

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

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ENVIR. APPEALS BOARD

In the matter of:)

PSD Appeal No. 07-03

DESERET POWER ELECTRIC)
COOPERATIVE (BONANZA))

PSD Permit Number)
OU-000204.00)
_____)

PETITIONER'S OPPOSITION TO MOTION TO STRIKE

Petitioner Sierra Club opposes EPA's motion to strike the portions of the reply briefs submitted by Sierra Club and Physicians for Social Responsibility that address EPA's landfill emissions regulations promulgated under section 111 of the Clean Air Act. Sierra Club does not oppose EPA's alternative motion for leave to file a surreply.

The Board granted review in this case on the issue of whether "the Region erred by failing to require a best available control technology ('BACT') limit for control of CO₂ emissions." Order Granting Review, Nov. 21, 2007, at 2. This issue encompasses the question of whether CO₂ is regulated under the Clean Air Act. See 42 U.S.C §§ 7475(a)(4), 7479(3). The discussion of EPA's landfill gas regulations in the reply briefs goes

directly to the issue on which the Board granted review because it responds to the argument that CO₂ is not regulated "under the Act." It is therefore well within the scope of an appropriate reply. See *Knauf Fiber Glass*, 8 E.A.D. 121, 126 n.9 (EAB 1999) ("The Board consider[s] all petitioner replies that relate[] to issues raised in the petitions for review.")

In its order granting review, the Board invoked the Supreme Court's *Massachusetts v. EPA* decision in recognizing that the issue presented in this case may be of national significance. Order Granting Review at 2. As the agency evaluates the implications of that Supreme Court ruling for the PSD program, it makes sense to consider all pertinent information, particularly relevant EPA regulations. By observing that CO₂ is regulated under EPA's landfill emissions regulation, Sierra Club is not attempting to raise new facts or interject new issues in its reply brief. Rather, it is simply citing the agency's own regulations to point out another way in which CO₂ is already regulated under the Act.¹

Considering all information germane to the issue of whether BACT applies to CO₂ emissions serves the interests of judicial economy. The discussion in the reply briefs of EPA's landfill gas regulations is appropriate because it relates to that issue and addresses arguments raised by

¹ Methane's status as a regulated pollutant is relevant to the extent that, along with CO₂, it is regulated for its greenhouse gas properties, and the regulatory history discusses both pollutants in terms of their CO₂ equivalence. See, e.g., 56 Fed. Reg. 24468, 24472 (May 30, 1991).

Respondents and their amici. Sierra Club therefore respectfully requests that the Board deny EPA's motion to strike.

Respectfully submitted,

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Dated: May 19, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to Motion to Strike in the matter of Deseret Power Electric Cooperative, PSD Appeal No. 07-03, were served by United States First Class Mail on the following persons this 19th of May, 2008:

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