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January 31, 2008

Via Hand Delivery

Ms. Erika Durr, Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
Colorado Building
1341 G Street N.W. Suite 600
Washington D.C. 20005

Re: Deseret Power Electric Cooperative, PSD Permit Number OU-000204.00,
PSD Appeal No. 07-03

Dear Ms. Durr:

Enclosed for filing is one original and 6 copies of Sierra Club's Opening Merits Brief for the above-referenced PSD Appeal Case. My colleague David Bookbinder submitted the Petition for Review, but we will both be working on this case, so please add my name and contact information to the docket service list for all future filings. If you have any questions about this filing or if I can be of any further assistance please call me at 415-977-5725.

Sincerely,

Joanne Spalding

Enclosures

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

In the matter of:)	PSD Appeal No. 07-03
)	
DESERET POWER ELECTRIC)	
COOPERATIVE (BONANZA))	
)	
PSD Permit Number OU-000204.00)	
)	

PETITIONER'S OPENING BRIEF

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INTRODUCTION

The Sierra Club seeks an order remanding the Prevention of Significant Deterioration ("PSD") Permit Number PSD-OU-0002-04.00 ("Bonanza PSD Permit") that EPA Region 8 issued to Deseret Power Electric Cooperative on August 30, 2007, for the purpose of including a best available control technology ("BACT") limit for carbon dioxide (CO_2) in the permit pursuant to Section 165(a)(4) of the Clean Air Act.

Region 8 issued the Bonanza PSD Permit authorizing construction of a new waste-coal-fired electric utility generating unit that would emit 1.8 million tons of carbon dioxide annually without including a BACT limit for CO_2 emissions. Sierra Club submitted comments on the draft permit, noting that it was deficient for failing to include a CO_2 emissions limit. In response, Region 8 stated, "EPA does not currently have the authority to address the challenge of global climate change by imposing limitations on the emissions of CO_2 and other greenhouse gases in PSD permits." Exh. 1, Response to Public Comments, at 5.

In fact, EPA can and must impose emissions limitations on CO_2 in PSD permits for new coal-fired power plants. Section 165(a)(4) of the Clean Air Act requires BACT "for each pollutant subject to regulation under this chapter emitted from . . . such facility." 42 U.S.C. § 7475(a)(4). As recently confirmed by the U.S. Supreme Court, CO_2 is a pollutant under the Clean Air Act. *Massachusetts v. Envtl. Protection Agency*, 127 S.Ct.

1438, 1462 (2007). It is emitted abundantly by coal-fired generators and is currently regulated under Section 821 of the Act. 42 U.S.C. § 7651k note; Pub. L. 101-549; 104 Stat. 2699. A BACT limit is therefore required.

Ignoring this straightforward obligation, EPA justified its refusal to impose BACT for CO_2 by interpreting "subject to regulation under the Act" as "presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant," citing a string of regulatory authorities that utterly fail to support this interpretation. Exh. 1 at 5-6.

The principal regulatory document on which EPA relies to support its interpretation is an internal memorandum that justifies EPA's approach solely on the basis that Congress did not intend regulation of CO_2. Exh. 4, Lydia N. Wegman, Definition of Regulated Air Pollutant for Purposes of Title V, Memo to Air Division Director, Regions I-X (April 26, 1993)("Wegman Memo"). In concluding that CO_2 was a pollutant, however, the Supreme Court in *Massachusetts* explicitly rejected the exact agency rationale, i.e., EPA's belief that Congress did not intend it to regulate greenhouse gases. Thus, in the wake of *Massachusetts*, any EPA regulatory treatment of CO_2 based on the rationale that Congress did not intend regulation of CO_2 is simply untenable.

In an effort to bolster this inadequate rationale, the Region and the Permittee have submitted briefs to the Board that contrive a thirty-year history of supposedly consistent regulatory interpretations supporting the

conclusion that CO_2 is not subject to BACT. Upon close examination, this "longstanding history" is nothing but a house of cards. Each of the authorities cited is irrelevant, equivocal, or unpersuasive. Taken together they demonstrate, at best, a history of inconsistency and avoidance with regard to regulation of CO_2 from stationary sources, to which no deference is owed. Finally, in a desperate attempt to buttress this shaky regulatory history argument, EPA makes the truly specious claim that Section 821 of the 1990 Amendments is not in fact part of the Clean Air Act, and thus the Section 821 regulations are not regulations "under the Act".

Sierra Club also notes that none of the authorities cited by EPA that actually deals with the term "regulation" in general or regulation of CO_2 specifically was the product of the kind of public participation appropriate to a regulatory decision of this magnitude. A ruling from the EAB on the critical issue of how EPA must treat CO_2 as a PSD pollutant would be based upon an inadequate record and opportunity for public participation. The PSD regulatory history shows that EPA does have the authority to regulate CO_2 as a PSD pollutant and its refusal to do so is the result not of any statutory prohibition but rather the agency's exercise of discretion that has never been subject to public examination. At a minimum, EAB should remand to the Region to fully develop the record

related to CO_2 and allow the public the opportunity to respond to EPA's positions.

ISSUE PRESENTED FOR REVIEW

Because carbon dioxide is a "pollutant subject to regulation" under the Clean Air Act, was EPA's failure to include in the Bonanza PSD Permit a best available control technology ("BACT") emission limit for carbon dioxide a clearly erroneous conclusion of law?

THRESHOLD PROCEDURAL REQUIREMENTS

The Environmental Appeals Board has jurisdiction to review this permit appeal under 40 C.F.R. Part 124. Sierra Club has standing because it participated in the public comment period on the draft permit (Exh. 2, comments filed by Tim Wagner on behalf of Sierra Club) and filed a timely petition for review. 40 C.F.R. § 124.19(a). The Board granted review of the first issue in Sierra Club's petition pursuant to 40 C.F.R. § 124.19(c).

STATEMENT OF FACTS

Deseret proposes to construct a "major modification" to its existing Bonanza plant, as defined in PSD rules. *See* 40 C.F.R. § 52.21(b)(2)(i). The proposed unit would include a circulating fluidized bed boiler, consisting of primary and secondary air fans, a combustor, a cyclone/solids separator, a superheater, an economizer, an air heater and an induced draft fan. Exh. 3, EPA Statement of Basis at 7. The proposed unit would additionally require combustion and generating systems, an emergency

generator, exhaust systems and pollution control equipment, coal and limestone material handling and storage systems, cooling water systems, and ash disposal systems. *Id.* The proposed unit would have a power output of up to 110 megawatts, bringing the overall Bonanza plant's total to approximately 610 megawatts. *Id.* at 6. It would emit 1.8 million tons of carbon dioxide annually. Exh. 2 at 2.

EPA issued a draft PSD permit on or about June 22, 2006. The comment period closed on July 29, 2006. On April 2, 2007, the U.S. Supreme Court handed down *Massachusetts v. EPA*, 127 S.Ct. 1438, holding that "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant.'" *Id.* at 1462. EPA then issued the final Bonanza PSD Permit and its Response to Comments on August 30, 2007, without reopening the permit for public comment. Sierra Club now urges the Board to remand this permit because EPA failed to establish a BACT emission limit for CO_2.

ARGUMENT

THE BONANZA PSD PERMIT SHOULD BE REMANDED BECAUSE IT LACKS A CO_2 BACT EMISSION LIMIT.

The Clean Air Act prohibits the construction of a new major stationary source of air pollutants in areas designated as in attainment of the National Ambient Air Quality Standards except in accordance with a prevention of significant deterioration (PSD) construction permit. 42 U.S.C. § 7475(a); 40 C.F.R. §52.21(a)(2)(iii). Section 165 of the Act requires that a

PSD permit include a BACT emission limit "for each pollutant subject to regulation under this chapter emitted from, or which results from" the facility. 42 U.S.C. § 7475(a)(4); *see also* 42 U.S.C. § 7479(3). EPA repeated that language in its implementing regulations: BACT is required for "any pollutant that otherwise is subject to regulation under the Act." 40 C.F.R. § 52.21(b)(50)(iv).

The Bonanza PSD Permit must include a BACT emission limit for carbon dioxide because it is a pollutant subject to regulation under the Act emitted from the facility. Carbon dioxide has been *regulated* under the Clean Air Act since 1993, when EPA adopted regulations implementing Section 821 that require monitoring, recordkeeping and reporting of CO_2 emissions by certain covered sources. *See* 42 U.S.C. § 7651k note; Pub. L. 101-549; 104 Stat. 2699; 40 C.F.R. § 75.1 *et seq.* On April 2, 2007, the Supreme Court held that carbon dioxide and other greenhouse gases are "pollutants" under the Clean Air Act. *Massachusetts v. EPA*, 127 S.Ct. at 1460. Now having been definitively ruled a *pollutant*, CO_2 is accordingly a *regulated pollutant* under the Act, and EPA is required to impose a CO_2 BACT emission limit in the Bonanza PSD permit.

A. The Supreme Court's Holding in Massachusetts v. EPA that Carbon Dioxide is a Pollutant Undermines EPA's Entire Approach to CO_2 Regulation.

In ruling that "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,'" the Supreme Court completely undermined EPA's rationale for failing to regulate greenhouse gases under the Clean Air Act. *Massachusetts v. EPA*, 127 S.Ct. at 1460. The flaw that the Court identified in EPA's position pervade the agency's approach to CO_2 regulation under other provisions of the statute, including the agency's refusal to require a BACT analysis for CO_2 in this case. EPA's interpretation of the language of the Clean Air Act was influenced by its mistaken belief about congressional intent:

> Because EPA believes that Congress did not intend it to regulate substances that contribute to climate change, the agency maintains that carbon dioxide is not an "air pollutant" within the meaning of the provision.

127 S.Ct. at 1460.

Here, the cornerstone of EPA's legal house of cards is a 1993 internal agency memorandum that addresses regulated air pollutants under Title V. *See* Exh. 4, Lydia N. Wegman, Definition of Regulated Air Pollutant for Purposes of Title V, Memo to Air Division Director, Regions I-X (April 26, 1993)("Wegman Memo"). The Wegman memo defines "air pollutant" in Section 302(g) narrowly to include only pollutants subject to those regulations under the Act that require actual control of emissions. *Id.* at 4-5. It explicitly states that the decision to narrowly define "air pollutant" was based on the agency's view that Congress intended it to do so,

specifically with respect to CO_2. *Id.* at 4. The memo also acknowledges that EPA was exercising discretion in arriving at this definition. *Id.* at 5.

In other words, the very same rationale that was rejected in *Massachusetts* is the basis of the Wegman memo that EPA and Deseret rely on so heavily. In a Section titled "Definition of 'Air Pollutant' Pursuant to Section 302," the Wegman memo interprets "air pollutant" narrowly with the explicit purpose of excluding carbon dioxide and methane from Title V requirements:

> Although Section 302(g) can be read quite broadly, so as to encompass virtually any substance emitted into the atmosphere, ***EPA believes that it is more consistent with the intent of Congress to interpret this provision more narrowly.*** Were this not done, a variety of sources that have no known prospect for future regulation under the Act would nonetheless be classified as major sources and be required to apply for title V permits. ***Of particular concern would be sources of carbon dioxide*** or methane.

Memorandum from Lydia Wegman to Air Division Director, Regions I-X, Definition of Regulated Air Pollutant for Purposes of Title V, Exh. 4, p. 4 (emphasis added). This language demonstrates that Wegman's conclusion is based on the mistaken belief that Congress did not intend to regulate CO_2.

The next paragraph of the memo makes it clear that EPA's belief that it should exclude carbon dioxide and methane sources from Title V requirements was its motivation for exercising its discretion to limit

"pollutants subject to regulation under the Act" to those pollutants subject to actual control of emissions:

> As a result, EPA is interpreting "air pollutant" for Section 302(g) purposes as limited to all pollutants subject to regulation under the Act. . . . It should be noted that the 1990 Amendments to the Act did include provisions with respect to carbon dioxide (Section 821) and methane (Section 603), but these requirements involve actions such as reporting and study, not actual control of emissions. Therefore, these provisions do not preempt EPA's discretion to exclude these pollutants in determining whether a source is major.

Id. at 4-5. This interpretation is dead wrong because it was driven by the same mistaken view of congressional intent – the belief that Congress did not intend to regulate greenhouse gases – that the Supreme Court identified in *Massachusetts v. EPA*.

The Court's analysis invalidating EPA's gloss on the motor vehicle provisions of the statute demonstrates that the agency was again unduly constrained by its view of congressional intent related to climate change:

> While the Congresses that drafted §202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of §202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.

127 S.Ct. at 1462.

This logic applies equally to the PSD provisions, which have similarly broad language covering "each pollutant subject to regulation" under the Act. The interpretation that EPA espouses is influenced by a

constrained view of congressional intent in establishing BACT requirements. EPA contends that it can limit the pollutants subject to BACT to only those pollutants covered by the types of regulations it had authority to adopt at the time the BACT provisions were enacted in 1977. Region 8 Resp. to Pet., p.12. This construction ignores the Supreme Court's directive to give effect to the congressional intent to promote regulatory flexibility that can address changing circumstances and scientific developments.

EPA's misguided belief that it should not regulate greenhouse gases under the Clean Air Act has led the agency to adopt cramped interpretations of numerous provisions, not just the definition of "pollutant" under Section 302(g). The Supreme Court's decision in *Massachusetts v. EPA* compels the agency to rethink entirely its statutory obligations.

B. Carbon Dioxide is Subject to Regulation.

Carbon dioxide is regulated under Section 821(a) of the Clean Air Act, which provides:

> Monitoring. – The Administrator of the Environmental Protection Agency ***shall promulgate regulations*** within 18 months after the enactment of the Clean Air Act Amendments of 1990 ***to require that all affected sources subject to Title V of the Clean Air Act shall also monitor carbon dioxide emissions*** according to the same timetable as in Sections 511(b) and (c). ***The regulations shall require that such data shall be reported to the Administrator.*** The provisions of Section 511(e) of Title V of the Clean Air Act shall apply for purposes of this Section in the same manner and to the same extent as such

provision applies to the monitoring and data referred to in Section 511.[1]

42 U.S.C. 7651k note; Pub.L. 101-549; 104 Stat. 2699 (emphasis added). In 1993, EPA promulgated the regulations required by Section 821. They require CO_2 emissions monitoring (40 C.F.R. §§ 75.1(b), 75.10(a)(3)); preparing and maintaining monitoring plans (40 C.F.R. § 75.33); maintaining records (40 C.F.R. § 75.57); and reporting such information to EPA (40 C.F.R. §§ 75.60 – 64). The regulations prohibit operation in violation of these requirements and provide that a violation of any Part 75 requirement is a violation of the Act. 40 C.F.R. § 75.5.[2]

The statutory language is clear: In Section 821 Congress ordered EPA "to promulgate regulations" requiring that hundreds of facilities covered by Title IV monitor and report their CO_2 emissions, and in Section 165, Congress required a BACT limit for "any pollutant subject to regulation" under the Act. The combined effect of these two statutory mandates is that BACT limits are applicable to CO_2 pursuant to Section 165.

1. EPA's Interpretation of "Regulation" is Unduly Narrow.

[1] According to the Reporter's notes, these references to Title V are meant to refer to Title IV, and the references to Section 511 are meant to refer to Section 412.

[2] Because violations of Section 821 are subject to the enforcement provisions of the Act, CO_2 is regulated under both the enforcement provisions of the Act and Section 821.

According to EPA, "regulation" in Section 165 of the Act does not mean regulation; rather, it means "a statutory or regulatory provision that requires actual control of emissions of that pollutant." Resp. to Public Comments, Exh. 1 at 5-6; Region 8 Resp. to Pet. at 6. In other words, regulations that require monitoring and reporting do not count as regulations. This narrow interpretation runs contrary to the plain language of the statute, and contravenes the Supreme Court's admonition to give full effect to the broadly-worded provisions of the Clean Air Act. *See Massachusetts v. EPA*, 127 S.Ct. at 1462 (finding that Congress deliberately used broad language in the Clean Air Act to render it flexible enough to avoid future obsolescence.)

a. The Plain Meaning of "Regulation" Encompasses Monitoring and Reporting Regulations.

The most basic canon of statutory interpretation is that words should be given their plain meaning. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Webster's defines "regulation" as "an authoritative rule dealing with details or procedure; (b) a rule or order issued by an executive authority or regulatory agency of a government and having the force of law." Merriam-Webster's Collegiate Dictionary 1049 (11th ed. 2005). While Black's Law Dictionary includes as one definition of regulation "the act or process

of controlling by rule or restriction," it also defines regulation as "a rule or order, having legal force, usu. issued by an administrative agency." Black's Law Dictionary (8th Ed. 2004).

The rules that EPA promulgated implementing Section 821 undeniably have the force of law, and a violation of the rules results in severe sanctions. 40 C.F.R. § 75.5. The Supreme Court has pointed out that information gathering, record keeping, and data publication rules are indisputably within the conventional understanding of "regulation." *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976)(record keeping and reporting requirements are regulation of political speech). And again, in *Massachusetts v. EPA*, the Supreme Court cautioned against interpreting the words of the Clean Air Act too narrowly in light of congressional intent.

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 842-843 (1984). Moreover, "'[t]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Massachusetts v. EPA*, 127 S.Ct. at 1462 (quoting *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998)).

Reading the statute as a whole, the congressional intent to define "regulation" broadly is clear. In drafting the Clean Air Act, Congress knew

how to refer to "actual control of emissions" when it wanted to, and in fact created two separate terms of art for just such occasions, "emissions limitation" and "emissions standard":

> The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.

42 U.S.C. §7602(k).

Congress then used the terms "emission limitation" and "emission standard" throughout the Act.[3] Thus if Congress wanted to limit the applicability of Section 165 to those pollutants that were subject to such an emission standard or limitation, it certainly knew how to do so. But it did not do so in Section 165.

Deseret argues that defining "regulation" as "actual control of emissions" results in a broader definition than would be accomplished by using the term "emission standard" or "emission limitation" because "EPA

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[3] *See, e.g.*, 42 U.S.C. § 7475(a)(3)("emissions from . . . such facility will not cause or contribute to air pollution in excess of . . . (C) any other applicable emission standard or standard of performance under this chapter"); 42 U.S.C. § 7651d(a)(1)("Each utility unit subject to an annual sulfur dioxide tonnage emission limitation under this Section . . ."); 42 U.S.C. § 7412(f)(5)("The Administrator shall not be required to conduct any review under this subsection or promulgate emission limitations under this subsection . . ."); 42 U.S.C. § 7521(f)(2)("This percentage reduction shall be determined by comparing any proposed high altitude emission standards to high altitude emissions . . ."); 42 U.S.C. § 7617(a)(7)("any aircraft emission standard under Section 7571 of this title").

can control emissions through 'standard[s] of performance,' 'design standards,' 'equipment standards,' 'work practice standards,' or 'operational standards.'" Mem. in Support of Permittee's Mtn. to Participate at 8 (citations omitted). Deseret's argument completely ignores the statutory definition of "emission standard" and "emission limitation" quoted above, which includes each of these control mechanisms except standards of performance. And if Congress meant, "emission standard or standard of performance under this chapter" rather than "regulation under this chapter," in Section 165(a)(4), it would simply have repeated those exact words from the immediately preceding subsection. *See* 42 U.S.C. § 7475(a)(3) ("emissions from . . . such facility will not cause or contribute to air pollution in excess of . . . (C) any other applicable ***emission standard or standard of performance under this chapter***")(emphasis added).[4]

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[4] Deseret also offers its own new rationale for why "subject to regulation" requires actual control of emissions, distinguishing regulation of a pollutant from regulation of a facility. Mem. in Support of Permittee's Mtn. to Participate at 6. The simple response to this argument is that it is not a rationale on which EPA has ever relied, and the arguments devised by the permittee's lawyers in the course of litigation are entitled to no deference. *See Mova Pharaceutical Corp v. Shalala*, 140 F.3d 1060, 1067 (D.C. Cir. 1998)("it is on an agency's own justifications that the validity of its regulations must stand or fall"); *Appalachian Power Co. v. FERC*, 101 F.3d 1432, 1439 (D.C. Cir. 1996)(argument raised by an intervenor cannot substitute for a missing rationale by the agency). More fundamentally, to say that the pollutant is regulated means that the actions of the emitter are subject to regulation – after all, there could be no emissions without an emitter. The pollutant and the source are inextricably regulated together. Deseret's suggestion that Section 821 regulates only the

b. EPA Has Not Provided Any Rationale to Give "Regulation" Two Different Meanings.

Interpreting "regulation" in the PSD provisions to mean some subset of "regulation" as used elsewhere in the Act also runs contrary to the rule repeatedly expressed by the Supreme Court that, "generally, identical words used in different parts of the same statute are . . . presumed to have the same meaning." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 33-34 (2005)); *see also Clark v. Martinez*, 543 U.S. 371, 378 (2005)("[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one").

To overcome the general rule of statutory interpretation that words should have a consistent meaning, EPA takes the position that the Supreme Court's decision in *Environmental Defense v. Duke Energy Corp.*, 127 S.Ct. 1423 (2007), liberates it to read the word "regulation" inconsistently because, "EPA may interpret the same term in the Clean Air Act differently considering the relevant programs and context." Region 8 Resp. to Pet., p.14-15. While it is true that "[c]ontext counts," 127 S.Ct. at 1433, the problem is that EPA has not offered ***any*** rationale to explain why

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emitting facilities and not the monitored pollutants misses this essential point.

"regulation" in Section 821 means "regulation," but that "regulation" in Section 165 means "actual control of emissions." None.

Indeed, the Act contains numerous other examples of Congress requiring regulations for many reasons aside from "actual control of emissions," including right in Section 165: "The review provided for in subsection (a) of this Section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, . . . of the ambient air quality at the proposed site . . . ." 42 U.S.C. §7475(e)(1). *See also* 42 U.S.C. §7619(a)("the Administrator shall promulgate regulations establishing an air quality monitoring system throughout the United States . . .").

That differences exist between Section 821 and Section 165(a)(4) is obvious, and by itself is not enough to rebut the presumption that the same term has the same meaning when it occurs in a single statute. EPA must provide an analysis of each Section "to determine whether the context gives the term a further meaning that would resolve the issue in dispute." *Environmental Defense v. Duke Energy Corp.*, 127 S.Ct. at 1433 (citations and internal quotations omitted). EPA has never provided such an analysis, either during the course of this permit proceeding or elsewhere. The Board does not defer to an interpretation of a term that is offered without sufficient authority based on an adequate record. *In re Shell Offshore, Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit,*

2007 EPA App. Lexis 37, p. 65, 73-79, OCS Appeal Nos. 07-01 & 07-02. The record in this case is devoid of any meaningful analysis or relevant authority that supports EPA's interpretation of the term "regulation" or its decision to grant the PSD permit without including a CO_2 BACT limit. Any agency post-hoc efforts to fill the gaps in this record given the current posture of this case would foreclose meaningful public participation on an issue of critical importance.

c. BACT Requirements Are Consistent with Congress's Intent to Monitor CO_2.

The argument that Congress could not have intended BACT to apply to pollutants that are not already subject to emissions limitations, EPA Resp. to Pet., p.19-20, is unpersuasive and does not justify defining "regulation" differently in the relevant statutory provisions. In fact, applying BACT to a pollutant not otherwise subject to controls makes perfect sense in the context of the PSD provisions, Section 821, and the statute as a whole. Requiring a BACT analysis in no way prejudges the outcome by mandating a particular emissions limit. The definition of BACT explicitly includes consideration of "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). As a result, the BACT analysis can be applied to emissions that Congress and EPA have not yet otherwise elected to control, in a manner that is cost-effective, consistent with the limits of available technology, and appropriate in light of environmental and energy implications. Indeed, as an emission control

requirement, BACT is more compatible with the idea of "pollutant flexibility" (as identified by the Supreme Court in *Massachusetts v. EPA*) than other Clean Air Act provisions.[5] Moreover, because BACT is inherently a case-by-case standard setting process, it allows for greater flexibility to consider site-specific conditions, cost, benefits, and other factors, than do other regulatory programs under the Act.

Given the nature of a BACT analysis, a congressional intent to study CO_2 and require monitoring, recordkeeping and reporting is entirely consistent with an intent to require new emission sources to examine whether cost-effective measures could reduce CO_2 emissions on a case-by-case basis. Actual emission reductions would be required only when they could be achieved cost-effectively using available technology (considering energy, environmental, and economic impacts and other costs). In short, the idea that CO_2 BACT analysis is fundamentally at odds with Congress's information gathering objectives under Section 821 is simply not evident from the language of the Act. *See Massachusetts v. EPA*, 127 S.Ct. at 1460-61 ("And unlike EPA, we have no difficulty reconciling Congress' various efforts to promote . . . research to better understand climate change with the agency's pre-existing mandate to

[5] For example, when adopting standards under the NAAQS and stationary air toxics provisions (CAA Sections 109 and 112, respectively), EPA may not consider cost, economic impact and other extraneous factors at all in setting the core standards.

regulate 'any air pollutant' that may endanger the public welfare.")(footnote and citation omitted).

In fact, BACT analyses might generate useful information about the costs of achieving carbon reductions, the technologies available, the collateral energy implications, and the environmental and other benefits of reduced carbon output, that would serve as an important supplement to other information gathering efforts. CO_2 BACT review could also help identify an appropriate trajectory to eventually establish uniform emissions limits or performance requirements for CO_2 under other provisions of the Act.[6]

Accordingly, regulating carbon dioxide as a PSD pollutant subject to a BACT analysis is logically consistent with a congressional desire to gather needed information without immediately imposing uniform emission reduction requirements. The structure of the statute thus supports the plain language meaning of "regulation" to include monitoring and reporting requirements.

2. Regulatory History Does Not Support EPA's Interpretation of "Regulation"

[6] Deseret's "parade of horribles" argument that this plain reading of the Act would compel EPA to require BACT analysis for oxygen and water vapor is unfounded. Mem. in Support of Mtn. to Participate, pp. 14-15. Oxygen and water vapor are only mentioned in the implementing regulations, 40 C.F.R. § 75.10(a)(3)(iii), 40 C.F.R. § 75.19 (c)(1)(iv)(H)(1), simply as markers to calculate emissions of other gases and are not themselves "subject to" any form of regulation.

EPA attempts to give its flawed and narrow definition of "regulation" a patina of authority by inventing a thirty-year history of regulatory interpretations that allegedly support the conclusion that "regulation" means "actual control of emissions" and that BACT therefore does not apply to CO_2. Most of these regulatory pronouncements offer no support for EPA's position. The few that are even relevant are equivocal and were actions taken without adequate opportunity for public input. Indeed, EPA has never explicitly put forth its narrow definition of "regulation" or taken a position on whether BACT applies to CO_2 emissions in any context that allows for meaningful public participation. If EPA has such a rationale, the agency should explain it thoroughly and publish it in a context that allows for public input. A regulatory interpretation of this magnitude warrants thoughtful analysis, transparent decision-making and meaningful public dialogue, not a cursory response to comments or a paragraph in a 15-year old internal agency memo.

a. Agency Memoranda

EPA's decision to interpret "regulation" to exclude rules requiring monitoring and recordkeeping is articulated in only one place, the Wegman memo, which devotes a mere three sentences to the issue. Wegman Memo, Exh. 4 at 5. As discussed above, the Wegman memo is no longer viable because the *Massachusetts v. EPA* decision completely undermined its rationale. While EPA contends that the Wegman

conclusion that CO_2 is not subject to regulation remains valid notwithstanding the Court's ruling that CO_2 is a pollutant, that conclusion is fatally flawed because it was based on the mistaken premise that Congress did not intend to regulate CO_2 under the Clean Air Act.

EPA also relies on a later memo that defined CO_2 as an air pollutant but acknowledged that the agency had not adopted regulations related to CO_2 under provisions of the Act that allow for agency discretion. *See* Exh. 5, Jonathon Z. Cannon, General Counsel, EPA, EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources, Memo to Carol M. Browner (April 10, 1998)("Cannon Memo"). The Cannon memo does not support a conclusion that CO_2 is not regulated under the Act: it states, "While CO2, as an air pollutant, is within EPA's scope of authority to regulate, the Administrator has not yet determined that CO2 meets the criteria for regulation under one or more provisions of the Act." *Id.* at 4; *see also id.* at 5. Because the regulations adopted under Section 821 were not based on any determination by the Administrator regarding whether CO_2 meets criteria for regulation under the Act, but rather on a determination made by Congress, the Cannon memo is immaterial. It says nothing about whether *Congress* has made a determination to regulate CO_2. Clearly, Congress has done so by adopting Section 821.

Moreover, the Cannon memo speaks to statutory provisions that give EPA discretion, and thus is irrelevant to whether regulations adopted

pursuant to Section 821 are "regulations" for purposes of Section 165(a)(4). By adopting Section 821, Congress *required* EPA to regulate CO_2; it did not give the Administrator discretion about whether to do so.

These internal agency documents are devoid of any analysis that would support an EPA decision to interpret "regulation" in Section 165 differently than in Section 821, and the public has never had the opportunity to comment on them. Moreover, as the Supreme Court noted in *Environmental Defense v. Duke Energy Corp.*, "an isolated opinion of an agency official does not authorize a court to read a regulation inconsistently with its language." 127 S.Ct. at 1436. This proposition applies with even greater force to an agency official's reading of a statute.

b. Rulemaking

In the thirty-year history of regulations implementing the PSD program, none of the proposed or final rules narrows the definition of "regulation" or addresses whether CO_2 is subject to BACT. The current implementing regulation, adopted in 2002, says nothing about CO_2 specifically and merely parrots the statutory language, requiring BACT for "[a]ny pollutant that otherwise is subject to regulation under the Act." 40 C.F.R. § 52.21(b)(50)(iv).[7] As discussed above, this language supports a

[7] EPA wrongly suggests that Sierra Club is making an untimely appeal of the agency's 2002 definition of a "regulated NSR pollutant". Region 8 Resp. to Pet. at 8. Sierra Club does not challenge EPA's definition of

broad definition of "regulation" that would require the imposition of BACT for CO_2 emissions. In any event, EPA cannot rely on it to support its contrary interpretation:

> [T]he existence of a parroting regulation does not change the fact that the question here is . . . the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."

Gonzales v. Oregon, 546 U.S. 243, 257 (2006).

The rulemaking proceedings that led to the adoption of the current rule do not provide any basis to conclude that BACT should not apply to CO_2. EPA cites the preamble to the rule, which contains a list of pollutants subject to PSD review that does not include CO_2, as evidence that EPA interpreted the PSD provisions to exclude CO_2 from BACT regulation. Region 8 Resp. to Pet. at 8. The language of the preamble, however, does not indicate that the list is all-inclusive, and it appears in a Section

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"regulated NSR pollutant"; rather, it is challenging Region 8's decision to exclude the Section 821 regulations from "regulation" as that term is used in both Section 165 and EPA's regulations. EPA has never previously stated in any rulemaking proceeding that "regulated NSR pollutants" is limited to those pollutants subject to "a statutory or regulatory provision that requires actual control of emissions." This position appears only in the Wegman memo concerning Title V permits. Exh. 4, Wegman memo at 4. Not only does the Wegman memo address a separate part of the Act (the definition of a major source under Title V), it was issued three years prior to the EPA's draft PSD regulations and nine years prior to their finalization. Even if the Wegman memo had addressed PSD permitting, as a guidance document it was not final agency action and could not have been appealed. Only now, when EPA has explicitly adopted this position in final agency action, that its position is ripe for review.

titled "Listed Hazardous Air Pollutants." 67 Fed. Reg. 80186, 80240 (Dec. 31, 2002). The same is true of the proposed rule. *See* 61 Fed. Reg. 38250, 38310 (July 23, 1996). This language does not demonstrate an intent to exclude CO_2 from BACT requirements or to narrow the definition of "regulation" in any way.[8] This rulemaking did not discuss, explain, or justify an agency decision to exclude CO_2 from the scope of PSD analysis, nor did this rulemaking provide notice and an opportunity for public comment on such a decision.

Efforts to rely on earlier rulemakings fare no better. In explaining the PSD rules adopted pursuant to the 1977 Amendments to the Clean Air Act, EPA unequivocally stated that "BACT applies to all pollutants regulated under the Act." 43 Fed. Reg. 26388 (June 19, 1978). In this rulemaking, EPA did define "subject to regulation under the Act," noting:

> Some questions have been raised regarding what "subject to regulation under this Act" means relative to BACT determinations. . . . ***"[S]ubject to regulation under the Act" means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations*** for any source type.

43 Fed. Reg. 26388, 26397 (emphasis added). *See also* 42 Fed. Reg. 57479, 57481 (Nov. 3, 1977)("The Amendments require BACT for all pollutants regulated under the Act. Thus, any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations will be subject to a case-by-

[8] At the time that the proposed rule was published, EPA did not even consider CO_2 to be a pollutant, so it is not surprising that the agency did not include it on a list of pollutants. *See* Wegman Memo, Exh. 4.

case BACT determination.").[9] While this rule predates the enactment of Section 821, the regulations implementing Section 821 are now codified in Subchapter C of C.F.R. Title 40. Nothing in this rulemaking proceeding precludes applying BACT to CO_2 or even suggests any attempt to limit the pollutants covered by the PSD provisions. Instead, it demonstrates that EPA initially interpreted "subject to regulation under the Act" quite broadly, an interpretation that was affirmed by the D.C. Circuit in *Alabama Power Co. v. Costle*, 636 F.2d 323, 404 (D.C. Cir. 1979).

EPA has never engaged in any rulemaking proceeding that addresses whether CO_2 should be subject to PSD permitting requirements or provided an opportunity for the public to comment on this critical issue.

c. EAB Cases

The EAB decisions on which EPA relies to support its regulatory history argument are also unpersuasive. EPA cites *North County Resource Recovery Assoc.*, 2 E.A.D. 229, 230 (Adm'r 1986), for the proposition that

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[9] This language is followed by a list of categories of pollutants that were included in the Act at that time. EPA implies that this list is somehow evidence that the agency construed "subject to regulation" to include only pollutants subject to actual emission controls (Region 8 Resp. to Pet. at 11), but the list simply reflects the statute as it then existed. EPA may be correct in asserting that "it was appropriate for EPA to construe 'subject to regulation under the Act' to refer to pollutants covered by the types of regulations EPA had the authority to adopt under other provisions of the Clean Air Act at that time," (Region 8 Resp. at 13) but nothing in this regulatory history indicates that EPA meant to exclude from BACT requirements pollutants that later became subject to regulation under the Act. The same can be said of the 1980 PSD rules. *See* 45 Fed. Reg. at 52723 (Aug. 7, 1980).

the agency "lacks the authority to impose [PSD permit] limitations or other restrictions directly on the emission of unregulated pollutants." Region 8 Resp. to Pet. at 5. This case does not define "unregulated pollutants," however, so it has no bearing on the definition of "regulation" in Section 165. It does not address whether CO_2 is a regulated pollutant or whether EPA has discretion to refuse to define it as such. The decision in *Knauf Fiber Glass*, 8 E.A.D. 121, 162 (EAB 1999), is equally unhelpful, simply stating that "[n]ot all air pollutants are covered by the federal PSD review requirements." Neither of these cases speaks to the issue of how to define a regulated pollutant, nor do they change the fact that carbon dioxide is regulated under Section 821.

In *Inter-Power of New York, Inc.*, 5 E.A.D. 130 (EAB 1994), the Board referred to carbon dioxide as an unregulated pollutant without analysis or citation to any authority. Moreover, the petitioner waived its arguments related to CO_2 by failing to address the region's response to comments, *id.* at n.35, so the Board's perfunctory remarks on the issue were made without the benefit of a fully developed record. EPA's reliance on the decision in *Kawaihae Cogeneration Project*, 7 E.A.D. 107 (EAB 1997), is equally unavailing. In that case, the Region stated that CO_2 is not considered a regulated air pollutant for permitting purposes, but the Board did not reach the merits of the CO_2 issue because the petitioners offered no information to support their position. *Id.* at 132.

Neither of these decisions sheds light on the definition of the term "regulation" in Section 165. Both cases were decided during a time when the agency took the position that CO_2 is not a pollutant. *See* Wegman Memo, Exh. 4. In neither case did the Board have a fully developed record on the CO_2 issue. Given the absence of analysis, the enormous amount of information about the harmful effects of CO_2 that has emerged in the decade since these cases were decided, and the intervening Supreme Court ruling in *Massachusetts v. EPA*, it would be folly to rely on these decisions as authority for the proposition that CO_2 is not now subject to the requirements of BACT.

3. EPA's Interpretation of "Regulation" Conflicts with *Alabama Power Co. v. Costle*.

The D.C. Circuit's holding in *Alabama Power Co. v. Costle*, 636 F.2d 323, 403 (D.C. Cir. 1979), foreclosed the narrow reading of the phrase, "each pollutant subject to regulation" that EPA espouses. In *Alabama Power*, industry groups challenged EPA regulations implementing the newly-enacted PSD provisions, arguing that BACT applied only to sulfur dioxide and particulate matter. The court upheld EPA's regulation that, as characterized by the court, "applies PSD and BACT ***immediately to each type of pollutant regulated for any purpose under any provision of the Act***, not limited to sulfur dioxide and particulates." *Id.* (emphasis added). The court emphatically stated that the phrase "each pollutant subject to regulation" should be read broadly:

> The only administrative task apparently reserved to the Agency . . . is to identify those . . . pollutants subject to regulation under the Act which are thereby comprehended by the statute. The language of the Act does not limit the applicability of PSD only to one or several of the pollutants regulated under the Act . . . .

Id. at 404.

The industry groups had argued that PSD requirements should not apply immediately to pollutants included in Section 166 of the Act (hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides), because that provision required EPA to study those pollutants prior to regulating them. *Id.* at 405-06. The court rejected the industry argument:

> . . . Though ***Congress could have decided to delay the applicability of PSD for such pollutants until all studies and regulations*** required by Section 166 ***have been completed, Congress apparently chose not to do so***, and it emphasized its decision on that point in at least five statutory provisions.

Id. at 406 (emphasis added). Thus, even though some of these pollutants were not yet subject to actual control of emissions, the court held that they were nonetheless "subject to regulation under the Act":

> . . .the plain language of Section 165 . . .in a litany of repetition, provides without qualification that each of its major substantive provisions shall be effective after 7 August 1977 with regard to each pollutant subject to regulation under the Act, or with regard to any "applicable emission standard or standard of performance under" the Act. As if to make the point even more clear, the definition of BACT itself in Section 169 applies to each such pollutant. ***The statutory language leaves no room for limiting the phrase "each***

> ***pollutant subject to regulation"*** to sulfur dioxide and particulates.

Id. Looking to the legislative history, the court observed that while Congress intended to study the Section 166 pollutants because of a lack of adequate information related to the implications of further regulating those pollutants, it nevertheless decided to extend BACT requirements "to ***all pollutants*** emitted from any new major emitting facility so that the maximum degree of emission reduction would be achieved in order to minimize potential deterioration." *Id.* (citing 123 Cong. Rec. S9162, S9170 (daily ed. 8 June 1977)).

Although this decision predates the enactment of Section 821, the D.C. Circuit's reasoning behind its holding that BACT applies "immediately to each type of pollutant regulated for any purpose under any provision of the Act," *id.* at 403, applies to the subsequent enactment of statutory provisions that subject additional pollutants to regulation, such as Section 821. The court's rationale compels the conclusion that BACT applies to CO_2.

In *Alabama Power*, industry groups raised arguments nearly identical to those raised in this case, and the Court's careful analysis of the statutory text and legislative history applies with equal force here. Like Section 166, Section 821 requires study of a pollutant but does not impose immediate emissions reductions. Moreover, Congress contemplated eventual control of CO_2 emissions when it

adopted Section 821, just as it anticipated controls of the Section 166 pollutants. As Congressman Moorhead noted in offering Section 821, "we can hardly expect to make responsible decisions about controlling these emissions if we fail to take the necessary steps to improve our understanding of the magnitude and rate of increase in these emissions."[10] 136 Cong. Rec. H2915-01, H2934 (May 23, 1990). In both cases, the congressional intent to study the pollutants is entirely compatible with the intent to apply BACT immediately.

4. If EPA Wants to Interpret "Regulation" as "Emission Limitation" It Must Do So With Meaningful Public Participation

The PSD provisions apply to CO_2 because it is a regulated pollutant under the plain language of the Clean Air Act. If EPA wants to define "regulation" to mean something other than "regulation," it must offer a coherent and rational justification for its decision to interpret the otherwise seemingly clear language of the Act in a counterintuitive manner. Moreover, that justification must include a full analysis of the practical and policy implications of adopting such an interpretation, especially in light of the compelling need to begin dealing with CO_2 and other greenhouse

[10] EPA Administrator Johnson recently announced that the agency is developing regulations under the Clean Air Act to control mobile source greenhouse gas emissions, which of course include CO_2 emissions. Exh. 6, Excerpts of Transcript, House Committee on Oversight and Government Reform, Hearing on EPA Approval of New Power Plants: Failure to Address Global Warming Pollutants, Nov. 8, 2007.

gas emissions immediately to avert the harmful health, environmental, social, economic, and other impacts that are now widely recognized as being associated with climate change.

The agency has never undertaken a considered analysis of this issue or solicited public input. Even if the agency believes that the Clean Air Act allows it to interpret "regulation" to mean "emission limitation," it is clear that the statute does not require that interpretation. Indeed, the Wegman and Cannon memos both acknowledge that EPA has discretion to define "regulation" in a manner that would include regulation of CO_2.[11] Exh. 4 at 5; Exh. 5 at 4. EPA clearly has the authority to require a BACT limit for CO_2. It simply has not exercised that authority, and it has failed to adequately justify its inaction.

If the Board determines that the plain language of the statute does not require EPA to impose BACT limits on CO_2 emissions, then it should remand the permit and direct Region 8 to provide a robust explanation of

[11] In fact, while flawed for other reasons, the Wegman memo specifically recognized that EPA's interpretation was discretionary, and that the agency could change its interpretation of whether regulation under Section 821 made CO_2 "subject to regulation" for other purposes in the Act. Exh. 4 at 5. Moreover, the agency has now reached the very conclusion that said would trigger reconsideration in the Wegman memo – deciding that CO_2 needs to be regulated. Exh. 6. Thus, even if the Wegman memo were not inherently suspect because of its reliance on the premise Congress did not intend to regulate CO_2, EPA would need to provide a rational policy explanation of why, in light of *Massachusetts v. EPA*, the IPCC's Fourth Assessment, and its own statements that CO_2 needs to be regulated under the Act, it is still refusing to treat CO_2 as subject to regulation for purposes of Section 165.

the basis for its exercise of discretion, including examination of the full range of underlying factual, technical, and policy considerations, and to reopen the public comment period to allow the public to address the agency's position on the definition of "regulation" and the consequences of that decision for the purposes of regulating CO_2.[12] If the Board were to resolve this case in the Region's favor, without a remand, it would foreclose public participation on this critical policy question, and deprive the appropriate agency decisionmaker of the ability to make a well informed policy decision in light of all the evidence and competing legal, factual and policy considerations.

C. CO_2 is Regulated "Under the Act"

Carbon dioxide is regulated under the Clean Air Act because Section 821 is part of the Act. It is also regulated by various provisions in state implementation plans (SIPs), which become part of the Clean Air Act when EPA approves them.

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[12] These considerations must include a balancing of, among other things, the health, environmental, societal, economic, logistical, and ethical implications of alternative EPA interpretations and approaches – taking into consideration new information about the impact of GHG emissions and the need to immediately reduce such emissions to avoid severe climate disruption. Without this kind of analysis, and related public comments, EPA cannot make a well informed decision on this matter. Nor is the threat of delay a sufficient justification for the Board to refuse to require the Region to undertake this kind of robust examination. Had the agency selected this course from the beginning, as it should have as soon as it realized that an issue of such magnitude was at stake, the process could have been complete by now, and the Region could already be deliberating with all the issues, concerns and considerations in sharp focus.

1. Section 821 is Part of the Clean Air Act.

Section 821 is unquestionably part of the Clean Air Act. It is part of a congressional enactment titled "Clean Air Act, Amendments," Pub. L. 101-549, 104 Stat. 2699 (1990) and the logical presumption is that the provisions of this enactment became a part of the Clean Air Act absent some indication that Congress intended otherwise. The content of Section 821, its relationship to other provisions of the Act, and the legislative and regulatory history all support the conclusion that it is part of the Clean Air Act.

Section 821 was conceived as part of the Clean Air Act, and separating it from the Act would render it incoherent. The monitoring, reporting and recordkeeping requirements it imposes depend on the framework in Section 412 of the Act, 42 U.S.C. § 7651k. Enforcement of Section 821 is accomplished through the enforcement mechanisms in the Act, and a violator is subject to the penalty provisions of the Act. *See* 42 U.S.C. § 7651k(e). In offering this provision, its sponsor, Congressman Moorhead, spoke of Section 821 as part of the process of "establishing a final version of the Clean Air Act." 136 Cong. Rec. H. 2934 (May 23, 1990).

EPA has consistently treated Section 821 as a part of the Clean Air Act. The regulations implementing Section 821, which are the same regulations that implement Section 412 of the Act, state:

> The purpose of this part is to establish requirements for the monitoring, recordkeeping, and reporting of sulfur dioxide (SO_2),

> nitrogen oxides (NO_X), and carbon dioxide (CO_2) emissions, volumetric flow, and opacity data from affected units under the Acid Rain Program ***pursuant to Sections 412 and 821 of the CAA, 42 U.S.C. 7401-7671q as amended by Public Law 101-549 (November 15, 1990) [the Act].***

40 C.F.R. § 75.1(a) (emphasis added). They provide that a violation of the regulations is "a violation of the Act." 40 C.F.R. § 75.5(a). The proposed rule noted that it "establishes requirements for the monitoring and reporting of CO_2 emissions pursuant to ***Section 821 of the Act***." 56 Fed. Reg. 63,002, 63,291 (Dec. 3, 1991)(emphasis added). Subsequent rulemaking proceedings referred to these regulations as "the 'core' regulations that implemented the ***major provisions of Title IV of the Clean Air Act*** (CAA or the Act), as amended November 15, 1990, ***including*** . . . the CEM regulation at 40 CFR part 75 authorized under ***Sections 412 and 821 of the Act***." 60 Fed. Reg. 26,510 (May 17, 1995)(emphasis added); *see also* 59 Fed. Reg. 42,509 (Aug. 18, 1994).

Even though the text, structure and history of the statute and its implementing regulations lead to the inevitable conclusion that Section 821 is part of the Clean Air Act, EPA now raises the baseless argument that Section 821 is not part of the Act because it was codified as a note, and because a compilation of the Act published by a House committee eleven years after its enactment implied that Section 821 did not amend the Act. Region 8 Resp. to Pet., p.20-21. Neither codification as a note

nor characterization by a later legislative committee offers any insight into whether a particular provision is part of a statute.

"[T]he fact that [a] provision was codified as a statutory note is of no moment." *Conyers v. Merit Systems Protection Bd.*, 388 F.3d 1380, 1382 n.2 (Fed. Cir. 2004). In the specific context of the Clean Air Act, the D.C. Circuit unhesitatingly categorized a note to 42 U.S.C. § 7502 as being "***in*** the Act." *New York v. U.S. EPA.*, 413 F.3d 3, 19 (D.C. Cir. 2005) (reviewing EPA's interpretation of the New Source Review permitting process for stationary sources under the CAA) (emphasis added).

The characterization of Section 821 in a 2001 House Energy and Commerce Committee publication[13] has no bearing on whether Congress intended it to be part of the Clean Air Act. The U.S. Supreme Court has repeatedly held that "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Massachusetts v. EPA*, 127 S.Ct. at 1460 n.27 (quoting *US v. Price*, 361 U.S. 304, 313 (1960)). "[P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight." *Cobell v. Norton*, 428

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[13] See House Committee on Energy and Commerce, Compilation of Selected Acts within the Jurisdiction of the Committee on Energy and Commerce 451-52 (Comm. Print, 2001), *available at* http://epw.senate.gov/cleanair.pdf. Section 821 appears under the heading "Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) That Did Not Amend the Clean Air Act." The category appears to describe not provisions that do not affect or were not part of the Act, but rather provisions that were added to the Act without altering the original language.

F.3d 1070, 1075 (D.C. Cir. 2005). A post-enactment publication of a committee of a subsequent Congress is entirely meaningless in ascertaining congressional intent.

EPA has never taken the position that Section 821 is not part of the Act. This frivolous argument is a merely a *post hoc* rationale devised by the agency's lawyers, and it conflicts with the position EPA took before the Supreme Court in *Massachusetts v. EPA*. EPA's response brief in that case lists "Section 821 of the CAA Amendments of 1990" in a group of provisions that it describes as "the only CAA provisions that specifically address either carbon dioxide emissions or global warming." 2006 WL 3043970, pp. 26-27.

An agency is not entitled to deference for a statutory interpretation advanced in litigation that conflicts with past pronouncements and actions of the agency. *Rosales-Garcia v. Holland*, 322 F.3d 386, 403 n.22 (6th Cir. 2003) ("Inasmuch as shifting agency interpretations issued in regulations are accorded less deference . . . we see no reason why we should respect shifting agency interpretations expressed in briefs."); *Akzo Nobel Salt, Inc., v. FMSHRC*, 212 F.3d 1301, 1304 (D.C. Cir. 2000) (holding that deference to an agency's position is unwarranted when the agency has changed its position and litigation counsel advance differing positions). In light of EPA's prior treatment of Section 821 in regulatory contexts and litigation, the agency's claim that Section 821 lies entirely

outside the Clean Air Act is disingenuous.

2. CO_2 Is Regulated by Various SIPs That Are Part of the Clean Air Act.

Carbon dioxide is regulated under the Clean Air Act even if Section 821 is not part of the Act. States have incorporated CO_2 regulations into their State Implementation Plans (SIPs). Once approved by the EPA, these SIPs are themselves federal law created pursuant to the Clean Air Act and form part of the Clean Air Act.

The requirement to monitor CO_2 is incorporated into various SIPs, including, for example, Wisconsin's. *See* Wis. Admin. Code § NR 438.03(1)(a) (requiring reporting of pollutants listed in Table I, including CO_2), adopted under the Act at 40 C.F.R. § 52.2570(c)(70)(i); NR 439.095(1)(f) (Phase I and phase II acid rain units... shall be monitored for... carbon dioxide... ."), adopted under the Act at 40 C.F.R. § 52.2570(c)(73)(i)(I).

Under the cooperative federalist design of the Clean Air Act, SIPs are promulgated "under the Act," and therefore regulations in a SIP are regulations "under the Act." Under Sections 110 and 113 of the Act, SIPs are created by states, approved by EPA, and administered jointly by states and the EPA, with states having the primary administrative role and EPA retaining oversight responsibility to ensure that federal law is upheld. 42 U.S.C. § 7413; *see also US v. Murphy Oil USA, Inc.*, 155 F.Supp. 2d 1117, 1137 (W.D. Wis. 2001). SIPs are approved by EPA and published in the

federal register, pursuant to 42 U.S.C. § 7410(h)(1). A state's failure to create its own SIP leads to the creation of a Federal Implementation Plan, a FIP. 42 U.S.C. 7410(c). So not only is a SIP binding law pursuant to the Clean Air Act, the Act's explicit alternative to the SIP is to have the EPA create binding federal law that is also, unarguably, regulation "under" the Act.

Once approved by the EPA, SIPs become part of the Clean Air Act. As the Tenth Circuit held in *Espinosa v. Roswell Tower, Inc.*, "The state implementation plan has the force and effect of federal law, thereby permitting the Administrator to enforce it in federal court." 32 F.3d 491, 492 (10th Cir. 1994); *see also Union Elec. Co. v. EPA*, 515 F.2d 206, 211 (8th Cir. 1975), *cert. granted*, 423 U.S. 821 (1975), and *judgment aff'd*, 427 U.S. 246 (1976); *Safe Air for Everyone v. US EPA*, 475 F.3d 1096, 1105 (9th Cir. 2007). Consequently, CO_2 is regulated under the Clean Air Act because regulation of CO_2 in a SIP constitutes "regulation under the Act."

CONCLUSION

For the reasons given herein, the Board should remand the Bonanza PSD Permit to Region 8 with instructions to require a CO_2 BACT emissions limit or to provide an explanation, following public notice and comment, as to why "regulation" in Section 165(a)(4) and 40 C.F.R. § 55.21(b)(50)(iv) does not include regulations promulgated pursuant to Section 821 and any State Implementation Plan.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opening Brief in the matter of Deseret Power Electric Cooperative, PSD Appeal No. 07-03, were served by United States First Class Mail on the following persons this 31st of January, 2008:

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