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

In re: Deseret Power Electric Cooperative	)	PSD Appeal 07-03
PSD Permit No. PSD-OU-0002-04.00	)	

REPLY OF PHYSICIANS FOR SOCIAL RESPONSIBILITY TO BRIEFS OF RESPONDENTS AND SUPPORTING AMICI

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INTRODUCTION

This Reply Brief is filed by and on behalf of Physicians for Social Responsibility ("PSR") and its members as Amicus Curiae in the above captioned case.[1] The arguments of Respondent and Amici for Respondents cannot resurrect EPA's flawed decision in this matter. Therefore, we renew our request that the Environmental Appeals Board ("EAB" or "Board") remand permit issued to Deseret Power Electric Cooperative ("Deseret") under the Clean Air Act ("CAA" or "Act") by U.S. EPA Region VIII (the "Region" or "EPA").[2] We further request that the Board instruct EPA to complete a full analysis of

[1] Physicians for Social Responsibility is a nonprofit organization, comprised of some 32,000 members. PSR submits this brief in its institutional capacity and on behalf of its membership.

[2] In particular, on August 30, 2007, the Region issued a prevention of significant deterioration (PSD) permit under section 165 of the CAA for construction of Deseret Power Electric Cooperative's proposed coal-fired electric utility generating unit at the existing Bonanza power plant near Bonanza, Utah (the "Bonanza Permit"). The PSD permit was issued by EPA Region 8 because the proposed plant is located within the Uintah and Ourah Indian Reservation and these tribes do not have an EPA-approved tribal permitting program under the Clean Air Act.

best available control technology ("BACT") for reducing emissions of CO_2 a potent greenhouse gas ("GHG"), or in the alternative instruct EPA to provide meaningful public notice of its factual, legal, and policy rational for not doing so and specifically solicit comment on that decision to allow an opportunity for the appropriate policy decisionmaker to fully consider the critical health implications and other consequences of this important policy decision *before* a final decision is made.[3]

DISCUSSION

1. GHGs Including CO_2 Are Already "Subject To Regulation"

PSR believes that the Act requires that EPA establish BACT emission limitations for GHG pollutants, including CO_2. The relevant language of the Act (and EPA's own regulations) is broadly worded to require PSD emission limits for any pollutant "subject to regulation." *See* CAA § 165(a)(4); 40 C.F.R. § 52.21(b)(50)(iv). As the Petitioner and Amici have observed, CO_2 is both subject to regulation because of EPA's existing obligation to regulate in light of the U.S. Supreme Court's decision in *Massachusetts v. EPA*[4] (which made clear that EPA cannot simply ignore greenhouse gas emissions under the Act) and the clear health and welfare impacts demonstrated by the relevant climate science (recently summarized in the Intergovernmental Panel on Climate Change ("IPCC") Forth Report).[5] In *Massachusetts*, the Court ruled that if GHG emissions endanger public health or welfare, the Agency has an obligation to establish emission

[3] Sierra Club's original Petition in this case also raised the question of whether EPA should have exercised its discretion under CAA section 165(a)(2) to consider alternatives to the proposed plant, and whether EPA adequately explained why it did not exercise this authority. In the event that the Board does not remand the Bonanza Permit for reconsideration of the whether to establish a CO_2 BACT limit, the Board should, at minimum, require that EPA explain why it is appropriate for the agency, when faced with such compelling evidence of the adverse impacts of CO_2, to refuse to consider alternatives to the proposed project that might have lower CO_2 emissions.

[4] 127 S.Ct. 1438 (2007).

[5] *See* www.ipcc.ch.

limitations applicable to GHGs under section 202 of the Act (and it would clearly need to regulate under other provisions as well).[6] GHGs, including CO_2 and methane, are also "subject to regulation" because existing statutory obligations and agency regulations already specifically target GHGs.[7]

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[6] For example, the CAA requirements regarding EPA's obligation to regulate emissions from stationary sources under section 111 includes "endangerment" language that is virtually identical to the language in section 202. *See* CAA § 111(b)(1)(A), 42 U.S.C. § 7411(b)(1)(A).

[7] This includes Section 821, which requires monitoring, record keeping, and reporting of CO_2 emissions from certain emission sources including power plants. Additionally, EPA has specifically regulated GHG emissions for purposes global climate change under the existing landfill gas regulations adopted under section 111 of the CAA. In the rulemaking adopting requirements to reduce "landfill gas emissions," EPA defines landfill gas as "a gaseous by-product of the land application of municipal refuse typically formed through the anaerobic decomposition of waste materials and composed principally of methane and CO_2." 40 C.F.R. §§ 60.4248, 63.6175, 63.6675. EPA's rules then require "control" of landfill gas emissions. 40 C.F.R. § 60.752. In adopting these regulations, EPA specifically found that GHG emissions (in the form f methane and "CO_2 equivalents") endanger public health and welfare, and relied in part on the health and welfare benefits associated with GHG emission reductions to justify its final rule:

> Briefly, *specific health and welfare effects from [Landfill Gas] emissions are as follows*: NMOC [non-methane organic compounds] contribute to ozone formation; some NMOC are known or suspected carcinogens, or cause other noncancer health effects; NMOC can cause an odor nuisance; methane emissions present a well-documented danger of fire and explosion on-site and off-site, and contribute to global climate change as a major greenhouse gas. *Today's rules will serve to significantly reduce **these potential problems** associated with LFG emissions.*
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> * * *
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> The Climate Change Action Plan, signed by the President in October, 1993, calls for EPA to promulgate a "tough" landfill gas rule as soon as possible. *This initiative also supports a more stringent emission rate cutoff that will achieve greater emission reduction.*
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> * * *
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> The additional methane reductions achieved by this option are also an important part of the total carbon reductions identified under the Administration's 1993 Climate Change Action Plan. *The EPA thus concludes that the chosen alternative is the most cost-effective to achieve the objectives of section 111 . . .*
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> * * *
>
> There is a general concern within the scientific community that the increasing emissions of greenhouse gases could lead to climate change, although the rate and magnitude of these changes are uncertain.
>
> In conclusion, while the social benefits of the rule have not been quantified, *significant health and welfare benefits are expected to result* from the reduction in landfill gas emissions caused by the rule.

See Standards of Performance for New Stationary Sources and Guidelines for control of Existing Sources: Municipal Solid Waste Landfills (Tuesday, March 12, 1996), 61 Fed. Reg. 9905, 9906, 991, 9914, 9917 (emphasis added). The proposed rule similarly evinced an intent to target GHGs:

> In comparison to the President's proposed initiative of planting a billion trees a year in response to climate change, based on carbon dioxide (CO_2) emissions, EPA has roughly estimated (in 1992 dollars) that 1.1 to 2.0 billion trees would need to be planted at a cost of 0.57 to 1.1 billion dollars in order to achieve *an equivalent reduction in CO_2 as achieved by today's proposal.* While EPA has attempted to quantify the relationship between the President's tree planting initiative and the *equivalent CO_2 reduction achievable in this proposal*, it should be noted that ancillary benefits associated with planting trees (such as the establishment of shade and wildlife habitat) could not

The Act, we believe, speaks for itself, and the Board should find that EPA has an obligation to consider GHG emissions, including specifically CO_2, as regulated pollutants it its PSD permitting actions. Respondents' arguments attempt to construct a legal artifice to circumvent the plain language of the Act – their arguments, however, are not compelling. At most, even accepting Respondents' arguments regarding statutory ambiguity, EPA merely has *discretion* to interpret the statute in a reasonable manner. Thus, even were this the case, because EPA is attempting, with this permit decision, to adopt narrowly prescriptive new limitations on its own authority, it must not do so without first developing a full record upon which the appropriate decisionmaker may reasonably base his decision. For this reason, the Board should, at minimum, remand the permit for further notice and comment proceedings.

2. EPA Has Adopted New Limitations on Its Own Authority

Respondents and Amici for Respondents argue that it is the Petitioner (and Amici) and not EPA who are arguing for a "new interpretation" of EPA's Clean Air Act authority, and that Petitioner has requested what is essentially a rulemaking in the context of a permit decision. This argument serves only to obscure the core failing of this permit decision – that EPA's interpretation of the Act here crystallizes the scope of the agency's authority in significant new ways, and that EPA never acknowledged in its original public notice or in any supplemental notice what is *by far* the most significant aspect of its

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be quantified.
Carbon dioxide is also an important greenhouse gas contributing to climate change. Under the proposed standard, annual CO_2 emissions would increase, proportional to the relative use of flares compared to energy recovery for control. It should be noted, however, that methane contributes considerably more to climate change on a weight basis than CO_2. *Thus, the reduction of methane emissions is expected to have a positive impact on global climate change.*
56 Fed. Reg. 24468 at 24472 (emphasis added).

decision – its treatment of CO_2 in the PSD program post-*Massachusetts v. EPA*.[8] At best, both EPA's and Petitioner's interpretations of EPA's obligations and authorities under the Act, as they relate to GHGs including CO_2, are "new" inasmuch as the agency, in light of recent events, is treading in uncharted waters in this permit decision.

Indeed, whether it decides to require CO_2 reductions or not, EPA's decision here will, in effect, establish a binding precedent for the PSD program that does not currently exist; precedent that will affect all future agency permitting actions, and from which the agency may not be able to deviate absent a rulemaking to change the agency's interpretation of applicable law. *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). In this respect, what the agency does in this instance is demonstrably "new," and tremendously significant from a regulatory and policy perspective.[9] Whether or not EPA has, as it argues here, acted in the past consistent with the interpretation of the Act that it now specifically espouses, the agency has never before *articulated* this interpretation in a manner that would specifically limit its future discretion under the PSD program as its decision here would do.[10]

For example, EPA argues in its Response Brief that the Act should not be read "to require EPA to establish PSD emission limits for all pollutants merely capable of regulation in the future." EPA Response Brief at 10. However, EPA's never before

[8] The decision is significant both with regard to whether CO_2 is a PSD pollutant and whether EPA must (or can) consider CO_2 related environmental impacts in connection with its "collateral impacts" analysis.

[9] This is clear from the breadth of participation in this case, and from other indicia – like the recent Congressional oversight activities on the very question of whether EPA should be dealing with CO_2 and other GHGs in PSD permits. *See* http://oversight.house.gov/investigations.asp?start=25&ID=121; http://globalwarming.house.gov/mediacenter/pressreleases?id=0186; http://oversight.house.gov/story.asp?ID=1483;

[10] As described in the various briefs in support of the petition for review, an interpretation that would allow for or require some consideration of CO_2 emissions in the wake of *Massachusetts v. EPA* and other recent events can also be understood as "consistent" with prior agency practice, inasmuch as prior agency actions do not clearly articulate the same narrow band of authority that EPA staked our in its decision on the Bonanza Permit.

articulated interpretation of the Act in this case goes much further than this – EPA has adopted in this permit action an interpretation that would categorically *preclude* the agency from ever establishing emission limits for pollutants for which it has not already specifically adopted emissions limitations, emissions standards, or other substantive controls. In effect, the agency has put forward here perhaps the most restrictive possible reading of the Act – one that has never been offered before, and one that materially changes the scope of the discretion available to the Agency (and perhaps states as well) in future permitting actions under the PSD program.[11] That is, prior to articulating its interpretation of the Act in this instance EPA might have elected to establish emission limits for CO_2 or other GHGs under the PSD program based on the "subject to regulation" language of the Act and the current legal and policy status of these pollutants (as described in the various briefs in this case). Nothing in EPA's purported "historic reading of the Act" (EPA Response Brief at 11-12) would have expressly prevented such an approach. However, in the wake of a final decision in on this permit, because of the narrowly prescribed, self-imposed limitations on its authority, it is likely that EPA will no longer be free to exercise discretion in this manner (absent intervening rulemaking).[12] As

[11] EPA's assertions that its interpretation is "well established" is belied by the agency's own arguments before the Board, which have evolved significantly over the course of this appeal and the appeal in *Christian County* – for example, EPA now claims that its interpretation of pollutants "subject to regulation" is not limited to pollutants for which the agency has adopted controls to limit emissions, but is broader because it also includes pollutants for which the agency has "controlled through production or import restrictions." *See* EPA Response Brief at 22. This argument, however, was entirely absent from EPA's initial response to the petition for review and the agency's brief in *Christian County* (in which it said its interpretation "reflected years of agency practice of considering an air pollutant to be 'subject o regulation' under the Act *only* when it was covered by other statutory or regulatory programs *that impose emission control requirements*"), Brief of the EPA Office of Air and Radiation, *In re Christian County*, PSD Appeal 07-01, Slip Op. at 9. This is the very epitome of post-hoc legal justification, not a well establish "historical" legal interpretation.

[12] Throughout its Response Brief, EPA conflates the idea of whether its new interpretation of "subject to regulation," as articulated in the Bonanza case, is "permissible" and whether another interpretation is "required." Nowhere does EPA explain what prior statement or articulation of its "interpretation" in particular might have foreclosed the agency's *discretion* to establish PSD limits for GHGs in general and

a result, while the proposed Bonanza facility itself is a relatively small project, the magnitude of this permitting decision overshadows the entire PSD program, and may well mean the difference, at least for plants approved over the next several years, between addressing and dealing with CO_2 emissions or *completely ignoring them.*

3. EPA Could Have and Should Have Requested Comment On Its Interpretation

Clearly, EPA possesses the authority in a permit proceeding to provide the public with notice of the basis for each aspect its decision – including as relevant here its decision, even in light of *Massachusetts v. EPA*, not to include emission requirements for GHGs or to otherwise consider climate-related emissions or impacts – and to solicit comment on the appropriateness of such decisions in light of relevant factual, legal and policy considerations. Indeed, where EPA is addressing an issue of such importance – here by expressly identifying previously unarticulated limitations on its statutory authority in a permit decision – it *must* explain its decision and the basis for that decision

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CO_2 in particular. Rather, EPA relies on a post-hoc legal rational to fill in the gaps remaining in its cobbled-together construction of its "longstanding" interpretation of the PSD program.

and invite public comment.[13] Thus, not only does EPA have discretion to solicit and consider comments on this issue, it has an obligation to do so.[14]

Nonetheless, EPA proceeded to issue the final permit in this instance, while fully aware of the sensitivity of the GHG issues, without ever having explained or solicited comment on its proposed interpretation and approach. Among other reasons, this is significant because had EPA appropriately solicited comment on whether or how to address CO_2 emissions (and perhaps other GHGs emissions) from the Bonanza plant *before* adopting sweeping and prescriptive limitations on its authority, it would have been required to consider and respond to public comments on not just the legality of its statutory construction but the *appropriateness* of exercising its discretion to adopt that construction in light of the numerous, vitally important policy considerations regarding human health affects, species and habitat impacts, social and economic consequences, impacts on parks and other natural resources, justice concerns, etc. It appears, in fact,

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[13] The Board has in the past addressed the requirement to present all significant issues in the public notice for a permit. *See, e.g., In re Indeck Elwood*, PSD Appeal 03-04 (EAB 2006). In *Indeck*, the Board chastised Illinois EPA for failing to address in its public notice the impacts of a proposed coal plan on a nearby national prairie, stating:

> Overall, we, too, are struck by the remarkably low profile the proximity of a nationally protected prairie - essentially a preservation site for vegetation of national and historic significance - assumed in IEPA's approach to the process of developing the permit before us. The fact that such a preserve is adjacent to, and apparently downwind from, the site for a proposed power plant would presumably have attracted IEPA's attention to a significant degree, and by all rights *should have featured prominently in the notice given the public* concerning the permit. Yet, the issue instead appears to have been given secondary status, to the point of not being referenced at all in the public notice. This strikes us as *not only unfortunate but also the stuff of which legal vulnerability is made.*

Id. (emphasis added). In the present case, the absence of any public notice regarding EPA's intent to specifically limit its authority to address CO_2 in the PSD permitting context is at least as glaring a public notice oversight.

[14] EPA claims that its approach is "permissible" (a claim we disagree with and, incidentally, one which EPA did not articulate in any public notice), but the agency fails entirely to explain why its interpretation is *appropriate* in light of relevant considerations (many of which, because of EPA's failure to notice the issue, have been raised only at this late stage of the permit process). Development of a meaningful *pre-decisional record* regarding relevant issues, including public health implications, is why public notice is so crucial here.

that EPA's selected approach was *specifically intended* to avoid addressing any of these clearly relevant considerations.[15]

The effect of EPA's procedural approach in this case has been to stifle meaningful public dialogue and undermine the EPA's ability to make a truly well-informed decision about how to address GHG under the PSD program. In light of the tremendous importance of the policy decision at issue in this case, the agency's abdication its responsibility to engage in a meaningful and inclusive public process necessitates a remand of the Bonanza Permit.

In its response to the present appeal, EPA argues that the Board should uphold Region VIII's decision to grant a PSD permit to Bonanza, observing the Board's preference for "final adjudication of most permitting decisions at the regional level," and for the establishment of "most permit conditions . . . at the Regional level." EPA Response at 8. However, these procedural arguments pre-suppose that the appropriate EPA decisionmaker has all relevant facts, issues and analysis before him at the time the final decision was made, and has adequately considered these factors (and the full nature,

[15] In this regard, we find it ironic that EPA's Response Brief cites the Act's "requirements for reasons decisionmaking" in support of its argument that EPA need *NOT* provide public notice and opportunity to comment on the appropriateness of EPA's justification for not addressing GHG emissions in this PSD permit – especially in light of the fact that EPA has specifically justified at least one previous CAA rule (the Municipal Landfill NSPS discussed above) in part based on its GHG-related benefits. EPA Response Brief at 20-21 (among other things arguing wrongly that EPA has yet to decide whether health and welfare considerations can justify regulation of GHGs). EPA argues that requiring control of CO_2 in the context of PSD would be "the regulatory equivalent of shoot first and ask questions later" – but based on numerous prior EPA actions, including but not limited to the landfill gas rules, it is clear that EPA has long been asking the relevant *questions* regarding the impact of GHGs *and* has already started shooting. In addition to the landfill gas requirements EPA makes much of the GHG reductions purportedly achieved as a result of the agency's voluntary programs – presumably because these reductions are associated with meaningful and worthy public health and welfare benefits. *See* http://www.epa.gov/climatechange/policy/neartermghgreduction.html. Additionally, EPA acknowledges the various and serious consequences of global warming on its website. *See* http://www.epa.gov/climatechange/effects/index.html. In effect, EPA has already determined that GHG emissions endanger public health and welfare, it simply refuses to acknowledge that it has done so.

scope, and implications of the decision at hand) *prior to issuing the final permit approval.* This is demonstrably not what occurred in this instance.

This permit decision was the very first for a coal-fired power plant (the largest sources of CO_2 emissions in the nation) that EPA itself has issued in the wake of *Massachusetts v. EPA*. Indeed, it is still the *only* such permit that EPA has issued, nor has the agency solicited comment in any other proceeding on its factual, policy, or legal justifications for ignoring GHG emissions under the PSD program.[16] Thus, in effect, the evolving record in this case represents the *only* detailed public discussion that the agency has engaged in on this critical EPA policy decision.[17]

Accordingly, the sad fact is that the present administrative appeal is the *only* reasonably informed opportunity that has emerged for the public to submit any factual, technical, legal, or policy issues for the agency's considerations – and agency here has *already committed itself to a course of action*.[18] That is, because EPA only addressed GHG emission in this case in response to public comment – and did not acknowledge the relevance of GHG issues in the public notice on the draft permit or in any supplemental

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[16] While the State of Illinois (not EPA) did issue a federal PSD permit after *Massachusetts v. EPA* – exercising delegated EPA authority – the Board ruled that the issue of GHGs had not been preserve for appeal. *See In re Christian County*. Also, while EPA issued a draft permit for the proposed Desert Rock facility in New Mexico in 2006, it has neither issued a final permit nor solicited post-*Massachusetts v. EPA* comments on the GHG issue in that proceeding. See http://www.epa.gov/region09/air/permit/desertrock/appl-info.html.

[17] The comment period in the Desert Rock case closed in October of 2006, so much of the public (including PSR) is effectively precluded from engaging the agency in that case on GHG issues.

[18] Significantly, the course of action to which EPA has committed itself to without upfront public notice relates not just to the establishment of BACT limitations for GHGs emissions, but also the consideration of GHGs in the BACT "collateral environmental impacts" analysis. EPA has adopted (also without upfront public notice) a sweeping and categorical disavowal of any obligation or authority to *ever* consider GHG emission or global climate change as a collateral environment impact – reading into the Act a limitation (exclusively allowing for consideration of *local* collateral environmental impacts) that is found absolutely *nowhere* in the plain language of the statutory text. This interpretation of the Act is arbitrary and capricious, and absolutely unsupportable under established conventions of statutory interpretation. Moreover, again, EPA adopted this far-reaching and ill-advised, policy-driven interpretation without the benefit of *any* public input regarding the wisdom or factual, technical, or policy implications and consequence of this approach. This failure provides independent grounds for remand of Bonanza's permit.

notice after *Massachusetts v. EPA* – no one has *ever* had the opportunity to engage in an *informed dialogue* with the agency on this issue (with knowledge of the agency's proposed position and justifications) prior to the permitting authority's final decision.

As this administrative appeal makes abundantly clear, there are a host of significant issues that are directly implicated by this permit decision which remain unresolved because they were not adequately addressed by the agency prior to taking final action. These shortcomings are the direct result of EPA's failure to adequately notify the public upfront of the substance of and rationale for the single most significant aspect of its decision. Thus, to remain consistent with EPA's "long-standing policy" of resolving important permitting issues at the Regional level, the Board should remand this permit to EPA with instruction to specifically solicit and consider comments on its intent to specifically and narrowly restrict its legal authority under the PSD program, and on the associated factual, legal, and policy implications (including the public health implications of its sweeping statutory interpretation).

CONCLUSION

Ultimately, the path that the Agency has taken in this case is the very antithesis of good government. The Board has the opportunity in this instance to play a critically important role to ensure that EPA adheres to both the letter and the spirit of the CAA, and to hold the agency to appropriate standards of informed policy decisionmaking. Accordingly, the Board should exercise its authority as administrative gatekeeper for "important policy considerations" by remanding the decision to EPA for the appropriate development of a full administrative record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document, **REPLY OF PHYSICIANS FOR SOCIAL RESPONSIBILITY TO BRIEFS OF RESPONDENTS AND SUPPORTING AMICI**, has been provided by U.S. Mail, this 25th Day of April, 2008, to the following:

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