

## Response to Comments

**Background:** EPA held two public comment periods on the proposed re-issuance of the prevention of significant deterioration (PSD) permit for Deseret Generation and Transmission Cooperative's (DG&T's) Bonanza electrical power plant. The first public comment period began on May 19, 2000, and ended on July 5, 2000. EPA inadvertently omitted a condition for sulfur dioxide (SO<sub>2</sub>) removal efficiency from the proposed permit. EPA re-noticed for public comment a proposed PSD permit that included the SO<sub>2</sub> removal efficiency requirement on September 19, 2000. The second public comment period ended on October 31, 2000. EPA stated that comments submitted in the first comment period would be considered by the Agency in its decision making process, and that they need not be resubmitted.

DG&T provided comments on July 5, 2000, and on October 25, 2000. In its October 25, 2000, letter, DG&T asserted that it was incorporating the earlier comments it made on July 5, 2000.

EPA received comments on the proposed PSD permitting action from O. Roland McCook, Sr., Chairman of the Ute Indian Tribe, on July 20, 2000, and from Tod J. Smith and Robert S. Thompson III, attorneys for the Tribe, on August 30, 2000.

### I. Jurisdiction

1. **Comment:** In its July 5, 2000 letter, DG&T commented that EPA was re-issuing the PSD permit to DG&T based on "an interim ruling" by the U.S. Court of Appeals for the Tenth Circuit in *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10<sup>th</sup> Cr. 1997). DG&T commented:

... [i]n light of the Supreme Court ruling in *Hagen v. Utah*, 510 U.S. 399 (1994), there exists strong reason to believe that the Bonanza Unit I site would *not* be included in the diminished boundaries of the Uncompahgre Reservation, thereby mooting the entire permit Reissuance presently underway. . . . Deseret maintains its belief that the plant is not within such diminished or de-established boundaries.

DG&T added that it was formally requesting further consideration by EPA "as to the propriety" of permit re-issuance in light of the Supreme Court's decision in *Hagen*.

**Response:** EPA believes there is a firm basis for asserting federal jurisdiction over DG&T's Bonanza power plant. In *Ute Indian Tribe v. Utah* (also called *Ute Indian Tribe V*), the Tenth Circuit ruled on the issue of the jurisdictional status of what is commonly referred to as the Uncompahgre portion of the Uintah and Ouray Reservation. It is not contested that the Bonanza power plant is located in this portion of the Reservation. The Tenth Circuit held that the entirety of the Uncompahgre portion of the Reservation remains Indian country as defined at 18 U.S.C. § 1151. *See, Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1528-29. In so holding, the Tenth Circuit

declined the State of Utah's request that the court reconsider its earlier determination regarding the Uncompahgre section in light of the Supreme Court's 1994 decision in *Hagen v. Utah*. See *id.* The Supreme Court subsequently denied a Petition for Certiorari to review the Tenth Circuit's decision in *Ute Indian Tribe v. Utah*. See, *Duchesne County v. Ute Indian Tribe*, 522 U.S. 1107, 140 L. Ed. 2d 101, 118 S.Ct. 1034 (1998). Accordingly, the legal status of the Uintah and Ouray Reservation is that, although certain portions of what is known as the Uintah Valley Reservation have been diminished, the entirety of the Uncompahgre portion remains Indian country and is subject to federal Clean Air Act permitting authority.

**2. Comment:** DG&T commented that an agreement between the State of Utah and the Ute Indian Tribe transfers "putative" jurisdiction over the power plant from the Tribe back to the State. DG&T stated that, pursuant to the agreement with the State, the Tribe "has agreed not to exercise jurisdiction over non-Indians and non-Tribal enterprises located within the disputed or otherwise unresolved reservation boundaries, which Deseret believes includes the Bonanza Unit I site."

**Response:** The comment refers to a Memorandum of Agreement between the State of Utah and the Ute Indian Tribe concerning certain jurisdictional issues between the two governments. EPA does not believe that this Memorandum of Agreement affects the EPA's authority to regulate the Bonanza power plant. EPA was not a party to the agreement, and the agreement does not address the exercise of federal authority within the Reservation boundaries. EPA's re-issuance of the PSD permit to DG&T is based upon federal authority and does not involve tribal authority over the facility. Thus, EPA does not need to interpret the Memorandum of Agreement at this time. Consistent with the law of the Tenth Circuit, the Uncompahgre portion of the Reservation, including the site of DG&T's Bonanza power plant is Indian country and thus subject to federal jurisdiction.<sup>1</sup>

**3. Comment:** Chairman McCook of the Ute Indian Tribe commented:

It appears to the Tribe, given the fact that the Bonanza Power Plant is within Indian country as defined at 18 U. S. C. § 1151, EPA is legally required to assert federal permitting jurisdiction over the Bonanza facility and other regulated facilities within the Uncompahgre Reservation.

The Tribe, therefore, agrees with the EPA's assessment of the issue and does not object to EPA's proceeding with the reissuance of a PSD permit for the Bonanza Power Plant.

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<sup>1</sup> The State of Utah withdrew its proposed Title IV and Title V Clean Air Act permits for the facility in December 1997. EPA issued an acid rain permit to DG&T under Title IV of the Act in November 1997, and will be issuing an operating permit to DG&T under Title V of the Act in the near future.

**Response:** EPA agrees that the Bonanza power plant is located within Indian country and that EPA has authority to re-issue the PSD permit.

## **II. More Stringent Standards**

**Comment:** In its July 5, 2000 letter, DG&T expressed a general concern that EPA was seeking to impose stricter emission standards than had been imposed by the State in state approval orders. DG&T commented that the only action that is warranted or legally permissible here is to "reissue without substantive change the Existing Permits."

**Response:** Generally, EPA has authority pursuant to section 165 of the Clean Air Act, 42 U.S.C. § 7465, to determine the best available control technology ("BACT") requirements which a major new source or major modification subject to PSD must meet. EPA made the original BACT determination for DG&T's Bonanza power plant in February 1981, when we issued the original PSD permit for this source. EPA has implicit authority to review a BACT analysis and to revise and re-issue a PSD permit to account for subsequent changes at the source.

For this permit re-issuance, we reviewed information provided by DG&T about the performance of the Bonanza power plant, as well as information about other, similar electric power plants in the region. On the basis of our review, we proposed a slightly more stringent limitation on SO<sub>2</sub> from Bonanza Unit 1 than the limitation in the State permits. As discussed in section III, below, the final permit does not contain the more stringent limitation. We also proposed to include more requirements for control of fugitive emissions, in addition to the fugitive emission control requirements of the original PSD permit. Those requirements, which are part of the final permit, are discussed in section IV below.

EPA is not performing a "ministerial" function in re-issuing the federal PSD permit for this source. As the permitting agency, EPA is not limited to incorporating the conditions of the state permits "without substantive change" into the federal permit and, in fact, has no authority to do so. Our authority to issue PSD permits and to re-issue PSD permits with revised or additional requirements is derived solely from section 165 of the Clean Air Act. To facilitate the PSD permit re-issuance process for DG&T, we did rely in part on work performed by the State. The Fact Sheet discusses our approach, which was to simplify and streamline the permitting process by utilizing the State's technical analyses.

## **III. SO<sub>2</sub> Emission Limits**

1. **Comment:** DG&T objected to the slight increase in stringency of the emission limit for SO<sub>2</sub> from 0.15 lbs/MMBTU heat input based on a 30-day rolling average, established in the March 16, 1998, state approval order, to 0.14 lbs/MMBTU heat input based on a 30-day rolling average, in the proposed EPA PSD permit. DG&T stated, "EPA has proffered no justifiable reason to ignore

fuel characteristics data identifying the coals reserve components which, according to the BACT analysis submitted to and accepted by USEPA, effectively mandate the continuation of the Existing Permit limits.”

**Response:** In our technical judgment, the Bonanza plant appears capable of achieving 0.14 lbs of SO<sub>2</sub> per MMBTU of heat input as averaged over 30 days, which is slightly lower than the 0.15 lbs. per MMBTU that the State of Utah established in its revised approval order issued in 1998, but considerably less stringent than the limitation of 418 lbs. per hour (the equivalent of 0.052 lbs. per MMBTU) that EPA originally established in 1981. If we were to impose the emission limitations in effect under prior permits, as DG&T requests in its comments, we would impose the 0.052 lbs. per MMBTU limit from the original EPA PSD permit.

EPA was aware of the concern DG&T had about the sulfur content of coal reserves and discussed this and other issues related to the SO<sub>2</sub> limit, beginning on page 18 of the Fact Sheet. We stated that although sulfur content in coal could increase, as of 1997 it had remained nearly the same for more than a decade. Nevertheless, we acknowledge DG&T's concern about the slightly more stringent emission limit for SO<sub>2</sub>. Because there is not a significant difference between the emission limit we proposed and the emission limit the State established in 1998 and because we believe, as demonstrated by DG&T's modeling analyses and the State's supplemental BACT determination, that the 1998 limit will continue to protect both the NAAQS and the PSD increments, EPA agrees to change Condition 25 B to a 0.15 lbs per MMBTU SO<sub>2</sub> emission limit based on a 30-day rolling average. We have deleted the paragraph on page 3 in the Introduction of the September 12, 2000, draft permit beginning with "For SO<sub>2</sub> emission limits, ..." in the final permit to make the Introduction and the permit conform.

2. **Comment:** In its July 5, 2000, letter, DG&T expressed concern about EPA's inclusion of a 90 percent SO<sub>2</sub> removal efficiency requirement in the re-issued PSD permit. DG&T asserts that the appropriate "federal standard, as applied to Bonanza Unit 1, should be based on a 70% removal requirement at 40 CFR § 60.43a(a)(2)."

**Response:** The permit that we first proposed and noticed for public review and comment did not include the 90 percent SO<sub>2</sub> removal efficiency requirement; that requirement was inadvertently omitted from the permit. For this reason, we re-proposed the permit to include the 90 percent control efficiency standard and re-opened the public comment period. In addition to the 90 percent removal efficiency requirement, which is now included in Condition 25, Condition 17 contains a requirement of 70 percent SO<sub>2</sub> removal efficiency based on the heat input of the coal. The 70 percent removal efficiency requirement is derived from the New Source Performance Standards (NSPS) for coal-fired electric power plants, 40 C.F.R. part 60, subpart Da. We added the applicable NSPS requirements to the re-issued PSD permit in response to

DG&T's request. This less stringent NSPS limitation, however, cannot supersede a more stringent limitation that was determined as BACT.

The original PSD permit issued to DG&T by EPA on February 4, 1981, includes Condition III.1(a), which requires a 90 percent SO<sub>2</sub> removal efficiency "averaged over 30 successive boiler operating days . . ." This standard is part of EPA's original BACT determination for control of SO<sub>2</sub> emissions from the source; it is clearly more restrictive than the 70 percent NSPS standard. We have re-written the 90 percent condition (Condition 25) to read: "The Permittee must achieve at least 90% SO<sub>2</sub> removal efficiency based on a 30-day rolling average," to make the requirement more effectively enforceable. In addition to being the original BACT determination for SO<sub>2</sub> removal efficiency, the 90 percent standard is the same limitation DG&T has been meeting under the most recent, March 16, 1998, state approval order. Some previous state approval orders included an even more stringent standard of 93.8 percent, which was relaxed back to the original 90 percent level in 1995. Thus the 90 percent standard in the re-issued permit does not reflect a change from the current state permit.

In summary, EPA believes that the 90 percent SO<sub>2</sub> removal efficiency based on a 30-day rolling average, the 0.15 lbs/MMBTU emission limit based on a 30-day rolling average, and the annual SO<sub>2</sub> emission limit of 0.0976 lbs/MMBTU are all protective of the NAAQS as well as Class I and Class II increments, and also satisfy the BACT requirement of PSD. The administrative record for nearly 20 years supports this conclusion.

#### **IV. Fugitive Emissions**

**Comment:** DG&T commented that the requirement that fugitive dust not exceed 20 percent opacity is derived from the Utah state implementation plan (SIP) and that EPA lacks authority to impose this limit in the PSD permit. DG&T stated:

USEPA cannot now provide any statistical, empirical, regulatory, legal, or other basis for selecting the proposed 20% limit on fugitive emissions . . . there exists no equivalent or corresponding federal limit on fugitive emissions.

**Response:** DG&T is incorrect in stating that the 20 percent limit on opacity of fugitive emissions – or other fugitive emission controls in Part E ("BACT for Roads and Fugitive Emissions") of the re-issued federal permit -- was derived from the Utah SIP, or that the limit has no basis in federal law or regulation. The 20 percent opacity limit comes directly from the original BACT determination and the original PSD permit issued by EPA in 1981. The only difference is that, in the re-issued permit, the opacity limit extends to the coal storage pile, whereas the 1981 federal PSD permit excluded the coal storage pile from this requirement. Section III (7) of the 1981 permit provides:

The emission control equipment presented in the application for handling the coal, limestone, and ash shall be utilized, and the owner shall not cause to be discharged into the atmosphere fugitive emissions from any portion of the operation, excluding the outside coal storage pile, which exhibit 20 percent opacity or greater.

The "emission control equipment presented in the application" is found in Part V of DG&T's permit application for the 1981 permit. The controls DG&T proposed included equipment requirements for conveyors and various dust control measures to reduce fugitive emissions from materials handling, coal storage, and paved and unpaved roads. In the application DG&T stated, "These systems all represent the Best Available Control Technology."

EPA accepted DG&T's proposed fugitive emission controls when we issued the original PSD permit in 1981. We also imposed a 20 percent opacity limit on all activities except the coal storage pile, as part of EPA's BACT determination at that time. All these fugitive emission controls have their basis in the federal statutory and regulatory mandate that all PSD sources must apply BACT to control emissions. See section 165 of the Clean Air Act (42 U.S.C. § 7465) and 40 C.F.R. § 52.21. The BACT mandate will be discussed in greater detail below.

EPA's original 1981 BACT determination for fugitive emission control was carried forward in the state permits. The most recent state permit, the 1998 approval order, includes the requirements for enclosed conveyors and baghouses, similar requirements for controlling fugitive dust from unpaved roads and unpaved operational areas, and similar requirements for spraying to control fugitive emissions from the coal storage pile. The 1998 state approval order also contained additional fugitive emission control requirements: controlling dust by spraying emissions from coal dumping operations, limiting the size of the coal pile, and applying the 20 percent opacity limitation to emissions from the coal pile. The state approval order also required DG&T to keep records of spraying and other fugitive emission control practices.

In the re-issued federal PSD permit, we are supplementing the original BACT determination for fugitive emissions at the power plant to include the additional control requirements described above. We believe DG&T is able to meet, and has been meeting, the additional control requirements, including the 20 percent opacity limit on emissions from the coal storage pile. In addition, Condition 36 of the re-issued permit requires DG&T to develop a fugitive emissions dust control plan, which allows the source flexibility in developing site-specific dust control procedures. Other conditions related to fugitive emissions control also allow flexibility, by requiring DG&T to use water sprayers only if "the 20% opacity level is in jeopardy of being exceeded" and if weather conditions allow (*e.g.*, temperatures are above freezing).

The authority for adding the additional control requirements and extending the 20 percent opacity limit to the coal storage pile is not the Utah SIP, as the comment suggests, but the PSD mandate to establish BACT for control of all emissions. A 20 percent opacity limit is typical of BACT determinations for fugitive emissions; by extending the limit to the coal storage pile, the federal permit will be more protective of national ambient air quality standards (NAAQS) and PSD increments for particulate matter

The BACT mandate is found in Section 165(a)(4) of the Clean Air Act, 42 U.S.C. § 7465(a)(4), which requires that a facility subject to PSD must meet BACT requirements for "each pollutant subject to regulation under this chapter." The statute does not make a distinction between stack emissions and fugitive emissions. In the *Alabama Power* decision, the D.C. Circuit Court of Appeals made clear that BACT must be applied to fugitive emissions as well as to stack emissions: "The terms of section 165, which detail the preconstruction review and permit requirements for each new or modified 'major emitting facility,' apply with equal force to fugitive emissions and emissions from industrial point sources." See *Alabama Power Co. v. Costle*, 636 F.2d 323, 369 (D.C. Cir. 1979). See also the preamble to the PSD regulations, 45 Fed. Reg. 52676, 52691 (August 7, 1980), in which EPA stated that "even if fugitive emissions remain excluded from threshold calculations, section 165 requires that fugitive emissions be taken into account in determinations of whether NAAQS or allowable increments will be violated (section 165(a)(3)) and that fugitive emissions be subjected to BACT requirements (section 165(a)(4))."<sup>2</sup>

EPA applies the mandate to limit fugitive emissions by imposing BACT on fugitive emissions in all PSD permitting actions, including administrative permit appeals. See, e.g., *In the matter of: Hawaiian Commercial and Sugar Company*, PSD Appeal No. 92-1, order of the U.S. EPA Environmental Review Board, 4 Environmental Appeals Decisions (E.A.D.) 85 (July 20, 1992) (discussing the adequacy of BACT requirements to prevent fugitive dust from producing visible emissions beyond the plant boundary).

EPA's PSD regulations define BACT as being required "for each pollutant subject to regulation under the Act that [the source] would have the potential to emit in significant amounts." See 40 C.F.R. § 52.21(j). Fugitive emissions at DG&T's facility consist of particulate matter, primarily dust. The significant level for particulate matter is established at 15 tons per year of PM<sub>10</sub>. See 40 C.F.R. § 52.21(b)(23). Because the Bonanza power plant has the potential to emit more than 15 tons per year of PM<sub>10</sub>, BACT must be applied to all particulate matter emissions from the facility, including fugitive dust. The fact that there is no equivalent NSPS or other federal regulatory standard for fugitive emissions from power plants is not relevant. The only difference that having

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<sup>2</sup>A power plant like DG&T's Bonanza plant is a "listed source" and must include fugitive emissions in threshold calculations of PSD applicability. See 40 C.F.R. § 52.21(b)(1)(iii). For DG&T's facility, therefore, the statement that fugitive emissions are subjected to BACT requirements is unqualified and arguably even stronger than it would be for an unlisted source that need not count fugitive emissions in determining whether or not the source is major.

an applicable NSPS standard would make would be to set a floor below which a BACT limit could not go. See section 165(a)(4) of the Act, 42 U.S.C. § 7465(a)(4). The permitting agency still must establish a BACT limit that it determines to be equivalent to the "maximum degree of reduction" achievable by the facility.

The maximum degree of reduction of fugitive emission control for DG&T was established in 1981 by the original federal PSD permit. This level of reduction was supplemented over the next seventeen years by state approval orders. The supplemental requirements can be achieved by DG&T. We believe it would not be appropriate to supplement and revise the BACT requirements for SO<sub>2</sub> in accordance with the current state permit and not at the same time supplement the BACT requirements for fugitive emissions. By including the 20 percent limit on fugitive emissions from the coal storage pile, we have also made the federal permit similar to the most recent state permit.

## V. Other

1. **Comment:** In its October 25, 2000 letter, DG&T objected to Condition 24 E, "Opacity Measurement." The proposed condition would have required that the source use Method 9 during visible light to conduct opacity measurements when the Continuous Opacity Monitor in 24 D is inoperative. DG&T states that there is no federal requirement for this condition and that it was not included in the state approval order.

**Response:** EPA accepts this comment. Condition 24E was not part of the original federal PSD permit, not was it included in any of the state approval orders. We believe the condition is reasonable, but agree to remove it from the final PSD permit.

2. **Comment:** DG&T "seeks relief from all requirements contained in the draft permit that were not contained in the original PSD permit or the latest approval order (DAQE-186-98), and that have no corresponding federal regulation, as set forth in this response."

**Response:** This comment is too general, lacks specificity, and is subject to varying interpretations. We find it difficult to determine which, if any, requirements would meet these criteria and therefore are unable to address the comment.