UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
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November 2, 2007

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
1341 G Street NW, Suite 600
Washington, DC 20005

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ENVIR. APPEALS BOARD

Re: Deseret Power Electric Cooperative, PSD Appeal No. 07-03

Dear Ms. Durr:

Enclosed for filing with the Environmental Appeals Board in the above-referenced matter is an original and five copies of the EPA Region VIII's Response to Petition for Review, with attached exhibits, and a Notice of Filing of the Certified Index of the Administrative Record. Copies of these documents have been served on all parties in accordance with the enclosed Certificate of Service.

Thank you for your assistance in this matter.

Sincerely,

Kristi M. Smith
U.S. EPA, Air and Radiation Law Office

Enclosures

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

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

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ENVIR. APPEALS BOARD

EPA REGION VIII's RESPONSE TO PETITION FOR REVIEW

The Board should deny review in this case because the Petitioner has failed to demonstrate clear error in Region VIII's action to grant a Prevention of Significant Deterioration (PSD) permit to Deseret Power Electric Cooperative (Deseret). On the first issue raised in the Petition for Review, the Region's determination that carbon dioxide (CO_2) is not currently a regulated pollutant under the Clean Air Act (CAA or Act) is consistent with the requirements of the Act, corresponding EPA regulations, and EPA's longstanding interpretation of those regulations. Since the PSD program was established in 1977, EPA has consistently and permissibly interpreted the phrase "pollutant subject to regulation under the Act" to describe air pollutants subject to a provision in the Clean Air Act or regulations promulgated by EPA under the Act that require actual control of emissions of that pollutant. Carbon dioxide is not currently subject to such a provision or regulation, and there is no cause for the Board to reverse the Agency's established interpretation in this case. The Board should also deny review on the Petitioner's second issue because public comments did not address the reasonably

ascertainable alternatives now raised for the first time in the Petition for Review, the document relied upon by Petitioner is not contained in the administrative record, and the Clean Air Act does not require that a permitting authority study alternatives that were not raised in public comments.

Background

This case involves an appeal of a PSD permit issued by EPA Region VIII to Deseret to construct a new waste-coal-fired utility generating unit at an existing power plant near Bonanza, Utah. EPA Region VIII is the permitting authority in this action because the planned 110 megawatt unit will be located on Indian country lands within the exterior boundaries of the Uintah & Ouray Indian Reservation in northeastern Utah. *See* 40 C.F.R. §52.2346; Statement of Basis at 1 (Resp. Exhibit 1). The new unit is designed to utilize an existing waste coal stockpile at Deseret's nearby coal mine. Statement of Basis at 1; Response to Comments at 1 (Resp. Exhibit 2). The stockpile is estimated to be approximately eight million tons and would otherwise be a wasted energy resource. Statement of Basis at 9-10. Deseret plans to use the additional capacity generated by the new unit to supply electricity to several municipalities in Utah. *See, e.g.* Letter from Daniel D. McArthur, Mayor of St. George, Utah (April 25, 2007).

In June of 2006, the Region issued a proposed permit that would require Deseret to meet stringent emission limitations to satisfy the PSD requirements of the Clean Air Act. Statement of Basis at 4; Response to Comments at 1. The proposal was accompanied by a "Draft Statement of Basis," which informed interested members of the public as to the significant features of the proposed project. At the start of public comment period on the proposed permit, EPA published public notices in five

newspapers in the vicinity of the project and submitted Public Service Announcements about the proposed permit action to several local radio stations in Utah. Statement of Basis at 4; Response to Comments at 1-2. In response, EPA received public comments both in support of the Deseret project, including letters from seven Utah municipalities expressing their need for additional electrical power and stating their plan to participate in the project, and in opposition to the project, including a letter submitted by Petitioner and six other groups. Statement of Basis at 4-5; Response to Comments at 2.

Over the next year, EPA Region VIII gave careful consideration to the public comments it received, and on August 30, 2007, the Region issued a final Federal PSD air permit to Deseret to authorize the addition of a 110-megawatt waste-coal-fired boiler to the existing Bonanza power plant (Permit No. PSD-OU-0002-04.00). EPA Region VIII also issued a final "Statement of Basis" on that date, as well as a "Response to Public Comments" formally responding to public questions and comments about the project proposal and proposed permit.

Standard of Review and Scope of Review

The Board's review of final PSD permit decisions is discretionary and the Board's exercise of such discretion is circumscribed. A petitioner bears the burden of convincing the Board that review is warranted. 40 C.F.R. Part 124. Under the Board's procedural rules, review may be granted under two circumstances. First, the decision by the Regional Administrator may be reviewed if it is based on a "finding of fact or conclusion of law which is clearly erroneous." 40 C.F.R. §124.19(a)(1). Second, review may be authorized if the permit action involves "an exercise of discretion or an important policy

consideration" which the Board believes, in its discretion, it should review. 40 C.F.R. §124.19(a)(2).

A petitioner who possesses standing to appeal is only permitted to raise issues that have been preserved for appeal through public comments or that were not reasonably ascertainable during the comment period. Under applicable regulations, "all reasonably available arguments" that support a position advocated by the petitioner must have been raised during the public comment period. *See* 40 C.F.R. §124.13. A petitioner is also obliged to allege arguments in a manner that are both specific and substantiated. *In Re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 708 (2002). These requirements ensure that any issues challenged on appeal are well defined and actually represent "bona fide" disagreements between the petitioner and the permit authority.

It is a long-standing EPA policy to favor final adjudication of most permitting decisions at the regional level. *See In re MCN Oil & Gas Company*, UIC Appeal No. 02-03, slip op. at 6 (EAB, September 4, 2002) 2002 WL 31030985. As EPA has repeatedly observed, "most permit conditions should be finally determined at the Regional level" and therefore the power of review will only be employed "sparingly." *See* 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 705 (EAB 2001). Accordingly, the Board frequently defers to regional permit authorities in its review of permit appeals, especially on matters of a technical nature. *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 54 (EAB 2001).

ARGUMENT

I. The Clean Air Act and EPA Regulations Do Not Currently Require PSD Permits to Contain Emissions Limitations for Carbon Dioxide.

The absence of a carbon dioxide emissions limitation in the Deseret PSD permit does not establish grounds for review or remand. The EPA Administrator long ago established that the Agency "lacks the authority to impose [PSD permit] limitations or other restrictions directly on the emission of unregulated pollutants." *North County Resource Recovery Assoc.*, 2 E.A.D. 229, 230 (Adm'r 1986). EPA is currently exploring options for addressing greenhouse gas emissions in response to the Supreme Court decision in *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), but the Agency has not yet issued regulations requiring control of carbon dioxide emissions under the Act generally or the PSD program specifically. Thus, carbon dioxide is not currently a pollutant regulated under the Clean Air Act.

A. Carbon Dioxide Is Not Currently A Pollutant "Subject to Regulation."

Carbon dioxide is not currently an air pollutant "subject to regulation" because EPA has not established National Ambient Air Quality Standards or New Source Performance Standard for carbon dioxide, identified carbon dioxide as a Class I or II substance under Title IV, or otherwise required control of carbon dioxide emissions under any other provision of the Act. *See* 40 C.F.R. §52.21(b)(50). Consistent with the Agency's contemporaneous interpretation of the definition of "regulated NSR pollutant" at the time it was adopted into regulations in 2002, the Board has previously determined in PSD permit appeals that carbon dioxide is not a regulated pollutant. *Inter-power of New York*, 5 E.A.D. 130, 151 (EAB 1994) (finding EPA was not required to examine

technologies aimed at controlling carbon dioxide because it was an unregulated pollutant); *see also Kawaihae Cogeneration Project*, 7 E.A.D. 107, 132 (EAB 1997) (upholding a PSD permit in which the permitting authority found that carbon dioxide was not "a regulated air pollutant for permitting purposes"). These opinions are consistent with several other Agency statements reflecting EPA's nearly 30-year history consistently interpreting the phrase "pollutant subject to regulation" to describe only those pollutants subject to regulations requiring actual control of emissions.

Given the absence of a definition of the term "regulation" in the Clean Air Act and the context in which this term is used in sections 165(a)(4) and 169(3) of the Act, the Agency's historic interpretation of these provisions is a permissible one that has been affirmed by the District of Columbia Circuit. Nothing in the 1990 Amendments to the Clean Air Act reflects an intent to change EPA's interpretation or to require limits on carbon dioxide.

While the recent Supreme Court decision in *Massachusetts v. EPA,* 127 S. Ct. 1438 (2007), held that carbon dioxide and other greenhouse gases are "air pollutants" under the CAA, that opinion did not make carbon dioxide a regulated NSR pollutant or a pollutant subject to regulation under the Clean Air Act. The Supreme Court did not address EPA's interpretation of sections 165(a)(3) or 169(3) of the Act, alter the requirements of the current PSD permitting program, or provide grounds to change EPA's longstanding and permissible interpretation these provisions.

1. Region VIII's Based Its Action on Applicable Regulations and EPA's Established Interpretation of Those Regulations.

The Region appropriately based its permitting decision on the applicable PSD regulations and the Agency's established interpretation of those regulations. The Clean

Air Act requires PSD permits to contain technology-based emissions limitations for "each pollutant subject to regulation under the Act." CAA §§ 165(a)(4), 169(3).[1] In accordance with that statutory provision, EPA regulations specify that PSD emissions limits are required "for each regulated NSR pollutant" emitted by the facility. 40 C.F.R. § 52.21(j). The Deseret permit was based on the regulatory definition of "regulated NSR pollutant" in section 52.21(b)(50) and the agency's established interpretation of this definition and the Clean Act provision on which the definition is based. Response to Comment at 5-6 (Response #1.a.).

As discussed in the Region's response to comments, EPA's PSD permitting regulations define a "regulated NSR pollutant" to include those pollutants for which emission control measures are required under three principal program areas – pollutants for which national ambient air quality standards (NAAQS) have been promulgated (and their precursors), pollutants subject to a section 111 New Source Performance Standard (NSPS), and class I or II substances regulated under title VI of the Act.[2] 40 C.F.R. § 52.21(b)(50)(i)-(iii). There is no dispute that carbon dioxide is not regulated under any of these three programs.

Consistent with the text of the Clean Air Act, the definition of "regulated NSR pollutant" also covers any "pollutant that otherwise is subject to regulation under the Act." 40 C.F.R. § 52.21(b)(50)(iv). However, EPA has never interpreted this phrase in the definition to cover pollutants subject only to monitoring and reporting requirements,

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[1] The United States Code refers to a "pollutant regulated under this chapter," which is a reference to Chapter 85 of Title 42 of the Code, where the Clean Air Act is codified. See, 42 U.S.C. §7475(a)(4); 42 U.S.C. §7479(3). For simplicity, this Response generally uses "the Act" and the Clean Air Act section numbers rather than the U.S. Code citation.
[2] Class I or II substances are specific categories of ozone depleting emissions.

such as those applicable to carbon dioxide under section 821 of the 1990 Amendments to the Clean Air Act and the Part 75 regulations that implement that provision. At the time EPA adopted its definition of "regulated NSR pollutant," the Agency listed in the preamble to the rule each pollutant that was "currently regulated under the Act" and "subject to Federal PSD review and permitting requirements." 67 Fed. Reg. 80186, 80240 (Dec. 31, 2002).[3] This list did not include carbon dioxide or any other pollutant that was not subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant. Through the contemporaneous adoption of the regulatory language and publication of a definitive list of pollutants subject to regulation at the time, EPA established its interpretation of the phrase "pollutant that otherwise is subject to regulation" in section 52.21(b)(50)(iv).

Petitioner and other interested parties had an opportunity to contest EPA's interpretation of section 52.21(b)(50)(iv) at the time it was adopted, and they are barred under section 307(b)(1) of the Clean Air Act from collaterally attacking EPA's interpretation of that regulation in this proceeding. *See* 42. U.S.C. 7601(b)(1) (requiring that challenge to nationally-applicable rules be brought in the D.C. Circuit within 60 days of publication in the Federal Register). The Board has no grounds to now change the interpretation established in the 2002 rulemaking, especially when it is consistent with two of the Board's own opinions holding that carbon dioxide is not a regulated pollutant after the 1990 Amendments of the Clean Air Act.

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[3] EPA listed CO, NOx, SO_2, PM and particulate matter less than 10 microns in diameter (PM-10), Ozone (VOC), Lead (Pb) (elemental), Fluorides (excluding hydrogen fluoride), Sulfuric acid mist, H_2S, TRS compounds (including H_2S), CFCs 11, 12, 112, 114, 115, Halons 1211, 1301, 2402, Municipal Waste Combustor (MWC) acid gases, MWC metals, and MWC organics.

The final 2002 rules were not the first time EPA had articulated its interpretation of "subject to regulation." The 1996 PSD rule proposal upon which the 2002 regulations are based also listed each of the pollutants that the Agency considered subject to regulation at the time, and that list also did not include carbon dioxide. 61 Fed. Reg. 38250, 38310. The proposal provided notice of EPA's intent to update its PSD regulations to exclude hazardous air pollutants[4] from the PSD program and to add ozone depleting substances on the basis the 1990 Amendments to the Clean Air Act. 61 Fed. Reg. at 38,307-11. Commenters that believed EPA should read "subject to regulation" broader and expand the definition of "regulated NSR pollutant" to include carbon dioxide by virtue of the enactment of section 821 of the 1990 Amendments had the opportunity to present their views to the Agency more than 10 years ago, but there is no indication that any commenters did so.

When EPA proposed regulations in 1996 to update its list of pollutants subject to the PSD program based on the 1990 Amendments, its interpretation of the statutory language "subject to regulation under the Act" was apparent to the regulated community and other stakeholders. In April 1993, shortly after the Part 75 Acid Rain Program regulations relied on by Petitioner were finalized (*see* 58 Fed. Reg. 3590 (Jan. 11, 1993)), the Office of Air and Radiation issued an interpretation that specifically considered section 821 of the 1990 Amendments and concluded that carbon dioxide was not "subject to regulation" because section 821 only called for reporting and study of carbon dioxide.

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[4] In the 1990 amendments, Congress adopted section 112(b)(6) of the Clean Air Act, which excludes hazardous air pollutant (HAPs) from PSD. 42 U.S.C. §7412(b)(6); Pub. L. No. 101-549, § 301. Congress did not need to include an additional exemption for carbon dioxide because EPA's prevailing interpretation of "subject to regulation" did not include pollutants that were not subject to controls, whereas HAPs were clearly subject to controls under section 112 of the Act, as amended.

Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, entitled *Definition of Regulated Air Pollutant for Purposes of Title V,* at 5 (April 26, 1993). The Wegman memo described those pollutants "subject to regulation under the Act" for title V permitting purposes, but it noted that the approach reflected in the memo was similar to the one used in PSD permitting.[5] Shortly after that, in 1994, the Board issued its decision in the *Inter-Power* case, which also recognized that carbon dioxide was not a regulated pollutant. 5 E.A.D. at 132.

Furthermore, while the 1996 proposal was still pending, EPA issued two additional documents concluding that carbon dioxide was not a regulated pollutant. In 1997, the Board issued its decision in the *Kawaihae* case, which upheld the Hawaii Department of Health's determination that carbon dioxide was not considered a regulated pollutant for permitting purposes because there were no regulations or standards prohibiting, limiting, or controlling the emissions of greenhouse gases from stationary sources at that time. 7 E.A.D. at 132. In 1998, the Agency's General Counsel issued an opinion concluding that carbon dioxide qualified as an "air pollutant" under the definition of section 302(g) of Act, but he also made clear that he did not consider carbon dioxide to be regulated under the Act at that time. The opinion plainly stated that:

> EPA's regulatory authority under the Clean Air Act extends to air pollutants, which, as discussed above, are defined broadly under the Act and include SO_2, NO_x, CO_2, and mercury emitted into the ambient air. EPA has in fact already

[5] Since the Wegman Memorandum defines a CAA "air pollutant" more narrowly than the definition recently afforded by the Supreme Court, the first premise of that memorandum may not continue to be viable. *Compare* Wegman Memo. at 4, *with Massachusetts v. EPA,* 127 S. Ct. 1438, 1460 (2007). However, the *Massachusetts* decision did not address the second premise of this portion of the Wegman memorandum -- the explanation of which air pollutants are considered "subject to regulation under the Act" for permitting purposes. As a result, the second premise of the memorandum remains viable, and it is reinforced by subsequent agency actions described earlier.

> regulated *each of these substances under the Act, with the exception of CO_2.* While CO_2 emissions are within the scope of EPA's authority to regulate, the Administrator has made no determination to date to exercise that authority under the specific criteria provided under any provision of the Act.

Memorandum from Jonathan Z. Cannon, General Counsel to Carol M. Browner, Administrator, entitled *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (April 10, 1998) (emphasis added).

Each of the rulemakings, adjudications, and interpretive statements described above reinforced, and in the case of the regulations codified, the Agency's original interpretation of the term "subject to regulation" adopted by Administrator Costle nearly 30 years ago when he promulgated the first PSD regulations implementing sections 165(a)(4) and 169(3) of the Clean Air Act. In the 1978 preamble to these rules, the Administrator observed that a pollutant "subject to regulation under the Act" means any pollutant regulated in EPA regulations for any source type. 43 Fed. Reg. at 26,397 (June 19, 1978). To illustrate what he meant, the Administrator listed criteria pollutants subject to a NAAQS, pollutants regulated under a New Source Performance Standard, and pollutants regulated under Title II of the Act for mobile sources. *See id.* This was the same interpretation proposed by the Administrator in 1977. 42 Fed. Reg. at 57481 (Nov. 3, 1977).[6]

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[6] Although the Administrator also stated that he considered "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations" to be "subject to regulation under the Act," at that time Subchapter C of Title 40 of the C.F.R. only covered pollutants subject to a statutory or regulatory provision that required actual control of emissions. Moreover, the reference to Subchapter C of Title 40 of the C.F.R. was not repeated in any of the Agency's interpretative statements or rulemakings after the 1990 Amendments and the adoption of the monitoring and reporting requirements for carbon dioxide in Part 75 of EPA's regulations, which is consistent with the Agency's view that "subject to regulation" describes only pollutants subject to regulations requiring actual control of emissions.

As almost 30 years of history illustrates, actual emission controls are necessary before a pollutant is considered "subject to regulation" for PSD permitting purposes under applicable EPA regulations. Section 821 of the 1990 Clean Air Act amendments requires only that certain sources monitor and report carbon dioxide emissions and that EPA make such emissions data publicly available. 42 U.S.C. § 7651k note (found at Pub. L. No. 101-549, 104 Stat. 2699). This provision and the implementing regulations in Part 75 do not impose any limitations on carbon dioxide emissions or require sources to install carbon dioxide emissions controls. Thus, since Section 821 of Public Law No. 101-549 and the Part 75 regulations do not establish emissions control requirements on carbon dioxide, it is not a pollutant "subject to regulation" under the Act and Region VIII did not err in its decision to exclude emissions limits on carbon dioxide from the Deseret permit.

2. EPA's Longstanding Interpretation of The Clean Air Act is Permissible.

Since the term "regulation" is not defined in the Clean Air Act and the phrase "pollutant subject to regulation" is used in the PSD provisions requiring control of emissions, it is reasonable in this context to construe "subject to regulation" to refer to pollutants actually subject to limitations and controls on emissions. Petitioner's preference for a different (and even broader) interpretation than the one adopted and applied by EPA for decades does not illustrate that EPA's interpretation is contrary to the plain meaning of the Act. Rather, at best, it merely illustrates that the phrase "subject to regulation" under the Act used in sections 165(a)(4) and 169(3) is ambiguous and susceptible to more than one interpretation.

Congress did not define "regulation" in the 1977 or 1990 Amendments to the Clean Air Act or provide any direct statement of its intended meaning of the term in the

legislative history. Black's Law Dictionary (8th Ed.) defines regulation as "the act or process of controlling by rule or restriction," which is consistent with EPA's historic interpretation of the term in the context of sections 165(a)(4) and 169(3) of the Act. Petitioner's citation of a different definition from Webster's dictionary simply illustrates the ambiguity of the term rather than establishing a plain meaning. Pet. at 6. Since Congress adopted neither the Black's nor the Webster's definitions, Congress clearly left a gap for EPA to fill in defining the meaning of the term "regulation" as used in the phrase "pollutant subject to regulation."

The interpretation that EPA has chosen to fill that gap is permissible in the context of the Clean Air Act provisions in which it appears. The "pollutant subject to regulation" language appears in the context of a requirement to establish emissions limitations for new and modified sources based on Best Available Control Technology (BACT). Thus, it is reasonable to interpret the BACT requirement as intended to apply to those pollutants that are presently controlled under other parts of the Act based on a previous determination by the Administrator or Congress that such emissions should be controlled. The BACT requirement was adopted at a time when EPA's principal responsibilities under the Clean Air Act were to promulgate NAAQS, review and approve State Implementation Plans for achieving the NAAQS, promulgate categorical emissions limitations under the NSPS and hazardous air pollutant programs, and reduce emissions from mobile sources under Title II. In this context, it was appropriate for EPA to construe "subject to regulation under the Act" to refer to pollutants covered by the types of regulations EPA had the authority to adopt under other provisions of the Clean Air Act at that time. As EPA observed in its 1980 PSD rules, the BACT requirement of

PSD complements the New Source Performance Standards (NSPS) program by extending coverage to additional source types and units and perhaps identifying candidates for future NSPS and hazardous air pollutant regulations. 45 Fed. Reg. at 52723 (Aug. 7, 1980).

Petitioner's argument that Congress could have simply used the defined term "emissions limitation" instead of the term "regulation" in sections 165(a)(4) and 169(3) is simplistic and overlooks the broader meaning that EPA has given to the phrase "subject to regulation." Although EPA has reasonably construed "subject to regulation" not to cover uncontrolled pollutants, EPA has read this phrase to apply to emissions of ozone depleting substances that are controlled through production and import restrictions that do not limit "the quantity, rate, or concentration of emissions on a continuous basis." *See* 42 U.S.C. § 7602(k).

Furthermore, the statutory construction principle cited by Petitioner that words are often presumed to have the same meaning does not demonstrate that EPA's interpretation is not permissible because the Agency interprets the phrase "regulation" differently in section 821 of the 1990 Amendments and in the PSD program. In a case far more relevant to the PSD program than the *Merrill Lynch* case cited by Petitioner, the Supreme Court recently established that EPA may interpret the same term in the Clean Air Act differently considering the relevant programs and context. *Environmental Defense v. Duke Energy Corp.*, 127 S.Ct. 1423, 1432 (2007). In *Duke*, the Court held that EPA had the discretion to construe the term "modification" differently in the NSPS and NSR programs, even though both relied on the exact same definition of "modification" in section 111(a)(4) of the Act. *Id.* at 1432. The Court reasoned that the general

presumption that the same term has the same meaning quickly gives way to context. *Id.* The term "regulation" is clearly used in different contexts in sections 165 and 169 of the Clean Air Act and section 821 of the Clean Air Act Amendments of 1990 (which in fact was never codified into the Clean Air Act, as discussed further below). Section 821 of the 1990 Amendments uses the term "regulation" to describe the rule that EPA was directed to promulgate incorporating the monitoring and reporting obligations, whereas sections 165(a)(4) and 169(3) refer to pollutants that will be subject to a technology-based emissions limitation. Thus, it is reasonable to interpret the term "regulation" differently under these provisions.

3. The D.C. Circuit Opinion in *Alabama Power* Affirmed EPA's Historic Interpretation of the Act.

Petitioner's reliance on the D.C. Circuit's opinion in *Alabama Power* is also misplaced. That decision actually upheld EPA's interpretation of the term "subject to regulation" and rejected an argument by industry petitioners that the statute mandated a narrower interpretation. *Alabama Power v. Costle*, 636 F.2d 323, 405-6 (D.C. Cir. 1980). The D.C. Circuit upheld the Administrator's 1978 interpretation and rejected an argument that attempted to narrow PSD to cover just the two pollutants for which Congress had established PSD increments in the Act (sulfur dioxide and particulate matter), when many more pollutants were already regulated by EPA under the Clean Air Act at the time. In rejecting industry's argument, the court did not instruct EPA as to how it should interpret the phrase "subject to regulation" and thus said nothing that directed EPA to expand or otherwise alter its interpretation.

The passages from the *Alabama Power* opinion quoted by the Petitioner do not reflect the context of the decision and omit key words that make the holding of the court

appear broader than it actually was. *See* Pet. at 9. For example, the last sentence in the second paragraph of Petitioner's quotation actually reads as follows: "The statutory language leaves no room for limiting the phrase 'each pollutant subject to regulation' to sulfur dioxides and particulates." 636 F.2d at 406. The complete sentence makes abundantly clear that the court was merely holding that there was no room to limit the phrase to just two pollutants, and not that there was no room for any limitation whatsoever of the phrase "pollutant subject to regulation." Likewise, when one understands the context of the case, it is clear that court's statement that "[t]he language of the Act does not limit the applicability of PSD only to one or several of the pollutants regulated under the Act" was holding only that all pollutants regulated under the Act (not just particulate matter or sulfur dioxide) must be covered. *See id. Alabama Power* did not hold that a pollutant was "subject to regulation under the Act" by virtue of the adoption of a requirement to simply monitor or report emissions.

4. The *Massachusetts* Decision Does Not Make Carbon Dioxide Regulated Under the Act.

Although the Supreme Court's decision in *Massachusetts v. EPA,* 127 S. Ct. 1438 (2007), held that carbon dioxide and other greenhouse gases are "air pollutants," the Court's decision does not require permitting authorities (including EPA Region VIII) to set carbon dioxide emission limits in PSD permits in the absence of some other regulatory action. The Court's decision did not instantly render carbon dioxide "regulated" under the Clean Air Act or hold that EPA was required to regulate carbon dioxide and other greenhouse gas emissions under section 202 of the CAA (the mobile source provision at issue in the *Massachusetts* case) or any other section of the Act. The Court simply concluded that carbon dioxide and other greenhouse gas emissions are "air

pollutants" under section 302(g) of the Act, *id.* at 1460, and therefore found that EPA *could* regulate them under Section 202 of the Act. *Id.* at 1462-63.

The Court clearly indicated that the Agency would have to take additional steps on remand, including making a finding of endangerment to public health or welfare, before carbon dioxide would become regulated under Section 202 of the Clean Air Act. *Id.* at 1363. Later this year, the Agency plans to address the question of an endangerment finding at the same time that it proposes regulatory action using the President's "Twenty in Ten" plan as a starting point.[7]

There is an important difference between an "air pollutant" under section 302(g) of the Act and a "pollutant subject to regulation" within the meaning of sections 165(a)(4) and 169(3) of the Act. *See Knauf Fiber Glass*, 8 E.A.D. 121, 162 (EAB 1999) ("not all air pollutants are covered by the federal PSD review requirements"). Considering this distinction, it is clear that the *Massachusetts* decision did not make carbon dioxide "subject to regulation" for PSD permitting purposes and did not change longstanding EPA policy and EAB precedent regarding the interpretation of that phrase. The Supreme Court decision effectively forced EPA to return to the interpretation (and distinction) reflected in the 1998 memorandum of General Counsel Cannon, which concluded that although carbon dioxide was an air pollutant, it had not yet been regulated.

[7] In light of the Court's opinion, EPA is currently evaluating whether it should establish standards for greenhouse gas emissions from mobile sources, *see* President's May 14, 2007 Executive Order (*available at* http://www.whitehouse.gov/news/releases/2007/05/20070514-1.html), and is also developing an overall strategy for addressing the emissions of CO_2 and other greenhouse gases under the CAA, *see* Response to Comments at 5.

5. Nothing in the 1990 Amendments Reflects Congressional Intent To Change EPA's Interpretation of the Law or Require BACT for Carbon Dioxide.

In 1990, when Congress enacted Clean Air Act Amendments and section 821 of those Amendments, it was aware of 12 years of EPA history interpreting the 1977 Amendments to the Act as requiring PSD limits only for those pollutants actually subject to limitations and controls on emissions. Congress did not add a definition of the term "regulation" or clarify that it intended a different meaning of the term "subject to regulation" in 1990.

Furthermore, the drafters of section 821 of the 1990 Amendments (known as the Moorhead-Cooper amendment in the House) did not express any intent to require emissions controls on carbon dioxide under the PSD program. Rather, they made clear that their intent was to gather information on carbon dioxide emissions in anticipation of future regulation. Statements of Congressman Moorhead, House Debates on May 17 and 23, 1990, *reprinted in* Senate Committee on Environment And Public Works, Legislative History of Clean Air Act Amendments of 1990 (Comm. Print, Nov. 1993), at 2613 and 2985-87; Statement of Congressman Cooper, House Debates on May 17, 1990, *id.* at 2563. In this context, Congressman Cooper said that his "amendment would not force any reductions right now." *Id.* at 2563. In addition, unlike many other provisions in the 1990 Amendments to the Clean Air Act, section 821 was not drafted as an amendment to a specific provision of the Clean Air Act. *See* Pub. L. No. 101-549, § 821. This suggests that Congress intended to ensure no misunderstanding that carbon dioxide was not intended to be subject to regulation under the Clean Air Act.

6. EPA's Historic Interpretation is Supported by Important Policy Considerations.

EPA's interpretation that the BACT requirement applies to pollutants subject to actual controls on emissions has stood the test of time because it is broad, but with reasonable boundaries that make the NSR program effective, yet manageable for EPA and the states to administer. EPA's interpretation allows the Administrator to first assess whether a particular pollutant should be controlled, and then provide notice and an opportunity to comment when a new pollutant is proposed to be regulated under one or more programs in the Act. It also provides an opportunity for EPA to develop regulations to manage the incorporation of a new pollutant into the PSD program, for example, by promulgating a significant emissions rate (or *de minimis* level) for the pollutant when it becomes regulated. *See,* 40 C.F.R. 52.21(b)(23). EPA staff are currently analyzing the implications of establishing a significance levels of greenhouse gas emissions under the PSD program.

Petitioner's interpretation would lead to the perverse result of requiring emissions limitations under the PSD program while the Administrator was still gathering information to allow him to evaluate whether he should establish controls on the pollutant. In other words, the mere act of gathering of information would essentially dictate the result of the decision that the information was being gathered to inform. If every requirement to report emissions data on a pollutant made that pollutant subject to BACT, EPA would be required to establish emissions limitations within the PSD program before gathering the emissions data necessary for reasoned decision making on whether to regulate a pollutant under other parts of the Clean Air Act. Congress cannot have intended for the Agency to establish PSD emissions limitations on each pollutant for

which Congress or the Administrator calls for an investigation of the nature and extent of emissions.

In order to carry out their administrative functions, federal agencies are often afforded broad discretion in interpreting and implementing statutory requirements. This is particularly true when the Agency is choosing its regulatory priorities. *See Massachusetts v. EPA*, 127 S. Ct. at 1459 (noting that the Court has repeatedly found that "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities"); *Sierra Club v. Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987) (finding that given Congress' broad mandate to EPA under the CAA, "the Agency cannot avoid setting priorities" in carrying out its regulatory duties). Such discretion is especially important when regulating and administering a complex permitting program, such as the Act's PSD program. Thus, EPA's historic interpretation of the Act should be maintained based on policy considerations.

B. Since Section 821 of the 1990 Amendments Was Not Incorporated Into the Clean Air Act, Even Under Petitioner's Argument, Carbon Dioxide Is Not Regulated "Under the Act."

Although the monitoring provision in section 821 of Public Law 101-549 was enacted as part of the 1990 Clean Air Act Amendments, it is one of a number of laws that were not incorporated into the Clean Air Act or codified into Chapter 85 of Title 42 of the United States Code. Section 821 is only found in the United State Code compilation as a note after 42 U.S.C. 7651k. The House and Energy Commerce Committee's compilation of the Clean Air Act and related statutes does not include section 821 as part of the Clean Air Act, but instead includes this section among "Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) That Did Not Amend the Clean Air

Act." *See* House Committee on Energy and Commerce, Compilation of Selected Acts within the Jurisdiction of the Committee on Energy and Commerce (Comm. Print, May 2001), at 441, 457-58. Thus, section 821 of Public Law 101-549 applies independent of the Clean Air Act.

Though EPA has implemented section 821 of Public Law 101-549 in conjunction with provisions of the Clean Air Act, the section is actually not part of the Act itself or Chapter 85 of Title 42 of the U.S. Code. Therefore, even if the Board were to find error in EPA's historic interpretation and consider pollutants for which sources need only monitor and report emissions to be "subject to regulation," that premise alone would not make carbon dioxide regulated "under the Act" (or "under this chapter" when citing the U.S. Code), because section 821 of the 1990 Amendments was never codified in the Clean Air Act or the Chapter of the United States Code in which the Clean Air Act appears.

Accordingly, for all of the reasons stated above, Petitioner has failed to demonstrate clear error in the Region's decision not to include a carbon dioxide BACT emissions limit in the Deseret PSD permit, because the Region lacked the authority to do so under the current PSD permitting provisions of the Act.

II. Region VIII Considered and Responded to All Comments Addressing Alternatives to the Proposed Source and Was Not Required to Do Anything More.

The Board should deny review on Petitioner's second issue because the issue was not preserved for review and is based on a document not contained in the Region VIII permitting record. To the extent the Board gets past these procedural issues, review should be denied on the merits because the Region fulfilled its obligation under the PSD

program requirements to consider all the alternatives to the Deseret facility raised in public comments. Region IX's recommendations with respect to a draft Environmental Impact Statement on a distinct project has no bearing on the adequacy of Region VIII's analysis of the Deseret project under the PSD program.

A. Petitioner's Comments Did Not Raise Alternatives Discussed In the Petition for Review That Were "Reasonably Ascertainable" During the *Comment* Period And Rely On a Document Not Contained In the Region VIII Permitting Record.

For the first time on appeal before the EAB, Petitioner raises additional issues regarding need for and alternatives to the Deseret project. Under well-established precedents of the Board, review of Petitioner's second issue should be denied on this procedural basis alone. *See, e.g. In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 590-91 (EAB 2004); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 519-20 (EAB 2002); *In re New England Plating Co., 9* E.A.D. 726, 736-37 (EAB 2001). The public must "raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period." 40 C.F.R. §124.13. In accordance with 40 C.F.R. §124.17(a)(2), Region VIII described and responded to all significant public comments received on the proposed PSD permit for Deseret.[8]

Petitioner's new concerns allege that before issuing the PSD permit, the EPA should have considered: (1) whether there is a need for the energy from the project, and (2) alternatives to the project, such as energy efficiency, staged development, design for future carbon capture and storage, the potential for development of geothermal resources, and various other options discussed in EPA Region IX's comment letter on a Draft

[8] EPA Region VIII Response to Comment document available online at: http://www.epa.gov/region8/air/permitting/ResponseToComments.pdf.

Environmental Impact Statement (DEIS) prepared by BLM regarding the proposed White Pine Energy Project in Nevada (dated June 22, 2007; CEQ# 20070151), *available at* http://www.epa.gov/region09/nepa/letters/white-pine-deis-62207.pdf.[9] But Petitioner plainly did not raise any project need or alternative issues during the public comment period on the Deseret permit, other than the alternative of constructing a coal gasification facility, which Region VIII clearly addressed in its response. Response to Comments at 19 (Response #2.d.). Nowhere in Petitioner's 29 pages of written public comments is there a comment on the need for the power plant project. *See generally* Petitioner's Exhibit 2. The Petition for Review raises a completely new set of concerns that Petitioner never once even mentioned or alluded to in its public comments. *See* Petitioner's Exhibit 2. Therefore, Petitioner has waived review on these issues. *See In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 168 (2000).

The issues now raised by Petitioner were clearly ascertainable at the time the comment period closed for the Deseret permit. Petitioner treats the recommendations from the Region IX White Pine comment letter as if they are completely novel issues that Petitioner could not have been expected to address in its comments. But this is not the case.

[9] Under Section 309 of the CAA, EPA is required to review and publicly comment on the environmental impacts of certain federal actions, including major federal actions which are the subject of Environmental Impact Statements. 42 U.S.C. § 7609(a); 40 C.F.R. Part 1504. If EPA determines the action is unsatisfactory from the standpoint of public health or welfare or environmental quality, EPA is directed to publish such determination and refer the matter to the Council on Environmental Quality. 42 U.S.C.§ 7609(b). Region IX's comment letter on the White Pine Energy Station DEIS was provided in the context of the Agency's review and comment role under Section 309 of the CAA and Section 102(2)(C) of the National Environmental Policy Act (NEPA). 42 U.S.C. § 4332(2)(c) and its implementing regulations at 40 C.F.R. Part 1503.

Questions about the need for new power plants and energy production options have clearly been part of the public discourse for years, and Sierra Club has participated in that discourse.[10] For example, in 2004, the Bureau of Land Management (BLM) provided Sierra Club notice about the proposed Atlantic Rim Coalbed Methane project in Wyoming through their Scoping Statement.[11] Then, several months before the Deseret public comment period, Sierra Club and other organizations submitted comments to BLM on the Atlantic Rim project raising issues of energy need, staged development, and alternatives to the proposed project.[12] During that same comment period, another commenter raised concerns regarding global warming and alternatives,[13] and EPA Region VIII submitted comments recommending that BLM evaluate the project

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[10] Sierra Club's National Internet site contains numerous postings demonstrating their participation in the discourse. *See*, "Sierra Club Response to Blackout" (August 15, 2003), *available at* http://www.sierraclub.org/pressroom/releases/pr2003-08-15.asp (discussing renewable energy); and "New TV and Print Ads Tell President Bush to Promote Energy Efficiency" (January 31, 2005), *available at* http://www.sierraclub.org/pressroom/releases/pr2005-01-31a.asp (describing public outreach efforts on energy solutions).

[11] BLM Scoping Statement, The Atlantic Rim Coalbed Methane Project, reference to notice to Sierra Club at page 7, *available at* http://www.blm.gov/style/medialib/blm/wy/nepa/rfodocs/atrimdocs.Par.73116.File.dat/AtlanticRimScope.pdf.

[12] Comments submitted by Sierra Club and others on BLM's Atlantic Rim CBM Project Draft EIS, pages 5 and 10 (February 21, 2006), *available at* http://www.blm.gov/style/medialib/blm/wy/nepa/rfodocs/atlantic_rim/feis/volume_4.Par.1507.File.dat/08_671a.pdf. In 2004, Sierra Club's national magazine included an article about the Wyoming's Red Desert area, referencing the "coalbed methane project." *See* "Beneath Wyoming Stars", Sierra Magazine (March/April, 2004), *available at* http://www.sierraclub.org/sierra/200403/reddesert.asp.

[13] Global warming comment in Atlantic Rim, Unique emails, pages 185-186, available at http://www.blm.gov/style/medialib/blm/wy/nepa/rfodocs/atlantic_rim/feis/volume_4.Par.12011.File.dat/14_unique_emails.pdf.

greenhouse gases and evaluate potential control technologies, similar to the Region IX White Pine comments.[14]

Therefore, all of these considerations were clearly "reasonably available . . . by the close of the public comment period," and these issues are not preserved for review before the EAB. 40 C.F.R. §124.13; *see also In re Carlota Copper Co.*, 11 E.A.D. 692, 728 (EAB 2004). In the *Carlota Copper* case, the Board rejected the petitioner's argument that it was sufficient to show that the Region "was generally 'aware' of their argument" before making the final permit decision. The Board explained that "the regulations dictate that Petitioners must demonstrate that someone prompted focused consideration of the issue by raising it *during* the public comment period; it is not sufficient for the issue to have been raised *before or after* the public comment period." *Id.* at 728 (emphasis in original).

Furthermore, the Region IX DEIS comment letter on the White Pine power plant project in Nevada that forms the basis for Petitioner's present appeal on these issues is not part of the administrative record for the Deseret PSD permit. The administrative record for a PSD permit action cannot include materials not before the permitting authority at the time of its decision. *See, e.g. In re ASARCO Inc. and Federated Metals Corp.*, 6 E.A.D. 410, 441 (EAB 1996) (request to supplement record with state data denied due to absence of evidence that EPA Regional office actually had such data before making its decision). EPA may not supplement the administrative record underlying a

[14] EPA Region VIII Comment Letter to BLM on proposed Atlantic Rim Natural Gas Field Development Project, Draft Environmental Impact Statement, BLM Document number 665, page 6 (February 21, 2006)(available online at: http://www.blm.gov/style/medialib/blm/wy/nepa/rfodocs/atlantic_rim/feis/volume_4.Par.24387.File.dat/07_619-666.pdf)

permit with additional materials once the permit has been issued. EPA regulations governing permit issuance procedures specify that "[t]he record shall be complete on the date the final permit issued." 40 C.F.R. § 124.18(c).

The *Kent County* decision cited by Petitioner does not establish grounds for the Board to supplement the record in this case or to otherwise consider the Region IX document in the course of an appeal of the Deseret PSD permit. *See Kent County v. EPA*, 963 F.2d 391 (D.C. Cir. 1992). The court did not supplement the record, but held that EPA's decision regarding a listing on the National Priorities List was arbitrary and capricious because it was based on an inadequate search for relevant information. *Id.* at 396. The key factor in the court's reasoning in that case was that EPA had itself initiated a search for relevant information in files outside of the headquarters CERCLA program. In this case, which is subject to a "clear error" standard of review, Petitioner has not shown that Region VIII attempted but failed to complete a search for information on the need and alternatives considered by other EPA offices which, as explained further below, Region VIII had no obligation to initiate. Furthermore, in the *Kent County* case, the material that was later found in Region III's files was technical information with direct bearing on decision at hand. As discussed further below, given the distinct requirements with respect to PSD permits and Environmental Impact Statements, Region IX's recommendations in the context of a comment on a DEIS for another project is not relevant to the adequacy of Region VIII's alternatives analysis under the PSD program.

B. Region VIII Was Not Required to Independently Study Alternatives Not Raised in Public Comments and the Recommendation of Another EPA Region Under a Different Legal Framework Does Not Demonstrate Clear Error Under the PSD Requirements.

To the extent the Board considers the merits of the Petitioner's argument based on alternatives not raised in public comments and a document not in the administrative record, Petitioner has shown no clear error in Region VIII not conducting an independent study of the alternatives to the Deseret waste-coal boiler project that Region IX recommended BLM evaluate for a different project under a different statute. Petitioner argues that Region VIII erred by not assessing the need for the waste coal unit and alternatives to the Deseret project such as "energy efficiency, staged development, design for future carbon capture and storage, the potential for development of geothermal resources, and various other options." Pet. at 10. This does not demonstrate error because these alternatives were not raised in public comments and the Agency's legal responsibilities for considering alternatives to the proposed project in the PSD program are different from federal agency obligations to assess project alternatives under the National Environmental Policy Act (NEPA).

In the PSD program, EPA (as the permitting authority) is required to consider and respond to alternatives submitted during the public comment period, but the Agency is not required to conduct an independent analysis of available alternatives. *In re Prairie State Generating Co.*, 13 E.A.D. ___, PSD Appeal No. 05-05, slip op. at 39 (EAB August 24, 2006). As explained in the following passage, the Board's interpretation regarding the PSD alternatives analysis reflected in the *Prairie State* opinion is firmly grounded in the terms of the Clean Air Act:

> Because the CAA contains specific language for permits in nonattainment areas requiring the permit issuer to perform an analysis of alternative sites, sizes, and production processes, among other things, to determine whether the benefits of the proposed source outweigh its costs, and because similar specific language is not included for the issuance of a PSD permit, compare 42 U.S.C. s. 7503(a)(5) with *id.* § 7475(a), the PSD permit issuer therefore is not required to perform an independent analysis of alternatives.

Id. The Board found no error in the permitting authority's conclusion that "it cannot be assumed that Congress intended that a wide-ranging analysis of alternatives must be conducted by the permitting authority." *Id.* Though the Board also observed that a permitting authority could identify alternatives on its own, the Board reiterated that "this authority is within the sound discretion of the permitting authority, but is not required." *Id.* at 40.

In contrast to the CAA, NEPA imposes an affirmative obligation on federal agencies to assess a reasonable range of alternatives to the proposed action in their Environmental Impact Statements. 42 U.S.C. § 4332(2)(C)(iii). The Council on Environmental Quality (CEQ) regulations implementing NEPA require that the EIS "briefly specify the underlying purpose and need of the project to which the agency is responding in proposing alternatives to the proposed action." 40 C.F.R. § 1502.13. The CEQ regulations also require that the EIS "rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly describe the reasons for their having been eliminated" 40 C.F.R. § 1502.14. These requirements to look at purpose and need as well as to evaluate all reasonable

alternatives are not PSD permit program requirements. As described above, the latter do not require the permitting authority to conduct an independent analysis of alternatives.[15]

Considering the relevant legal requirements, it is clear there was no error in the Region's alternatives analysis in this case. The alternatives referenced by Petitioner were not submitted during the public comment period for the Deseret PSD permit. Therefore, Region VIII was not required under the Clean Air Act, PSD regulations, or the precedents of the Board to independently consider the alternatives in processing the PSD permit. Petitioner can show no error in Region VIII's decision not to invest its resources in conducting an independent study of alternatives or need, as this is a matter solely within the "sound discretion" of the permitting authority. The fact that another EPA Region recommended that BLM address certain alternatives for the White Pine project under a wholly different statutory and regulatory scheme does not illustrate clear error by Region VIII in its evaluation of the Deseret project under the PSD program. Though Region VIII had the discretion under the PSD program to consider the same alternatives recommended by Region IX in another context, there was no error in Region VIII's decision not to do so in the absence of public comments raising those alternatives.

Furthermore, even if the legal regimes under the PSD program and NEPA were the same and the White Pine letter could somehow be constructively considered part of the record for review of Region VIII's action on the Deseret permit, its not clear that Region IX's recommendations would have been appropriate for the Deseret permit, given the factual distinctions between the two projects. The White Pine project is an entirely

[15] It is noteworthy that CAA permits are exempt from the requirements of NEPA by Section 7(c) of the Energy Supply and Environmental Coordination Act of 1974 , 15 U.S.C. § 793(c)(1).

new 1590 megawatt power plant in Nevada, whereas the Deseret project is a 110-megawatt unit in Utah that will be added to an existing plant. Thus, the "density of new-coal-burning plants in Nevada," which Petitioner highlights as a "needs" issue that Region IX raised for White Pine, is not necessarily relevant to a plant outside of Nevada. Similarly, the recommendation to consider "staged development" for the larger White Pine project has less relevance to the incremental addition of a unit less than one-tenth the size to the existing Deseret facility, which is to some extent already a staged development approach. In addition, the "potential for geothermal resources" may differ because the two projects are in different locations with presumably different geothermal resource potential.

Accordingly, the various recommendations made in the White Pine comment letter do not change the fact that EPA has no duty under the PSD permit process to consider alternatives not presented to the Agency during public comment period, including the alternatives presented by the Petitioner in the latter portion of its Petition.

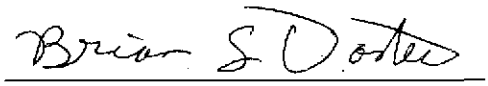
Conclusion

For the reasons explained above, the Board should deny review in this case because the Petitioner has failed to demonstrate clear error in Region VIII's decision to grant a PSD permit to Deseret Power. Region VIII's treatment of carbon dioxide emissions in the Deseret PSD permitting process was appropriate given the requirements of the Act, corresponding implementing regulations, and EPA policy implementing those requirements. Region VIII was not required to include an emission limit for carbon dioxide emissions in the PSD permit for the Deseret facility. In addition, the Region carefully considered and fully responded to all the public comments, and EPA is not

required to consider alternatives to the proposed power plant that were not submitted during the public comment period.

Date: Nov. 2, 2007

Respectfully submitted,



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