

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

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ENVIR. APPEALS BOARD

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In re: :
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Deseret Power Electric : PSD Appeal No. 07-03
Cooperative :
: :
PSD Permit PSD-OU-0002-04.00 :
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Washington, D.C.
Thursday, May 29, 2008

The above-entitled matter came on
for ORAL ARGUMENT at approximately 10:04 a.m.
at the Environmental Protection Agency, 1201
Constitution Avenue, NW, Washington, D.C.

BEFORE:

EDWARD E. REICH
KATHIE A. STEIN
ANNA L. WOLGAST
Presiding Judges

<p style="text-align: right;">2</p> <p>1 APPEARANCES:</p> <p>2 On behalf of Deseret Power Electric Cooperative:</p> <p>3 JAMES RUSSELL, ESQUIRE</p> <p>4 Winston & Strawn, LLP</p> <p>5 1700 K Street, NW</p> <p>6 Washington, D.C. 20006-3817</p> <p>7 (202) 282-5000</p> <p>8 On behalf of Environmental Protection Agency:</p> <p>9 BRIAN L. DOSTER, ESQUIRE</p> <p>10 EPA Office of General Counsel</p> <p>11</p> <p>12 On behalf of Sierra Club:</p> <p>13 JOANNE SPALDING, ESQUIRE</p> <p>14 DAVID BOOKBINDER</p> <p>15 Sierra Club</p> <p>16 85 Second Street, Second Floor</p> <p>17 San Francisco, California 94105-3441</p> <p>18 (415) 977-5725</p> <p>19</p> <p>20 MORGAN COSTELLO, ESQUIRE</p> <p>21 Assistant Attorney General</p> <p>22 New York State Attorney General's Office</p> <p>On behalf of the Utility Air Regulatory Group:</p> <p>ALLISON WOOD, ESQUIRE</p> <p>Hunton & Williams</p> <p>1900 K Street, NW</p> <p>Washington, D.C. 20006</p> <p>(202) 955-1500</p> <p>ALSO PRESENT:</p> <p>Eurika Durr</p> <p>Gary Millstein</p> <p style="text-align: center;">* * * * *</p>	<p style="text-align: right;">4</p> <p>1 whether the Region erred by failing to</p> <p>2 require a best available control technology</p> <p>3 limit for the control of carbon dioxide</p> <p>4 emissions, as Petitioner Sierra Club argues</p> <p>5 was required by Section 165 of the Clean Air</p> <p>6 Act.</p> <p>7 While Sierra Club's petition also</p> <p>8 raised a second issue relating to an alleged</p> <p>9 error in failing to consider certain</p> <p>10 alternatives to the proposed facility, review</p> <p>11 was not granted on that issue, although the</p> <p>12 Board continues to hold it under advisement.</p> <p>13 That, as said, is clearly specified in the</p> <p>14 Board's order of March 31, 2008 scheduling</p> <p>15 this argument. That issue is not within the</p> <p>16 scope of this morning's argument.</p> <p>17 I should also note that as invited</p> <p>18 by the Board's order granting review, the</p> <p>19 Board received a number of amicus briefs on</p> <p>20 both sides of the issue, and in fact, as I'll</p> <p>21 address shortly, certain amici have been</p> <p>22 invited to participate in this morning's</p>
<p style="text-align: right;">3</p> <p>1 PROCEEDINGS</p> <p>2 MS. DURR: The Environmental Appeals</p> <p>3 Board of the United States Environmental</p> <p>4 Protection Agency is now in session for oral</p> <p>5 argument in re: Deseret Power Electric</p> <p>6 Cooperative, Permit No. PSD-OU-0002-04.00,</p> <p>7 PSD Appeal No. 07-03, the Honorable Judges Anna</p> <p>8 Wolgast, Ed Reich, Kathie Stein presiding.</p> <p>9 Please turn off all cell phones,</p> <p>10 and no recording devices are allowed.</p> <p>11 Please be seated.</p> <p>12 JUDGE REICH: Good morning. We're</p> <p>13 hearing oral argument this morning in the matter</p> <p>14 of Deseret Power Electric Cooperative's Bonanza</p> <p>15 Power Plant, the PSD permit appeal pursuant to</p> <p>16 the Board's orders of March 31, 2008 and</p> <p>17 April 28, 2008.</p> <p>18 I would like initially to address</p> <p>19 the scope of this hearing. The sole issue</p> <p>20 before the Board in this hearing is the issue</p> <p>21 on which the Board granted review in its</p> <p>22 order of November 21, 2007. That issue is</p>	<p style="text-align: right;">5</p> <p>1 argument. A number of the amicus briefs</p> <p>2 discussed the issues of global warming, the</p> <p>3 contribution of greenhouse gases, and the</p> <p>4 implications for control in a much broader</p> <p>5 context than the issue before us today.</p> <p>6 While the Board greatly appreciates</p> <p>7 the time and effort of all the amici in</p> <p>8 attempting to assist the Board in its</p> <p>9 deliberations, we must reiterate that we are</p> <p>10 only focused on and empowered to address the</p> <p>11 much more narrowly-defined issues raised in</p> <p>12 the petition.</p> <p>13 Turning to how we'll proceed this</p> <p>14 morning, we will follow the order set forth</p> <p>15 in our April 28, 2008 order regarding oral</p> <p>16 argument. Sierra Club as Petitioner has been</p> <p>17 allocated 30 minutes for its argument, and</p> <p>18 may, if it chooses, reserve at the beginning</p> <p>19 of its argument up to five minutes for</p> <p>20 rebuttal.</p> <p>21 Then we will hear from one of the</p> <p>22 amici supporting Sierra Club's position for</p>

<p style="text-align: right;">6</p> <p>1 up to 15 minutes, that being counsel for 2 eight state attorneys filing 3 collectively -- more particularly, the 4 attorney generals of the states of New York, 5 California, Connecticut, Delaware, Maine, 6 Massachusetts, Rhode Island, and Vermont. 7 Then, EPA's regional office and 8 Office of Air and Radiation, as represented 9 by EPA's Office of General Counsel, will be 10 afforded 30 minutes, followed by Permittee 11 Deseret for 10 minutes, and amicus Utility 12 Air Regulatory Group, aligned with EPA, for 13 10 minutes. Then Sierra Club may use the 14 reserve time, if any, for rebuttal. 15 I would note that while the Board 16 invited the National Parks Conservation 17 Association, who filed an amicus brief 18 supporting the Petitioner, to make a brief 19 presentation, they notified the Board by 20 letter of May 27, 2008 that they will not be 21 making an appearance. 22 As to each of the amici</p>	<p style="text-align: right;">8</p> <p>1 order in which they will be arguing, 2 beginning with Sierra Club. 3 MS. SPALDING: Joanna Spalding for the 4 Sierra Club. 5 MS. COSTELLO: Morgan Costello, 6 assistant attorney general with the New York 7 State Attorney General's Office, on behalf of 8 the state (inaudible). 9 JUDGE REICH: Thank you. 10 MR. DOSTER: Brian Doster, EPA Office 11 of General Counsel. 12 MR. RUSSELL: Jim Russell, Winston & 13 Strawn, on behalf of Deseret. 14 MS. WOOD: Allison Wood, Hunton & 15 Williams, on behalf of the Utility Air 16 Regulatory Group. 17 JUDGE REICH: Thank you, Counsel. 18 Ms. Spalding, you may proceed. And 19 please advise us up front whether you're 20 reserving time for rebuttal. 21 MS. SPALDING: Good morning. My name 22 is Joanne Spalding, and I represent the Sierra</p>
<p style="text-align: right;">7</p> <p>1 participating in this argument, the Board's 2 order of April 28, 2008 specified which 3 portions of their brief the Board would like 4 them to address. It would be most helpful to 5 the Board in avoiding unnecessary repetition 6 if amici would focus their arguments 7 accordingly. 8 And finally, as those familiar with 9 oral arguments well know, the Board is likely 10 to ask numerous questions during the course 11 of this morning's argument. The Board's 12 purpose in asking these questions is to fully 13 probe the issues before it, and to assure the 14 Board's full understanding of the positions 15 of the various parties. 16 The questions themselves should not 17 in any way be interpreted as reflecting any 18 particular leaning of the Board, or even any 19 particular judge at this time. 20 Now I'd like to begin by asking 21 counsel to state their names for the record 22 and whom they represent, proceeding in the</p>	<p style="text-align: right;">9</p> <p>1 Club. 2 And yes, I would like to reserve 3 five minutes for rebuttal. 4 JUDGE REICH: Thank you. 5 Feel free to proceed. 6 MS. SPALDING: Thank you. 7 Deseret's Bonanza Plant will emit 8 1.8 million tons of carbon dioxide every 9 year, likely for half a century or more. 10 Carbon dioxide is a pollutant regulated under 11 the Clean Air Act. Congress mandated EPA 12 promulgate regulations requiring monitoring 13 and reporting of carbon dioxide when it 14 amended the Clean Air Act in 1990, and EPA 15 did promulgate those regulations in 1993. 16 Best Available Control Technology 17 is required for each pollutant subject to 18 regulation under the Act, so EPA must impose 19 BACT on Bonanza's carbon dioxide emissions. 20 Despite the statutory mandate, EPA 21 has refused to require BACT for carbon 22 dioxide emissions, narrowly interpreting the</p>

10	<p>1 meaning of the word "regulation." EPA's 2 position is wrong. It is at odds with the 3 plain meaning, structure, and history of the 4 Clean Air Act, and it is based on reasoning 5 that has been undermined by the Supreme 6 Court's decision in Massachusetts v. EPA. 7 Contrary to the Supreme Court's 8 admonition to give full effect to the broad 9 language of the Clean Air Act, EPA has 10 already precluded the Clean Air Act from 11 evolving to address changed circumstances and 12 scientific developments by applying BACT 13 narrowly. It is holding the PSD program 14 hostage to the administrator's delays in 15 making an endangerment finding, even though 16 the PSD provisions do not require an 17 endangerment determination. 18 JUDGE REICH: Let me ask, in terms of 19 your view of the term "subject to regulation 20 under the Act," does Sierra Club agree with the 21 position that the state AGs took in their brief 22 that it includes not only regulated air</p>	12	<p>1 The Board has -- 2 JUDGE STEIN: Ms. Spalding? 3 MS. SPALDING: Yes. 4 JUDGE STEIN: You mentioned that you 5 think the term "subject to regulation" has a 6 plain meaning. If it has such a plain meaning, 7 why would they need to put that interpretation 8 out for notice and comment? 9 MS. SPALDING: Our position is that if 10 the EPA wishes to narrow the interpretation, 11 that it has a plain meaning that is broad, and 12 that the Clean Air Act uses the same term in two 13 places -- it says that BACT is required for any 14 pollutant subject to regulation in Section 165. 15 And then in Section 821, it says -- it requires 16 EPA to promulgate regulations. 17 And so -- and those terms mean the 18 same thing. And if the EPA would like to 19 interpret them in some different way, it at 20 least must do so in a way that provides a 21 reasoned basis for its decision, and that 22 it -- and that allows appropriate public</p>
11	<p>1 pollutants, but pollutants that the agency has 2 authority to regulate, where the agency has not 3 yet exercised that authority? 4 MS. SPALDING: The Sierra Club is in 5 this case arguing a narrower -- that, basically, 6 that you don't need to decide that issue here. 7 Carbon dioxide is already regulated under the 8 Act, and so the Board need not make that 9 determination at this time. 10 JUDGE REICH: Okay. 11 MS. SPALDING: EPA is playing hide the 12 ball and committing a procedural error by using 13 this permit proceeding to adopt an extremely 14 important legal interpretation that 15 impermissibly narrows a broad statutory 16 definition without ever putting that definition 17 out for public notice and comment. 18 Moreover, EPA's belated revelation 19 that Section 821 is not part of the Clean Air 20 Act is at odds with the language of that 21 provision, and with the Agency's prior 22 statements and implementation of it.</p>	13	<p>1 input into that determination. 2 The Board has the opportunity to 3 remedy these errors by remanding the permit 4 to Region 8, with instructions to include a 5 BACT limit for carbon dioxide. 6 Congress required BACT for each 7 pollutant subject to regulation, and then 8 ordered EPA to promulgate regulations 9 governing carbon dioxide emissions. It used 10 the same word in both places, and the 11 presumption is that it means the same thing. 12 The plain meaning of "regulation" 13 includes monitoring and reporting 14 regulations. The Supreme Court has so held 15 in the case of Buckley v. Vallejo. 16 Carbon dioxide is subject to 17 monitoring under the Act, and monitoring is a 18 form of regulation. So carbon dioxide is 19 subject to regulation. 20 To avoid requiring BACT for carbon 21 dioxide, EPA ignores this plain meaning by 22 interpreting "subject to regulation" to mean</p>

14	<p>1 "presently subject to a statutory or 2 regulatory provision that requires actual 3 control of emissions of that pollutant". Had 4 Congress meant presently subject to actual 5 control of emissions, it would have used 6 narrower language to indicate that intent. 7 Instead, it used "regulation," with 8 the full understanding that regulations come 9 in many varieties. 10 EPA's gloss on the meaning of 11 "regulation" substantially narrows the scope 12 of the Clean Air Act, contrary to the Supreme 13 Court's decision in Massachusetts v. EPA. If 14 EPA is to construe "regulation" to mean 15 something different, it must provide a 16 reasoned basis for its decision. 17 A broad definition of "regulation" 18 in Section 165(a)(4) is consistent with the 19 statutory scheme. The purpose of the PSD 20 program is to protect public health and 21 welfare from any actual or potential adverse 22 effect from air pollution. This establishes</p>	16	<p>1 thoughts about whether the burden of dealing 2 with that can be managed in some way? 3 MS. SPALDING: Yes. First, let me say 4 that administrative inconvenience in applying a 5 statute cannot negate the applicability of the 6 Act's requirements. And also, that a coal-fired 7 power plant that will emit millions of tons of 8 carbon dioxide should not be able to hide behind 9 smaller emitters of carbon dioxide to avoid a 10 statutory requirement. 11 This is an issue that EPA will need 12 to address. And frankly, it could have 13 addressed the issue when it promulgated the 14 regulations back in 1993 or in the 15 years 15 since then, and has not done so. It can 16 either address it administratively or by 17 seeking some sort of a fix from Congress. 18 And to the extent that the EPA has 19 discretion, it should be taking this limit 20 into consideration in the public process and 21 invite public input. Actually, a remand is 22 an appropriate mechanism at this point to</p>
15	<p>1 a lower threshold than NAC's new source 2 performance standards and motor vehicle 3 emission standards. Unlike those provisions, 4 no endangerment determination is needed to 5 apply BACT to pollutants regulated under the 6 Act. 7 JUDGE REICH: Let me ask a little bit 8 about the potential implications of your 9 argument. A number of the amicus siding with 10 the Agency talked about the implications in 11 terms of the potentially significant expansion 12 in the number of facilities that would be 13 subject to the PSD process, and within that, 14 BACT -- and that that had the potential to 15 overburden the system, potentially drawing 16 resources and attention away from facilities 17 that might be more significant. 18 Do you agree or disagree that 19 determining that carbon dioxide is subject to 20 regulation under the Act would substantially 21 increase the number of facilities subject to 22 PSD review? And if so, do you have any</p>	17	<p>1 allow the public to have input into that very 2 question. 3 So essentially, the -- 4 JUDGE REICH: Why would the remand in 5 this case be a better vehicle than petitioning 6 the Agency to modify the regulations to 7 reconsider the way subject to the Act has been 8 defined? 9 MS. SPALDING: But the regulations 10 don't -- do not narrow the scope of "subject to 11 regulation." There's no way to petition the 12 Agency -- we're happy with the regulation. The 13 regulation says any "other pollutant subject to 14 regulation under the Act." So the regulation is 15 as broad as the statutory language. The 16 only -- it is in this permit proceeding that the 17 EPA has narrowly defined "regulation" to include 18 actual control of emissions. 19 And the only other place that 20 that's been defined is in the Wegman memo. 21 So there's not been -- it would not be 22 logical for the public to actually submit any</p>

18	<p>1 sort of rulemaking request to narrow</p> <p>2 something that's not narrow. It's broad.</p> <p>3 JUDGE STEIN: What about the 2002</p> <p>4 rulemaking, the 1996 proposal and 2002</p> <p>5 rulemaking?</p> <p>6 MS. SPALDING: That's the rule to</p> <p>7 which I am referring. It's a four-part</p> <p>8 definition, and the fourth part says any other</p> <p>9 pollutant and -- I might not be quoting this</p> <p>10 exactly -- but any other pollutant otherwise</p> <p>11 subject to regulation under the Act.</p> <p>12 JUDGE STEIN: But CO2 is not on the</p> <p>13 list of the pollutants that the Agency listed</p> <p>14 or -- I understand that's preamble language</p> <p>15 rather than regulatory text -- but what do you</p> <p>16 make of the fact that CO2 is not on the list of</p> <p>17 pollutants currently subject to --</p> <p>18 MS. SPALDING: That list has -- I have</p> <p>19 a number of responses to that, if you have a</p> <p>20 minute. That list is incomplete. It also does</p> <p>21 not include PM 2.5, which is clearly subject to</p> <p>22 regulation under the Act.</p>	20
19	<p>1 That list appears in a section both</p> <p>2 in the 1996 proposed rule and in the final</p> <p>3 rule that discusses how hazardous pollutants</p> <p>4 will be dealt with under the BACT program,</p> <p>5 and -- or as -- and whether or not hazardous</p> <p>6 pollutants are regulated. In that preamble,</p> <p>7 and I don't have it in front of me, but</p> <p>8 there's a -- it specifically says that it is</p> <p>9 addressing certain changes, including</p> <p>10 hazardous air pollutants and stratospheric</p> <p>11 ozone depletion in this rulemaking, and that</p> <p>12 other changes related to the 1990 amendments</p> <p>13 will be made later.</p> <p>14 So there's no public notice. And</p> <p>15 that, combined with the fact that the list</p> <p>16 appears in the section dealing with hazardous</p> <p>17 air pollutants and how they will be</p> <p>18 addressed, plus the fact that in the 1996</p> <p>19 proposed rule, there was no attempt to define</p> <p>20 a regulated NSR (?) pollutant or pollutants</p> <p>21 subject to regulation. That definition only</p> <p>22 came with the final rule in 2002, on which</p>	21
	<p>1 there was no public comment. And had there</p> <p>2 been public comment, it would have -- the</p> <p>3 public would have said there's a</p> <p>4 broadly-worded rule, there's a list under</p> <p>5 hazardous air pollutants that -- there was</p> <p>6 nothing that you could have looked to to say</p> <p>7 carbon dioxide is not included.</p> <p>8 JUDGE REICH: Was every pollutant</p> <p>9 included on that list that has this air</p> <p>10 pollutant?</p> <p>11 MS. SPALDING: Wait. I'm sorry?</p> <p>12 JUDGE REICH: Was every pollutant that</p> <p>13 was on that list that has this air pollutant?</p> <p>14 MS. SPALDING: No, they were not.</p> <p>15 JUDGE REICH: Well, then if you looked</p> <p>16 at the list, you knew that obviously that was</p> <p>17 attempting to address more than hazardous air</p> <p>18 pollutants. The title of the section may not</p> <p>19 have tipped you off, but the list itself was</p> <p>20 pretty clear that that was broader than just</p> <p>21 hazardous air pollutants.</p> <p>22 MS. SPALDING: But it did not include</p>	

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1 it would not -- was only addressing limited
2 portions of the Clean Air Act amendments of 1990
3 with regard to how they would be incorporated
4 into the PSD provisions.
5 JUDGE WOLGAST: What significance do
6 you attribute to the lack of a specific
7 reference to the so-called catch-all provision
8 of Category 4 in the 2002 preamble?
9 MS. SPALDING: To the lack of a -- in
10 the preamble? Well, I actually think that that
11 supports the argument that that phrase is as
12 broad as the Act. That the preamble addressed
13 what the other categories were, and that that
14 particular -- and the last catch all-phrase is
15 as broad as the statute itself.
16 JUDGE STEIN: If we were to agree with
17 you and decide that this permit needed to be
18 remanded, what would happen next in terms of the
19 remand? Essentially, you're asking for the
20 Agency and the company to go through a BACT
21 determination for CO2. Is that the outstanding
22 issue that you're asking?

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1 MS. SPALDING: Yes. The Sierra Club
2 is seeking a BACT determination for CO2, and
3 public input into that determination as required
4 by the PSD provisions.
5 JUDGE STEIN: Has there been a BACT
6 determination for CO2 anywhere in the country,
7 to your knowledge?
8 MS. SPALDING: Not to my knowledge.
9 JUDGE STEIN: Has anyone gone through
10 the process of a BACT evaluation, of just going
11 through all of the various steps that would go
12 into determining what BACT is?
13 MS. SPALDING: You know, I have to
14 apologize for my -- I actually seem to remember
15 that there were one or two states that might be
16 starting that process. And I don't know the
17 details. I apologize for that.
18 The PSD program is the most logical
19 place to begin looking at control
20 technologies for pollutants, because when
21 such technologies are developed, new and
22 modified sources offer the greatest

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1 flexibility for using them. It makes perfect
2 sense to apply BACT to pollutants that may
3 not be regulated under provisions that
4 require an endangerment finding.
5 Within the PSD provisions, BACT
6 applies the most broadly. It applies to each
7 pollutant subject to regulation under the
8 Act, whereas other provisions of the PSD
9 program apply only to pollutants -- for
10 example, that are subject to maximum
11 allowable increases.
12 So it is the most broad provision
13 in both the PSD program and in the statute as
14 a whole in terms of the purpose and what it
15 applies to.
16 The lowered threshold for
17 triggering BACT makes sense within the
18 statutory structure, because BACT is not a
19 generally applicable standard, but rather, a
20 case-by-case analysis that allows for
21 balancing of energy, environmental, and
22 economic impacts and other costs. It is

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1 conducted under EPA regulations that allow
2 the administrator to guide the analysis of
3 potential adverse effects. And it includes a
4 mechanism for the administrator to exercise
5 his judgment by weighing in on the BACT
6 analysis for any particular source.
7 The D.C. Circuit recognized in
8 Alabama Power v. Castle (?) that BACT can
9 apply even to pollutants determined not to
10 present substantial public health or welfare
11 concerns, and immediately to each type of
12 pollutant regulated for any purpose under any
13 provision of the Act.
14 JUDGE REICH: Did they talk about
15 regulated for any purpose? Is that language in
16 the actual --
17 MS. SPALDING: That's a quote.
18 JUDGE REICH: And what was the
19 particular issue they were dealing with in
20 Alabama Power? Was it parallel to this?
21 MS. SPALDING: Well, it certainly had
22 similarities. It was -- the statute at that

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1 time was different, and so -- but yes, I think
2 that essentially it was parallel. They were
3 dealing with a situation where industry was
4 arguing that pollutants that had not yet
5 been -- for which maximum allowable increments
6 had not yet been determined --
7 JUDGE REICH: But weren't those
8 pollutants regulated under the Act in some way
9 at that time? There weren't increments, but at
10 least the Agency asserts that all those
11 pollutants were in fact regulated in some way,
12 and what the court was really doing -- and
13 reading the case, it certainly lends itself to
14 that interpretation -- was dealing with the
15 interplay between 165 and 166, and whether the
16 fact that they needed to do study under 166 took
17 them out from under the umbrella of 165.
18 But it really didn't seem to be
19 focused on pollutants for which there was no
20 regulation whatsoever yet.
21 MS. SPALDING: Well, we aren't dealing
22 with a pollutant for which there's no regulation

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1 whatsoever. We're dealing with a pollutant that
2 is regulated by monitoring and reporting
3 requirements.
4 And so while it is not exactly
5 comparable, it does -- and the statute had a
6 different structure at that time, so that the
7 pollutants that were regulated under the Act
8 were perhaps more subject to emissions
9 controls. But it still stands for the
10 proposition that the statutory language is
11 broad. EPA has interpreted it broadly, and
12 the court has affirmed that broad
13 interpretation.
14 JUDGE REICH: If it -- does it go
15 beyond allowing us to conclude that if it's
16 regulated under the Act, then it requires
17 BACT -- does it go to the next step and tell us
18 what is regulated under the Act, or is it just
19 talking about the implications of being
20 regulated under the Act.
21 MS. SPALDING: Does Alabama Power --
22 JUDGE REICH: Yeah.

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1 MS. SPALDING: It has some language
2 about which pollutants are regulated, and in
3 fact, there's a footnote -- I think it's a
4 footnote 134 that specifically says that a
5 pollutant can be regulated under BACT even if it
6 does not present a substantial -- and actually,
7 let me get the quote, because I -- "even for
8 pollutants determined not to present substantial
9 public health or welfare concerns."
10 JUDGE REICH: But again, my question
11 really is whether Alabama Power is instructive
12 only as to the implications of being regulated,
13 or whether it's also instructive as to what it
14 means to be regulated.
15 MS. SPALDING: Well, I think that the
16 language "for any purpose regulated for any
17 purpose under the Act" is instructive.
18 So, and --
19 JUDGE REICH: Okay.
20 MS. SPALDING: The only place that EPA
21 has stated its narrow interpretation that it now
22 advances in this case is the Wegman memo, which

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1 is an internal agency memo which defined
2 "pollutant" narrowly to exclude carbon dioxide
3 based on the rationale that Congress did not
4 intend to regulate sources of carbon dioxide and
5 methane.
6 The Massachusetts v. EPA case has
7 demonstrated the fallacy of this rationale.
8 That memo limited pollutants subject to
9 regulation under the Act to those subject to
10 actual control of emissions based on the same
11 rationale. The memo excludes carbon dioxide
12 and methane as subject to regulation under
13 the Act expressly to avoid regulating sources
14 of these pollutants.
15 Contrary to EPA's arguments,
16 Section 821 is part of the Clean Air Act.
17 The monitoring and reporting of carbon
18 dioxide that's required by that provision is
19 required and enforceable under the Act.
20 Monitoring, reporting, record
21 keeping, and enforcement provisions of
22 Section 821 are inextricably linked to

30	<p>1 Section 412.</p> <p>2 JUDGE REICH: Can I ask -- if we</p> <p>3 decided, contrary to your argument, that</p> <p>4 Congress did not intend 821 to be part of the</p> <p>5 Clean Air Act, what relevance at all should we</p> <p>6 give to Agency statements to the contrary? Is</p> <p>7 there anything that the Agency could have done</p> <p>8 inadvertently by referring to it as being part</p> <p>9 of the Act that would make it part of the Act if</p> <p>10 we determined Congress had not intended that?</p> <p>11 MS. SPALDING: The Agency statements</p> <p>12 in and of themselves cannot make it part of the</p> <p>13 Act if Congress didn't intend it. But Congress</p> <p>14 did intend it to be part of the Act.</p> <p>15 JUDGE REICH: Right, I understand.</p> <p>16 MS. SPALDING: And EPA has implemented</p> <p>17 it as part of the Act. It has adopted</p> <p>18 regulations for Sections 412 and 821 together.</p> <p>19 Section 821 explicitly requires</p> <p>20 that the prohibition provisions of</p> <p>21 Section 412 apply to violations of</p> <p>22 Section 821, making it enforceable under the</p>	32	<p>1 it -- it's a different -- those are different</p> <p>2 words, and they have significance in this</p> <p>3 context because Section 165, the BACT</p> <p>4 provisions, apply only to new and modified</p> <p>5 sources. So it wouldn't be reducing any</p> <p>6 existing emissions of carbon dioxide. It</p> <p>7 would only apply for a new source or a source</p> <p>8 that undertook modifications.</p> <p>9 JUDGE REICH: In the UARG brief, they</p> <p>10 quote another part of the legislative history,</p> <p>11 and I'm taking it at face value -- there's a</p> <p>12 statement by one of the sponsors of the</p> <p>13 amendment that laid out a threefold purpose.</p> <p>14 And it was on page 12 of their brief. And what</p> <p>15 it says is this: "The purpose of this provision</p> <p>16 is threefold. First, in order to furnish better</p> <p>17 scientific evidence so that we will know exactly</p> <p>18 what the U.S. contribution to the problem of</p> <p>19 global warming is."</p> <p>20 I'm going to skip parts of it.</p> <p>21 "Second, Mr. Chairman, we need to</p> <p>22 form a baseline so we know what the utility</p>
31	<p>1 Clean Air Act. That means it can be enforced</p> <p>2 both by the Agency under Section 113 and</p> <p>3 through citizen suits under Section 304. The</p> <p>4 regulations are consistent, stating that a</p> <p>5 violation of the regulations is a violation</p> <p>6 of the Act.</p> <p>7 JUDGE WOLGAST: What significance do</p> <p>8 you give the legislative history that both the</p> <p>9 Agency and your cite in support of their</p> <p>10 argument -- that this should be read more</p> <p>11 narrowly and it wasn't intended that CO2 to be</p> <p>12 subject to regulation under the Act?</p> <p>13 MS. SPALDING: The language that they</p> <p>14 cite says that the provision does not force</p> <p>15 reductions of carbon dioxide, and this is</p> <p>16 actually consistent with reading Section 821 as</p> <p>17 part of the Act and as subject to BACT.</p> <p>18 First of all, I want to note that</p> <p>19 in spite of the characterization in the</p> <p>20 UARG brief, the legislative history did not</p> <p>21 say it would not require emissions controls.</p> <p>22 It said it would not force reductions. If</p>	33	<p>1 effort is in cleaning up the problem so we</p> <p>2 know when to give them credit for their</p> <p>3 reductions. Finally, we need to know in</p> <p>4 order to form a proper role in international</p> <p>5 negotiations so we can know what the U.S.</p> <p>6 Contributions to the problem is."</p> <p>7 Do you disagree that those were the</p> <p>8 goals of the sponsor, and if so, how does</p> <p>9 making carbon dioxide an element of BACT</p> <p>10 further those goals?</p> <p>11 MS. SPALDING: Those are the primary</p> <p>12 goals that were listed in the regulatory history</p> <p>13 when the amendment was offered on the House</p> <p>14 floor.</p> <p>15 JUDGE REICH: And what, beyond the</p> <p>16 monitoring itself, does making it subject to</p> <p>17 BACT review add to furthering those goals?</p> <p>18 MS. SPALDING: It furthers those goals</p> <p>19 by actually taking steps toward -- well, first</p> <p>20 of all, it requires monitoring, and the</p> <p>21 monitoring enables utilities to determine what</p> <p>22 their emissions are. And as they implement BACT</p>

34

1 requirements, they -- as they modify sources,
2 for instance, then they can take credit for
3 those reductions. They will be monitoring those
4 emissions and they can take credit for those
5 reductions.
6 In terms of international
7 negotiations, the United States can take
8 credit for those reductions.
9 And there is legislative history
10 that says "by establishing an early baseline
11 of carbon dioxide emissions for domestic
12 utility companies, we will put the United
13 States in a position to take credit for its
14 efforts to control emissions."
15 That's actually the only place
16 where it talks about controlling emissions.
17 It doesn't say that it will not force
18 emissions controls.
19 JUDGE REICH: But what I'm trying to
20 understand is beyond the monitoring, which
21 clearly 821 contemplates and nobody is disputing
22 the enforceability of 821 in some

35

1 fashion -- what making it further subject to
2 BACT review adds to furthering those three
3 goals?
4 MS. SPALDING: It furthers those three
5 goals by -- well, one of the purposes was to
6 gather information about carbon dioxide, and the
7 BACT process is actually quite conducive to
8 gathering information and implementing controls
9 only as the technology becomes available. It is
10 not -- it doesn't require technologies that
11 aren't available to be developed. It doesn't
12 require technologies that are not cost-effective
13 to be implemented. So that as the science
14 advances and as information is gathered, we can
15 also be looking at those technologies and
16 watching them develop in the BACT process.
17 Again, for new sources and modified
18 sources which offer the most flexibility in
19 terms of installing new technologies or
20 making use of them.
21 JUDGE REICH: In terms of looking for
22 indicia of whether Congress intended 821 to be

36

1 part of the Clean Air Act or not, a couple of
2 things that the Agency cites are the absence of
3 amendatory language. But also the fact that in
4 referring to other parts of the Clean Air Act,
5 they talk about section so-and-so of the Clean
6 Air Act. Are you aware offhand if there were
7 any other provisions in the Clean Air Act that
8 reference a different provision of the Clean Air
9 Act as such-and-such of the Clean Air Act, as
10 opposed to of this Act or the Act? Is there
11 anything else analogous?
12 MS. SPALDING: I cannot cite one off
13 the top of my head, no. I do think that the
14 language needs to be taken as a whole, and you
15 need to -- the fact that it's a note to a
16 provision that is where it incorporates the
17 prohibition requirements, and that it is -- it
18 becomes regulated under the Act because it's
19 enforceable under the Act, and the requirements
20 are enforceable. They're inextricably linked
21 together. And so looking at the provision as a
22 whole indicates that it's part of the Clean Air

37

1 Act.
2 I also wanted to just point out one
3 more thing about the legislative history.
4 Another statement was by -- I think
5 Congressman Moorhead -- was, "What I hope to
6 achieve with this amendment is the
7 elimination of the possibility that U.S.
8 utilities will force CO2 emissions," -- I'm
9 sorry, "will reduce CO2 emissions as a
10 consequence of compliance with these Clean
11 Air Act amendments, and not get credit for
12 these reductions in the future."
13 And I think that speaks a little
14 bit to what you were talking about before,
15 that where it explicitly contemplates that
16 implementation of the 1990 amendments might
17 result in reduced carbon dioxide emissions.
18 JUDGE REICH: Thank you. Your time
19 has expired. Let me see if my colleagues have
20 further questions. Nope.
21 Okay, thank you, Ms. Spalding.
22 Ms. Costello?

38

1 MS. COSTELLO: Yes, good morning.
2 JUDGE REICH: Good morning.
3 MS. COSTELLO: At issue in this
4 proceeding is whether EPA committed a clear
5 error of law when it determined that the phrase
6 "subject to regulation" under the Clean Air Act
7 constrained its authority to impose limits in a
8 PSD permit on pollutants that unquestionably
9 adversely affect public health and welfare.
10 In response to comments, EPA stated
11 "EPA does not currently have the authority to
12 address the challenge of global climate
13 change by imposing limitations on the
14 emissions of CO2 and other greenhouse gases
15 in PSD permits."
16 This conclusion was erroneous for
17 three primary reasons. First, EPA has the
18 authority under the Clean Air Act to regulate
19 CO2, and it should be imposing limits on such
20 emissions based on their incontrovertible
21 adverse effect on public health and welfare.
22 The Clean Air Act -- number two.

39

1 The Clean Air Act requires EPA to impose BACT
2 emission limits on pollutants that are
3 subject to regulation, not pollutants that
4 are already regulated. The words "subject
5 to" must be given meaning; otherwise, they're
6 superfluous.
7 And number three, concluding that
8 EPA has an obligation to set binding emission
9 limits for CO2 as a pollutant subject to
10 regulation under the Clean Air Act is
11 consistent with the legislative purpose and
12 the intent of the PSD program.
13 EPA has the authority and should be
14 limiting CO2 emissions. There's no serious
15 question about that. Massachusetts v. EPA,
16 the Supreme Court held that the EPA has the
17 authority to regulate CO2, and must
18 determine, based solely on the science,
19 whether such emissions endanger health and
20 welfare.
21 The Court also stated that the
22 harms associated with climate change are

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1 serious and well-recognized.
2 EPA does not question the
3 seriousness of CO2 as an air pollutant. In
4 their denial of a waiver to California for
5 their greenhouse gas emission standards for
6 new motor vehicles, the EPA publicly and
7 expressly endorsed in the Federal Register
8 the scientific consensus reflected in the
9 IPCC's summary for policymakers that global
10 warming is unequivocal, that emissions of CO2
11 and other greenhouse gases are contributing
12 to global warming, and that such warming
13 poses numerous dangers to public health and
14 welfare.
15 The EPA administrator personally
16 approved an affirmative endangerment
17 determination, and transmitted a draft
18 Federal Register notice announcing such
19 determination to the White House Office of
20 Management and Budget over five months ago.
21 EPA's constrained interpretation of
22 the authority under the Act ignores the plain

41

1 statutory language. The meaning of "subject
2 to regulation" in the context of the PSD
3 program is much broader than EPA's
4 interpretation.
5 JUDGE REICH: How would you define
6 that?
7 MS. COSTELLO: We would define
8 "subject to regulation" as subject -- EPA has
9 the authority to regulate it and should be
10 regulating it because of its adverse effects on
11 public health and welfare, its actual or
12 potential -- as the intent of the PSD program
13 that's stated in Section 160 of the Act
14 expressly says that the purpose of the PSD
15 program is to protect public health and welfare
16 from any actual or potential adverse effect
17 which in administrator's judgment may reasonably
18 anticipated to occur.
19 The EPA's and the Permittee's
20 interpretation make the word "subject to"
21 entirely superfluous. Congress did not say
22 "regulated pollutants." Congress did not say

42	<p>1 "pollutants presently subject to a statutory 2 or regulatory provision." If Congress had 3 intended to limit the applicability of the 4 PSD program to pollutants that were already 5 subject to binding emissions limits or 6 otherwise regulated, it would have and could 7 have said so, but it did not.</p> <p>8 The interpretation the EPA is 9 currently giving to "subject to" is also 10 inconsistent with how EPA has interpreted 11 that language in other contexts and other 12 statute -- environmental laws that -- we 13 cited one example of that in our brief, which 14 was a memo in 1995 interpreting the phrase 15 "subject to" under the Resource Conservation 16 and Recovery Act and the Clean Water Act. 17 EPA interpreted -- the memo says "EPA has 18 consistently interpreted the language 'point 19 sources' subject to the Clean Water Act to 20 mean 'point sources' that should have a 21 discharge permit in place whether in fact 22 they do or not."</p>	44	<p>1 affect public health and welfare.</p> <p>2 JUDGE WOLGAST: But as Judge Reich was 3 alluding to in his -- as you said, under 4 the -- I think it was Shapiro memo that you're 5 referring to -- there, those entities were 6 regulated. It was just a question of whether 7 they had their paper; i.e., their permit, in 8 place. But they were under regulation at that 9 point, were they not?</p> <p>10 MS. COSTELLO: Yes. And here, we're 11 talking about sources that are already regulated 12 under -- or are regulated under the PSD program. 13 In particular here, the Deseret power plant. 14 There's no question that coal-fired power plants 15 are sources that are regulated and are required 16 to obtain a permit --</p> <p>17 JUDGE REICH: But we're not talking 18 about facilities being regulated, we're talking 19 about pollutants being regulated.</p> <p>20 MS. COSTELLO: That is correct. And I 21 think that the context of this memo and the use 22 of the words "subject to" in the context of the</p>
43	<p>1 EPA has not addressed this 2 inconsistency.</p> <p>3 JUDGE REICH: In that example -- I 4 want to see how analogous it is. That example 5 was a circumstance where there was a clear 6 requirement to obtain a permit, and they were 7 talking about the universe of facilities that 8 were subject to that requirement that had not 9 yet obtained a permit. And I -- therefore, this 10 "subject to regulation" I think springs from the 11 clear statutory requirement to have a permit.</p> <p>12 Is that truly analogous to what 13 we're dealing with here?</p> <p>14 MS. COSTELLO: Yes, I believe it is. 15 Because I believe that --</p> <p>16 JUDGE REICH: Where's the clear 17 mandate?</p> <p>18 MS. COSTELLO: Well, the mandate is on 19 EPA to protect public health and welfare. And 20 here, the interpretation that's being given by 21 EPA is constraining their authority to address a 22 pollutant that has been shown to adversely</p>	45	<p>1 Clean Water Act is a closer analogy than there 2 in UARG's brief. They cited to the Mobil Oil 3 Corporation case, where the Board considered the 4 words "subject to" in a different statutory 5 context.</p> <p>6 That statutory context was -- they 7 were interpreting under the federally 8 permitted release exemption that's contained 9 in the Emergency Planning and Community Right 10 to Know Act, which incorporated a phrase from 11 CERCLA, and it excluded from the reporting 12 requirements any releases that were subject 13 to a permit.</p> <p>14 And in that context, it was -- they 15 were construing an exclusion of authority. 16 And here, what EPA's interpretation is would 17 be an exclusion from their authority, which 18 under statutory interpretation principles 19 should be construed narrowly. The 20 interpretation that we believe is 21 appropriate, which is "subject to 22 regulation," is broader, and it gives EPA the</p>

46	<p>1 authority to address pollutants that it has</p> <p>2 the authority to regulate and it should be</p> <p>3 regulating -- is not seeking to exclude or</p> <p>4 place limits on EPA's authority.</p> <p>5 JUDGE REICH: So you are not</p> <p>6 arguing -- because I wasn't sure from the brief.</p> <p>7 You're not arguing that "subject to regulation"</p> <p>8 extends to every pollutant the Agency has</p> <p>9 authority to regulate. You're saying it only</p> <p>10 extends to a subset of that universe, based on</p> <p>11 some determination about which pollutants are</p> <p>12 appropriate to regulate in the PSD context? Is</p> <p>13 that in essence what you're saying?</p> <p>14 MS. COSTELLO: It's based on the</p> <p>15 potential or actual adverse effects on public</p> <p>16 health and welfare, which --</p> <p>17 JUDGE REICH: And is there a standard?</p> <p>18 I mean, that's what you consider, but is there a</p> <p>19 standard that says these are effects that are</p> <p>20 significant enough that it should be regulated</p> <p>21 and these aren't? How do you apply that in a</p> <p>22 particular case?</p>	48	<p>1 conceptually for other pollutants?</p> <p>2 MS. COSTELLO: Conceptually, I</p> <p>3 hesitate to speculate as to what other</p> <p>4 pollutants it might be extended to at this</p> <p>5 point, because I think we're not right now</p> <p>6 talking about any other pollutants.</p> <p>7 We're talking about CO2, which</p> <p>8 has -- which is unquestionably adversely</p> <p>9 affecting public health and welfare.</p> <p>10 JUDGE REICH: Thank you, Ms. Costello.</p> <p>11 MS. COSTELLO: You're welcome.</p> <p>12 JUDGE REICH: I believe your time has</p> <p>13 expired.</p> <p>14 MS. COSTELLO: Oh, it has? Okay.</p> <p>15 That was quick. Thank you.</p> <p>16 MR. DOSTER: Good morning. Brian</p> <p>17 Doster from the EPA Office of General Counsel,</p> <p>18 Air and Radiation Law Office. I'm appearing</p> <p>19 here today on behalf of Region 8, the</p> <p>20 Respondent, and the Office of Air and</p> <p>21 Radiation's participating amicus.</p> <p>22 The Board should uphold the</p>
47	<p>1 MS. COSTELLO: I think that that would</p> <p>2 be up to the Agency and the administrator to</p> <p>3 determine.</p> <p>4 JUDGE REICH: In a case-by-case?</p> <p>5 MS. COSTELLO: On a case-by-case</p> <p>6 basis, exactly, because the PSD program applies</p> <p>7 on a case-by-case basis. And it applies to new</p> <p>8 and modified sources, and that is exactly the</p> <p>9 area in which EPA should have the authority to</p> <p>10 address --</p> <p>11 JUDGE REICH: So does that mean that a</p> <p>12 pollutant could be regulated under the Act</p> <p>13 relative to one facility but not another</p> <p>14 facility?</p> <p>15 MS. COSTELLO: I think in terms of</p> <p>16 carbon dioxide that, given the nature of that</p> <p>17 air pollutant and the global nature of the harms</p> <p>18 to public health and welfare, that it would not</p> <p>19 vary -- you know, the requirement to address CO2</p> <p>20 in the permitting proceeding would not vary from</p> <p>21 plant to plant.</p> <p>22 JUDGE REICH: But could it</p>	49	<p>1 Region 8 action in this case because it is</p> <p>2 grounded on a permissible interpretation of</p> <p>3 the PSD provisions of the Clean Air Act that</p> <p>4 EPA has consistently followed for nearly 30</p> <p>5 years. EPA's historic view that a pollutant</p> <p>6 subject to regulation is a pollutant for</p> <p>7 which EPA or Congress have required actual</p> <p>8 controls on emissions is consistent with an</p> <p>9 accepted meaning of the term "regulation" and</p> <p>10 the context of the Clean Air Act.</p> <p>11 Petitioners and amici have not demonstrated</p> <p>12 that this interpretation is clearly</p> <p>13 erroneous.</p> <p>14 JUDGE STEIN: Mr. Doster, let me get</p> <p>15 to the heart of one of my questions. You</p> <p>16 started your remarks with the observation that</p> <p>17 EPA believes this interpretation is permissible.</p> <p>18 Does that mean that EPA is no longer contending</p> <p>19 that it lacks the authority, simply that it's a</p> <p>20 permissible interpretation?</p> <p>21 MR. DOSTER: We've never contended</p> <p>22 that we lack the authority. We clearly could</p>

50	<p>1 write a new source performance standard and 2 regulate CO2 under that provision, which would 3 trigger the PSD program. 4 The particular statement that 5 you're referring to on our response to 6 comment was that with respect to this 7 particular pollutant, CO2, we do not 8 currently have the authority to regulate it 9 because it is not a regulated NSR pollutant. 10 We don't have the authority to subject it to 11 an emissions limit in the PSD program, more 12 specifically. 13 JUDGE STEIN: So what you're saying, 14 you don't have the legal authority to interpret 15 "subject to regulation" in a way -- i.e. 16 821 -- that would allow for you to interpret the 17 term in a way that you could consider a 18 regulated pollutant? 19 MR. DOSTER: I see your point, Your 20 Honor. 21 At the time of our response to 22 comments, given our prevailing interpretation</p>	52	<p>1 and it applies a permissible meaning. 2 Petitioners have cited several 3 dictionary definitions of the meaning of the 4 term "regulation." 5 We've cited another dictionary 6 definition. Both are equally valid 7 definitions of the term "regulation." And 8 our definition is that "regulation" refers to 9 the act or process of controlling by rule or 10 restriction -- is a fair interpretation. 11 It -- sorry about that. I'll just 12 continue. 13 Our interpretation is based on an 14 accepted meaning of the term "regulation." 15 So our interpretation is not impermissible 16 either. It is a fair interpretation of the 17 Act, it makes sense in the context of the 18 Clean Air Act, given that there are various 19 provisions in the Act that call for the 20 administrator to exercise his judgment as to 21 whether it is appropriate to regulate a 22 pollutant -- to establish controls on a</p>
51	<p>1 that "subject to regulation" referred to a 2 pollutant subject to actual controls, we 3 expressed the view that given that 4 interpretation -- under that interpretation, 5 we did not have the authority to do so. 6 Under the interpretation that 7 Petitioners have espoused in this case, which 8 we do not contend is an impermissible 9 interpretation, it's just simply not just the 10 best reading, and it is not the reading that 11 we have followed for 30 years in the past. 12 So if your point is might we have 13 the discretion to interpret the provision the 14 way the Petitioners contend, because we don't 15 believe that there is a clear meaning here, I 16 don't contest that may be a possible 17 interpretation. 18 I don't think that interpretation 19 is consistent with the context of the Act. 20 It's certainly different from our historic 21 interpretation, which is permissible and 22 grounded firmly in the context of the Act,</p>	53	<p>1 pollutant. 2 And it makes sense in the statutory 3 scheme for a provision that addresses the 4 control of emissions based on determinations 5 to regulate those emissions elsewhere under 6 the Clean Air Act -- it makes sense to ground 7 that determination on the judgment of the 8 administrator, or an expressed determination 9 by Congress that that emission, that 10 pollutant is subject to control. 11 If I might continue with my 12 argument, I'd like to note that the Board has 13 heard this issue once before in the Christian 14 County case, and since that time, we've seen 15 a number of additional briefs submitted and 16 45 minutes of oral argument here today. 17 But I think what's really striking 18 since -- after all this advocacy, is that no 19 party has demonstrated to this Board that any 20 entity with the authority to make CO2 a 21 regulated NSR pollutant has clearly expressed 22 the intent to do so -- not the Congress, not</p>

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<p>1 the Supreme Court or the lower courts, not 2 the administrator or any permitting 3 authority, state or federal. 4 Furthermore, neither this Board, 5 the EPA General Counsel, or any other Agency 6 official has interpreted these actions of 7 Congress, the courts, or the administrator to 8 have the effect of making carbon dioxide a 9 pollutant subject to regulation under the 10 Act. 11 Yet Petitioners appear before you 12 today advocating that we have been missing a 13 plain meaning -- that all of these people 14 have been missing a plain meaning of the 15 Clean Air Act for almost 18 years. But 16 the -- at no time in that period of time have 17 the Petitioners or any other party raised 18 this legal theory to the Agency based on this 19 plain meaning of the Act. 20 And the authorities and the 21 provisions on which they base this argument 22 have been available throughout this entire</p>	<p>1 regulations in 5221, I note that we define 2 the "major stationary source," and that's 3 defined in terms of "any regulated NSR 4 pollutant," which on its face seems a 5 narrower term. And I'm wondering how we got 6 from "any air pollutant" in 169 to "regulated 7 NSR pollutant" in the regs, and if that 8 reflected the interpretation in the Wegman 9 memo that Congress intended the broader term 10 "air pollutant" to really just mean the 11 subset of "regulated pollutants." 12 And that premise is now 13 questionable, at best, given Massachusetts, 14 whether we now have a set of regulations that 15 don't really track what Congress promulgated. 16 And I ask this -- I want to be 17 clear, not because I think this is a forum 18 for challenging EPA regulations, because it's 19 not. But I think it may be relevant in terms 20 of understanding what Congress may or may not 21 have had in mind relative to sources that 22 emit carbon dioxide, in terms at least of the</p>
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<p>1 time. And the only new development is the 2 Massachusetts v. EPA Supreme Court decision, 3 and the Board has already recognized that in 4 its Christian County opinion that the 5 interpretation reflected in that opinion by 6 itself does not compel the regulation of CO2 7 in PSD permits. 8 JUDGE REICH: Mr. Doster, I'm a little 9 bit puzzled by something. It's a little bit 10 broader than the specifics of the case, but it 11 may have some implications in terms of the case. 12 Maybe you can help kind of walk me through this. 13 Looking at the applicability of the PSD 14 permitting program as a whole -- putting aside 15 for the moment the BACT component -- if I look 16 at how the statute applies to a major emitting 17 facility, if I looked at the definition of 18 "major emitting facility" in 169, it frames the 19 applicability in terms of tons per year of any 20 pollutant. It doesn't at that point talk about 21 any regulated pollutant. 22 When I look at the implementing</p>	<p>1 PSD program as a whole. 2 So if I didn't lose you in that. 3 MR. DOSTER: I'm with you. 4 JUDGE REICH: Okay. 5 MR. DOSTER: I know exactly what 6 you're talking about. 7 JUDGE REICH: Can you help me there? 8 MR. DOSTER: The practical 9 significance of the provision you're talking 10 about in our rules really is to determine which 11 pollutants we consider in determining whether a 12 source is a major source, in determining 13 whether -- you know, a source emits more than 14 100 or 250 tons per year of an individual 15 pollutant. 16 EPA has traditionally, as reflected 17 in that language that you've quoted from the 18 rules, we have traditionally interpreted the 19 term "pollutant" from Section 169. 20 One, that I think the definition of 21 "major emitting facility," we've 22 traditionally interpreted that to refer to</p>

58

1 regulated pollutants, as reflected in that
2 definition, for the simple reason that
3 we -- we haven't been determining
4 applicability. If that were the case, we
5 would be already in the boat that the
6 Industry Petitioners are gravely concerned
7 about, which is that a number of additional
8 small sources would be subject to the PSD
9 program based on any number of emissions,
10 particularly CO2 emissions here, which it
11 doesn't take a very big facility or a very
12 big combustion source in order to have more
13 than 100 or 250 tons of emissions.
14 JUDGE REICH: That's precisely what
15 led to my question. Yeah.
16 MR. DOSTER: So if we had interpreted
17 it that way, we would already be in the
18 situation that people are concerned about here.
19 JUDGE WOLGAST: But the other part of
20 Judge Reich's question is -- but if that
21 interpretation of tying that to a regulated
22 pollutant is based on the Wegman memo, then how

59

1 is that currently constrained?
2 MR. DOSTER: I don't agree that -- I
3 don't think it's based on the Wegman memo. I
4 think it's similar. I agree that --
5 JUDGE REICH: Is it based on the same
6 reasoning as the Wegman memo?
7 MR. DOSTER: It's a similar rationale.
8 JUDGE REICH: Okay.
9 MR. DOSTER: I don't know that it's
10 identical in the sense that -- you know, the
11 Wegman memo as I read it deals with -- it deals
12 clearly with Title 5, and the question of
13 Title 5 applicability. But it was the same kind
14 of question. If we read this a certain way,
15 we're going to subject a number of pollutants to
16 Title 5 -- or sources to Title 5 -- that aren't
17 even subject to applicable requirements under
18 Title 5. That --
19 JUDGE REICH: And you have conceded
20 that to the extent that the Wegman memo dealt
21 with the issue of how to interpret what an air
22 pollutant is, that's no longer really good law.

60

1 MR. DOSTER: I have conceded it at
2 oral argument. I think I've been a little more
3 cautious in my briefs, but I think in fact the
4 last time I appeared before you, I did concede
5 that.
6 But -- you know, I'm not sure
7 that -- I don't concede that necessarily, we
8 don't have the discretion to consider an
9 additional narrowing approach in Title 5,
10 given the particular consequences of --
11 JUDGE REICH: Well, but --
12 MR. DOSTER: The ruling.
13 JUDGE REICH: But what about in the
14 context of PSD, which is the case before us?
15 MR. DOSTER: In PSD, for the reasons I
16 laid out, I think there is -- you know, even if
17 one takes the view that there's a literal
18 meaning here that we can't depart from, under
19 the principles of (inaudible) of the de minimis
20 or administrative convenience and those kinds of
21 things, we certainly would have the ability to
22 make the program manageable and to focus on the

61

1 real pollutants that are regulated, the
2 pollutants that really determine whether a
3 source is a big source that really subject to
4 the program, which has always been Congress'
5 intent.
6 JUDGE REICH: Would you have that same
7 inherent authority to implement a BACT
8 requirement for carbon dioxide if we conclude
9 that there was one? And would that help address
10 the issues some of the amici raise in terms of
11 the implications of finding that carbon dioxide
12 was subject to regulation?
13 MR. DOSTER: I think Congress has
14 clearly treated those two things differently, as
15 you pointed out. They've used the word
16 "pollutant" in one definition and they've used
17 the word "pollutant subject to regulation" in
18 another definition. So they intended something
19 different by that language.
20 JUDGE REICH: And you don't think we
21 have the same kind of discretion in implementing
22 165 that we would have in implementing --

62

1 MR. DOSTER: It's a discretion to
2 interpret subject to regulation, not necessarily
3 keyed on what is the meaning of the term "air
4 pollutant," but in terms of --
5 JUDGE REICH: No, exactly.
6 MR. DOSTER: What is --
7 JUDGE REICH: But I mean, is there an
8 analogous discretion to --
9 MR. DOSTER: To narrow or to broaden?
10 JUDGE REICH: To narrow it to make the
11 program administratively more workable.
12 MR. DOSTER: Certainly. I certainly
13 agree. I mean, that is the fundamental premise
14 of our argument. And we have historically done
15 that. I don't think -- you know, it was to look
16 at the pollutants that the administrator had
17 determined were -- either had found an
18 endangerment for, or that the Congress had
19 specifically and clearly designated are
20 pollutants that we needed to regulate. And
21 those were the things that we were focusing on.
22 So yes, our discretion is to focus

63

1 on the pollutants, that there's been an
2 official determination that they need to be
3 regulated. And in this case, we don't have
4 that. We have a peripheral provision not
5 even incorporated into the Clean Air Act,
6 which has been -- you know, equated to an
7 elephant in the mousehole in the words of
8 *Whitman v. EPA* decision.
9 JUDGE REICH: If something is made
10 subject to the enforcement provisions of the
11 Clean Air Act, why isn't that sufficient to make
12 it subject to regulation under the Act even if
13 the requirement springs from a different
14 statute? Isn't enforceability really a key
15 component of being subject to regulation?
16 MR. DOSTER: In theory, I guess I
17 can't dispute that. But the words that Congress
18 used were "subject to regulation" under the
19 Clean Air Act, or under this chapter, as
20 promulgated in the codes.
21 JUDGE REICH: But can't regulation
22 include enforcement?

64

1 MR. DOSTER: Certainly regulation
2 includes enforcement --
3 JUDGE REICH: So could you read it,
4 then, as one of the ways of reading it as
5 subject to enforcement under the Clean Air Act,
6 which this seems to be?
7 MR. DOSTER: Enforcement -- I'm not
8 sure I follow. I mean, I think of enforcement
9 in the context of enforcing a clearly applicable
10 requirement, a restriction, an emissions limit
11 that somebody has failed to meet. That's what I
12 think of enforcement to mean. You're talking
13 about legal enforceability, enforceable as a
14 matter of law?
15 JUDGE REICH: Yeah, I'm saying if
16 regulation includes enforcement, then can I read
17 that "subject to regulation under the Act" to
18 include something that is subject to enforcement
19 under the Act? Which this appears to be,
20 because it relies on the Air Act for its
21 enforcement mechanism.
22 MR. DOSTER: If you take the

65

1 dictionary meaning of the term "regulation" that
2 we've discussed in this case, I don't think you
3 can read that to be enforcement. You can read
4 "regulation" to mean enforcement. You can read
5 regulation to mean, as the Petitioners have, to
6 mean a rule promulgated and published in the
7 Code of Federal Regulations. And if that's what
8 you mean by enforcement under the Act, you know,
9 it could be the case. But this particular
10 monitoring provision as we specified is based on
11 Section 821, a provision that is not under the
12 Act.
13 JUDGE REICH: Do you agree with
14 Deseret's argument that if 821 regulates
15 anything, it regulates facilities rather than
16 pollutants?
17 MR. DOSTER: Yes. I'm not sure I
18 completely agree with it, but I think the
19 general tenor of it I think is correct. Our
20 interpretation of "regulation" as to control by
21 rule or restriction -- or to, if you read the
22 dictionary -- the Webster's dictionary, to

1 direct or to -- they're directed -- the facility
 2 is directed to compile and report its emissions.
 3 So -- but the emissions themselves are not
 4 regulated. They're not controlled. The
 5 emissions -- it's simply an
 6 information-gathering requirement. So yes,
 7 there's no -- the facility is required to report
 8 and subject to, in some sense, a control, a
 9 requirement to report, but not to actually limit
 10 its emissions.

11 JUDGE WOLGAST: Do you agree that if
 12 the facility refuses to report that that refusal
 13 is enforceable, that EPA can then take action?

14 MR. DOSTER: Certainly, it's -- I
 15 mean, it's enforceable under the regulations.
 16 The question is really whether that's
 17 enforceable as the implementation of the Clean
 18 Air Act.

19 JUDGE WOLGAST: I'm struggling
 20 with -- I mean, looking at how these enforcement
 21 provisions fit together in terms of Section 412
 22 and Section 414, which has been argued is -- and

1 legal basis for it. It was the legal reason
 2 that that is our organic authority to promulgate
 3 the regulations that required it.

4 JUDGE WOLGAST: Have you ever done
 5 that? Have you ever enforced this provision?

6 MR. DOSTER: I am not aware of that.
 7 I don't know one way or the other. I don't have
 8 those details.

9 JUDGE WOLGAST: So you're saying you
 10 wouldn't use Section 113 of the Act to invoke a
 11 court's jurisdiction to require monitoring?

12 MR. DOSTER: That -- it's a good
 13 question. I don't know. We haven't directly
 14 faced it, I think, under the interpretation that
 15 I'm advocating today. I think we would be
 16 hesitant to do so.

17 JUDGE REICH: In terms of the
 18 implications of what you're asking us to decide,
 19 75.5 indicates, as you well know, that a
 20 violation of the regulations in Part 75, which
 21 includes carbon dioxide, is a violation of the
 22 Act. And I know in your briefs you've

1 do you agree is the mechanism by which it would
 2 become enforceable under the Act?

3 MR. DOSTER: There's -- if I could
 4 actually get the specific language -- there's a
 5 reference -- as I understand it, there's a
 6 reference to a provision which is not actually
 7 that provision.

8 The drafters of the Code have
 9 interpreted that to have been Congress'
 10 intent, but there was a mistake in the
 11 citation. But as I recall the language, I
 12 believe it says that it shall be enforceable
 13 not under that provision, but in the same
 14 manner as something under that provision. I
 15 need to grab the specific language, if --

16 JUDGE WOLGAST: So I guess that -- I
 17 understand your point. But that leads me to
 18 ask, so how is it enforceable? How do you
 19 invoke the jurisdiction of the court?

20 MR. DOSTER: Under the Public Law
 21 101-549, which is the law under which the
 22 requirement was created. And so that is the

1 acknowledged that in some of the documents to
 2 date, you've been a little imprecise in using
 3 that reference to the Act as it relates to 821.
 4 Would you say that that is no longer an accurate
 5 statement as it relates to carbon dioxide
 6 monitoring, that it's no longer a violation of
 7 the Act under 75.5?

8 MR. DOSTER: I would note first -- and
 9 I'll address your question, but I think this is
 10 relevant to it -- the Act as used in 75.5 is
 11 basically incorporating the phrase that is used
 12 in 75.1(a), which is where we say "Sections 412
 13 and 821 of the Clean Air Act as amended by
 14 Public Law 101-549 (the Act)."

15 So to the extent -- what I'm saying
 16 is that we were wrong in 75.1(a) in saying
 17 821 of the Clean Air Act. We should have
 18 been more precise, because it isn't part of
 19 the Clean Air Act -- and said 821 of Public
 20 Law 101-549.

21 But I'm not saying that that
 22 citation in 75.5 is wrong, because it's

1 referring back to 821. And so it is a
2 violation of 821.

3 JUDGE REICH: To the extent that you
4 cited I think both 412 of the Clean Air Act and
5 821 as authority for the Part 75 provisions, was
6 the authority for the carbon dioxide provision
7 solely 821?

8 MR. DOSTER: That is our position,
9 yes.

10 If I could move on, I'd like to
11 respond to one point that Petitioners made
12 with respect to the Alabama Power decision,
13 because I think it's so illustrative of the
14 liberties that the Petitioners are taking
15 with the authorities that they're citing in
16 this case, and that the Board should be
17 cognizant of it.

18 They cite to footnote 131 of Judge
19 Leaventhall's opinion in Alabama Power for
20 the notion that it's still possible for a
21 pollutant, which -- so I can get the exact
22 language, "does not present substantial

1 promulgate a 111 NSPS for those excluded
2 pollutants, they would become subject to
3 regulation under the BACT analysis.

4 So this footnote does nothing to
5 support the Petitioners' argument, and it
6 completely confirms our position here today.

7 Furthermore, they cite the
8 legislative history in the -- you know, and
9 argue that there was an intent to control CO2
10 omissions from the legislative history. But
11 again, they quote selective provisions, and
12 you don't -- read the whole thing -- if you
13 read the whole thing in context, it's very
14 clear that the only purpose of the drafters
15 of that amendment was for
16 information-gathering.

17 They say at one point, "we can
18 hardly expect to make responsible decisions
19 about controlling these emissions if we fail
20 to take the necessary steps to prove our
21 understanding of the magnitude and rate of
22 increase in these emissions."

1 public health or welfare concerns to be
2 regulated under the Act."

3 This is demonstrably out of context
4 and completely inconsistent with the
5 footnote. The footnote is not even in the
6 part of the opinion that relates to "subject
7 to regulation" and the BACT requirement.
8 It's with respect to a fugitive missions (?)
9 part of the opinion.

10 What it says is that Congress -- or
11 that EPA might have the discretion to exclude
12 particulates of a size or composition
13 determined to not to present substantial
14 public health or welfare concerns from the
15 NACs (?) for particulates.

16 So it doesn't say what they're
17 saying it says, that it stands for the
18 proposition that the BACT analysis applies to
19 a pollutant that does not present substantial
20 public health or welfare concerns. Further
21 down in that footnote, if you read it, it
22 says quite clearly that if EPA were to

1 They're not controlling it here.
2 They clearly indicate that. Their intent is
3 to gather information in anticipation of
4 potential control at some point at a later
5 date.

6 JUDGE REICH: Could the BACT process
7 facilitate gathering information even if you
8 conclude at the end of that process that there
9 really is no control that's appropriate for
10 BACT?

11 MR. DOSTER: It certainly -- it could
12 contribute to gathering information, I can't
13 contest that if you were to do the analysis.
14 But that would -- you're -- I'm sorry. The
15 premise of your question is, you would go
16 through the analysis and then it would lead to
17 no control?

18 JUDGE REICH: Potentially.

19 MR. DOSTER: I'm not sure I see the
20 point of the analysis at that degree and --

21 JUDGE REICH: But I mean, that may not
22 be a preordained result. All I'm saying is that

74

1 in addition to the monitoring data that 821
2 clearly contemplates, potentially you would get
3 additional useful information by going through a
4 BACT review, which may ultimately lead you to
5 conclusion that at the moment, there is no
6 control that's appropriate, but it still adds to
7 your knowledge about CO2 and potential controls
8 of CO2, and otherwise sort of strengthens your
9 ability to ultimately make a determination
10 relative to whether some further control of CO2
11 is appropriate.

12 MR. DOSTER: We don't have to go
13 through a BACT analysis to develop that
14 information.

15 I don't quite follow why that would
16 be the hook. I mean, we could do that on our
17 own. In fact, I think we already are. I
18 mean, we're working very diligently on an
19 advance notice of proposed rulemaking.

20 JUDGE REICH: But it could be a way to
21 force that to be done as opposed to relying on
22 just Agency discretion to decide to do it or not

75

1 do it.

2 MR. DOSTER: I suppose if one thought
3 that's what Congress intended, that you could
4 read it as being forced to be done that way.
5 But the BACT provision -- the central word in
6 the BACT provision is an "emissions limitation."
7 So the BACT provision's intent is
8 to establish -- it's a technology-forcing
9 provision to establish a technology-based
10 emissions limitation.

11 So the gathering of information
12 relative to that doesn't seem to me to be
13 consistent with the purpose of the BACT
14 provision. While this could be an ancillary
15 benefit under your theory here, it just
16 doesn't seem like that's what -- Congress
17 intended us to go through the exercise just
18 to gather information. Intended us to go
19 through the exercise to establish emissions
20 limits and to control emissions on pollutants
21 that somebody had determined there was a
22 danger for public health and welfare from, in

76

1 an official capacity.

2 JUDGE WOLGAST: Could I clarify
3 something you said a couple of minutes ago? Are
4 you saying that monitoring and reporting
5 requirements can't be interpreted to be
6 "regulation" within the meaning of Section 165?
7 MR. DOSTER: Yes, that's our central
8 position, and I think it has been in this case.
9 You're asking if it can't be interpreted that
10 way?
11 No, we're not saying this is a
12 Chevron One case in favor of our
13 interpretation. We're saying that there is
14 some ambiguity and that the provision is
15 susceptible to more than one interpretation.
16 We've said that in our briefs, that there are
17 different meanings of the term "regulation,"
18 Petitioners have cited to one. We've cited
19 to another, which we think is a commonly
20 accepted and clearly understood meaning, and
21 that our interpretation is therefore clearly
22 permissible.

77

1 It's not clearly erroneous for us
2 to have applied an established dictionary
3 meaning of the term.

4 JUDGE WOLGAST: About your
5 interpretation, am I correct that the preamble
6 to the 2002 rule doesn't specifically address
7 the catch-all provision, or explain how the
8 Agency sees the scope of that provision?
9 MR. DOSTER: It does not explicitly
10 articulate our interpretation of that provision,
11 to my knowledge, in the preamble. I think what
12 we've argued is that the list that was
13 contemporaneously published with that is an
14 indication of what our interpretation was, that
15 that list was not the only indication of our
16 interpretation. That in addition, two of the
17 Board's opinions -- the Cannon memo, the Wegman
18 memo -- the original interpretation of
19 Administrator Kosloff (?) to focus on pollutants
20 that were subject to controls. All of that
21 collectively together, if you take all of that
22 history, it's very clear what our position has

78

1 been.

2 I will acknowledge that in the 2002

3 final rule, we did not articulate this in the

4 way the Petitioners would have liked for us

5 to have done so.

6 But we made clear in 1996 which

7 pollutants we thought were covered, and we

8 were adding pollutants and subtracting

9 pollutants from that list based on the 1990

10 amendments.

11 So if anybody at that time thought

12 we should have been covering CO2, there was

13 clear notice and opportunity for them to

14 raise this issue with us at that time. And

15 at that time, we would have then had the

16 opportunity to respond to the comment and

17 articulate the interpretation that we have

18 long been following that is apparent from all

19 these other activities.

20 JUDGE WOLGAST: On a related point to

21 what you just said, I read your brief to say

22 that this is an improper forum for this argument

79

1 by Sierra Club. That they in fact are barred

2 from objecting at this point to EPA's

3 interpretation of a regulated NSR pollutant.

4 But I am somewhat puzzled by -- if they had

5 brought a challenge to the 2002 rulemaking, what

6 specifically would they have challenged? What

7 would that challenge have looked like?

8 MR. DOSTER: They would have

9 challenged the fact that we didn't list the

10 pollutant CO2, or we didn't establish a

11 significant emissions rate for CO2, which is

12 what we do for every pollutant that we consider

13 regulated. And that we should have been

14 covering the pollutant under the program but

15 weren't taking the steps necessary to do that.

16 JUDGE WOLGAST: But it also --

17 MR. DOSTER: You would have had to

18 comment on it first. First off, they would have

19 had to comment on it, I believe. If they

20 thought we should be regulating CO2 under this

21 program, they would have commented on it and we

22 could have addressed this question. If they had

80

1 this legal theory, this plain meaning that we've

2 all been missing -- if that had been presented

3 to us or -- we would have had the opportunity to

4 articulate this and respond. But instead, they

5 wait until we apply it in a permit proceeding.

6 There's two board opinions that say

7 it's not -- a regulated pollutant. There's

8 memos from the general counsel indicating

9 that this is -- that we have -- the position

10 that the Supreme Court ultimately

11 adopted -- yet they wait until a permitting

12 decision -- when a region reasonably relies

13 on this history and determines that CO2 is

14 not subject to regulation, that the Supreme

15 Court decision, the intervening decision, did

16 not change that interpretation -- it simply

17 addressed the question of whether CO2 was an

18 air pollutant. We respond to a comment

19 raising the issue for the first time in a

20 permit proceeding and we address it.

21 So perhaps this is the appropriate

22 time. And maybe you have trouble with our

81

1 argument that they were barred at that time.

2 But -- you know, they couldn't have even

3 raised it then, because they didn't even

4 comment on it in the 2002 rulemaking.

5 So we didn't even have an

6 opportunity to address the issue and

7 articulate what had -- what the evidence

8 shows we had clearly been doing all along,

9 whether -- it may not have been exactly

10 expressly articulated in one place with one

11 pretty red bow on it, but it was clear in the

12 progression of our behavior over time what we

13 were doing and how we have interpreted the

14 Act.

15 JUDGE STEIN: I have a couple

16 questions. I wanted to go back to the

17 monitoring and 821 and the Part 75 regulations.

18 Following your line of thinking, am I correct in

19 understanding that you're saying some of the

20 monitoring provisions under the regulations in

21 Part 75 are not enforceable under Section 113 of

22 the Clean Air Act? Is that a correct

82

1 understanding?

2 MR. DOSTER: I am saying that's

3 consistent with our interpretation advocated to

4 you here today that that would not be

5 appropriate. We have not made that judgment,

6 and I'm not in a position to weigh in on that in

7 an a definitive way. But the extent --

8 JUDGE STEIN: What's the ramification

9 of that? I mean, where does that stop? I mean,

10 you've got regulations that are promulgated

11 under both -- you know, the authority of the

12 Clean Air Act and 821. They're in a part that

13 typically is enforceable under 113, the

14 principal enforcement mechanism under the Clean

15 Air Act. What else might not be enforceable

16 under the Clean Air Act if we're to accept your

17 821 theory?

18 MR. DOSTER: That's hard to answer

19 because I don't know. I mean, an example would

20 be the 4042 acid precipitation study that we

21 were required to do, which is under a provision

22 that's also not promulgated in the Act.

83

1 JUDGE STEIN: So there would be

2 no -- so in other words, if EPA didn't do that

3 study, there would be no remedy for someone to

4 bring suit to compel EPA?

5 MR. DOSTER: In fact, no. Because, in

6 fact, they did bring suit to compel EPA to do

7 that study, or at least question the study that

8 we did. The New York v. Browner case that's

9 been cited to you in this case was an action

10 for -- I think it was an unreasonable delay case

11 or some action to enforce Section 404.

12 JUDGE STEIN: Did the Agency in that

13 case say that there was no authority on the part

14 of the citizens to bring that suit because it

15 wasn't part of the Clean Air Act?

16 MR. DOSTER: We did not argue that.

17 In the case, in fact, that opinion is very

18 limited in its analysis of that issue. So to my

19 knowledge, I don't think we argued that specific

20 issue. We I believe argued that we had done the

21 study, that we had done an appropriate study. I

22 think the question was whether there was

84

1 something missing from the study. We had taken

2 action, and I think the question was whether

3 part of the study was incomplete.

4 JUDGE STEIN: Isn't there a narrower

5 way to look at this with potentially less

6 broad-reaching consequences, which is that by

7 the act of promulgating the regulations under

8 the authority of 821 in the Act, they in fact

9 became subject to the enforcement authority of

10 the Clean Air Act?

11 MR. DOSTER: It's not -- this is not

12 the central premise of my argument. This is one

13 piece that -- if you were to conclude that a

14 monitoring provision is regulation, this would

15 not be under the Act. But my primary argument

16 and our primary position does not depend on

17 this. Our primary position is that "subject to

18 regulation" means subject to actual control of

19 emissions.

20 JUDGE STEIN: If that was Congress'

21 intent, how do you respond to Petitioner's

22 argument that Congress could have used those

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1 words in the statute?

2 MR. DOSTER: We've addressed this in

3 our brief. Congress could just as easily have

4 said "subject to a regulation" or "subject to

5 regulations," which would be consistent exactly

6 with their meaning. The term "regulation" as

7 we've interpreted it under what they allege is a

8 narrow interpretation -- which is in fact quite

9 broad -- we have interpreted "regulation" more

10 broadly than the definition of the term

11 "regulation" because we interpret it to cover

12 Title 5 pollutants which are subject to import

13 and production restrictions which do not fit

14 within the definition of a continuous limitation

15 on emissions, as defined in the definition of

16 emissions limitations.

17 So we have given that provision a

18 broader construction than emissions

19 limitation. So if Congress had intended it

20 to be narrower, they'd be narrowing it, and

21 would be excluding ozone-depleting substances

22 from the program.

86	<p>1 JUDGE REICH: Thank you, Mr. Doster.</p> <p>2 MR. RUSSELL: Good morning, Your</p> <p>3 Honor.</p> <p>4 JUDGE REICH: Good morning.</p> <p>5 MR. RUSSELL: Jim Russell, Winston &</p> <p>6 Strawn, for Deseret.</p> <p>7 I thought with my 10 minutes, that</p> <p>8 I would first thank you for expeditiously</p> <p>9 scheduling this oral argument considering the</p> <p>10 full briefing. And obviously, the Permittee</p> <p>11 looks forward to an early decision, but we</p> <p>12 thank you for the schedule that we have and</p> <p>13 the diligence with which you've looked at</p> <p>14 this.</p> <p>15 I'd like to go back to Christian</p> <p>16 County for a moment since we're talking about</p> <p>17 undefined phrases. You'll recall in</p> <p>18 Christian County, we have the phrase</p> <p>19 "reasonably ascertainable" or "reasonably</p> <p>20 available." And the Board applied a common</p> <p>21 sense test to what that phrase meant.</p> <p>22 We obviously like our brief. We</p>	88	<p>1 regulated pollutant. And EPA is required to</p> <p>2 impose a carbon dioxide BACT emission limit</p> <p>3 in the Bonanza PSD permit."</p> <p>4 That seems backward to me. I don't</p> <p>5 know how you can regulate a pollutant that</p> <p>6 isn't a pollutant. But let's go ahead and</p> <p>7 look at Petitioner's reply brief. In --</p> <p>8 JUDGE STEIN: Isn't the argument that</p> <p>9 it was a pollutant, but until the Supreme Court</p> <p>10 decided that it was a pollutant all along -- but</p> <p>11 that until the Supreme Court decided that issue,</p> <p>12 there was a dispute about it?</p> <p>13 MR. RUSSELL: Right.</p> <p>14 JUDGE STEIN: But that in the -- I</p> <p>15 mean, I don't imagine the Supreme Court</p> <p>16 suggesting suddenly that the Act was enacted in</p> <p>17 2008 or --</p> <p>18 MR. RUSSELL: That's right.</p> <p>19 JUDGE STEIN: Or 2007, excuse me. But</p> <p>20 it's been a pollutant all along.</p> <p>21 MR. RUSSELL: And so the Supreme Court</p> <p>22 said -- since you have the authority to regulate</p>
87	<p>1 like the law that we have cited. But I'd</p> <p>2 like to try to apply a common sense test to</p> <p>3 some of Petitioner's statements here in its</p> <p>4 overall over-reaching argument that carbon</p> <p>5 dioxide has always been regulated, it just</p> <p>6 hasn't been a pollutant.</p> <p>7 If you -- and that at the end of my</p> <p>8 10 minutes, I'd like to just ask you briefly</p> <p>9 what has changed since Christian County and</p> <p>10 what has changed since Massachusetts v. EPA.</p> <p>11 But last time, Judge Wolgast asked me what</p> <p>12 our best argument was, and I'd like to focus</p> <p>13 on Christian County common sense.</p> <p>14 If we look at Petitioner's opening</p> <p>15 brief, page 6, "Carbon dioxide has been</p> <p>16 regulated under the Clean Air Act since 1993,</p> <p>17 when EPA adopted regulations implementing</p> <p>18 Section 821. The Supreme Court then held</p> <p>19 that carbon dioxide and other greenhouse</p> <p>20 gases are pollutants under the Clean Air Act.</p> <p>21 Now having been definitively ruled a</p> <p>22 pollutant, carbon dioxide is accordingly a</p>	89	<p>1 it, you really ought to consider an endangerment</p> <p>2 finding to see whether it poses health risks.</p> <p>3 JUDGE REICH: That clearly is relative</p> <p>4 to a different statutory scheme. I just -- just</p> <p>5 to make sure I understand kind of the broader</p> <p>6 position of Deseret -- the Agency clearly takes</p> <p>7 the position that there was more than one</p> <p>8 possible interpretation to "subject to</p> <p>9 regulation" --</p> <p>10 MR. RUSSELL: Right.</p> <p>11 JUDGE REICH: But the one they chose</p> <p>12 was the best and clearly permissive, and one</p> <p>13 that has a long history and we ought to accept.</p> <p>14 Deseret talks a lot about plain meaning.</p> <p>15 MR. RUSSELL: Right.</p> <p>16 JUDGE REICH: Do you disagree with the</p> <p>17 Agency that its interpretation is only</p> <p>18 permissive, or do you believe that there was</p> <p>19 only one interpretation the Agency could have</p> <p>20 taken?</p> <p>21 MR. RUSSELL: No, there's not only one</p> <p>22 interpretation the Agency could have taken. But</p>

90	<p>1 the question is, of course, as you know, whether</p> <p>2 the one it took was clearly erroneous. And we</p> <p>3 believe that it was not. We applied for a</p> <p>4 permit --</p> <p>5 JUDGE REICH: Okay.</p> <p>6 MR. RUSSELL: Designed to specs.</p> <p>7 JUDGE REICH: So your reference to</p> <p>8 plain meaning doesn't suggest that there was</p> <p>9 only one permissible interpretation. It does</p> <p>10 recognize the Agency had some discretion in how</p> <p>11 it chose to define --</p> <p>12 MR. RUSSELL: In essence --</p> <p>13 JUDGE REICH: "Subject to regulation?"</p> <p>14 MR. RUSSELL: One of your jobs here,</p> <p>15 of course, not to be taken the wrong way -- is</p> <p>16 to define what is the plain meaning of "subject</p> <p>17 to regulation" under this chapter. And I'm</p> <p>18 suggesting that the Christian County test of</p> <p>19 common sense that you used for "reasonably</p> <p>20 available" and "reasonably ascertainable" is a</p> <p>21 good candidate.</p> <p>22 If you look at Petitioner's reply</p>	92	<p>1 some basic legal precepts. One of them, of</p> <p>2 course, is that BACT is an emission</p> <p>3 limitation based on maximum degree of</p> <p>4 reduction.</p> <p>5 You raise a good point about</p> <p>6 whether a BACT analysis could lead to a</p> <p>7 no-control just information result. I think</p> <p>8 that's a good question.</p> <p>9 I don't know. But under the</p> <p>10 statute, BACT is an emission limitation.</p> <p>11 Well, how does that logically follow from a</p> <p>12 requirement to monitor? If you have a</p> <p>13 requirement to monitor, it doesn't</p> <p>14 automatically lead to the conclusion there's</p> <p>15 going to be an emission limitation. There</p> <p>16 could even be an increase. It depends on</p> <p>17 what the data reveals. It depends on what</p> <p>18 the science says.</p> <p>19 Their argument ignores the law,</p> <p>20 because of course, Section 165 does not say</p> <p>21 "subject to" being mentioned anywhere. It</p> <p>22 says "subject to regulation under this</p>
91	<p>1 brief page 1, we have another little</p> <p>2 syllogism here that seeks to cover up legal</p> <p>3 and logical defects in this sweeping policy</p> <p>4 agenda that they have. Carbon dioxide is a</p> <p>5 pollutant regulated under the Clean Air Act,</p> <p>6 and they cite Massachusetts for that. Carbon</p> <p>7 dioxide is a pollutant regulated under the</p> <p>8 Clean Air Act.</p> <p>9 Massachusetts didn't say that.</p> <p>10 Therefore, Deseret may not</p> <p>11 construct the proposed facility --</p> <p>12 (Interruption)</p> <p>13 SPEAKER: Sorry.</p> <p>14 MR. RUSSELL: Unless it is something</p> <p>15 subject to the Best Available Control Technology</p> <p>16 for CO2. It's that simple.</p> <p>17 If you would consider a common</p> <p>18 sense approach to an undefined phrase,</p> <p>19 "subject to regulation" under this chapter,</p> <p>20 I'd like you to consider that these sweeping</p> <p>21 syllogisms and -- can I say, sound bites that</p> <p>22 appear so often in these briefs -- ignore</p>	93	<p>1 chapter" and your job is, of course, to</p> <p>2 confirm what the meaning of "regulation" is.</p> <p>3 But I would offer you a couple of</p> <p>4 common sense analogies in the hope that it's</p> <p>5 helpful. And this is apart from the briefs,</p> <p>6 but consistent with them.</p> <p>7 The Petitioner would have you</p> <p>8 believe that to require an automobile</p> <p>9 manufacturer to install a speedometer has</p> <p>10 thus rendered speed subject to regulation.</p> <p>11 The Petitioner would have you believe that to</p> <p>12 require an airplane manufacturer to install</p> <p>13 an altimeter has thus rendered altitude</p> <p>14 subject to regulation. And you can go</p> <p>15 further down the list and use devices like</p> <p>16 blood pressure monitors or temperature</p> <p>17 devices.</p> <p>18 But that's why their 821 argument</p> <p>19 doesn't work, is because -- go ahead.</p> <p>20 JUDGE REICH: If you were required to</p> <p>21 install a speedometer and then you were required</p> <p>22 to report the data from the speedometer, doesn't</p>

94

1 that at least bring you closer to the concept of
2 regulation?
3 MR. RUSSELL: Yes.
4 JUDGE REICH: I mean, I'm not saying
5 whether it gets you there or not. I'm saying
6 it's not a precise analogy just to talk about
7 installation without also talking about the
8 obligation to report.
9 MR. RUSSELL: But speed has not yet
10 been limited. And so the question is, what is
11 BACT? Is it a speed limitation, as the statute
12 says and as the Agency has construed for many
13 decades in their supposed house of cards
14 regulatory philosophy?
15 JUDGE WOLGAST: But to go to your
16 common sense argument --
17 MR. RUSSELL: Yes, ma'am.
18 JUDGE WOLGAST: If Deseret or any
19 other coal-fired utility is required to obtain
20 data and report that data -- that it's expending
21 personnel, costs, and other costs, wouldn't they
22 consider themselves, in a commonsensical view,

95

1 regulated?
2 MR. RUSSELL: It could. The question
3 is, what do you mean by "regulated?"
4 We say limited. We say controlled.
5 To require a monitoring exercise by
6 regulation is to be regulated. But is that
7 what BACT means? Is that what the statute
8 means? And if so, why doesn't 821 appear on
9 the face of the statute? Could it be that
10 Congress actually anticipated that its 821
11 regulations, if inserted onto the face of the
12 Act, would upset the entire architecture of
13 the statute, including such things as the NAC
14 increments and statutory -- major source
15 thresholds.
16 The problem, again, with an
17 over-reaching argument such as they have is
18 that it can lead to some really strange
19 results, and some of that was talked about
20 earlier today. I'd like to reiterate it,
21 because it actually appears in their reply
22 brief on page 8. This came up today during

96

1 the first oral argument.
2 Respondents and their amici
3 expressed a concern about the large number of
4 small sources -- apartment buildings,
5 hospitals, fast food restaurants, that may
6 have to go through the PSD process if CO2 is
7 a regulated pollutant. Your Honor alluded to
8 this earlier.
9 Not only can EPA go to Congress for
10 a legislative solution to this, but the Board
11 should not allow Bonanza or any other source
12 pouring millions of dollars of CO2 into the
13 air to avoid regulation by hiding behind the
14 local Dunkin' Donuts.
15 Another snappy sound bite, but look
16 what they just said. I think they said that
17 it already applies to all those millions of
18 small sources, and that what EPA ought to be
19 doing is seeking a legislative fix.
20 JUDGE REICH: Okay, thank --
21 MR. RUSSELL: If they didn't say that,
22 as you suggested before, it certainly could go

97

1 that way.
2 JUDGE REICH: Thank you, Mr. Russell.
3 I have -- before we let you go, a question on
4 something we really haven't talked about,
5 because I don't want to misinterpret something
6 you said in your brief.
7 One argument that has been made is
8 wholly apart from the 821 argument that
9 carbon dioxide is subject to regulation
10 because it's regulated under one or more
11 state implementation plans.
12 And I note that in the brief you
13 filed -- and this was -- I think the brief
14 when you first intervened was before we
15 granted review. You're talking about the
16 different terms in terms of emission
17 standards, equipment standards, practice
18 standards, and the sort of diversity of
19 different terms that could be used.
20 And there's a sentence that says:
21 "Of course, Congress could have included a
22 long list of every type of measure for

98	100
<p>1 controlling emissions and every corresponding 2 section of the Act (although it still might 3 have needed to list provisions and state 4 implementation plans that control emissions 5 but are not specifically spelled out in the 6 Act)."</p> <p>7 By referring to state 8 implementation plans in that part of your 9 argument, are you suggesting that in fact 10 something could become subject to regulation 11 if it is regulated only in the state 12 implementation plan?</p> <p>13 MR. RUSSELL: I don't see how that 14 would make sense.</p> <p>15 JUDGE REICH: So that wasn't the 16 intent of your reference to state implementation 17 plans?</p> <p>18 MR. RUSSELL: I don't see how that 19 would make sense. I don't see how Region 8 20 would have to incorporate a BACT requirement 21 just because Wisconsin by itself had addressed 22 the issue somewhere somehow.</p>	<p>1 lot this morning about what does "subject to 2 regulation" mean. Now I'd like to focus on the 3 next prong of 165: "Under this Act." And what 4 does "under this Act" mean, and does Section 821 5 fall within the Clean Air Act?</p> <p>6 UARG's answer to that is no, it 7 does not. And that answer is supported by 8 the text of 821 itself, by the legislative 9 history of Section 821, and also by the 10 legislative history of the 1990 amendments 11 themselves.</p> <p>12 One of the things that is 13 noticeable when you read the briefs in this 14 case is that all the legislative history 15 points towards this conclusion, that Congress 16 never intended for Section 821 to have the 17 effect that Petitioners would ascribe to it.</p> <p>18 Petitioners -- Sierra Club earlier 19 read a passage from the legislative history 20 that they say show that Congress had in fact 21 contemplated emission reductions. In fact, 22 that quote was taken out of context, and I'd</p>
99	101
<p>1 JUDGE REICH: I just wanted to make 2 sure that that wasn't your intention, given the 3 way you phrased it.</p> <p>4 MR. RUSSELL: And then lastly, I would 5 ask you, because my time is up, what has changed 6 since Christian County? Christian -- the Board 7 commented on Deseret, didn't on Christian 8 County. Extracted the Sierra Club's public 9 comments --</p> <p>10 JUDGE REICH: Right. I think we're 11 over time, Mr. Russell, thank you very much.</p> <p>12 MR. RUSSELL: I thank you for your 13 attention.</p> <p>14 JUDGE REICH: Okay. And UARG.</p> <p>15 MS. WOOD: Good morning. I have a bit 16 of laryngitis; it's actually much better than it 17 was a few days ago. If you can't hear me, 18 please let me know.</p> <p>19 JUDGE REICH: We're doing fine.</p> <p>20 MS. WOOD: The Utility Air Regulatory 21 Group would like to thank the Board for this 22 opportunity to present argument. We've talked a</p>	<p>1 like to read the entire passage from the 2 legislative history to you.</p> <p>3 This is on page 2987 of the 4 legislative history. This is a statement by 5 Congressman Moorhead, one of the sponsors of 6 the amendment.</p> <p>7 "The Cooper-Moorhead amendment will 8 also give us a head start if and when we need 9 to take steps to reduce our carbon dioxide 10 emissions. By establishing an early record 11 of carbon dioxide emissions for our domestic 12 utility companies, we will put the United 13 States in a position to take credit for its 14 efforts to control emissions. This is an 15 important point. What I hope to achieve with 16 this amendment is the elimination of the 17 possibility that U.S. utilities will reduce 18 CO2 emissions as a consequence of compliance 19 with these Clean Air Act amendments and not 20 get credit for these reductions."</p> <p>21 Importantly, the first sentence of 22 the passage I wrote, Congressman Moorhead</p>

102

1 says that it would give a head start if and
2 when we need to take steps to reduce CO2.
3 JUDGE REICH: But what's the
4 significance of the word "reduce"? I mean, in
5 my mind, when you talk about reducing something,
6 you have a certain level and you're talking
7 about bringing that level down. If you're
8 talking about a new source that at the moment
9 isn't contributing anything, then regulating
10 what that new source puts out I don't think
11 would be viewed as reducing. So I'm not sure
12 that language necessarily translates into
13 regulating sources that at the moment aren't
14 emitting anything because they're not yet
15 constructed.
16 MS. WOOD: But if you think about
17 logically what it is that he's saying, the if
18 and when, if you take Petitioner's position, the
19 if would no longer be an if. We would know that
20 under their interpretation, PSD and BACT was
21 about to apply, and we would even know when. We
22 would know that it would be 18 months after the

103

1 enactment of the Clean Air Act amendments.
2 And I do see your point about -- is
3 a reduction -- you know, is that different
4 from what a new source would do? And I
5 think -- you know, when Congress is speaking,
6 sometimes they use the words "reduce" and
7 sometimes they talk about regulation, and I
8 think they're using those interchangeably,
9 and they're thinking that a regulation is a
10 form of reduction. And indeed, if you think
11 about -- you know, PSD and BACT applying to
12 just a new source, it is in fact a form of a
13 reduction because it's less than it would
14 have been without the BACT being applied.
15 JUDGE WOLGAST: That assumes, though,
16 that the end of the analysis is that there is a
17 viable technology, or the other criteria are met
18 to install -- to reduce BACT emissions.
19 MS. WOOD: Right, assuming for the
20 sake of argument. But I think that -- you know,
21 I don't know whether or not that technology
22 exists, but I think -- you know, for the sake of

104

1 argument, assuming that it would. Otherwise,
2 you know, it wouldn't. But at some point in the
3 future, you could see whether it exists now or
4 not, whether it existed at the time when
5 Congress was contemplating this. It's
6 certainly -- you know, probable to think that it
7 would exist at some point.
8 And what is very clear when you're
9 looking at the legislative history is that in
10 dealing with carbon dioxide emissions,
11 Congress took great pains to be sure that it
12 was never doing anything that could be
13 construed as a regulation, or anything that
14 would impose mandatory emission reductions at
15 that time on carbon dioxide emissions.
16 If you take what Petitioners are
17 saying, then Section 821 would have in fact
18 compelled that either in 1990 or in 1993,
19 depending on whether you believe it would
20 have compelled it upon the enactment of the
21 Clean Air Act amendments or once EPA
22 promulgated the regulations for monitoring.

105

1 JUDGE STEIN: Do you agree with EPA
2 that by virtue of the fact that the Part 75
3 regulations are at least in part under 821, that
4 those regulations are unenforceable under
5 Section 113 of the Act?
6 MS. WOOD: No, I don't. When you look
7 at 821 itself, the last sentence of Subsection A
8 of Section 821 says -- and I'm going to put in
9 the correct section numbers; they're wrong in
10 the original text: "The provisions of
11 Section 412(e) of Title 4 of the Clean Air Act
12 shall apply for purposes of this Section in the
13 same manner and to the same extent as such
14 provision applies to the monitoring and data
15 referred to in Section 412."
16 That provision -- in doing that,
17 what Congress did was tie it to Subsection E
18 of 412, which is the prohibition against
19 operating a source in violation of the
20 monitoring requirements. And it's through
21 that last sentence that it ties it into the
22 enforcement provisions of the Act.

106

1 JUDGE WOLGAST: So then it's your
2 position that Section 414 and Section 113 would
3 apply to any violations of the monitoring
4 provisions?
5 MS. WOOD: To a violation of the
6 monitoring? Yes.
7 JUDGE WOLGAST: And let me just ask
8 you a question about that, because -- I mean, in
9 Section 414, it says it's unlawful for any
10 person subject to the subchapter to violate any
11 prohibition requirement of a regulation
12 promulgated pursuant to the subchapter shall be
13 a violation. And, you know, as I read that, it
14 seems like the monitoring provisions either are
15 a regulation pursuant to this subchapter or
16 they're not.
17 MS. WOOD: They may not be for the
18 purposes of 414, but I think what Congress is
19 trying to do in that sentence is make sure it's
20 enforceable, because they're addressing your
21 exact concern, which is what is the point of
22 having this monitoring requirement if there's no

107

1 stick with which to enforce people complying
2 with it?
3 JUDGE WOLGAST: Exactly, but doesn't
4 this lead us then -- it's part of the Act for
5 one purpose and not part of the Act for another
6 purpose?
7 MS. WOOD: I don't think it is part of
8 the Act, and I don't think that that sentence or
9 the fact that it's enforceable through the Act
10 makes it a part of the Act. I think, indeed,
11 when you look at the language of the sentence
12 I'm saying that ties it to Subsection E of 412,
13 it says Title 4 of the Clean Air Act. And
14 again, this goes back to an argument that was
15 discussed earlier.
16 Congress was very careful not to
17 say "this Act." This section does not have
18 the prefatory language that says the Clean
19 Air Act is amended. But I do think they
20 wanted to make sure that at least if someone
21 did not comply with this requirement, that it
22 would be enforceable.

108

1 And it makes sense, given the fact
2 that these were electric utility units
3 subject to the acid rain program -- to tie it
4 to a provision in the acid rain program.
5 That doesn't mean it became part of the Act.
6 JUDGE WOLGAST: But the problem I'm
7 having is for it to be enforceable, you have to
8 be able to invoke the jurisdiction of the court
9 under 113, as you stated. And in order to plead
10 that, by terms of 113, you have to show that
11 there is a violation of a requirement or
12 prohibition of the subchapter, or in this case,
13 4(a).
14 MS. WOOD: I'd have to look at the
15 exact language of E. I don't know if you have
16 it in front of you.
17 JUDGE WOLGAST: Of -- I'm sorry.
18 MS. WOOD: Of 412(e)?
19 JUDGE WOLGAST: In fact, I do. "It
20 shall be unlawful for the owner or operator of
21 any source subject to the subchapter to operate
22 a source without complying with the requirements

109

1 of this section and any regulations implementing
2 this section." Then that sends you to the
3 enforcement provisions of 414 that talks about
4 regulations promulgated pursuant to this
5 subchapter shall be a violation, and then that
6 takes you to 113, which is the general
7 enforcement provisions.
8 MS. WOOD: But I don't see how taking
9 those steps makes Section 821 a part of the Act.
10 I think Congress was very careful to keep it
11 outside of the Act, but also wanted it to be
12 enforceable. So they make the cross-reference
13 to E, just as they also cross-reference A and B
14 of Section 412 as to the timing and the manner
15 in which the monitoring should take place.
16 Other legislative history also
17 supports this --
18 JUDGE REICH: We have another
19 question.
20 MS. WOOD: You have another -- I'm
21 sorry.
22 JUDGE WOLGAST: Yes. One other quick

110	<p>1 question. On page 8 of your brief, and this is 2 to go back to the text itself of 821. You say 3 that it wasn't congressional intent that 4 the -- and I'm probably not using your exact 5 verbiage here, but it says that the provisions 6 including 821 didn't amend -- and then these are 7 your words: "Or add to the text of the CAA." 8 And I understand where you say it "did not 9 amend," because that's in the title of the 10 section itself.</p> <p>11 And my question is, your verbiage 12 "or add to?" And for that premise, are you 13 relying on text or are you relying on the 14 legislative history of 821?</p> <p>15 MS. WOOD: I'm not sure that when we 16 made that sentence, that we, frankly, gave it 17 that much thought. I think we're talking about 18 amending the Clean Air Act. We're probably 19 meaning where you're changing the language. And 20 perhaps when we said "add to" we meant "adding," 21 like, for example, the acid rain program was 22 added, it was an entirely new title.</p>	112	<p>1 the Clean Air Act, an agency may only reverse 2 that interpretation pursuant to notice and 3 comment rulemaking. EPA may not reverse that 4 interpretation pursuant to subsequent 5 guidance, documents, or briefing in this 6 matter.</p> <p>7 I wanted to focus a little bit more 8 on the statement of Congressman Moorhead and 9 the legislative history of Section 821. And 10 this goes to you, Judge Reich, on this part 11 that you were quoting about the purpose. And 12 I had the chance to look at that. And in the 13 second part of the purpose, it says, "We need 14 to form a baseline so we know what the 15 utility effort is in cleaning up the problem, 16 so that we know when to give them credit for 17 their reductions, and when we know they are 18 not perhaps moving as quickly as we would 19 like."</p> <p>20 So it assumes that utilities will 21 be addressing carbon dioxide emissions. 22 And then I also want to just</p>
111	<p>1 I don't think that it was -- that 2 the use of both words was intended to have 3 any great impact.</p> <p>4 JUDGE REICH: Okay, thank you.</p> <p>5 MS. WOOD: Thank you.</p> <p>6 JUDGE REICH: We have Sierra Club for 7 up to five minutes of rebuttal.</p> <p>8 Ms. Spalding.</p> <p>9 MS. SPALDING: Thank you. As I have 10 already discussed in our briefs and our previous 11 argument, Section 821 is part of the Act. And I 12 want to make a further point, that by describing 13 821 as part of the Clean Air Act in its 14 rulemakings, EPA has adopted an interpretation 15 of those provisions of the Act that is due 16 deference. And the EPA cannot arbitrarily 17 change that.</p> <p>18 Moreover, under the D.C. Circuit's 19 line of cases, including Paralyzed Veterans 20 v. MCI Center, once an agency has adopted a 21 legal interpretation such as EPA's 22 interpretation that Section 821 is part of</p>	113	<p>1 clarify one point that maybe doesn't need to 2 be said, but I think that sometimes in the 3 context of this argument, there's been a 4 conflation of the requirements of 5 Section 821, and the interpretation of 6 Section 165, of the term "regulation" in 7 Section 165. And I want to make sure I say 8 that the -- of course, the Section 165 was 9 adopted in 1977 and the 1990 amendments to 10 the Clean Air Act and the legislative history 11 of those amendments doesn't determine what 12 the Agency's interpretation should be under 13 Section 165, to the extent that that issue 14 has gotten confused.</p> <p>15 I also want to point out that this 16 distinction between a pollutant subject to 17 regulation and a facility subject to 18 regulation is really just a red herring. The 19 pollutant is subject to monitoring. 20 Monitoring is a form of regulation. 21 Even with pollutants that are 22 subject to actual control of emissions, it's</p>

114

1 the facility or the operator. And not even
2 the facility, it's the operator that is
3 subject to regulation.
4 And with the various dictionary
5 definitions of the term "regulation," the
6 point is that Congress used the same word in
7 two different provisions, and there has been
8 no appropriate level of analysis about why
9 that word should mean different things. That
10 has been available for public input.
11 The remand in this case is
12 important, because this interpretation, which
13 is explained for the first time in this
14 permit proceeding, is among the most
15 significant decisions EPA has made under the
16 PSD program.
17 If EPA does have discretion to
18 adopt this interpretation, given the
19 tremendous significance and implications of
20 this decision, it must adopt it only after
21 giving the public an opportunity to provide
22 input. This will allow primary policy

115

1 decisionmakers in Region 8 and EPA
2 Headquarters to meaningfully consider all
3 relevant implications and factors before
4 making a final decision that writes this
5 interpretation into stone.
6 And finally, I just want to say a
7 word about the future. Absent some
8 intervening action by Congress, BACT limits
9 will be applied for carbon dioxide emissions
10 eventually. If not because of Section 821,
11 then because of an endangerment determination
12 or because of the Appropriations Act of 2008,
13 which is not cited in our briefs. And I only
14 mention it to point out that it requires EPA
15 to use its existing authority under the Clean
16 Air Act to establish regulations requiring
17 monitoring and reporting of greenhouse gases
18 within 18 months. So those monitoring and
19 reporting regulations are coming, and it's
20 explicitly under the Clean Air Act.
21 In the meantime, coal-fired power
22 plants now being permitted will begin spewing

116

1 millions of tons per year of carbon dioxide
2 into the air, and will operate for a
3 half-century or more, dramatically limiting
4 our options for reducing this nation's
5 greenhouse gas emissions and minimizing the
6 worse effects of climate change.
7 The Board should remand the Bonanza
8 permit and require Region 8 to include a BACT
9 limit for carbon dioxide.
10 JUDGE REICH: Thank you. I'd like to
11 thank counsel for the excellent quality of
12 argument this morning. I'm sure it will be
13 helpful to the Board in its deliberations.
14 And this hearing stands adjourned.
15 (Whereupon, at approximately
16 11:58 a.m., the HEARING was
17 adjourned.)
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<p style="text-align: center;">A</p> <p>ability 60:21 74:9</p> <p>able 16:8 108:8</p> <p>above-entitled 1:11</p> <p>absence 36:2</p> <p>Absent 115:7</p> <p>accept 82:16 89:13</p> <p>accepted 49:9 52:14 76:20</p> <p>accurate 69:4</p> <p>achieve 37:6 101:15</p> <p>acid 82:20 108:3 108:4 110:21</p> <p>acknowledge 78:2</p> <p>acknowledged 69:1</p> <p>act 4:6 9:11,14 9:18 10:4,9,10 10:20 11:8,20 12:12 13:17 14:12 15:6,20 17:7,14 18:11 18:22 22:2,12 24:8 25:13 26:8 27:7,16 27:18,20 28:17 29:9,13,16,19 30:5,9,9,13,14 30:17 31:1,6 31:12,17 36:1 36:4,6,7,9,9,10 36:10,18,19 37:1,11 38:6 38:18,22 39:1 39:10 40:22 41:13 42:16,16 42:19 45:1,10 47:12 49:3,10 51:19,22 52:9 52:17,18,19 53:6 54:10,15 54:19 63:5,11</p>	<p>63:12,19 64:5 64:17,19,20 65:8,12 66:18 67:2 68:10,22 69:3,7,10,13 69:14,17,19 70:4 71:2 81:14,22 82:12 82:15,16,22 83:15 84:7,8 84:10,15 87:16 87:20 88:16 91:5,8 95:12 98:2,6 100:3,4 100:5 101:19 103:1 104:21 105:5,11,22 107:4,5,8,9,10 107:13,17,19 108:5 109:9,11 110:18 111:11 111:13,15 112:1 113:10 115:12,16,20</p> <p>action 49:1 66:13 83:9,11 84:2 115:8</p> <p>actions 54:6</p> <p>activities 78:19</p> <p>actual 14:2,4,21 17:18 25:16 29:10 41:11,16 46:15 49:7 51:2 84:18 113:22</p> <p>Act's 16:6</p> <p>add 33:17 110:7 110:12,20</p> <p>added 110:22</p> <p>adding 78:8 110:20</p> <p>addition 74:1 77:16</p> <p>additional 53:15 58:7 60:9 74:3</p> <p>address 3:18 4:21 5:10 7:4</p>	<p>10:11 16:12,16 20:17 38:12 43:21 46:1 47:10,19 61:9 69:9 77:6 80:20 81:6</p> <p>addressed 16:13 19:18 22:12 43:1 79:22 80:17 85:2 98:21</p> <p>addresses 53:3</p> <p>addressing 19:9 22:1 106:20 112:21</p> <p>adds 35:2 74:6</p> <p>adjourned 116:14,17</p> <p>administrative 16:4 60:20</p> <p>administrative... 16:16 62:11</p> <p>administrator 25:2,4 40:15 47:2 52:20 53:8 54:2,7 62:16 77:19</p> <p>administrator's 10:14 41:17</p> <p>admonition 10:8</p> <p>adopt 11:13 114:18,20</p> <p>adopted 30:17 80:11 87:17 111:14,20 113:9</p> <p>advance 74:19</p> <p>advances 28:22 35:14</p> <p>adverse 14:21 25:3 38:21 41:10,16 46:15</p> <p>adversely 38:9 43:22 48:8</p> <p>advise 8:19</p> <p>advisement 4:12</p> <p>advocacy 53:18</p>	<p>advocated 82:3</p> <p>advocating 54:12 68:15</p> <p>affect 38:9 44:1</p> <p>affirmative 40:16</p> <p>affirmed 27:12</p> <p>afforded 6:10</p> <p>agency 1:1,13 2:6 3:4 11:1,2 15:10 17:6,12 18:13 21:5 22:20 26:10 29:1 30:6,7,11 31:2,9 36:2 46:8 47:2 54:5 54:18 74:22 77:8 83:12 89:6,17,19,22 90:10 94:12 111:20 112:1</p> <p>Agency's 11:21 113:12</p> <p>agenda 91:4</p> <p>ago 40:20 76:3 99:17</p> <p>agree 10:20 15:18 22:16 59:2,4 62:13 65:13,18 66:11 67:1 105:1</p> <p>AGs 10:21</p> <p>ahead 88:6 93:19</p> <p>air 2:15 4:5 6:8 6:12 8:15 9:11 9:14 10:4,9,10 10:22 11:19 12:12 14:12,22 19:10,17 20:5 20:9,13,17,21 21:21 22:2 29:16 30:5 31:1 36:1,4,6,7 36:8,9,22 37:11 38:6,18 38:22 39:1,10</p>	<p>40:3 47:17 48:18,20 49:3 49:10 52:18 53:6 54:15 56:6,10 59:21 62:3 63:5,11 63:19 64:5,20 66:18 69:13,17 69:19 70:4 80:18 81:22 82:12,15,16 83:15 84:10 87:16,20 91:5 91:8 96:13 99:20 100:5 101:19 103:1 104:21 105:11 107:13,19 110:18 111:13 112:1 113:10 115:16,20 116:2</p> <p>airplane 93:12</p> <p>Alabama 25:8 25:20 27:21 28:11 70:12,19</p> <p>aligned 6:12</p> <p>allege 85:7</p> <p>alleged 4:8</p> <p>Allison 2:16 8:14</p> <p>allocated 5:17</p> <p>allow 17:1 25:1 50:16 96:11 114:22</p> <p>allowable 24:11 26:5</p> <p>allowed 3:10</p> <p>allowing 27:15</p> <p>allows 12:22 24:20</p> <p>alluded 96:7</p> <p>alluding 44:3</p> <p>all-phrase 22:14</p> <p>alternatives 4:10</p> <p>altimeter 93:13</p> <p>altitude 93:13</p>
--	---	--	--	---

ambiguity 76:14	apart 21:12 93:5	74:6,11 80:21	ascertainable	9:16 35:9,11
amend 110:6,9	97:8	82:5 83:21	86:19 90:20	54:22 86:20
amendatory	apartment 96:4	114:8	ascribe 100:17	90:20 91:15
36:3	apologize 23:14	Appropriations	aside 55:14	114:10
amended 9:14	23:17	115:12	asked 87:11	Avenue 1:14
69:13 107:19	apparent 78:18	approved 40:16	asking 7:12,20	avoid 13:20 16:9
amending	appeal 1:4 3:7	approximately	22:19,22 68:18	29:13 96:13
110:18	3:15	1:12 116:15	76:9	avoiding 7:5
amendment	Appeals 1:1 3:2	April 3:17 5:15	asserts 26:10	aware 36:6 68:6
32:13 33:13	appear 54:11	7:2	assist 5:8	a.m 1:12 116:16
37:6 72:15	91:22 95:8	arbitrarily	assistant 2:14	
101:6,7,16	appearance 6:21	111:16	8:6	B
amendments	APPEARANC...	architecture	associated 39:22	B 109:13
19:12 22:2	2:1	95:12	Association 6:17	back 16:14 70:1
37:11,16 78:10	appeared 60:4	area 47:9	assumes 103:15	81:16 86:15
100:10 101:19	appearing 48:18	argue 72:9 83:16	112:20	107:14 110:2
103:1 104:21	appears 19:1,16	argued 66:22	assuming 103:19	backward 88:4
113:9,11	64:19 95:21	77:12 83:19,20	104:1	BACT 9:19,21
amici 4:21 5:7	applicability	argues 4:4	assure 7:13	10:12 12:13
5:22 6:22 7:6	16:5 42:3	arguing 8:1 11:5	attempt 19:19	13:5,6,20 15:5
49:11 61:10	55:13,19 58:4	26:4 46:6,7	attempting 5:8	15:14 19:4
96:2	59:13	argument 1:12	20:17	22:20 23:2,5
amicis 15:9	applicable 24:19	3:5,13 4:15,16	attention 15:16	23:10,12 24:2
amicus 4:19 5:1	59:17 64:9	5:1,16,17,19	99:13	24:5,17,18
6:11,17 48:21	applied 77:2	7:1,11 15:9	attorney 2:14,14	25:5,8 27:17
analogies 93:4	86:20 90:3	22:11 30:3	6:4 8:6,7	28:5 31:17
analogous 36:11	103:14 115:9	31:10 53:12,16	attorneys 6:2	32:3 33:9,17
43:4,12 62:8	applies 24:6,6	54:21 60:2	attribute 22:6	33:22 35:2,7
analogy 45:1	24:15 47:6,7	62:14 65:14	authorities	35:16 39:1
94:6	52:1 55:16	72:5 78:22	54:20 70:15	55:15 61:7
analysis 24:20	71:18 96:17	81:1 84:12,15	authority 11:2,3	71:7,18 72:3
25:2,6 71:18	105:14	84:22 86:9	38:7,11,18	73:6,10 74:4
72:3 73:13,16	apply 15:5 24:2	87:4,12 88:8	39:13,17 40:22	74:13 75:5,6,7
73:20 74:13	24:9 25:9	92:19 93:18	41:9 43:21	75:13 88:2
83:18 92:6	30:21 32:4,7	94:16 95:17	45:15,17 46:1	92:2,6,10
103:16 114:8	46:21 80:5	96:1 97:7,8	46:2,4,9 47:9	94:11 95:7
ancillary 75:14	87:2 102:21	98:9 99:22	49:19,22 50:8	98:20 102:20
Anna 1:18 3:7	105:12 106:3	103:20 104:1	50:10,14 51:5	103:11,14,18
announcing	applying 10:12	107:14 111:11	53:20 54:3	115:8 116:8
40:18	16:4 103:11	113:3 116:12	61:7 68:2 70:5	balancing 24:21
answer 82:18	appreciates 5:6	arguments 7:6,9	70:6 82:11	ball 11:12
100:6,7	approach 60:9	29:15	83:13 84:8,9	barred 79:1 81:1
anticipated	91:18	articulate 77:10	88:22 115:15	base 54:21
41:18 95:10	appropriate	78:3,17 80:4	automatically	based 10:4 29:3
anticipation	12:22 16:22	81:7	92:14	29:10 38:20
73:3	45:21 46:12	articulated	automobile 93:8	39:18 46:10,14
anybody 78:11	52:21 73:9	81:10	available 4:2	52:13 53:4

54:18 58:9,22 59:3,5 65:10 78:9 92:3 baseline 32:22 34:10 112:14 basic 92:1 basically 11:5 69:11 basis 12:21 14:16 47:6,7 68:1 beginning 5:18 8:2 behalf 2:2,6,9,15 8:7,13,15 48:19 behavior 81:12 belated 11:18 believe 43:14,15 45:20 48:12 51:15 67:12 79:19 83:20 89:18 90:3 93:8,11 104:19 believes 49:17 benefit 75:15 best 4:2 9:16 51:10 56:13 87:12 89:12 91:15 better 17:5 32:16 99:16 beyond 27:15 33:15 34:20 big 58:11,12 61:3 binding 39:8 42:5 bit 15:7 37:14 55:9,9 99:15 112:7 bite 96:15 bites 91:21 blood 93:16 board 1:1 3:3,20 3:21 4:12,19 5:6,8 6:15,19	7:3,5,9,18 11:8 12:1 13:2 45:3 48:22 53:12,19 54:4 55:3 70:16 80:6 86:20 96:10 99:6,21 116:7 116:13 Board's 3:16 4:14,18 7:1,11 7:14 77:17 boat 58:5 Bonanza 3:14 9:7 88:3 96:11 116:7 Bonanza's 9:19 BOOKBINDER 2:10 bow 81:11 Brian 2:7 8:10 48:16 brief 6:17,18 7:3 10:21 31:20 32:9,14 42:13 45:2 46:6 78:21 85:3 86:22 87:15 88:7 91:1 95:22 97:6,12 97:13 110:1 briefing 86:10 112:5 briefly 87:8 briefs 4:19 5:1 53:15 60:3 68:22 76:16 91:22 93:5 100:13 111:10 115:13 bring 83:4,6,14 94:1 bringing 102:7 broad 10:8 11:15 12:11 14:17 17:15 18:2 22:12,15 24:12 27:11,12	85:9 broaden 62:9 broader 5:4 20:20 41:3 45:22 55:10 56:9 85:18 89:5 broadly 24:6 27:11 85:10 broadly-worded 20:4 broad-reaching 84:6 brought 79:5 Browner 83:8 Buckley 13:15 Budget 40:20 buildings 96:4 burden 16:1 21:19 C C 3:1 CAA 110:7 California 2:12 6:5 40:4 call 52:19 candidate 90:21 Cannon 77:17 capacity 76:1 carbon 4:3 9:8 9:10,13,19,21 11:7 13:5,9,16 13:18,20 15:19 16:8,9 20:7 21:12 29:2,4 29:11,17 31:15 32:6 33:9 34:11 35:6 37:17 47:16 54:8 56:22 61:8,11 68:21 69:5 70:6 87:4 87:15,19,22 88:2 91:4,6 97:9 101:9,11 104:10,15	112:21 115:9 116:1,9 cards 94:13 careful 107:16 109:10 case 11:5 13:15 17:5 26:13 28:22 29:6 45:3 46:22 49:1 51:7 53:14 55:10,11 58:4 60:14 63:3 65:2,9 70:16 76:8,12 83:8,9,10,13 83:17 100:14 108:12 114:11 cases 111:19 case-by-case 24:20 47:4,5,7 Castle 25:8 catch 22:14 catch-all 22:7 77:7 categories 22:13 Category 22:8 cautious 60:3 cell 3:9 Center 111:20 central 75:5 76:7 84:12 century 9:9 CERCLA 45:11 certain 4:9,21 19:9 59:14 102:6 certainly 25:21 26:13 51:20 60:21 62:12,12 64:1 66:14 73:11 96:22 104:6 Chairman 32:21 challenge 38:12 79:5,7 challenged 79:6 79:9	challenging 56:18 chance 112:12 change 38:13 39:22 80:16 111:17 116:6 changed 10:11 87:9,10 99:5 changes 19:9,12 changing 110:19 chapter 63:19 90:17 91:19 93:1 characterizati... 31:19 Chevron 76:12 chooses 5:18 chose 89:11 90:11 Christian 53:13 55:4 86:15,18 87:9,13 90:18 99:6,6,7 Circuit 25:7 Circuit's 111:18 circumstance 43:5 circumstances 10:11 citation 67:11 69:22 cite 31:9,14 36:12 70:18 72:7 91:6 cited 42:13 45:2 52:2,5 70:4 76:18,18 83:9 87:1 115:13 cites 36:2 citing 70:15 citizen 31:3 citizens 83:14 clarify 76:2 113:1 Clean 4:5 9:11 9:14 10:4,9,10 11:19 12:12
---	--	---	---	--

14:12 22:2 29:16 30:5 31:1 36:1,4,5,7 36:8,9,22 37:10 38:6,18 38:22 39:1,10 42:16,19 45:1 49:3,10 52:18 53:6 54:15 63:5,11,19 64:5 66:17 69:13,17,19 70:4 81:22 82:12,14,16 83:15 84:10 87:16,20 91:5 91:8 100:5 101:19 103:1 104:21 105:11 107:13,18 110:18 111:13 112:1 113:10 115:15,20 cleaning 33:1 112:15 clear 20:20 38:4 43:5,11,16 51:15 56:17 72:14 77:22 78:6,13 81:11 104:8 clearly 4:13 18:21 34:21 49:12,22 53:21 59:12 61:14 62:19 64:9 71:22 73:2 74:2 76:20,21 77:1 81:8 89:3 89:6,12 90:2 climate 38:12 39:22 116:6 closer 45:1 94:1 Club 2:9,11 4:4 5:16 6:13 8:2,4 9:1 10:20 11:4 23:1 79:1	100:18 111:6 Club's 4:7 5:22 99:8 coal-fired 16:6 44:14 94:19 115:21 Code 65:7 67:8 codes 63:20 cognizant 70:17 colleagues 37:19 collectively 6:3 77:21 combined 19:15 combustion 58:12 come 14:8 coming 115:19 comment 11:17 12:8 20:1,2 50:6 78:16 79:18,19 80:18 81:4 112:3 commented 79:21 99:7 comments 38:10 50:22 99:9 committed 38:4 committing 11:12 common 86:20 87:2,13 90:19 91:17 93:4 94:16 commonly 76:19 commonsensical 94:22 Community 45:9 companies 34:12 101:12 company 22:20 comparable 27:5 compel 55:6 83:4,6 compelled 104:18,20	compile 66:2 completely 65:18 71:4 72:6 compliance 37:10 101:18 comply 107:21 complying 107:1 108:22 component 55:15 63:15 composition 71:12 concede 60:4,7 conceded 59:19 60:1 concept 94:1 conceptually 48:1,2 concern 96:3 106:21 concerned 58:6 58:18 concerns 25:11 28:9 71:1,14 71:20 conclude 27:15 61:8 73:8 84:13 concluding 39:7 conclusion 38:16 74:5 92:14 100:15 conductive 35:7 conducted 25:1 confirm 93:2 confirms 72:6 conflation 113:4 confused 113:14 Congress 9:11 13:6 14:4 16:17 29:3 30:4,10,13,13 35:22 41:21,22 42:2 49:7 53:9 53:22 54:7 56:9,15,20	61:4,13 62:18 63:17 67:9 71:10 75:3,16 84:20,22 85:3 85:19 95:10 96:9 97:21 100:15,20 103:5 104:5,11 105:17 106:18 107:16 109:10 114:6 115:8 congressional 110:3 Congressman 37:5 101:5,22 112:8 Connecticut 6:5 consensus 40:8 consequence 37:10 101:18 consequences 60:10 84:6 Conservation 6:16 42:15 consider 4:9 46:18 50:17 57:11 60:8 79:12 89:1 91:17,20 94:22 115:2 consideration 16:20 considered 45:3 considering 86:9 consistent 14:18 31:4,16 39:11 49:8 51:19 75:13 82:3 85:5 93:6 consistently 42:18 49:4 Constitution 1:14 constrained 38:7 40:21 59:1 constraining 43:21	construct 91:11 constructed 102:15 construction 85:18 construe 14:14 construed 45:19 94:12 104:13 construing 45:15 contained 45:8 contemplated 100:21 contemplates 34:21 37:15 74:2 contemplating 104:5 contemporane... 77:13 contend 51:8,14 contended 49:21 contending 49:18 contest 51:16 73:13 context 5:5 32:3 41:2 44:21,22 45:5,6,14 46:12 49:10 51:19,22 52:17 60:14 64:9 71:3 72:13 100:22 113:3 contexts 42:11 continue 52:12 53:11 continues 4:12 continuous 85:14 contrary 10:7 14:12 29:15 30:3,6 contribute 73:12 contributing 40:11 102:9 contribution 5:3
---	---	---	---	---

32:18	48:10,11,14	101:18 102:2	defects 91:3	91:10 94:18
Contributions	costs 24:22	created 67:22	deference	99:7
33:6	94:21,21	credit 33:2 34:2	111:16	Deseret's 9:7
control 4:2,3 5:4	cost-effective	34:4,8,13	define 19:19	65:14
9:16 14:3,5	35:12	37:11 101:13	41:5,7 56:1	designated
17:18 23:19	counsel 2:7 6:1,9	101:20 112:16	90:11,16	62:19
29:10 34:14	7:21 8:11,17	criteria 103:17	defined 17:8,17	Designed 90:6
53:4,10 65:20	48:17 54:5	cross-reference	17:20 29:1	Despite 9:20
66:8 72:9 73:4	80:8 116:11	109:12,13	56:3 85:15	details 23:17
73:9,17 74:6	country 23:6	currently 18:17	definition 11:16	68:8
74:10 75:20	County 53:14	38:11 42:9	11:16 14:17	determination
84:18 91:15	55:4 86:16,18	50:8 59:1	18:8 19:21	10:17 11:9
98:4 101:14	87:9,13 90:18		52:6,8 55:17	13:1 15:4
113:22	99:6,8		57:20 58:2	22:21 23:2,3,6
controlled 66:4	couple 36:1 76:3	D 3:1	61:16,18 85:10	40:17,19 46:11
95:4	81:15 93:3	danger 75:22	85:14,15	53:7,8 63:2
controlling	course 7:10 90:1	dangers 40:13	definitions 52:3	74:9 115:11
34:16 52:9	90:15 92:2,20	data 74:1 92:17	52:7 114:5	determinations
72:19 73:1	93:1 97:21	93:22 94:20,20	definitive 82:7	53:4
98:1	113:8	105:14	definitively	determine 33:21
controls 27:9	court 13:14	date 69:2 73:5	87:21	39:18 47:3
31:21 34:18	26:12 27:12	DAVID 2:10	degree 73:20	57:10 61:2
35:8 49:8 51:2	39:16,21 54:1	days 99:17	92:3	113:11
52:22 74:7	55:2 67:19	de 60:19	Delaware 6:5	determined 25:9
77:20	80:10,15 87:18	dealing 16:1	delay 83:10	26:6 28:8
convenience	88:9,11,15,21	19:16 25:19	delays 10:14	30:10 38:5
60:20	108:8	26:3,14,21	deliberations	62:17 71:13
Cooperative 1:5	courts 54:1,7	27:1 43:13	5:9 116:13	75:21
2:2 3:6	court's 10:6,7	104:10	demonstrably	determines
Cooperative's	14:13 68:11	deals 59:11,11	71:3	80:13
3:14	cover 85:11 91:2	dealt 19:4 59:20	demonstrated	determining
Cooper-Moor...	covered 78:7	decades 94:13	29:7 49:11	15:19 23:12
101:7	covering 78:12	decide 11:6	53:19	57:11,12 58:3
Corporation	79:14	22:17 68:18	denial 40:4	develop 35:16
45:3	CO2 18:12,16	74:22	depart 60:18	74:13
correct 21:7	22:21 23:2,6	decided 30:3	depend 84:16	developed 23:21
44:20 65:19	31:11 37:8,9	88:10,11	depending	35:11
77:5 81:18,22	38:14,19 39:9	decision 10:6	104:19	development
105:9	39:14,17 40:3	12:21 14:13,16	depends 92:16	55:1
corresponding	40:10 47:19	55:2 63:8	92:17	developments
98:1	48:7 50:2,7	70:12 80:12,15	depletion 19:11	10:12
Costello 2:13 8:5	53:20 55:6	80:15 86:11	describing	devices 3:10
8:5 37:22 38:1	58:10 72:9	114:20 115:4	111:12	93:15,17
38:3 41:7	74:7,8,10	decisionmakers	Deseret 1:4 2:2	dictionary 52:3
43:14,18 44:10	78:12 79:10,11	115:1	3:5,14 6:11	52:5 65:1,22
44:20 46:14	79:20 80:13,17	decisions 72:18	8:13 44:13	65:22 77:2
47:1,5,15 48:2	91:16 96:6,12	114:15	86:6 89:6,14	114:4

different 12:19 14:15 26:1 27:6 32:1,1 36:8 45:4 51:20 61:19 63:13 76:17 89:4 97:16,19 103:3 114:7,9	dispute 63:17 88:12 disputing 34:21 distinction 113:16 diversity 97:18 documents 69:1 112:5 doing 26:12 81:8 81:13 96:19 99:19 104:12 105:16 dollars 96:12 domestic 34:11 101:11 Donuts 96:14 Doster 2:7 8:10 8:10 48:16,17 49:14,21 50:19 55:8 57:3,5,8 58:16 59:2,7,9 60:1,12,15 61:13 62:1,6,9 62:12 63:16 64:1,7,22 65:17 66:14 67:3,20 68:6 68:12 69:8 70:8 73:11,19 74:12 75:2 76:7 77:9 79:8 79:17 82:2,18 83:5,16 84:11 85:2 86:1	E E 1:17 3:1,1 105:17 107:12 108:15 109:13 earlier 95:20 96:8 100:18 107:15 early 34:10 86:11 101:10 easily 85:3 economic 24:22 Ed 3:8 EDWARD 1:17 effect 10:8 14:22 38:21 41:16 54:8 100:17 effects 25:3 41:10 46:15,19 116:6 effort 5:7 33:1 112:15 efforts 34:14 101:14 eight 6:2 either 16:16 52:16 62:17 104:18 106:14 electric 1:4 2:2 3:5,14 108:2 element 33:9 elephant 63:7 elimination 37:7 101:16 Emergency 45:9 emission 15:3 39:2,8 40:5 53:9 88:2 92:2 92:10,15 97:16 100:21 104:14 emissions 4:4 9:19,22 13:9 14:3,5 17:18 27:8 29:10 31:21 32:6 33:22 34:4,11 34:14,16,18 37:8,9,17	38:14,20 39:14 39:19 40:10 42:5 49:8 50:11 53:4,5 58:9,10,13 64:10 66:2,3,5 66:10 72:19,22 75:6,10,19,20 79:11 84:19 85:15,16,18 98:1,4 101:10 101:11,14,18 103:18 104:10 104:15 112:21 113:22 115:9 116:5 emit 9:7 16:7 56:22 emits 57:13 emitters 16:9 emitting 55:16 55:18 57:21 102:14 empowered 5:10 enables 33:21 enacted 88:16 enactment 103:1 104:20 endanger 39:19 endangerment 10:15,17 15:4 24:4 40:16 62:18 89:1 115:11 endorsed 40:7 energy 24:21 enforce 83:11 107:1 enforceability 34:22 63:14 64:13 enforceable 29:19 30:22 36:19,20 64:13 66:13,15,17 67:2,12,18 81:21 82:13,15	106:20 107:9 107:22 108:7 109:12 enforced 31:1 68:5 enforcement 29:21 63:10,22 64:2,5,7,8,12 64:16,18,21 65:3,4,8 66:20 82:14 84:9 105:22 109:3,7 enforcing 64:9 entire 21:21 54:22 95:12 101:1 entirely 41:21 110:22 entities 44:5 entity 53:20 environmental 1:1,1,13 2:6 3:2,3 24:21 42:12 EPA 2:7 6:12 8:10 9:11,14 9:18,20 10:6,9 11:11 12:10,16 12:18 13:8,21 14:13,14 16:11 16:18 17:17 25:1 27:11 28:20 29:6 30:16 38:4,10 38:11,17 39:1 39:8,13,15,16 40:2,6,15 41:8 42:8,10,17,17 43:1,19,21 45:22 47:9 48:17 49:4,7 49:17,18 54:5 55:2 56:18 57:16 63:8 66:13 71:11,22 83:2,4,6 87:10 87:17 88:1
--	--	---	---	--

96:9,18 104:21 105:1 111:14 111:16 112:3 114:15,17 115:1,14 EPA's 6:7,9 10:1 11:18 14:10 29:15 40:21 41:3,19 45:16 46:4 49:5 79:2 111:21 equally 52:6 equated 63:6 equipment 97:17 erred 4:1 erroneous 38:16 49:13 77:1 90:2 error 4:9 11:12 38:5 errors 13:3 espoused 51:7 ESQUIRE 2:3,7 2:10,13,16 essence 46:13 90:12 essentially 17:3 22:19 26:2 establish 52:22 75:8,9,19 79:10 115:16 established 77:2 establishes 14:22 establishing 34:10 101:10 Eurika 2:20 evaluation 23:10 eventually 115:10 evidence 32:17 81:7 evolving 10:11 exact 70:21 106:21 108:15 110:4	exactly 18:10 27:4 32:17 47:6,8 57:5 62:5 81:9 85:5 107:3 example 24:10 42:13 43:3,4 82:19 110:21 excellent 116:11 exclude 29:2 46:3 71:11 excluded 45:11 72:1 excludes 29:11 excluding 85:21 exclusion 45:15 45:17 excuse 21:3 88:19 exemption 45:8 exercise 25:4 52:20 75:17,19 95:5 exercised 11:3 exhaustive 21:21 exist 104:7 existed 104:4 existing 32:6 115:15 exists 103:22 104:3 expansion 15:11 expect 72:18 expeditiously 86:8 expending 94:20 expert 21:16 expired 37:19 48:13 explain 77:7 explained 114:13 explicitly 30:19 37:15 77:9 115:20 expressed 51:3 53:8,21 96:3	expressly 29:13 40:7 41:14 81:10 extended 48:4 extends 46:8,10 extent 16:18 59:20 69:15 70:3 82:7 105:13 113:13 Extracted 99:8 extremely 11:13 21:19 F face 32:11 56:4 95:9,11 faced 68:14 facilitate 73:7 facilities 15:12 15:16,21 43:7 44:18 65:15 facility 4:10 47:13,14 55:17 55:18 57:21 58:11 66:1,7 66:12 91:11 113:17 114:1,2 fact 4:20 18:16 19:15,18 26:11 26:16 28:3 36:3,15 42:21 60:3 74:17 79:1,9 83:5,6 83:17 84:8 85:8 98:9 100:20,21 103:12 104:17 105:2 107:9 108:1,19 factors 115:3 fail 72:19 failed 64:11 failing 4:1,9 fair 52:10,16 fall 100:5 fallacy 29:7 familiar 7:8	far 21:10,13 fashion 35:1 fast 96:5 favor 76:12 federal 40:7,18 54:3 65:7 federally 45:7 Feel 9:5 filed 6:17 97:13 filing 6:2 final 19:2,22 78:3 115:4 finally 7:8 33:3 115:6 finding 10:15 24:4 61:11 89:2 fine 99:19 firmly 51:22 first 16:3 31:18 32:16 33:19 38:17 69:8 79:18,18 80:19 86:8 96:1 97:14 101:21 114:13 fit 66:21 85:13 five 5:19 9:3 40:20 111:7 fix 16:17 96:19 flexibility 24:1 35:18 floor 2:11 33:14 focus 7:6 60:22 62:22 77:19 87:12 100:2 112:7 focused 5:10 26:19 focusing 62:21 follow 5:14 64:8 74:15 92:11 followed 6:10 49:4 51:11 following 78:18 81:18 food 96:5	footnote 28:3,4 70:18 71:5,5 71:21 72:4 force 31:14,22 34:17 37:8 74:21 forced 75:4 form 13:18 32:22 33:4 103:10,12 112:14 113:20 forth 5:14 forum 56:17 78:22 forward 86:11 found 62:17 fourth 18:8 four-part 18:7 frames 55:18 Francisco 2:12 frankly 16:12 110:16 free 9:5 front 8:19 19:7 108:16 fugitive 71:8 full 7:14 10:8 14:8 86:10 fully 7:12 fundamental 62:13 furnish 32:16 further 33:10 35:1 37:20 71:20 74:10 93:15 111:12 furthering 33:17 35:2 Furthermore 54:4 72:7 further 33:18 35:4 future 37:12 104:3 115:7 G G 3:1
--	--	--	---	---

Gary 2:21	goes 107:14	20:5,17,21	holding 10:13	import 85:12
gas 40:5 116:5	112:10	21:8,20	Honor 50:20	important 11:14
gases 5:3 38:14	going 23:10	head 36:13	86:3 96:7	101:15 114:12
40:11 87:20	32:20 59:15	101:8 102:1	Honorable 3:7	Importantly
115:17	74:3 92:15	Headquarters	hook 74:16	101:21
gather 35:6 73:3	105:8	115:2	hope 37:5 93:4	impose 9:18
75:18	good 3:12 8:21	health 14:20	101:15	38:7 39:1 88:2
gathered 35:14	38:1,2 48:16	25:10 28:9	hospitals 96:5	104:14
gathering 35:8	59:22 68:12	38:9,21 39:19	hostage 10:14	imposing 38:13
73:7,12 75:11	86:2,4 90:21	40:13 41:11,15	house 33:13	38:19
general 2:7,14	92:5,8 99:15	43:19 44:1	40:19 94:13	imprecise 69:2
6:9 8:6,11	gotten 113:14	46:16 47:18	Hunton 2:17	improper 78:22
48:17 54:5	governing 13:9	48:9 71:1,14	8:14	inadvertently
65:19 80:8	grab 67:15	71:20 75:22		30:8
109:6	granted 3:21	89:2	I	inaudible 8:8
generally 24:19	4:11 97:15	hear 5:21 99:17	identical 59:10	60:19
generals 6:4	granting 4:18	heard 53:13	ignore 91:22	include 13:4
General's 2:14	gravely 58:6	hearing 3:13,19	ignores 13:21	17:17 18:21
8:7	great 104:11	3:20 116:14,16	40:22 92:19	20:22 21:4
give 10:8 30:6	111:3	heart 49:15	illustrative	63:22 64:18
31:8 33:2	greatest 23:22	heavy 21:19	70:13	116:8
101:8 102:1	greatly 5:6	held 13:14 39:16	imagine 88:15	included 20:7,9
112:16	greenhouse 5:3	87:18	immediately	21:11 97:21
given 39:5 43:20	38:14 40:5,11	help 55:12 57:7	25:11	includes 10:22
47:16 50:22	87:19 115:17	61:9	impact 111:3	13:13 25:3
51:3 52:18	116:5	helpful 7:4 93:5	impacts 24:22	64:2,16 68:21
56:13 60:10	ground 53:6	116:13	impermissible	including 19:9
85:17 99:2	grounded 49:2	herring 113:18	51:8 52:15	95:13 110:6
108:1 114:18	51:22	hesitant 68:16	impermissibly	111:19
gives 45:22	Group 2:15 6:12	hesitate 48:3	11:15	incomplete
giving 42:9	8:16 99:21	hide 11:11 16:8	implement	18:20 84:3
114:21	guess 63:16	hiding 96:13	33:22 61:7	inconsistency
global 5:2 32:19	67:16	historic 49:5	implementation	43:2
38:12 40:9,12	guidance 112:5	51:20	11:22 37:16	inconsistent
47:17	guide 25:2	historically	66:17 97:11	42:10 71:4
gloss 14:10		62:14	98:4,8,12,16	incontrovertible
go 22:20 23:11	H	history 10:3	implemented	38:20
27:14,17 73:15	half 9:9	31:8,20 32:10	30:16 35:13	inconvenience
74:12 75:17,18	half-century	33:12 34:9	implementing	16:4
81:16 86:15	116:3	37:3 72:8,10	35:8 55:22	incorporate
88:6 93:14,19	happen 22:18	77:22 80:13	61:21,22 87:17	98:20
94:15 96:6,9	happy 17:12	89:13 100:9,10	109:1	incorporated
96:22 97:3	hard 82:18	100:14,19	implications 5:4	22:3 45:10
110:2	harms 39:22	101:2,4 104:9	15:8,10 27:19	63:5
goals 33:8,10,12	47:17	109:16 110:14	28:12 55:11	incorporates
33:17,18 35:3	hazardous 19:3	112:9 113:10	61:11 68:18	36:16
35:5	19:5,10,16	hold 4:12	114:19 115:3	incorporating

69:11 increase 15:21 72:22 92:16 increases 24:11 increments 26:5 26:9 95:14 indicate 14:6 73:2 indicates 36:22 68:19 indicating 80:8 indication 77:14 77:15 indicia 35:22 individual 57:14 industry 26:3 58:6 inextricably 29:22 36:20 information 35:6,8,14 73:3 73:7,12 74:3 74:14 75:11,18 92:7 information-g... 66:6 72:16 inherent 61:7 initially 3:18 input 13:1 16:21 17:1 23:3 114:10,22 inserted 95:11 install 93:9,12 93:21 103:18 installation 94:7 installing 35:19 instance 34:2 instructions 13:4 instructive 28:11,13,17 intend 29:4 30:4 30:13,14 intended 30:10 31:11 35:22 42:3 56:9 61:18 75:3,17	75:18 85:19 100:16 111:2 intent 14:6 39:12 41:12 53:22 61:5 67:10 72:9 73:2 75:7 84:21 98:16 110:3 intention 99:2 interchangeably 103:8 internal 29:1 international 33:4 34:6 interplay 26:15 interpret 12:19 50:14,16 51:13 59:21 62:2 85:11 interpretation 11:14 12:7,10 26:14 27:13 28:21 40:21 41:4,20 42:8 43:20 45:16,18 45:20 49:2,12 49:17,20 50:22 51:4,4,6,9,17 51:18,21 52:10 52:13,15,16 55:5 56:8 58:21 65:20 68:14 76:13,15 76:21 77:5,10 77:14,16,18 78:17 79:3 80:16 82:3 85:8 89:8,17 89:19,22 90:9 102:20 111:14 111:21,22 112:2,4 113:5 113:12 114:12 114:18 115:5 interpreted 7:17 27:11 42:10,17	42:18 54:6 57:18,22 58:16 67:9 76:5,9 81:13 85:7,9 interpreting 9:22 13:22 42:14 45:7 Interruption 91:12 intervened 97:14 intervening 80:15 115:8 invite 16:21 invited 4:17,22 6:16 invoke 67:19 68:10 108:8 IPCC's 40:9 Island 6:6 issue 3:19,20,22 4:8,11,15,20 5:5 11:6 16:11 16:13 22:22 25:19 38:3 53:13 59:21 78:14 80:19 81:6 83:18,20 88:11 98:22 113:13 issues 5:2,11 7:13 61:10 i.e 44:7 50:15	20:8,12,15 21:2,4,10,14 21:17 22:5,16 23:5,9 25:14 25:18 26:7 27:14,22 28:10 28:19 30:2,15 31:7 32:9 33:15 34:19 35:21 37:18 38:2 41:5 43:3 43:16 44:2,2 44:17 46:5,17 47:4,11,22 48:10,12 49:14 50:13 55:8 57:4,7 58:14 58:19,20 59:5 59:8,19 60:11 60:13 61:6,20 62:5,7,10 63:9 63:21 64:3,15 65:13 66:11,19 67:16 68:4,9 68:17 70:3,18 73:6,18,21 74:20 76:2 77:4 78:20 79:16 81:15 82:8 83:1,12 84:4,20 86:1,4 87:11 88:8,14 88:19 89:3,11 89:16 90:5,7 90:13 93:20 94:4,15,18 96:20 97:2 98:15 99:1,10 99:14,19 102:3 103:15 105:1 106:1,7 107:3 108:6,17,19 109:18,22 111:4,6 112:10 116:10 Judges 1:18 3:7 judgment 25:5	41:17 52:20 53:7 82:5 jurisdiction 67:19 68:11 108:8 K K 2:4,17 Kathie 1:17 3:8 keep 109:10 keeping 29:21 key 63:14 keyed 62:3 kind 55:12 59:13 61:21 89:5 kinds 60:20 knew 20:16 know 7:9 21:10 21:13 23:13,16 32:17,22 33:2 33:3,5 45:10 47:19 57:5,13 59:9,10 60:6 60:16 62:15 63:6 65:8 68:7 68:13,19,22 72:8 81:2 82:11,19 88:5 90:1 92:9 99:18 102:19 102:21,22 103:3,5,11,20 103:21,22 104:2,6 106:13 108:15 112:14 112:16,17 knowledge 23:7 23:8 74:7 77:11 83:19 Kosloff 77:19
				L L 1:18 2:7 labeled 21:20 lack 22:6,9 49:22 lacks 49:19

laid 32:13 60:16	level 102:6,7 114:8	102:17	manner 67:14 105:13 109:14	84:18 95:7,8
language 10:9 11:20 14:6 17:15 18:14 25:15 27:10 28:1,16 31:13 36:3,14 41:1 42:11,18 57:17 61:19 67:4,11 67:15 70:22 102:12 107:11 107:18 108:15 110:19	liberties 70:14	long 78:18 89:13 97:22	manufacturer 93:9,12	meant 14:4 86:21 110:20
large 96:3	liked 78:4	longer 49:18 59:22 69:4,6 102:19	March 3:16 4:14	measure 97:22
laryngitis 99:16	limit 4:3 13:5 16:19 42:3 50:11 64:10 66:9 88:2 116:9	look 55:15,22 62:15 84:5 87:14 88:7 90:22 96:15 105:6 107:11 108:14 112:12	Massachusetts 6:6 10:6 14:13 29:6 39:15 55:2 56:13 87:10 91:6,9	mechanism 16:22 25:4 64:21 67:1 82:14
lastly 99:4	limitation 75:6 75:10 85:14,19 92:3,10,15 94:11	looked 20:6,15 55:17 79:7 86:13	matter 1:11 3:13 64:14 112:6	meet 64:11
law 38:5 48:18 59:22 64:14 67:20,21 69:14 69:20 87:1 92:19	limitations 38:13 85:16	looking 23:19 35:15,21 36:21 55:13 66:20 104:9	maximum 24:10 26:5 92:3	memo 17:20 28:22 29:1,8 29:11 42:14,17 44:4,21 56:9 58:22 59:3,6 59:11,20 77:17 77:18
laws 42:12	limited 22:1 29:8 83:18 94:10 95:4	looks 86:11	ma'am 94:17	memos 80:8
lead 73:16 74:4 92:6,14 95:18 107:4	limiting 39:14 116:3	lose 57:2	MCI 111:20	mention 115:14
leads 67:17	limits 38:7,19 39:2,9 42:5 46:4 75:20 115:8	lot 89:14 100:1	mean 12:17 13:22 14:14 21:8 42:20 46:18 47:11 49:18 56:10 62:7,13 64:8 64:12 65:4,5,6 65:8 66:15,20 73:21 74:16,18 82:9,9,19 88:15 94:4 95:3 100:2,4 102:4 106:8 108:5 114:9	mentioned 12:4 92:21
leaning 7:18	line 81:18 111:19	lower 15:1 54:1	meaning 10:1,3 12:6,6,11 13:12,21 14:10 39:5 41:1 49:9 51:15 52:1,3 52:14 54:13,14 54:19 60:18 62:3 65:1 76:6 76:20 77:3 80:1 85:6 89:14 90:8,16 93:2 110:19	met 103:17
Leaventhall's 70:19	linked 29:22 36:20	lowered 24:16	meanings 76:17	methane 29:5,12
led 58:15	list 18:13,16,18 18:20 19:1,15 20:4,9,13,16 20:19 21:11,21 77:12,15 78:9 79:9 93:15 97:22 98:3	M	means 13:11 28:14 31:1	million 9:8
legal 11:14 50:14 54:18 64:13 68:1,1 80:1 91:2 92:1 111:21	literal 60:17	magnitude 72:21		millions 16:7 96:12,17 116:1
legislative 31:8 31:20 32:10 34:9 37:3 39:11 72:8,10 96:10,19 100:8 100:10,14,19 101:2,4 104:9 109:16 110:14 112:9 113:10	little 15:7 37:13 55:8,9 60:2 69:2 91:1 112:7	Maine 6:5		Millstein 2:21
lends 26:13	LLP 2:3	major 55:16,18 56:2 57:12,21 95:14		mind 56:21 102:5
letter 6:20	local 96:14	making 6:21 10:15 30:22 33:9,16 35:1 35:20 54:8 115:4		minimis 60:19
let's 88:6	logical 17:22 23:18 91:3	manageable 60:22		minimizing 116:5
	logically 92:11	managed 16:2		minute 18:20
		Management 40:20		minutes 5:17,19 6:1,10,11,13 9:3 53:16 76:3 86:7 87:8 111:7
		mandate 9:20 43:17,18		misinterpret 97:5
		mandated 9:11		missing 54:12,14 80:2 84:1
		mandatory 104:14		missions 71:8
				mistake 67:10
				Mobil 45:2
				modifications 32:8
				modified 23:22

32:4 35:17 47:8 modify 17:6 34:1 moment 55:15 74:5 86:16 102:8,13 monitor 92:12 92:13 monitoring 9:12 13:13,17,17 27:2 29:17,20 33:16,20,21 34:3,20 65:10 68:11 69:6 74:1 76:4 81:17,20 84:14 95:5 104:22 105:14,20 106:3,6,14,22 109:15 113:19 113:20 115:17 115:18 monitors 93:16 months 40:20 102:22 115:18 Moorhead 37:5 101:5,22 112:8 Morgan 2:13 8:5 morning 3:12,13 5:14 8:21 38:1 38:2 48:16 86:2,4 99:15 100:1 116:12 morning's 4:16 4:22 7:11 motor 15:2 40:6 mousehole 63:7 move 70:10 moving 112:18	names 7:21 narrow 12:10 17:10 18:1,2 28:21 62:9,10 85:8 narrower 11:5 14:6 56:5 84:4 85:20 narrowing 60:9 85:20 narrowly 9:22 10:13 17:17 29:2 31:11 45:19 narrowly-defi... 5:11 narrows 11:15 14:11 National 6:16 nation's 116:4 nature 47:16,17 nearly 49:4 necessarily 60:7 62:2 102:12 necessary 72:20 79:15 need 11:6,8 12:7 16:11 32:21 33:3 36:15 63:2 67:15 101:8 102:2 112:13 113:1 needed 15:4 22:17 26:16 62:20 98:3 needs 36:14 negate 16:5 negotiations 33:5 34:7 neither 54:4 never 49:21 100:16 104:12 new 2:14 6:4 8:6 15:1 23:21 32:4,7 35:17 35:19 40:6 47:7 50:1 55:1	83:8 102:8,10 103:4,12 110:22 Nope 37:20 note 4:17 6:15 31:18 36:15 53:12 56:1 69:8 97:12 notice 11:17 12:8 19:14 40:18 74:19 78:13 112:2 noticeable 100:13 notified 6:19 notion 70:20 November 3:22 no-control 92:7 NSPS 72:1 NSR 19:20 50:9 53:21 56:3,7 79:3 number 4:19 5:1 15:9,12,21 18:19 38:22 39:7 53:15 58:7,9 59:15 96:3 numbers 105:9 numerous 7:10 40:13 NW 1:14 2:4,17	offer 23:22 35:18 93:3 offered 33:13 offhand 36:6 office 2:7,14 6:7 6:8,9 8:7,10 40:19 48:17,18 48:20 official 54:6 63:2 76:1 Oh 48:14 Oil 45:2 Okay 11:10 21:14 28:19 37:21 48:14 57:4 59:8 90:5 96:20 99:14 111:4 omissions 72:10 once 53:13 104:21 111:20 opening 87:14 operate 108:21 116:2 operating 105:19 operator 108:20 114:1,2 opinion 55:4,5 70:19 71:6,9 83:17 opinions 77:17 80:6 opportunity 13:2 78:13,16 80:3 81:6 99:22 114:21 opposed 36:10 74:21 options 116:4 oral 1:12 3:4,13 5:15 7:9 53:16 60:2 86:9 96:1 order 3:22 4:14 4:18 5:14,15 7:2 8:1 32:16 33:4 58:12	108:9 ordered 13:8 orders 3:16 organic 68:2 original 77:18 105:10 ought 89:1,13 96:18 outside 109:11 outstanding 22:21 overall 87:4 overburden 15:15 over-reaching 87:4 95:17 owner 108:20 ozone 19:11 ozone-depleting 85:21
N n 3:1 25:7 NAC 95:13 NACs 71:15 NAC's 15:1 name 8:21		O O 3:1 objecting 79:2 obligation 39:8 94:8 observation 49:16 obtain 43:6 44:16 94:19 obtained 43:9 obviously 20:16 86:10,22 occur 41:18 odds 10:2 11:20	P P 3:1 page 32:14 87:15 91:1 95:22 101:3 110:1 pains 104:11 paper 44:7 parallel 25:20 26:2 Paralyzed 111:19 Parks 6:16 part 11:19 18:8 29:16 30:4,8,9 30:12,14,17 31:17 32:10 36:1,22 58:19 68:20 69:18 70:5 71:6,9 81:17,21 82:12 83:13,15 84:3 98:8 105:2,3 107:4,5,7,10 108:5 109:9 111:11,13,22	

112:10,13	115:22	plan 98:12	52:22 53:1,10	possibility 37:7
participate 4:22	permitting	Planning 45:9	53:21 54:9	101:17
participating	47:20 54:2	plans 97:11 98:4	55:20,21 56:4	possible 51:16
7:1 48:21	55:14 80:11	98:8,17	56:6,7,10	70:20 89:8
particular 7:18	person 106:10	plant 3:15 9:7	57:15,19 58:22	potential 14:21
7:19 22:14	personally 40:15	16:7 44:13	59:22 61:16,17	15:8,14 25:3
25:6,19 44:13	personnel 94:21	47:21,21	62:4 70:21	41:12,16 46:15
46:22 50:4,7	petition 4:7 5:12	plants 44:14	71:19 79:3,10	73:4 74:7
60:10 65:9	17:11	115:22	79:12,14 80:7	potentially
particularly 6:3	Petitioner 4:4	playing 11:11	80:18 87:6,22	15:11,15 73:18
58:10	5:16 6:18 93:7	plead 108:9	88:1,5,6,9,10	74:2 84:5
articulates	93:11	please 3:9,11	88:20 91:5,7	pouring 96:12
71:12,15	Petitioners	8:19 99:18	96:7 113:16,19	power 1:4 2:2
parties 7:15	49:11 51:7,14	plus 19:18	pollutants 11:1	3:5,14,15 16:7
parts 32:20 36:4	52:2 54:11,17	PM 18:21 21:1,4	11:1 15:5	25:8,20 27:21
party 53:19	58:6 65:5	21:6,8,11	18:13,17 19:3	28:11 44:13,14
54:17	70:11,14 72:5	point 16:22 37:2	19:6,10,17,20	70:12,19
passage 100:19	76:18 78:4	42:18,20 44:9	20:5,18,21	115:21
101:1,22	100:17,18	48:5 50:19	21:21 23:20	practical 57:8
people 54:13	104:16	51:12 55:20	24:2,9 25:9	practice 97:17
58:18 107:1	Petitioner's	67:17 70:11	26:4,8,11,19	preamble 18:14
perfect 24:1	84:21 87:3,14	72:17 73:4,20	27:7 28:2,8	19:6 22:8,10
performance	88:7 90:22	78:20 79:2	29:8,14 38:8	22:12 77:5,11
15:2 50:1	102:18	92:5 101:15	39:2,3 41:22	precepts 92:1
period 54:16	petitioning 17:5	103:2 104:2,7	42:1,4 44:19	precipitation
peripheral 63:4	philosophy	106:21 111:12	46:1,11 48:1,4	82:20
permissible 49:2	94:14	113:1,15 114:6	48:6 56:11	precise 69:18
49:17,20 51:21	phones 3:9	115:14	57:11 58:1	94:6
52:1 76:22	phrase 22:11	pointed 61:15	59:15 61:1,2	precisely 58:14
90:9	38:5 42:14	points 100:15	62:16,20 63:1	precluded 10:10
permissive	45:10 69:11	policy 91:3	65:16 72:2	prefatory
89:12,18	86:18,21 91:18	114:22	75:20 77:19	107:18
permit 1:6 3:6	phrased 99:3	policymakers	78:7,8,9 85:12	premise 56:12
3:15 11:13	phrases 86:17	40:9	87:20 113:21	62:13 73:15
13:3 17:16	piece 84:13	pollutant 9:10	pollution 14:22	84:12 110:12
22:17 38:8	place 17:19	9:17 12:14	portions 7:3	preordained
42:21 43:6,9	23:19 28:20	13:7 14:3	22:2	73:22
43:11 44:7,16	34:15 42:21	17:13 18:9,10	poses 40:13 89:2	present 2:19
45:13 80:5,20	44:8 46:4	19:20 20:8,10	position 5:22	25:10 28:6,8
88:3 90:4	81:10 109:15	20:12,13 21:9	10:2,21 12:9	70:22 71:13,19
114:14 116:8	places 12:13	24:7 25:12	34:13 70:8	99:22
Permitee 6:10	13:10	26:22 27:1	72:6 76:8	presentation
86:10	plain 10:3 12:6,6	28:5 29:2 39:9	77:22 80:9	6:19
Permitee's 41:19	12:11 13:12,21	40:3 43:22	82:6 84:16,17	presented 80:2
permits 38:15	40:22 54:13,14	46:8 47:12,17	89:6,7 101:13	presently 14:1,4
55:7	54:19 80:1	49:5,6 50:7,9	102:18 106:2	42:1
permitted 45:8	89:14 90:8,16	50:18 51:2	positions 7:14	presiding 1:18

3:8	110:21 114:16	77:10 82:21	99:8 114:10,21	109:22
pressure 93:16	progression	84:14 85:17	publicly 40:6	quickly 112:18
presumption	81:12	105:14,16	published 65:6	quite 35:7 71:22
13:11	prohibition	108:4	77:13	74:15 85:8
pretty 20:20	30:20 36:17	provisions 10:16	purpose 7:12	quote 25:17 28:7
81:11	105:18 106:11	15:3 22:4 23:4	14:19 24:14	32:10 72:11
prevailing 50:22	108:12	24:3,5,8 29:21	25:12,15 28:16	100:22
previous 111:10	promulgate 9:12	30:20 32:4	28:17 32:13,15	quoted 57:17
primary 33:11	9:15 12:16	36:7 49:3	39:11 41:14	quoting 18:9
38:17 84:15,16	13:8 68:2 72:1	52:19 54:21	72:14 75:13	112:11
84:17 114:22	promulgated	63:10 66:21	107:5,6 112:11	
principal 82:14	16:13 56:15	70:5 72:11	112:13	R
principles 45:18	63:20 65:6	81:20 98:3	purposes 35:5	R 3:1
60:19	82:10,22	105:10,22	105:12 106:18	Radiation 6:8
prior 11:21	104:22 106:12	106:4,14 109:3	pursuant 3:15	48:18
probable 104:6	109:4	109:7 110:5	106:12,15	Radiation's
probably 110:4	promulgating	111:15 114:7	109:4 112:2,4	48:21
110:18	84:7	provision's 75:7	put 12:7 21:19	rain 108:3,4
probe 7:13	prong 100:3	PSD 1:4,6 3:7,15	34:12 101:12	110:21
problem 32:18	proper 33:4	10:13,16 14:19	105:8	raise 61:10
33:1,6 95:16	proposal 18:4	15:13,22 22:4	puts 102:10	78:14 92:5
108:6 112:15	proposed 4:10	23:4,18 24:5,8	putting 11:16	raised 4:8 5:11
procedural	19:2,19 21:22	24:13 38:8,15	55:14	54:17 81:3
11:12	74:19 91:11	39:12 41:2,12	puzzled 55:9	raising 80:19
proceed 5:13	proposition	41:14 42:4	79:4	ramification
8:18 9:5	27:10 71:18	44:12 46:12		82:8
proceeding 7:22	protect 14:20	47:6 49:3 50:3	Q	rate 72:21 79:11
11:13 17:16	41:15 43:19	50:11 55:7,13	quality 116:11	rationale 29:3,7
38:4 47:20	Protection 1:1,1	57:1 58:8	question 17:2	29:11 59:7
80:5,20 114:14	1:13 2:6 3:4	60:14,15 88:3	28:10 39:15	read 21:20 31:10
process 15:13	prove 72:20	96:6 102:20	40:2 44:6,14	59:11,14 64:3
16:20 23:10,16	provide 14:15	103:11 114:16	58:15,20 59:12	64:16 65:3,3,4
35:7,16 52:9	114:21	PSD-OU-0002...	59:14 66:16	65:21 71:21
73:6,8 96:6	provides 12:20	1:6 3:6	68:13 69:9	72:12,13 75:4
production	provision 11:21	public 11:17	73:15 79:22	78:21 100:13
85:13	14:2 22:7	12:22 14:20	80:17 83:7,22	100:19 101:1
program 10:13	24:12 25:13	16:20,21 17:1	84:2 90:1 92:8	106:13
14:20 19:4	29:18 31:14	17:22 19:14	94:10 95:2	reading 26:13
23:18 24:9,13	32:15 36:8,16	20:1,2,3 21:19	97:3 106:8	31:16 51:10,10
39:12 41:3,12	36:21 42:2	23:3 25:10	109:19 110:1	64:4
41:15 42:4	50:2 51:13	28:9 38:9,21	110:11	real 61:1
44:12 47:6	53:3 57:9 63:4	40:13 41:11,15	questionable	really 26:12,18
50:3,11 55:14	65:10,11 67:6	43:19 44:1	56:13	28:11 53:17
57:1 58:9	67:7,13,14	46:15 47:18	questions 7:10	56:10,15 57:10
60:22 61:4	68:5 70:6 75:5	48:9 67:20	7:12,16 37:20	59:22 61:2,3
62:11 79:14,21	75:6,9,14	69:14,19 71:1	49:15 81:16	63:14 66:16
85:22 108:3,4	76:14 77:7,8	71:14,20 75:22	quick 48:15	73:9 89:1

95:18 97:4 113:18 reason 58:2 68:1 reasonably 41:17 80:12 86:19,19 90:19 90:20 reasoned 12:21 14:16 reasoning 10:4 59:6 reasons 38:17 60:15 rebuttal 5:20 6:14 8:20 9:3 111:7 recall 67:11 86:17 received 4:19 recognize 90:10 recognized 25:7 55:3 reconsider 17:7 record 7:21 29:20 101:10 recording 3:10 Recovery 42:16 red 81:11 113:18 reduce 37:9 101:9,17 102:2 102:4 103:6,18 reduced 37:17 reducing 32:5 102:5,11 116:4 reduction 92:4 103:3,10,13 reductions 31:15 31:22 33:3 34:3,5,8 37:12 100:21 101:20 104:14 112:17 refer 57:22 reference 22:7 36:8 67:5,6 69:3 90:7 98:16 referred 51:1	105:15 referring 18:7 30:8 36:4 44:5 50:5 70:1 98:7 refers 52:8 reflected 40:8 55:5 56:8 57:16 58:1 reflecting 7:17 refusal 66:12 refused 9:21 refuses 66:12 regard 22:3 regarding 5:15 region 4:1 13:4 48:19 49:1 80:12 98:19 115:1 116:8 regional 6:7 Register 40:7,18 regs 56:7 regulate 11:2 29:4 38:18 39:17 41:9 46:2,9,12 50:2 50:8 52:21 53:5 62:20 88:5,22 regulated 9:10 10:22 11:7 15:5 19:6,20 24:3 25:12,15 26:8,11 27:2,7 27:16,18,20 28:2,5,12,14 28:16 36:18 39:4 41:22 42:6 44:6,11 44:12,15,18,19 46:20 47:12 50:9,18 53:21 55:21 56:3,6 56:11 58:1,21 61:1 63:3 66:4 71:2 79:3,13 80:7 87:5,16 88:1 91:5,7	95:1,3,6 96:7 97:10 98:11 regulates 65:14 65:15 regulating 29:13 41:10 46:3 79:20 102:9,13 regulation 9:18 10:1,19 12:5 12:14 13:7,12 13:18,19,22 14:7,11,14,17 15:20 17:11,12 17:13,14,14,17 18:11,22 19:21 21:9 24:7 26:20,22 29:9 29:12 31:12 38:6 39:3,10 41:2,8 43:10 44:8 45:22 46:7 49:6,9 50:15 51:1 52:4,7,8,14 54:9 55:6 61:12,17 62:2 63:12,15,18,21 64:1,16,17 65:1,4,5,20 71:7 72:3 76:6 76:17 80:14 84:14,18 85:4 85:6,9,11 89:9 90:13,17 91:19 92:22 93:2,10 93:14 94:2 95:6 96:13 97:9 98:10 100:2 103:7,9 104:13 106:11 106:15 113:6 113:17,18,20 114:3,5 regulations 9:12 9:15 12:16 13:8,14 14:8 16:14 17:6,9	25:1 30:18 31:4,5 56:1,14 56:18 65:7 66:15 68:3,20 81:17,20 82:10 84:7 85:5 87:17 95:11 104:22 105:3,4 109:1,4 115:16 115:19 regulatory 2:15 6:12 8:16 14:2 18:15 33:12 42:2 94:14 99:20 Reich 1:17 3:8 3:12 8:9,17 9:4 10:18 11:10 15:7 17:4 20:8 20:12,15 21:2 21:4,10,14,17 25:14,18 26:7 27:14,22 28:10 28:19 30:2,15 32:9 33:15 34:19 35:21 37:18 38:2 41:5 43:3,16 44:2,17 46:5 46:17 47:4,11 47:22 48:10,12 55:8 57:4,7 58:14 59:5,8 59:19 60:11,13 61:6,20 62:5,7 62:10 63:9,21 64:3,15 65:13 68:17 70:3 73:6,18,21 74:20 86:1,4 89:3,11,16 90:5,7,13 93:20 94:4 96:20 97:2 98:15 99:1,10 99:14,19 102:3 109:18 111:4,6	112:10 116:10 Reich's 58:20 reiterate 5:9 95:20 related 19:12 78:20 relates 69:3,5 71:6 relating 4:8 relative 47:13 56:21 74:10 75:12 89:3 release 45:8 releases 45:12 relevance 30:5 relevant 56:19 69:10 115:3 relies 64:20 80:12 relying 74:21 110:13,13 remand 16:21 17:4 22:19 114:11 116:7 remanded 22:18 remanding 13:3 remarks 49:16 remedy 13:3 83:3 remember 23:14 rendered 93:10 93:13 repetition 7:5 reply 88:7 90:22 95:21 report 66:2,7,9 66:12 93:22 94:8,20 reporting 9:13 13:13 27:2 29:17,20 45:11 76:4 115:17,19 represent 7:22 8:22 represented 6:8 request 18:1 require 4:2 9:21
--	--	--	---	--

solution 96:10	91:13	101:4 112:8	striking 53:17	114:3
somebody 64:11 75:21	speaking 103:5	statements 11:22 30:6,11 87:3	structure 10:3 24:18 27:6	submit 17:22
somewhat 79:4	speaks 37:13	states 1:1 3:3 6:4	struggling 66:19	submitted 53:15
sorry 20:11 37:9 52:11 73:14 91:13 108:17 109:21	specific 22:6 67:4,15 83:19	statute 16:5 22:15 24:13 25:22 27:5 42:12 55:16 63:14 85:1 92:10 94:11 95:7,9,13	study 26:16 82:20 83:3,7,7 83:21,21 84:1 84:3	Subsection 105:7,17 107:12
sort 16:17 18:1 74:8 97:18	specifically 19:8 21:22 28:4 50:12 62:19 77:6 79:6 98:5	stating 31:4	subchapter 106:10,12,15 108:12,21 109:5	subsequent 112:4
sound 91:21 96:15	specifics 55:10	stationary 56:2	subject 9:17 10:19 12:5,14 13:7,16,19,22 14:1,4 15:13 15:19,21 17:7 17:10,13 18:11 18:17,21 19:21 21:9 24:7,10 27:8 29:8,9,12 31:12,17 33:16 35:1 38:6 39:3 39:4,9 41:1,8,8 41:20 42:1,5,9 42:15,19 43:8 43:10 44:22 45:4,12,21 46:7 49:6 50:10,15 51:1 51:2 53:10 54:9 58:8 59:15,17 61:3 61:12,17 62:2 63:10,12,15,18 64:5,17,18 66:8 71:6 72:2 77:20 80:14 84:9,17,18 85:4,4,12 89:8 90:13,16 91:15 91:19 92:21,22 93:10,14 97:9 98:10 100:1 106:10 108:3 108:21 113:16 113:17,19,22	subset 46:10 56:11
source 15:1 25:6 32:7,7 50:1 56:2 57:12,12 57:13 58:12 61:3,3 95:14 96:11 102:8,10 103:4,12 105:19 108:21 108:22	specified 4:13 7:2 65:10	statutory 9:20 11:15 14:1,19 16:10 17:15 24:18 27:10 41:1 42:1 43:11 45:4,6 45:18 53:2 89:4 95:14	substantially 10:19 12:5,14 13:7,16,19,22 14:1,4 15:13 15:19,21 17:7 17:10,13 18:11 18:17,21 19:21 21:9 24:7,10 27:8 29:8,9,12 31:12,17 33:16 35:1 38:6 39:3 39:4,9 41:1,8,8 41:20 42:1,5,9 42:15,19 43:8 43:10 44:22 45:4,12,21 46:7 49:6 50:10,15 51:1 51:2 53:10 54:9 58:8 59:15,17 61:3 61:12,17 62:2 63:10,12,15,18 64:5,17,18 66:8 71:6 72:2 77:20 80:14 84:9,17,18 85:4,4,12 89:8 90:13,16 91:15 91:19 92:21,22 93:10,14 97:9 98:10 100:1 106:10 108:3 108:21 113:16 113:17,19,22	substances 85:21
sources 23:22 29:4,13 32:5 34:1 35:17,18 42:19,20 44:11 44:15 47:8 56:21 58:8 59:16 96:4,18 102:13	specs 90:6	Stein 1:17 3:8 12:2,4 18:3,12 22:16 23:5,9 49:14 50:13 81:15 82:8 83:1,12 84:4 84:20 88:8,14 88:19 105:1	subject 9:17 10:19 12:5,14 13:7,16,19,22 14:1,4 15:13 15:19,21 17:7 17:10,13 18:11 18:17,21 19:21 21:9 24:7,10 27:8 29:8,9,12 31:12,17 33:16 35:1 38:6 39:3 39:4,9 41:1,8,8 41:20 42:1,5,9 42:15,19 43:8 43:10 44:22 45:4,12,21 46:7 49:6 50:10,15 51:1 51:2 53:10 54:9 58:8 59:15,17 61:3 61:12,17 62:2 63:10,12,15,18 64:5,17,18 66:8 71:6 72:2 77:20 80:14 84:9,17,18 85:4,4,12 89:8 90:13,16 91:15 91:19 92:21,22 93:10,14 97:9 98:10 100:1 106:10 108:3 108:21 113:16 113:17,19,22	substantial 25:10 28:6,8 70:22 71:13,19
so-and-so 36:5	speculate 48:3	step 27:17	summary 40:9	subtracting 78:8
so-called 22:7	speed 93:10 94:9 94:11	steps 23:11 33:19 72:20 79:15 101:9 102:2 109:9	sufficient 63:11	such-and-such 36:9
Spalding 2:10 8:3,3,18,21,22 9:6 11:4,11 12:2,3,9 16:3 17:9 18:6,18 20:11,14,22 21:3,7,13,15 21:18 22:9 23:1,8,13 25:17,21 26:21 27:21 28:1,15 28:20 30:11,16 31:13 33:11,18 35:4 36:12 37:21 111:8,9	spelled 98:5	stick 107:1	suggest 90:8	suddenly 88:16
SPEAKER	spewing 115:22	stone 115:5	suggested 96:22	sufficient 63:11
	spite 31:19	stop 82:9	suggesting 88:16 90:18 98:9	suits 31:3
	sponsor 33:8	strange 95:18	suit 83:4,6,14	summary 40:9
	sponsors 32:12 101:5	stratospheric 19:10	suits 31:3	superfluous 39:6 41:21
	springs 43:10 63:13	Strawn 2:3 8:13 86:6	support 31:9 72:5	support 31:9 72:5
	standard 24:19 46:17,19 50:1	Street 2:4,11,17	supported 100:7	supported 100:7
	standards 15:2,3 40:5 97:17,17 97:18	strengthens 74:8	supporting 5:22 6:18	supporting 5:22 6:18
	stands 27:9 71:17 116:14		supports 22:11 109:17	supports 22:11 109:17
	start 101:8 102:1		suppose 75:2	suppose 75:2
	started 49:16		supposed 94:13	supposed 94:13
	starting 23:16		Supreme 10:5,7 13:14 14:12 39:16 54:1 55:2 80:10,14 87:18 88:9,11 88:15,21	Supreme 10:5,7 13:14 14:12 39:16 54:1 55:2 80:10,14 87:18 88:9,11 88:15,21
	state 2:14 6:2 7:21 8:7,8 10:21 54:3 97:11 98:3,7 98:11,16		sure 46:6 60:6	sure 46:6 60:6
	stated 28:21 38:10 39:21 41:13 108:9			
	statement 32:12 37:4 50:4 69:5			

64:8 65:17 73:19 89:5 99:2 102:11 104:11 106:19 107:20 110:15 113:7 116:12 surrogate 21:5 susceptible 76:15 sweeping 91:3 91:20 sylogism 91:2 sylogisms 91:21 system 15:15	91:15 103:17 103:21 technology-ba... 75:9 technology-fo... 75:8 tell 27:17 temperature 93:16 tenor 65:19 term 10:19 12:5 12:12 49:9 50:17 52:4,7 52:14 56:5,9 57:19 62:3 65:1 76:17 77:3 85:6,10 113:6 114:5 terms 10:18 12:17 15:11 22:18 24:14 34:6 35:19,21 47:15 55:11,19 56:3,19,22 61:10 62:4 66:21 68:17 97:16,16,19 108:10 test 86:21 87:2 90:18 text 18:15 100:8 105:10 110:2,7 110:13 thank 8:9,17 9:4 9:6 37:18,21 48:10,15 86:1 86:8,12 96:20 97:2 99:11,12 99:21 111:4,5 111:9 116:10 116:11 theory 54:18 63:16 75:15 80:1 82:17 they'd 85:20 thing 12:18 13:11 21:11	37:3 72:12,13 things 36:2 60:21 61:14 62:21 95:13 100:12 114:9 think 12:5 21:1 21:18 22:10 26:1 28:3,15 36:13 37:4,13 43:10 44:4,21 47:1,15 48:5 51:18 53:17 56:17,19 57:20 59:3,4 60:2,3 60:16 61:13,20 62:15 64:8,12 65:2,18,19 68:14,15 69:9 70:4,13 74:17 76:8,19 77:11 83:10,19,22 84:2 92:7 96:16 97:13 99:10 102:10 102:16 103:5,8 103:10,20,22 104:6 106:18 107:7,8,10,19 109:10 110:17 111:1 113:2 thinking 81:18 103:9 thought 75:2 78:7,11 79:20 86:7 110:17 thoughts 16:1 three 35:2,4 38:17 39:7 threefold 32:13 32:16 threshold 15:1 24:16 thresholds 95:15 Thursday 1:9 tie 105:17 108:3 ties 105:21 107:12	time 5:7 6:14 7:19 8:20 11:9 26:1,9 27:6 37:18 48:12 50:21 53:14 54:16,16 55:1 60:4 78:11,14 78:15 80:19,22 81:1,12 87:11 99:5,11 104:4 104:15 114:13 timing 109:14 tipped 20:19 title 20:18 59:12 59:13,16,16,18 60:9 85:12 105:11 107:13 110:9,22 today 5:5 48:19 53:16 54:12 68:15 72:6 82:4 95:20,22 tons 9:8 16:7 55:19 57:14 58:13 116:1 top 36:13 track 56:15 traditionally 57:16,18,22 translates 102:12 transmitted 40:17 treated 61:14 tremendous 114:19 trigger 50:3 triggering 24:17 trouble 80:22 truly 43:12 try 87:2 trying 34:19 106:19 turn 3:9 Turning 5:13 two 12:12 23:15 38:22 61:14	77:16 80:6 114:7 tying 58:21 type 25:11 97:22 typically 82:13
T				U
take 34:2,4,7,13 58:11 64:22 66:13 72:20 77:21 101:9,13 102:2,18 104:16 109:15 taken 36:14 84:1 89:20,22 90:15 100:22 takes 60:17 89:6 109:6 talk 25:14 36:5 55:20 94:6 102:5 103:7 talked 15:10 95:19 97:4 99:22 talking 27:19 37:14 43:7 44:11,17,18 48:6,7 57:6,9 64:12 86:16 94:7 97:15 102:6,8 110:17 talks 34:16 89:14 109:3 technologies 23:20,21 35:10 35:12,15,19 technology 4:2 9:16 35:9				UARG 31:20 32:9 99:14 UARG's 45:2 100:6 ultimately 74:4 74:9 80:10 umbrella 26:17 undefined 86:17 91:18 undermined 10:5 understand 18:14 30:15 34:20 67:5,17 89:5 110:8 understanding 7:14 14:8 56:20 72:21 81:19 82:1 understood 76:20 undertook 32:8 unenforceable 105:4 unequivocal 40:10 United 1:1 3:3 34:7,12 101:12 units 108:2 universe 43:7 46:10 unlawful 106:9 108:20 unnecessary 7:5 unquestionably 38:8 48:8 unreasonable 83:10 uphold 48:22 upset 95:12

use 6:13 35:20 44:21 68:10 93:15 103:6 111:2 115:15 useful 74:3 uses 12:12 utilities 33:21 37:8 101:17 112:20 utility 2:15 6:11 8:15 32:22 34:12 94:19 99:20 101:12 108:2 112:15 U.S 32:18 33:5 37:7 101:17	108:11 109:5 violations 30:21 106:3 virtue 105:2	weigh 82:6 weighing 25:5 welcome 48:11 welfare 14:21 25:10 28:9 38:9,21 39:20 40:14 41:11,15 43:19 44:1 46:16 47:18 48:9 71:1,14 71:20 75:22 well-recognized 40:1 weren't 26:7,9 79:15 we'll 5:13 we're 3:12 17:12 27:1 43:13 44:10,17,18 48:5,7 59:15 74:18 76:11,13 82:16 86:16 99:10,19 110:17,18 we've 49:21 52:5 53:14 57:21 65:2 76:16,18 77:12 80:1 85:2,7 99:22	94:15,18 103:15 106:1,7 107:3 108:6,17 108:19 109:22 wondering 56:5 Wood 2:16 8:14 8:14 99:15,20 102:16 103:19 105:6 106:5,17 107:7 108:14 108:18 109:8 109:20 110:15 111:5 word 10:1 13:10 41:20 61:15,17 75:5 102:4 114:6,9 115:7 words 32:2 39:4 44:22 45:4 63:7,17 83:2 85:1 103:6 110:7 111:2 work 93:19 workable 62:11 working 74:18 worse 116:6 wouldn't 32:5 68:10 94:21 104:2 write 50:1 writes 115:4 wrong 10:2 69:16,22 90:15 105:9 wrote 101:22	8:6 83:8 <hr/> 0 07-03 3:7 08-01 1:4 <hr/> 1 1 91:1 1.8 9:8 10 6:11,13 21:4 86:7 87:8 10:04 1:12 100 57:14 58:13 101-549 67:21 69:14,20 11:58 116:16 111 72:1 113 31:2 68:10 81:21 82:13 105:5 106:2 108:9,10 109:6 12 32:14 1201 1:13 131 70:18 134 28:4 15 6:1 16:14 160 41:13 165 4:5 12:14 26:15,17 32:3 61:22 76:6 92:20 100:3 113:6,7,8,13 165(a)(4) 14:18 166 26:15,16 169 55:18 56:6 57:19 1700 2:4 18 54:15 102:22 115:18 1900 2:17 1977 113:9 1990 9:14 19:12 22:2 37:16 78:9 100:10 104:18 113:9 1993 9:15 16:14 87:16 104:18
V v 10:6 13:15 14:13 25:8 29:6 39:15 55:2 63:8 83:8 87:10 111:20 valid 52:6 Vallejo 13:15 value 32:11 varieties 14:9 various 7:15 23:11 52:18 114:4 vary 47:19,20 vehicle 15:2 17:5 vehicles 40:6 verbiage 110:5 110:11 Vermont 6:6 Veterans 111:19 viable 103:17 view 10:19 49:5 51:3 60:17 94:22 viewed 102:11 violate 106:10 violation 31:5,5 68:20,21 69:6 70:2 105:19 106:5,13	W wait 20:11 80:5 80:11 waiver 40:4 walk 55:12 want 31:18 43:4 56:16 97:5 111:12 112:22 113:7,15 115:6 wanted 37:2 81:16 99:1 107:20 109:11 112:7 warming 5:2 32:19 40:10,12 40:12 Washington 1:2 1:8,14 2:4,18 wasn't 31:11 46:6 83:15 98:15 99:2 110:3 watching 35:16 Water 42:16,19 45:1 way 7:17 12:19 12:20 16:2 17:7,11 26:8 26:11 50:15,17 51:14 58:17 59:14 68:7 74:20 75:4 76:10 78:4 82:7 84:5 90:15 97:1 99:3 ways 64:4 Webster's 65:22 Wegman 17:20 28:22 56:8 58:22 59:3,6 59:11,20 77:17	whatsoever 26:20 27:1 White 40:19 Whitman 63:8 wholly 97:8 Williams 2:17 8:15 Winston 2:3 8:12 86:5 Wisconsin 98:21 wishes 12:10 Wolgast 1:18 3:8 22:5 31:7 44:2 58:19 66:11,19 67:16 68:4,9 76:2 77:4 78:20 79:16 87:11	X x 1:3,6 <hr/> Y Yeah 27:22 58:15 64:15 year 9:9 55:19 57:14 116:1 years 16:14 49:5 51:11 54:15 York 2:14 6:4	

1995 42:14	415 2:12	977-5725 2:12		
1996 18:4 19:2	45 53:16			
19:18 78:6				
	5			
2	5 59:12,13,16,16			
2.5 18:21 21:1,6	59:18 60:9			
21:8,11	85:12			
20006 2:18	5221 56:1			
20006-3817 2:4				
2002 18:3,4	6			
19:22 22:8	6 87:15			
77:6 78:2 79:5				
81:4	7			
2007 3:22 88:19	75 68:20 70:5			
2008 1:9 3:16,17	81:17,21 105:2			
4:14 5:15 6:20	75.1(a) 69:12,16			
7:2 88:17	75.5 68:19 69:7			
115:12	69:10,22			
202 2:5,18				
21 3:22	8			
250 57:14 58:13	8 13:4 48:19			
27 6:20	49:1 95:22			
28 3:17 5:15 7:2	98:19 110:1			
282-5000 2:5	115:1 116:8			
29 1:9	821 11:19 12:15			
2987 101:3	29:16,22 30:4			
	30:18,19,22			
3	31:16 34:21,22			
30 5:17 6:10	35:22 50:16			
49:4 51:11	65:11,14 69:3			
304 31:3	69:13,17,19			
31 3:16 4:14	70:1,2,5,7 74:1			
	81:17 82:12,17			
4	84:8 87:18			
4 22:8 105:11	93:18 95:8,10			
107:13	97:8 100:4,8,9			
4(a) 108:13	100:16 104:17			
404 83:11	105:3,7,8			
4042 82:20	109:9 110:2,6			
412 30:1,18,21	110:14 111:11			
66:21 69:12	111:13,22			
70:4 105:15,18	112:9 113:5			
107:12 109:14	115:10			
412(e) 105:11	85 2:11			
108:18				
414 66:22 106:2	9			
106:9,18 109:3	94105-3441 2:12			
	955-1500 2:18			