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 REPLY BRIEF

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INTRODUCTION

Deseret Power Electric Cooperative proposes building a new waste-coal-fired power plant that would emit 1.8 million tons of carbon dioxide annually. No major emitting facility may be constructed in a PSD region unless it is subject to the best available control technology for each pollutant subject to regulation under the Clean Air Act. 42 U.S.C. § 7475(a)(4). Carbon dioxide is a pollutant regulated under the Clean Air Act. *Massachusetts v. Envtl. Protection Agency,* 127 S.Ct. 1438, 1462 (2007), 42 U.S.C. §7651k note; 40 C.F.R. § 75.1 *et seq.* Therefore, Deseret may not construct the proposed facility unless it is subject to the best available control technology for CO_2. It's that simple.

Nevertheless, EPA clings to its established policy of refusing to regulate CO_2. And, thus, once again EPA must torture the language of the Clean Air Act in order to justify its inaction, this time relying on internal agency documents never subject to public input that construe "pollutant" to exclude CO_2 and "regulation" to exclude monitoring and reporting regulations. The decision and reasoning in *Massachusetts v. EPA* and the plain language of the Act and its regulations all establish that the EPA is wrong. The Board should refuse to condone the agency's position and require BACT for CO_2 emissions from Deseret's Bonanza plant.

Sierra Club asks that the Board remand the Bonanza PSD Permit and instruct Region 8 to include a BACT limit for CO_2. Alternatively, Sierra Club

asks that the Board remand the permit and require Region 8 to fully explain its refusal to impose BACT for the plant's CO_2 emissions, allow meaningful public comment, and provide adequate responses to those comments.

STANDARD OF REVIEW

This case turns on the meaning of the word "regulation" in section 165 of the Clean Air Act. Because the case involves interpretation of a statute, the Board's review is essentially *de novo*. "Parties in cases before the Board may not ordinarily raise the doctrine of administrative deference as grounds for requiring the Board to defer to an interpretation of statutory or regulatory requirements advanced by any individual component of the EPA. This rule applies because the Board serves as the final decisionmaker for EPA in cases within the Board's jurisdiction." *Lazarus, Inc.*, 7 E.A.D. 318, 351 n.55 (EAB 1997) (citing *In re Mobil Oil Corp.*, 5 E.A.D. 490, 509 n.30 (EAB 1994)). "The Board does not view its function as that of making its legal views consistent with those of program and Regional offices. . . . [T]he Board must often evaluate and weigh the competing views of Agency program and Regional offices against those of citizens, advocacy groups, industry representatives, other federal agencies, and State and local governments. It must exercise independent judgment in that regard." *In re Genesee Power Station Limited Partnership*, U.S. EPA, PSD Appeal Nos. 93-1 through 93-7, 1993 WL

473846 (EPA Envtl. App. Bd. Oct. 22, 1993) (order on motion for clarification). The Board will remand a PSD permit to the issuing entity if it is based on an erroneous interpretation of the Clean Air Act. *See Hadson Power 14—Buena Vista*, 4 E.A.D. 258, 260 (EAB 1992).

ARGUMENT

I. The Plain Meaning , Structure, and History of the Clean Air Act and Its Regulations Require Imposing BACT on CO_2 Emissions from the Bonanza Plant.

When Congress adopted the PSD provisions of the Clean Air Act in 1977, it required a BACT emission limit "for each pollutant subject to regulation under this chapter." 42 U.S.C. § 7475(a)(4). When it amended the Act in 1990, it required EPA to "promulgate regulations" requiring monitoring and reporting of CO_2 emissions. 42 U.S.C. § 7651k note. Those regulations rendered CO_2 "subject to regulation" under the Act and therefore subject to BACT.

Nothing in the text of the Act would lead to the conclusion that a "regulation" requiring monitoring and reporting of a pollutant does not qualify as a "regulation" for determining which pollutants are subject to the BACT requirement. Congress used the same word in both places, and the strong presumption is that the word means the same thing in both instances. *Commissioner of Internal Revenue v. Lundy*, 516 U.S. 235, 249-50 (1996).

While EPA may interpret the same word differently based on statutory context, *Environmental Defense v. Duke Energy Corp.*, 127 S.Ct. 1423, 1433 (2007), the agency **must** provide a reasoned basis for its decision, *Bowan v. American Hosp. Ass'n*, 476 U.S. 610, 626-27 (1986). Instead, EPA offers up a potpourri of *post hoc* rationalizations as to why Congress meant "regulation" in Section 821 to mean "regulation," but meant "regulation" in Section 165 to mean "a statutory or regulatory provision that requires actual control of emissions of that pollutant." Each of these rationalizations is based on the agency's constrained view of the purpose and structure of the PSD provisions, and ultimately none support its interpretation of "regulation." *See* Exh. 1 to Petitioner's Opening Br. at 5-6. Moreover, unlike the agency interpretation at issue in *Environmental Defense v. Duke*, EPA's interpretation of "regulation" has not been subject to notice and comment or any kind of public scrutiny that would provide the agency with the benefit of competing views.

EPA's second line of defense is that this is how it has construed "regulation" for decades. In other words, in lieu of a legal justification EPA retreats to the position of "we may be wrong, but at least we've been consistently wrong." Remarkably, EPA seems not to understand that the fact that it has been wrong for decades is all the more reason for fixing things now, and not a reason for compounding its mistakes.

A. Nothing in the Structure of the Clean Air Act Supports a Restrictive Definition of "Regulation."

1. An Endangerment Finding Is Not Needed to Apply BACT to Pollutants Regulated Under the Act.

EPA's first attempt at tying its own hands is to argue that it is inconsistent with the overall scheme of the Clean Air Act for individual BACT determinations under the PSD to apply to a pollutant "before either the legislature or executive branches [sic] have made a judgment that a pollutant in fact presents a danger to public health or welfare." EPA Br. 20-21; see Deseret Br. 12. EPA argues that the PSD program applies to pollutants only "[i]f the Administrator determines under section 202 or other provisions that potential effects on public health or welfare provide a basis to set standards for an additional pollutant not previously subject to controls." EPA Br. 21.

EPA is dead wrong: in fact, Congress used language showing that it clearly intended that BACT apply **regardless** of whether an endangerment finding had been made for that pollutant. Congress explicitly required EPA to make an endangerment finding before establishing generally applicable standards such as the NAAQS, New Source Performance Standards, or motor vehicle emissions standards. Each of these programs expressly require EPA to find that emissions of a pollutant "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" as a prerequisite to

regulation. 42 U.S.C. § 7408(a)(1)(A); 42 U.S.C. § 7521(a)(1); *see also* 42 U.S.C. § 7411(b)(1).

In stark contrast, Congress was equally explicit in stating that the purpose of the PSD program was to "protect public health and welfare from **any** actual or **potential adverse effect** which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution . . . , notwithstanding attainment and maintenance of all national ambient air quality standards." 42 U.S.C. § 7470(1). Thus Congress – which was quite familiar with the "endangerment trigger" -- **deliberately established a much lower threshold for requiring BACT than an "endangerment finding."** Thus requiring BACT for "each pollutant subject to regulation under the Act" meshes perfectly with the purpose of the PSD program to guard against any "potential adverse effect" as opposed to "endangerment of public health or welfare."

This lower threshold for triggering BACT makes perfect sense, because BACT is not a generally applicable standard, but rather involves a case-by-case analysis. The balancing of "energy, environmental, and economic impacts and other costs" required in the BACT analysis provides a mechanism for implementing this purpose. 42 U.S.C. § 7479(3). The Act contemplates that this balancing will be "conducted in accordance with regulations promulgated by the Administrator," enabling the Administrator to guide the analysis of any potential adverse effect in the case of any

given pollutant. 42 U.S.C. § 7475(a)(2). Moreover, section 165 provides "an opportunity for . . . representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations," allowing the Administrator to exercise his judgment by evaluating potential adverse effects during the BACT analysis for any particular emission source. *Id.*

Thus it is not surprising that in *Alabama Power,* the D.C. Circuit closely examined the structure of the PSD program and recognized that, unlike various other provisions of the Act, BACT can apply even to pollutants "determined not to present substantial public health or welfare concerns." *Alabama Power Co. v. Costle*, 636 F.2d 323, 370 n.134 (D.C. Cir. 1979). As a result, the Court agreed with EPA that BACT applies "immediately to each type of pollutant regulated for any purpose under any provision of the Act. . . ." *Id.* at 403.[1] It is enough that Congress or the

[1] The suggestion that *Alabama Power* offers any support for EPA's definition of "regulation" is absurd. The regulation at issue there was all-inclusive (as is the language of the current regulation, 40 C.F.R. § 52.21(b)(50)(iv)). In holding that BACT applies to each pollutant regulated for any purpose, the court's discussion of various specific provisions that involved actual control of emissions merely reflects the statute as it existed at that time. Deseret and its amici emphasize the statement that, "[o]nce a standard of performance has been promulgated for 'excluded particulates,' those pollutants become "subject to regulation" within the meaning of section 165(a)(4), the provision requiring BACT." 636 F.2d at 370 n.134 (citation omitted). Deseret Br. 19-20; NRECA Br. 12; UARG Br. 38. But far from meaning "that a pollutant had to be subject to some kind of requirement for emission standards under the Act to be 'subject to regulation" under the Act," UARG Br. 38, this language simply recites an example of the very

Administrator has decided to regulate a pollutant in some way, and here, Congress has chosen to regulate CO_2.[2] This legislative decision bypasses the various statutory provisions requiring an endangerment finding.

EPA then raises imagined administrative obstacles to requiring BACT here, e.g., that it has not had the opportunity to "develop regulations to manage the incorporation of [CO_2] into the PSD program." EPA Br. 19. EPA's past failure to properly implement the Act cannot justify its current refusal to do so. It could have developed those regulations in 1993, when it promulgated regulations pursuant to section 821, or at any time in the fifteen years since then.[3] And – stall tactics aside -- it certainly will have to do so in the near future.[4] Given the 250 ton PSD threshold, Respondents and their amici profess a concern about the large number of small sources – apartment buildings, hospitals, fast food restaurants — that may have to go through the PSD process if CO_2 is a regulated pollutant. *See, e.g.*, Deseret Br. 22. Not only can EPA can go to Congress for a legislative

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proposition that Sierra Club advances: once a pollutant is regulated in some way under the Act, it becomes subject to BACT.

[2] EPA's claim that "Congress provided no indication that it intended [§821] to supplant EPA's discretion to determine which pollutants to regulate under the Act," EPA Br. 17, ignores the fact that EPA has no such discretion when Congress orders EPA to regulate a pollutant, as it did in §821.

[3] At that time, the agency considered whether CO2 should be classified as a pollutant and said that it had discretion to include CO2 as a regulated pollutant. Wegman Memo, Exh. 4 to Petitioner's Opening Br. at 4-5.

solution to this, but the Board should not allow Bonanza or any other source pouring millions of tons of CO_2 into the air to avoid regulation by hiding behind the local Dunkin' Donuts.

Nowhere is EPA's intransigence as to the prospect of regulating CO_2 more apparent than when it argues it cannot subject CO_2 to BACT **because its authority under the PSD program was frozen in time when the 1977 Amendments to the Clean Air Act were passed**. No kidding: the agency affirmatively insists on "[g]rounding EPA's determination of which pollutants are regulated under the PSD program on the authority EPA had in 1977 to control emissions under the Clean Air Act." EPA Br. 21. This remarkable position ignores the broad language of the BACT requirement, the import of the 1990 Amendments and, most critically, one of the bedrock principles of the whole statute: "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." *Massachusetts v. EPA*, 127 S.Ct. at 1462.

2. The Structure of the PSD Program Contemplates that Various Pollutants Will Be Subject to Varying PSD Provisions.

In fashioning the PSD program, Congress imposed varying PSD requirements depending upon the status of the pollutant; all regulated pollutants were controlled to some extent, while those regulated under certain specific provisions of the Act were subjected to a more rigorous

[4] The clock may be running out on EPA's game: Exh. 1 (*Massachusetts v. EPA* (D.C. Cir. Dkt. 03-1361) Petition for Writ of Mandamus to Compel Compliance

level of analysis and control. For example, while sections 165(a)(4) and 165(e)(1) apply to "each pollutant subject to regulation" under the Act, section 163 applies only to pollutants subject to maximum allowable increases (particulate matter, sulfur dioxide, and nitrogen oxides). 42 U.S.C §§ 7473, 7475. Recognizing this variability, the *Alabama Power* court repeatedly emphasized the broad application of the BACT requirement, 636 F.2d at 403-06, while at the same time noting that certain other parts of the PSD provisions apply only to a subset of pollutants subject to regulation under the Act. The court noted that a pollutant can be subject to BACT under section 165(a)(4), while not requiring a showing under section 165(a)(3) that emissions would violate NAAQS or allowable increments. *Id.* at 370 n.134; *see* 42 U.S.C. § 7475(a)(3). Thus, Deseret is wrong when it argues that BACT applies only to pollutants with maximum allowable increases or maximum allowable concentrations. *See* Deseret Br. 11-12.[5]

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with Mandate).

[5] BACT clearly applies to sulfuric acid mist, for example, which has no maximum allowable increments or concentrations. 67 Fed. Reg. 80186, 80240 (Dec. 31, 2002). Deseret ignores a similar distinction between section 165(e)(1) and 165(e)(2). *See* Deseret Br. 10-11. Section 165(e)(1) applies broadly, like BACT, requiring an air quality **analysis** "for each pollutant subject to regulation under this chapter which will be emitted from such facility." Section 165(e)(2) is more narrow, requiring air quality **monitoring** only for pollutants with maximum allowable increases or maximum allowable concentrations. 42 U.S.C. § 7475(e). *See Alabama Power*, 636 F.2d at 371-72 (holding that section 165(e)(2) requires monitoring for NAAQS pollutants, but section 165(e)(1) requires only "analysis" for pollutants subject to regulation under the Act). Thus, it is perfectly consistent with the statutory structure to subject emissions of various pollutants to different PSD requirements.

Similarly, Deseret and EPA are wrong when they suggest that the reference in section 169(3) to new source performance (section 111) and hazardous air pollutant (section 112) standards indicates an intent to limit BACT to pollutants subject to emissions controls under some other provision of the Act. EPA Br. 14; Deseret Br. 12. The language of section 169(3) belies this assertion. The first sentence provides a definition of BACT to be applied broadly to "each pollutant subject to regulation under this chapter." 42 U.S.C. § 7479(3). The second sentence ensures that employing the BACT standard defined in the first sentence does not result in a violation of section 111 or 112 for **any** pollutants to which those provisions apply, including not only the pollutant subject to that BACT analysis, but also any other section 111 or 112 pollutant. It serves the dual purpose of ensuring that (1) controls for one pollutant do not raise emissions of other pollutants above levels allowed by sections 111 and 112, and (2) the flexibility inherent in the BACT standard does not result in emissions levels for any pollutant that violate those other standards. It is simply an effort to ensure consistency among the statutory provisions. Finally, the phrase "any applicable standard" implies that no section 111 or 112 standard may apply. *Id.*

B. EPA's Interpretation of "Regulation" Violates the Regulatory Definition and is Unsupported by Regulatory History.

Section 165(a)(4) requires BACT for "each pollutant subject to regulation," and EPA's regulations parrot this language (with the explicit exception of most hazardous air pollutants, which were excluded by the 1990 Amendments). 40 C.F.R. § 52.21(b)(50)(iv); *see* 42 U.S.C. § 7412(b)(6). Because on its face the language of the Act encompasses all pollutants subject to regulation of whatever stripe, EPA cannot limit the language of its implementing rule to pollutants subject to actual control of emissions. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (holding that "an agency does not acquire special authority to interpret its own words when . . . it has elected merely to paraphrase the statutory language").

EPA defends its interpretation by repeatedly invoking a 30-year history of "consistent" agency interpretation that "regulation" is only "regulation" if it involves "actual control of emissions." EPA Br. 30-45. Remarkably, nowhere in this 30-year history can EPA's interpretation of "regulation" be found in **any** agency rule or rulemaking proceeding. EPA has **never** articulated its interpretation or rationale in **any** proceeding that has allowed the public to provide input. The **only** place where EPA has ever provided any insight, however slight, into this position is the Wegman memo, which was not open to public comment or judicial review. *See* Exh. 4 to Petitioner's Opening Br. at 17. Even that memo did not squarely define "subject to regulation under the Act." *See id.* at 4-5.

As for the specific question of whether CO_2 is "subject to regulation under the Act," it appears that the only times EPA even mentioned this issue in a context that involved external input was in cursory fashion in two cases before this Board: *Inter-Power of New York, Inc.*, 5 E.A.D. 130 (EAB 1994), and *Kawaihae Cogeneration Project*, 7 E.A.D. 107 (EAB 1997). These cases do not support the EPA's position here. In *Inter-Power of New York*, the Board's perfunctory comment that CO_2 was an "unregulated pollutant" was correct as applied in that case, **because the petitioners were challenging a permit that had been issued before EPA regulated CO_2 by adopting the section 821 monitoring rules**. 5 E.A.D. at 131; *see* 58 Fed. Reg. 3701 (Jan. 11, 1993). Even Sierra Club agrees that a pollutant is not regulated until it is regulated. In *Kawaihae*, the petitioners did not argue that CO_2 is regulated under the Act or that the PSD permit should have included a CO_2 BACT emission limit, so the Board did not reach the merits of the CO_2 regulation issue. 7 E.A.D. at 132. These cases form a shaky foundation on which to base a final agency decision that CO_2 is not subject to BACT requirements, especially in light of the intervening Supreme Court ruling that CO_2 is a pollutant.

EPA, Deseret and their amici have cited no other regulatory history that supports an interpretation of "regulation" to mean "actual control of emissions" or justifies excluding CO_2 from the BACT requirement. Their repeated assertion that this interpretation is supported by thirty years of

consistent regulatory history does not make it so. In fact, the rulemaking proceedings that they cite never hint that EPA, in adopting a broadly-worded definition of "regulated NSR pollutant," excluded CO_2 or limited the application of BACT to pollutants "subject to actual control of emissions."

The 1996 notice of proposed rulemaking provided no clue that EPA intended to define the entire universe of pollutants it considered subject to regulation under the Clean Air Act. Instead, it indicated that it was addressing only limited parts of the 1990 Amendments, and suggested EPA would address the remainder in future rulemaking:

> As discussed below EPA is proposing several changes pursuant to the 1990 Amendments to the PSD Rules a 40 CFR 51.166 and 40 CFR 52.21 to codify **some** of revised preconstruction permit requirements of part C of title I of the Act. These changes include (1) the applicability of PSD to ozone depleting substances (ODS) regulated under title VI of the Act, and (2) the exemption of the HAP listed under section 112 of the Act from Federal PSD applicability. **The EPA is considering future rulemaking to propose other changes to EPA's PSD program in light of the 1990 Amendments.**

61 Fed. Reg. 38250, 38307 (July 23, 1996) (emphasis added). The notice did not define "pollutant subject to regulation" or use the phrase "regulated NSR pollutant." It gave no indication that the list that EPA now claims is a comprehensive catalogue of pollutants subject to PSD permitting was intended to be definitive and exclusive. *Id.* at 38310. In fact, this list appeared in a section of the rulemaking titled "Listed Hazardous Air Pollutants" that addressed which **hazardous** air pollutants

would continue to be subject to PSD requirements in light of the 1990 amendment to section 112. *Id.* at 38309-11. CO_2 is mentioned nowhere in the notice, and of course it is neither a hazardous air pollutant nor an ozone depleting substance. The proposed rule provides no notice whatsoever that the status of CO_2 as a pollutant subject to BACT was at issue.

The 2002 final rule (on which the public had no opportunity to comment) used and defined the phrase "regulated NSR pollutant" for the first time. *See* 67 Fed. Reg. 80186, 80189 & 80278 (Dec. 31, 2002). This broad definition, now codified at 40 C.F.R. § 52.21(b)(50), gave no indication of the narrow interpretation EPA now espouses in this case. The preamble contains the same list of pollutants that appeared in the notice, still in a section addressing hazardous air pollutants. 67 Fed. Reg. at 80240. Significantly, this list does not include $PM_{2.5}$, a pollutant that is most certainly "subject to actual control of emissions" under the Act. $PM_{2.5}$ is clearly a "regulated NSR pollutant" even if EPA uses PM_{10} as a surrogate in the BACT analysis, so its absence demonstrates that the list is incomplete.

"Regulation" does not mean "actual control of emissions," and EPA has no consistent and longstanding history interpreting it that way. Given the broad definition of "regulated NSR pollutant," the lack of notice that EPA interpreted it to exclude CO_2, and the absence of any hint that the status of CO_2 as a pollutant subject to regulation was even at issue in the

rulemaking proceeding that led to that definition, EPA's assertion that Sierra Club is raising a collateral attack on the 2002 rule is ludicrous. EPA Br. 34. For a member of the public to divine some unspoken agency intent to narrowly interpret that broad definition, and then challenge the rule within sixty days of promulgation, would require astonishing prescience. Any such facial challenge would have failed for lack of evidence that the definition of "regulated NSR pollutant" actually excludes CO_2. By definition, a facial challenge must show that the rule is illegal on its face, but section 52.21(b)(50) is facially valid. Sierra Club's challenge is unequivocally not time barred. *See Functional Music, Inc. v. FCC*, 274 F.2d 543, 547 (D.C. Cir. 1959).

The Act and regulation mandate that EPA apply BACT to CO_2 emissions, and EPA's refusal to do so, based on an interpretation contrary to the plain language and never subject to public input, demands further scrutiny in a context that allows for meaningful public participation.

II. CO_2 IS REGULATED "UNDER THE ACT."

A. Section 821 is an Integral Part of the Clean Air Act.

Section 821 is unquestionably part of the Clean Air Act. The monitoring, reporting and recordkeeping requirements it imposes are inextricably tied to the framework in section 412 of the Act, 42 U.S.C. § 7651k, EPA has consistently treated it as part of the Act and adopted implementing regulations under the authority of the Act, and the

regulations are enforceable under the Act. Yet EPA now asserts that section 821 is not part of the Clean Air Act, and that the agency has been mistaken all along in treating it as though it were. EPA Br. 51. EPA's about-face again manifests its intent to interpret the Act in any way that will allow it to avoid regulating CO_2 emissions.

Section 821 is an intrinsic and enforceable part of the Clean Air Act. In enacting section 821, Congress commanded EPA to promulgate binding regulations requiring all Title V sources to "monitor carbon dioxide emissions according to the same timetable as in section [412](b) and (c)" and report that data to the Administrator. 42 U.S.C. § 7651k note. Congress explicitly made these requirements enforceable under the Clean Air Act by mandating that the "prohibition" provisions of section 412(e) "**shall apply** for the 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 [412]." 42 U.S.C. § 7651k(e) and note (emphasis added). Section 412(e) provides:

> It shall be unlawful for the owner or operator of any source subject to this subchapter to operate a source without complying with the requirements of this section, and any regulations implementing this section.

42 U.S.C. § 7651k(e). Congress clearly intended section 821 to be an enforceable part of the Act. The regulations are consistent with this purpose, stating explicitly that "[a] violation of any applicable regulation in this part . . . . is a violation of the Act." 40 C.F.R. § 75.5(a). Because the

CO_2 emissions monitoring and reporting requirement is enforceable under the Act, CO_2 is regulated under the Act.[6]

Even if section 821 is not part of the Act, it is undeniably enforceable *under the Act* because it incorporates section 412(e). Additionally, it is enforceable under the Act's regulations because the regulations implementing section 821 and section 412 are one and the same, and they were clearly promulgated under the Act. As the regulations explicitly affirm, 40 C.F.R. § 75.5(a), a Clean Air Act regulation creates an enforceable duty under the Act itself. At a minimum, the CO_2 monitoring and reporting requirements imposed by section 821 are enforceable *under the regulations*, so CO_2 is regulated under the Act.

Moreover, the Act makes it unlawful to operate a source without complying with section 821 requirements. 42 U.S.C. § 7651k(e). Here again, the regulations are consistent. *See* 40 C.F.R. § 75.5(b)("No owner or operator of an affected unit shall operate the unit without complying with the requirements of . . . this part.")

It is plain from the language of section 821 and its interconnection with section 412 that section 821 is part of the Clean Air Act. Because the statute is clear, reference to legislative history is unwarranted. "Because the Constitution requires Congress to act by *legislation,* and not merely

[6] Because §821 is inextricably intertwined with §412, the lack of an express statement within the former that it amends the Act does not undermine the conclusion that is part of the Act.

through committee reports, it is small wonder that the Supreme Court has warned courts that 'going behind the plain language of the statute . . . is a step to be taken cautiously even under the best of circumstances.'" *American Mining Cong. v. EPA*, 824 F.2d 1177, 1191 n.19 (D.C. Cir. 1987) (quoting *United States v. Locke*, 471 U.S. 84, 105 S.Ct. 1785, 1793 (1985).[7]

Even if resort to legislative history were needed, the sources on which Respondents and their amici rely shed no light on whether section 821 is part of the Act. For example, the statements quoted in the UARG brief for the proposition that Congress did not intend to regulate CO_2 through the PSD provisions actually related to the Act's transportation provisions. UARG Br. 16-17. Moreover, the statement that "Cooper-Moorhead does not force reductions in CO_2," *id.* at 13, is true. Emissions reductions would only come after EPA adopted regulations, and more importantly, consistent with the BACT scheme, after cost-effective technologies became available to control CO_2 emissions.

B. CO_2 is Regulated by the Landfill Emission Regulations of the Act.

CO_2 is not only regulated under section 821 and certain state implementation plans (as discussed in Petitioner's Opening Br. 38-39). It is

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[7] It is particularly inappropriate to rely on the post-enactment committee publications cited by Respondents and their amici (such as the various House Committee on Energy and Commerce Compilations of Selected Acts within the Jurisdiction of the Committee on Energy and Commerce), and post-enactment statements of individual legislators (see UARG Br. 11 n.9).

also regulated under the landfill emission regulations promulgated under section 111 of the Clean Air Act. *See* 40 C.F.R. Part 60 Subparts CC and WWW.[8] Under these regulations, EPA defines "municipal solid waste landfill emissions" or "MSW landfill emissions" as "gas generated by the decomposition of organic waste deposited in an MSW landfill or derived from the evolution of organic compounds in the waste." 40 C.F.R. § 60.751. The pollutant regulated by these standards, "MSW landfill emissions, or LFG, is composed of methane, CO_2, and NMOC [nonmethane organic compounds]." *Air Emissions from Municipal Solid Waste Landfills – Background Information for Final Standards and Guidelines*, EPA-453/R-94-021, December 1995.

Municipal solid waste (MSW) landfills in some categories are required to monitor their emissions, and on the basis of that monitoring, to install a control and collection system. 40 C.F.R. § 60.752(b). As explained in the preamble to the final rule:

> For most NSPS, emission reductions and costs are expressed in annual terms. In the case of the NSPS and EG for landfills, the final regulations require controls at a given landfill only after the increasing NMOC emission rate reaches the level of the regulatory cutoff. The controls are applied when the emissions exceed the threshold, and they must remain in place until the emissions drop below the cutoff.

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[8] *See also* 63 Fed. Reg. 2154-01 (Jan. 14, 1998)(approving Utah plan for implementing Municipal Solid Waste Landfill Emissions Guidelines).

61 Fed. Reg. 9905, 9908 (March 12, 1996). MSW landfills with a capacity of 2.5 million cubic meters are required to calculate emission rates for nonmethane organic carbon. 40 C.F.R § 60.752(b). For some landfills, the NMOC emission rates are calculated using data collected through sampling. 40 C.F.R § 60.754(a)(3),(4). Landfills with a calculated emission rate of greater than 50 megagrams per year of NMOC are required to install collection and control systems. 40 C.F.R § 60.754(b)(2).

For landfill gases then, including CO_2, monitoring regulations are thus directly tied to emission limitations. Based on these new source performance standards, CO_2 is unquestionably subject to regulation under the Act.

CONCLUSION

For the reasons given herein, the Board should remand the Bonanza PSD Permit and instruct Region 8 to require a CO_2 BACT emissions limit, or alternatively, to provide a reasoned explanation, allowing an opportunity for public notice and comment, of why "regulation" in section 165(a)(4) and 40 C.F.R. § 52.21(b)(50) does not include the regulations promulgated pursuant to section 821 or any State Implementation Plan, or section 111 regulations governing municipal solid waste landfills.

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Dated: April 25, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply 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 25th of April, 2008:

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