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

In the matter of:	)	
	)	
DESERET POWER ELECTRIC	)	PSD Appeal No. 07-03
COOPERATIVE	)	
PSD PERMIT NUMBER OU-000204.00	)	

BRIEF OF AMICI CURIAE COMPETITIVE ENTERPRISE INSTITUTE FREEDOMWORKS NATIONAL CENTER FOR PUBLIC POLICY RESEARCH AMERICAN CONSERVATIVE UNION AMERICAN LEGISLATIVE EXCHANGE COUNCIL AMERICANS FOR PROSPERITY FOUNDATION AMERICANS FOR TAX REFORM CITIZENS AGAINST GOVERNMENT WASTE CONGRESS OF RACIAL EQUALITY INDEPENDENT WOMEN'S FORUM FRONTIERS OF FREEDOM FOUNDATION NATIONAL CENTER FOR POLICY ANALYSIS NATIONAL TAXPAYERS UNION THE 60 PLUS ASSOCIATION

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Amici

Amici are as follows:

- The Competitive Enterprise is a non-profit public policy organization dedicated to advancing the principles of free enterprise and limited government.

- FreedomWorks is a nonprofit, nonpartisan organization with hundreds of thousands of members throughout the nation. One of its missions is to educate citizens on, and to promote the adoption of, free-market policies that inure to the benefit of consumers and citizens generally.

- The National Center for Public Policy Research is a communications and research foundation dedicated to providing free market solutions to today's public policy problems.

- The American Conservative Union is the nation's oldest and largest grassroots conservative lobbying organization.

- The American Legislative Exchange Council is an association of several hundred state legislators whose mission is to advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty, through a non-partisan, public-private partnership between America's state legislators and concerned members of the private sector, the federal government and the general public.

- The Americans for Prosperity Foundation is a national grassroots organization dedicated to educating citizens in support of limited government and free market principles on the local, state, and federal levels.

- Americans for Tax Reform is a non-profit organization that serves as a national clearinghouse for the grassroots taxpayers' movement by working with approximately 800 state and county level groups.

- Citizens Against Government Waste is a private, non-partisan, non-profit organization representing more than one million members and supporters nationwide. CAGW's mission is to eliminate waste, mismanagement, and inefficiency in the federal government.

- The Congress of Racial Equality (CORE) is the third oldest and one of the "Big Four" civil rights groups in the United States.

- The Frontiers of Freedom Institute is an educational institute (or think tank) whose mission is to promote conservative public policy.

- The Independent Women's Forum is a non-partisan, non-profit research and educational institution made up of all women scholars that educates women and society about issues affecting freedom, economic opportunity, and the rule of law.

- The National Center for Policy Analysis is a nonprofit, nonpartisan public policy research organization whose goal is to develop and promote private alternatives to government regulation and control, solving problems by relying on the strength of the competitive, entrepreneurial private sector.

- The National Taxpayers Union is a nonprofit, non-partisan citizen group with more than 350,000 members who work for lower taxes and smaller government at all levels.

- The 60 Plus Association is a nonpartisan organization working on issues of interest to senior citizens and calling on support from nearly 4.5 million citizen activists.

Introduction

What an astonishingly audacious position Petitioner and its supporters are asserting. They claim that carbon dioxide (CO_2) and perforce other greenhouse gases (GHGs) are presently subject to Prevention of Significant Deterioration (PSD) regulation ***even though EPA has not formally determined in a public process that CO_2 or other GHGs may reasonably be anticipated to endanger public health or welfare***. They have separately filed with EPA at least six formal demands for the Administrator to make a formal endangerment finding and regulate GHGs in different sectors of the economy, including on remand of *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).[1] Three of these demands were made in the last six months, and the *Massachusetts v. EPA* remand was only issued on September 14, 2007. Yet petitioner and its allies now ask the Board, within the context of a PSD permit appeal, to mandate GHG regulation under the PSD program without even waiting for the EPA Administrator to determine

[1] In addition to the remand in *Massachusetts v. EPA*, *see New York v. EPA*, No. 06-1322 (D.C. Cir. 2006) (remand from Court case seeking to review EPA's refusal to set new source performance standards for electric generating units and other large stationary sources); *Standards of Performance for Petroleum Refineries*; Proposed Rule, 72 Fed. Reg. 27178 (May 14, 2007), Comment by Environmental Integrity Project and the Sierra Club (August 7, 2007); *Petition for Rulemaking under the Clean Air Act to Reduce the Emission of Air Pollutants from Marine Shipping Vessels that Contribute to Global Climate Change* (Oct. 3, 2007), brought by Oceana, Friends of the Earth, Center for Biological Diversity and Earth Justice, and *Petition for Rulemaking Seeking the Regulation of Greenhouse Gas Emissions from Ocean-Going Vessels* (Oct. 3, 2007), brought by the State of California; *Petition for Rulemaking Seeking the Regulation of Greenhouse Gas Emissions from Nonroad Vehicles and Engines* (Jan. 29, 2008), brought by the States of California, Connecticut, Massachusetts, New Jersey and Oregon; and *Petition for Rulemaking under the Clean Air Act to reduce the Emission of Air Pollutants from Aircraft that Contribute to Global Climate Change* (Dec. 31, 2007), brought by Friends of the Earth, Oceana, NRDC and Earth Justice.

whether GHG emissions endanger public health or welfare – and without allowing the public to participate in a formal process to express views on this critical issue.

The effect of their position, if adopted by this Board, would reverberate across the economy. As discussed below, not only would large GHG-emitters be regulated under the PSD program, but hundreds of thousands of relatively small GHG-emitters would be regulated as well. And this would occur despite the fact that EPA has never formally determined through a public process that GHG emissions create public health or welfare danger.

Such an outcome would stand the Clean Air Act (CAA) – and indeed the theory of government regulation of any kind – on its head. The objective of the CAA is to "protect and enhance the quality of the Nation's air resources so as to promote public health and welfare and the productive capacity of its population."[2] Petitioner and its allies seek massive regulation untethered from this basic purpose. The Board should not be the vehicle for this absurd result. Without the predicate endangerment finding, the regulation Petitioner seeks is no more than regulation for regulation's sake. The Petition must be denied.

Argument

I. This Case Is About Much More than Just the Bonanza Project.

Ostensibly, this case was brought primarily to adjudicate whether EPA Region 8 should have established best available control technology (BACT) for CO_2 in the Bonanza Project PSD permit. But the case has far broader implications, as Petitioner and its allies well know and as the Board recognized in granting review for purposes of

[2] CAA § 101(b)(1). Parallel citations to the CAA are provided in the Table of Authorities.

allowing more extensive briefing. If, as Petitioner asserts, CO_2 is currently "subject to regulation" under CAA § 165(a)(4), then CO_2 and other GHGs are regulated "pollutants" under CAA § 169(1), which defines the term "major emitting facility" for purposes of triggering pre-construction PSD review requirements under CAA § 165. If GHGs are regulated "pollutants" for purposes of triggering CAA § 165, then any facility having the potential to emit (PTE) 100 tons per year (TPY) or more of GHGs (if it is in a category on the CAA § 165 list) or 250 TPY or more (if it is not), is subject to PSD regulation. New facilities with PTEs at or above those thresholds would be subject to PSD and BACT requirements. Existing facilities with PTEs at or above those thresholds that undergo a "major modification" increasing their GHG emissions by *any* amount would also be subject to PSD and BACT requirements, since EPA has not adopted "significance levels" for GHGs.[3]

The effect of this outcome would be staggering. While 100/250 TPY may be appropriate as a threshold for PSD regulation of traditional air pollutants, it is a minuscule amount of CO_2. Buildings of about 100,000 square feet, if they are heated by a furnace using fossil fuel (including oil or natural gas), likely produce CO_2 emissions in excess of 250 TPY, as do relatively small users of natural gas such as commercial kitchens that use natural gas for cooking, or businesses that use CO_2 naturally as a component of their operations. A very large number and variety of buildings and facilities exceed this threshold – including many office and apartment buildings; hotels; enclosed malls; large retail stores and warehouses; colleges, hospitals and large

[3] See 40 C.F.R. §§ 52.21(b)(2), (b)(23)(ii).

assisted living facilities;[4] large houses of worship; product pipelines; food processing facilities; large heated agricultural facilities; indoor sports arenas and other large public assembly buildings; restaurants; soda manufacturers; bakers, breweries and wineries; and many others. None of these types of sources has ever been subject to PSD permitting requirements before because they emit so little traditional air pollution; but they would be now if CO_2 is deemed to be a regulated CAA pollutant.

PSD permitting is an incredibly costly, time-consuming and burdensome process. The Bonanza unit took more than three years to permit at a likely cost of millions of dollars. If CO_2 were deemed to be a regulated CAA pollutant now, then just the administrative burden alone – putting aside any BACT or other requirements that would result from the permitting process – would create an overwhelming and unprecedented roadblock to new investment for a host of previously unregulated buildings and facilities. At the same time, state and federal PSD-permitting agencies are wholly unprepared for the flood of PSD permit applications that would ensue. These permitting agencies would either have to reassign scarce resources from other environmental programs to handle the permitting burden, resulting in a decline in environmental regulation in these other areas, or PSD permitting would becomes so backlogged as to effectively create a permitting moratorium.

At some time in the future, EPA may determine, after considering the endangerment and regulatory issues in a public process or processes, that GHG regulation under the CAA is appropriate, notwithstanding the PSD consequences.

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[4] Under CAA § 169(1), States may exempt non-profit health or education institutions from the PSD program. Absent such exemption, even non-profit hospitals, nursing homes, assisted living facilities and school buildings of more than about 100,000 square feet would be subject to PSD regulation if CO2 is deemed to be a regulated CAA pollutant.

Alternatively, Congress may step in and legislate a resolution. But for purposes of the Petition here, the Board must be aware of the stunning consequences of a decision in favor of Petitioner. The decision cannot and will not be limited to a single large CO_2-emitter, or even to large CO_2-emitters in general, but instead will have broad precedential effect. At issue is whether EPA will embark on extensive GHG regulation by administrative fiat, or whether EPA will first determine through a formal public process that regulation is justified by health and welfare concerns.

II. Massive Regulation Without a Publicly and Formally Determined Public Health or Welfare Purpose Would Make a Mockery of the Regulatory Process.

The arguments of Petitioner and its allies never confront the basic fallacy of their underlying position – that they seek implementation of a far-reaching GHG regulatory scheme without the Administrator first having decided through a formal public process that the regulation is justified by health or welfare needs. They make a string of arguments based on mere cleverness: that "subject to regulation" must mean potentially rather than actually subject to regulation; that monitoring and reporting under Section 821 of Pub. L. 101-549 constitutes "regulation"; that Section 821 is part of the CAA; etc. But as their chain of argument moves from link to link, they never step back to consider the fundamental absurdity of what they ask this Board to do, which is to mandate GHG regulation without a prior determination of the public health and welfare predicate.

In fact, the law does not authorize the Board to interpret the CAA § 165(a)(4) "subject to regulation" language divorced from the public health and welfare purposes of the statute, as Petitioner urges. Perhaps the most basic maxim of statutory construction

is that "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to *its object and policy*." *Crandon v. U.S.*, 494 U.S. 152, 158 (1990), *citing K Mart Corp. v. Carrier, Inc.*, 486 U.S. 281, 291 (1988) (emphasis supplied). As stated in *Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006), '[i]nterpretation of a word or phrase depends upon reading the *whole* statutory text, *considering the purpose and context of the statute*...." (Emphasis supplied.) *See also Holloway v. U.S.*, 526 U.S. 1, 6 (1999) ("[i]n considering the statute at issue, 'we consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme,'" *quoting Bailey v. United States*, 516 U.S. 137, 145 (1995)).

Petitioner's interpretation of the phrase "subject to regulation" cannot meet this standard. EPA must have a reason to regulate that is grounded in the CAA purpose to protect the public. For this reason, the phrase 'subject to regulation" must be interpreted as Deseret urges – as "subject to an emission limitation." Otherwise, Deseret and hundreds of thousands of other sources will be subject to GHG regulation without a public health or welfare reason.

As explained in its brief, Deseret's reading of the phrase "subject to regulation" comports with the language's literal meaning. But even if that phrase has the literal meaning Petitioner ascribes, Petitioner nevertheless cannot prevail here, because that meaning is so antithetical to the statutory purpose of regulating to protect health and welfare. As numerous courts have explained, the necessity of interpreting statutory language in accordance with the purpose of the statute as a whole is so strong that

courts will disregard literal meaning in order to avoid a result demonstrably at odds with the statutory scheme. In the oft-quoted words of Judge Learned Hand:

> Of course it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable, source of interpreting the meaning of any writing.... But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.[5]

Relying on this principle, the United States Court of Appeals for the District of Columbia Circuit has stated that "Courts are not helpless captives when a literal application of statutory language would subvert a regulatory scheme." *Buffalo Crushed Stone, Inc. v. Surface Transportation Board*, 194 F.3d 125, 129 (D.C. Circuit 1999). According to the Court, where a conflict exists between literal meaning and Congressional intent, "it is appropriate to consider the purpose of the disputed provision and to construe the text accordingly. *Id.* Put more bluntly, "[w]hile the plain language of the statute is an important guide, 'manifest intent prevails over the letter.'" *U.S. v. Stewart*, 104 F.3d 1377, 1388 D.C. Cir. 1997), *quoting In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991). As the Court said, "courts will not attribute to Congress the intent to bring about an anomalous result." *Id.*

Thus, applying a statute in conformance with its intent is the touchstone of statutory construction. Yet not once in all of their extensive briefing does Petitioner or its allies offer an explanation as to how massive regulation without an endangerment finding could possibly comport with Congressional intent in the CAA. The closest they

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[5] *Cabell v. Markham*, 148 F.2d 737, 738 (2d Cir. 1945).

come is their argument that by determining that GHGs are CAA "air pollutants," the Court in *Massachusetts v. EPA* changed the regulatory landscape and "compel[led] EPA to rethink entirely its statutory obligations."[6] But *Massachusetts v. EPA* in no way provides justification for PSD regulation of GHGs here; indeed, just the opposite is the case. As Petitioner states, the Supreme Court indeed found that GHGs qualify as GHG "air pollutants," but only because it found that the CAA definition of "air pollutant" is "sweeping" and "embraces all airborne compounds of whatever stripe." *Massachusetts v. EPA*, 127 S. Ct. at 1460. Petitioner fails to point out that the Court also found that defining GHGs as CAA "air pollutants" has no regulatory consequence. According to the Court, for EPA to regulate, it must first find a danger to public health or welfare. *Id.* at 1459. As the Court said, the statute "condition[s] the exercise of EPA's authority on the formation of a 'judgment,' 42 U.S.C. § 7521(a)(1), [and] *that judgment must relate to whether an air pollutant 'cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare*...." *Id.* at 1462 (emphasis supplied).

Indeed, the *Massachusetts v. EPA* petitioners, which included the Petitioner and its state allies here, specifically disavowed the contention that defining GHGs as CAA "air pollutants" would trigger regulatory consequences. Petitioners told the Court on brief that:

> At the first step in the process, section 202(a)(1) directs the EPA Administrator's attention to the questions whether "any air pollutant" from new motor vehicles or new motor vehicle engines "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare." *If "in his judgment" (42 U.S.C. § 7521(a)(1), this*

[6] Petitioners' Brief at 10.

> *so-called "endangerment standard" is met, then the obligation to regulate is triggered.*[7]

Petitioners were clear during oral argument as to what they were asking the Court to do and what they weren't:

> *We are not asking the Court to pass judgment on the science of climate change or to order EPA to set emission standards.* We simply want EPA to visit the rulemaking petition based upon permissible considerations.[8]

Yet these same entities now seek to convince the Board that the Supreme Court's decision, without EPA making an endangerment finding, can be relied on as a source of authority for massive regulation. It as if they view their litigation and regulatory strategy as a giant game of "gotcha," first arguing to the Court that they are not seeking a determination that EPA must regulate absent an endangerment finding and then citing the Court decision here to argue that regulation without such a finding is required. Petitioner and its allies, however, had it right in their Court argument: the Court's finding that GHGs are CAA "air pollutants" does not trigger regulation until and unless an endangerment finding is made.

III. This Board Cannot Supply the Missing Endangerment Finding.

Perhaps the strategy of Petitioner and its allies is to either have the Board make the endangerment finding for the Administrator or to assume endangerment. Although Petitioner does not make this argument in its brief, amici Dr. James E. Hansen and

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[7] *Massachusetts v. EPA,* Petition for Writ of Certiorari at 5 (March 2, 2006) (emphasis supplied).
[8] *Massachusetts v. EPA*, No. 05-1120, Supreme Court Oral Argument Transcript at 4 (November 29, 2006) (emphasis supplied) (emphasis supplied).

Physicians for Social Responsibility urge the Board to overturn the permit based on their conception of greenhouse science.

That the Board cannot supply the missing endangerment finding should go without saying. Endangerment was not part of the petition in this case,[9] and, in any event, this Board does not have authority to exercise the Administrator's authority to make an endangerment finding. The Administrator must exercise that authority himself pursuant to rulemaking. Petitioner and its state allies appear to recognize this fact, as their requests to EPA to make an endangerment finding and to regulate GHGs have all been in the context of rulemaking petitions or pending rulemakings.[10]

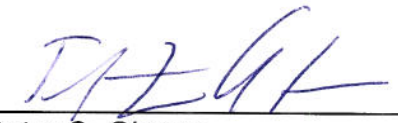
In sum, Petitioner and its allies may be frustrated by the fact that the Administrator has not made an endangerment finding and they may feel that the Administrator has no choice but to do so. But they cannot expect this Board to effectively usurp the Administrator's authority, either by making the endangerment finding itself or by assuming endangerment in the absence of such a finding.

Conclusion

The Petition must be denied.

Dated: March 21, 2008

Respectfully submitted,



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[9] *See* Environmental Appeals Board Practice Manual at 39 ("The EAB does not have authority to rule on matters that are outside the permit process," citing cases).
[10] *See* n. 1, *infra*.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Amici Curiae in the matter of Deseret Power Electric Cooperative, PSD Appeal No. 07-03, were sent to the following persons by first class mail.

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