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

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| In the matter of: | ) | |
| Deseret Power Electric Cooperative (Bonanza) | ) | PSD Appeal No. 07-03 |
| PSD Permit Number OU-000204.00 | ) | |

# SUPPLEMENTAL BRIEF OF AMICI CURIAE AMERICAN PETROLEUM INSTITUTE, AMERICAN CHEMISTRY COUNCIL, AMERICAN ROYALTY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION IN OPPOSITION TO PETITIONER'S OPENING BRIEF

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## INTRODUCTION

*Amici curiae* American Petroleum Institute, American Chemistry Council, American Royalty Council, Chamber of Commerce of the United States of America, National Association of Manufacturers, National Oilseed Processors Association, and National Petrochemical & Refiners Association ("*amici*") submit this brief in support of EPA and in response to the Board's June 16, 2008 order requesting supplemental briefing. The Board asked EPA to address two issues: (1) whether section 821 of Public Law 101-549 (the provision in the 1990 Clean Air Act Amendments law that authorized EPA to require monitoring and reporting of $CO_2$ emissions) is enforceable under the Clean Air Act, and (2) for the "purpose of understanding Congressional intent as to the scope of the permitting requirement for the PSD program (as opposed to the BACT requirement in particular)," whether a facility with the potential to emit 100 or 250 tons per year of carbon dioxide ("$CO_2$") "is a major emitting facility requiring a PSD permit" in light of the Supreme Court's decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

*Amici* support EPA's supplemental brief in response to the Board's June 16, 2008 order. *Amici* agree with EPA that the somewhat ambiguous authority provided in of section 821 of Public Law 101-549 for enforcing its $CO_2$ monitoring and reporting requirements does not in any way obviate Congress's

clear intention not to include EPA's authority to require $CO_2$ monitoring and reporting as an element of the Clean Air Act. *See* EPA Supplemental Brief at 8, 24; brief of these *amici* ("*Amici* Brief") at 9-11. *Amici* also agree with EPA that the definition of "major stationary source" or "major modification" is not before the Board and that, in any event, EPA's interpretation of that definition as limited to emissions of pollutants regulated under the Clean Air Act is reasonable. EPA Supplemental Brief at 25-26, 30-36. The only issue fro the Board is whether a PSD permit for a major modification of a source that emits $CO_2$ must include BACT limits for $CO_2$. *Amici* wish here to reinforce several of the points EPA made and to address the implications of the Board's two questions.

## ARGUMENT

### I. Regardless of the Authority for Enforcement of Section 821 of Public Law 101-549, $CO_2$ Is Not Currently "Regulated" Under the Clean Air Act.

*Amici* support the position of EPA and the permit applicant, that $CO_2$ does not fall within the category of "regulated NSR pollutants" for which a BACT determination is required. *See* EPA Supplemental Brief at 7-9. EPA has reasonably interpreted its regulations not to cover a pollutant, like $CO_2$, that is not currently subject to any limitations on its emissions under the CAA.

Based on the Board's June 16, 2008 order for supplemental briefing and

questions at the May 29, 2008 oral argument, it appears that the Board may be considering interpreting whether $CO_2$ is a "pollutant subject to regulation under" the CAA, a prerequisite for requiring application of BACT under 42 U.S.C. § 7475(a)(4), based on whether the failure to monitor and report $CO_2$ emissions as required by regulations issued under section 821 of Public Law 101-549 is subject to enforcement action under the CAA.[1] As *amici* explained in their initial brief, the Board should defer to EPA's interpretation of the CAA and the PSD regulations, as not making a pollutant "subject to regulation under" the CAA just because a source can be required to monitor for that pollutant. *See Amici* Brief at 7-9; *see also* EPA Supplemental Brief at 24 n.6.

Such an interpretation would be contrary to the ordinary, dictionary meaning of "regulate" and would in effect render the "subject to regulation under" the CAA criterion for imposing BACT a nullity. *Amici* Brief at 8-9; *see also Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1043 (9th Cir. 1996) (Tribal-State Compact defining "regulate" as "the *power to control* through statute, ordinance, administrator rule…" (emphasis added)). Indeed, the decision <u>whether</u> to regulate $CO_2$ was the subject of *Massachusetts v. EPA* and

[1] Regulation under the CAA similarly is a prerequisite for a BACT limit under EPA's PSD regulations, which specify that BACT is required for a "significant" net increase in emissions of a "regulated NSR pollutant," which EPA has defined in 40 C.F.R. § 52.21(b)(50). *See* 40 C.F.R. § 52.21(j)(3).

is what EPA must now consider upon remand. *See* 127 S. Ct. at 1459, 1462 ("EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies."), 1463 ("We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding."). The Supreme Court's determination that $CO_2$ fits within the CAA definition of "air pollutant" means that EPA can regulate its emissions, not that it already has. It is for the Administrator, not the Board, to respond to the remand and to make the decision about whether to regulate $CO_2$ emissions from motor vehicles under the CAA. EPA issued a comprehensive Advance Notice of Proposed Rulemaking that discusses in detail issues that EPA must consider (and that a number of Cabinet-level agencies believe EPA must consider) before deciding whether and how to regulate $CO_2$ emissions from motor vehicles and from other sources. 73 Fed. Reg. 44,354 (July 30, 2008). Additionally, states filing an *amicus* brief in support of Sierra Club in these proceedings have been arguing elsewhere that EPA has <u>not</u> regulated $CO_2$. *See Amici* Brief at 7 n.3.

Even if $CO_2$ monitoring and reporting requirements imposed pursuant to section 821 of Public Law 101-549 were enforceable under the CAA, that would not make $CO_2$ a pollutant regulated under the CAA, for two reasons.

First, as explained above, requiring a source to monitor and report on its emissions does not "regulate" that source's emissions; even if the authority to require monitoring and reporting and the enforcement authority were both contained in the CAA, that still would not make $CO_2$ a pollutant regulated under the CAA.

Secondly, the monitoring authority in section 821 is not a requirement imposed by the CAA,[2] and the ability to bring an enforcement action under another statute does not convert a regulatory provision into regulation under that other act. An analogous argument was made in *Smith v. Provident Bank*, 170 F.3d 609, 614-15 (6th Cir. 1999). In that case, the plaintiff sought to bring various state law claims against Provident Bank, as trustee of pension plans subject to the Employee Retirement Income Security Act ("ERISA"). The bank argued that those state-law claims were alternative means for seeking relief

[2] *See Amici* Brief") at 9-11; EPA March 21, 2008 Brief at 45-53. *See also* House Committee on Energy and Commerce, 107th Cong., 1st Session, Compilation of Selected Acts Within the Jurisdiction of the Committee on Energy and Commerce, As Amended Through December 31, 2000, Environmental Law Vol. 1, Comm. Print 107-H, at 435, 451-52, (Appendix to the Clean Air Act titled: "Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) that Did Not Amend the Clean Air Act,") available at http://energycommerce.house.gov/107/pubs/environ1.pdf (last visited 9/11/08). Additionally, it should be obvious that the fact that EPA or the Department of Justice may on occasion have used imprecise or sloppy language that suggested section 821 is part of the Clean Air Act could not trump the plain language of Public Law 101-549, in which Congress deliberately chose not to adopt section 821 as an amendment to the CAA.

provided by, and therefore were preempted by, ERISA. The plaintiff responded that the claims were not preempted, because of a "saving clause" in ERISA for "any law of any State which regulates insurance, banking, or securities." *Id*. at 614. The Court found that "the test for application of the saving clause is whether the law substantively regulates a relationship or merely provides alternative remedies for harms for which ERISA already provides redress." *Id*. at 615. Because the state law "does not regulate or define what constitutes a 'wrongful' transfer of a security but provides remedies for such a transfer," the Court found that the bank's conduct in question was regulated under ERISA and was not regulated under the state law. *Id*. Thus, by the same token, if violations of monitoring and reporting requirements imposed pursuant to section 821 of Public Law 101-549 are enforceable under the CAA, that does not mean that those CAA enforcement authorities, nor the monitoring and reporting provisions of section 821 of Public Law 101-549, constitute "regulation" of $CO_2$ under the CAA.

## II. The Board Lacks Jurisdiction To Consider Issues Concerning the Definition of Major Stationary Source and Major Modification.

The Board's June 16, 2008 order for supplemental briefing directed EPA to "address whether, under section 165(a) of the Clean Air Act..., a facility with the potential to emit at least the requisite number of tons per year… of carbon

dioxide is a major emitting facility requiring a PSD permit." The order specifically directed EPA to discuss the effect of *Massachusetts v. EPA* on the definition of "major emitting facility" in CAA section 169(1) and the "regulatory history" of EPA's position that the PSD regulations apply to a source which is "major" for a pollutant "regulated under" the CAA. The Board is seeking briefing from EPA on these issues for the "purpose of understanding Congressional intent as to the scope of the permitting requirement for the PSD program (as opposed to the BACT requirement in particular)…."

These issues are not properly before the Board. There is no question that the Bonanza PSD Permit addresses a modification that is "major," at a stationary source that is "major," because of its emissions of pollutants other than $CO_2$. No party argued otherwise. *See* EPA Supplemental Brief at 25. The issue before the Board is whether, in a permit for the major modification of a major stationary source, for which a PSD permit is required, the permit must include BACT limitations for the source's $CO_2$ emissions.

The Board has jurisdiction to review the issuance of a PSD permit, not to issue an advisory opinion on the meaning of portions of the PSD regulations and the PSD authority in the CAA which are not at issue for the particular PSD permit. *See* "The Environmental Appeals Board Practice Manual," June 2004, at 39 ("The EAB's jurisdiction under section 124.19(a) is limited to issues

related to the 'conditions' of the federal permit that are claimed to be erroneous.") It would be especially inappropriate for the Board to do so at a time when the Administrator is considering, with input from the public and other parts of the Executive Branch, how, if at all, the PSD regulations should apply to $CO_2$ emissions. *See* 73 Fed. Reg. at 44,400, 44,497-502.

As *amici* and EPA have noted, a determination that any new stationary source that emits more than 100 or 250 tons per year of $CO_2$ (depending on the type of source), or any major modification of such a source, requires a PSD permit before commencing construction would have huge implications for EPA, the states, the regulated community, and the public welfare generally. *See Amici* Brief at 15-20; EPA Supplemental Brief at 35-36. The number of facilities subject to the PSD permitting program, and the number of changes at such facilities that could require a PSD permit prior to construction, would be expanded dramatically. It would be particularly inappropriate for the Board to substitute its judgment for EPA's long-standing interpretation of the CAA, and usurp the Administrator's policy-making responsibility in considering how the PSD regulations may apply to $CO_2$ emissions in the future, on an issue with such huge potential impact.

Additionally, the Board, as well as any court reviewing a PSD permit, does not have authority to question the validity of EPA's PSD regulations, but

rather must take them as they are. Section 307(b)(1) of the CAA required any challenge to the PSD regulations, including the portions defining "major modification" and the criteria for imposing BACT in terms of emissions of pollutants regulated under the CAA, to be filed within 60 days after those regulations were published on December 31, 2002, 67 Fed. Reg. 80186, 80,275, 80,278. Courts have rejected attempts to challenge the PSD regulations collaterally later in the context of judicial review of an individual PSD permit:

> [Hawaiian Electric Co.] in effect challenges the validity as well as the application of 40 C.F.R. § 52.21(b)(2)(iii)(e)(1). Under 42 U.S.C. § 7607(b)(1), "[a]ny petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the *Federal Register*." This requirement has been upheld as a valid mechanism to prevent continual piecemeal attacks on the same EPA action. *See City of Seabrook, Tex. v. EPA*, 659 F.2d 1349, 1370 (5th Cir.1981), *cert. denied*, 459 U.S. 822, 103 S.Ct. 51, 74 L.Ed.2d 57 (1982). The final 1980 PSD regulations were published in the *Federal Register* on August 7, 1980. 45 *Fed.Reg.* 52,676 (1980). Time for review of 40 C.F.R. 52.21(b)(2)(iii)(e)(1) has long expired.

*Hawaiian Elec. Co., Inc. v. U.S. EPA*, 723 F.2d 1440, 1447 (9th Cir. 1984); *see also State of Maine v. Thomas*, 874 F.2d 883, 888 (1st Cir. 1989); *Motor Vehicle Manufacturers' Ass'n v. Costle*, 647 F.2d 675, 677 n.3 (6th Cir. 1981); *cf. U.S. v. Duke Energy Corp.*, 411 F.3d at 549 n.7 (4th Cir. 2005), *rev'd on other grounds sub nom. Environmental Defense v. Duke Energy Corp.*, 127 S.Ct. 1423, 1436 (2007).

Thus, "the scope of the permitting requirement for the PSD program (as opposed to the BACT requirement in particular)," Order at 4, to the extent it involves questions of EPA's basis for limiting the applicability of the PSD regulations to major stationary sources of those pollutants regulated under the CAA, is not an issue that the Board has jurisdiction to opine on even if it had been raised in this permit appeal. Nor is the "scope…of the BACT requirement in particular," to the extent the question is whether EPA regulations properly limit BACT to emissions of "NSR regulated pollutants." *See also, e.g., In re City of Port St. Joe and Florida Coast Paper Co.,* 7 E.A.D. 275, 286 (EAB 1997) ("A permit appeal proceeding is not the appropriate forum in which to challenge either the validity of Agency regulations or the policy judgments that underlie them.").

## CONCLUSION

For the reasons set forth above, *amici* urge the Board to deny the Sierra Club petition for review and uphold EPA's issuance of the Bonanza PSD Permit. In particular, the Board should not attempt to second-guess EPA's interpretation of the CAA and its PSD regulations, nor to opine on whether those regulations are consistent with the CAA, in the context of a challenge to the BACT conditions of an individual PSD permit for an admittedly major source. Questions about whether and how to regulate $CO_2$ emissions, and

whether and how to apply the PSD permit program to $CO_2$ emissions, are currently being considered by the Administrator and by Congress, and those are the proper venues for the development of policy with such wide-reaching ramifications.[3]

Respectfully submitted,

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[3] Indeed, the D.C. Circuit recently rejected an attempt to short-circuit that process and require EPA to issue an endangerment decision for $CO_2$ immediately. *Massachusetts v. EPA*, D.C. Cir. No. 03-1361, order of June 26, 2008.

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