BEFORE THE
ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	**PSD Appeal No. 07-03**
Deseret Power	)	
Electric Cooperative	)	
	)	

SUPPLEMENTAL BRIEF *AMICI CURIAE* OF UTAH AND WESTERN NON-GOVERNMENTAL ORGANIZATIONS

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SUPPLEMENTAL BRIEF AMICI CURIAE OF UTAH AND WESTERN NON-GOVERNMENTAL ORGANIZATIONS

The Utah and Western Non-Governmental Organizations[1] respectfully submit their response to the Board's June 16, 2008 Order requesting supplemental briefing and to the Region/OAR's filings dated August 8, 2008 and September 9, 2008.

During oral argument, the Board asked the Region/OAR whether the CO_2 monitoring requirements are "enforceable under Section 113 of the Clean Air Act." Transcript at 81. Counsel for the Region/OAR responded that "consistent with our interpretation," enforcement under the Clean Air Act "would not be appropriate." *Id.*

The Region/OAR's August 8 supplemental filing, however, retracts that position. The new filing reveals not only that it is appropriate to enforce the CO_2 monitoring provisions under the Clean Air Act, but that EPA has repeatedly done so. As the hundreds of pages submitted by EPA show, across many administrative and federal district court cases in which it has enforced the CO_2 monitoring requirements, the Agency has never relied on any enforcement authority other than the Clean Air Act. And contrary to the Region/OAR's position, the fact that the CO_2

[1] The groups joining in this brief represent thousands of members and concerned citizens in Utah and across the American West. The groups include Utah Physicians for a Healthy Environment, Post Carbon Salt Lake, Grand Canyon Trust, Montana Environmental Information Center, Wyoming Outdoor Council, Western Resource Advocates, and the Rocky Mountain Office of Environmental Defense Fund.

monitoring requirements are enforceable under the Clean Air Act – to the tune of hundreds of thousands of dollars in civil penalties – confirms that CO_2 is "regulated under" the Act.

In addition, as the Region/OAR have acknowledged in their September 9, 2008 letter to the Board, EPA has recently published in the Federal Register a state implementation plan for Delaware that not only requires *monitoring* of CO_2, but imposes *quantitative limits* on CO_2 emissions. In other words, ***even under the too-narrow definition of "regulation" that the Region/OAR have advocated in this case, CO_2 is regulated under the Clean Air Act.*** As the EPA itself states in its Federal Register notices, it approved the Delaware SIP (and made it part of federal law) "under the Clean Air Act" (*see* 73 Fed. Reg. 11,845) and "in accordance with the Clean Air Act" (*see* 73 Fed. Reg. at 23,101). EPA has been reviewing Delaware's SIP submitted at least since November 1, 2007, when Delaware submitted the SIP revision to EPA. 73 Fed. Reg. at 11,846.

Contrary to the Region/OAR's contention, the fact that the Delaware SIP was approved in 2008, after the Region acted on Deseret's permit application, does not end the matter. Given the importance of this development, amici respectfully request that, if the Board does not impose a BACT requirement on other grounds, the Board remand this proceeding to Region 8 for reconsideration in light of the EPA's action limiting CO_2 emissions under the Clean Air Act. *See In re J&L Specialty Prods. Corp.*, 5 E.A.D. 31, 66 (EAB 1994) (Board "has the discretion to remand permit conditions for reconsideration in light of legal requirements that change" between a Region's action on a permit and the conclusion of administrative appeals).[2]

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[2] In *J&L*, the Board stated: "On administrative review, the Agency has the discretion to remand permit conditions for reconsideration in light of legal requirements that change before the permit becomes *final agency action*." 5 E.A.D. at 66 (emphasis added). Under the applicable regulations here, "final agency action occurs when a final . . . PSD permit decision is

Finally, amici respectfully request that the Board take official notice of another Federal Register publication by EPA since the completion of substantive briefing in this proceeding.[3] Specifically, on July 30, 2008, EPA published an Advanced Notice of Proposed Rulemaking that addresses potential solutions to the policy concerns that Deseret and some amici have raised about application of Prevention of Significant Deterioration ("PSD") permitting requirements to CO_2. As this EPA notice demonstrates, the Board need not address these policy issues, to which EPA has already identified possible solutions. Instead, the EAB need only decide whether the proposed Bonanza plant – which would emit more than a million tons of CO_2 every year – is subject to PSD requirements, regardless of how EPA addresses significantly smaller emitters.

1. The Region/OAR Concede that the Carbon Dioxide Monitoring Requirement Is Enforceable Under the Clean Air Act

In their supplemental brief, the Region/OAR admit (at 19-20) that the enforcement provisions of the Clean Air Act, including Section 113 of the Act, 42 U.S.C. § 7413, can fairly be read to include authority to enforce the CO_2 monitoring provisions. In endorsing this position, the Region/OAR have abandoned the contention at oral argument that it "would not be appropriate" to use the Clean Air Act to enforce the CO_2 monitoring requirements.

As the Region/OAR acknowledge (at 19), the Clean Air Act's enforcement provision (Section 113) applies, by its terms, to violations of the Clean Air Act, but does not specifically refer to statutory provisions that are codified as a note to the Act, such as Section 821.

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issued by EPA and agency review procedures under this section are exhausted." 40 C.F.R. § 124.19(f)(1).

[3] Under settled precedent, and as the Region/OAR's September 9, 2008 filing recognizes, the Board may take official notice of documents published in the Federal Register. *E.g.*, *In re Arecibo & Aguadilla Regional Wastewater Treatment Plants*, 12 E.A.D. 97, 145 n.86 (EAB 2005) ("The Board takes official notice of relevant non-record information contained in the [pertinent] judicial proceedings .... The Board generally regards public documents of this kind as appropriate for official notice.") (citations omitted); *see also infra* note 7.

Nevertheless, as the Region/OAR admit, Congress plainly intended for the CO_2 monitoring provisions of Section 821 to be enforceable. The Region/OAR themselves therefore state that it is fair to conclude that "the authority in [Clean Air Act] § 113" was "expanded" to include enforcement of Section 821's CO_2 monitoring requirements. Region/OAR Supp. Response at 19.[4] In other words, far from it being "inappropriate" to enforce the CO2 monitoring requirement under the Clean Air Act, the Region/OAR have conceded that it is perfectly proper to do so.

The Region/OAR also discuss a different interpretation: that Section 821 creates a parallel enforcement regime, which is just like the Clean Air Act mechanism, but is somehow not part of the Clean Air Act. (Region/OAR Supp. Response at 11-19.) As discussed below, this theory is inconsistent with EPA's own precedents and none of the precedent cited by the Region/OAR is on point. In fact, as discussed in detail below, both the Clean Air Act and the EPA's implementing regulations expressly provide for enforcement of the CO_2 monitoring provisions under the Clean Air Act.

2. EPA Has Consistently Enforced the Carbon Dioxide Monitoring Requirement Under Section 113 of the Clean Air Act

Thanks to the EAB's initiative, the Region/OAR have provided the EAB and the other parties and amici with key documents from several proceedings in which EPA has enforced the CO_2 monitoring requirements of Section 821. As we describe in detail here, those documents show that EPA has consistently and uniformly relied on Section 113 of the Clean Air Act to enforce the CO_2 monitoring provisions of Section 821.

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[4] Despite conceding that CO_2 monitoring is enforceable under the Act, the Region/OAR continue to maintain, incorrectly, that Section 821 is not part of the Clean Air Act. But what is crucial for purposes of the Board's inquiry is that the Region/OAR agree that the Act can fairly be read to provide for enforcement of CO_2 monitoring under the enforcement provisions of the Clean Air Act.

In 1995, for example, the Agency sought – and obtained – monetary penalties against IES Utilities Inc. for failure to ensure continuous emissions monitoring ("CEM") of, among other things, carbon dioxide. *In re IES Utilities Inc.*, EPA Dkt. No. VII-95-CAA-111. Although the Region/OAR now describe the Agency's prior enforcement practices as "imprecise" (Region/OAR Supp. Response at 21), that is not so: in the *IES* case, EPA squarely invoked, again and again, the Clean Air Act's enforcement provisions in seeking penalties for failure to monitor CO_2 emissions. In other words, the EPA's enforcement effort in *IES* is consistent with the first reading discussed above – that CO_2 monitoring is enforceable under Section 113 of the Clean Air Act – but inconsistent with the notion of some separate, parallel enforcement authority under Section 821.

The Region/OAR seek to minimize the Agency's many past CO_2 enforcement actions under the Clean Air Act by suggesting that because there were several types of emissions at issue (*e.g.*, SOx, NOx, and CO_2), the Agency did not take any position about whether the Clean Air Act itself can be used to enforce the CO_2 monitoring requirements. Region/OAR Supp. Response at 20-23. But that is not accurate. In the *IES Utilities* case, for example, EPA plainly sought to enforce the CO_2 monitoring provisions, but brought suit *only* under Section 113 of the Clean Air Act, *not* under Section 821. The first page of the Agency's civil administrative Complaint makes that clear:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	Docket No. VII-95-CAA-111
IES UTILITIES INC.	)	
Cedar Rapids, Iowa	)	COMPLAINT AND NOTICE OF
	)	OPPORTUNITY FOR HEARING
Respondent	)	

COMPLAINT

This civil administrative Complaint and Notice of Opportunity for Hearing under Section 113(d) of the Clean Air Act (the "Act"), 42 U.S.C. § 7413(d), proposes penalties for

As EPA explained in its *IES* complaint, the Continuous Emissions Monitoring regulations in Part 75 of the CFR specifically require measurement of CO_2 emissions:

> 8. 40 C.F.R. § 75.10(a)(3) provides, in relevant part, that the owner or operator for each affected unit shall determine CO_2 emissions by using the options specified in 40 C.F.R. § 75.10(a)(3)(i); 40 C.F.R. § 75.10(a)(3)(ii) or 40 C.F.R. § 75.10(a)(3)(iii).

EPA also made clear that the Clean Air Act itself – in particular, Section 412(e) of the Act – requires compliance with the CEM requirements (including, necessarily, the CO_2 monitoring requirements):

> 5. Section 412(e) of the Act, 42 U.S.C. § 7651k(e), makes it unlawful for the owner or operator of any source subject to Title IV of the Act to operate a source without complying with Section 412 and the implementing regulations at 40 C.F.R. Part 75, including 40 C.F.R. §§ 75.4 and 75.5.

EPA left no doubt that it was focusing on violations of the CO_2 monitoring requirements in particular, and not solely on SOx or NOx emissions:

> 16. As of January 1, 1995, Respondent had not completed the certification testing of required continuous emission monitors for carbon dioxide at Sixth Street units 4(7/8) and 5(9/10).
>
> 17. As of January 1, 1995, Respondent had not completed the certification testing of required continuous emission monitors for carbon dioxide at Prairie Creek unit 3.
>
> 18. As of January 1, 1995, Respondent had not completed the certification testing of required continuous emission monitors for carbon dioxide at Sutherland units 1, 2 and 3.

When the respondents agreed to settle the *IES Utilities* case, the Consent Order signed by EPA reiterated that EPA was relying exclusively on Section 113 of the Clean Air Act, not on some murky parallel authority:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

In the Matter of	)	
	)	
IES UTILITIES INC.	)	CAA Docket No. VII-95-CAA-111
Cedar Rapids, Iowa	)	
	)	
Respondent.	)	

CONSENT AGREEMENT AND CONSENT ORDER

This proceeding for the assessment of a civil penalty was initiated on or about June 19, 1995, pursuant to Section 113(d) of the Clean Air Act (hereinafter CAA), as amended, 42 U.S.C. § 7413(d), when the United States Environmental Protection Agency

Because of IES Utilities' violations of the Continuous Emissions Monitoring requirements applicable to CO_2 and other pollutants, EPA imposed a negotiated civil penalty of more than $100,000. *IES Utilities* Consent Agreement and Consent Order at 2-3.

The *IES* enforcement proceeding is one of several in which EPA has relied on Section 113 – not on some ill-defined scheme in some other statutory provision – to enforce the CO_2 monitoring requirements.

EPA's enforcement action in 2000 against Indiana Municipal Power likewise shows – with no "imprecision" at all – that EPA was relying solely on Section 113 of the Clean Air Act as the basis for seeking civil penalties for violation of the CO_2 monitoring requirements. Here is the caption of EPA's administrative complaint:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	**Docket No.** CAA-5- 2000-0 16
	)	
Indiana Municipal Power	)	**Proceeding to Assess a**
Agency, Carmel, Indiana	)	**Civil Penalty under**
at its	)	**Section 113(d) of the**
Anderson Combustion Turbine	)	**Clean Air Act,**
Facility, Anderson, Indiana	)	**42 U.S.C. § 7413(d)**
and	)	
Richmond Combustion Turbine	)	
Facility, Richmond, Indiana,	)	
Respondent.		

Administrative Complaint

1. This is an administrative proceeding to assess a civil penalty under Section 113(d) of the Clean Air Act (the Act), 42 U.S.C. § 7413(d).

Consistent with its practice in other proceedings enforcing the CO_2 monitoring requirements, in its complaint in the *Indiana Municipal Power* case EPA treated Section 821 as part of the Clean Air Act:

> 5. Pursuant to Section 412 and 821 of the Act, 42 U.S.C. §§ 7401-7671q, as amended by Public Law 101-549 (November 15, 1990) the Administrator established requirements for the monitoring, record keeping, and reporting of sulfur dioxide, nitrogen oxide, and carbon dioxide emissions, volumetric flow, and opacity under the Acid Rain Program at 40 C.F.R. Part 75.

In the Consent Order in the *Indiana Municipal Power* case, EPA reiterated its view that Section 821 is part of the Clean Air Act:

> 2. On , EPA filed the complaint in this action against Respondent Indiana Municipal Power Agency. The complaint alleges that IMPA violated Sections 412 and 821 of the Act, 42 U.S.C. §§ 7401-7671q, and 40 C.F.R. Part 72 and 75 at its facilities in Anderson and Richmond.

EPA ultimately imposed a civil penalty of nearly $75,000 on the Indiana Municipal Power Agency for its violations of the CO_2 monitoring and other requirements. Exh. 1 to Region/OAR Supp. Response at 38.

In a third civil administrative enforcement action, against the City of Detroit, EPA yet again asserted that the Clean Air Act requires utilities to monitor their CO_2 emissions.

II. REGULATORY BACKGROUND

5. The Acid Rain Program, which implements the Acid Deposition Control provisions found in Subchapter IV-A of the Clean Air Act, 42 U.S.C. §§ 7651-7651o, is codified at 40 C.F.R. Parts 72 through 78. The Acid Rain Program sets forth permitting, operating, monitoring, certification, recordkeeping and reporting requirements for "affected units," as that term is defined under the program.

* * * * * *

7. The Acid Rain Program requires, among other things, that the owner or operator of an affected unit monitor, record and report sulfur dioxide (SO_2), nitrogen oxides (NOx) and carbon dioxide (CO_2) emissions, volumetric flow and opacity data.

EPA's complaint against Detroit specifically focused on the Clean Air Act regulations requiring monitoring of CO_2 emissions:

17. 40 C.F.R. § 60.45, requires that affected units install, calibrate, maintain and operate continuous emission monitoring systems for measuring NOx and CO_2 emissions.

And consistent with its uniform practice, in the 2004 *City of Detroit* proceeding, EPA again relied solely on Section 113 of the Clean Air Act as the statutory basis for seeking remedies for violation of the CO_2 monitoring requirements:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	Docket No. ~~CAA-05-~~ 2004 002
	)	
City of Detroit, Department of Public Lighting Mistersky Power Station Detroit, Michigan	)	Consent Agreement and Final Order
Respondent.	)	

CONSENT AGREEMENT AND FINAL ORDER

I. JURISDICTIONAL AUTHORITY

1. This is a civil administrative action instituted pursuant to Section 113(d) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d), and Sections 22.1(a)(2), 22.13(b), and 22.34 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," 40 C.F.R. Part 22 (the Consolidated Rules).

In court, the Justice Department (as counsel for EPA) has likewise expressly relied on Section 113 of the Clean Air Act as the basis for enforcing the CO_2 monitoring provisions. The following is from the cover page of the 1998 federal district court complaint against Block Island Power Company:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Civil Action No.
BLOCK ISLAND POWER COMPANY, INC., Defendant.	)	CA 99 0451

COMPLAINT

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), files this complaint and alleges as follows:

Nature of Action

1. This is a civil action instituted pursuant to Section 113(b) of the Clean Air Act (the "Act"), 42 U.S.C. § 7413(b), in which the United States seeks civil penalties and injunctive relief for Block Island Power Company, Inc.'s

Even the DOJ's cover sheet for the lawsuit pointedly relied on the same authority:

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE
DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)
The United States is seeking penalties and injunctive relief under Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b).

In its lawsuit against Block Island Power, the United States treated the CO_2 monitoring requirements as part and parcel of the Clean Air Act strictures requiring affected units to measure various types of emissions:

> IV. Acid Deposition Control
>
> 29. Section 412 of the Act, 42 U.S.C. § 7651k, and 40 C.F.R. Part 75, require the owner or operator of a "new affected unit" regulated under Subchapter IV-A of the Act, 42 U.S.C. §§ 7651 to 7651o, relating to the reduction of acid rain, to install, certify, operate, and maintain continuous emission monitoring systems at each affected unit for sulfur dioxide, nitrogen oxides, opacity and carbon dioxide.

The Court ultimately imposed an (agreed) civil penalty of nearly $75,000 on the *Block Island* respondents for their violations of the CO_2 emissions monitoring requirements and other provisions of the Clean Air Act and implementing regulations. Exh. 1 to Region/OAR Supp. Response at 93.

In a fifth enforcement action, in 1996 EPA intervened in a citizen suit against Public Service Company of Colorado, based on EPA's enforcement authority under Section 113 of the Clean Air Act:

> WHEREAS, the United States moved under the Act without opposition to intervene in the Sierra Club's action as a party plaintiff pursuant to Sections 304(c) and 113(b) of the Act, 42 U.S.C. §§ 7604(c) and 7413(b), and file a complaint for Defendants' violations of: (1) the Colorado State Implementation Plan, Colorado Air Quality Control Act, §§ 25-7-1-I through 25-7-609, C.R.S. and its implementing regulations, 5 C.C.R. 1001-1 et seq.; (2) the NSPS, 40 C.F.R. § 60.11(d), promulgated under Section 111 of the Act, 42 U.S.C. § 7411; and (3) Defendants' emission permit;

Exh. 1 to Region/OAR Supp. Response at 122.

In the Consent Decree entered thereafter in the *Public Service Co.* lawsuit, EPA stipulated that the Court had jurisdiction over the subject matter of the Act *under Section 113*:

> III. JURISDICTION AND VENUE
>
> 3. This Court has jurisdiction over the Parties to and the subject matter of this action under Section 304 of the Act, 42 U.S.C. § 7604, the citizen suit provision of the Act, Section 113 of the Act, 42 U.S.C. § 7413, and under 28 U.S.C. §§ 1331, 1345, and 1355.

The Consent Decree required the *Public Service Co.* respondents to comply with emissions monitoring requirements for both CO_2 and other air pollutants:

> VI. CONTINUOUS EMISSION MONITORS
>
> 9. At all times after entry of this Decree, Defendants shall maintain, calibrate and operate CEMS for each unit of the Hayden Station to measure accurately SO(2) and NO(x) emissions from each such unit, as well as flow and carbon dioxide, in full compliance with the requirements found at 40 C.F.R. Part 75. Nothing herein shall preclude Defendants from installing, certifying and operating integrated CEMS equipment to measure SO(2), NO(x) or opacity, or any combination thereof.

Exh. 1 to Region/OAR Supp. Response at 132.

* * * * * * * * * * *

In short, across all of the enforcement proceedings that EPA has disclosed in its August 8 Supplemental Response, EPA has uniformly – and exclusively – relied on the Clean Air Act as the statutory basis for enforcing the CO_2 monitoring provisions. And that reliance is not the product of confusion or mistake: in a contemporaneous lawsuit, the EPA specifically preserved a jurisdictional objection over *another* provision of the 1990 Clean Air Act Amendments that was codified as a note to the Clean Air Act. *See infra* pp. 15-16.

3. The Region/OAR's Alternative Theory Is Inconsistent with the Agency's Uniform Past Practices

In a strained effort to avoid the Agency's long-standing interpretation of the law, the Region/OAR claim that Section 821 creates an enforcement regime that is a precise mirror image of that in the Clean Air Act, but is not part of the Act. Region/OAR Supp. Response at 11-19. This strained contention has no basis in the Agency's actual practices, is contradicted by the Act and the Agency's own regulations, and is not supported by the case law.

Though the Region/OAR devote many pages in their Supplemental Response to this novel theory, the EPA has never mentioned it before in its numerous enforcement actions spanning many years. To the contrary, as discussed above, EPA has consistently asserted that the CO_2 monitoring requirements are enforceable under the Clean Air Act itself.

Nor was the legal theory that EPA has now articulated – that provisions of the Clean Air Act Amendments codified as a "note" supposedly deserve lesser status – any secret at the time. Consider this: in late 1997 and early 1998, the United States and EPA signed a proposed Consent Decree enforcing the CO_2 monitoring requirements against Block Island Power Company, expressly under the authority of Section 113 of the Clean Air Act. Exh. 1 to Region/OAR Supp. Response at 86 ("This Court has jurisdiction over the subject matter of this action and the parties hereto pursuant to Section 113 (b) of the Act, 42 U. S. C. 7413(b) . . . ."); *see id.* at 112-13 (signature pages). The Court entered the Consent Decree on July 14, 1998. *Id.* at 112. Only two weeks later, the United States and EPA filed a brief in federal court reserving an argument that the court lacked jurisdiction to enforce another provision of the 1990 Clean Air Act Amendments that – like Section 821 – was codified in the U.S. Code as a note.[5] EPA was

[5] Memorandum of Law in Support of EPA's Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, *State of New York v. Browner*, Civ. No.

thus fully aware, at the time it enforced the CO_2 monitoring requirements under Section 113 of the Clean Air Act, of the option of arguing that codification as a note barred enforcing the monitoring requirements under the Clean Air Act. EPA's consistent practice in relying on Section 113 of the Clean Air Act in enforcing the CO_2 monitoring provisions is thus *not* the product of any "lack of clarity." And that consistent practice makes perfect sense, since unlike the other provision codified as a "note," EPA used authority under Section 821 to adopt a suite of regulations (in Part 75) under the Clean Air Act and also required in other regulations (in Part 71) that the CO_2 monitoring requirements adopted pursuant to Section 821 be enforced under the Act.

In any event, neither of the cases on which the Region/OAR rely in support of this novel theory – *Peabody* and *Navistar* – supports the Region/OAR's position here. *First*, unlike here, those cases addressed a wholesale incorporation of one statute by another. *See Director, Office of Workers' Compensation Programs v. Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977); *United States v. Navistar International Transportation Corp.*, 152 F.3d 702 (7th Cir. 1998). *Second*, *Peabody* and *Navistar* simply discuss the *extent* to which a particular set of statutory procedures should be followed in enforcing another statutory provision. Neither case addresses, much less endorses, the key *qualitative* issue here: the Region/OAR's theory (at 18-19) that if a statutory provision refers to the enforcement procedures of another statutory provision, it thereby creates a parallel, but completely distinct, enforcement regime. *Third*, neither case arises under the circumstances of this one: a statutory provision codified as a note to the very same Act whose

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97-1028, at 7 n.4 (N.D.N.Y. filed July 27, 1998) (relevant portions to be filed by Petitioner). While the argument set forth by EPA in the *Browner* footnote is incorrect, the relevant point here is that EPA repeatedly chose to enforce the CO_2 monitoring provisions under the Clean Air Act even though it was aware of the position that statutory provisions codified as "notes" to the Act may not be so enforced.

enforcement procedures are to be applied. *Finally*, unlike in either *Peabody* or *Navistar*, here the agency (EPA) adopted regulations mandating enforcement of the (CO_2 monitoring) requirements under the relevant statute (the Clean Air Act). *See infra* pp. 17-18.

As discussed above, the enforcement documents filed by the Region/OAR with their Supplemental Response show that the Agency has consistently taken the position that the CO_2 monitoring provisions are enforceable under the Clean Air Act. Since the Region/OAR have conceded that this is a reasonable reading of the relevant statutory provisions, and have consistently taken this position over many years, the answer to the question the Board has posed is: yes, the CO_2 monitoring provisions are enforceable under the Clean Air Act.

In addition, as discussed in the next section, both the text of the Clean Air Act itself and EPA's own regulations leave no doubt that the CO_2 monitoring requirements are enforceable under the Clean Air Act.

4. Both the Act and EPA's Regulations Make Absolutely Clear That the CO_2 Monitoring Requirements Are Enforceable Under the Clean Air Act

Under Title V of the Clean Air Act, operating permits must include "applicable requirements of this chapter." *See* Clean Air Act § 504(a), 42 U.S.C. § 7661c(a); *see also* 42 U.S.C. § 7661a(b)(5)(A) (permitting authority must have authority to "assure compliance . . . with each applicable . . . requirement under this chapter"). EPA has defined the term "applicable requirements" in its regulations to include "[a]ny standard or other requirement of the acid rain program under . . . 40 CFR parts 72 through 78." 40 C.F.R. § 71.2. The CO_2 monitoring requirements are, of course, within Part 75 of the CFR, and thus constitute "applicable requirements."

Other EPA regulations list the "prohibited acts" that are subject to the Act's enforcement powers:

> "Violations of ***any applicable requirement***; any permit term or condition; any fee or filing requirement; any duty to allow or carry out inspection, entry, or monitoring activities; ***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 available under the Act.***"

40 C.F.R. § 71.12 (emphasis added).

As to Deseret, for which EPA is the permitting authority, the EPA's regulations requiring monitoring of CO_2 are both "applicable requirements" (as just discussed) and "regulation[s] . . . issued by the permitting authority." *Id.* Violations of those requirements and regulations are therefore "subject to full Federal enforcement authorities available under the Act." *Id.* And "the Act," in turn, is defined in the EPA's regulations as "the Clean Air Act." *See* 40 C.F.R. § 71.2 ("Act means the Clean Air Act, as amended, 42 U.S.C. 7401 et seq."). Thus, under EPA's own regulations, the CO_2 monitoring requirements are unambiguously enforceable under the Clean Air Act itself.

5. EPA's Long-Standing Practices Show That It Considers CO_2 a Pollutant Subject to Regulation Under the Act

In its Order seeking additional briefing, the Board asked the Region/OAR whether the CO_2 monitoring requirements are enforceable under the Clean Air Act. As discussed above, both the Region/OAR's concession in their supplemental brief, and the Agency's consistent practice across the enforcement proceedings disclosed in the Region/OAR's supplemental response, show that the answer to the Board's question is yes.

Faced with this inescapable reality, the Region/OAR try to belittle the significance of these concessions by asserting – while citing no precedent – that enforcement of the CO_2 requirements "under the Act" somehow "does not sweep either section 821 or the regulations implementing it into the Act." (Region/OAR Supp. Response at 19.) The Region/OAR carefully

avoid quoting the relevant statutory language, which is whether CO_2 is "subject to regulation under this Act." 42 U.S.C. § 7475(a)(4) (emphasis added).

The Region/OAR's reticence is not surprising: by the fact of pursuing enforcement proceedings about CO_2 emissions under the authority of the Clean Air Act, EPA has necessarily taken the position that CO_2 is "subject to regulation under" the Clean Air Act. In particular, EPA has used its authority under Section 113 of the Clean Air Act to obtain administrative penalty orders for hundreds of thousands of dollars, issue an "order requiring [a violator] to comply with [the CO_2] requirement or prohibition," and bring a civil lawsuit in federal court against the alleged violator. 42 U.S.C. § 7413(a)(3). By its terms, Section 113 itself applies only to violations related to State Implementation Plans and to violations 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." *Id.* Through its own actions, therefore, EPA has shown that it recognizes that CO_2 is "subject to regulation under th[e] Act." Notably, the Region/OAR do not argue to the contrary; as discussed above, the Region/OAR avoid quoting the controlling statutory language in their supplemental brief. (Region/OAR Supp. Response at 20.)

6. Since Briefing Was Completed in this Case, EPA Has Approved a State Implementation Plan That Requires Not Only *Monitoring* of CO_2 Emissions But *Specific Limits* on CO_2 Emissions

As the Board is aware, the Region/OAR have argued in this proceeding that strict, mandatory monitoring of CO_2 emissions – as opposed to limits on emissions – does not make CO_2 "subject to regulation" under the Clean Air Act. The Region/OAR have also argued, as discussed above, that the CO_2 monitoring requirements are not regulation "under the [Clean Air] Act." For the reasons that Petitioners and many amici have previously explained, both of these positions are incorrect.

In any event, as the Region/OAR's September 9, 2008 filing discloses, the premise of that position is out of date: ***EPA has now approved and promulgated a Delaware state implementation plan revision that sets limits on CO_2 emissions.***

Specifically, in a Federal Register notice that became effective on May 29, 2008, EPA promulgated its approval of CO_2 emission standards, operating requirements, record keeping and reporting requirements, and emissions certification, compliance and enforcement obligations for new and existing stationary electric generators in Delaware. *See* 73 Fed. Reg. 23,101.

Critically, EPA approved emission standards for CO_2. The control requirements approved and promulgated by EPA included a CO_2 emission standard of 1900 lbs/MWh for existing distributed generators, 1900 lbs/MWh for new distributed generators installed on or after January 1, 2008, and 1,650 lb/MWh for new distributed generators installed on or after January 1, 2012. *See* Delaware Department of Natural Resources and Environmental Control (DNREC), Regulation No. 1144: Control of Stationary Generator Emissions, § 3.2; *see also* 73 Fed. Reg. at 23,102-103 (codifying approval in the Code of Federal Regulations at 40 C.F.R. § 52.420).

In EPA's proposed and final rulemaking notices, the Agency plainly stated that it was approving the SIP revision "under the Clean Air Act" (73 Fed. Reg. 11,845) and "in accordance with the Clean Air Act" (73 Fed. Reg. at 23,101). EPA's action in approving the SIP revision made the control requirements and obligations part of the "applicable implementation plan" enforceable under the Clean Air Act. *See* 42 U.S.C. § 7602(q).

Many Clean Air Act provisions authorize EPA enforcement of requirements and prohibitions under the "applicable implementation plan." *See, e.g.*, 42 U.S.C. § 7413(a)(1) (authorizing EPA Administrator to issue a compliance order, issue an administrative penalty, or bring civil action against the violating party); *id.* at (a)(2) (Administrator may enforce the

"applicable implementation plan" if states fail to do so); *id.* at (b)(1) (requiring the Administrator to commence a civil action or assess and recover a civil penalty against the owner or operator of a source or facility that violates an "applicable implementation plan"). In addition, EPA's action makes the emission standards and limitations enforceable by a citizen suit under section 304 of the Clean Air Act. 42 U.S.C. § 7604.

The Supreme Court has made clear that the requirements under an EPA-approved state implementation plan are federally-enforceable obligations under the Clean Air Act:

> The language of the Clean Air Act plainly states that EPA may bring an action for penalties or injunctive relief whenever a person is in violation of any requirement of an "applicable implementation plan." § 113(b)(2), 42 U.S.C. § 7413(b)(2) (1982 ed.). There can be little or no doubt that the existing SIP remains the "applicable implementation plan" even after the State has submitted a proposed revision.

General Motors Corp. v. United States, 496 U.S. 530, 540 (1990).

The Agency's recent approval of the Delaware SIP revision imposing limits on CO_2 emissions leaves no doubt that the proposed Bonanza coal-fired power plant must comply with the best available control technology for CO_2 – a pollutant that, even by EPA's own too-narrow definition, is subject to regulation under the Act. In their September 9, 2008 letter, the Region/OAR attempt to minimize the significance of this crucial development as follows: "Consistent with the arguments submitted on behalf of OAR and Region 8 in this proceeding, these offices do not believe that such action should influence the Board's decision in this case concerning a PSD permit *issued prior to April 29, 2008 in another jurisdiction.*" Region/OAR Sept. 9. 2008 Letter at 1 (emphasis added).

Although the Region/OAR do not elaborate, the statement just quoted suggests that the Board should ignore the Delaware SIP for two reasons: (a) the Region acted on Deseret's PSD permit application before the Delaware SIP was approved by EPA in 2008, and (b) the Delaware

SIP is relevant, for purposes of the PSD provisions of the Act, only in Delaware (or perhaps only in Region 3). Neither of those reasons provides any justification for the Board to ignore this important new EPA action.

As to the first issue, the Region/OAR offer no authority for the proposition that the Board must ignore legal developments that occur after the Region acts on a permit. It is settled law that, in reviewing the issuance of a permit, the Board "has the discretion to remand permit conditions for reconsideration in light of legal requirements that change before the permit becomes final agency action. " *In re J&L Specialty Prods. Corp.*, 5 E.A.D. 31, 66 (EAB 1994); *see also In re GSX Services of South Carolina, Inc.*, 4 E.A.D. 451, 465 (EAB 1992) (remand for consideration of impact of newly-promulgated rules). As the Board explained in ordering a remand in the *J&L* case, "[w]hile the Region may not have been aware" of the development when it made its decision, "we are now aware" that the development has occurred, making a remand the appropriate option. 5 E.A.D. at 66.

The Region/OAR's second contention – that the Delaware SIP is relevant (for PSD purposes) only in Delaware (or only in Region 3) – is based on a misreading of the Act. The central issue here is whether, in the language of Section 165(a)(4) of the Clean Air Act, CO_2 is a pollutant "subject to regulation under [the Clean Air] Act." 42 U.S.C § 7475(a)(4). This statutory test is simple, direct, and without qualification. The Region/OAR, however, seek to read into the statute a qualification that is not there, so that the provision would read: "subject to regulation under the Clean Air Act ***in the state (or Region) where the facility is to be constructed.***" But that is not what the Act says, nor do the Region/OAR offer any support for their contention that regulation of CO_2 in another part of the country does not count as "regulation." Under the plain language of Section 165(a)(4) of the Clean Air Act, if CO_2

emissions are restricted under the Clean Air Act, whether in one state or all 50, they are "subject to regulation under the Act" – even under the Region/OAR's improperly narrow definition of "regulation."[6]

Moreover, here it was EPA itself that issued the PSD permit, because the facility is to be located on tribal lands over which EPA has permitting authority. And it was also EPA that approved the Delaware SIP regulating CO_2 under the CAA. The permitting authority here – EPA – has thus squarely taken the position that CO_2 is regulated under the Clean Air Act, and any argument that the Delaware SIP is from another jurisdiction is irrelevant.

7. Since Briefing Was Completed, EPA Has Also Issued a Notice of Proposed Rulemaking Discussing Ways of Limiting the Impact of PSD Requirements Based on CO_2 Emissions

As the Board will also recall, Deseret and supporting amici have argued that a determination that CO_2 is regulated under the Clean Air Act will trigger a PSD permitting process for many relatively small entities. *E.g.*, Response Br. of Permittee Deseret Power Electric Cooperative (March 21, 2008) at 21-22.

The EAB need not resolve these policy issues to decide this proceeding; it is for EPA, in its rulemaking capacity, to address those issues. Indeed, the Region/OAR point out in their Supplemental Response (at 25-26) that the proposed Bonanza plant is unquestionably a "Major Stationary Source" and a "Major Emitting Facility" under the PSD provisions of the Clean Air Act. Nor is there any dispute that the Deseret/Bonanza plant would be a massive emitter of CO_2, in amounts exceeding, by orders of magnitude, the tons-per-year threshold specified in Section 169(1) of the Clean Air Act, 42 U.S.C. § 7479(1).

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[6] *See also Western States Petroleum Ass'n v. EPA* , 87 F.3d 280 (9th Cir. 1996) (criticizing EPA for applying different standards to different regions).

Since the conclusion of substantive briefing in this case, EPA has published a lengthy discussion of the policy options available to it to minimize potential concerns about application of the PSD requirement to small entities.[7] In particular, on July 30, 2008, EPA published in the Federal Register a lengthy notice about ways of regulating greenhouse gases under the existing Clean Air Act. Advance Notice of Proposed Rulemaking, Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354 (July 30, 2008). EPA's notice includes extensive discussion of options available to EPA to limit the impact of the PSD requirement (as to CO_2) on smaller entities. *Id.* at 44503-44510 ("What Are Some Possible Tailoring Approaches to Address Administrative Concerns for GHG NSR?"). EPA's analysis of potential options confirms that concerns about administrability of the PSD program are for EPA in its rulemaking capacity, not for the EAB in adjudicating this matter. Whatever options EPA may choose to address concerns about smaller sources, it is clear that the Bonanza coal-fired power plant, projected to emit 1.8 million tons of CO_2 every year, would be subject to PSD requirements.

8. The Board Need Not and Should Not Seek to Resolve the Legal Issues Arising From the Definition of "Major Emitting Facility," Since All Parties Agree that the Proposed Bonanza Plant Is a "Major Emitting Facility" Under Any Definition

In its Order requesting supplemental briefing, the Board also asked about the Agency's regulation defining the term "major emitting facility," and in particular about the Agency's

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[7] The Board can take official notice of this Federal Register publication. *See In re Arecibo & Aguadilla Regional Wastewater Treatment Plants,* 12 E.A.D. 97, 145 n.86 (EAB 2005) ("The Board takes official notice of relevant non-record information contained in the [pertinent] judicial proceedings . . . . The Board generally regards public documents of this kind as appropriate for official notice.") (citations omitted); *In re City of Denison*, 4 E.A.D. 414, 419 n.8 (EAB 1992) ("The Order is not part of the administrative record in this proceeding, but it is an official government record subject to official notice."); *In re Hawaiian Commercial & Sugar Co.*, 4 E.A.D. 95, 102 n.13 (EAB 1992) (taking official notice of guidance document in PSD proceeding).

decision in 1977 to limit that term to facilities that emit regulated pollutants. Amici respectfully suggest that the Board need not and should not attempt to resolve that issue in this proceeding. As the Region/OAR acknowledge in their Supplemental Response, "[i]t is undisputed that the Deseret Bonanza facility is a 'major emitting facility' as defined in CAA § 169 and is a 'major stationary source' under the definition in the implementing regulations at 40 C.F.R. § 52.21(b)(1)(i)." Region/OAR Supp. Response at 25. Because there is no dispute about that issue in this proceeding, the well-established principle that tribunals should avoid resolving abstract issues strongly counsels against the Board's addressing this issue here. *See In re Caribbean Gulf Refining Corp.* (CARECO), 2 E.A.D. 107 (EAB 1985) ("By analogy, courts traditionally have been reluctant to review matters unless they arise in the context of a case or controversy which is ripe for judicial resolution."); *In re Midwest Steel Division, National Steel Corp.*, 3 E.A.D. 307 (1990) ("The issue will not be ripe for resolution until [the Region] attempts to apply [the condition at issue] (for example, in an enforcement action) in a manner contrary to [the party's] views on the subject."). Because the issue has not been raised by any party and is not in dispute, the Utah and Western Non-Governmental Organizations do not here address this complex issue of statutory construction, nor attempt to provide a point-by-point rebuttal of the Region/OAR's positions, many of which are controversial.[8] We respectfully suggest that the Board postpone resolution of these matters until it is presented with a case in which they are actually in dispute.

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[8] Amici's decision not to address this complex issue should not be understood as agreement with the Region/OAR's contentions about the issue. The Utah and Western Non-Governmental Organizations reserve the right to address this issue in any future proceeding in which it may be disputed.

CONCLUSION

The Region/OAR's Supplemental Response shows that EPA has for many years consistently policed the CO_2 monitoring requirements of Section 821 under the enforcement provisions of the Clean Air Act. Unable to dispute the Agency's own enforcement record, the Region/OAR correctly acknowledges that it is fair to conclude that the monitoring requirements are enforceable under the Clean Air Act, and in particular under Section 113 of the Act. That conclusion is also dictated by the plain language of the Clean Air Act and the regulations implementing it, including Sections 502(b)(5)(A) and 504(a) of the Act and Sections 71.2 and 71.12 of Title 40 of the Code of Federal Regulations.

The EPA's recent Advanced Notice of Potential Rulemaking shows that the Agency has begun the process of addressing policy questions about how to interpret the PSD requirements in a manner that will not impose unnecessary burdens on smaller entities. The Board need not resolve those issues in this proceeding about a massive industrial emitter.

Finally, as the Region/OAR have acknowledged in their September 9, 2009 filing, EPA has recently approved a State Implementation Plan that specifically limits CO_2 emissions. In doing so, EPA stated that it was acting "under the Clean Air Act" (73 Fed. Reg. 11,845) and "in accordance with the Clean Air Act" (73 Fed. Reg. at 23,101). Given the importance the Region/OAR have attached to the distinction between monitoring of emissions and quantitative limits on emissions, as well as to whether CO_2 is subject to regulation "under [the Clean Air] Act," EPA's approval of this SIP is an important development. Under the principles set forth in the *J&L* case, if the Board does not conclude that BACT requirements apply to CO_2 for other reasons, the Board should remand this proceeding to the Region for consideration of the impact

of EPA's decision to require control of CO_2 emissions under the Clean Air Act through the Delaware State Implementation Plan.

Respectfully submitted,

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