

EXHIBIT 12.1

July 31, 2008

BY ELECTRONIC MAIL

Mr. Joseph Lapka
Air Permitting Program
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Email: desertrockairpermit@epa.gov
Lapka.joseph@epa.gov

RE: Supplemental Comments on EPA's Proposed PSD Permit for the Desert Rock Energy Facility

Dear Mr. Lapka:

Environmental Defense Fund respectfully submits these supplemental comments on behalf of thousands of members that will be adversely impacted by the construction and operation of the proposed Desert Rock Power Plant. Environmental Defense Fund hereby incorporates as part of our comments for the administrative record in this proceeding all of the prior comments we have submitted to the Agency about this matter as well as the documents referenced and cited to herein. These supplemental comments are based on new information of central relevance to EPA's PSD permit decision for the Desert Rock Power Plant.

In response to a petition filed by the Sierra Club asking the U.S. Environmental Protection Agency's Environmental Appeals Board to invalidate EPA Region 8's refusal to subject a proposed coal-fired electric generating unit to the best available control technology for carbon dioxide pollution, Region 8 and the Office of Air and Radiation have consistently asserted that carbon dioxide is not an air pollutant "subject to regulation" under the Clean Air Act. *See, e.g.*, Reply Brief of EPA at 11-12, In re: Deseret Power Electric Cooperative, PSD Appeal No. 07-03 (EAB Mar. 31, 2008) (citing 40 C.F.R. § 52.21(b)(50)).

EPA claims:

Carbon dioxide is not currently an air pollutant "subject to regulation" because neither EPA nor Congress has established National Ambient Air Quality Standards or New Source Performance Standards for carbon dioxide, identified carbon dioxide as a Class I or II substance under Title IV of the Clean Air Act, *or otherwise required control of carbon dioxide emissions under any other provision of the Act.*

Id. (emphasis added). We vigorously disagree with this interpretation and our concerns are set forth in prior comments to the Agency in this PSD permit proceeding and in Environmental Defense Fund's *amicus* brief submitted in the Deseret Power Electric Cooperative PSD Appeal proceeding. Simply put, EPA may not substitute its desires for those of Congress in excluding

carbon dioxide from the BACT requirement by construing “subject to regulation” to instead mean “subject to control.”

Nevertheless, even under EPA’s flawed interpretation of the statute, the Agency concedes that carbon dioxide is “subject to regulation” for purposes of BACT if carbon dioxide emissions are “subject to control” under the Clean Air Act.

On April 29, 2008, after notice and public comment, EPA approved and promulgated a state implementation plan revision submitted by the State of Delaware establishing carbon dioxide emission standards, operating requirements, record keeping and reporting requirements, and emissions certification, compliance and enforcement obligations for new and existing stationary electric generators. See 73 Fed. Reg. 23,101 (April 29, 2008). Among other regulatory provisions, EPA approved emission standards for the pollutant carbon dioxide. The control requirements approved and promulgated by EPA included a carbon dioxide emission standard of 1900 lbs/MWh for existing distributed generators, 1900 lbs/MWh for new distributed generators installed on or after January 1, 2008, and 1,650 lb/MWh for new distributed generators installed on or after January 1, 2012. See Delaware Department of Natural Resources and Environmental Control (DNREC), Regulation No. 1144: Control of *Stationary Generator* Emissions, §3.2; see also 73 Fed. Reg. at 23,102-103 (codifying approval in the Code of Federal Regulations at 40 CFR §52.420).

In both EPA’s proposed and final rulemaking notices, the Agency plainly stated that it was approving the SIP revision “under the Clean Air Act” (see 73 Fed. Reg. 11,845 (March 5, 2008)) and “in accordance with the Clean Air Act.” See 73 Fed. Reg. at 23,101. EPA’s action approving the SIP revision made the control requirements and obligations part of the “applicable implementation plan” enforceable under the Clean Air Act. See 42 U.S.C. §7602(q). Numerous provisions of the Clean Air Act provide for EPA enforcement of requirements and prohibitions under the “applicable implementation plan.” See, e.g., 42 U.S.C. § 7413(a)(1) (providing for the EPA Administrator to issue a compliance order, issue an administrative penalty, or bring civil action against the violating party); *id.* at (a)(2) (providing for the Administrator to enforce the “applicable implementation plan” if states fail to do so); *id.* at (b)(1) (requiring the Administrator to commence a civil action or assess and recover a civil penalty against the owner or operator of a source or facility that violates an “applicable implementation plan”.) In addition, EPA’s action makes the emission standards and limitations enforceable by citizen suit under section 304 of the Clean Air Act. 42 U.S.C. §7604.

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

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

See *General Motors Corp. v. U.S.*, 496 U.S. 530, 540 (1990).

Even considering EPA's own severe (and improper) interpretation of its BACT responsibilities for carbon dioxide, the Agency's very recent approval of the Delaware SIP revision containing emission standards for carbon dioxide leaves no doubt that the proposed Desert Rock coal-fired power plant must comply with the best available control technology for carbon dioxide – a pollutant manifestly subject to regulation under the Act.

The Federal Register notices and the Delaware control requirements approved by EPA as part of the applicable implementation plan are attached.

Sincerely yours,

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