

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

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

**MOTION TO STRIKE AND
ALTERNATIVE MOTION FOR LEAVE TO FILE SURREPLY**

Respondent EPA Region VIII and amicus EPA Office of Air and Radiation (“OAR”) move to strike new arguments raised by Petitioner Sierra Club and amicus Physicians for Social Responsibility for the first time in their reply briefs. In the alternative, Region VIII and OAR seek leave to file the attached surreply addressing the new argument with respect to regulation of carbon dioxide that is presented in the reply briefs.

On pages 19-21 of its reply brief, Petitioner argues for the first time in this proceeding that carbon dioxide is regulated under landfill emission regulations promulgated under section 111 of the Clean Air Act. Amicus Physicians for Social Responsibility (“PSR”) introduces the same argument in footnote 7 (page 3) of its reply and also argues in the body of its reply that methane is subject to regulation under these rules. Neither of these parties made this argument in their initial briefs in the case, and the alleged significance of the landfill emissions regulation was not raised in public comments on the permit. Petition, Exhibit 2. As a result, Respondent and supporting amicus have been denied the opportunity to respond to this new legal theory.

This new argument was reasonably ascertainable at the time Petitioner and amicus filed opening briefs on January 30, 2008. The landfill emissions regulations referenced by these parties were completed on March 12, 1996. Furthermore, the attorney who filed an amicus brief in this case for Utah and Western Non-Governmental Organizations presented this argument to EPA in supplemental comments dated October 9, 2007 on a separate PSD permit. *See Exhibit A, Supplemental Comments on EPA's Proposed PSD Permit for the Desert Rock Energy Facility, (Oct. 9, 2007), at 8-9.*

Under standard principles of appellate procedure, new issues raised for the first time in a reply brief are waived. *Benkelman Telephone Co. v. FCC*, 220 F.2d 601, 607 n. 10 (D.C. Cir. 2000). The Board has previously declined to consider new issues raised in reply briefs, reasoning that “[n]ew issues raised for the first time at the reply stage of these proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness.” *Knauf Fiber Glass*, 8 E.A.D. 121, 126 n.9 (EAB 1999). The Board granted review in this case solely on the question of whether the Deseret Power permit should contain an emissions limitation for carbon dioxide, and the issue of whether the permit should contain an emissions limit for methane was not raised in the Petition for Review. Since the regulatory status of methane is a wholly new matter and the argument that carbon dioxide is regulated under the landfill regulations was not included in Petitioner’s and amicus PSR’s opening briefs, the Board should decline to consider these arguments and strike pages 19-21 of Petitioner’s reply brief and footnote 7 of the reply brief of amicus PSR.

In the alternative, if the Board declines to strike the belated argument regarding carbon dioxide, the Board should grant Respondent and supporting amicus leave to file

surreply briefs addressing the new argument on carbon dioxide presented in the two reply briefs based on the landfill regulations. The Board has previously allowed surreply briefs that focus only on new issues raised in a reply brief. *Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18 (March 19, 2008), Slip op. at 11 (2008 WL 782613) (“The Board similarly noted that it would consider the substance of any surreply only to the extent that such document responded to the new arguments identified by the City in its reply brief.”). Region VIII and OAR request leave to file the surreply attached to this motion, which addresses only the new argument that carbon dioxide is subject to regulation under the landfill regulations.

Date: May 8, 2008

Respectfully submitted,



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EXHIBIT A
(Respondent's Motion to Strike)

October 9, 2007

BY ELECTRONIC MAIL

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

Dear Mr. Baker:

Environmental Defense 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 hereby incorporates as part of our comments for the administrative record in this proceeding all of the documents referenced and cited to herein. These comments are based on recent developments and information of central relevance to EPA's permit decision for the Desert Rock Power Plant.

EPA Must Consider Its Own Recent Information and Findings in Making a Final Determination Regarding the PSD Permit for Desert Rock

EPA must consider its own very recent statements and determinations in any final PSD permit decision for the Desert Rock Power Plant. EPA very recently found that carbon dioxide and other greenhouse gases contribute to global warming. In reviewing the impacts of a major coal plant proposed in Nevada, the White Pine Energy Station Project, EPA found that "[g]lobal warming is caused by emissions of carbon dioxide and other heat-trapping gases." See Letter from EPA Region IX to Jeffrey A Weeks, Bureau of Land Management (June 22, 2007), attached for inclusion in the administrative record for the Desert Rock PSD permit proceeding. There is no question that carbon dioxide and

other greenhouse gases are “air pollutants,” that carbon dioxide and other greenhouse gases have long been regulated under the Act and that they cause global warming.

EPA also recently found that there are in fact available methods, systems and techniques to control carbon dioxide and other greenhouse gases. In its June 22, 2007 letter on the White Pine Energy Station Project, EPA directed the BLM to “discuss carbon capture and sequestration and other means of capturing and storing carbon dioxide as a component of the proposed alternatives.” *Id.* In submitting these comments to the BLM, EPA fulfilled its delegated responsibility under section 309 of the Clean Air Act to review and comment on a major federal agency action. 42 U.S.C. § 7609. These comments represented EPA’s findings on the draft EIS for the White Pine project and were made public. Thus, EPA has elsewhere determined that CCS is an available technology that should be considered, together with other means, for the control of carbon dioxide emissions. We submit these EPA comments for full consideration as part of the PSD permit decision for Desert Rock. EPA has a duty to account for these recent findings and recommendations which are of central relevance to the PSD permit decision.

In its June 22, 2007 comments on the White Pine Energy Station Project, EPA also addressed the importance of compliance with a new California law establishing greenhouse gas emissions performance standards for coal-fired power plants. EPA specifically recommended:

“If the potential purchasers of power include California utilities, the FEIS should address the issue of compliance with the new ‘greenhouse gas emissions performance standard’ as adopted by the California Public Utilities Commission (CPUC) on January 25, 2007. California utilities are barred from buying electricity from most coal-fired power plants unless specific standards are met, effective February 1, 2007.”

See EPA Letter at p. 2. EPA must likewise bar the sell of power from Desert Rock to California utilities consistent with the regulations adopted under California Senate Bill 1368 and implementing administrative decisions.

The Clean Air Act also instructs EPA to consider alternatives to the proposed project in the pre-construction review permitting program. This is a core element of the PSD program. Section 165(a)(2) directs the permitting authority to fully consider all written and oral presentations “on the air quality impact of such source, alternatives thereto, control technology requirements and other considerations.” 42 U.S.C. § 7475(a)(2) (emphasis added). This is consonant with the statutory purposes of the PSD program which expressly provide for the imperative of procedural rigor and fully informed decisionmaking in the preconstruction review permit process. The PSD program is pointedly designed “to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.” CAA § 160(5), 42 U.S.C. § 7470(5).

EPA made specific findings in the June 22, 2007 letter to BLM that are directly relevant to the Desert Rock PSD permit proceeding. EPA must take account of its own findings in considering “alternatives” to the Desert Rock Power Plant and ensuring that the permit decision is fully informed. For example, in the June 22, 2007 letter EPA expressed significant concern that the “density of new coal-burning plants in Nevada is in excess of the demonstrated need for energy throughout the Western States.” EPA Letter at p. 2. EPA also found that BLM had erred in failing to consider alternatives to the proposed 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. See EPA Letter at ps. 3-5, 14. EPA must likewise follow its own recommendations and findings in considering “alternatives” to Desert Rock and assuring that all of the consequences of the permitting decision are thoroughly considered and fully informed including energy efficiency, design for carbon capture and storage, and the potential for renewables.

EPA’s consideration of its own findings and expert analysis is required by law. See *Kent County v. EPA*, 963 F.2d 391, 394 (D.C. Cir. 1992). In *Kent County*, the court held that EPA’s decision to list a site on the National Priorities List was arbitrary and capricious because it failed to include in the administrative record relevant statements by agency experts. *Id.* at 396. It would likewise be reversible error for EPA to fail to consider its own highly relevant statements regarding another coal-fired power plant that carbon dioxide emissions cause global warming, that carbon dioxide can be controlled through available technology such as CCS, and to consider a range of alternatives to the proposed coal plant.

Moreover, EPA’s findings and determinations announced in the June 2007 action on the Nevada coal plant arose after the close of the comment period on the Desert Rock permit proceeding. See 40 C.F.R. § 124.13; *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 n.8 (EAB 1999) (“a petitioner may demonstrate that an issue was not reasonably ascertainable during the public comment period.”).

EPA’s findings regarding the proposed White Pine coal plant arose as the Agency was carrying out its duty to “review and comment in writing on the environmental impact” as part of the NEPA process set forth in Section 309 of the Clean Air Act. 42 U.S.C. § 7609. PSD permits have been exempted from the requirements of this section by the courts and statute because the PSD program is designed to be “functionally equivalent” to NEPA review. In *Portland Cement Ass’n v. Ruckelshaus*, the court exempted EPA from fulfilling NEPA requirements because the “Clean Air Act, properly construed, requires the functional equivalent of a NEPA impact statement.” *Portland Cement Ass’n v. Ruckelshaus*, 485 F.2d 375, 384 (D.C. Cir. 1973). Congress later explicitly exempted actions taken under the Clean Air Act from the NEPA process in the Energy Supply and Environmental Coordination Act (ESECA). 15 U.S.C. § 793(c)(1). The Eleventh Circuit categorized this “express exemption as Congress’ way of making more obvious what would likely occur as a matter of judicial construction.” *State of Ala. ex rel. Siegelman v. EPA*, 911 F.2d 499, 505 (11th Cir. 1990). Thus, EPA’s comments on the DEIS for the White Pine project are the “functional equivalent” of its determinations made in the

Desert Rock PSD permit proceeding, and EPA must thoroughly address these findings, information and determinations as an integral part of the PSD permit proceeding.

EPA's PSD permit proceeding for Desert Rock is subject to the general tenets of administrative law, including the requirement that the decision not be "arbitrary and capricious." Because EPA has made such clear, fact-based determinations regarding the White Pine power plant, EPA carries a heavy burden in taking a divergent position in the Desert Rock PSD permit proceeding. See *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983) ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."); see also *id.* at 43 (EPA "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."). In the Desert Rock PSD permit proceeding, EPA must articulate a satisfactory explanation why available measures to control greenhouse gas emissions, including CCS, were not evaluated, and why alternatives were not considered as it has stated is necessary in the context of the White Pine project.

EPA Must Thoroughly Consider Whether Desert Rock Will Contribute to Ozone Concentrations Exceeding Recently Proposed Health Protective Levels

On July 11, 2007, EPA published proposed revisions to strengthen the national ambient air quality standards for ozone. See 72 Fed. Reg. 37,818. In October 2006, the EPA Clean Air Scientific Advisory Committee unanimously and unambiguously advised EPA Administrator Stephen Johnson: "(1) There is no scientific justification for retaining the current primary 8-hr NAAQS of 0.08 parts per million (ppm), and (2) The primary 8-hr NAAQS needs to be substantially reduced to protect human health, particularly in sensitive subpopulations."¹ The Committee also unanimously agreed upon a recommended range: "Therefore, *the CASAC unanimously recommends a range of 0.060 to 0.070 ppm for the primary ozone NAAQS.*"² These recommendations leave no room for misinterpretation. Indeed, the CASAC pointedly found that "*there is no longer significant scientific uncertainty regarding CASAC's conclusion that the current 8-hr primary NAAQS must be lowered*" and "[r]etaining this standard would continue to put large numbers of individuals at risk" –

[T]here is no longer significant scientific uncertainty regarding the CASAC's conclusion that the current 8-hr primary NAAQS must be lowered. A large body of data clearly demonstrates adverse human health effects at the current level of the 8-hr primary ozone standard. Retaining this standard would continue to put large numbers of individuals at risk for respiratory effects and/or significant

¹ Dr. Rogene Henderson, Chair, CASAC, to Stephen Johnson, EPA Administrator, "Clean Air Scientific Advisory Committee's (CASAC) Peer Review of the Agency's 2nd Draft Ozone Staff Paper," (Oct. 24, 2006).

² *Id.* at 2 (italics in original).

impact on quality of life including asthma exacerbations, emergency room visits, hospital admissions and mortality.³

In sum, CASAC unequivocally found that there is no basis in public health considerations for EPA to retain the current standard.

The scientific evidence of mortality benefits is one of the significant scientific developments since EPA's 1997 decision to lower the ozone health standard. The CASAC expressly pointed to the studies on ozone mortality effects as part of the body of evidence documenting adverse health effects below the current health standard. The CASAC found:

- ❖ “Several new single-city studies and large multi-city studies designed specifically to examine the effects of ozone and other pollutants on both morbidity and mortality have provided more evidence for adverse health effects at concentrations lower than the current standard.”⁴
- ❖ “[A]dverse health effects due to low-concentration exposure to ambient ozone (that is, below the current primary 8-hour NAAQS) found in the broad range of epidemiologic and controlled exposure studies cited above include . . . an increase in mortality (non-accidental, cardiorespiratory deaths) reported at exposure levels well below the current standard.”⁵
- ❖ “Retaining this [the current] standard would continue to put large numbers of individuals at risk for . . . mortality.”⁶

CASAC's series of statements in its October 2006 correspondence to the Administrator placed CASAC's full force, unanimously, on the evidence of mortality and other health effects in compelling EPA to adopt a lower standard to protect public health with an adequate margin of safety.

EPA must fully evaluate the potential for the proposed Desert Rock Power Plant to contribute to elevated ozone concentrations above and must address ozone concentrations above those health and welfare standards EPA itself provisionally recommended in the rulemaking proposal published on July 11, 2007. In this analysis, the extensive ozone-forming pollution Desert Rock Power Plant must be evaluated together with other sources in the region.

Environmental Defense has evaluated available National Park Service long-term ozone monitoring data at the Grand Canyon. Those data, presented graphically below, show that ozone concentrations at the Grand Canyon have been steadily rising and currently

³ *Id.* at 5 (italics in original).

⁴ *Id.* at 3 (citations omitted).

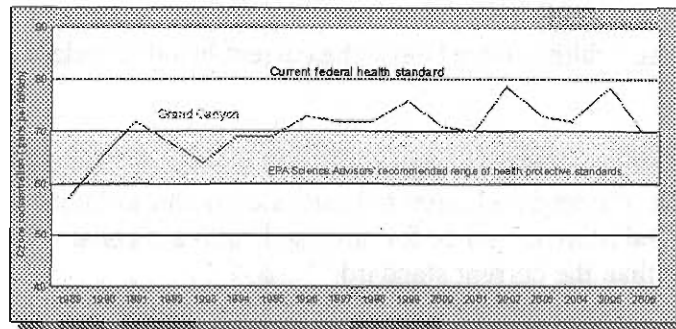
⁵ *Id.* at 4.

⁶ *Id.* at 5.

exceed health-protective levels. EPA must ensure that the Desert Rock Power Plant does not contribute to unhealthy ozone air pollution levels.

Environmental Defense: October 2007

Ozone Concentrations in Grand Canyon National Park
4th highest daily maximum 8-hour ozone concentration (ppb), 1989 - 2006



Source: National Park Service at: ww2.nature.nps.gov/air/Monitoring/docs/2006_O3ParkConc.pdf

EPA Must Determine BACT for CO₂ and Other Greenhouse Gases, and May Not Shirk Its Responsibility to Address Global Warming Pollution from the Desert Rock Power Plant

In refusing to regulate carbon dioxide and other greenhouse gases that would be discharged from the proposed addition of a coal-fired unit at the Desert power plant located on tribal lands in Utah, EPA very recently claimed that the requirement providing for the application of BACT to each pollutant “subject to regulation under the Act” is limited to pollutants that are subject to a statutory or regulatory requirement controlling emissions of that pollutant:

EPA has historically interpreted the term “subject to regulation under the Act” to describe pollutants that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant. *See* 43 Fed. Reg. 26388, 26397 (June 19, 1978) (describing pollutants subject to BACT requirements); 61 Fed. Reg. 38250, 38309-10 (July 23, 1996) (listing pollutants subject to PSD review). In 2002, EPA codified this approach for implementing PSD by defining the term “regulated NSR pollutant” and clarifying that Best Available Control Technology is required “for each regulated NSR pollutant that [a major source] would have the potential to emit in significant amounts.” 40 C.F.R. § 52.21(j)(2); 40 CFR 52.21(b)(50). In defining a “regulated NSR pollutant,” EPA identified such pollutants by referencing pollutants regulated in three principal program areas -- NAAQS pollutants, pollutants subject to a section 111 NSPS, and class I or II substance under title VI of the Act-- as well as any pollutant “that otherwise

is subject to regulation under the Act.” 40 CFR 52.21(b)(50)(i)-(iv). As used in this provision, EPA continues to interpret the phrase “subject to regulation under the Act” to refer to pollutants that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant. Because EPA has not established a NAAQS or NSPS for CO₂, classified CO₂ as a title VI substance, or otherwise regulated CO₂ under any other provision of the Act, CO₂ is not currently a “regulated NSR pollutant” as defined by EPA regulations.

EPA Response to Comments for the Deseret Power Plant, available at <http://www.epa.gov/region8/air/permitting/deseret.html> (Aug. 31, 2007).

EPA’s arguments seriously miss the mark. The regulatory definition on its face is expansive and applies to any pollutant that otherwise is subject to regulation under the Act. 40 CFR 52.21(b)(50). Specifically, the regulation states:

Regulated NSR pollutant, for purposes of this section, means the following:

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

40 C.F.R. § 52.21(b)(50)(emphasis added). EPA may not reinvent the statute and regulations to eliminate its current legal duty to regulate carbon dioxide and other greenhouse gases.

Indeed, as laid out in extensive supplemental comments by a coalition of organizations, carbon dioxide and other greenhouse gases have long been regulated under the Act. We hereby incorporate by reference the supplemental comments submitted on October 4th by a coalition of organizations in the Desert Rock PSD permit proceeding documenting the manner in which carbon dioxide has been subject to regulation under the Act.

EPA's argument that the phrase "subject to regulation under the Act" means a control requirement for the pollutant ignores the plain language which is expansive on its face. Section 169(3) is capacious in applying BACT to "each pollutant subject to regulation under this chapter emitted from or which results from *any* major emitting facility." Emphasis added.

Congress did not, by contrast, limit the application of BACT to pollutants "that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant" as EPA claims. Indeed, the terms "emission limitation" and "emission standard" are directly defined under the Act. See 42 U.S.C. § 7602(k). Had Congress intended to confine the application of BACT to pollutants subject to an "emission limitation" or "emission standard" as it pointedly did in numerous instances under the law, it would have in fact used those terms. But it did not. And EPA may not graft them on to the statute where they do not appear.⁷

Section 821 of the Clean Air Act Amendments of 1990 requires some sources, including coal fired power plants, to monitor and report CO₂ emissions. The regulations implementing § 821 require the owner of a coal fired power plant to use a CO₂ continuous emission monitoring system and a flow monitoring system to record CO₂ concentration and mass emissions. 40 C.F.R. § 75.10(3)(i). Carbon dioxide is thus a "pollutant that otherwise is subject to regulation under the Act."

The statutory purpose of the PSD program is to protect public health and welfare from any actual or potential adverse effect of air pollution which the Administrator reasonably anticipates could occur. 42 U.S.C. §7470(1). Given this sweeping statutory purpose, it is particularly appropriate that EPA impose BACT limitations for *all* pollutants subject to regulation, including those which are subject to monitoring requirements. Monitoring is an essential tool of regulation, not just an ancillary data collection exercise.

Environmental regulations rely heavily on monitoring for their success. Each of the NSPS standards establishes detailed monitoring and reporting requirements. See, e.g., 40 C.F.R. §§ 60.35c, 60.756, 60.757. Failure to comply with monitoring requirements may result in significant civil penalties. The Supreme Court in Massachusetts v. EPA recognized the importance of collaboration and research, enabled by monitoring and reporting, for any "thoughtful regulatory effort." Massachusetts, 127 S. Ct. 1438, 1461 (2007).

While §821 of the Clean Air Act Amendments of 1990 and implementing regulatory requirements plainly qualify CO₂ as a pollutant subject to regulation under the Act, greenhouse gases such as CO₂ and methane are also regulated as a component of landfill gases. EPA has promulgated emission guidelines and standards of performance for "municipal solid waste landfill emissions." 40 CFR §§ 60.33c, 60.752. Landfill

⁷ Environmental Defense notes that even the statutory definition of the terms "emission limitation" and "emission standard" encompass "any requirement relating to the operation or maintenance of a source to assure continuous emission reduction and any design, equipment, work practice or operational standard promulgated under this chapter." 42 U.S.C. §7602(k).

emissions are defined as "gas generated by the decomposition of organic waste deposited in an MSW landfill or derived from the evolution of organic compounds in the waste." 40 CFR § 60.751. The pollutants regulated by these standards, "MSW landfill emissions, or LFG, is composed of methane, CO₂, and NMOC." Air Emissions from Municipal Solid Waste Landfills – Background Information for Final Standards and Guidelines, EPA-453/R-94-021, December 1995, available at <http://www.epa.gov/ttn/atw/landfill/landflpg.html>. Thus, CO₂ and methane are regulated through the landfill emission regulations at 40 C.F.R. Part 60 Subparts Cc, WWW. See also 56 Fed. Reg. 24468 (May 30, 1991) ("Today's notice designates air emissions from MSW landfills, hereafter referred to as "MSW landfill emissions," as the air pollutant to be controlled").

EPA's long-standing interpretation of BACT applicability is expansive and dynamic, and EPA has long found that BACT must be adjusted to reflect regulations covering a wide range of pollutants. In EPA's October 1990 NSR Workshop Manual, EPA described the fact that BACT applies by operation of law upon regulation of pollutants under other provisions of the Act:

Regulations covering several pollutants such as cadmium, coke oven emissions, and municipal waste incinerator emissions have recently been proposed. Applicants should, therefore, verify what pollutants have been regulated under the Act at the time of application.

See EPA NSR Workshop Manual at p. A.21, n. d.

EPA's recent arguments in the Deseret PSD permit proceeding for evading responsibility to regulate greenhouse gases are without merit. EPA must establish BACT emissions limitations for carbon dioxide and other greenhouse gases that are indeed subject to regulation under the Act.

Sincerely yours,

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

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

**SURREPLY BRIEF OF EPA
OFFICE OF AIR AND RADIATION AND REGION VIII**

Contrary to the arguments in the Petitioner’s Reply Brief (pages 19-21) and the Reply of Physicians for Social Responsibility (footnote 7, page 3), carbon dioxide is not subject to regulation under the New Source Performance Standards (“NSPS”) for Municipal Solid Waste (“MSW”) Landfills adopted under section 111 of the Clean Air Act.¹ The emission guidelines and standards of performance for MSW landfills in Subparts Cc and WWW of Part 60 regulate only “MSW landfill emissions,” not the individual components of landfill gases. *See* 40 CFR §§ 60.30c-36c; 40 CFR §§ 60.750-759. Both the regulatory text and the preamble to the final rules explicitly address this issue and clarify that “MSW landfill emissions” is a single designated pollutant and the only pollutant subject to regulation by these subparts.

The regulatory text of Subpart Cc clarifies that it contains guidelines for the control of “certain designated pollutants” and identifies “MSW landfill emissions” as the pollutant to be controlled by the State plans. 40 CFR §§ 60.30c, 60.33c(a). Similarly, Subpart WWW requires affected sources to collect and control landfill gases, and defines

¹ This surreply does not address the argument of amicus with respect to methane because this issue is beyond the scope of the initial Petition for Review and the Board’s order granting review with respect to whether the permit should contain an emissions limitation for carbon dioxide.

“MSW landfill emissions” as “gas generated by the decomposition of organic waste deposited in an MSW landfill or derived from the evolution of organic compounds in the waste.” 40 CFR § 60.751. This definition makes clear that the regulated pollutant is confined to emissions that originate from an MSW landfill.

In adopting these MSW regulations, EPA was explicit that it was regulating only MSW landfill emissions collectively, and not the individual components of those emissions. EPA stated the following in the preamble to the proposed rule:

The pollutant to be regulated under the proposed standards and guidelines is “MSW landfill emissions.” Municipal solid waste landfill emissions, also commonly referred to as “landfill gas,” is a collection of air pollutants, including methane and NMOC’s [non-methane organic compounds], some of which are toxic. The composite pollutant is proposed to be regulated under section 111(b), for new facilities, and is proposed to be the designated pollutant under section 111(d), for existing facilities.

56 Fed. Reg. 24468, 24470 (May 30, 1991). In additional discussion, EPA explained the following:

The EPA views these emissions as a complex aggregate of pollutants which together pose a threat to public health and welfare based on the combined adverse effects of the various components. As previously stated, these components are methane and NMOC’s, including various toxic substances. ... [T]he exact composition of MSW landfill emissions can vary significantly from landfill to landfill and over time. Although the types of compounds are typically the same, the complex mixture cannot be characterized quantitatively in terms of single pollutants. The EPA thus views the complex air emission mixture from landfills to constitute a single designated pollutant.

Id. at 24474. Thus, the argument that the individual components of landfill gases are separately regulated under these provisions is incorrect and inconsistent with the regulatory text and record for Subparts Cc and WWW.

The sources cited by Petitioner and amicus do not establish that carbon dioxide is regulated under Subparts Cc and WWW. Rather than citing the controlling definition of

“MSW landfill emissions” (40 C.F.R. § 60.751), amicus cites only definitions of a different term (“landfill gases”) promulgated under a completely different program -- the section 112 air toxics program. The definition of “landfill gases” reflected in EPA’s air toxics rules for Stationary Combustion Turbines (Part 63, Subpart YYYY) and Stationary Reciprocating Internal Combustion Engines (Part 63, Subpart XXXX)² does not apply to the section 111 regulations. *See* 40 C.F.R. § 63.6175; 40 C.F.R. § 63.6675.³ The background information document cited by Petitioner at best establishes only that MSW landfill emissions may contain carbon dioxide, but it does not establish that this constituent is regulated by law under Subparts Cc and WWW. The terms of the regulations for the MSW landfills are controlling.

The Subpart Cc guidelines and Subpart WWW standards are based on each source’s emissions of non-methane organic⁴ compounds (NMOC), and the controls mandated by the regulations focus on reducing NMOC emissions. EPA determined that the best demonstrated technology (BDT) “requires the reduction of MSW landfill emissions from both new and existing MSW landfills emitting more than 50 Mg/yr of NMOC with (1) a well-designed and well-operated gas collection system and (2) a control device capable of reducing NMOC in the collected gas by 98 weight-percent.” 61 Fed. Reg. 9905, 9907 (Mar. 12, 1996).

² These section 112 regulations do not regulate landfill gases, but rather regulate the air toxics emissions resulting from combustion of landfill gases and other fuels that may be used in combustion turbines and reciprocating internal combustion engines. Furthermore, even if these air toxics rules regulated carbon dioxide, this pollutant would not become a regulated NSR pollutant because air toxics are excluded from PSD requirements. *See*, 42 U.S.C. § 7412(b)(6); 40 C.F.R. § 52.21(b)(50).

³ The third reference in this string citation by amicus (section 60.4248) does not correspond to any section contained in the Code of Federal Regulations.

⁴ Although carbon dioxide contains carbon, it is considered an inorganic compound. *See*, Industrial Waste Air Model Technical Background Document, EPA 530-R-02-010 (August 2002), page 2-6. <<http://www.epa.gov/epaoswer/non-hw/indusd/tools/iwair/iwair-2.pdf>>. The test methods used in the MSW landfill rule call for separating carbon dioxide from NMOC. 40 C.F.R. Part 60, Appendix A (Method 25C); 61 Fed. Reg. at 9941.

Whether, and the extent to which, States are required to control emissions from landfills under Subpart Cc depends primarily on a source's NMOC emission rate, not on its emissions of methane or carbon dioxide. *See* 60 CFR § 60.33c (a), (e); 40 CFR § 60.752(b)(2).

The specific control options offered in both subparts Cc and WWW focus on control of NMOC emissions and do not assure control of carbon dioxide. *See* 40 CFR § 60.33c(c)(1)-(3), CFR § 60.752(b)(2)(iii)(A)-(C). Three control options are available: (1) flaring; (2) employing a control system designed and operated to reduce NMOC by weight by 98 percent; and (3) processing the gas for use as a fuel. *See* 40 CFR 60.752(b)(2)(iii). The second option does not require control of the carbon dioxide component, but rather requires control of the collective mix of NMOC from landfills, which is used as the surrogate of the single designated pollutant "MWS landfill emissions." *Id.* at 24475. While all of these control options have the effect of reducing overall MSW landfill emissions, they may actually increase secondary emissions of individual components of landfill gases. *See* 56 Fed. Reg. at 24472; Air Emissions from Municipal Solid Waste Landfills – Background Information for Final Standards and Guidelines, EPA-450/3-90-0011a (Chapters 4 and 6). Thus, the control options specified in the rule do not target each component of MSW landfill emissions.

Amicus overstates the significance of various EPA statements in the preambles to the MSW landfill rule which recognized that control of MSW landfill emissions would also reduce greenhouse gas emissions. The record does not reflect the MSW landfill regulations were motivated by climate change considerations, but rather that the Agency recognized reduction of greenhouse gases (primarily methane) was "an ancillary benefit

from regulating air emissions from MSW landfills.” 61 Fed. Reg. at 9917. The excerpts quoted by amicus show only that EPA was aware of the climate change related benefits of the NSPS, and that the Agency anticipated methane emissions would decrease as a result of the rule. With respect to carbon dioxide emissions, the most EPA said was that carbon dioxide increases would potentially be mitigated if sources chose to recover energy from landfill gas emissions rather than controlling these emissions by combustion in a flare. 56 Fed. Reg. at 24472. These Agency statements do not show that carbon dioxide is actually regulated by the NSPS, which is a separate question that can only be answered by looking at what the rule actually requires. The fact that EPA considered the ancillary benefits of reducing greenhouse gases does not undermine the clear statements elsewhere that the rule regulates a single designated pollutant – the composite pollutant called “MSW landfill emissions” – and not the individual components of the composite pollutant.

Finally, EPA specifically addressed the applicability of Clean Air Act permitting programs to MSW landfill emissions in the 1996 landfill rule. This rule established the PSD significant emissions rate for “municipal solid waste landfill emissions” which are “measured as nonmethane organic compounds.” 40 C.F.R. § 52.21(b)(23); 61 Fed. Reg. at 9918. The New Source Review Permits section of the preamble to the final landfill regulation discusses how “PSD rules now apply to all subject stationary sources which have increases in landfill gas above the significance level, 50 tpy or more of NMOC.” 61 Fed. Reg. at 9912. This portion of the preamble does not indicate that the PSD rules apply to emissions of one or more of the components of MSW landfill emissions from any type of stationary source. Furthermore, the subsequent discussion of Title V

applicability notes that sources below a certain design capacity are not subject to standards or required to put on emission controls but are subject to reporting requirements. However, EPA concluded that the reporting requirement alone did not make such source subject to regulation for the purposes of Part 70. Thus, this rule is fully consistent with EPA's view (reflected in the 1993 Wegman memorandum and applied in the PSD program) that reporting requirements do not make pollutants "subject to regulation."

Petitioners and Amici have not established that carbon dioxide is "subject to regulation" as a result of section 821 of the Clean Air Act Amendments or the landfill regulations at 40 C.F.R. Subpart Cc and WWW. The Board should uphold the actions of Region VIII in this case.

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Respectfully submitted,



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