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

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

BRIEF OF *AMICUS CURIAE* NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND PERMITTEE DESERET POWER ELECTRIC COOPERATIVE

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STATEMENT OF INTEREST

The National Rural Electric Cooperative Association ("NRECA") was formed in 1942 by the nation's rural electric cooperative leaders dedicated to electrifying vast regions of the country and providing reliable and affordable electric power through electric cooperative entities, where no central station power existed at the time. Today, NRECA serves as the national service organization for 930 not-for-profit rural electric cooperatives[1] that provide electric service to 40 million Americans in 47 states. Each electric cooperative is incorporated as a private entity in the state in which it resides and has a legal obligation to provide reliable electric service to its customer-members. Collectively, cooperatives serve all or portions of 2,500 of the nation's 3,128 counties, and their service areas cover 75 percent of the U.S. landmass.

The scarcity of reliable and affordable electric power at the wholesale level in many regions of the United States beginning in the late 1960s created a need for cooperative self-generation of electric power. Today, 65 rural electric generating and transmission cooperatives ("G&Ts"), which are owned by the distribution cooperatives they serve, generate and transmit power to 670 of the 865 distribution cooperatives. The distribution cooperatives not served by a G&T receive power from other private and public power entities.

Overall, cooperative G&T generation produces 41 percent of all distribution cooperative requirements.[2] The need to provide reliable, primary (baseload) and affordable electric power from the mid 1960s to the mid 1980s effectively dictated generation with coal as the fuel rather

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[1] Not-for-profit electric generation cooperatives' electric rates are based on costs of service plus small operating margins. They have no investor shareholders and possess only limited equity that is owned by their load serving cooperatives and ultimately by their electric consumers. Deseret G&T Cooperative is an NRECA member.

[2] Not all the wholesale power provided by the G&Ts is self-produced.

than other potential fuel sources such as natural gas[3] and nuclear.[4] Presently, the electric cooperatives generate 23,000 MW of coal-fired steam-electric generation comprising about 7% of the nation's total.[5] The power provided to the distribution cooperatives from non-cooperative generation sources within the electric utility sector originates from a mix of generation types, including coal, natural gas, and renewables.

NRECA's cooperative members are dedicated to encouraging their member-consumers to conserve electricity and offering them a broad array of electric generation choices including "green power." Today, about two-thirds of the cooperatives offer a green or renewable power option.[6] The majority of this generation is by wind or biomass. The electric cooperatives also are committed to energy conservation as a means to "shave" peak demand to reduce least efficient and most expensive electric generation and to mitigate the need for additional baseload generation. For example, 92% of all load serving cooperatives provide energy efficiency education to their cooperative consumers; 77% offer energy audits; 49% offer financial incentives; and 41% offer weatherization services.

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[3] The Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No, 95-620, mandated that new electric generation must be "coal capable," thus requiring new fossil-fuel plants to entail higher capital costs than for natural gas only facilities. *See The Clean Air Act, the Electric Utilities, and the Coal Market*, CBO Study, April 1982, at 29. Once built, the fuel price differential between gas and coal economically dictated coal use.

[4] Cooperatives own 2850 MW of nuclear generation in partnerships with non-cooperative entities but do not operate any nuclear facilities.

[5] Although cooperatively owned coal-fired generation comprises only 7% of the nation's total, these units have acquired almost twenty-percent of all Clean Air Act PSD permits for new coal-fired units in the fossil fueled-fired steam electric industrial category. Thus, a disproportionate number of cooperative units have undergone new unit BACT analysis.

[6] The source of these statistics in this paragraph is information on these programs provided to NRECA by its members in a 2004 survey. NRECA is in the process of updating the survey. Thus far, NRECA has not yet gathered data on the impacts that these programs have on avoiding unnecessary new baseload generation, but believes the positive economic and environmental effects of avoiding new baseload generation have been substantial.

To further NRECA efforts in areas of energy efficiency, NRECA has entered into a Memorandum of Understanding ("MOU") with the Natural Resources Defense Council ("NRDC"), a national environmental organization, to jointly assist NRECA in its efforts to identify and support improvements in building efficiency standards and to strengthen the nation's energy-efficiency infrastructure among other joint commitments. For the Board's convenience, a copy of the MOU is attached hereto as Exhibit A.

While NRECA and its members believe "green power" and energy conservation are important facets of an electric utility integrated resource plan, NRECA also believes that as a practical matter, the nation's electric utilities, including cooperatives, will have to supply additional baseload power to meet future demands for new electric power. *See* U.S. Department of Energy, Energy Information Administration ("EIA") 2007 Annual Energy Outlook. And, at least in the near term, notable portions of additional baseload power needs will have to come from proven coal combustion technologies to ensure electric reliability, as well as price affordability and stability.[7] *See id.*

The emissions controls mandated with the construction of new coal-fired electric generation that address regulated Clean Air Act pollutants continue to improve in performance over time. These new unit requirements coupled with existing nationwide and regional emission caps[8] have resulted in both historical and future projected substantial decline of all the major pollutants associated with coal-fired generation over time. *See* 70 Fed. Reg. 61,081 (Oct. 20,

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[7] Even EIA low electricity projections show over a 1000 billion kilowatt hour increase in electric demand by 2030. According to EIA new renewable energy will supply only a tiny fraction of this new demand.

[8] Presently coal-fired electric generating units are regulated under numerous Clean Air Act national, regional, and state programs such as Acid Rain Program, Clean Air Act Interstate Rule ("CAIR"), Ozone SIP Call, and the Regional Haze Rule.

2005); EPA Air Trends 2007. Further, advancements in coal combustion techniques have resulted in ever increasing thermal efficiencies associated with each new generation of coal-fired generation leading to lower carbon dioxide ("CO_2") emissions on a per electricity generated basis as compared to an earlier generation.[9] *See* Dr. James Katzer, et al., *The Future of Coal,* Massachusetts Institute of Technology (2007).

NRECA is not alone in its assessment that additional coal-fired electric generation is needed to ensure electricity availability and affordability. Government, quasi-government, and private entities also caution against over reliance on natural gas in the electric utility sector and the resulting negative impacts on other economic sectors that rely on natural gas as feedstock and for on-site energy. Such overreliance would be exacerbated if the nation embraces an imprudent response to climate change concerns.

To summarize, NRECA's interests in this petition before the EPA Environmental Appeals Board ("EAB") bridge energy, Clean Air Act, and climate change law and policy. NRECA believes this case should not be decided in a vacuum where climate change concerns overwhelmingly trump all other considerations the EPA is obliged to consider within the Clean Air Act context, including established and longstanding law and regulation.

As the national organization representing the nation's electric cooperatives, NRECA supports and has a profound interest in an effective and prudent climate change environmental policy; one that will meaningfully address long-term greenhouse gas mitigation and one that will

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[9] Any CO_2 efficiency comparison between older and newer generating units must account for the more extensive emissions control devices installed on the newer units under BACT since these devices reduce overall unit efficiencies due to their energy requirements.

allow our members to provide the nation's 40 million electric cooperative consumers with both affordable and reliable electricity. But, not one that is unwise or reckless.[10]

SUMMARY AND CONCLUSION

On August 30, 2007, following federal regulations, EPA Region VIII issued a Clean Air Act (the "Act") PSD permit for a proposed 110 MW coal fired boiler to be located at the Deseret G&T Cooperative Bonanza plant site. After failing to persuade EPA to deny the permit, Sierra Club now petitions this EAB requesting that the EAB overrule the permit's issuance alleging EPA failed to consider best available control technology ("BACT") for the proposed boiler's CO_2 emissions.

The petitioner and supporting *amici* appear to be making the issuance of Deseret's permit for this single facility a referendum on the adequacy of our national policy to address concerns over the effects of worldwide manmade greenhouse gas emissions on future climate. They are, however, in the wrong forum to effectuate worldwide or even national greenhouse gas policy. To do this within EPA, petitioner must redirect its efforts towards encouraging a national rulemaking allowing extensive notice and comment on the myriad of issues needing consideration and resolution in the context of a complex rulemaking. Indeed policymaking should be made by policymakers, not the EAB.

The sole relevant issue, then, before the EAB is whether EPA violated the law for failing to incorporate BACT for CO_2 into the PSD permit. The only relevant underlying question needing an answer to resolve this issue is whether CO_2 is "subject to regulation" under the Act. If so, then the Act requires BACT analysis for CO_2 following the statutory criteria. If not the permit must be sustained

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[10] *See* FERC Chairman Keheller's statement on page 18 of this brief.

Contrary to Petitioner's contentions, the recent Supreme Court holding in *Massachusetts* does not subject CO_2 to regulation under the Act. In fact the majority holding gives EPA two clear options to proceed. First, using guidelines incorporated in the Act, EPA could decide CO_2 regulation is not appropriate. Second, EPA could propose a regulatory program subjecting CO_2 to regulation utilizing its discretion as to the manner, timing, content and coordination of the program with other agencies. To date, EPA has not issued proposals to regulate CO_2. Additionally, the petitioner has failed to cite any other supporting law or regulation to overcome EPA's conclusion during the permitting process that CO_2 is not "subject to regulation." Thus, the permit must be sustained.

BACKGROUND

Deseret Power Electric Cooperative ("Deseret") is proposing to build a new 110-megawatt waste-coal-fired steam electrical generating unit at its existing Bonanza Power Plant near Bonanza, Utah, on the Uintah and Ouray Indian Reservation. Environmental Protection Agency ("EPA") Deseret Permit to Construct at 1. Steam will be supplied by a Circulating Fluidized Bed ("CFB") boiler, with a maximum heat input not to exceed 1,445 million BTu per hour and designed to combust waste from Deseret's existing mine. *See id.* The waste coal is generated from the coal washing process at the mine and washed coal is supplied to the existing Bonanza plant. *See id.*

Because the construction is a "major modification" to the Bonanza plant, Deseret requires a prevention of significant deterioration ("PSD") permit from EPA under federal regulations. EPA issued the draft PSD permit on June 22, 2006. After the notice and comment period, EPA issued the final permit and its Response to Comments on August 30, 2007. On October 1, 2007, Petitioner Sierra Club filed a Petition for Review and Request for Oral Argument with the EAB

alleging that "EPA erred by: (a) not requiring, pursuant to Section 165(a)(4) of the Act, a BACT emission limit for carbon dioxide ("CO_2") emissions from the new Bonanza coal-fired unit; and (b) taking positions in this matter that are contrary to positions taken by the agency in another coal-fired power plant proceeding." Sierra Club Petition for Review at 1.

ARGUMENTS

Sierra Club and its *amici* make a number of arguments as to why the EPA's issuance of a significant deterioration ("PSD") permit to Deseret for the construction of a new waste-coal-fired generating unit at Deseret's Bonanza Power Plant should be reversed. These include concerns regarding the impact of worldwide anthropogenic greenhouse gas emissions on long-term climate change. Sierra Club's concerns about the impact of CO_2, as well as those of *amici*, however, are irrelevant to the issues before this Board.[11] The issue before the EAB is whether the law currently *requires* a BACT analysis for CO_2; not whether it is good policy to require a BACT analysis for CO_2. As shown below, CO_2 is not currently "subject to regulation" under the federal Clean Air Act and therefore did not require a BACT analysis in the permit application process for the Deseret air permit.

The proper remedy for Sierra Club's claim is to petition EPA to promulgate rules and permit the public the opportunity for notice and comment, not for the EAB to impose such a requirement after the fact on one small commercial emissions unit. Any such rulemaking should not take place in a vacuum. Instead, it should comprehend overall energy, environmental, and economic impacts consistent with established BACT law and regulation.

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[11] Indeed, the National Parks Conservation Association filed a brief in which it discusses the alleged effects of CO_2 for over seven of its sixteen pages. None of this is relevant to the issue of whether the law requires a BACT analysis of CO_2. Likewise, the *amicus* brief filed by Dr. James Hansen, contains a long diatribe concerning EPA's failure to make an endangerment finding for CO_2.

I. CO_2 IS NOT "SUBJECT TO REGULATION" AND THEREFORE A BACT ANALYSIS IS NOT REQUIRED.

A. BACT analyses are only required for regulated pollutants.

The Clean Air Act provides that "the term 'best available control technology' means an emission limitation based on the maximum degree of reduction of *each pollutant subject to regulation* under this chapter . . . ." 42 U.S.C. § 7479(3) (2003) (emphasis added).

By definition, BACT analyses are not required for every pollutant. Instead, a BACT analysis is only required for pollutants *subject to regulation* under the specified chapter of the Act. If the emission is not a pollutant subject to regulation, then there is no requirement to conduct a BACT analysis. *See id.*

B. CO_2 is not subject to regulation under the Clean Air Act.

Because a BACT analysis for CO_2 need be performed only if CO_2 is subject to regulation under the Act, the relevant question becomes whether CO_2 is a regulated pollutant under the Act. As shown below, there are no EPA regulations regulating CO_2 as a pollutant for purposes of the Prevention of Significant Deterioration ("PSD") program. Contrary to the arguments of Sierra Club and *amici*, CO_2 is not regulated and therefore not "subject to regulation."

1. A plain reading of the law demonstrates that CO_2 is not subject to regulation.

EPA has chosen to regulate only certain pollutants under the Act. Since 2002, the EPA has set forth a comprehensive list of the pollutants subject to PSD permitting (and consequently BACT analysis) under the Act. *See* 67 Fed. Reg. 80,186 (Dec. 31, 2002); *see also* 61 Fed. Reg. 38250 (July 23, 1996). When the regulations were promulgated in 2002, the PSD review process was expressly limited to "regulated NSR pollutants." Specifically, the Act's regulations were amended to state that a "regulated NSR pollutant" means:

> (i) Any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the Administrator (e.g., volatile organic compounds and NOX are precursors for ozone);
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> (ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act;
>
> (iii) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or
>
> (iv) Any pollutant that otherwise is subject to regulation under the Act, except that any or all hazardous air pollutants either listed in section 112 of the Act or added to the list pursuant to section 112(b)(2) of the Act, which have not been delisted pursuant to section 112(b)(3) of the Act, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Act.

40 C.F.R. § 52.21(b)(50). During the promulgation of these rules, Petitioner did not comment that that this definition incorporated CO_2, as they would like to do now. *See* 67 Fed. Reg. at 20199-241 (summaries of comments). Consequently, Petitioner should not be permitted to do so now.

Under the existing PSD regulations, for CO_2 to be considered an NSR regulated pollutant, it would need to be a regulated under the Act. This requires: (1) there be a NAAQS for CO_2 or that CO_2 be considered a precursor of a NAAQS pollutant; (2) there be a new source performance standard under CO_2 (Section 111 of the Act); (3) CO_2 be considered an ozone-depleting substance under Title VI; or (4) CO_2 otherwise be subject to regulation. CO_2 does not meet any of these criteria.

Therefore, because CO_2 is not "regulated air pollutant" a BACT analysis is not required.

2. EPA and the Courts have never treated CO_2 as being subject to regulation.

The EPA has consistently interpreted "subject to regulation" to mean only pollutants that currently have emissions controls. *See* 43 Fed. Reg. 26,388, 26,397 (June 19, 1978); 61 Fed. Reg. 38,250, 38,309-10 (July 23, 1996). For instance, in 1978, EPA stated:

> Some questions have been raised regarding what "subject to regulation under this Act" means relative to BACT determinations. The Administrator believes that the proposed interpretation published on November 3, 1977, is correct and is today being made final. As mentioned in the proposal, "subject to regulation under the Act" means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type. This then includes all criteria pollutants subject to NAAQS review, pollutants regulated under the Standards of Performance for New Stationary Sources (NSPS), pollutants regulated under the National Emission Standards for Hazardous Air Pollutants (NESHAP), and all pollutants regulated under Title II of the Act regarding emission standards for mobile sources.

43 Fed. Reg. at 26,397. CO_2 met none of these criteria. Subsequently, in 1996, EPA stated "the following pollutants currently regulated under the Act as of January 1, 1996, are still subject to Federal PSD review and permitting requirements . . ." 61 Fed. Reg. at 38,309-10. This Federal Register notice lists pollutants subject to regulation and CO_2 is not listed. EPA further states that "[t]he PSD program will also automatically apply to *newly regulated pollutants, for example, upon final promulgation of an NSPS applicable to a previously unregulated pollutant.*" *Id.* (emphasis added). There is no NSPS for CO_2 nor is there any other like regulation of CO_2. Certainly, it is without question that EPA's interpretation of its own regulations should be given deference. *See Stinson v. United States*, 508 U.S. 36, 45 (1993) (agency's interpretation of its own regulation permitted so long as the interpretation is not "clearly erroneous"); *National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129-31 (D.C. Cir. 1997); *NRDC v. EPA*, 25 F.3d

1063, 1068-69 (D.C. Cir. 1994). Finally, as stated above, in 2002, EPA defined "regulated NSR pollutants" which does not include CO_2. 67 Fed. Reg. 80,186, *supra*.

Indeed, as late as the fall of 2007, EPA stated that it is considering *whether* to promulgate regulations regarding greenhouse gas emissions from power plants. *See* BNA Daily Environment Report, No. 217 (Nov. 9, 2007), at A-6. By definition this means that EPA *does not* currently regulate greenhouse gas emissions from power plants.

In *Alabama Power Company v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), which is cited by Sierra Club in its brief for other reasons, the District of Columbia Circuit noted that a pollutant may be an air pollutant within the meaning of the Act, but not be "subject to regulation" for purposes of BACT. *Alabama Power Co.*, 636 F.2d at 370, n. 134. Specifically, the D.C. Circuit stated:

> EPA has discretion to define the pollutant termed "particulate matter" to exclude particulates of a size or composition determined not to present substantial public health or welfare concerns. Such "excluded particulates" would remain "air pollutants" within the meaning of the Act, section 302(g) . . . .
>
> . . .
>
> *Once a standard of performance has been promulgated for "excluded particulates," those pollutants become "subject to regulation"* within the meaning of section 165(a)(4), 42 U.S.C. § 7475(a)(4) (1978), the provision requiring BACT prior to PSD permit approval.

Id. (emphasis added). Such reasoning makes it clear that it is possible and for that matter, expected, that there will be air pollutants that are *not* regulated under the Act. Indeed, it is within EPA's discretion to determine which pollutants fall within certain regulatory schemes. Such reasoning underscores the point that a BACT analysis must be completed only for a pollutant that has had a standard of performance promulgated for it. Of course, no standard of performance has been promulgated for CO_2.

A later decision by this Board also affirmed that the PSD program was intended only to apply to air pollutants actually regulated under the Act. In that case, this Board determined that "subject to regulation," within the meaning of the BACT requirements, had the same meaning as the term "regulated." The Board stated that "EPA lacks authority to impose limitations or other restrictions directly on the emission of unregulated pollutants. EPA clearly has no such authority over emissions of unregulated pollutants." *North County Recovery Ass'n*, 2 E.A.D. 229 (EAB 1986).

Since EPA has not promulgated a standard of performance, PSD increment, air quality standard, or other emission standards for CO_2, CO_2 is not "subject to regulation" under the Clean Air Act.

C. Recent administrative decisions support Deseret's and EPA's positions.

In the wake of the Supreme Court's decision in *Massachusetts v. EPA,* 127 S. Ct. 1438 (2007), that CO_2 is a pollutant that can be regulated, at least two state permits have been challenged on the basis that they do not require a BACT analysis for CO_2. In the two cases located by NRECA, the reviewing body rejected arguments similar to those made by Sierra Club and its *amici* here. In the first case, *Friends of the Chattahoochhee, Inc. v. Couch*, Docket No.: OSAH-BNR-AQ (Georgia Office of State Administrative Hearings), an Administrative Law Judge upheld an air quality permit for a 1,200 megawatt coal fired electric generation station and determined that CO_2 is not a regulated NSR pollutant as defined by Section 52.21(b)(50) and therefore does not require a BACT analysis. *See* Memorandum Opinion and Order on Notions for Summary Determination, *Friends of the Chattahoochhee, Inc. v. Couch*, Docket No.: OSAH-BNR-AQ (Dec. 18. 2007). For the Board's convenience, a copy of that Opinion and Order is attached hereto as Exhibit B.

In the second recent case, challengers to an air quality permit issued to a rural electric cooperative in Montana argued that the permit was wrongly granted because, *inter alia*, the Montana Department of Environmental Quality ("MDEQ") did not conduct a BACT analysis for CO_2. The Montana Board of Environmental Review granted summary judgment for MDEQ and the permittee, finding that "CO2 is not a regulated pollutant, 'subject to regulation' and BACT requirements." *See* Third Order Setting Hearing and Denying Motion to Strike Portions of Affidavit of Appellants, In the Matter of: The Appeal of Southern Montana Electric Regarding its Air Quality Permit No. 3423-00 for the Highwood Generation Stations, Case No. BER 2007-06 AQ (Mont. Board of Environmental Review) (pending final written decision) attached hereto as Exhibit C.

D. The federal Acid Rain Program does not treat CO_2 as a regulated pollutant.

Sierra Club contends that CO_2 is a regulated pollutant and therefore subject to a BACT analysis because CO_2 is required to be monitored in certain instances under the Act's Acid Rain Program. Sierra Club's Brief at 33-37. This argument has no merit.

Sierra Club points to 42 U.S.C. § 7651k and EPA regulations promulgated at 40 C.F.R. Part 75 as support for its proposition that CO_2 is subject to regulation. That statute and those regulations do ***not*** support MEIC's argument because they do not constitute ***regulation*** of CO_2. Instead, these provisions are part of the EPA Acid Rain Program rules. The Acid Rain Program discusses CO_2 in two separate sections, neither of which *regulates* CO_2.[12]

The first discussion of CO_2 in the Acid Rain Program concerns air pollution control and emission reduction for sulfur dioxide ("SO_2") and nitrogen oxides ("NO_x"). *See* 40 C.F.R. § 72.2

[12] NRECA understands that other briefs being submitted on behalf of or in support of EPA and Deseret will explain that Section 821 is not part of the Act. For the sake of brevity, NRECA will not address that point here.

("Acid Rain Program means the national sulfur dioxide and nitrogen oxides air pollution control and emissions reduction program . . . ."). Either CO_2 or O_2, which are included in exhaust flue gases from coal fired plants, also are required to be monitored for purposes of establishing the NO_x or SO_2 emission rate. *See* 40 C.F.R. Part 75.[13] Thus, a source has a choice of monitoring either CO_2 or O_2 for this purpose. Therefore, under that provision, not only is a source not required to monitor CO_2 (as opposed to O_2) but even if it does monitor CO_2, it does so as part of its analysis of other pollutants. A mere monitoring requirement does not render a pollutant "regulated" for these purposes.

While Sierra Club relies heavily on the separate requirement under 40 C.F.R. Part 75 that CO_2 be monitored, this requirement is only an informational monitoring program. 40 CFR § 75.13 requires the continuous monitoring of CO_2 to allow the public to have access to annual data on CO_2 emissions and does not constitute regulation of CO_2. *See* Pub. L. No. 101-549, § 821(b), 104 Stat. 2399 (1990); Proposed Rule, Acid Rain Program: Permits, Allowance System, Continuous Emissions Monitoring, and Excess Emissions, 56 Fed. Reg. 63002-01, 63061-67 (Dec. 3, 1991). This statute and regulation do not mandate that anyone use this information to control CO_2 in any way and the statute and regulations set no emission limits or performance standards for CO_2.

If monitoring-only requirements were indeed "regulation" of CO_2 for purposes of BACT, the Supreme Court in *Massachusetts* could have cited the Acid Rain Program to hold that CO_2

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[13] The NO_x or SO_2 emission rate is determined by monitoring the pollutant concentration (NO_X or SO_2) and the diluent gas concentration of either oxygen (O_2) or carbon dioxide in the flue gas. *See* 40 C.F.R. § 75.10(a)(2). It is necessary to look to O_2 or CO_2 to determine the NO_x or SO_2 emission rate because the different volume of gas produced and the atmospheric pressure present at a plant, among other factors, make it impossible to determine the amount of NO_x or SO_2 that the exhaust flue gases from coal fired power plants contain. Instead, the gas must be standardized to allow for comparison and study. This is accomplished by measuring *either* O_2 or CO_2.

has been regulated since 1990 as a pollutant. But, the Supreme Court never referenced that Program to reach its conclusion that CO_2 was an air pollutant.[14] Since the highest court in the land did not decide until the spring of 2007 that CO_2 was even an "air pollutant," CO_2 could not have been a pollutant "subject to regulation" prior to the Supreme Court decision.

A plain reading of the Acid Rain Program regulations demonstrates that the Program does not subject CO_2 to regulation. The legislative history of the Clean Air Act Amendments of 1990 underscores this point. In the Conference Report to accompany S. 1630, the committee stated with regard to the CO_2 monitoring requirement:

> The intent of the managers is to establish *a data collection policy* on carbon dioxide (CO_2) emission in this country. For this purpose, all sources subject to Title IV will be required to monitor their CO_2 emissions on an annual basis. This calculation can be made either through the use of emission monitors, or other comparably precise methods such as fuel sampling coupled with unit operating data. It is not the intent of the managers to require the installation of continuous emissions monitoring systems for CO_2 on all sources subject to Title IV.

Conference Report, Public Law 101-549, *available at* LEXSEE 1990 CAA Leg. Hist. 1451, at 1798 (emphasis added). This discussion demonstrates that according to the conference committee, the Acid Rain Program was merely a monitoring requirement. There is no indication Congress intended to regulate CO_2 itself.

Therefore, the Acid Rain Program's informational-only monitoring requirements of CO_2 do not equate to CO_2 being "subject to regulation."[15]

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[14] Sierra Club and the other petitioners in *Massachusetts* did make a similar argument to the Supreme Court in its opening brief in that case. *See* Brief of Petitioners, *Massachusetts v. EPA*, No. 05-1120, at 17. Because the Court never mentioned this argument in its opinion there, it appears the Court did not find that argument persuasive.

[15] An American Bar Association Section of Environment, Energy, and Resources treatise, *Global Climate Change and U.S. Law* ("*Global Change*"), published in 2007, before the Supreme Court decision

II. ANY REGULATION OF CO_2 SHOULD BE PART OF A COMPREHENSIVE ENVIRONMENTAL POLICY WITH ENERGY CONSIDERATIONS.

Beyond the legal question whether CO_2 is a "regulated pollutant," there are significant policy reasons for EAB to defer to EPA to consider regulation of CO_2 as part of a comprehensive program in the context of prudent energy, economic, and environmental considerations.

NRECA believes a prudent climate policy must be workable and allow rural electric cooperative electric consumers the continued benefit of reliable and affordable electricity. If in response to the Supreme Court's directive in *Massachusetts v. EPA*, *supra*, the agency decides to initiate formal rulemaking to regulate CO_2 as a Clean Air Act pollutant, many complex decisions regarding the timing, manner, scope, and content of any such regulations would have to be made to balance, for example, national environmental-energy compatibility, as the Supreme Court envisioned. *Massachusetts*, 127 S. Ct. at 1462. All interested parties deserve and should provide input into any such complex decision-making, and such decision-making should be made within the context of an overall regulatory program. During such a rulemaking process, EPA also will be able determine "the manner, timing, content, and coordination of its regulations with those of other agencies," thus resulting in a regulation that is effective and practical. *Id.* at 1462. The EAB is not the forum, nor is an individual permit the case to address and construct national climate policy.

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in *Massachusetts*, includes a section entitled "Are GHGs 'Air Pollutants'?", which begins by stating, "A seminal debate is ongoing as to whether GHGs are air pollutants within the meaning of the Act and, thus, within the regulatory jurisdiction of the EPA." *Global Change*, Chapter 5, § II(B), at 137. This statement affirms the point that prior to *Massachusetts* it was uncertain whether greenhouse gas emissions were considered air pollutants under the Act. Therefore, it is implausible to argue, as Sierra Club does, that CO_2 has been regulated since the promulgation of the Acid Rain Program's monitoring requirements in 1990.

Recently, the Chairman of the Federal Energy Regulatory Commission ("FERC") expressed concern that the country's increased reliance on natural gas fired electric generation poses electricity reliability and affordability issues. Chairman Joseph T. Kelliher, Statement at States of US Competitive Wholesale Power Markets, CERAWEEK 2008 - Quest for Security: Strategies for a New Energy Future (Feb. 15, 2008), attached hereto as Exhibit D. Chairman Joseph Kelliher gave a speech accompanied by a paper cautioning that a climate policy is not just an environmental policy, but an energy policy as well. *Id.* Recognizing that new coal generation faces regulatory uncertainty and that the U.S. is "poised on the edge of a large generation build" the paper warns that relying on natural gas as a single fuel for incremental new electricity supply "...can run great risks." *Id.* As Chairman Kelliher so distinctly put it:

> There are many options on how to approach climate change. Some approaches may be sound energy policy, some may be acceptable energy policy. But others may be profoundly unwise or reckless energy policy.

Id.

Also, the CEO of the North American Electric Reliability Corporation ("NERC")[16] Rick Sergel, is likewise concerned about the ability of the nation's electric infrastructure to supply needed electric power, particularly in view of recent cancellations of coal-fired electric generation facilities and the lack of viable options for baseload electric generation. With natural gas supplies "volatile in both price and supply," with nuclear plants costly and taking longer to build, and with coal plant cancellations, the NERC CEO thinks "[w]e're very close to the edge" of being able to provide adequate electric power. *See* Judy Pasternak quoting NERC Chairman, *Coal is No Longer on Front Burner*, L.A. Times, Jan. 18, 2008, available at www.latimes.com,

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[16] NERC was certified as the "electric reliability organization" by the Federal Electric Regulatory Commission ("FERC") on July 20, 2006.

and attached hereto as Exhibit E.

This appellate Board should not be in the position of creating climate change policy, especially one which may prove unwise or reckless. Instead, policymaking should be left to policymakers.

III. THE DESERET PROJECT ASSURES MAXIMUM REDUCTION OF POLLUTANTS, IS ENVIRONMENTALLY BENEFICIAL, AND THE SIERRA CLUB FAILED TO PROPOSE ANY FEASIBLE ALTERNATIVE TECHNOLOGIES TO CONTROL CO_2.

As the Board is aware, Deseret's proposed project is a 110 MW Circulating Fluidized Bed ("CFB") to be located at the existing Bonanza Power Plant in Uintah County, Utah, and is designed and intended to utilize waste coal as its primary fuel. *See* PSD Permit. Waste coal is an unavoidable byproduct of the coal washing process utilized to supply cleaned coal to the existing Bonanza unit. *See* PSD Permit Statement of Basis. Typically, waste coal's "heat rate" or Btu content is around 50% of that of washed coals. Waste coal's low heat rate coupled with additional impurities, as compared to washed coal, makes its use as a fuel to generate electricity difficult in typical boiler designs. See Coal: America's Energy Future, Volume II, at 2, excerpt attached hereto as Exhibit F.

Developed over the last twenty years, the CFB technology chosen for Deseret's planned unit is ideal for utilizing waste coal as a primary fuel. CFB combustion takes place at significantly lower temperatures and has an elongated boiler residence time as compared to combustion in a conventional coal-fired boiler. These characteristics allow waste coal with a typically high moisture and impurity content to be efficiently utilized in a CFB as a fuel to provide electric power instead of remaining a "coal waste." U.S. Department of Energy National Coal Council March 2006 Report.

Additionally, CFB combustion characteristics result in significant reduction of pollutants associated with the burning of coal to occur within the boiler itself. Thermal nitrogen oxides ("NOx") emissions are minimized as compared to other combustion technologies[17] and "sorbents" can be added to the combustor to substantially reduce sulfur dioxide ("SO_2") emissions. As with Deseret's planned unit, additional emission controls under the Clean Air Act new source permitting process (PSD BACT) can be added after the combustor to further reduce SO_2 and NOx, as well as to address particulate, acid aerosols, and mercury emissions. *See* Deseret's Clean Air Act PSD permit at issue (PSD-OU-0002-04.00) and accompanying Final Statement of Basis.

Perhaps the benefits of utilizing CFB technology can be no better exemplified than by examining the policies and successes of this technology within the state of Pennsylvania. Since 2004, Pennsylvania has placed the utilization of waste coal to generate electricity under its Clean Portfolio Standard. The Honorable Kathleen A. McGinty, testimony before the Pennsylvania Senate Environmental Resources and Energy Committee (Sept. 8. 2004), attached hereto as Exhibit G. The Secretary of the Pennsylvania Department of Environmental Protection, Kathleen McGinty, extolled the benefits of CFB technology to turn an environmentally harmful material (waste coal) into a potential resource. The Secretary stated that using waste coal to produce energy is "...an innovative process that will attract new investment and help create jobs we critically need while ensuring the highest standards of environmental protection and public health."

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[17] Unit NO_X emissions from coal combustion, absent additional emission controls, are a product of the coal's chemical makeup and the combustion process or thermal characteristics. CFB technology chosen for this unit is low heat and produces little thermal NO_X.

During the Deseret permitting process, the petitioner and other commenters offered no technological alternatives to the CFB chosen technology and emission controls to address CO_2 in the collateral impacts step of the BACT analysis. *See* EPA Response to Comments. For example Integrated Gas Combined Cycle ("IGCC") is considered by many to be a promising alternative technology to present day options using coal to generate electricity. However, as EPA aptly pointed out, even assuming that IGCC is a combustion alternative for BACT purposes, it is not feasible considering Deseret's Bonanza's planned unit's size and fuel use.[18] EPA Response to Comments at 19. This conclusion went unchallenged by petitioners.

Moreover, commenters offered no suggestions for different technology for the emissions recognized by EPA as part of the BACT collateral impacts analysis as relating to CO_2 emissions. *See id.* at 7. Finally some commenters suggested that EPA should have required CFB "supercritical" technology because of the potential to enhance overall unit efficiency, thereby mitigating CO_2 emissions, but as EPA correctly concluded, no such technology is commercially available for a unit of the size to be permitted. *Id.* at 20. Again, these conclusions went unchallenged by petitioners.

In short, Petitioner Sierra Club offers no feasible alternatives to the combustion and emissions control technologies chosen for Deseret's planned unit as a result of the exhaustive PSD BACT new source permitting, even if CO_2 were considered a BACT pollutant subject to regulation.

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[18] For IGCC, CO_2 capture and sequestration at utilities has not been commercially demonstrated.

IV. THE APPROPRIATE REMEDY TO REGULATE CO_2 EMISSIONS FROM POWER PLANTS IS TO PROMULGATE REGULATIONS FOR NOTICE AND COMMENT.

The facts as presented here should not be the basis for an *ad hoc* after the fact regulation by the EAB. Sierra Club cannot point to any permit issued anywhere in the country by EPA or any state permitting authority that requires a BACT analysis for CO_2 or any requirement in the Act. It would be inappropriate and a violation of due process for the EAB to require such analysis in the context of a single permit after the fact. Such a requirement, if any, should apply after taking into account a broad array of complex issues that can only be appropriately addressed by notice and comment rulemaking. Ironically, Sierra Club argues that if EPA does not remand this case, that "it would foreclose public participation on this critical policy question, and deprive the appropriate agency decisionmaker of the ability to make a well informed policy decision . . . ." *See* Sierra Club Brief at 33. However, if the EAB required a BACT analysis for CO_2 without a formal rulemaking's notice and comment period, such action would equate to *ad hoc* rulemaking. If CO_2 is to be regulated, EPA must follow the process set forth by the Administrative Procedure Act and ensure an opportunity for all interested parties to be provided adequate notice and opportunity to comment. *See* 5 U.S.C. § 553(b), (c). The public -- including all stakeholders -- should have an opportunity to provide comments concerning the regulation of CO_2.

What Sierra Club asks in the way of this *ad hoc* rulemaking is for EAB to promulgate a rule. EAB, however, does not have the authority to do so. EAB is the final Agency decisionmaker on administrative appeals under all major environmental statutes that EPA administers. Environmental Appeals Board Practice Manual at 1 (citing 40 CFR § 1.25(e)). In contrast, it is the EPA itself that is vested with the power to promulgate rules pursuant to the Clean Air Act and other environmental statutes. *See, e.g.*, 42 U.S.C. § 7409(a); 42 U.S.C.

§ 7414(a); 42 U.S.C. § 7521; 42 U.S.C. § 9604; *see also, e.g., Citizens to Save Spencer County v. EPA*, 600 F.2d 844 (D.C. Cir. 1979).

If the EAB were to remand the Deseret Permit, it would send the signal to the public that permit applicants cannot rely on the law and precedent and thus would have no certainty that their projects would not be stopped arbitrarily after the expenditure of substantial financial resources. This result would undoubtedly lead to, as has already happened, the abandonment of new construction of baseload plants that are surely needed as part of any sound energy policy. Therefore, for legal and policy reasons, the Deseret permit should be upheld.

CONCLUSION

For the reasons stated above, the National Rural Electric Cooperative Association respectfully requests that the Board affirm EPA's granting of the Deseret PSD Permit

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Dated: March 21, 2008

CERTIFICATE OF SERVICE

I hereby certify that a copy of the "Brief of *Amicus Curiae* National Rural Electric Cooperative Association in Support of Respondent United States Environmental Protection Agency and Permittee Deseret Power Electric Cooperative" preceding was sent to the following via U.S. Mail and email where an email address is listed below:

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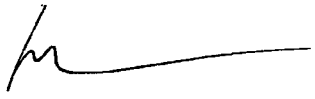

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