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

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

BRIEF OF AMICI CURIAE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, MAINE, MASSACHUSETTS, RHODE ISLAND, AND VERMONT IN SUPPORT OF PETITIONER

STATE OF NEW YORK

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TABLE OF CONTENTS

Statement of Interest

The Attorneys General of New York, California, Connecticut, Delaware, Maine, Massachusetts, Rhode Island, and Vermont respectfully submit this brief as amici curiae in support of petitioner Sierra Club to the Environmental Protection Agency's Environmental Appeals Board ("EAB") on the critical issue of whether new coal-fired power plants may be constructed without consideration of the resulting effects on global warming.

Climate change is the single greatest environmental challenge facing us today. Although climate change is a global problem, actions at the national, state, and local levels are needed to achieve the necessary reductions in carbon dioxide (CO_2) emissions. Scientists overwhelmingly agree that the world must reduce emission of greenhouse gases, including CO_2, to well below 1990 levels within a few decades if we are to stabilize climate change at an acceptable level. To do so, we must take immediate action. As the chairman of the United Nations Intergovernmental Panel on Climate Change (IPCC) recently declared: "If there's no action before 2012, that's too late. What we do in the next two to three years will determine our future."

To that end, many states have made the reduction of CO_2 emissions a priority. For example, New York and nine other northeastern states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont) participate in the Regional Greenhouse Gas Initiative (RGGI), a mandatory cap-and-trade program to reduce CO_2 emissions from power plants, which are major contributors to global warming. By the end of 2018, the RGGI states will achieve a 10 percent reduction in CO_2 emissions, with a cumulative reduction below baseline of roughly 50 million tons. Similarly, California passed the Global Warming Solutions Act, AB 32, in 2006, which requires the state's utilities, oil refiners,

cement manufacturers, and other large industrial greenhouse gas emitters to reduce their CO_2 emissions to 1990 levels by 2020. Utah, the state in which the plant at issue in this case in located, has joined with California, Arizona, Montana, New Mexico, Oregon, and Washington as members in the Western Climate Initiative. Under this agreement, member states will reduce emissions by 15 percent below 2005 levels by 2020. Furthermore, six Midwestern states recently signed the Midwestern Regional Greenhouse Gas Reduction Accord committing to a regional cap-and-trade program for CO_2. Along with the states participating in RGGI and the Western Climate Initiative, this new Midwestern accord brings the number of states committed to regional trading systems to 23.

Moreover, of particular relevance to the instant case, several western states have recently established emission limitations for CO_2 emissions from power plants: Montana enacted a law that requires new coal plants to capture and sequester a minimum of 50 percent of the CO_2 produced (see Mont. Code Ann. § 69-8-421 (2007)); California adopted a greenhouse gas emissions performance standard requiring that all new long-term commitments for baseload generation to serve California consumers be with power plants that have CO_2 emissions of no greater than a combined cycle gas turbine plant, which was established at 1,100 pounds of CO_2 per megawatt hour (see Cal. Public Utilities Code § 8340 (2007) & Cal. Public Utilities Comm'n Proceeding No. R.06-04-009 (Jan. 25, 2007), available at http://www.cpuc.ca.gov/PUC/energy/electric/Climate+Change/070411_ghgeph.htm); and Washington enacted a similar law to California's, see Wash. Rev. Code § 80.80.040 (2007) (establishing greenhouse gases emissions performance standard for all baseload electric generation for which electric utilities enter into long-term financial commitments). In addition to these measures being undertaken by state

governors and legislatures, State Attorneys General have taken action to obtain reductions in greenhouse gas emissions:

- The Attorneys General of Connecticut, California, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, and New York City sued the five largest U.S. power plant emitters of greenhouse gas emissions seeking to require them to reduce these emissions. Connecticut v. American Electric Power, Case No. 05-5104 (2nd Circuit) (appeal pending).

- The Attorneys General of New York, California, Connecticut, Delaware, Maine, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia and New York City sued EPA to compel the agency to set emission limits for greenhouse gas emissions from power plants, New York v. EPA (D.C. Cir. No. 06-1322).

- The Attorneys General of Massachusetts, California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia and New York City sued EPA to require the agency to set emission standards for greenhouse gases from motor vehicles, Massachusetts v. EPA (D.C. Cir. No. 03-1361), which culminated in the landmark Supreme Court decision.

- The Attorneys General of California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and the District of Columbia, and New York City sued the National Highway Traffic Safety Administration successfully argued that NHTSA's fuel economy standards for light trucks failed to adequately consider greenhouse gas emissions from these vehicles. Center for Biological Diversity v. NHTSA, 508 F.3d 508 (9th Cir. 2007) (vacating regulations).

- The Attorneys General of New York, California, Connecticut, Delaware, Maine, Rhode Island, Vermont, and Wisconsin submitted comments last year to the Kansas Department of Health and Environment advocating for a denial of the PSD permit for the proposed Holcomb plant unless steps were taken to address CO_2 emissions. Letter from Eliot Spitzer, et al. to Kansas Department of Health and Environment (Dec. 15, 2006).

In contrast to these efforts, the proposed 110-megawatt generating unit at Bonanza plant would substantially increase CO_2 emissions. As proposed, the new unit would utilize traditional coal-burning technology, which emits large amounts of CO_2. Although the proposed new unit at Bonanza is relatively small in comparison to others that have been proposed (the Holcomb plant

in Kansas, for instance, would generate approximately 1,500 megawatts of energy and emit about 15.4 million tons of CO_2 yearly), the proposed unit is nonetheless projected to emit more than 1.8 million tons of CO_2 per year. With a lifetime of more than 50 years, this unit, if built as proposed, might well emit more than 90 million tons of CO_2 in total, thus significantly contributing to emissions that cause global warming.

Moreover, the EPA's August 30, 2007 decision on the Prevention of Significant Deterioration (PSD) permit for the Bonanza plant was important because it marked the first post-Massachusetts v. EPA issuance of a such a permit for a power plant. Rather than taking the opportunity to establish that applicants seeking PSD permits for new power plants must consider the effects of greenhouse gas emissions and mitigate such emissions, EPA Region 8's decision on the Bonanza permit served notice that "business as usual" will continue for the foreseeable future.[1] In stark contrast, just 6 weeks later, on October 18, 2007, the Kansas Department for Health and Environment denied a PSD permit for the proposed Holcomb plant on the grounds that – given that the plant would use conventional coal technology and not capture or sequester CO_2 emissions – the plant would cause unacceptable harm to the environment. In the instant case, the EAB has an opportunity to rectify EPA Region 8's decision by ruling that the new unit at the Bonanza plant cannot be built unless global warming effects are taken into account.

[1] Although there are reports that EPA plans to promulgate rules for greenhouse gases under the New Source Review program, our concern is that, in the meantime, EPA not ignore CO_2 emissions from new coal-fired power plants, like the proposed new unit at issue here.

Summary of Argument

Given the Supreme Court's decision in Massachusetts v. EPA, 127 S. Ct. 1438 (2007), establishing that CO_2 is an air pollutant and the overwhelming scientific evidence that CO_2 emissions harm public health and welfare, EPA erred when it determined that CO_2 is not a pollutant "subject to regulation" under the Clean Air Act. If EPA had determined that CO_2 is a regulated pollutant under the statute, Deseret would have had to implement the Best Available Control Technology (BACT) for CO_2 emissions at the Bonanza plant. Moreover, EPA unreasonably failed to consider the environmental impacts of climate change and the costs of future regulation of greenhouse gas emissions in its permitting decision as required under sections 165(a)(4) and 169(3) of the Act. Finally, EPA unreasonably failed to exercise its discretion under Section 165(a)(2) of the Act to consider alternatives to the Bonanza plant's traditional coal-fired operations, such as energy conservation and efficiency, or to compel the mitigation of greenhouse gas emissions, such as by requiring the purchasing of carbon offsets as a condition of the plant's operations.

Argument

1. EPA Erred in Deciding that Carbon Dioxide Is Not an Air Pollutant "Subject to Regulation" Under the Clean Air Act.

Under the Clean Air Act, the PSD permit for the Bonanza plant must require use of BACT for pollutants that are "subject to regulation" under the Act. 42 U.S.C. § 7475(a)(4); see also 40 C.F.R. § 52.21(b)(50)(iv) (BACT required for "any pollutant that is otherwise subject to regulation under the Act."). The statute defines BACT as "an emissions limitation . . . based on the maximum degree of reduction for each pollutant subject to regulation under the Act" that the

Administrator determines is achievable "on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3); see also 40 C.F.R. § 52.21(b)(12).

Emissions of a pollutant need not be required to be actually controlled under existing regulations for the pollutant to be "subject to regulation" under the Clean Air Act, thereby triggering BACT.[2] Rather, given the language of the statute and the regulations, pollutants subject to regulation under the Clean Air Act extend not only to air pollutants for which the Act itself or the EPA by regulation have imposed requirements, but may also apply to air pollutants for which EPA possesses but has not yet exercised authority to impose requirements. See 40 C.F.R. § 52.21(b)(50) (BACT applies not only to air pollutants for which there are national ambient standards under Section 109 of the Act, standards of performance for new sources under Section 111 of the Act, or standards under or established by Title VI of the Act (relating to acid deposition control), but also to "[a]ny pollutant that is otherwise subject to regulation under the Act"). As explained below, such is the case here with CO_2 emissions.

Given the Supreme Court's decision last year in Massachusetts v. EPA, there can be no dispute that EPA possesses the authority to regulate CO_2 emissions under the Act. Based on the plain language of the statute, the Court held that the Act's definition of "air pollutant" "embraces all airborne compounds of whatever stripe," including CO_2. Massachusetts, 127 S. Ct. at 1460.

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[2] Sierra Club argues that CO_2 is already "subject to regulation under the Act," thereby triggering the BACT requirement for CO_2 emissions from the Bonanza plant, because EPA has issued regulations under the Act requiring the monitoring and reporting of greenhouse gas emissions. State Amici offer an alternative basis for reaching the same conclusion that the BACT requirement applies here: that EPA erred in its conclusion that the new unit's CO_2 emissions are not pollution "subject to regulation under the Act" given EPA's authority to regulate CO_2 and the well-established harms from these emissions.

Although the phrase "subject to regulation under the Act" is not defined in the statute, that just means that EPA should give the phrase its ordinary meaning. See American Fed'n of Gov't Employees v. Glickman, 215 F.3d 7, 10 (D.C. Cir. 2000) (lack of a statutory definition does not render a term ambiguous, but instead means it should be given its ordinary meaning). In this regard, two sections of the statute – Section 111 and Section 202 – are particularly relevant to the interpretation of EPA's "regulation" of CO_2 emissions. Both Section 111 (governing major stationary sources, including power plants) and Section 202 (addressing new motor vehicles) compel EPA to regulate CO_2 emissions if the Agency determines that CO_2 emissions "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §§ 7411(b)(1)(A) and 7421(a)(1); see Massachusetts, 127 S. Ct. at 1462.

Here, EPA erred in deciding that CO_2 emissions from the Bonanza plant are not "subject to regulation under the Act" because, not only does the Agency possess the authority to regulate CO_2, there can be no serious dispute that CO_2 emissions from motor vehicles, power plants, and other major sources "may reasonably be anticipated to endanger public health or welfare." The scientific evidence regarding the pace and harmful effects of global warming caused by CO_2 and other greenhouse gases is extraordinarily compelling. Global warming is accelerating: eleven of the past twelve years rank as the warmest since records began to be kept in 1850. United Nations Intergovernmental Panel on Climate Change (IPCC), "Summary for Policymakers of the Synthesis Report of the IPCC Fourth Assessment Report," (Nov. 2007) ("IPCC Report"), at 1, available at www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf; see also Andrew C. Revkin, "Arctic Melt Unnerves the Experts," N.Y. Times, Oct. 2, 2007 ("The pace of change has far exceeded what had been estimated by almost all simulations used to envision how the Arctic

will respond to rising concentrations of greenhouse gases linked to global warming."). In addition, numerous harms from global warming are already occurring or are imminent. Massachusetts, 127 S. Ct. at 1455 ("The harms associated with climate change are serious and well-recognized."). The IPCC predicts that numerous harms to public health and welfare will continue and worsen if global warming continues unabated, among them decreased snowpack and more winter flooding in the western U.S., and more heat-related illnesses caused by an increase in intensity and duration of heatwaves in North American cities. IPCC Report at 10. In light of the overwhelming scientific evidence that greenhouse gases such as CO_2 cause harm to public health and welfare, and the fact that plants such as the Bonanza plant can be expected to operate for 50 or more years – generating enormous amounts of greenhouse gases – it was unreasonable for EPA to conclude that CO_2 is not an air pollutant "subject to regulation" under the Act. Indeed, as discussed above, several states now have laws in place requiring coal-fired power plants to limit their CO_2 emissions.

Moreover, EPA has repeatedly expressed its intent to promulgate regulations that presuppose an affirmative endangerment determination. See, e.g., 72 Fed. Reg. 69,934 (Dec. 10, 2007) (final regulations under Section 202 to be published by October 2008). Similarly, in an Executive Order issued right after the Massachusetts v. EPA decision, President Bush took the position that EPA and other federal agencies should regulate CO_2 emissions under the Act. See Executive Order, "Cooperation Among Agencies in Protecting the Environment with Respect to Greenhouse Gas Emissions from Motor Vehicles, Nonroad Vehicles, and Nonroad Engines," (May 14, 2007), available http://www.whitehouse.gov/news/releases/2007/05/20070514-1.html. EPA's unexplained delay in moving forward with regulations under Section 202, see Letter from

Martha Coakley, Massachusetts Attorney General, et al. to EPA Administrator Johnson (Jan. 23, 2008), available at http://www.mass.gov/Cago/docs/press/2008_01_23_epa_climate_ruling_attachment1.pdf, cannot properly be used by the Agency as a shield against its permitting obligations under the PSD law.

In the Bonanza permit proceeding, EPA incorrectly interpreted the phrase "subject to regulation under the Act" as only applying to a pollutant that is "presently subject to a statutory or regulatory provision that requires actual control of emissions for that pollutant." See EPA Resp. to Comments at 6 (concluding that no BACT emission limit for CO_2 was required because CO_2 is not currently subject to emission standards under the Act). However, Congress did not use these narrow qualifiers in describing which pollutants trigger the BACT requirement in Section 169(3); it made BACT applicable to each pollutant "subject to regulation" under the statute. By contrast, in other sections of the statute, Congress did use terms akin to the "actual control of emissions" phrase that EPA contends should be read implicitly into Section 169(3). See, e.g., 42 U.S.C. 7651d(a)(1) ("Each utility unit subject to an annual sulfur dioxide tonnage emission limitation under this section"). Congress's different use of language in these statutory sections should be given effect. See New York v. EPA, 413 F.3d 3, 39-40 (D.C. Cir. 2005) (in construing NSR modification definition, giving effect to the fact that Congress used the word "emitted" instead of terms "potential to emit" or "emission limitation" used in other sections of the statute).

EPA's reliance on a 1993 guidance memorandum to support its argument that CO_2 emissions from the Bonanza plant are not "subject to regulation under the Act" is misplaced. See EPA Region VIII's Response to Petition for Review (Nov. 2, 2007) at 10–11 (discussing

memorandum for Lydia Wegman, Deputy Director, Director of OAQPS, to Air Division Directors, Regions I-X, "Definition of Regulated Air Pollutant for Purposes of Title V," (April 26, 1993) ("Wegman Memo")). The Wegman Memo, written nearly 15 years ago, takes the position that CO_2 is not a pollutant "subject to regulation under the Act" because Congress intended the definition of "air pollutant" in Section 302(g) of the Act to be construed somewhat narrowly. See Wegman Memo at 4 (concluding that Congress did not intend the definition to refer to pollutants that "have no known prospect for regulation under the Act . . . [such as] carbon dioxide."). This interpretation does not survive the Supreme Court's decision in Massachusetts v. EPA, 127 S.Ct. at 1460 (greenhouse gas emissions are air pollutants under Section 302(g) of the Act) and 1462 ("Because greenhouse gases fit will within the Clean Air Act's capacious definition of 'air pollutant,' we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles"; "Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation of why it cannot or will not exercise its discretion to determine whether they do").

Indeed, EPA has interpreted the term "subject to" in the context of other environmental laws to mean polluting activity that "should" be regulated, as opposed to polluting activity that is currently being regulated. For example, in a 1995 memorandum interpreting the phrase "subject to" under the Resource Conservation and Recovery Act and the Clean Water Act, EPA stated that it had "consistently interpreted the language 'point sources subject to permits under [section 402 of the Clean Water Act]' to mean point sources that should have a [discharge] permit in place, whether in fact they do or not." Memorandum from Michael Shapiro, et al., Office of

General Counsel to Waste Management Division Directors, "Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste," at 2 (Feb. 17, 1995) (attached hereto as Attachment A).

In sum, in light of the Massachusetts v. EPA decision conclusively establishing EPA's authority to regulate CO_2 emissions, the statutory requirement for EPA to regulate under Section 111 and 202, and the indisputable evidence that CO_2 emissions endanger public health and welfare, EPA erred by concluding that the Bonanza plant's new unit's CO_2 emissions are not pollution that is "subject to regulation under the Act."

2. EPA's Refusal to Consider the Environmental and Economic Impacts of CO_2 Emissions in Its Permitting Decision for the Bonanza Plant Was Erroneous.

Even if EPA was not required to set numeric limits for CO_2 emissions in the Bonanza permit, EPA failed to consider the environmental impacts of climate change and the costs of future regulation of greenhouse gas emissions in its permitting decision as required under the Clean Air Act. This obligation arises in part under sections 165(a)(4) and 169(3) of the Act, which together mandate that EPA "tak[e] into account energy, environmental, and economic impacts and other costs" as part of its BACT analysis. 42 U.S.C. § 7479(3). In addition to the BACT provisions, sections 160(1) and (5), which declare the purposes of the PSD program, also make clear that EPA is required to consider the general environmental impacts of its permitting decisions, notwithstanding attainment and maintenance of all national ambient air quality standards. See 42 U.S.C. § 7470(1), (5). These provisions set forth the legislative goals of protecting against adverse impacts that "reasonably may be anticipate [sic] to occur from air pollution" despite "attainment and maintenance of all national air quality standards," and of

carefully evaluating "all the consequences" of a decision to permit increased air pollution. Id.; see also Gregory B. Foote, Considering Alternatives: The Case for Limiting CO_2 Emissions from New Power Plants Through New Source Review, 34 E.L.R. 10642 (July 2004).[3] Significantly, this statement of purpose calling for a broad environmental impacts analysis on its face encompasses all "air pollutants," not just those "subject to regulation." As the Supreme Court definitively established in Massachusetts v. EPA, CO_2 is an "air pollutant" under the Act. Thus, Congress intended that EPA carefully evaluate the adverse environmental impacts of any increase in CO_2 emissions resulting from EPA's permitting decisions.

EPA's position that CO_2 is not "subject to regulation" under the Act – even if correct – would not affect EPA's obligation to take into account such emissions when setting emission limits for other pollutants and when establishing other terms of the permit for the Bonanza plant. The EAB has determined that BACT requires EPA to consider and evaluate "the environmental impact of unregulated pollutants in the course of making a BACT determination for the regulated pollutants." In re North Country Resource Recovery Associates, 2 E.A.D. 229, 230 (Adm'r 1986) (rejecting EPA's claim that it does not have authority to consider unregulated pollutants when setting emission limitations in a PSD permit); see also In re Genesee Power Station, 4 E.A.D. 832 (EAB 1993). This "collateral impacts analysis" further contemplates that EPA may choose more stringent emission limitations for a regulated pollutant than it would otherwise have chosen if setting such limitations would have the incidental benefit of restricting an as yet

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[3] A copy of the Foote article was attached to and incorporated by reference into the comments submitted by Western Resource Advocates, et al. on the draft PSD permit for the Bonanza plant. In its Response to Comments, EPA failed to acknowledge the Foote article, or respond to many of the arguments and alternatives proposed therein.

unregulated pollutant that may cause adverse environmental impacts. See In re North Country Resource Recovery Associates, 2 E.A.D. at 230. Given EPA's broad statutory responsibility to consider the environmental impacts of its permitting decisions, the severe adverse environmental impacts likely to result from CO_2 emissions, the current absence of other regulatory mechanisms to address these emissions, and the ability and responsibility of EPA to mitigate the impacts of CO_2 emissions through appropriate permit conditions, EPA's purposeful exclusion of CO_2 emissions from its BACT analysis was wholly unreasonable.

Further, EPA cannot conduct an appropriate BACT analysis taking into account energy, environmental, and economic impacts and other costs without considering the likely future regulatory costs of controlling CO_2 emissions. See Center for Biological Diversity v. NHTSA, 508 F.3d at 533-35 (determining that the National Highway Traffic Safety Administration failed its statutory duty to determine "maximum feasible" fuel economy standards because the agency had failed to monetize the benefits of reductions in CO_2 emissions when setting the standards). A newly constructed coal-fired power plant will likely operate for at least 50 to 60 years. It is highly likely that Congress, if not EPA, will impose mandatory regulations on the emissions of CO_2 early in the life-span of the Bonanza plant. Thus, an analysis of the costs associated with the approval of a particular control technology must also consider the likely future costs to control CO_2 emissions, such as through retrofitting to capture and sequester such emissions. Given the likelihood of CO_2 regulation in the near future, it would be unreasonable for any permitting authority to ignore the significant financial risks associated with approval of a coal-fired power plant today that does not minimize CO_2 emissions. However, in its response to comments, EPA refused to consider the detrimental environmental effects of the increased CO_2 emissions

resulting from the proposed new plant. See Response to Comments at 7-9. EPA also failed to take into account the likely future costs of controlling CO_2 emissions. EPA's admitted failure to even consider the potential collateral environmental impacts of CO_2 emissions or the costs associated with such emissions as required under the Act renders EPA's permitting decision arbitrary and capricious.

Next, EPA's stated grounds for refusing to consider the potential collateral impacts of CO_2 emissions are flawed. EPA attempted to justify its refusal by claiming that the record and commenters had not shown that "the outcome of our BACT analysis for regulated NSR pollutants emitted by the Deseret Bonanza WFCU would have [] resulted in a different choice of control technologies had we considered the potential collateral environmental impacts of CO_2 emissions." Response to Comments at 7. In making this determination, EPA inappropriately failed to consider any control technology that would have resulted in more, rather than less, stringent emissions limitations. This refusal unreasonably ignored the EAB's determination that the prospect of adverse environmental impacts from a proposed source can lead to more – as opposed to less – stringent emission limits than otherwise would have been required. See In re North Country Resource Recovery Associates, 2 E.A.D. at 230.

Finally, EPA unreasonably decided to restrict its collateral environmental impacts analysis to consideration of local impacts that are directly attributable to construction and operation of the proposed source. Response to Comments at 8-9. EPA's constrained approach ignored the serious harms attributable to global warming that will be felt not only on a global scale, but also locally, and the contribution of CO_2 emissions, especially emissions from coal-fired power plants like the proposed Bonanza plant, to such harms. The fact that global warming

is a global phenomenon does not relieve EPA from undertaking its statutory obligation to address greenhouse gas pollution from a particular source or group of sources once it determines that such pollution endangers public health or welfare. See Massachusetts, 127 S.Ct. at 1462-63 (holding that EPA can avoid addressing greenhouse gas emissions only if it determines that such emissions do not contribute to climate change or it provides a reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do). Further, EPA regulates similar cumulative, regional-scale pollution problems, such as ozone pollution and acid rain, that are difficult to attribute to any particular source. Thus, it is unreasonable for EPA to fail to address the contributions of individual coal-fired power plants to the problem of climate change on the basis that the impacts are not purely local.

3. EPA's Refusal to Consider Alternatives to the Bonanza Plant's Traditional Coal-fired Operations was Unreasonable.[4]

EPA also unreasonably failed to exercise its discretion under Section 165(a)(2) of the Clean Air Act to consider alternatives to the Bonanza plant's traditional coal-fired operations. Section 165(a)(2) authorizes the permitting authority to consider the "air quality impact of [the pollution] source, alternatives thereto, control technology requirements, and other appropriate considerations." The EAB has consistently held that a permitting authority has broad discretion under section 165(a)(2) of the Act to consider alternatives, conduct or require analyses, and impose permit conditions to address issues beyond the required BACT analysis. See In re Prairie

[4] State amici respectfully urge EAB's consideration of the following argument concerning the issue of the alternatives analysis authorized under Section 165(a)(2) of the Act. Although the EAB declined to grant the aspect of Sierra Club's appeal regarding whether EPA Region 8 erred by not following the position on alternatives advocated by EPA Region 9 on the White Pine Energy Station project in Nevada, the Board stated that "it continues to hold Sierra Club's second issue under advisement." EAB Order at 2, n.4.

State Generating Co., PSD Appeal 05-05, 13 E.A.D. ___, 2006 EPA App. LEXIS *38, *74-78 (EAB, Aug. 24, 2006); In re Knauf Fiber Glass, 8 E.A.D. 121, 136 (EAB 1999); In re Hillman Power, 10 E.A.D. 673, 692 (EAB 2002). Therefore, even if EPA could lawfully issue a PSD permit for the proposed Bonanza plant without establishing a BACT limit for CO_2, EPA has a duty to responsibly exercise its discretion under section 165(a)(2) to consider all alternatives and options available to address CO_2 emissions.

EPA, as the permitting authority, has an obligation under section 165(a)(2) to consider and respond to relevant public comments on alternatives to a source, as well as discretion under the Act to modify the PSD permit based on comments raising alternatives or other appropriate considerations. In re Prairie State, 2006 EPA App. LEXIS at *74-75 . Moreover, the EAB has made clear that a permitting authority has discretion to modify a permit based on consideration of "alternatives" whether or not the issues are raised by commenters: "Indeed, the permit issuer is not required to wait until an 'alternative' is suggested in the public comments before the permit issuer may exercise the discretion to consider the alternative. Instead, the permit issuer may identify an alternative on its own." In re Prairie State, 2006 EPA App. LEXIS at *78.

Section 165(a)(2) provides EPA with the authority to consider a wide range of options to control CO_2 emissions and to adopt conditions or requirements that it deems appropriate to mitigate the global warming impacts of a proposed new source. For example, the EAB has held that a permitting authority may require "redefinition of the source," including requiring or restricting certain fuels. In re Hillman Power, 10 E.A.D. at 692. In addition, section 165(a)(2) empowers EPA to address CO_2 emissions from proposed facilities by considering alternatives that would obviate the need to build the facility or at least mitigate its emission of greenhouse

gases, such as:

- specific energy efficiency, conservation, or demand-side management measures to reduce energy consumption;
- development of renewable energy sources;
- use of less CO_2-intensive fuel (such as natural gas instead of coal);
- construction of smaller sources;
- capture and disposal of CO_2;
- cofiring with biomass;
- construction of facilities using more efficient combustion technology; and/or
- purchase of CO_2 offsets.

See In re Prairie State, 2006 EPA App. LEXIS at * 81-82 (Section 165(a)(2) provides EPA with the authority to consider a "no-build" alternative to address air quality concerns).

Several of these alternatives, including requiring the purchase of CO_2 offsets as a permit condition, were raised and discussed in the Foote article, Considering Alternatives: The Case for Limiting CO_2 Emissions from New Power Plants Through New Source Review, which petitioners incorporated by reference into their comment letter submitted to EPA. However, in the permit decision, EPA failed to consider these alternatives or otherwise provide any justification for failing to exercise its discretion to do so. Given the decision in Massachusetts v. EPA, the latest IPCC reports, Congressional efforts to establish global warming legislation, EPA's recognition of the importance of addressing climate change, and EPA's self-described efforts to develop a strategy to address climate change, the agency's decision to ignore possible options and alternatives to mitigate or eliminate the impacts of a large new source of CO_2 was arbitrary and capricious.

Conclusion

For the reasons set forth above, the EAB should vacate the Bonanza PSD permit decision and remand to EPA for further proceedings.

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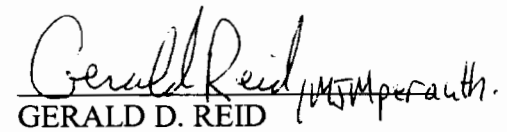
By: 

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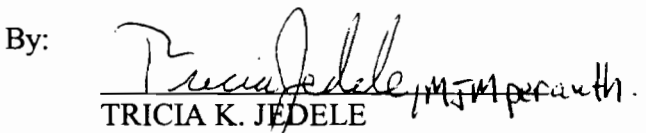
By: 

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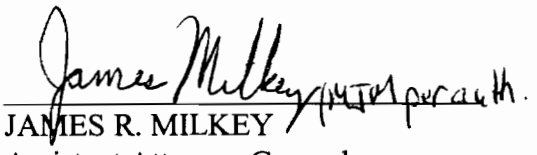
By: 

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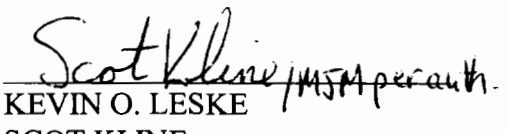
By: 

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ATTACHMENT A

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

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Interpretation of Industrial Wastewater Discharge Exclusion From the Definition of Solid Waste

FROM: Michael H. Shapiro
Director
Office of Solid Waste (5301)

Lisa K. Friedman
Associate General Counsel
Solid Waste and Emergency Response Division (2366)

TO: Waste Management Division Directors, Regions I-X

This memorandum is to clarify that the Resource Conservation and Recovery Act (RCRA) requirements apply to discharges of leachate into groundwater from leaking waste management units, even when the groundwater provides a direct hydrologic connection to a nearby surface water of the United States. The definition of solid waste in RCRA section 1004(27) excludes certain industrial discharges which are point sources subject to permits under the Clean Water Act (CWA); and EPA has said that CWA jurisdiction (under section 402) extends to point source discharges to groundwater where there is a direct hydrologic connection between the point source and nearby surface waters of the United States. However, discharges of leachate from waste management units to groundwater are not excluded from the definition of solid waste in RCRA section 1004(27), because the exclusion extends only to "traditional," pipe outfall-type point source discharges, and not to discharges upstream of that point. (This memorandum interprets the meaning of "point source discharge" solely for the purposes of RCRA section 1004(27), and not for CWA purposes.)

Discussion

RCRA section 1004(27) excludes from the definition of solid waste "solid or dissolved materials in . . . industrial discharges which are point sources subject to permits under

[section 402 of the Clean Water Act]." For the purposes of the RCRA program, EPA has consistently interpreted the language "point sources subject to permits under [section 402 of the Clean Water Act]" to mean point sources that should have a NPDES permit in place, whether in fact they do or not. Under EPA's interpretation of the "subject to" language, a facility that should, but does not, have the proper NPDES permit is in violation of the CWA, not RCRA.

In interpreting and implementing this exclusion, the Agency promulgated a rule at 40 C.F.R. § 261.4(a)(2) that states:

> The following materials are not solid wastes for the purpose of this part:
> . . . Industrial wastewater discharges that are point source discharges subject to regulation under section 402 of the Clean Water Act, as amended.

EPA's interpretation of the rule's narrow scope is set out in an explanatory "Comment" that also appears in the Code of Federal Regulations following the final rule language:

> This exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment.

40 C.F.R. § 261.4(a)(2) (comment) (emphasis added). This explanatory comment to the rule emphasizes that the exclusion is a modest and narrow one. Moreover, the comment reflects EPA's intent, at the time it promulgated the rule, that the exclusion apply solely to the traditional pipe outfall-type situation (i.e., ultimate release to waters of the United States). As EPA explained in the preamble:

> The obvious purpose of the industrial point source discharge exclusion in section 1004(27) was to avoid duplicative regulation of point source discharges under RCRA and the Clean Water Act. Without such a provision, the discharge of wastewater into navigable waters would be "disposal" of solid waste, and potentially subject to regulation under both the Clean Water Act and RCRA Subtitle C. These considerations do not apply to industrial wastewaters prior to discharge since most of the environmental hazards posed by wastewaters in treatment and holding facilities -- primarily groundwater contamination -- cannot be controlled under the Clean Water Act or other EPA statutes.

45 Fed Reg. 33098 (May 19, 1980)(emphasis added).

Thus, EPA based this exclusion on the need to avoid duplicative regulation under two statutes for discharges that occur at the end-of-the-pipe (i.e., discharges directly to surface water). EPA did not intend that the exclusion cover groundwater discharges from treatment processes that occur prior to the "end-of-the-pipe" discharge. Thus, this exclusion only covers a subset of point sources regulated under the CWA.

Therefore, wastewater releases to groundwater from treatment and holding facilities do not come within the meaning of the RCRA exclusion in 40 C.F.R. § 261.4(a)(2), but rather remain within the jurisdiction of RCRA. In addition, such groundwater discharges are subject to CWA jurisdiction, based on EPA's interpretation that discharges from point sources through groundwater where there is a direct hydrologic connection to nearby surface waters of the United States are subject to the prohibition against unpermitted discharges, and thus are subject to the NPDES permitting requirements. See 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990)(storm water permit application regulations); 56 Fed. Reg. 64876, 64892 (Dec. 12, 1991)(Indian water quality standards regulations); 58 Fed. Reg. 7610, 7631 (Feb. 8, 1993)(Region 6 general permit for feedlots).

If you have any questions on this memorandum, please call Kathy Nam of OGC at (202) 260-2737 or Mitch Kidwell of OSW at (202) 260-4805.

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

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Moving the NPDES Program to a Watershed Approach

FROM: Michael B. Cook, Director
Office of Wastewater Management

TO: Water Management Division Directors, Regions 1-10

I am pleased to transmit to you our report, *Moving the NPDES Program to a Watershed Approach*. As explained during each of the 1994 Regional visits, the purpose of this report is to summarize the status of Regional efforts to implement the NPDES Watershed Strategy and highlight the various approaches used to develop State Assessments, Regional Action Plans, and Internal Strategies. The Report capsulizes the Regional views on issues, needs, and expected benefits with regard to implementing the NPDES Watershed Strategy, and discusses the types of activities Regions believe the Office of Wastewater Management (OWM) should undertake to support Regional implementation of both the Strategy and the broader Watershed Protection Approach.

The Report indicates that Regional programs are making progress in implementing the Strategy since it was finalized in March 1994. Nine of the ten Regions projected that they would submit their Internal Strategies and completed State Assessments and Regional Action Plans for 39 States and Puerto Rico in September. Assessments and Regional Action Plans for the remaining 12 States and the District of Columbia are expected to be completed in FY 95. Each Regional office has established some variation of an internal workgroup to serve as a focus for Regional watershed protection efforts. These workgroups tend to have multi-program representation from both the Water Management Division and Environmental Services Division.

The combined list of Regional issues and needs reflect common themes such as coordinated leadership in the Office of Water (OW), and flexibility in implementing watershed protection efforts. These common issues and needs are having an impact on our activities in OWM, and are being shared with other OW Programs. I expect that they will also be considered in upcoming management discussions.

We hope that the Report promotes ideas and stimulates discussion across the Regions and States. Please feel free to call me or Jeff Lape, NPDES Watershed Matrix Manager, at (202) 260-5230 if you have any questions regarding the Report.

Attachment

cc. Bob Perciasepe
Bob Wayland
Jim Elder
Tudor Davies
Permits Branch Chiefs, Regions 1-10
Cynthia Dougherty
Mike Quigley
Ramona Trovato
Jane Ephrimedes