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MONTANA EIGHTH JUDICIAL DISTRICT COURT

CASCADE COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER and CITIZENS FOR CLEAN ENERGY, Petitioners, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent, and SOUTHERN MONTANA ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC., Respondent-Intervenors.	Case No. DDV 08-820 **PETITIONERS' SUPPLEMENTAL BRIEF**

INTRODUCTION

Respondents in this case have relied on legal positions taken by the Environmental Protection Agency ("EPA") in an effort to persuade this Court that carbon dioxide ("CO_2") emissions are not subject to critically important pollution control requirements under the federal Clean Air Act and the Clean Air Act of Montana. However, EPA's final decision-maker has now held that none of these arguments can justify the failure to impose CO_2 emissions limits in a Prevention of Significant Deterioration ("PSD") air permit. The Environmental Appeals Board ("EAB") is the final arbiter of administrative appeals under all major environmental statutes that EPA administers, meaning that it has the last word on EPA's legal interpretation of the Clean Air Act. Respondents can no longer rely on EPA arguments that the agency's own administrative tribunal has now decisively rejected.

Over the past decade, EPA has sought to accommodate fossil-fuel industrial interests by refusing to acknowledge that there are any applicable legal constraints on CO_2 emissions from major polluters. Thus, EPA has invented several novel — and meritless — legal theories for excluding CO_2 from the PSD program's best available control technology ("BACT") requirements. EPA has argued that "subject to regulation" for purposes of BACT requirements refers to regulation in the form of actual control of emissions. It has argued that CO_2 monitoring and reporting requirements are not part of the Clean Air Act even though they were passed as part of the Clean Air Act Amendments of 1990 and codified in Part 40, Subchapter C of the Code of Federal Regulations along with all other implementing regulations of the Clean Air Act. Respondents have parroted each of these theories to this Court.

Now, however, these theories have been discredited by the agency itself. On November 13, 2008, the EAB issued a final decision rejecting every argument that EPA has ever advanced

to justify its refusal to enforce BACT requirements for CO_2, including the only arguments raised by Respondents in this proceeding.[1] See In re: Deseret Power Electric Cooperative, PSD Appeal No. 07-03, slip op. (E.A.B. Nov. 13, 2008) ("Deseret") (submitted with MEIC's Notice of Supplemental Authority, filed Nov. 25, 2008).

The EAB addressed the same question presented in this case: whether CO_2 is "subject to regulation" under the Clean Air Act, and therefore subject to BACT requirements. The EAB concluded that EPA's Region 8 failed to support its decision not to impose a BACT limit on CO_2 for the proposed Bonanza coal-fired power plant in Utah, and remanded the air quality permit to the agency. See id., slip op. at 63-64. The EAB further affirmed the original interpretation of "subject to regulation" that EPA published in the Federal Register in 1978—that is, pollutants are "subject to regulation" if they are regulated under the Code of Federal Regulations, Title 40, Subchapter C. Indeed, this is the only reading of "subject to regulation" that is consistent with the plain language of the statute.

Because CO_2 is currently subject to the Clean Air Act's implementing regulations, it is necessarily subject to BACT requirements. The EAB's decision dispenses with the arguments that DEQ and the Southern Montana Electric Generation and Transmission Cooperative, Inc. ("SME") have made to the contrary.

BACKGROUND

In Deseret, Sierra Club challenged EPA's issuance of a PSD permit authorizing the Deseret Power Electric Cooperative to construct a new waste-coal-fired unit at its existing

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[1] In seeking to justify the Montana Department of Environmental Quality's ("DEQ") failure to comply with BACT requirements for CO_2, Respondents rely almost exclusively on EPA's rationale for declining to impose CO_2 limits for the proposed Bonanza coal plant. The EAB's decision rejecting that same rationale and remanding the Bonanza PSD air permit is thus precisely on point.

Bonanza Power Plant in Utah. Sierra Club argued that EPA "violated [Clean Air Act] CAA sections 165(a)(4) and 169(3) by failing to apply 'BACT,' or best available control technology, to limit carbon dioxide ("CO_2") emissions from the facility." Deseret, slip op. at 1. EPA sought to defend its permitting decision on grounds that: (1) "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;" and (2) "the Part 75 regulations implementing section 821 of the 1990 Public Law are not 'under' the CAA within the meaning of CAA sections 165 and 169 because section 821 is not part of the CAA." Id. at 2.

The EAB categorically rejected both of these arguments. It found that EPA in 1978 "expressly interpreted 'subject to regulation under this Act' to mean 'any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type'" and that the agency had never withdrawn this interpretation in subsequent rule-makings. Id. at 3. It further "reject[ed] as not sustainable in this proceeding the Region's alternative argument – that any regulation arising out of section 821 cannot, in any event, constitute regulation 'under this Act' because section 821 is not part of the CAA." Id. at 4. Given these findings, there is no longer any EPA rationale in place that could possibly support the issuance of a PSD permit without BACT-determined emissions limits for CO_2.

With respect to the purely legal question whether CO_2 is "subject to regulation" under the plain language of the Clean Air Act, the EAB found that "the statute is not so clear and unequivocal as to preclude Agency interpretation of the phrase 'subject to regulation under this Act.'" Id. at 2. In this respect, the EAB's decision was wrong. The Clean Air Act's BACT provisions are not ambiguous. Because CO_2 is subject to monitoring and reporting requirements,

it is "subject to regulation" within the plain meaning of those words. On this question of statutory interpretation, this Court owes no deference to the EAB, an agency tribunal. See, e.g., American Bar Ass'n v. F.T.C., 430 F.3d 457, 468 (D.C. Cir. 2005) (holding that courts "owe the agency no deference on the existence of ambiguity" in a statute); see also Friends of the Chattahoochee v. Couch, No. 2008CV146398, slip op. at 7 (Ga. Super Ct. July 30, 2008) (finding that "there is no question that CO_2 is 'subject to regulation under the Act.'").

Based on the incorrect conclusion that EPA "has discretion under the statute to interpret the term 'subject to regulation under this Act,' the EAB remanded the Bonanza plant permit "for reconsideration of its conclusions regarding application of BACT to limit CO_2 emissions." Deseret, slip op. at 4. The EAB further invited EPA to "address[] the interpretation of the phrase 'subject to regulation under this Act' in the context of an action of nationwide scope." Id. at 5.

ARGUMENT

I. THE EAB AFFIRMED THAT BACT APPLIES TO ALL POLLUTANTS REGULATED UNDER CODE OF FEDERAL REGULATIONS, TITLE 40, SUBCHAPTER C

The EAB held that the only agency interpretation of "subject to regulation under this Act" that was entitled to judicial deference was contained in the 1978 Federal Register preamble to a final rulemaking implementing the Clean Air Act's PSD program. See Deseret, slip op. at 39 (EPA's interpretation "in the 1978 Federal Register also possesses the hallmarks of an Agency interpretation that courts would find worthy of deference"). The preamble to the 1978 PSD regulations states:

> Some questions have been raised regarding what "subject to regulation under this Act" means relative to BACT determinations. The Administrator believes that the proposed interpretation published on November 3, 1977, is correct and is today being made final. As mentioned in the proposal, "subject to regulation under this Act" means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type.

43 Fed. Reg. 26,388, 26,397 (June 19, 1978) (cited in Deseret, slip op. at 38) (emphasis added). Thus, to the extent this Court looks to EPA for guidance in interpreting the Clean Air Act, the EAB has confirmed that the only authoritative agency interpretation of "subject to regulation" that currently exists is the 1978 interpretation.

Under this interpretation, which tracks the plain language of the statute, CO_2 is "subject to regulation" for BACT purposes because it is regulated under Subchapter C of Title 40 of the Code of Federal Regulations. As EAB noted in Deseret, "[w]hen EPA issued regulations in 1993 implementing the 1990 Public Law and in particular section 821's CO_2 monitoring and reporting requirements, EPA did so by amending Subchapter C of Title 40 of the Code of Federal Regulations." Deseret, slip op. at 41. These regulations require that polluting facilities "measure … CO_2 emissions for each affected unit," 40 C.F.R. § 75.10(a), and they prohibit operation of such units "so as to discharge, or allow to be discharged, emissions of … CO_2 to the atmosphere without accounting for all such emissions," id. § 75.5(d). Failure to comply with any of the regulatory requirements relating to CO_2 constitutes "a violation" of the Clean Air Act. See id. § 75.5(a) (providing that "[a] violation of any applicable regulation in this part by the owners or operators or the designated representative of an affected source or an affected unit is a violation of the Act"). In light of these requirements, there is no doubt that CO_2 is currently regulated in keeping with EPA's 1978 interpretation of the unambiguous phrase "subject to regulation."

In its 1993 rulemaking to revise the PSD regulations, EPA did not withdraw its 1978 interpretation of "subject to regulation." See Deseret, slip op. at 42; see also Acid Rain Program: General Provisions and Permits, Allowance System, Continuous Emissions Monitoring, Excess Emissions and Administrative Appeals, 58 Fed. Reg. 3,590 (Jan. 11, 1993) (final rule revising

the Clean Air Act PSD regulations and implementing section 821's CO_2 monitoring and reporting requirements). Nor has any subsequent rulemaking, including the 2002 rulemaking cited by Respondents, disturbed the 1978 interpretation. See Deseret, slip op. at 3-4. Thus, the only existing EPA interpretation of the phrase "subject to regulation" in section 165(a)(4) of the Act affirms that BACT is required for CO_2 emissions because CO_2 is regulated under the Act's implementing regulations. 42 U.S.C. § 7465(a)(4); see also MEIC Op. Br. at 13.

II. THE EAB REJECTED EACH OF RESPONDENTS' ARGUMENTS THAT CO_2 IS NOT "SUBJECT TO REGULATION" FOR BACT PURPOSES

The EAB explicitly addressed — and rejected — Respondents' only arguments for why CO_2 is not subject to regulation under the Clean Air Act: (1) that EPA historically had defined the phrase "subject to regulation" to exclude CO_2; and (2) that section 821 of the 1990 Clean Air Act Amendments and its implementing regulations, which require monitoring and reporting of CO_2 emissions, are not part of the Clean Air Act. This Court should likewise reject Respondents' arguments and conclude that CO_2 is subject to regulation under the Clean Air Act.

A. The EAB Rejected The Argument That EPA Has Interpreted "Subject To Regulation" To Exclude CO_2

Ignoring the only agency interpretation of "subject to regulation" that EPA expressly finalized in 1978, Respondents in this case have argued that EPA's longstanding interpretation of the Act excludes CO_2 from the universe of pollutants "subject to regulation" for BACT purposes. In Deseret, EAB examined each of the EPA statements that Respondents have proffered in support of their position, and it rejected them in turn. See Deseret, slip op. at 35-49.

First, SME argues that the definition of "regulated NSR pollutant[s]" that EPA promulgated in 2002 does not extend to pollutants subject to monitoring and reporting requirements. See SME Br. at 8-9 (citing 40 C.F.R. § 52.21(b)(50)). According to SME, this

regulatory language suggests that “for CO_2 to be considered an NSR regulated pollutant, one of the following criteria must be met: (1) there be a National Ambient Air Quality Standards (‘NAAQS’) for CO_2 or that CO_2 be considered a precursor of a NAAQS pollutant; (2) there be a new source performance standard (‘NSPS’) under CO_2; (3) CO_2 be considered an ozone-depleting substance under Title VI; or (4) CO_2 otherwise be subject to regulation.” Id. (emphasis added). SME then goes on to assert that “CO_2 does not meet any of these criteria” because it is not subject to requirements that demand actual control of emissions. SME Br. at 8-9.

The EAB expressly rejected this argument, explaining that the definition of regulated NSR pollutant “says nothing about CO_2 specifically and the fourth part of the definition merely parrots the statutory language, requiring BACT for any pollutant that otherwise is subject to regulation under the Act. The regulatory text simply does not refer to actual control of emissions … .” Deseret, slip op. at 44 (internal quotations and citations omitted). Thus, the regulation “does not clearly articulate a definition limited to ‘actual control of emissions,’” as SME advocates. Id. at 43.

Respondents further point to the preamble to EPA’s 1978 rulemaking for the proposition that CO_2 is not subject to regulation. As discussed above, the preamble defines “pollutant subject to regulation” as “any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type.” 43 Fed. Reg. at 26,397. While CO_2 meets this definition in light of applicable monitoring and reporting requirements, DEQ and SME point out that the preamble identifies certain categories of pollutants that the definition “includes.” Id.; DEQ Br. at 4; SME Br. at 9. None of these categories, according to Respondents, encompasses CO_2. See DEQ Br. at 4; SME Br. at 9.

EAB rejected this argument, declining to find that EPA, in 1978, intended these pollutant categories to be exclusive. See Deseret, slip op. at 40. As explained by the EAB, the word "includes" normally introduces "an illustrative, and non-exclusive, list of pollutants subject to regulation under the Act." Id. (emphasis added). Thus, the mere fact that CO_2 does not fit into one of the categories of pollutants that EPA identified as subject to regulation in the 1978 preamble does not foreclose the prospect that CO_2 became "subject to regulation" after Congress passed the 1990 Clean Air Act amendments.[2]

Respondents also argue that EPA adopted an interpretation of "pollutant subject to regulation" that excluded CO_2 when, in 1996, EPA published a list of pollutants subject to BACT review that did not include CO_2. See DEQ Br. at 4-5; SME Br. at 9. DEQ further argues that a similar list published in 2002 included pollutants that "were subject to actual emission limitations … and the list did not include CO_2." DEQ Br. at 5.

Again, in Deseret, EAB expressly rejected these arguments. The EAB noted that the lists referenced by Respondents are found in preambles to 1996 and 2002 rulemakings that do not provide "any public notice of the interpretation the [EPA] now advocates." Deseret, slip op. at 47. The EAB further found no indication that the lists in the 1996 and 2002 Federal Register notices were "provided as an interpretation of the defined term 'regulated NSR pollutant.'" Id. at 48. Rather, the EAB clarified that the lists were included "under a general discussion of regulatory changes made to exclude hazardous air pollutants listed under CAA section 112 from

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[2] EAB stated that "the 1978 Federal Register preamble does not lend support to the [EPA's] conclusion that its authority was constrained by an historical Agency interpretation to apply BACT only to pollutants that are 'subject to a statutory or regulatory provision that requires actual control of emission of that pollutant.' Instead, the 1978 Federal Register notice augers in favor of a finding that, in 1978, the Agency interpreted 'subject to regulation under this Act' to mean 'any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type.'" Deseret, slip op. at 41 (quoting 43 Fed. Reg. at 26,397).

PSD review as required by the 1990 Public Law," and thus "cannot be viewed as indicating the Agency's interpretation of regulatory text." Id. Thus, the EAB held that "[n]either the 2002 preamble nor the 1996 preamble for the proposed rulemaking expressly withdrew the 1978 interpretation" and that "this rulemaking fails to establish or even support any binding historical interpretation" that would equate regulation with actual control of emissions." Id. at 4.[3]

In short, the EAB confirmed that EPA has never announced an authoritative interpretation of the phrase "pollutant subject to regulation" that would exclude CO_2. See also MEIC Reply Br. at 8-10. On the contrary, the agency's only express interpretation of the phrase — that all pollutants regulated under Subchapter C of Title 40 of the Code of Federal Regulations are "subject to regulation" — requires a determination that the Clean Air Act's PSD requirements apply to CO_2.

B. EAB Rejected The Argument That Section 821 Of The 1990 Clean Air Act Amendments And Its Implementing Regulations Are Not Part Of The Clean Air Act

Section 821(a) of the 1990 Clean Air Act Amendments directed EPA to promulgate regulations to require certain sources, including coal-fired power plants, to monitor CO_2 emissions and report monitoring data to EPA. 42 U.S.C. § 7651k note; 104 Stat. 2399, § 821. Accordingly, in 1993, EPA promulgated regulations to implement section 821 as part of the rules implementing the acid rain provisions of Title IV of the Act. These rules are Clean Air Act regulations codified in Subchapter C of Title 40 of the Code of Federal Regulations. See 40 C.F.R. Part 75.

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[3] The EAB also rejected the argument, raised by DEQ here, that In re North County Resource Recovery Ass'n, 2 E.A.D. 229 (E.A.B. 1986), supports a conclusion that CO_2 is not "subject to regulation." See DEQ Br. at 6. As the EAB explained, the North County case concluded that EPA lacks the authority to establish emissions limits in PSD permits for "unregulated pollutants," but it did "not answer the question of what 'pollutant subject to regulation' means." Deseret, slip op. at 36, n.38.

Like Respondents in this case, EPA in the Deseret proceedings argued that section 821 is not part of the Clean Air Act, but rather a free-floating provision of the 1990 Clean Air Act amendments that falls under another unidentified, statutory scheme. See Deseret, slip op. at 55; see also DEQ Br. at 10-11, SME Br. at 13. EAB dismissed this argument, observing that EPA had always "referred to section 821 of the 1990 Public Law as part of the [Clean Air Act]," including in the 1993 regulations implementing section 821.[4] Deseret, slip op. at 59. Further, EAB observed that EPA's numerous enforcement actions treated section 821's implementing regulations as part of the Clean Air Act. Id. at 59-60. Thus, EAB rejected EPA's argument "that regulations promulgated to satisfy Congress' direction set forth in section 821 of the 1990 Public Law are not 'under' the [Clean Air Act]." Id. at 63; see also MEIC Reply Br. at 2-5. This court should likewise reject Respondents' contention that section 821 and its implementing regulations are not part of the Clean Air Act.

In sum, EAB found that EPA could not justify its failure to impose BACT-determined emissions limits for CO_2. This court should find that the same arguments made by DEQ and SME in this case are equally unavailing.

III. IN LIGHT OF DESERET, EPA MUST EITHER DETERMINE THAT CO_2 IS "SUBJECT TO REGULATION" UNDER THE ACT, OR JUSTIFY A DECISION TO WITHDRAW ITS 1978 INTERPRETATION

The EAB ultimately stopped short of holding that CO_2 is necessarily "subject to regulation" under the Clean Air Act; but it also rejected all contrary interpretations that EPA advanced. The only relevant statutory "interpretation … made final" by EPA is its statement in

[4] EAB addressed the statutory construction and legislative history arguments that SME relies upon in the present case, and determined that EPA's "historical statements regarding section 821 preclude our acceptance of the interpretation the [EPA] now advocates." Deseret, slip op. at 58; see also SME Br. at 13.

the 1978 preamble that "'subject to regulation under this Act' means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type." 43 Fed. Reg. at 26,397. EPA has never altered or withdrawn this interpretation, nor has it adopted an interpretation that limits "regulation" for BACT purposes to actual control of emissions. See Deseret, slip op. at 35-54. While the EAB suggested that EPA can revisit this interpretation, for now, the 1978 rulemaking preamble provides the only relevant agency interpretation with the power to persuade. See Deseret, slip op. at 63-64; see also id. at 62 (noting that if EPA decides to change course, it "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") (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983)).

In order to exempt CO_2 from applicable BACT requirements in the wake of Deseret, EPA would have to develop some new rationale that it did not present to the EAB, and it would have to complete all necessary steps to formally adopt a new interpretation that is consistent with the Act. Further, any such interpretation would have to withstand judicial review. Given the plain meaning of "subject to regulation," the only possible conclusion that the agency can reach on remand from the Deseret decision is that CO_2 is a "pollutant subject to regulation" under the Act. 42 U.S.C. § 7475(a)(4).

IV. MONTANA'S CONSTITUTION REQUIRES AN INTERPRETATION OF THE CLEAN AIR ACT THAT LIMITS CO_2 EMISSIONS FROM COAL-FIRED POWER PLANTS

The Deseret decision holds that the Clean Air Act's language triggering BACT requirements for "any pollutant subject to regulation" is "broad enough to embrace different meanings." Deseret, slip op. at 31. MEIC maintains that the statutory language of the Clean Air Act and implementing state laws is clear and that BACT requirements must apply to CO_2.

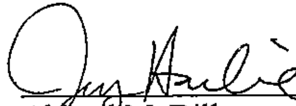
However, if this Court finds that the statutory language is ambiguous, the right to be free of unreasonable environmental degradation guaranteed in Montana's Constitution should inform this Court's determination of the most reasonable interpretation of the statutory language as applied to PSD permits issued for Montana facilities. See Mont. Const. art. II, § 3; see also MEIC Op. Br. at 7-8, 14-16.

The Montana Legislature identified the Clean Air Act of Montana as a means of fulfilling its constitutional duty to protect "the environmental life support system from degradation" due to air pollution. Mont. Code Ann. § 75-2-102(1). As discussed in Petitioners' opening brief, the pervasive impacts of global warming — which is driven in large part by CO_2 emissions from coal-fired power plants — undoubtedly will degrade Montana's "environmental life support system." See MEIC Op. Br. at 14-16. Thus, to the extent that DEQ's permitting obligations are unclear under the statute, Montana's Constitution calls for a determination that the Clean Air Act of Montana, which incorporates the federal Clean Air Act's definition of BACT, requires DEQ to limit CO_2 emissions from coal-fired power plants. See Broers v. Mont. Dept. of Revenue 237 Mont. 367, 372, 773 P.2d 320, 323-24 (1989) ("language may and should be construed in the light of the purposes of the legislation, especially a declared purpose and policy").

CONCLUSION

The EAB decision in Deseret strongly supports MEIC's contention in this case: that CO_2 is a pollutant subject to regulation and DEQ must therefore establish a CO_2 BACT emissions limit in the air quality permit for the Highwood Generating Station. For this reason, and the reasons set forth in MEIC's opening and reply briefs, MEIC respectfully requests that Air Quality Permit No. 3423-00 be invalidated and remanded to DEQ to establish BACT-determined emissions limits for the Highwood Generating Station's CO_2 emissions.

Respectfully submitted on this 11th day of December, 2008,



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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2008, I served a complete and accurate copy of Petitioners' Supplement Brief on the following persons by email pursuant to the Parties' Stipulation filed on August 25, 2008:

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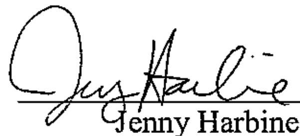

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