the appeal of its PSD approval, in the hopes that a favorable decision would be forthcoming. Motion to Participate and Motion for Expedited Consideration at 10, *In re ConocoPhillips Company*, PSD 07-02,

There are two very real effects of this and similar delays. First, in the current economic downturn, all delays cost permittees additional money and in some cases, actually threaten the viability of the project being permitted. As the Board is certainly aware, timing of the completion of projects is vital for a project to ensure that it meets an investment threshold. The viability of a project is significantly threatened if the new product from a project is not delivered within a given business cycle, or if equipment costs rise significantly (e.g., steel pipe), or the availability of skilled labor is siphoned off for other projects that move ahead while an appealed project languishes. Delays of a few months can result in project cancellation. It does not appear to be prudent to delay projects at this uncertain economic time, especially, when EPA's rules do not require a CO_2 limit at this time.

More specific to *Amici*, due to this delay, if unanticipated problems are encountered during the turnaround and the facility does not complete the turnaround in a timely fashion, gasoline supplies in the Midwest during the summer season, the highest demand period, could be directly affected. As noted in previous ConocoPhillips filings, the Midwest gasoline market in recent years has been one of the tightest in the country. *In re ConocoPhillips Company*, PSD Appeal No. 07-02, Motion to Participate and Motion for Expedited Consideration at 9.

Many plants that are currently planning construction and/or modification face these potential delays and economic penalties. The Board's affirmation of EPA's interpretation should relieve most of the uncertainty associated with current permitting and prevent the PSD program being used to address problems of a global nature at a single facility within the context of a single permit. Rejecting EPA's interpretation would result in CO_2 emission controls being imposed haphazardly and individually through litigation.

B. A Finding that BACT Limits are Currently Required for CO_2 Emissions at Major Sources will Subject Hundreds of Previously Unregulated Facilities to PSD Permitting at Tremendous Costs in Agency and Industry Resources.

As noted above, for BACT emission limits to be imposed on CO_2 emissions as part of the Bonanza PSD Permit, those CO_2 emissions would have to be determined to represent a "significant net emissions increase" of a "regulated NSR pollutant" at a "major source facility." If the Board were to determine that CO_2 meets the definition of "regulated NSR pollutant" (despite the demonstration in Part I, supra, that it does not) then "any emission rate" would be considered a "significant" increase under 40 C.F.R. § 52.21(b)(23)(ii) (2007), since a significance level for CO_2 has not yet been established. Therefore, if CO_2 were determined to be a "regulated NSR pollutant," the planned construction of or a slight physical change or change in the method of operation of a major source facility that produces CO_2 could immediately require a preconstruction PSD permit.

Additionally, treating CO_2 as a "regulated NSR pollutant" has an immediate and far-reaching impact on the designation of "major stationary sources." EPA has interpreted the statutory thresholds for determining whether a facility is a "major stationary source" (100 tons per year ("tpy") for facilities in certain categories and 250 tpy for all other facilities) to apply to emissions of a "regulated NSR pollutant." *See* 40 C.F.R. § 52.21(b)(1)(i)). If the

term "regulated NSR pollutant" includes CO_2, which is emitted from fuel-burning sources in far larger quantities than regulated pollutants like SO_2 and NO_x, then far more facilities would be considered "major stationary sources."

For example, burning natural gas typically generates about 120.6 pounds of CO_2 per thousand cubic feet of natural gas consumed.[6] Accordingly, a source would only need to burn approximately 1,660 mcf of natural gas per year to exceed 100 tons of CO_2 emitted per year, or about 4,150 mcf to exceed 250 tpy. According to the U.S. Department of Energy, a facility with floor space of 100,000 square feet or more or employing 100 workers or more might well exceed 250 tpy of CO_2 emissions just from space heating.[7] Other non-traditional sources which might be newly affected are sources with institutional size hot water heaters.

Thus, suddenly defining, through this PSD permit appeal, "regulated NSR pollutant" to include CO_2 could vastly increase the number and type of facilities that would need to obtain a PSD permit before they were constructed or before they were modified. Multitudes of facilities (including some that until now have not been covered by any Clean Air Act permitting requirement) would have to analyze their operations and would have to restrict their activities until PSD permits could be obtained.

Moreover, those applications would be particularly resource-intensive because there is no history of BACT determinations for CO_2 and no EPA guidance on the subject. Additionally, BACT determinations often take into account what existing State Implementation Plan emission limits and national New Source Performance Standards may apply or require. (*See* 40 C.F.R. § 52.21(j)(1).) At this time, there are no guiding rules for permit writers or those trying to

[6] Source: U.S. Dept. of Energy, http://www.eia.doe.gov/oiaf/1605/coefficients.html.

[7] Source, U.S. Dept. of Energy, http://www.eia.doe.gov/emeu/consumption/index.html, Table C24.

anticipate what their permit might require here to rely upon. While some states have adopted technology forcing requirements for future projects, these are not useful in determining what is **current** BACT.[8] Thus, each and every one of the many permits anticipated to be required would require a one-off BACT determination, requiring copious amounts of permit writers' time and increasing the likelihood of lengthy appeals.

Additionally, it is anticipated that most of these permits would be processed by state and local permitting agencies, many of which are not currently resourced to process what could be a multitude of applications at one time for otherwise small emitters. The regulatory authorities would clearly be overwhelmed by the huge increase in facilities subject to PSD permitting requirements, and a regulatory log jam would likely result. In response to such log jam, as discussed above, many construction projects would be delayed or abandoned at a time when our economy is already faltering. Further, it would not be just industrial projects that would be put on hold. Instead, it would also be the construction of many facilities which would normally be exempt from permitting including facilities such as apartments, schools, hospitals and other

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[8] For example, the State of Washington requires new coal projects to prepare a "Greenhouse Gas Reduction Program plan" as part of its permitting process. Iowa and New Jersey have enacted laws which require future reductions without real direction as to how those reductions will occur. Numerous governors have called for advisory councils and energy efficiency, but no one has proposed actual concrete controls. *See e.g., Governor Culver Signs Greenhouse Gas Emission Bill*, Office of the Governor and Lt. Governor, April 27, 2007, http://www.governor.iowa.gov/news/2007/04/27_1.php; *Pawlenty Signs Next Generation Energy Act,* Office of Governor Tim Pawlenty, May 25, 2007, http://www.governor.state.mn.us/mediacenter/pressreleases/2007/PROD008146.html; *Governor Signs Global Warming Act*, Office of the Governor State of New Jersey, July 6, 2007, http://www.state.nj.us/governor/news/news/approved/20070706.html; *Governor Kulongoski Announces Global Warming Commission and Outlines 2009 Climate Change Agenda*, Governor Ted Kulongoski, Oregon, January 24, 2008, http://governor.oregon.gov/Gov/P2008/press_012408.shtml; *Governor Gregoire Signs Legislation that Positions Washington as Leader in Response to Climate Change*, Governor Chris Gregoire, Washington, May 3, 2007, http://www.governor.wa.gov/news/news/view.asp?pressRelease=569&newsType=1.

public structures with on-site space heating. Even projects that would have the effect of increasing energy efficiency and reducing overall CO_2 emissions could be delayed indefinitely.

Clearly, application of the PSD program to CO_2 emissions would be a huge regulatory change that should only be imposed through rulemaking (and, likely, legislation). Rulemaking procedures ensure that all stakeholders have an opportunity to be heard and work together to develop practical, workable solutions. Upholding EPA's interpretation is correct legally and allows all interested parties some time to address such important policy matters.

The need for a coordinated policy and magnitude of the potential issues has been described in the holding in *Conn. v. Amer. Elec.*, 406 F.2d Supp. 265, 274 (S.D. NY 2005). Although admittedly issued prior to the ruling in *Massachusetts*, the Southern District of New York noted that these important issues should not be decided by the judiciary. There, the judge noted:

> Because resolution of the issues presented here [global warming] requires identification and balancing of economic, environmental, foreign policy, and national security interests, "an initial policy determination of a kind clearly for non-judicial discretion" is required. Vieth, 541 U.S. at 278 (quoting Baker, 369 U.S. at 212). Indeed, the questions presented here "uniquely demand single-voiced statement of the Government's views." Baker, 369 U.S. at 211.

Conn. v. Amer. Elec., 406 F.2d Supp. 265, 274 (S.D. NY 2005), quoting *Veith v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769 (2004) and *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691 (1962). Thus, these actions present non-justifiable political questions that are consigned to the political branches, not the Judiciary.

CONCLUSION

For the reasons set forth above, *Amici Curiae* ConocoPhillips Company and WRB Refining LLC urge the Board to deny the Sierra Club's petition for review and uphold EPA's issuance of the Bonanza PSD Permit.

Respectfully submitted,

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Dated: March 19, 2008

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CNPH:005/Fil/Amicus Brief of ConocoPhillips

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CNPH:005/ConocoPhillips Appeal/COS - Brief