

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

## 1 APPEARANCES:

2 On behalf of Christian County Generation:

3 JAMES H. RUSSELL, ESQUIRE

Winston &amp; Strawn, LLP

4 35 West Wacker Drive

Chicago, Illinois 60601-9703

5 (312) 558-5700

6 On behalf of Environmental Protection Agency:

7 BRIAN L. DOSTER, ESQUIRE

Office of General Counsel

8 U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, NW

9 Room 7340 ARN; MC-2344A

Washington, D.C. 20460

10 (202) 564-1932

## 11 ALSO PRESENT:

12 BRUCE NILLES

Sierra Club, Midwest Office

13 122 West Washington Avenue, Suite 830

Madison, Wisconsin 53703

14 (608) 257-4994

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1 P R O C E E D I N G S

2 CLERK: All rise. This hearing is  
3 now in session for oral argument, in re:  
4 Christian County Generation, Permit  
5 No. 021060ABC, PSD Appeal No. 07-01.

6 The Honorable Judges, Anna Wolgast,  
7 Ed Reich, Kathie Stein, presiding.

8 Please be seated.

9 JUDGE REICH: Good morning. We're  
10 hearing a oral argument this morning in the  
11 matter of Christian County Generation, a PSD  
12 permit appeal, pursuant to the Board's order  
13 of September 25, 2007, as amended on  
14 October 15, 2007, and we'll proceed as  
15 follows:

16 Sierra Club has been allocated 40  
17 minutes for its argument, and it may reserve  
18 up to 10 minutes of that time for rebuttal.

19 Christian County Generation is  
20 allocated 30 minutes, and EPA's Office of Air  
21 and Radiation, as represented by EPA's Office  
22 of General Counsel, and appearing at the

1 Board's request, will have 20 minutes for its  
2 argument.

3 Then Sierra Club may use its  
4 reserve time, if any, for rebuttal.

5 Regrettably, the Board was notified  
6 by fax from Robb Layman, Assistant Counsel,  
7 Illinois Environmental Protection Agency on  
8 October 12th, that the Illinois EPA would not  
9 be able to participate in this argument due  
10 to unresolved issues of legal representation  
11 between the Illinois EPA and the Illinois  
12 Attorney General's Office.

13 In response to this development,  
14 the time allocated to Christian County  
15 Generation, which is aligned with the  
16 Illinois EPA, although their arguments may  
17 not be identical in all respects, was  
18 increased to 30 minutes as previously noted.

19 Let me also note primarily that the  
20 Board understands that IEPA, as well as  
21 Christian County Generation, have argued that  
22 the issues and arguments raised in the Sierra

1 Club petition were not preserved for review.  
2 Sierra Club, not surprisingly, disputes that  
3 assertion. I'd like to emphasize the fact  
4 that the Board that is hearing the argument  
5 on these issues does not reflect any  
6 determination either way as to whether the  
7 issues and arguments were preserved and are  
8 thus properly before the Board.

9 Indeed, I expect the question of  
10 whether the issues and arguments were  
11 preserved will likely be part of the argument  
12 we have this morning. I would note further  
13 that since the scheduling of this argument,  
14 Sierra Club filed on October 9 a reply brief,  
15 which the Board accepted by order of  
16 October 16.

17 As part of this reply brief, Sierra  
18 Club withdrew its collateral impacts analysis  
19 claim. Thus, that issue is no longer before  
20 the Board and will form no part of this  
21 morning's argument.

22 Finally, I would note that on

1 October 15, Christian County Generation filed  
2 a letter requesting permission to discuss  
3 three documents during this argument. In the  
4 same order accepting the petitioner's reply  
5 brief, the Board granted Christian County  
6 Generation's request in part, and denied it  
7 in part.

8 Without a lot of preamble, I would  
9 like to begin by asking counsel to state  
10 their names for the record and whom they  
11 represent, in the order in which they will be  
12 arguing, beginning with Sierra Club.

13 MR. NILLES: Good morning. Bruce  
14 Nilles on behalf of the Sierra Club.

15 JUDGE REICH: Thank you,  
16 Mr. Nilles. CCG.

17 MR. RUSSELL: Good morning. Jim  
18 Russell, Christian County Generation.

19 MR. DOSTER: Good morning. Brian  
20 Doster, EPA Office of General Counsel, Air  
21 and Radiation Law Office, on behalf of the  
22 Office of Air and Radiation.

1 JUDGE REICH: Thank you, gentlemen.  
2 Mr. Nilles, you can proceed, and please, let  
3 us know upfront if you're reserving time for  
4 rebuttal.

5 MR. NILLES: Thank you. Good  
6 morning. Again, Bruce Nilles, on behalf of  
7 petitioner Sierra Club, and at the outset, I  
8 would like to reserve 10 minutes for  
9 rebuttal, if that would be okay.

10 JUDGE REICH: Okay, fine.

11 MR. NILLES: What I'd like to do  
12 this morning is give a quick overview of the  
13 context of this case, and then turn quickly  
14 to the two central legal issues in this  
15 matter.

16 First of all, as the Court  
17 indicated, did Sierra Club waive the right to  
18 raise the question of carbon dioxide BACT  
19 limit in this proceeding?

20 Secondly, does the word  
21 "regulation" in the term subject to  
22 regulation in Section 165 have its ordinary

1 meaning and encompass the acid rain Title IV  
2 regulations, or does it have an alternate  
3 meaning.

4 Looking at this project, Christian  
5 County is proposing to build a large power  
6 plant with the primary fuel of Illinois coal.  
7 Without any carbon dioxide controls, that  
8 plant will emit, if constructed as proposed,  
9 about 4 million tons of carbon dioxide a  
10 year. That's the equivalent of about 700,000  
11 new cars in Illinois every year for the next  
12 50 years.

13 And unlike cars which may last 7 to  
14 10 years on average, this coal plant, of  
15 course, will last for about 50 years based on  
16 the experience of other similar power plants.

17 That's about 200 million tons of  
18 carbon dioxide over the next 50 years. And  
19 it's not being permitted in a vacuum.  
20 According to the October 2007 report from the  
21 Department of Energy, there are approximately  
22 90 new coal-fired power plants, or power



1 plants using coal proposed in the United  
2 States currently either in the permitting  
3 process today or right behind in the planning  
4 and application process.

5           The consequence if we build all  
6 these power plants -- and not a single one of  
7 them is proposing at this point to do  
8 anything about its carbon dioxide  
9 emissions -- it would be an enormous increase  
10 in carbon dioxide at a time when we are  
11 wrestling with how do we solve the challenge  
12 of global warming.

13           As we lay out on our reply brief,  
14 there are some very simple things that can be  
15 done to a power plant to minimize its carbon  
16 dioxide emissions, increase the efficiency;  
17 use of clean fuels, particularly including  
18 biomass, combined heat and power, co-locating  
19 this power plant with another industrial  
20 process, such as an ethanol plant  
21 dramatically increases the efficiency and  
22 minimizes the carbon emissions, and lastly,

1 as the EPA itself has noted in recent  
2 comments on a draft environmental impact  
3 statement, carbon capture and storage may  
4 offer -- help with about up to 90 percent  
5 carbon control.

6 Now, all these power plants are  
7 moving through the permitting process,  
8 including Christian County. If we wait until  
9 they're built and then try to come back and  
10 retrofit them and do something about carbon,  
11 it can be either infeasible or  
12 extraordinarily expensive. The power plant's  
13 not located in the right place to be  
14 co-located with an industrial process so that  
15 we can use combined heat and power -- it  
16 simply won't happen.

17 It's not designed to use  
18 alternative fuels, cleaner fuels, including  
19 co-firing with biomass, and it may be for all  
20 intents and purposes impossible to come back  
21 and solve that problem later.

22 So from the public policy

1 perspective, addressing this problem upfront  
2 makes an enormous amount of sense and should  
3 be done in this case.

4 Turning to the legal issues, which  
5 of course are more important for today's  
6 review -- turning to the issue of waiver.

7 Respondents argue that Sierra Club  
8 did not raise the issue of carbon dioxide  
9 BACT emission limits during the public  
10 comment period.

11 As a technical matter, that is  
12 correct. However, the Board's rules and this  
13 case is -- do not hold that all issues have  
14 to be unequivocally raised in all  
15 proceedings. The test this Board has laid  
16 out both in the rules and in its case law is  
17 that only issues that were reasonably  
18 ascertainable -- and there may be good cause  
19 in some limited circumstances to not raise an  
20 issue.

21 Sierra Club did raise the --

22 JUDGE REICH: That's interesting,

1 because I think that's the first time that I  
2 remember you mentioning good cause in  
3 addition to not being reasonably  
4 ascertainable. Are you saying that you have  
5 an independent good cause argument, and have  
6 you made that before?

7 MR. NILLES: The reply brief lays  
8 out the reasonably ascertainable --

9 JUDGE REICH: All right.

10 MR. NILLES: Within that rubric, we  
11 would argue there is that good cause --

12 JUDGE REICH: Uh-huh.

13 MR. NILLES: Opportunity in the  
14 very narrow circumstances with the facts  
15 presented as they are here today.

16 JUDGE REICH: Uh-huh.

17 MR. NILLES: It is not as if Sierra  
18 Club didn't raise this issue. We were  
19 intimately involved in this permit process.

20 On January 11, 2007, during the  
21 public comment period at the Taylorville High  
22 School, Sierra Club volunteer staff attended,

1 raised questions and testified we have to do  
2 something about global warming, there are  
3 ways to minimize global warming, the Agency  
4 should raise -- should address this issue,  
5 and -- in this permit proceeding.

6 In the public comments that were  
7 filed a month later in February -- 17 pages  
8 of single-spaced comments, half of those  
9 comments talk about the science of global  
10 warming and identify four specific ways the  
11 Agency could address carbon dioxide  
12 emissions, including consideration under the  
13 Endangered Species Act, setting regulations  
14 for carbon dioxide on its own consideration  
15 on the collateral impacts and under  
16 165(a)(2), under the Alternatives Analysis.

17 JUDGE REICH: At the time you were  
18 providing these comments, what was the status  
19 of the case before the Supreme Court -- the  
20 Massachusetts case? Was it already before  
21 them and had it been argued?

22 MR. NILLES: I believe it had been

1 argued.

2 JUDGE REICH: You believe it had.

3 So at that point, basically you and everybody  
4 else was in a posture of waiting for a  
5 decision on the case that had been argued?

6 MR. NILLES: That is correct.

7 JUDGE REICH: Recognizing that the  
8 Supreme Court took that case -- recognizing  
9 that you were still waiting for a decision,  
10 did you not recognize that there was a  
11 possibility that the Supreme Court was going  
12 to rule in favor of the arguments you made?

13 MR. NILLES: That was obviously a  
14 possibility and an outcome we were hoping  
15 for, which is why we argued it.

16 JUDGE REICH: So this is not a  
17 circumstance -- and I can envision  
18 conceivably that these circumstances, but  
19 this is not a circumstance where the legal  
20 picture changed because there was some  
21 decision by a court that really nobody was  
22 anticipating and established a wholly

1 different test or something else.

2           This is what it seems to me,  
3 basically an issue to which -- assuming I  
4 reach the merits, there were only two issues,  
5 yes or no on the question whether it's a  
6 pollutant, and had some confidence that there  
7 was a possibility that they would understand,  
8 as they indeed said, yes, it's a pollutant,  
9 and yet you didn't even think that it was  
10 worth making the argument, if not only to  
11 avoid this -- the issue of preservation that  
12 we're dealing with right now?

13           MR. NILLES: In January and  
14 February of 2007, we were dealing with the  
15 legal framework that was before us in  
16 Illinois, and even today, Illinois EPA argues  
17 that Massachusetts EPA does have no bearing  
18 on this case. So the situation we were  
19 dealing with in January and February was a  
20 framework under which Illinois EPA had in  
21 prior permitting proceedings said we have no  
22 authority to address carbon dioxide under any

1 circumstance.

2 EPA had taken position it was not a  
3 pollutant, and the only court that had  
4 reviewed this issue to date, the D.C.  
5 Circuit, hadn't even found that there was  
6 standing for Petitioners to raise this.

7 JUDGE REICH: On the subject to  
8 regulation issue, Illinois now is controlled  
9 by the federal regs, not the EPA regulations.  
10 To the extent that you have this argument  
11 about acid rain, you wouldn't have had that  
12 irrespective of what Illinois thought about  
13 its own regulations.

14 MR. NILLES: But we still have to  
15 overcome the hurdle of is it a pollutant.

16 JUDGE REICH: Right. And that  
17 issue was -- clearly an open issue pending a  
18 decision. I mean, you knew where the Agency  
19 was coming from, but you knew that there was  
20 going to be a decision and there was a  
21 significant possibility that that decision  
22 was going to come down in a way that



1 supported your position, and yet you still  
2 didn't think it worthwhile to make that  
3 argument?

4 I mean, I can't -- I find it  
5 difficult to think you only make arguments  
6 that you know that the person you're making  
7 them to agree with. You know, at times you  
8 must make arguments knowing they may not  
9 agree with it, but it sets the pattern for a  
10 further appeal or other developments.

11 It's just -- as I said, I can see  
12 circumstances where something comes out of  
13 left field. This one seems like it was a  
14 very focused issue that was one that was not  
15 resolved because, notwithstanding the  
16 position of the Agency, the Supreme Court had  
17 taken the case and the Supreme Court was  
18 going to issue a decision on it.

19 And I think that's a context that  
20 you need to consider when dealing with  
21 reasonably ascertainable.

22 MR. NILLES: Again, Your Honor, the

1    comments and the testimony that was filed in  
2    this proceeding was using the framework, and  
3    it was the legal framework that was in place  
4    back in the early part of this year.

5                   IEPA still didn't agree with the  
6    comments we made, but at least it was in the  
7    framework that they had laid out for the  
8    years before, and that was the framework  
9    within which we're operating. And also the  
10   significance of the Supreme Court ruling; it  
11   was one of the most sweeping, emphatic  
12   decisions about carbon dioxide and global  
13   warming -- very serious issues, the Agency  
14   cannot ignore it. And the emphatic language  
15   it uses to establish standing for the State  
16   of Massachusetts swept away the whole  
17   framework that had been in place prior to  
18   April 2, 2007.

19                   JUDGE REICH: Can I see it, because  
20   I didn't anything in the record that after  
21   the Massachusetts decision but before the  
22   permit was issued, you never contacted

1 Illinois and asked them to reopen the comment  
2 period, or reconsider the draft permit in  
3 light of the Massachusetts decision? I'm not  
4 saying you have a legal obligation to do  
5 that, but I do want to confirm that there's  
6 nothing there that is in the record that  
7 suggests that you did that.

8 MR. NILLES: That is correct, Your  
9 Honor. We were not aware of any procedure in  
10 the Court's rules or 124 or otherwise for us  
11 to do that. That is correct.

12 JUDGE REICH: Well, definitely, the  
13 permit wasn't yet issued, so it really --

14 MR. NILLES: Okay.

15 JUDGE WOLGAST: Do you agree that  
16 it's your burden to show that this issue  
17 could not have been reasonably ascertained?

18 MR. NILLES: We believe it's a  
19 legal matter. It's the Agency's obligation  
20 to establish BACT for CO2, regardless of what  
21 we do. And then in the question of should we  
22 have raised it, I think it's fair to say that

1    this office -- these are unique  
2    circumstances, are very narrow circumstance  
3    with -- the exception would apply, and at the  
4    end of the day, I'm not sure if the Board has  
5    ever determined whose burden that would be.

6               Given the facts in this case, it  
7    would seem that given that Sierra Club had  
8    raised the issue of CO2, the decision came  
9    down, there is a good argument to be made  
10   that it was on the permitting agency to  
11   reopen the permit at that point, and to  
12   consider the fact that the landscape had  
13   changed. So I guess, in conclusion, the  
14   burden would be on -- I'm not sure there  
15   would be a burden if this is a strict legal  
16   question.

17              JUDGE STEIN: Mr. Nilles, you  
18   mentioned that this was a narrow  
19   circumstance. And assuming we were to agree  
20   with you if this issue was not reasonably  
21   ascertainable, I am interested in  
22   understanding what that would mean as a

1 practical matter. Does that mean that every  
2 time an appellate court or a court reverses a  
3 lower court on a legal issue, that the permit  
4 proceeding gets reopened? I mean, I was  
5 hoping you could help explain to me how broad  
6 or how narrow a ruling that would be?

7 MR. NILLES: The facts in this case  
8 are that the legal framework changed between  
9 the close of the comment period and the  
10 issuance of the permit.

11 JUDGE REICH: Doesn't that depend  
12 on how you define a legal framework? I mean,  
13 the act was the same. Nothing changed. I'm  
14 sure in your view the world was the same  
15 other than the fact that the Supreme Court  
16 told the Agency its interpretation was wrong.  
17 But I mean, there was not intervening change  
18 in the law --

19 MR. NILLES: That's correct.

20 JUDGE REICH: Other than correcting  
21 a misunderstanding that EPA apparently had.

22 MR. NILLES: That's correct. But

1 in this case, the permit wasn't final. So to  
2 answer your question specifically, we are  
3 arguing today that the narrow issue is that  
4 the permit is not yet final, as it was not in  
5 this case, because the Agency hadn't issued  
6 the final permit. Under those circumstances,  
7 if there is a change in the legal framework  
8 such as a Supreme Court putting aside the  
9 prevailing agency position about the  
10 controlling law, under those facts, that's  
11 the narrow exception that we're referring to  
12 today.

13 JUDGE REICH: In terms of not  
14 contacting the state after the Massachusetts  
15 decision, did your thought to the fact that,  
16 as you seem to recognize in your reply brief,  
17 that the arguments that you had actually made  
18 them in that proceeding to date were are all  
19 based on the assumption that it was an  
20 unregulated pollutant, and therefore it  
21 wasn't just a question of where are we  
22 looking at.

1           It was a question of the fact that  
2   while you had argued to that point, it no  
3   longer seemed to be a correct interpretation  
4   of the law. Did you not think about the fact  
5   that they were reacting at that point to  
6   comments that really no longer reflected your  
7   position of what the law was?

8           MR. NILLES: Again, there's -- the  
9   Agency, if the onus was on anyone to reopen  
10   because of the change in the legal framework,  
11   it would be on the Agency. I'm not aware of  
12   any procedures for us to, after the public  
13   comment process is closed, but before the  
14   issue, before the permit is closed -- before  
15   the permit is issued, to petition the Agency  
16   or do something at that point.

17           JUDGE REICH: Okay.

18           JUDGE STEIN: How many permits  
19   under your theory of what is reasonably  
20   ascertainable, in that whenever there is a  
21   change in the law, that all of these  
22   proceedings need to be opened -- do you have

1 any idea how many permits potentially are  
2 affected by your view of what constitutes  
3 reasonably ascertainable? And I realize this  
4 question may perhaps be more appropriately  
5 directed to the Agency. But given that you  
6 comment frequently on these coal-fired power  
7 plants, how many permits are we talking  
8 about?

9 MR. NILLES: In that narrow window  
10 between the close of the comment period and  
11 the issuance of the final permit, I'm not  
12 aware of any other proceeding I can think of  
13 where some legal framework of this magnitude  
14 was changed in the intervening period. So  
15 I'm not aware of, for example -- so, I'm  
16 not -- the answer is zero.

17 JUDGE STEIN: I am troubled by the  
18 breadth of the notion that you describe, in  
19 the sense that these permit proceedings are  
20 lengthy proceedings, sometimes taking years.  
21 And then suddenly there's a court decision  
22 where you're not merely looking at a



1 brand-new test that wasn't anticipated,  
2 you're looking at a change in position. And  
3 now we are suddenly talking about going back  
4 to square one on potentially a host of  
5 permits for the construction that are pending  
6 around the country.

7 And I'm not arguing for the  
8 environmental ramifications that you're  
9 pointing out, but from a practical  
10 perspective, I think that it's not an  
11 insignificant consideration.

12 MR. NILLES: Again, Your Honor, we  
13 are not -- the permits that are still in the  
14 public comment process today, we are raising  
15 this issue. So there is no ambiguity on  
16 those. What we are dealing with is that very  
17 narrow window where something as significant  
18 as a Supreme Court ruling happens between the  
19 close of the comment period and the issuance  
20 of the permit. So that's a very, very narrow  
21 slice of time. It's not years; it's  
22 literally weeks or potentially a couple of

1 three months. And that's what we are dealing  
2 with. And again --

3 JUDGE STEIN: Any change in the law  
4 classifies under your view of what's  
5 reasonably ascertainable?

6 MR. NILLES: That's not what we're  
7 arguing, Your Honor. What we're dealing  
8 with -- we can imagine there's something that  
9 may be insignificant, but here we're dealing  
10 with a fundamental question about the largest  
11 pollutant being emitted from the source, the  
12 legal status, legal framework, for how that  
13 pollutant is regulated was changed in that  
14 intervening period between --

15 JUDGE STEIN: It was determined to  
16 be a pollutant.

17 MR. NILLES: Correct.

18 JUDGE STEIN: But you mentioned you  
19 were going to talk about why in fact that  
20 translated since it being a regulated  
21 pollutant. So I'd be interested in hearing  
22 your arguments on that point.

1 MR. NILLES: Okay.

2 JUDGE REICH: Okay. Let me just  
3 make sure that we're prepared to move on to  
4 the substance of the issue. Okay. Why don't  
5 we address the substance of the issue.

6 MR. NILLES: Right before we leave  
7 that, obviously, we're asking the Court to  
8 remand this permit. But as the Court noticed  
9 in its opening comments, there is another  
10 permit proceeding right behind this involving  
11 Deseret, and I believe also a ConocoPhillips  
12 PSD permit appeal raising this very same  
13 issue.

14 And so I would urge, if this Court  
15 is weighing whether or not to address this  
16 question, and the waiver issue is  
17 recognized -- and the issue is coming at some  
18 point very shortly -- again from a policy  
19 perspective, it's not only in PSD-delegated  
20 states where Agency is the permitting Agency  
21 wrestling with this issue, there are 90  
22 permit proceedings out there in the permit

1 pipeline that are going to have to address  
2 what do we do about CO2. And the sooner we  
3 get some resolution of this, obviously, the  
4 greater clarity for all the parties involved,  
5 both the regulatees and the regulators.

6           Turning to the question of whether  
7 carbon dioxide is a pollutant subject to  
8 regulation. The statutory framework in this  
9 case is very simple. In 1977, Congress  
10 amended the Clean Air Act to add the PSD  
11 program, and used the language BACT is  
12 required for any pollutant "subject to  
13 regulation." And to ensure that it was clear  
14 as to what it was meaning, at Section 169,  
15 the definition of BACT again uses that very  
16 same language, "subject to regulation."

17           Thirteen years later, 1990,  
18 Congress again amended the Clean Air Act, and  
19 in that case specifically ordered EPA to  
20 adopt regulations under Title IV of the Acid  
21 Rain laws requiring monitoring,  
22 recordkeeping, and reporting of carbon

1     dioxide emissions from power plants.

2                     If it intended to exclude carbon  
3     dioxide from the PSD definition, Congress  
4     obviously knew explicitly how to do that. In  
5     1991, when it added carbon dioxide  
6     requirements, it also added a whole suite of  
7     requirements under the Hazardous Air  
8     Pollutant Section 112 requirements, and  
9     explicitly excluded Section 112 pollutants  
10    from the PSD program. It did not do so for  
11    carbon dioxide.

12                    JUDGE REICH: There is a  
13    distinction -- you may not see it as a  
14    legally significant distinction, but there is  
15    a distinction between pollutants subject to  
16    Hazardous Air Pollutant regulations which  
17    clearly do establish emission limitations for  
18    those pollutants, and acid rain CO2  
19    requirement, which is a monitoring  
20    requirement?

21                    MR. NILLES: Your Honor, you used  
22    the exact term that the Congress used in the

1 statute when it intended to mean actual  
2 control. Emission standard and limitation  
3 has a very specific meaning, and it's the  
4 meaning that EPA put forward as to what  
5 regulation means.

6 JUDGE REICH: I understand that  
7 argument. I'm suggesting that CO2 may not  
8 have been viewed in parallel with hazardous  
9 air pollutants when they were dealing with  
10 our regulation.

11 MR. NILLES: We would point out  
12 that, or offer that, when Congress used the  
13 word "regulation," there is no indication  
14 that it meant to mean anything other than the  
15 generic usual commonsense notion of  
16 regulation. It used it in 1977, it used in  
17 1990. And there was no indication at all  
18 that Congress meant to prescribe or narrow  
19 the definition of regulation of 1990, and  
20 exclude monitoring, reporting, and  
21 recordkeeping requirements.

22 Illinois EPA in their brief tries

1 to make the argument that somehow those  
2 regulations are diminutive regulations. And  
3 of course, if we look at the history of  
4 environmental protection, reporting  
5 requirements, monitoring requirements, are  
6 some of the most successful regulations we  
7 have had in the United States over the last  
8 30 years, toxic release inventory being the  
9 best example. And again --

10 JUDGE REICH: Let me ask about the  
11 2002 Rhein Act (?) which is discussed in your  
12 reply brief. You cite to language that lists  
13 certain pollutants and indicate that because  
14 that's prefaced by "such as," that indicates  
15 that it's not an exhaustive list, and we  
16 should look at it that way. And by that I  
17 see you're looking at the language at the  
18 bottom of 80239 -- it's the language quoted  
19 in your brief.

20 I'll give you a chance to pull that  
21 out.

22 MR. NILLES: Okay.

1 JUDGE REICH: Do you have it?  
2 Okay, but what I'm curious about is, when you  
3 proceed to 80240, where the Agency says the  
4 following pollutants currently regulated  
5 under the Act are subject to federal PSD  
6 review, there's a listing of pollutants that  
7 does not include CO2. And I don't see any  
8 language here comparable to the "such as"  
9 language that suggests that this is anything  
10 other than a complete list. And I'm  
11 wondering how you reconcile that.

12 MR. NILLES: Your Honor, the bigger  
13 issue in the 2002 regulations is, when EPA  
14 issued those final regulations, it was taking  
15 what had been proposed back in 1996 and very  
16 explicitly identified it wasn't addressing  
17 all the 1996 rulemaking issues, it was  
18 limiting it exclusively to five specific  
19 issues that it was going to be adopting in  
20 2002.

21 There is no mention of carbon  
22 dioxide. There is no discussion about



1 narrowing the definition of "regulated  
2 pollutant" to exclude carbon dioxide. And  
3 it's sort of an implicit argument that  
4 somehow this preamble, because it doesn't  
5 talk about CO2, meant to explain the Agency  
6 making a dramatic change in the framework,  
7 and excluding carbon dioxide.

8 JUDGE REICH: So the issue is -- so  
9 you think the five issues you referenced  
10 discussed every one of the pollutants that  
11 are listed on this list?

12 MR. NILLES: It did not, Your  
13 Honor. It was changing the PSD program, and  
14 there was no indication that they were  
15 changing the definition of regulated  
16 pollutant into --

17 JUDGE REICH: But I mean, if they  
18 had a list and it listed pollutants that  
19 weren't relevant for the purposes of the five  
20 issues you talked about, then why would it  
21 not have listed CO2 as well?

22 MR. NILLES: Your Honor, it's not

1 clear why they didn't list CO2. But if we  
2 look at the actual regulation that was  
3 adopted in 2002 and the definition of "NSR  
4 regulated pollutant," the fourth category  
5 is -- and there is a statutory language, "any  
6 other pollutant otherwise subject to  
7 regulation." It is a very broad definition.

8           When the Agency intended to  
9 restrict the definition of regulated  
10 pollutant, it did so in Title V. The  
11 definition of "regulated air pollutant" in  
12 Title V doesn't include this broad statutory  
13 language from the PSD program otherwise  
14 subject to regulation.

15           JUDGE STEIN: How do you address  
16 the argument that I believe was made in the  
17 briefs by IEPA that when you look at this  
18 "any other pollutant" language, you need to  
19 look at it in light of the three provisions  
20 that precede it, which are much narrower and  
21 much more specific? How do you respond to  
22 that argument?

1           MR. NILLES: We mention in our  
2   reply brief that when the Agency is simply  
3   parroting the language of the statute,  
4   Supreme Court in the Gonzales case, said look  
5   to the statute. Unless the Agency is  
6   explicitly doing something different in its  
7   regulations, which it did not do in 2002, it  
8   again adopted the specific language from the  
9   Act that had been in place since 1977. We  
10   should look to what the definition of that  
11   statutory act is.

12           That takes to Alabama Power, which  
13   back in 1980, was presented with the very  
14   question of what does "subject to regulation"  
15   mean. Industry was arguing, it doesn't mean  
16   any pollutant that's regulated.

17           JUDGE REICH: I have a question on  
18   that because that's interesting. In this  
19   Christian County Generation brief, they also  
20   refer to Alabama Power for the proposition  
21   that "subject to regulation" means already  
22   regulated. And you note in page 12 of your

1 reply brief, that point -- and you say the  
2 permittee cites the Alabama Power for the  
3 proposition that PSD applies to pollutants  
4 "already regulated."

5 "Because carbon dioxide is already  
6 regulated under the Act's Section 821  
7 regulations, Sierra Club agrees with the  
8 permitting on this point." I want to make  
9 sure I understand that. Are you agreeing  
10 that the universe of "pollutants subject to  
11 PSD" are those that are already regulated for  
12 some purpose?

13 MR. NILLES: For today's  
14 proceeding, that's our argument, yes, Your  
15 Honor.

16 JUDGE REICH: Does that mean you  
17 are effectively withdrawing your argument  
18 that "subject to regulation" also includes  
19 pollutants that are not yet regulated but  
20 that the Agency may have a legal ability to  
21 regulate?

22 MR. NILLES: That's correct. For

1 today's proceeding, it is that category of  
2 pollutants which are regulated as of the date  
3 of the permit being issued.

4 JUDGE REICH: Because when you say  
5 today's proceeding, I am assuming that that  
6 effectively means you are abandoning that  
7 argument, and your argument is now limited to  
8 arguing that CO2 is already regulated, either  
9 because of the acid rain monitoring  
10 requirement or the Illinois SIP.

11 MR. NILLES: That's correct.

12 JUDGE REICH: Is that a proper  
13 interpretation?

14 MR. NILLES: That is, Your Honor.

15 JUDGE REICH: Okay.

16 MR. NILLES: Just to note, the  
17 Alabama Power case, when presented with the  
18 question of what is the scope of subject to  
19 regulation mean, determined that -- or stated  
20 that the EPA regulation, the one issued in  
21 1978, applies immediately to "each type of  
22 pollutant regulated for any purpose under any

1 provision of the Act." It could not have  
2 been more clear.

3 And the Court goes on to note that  
4 there is no ambiguity in the statutory  
5 language. Again, the one quote that  
6 is -- has really looked to this question back  
7 when the PSD regulations were first adopted,  
8 unequivocally states that if it is regulated,  
9 it is subject -- if it is regulated anywhere  
10 in the Act, it is regulated for purposes of  
11 PSD.

12 JUDGE REICH: Before we proceed,  
13 can I ask you a question about your argument  
14 that's based on the Illinois SIP. And it is  
15 a little awkward not having Illinois here to  
16 address this, but you basically made an  
17 argument, as I recall, about the Illinois SIP  
18 in your comments, although in that context it  
19 was not that the Illinois SIP provision made  
20 this subject to review. It is more whether  
21 they had the authority to issue a permit  
22 given that provision of the Illinois SIP.

1                   And the Agency did respond to that.  
2    You indicate that -- they haven't given a  
3    reasoned explanation. But as I remember the  
4    response to comments, they basically talk  
5    about that provision at some length. They  
6    indicate that it is more properly  
7    characterized as a statutory prohibition; in  
8    essence, a nuisance provision subject to  
9    direct enforcement. They don't see it as a  
10   regulation.

11                   Given the deference that we  
12   normally afford to states in interpreting  
13   their own laws, why shouldn't we accept that  
14   as a definitive interpretation of the  
15   Illinois law?

16                   MR. NILLES: The provision of the  
17   Clean Air Act that we're dealing with,  
18   "subject to regulation," and the key word  
19   obviously being regulation, picks up the  
20   Illinois SIP provision because the Illinois  
21   SIP provision is a regulation. It was a  
22   regulation proposed by the Agency to U.S.

1 EPA. EPA went though notes and comments  
2 before making it incorporated into the SIP.  
3 It is therefore by definition a regulation.

4 JUDGE REICH: So basically,  
5 anything that is in the form of a regulation  
6 qualifies?

7 MR. NILLES: That is in the  
8 regulation and that covers the pollutant at  
9 issue. Correct.

10 JUDGE WOLQAST: Its seems again,  
11 going back to a sort of an issue of a  
12 statutory regulatory interpretation, that  
13 whatever chemicals are covered as a BACT  
14 pollutant, as an NSR pollutant for purposes  
15 of BACT, is cabined by the "subject to"  
16 regulation that we're talking about now. But  
17 also that it appears in -- at significant  
18 levels. Could you speak to that, and how you  
19 arrive at the conclusion that a significant  
20 level should be anything greater than zero?

21 MR. NILLES: The EPA definition of  
22 the significance in the PSD regulation 5221



1    lays out significant levels for each of the  
2    pollutant subject to regulation and has a  
3    catchall phrase at the end -- if a  
4    significant level has not been determined,  
5    the significant level is zero. So that is  
6    the simple interpretation of the Agency's own  
7    regulations which are in place today.

8                JUDGE WOLQAST: Could you speak to  
9    how that then could or should in your view  
10   work on the ground in terms of establishing a  
11   BACT technology?

12               MR. NILLES: EPA obviously has  
13   discretion to set significance level for CO2.  
14   It has not done so. So at this point,  
15   pollutants that, for new major sources  
16   of -- it has to me a major source in order to  
17   be subject to the PSD program -- that is, it  
18   has to be one of the categories of 100 tons  
19   or one of the 250-ton catchall facilities.  
20   And once it has done that, then BACT is  
21   required for each pollutant subject to  
22   regulation, regardless of amounts. So for

1 example, for Beryllium, which is permitted in  
2 pounds annually, there has to be a BACT  
3 limit. And in this case, we would say carbon  
4 dioxide, which is not admitted in pounds, is  
5 admitted in millions of tons, similarly would  
6 be subjected to a BACT limit.

7 JUDGE WOLQAST: Let me just you one  
8 other question just to make sure I understand  
9 your position on the subject to regulation  
10 issue. Do I understand it correctly that  
11 your position is that EPA would not have the  
12 discretion to prioritize whatever pollutants  
13 that they think may be more hazardous to be  
14 covered within the universe of an NSR  
15 pollutant for BACT purposes?

16 MR. NILLES: That is correct. In  
17 terms of the discretion of which pollutants  
18 are in or out, absolutely, because this is  
19 a -- in the statute, it is any pollutant  
20 subject to regulation. Congress has ordered  
21 a regulation of carbon dioxide. At that  
22 point, the Agency cannot say we can't address

1 carbon dioxide. At that point, that  
2 discussion is over. It can set a  
3 significance level. And there are other  
4 things it can do in terms of how it is  
5 implemented, but the question of whether CO2  
6 is an NSR regulated pollutant; that has  
7 already been resolved by Congress.

8 JUDGE STEIN: I have two questions.  
9 One, EPA starts in its brief that there was  
10 no appeal of the 2002 rulemaking.

11 Do you dispute that?

12 MR. NILLES: There was an appeal,  
13 but my understanding is that it did not raise  
14 the issue of CO2.

15 JUDGE STEIN: So there's no dispute  
16 about whether the issue of CO2 was raised in  
17 that appeal?

18 MR. NILLES: Correct. To my  
19 knowledge, it was not raised.

20 JUDGE STEIN: Given that the acid  
21 rain monitoring regulations have been on the  
22 book since the early to mid '90s, are you

1     aware that Sierra Club has taken the position  
2     since that regulation came on the books that  
3     it was a regulated pollutant prior to your  
4     assertion of your argument in this case?

5                 MR. NILLES: I'm not aware of  
6     Sierra Club prior to this case; i.e., post  
7     Mass EPA, arguing in the NSR context that CO2  
8     is a regulated pollutant. That is correct.

9                 JUDGE STEIN: One other question,  
10    again dealing with the 2002 rulemaking. And  
11    again, back to the question I just asked you  
12    of the correct interpretation of the universe  
13    of NSR BACT pollutants. One of the things  
14    that the December 31, 2002 regulation did was  
15    to exempt Section 112(b)(6) HAP pollutants.  
16    How, in your view, could that legally be  
17    correct, if in fact those are pollutants that  
18    are regulated?

19                MR. NILLES: Congress exclusively  
20    said in 112 -- I think it is (a)(4), but in  
21    Section 112 Congress explicitly said these  
22    pollutants will not be subject to PSD. So

1    what EPA was doing was taking the step  
2    that -- statutory command from Congress and  
3    excluding those pollutants.

4                   JUDGE REICH:  Good.  Thank you,  
5    Mr. Nilles.

6                   Mr. Russell?

7                   MR. RUSSELL:  Good morning.  My  
8    name is Jim Russell.  I'm with the law firm  
9    of Winston & Strawn on behalf of Christian  
10   County Generation.  I would like first to  
11   express our gratitude to the Court for going  
12   ahead with this argument in the absence of  
13   Illinois EPA.  As you know, our Christian  
14   County Generation's permit is ineffective  
15   because of the mere filing of this appeal.

16                   And in a \$2 billion construction  
17   project like this, delay is very costly for  
18   financing reasons, construction reasons and  
19   other reasons.  And so any other further  
20   delay in the proceeding itself is even more  
21   detrimental to us.  We thank you for  
22   proceeding with the argument.

1           We are here today to support the  
2   Illinois EPA's response to the summary and  
3   its response in this case, and we support  
4   U.S. EPA, OAR/OGC brief. I believe it's fair  
5   to say that at the moment, there are three  
6   parties before you -- two of them government  
7   agencies -- who agree on the standing on the  
8   waiver issue. The U.S. EPA brief says that  
9   it agrees but doesn't deal with it. The  
10   Illinois brief says that it agrees and does  
11   deal with it. We feel strongly about it, and  
12   we deal with it in our brief.

13           And we believe that the record  
14   shows that the three parties before you: U.S.  
15   EPA, Illinois EPA and Christian County  
16   Generation, also agree on the so-called  
17   merits of the claim, with one reservation,  
18   and that being that the Illinois EPA brief in  
19   a footnote reserved any comment on whether or  
20   not Petitioner had raised a significant  
21   policy consideration. But it certainly  
22   agreed that Petitioner had raised no clearly

1 erroneous conclusion of law. And it dealt  
2 extensively with the merits as well.

3           Before I start -- I'd like to start  
4 with the question, Your Honor, and that is  
5 about your ruling today that collateral  
6 impacts will form no part of this discussion.  
7 I assume that everything that Petitioner  
8 commented on in its written comments in the  
9 permit proceeding may still be commented on,  
10 even though it was in connection with  
11 collateral impacts. I have in mind several  
12 references and its public comments --

13           JUDGE REICH: You can certainly  
14 reference it relative to the issues that are  
15 before us.

16           MR. RUSSELL: Okay.

17           JUDGE REICH: All I was suggesting  
18 is that we didn't want to waste everybody's  
19 time talking about that issue itself since no  
20 one was before us. But if you think that  
21 there were comments made in that context that  
22 have relevance to the issue still before us,

1 then you can feel free to reference those.

2 MR. RUSSELL: I do, and I thank  
3 you, and that is what I'm going to get into.

4 Our overarching reading of this  
5 case, both as to standing and the merits, is  
6 ubiquitous inconsistent statements, changing  
7 theories, changing facts, factual  
8 representations. And basically a difficulty  
9 we have in getting a handle on what it is  
10 that the Petitioner is really saying.

11 I know that you were commenting and  
12 this a little bit in Mr. Nilles' argument,  
13 but I would like to take you through some  
14 pieces of the reply brief and get into these  
15 point in a little more detail.

16 If you look at the reply brief  
17 summary page 2 -- and I'm sure you are  
18 familiar with it -- but third full paragraph,  
19 "when the comment period closed for the draft  
20 Christian County PSD permit, EPA, IEPA and  
21 the D.C. Circuit Court, the only Court to  
22 have ruled on the issue, were of the view



1     that carbon dioxide is not a pollutant. The  
2     only court to have ruled on the issue were of  
3     the view that carbon dioxide is not a  
4     pollutant."

5                 Well, Your Honor, the reason I  
6     asked to comment on the Appellate Court  
7     opinion in Massachusetts versus EPA is that  
8     that is an untrue statement. As Your Honors  
9     may note, neither of the majority opinions  
10    said anything about that.

11                And Judge Tatel's dissenting  
12    opinion held the opposite. Petitioner was a  
13    party to that case at the appellate level.  
14    So it's difficult for us to understand why it  
15    is that a party to the appellate court  
16    litigation who obtains a dissenting opinion  
17    from Judge Tatel, 20-page opinion, ruling  
18    that CO2 could be a regulated pollutant, why  
19    is that not reasonably ascertainable or  
20    reasonably available for purposes of our  
21    permit proceeding?

22                That ruling by the way was July 15,

1 2005. Our comment period closed in 2007.

2 If we look at the next sentence in  
3 the reply brief, "prior to the Supreme Court  
4 ruling, which occurred after the comment  
5 period closed, it was reasonable" -- he means  
6 reasonably ascertainable -- "that the CO2  
7 BACT issue was a viable argument." It was  
8 not reasonably ascertainable. "But that it  
9 was a viable argument that would have  
10 received any attention from IEPA, EPA or any  
11 reviewing entity including this Board."

12 So now, a test is changing. As you  
13 well know, the reg says if there's a  
14 reasonably available, reasonably  
15 ascertainable, you must raise it.

16 But according to the reply brief,  
17 that is not necessarily true if it's not a  
18 viable argument. That's not necessarily true  
19 if it wouldn't have received any attention  
20 from Illinois EPA, EPA or any reviewing  
21 entity.

22 JUDGE REICH: You're not suggesting

1     that that argument wasn't received positively  
2     or are you -- you're just suggesting that  
3     they had an obligation to raise it even if  
4     they thought that they were going to be ruled  
5     against.

6                 MR. RUSSELL: Yes. The reg is very  
7     clear. Your reg is very clear. Reasonably  
8     ascertainable. Reasonably available, you  
9     must raise it.

10                JUDGE STEIN: What's the practical  
11     consequence of that? Are we now, if we were  
12     to adopt your view of what "reasonably  
13     ascertainable" is, what does that mean for  
14     permit appeals and permit proceedings in the  
15     future? Are they going to be cluttered with  
16     arguments that have no practical chance under  
17     the current legal framework of success, and  
18     are we encouraging sort of -- sort of asking  
19     the flip side of the question I asked  
20     Mr. Nilles but -- but it is an issue I am  
21     quite concerned about in both directions.

22                MR. RUSSELL: It means that the

1 permit issuer is given a chance to respond to  
2 it, and that it's not thereafter raised here.  
3 That is the purpose, I believe, of the waiver  
4 doctrine, is to give the permit issuer a  
5 chance to respond. Here, that didn't happen  
6 because it wouldn't have received any  
7 attention.

8 JUDGE STEIN: So then what happens?  
9 Sierra Club or someone similarly situated  
10 knows that the Massachusetts case is on  
11 appeal. They raise the argument before  
12 Illinois EPA. Illinois EPA says it's not  
13 regulated. Sierra Club then takes that to  
14 us. Massachusetts comes down. Then what do  
15 we do with it?

16 MR. RUSSELL: I don't know that  
17 Massachusetts changes anything.  
18 Massachusetts is being used here as a pretext  
19 for the lack of a prior argument that was  
20 very reasonably available and reasonably  
21 ascertainable.

22 JUDGE REICH: Apart from reasonably

1     ascertainable, I'm confused by the comment  
2     that Massachusetts doesn't change anything,  
3     in that way before you ever get to this  
4     subject to regulation language, you still  
5     have to get through this hurdle about whether  
6     or not it's an air pollutant.

7                     And clearly in terms of the way the  
8     Agency addressed it, Massachusetts  
9     fundamentally did change things. So I  
10    understand the argument about reasonably  
11    ascertainable, but if you're suggesting that  
12    the picture didn't change after  
13    Massachusetts, I'm not understanding your  
14    argument.

15                    MR. RUSSELL: Massachusetts  
16    authorized the Agency to regulate this air  
17    pollutant. The significance, the real  
18    significance, not for this case, but for  
19    those of us in the environmental bar, is the  
20    standing issue. That's what was  
21    revolutionary about Massachusetts versus EPA.  
22    And we support U.S. EPA's brief, insofar as

1 it's now addressing the prospect of  
2 regulating CO2, a global greenhouse gas.

3           So to answer Judge Stein's  
4 question, it's unclear to me how future  
5 judicial decisions would then change the  
6 pleading status of arguments that were pled  
7 because they were reasonably ascertainable or  
8 reasonably -- but the point is that that  
9 isn't relevant here. The permit issuer  
10 should be given the chance to deal with that  
11 one way or the other. And then it's up to  
12 you to determine whether or not the Court has  
13 somehow -- or the Supreme Court has somehow  
14 raised a moot argument that was previously  
15 not ascertainable or not available.

16           JUDGE REICH: But I do share to  
17 some degree Judge Stein's concern because I  
18 think, as I alluded to earlier, if you had  
19 had what I think was a very crystallized  
20 clear issue -- I mean, it may not have been  
21 clear in terms of what the decision would  
22 be -- but in terms of understanding what the

1 issue was, I think it was pretty clear.  
2 There may be a whole host of court decisions  
3 that have some relevance but are a little bit  
4 more tangential. And I'm concerned about how  
5 far in the direction we have to push people  
6 to make arguments that might somehow suddenly  
7 become relevant for purposes of preserving  
8 that argument.

9 MR. RUSSELL: Well, you don't have  
10 to push in this case, Your Honor, because as  
11 I would like to explain, not only was it  
12 available and ascertainable in the appellate  
13 court litigation to which the Sierra Club was  
14 a party, but the Sierra Club commented on  
15 that point in the comments in this case, and  
16 have commented in another prior case. So if  
17 it is all right with you, may I go on to  
18 that?

19 Again, page 3 of the summary, about  
20 the sixth line from the bottom. For example,  
21 Sierra Club was one of the original parties  
22 that petitioned EPA to find carbon dioxide a

1 pollutant and regulate it under Title II of  
2 the Act. Yet somehow, it was not reasonable  
3 to raise that until Massachusetts versus EPA  
4 had been decided. Again, the Petitioner  
5 being a party. It's troubling to us why  
6 these arguments are not reasonably  
7 ascertainable and reasonably available.

8           Let's go on. Page 4, and this goes  
9 right to CFR 124.13. "Against this backdrop,  
10 and even though the controlling statutory and  
11 regulating law have not changed since 1993,  
12 when EPA adopted the Section 821 regulations,  
13 it was reasonable for Sierra Club to not  
14 raise the CO2 BACT issue in this or any other  
15 permit proceeding until the Supreme Court  
16 resolved the issues in its favor."

17           Well, three points on that. Now,  
18 we have another testing grafted onto 40 CFR  
19 124. Viable, receive any attention, and now  
20 whether it is reasonable to raise it. I  
21 don't think that's the spirit a letter of  
22 your regs. But secondly, they did raise it



1 in our case, and said the opposite. And that  
2 goes to page 6 of the written comments in the  
3 case. This is filed February 13 of this  
4 year. Even in the absence of U.S. EPA  
5 regulating carbon dioxide, Illinois EPA must  
6 still consider carbon dioxide as a  
7 non-regulated pollutant in the BACT analysis.

8 JUDGE REICH: But isn't that what  
9 just reinforces the fact Mr. Nilles'  
10 argument, whether you agree with it or not,  
11 that they were -- at the time they were  
12 commenting, they were dealing with the issue  
13 within the framework that they understood the  
14 EPA to be looking at the issue.

15 MR. RUSSELL: But again, Your  
16 Honor, the question is who decides what's  
17 reasonably ascertainable and what's  
18 reasonably available? They were making the  
19 argument in the Massachusetts case at the  
20 appellate level, still making it on the reply  
21 in the brief to Supreme Court, addressing it  
22 in our comments and saying the opposite. And

1 then as I will point out in a minute, a year  
2 before addressing it in other comments --

3 JUDGE REICH: But again, I --

4 MR. RUSSELL: And saying -- again  
5 the opposite.

6 JUDGE REICH: They were addressing  
7 it in your comments and saying the opposite,  
8 not necessarily because they thought  
9 ultimately that was the correct answer, but  
10 because they thought that was the framework  
11 within which the Agency was approaching those  
12 issues.

13 And Mr. Nilles can correct me if  
14 I'm wrong on rebuttal, but it seems to me  
15 that that's what he is suggesting. It wasn't  
16 that they necessarily thought that that was  
17 the right answer, but they thought that was  
18 the framework the Agency was dealing with,  
19 and they chose, correctly or otherwise, to  
20 make their arguments solely within that  
21 framework.

22 MR. RUSSELL: Who can say what a

1     Petitioner's thought process was and whether  
2     or not it was legitimate and reasonable or  
3     viable or worthy of attention? I, as you  
4     know, thought we had a regulation on the  
5     point which is very clear. But --

6                 JUDGE STEIN: If the purpose of the  
7     reason -- if among the purposes of the  
8     reasonably -- or of needing to raise a  
9     comment, is to allow the commenting authority  
10    the first opportunity to respond, and if it's  
11    reasonably clear in terms of the legal issue  
12    how the permitting authority would have  
13    responded prior to Massachusetts, how is it  
14    that in this particular circumstance, it's  
15    essential for that to have gone to the  
16    permitting Agency in the first place?

17                We're dealing with the circumstance  
18    where this issue is kicking around in at  
19    least three permit appeals in one form or  
20    another. There doesn't seem to be much  
21    dispute that had this issue been raised  
22    earlier, that Illinois EPA would have said,

1 "It's not regulated." Why is it that in this  
2 case, we should insist on giving IEPA an  
3 opportunity to say just that?

4 MR. RUSSELL: Well, Your Honor,  
5 respectfully, I suppose one can make educated  
6 guesses about what a permit issuer is going  
7 to do. Certainly, we advise clients based on  
8 reasonable guesses of what a permit issuer is  
9 going to do. But if you depart from a  
10 regulation, you're into a very subjective  
11 area as to what a Petitioner is or isn't  
12 supposed to do.

13 JUDGE WOLQAST: To ask a related  
14 question, does it matter that the comment  
15 would have raised a legal, rather than a  
16 factual or technical, issue to the permitting  
17 entity?

18 MR. RUSSELL: Probably not. The  
19 argument was reasonably ascertainable.  
20 Whatever it was that they wanted to say could  
21 have been said and was being said in court  
22 and in another proceeding. And in this

1 proceeding with an opposite message. So I  
2 think you're correct.

3 But the permit issuer ought to be  
4 given the chance to respond, and so should  
5 the permittee. The permittee deals with the  
6 permit issuer on a very collegial basis for  
7 a long period of time. And if the Illinois  
8 EPA says to the permittee, or the permit  
9 applicant, we think we have a problem here,  
10 permit applicant would like to be able to  
11 solve it in advance rather than have it  
12 litigated.

13 And that's where we are now, as we  
14 can talk about in just a minute. Is CO2  
15 controlled by litigation? That's where we  
16 are going, apparently. Unless U.S. EPA's  
17 view and Illinois view prevails, which we  
18 agree with.

19 May I go on to one other comment?

20 JUDGE REICH: Please.

21 MR. RUSSELL: They did address it  
22 in our comments, said the opposite. That was

1 this year. But July 2006, in Deseret, they  
2 addressed it in comments. We asked for  
3 permission to comment on their comments, if  
4 not the Agency's response. And what they  
5 said, July 2006, "We believe that the EPA has  
6 a legal obligation to regulate CO2 and other  
7 greenhouse gases as pollutants under the  
8 Clean Air Act. Indeed, 12 states, 14  
9 environmental groups in two cities filed  
10 suites stating that EPA must regulate  
11 greenhouse gas emissions under the Clean Air  
12 Act."

13 This by the way is the second full  
14 paragraph of page 2 of their comments in  
15 Deseret, which are in your docket. "The  
16 parties appealed the U.S. EPA's decision to  
17 reject a position that sought to have the  
18 federal government regulate greenhouse gas  
19 emissions from new motor vehicles. The issue  
20 is now before the Supreme Court."

21 And Judge Stein, "if the Supreme  
22 Court agrees that the greenhouse gases such

1 as CO2 must be regulated under the Clean Air  
2 Act, such a decision may also require the  
3 establishment of CO2 emission limits in this  
4 permit."

5 So which is it? What is the story?  
6 Is it reasonably ascertainable when you  
7 advocate it, but not reasonably ascertainable  
8 when you said the opposite? Is that where we  
9 are on the standing issue?

10 It seems to me the regulation is  
11 very clear. If the regulation were not  
12 clear, that would be a different story. One  
13 other point on that, and that's summary  
14 page 4 -- strike that; I wanted to refer to  
15 page 5, and that is on Deseret, but following  
16 the Supreme Court's decision, the Sierra  
17 Club -- at the top of the page, following the  
18 Supreme Court's decision the Sierra Club had  
19 been raising this issue in subsequent permit  
20 proceedings. You just raised it in Deseret  
21 in July 2006. Supreme Court decision is  
22 2007.

1 JUDGE REICH: I'd like to make sure  
2 we have all the time to address --

3 MR. RUSSELL: And I'm --

4 JUDGE REICH: The substance of the  
5 issue.

6 MR. RUSSELL: I'm ready to do that.

7 JUDGE WOLQAST: Could I ask you  
8 one on that?

9 MR. RUSSELL: Yes, please.

10 JUDGE WOLQAST: What is your best  
11 argument, as a matter of statutory  
12 interpretation, as to why the "subject to  
13 regulation" term, phrase, whatever, should  
14 not encompass the acid rain monitoring  
15 regulation?

16 MR. RUSSELL: The acid rain  
17 monitoring regulations talk only about  
18 monitoring.

19 JUDGE WOLQAST: But again, speaking  
20 to principles of statutory construction and  
21 the language subject to regulation --

22 MR. RUSSELL: Plain language. The



1 language is plain. It also regulates oxygen  
2 monitoring, I believe. Does that mean we  
3 limit oxygen because we monitor it?

4 JUDGE REICH: On that regard, in  
5 the reply brief, Sierra Club does discuss the  
6 fact that there's specific terminology used  
7 for when you're talking about an actual  
8 control of omissions. They talk about  
9 emission limitations, talk about emission  
10 standards. If what Congress was intending  
11 here was that something be subject to an  
12 actual control of regulations, why would they  
13 not have used a term like "emission  
14 limitations" or "emission standards" rather  
15 than "subject to regulation," which appears  
16 on its face to be potentially broader?

17 MR. RUSSELL: We agree with U.S.  
18 EPA's views of the subject to regulation  
19 issue. By the way, there has been a new  
20 change on that point, as you know, as of  
21 today. Subject to further regulation is --

22 JUDGE REICH: Oh.

1 MR. RUSSELL: So I've --

2 JUDGE REICH: When you talk about  
3 plain language, are you saying that that's  
4 the only way to read it, that it's not even a  
5 question of ambiguity where we get into  
6 Chevron deference, (?) that it's just  
7 absolutely clear on the face of it?

8 MR. RUSSELL: It doesn't make any  
9 sense to not use the plain language argument.

10 JUDGE REICH: Uh-huh.

11 MR. RUSSELL: If you don't use the  
12 plain language argument, what is the  
13 limitation? Well, there isn't one. If you  
14 don't use the plain language --

15 JUDGE WOLQAST: But to be clear,  
16 are you saying that "subject to regulation"  
17 has no ambiguity, that you can only read it  
18 to say subject to an emission limitation?

19 MR. RUSSELL: Subject to regulation  
20 is ambiguous, as was brought out in the  
21 petition for review in three different ways.  
22 In the reply brief, it's no longer ambiguous.

1 Subject to regulation can be read several  
2 ways. We like, and I believe it is correct,  
3 that the "otherwise" portion of "otherwise  
4 subject to regulation" shows what that means,  
5 in terms of the three prior categories that  
6 are regulated. So I -- I --

7 JUDGE WOLQAST: You're referring to  
8 the Illinois --

9 MR. RUSSELL: No, no. No. The --

10 JUDGE WOLQAST: Argument of the  
11 general --

12 MR. RUSSELL: And the --

13 JUDGE WOLQAST: Pacifist --

14 MR. RUSSELL: NSBS Title VI  
15 substances and those otherwise regulated.

16 JUDGE WOLQAST: I understand, but  
17 what I'm trying to ask is, are you agreeing  
18 with the Illinois argument that the otherwise  
19 subject to regulation, the so-called catchall  
20 or more generic provision, is somehow linked  
21 to the specifics of the three specified --

22 MR. RUSSELL: Yes.

1 JUDGE WOLQAST: Categories?

2 MR. RUSSELL: Yes. That's my  
3 point. It is rendered nonsensical otherwise,  
4 if I can use that word.

5 JUDGE STEIN: How is it rendered  
6 nonsensical?

7 MR. RUSSELL: Because then it takes  
8 on a -- you have to read it in the context of  
9 what that says. Otherwise --

10 JUDGE STEIN: You could read it in  
11 context but I'm not sure that's the only  
12 reading of that provision.

13 MR. RUSSELL: This is a --

14 JUDGE STEIN: I mean, here --

15 MR. RUSSELL: Our position is that  
16 you take the plain language, if it makes  
17 sense -- which this does. The Petitioner's  
18 arguments here are so stretched on "otherwise  
19 regulated" that they don't make common sense.

20 JUDGE STEIN: What if we were  
21 agreed to you that the notion of otherwise  
22 regulated stretched to its limits may not

1 make sense, but here we're dealing with  
2 Section 821 of the Clean Air Act, which was  
3 specifically put into the statute by Congress  
4 that thought it was sufficiently important.

5 MR. RUSSELL: Right.

6 JUDGE STEIN: That they put in a  
7 monitoring provision in the form of a  
8 regulation. I mean, let's take that example.

9 MR. RUSSELL: Okay.

10 JUDGE STEIN: Why is that that is  
11 not subsumed under category 4?

12 MR. RUSSELL: Why then do you need  
13 Massachusetts versus EPA to authorize U.S.  
14 EPA to regulate carbon dioxide?

15 JUDGE STEIN: But isn't that a  
16 separate question -- doesn't that then go to  
17 what did Congress mean by the term  
18 "pollutant" as opposed to what did Congress  
19 mean by the term "regulation"?

20 MR. RUSSELL: It goes to the  
21 regulation point and whether or not it was  
22 already regulated. Why do we --

1 JUDGE REICH: Are you saying  
2 Massachusetts somehow addressed the question  
3 of subject to regulation, as opposed to  
4 addressing the question of what a pollutant  
5 is?

6 MR. RUSSELL: I'm sorry. Say  
7 again, Your Honor.

8 JUDGE REICH: The way you phrased  
9 that, I was not sure if you suggesting that  
10 somehow the Court went beyond the issue of  
11 whether CO2 is a pollutant and addressed the  
12 question of subject to regulation?

13 MR. RUSSELL: No, it did not. It's  
14 a standing case. And it's an authorization  
15 to regulate CO2 for mobile (?) sources.  
16 Again -- my time is almost up. On the  
17 merits, if you accept this point of view, we  
18 will be in a patchwork quilt of stationary  
19 source CO2 controls, dictated by litigants on  
20 a localized basis much like product liability  
21 is.

22 There are regulations for

1 automobiles, for example, automobile safety.

2 But if you go through the owners manual of  
3 your vehicle, you will find with whatever  
4 brand it is that it is filled with warning  
5 labels on this point and that point and the  
6 other point. All those warning labels came  
7 from litigation rather than a statute or a  
8 regulation.

9 JUDGE STEIN: Wouldn't this just go  
10 through --

11 MR. RUSSELL: That's why the --

12 JUDGE STEIN: The ordinary BACT  
13 process? In other words, if this issue, if  
14 we were to agree that the issue were ripe, if  
15 we were to agree as a legal matter that a  
16 BACT limit needed to be set, wouldn't it  
17 simply go back to the permitting authority to  
18 basically perform a BACT analysis, which by  
19 definition is a case-by-case analysis?

20 MR. RUSSELL: What would that be,  
21 Your Honor?

22 JUDGE STEIN: Presumably, that's

1 for the permitting authority to decide in the  
2 first instance.

3 MR. RUSSELL: That's my point. And  
4 they would apply their SIP whether it's  
5 approved or not. And the SIP is going to  
6 have some requirements, some emission  
7 limitations. But right now, yes, it's --

8 JUDGE STEIN: I'm not disagreeing  
9 with you that you may or may not want a  
10 patchwork. All I'm saying is that BACT in  
11 general is a process that takes a variety of  
12 things into account, and that unlike some  
13 other programs where what gets applied is a  
14 little less case by case, it seems to me in  
15 this particular circumstance when you're  
16 dealing with PSD, it certainly is a program  
17 that unlike some other purely  
18 technology-based programs is more  
19 susceptible.

20 I mean, I understand your overall  
21 point that you're sort of taking a leap from  
22 no regulation into sort of a new area, case



1 by case. But I still think that in the PSD  
2 program, that is something you have done more  
3 often than in some of the other programs.

4 MR. RUSSELL: Well, I agree with  
5 you. The statute says case by case.

6 JUDGE REICH: Do you agree that  
7 BACT is intended to be technology forcing?

8 MR. RUSSELL: It can be. And we've  
9 certainly -- Illinois (?) had --

10 JUDGE REICH: Uh-huh.

11 MR. RUSSELL: Going back to the  
12 '70s, technology forcing regulations.

13 JUDGE REICH: Uh-huh.

14 MR. RUSSELL: I'm out of time, I'm  
15 sorry. But the statutory language on case by  
16 case I don't think equates to purely  
17 individual ad hoc spontaneous. There is a  
18 guidance process. There has been in the NSR  
19 guidance process. The Agency is working on a  
20 regulation -- U.S. EPA is working on a  
21 regulation that has global implications. To  
22 me, if you were to ask me about the policy,

1 the sense of it, I see it to be very  
2 counterproductive to have individual  
3 litigants dictating BACT site by site in the  
4 absence of some level of guidance which a  
5 permit issuer looks to but need not always  
6 comply with.

7 JUDGE REICH: Okay. Thank you,  
8 Mr. Russell.

9 MR. RUSSELL: That is all I had.  
10 And I thank you for your time.

11 JUDGE REICH: Appreciate that.

12 Mr. Doster. First of all,  
13 Mr. Doster, I want to express our  
14 appreciation for your appearing before us  
15 since you're appearing at the Board's request  
16 rather than your own initiative.

17 MR. DOSTER: It's my pleasure. I  
18 appreciate actually having the opportunity to  
19 speak to these issues. I'm appearing here on  
20 behalf of the Office of Air and Radiation, as  
21 you requested. I'm prepared to address the  
22 waiver issue if you would like to have

1 questions from me on that, but since you  
2 asked us to directly address the merits, I'm  
3 going to move immediately to that.

4 JUDGE REICH: Why don't you do  
5 that, and then if any of the judges have  
6 questions on the waiver, they can raise that  
7 at the end.

8 MR. DOSTER: Okay. On the merits,  
9 the question before you here today is really  
10 very simple. Should the Board reverse  
11 30-year history of EPA interpreting the term  
12 "subject to regulation under the Act"? The  
13 only reasonable answer to this question is  
14 no, for two principal reasons.

15 First, since the 1977 amendments to  
16 the Clean Air Act, the EPA has repeatedly and  
17 consistently in a litany of examples that I  
18 will run through with you here today  
19 construed the phrase subject to regulation to  
20 describe only air pollutants subject to a  
21 statutory or regulatory provision that  
22 requires actual control of emissions of that

1 pollutant.

2           Second, because EPA's long-standing  
3 interpretation that has stood the test of  
4 time is a permissible one, given the context  
5 of the statute in which the phrase subject to  
6 regulation appears in the context of a  
7 controlled technology requirement based on  
8 best available control technology.

9           JUDGE REICH: When you say it's  
10 permissible, does that mean that you're  
11 suggesting that there is more than one  
12 possible interpretation, and this is a case  
13 of Chevron deference?

14           MR. DOSTER: In one respect, there  
15 is. In an other respect, there is not.  
16 First and foremost, Section 821 of the 1990  
17 Clean Air Act amendments is not a part of the  
18 Clean Air Act, our brief in fact was mistaken  
19 on that. An error that I would like to  
20 correct for the record.

21           Section 821 of the '90 amendments  
22 had not been codified in the Clean Air Act.

1 It appears as the note to Section 412 of the  
2 Clean Air Act. It was never codified. So in  
3 that sense, this is not a Chevron II issue.  
4 Under the Act -- the Section 821 monitoring  
5 requirement is not under the Act. And that's  
6 clear.

7 On that question of the meaning of  
8 "subject to regulation," or the term  
9 "regulation" within that phrase, I do believe  
10 that this is a Chevron II issue, where there  
11 may be more than one potential  
12 interpretation. However, EPA's  
13 interpretation is a permissible one and a  
14 reasonable one that has existed for 30 years  
15 and is supported by many, many instances of  
16 Agency precedent practice.

17 Ever since the 1978 rulemaking when  
18 Administrator Cossell first addressed this  
19 issue, and issued the first PSD regulations  
20 after the '77 amendments, it was clear, and  
21 by the list of pollutants that were -- or the  
22 list of things that were covered by the BACT

1 at that time, that it was NAX pollutants, it  
2 was NSPS pollutants and NISHAP pollutants or  
3 Title II mobile source pollutants.

4           There's never been any question  
5 since that time that that's what regulation  
6 meant in the Agency's view, and that was a  
7 reasonable interpretation. In the Alabama  
8 Power case, the Court did not consider the  
9 question before you here today. The issue in  
10 that case was whether a much narrower  
11 interpretation advocated by the -- the  
12 industry petitioners in that case should have  
13 been adopted by EPA.

14           In that case, the industry  
15 petitioners advocated that subject to  
16 regulation should be limited to only two  
17 pollutants, PM and SO2, which were the only  
18 pollutants for which Congress had established  
19 PSD increments at that time. So the court's  
20 decision in that case rejected that  
21 interpretation and upheld the Administrator's  
22 1978 interpretation. It did not expand on

1 the Administrator's interpretation, as the  
2 Petitioners argue here.

3           Though it many have used somewhat  
4 expansive language, all it was doing was  
5 affirming the interpretation at that time  
6 that Administrator Cossell had set forth in  
7 the final rule under review, which was that  
8 "subject to regulation" referred to  
9 pollutants that were subject to an actual  
10 emission standard at the time.

11           JUDGE STEIN: But surely you're not  
12 suggesting that this Board, as the final  
13 decisionmaker for the Agency, is constrained  
14 in a way that a Court might be in a  
15 Chevron II situation?

16           MR. DOSTER: No. No, I'm not  
17 suggesting that the -- you know, you are  
18 reaching a final decision on behalf of the  
19 Agency. So the considerations for you are  
20 also whether it's an appropriate  
21 interpretation or a right interpretation from  
22 a policy standpoint. History has suggested

1     that that is. We've been using this  
2     interpretation for some time, including since  
3     the 1990 amendments to the Clean Air Act.

4             There is no indication in the  
5     legislative history on the 1990 amendment  
6     that added Section 821 of the '90 amendments  
7     that the sponsors of that amendment intended  
8     for that to invoke NSR. In fact, they  
9     specifically said in the legislative history  
10    that it was not their intent -- I will quote  
11    from a statement of Congressman Cooper, who  
12    was one of the sponsors of that amendment on  
13    May 17, 1990 -- said, "My amendment would not  
14    force any reductions right now." It was  
15    clearly not his intent to invoke the subject  
16    to regulation phrase in the BACT definition.

17            JUDGE REICH: I saw the language,  
18    but I know that it said "force any  
19    reductions," which is suggestive of reducing  
20    current emissions from an existing facility.  
21    That's a little different in character than  
22    really regulating a facility not yet built.



1 So I'm not sure if that language is  
2 compelling.

3 MR. DOSTER: Maybe not dispositive,  
4 but the overall context of the amendment was  
5 also to ensure that our sources in the United  
6 States were to get credit for any reductions  
7 that were made as a result of regulation in  
8 the future. The context of it was not with  
9 the perspective that we were expecting there  
10 to be regulation under the PSD program.

11 JUDGE REICH: Uh-huh.

12 MR. DOSTER: It was in the context  
13 of in the event we were -- entering into an  
14 international agreement that would call for  
15 reductions in the future, that we would know  
16 what our reductions were, what our baseline  
17 was in 1990, and that was the intent of the  
18 sponsors of the amendment at the time.

19 JUDGE WOLQAST: Could you speak to  
20 Mr. Nilles' point, that if Congress had  
21 intended "subject to regulation" to be more  
22 narrowly construed to only include emission

1 limitations, it could readily have said that.

2 MR. DOSTER: It could have readily  
3 have defined the term "regulation." It could  
4 have adopted the Webster's Dictionary  
5 definition that has been cited, but the  
6 Congress did not. I think if you look at  
7 Black's Law Dictionary, the definition of  
8 "regulation" in Black's Law Dictionary Eighth  
9 Edition is the act or process of controlling  
10 by rule or restriction.

11 That's consistent with the  
12 interpretation that the EPA has followed for  
13 the last 30 years. So perhaps because  
14 Congress adopted no definition of the term  
15 regulation, that it felt it was not necessary  
16 to specify what it meant because under the  
17 Black's Law Dictionary, what it meant was  
18 clear. And how it had been used ever since  
19 the 1977 amendments was apparent.

20 So I don't think it was necessary  
21 for -- regulation is not defined anywhere  
22 else. So it wasn't necessary for the

1 Congress to specify differently or to  
2 explicitly say that emission limitations  
3 was --

4 JUDGE WOLQAST: So are you saying  
5 that there's no ambiguity to the phrase  
6 "subject to regulation"?

7 MR. DOSTER: No, I'm not, because  
8 they've cited another dictionary definition  
9 that that they purport to have a different  
10 meaning. But I think Congress's intent, that  
11 it intended it to be consistent with EPA's  
12 interpretation -- Congress did not change it  
13 in the 1990 amendments. Congress did not  
14 inform EPA after 13 years of history  
15 interpreting the term subject to regulation  
16 and the rules that we had written that we  
17 needed to interpret regulation to cover  
18 monitoring requirements. It had an  
19 opportunity to do that and did not do so.

20 JUDGE STEIN: Why does Congress  
21 exclude HAPS from being considered NSR  
22 pollutants, point one. And point two, why

1 didn't they expand that to uncover CO2, given  
2 Section 821?

3 MR. DOSTER: I'm not directly  
4 familiar with the exact reasons why Congress  
5 excluded HAPS, but I think it was just an  
6 administrative factor, that in fact HAPS had  
7 been covered, but they had amended  
8 Section 112 in 1990 and created a new  
9 framework for the MACT standard and the MACT  
10 requirement. So I would speculate that that  
11 was because it would be redundant to then  
12 require BACT for hazardous air pollutants,  
13 because they had established a technology  
14 mandate in the 1990 amendments that did not  
15 exist prior to the 1990 amendments.

16 Prior to the 1990 amendments, HAPS  
17 were addressed under a risk-based framework  
18 which had been unsuccessful and had taken a  
19 great deal of time. So I would surmise,  
20 though I haven't seen the specific  
21 legislative history, that its intent was  
22 to avoid the redundancy between BACT and

1     MACT.  Sorry, you had a second part to your  
2     question.

3                 JUDGE STEIN:  The second part of  
4     that was that given that in 1990 they were  
5     excluding a certain class of pollutants from  
6     regulation as NSR pollutants --

7                 MR. DOSTER:  I would --

8                 JUDGE STEIN:  At the same time that  
9     they -- you know, put in Section 821 as a  
10    note that they exclude CO2 from  
11    regulation -- from the NSR --

12                MR. DOSTER:  The same rationale  
13    that I surmise wouldn't exist then, that  
14    there wouldn't be redundancy with the MACT  
15    requirement, with the technology-based  
16    requirement for CO2.  But there was -- you  
17    know, there's no indication of an intent by  
18    Congress at that time to have in fact  
19    contemplated that CO2 would immediately be  
20    covered by the PSD program as a result of the  
21    Section 821 addition to the 1990 amendments.

22                So we don't really have any -- we

1 have no clear indication that that was in  
2 fact their intent. We have an amendment in  
3 1990 that was not updating the Clean Air Act  
4 itself -- not codified in the Act, that  
5 followed the original definition, the  
6 original language "subject to regulation,  
7 under the Act" was issued in 1977. It was  
8 passed by Congress in 1977.

9           There was no indication of an  
10 integration in that. Congress was not  
11 amending Section 165 in the 1990 amendments.  
12 So if they had intended for CO2 to have been  
13 covered, they could have amended Section 165  
14 at that time, rather than writing a provision  
15 that didn't even get codified in the Act  
16 itself.

17           JUDGE STEIN: So in your view,  
18 what's the significance of the fact that it  
19 wasn't ultimately codified?

20           MR. DOSTER: I think it reflects  
21 somewhere in the history an intent to be very  
22 clear that this was not a regulated

1 pollutant. It certainly was not intended to  
2 be incorporated into the NSR program. And we  
3 have researched the issue and tried to figure  
4 out the origins of that. And these things  
5 are apparently done through a committee of  
6 people that consider it, and they didn't deem  
7 it to be sufficiently related to any  
8 provision of the Act itself to be codified.

9 JUDGE REICH: So basically you are  
10 saying that it could not be covered by  
11 Section 5221 B(50)(iv), because that says  
12 that any pollutant that otherwise is subject  
13 to regulation under the Act -- and this is  
14 not subject to regulation under the Act,  
15 because that provision is not codified.

16 MR. DOSTER: Right.

17 JUDGE REICH: Can I ask about  
18 something a little bit different just for  
19 clarification? In your brief, on page 5,  
20 when you're talking about the 2002  
21 rulemaking, and the list that I referred to  
22 earlier that listed currently regulated

1 pollutants but did not include CO2, you say a  
2 list that did not include CO2, even though  
3 EPA guidance existed at that time that  
4 considered CO2 to be an air pollutant, you  
5 don't reference what that guidance was.

6 Was that the Cannon Memo?

7 MR. DOSTER: Correct. Yes, it was  
8 the Cannon Memo from 1998, which was  
9 basically the interpretation that the Supreme  
10 Court ultimately adopted. And at that time,  
11 it -- General Counsel Cannon, in that memo,  
12 also stated very clearly that CO2 was not a  
13 regulated pollutant.

14 And I would like to read a quote  
15 from that memo that I think is very  
16 instructive in terms of EPA's history on this  
17 issue. The general counsel stated, "EPA has  
18 a legal obligation to regulate CO2 and other  
19 greenhouse gases as pollutants under the  
20 Clean Air Act." Sorry, this is the wrong  
21 quote. Different -- different one. That's  
22 the one that Mr. Russell read earlier.



1           If I could -- "EPA's regulatory  
2   authority under the Clean Air Act extends to  
3   air pollutants which as discussed above are  
4   defined broadly under the Act and include  
5   SO2, not CO2 and Mercury emitted into the  
6   ambient air. EPA has in fact already  
7   regulated each of these substances under the  
8   Act, with the exception of CO2. While CO2  
9   emissions are within the scope of the EPA's  
10   authority to regulate, the administrator has  
11   made no determination to date to exercise  
12   that authority under the specific criteria  
13   provided under any provision of the Act."

14           JUDGE REICH: And as far as you  
15   understand it as of the day of promulgation  
16   of the 2002 Federal Register Notice of this,  
17   that was still EPA's interpretation.

18           MR. DOSTER: The Fabricant memo  
19   that changed that interpretation was in 1993.

20           JUDGE STEIN: In 2003.

21           MR. DOSTER: I'm sorry. 2003.

22           JUDGE REICH: 2003.

1 MR. DOSTER: Thanks. So it --

2 JUDGE REICH: I'm assuming there  
3 was a period of evolution before the  
4 Fabricant memo was actually issued, and I  
5 just want confirmation and your understanding  
6 that as of December 21, 2002, that was still  
7 the operative interpretation.

8 MR. DOSTER: As far as the Office  
9 of General Counsel was concerned, that is my  
10 understanding.

11 JUDGE STEIN: I wanted to ask you a  
12 question about the 2002 amendments.  
13 Illinois, as I've mentioned before, made an  
14 argument that 5221(50)(iv) should be  
15 interpreted essentially narrowly, or in the  
16 light of the fact that (i), (ii), and (iii)  
17 are fairly specifically defined terms.  
18 What's the Agency's view?

19 MR. DOSTER: We agree with that  
20 interpretation. That is consistent with what  
21 we have always done historically. If we read  
22 subject to regulation differently at the time

1 we had adopted it, we presumably would have  
2 done what Petitioners are advocating here  
3 today. We understood subject to regulation  
4 in the context with that list. We understood  
5 it to be covering things that were like the  
6 things that are already in that list, that  
7 were pollutants, that were subject to a  
8 specific requirement for control.

9 JUDGE STEIN: Can you identify for  
10 me any pollutants that are not covered in  
11 (i), (ii) or (iii) that are covered by (iv)?

12 MR. DOSTER: Yes. But they are  
13 covered in the sense that they might -- well,  
14 okay. I -- I understand your question. I  
15 was thinking it was a different one.

16 JUDGE STEIN: Answer that one, too.

17 MR. DOSTER: What I thought you  
18 were asking is that there are other  
19 pollutants that are currently unregulated  
20 that are not subject to regulation.  
21 Pollutants like HAPS that we de-listed, and  
22 things of that nature. The specific question

1 of are there any pollutants on that list, let  
2 me see if I can look at the list itself in  
3 our 2002 rule and see if I can identify one  
4 of those that would fit in that category.

5           Actually, I don't think I can even  
6 do that by looking at the list. I'm not  
7 familiar with all the details of the NSPS,  
8 and which various provisions that those come  
9 from. So I don't --

10           JUDGE STEIN: But nothing leaps out  
11 to mind of something that isn't on (i), (ii)  
12 or (iii) that fits into this catchall,  
13 however broad or narrow?

14           MR. DOSTER: Nothing immediately  
15 comes to mind. I think one thing that is  
16 notable is that the catchall, the list that  
17 was promulgated does not include Title II,  
18 pollutants covered by Title II mobile  
19 sources, though in 1978, the Administrator  
20 recognized those as potential -- as an area  
21 that would be subject to regulation. So the  
22 2002 did not enumerate the Title II

1 pollutants. So that is a potential category,  
2 to the extent there was a pollutant that  
3 would be covered under Title II that is not  
4 covered under Title I anywhere. But I don't  
5 know. I can't identify one of these.

6 JUDGE WOLQAST: What would you  
7 point us to as the Agency's most clear  
8 interpretation of subject to regulation?

9 MR. DOSTER: The clearest  
10 interpretation -- in terms of this  
11 interpretation is what we stated in our  
12 papers is that it refers to something that is  
13 subject to -- actually subject to an  
14 emissions limitation.

15 JUDGE WOLQAST: Other than your  
16 argument, the --

17 MR. DOSTER: Are you --

18 JUDGE WOLQAST: A past Agency --

19 MR. DOSTER: Are you really asking  
20 what is our statutory -- what is our  
21 interpretation as to why it's a reasonable --

22 JUDGE WOLQAST: Either --

1 MR. DOSTER: Interpretation --

2 JUDGE WOLQAST: Statutory or  
3 regulatory interpretation of 5221, a past  
4 clear statement of the Agency interprets  
5 subject to regulations.

6 MR. DOSTER: In terms of a single  
7 interpretation, the clearest statement with  
8 respect to the issue before you is from the  
9 1993 Wegman memo, where the specific issue of  
10 Section 821 of the 1990 amendments was  
11 addressed in the context of the question of  
12 what does "subject to regulation" mean.

13 JUDGE WOLGAST: I did want to ask  
14 you about that, because I'm wondering, what's  
15 the vitality of the Wegman memo  
16 post-Massachusetts? And I ask that because  
17 while I understand the logic of the Wegman  
18 memo, the premise of the analysis was a more  
19 narrow interpretation of the term  
20 "pollutant."

21 MR. DOSTER: There were two  
22 premises of that analysis. One was what does

1 the term "air pollutant" mean in the context  
2 of Title V, and that interpretation was it  
3 means a pollutant subject to regulation. But  
4 the second premise is what is a "pollutant  
5 subject to regulation." And on the first  
6 premise, we've stated in our brief -- and  
7 agree that the Supreme Court decision no  
8 longer makes that premise viable, that the  
9 reasoning of that memo was basically  
10 overruled by the Supreme Court decision, but  
11 on the second premise, what "does subject to  
12 regulation" mean, the Supreme Court decision  
13 has not addressed that issue.

14 And the Agency's interpretation  
15 remains consistent with what it was in that  
16 memo, and has been for the last 30 years,  
17 including 17 since the 1990 amendments.

18 JUDGE STEIN: How does the Wegman  
19 memo differ from the statement in the 2002  
20 preambular text? I mean, you've obviously  
21 pointed to the Wegman memo rather than the --

22 MR. DOSTER: It differs because it

1 is a specific consideration of the issue  
2 raised by Petitioner of the argument that  
3 Section 821 of the 1990 amendments has  
4 significance in this issue. In the 2002  
5 rulemaking, we did not get a comment -- even  
6 though this issue was clearly ascertainable,  
7 this issue was ascertainable since 1990.

8 In 1996, EPA published a list in  
9 the proposal of those pollutants that it  
10 thought were regulated. We received no  
11 comment in that rulemaking that CO2 should be  
12 on that list. Or at least the final preamble  
13 shows no indication of that comment. I  
14 haven't scoured the record, but the final  
15 preamble shows no indication -- comment or  
16 put the issue of Section 821 directly to the  
17 agency.

18 And so we listed those pollutants  
19 that were understood to be regulated at that  
20 time. But it's a definitive list, as Judge  
21 Reich pointed earlier, the prefatory language  
22 on that page of the 2002 rulemaking lists all



1 of the pollutants that EPA considered to be  
2 subject to regulation at the time. So it is  
3 certainly not -- there's not an affirmative  
4 answer to the issue raised here by the Board,  
5 but it's clearly a recognition that there's  
6 no regulation in place under our prevailing  
7 interpretation of "subject to regulation"  
8 that would make CO2 an NSR pollutant.

9 JUDGE STEIN: I asked a question I  
10 believe to our -- I had a colloquy with  
11 Mr. Russell about the practical consequences  
12 of treating CO2 as a pollutant or the  
13 regulatory -- and I'd be interested in the  
14 Agency's views on the matter -- view of the  
15 matter. In terms of permitting, what in  
16 practical terms that would mean. And  
17 certainly in the -- well, in the acid rain  
18 context in particular.

19 MR. DOSTER: The practical  
20 consequences if this board were to determine  
21 that --

22 JUDGE STEIN: Right, yeah, in other

1 words --

2 MR. DOSTER: It is subject to  
3 regulation now?

4 JUDGE STEIN: More from a  
5 permitting agency's perspective. I mean,  
6 what it would mean for the regions or for  
7 state permitting agencies if they were  
8 suddenly, in the absence of further guidance  
9 from the Agency, to have to grapple with what  
10 that means in the context of the individual  
11 department. I think --

12 MR. DOSTER: We are currently  
13 in -- I'm not sure I'm the best person to  
14 speak to this issue. We have a number of  
15 staff in the Agency that are currently very  
16 actively studying those issues right now, and  
17 are considering a number of the implications  
18 of what they would be. There are issues with  
19 what the significance rate would be and how  
20 we would determine the number of sources.  
21 There are issues with what would BACT  
22 be -- there's no viable sequestration

1 technology at this moment, so what would BACT  
2 be, even if we could capture CO2, as we might  
3 with the particular facility at issue here,  
4 an IGCC facility, what would we do with it?  
5 How would -- where would we put it?

6           Sequestration has not been  
7 established yet as a technology, so those  
8 questions are under review, and I don't know  
9 that I'm at liberty or have the expertise to  
10 really discuss them in more depth, but you  
11 know, we do believe there will be many  
12 significant implications if -- and sudden and  
13 drastic if this board were to agree with the  
14 Petitioners.

15           JUDGE REICH: Thank you,  
16 Mr. Doster.

17           Mr. Nilles, you have 10 minutes for  
18 rebuttal.

19           MR. NILLES: Thank you, Your Honor.  
20 A couple of quick points. As we laid out, we  
21 believe this is a very simple question of  
22 statutory interpretation, controlled, if you

1 will, by the framework laid in Chevron  
2 Step I. As an alternative -- and this goes  
3 to your point, Judge Wolgast, the Agency  
4 argues its ambiguity. Ambiguity, their  
5 interpretation has to be reasonable; cannot  
6 be arbitrary and capricious. There is simply  
7 no Agency explanation anywhere in the record  
8 that lays out in any meaningful language an  
9 analysis how do you get from the word  
10 "regulation" -- and Mr. Doster talked about  
11 regulation must mean something else.

12 Well, Congress used the word  
13 "regulation" in 165, it used "regulation" in  
14 821, there's no indication of it using  
15 different terms, and if means regulation in  
16 one place, there's again, no indication they  
17 meant otherwise. The Agency doesn't explain  
18 how do you get from the definition of  
19 regulation as it is used in both the PSD  
20 program and the definition of BACT, to  
21 meaning something equivalent to emission  
22 control or emission standard.

1           The Wegman memo, as you point out,  
2   has been -- the central core of that memo was  
3   tossed out by the Supreme Court in terms of  
4   what is a pollutant. And again, that memo  
5   was not getting at the core question in  
6   laying out and really parsing the language of  
7   the statute or the regulations, and answering  
8   the question, how does one interpret  
9   regulation at the end of the day to mean  
10   something less than that term is used in  
11   general parlance.

12           That memo was dealing with Title V.  
13   It doesn't mention the language in 165, it  
14   doesn't explain how the Agency is getting to  
15   its conclusion that it enunciates today that  
16   somehow carbon dioxide is not a pollutant  
17   "subject to regulation." So at a minimum, if  
18   the Board determines that this is not a  
19   straight question of statutory  
20   interpretation, at a minimum, we recommend  
21   that the Board remandate that decision back  
22   to the Agency and ask for an explanation in

1 light of Mass. v. EPA, in light of a lack of  
2 a record demonstrating how it reached this  
3 legal conclusion, and provide the opportunity  
4 for public comment to have a full record on  
5 which this board could make a more reasoned  
6 decision.

7 A couple other quick points.

8 Mr. Russell referred to our comments in  
9 Deseret, the bonanza (?) project that is  
10 pending before this board. In our comments,  
11 he failed to go to the next sentence where we  
12 lay out, yes, the Supreme Court did in fact  
13 have this case on review, but we go on to say  
14 at a minimum, EPA should consider CO2 in the  
15 BACT analysis and then go on to talk about  
16 "as an unregulated pollutant."

17 So back when we filed these  
18 comments in Deseret, we were again flagging  
19 the Supreme Court maybe taking this issue up,  
20 but the framework that was in place back  
21 before the Supreme Court ruling was that it  
22 was an unregulated pollutant.

1           And one final point on the 2002  
2   preamble that we talked about that the Board  
3   has asked questions about. EPA does list the  
4   pollutants in the Federal Register notice  
5   that are in its view subject to PSD, but at  
6   that point, the Agency was of the view, as it  
7   enunciated a few months later in the  
8   Fabricant memo, CO2 was not a pollutant.

9           JUDGE REICH: So you're basically  
10   saying that notwithstanding the  
11   representation from Mr. Doster that as of  
12   that date, even though the only published  
13   guidance was the Cannon memo, that the Agency  
14   had already changed its interpretation?

15          MR. NILLES: There had obviously  
16   been a very strong signal from the  
17   administration that it was taking a very  
18   different tack on carbon dioxide, and that  
19   was manifested months later with the  
20   Fabricant memo.

21          JUDGE REICH: Is there something on  
22   or before that date that documents where the

1 Agency's evolution in thinking was?

2 MR. NILLES: We do not have access  
3 to those internal deliberations. No, Your  
4 Honor.

5 JUDGE REICH: Okay.

6 JUDGE STEIN: Is there any dispute  
7 between the parties that once the Title II  
8 regulations come down, which I believe the  
9 administrator has indicated would come down  
10 in December of '08, that at that time there  
11 would be no disagreement that CO2 would at  
12 that time be a regulated pollutant? I mean,  
13 I realize I'm asking you a question that I  
14 know may go beyond your capacity to answer,  
15 but --

16 MR. NILLES: It's certainly beyond  
17 my capacity because I can't speak for the  
18 Agency. Our view of that would of course be  
19 another trigger, and you heard Mr. Doster say  
20 that may -- that fourth category that you  
21 referred to, Judge Stein, may indeed pick up  
22 Title II, but I didn't get an unequivocal



1 sense from what he was saying that that was  
2 the Agency's final determination of this  
3 point.

4 JUDGE STEIN: But assuming that's  
5 the case, isn't what we're dealing with here  
6 is sort of a timing question? In other  
7 words, we've got a category of facilities  
8 that are sort of in this interim period prior  
9 to the time at which those regulations come  
10 down. And I'm not saying that the  
11 environmental consequences may not be  
12 insignificant in that interim period, but  
13 from a permitting perspective, how do you  
14 respond to the arguments that have been made  
15 about the practicality of permitting these  
16 individual facilities in the absence of  
17 guidance?

18 MR. NILLES: Let me just touch on  
19 the environmental significance. Two of these  
20 power plants proposed in the Midwest are  
21 equivalent to all the CO2 emissions that the  
22 7 initials RGGIs, the northeast states that

1 are working on power plant reduction measures  
2 through the regional Greenhouse Gas  
3 Initiative, they're working to cut their  
4 emissions by about 24 million tons a year by  
5 2020. Seven Northeast states from all the  
6 power plants. Two coal plants proposed in  
7 the Midwest; 24 million tons.

8           So the environmental consequences  
9 of waiting until the end of 2008 for another  
10 dozen, two dozen, three dozen coal plants to  
11 get approved without any CO2 controls, we're  
12 talking about tens -- dozens and dozens of  
13 millions of tons of carbon dioxide. And as a  
14 practical matter, these are projects that if  
15 they have to do some CO2 control in the  
16 future, it may be either infeasible or at  
17 huge, enormous costs. So from the practical  
18 matter, again, the sooner we do this, the  
19 better.

20           In terms of the robustness of the  
21 BACT process, Judge Stein, as you indicated,  
22 the BACT process lays out a long-time

1 five-step process that considers energy,  
2 economics, and environmental consequences,  
3 and we believe that it would be very simple  
4 to plug in CO2 into that process and work out  
5 does it make economic sense, and identify at  
6 step one all the technologies, and then go  
7 through that rigorous process that has been  
8 done for all the other pollutants. And  
9 there's no reason we can't do that today for  
10 carbon dioxide emissions.

11 I want to just go back to the  
12 waiver issue. It's clear that if we had  
13 raised this issue, the practical consequences  
14 would have been exactly the same. We would  
15 be in the same place today if we had raised  
16 it. So I just want to note that Illinois EPA  
17 and EPA and Christian County all argue it  
18 doesn't apply, we would be in the same place  
19 today whether or not we had raised it back  
20 before Mass. v. EPA.

21 JUDGE WOLGAST: Could you speak to  
22 Mr. Doster's argument that because

1 Section 821 wasn't actually codified in the  
2 Clean Air Act, it cannot be a regulation  
3 "subject to regulation" within the meaning of  
4 Section 165?

5 MR. NILLES: Your Honor, it's the  
6 first time we've heard that argument. I  
7 guess I would go back to -- in 1978 when EPA  
8 adopted the first PSD regulations and was  
9 interpreting what does "subject to  
10 regulation" means, and I think Brian Doster  
11 mentioned that it's pollutants including the  
12 NAAQS, the NSPS has its air pollutants in  
13 Title II, but it also says, any pollutant  
14 regulated under Subchapter C of Title 40 of  
15 the CFR. That's where the 821 regulations  
16 are.

17 So back in 1978, the regulations  
18 that EPA were saying at that point equaled  
19 subject to regulations were in fact added in  
20 1993 by EPA in 821. Honestly, I can't speak  
21 to was it in the act or out of the act, but  
22 as a practical matter, EPA has interpreted it

1 obviously as part of the Clean Air Act, and  
2 it's a part of the CFR where EPA all of its  
3 other Clean Air Act regulations today.

4 JUDGE REICH: Thank you,  
5 Mr. Nilles.

6 MR. NILLES: Thank you.

7 JUDGE REICH: I appreciate the  
8 argument of counsel. I think it was a very  
9 good argument, very helpful for the Board in  
10 understanding the issues being presented. We  
11 will obviously take this matter under  
12 advisement.

13 This hearing is adjourned.

14 (Whereupon, at approximately  
15 11:45 a.m., the HEARING was  
16 adjourned.)

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## CERTIFICATION OF TRANSCRIPT

I certify that the attached transcribed hearing, in the matter of Christian County Generation, LLC, taken on October 17, 2007, was held as herein appears and that this is the original transcript.

I, the undersigned, do certify that this is a true, accurate, and complete transcript prepared from the digital recordings taken by Jacqueline Richards-Craig, a court reporter employed by Beta Court Reporting, and that I have verified the accuracy of the transcript by comparing the typewritten transcript against the recordings provided.

Transcriber/Proofreader:

Andy White

Date:

10/22/07