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

In re:	)	
Deseret Power Electric Cooperative	)	PSD Appeal No. 07-03

RESPONSE OF EPA OFFICE OF AIR AND RADIATION AND REGION VIII TO BRIEFS OF PETITIONER AND SUPPORTING AMICI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Administrative Decisions

Other Authorities

Statutes

Regulations

Federal Register

INTRODUCTION

The Board should uphold the Prevention of Significant Deterioration (PSD) permit issued to Deseret Power Electric Cooperative (Deseret) because the Petitioner and supporting amici have failed to demonstrate clear error in Region VIII's action to grant that permit without establishing emission limitations for carbon dioxide. The Clean Air Act (CAA or Act) is reasonably construed to support EPA's longstanding interpretation that the phrase "pollutant subject to regulation under the Act" describes air pollutants subject to a provision in the Clean Air Act or regulations promulgated by EPA under the Act that require actual control of emissions of that pollutant. The Region followed established EPA legal interpretations and correctly determined that the Deseret PSD permit was not required to contain a Best Available Control Technology (BACT) limit for carbon dioxide emissions because carbon dioxide currently is not a regulated pollutant under the Clean Air Act. There is no cause for the Board to reverse the Agency's established interpretation of the PSD provisions in this case or to remand this case for the purpose of notice and comment rulemaking.

Contrary to the arguments of Petitioner and supporting amici, EPA's program offices[1] are not the parties in this case advancing a new interpretation of controlling regulations and the Clean Air Act or misreading the holding of the Supreme Court's opinion in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). The interpretation of the BACT provisions reflected in Region VIII's Response to Comments follows nearly 30 years of EPA practice. It also gives meaning to the Supreme Court's recent holding that

[1] Since the Board has granted review and invited briefs from additional parties, this brief is submitted on behalf of both the Respondent EPA Region VIII and EPA's Office of Air and Radiation participating as amicus curiae.

greenhouse gases qualify as air pollutants and that the Administrator must evaluate whether to regulate such pollutants under the criteria in the Clean Air Act. [2]

STATEMENT OF THE CASE

On October 1, 2007, Sierra Club ("Petitioner") filed a petition under 40 C.F.R. § 124.19(a), requesting that the EAB review Region VIII's decision to issue the Deseret PSD permit. On November 21, 2007, after considering the arguments raised in the petition and in the responses filed by Region VIII and Deseret, the Board granted review with regard to only one issue raised in Sierra Club's petition: whether Region VIII "erred by failing to require a [BACT] limit for control of CO_2 emissions" in the Deseret PSD permit. Nov. 21 Order at 2. On January 31, 2008, Sierra Club filed its Opening Brief, which incorporated the relevant arguments raised in their initial Petition for Review. Petitioner's Opening Brief also provided additional support for some of those arguments and responded to arguments that were raised in EPA's and Deseret's responses to the initial petition. In addition, the following six amicus curiae filed briefs in support of Sierra Club's position in the matter: Center for Biological Diversity (CBD); Climate Scientist Dr. James E. Hansen (Hansen); National Parks Conservation Association (NPCA); Physicians for Social Responsibility (PSR); the States of New York, California, Connecticut, Delaware, Maine, Massachusetts, Rhode Island, and Vermont (States); Utah and Western Non-Governmental Organizations (UWNGO).

[2] This brief attempts to incorporate all relevant arguments contained in Region VIII's Response to Petition for Review, filed with the EAB on November 2, 2007, while also responding to new arguments raised in briefs filed by Petitioner and amici in support of Petitioner. However, as a matter of record, Region VIII and OAR incorporate by reference Region VIII's Response to Petition for Review (filed Nov. 2, 2007), including the background statement of facts.

STANDARD OF REVIEW

The Board's review of final PSD permit decisions is discretionary and the Board's exercise of such discretion is circumscribed. A petitioner bears the burden of convincing the Board that review is warranted. 40 C.F.R. Part 124. Under the Board's procedural rules, review may be granted under two circumstances. First, the decision by the Regional Administrator may be reviewed if it is based on a "finding of fact or conclusion of law which is clearly erroneous." 40 C.F.R. § 124.19(a)(1). Second, review may be authorized if the permit action involves "an exercise of discretion or an important policy consideration" which the Board believes, in its discretion, it should review. 40 C.F.R. § 124.19(a)(2).

The Board has not articulated how this general standard of review will change, if at all, once review of a permit has been granted. *See generally Dominion Energy Brayton Point*, 12 E.A.D. 490, 508-511 (EAB 1994) (discussing standard of review in a final order after previously granting review of NPDES permit). However, it is a long-standing EPA policy to favor final adjudication of most permitting decisions at the regional level. *See In re MCN Oil & Gas Company*, UIC Appeal No. 02-03, slip op. at 6 (EAB, September 4, 2002) 2002 WL 31030985. As EPA has repeatedly observed, "most permit conditions should be finally determined at the Regional level" and therefore the power of review will only be employed "sparingly." *See* 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 705 (EAB 2001). Accordingly, the Board frequently defers to regional permit authorities in its review of permit appeals, especially on matters of a technical nature. *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 54 (EAB 2001).

SUMMARY OF ARGUMENT

The Clean Air Act and EPA regulations do not currently require that a PSD permit contain emissions limitations for carbon dioxide. The EPA Administrator long ago established that the Agency "lacks the authority to impose [PSD permit] limitations or other restrictions directly on the emission of unregulated pollutants." *North County Resource Recovery Assoc.*, 2 E.A.D. 229, 230 (Adm'r 1986). While EPA is currently exploring options for addressing greenhouse gas emissions in response to the Supreme Court decision in *Massachusetts v. EPA*, the Agency has not yet issued regulations requiring control of carbon dioxide emissions under the Act.

The language in sections 165(a)(4) and 169(3) of the Clean Air Act requiring technology-based emissions limitations for "each pollutant subject to regulation under the Act"[3] is permissibly construed in context to call for emissions limitations under the PSD program only for those pollutants that are otherwise subject to controls on emissions based on an express EPA determination or Congressional directive that such control is appropriate. Given that this language appears in a section 165(a)(4) – a provision that requires actual controls on emissions – it is reasonable to interpret Congress to have intended EPA to apply such controls to the pollutants that are controlled under other provisions of the Act. Considering that Congress authorized EPA to gather emissions data under other provisions of the Clean Air Act to inform the Administrator's judgment on whether to establish controls and required reasoned decisionmaking, it is fully consistent with Congressional design to decline to establish BACT limitations on

[3] The United States Code refers to "each pollutant regulated under this chapter," which is a reference to Chapter 85 of Title 42 of the Code, where the Clean Air Act is codified. *See* 42 U.S.C. §§ 7475(a)(4), 7479(3). For simplicity, this Response generally uses "the Act" and the Clean Air Act section numbers rather than the U.S. Code citation.

pollutants that are not yet controlled but only subject to data collection and study. The interpretation of the BACT provisions reflected in Region VIII's Response to Comments gives meaning to the Supreme Court's recent holding that greenhouse gases qualify as air pollutants and that the Administrator must evaluate whether to regulate such pollutants under the criteria in the Clean Air Act.

Consistent with this Congressional intent, for nearly 30 years EPA has consistently interpreted the BACT provisions of the PSD program to apply only to emissions of pollutants that are controlled or limited under the Clean Air Act or EPA implementing regulations. Since the monitoring and reporting requirements applicable to carbon dioxide under section 821 of the Clean Air Act Amendments of 1990 and EPA regulations do not require control of, or otherwise limit, carbon dioxide emissions, these requirements do not constitute "regulation" that invokes the BACT requirements under the PSD program. The Petitioner and amici are the parties advancing new interpretations of the Clean Air Act and PSD regulations on the basis of provisions that were: (i) not cited in prior adjudications of the Board addressing whether carbon dioxide was a regulated pollutant, (ii) not raised in public comments on a rulemaking in which EPA identified the pollutants currently subject to regulation and proposed to exclude or include other pollutants based on the 1990 amendments to the Act, and (iii) not even cited in the public comments on the permit at issue in this case.

In addition, BACT does not apply to pollutants for which EPA possesses the authority to regulate but has not yet regulated. If section 165(a)(4) and 169(3) were interpreted to require EPA to establish PSD emission limits for all pollutants merely capable of regulation in the future, it would result in an administratively unworkable

program which would permits issued under the PSD program to contain emissions limitations on the basis of presumed decisions under other provisions of the Act that the Administrator has not yet made or developed a record to support.

Furthermore, since section 821 of the 1990 amendments did not actually amend the Clean Air Act, the reporting and monitoring of carbon dioxide is not actually required under the Clean Air Act. As a result, even if monitoring and reporting was a "regulation," carbon dioxide is not currently a pollutant regulated under the Clean Air Act. Thus, the absence of a carbon dioxide emissions limitation in the Deseret PSD permit does not establish grounds for remand.

Finally, because Petitioner chose to make a source-specific permitting action the forum to advance its new interpretation of the Clean Air Act and to challenge EPA's historic reading of the Act (based on an overbroad reading of a recent Supreme Court decision), the Board should not entertain the arguments that EPA's entire PSD permitting process should be suspended pending a notice and comment rulemaking on this topic. Given that the Region has followed established Agency interpretations that are not affected by the Supreme Court decision, there is no cause for the Board to remand this case for notice and comment rulemaking.

ARGUMENT

I. Carbon Dioxide Is Not Currently A Pollutant "Subject to Regulation"

Carbon dioxide is not currently an air pollutant "subject to regulation" because neither EPA nor Congress has established National Ambient Air Quality Standards or New Source Performance Standards for carbon dioxide, identified carbon dioxide as a Class I or II substance under Title IV of the Clean Air Act, or otherwise required control of carbon dioxide emissions under any other provision of the Act. *See* 40 C.F.R. §

52.21(b)(50). Region VIII's conclusion that the Agency's regulatory definition of "regulated NSR pollutant" does not incorporate pollutants subject only to reporting and monitoring requirements is consistent with nearly 30 years of EPA practice and is not precluded by the terms of the Clean Air Act. The Agency's historic interpretation of the ambiguous phrase "pollutant subject to regulation under the Act" language in sections 165(a)(4) and 169(3) of the Clean Air Act is a permissible one, considering the context in which this language is used in the Act. *See* 42 U.S.C. §§ 7475(a)(4), 7479(3). EPA's interpretation of the language in the definition of "regulated NSR pollutant" was apparent at the time this provision was drafted, and the Agency's interpretation was consistent with prior interpretive statements and decisions of the Environmental Appeals Board concluding (after the 1990 amendments of the Clean Air Act) that carbon dioxide was not a "pollutant subject to regulation under the Act." The basis for this interpretation has not been undermined by the Supreme Court's decision in *Massachusetts v. EPA*.

A. The BACT Provisions In The Clean Air Act Are Permissibly Construed To Require Limits Only for Pollutants Otherwise Subject to Controls

Petitioner's preference that EPA apply a different (and even broader) interpretation of the phrase "subject to regulation under the Act" than the one adopted and applied by EPA for decades does not illustrate that EPA's interpretation of sections 165(a)(4) and 169(3) of the CAA is contrary to the plain meaning of the Act. Rather, at best, it merely illustrates that the phrase "subject to regulation under the Act" is ambiguous and susceptible to more than one interpretation. The various dictionary definitions cited in this case illustrate that the term "regulation" is susceptible to more than one meaning. Petitioner has provided no direct or contextual evidence that Congress intended that EPA choose one particular meaning of the undefined term "regulation."

The context of the Clean Air Act and case law support EPA's historic interpretation that the phrase "pollutants subject to regulation" describes pollutants for which the EPA or Congress has established actual controls on emissions.

1. The term "regulation" is susceptible to more than one meaning.

Congress did not define "regulation" in the 1977 or 1990 amendments to the Clean Air Act or provide any statement of its intended meaning of the term in the legislative history. Black's Law Dictionary (8th Ed.) defines regulation as "the act or process of controlling by rule or restriction," which is consistent with EPA's historic interpretation of the term in the context of sections 165(a)(4) and 169(3) of the Act. Petitioner's citation of an alternative meaning from the same dictionary and a different definition from Webster's dictionary simply illustrates the ambiguity of the term rather than establishing a plain meaning. Pet. at 6. Since Congress did not adopt its own definition of "regulation" in the Clean Air Act or incorporate any particular one from Black's or Webster's definitions, one must turn to the context of the Act and legislative history to determine whether Congress had a clear intent or left a gap for the Agency to fill in construing the phrase "pollutant subject to regulation." *See Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006) (when Congress employs a term susceptible to several meanings, the words of the statute should be read in context).

2. The context in which the term "regulation" is used in sections 165(a)(4) and 169(3) of the Clean Air Act illustrates that EPA's historic interpretation is permissible.

The context surrounding the BACT requirement of the PSD program supports the interpretation of the phrase "subject to regulation under the Act" applied by Region VIII in this case. As used in sections 165(a)(4) and 169(3) of the Clean Air Act, this language determines the applicability of a requirement to establish emissions limitations for new

and modified sources based on the use of the control technology determined to be the best available for the permitted source. Considering this, it is reasonable to interpret the BACT requirement as applying only to the same pollutants that are presently controlled under other parts of the Act based on a previous determination by the Administrator or Congress that such emissions should be controlled.

Congress explicitly tied the BACT requirement to the Agency's authority to establish emissions limitations under sections 111 and 112 of the Act.[4] The definition of BACT in section 169(3) establishes that BACT may in no case result in emission controls less stringent than the New Source Performance Standards (NSPS) or National Emissions Standards for Hazardous Air Pollutants established under the criteria in these provisions of the Act. This linkage indicates that Congress expected BACT to apply to pollutants controlled under these programs. As EPA observed in its 1980 PSD rules, the BACT requirement of PSD complements the NSPS program by extending coverage to additional source types and units and perhaps identifying candidates for future NSPS and hazardous air pollutant regulations. 45 Fed. Reg. 52676, 52723 (Aug. 7, 1980).

The BACT requirement was adopted in 1977 at a time when EPA's principal responsibilities under the Clean Air Act were to promulgate National Ambient Air Quality Standards (NAAQS), review and approve State Implementation Plans for achieving the NAAQS, reduce emissions from mobile sources under Title II, and promulgate the categorical emissions limitations discussed above under the NSPS and hazardous air pollutant programs. In this context, it was permissible for EPA to construe

[4] Congress has since excluded section 112 pollutants from the PSD program. 42 U.S.C. § 7412(b)(6). Congress added this provision in the 1990 amendments to the Clean Air Act. *See* Pub. L. No. 101-549, § 301.

"subject to regulation under the Act" to refer to pollutants controlled by the types of regulations EPA had the authority to adopt under those provisions of the Clean Air Act at that time.

Given the way Congress drafted sections 165(a)(4) and 169(3) of the Act, it is clear (and apparently not disputed in this case) that Congress intended for EPA to determine the applicability of the BACT requirement on the basis of decisions to regulate particular pollutants under other parts of the Act. Other provisions in the Clean Air Act that authorize the Administrator to establish emissions limitations or controls on emissions provide criteria for the exercise of the Administrator's judgment to determine which pollutants or source categories to regulate. Most of the criteria in the Act applicable to a determination by the Administrator to regulate pollutants or source categories are based on public health or welfare. Under section 108 of the Act, criteria pollutants (for which NAAQS are required) are listed in part based on the Administrator's judgment that emissions of the pollutant "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). In addition, under section 111 of the Act, source categories for which NSPS are promulgated are identified based on the Administrator's judgment that a source category "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Likewise, the provision at issue in the Supreme Court case calls for a similar finding of endangerment before EPA establishes controls on individual pollutants emitted by mobile sources. 42 U.S.C. § 7521(a)(1).

In those instances under the Clean Air Act where Congress has not left control of a pollutant to the Administrator's judgment and directed EPA to establish air quality standards or controls for individual pollutants, either the pollutants were already subject to controls under another provision of the Act or Congress clearly intended to substitute its judgment for the Administrator's by determining which pollutants to control. For example, when Congress established PSD increments in section 163 of the Act, the chosen pollutants (particulate matter and sulfur dioxide) were already subject to NAAQS at the time.[5] *See* 42 U.S.C. § 7473. In addition, when Congress directed EPA to promulgate additional increments or other measures for more pollutants in section 166 of the Act, it listed additional pollutants that were already covered by national standards. *See* 42 U.S.C. § 7476(a).[6] In Title VI of the Clean Air Act, Congress identified specific ozone depleting substances to be controlled in order to fulfill the United States obligations under Montreal Protocol on Substance that Deplete the Ozone Layer. *See* 42 U.S.C. § 7671a. When Congress listed 189 hazardous air pollutants in the revised version of section 112 adopted in the 1990 amendments and directed EPA to promulgate technology-based emissions standards for these pollutants, 42 U.S.C. § 7412(b)-(d), this

---

[5] In addition, EPA had previously established increments for particulate matter and sulfur dioxide in first PSD program regulations, which pre-dated the 1977 amendments to the Clean Air Act. 39 Fed. Reg. 42510 (Dec. 5, 1974).

[6] S. Rep. No. 95-127 at 30 ("EPA … is required to study strategies to prevent significant deterioration for other regulated pollutants"); H.R. Rep. No. 95-294 at 524-525 ("With respect to the other four pollutants (photochemical oxidants, nitrogen dioxide, hydrocarbons, and carbon monoxide) for which national standards are currently promulgated …"). At the time of the 1977 amendments, the term hydrocarbons was used to refer to what are now called volatile organic compounds, and ozone was the primary photochemical oxidant. *See* H.R. Rep. No. 95-294 at 253 (Letter of Administrator Costle to Congressman John E. Moss). Criteria documents and NAAQS for these substances were promulgated in the early 1970s. *See* H.R. Rep. No. 95-294 at 180. In addition, hydrocarbons were regulated under Title II of the Act in the 1970s. *See* S. Rep. No. 95-127 at 4.

program replaced an earlier air toxics program that had given the Administrator discretion to determine which air toxics to control on the basis of health risk determinations. H.R. Rep. No. 101-490. pt. 1 (May 1990) at 150-51, *reprinted in* Senate Committee on Environment And Public Works, Legislative History of Clean Air Act Amendments of 1990 (Comm. Print, Nov. 1993) (hereinafter "Leg. History of CAA Amendments of 1990"), at 3174-75. Congress made clear that its decision to do this was based on disappointment with the pace of regulation under the health-based air toxics program that had existed before 1990. *National Lime Ass'n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000), *citing* S. Rep. No. 101-228 (Dec. 1989) at 128, H.R. Rep. No. 101-490, pt.1 (May 1990) at 322.

In contrast, when it enacted section 821 of the 1990 amendments, Congress provided no indication that it intended for this provision to supplant EPA's discretion to determine which pollutants to regulate under the Act. Section 821 of the Clean Air Act Amendments of 1990 does not explicitly direct EPA to establish limitations or controls on carbon dioxide emissions. In the legislative history, the drafters of section 821 of the 1990 amendments (known as the Moorhead-Cooper amendment in the House) did not express any intent to require emissions controls on carbon dioxide under the PSD program or any other Clean Air Act program. Rather, they made clear that their intent was to gather information on carbon dioxide emissions in anticipation of potential *future* regulation. Statements of Congressman Moorhead, House Debates on May 17 and 23, 1990, *reprinted in* Leg. History of CAA Amendments of 1990 at 2613 and 2985-87; Statement of Congressman Cooper, House Debates on May 17, 1990, *id.* at 2563. In this context, Congressman Cooper said that his "amendment would not force any reductions

right now." *Id.* at 2563. Furthermore, in 1990, Congress did not add a definition of the term "regulation" or otherwise clarify that it intended the term "subject to regulation under the Act" used in section 165(a)(4) or 169(3) to cover emissions of pollutants like carbon dioxide that were not controlled under the Act. The PSD program is not mentioned in section 821 of the 1990 amendments or any legislative history associated with that provision.[7]

The context of the Clean Air Act also indicates that Congress intended for EPA to make informed and reasoned decisions to control emissions after evaluating relevant data. Section 114 of the Clean Air Act authorizes the Administrator to collect emissions data for a number of purposes, including development of State Implementation Plans and categorical emissions limitations. 42 U.S.C. § 7414(a). The enactment of this provision is evidence that Congress generally expected EPA would gather emissions data prior to establishing plans to control emissions or developing emissions limitations. Congress also included in section 307(d)(9) of the Clean Air Act a requirement for reasoned decision by authorizing courts to reverse Agency action that was arbitrary or capricious. 42 U.S.C. § 7414(d)(9). In combination, these provisions reflect an intent for EPA to collect emissions data to inform reasoned decisions whether to establish controls on air pollutants.

In the context of an Act designed to control emissions of air pollutants in various ways and to require reasoned decisionmaking informed by emissions data, it is

[7] As discussed further below, unlike many other provisions in the 1990 amendments to the Clean Air Act, section 821 was not drafted as an amendment to a specific provision of the Clean Air Act. *See* Pub. L. No. 101-549, § 821. This supports EPA's interpretation that Congress did not intend to make carbon dioxide subject to regulation under the Clean Air Act merely by virtue of the enactment of section 821.

permissible for EPA to decline to control under the PSD program those pollutants that are only subject to data gathering and study while establishing limitations under the PSD program for those pollutants that are controlled or limited based on the expressed judgment of the Administrator or Congress that such pollutants should be controlled. EPA's longstanding interpretation that the BACT requirement applies to pollutants subject to actual controls on emissions is broad, but the Agency's interpretation also has reasonable boundaries that make the NSR program effective, yet manageable, for EPA and the states to administer. EPA's interpretation allows the Administrator to first assess whether public health or welfare effects justify controlling a particular pollutant or source category, and then provide notice and an opportunity to comment when a new pollutant is proposed to be regulated under one or more programs in the Act. It also provides an opportunity for EPA to develop regulations to manage the incorporation of a new pollutant into the PSD program, for example, by promulgating a significant emissions rate (or *de minimis* level) for the pollutant when it becomes regulated. *See* 40 C.F.R. § 52.21(b)(23).

3. Petitioner and amici have not demonstrated that Congress clearly intended that EPA require BACT limits for pollutants subject to monitoring and reporting.

Considering the overall statutory design reflected in the Clean Air Act, Petitioner cannot show that Congress plainly intended to compel EPA to apply PSD controls to every pollutant subject to a study or the collection of emissions data, even if the study or data collection is implemented via a regulation. In contrast to EPA's interpretation that PSD complements the NSPS program by identifying additional source categories for standard setting, the view introduced by the Petitioner in this case is that Congress intended for the BACT requirement to extend coverage of the Clean Air Act to additional

pollutants, even if they are not presently subject to any controls and are merely subject to study. Petitioner's view does not square with the context of the Act and the requirements for reasoned decisionmaking contained in section 307 of the Act. Petitioner's interpretation would lead to the perverse result of requiring emissions limitations under the PSD program while the Administrator was still gathering the information necessary to allow him to evaluate whether he should establish controls on the pollutant under other parts of the Act – essentially the regulatory equivalent of shoot first and ask questions later. In other words, the mere act of gathering information would essentially dictate the result of the decision that the information was being gathered to inform. The overall structure of the Act does not support the interpretation that Congress intended for the Agency to establish PSD emissions limitations on a pollutant merely on the basis of a determination by Congress that the Agency should investigate the nature and extent of emissions or establish a baseline for emissions in the event of a future regulation.

Petitioner argues that it would not be premature and inconsistent with Congressional intent to apply BACT on the basis of the requirement to study pollutant emissions because the permit reviewing authority can account for energy, environmental, and economic impacts when establishing emissions limitations on a case-by-case basis for pollutants not otherwise subject to controls under the Act. Pet.'s Opening Brief at 18-19. However, this argument ignores the key criterion used throughout other provisions in the Act for determining whether there is cause to establish controls – impacts on public health or welfare. The nature and extent of emissions can inform the Administrator's judgments as to whether emissions warrant controls. Petitioner's interpretation would have EPA regulate pollutants under the PSD program before either the legislature or

executive branches have made a judgment that a pollutant in fact presents a danger to public health or welfare. In arguing that a requirement to study pollutant emissions is "regulation" for PSD permitting purposes, Petitioner misses the point when they cite the Supreme Court's observation that there is nothing inconsistent with ongoing research efforts and a mandate to regulate pollutants that may endanger public health or welfare. *Massachusetts v. EPA*, 127 S.Ct. at 1460-61. In finding a lack of inconsistency, the Supreme Court was in fact acknowledging a distinction not recognized by Petitioner between gathering data on pollutants and regulating pollutants based on a finding of endangerment. It is fully consistent with the Congressional intent and the Supreme Court decision to defer establishing emissions limitations under the PSD program until either the Administrator or Congress determines that potential effects on public health or welfare justify controls.

Grounding EPA's determination of which pollutants are regulated under the PSD program on the authority EPA had in 1977 to control emissions under the Clean Air Act does not preclude the Clean Air Act or the Agency from evolving to address changed circumstances. If the Administrator determines under section 202 or other provisions that potential effects on public health or welfare provide a basis to set standards for an additional pollutant not previously subject to controls, the PSD program can adapt to incorporate that pollutant. Furthermore, if Congress directs EPA to control an individual pollutant or category of pollutants, such as ozone depleting substances under Title VI to implement the Montreal Protocol, EPA can adapt the PSD program to incorporate these pollutants as the Agency did in its 1996 proposal and 2002 final rule (described in detail below). Importantly, EPA's traditional interpretation of "subject to regulation" ensures

that the adaptation to changed circumstances is orderly and reasoned, after the Agency has an opportunity to gather and analyze data and determine whether a particular pollutant should be controlled under the provisions in the Act that establish direct criteria for such an exercise.

Petitioner asserts that Congress could have used the defined term "emissions limitation" instead of the term "regulation" in sections 165(a)(4) and 169(3) of the Clean Air Act if the legislature had intended that EPA apply BACT only to pollutants subject to control or limitation, but this speculation overlooks the broader meaning that EPA has given to the phrase "subject to regulation." Although EPA has reasonably construed "subject to regulation" not to cover uncontrolled pollutants, EPA has also read this phrase to apply to emissions of ozone depleting substances, which are controlled through production and import restrictions that do not limit "the quantity, rate, or concentration of emissions on a continuous basis." *See* 42 U.S.C. § 7602(k) (definition of "emission limitation"). Petitioner's argument on page 14-15 of brief does not rebut this point, which considers the statutory language. EPA's interpretation of the term "regulation" is in fact broader than the definition of emissions limitation.

EPA's interpretation of the PSD provisions is not inconsistent with a Congressional intent to ensure that the PSD program or the Clean Air Act applies broadly. Such an intent does not require extending a program to its furthest extreme. The PSD program is already broad under EPA's interpretation, capturing every pollutant for which the Administrator or Congress has determined a need for emissions control except for hazardous air pollutants that are specifically exempted under section 112. Furthermore, although the use of the word "any" generally suggests an intent for broad

applicability, *see* UWNGO Brief at 5, the language used in both sections 165(a)(4) and 169(3) of the Clean Air Act is "*each* pollutant subject to regulation." 42 U.S.C. §§ 7475(a)(4), 7479(3) (emphasis added). Thus, cases that address the significance of the word "any" in statutory construction are inapposite here.[8]

4. Congress did not intend for the term "regulation" to have the same meaning under the PSD provisions of the Clean Air Act and section 821 of the 1990 amendments.

Petitioner has not demonstrated that Congress intended for the term "regulation" to have the same meaning throughout the Clean Air Act and the 1990 amendments. As an initial matter, Congress did not actually use the same term in section 821 of the 1990 amendments and the PSD provisions in the Act. Section 821 of the 1990 amendments uses the plural "regulations" whereas the PSD provisions use the singular "regulation." *Compare* Pub. L. No. 101-549 § 821 (EPA Administrator "shall promulgate regulations....") *with* 42 U.S.C. § 7475(a)(4) ("proposed facility is subject to [BACT] for each pollutant subject to regulation"). This distinction is not without significance. Congress did not write section 165(a)(4) to say "subject to regulation**S** under the Act" or "subject to **A** regulation under the Act." The latter phrasing would have been more consistent with the dictionary meanings that describe a regulation as a "rule" such as would be contained in the Code of Federal Regulations. If, as Petitioner argues, Congress could have used the term "emissions limitation," it certainly would not have

[8] In the definition of "regulated NSR pollutant" in EPA's regulations, the term "any" modifies the word "pollutant," but it does not shed any light on the meaning of the phrase "subject to regulation." *See* 40 C.F.R. § 52.21(b)(50)(iv). Furthermore, as discussed further below, when the Agency promulgated this definition, it did not interpret this fourth prong of the rule to cover carbon dioxide. *See New York v. EPA*, 443 F.3d 880, 887-88 (D.C. Cir. 2006) (noting that the use of the modifier "any" in the definition of an NSR modification "cannot bring an activity that is never considered a 'physical change' in ordinary usage within the ambit of NSR").

been any harder for Congress to add an "S" or an "A" if this was in fact how Congress intended for EPA to read section 165(a)(4) of the Act. But that is not the phrasing that Congress chose. Congress instead chose in section 165(a)(4) to use the term "regulation" in a context that is more suitable to the dictionary meaning historically followed by EPA that refers to an "act or process" rather than a "rule."

Even if one is not persuaded by the fine distinction in meaning that results from the absence of the article and the plural in section 165(a)(4) of the Act when compared to section 821 of the 1990 amendments, the context of each provision is sufficient to demonstrate that Congress did not clearly intend for the terms "regulation" and "regulations" to have the same meaning across these two provisions. The verbs that are used adjacent to the term "regulation" and "regulations" are different. Section 821 of the 1990 amendments directs the administration to "promulgate regulations" that require monitoring and reporting while section 165(a)(4) requires the Agency to determine which pollutants are "subject to regulation." The latter terminology is more naturally read to describe an "act or process," which supports EPA's application of the meaning from Black's Law Dictionary (8th Ed.) that emphasizes "controlling by rule or restriction." The phrase "promulgate regulations" fits best with the adoption of a "rule or practice" or "rule of order," as used in the dictionary meanings from Black's and Webster's cited by Petitioners. Pet. at 6.

Furthermore, the contextual subject matter of these two provisions differs. Section 821 of the 1990 amendments uses the term "regulations" to describe the rules that EPA was directed to promulgate incorporating the monitoring and reporting obligations for carbon dioxide, whereas sections 165(a)(4) and 169(3) refer to pollutants that must be

restricted by a technology-based emissions limitation. As discussed in detail above, this distinction is significant because under other provisions of the Act, particular pollutants are subject to standards or controls only after the Administrator has determined that such controls are warranted or Congress has explicitly directed the Administrator to establish controls for a pollutant. Since no other provision of the Act indicates Congressional intent to control emissions solely on the basis of a directive to monitor and report the emissions, it does not follow that Congress would have intended the term "regulation" (and the plural of the same) in both provisions to have such an effect.

These contextual differences are sufficient to overcome the general presumption that Congress intended for the term "regulation" in section 165(a)(4) of the Act to have the same exact meaning as the term "regulations" in section 821 of the 1990 amendments. *Environmental Defense v. Duke Energy Corp.*, 127 S.Ct. 1423, 1432 (2007) (explaining that the general presumption that the same term has the same meaning is not rigid and readily gives way to context). In the *Duke* case, the Supreme Court held that EPA had the discretion to construe the term "modification" differently in the NSPS and NSR programs, even though both relied on the exact same definition of "modification" in section 111(a)(4) of the Act. *Id.* at 1432. Finding no "iron rule" to cause it to ignore EPA's reasons for regulating PSD and NSPS modifications differently, the Court held that EPA's construction of the Act needed to do nothing more than fall with the limits of what is reasonable. *Id.* at 1434. Petitioner has not demonstrated any "iron rule" that Congress intended for PSD to cover pollutants only subject to monitoring and reporting and EPA's historic interpretation of the PSD provisions is reasonable in the context of the Act.

5. EPA's interpretation gives meaning to the Supreme Court decision in *Massachusetts v. EPA*, which held only that the Administrator should evaluate whether to regulate carbon dioxide.

Contrary to Petitioner's argument, the Supreme Court's decision in *Massachusetts v. EPA* did not change the basic architecture of the Clean Air Act or the basis for EPA's interpretation of the PSD provisions when it held that carbon dioxide and other greenhouse gases are "air pollutants" under section 302(g) of the Act. In fact, the Court's decision is more compatible with EPA's reading of the Act than with Petitioner's in that it remands the case so the Administrator can exercise his discretion to determine whether carbon dioxide should be regulated under the criteria in section 202 of the Clean Air Act. EPA's historic interpretation of the BACT requirement in the Clean Air Act is fully consistent with and gives meaning to the Court's decision.

The Supreme Court's decision does not require permitting authorities (including EPA Region VIII) to set carbon dioxide emission limits in PSD permits in the absence of some other regulatory action. The Board recognized this when it concluded in a recent decision that "the interpretation of federal law announced by the Supreme Court in its *Massachusetts* decision, standing alone, does not compel application of a CO_2 BACT limit." *In Re Christian County Generation*, LLC, PSD Appeal No. 07-01, slip op. at 17 (EAB Jan. 28, 2008). The decision in *Massachusetts v. EPA* did not instantly render carbon dioxide "regulated" under the Clean Air Act, hold that carbon dioxide was already regulated, or direct EPA to regulate carbon dioxide and other greenhouse gas emissions under section 202 or any other section of the Act. The Supreme Court simply concluded that carbon dioxide and other greenhouse gas emissions are "air pollutants" under section 302(g) of the Act, *127* S. Ct. at 1460, and therefore found that EPA was not precluded from regulating these substances under section 202 of the Act, *id.* at 1462-63. The Court

clearly indicated that the Agency would have to take additional steps on remand, including making a finding of endangerment to public health or welfare, before carbon dioxide could become regulated under section 202 of the Clean Air Act. *Id.* at 1363.[9]

There is a difference between an "air pollutant" under section 302(g) of the Act and a "pollutant subject to regulation" within the meaning of sections 165(a)(4) and 169(3) of the Act. *See Knauf Fiber Glass*, 8 E.A.D. 121, 162 (EAB 1999) (noting that "not all air pollutants are covered by the federal PSD review requirements"). Because not all "air pollutants" are "pollutants subject to regulation," it is clear that the *Massachusetts* decision did not make carbon dioxide "subject to regulation" for PSD permitting purposes and did not change longstanding EPA policy and EAB precedent regarding the interpretation of that phrase. The Supreme Court decision effectively forced EPA to return to the interpretation (and distinction) reflected in the 1998 memorandum of EPA General Counsel Cannon discussed further below, which concluded that although carbon dioxide was an air pollutant, it had not yet been regulated.

6. The D.C. Circuit opinion in *Alabama Power* affirmed EPA's historic interpretation of the Act.

Petitioner's and amici's reliance on the D.C. Circuit's opinion in *Alabama Power* is also misplaced. That decision actually upheld EPA's interpretation of the term "subject to regulation" and rejected an argument by industry petitioners that the statute mandated a narrower interpretation. *Alabama Power v. Costle*, 636 F.2d 323, 405-6 (D.C. Cir. 1980). The D.C. Circuit upheld the Administrator's 1978 interpretation and

[9] As EPA has indicated previously, the Agency currently is developing an overall approach to most effectively address the emissions of carbon dioxide and other greenhouse gases under the CAA, including responding to the remand in *Massachusetts v. EPA*. *See* Response to Comments at 5, Ex. 1 to Pet.'s Opening Brief.

rejected an argument that attempted to narrow PSD to cover just the two pollutants for which Congress had established PSD increments in the Act (sulfur dioxide and particulate matter), when many more pollutants were already regulated by EPA under the Clean Air Act at the time. In rejecting industry's argument, the court did not instruct EPA as to how it should interpret the phrase "subject to regulation" and thus said nothing that directed EPA to expand or otherwise alter its interpretation.

There is no support in the *Alabama Power* opinion for the Petitioner's assertion (on page 29 of it brief) that the D.C. Circuit held that BACT applies to pollutants not yet subject to actual control of emissions. The central issue in this part of the case was whether the language in section 165(a)(4) – the requirement to establish BACT limitations for each pollutant regulated under the Act – was superseded or delayed by the requirement in section 166(a) of the Act that EPA conduct a study prior to promulgating maximum allowable increases (known as the PSD increments) or other measures[10] for specific pollutants. The court held that there was no conflict between sections 165 and 166 and thus concluded that there was no support for industry's argument that Congress intended to limit the BACT requirement to only those two pollutants (sulfur dioxide and particulate) for which Congress had already established PSD increments until EPA promulgated additional increments under section 166. *Id.*, 636 F.2d at 406. Each of the pollutants listed in section 166(a) of the Act was already regulated at the time under a NAAQS or NSPS provisions. *See* fn 6, *supra.* Thus, the issue that the court decided was only whether the requirement in 166(a) to study these enumerated pollutants precluded

[10] As EPA has recognized in recent rulemaking, the Agency has the discretion to promulgate measures other than increments to satisfy the requirements in section 166 of the Act. 72 Fed. Reg. 54112 (Sept. 21, 2007); 70 Fed. Reg. 59582 (Oct. 12, 2005).

the language in sections 165(a)(4) and 169(3) of the Act from sweeping up these same pollutants that were already regulated under other provisions of the Act.

The *Alabama Power* court did not identify the specific pollutants that it believed were subject to regulation or hold that each of the pollutants listed in section 166(a) was subject to regulation by virtue of the fact that Congress had called for study of the pollutants prior to establishing additional pollutant-specific regulations under section 166. Thus, the *Alabama Power* case does not support the view that a pollutant is "subject to regulation under the Act" based solely on a requirement to study, monitor, or report emissions.

When considered in context, it is clear that the various passages from this opinion quoted by the Petitioner do not extend the reach of the court's holding as far as the Petitioner contends. For example, the court's observation that Congress chose not to delay the applicability of PSD to the section 166 pollutants until the studies and regulations required under section 166 were completed merely reflects the holding that section 166 does not postpone the requirements in section 165 of the Act that are applicable to pollutants already subject to regulation under other provisions. Furthermore, the *Alabama Power* court's statement that "[t]he language of the Act does not limit the applicability of PSD only to one or several of the pollutants regulated under the Act," 636 F.2d at 404, only reflects the court's holding that all of, versus some of, the pollutants regulated under the Act must be covered. This passage says nothing about what is required for an individual pollutant to be considered "regulated under the Act." Likewise, the quoted statement that "[t]he statutory language leaves no room for limiting the phrase 'each pollutant subject to regulation' to sulfur dioxides and particulates," *id.* at

406, means only that BACT was not limited to just the two pollutants for which increments had already been established. This passage does not reflect a holding by the court that there is no room remaining for EPA to determine the meaning of the term "regulation" and the pollutants that are subject to regulation.

B. Region VIII Based Its Action on Applicable Regulations and EPA's Established Interpretation of Those Regulations.

The Region appropriately based its permitting decision on the applicable PSD regulations and the Agency's established interpretation of those regulations, which is not precluded by, but rather supported by, the structure of the Clean Air Act. The Clean Air Act requires PSD permits to contain technology-based emissions limitations for "each pollutant subject to regulation under the Act." *See* 42 U.S.C. §§ 7475(a)(4), 7479(3). In accordance with that statutory provision, EPA regulations specify that PSD emissions limits are required "for each regulated NSR pollutant" emitted by the facility. 40 C.F.R. § 52.21(j). The Region based the Deseret permit on the regulatory definition of "regulated NSR pollutant" in section 52.21(b)(50) and the Agency's established interpretation of this definition and the Clean Act provision on which the definition is based. Response to Comment at 5-6 (Response #1.a.), Ex. 1 to Pet.'s Opening Brief.

1. EPA's definition of "regulated NSR pollutant" in the PSD regulations does not cover carbon dioxide.

As discussed in the Region's Response to Comments, EPA's PSD permitting regulations define a "regulated NSR pollutant" to include those pollutants for which emission control measures are required under three principal program areas – pollutants for which NAAQS have been promulgated (and their precursors), pollutants subject to a section 111 New Source Performance Standard (NSPS), and class I or II substances

regulated under title VI of the Act.[11] 40 C.F.R. § 52.21(b)(50)(i)-(iii). There is no dispute that carbon dioxide is not regulated under any of these three programs.

Consistent with the text of the Clean Air Act, the definition of "regulated NSR pollutant" also covers any "pollutant that otherwise is subject to regulation under the Act." 40 C.F.R. § 52.21(b)(50)(iv). However, consistent with the context of the Clean Air Act discussed above, EPA has never interpreted this phrase in the definition of its regulation to cover pollutants subject only to monitoring and reporting requirements, such as those applicable to carbon dioxide under section 821 of the 1990 amendments to the Clean Air Act and the Part 75 regulations that implement that provision. At the time EPA adopted its definition of "regulated NSR pollutant," the Agency listed in the preamble to the rule each pollutant that was "currently regulated under the Act" and "subject to Federal PSD review and permitting requirements." 67 Fed. Reg. 80186, 80240 (Dec. 31, 2002).[12] This list did not include carbon dioxide or any other pollutant that was not subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant.

The language in the final preamble is explicit that the list contains pollutants "currently regulated under the Act" and contains no reservation that the list was not intended to be a comprehensive and exclusive list of all pollutant that EPA considered

---

[11] Class I or II substances are specific categories of ozone depleting emissions.

[12] EPA listed CO, NOx, SO_2, PM and particulate matter less than 10 microns in diameter (PM-10), Ozone (VOC), Lead (Pb) (elemental), Fluorides (excluding hydrogen fluoride), Sulfuric acid mist, H_2S, TRS compounds (including H_2S), CFCs 11, 12, 112, 114, 115, Halons 1211, 1301, 2402, Municipal Waste Combustor (MWC) acid gases, MWC metals, and MWC organics.

regulated at the time.[13] 67 Fed. Reg. at 80240. Moreover, the list in the 2002 rule added ozone depleting substances that were regulated for the first time in the 1990 amendments and removed hazardous air pollutants which were exempted for the first time based on the same amendments. Thus, it is clear that EPA intended the 2002 rule to update the PSD program to reflect the 1990 amendments and that, if EPA had interpreted the Act or its regulations to "regulate" carbon dioxide, the Agency would have incorporated this substance as well.[14]

EPA's interpretation of the last clause in the definition of "regulated NSR pollutant" has consistently followed the rule of construction known as *ejusdem generis*, which provides that "[w]here general words follow the enumeration of particular classes of things, the general words are most naturally construed as applying only to things of the same general class as those enumerated." *See American Mining Congress v. USEPA*, 824 F.2d 1177, 1189 (D.C. Cir. 1987). In *American Mining Congress*, the D.C. Circuit examined whether EPA correctly amended the regulatory definition of "solid waste" to

---

[13] Although a NAAQS for $PM_{2.5}$ was promulgated prior to 2002, EPA did not include $PM_{2.5}$ on this list. EPA did not directly address $PM_{2.5}$ under the PSD program at this time because it was using PM_{10} as a surrogate for $PM_{2.5}$ under an interim implementation policy. *See* Memorandum from John S. Seitz, Director Office of Air Quality Planning and Standards, to Regional Air Directors, *Interim Implementation of New Source Review for PM2.5* (Oct. 23, 1997).

[14] At the time of this rulemaking, EPA had not yet changed the General Counsel's interpretation that carbon dioxide was an air pollutant. The Memorandum of General Counsel Fabricant that reversed this interpretation was not issued until August 2003. Memorandum from Robert Fabricant, General Counsel to Marriane Horinko, Acting Administrator, *EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act* (Aug. 28, 2003). Any suggestion that carbon dioxide was excluded from the 2002 rule based on the interpretation later articulated in the Fabricant memo is belied by the fact that EPA proposed the same list in 1996, when by the same logic the agency would have held the view later articulated in the Cannon memo. Petitioner can cite to no evidence that prior to the 1998 Cannon memo, it was EPA's view that Congress did not authorize EPA to treat carbon dioxide as an "air pollutant" under section 302(g) of the Clean Air Act.

include materials destined for reuse in an industry's ongoing production process. The court found that because the statutory definition of "solid waste" contained three specific terms – garbage, refuse, and sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility – and "the broader term, 'other discarded material'... [i]t is most sensible to conclude that Congress, in adding the concluding phrase 'other discarded material,' meant to grant EPA authority over similar types of waste, but not to open up the federal regulatory reach of an entirely new category of materials." *Id.* at 1189-90. Likewise, EPA's interpretation of section 52.21(b)(50)(vi) should be upheld because it sensibly covers regulations of a like kind that require control of emissions, while Petitioner's new interpretation would open up the PSD program to a new category of pollutants that have never been considered "regulated" under the Act.

The 1996 PSD rule proposal upon which the 2002 regulations are based also listed each of the pollutants that the Agency considered "currently regulated under the Act as of January 1, 1996," and that list also did not include carbon dioxide. 61 Fed. Reg. 38250, 38310 (July 31, 1996). This quoted language is comprehensive in nature and provides no support for Petitioner's contention that it was not intended by the Agency to be an exclusive list. Furthermore, the proposal provided notice of EPA's intent to update its PSD regulations to exclude hazardous air pollutants[15] from the PSD program and to include ozone depleting substances on the basis the 1990 amendments to the Clean Air Act. 61 Fed. Reg. at 38,307-11. Commenters who believed EPA should read "subject to regulation" more broadly and expand the definition of "regulated NSR pollutant" to

[15] In the 1990 amendments, Congress adopted section 112(b)(6) of the Clean Air Act, which excludes hazardous air pollutant (HAPs) from PSD. 42 U.S.C. § 7412(b)(6); Pub. L. No. 101-549, § 301.

include carbon dioxide by virtue of the enactment of section 821 of the 1990 amendments had notice of the EPA's contrary view and had the opportunity to present their current arguments to the Agency more than 10 years ago. There is no indication that any commenters did so.

Thus, through the contemporaneous adoption of the regulatory language and publication of a definitive list of pollutants subject to regulation at the time, EPA established its interpretation of the phrase "pollutant that otherwise is subject to regulation" in section 52.21(b)(50)(iv). Since this was consistent with EAB decisions and guidance memorandum discussed below that had clearly stated that carbon dioxide was not a regulated pollutant, there was no need for EPA to explicitly state in the final 2002 notice that the Agency intended to exclude carbon dioxide from the PSD program.

Petitioner and other interested parties had an opportunity to contest EPA's interpretation of section 52.21(b)(50)(iv) at the time it was adopted in 2002, and they are barred under section 307(b)(1) of the Clean Air Act from collaterally attacking EPA's interpretation of that regulation in this proceeding. *See* 42. U.S.C. 7601(b)(1) (requiring that challenge to nationally-applicable rules be brought in the D.C. Circuit within 60 days of publication in the Federal Register). The Board has no grounds to now change the interpretation established in the 2002 rulemaking, especially when it is consistent with the Clean Air Act and two of the Board's own opinions holding that carbon dioxide is not a regulated pollutant after the 1990 amendments of the Clean Air Act.

2. EPA's definition of "regulated NSR pollutant" codified an interpretation of the Act consistently followed by the Agency and articulated in statements available to the public.

When EPA proposed regulations in 1996 to update its list of pollutants subject to the PSD program based on the 1990 amendments, its interpretation of the statutory

language "subject to regulation under the Act" was apparent to the regulated community and other stakeholders from an Agency memorandum addressing section 821 of the 1990 amendments and an EAB order holding that carbon dioxide was not regulated. Furthermore, before this proposal was finalized in 2002, EPA's interpretation of the Act was amplified in two additional documents that were consistent with the EPA documents that had preceded them.

a. The 1993 Wegman Memo clearly set forth EPA's position that section 821 of the 1990 amendments did not render carbon dioxide a pollutant "subject to regulation under the Act."

In April 1993, shortly after the Part 75 Acid Rain Program regulations relied on by Petitioner were finalized (*see* 58 Fed. Reg. 3590 (Jan. 11, 1993)), the Office of Air and Radiation issued an interpretation that specifically considered section 821 of the 1990 amendments and concluded that carbon dioxide was not "subject to regulation" because section 821 only called for reporting and study of carbon dioxide and did not involve "actual control of emissions." Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, entitled *Definition of Regulated Air Pollutant for Purposes of Title V,* at 5 (April 26, 1993) ("Wegman memo"), Ex. 4 to Pet.'s Opening Brief. The Wegman memo described those pollutants "subject to regulation under the Act" for title V permitting purposes, but it noted that the Agency's interpretation of this phrase was similar to the one used in PSD permitting. *Id.* at 5.

The 1993 Wegman memorandum described the scope of pollutants covered by the Title V program on the basis of a two-step line of reasoning reflected in three paragraphs in section II of that document (pages 4-5). In the first step, reflected in the first paragraph and first sentence of the second, the Agency adopted the premise that it was more consistent with the intent of Congress to interpret the section 302(g) definition of "air

pollutants" narrowly in the context of Title V to refer only to those pollutants subject to regulation under the Act. Then, in the second step, starting after the first sentence in the second paragraph, the Agency explained its interpretation of the phrase "subject to regulation under the Act," which is the same phrase used in section 165(a)(3) and 169(4) of the Clean Air Act applicable to the PSD program. As part of this second step, in the final paragraph of the discussion, the 1993 memo references a 1987 memorandum applicable to the PSD program that articulated the position that a pollutant regulated under the Act is one that is addressed in an ambient air quality standard or a categorical emissions limitation. Gerald E. Emison, Director, Office of Air Quality Planning and Standards, *Implementation of North County Resource Recovery PSD Remand* (Sept. 22, 1987) (footnote on the first page).

Since the first premise of the Wegman memo interpreted the section 302(g) definition of "air pollutant" more narrowly than the broad reading recently adopted by the Supreme Court, OAR and Region VIII do not dispute that Supreme Court decision casts doubt on the first premise of that memorandum. *Compare* Wegman Memo. at 4, *with Massachusetts v. EPA,* 127 S. Ct. at 1460. However, the *Massachusetts* decision did not address the second premise – the explanation of which air pollutants are reasonably considered "subject to regulation under the Act" for permitting purposes when that standard applies (as it does in this case). Thus, this second premise, which was based on prior PSD program guidance, remains a viable interpretation of the phrase "subject to regulation" and is reinforced by subsequent Agency actions described elsewhere in this Response.

Petitioner is incorrect that all the reasoning in section II of the Wegman memo (both the first and second premises) is undermined by the Supreme Court decision. Petitioner can find no support in the terms of the Wegman memo for its assertion that the Agency's reasoning in that memo was grounded on the view that Congress did not authorize EPA to regulate carbon dioxide or other greenhouse gases under the Clean Air Act. EPA's expressed basis for the first premise – adopting a narrower interpretation of section 302(g) in the context of Title V – was a concern that a broader interpretation of section 302(g) encompassing virtually any substance emitted into the atmosphere would subject sources with "no known prospect for future regulation under the Act" to the Title V program. Wegman Memo. at 4. Thus, the key concern reflected in the first step of EPA's reasoning in 1993 was the prospect of imposing Title V on sources that were not anticipated to be regulated at the time, which is consistent with the purpose of the Title V program to consolidate existing applicable requirements into a single permit vehicle. *See* 57 Fed. Reg. 32250, 32251 (July 21, 1992).

The Petitioner's assumed reason for why the Agency did not have any known plans to regulate carbon dioxide and methane – the view that Congress did not intend to authorize EPA to regulate such substances under the Clean Air Act – is not expressed anywhere in the 1993 memo. In fact, the memo suggests EPA's view at the time was the opposite. The final sentence of the second paragraph of the memo indicates that EPA believed carbon dioxide and methane could be classified as "pollutants subject to regulation" under the Act if the results of the studies required by the 1990 amendments to the Act suggested the need for regulation. Petitioner has cited no evidence in the Wegman memo or elsewhere to support their contention that EPA's view in 1993 was

that Congress did not intend for the Clean Air Act to cover carbon dioxide and other greenhouse gas emissions.

Thus, the actual terms of the Wegman memo indicate that the relationship of the two premises in section II of the memo is the opposite of what Petitioner contends. The fact that carbon dioxide and methane were not regulated at the time and had no known prospect for future regulation informed EPA's view that Congress intended for section 302(g) to be interpreted narrowly in the context of Title V to cover sources that were actually regulated under other provisions of the Act. Petitioner's contention that the first premise informed the second – that EPA interpreted the phrase "subject to regulation" narrowly based on the view that Congress did not intend to authorize EPA to regulate methane and carbon dioxide – is not supported by the terms of the memo.

b. Prior decisions of the Board also confirm that carbon dioxide is not a regulated pollutant.

Shortly after the issuance of the Wegman memo, in 1994, the Board issued its decision in the *Inter-power of New York* case, which also recognized that carbon dioxide was not a regulated pollutant. 5 E.A.D. 130, 151 (EAB 1994). In this opinion, the Board unequivocally concluded as follows:

> Both carbon dioxide and hydrogen chloride are, however, unregulated pollutants. In such circumstances, the Region was not required to examine control technology aimed at controlling these pollutants.

5 E.A.D. at 132. Nothing in the body of the Board's opinion or the footnote (number 35) cited in Petitioner's brief, supports Petitioner's claim that the petitioner waived the argument in the *Inter-Power* case that a technology-based limitation was required for carbon dioxide. The body of the opinion directly responds on the merits to the argument that various control technologies could have been employed by Region II to limit carbon

dioxide and hydrogen chloride. Footnote 35 addresses a separate argument that the Region should have considered the collateral carbon dioxide emissions from the use of a technology for controlling the regulated pollutant nitrogen oxides. The Board denied review on this issue because the Region had considered the collateral carbon dioxide emissions from the nitrogen oxide control technology and the Petitioner had merely parroted its earlier comments without addressing why the Petitioner believed the Region's response was inadequate. Id. at 151 n. 35. The text of the Board's opinion does not support Petitioner's assertion that the record was not sufficiently developed for the Board to address the question of whether carbon dioxide was a regulated pollutant. Since a conclusion that something is unregulated is necessarily based on the absence of any regulations, the lack of specific citations or more thorough analysis does not undermine the Board's holding.

In 1997, the Board issued its decision in the *Kawaihae Cogeneration Project* case, which upheld the Hawaii Department of Health's determination that carbon dioxide was not considered a regulated pollutant for permitting purposes because there were no regulations or standards prohibiting, limiting, or controlling the emissions of greenhouse gases from stationary sources at that time. 7 E.A.D. 107, 132 (EAB 1997). The Board denied review because the Petitioner had not provided any information suggesting that Hawaii's conclusion was clearly erroneous.

However, this holding should not be interpreted, as Petitioner argues, as a failure to reach the merits of the issue. The Board's opinion indicates that the petitioners in the *Kawaihae* case based their argument on international agreements concerning global warming, so the Board's opinion is at minimum a decision on the merits that such

agreements are insufficient to make carbon dioxide a regulated pollutant under the Clean Air Act. Furthermore, since Hawaii had reasoned that carbon dioxide was not regulated because there were no regulations in place prohibiting, limiting, or controlling carbon dioxide emissions, the Board's holding is instructive in this case. The Board's conclusion that the Petitioner had demonstrated no error in Hawaii's classification of carbon dioxide was consistent with the Agency's conclusion in the 1993 Wegman memo that a requirement for actual control of emissions was necessary for a pollutant to be subject to regulation.

Even if the Board were to conclude that its prior opinions do not dispose of the issue on which the Board has granted review in this case, this would not undermine the relevance of these opinions. The limitations in these cases asserted by Petitioner do not change the fact that the Board concluded in 1994 that carbon dioxide was not a regulated pollutant and found no clear error in 1997 with Hawaii's conclusion that carbon dioxide was not a regulated pollutant due to the absence of regulations prohibiting, limiting, or controlling the emissions of greenhouse gases. Furthermore, at the very least, the *Inter-Power* opinion provided notice to the stakeholder community of EPA's interpretation of the PSD provisions in the Act after the enactment of the 1990 amendments, after the promulgation of the Part 75 regulations, and before the 1996 notice of proposed rulemaking described above. The *Kawaihae* case amplified that interpretation while the 1996 rulemaking remained pending. Thus, these cases help illustrate that EPA has never wavered from its interpretation that the phrase "pollutant subject to regulation" refers to pollutants subject to regulations or statutory provisions requiring actual control of emissions.

c. *The 1998 Cannon memo also established that carbon dioxide was not a regulated pollutant*

In 1998, the Agency's General Counsel issued an opinion concluding that carbon dioxide qualified as an "air pollutant" under the definition of section 302(g) of Act, but he also made clear that he did not consider carbon dioxide to be regulated under the Act at that time. The opinion plainly stated that:

> EPA's regulatory authority under the Clean Air Act extends to air pollutants, which, as discussed above, are defined broadly under the Act and include SO_2, NO_x, CO_2, and mercury emitted into the ambient air. *EPA has in fact already regulated each of these substances under the Act, with the exception of CO_2.* While CO_2 emissions are within the scope of EPA's authority to regulate, the Administrator has made no determination to date to exercise that authority under the specific criteria provided under any provision of the Act.

Memorandum from Jonathan Z. Cannon, General Counsel to Carol M. Browner, Administrator, entitled *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (April 10, 1998) (emphasis added), Ex. 5 to Pet.'s Opening Brief. The General Counsel's analysis confirmed and amplified EPA's interpretation that a pollutant is not regulated until the Administrator or Congress require controls on emissions.

The significance of the Cannon memorandum is not minimized by Petitioners attempt to limit its analysis to only the Administrator's discretion to regulate carbon dioxide. Under the Petitioner's interpretation of the phrase "subject to regulation under the Act," by the date of the Cannon memo, the Administrator would have in fact already exercised her discretion to regulate carbon dioxide under a provision of the Act by virtue of her decision to implement section 821 of the Clean Air Act Amendments of 1990 under the Part 75 regulations. *See* Acid Rain Program: General Provisions and Permits, Allowance System, Continuous Emissions Monitoring, Excess Emissions and

Administrative Appeals (final rule), 58 Fed. Reg. 3590 (Jan. 11, 1993). Thus, the statement in the memo that carbon dioxide was not yet regulated would only make sense if the General Counsel were applying EPA's longstanding interpretation on what it means to be "regulated under the Act." Furthermore, if Congress had already made clear that carbon dioxide must be regulated under the PSD program, its stands to reason that the chief legal officer of the Agency would have mentioned such a significant event in the context of a discussion of the Administrator's authority to regulate a pollutant under other provisions of the Act.

d. EPA has consistently followed a reasonable interpretation of "subject to regulation under the Act" for nearly 30 years.

Each of the rulemakings, adjudications, and interpretive statements described above reinforced, and in the case of the regulations codified, the Agency's original interpretation of the term "subject to regulation" adopted by Administrator Costle nearly 30 years ago when he promulgated the first PSD regulations implementing sections 165(a)(4) and 169(3) of the Clean Air Act. In the 1978 preamble to EPA's first PSD rules after the 1977 amendments to the Clean Air Act, the Administrator observed that a pollutant " 'subject to regulation under the Act' means any pollutant regulated in Subchapter C of Title 40 the Code of Federal Regulation [CAA regulations] for any source type." 43 Fed. Reg. 26388, 26397 (June 19, 1978). To illustrate what was covered by this interpretation, the Administrator listed criteria pollutants subject to a NAAQS, pollutants regulated under a New Source Performance Standard, pollutants regulated under the National Emissions Standards for Hazardous Air Pollutants (since removed by 1990 amendments), and all pollutants regulated under Title II of the Act for mobile sources. *See id.* The interpretation adopted by the Agency in 1978 was the same

interpretation proposed by the Administrator in 1977. 42 Fed. Reg. 57479, 57481 (Nov. 3, 1977).

Although the Administrator also stated that he considered "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations" to be "subject to regulation under the Act," 43 Fed. Reg. 26388, 26397 (June 19, 1978), at that time Subchapter C of Title 40 of the C.F.R. only covered pollutants subject to a statutory or regulatory provision that required actual control of emissions. Moreover, the reference to Subchapter C of Title 40 of the C.F.R. was not repeated in any of the Agency's interpretative statements or rulemakings after the 1990 amendments and the adoption of the monitoring and reporting requirements for carbon dioxide in Part 75 of EPA's regulations, which is consistent with the Agency's view that "subject to regulation" describes only pollutants subject to regulations requiring actual control of emissions.

As almost 30 years of history illustrates, EPA has consistently interpreted the phrase "pollutant subject to regulation," as used in the PSD program, to describe a pollutant for which the Administrator or Congress has required some form of control on emissions. Section 821 of the 1990 Clean Air Act amendments requires only that certain sources monitor and report carbon dioxide emissions and that EPA make such emissions data publicly available. 42 U.S.C. § 7651k note (found at Pub. L. No. 101-549, 104 Stat. 2699). This provision and the implementing regulations in Part 75 do not impose any limitations on carbon dioxide emissions or require sources to install carbon dioxide emissions controls. Thus, since section 821 of Public Law No. 101-549 and the Part 75 regulations do not establish emissions control requirements on carbon dioxide, it is not a pollutant "subject to regulation" under the Act and Region VIII did not err in its decision

to rely on several of these precedents and to exclude emissions limits on carbon dioxide from the Deseret permit.

II. BACT Does Not Apply to Pollutants for Which EPA Possesses The Authority to Regulate But Has Not Yet Regulated.

The Congressional objective of reasoned decisionmaking under the Clean Air Act would be further eroded under the interpretation of the phrase "subject to regulation" advocated by amici in this case. The Attorneys General of several states argue that carbon dioxide is now "subject to regulation" because EPA possesses but has not yet exercised the authority to impose controls on emissions of this pollutant. States' Brief at p. 6. These amici and others argue that EPA has no basis to deny that carbon dioxide endangers public health or welfare and thus that carbon dioxide is "subject to regulation" because regulations addressing carbon dioxide under sections 111 and 202 of the Clean Air Act are inevitable.

This is an unworkable interpretation of the Act that would have EPA establish emissions limitations under the PSD program on the basis of presumed decisions under other provisions of the Act that the Administrator has not yet made or developed a record to support. Regardless of whether EPA should or should not make an endangerment finding under section 202 of the Clean Air Act, the simple fact is that at this time the Administrator has not done so. The mere potential of such an action (even if amici believe it is a fait acompli) does not justify adopting such a broad interpretation of the PSD provisions.

Under the States' reading of the phrase "subject to regulation," *any* emissions that *could* be considered an air pollutant, and thus could *potentially* be subject to regulation under the CAA at *any* time in the future, would require an emissions limitation under the

PSD program *now*. This is clearly inconsistent with the EAB's previous observation that "[n]ot all air pollutants are covered by the federal PSD review requirements." *Knauf Fiber Glass*, 8 E.A.D. at 162. If section 165(a)(4) were interpreted to require EPA to establish PSD emission limits for all pollutants merely capable of regulation in the future, this would result in an administratively unworkable program. There would be almost no bounds to the substances for which permitting authorities would be required to set PSD limits, especially in light of the Supreme Court's reading of what constitutes an "air pollutant" under the Act. *See Massachusetts v. EPA*, 127 S. Ct. at 1460 (finding that the Act's "sweeping definition" of air pollutant "embraces all airborne compounds of whatever stripe"). In order to carry out their administrative functions, federal agencies are often afforded broad discretion in interpreting the statutory requirements and setting regulatory priorities. *Sierra Club v. Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987) (finding that given Congress' broad mandate to EPA under the CAA, "the Agency cannot avoid setting priorities" in carrying out its regulatory duties). Petitioner's argument completely usurps EPA's discretion to interpret and implement the PSD program under the CAA in an orderly and reasoned manner. *See generally Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423 (2007) (finding that EPA has discretion to define relevant statutory terms in the context of implementing the overall PSD program).

III. Since Section 821 of the 1990 Amendments Was Not Incorporated Into the Clean Air Act, Even Under Petitioner's Interpretation of "Subject to Regulation," Carbon Dioxide Still Is Not Subject to Regulation "Under the Act."

Although the monitoring and reporting provision in section 821 was enacted as part of the Clean Air Act Amendments of 1990 (Public Law 101-549), section 821 is one of a number of provisions of the public law that were not incorporated into the Clean Air

Act or codified into Chapter 85 of Title 42 of the United States Code. Section 821 of the 1990 amendments is only found in the United State Code compilation of the Act as a note after CAA section 412 (42 U.S.C. § 7651k). The House Energy and Commerce Committee's compilation of the Clean Air Act and related statutes does not include section 821 as part of the Clean Air Act, but instead includes this section among "Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) That Did Not Amend the Clean Air Act." *See* House Committee on Energy and Commerce, Compilation of Selected Acts within the Jurisdiction of the Committee on Energy and Commerce (Comm. Print, May 2001), at 441, 457-58.

Although EPA has implemented section 821 of Public Law 101-549 in conjunction with provisions of the Clean Air Act, the section is actually not part of the Act itself or Chapter 85 of Title 42 of the U.S. Code. Therefore, even if the Board were to find error in EPA's historic interpretation and consider pollutants for which sources need only monitor and report emissions to be "subject to regulation," that premise alone would not make carbon dioxide regulated "under the Act" for PSD purposes (or "under this chapter" when citing the U.S. Code). Consistent with Congressional direction and the language of Public Law 101-549, section 821 of the 1990 amendments was never included in the Clean Air Act or the Chapter of the United States Code in which the Clean Air Act appears.

A. Section 821 is an enforceable law, but not under the Clean Air Act.

EPA does not dispute that section 821 of Public Law 101-549 is an enforceable law as enacted by Congress, but contrary to Petitioner's assertions, section 821 applies independent of the Clean Air Act. *See* Pet.'s Opening Brief at 34-48. Petitioner argues that because section 821 was included in an enactment titled "Clean Air Act,

Amendments," the section "became part of the Clean Air Act." *Id.* at 34. But as Petitioner recognizes, the "presumption" that section 821 is part of the Act fails if there is "some indication that Congress intended otherwise." *Id.* In this case, the text of the public law itself provides a clear indication otherwise.

For each provision of Public Law 101-549 that was later codified as a section of the Clean Air Act, Congress inserted language indicating the exact place and section number where the language would appear in the Clean Air Act. For example, section 822 of 1990 amendments says "Section 327 of the Clean Air Act is amended to read as follows: ...." *See* Pub. L. No. 101-549, § 822; codified at 42 U.S.C. § 7626. In addition, section 801 of the 1990 amendments says "Title III of the Clean Air Act is amended by adding the following new section after section 327: ...." *See* Pub. L. No. 101-549, § 801, codified at 42 U.S.C. § 7627.

In contrast, Congress did not enact any language indicating that section 821 should be included in the Clean Air Act. *See* Pub. L. No. 101-549 § 821. The relevant statutory text of 821, which requires the Administrator to promulgate regulations for monitoring carbon dioxide emissions from certain stationary sources, was later included as a note to CAA section 412, which contains the monitoring, reporting, and recording requirements for the acid rain program, as codified in the United States Code chapter that contains the Act. *See* 42 U.S.C. § 7651k. Likewise, an examination of other provisions of Public Law 101-549 that were included only as notes to the sections of the Act included in the United States Code reveals there is no language like that cited above indicating that Congress intended any of those sections to be included in the Clean Air Act. *See, e.g.*, Pub. L. No. 101-549, § 811; note to 42 U.S.C. § 7612; Pub. L. No. 101-

549, § 305(c); note to 42 U.S.C. § 7429. Accordingly, in passing the public law known as the Clean Air Act Amendments of 1990, Congress gave a clear indication which sections were and were not to be treated as a part of the Clean Air Act, and this clear language trumps any presumption that section 821 is a part of the Act. *See Ardestani v. INS*, 502 U.S. 129, 135-136 (1991) ("The strong presumption that the plain language of a statute expresses congressional intent is rebutted only in rare and exceptional circumstances where a contrary legislative intent is clearly expressed.").[16]

The use of such indicator language by Congress in Public Law 101-549 shows that the House Energy and Commerce Committee's listing of section 821 among the "Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) That Did Not Amend the Clean Air Act" is not some type of "post-enactment legislative history." Pet.'s Opening Brief at 26. Rather, this publication is exactly what it purports to be – a compilation of the provisions of the 1990 amendments which Congress itself indicated were not a part of the Clean Air Act. Each provision listed in this section of the compilation is one of the provisions for which Congress did not specify incorporation into the Clean Air Act. Accordingly, each provision included in that section was not codified into the United States Code chapter containing the Clean Air Act, but rather was

[16] Petitioner also relies on one line of legislative history to support its argument that section 821 is a part of the Clean Air Act. Pet's Opening Brief at 34. However, the statement – that section 821 was a part of "establishing a final version of the Clean Air Act" – was made when the provision was originally offered as an Amendment to the House version of the Bill, not as a statement on the final bill passed by Congress. In fact, the final Conference Report on the Clean Air Act Amendments of 1990 does not discuss section 821. *See generally* H.R. Conf. Rep. No. 101-952, *reprinted in* Leg. History of CAA Amendments of 1990 at 1451-1805.

either included only as a note to a codified section in that chapter or not included in any section of that chapter.[17]

Petitioner cites to various cases to support its argument that inclusion of section 821 as a note to a codified provision in chapter of the United States Code containing the Clean Air Act means that section 821 is part of the Act. But *Conyers v. Merit Systems Protection Board* only supports the notion that section 821 is an enforceable law, not that it is part of the Clean Air Act. 388 F.3d 1380 (Fed. Cir. 2004).. In that case, the public law containing the Aviation and Transportation Safety Act (ATSA) included a specific employment provision that was included only as a note to the overall employment scheme codified in the United States Code in which the ATSA appears. The Federal Circuit found that the specific provision still applied to petitioner's claims because the text of the provision passed by Congress indicated that it applied "[n]otwithstanding any other provision of law." *Id.* at 1832 n.2 (discussing section 111(d) of Pub. L. No. 107-71, note to 49 U.S.C. § 44935). Likewise, in *New York v. EPA*, the D.C. Circuit was examining whether Congress would specifically indicate when it was incorporating an existing regulatory definition into the statutory text of the CAA. 413 F.3d 3 (D.C. Cir. 2005). While the court used the phrase "[e]lsewhere in the Act" to refer to a provision of the 1977 Clean Air Act amendments that was included only as a note to section 172 of the codified Act, the use of the phrase itself does not mean that section 821 and all other

[17] Petitioner also tries to argue that this section of the CAA Compilation was only intended to describe provisions of Public Law 101-549 "that were added to the Act without altering the original language." Pet.'s Brief at 36 n.13. However, this assertion is also incorrect. As shown above, Congress included a number of provisions in Public Law 101-549 that contained entirely new language for the CAA, and in so doing, Congress included language stating that the provisions should be added to and codified as part of the Act. *See* Pub. L. No. 101-549, § 801 ("Title III of the Clean Air Act *is amended by adding the following new section* after section 327: ....") (emphasis added).

section like it are a part of the Act because the specific question of whether the 1977 provision was actually part of the Clean Air Act was not before the court. *Id.*, 413 F.3d at 19.[18]

EPA does not dispute that section 821 is an enforceable law enacted by Congress, and that in passing that section, Congress directed EPA to require certain stationary sources to monitor and report carbon dioxide emissions. In fact, the Agency enacted regulations requiring the appropriate sources to monitor and report carbon dioxide emissions in order to implement that law. *See* 40 C.F.R. §§ 75.15(d), 75.81(a)(4). However, considering the exact language Congress used in section 821 of Public Law 101-549 and the later inclusion of that section only as a note to a codified provision of the CAA, there is no basis to find that section 821 is a part of the Clean Air Act itself or that any "regulation" arguably resulting from that law is regulation "under" the Clean Air Act.

B. EPA's promulgation of the carbon dioxide monitoring and reporting requirements of section 821 of the 1990 amendments did not make carbon dioxide regulated "under the Act."

In addition to asserting that section 821 of the 1990 CAA amendments is part of the Clean Air Act on its face, Petitioner and amici Utah and Western Non-Governmental

---

[18] Similarly, amici Utah and Western Non-Governmental Organizations' reliance on *New York v. Browner* does not make section 821 part of the Clean Air Act. UWNGO brief at 9-10. While *New York v. Browner* centered on the requirement for EPA to conduct the acid deposition studies required by section 404(2) of the 1990 amendments, which was included as a note to CAA section 401 in 42 U.S.C. § 7651, there is no indication that the court was asked to address the specific question of whether section 404(2) of the 1990 CAA amendments was a part of the Act. 1998 WL 213708 (N.D.N.Y., April 21, 1998). Moreover, section 404(2) of the Clean Air Amendments of 1990 can be differentiated from section 821 because section 404 of the 1990 amendments was specifically included among a list of provisions that became the new Title IV of the Clean Air Act. Section 401 of the 1990 amendments begins by stating "[t]he Clean Air Act is amended by adding the following new title after title III," and section 404 of the 1990 amendments is part of that new Title. Pub. L. No. 101-549, § 401. As discussed earlier, there is no specific language in the 1990 amendments adding section 821 to the Clean Air Act.

Organizations argue that carbon dioxide is regulated "under the Act" based on EPA's promulgation of the regulations implementing section 821. However, this assertion also fails.

While EPA incorrectly identified section 821 of the 1990 amendments as section 821 of the Clean Air Act in the course of prior rulemaking activities, *see generally* Pet.'s Opening Brief at 34-35, the Agency's prior statements did not and could not change the law enacted by Congress. As described in detail above, these prior statements by the Agency in the Federal Register and the Code of Federal Regulations were not consistent with the Congressional enactment, and the Agency should have been more precise in its terminology at that time. EPA's inartful drafting of language regarding section 821 in the course of broader rulemaking implementing the Title V Acid Rain program did not amend the Act or convert section 821 of the Public Law No. 101-549 into something it clearly is not – the Clean Air Act does not contain a Title VIII or any sections numbered in the 800s. Even if the Agency is entitled to no judicial deference on this issue because of its prior misstatements, it is immaterial because the Congressional language relating to this issue is unambiguous and controlling.[19]

Amici Utah and Western Non-Governmental Organizations further contend that even if section 821 is not part of the Act, the carbon dioxide monitoring and reporting requirement contained in Part 75 must be considered "a regulation 'under the Act' because it takes its authority from numerous provisions of the Act." UWNGO Brief at 9-

[19] Statements made in EPA briefs regarding the CAA status of section 821, *see* Pet.'s Brief at 37, also fail to supersede Congressional language to the contrary. Furthermore, EPA's brief in the *Massachusetts v. EPA* case correctly described section 821 as "section 821 of the CAA Amendments of 1990," even though it loosely described the list in which this language appeared as a list of "CAA provisions."

10. However, contrary to amici's assertions, EPA specifically indicated that it was relying on the statutory authority contained in section 821 of 1990 amendments in promulgating the carbon dioxide provisions of the Part 75 regulations. *See* 56 Fed. Reg. 63002, 63062 (Dec. 3, 1991) (stating that there was "statutory authority" under section 821 "to monitor carbon dioxide (CO_2) emissions," while section 412 of the Act provided authority for promulgating monitoring and reporting requirements "for SO_2, NO_x, opacity, and volumetric flow"); *see also id.* at 63085 (generally stating that carbon dioxide emissions monitoring was required under section 821). The reliance on section 821 to promulgate the specific carbon dioxide monitoring and reporting rules is more indicative of the authority upon which EPA relied than the more general statement at the beginning of the rule that the statutory authority for the overall rulemaking "Title IV of the Clean Air Act." *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (explaining that when reading two related statutory clauses, the specific language of one clause is not ordinarily overridden by a general language of the other because "the specific governs the general"). Thus, the carbon dioxide monitoring and reporting requirements of section 821 could have been, and were, promulgated independent of a specific CAA authority.[20]

[20] Amici Utah and Western Non-Governmental Organizations also argue that the carbon dioxide monitoring and reporting rules are promulgated "under the Act" because the appeal procedures contained in the Part 78 regulations apply to carbon dioxide and the authority to promulgate the Part 78 procedures came from the Act generally. UWNGO brief at 9. However, this argument fails to recognize that the Part 78 appeal procedures are general regulations that do not mention carbon dioxide reporting specifically – they simply provide a procedure for review of a decision implementing the underlying reporting requirements issued pursuant to section 821, but they do not make those reporting requirements part of the CAA itself.

Accordingly, EPA's promulgation of the carbon dioxide monitoring and reporting requirements included in section 821 of the 1990 amendments did not make section 821 a part of the Clean Air Act, nor did the regulations themselves become part of the Act.[21]

IV. A Remand to Initiate Notice and Comment Rulemaking On the Matter Before the Board is Not Justified

The Board should deny the request by Petitioner and several amici to remand this particular matter for the Agency to provide notice and an opportunity to comment on the Region's conclusion that carbon dioxide is not currently a regulated NSR pollutant. *See generally* Pet.'s Opening Brief at 31-33; NPCA Brief at 11; PSR Brief at 6, 12-15. As discussed in detail above, the legal interpretation applied by Region VIII in the Deseret permitting action was an established interpretation followed by EPA for nearly 30 years

---

[21] Petitioner also argues that carbon dioxide is already regulated under the Clean Air Act because EPA has approved a state implementation plan (SIP) containing carbon dioxide monitoring and reporting requirements and those monitoring and reporting requirements are included in the Code of Federal Regulations provisions for that SIP. *See* Pet.'s Opening Brief at 38-39. There is no indication that EPA specifically considered whether the carbon dioxide requirements were properly included in the SIP as provisions necessary to implement, maintain, and enforce the ozone NAAQS, *see generally* 58 Fed. Reg. 64115 (Dec. 6, 1993) and 59 Fed. Reg. 41709 (August 15, 1994), but their inclusion in an approved SIP would, at most, make carbon dioxide regulated under the Act only in the state subject to the approved SIP. Such a reading is required by the "cooperative federalism" that underlies the role of SIPs in the Clean Air Act. *See Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 467 (6th Cir. 2004). In the context of the PSD program, Petitioner's reading would make each provision of each individual state's SIP a CAA requirement with nationwide implications, where the specific decisions of one state in deciding how to implement the CAA within its borders could create PSD permitting requirements for all sources in all states. While Congress allowed individual states to create some CAA implementing regulations that are more stringent than federal regulations to apply within its borders, 42 U.S.C. § 7416, Congress did not allow individual states to set national regulations that impose those requirements on all other states. *See State of Connecticut v. U.S. E.P.A.*, 656 F.2d 902, 909 (2d Cir. 1981) (Finding that while a state is free to adopt air quality standards more stringent than required by the NAAQS or other federal law provisions, Congress "carefully drafted" the Act to preclude those stricter requirements from applying to other states.) Thus, inclusion of carbon dioxide monitoring and reporting requirements in a SIP for one state does not make carbon dioxide "subject to regulation under the Act" for the nationwide PSD program.

and is not a new interpretation for which the stakeholder community has never had any notice. In addition, as also discussed previously, Petitioner and amici did not avail themselves of an earlier opportunity to address this issue in a rulemaking process when EPA published a comprehensive list of pollutants subject to the PSD program at the same time that it proposed to add and subtract pollutants on the basis of the 1990 amendments to the Clean Air Act. Furthermore, there is no procedural prohibition against case-by-case adjudications as new policy issues arise, and a remand for this purpose would effectively impose a moratorium on PSD permitting under the federal PSD program until the conclusion of a notice and comment process. Finally, the broader policy concerns raised by Petitioner with respect to global climate change are more appropriately considered in the context of other actions pending within the Agency and not in a rulemaking under the PSD program.

EPA's air program offices are not opposed to considering the full implications of addressing carbon dioxide under the PSD program in a rulemaking forum, but this does not justify a remand of (or, effectively, a moratorium on) individual permits until such a process is completed. Region VIII observed in its Response to Comments on the Deseret permit that a rulemaking would be a more appropriate place to address comments requesting that EPA begin incorporating regulation of carbon dioxide into the PSD program. Response to Comments at 6 (Response #1.a.), Ex. 1 to Pet.'s Opening Brief.

Notwithstanding the decision of the Supreme Court, EPA Regions and their delegated permitting authorities have a continuing obligation to process pending federal PSD permit applications in a timely manner. To meet that obligation in this case, Region VIII was required to consider the issues raised by the public comments citing the pending

Supreme Court case and provide a response that considered the effect of the Supreme Court's intervening decision on the PSD requirements. Rulemaking was not required for the Region to reach the conclusion that the Supreme Court decision did not alter the existing Agency interpretation reflected in the last EPA rulemaking to address the scope of pollutants covered under the PSD program and prior adjudications of the Board that considered the specific question of whether carbon dioxide was regulated under the Clean Air Act. There is nothing improper in the Agency proceeding through case-by-case adjudications of these types of issues as they arise in the permitting process, and this does not preclude the Agency from also initiating rulemaking proceedings at a later date on significant matters that merit additional input from stakeholders and from reconsidering its initial adjudication of an individual issue. However, under these circumstances, the prevailing interpretations of the Agency and the case-by-case application of those interpretations should stand until EPA can conclude a separate notice and comment process.

If the Board were to remand the Deseret permit until the conclusion of a rulemaking process, this would hold up nearly every pending permit because this issue will likely be raised in each PSD permitting action. Although the challenge of global climate change is important and under active deliberation at EPA, this does not justify a complete cessation of the permitting process until the Administrator can make a determination regarding whether and how greenhouse gases should be regulated under the Clean Air Act (including resolving the matter remanded for his consideration in *Massachusetts v. EPA*). In the event that the Administrator later chooses to exercise authority under the Act to address carbon dioxide emissions, the issuance of a PSD

permit prior to that decision does not necessarily preclude other methods for addressing carbon dioxide emissions from previously permitted sources.

Furthermore, this proceeding is not the appropriate place for considering the questions of whether emissions of carbon dioxide are reasonably anticipated to endanger public health or welfare and should be regulated under the Clean Air Act. The Office of Air and Radiation is considering how to respond to the Court's remand in the *Massachusetts v. EPA* case and will address the considerations raised by amici on this issue in that context. Furthermore, in addition to re-evaluating the petition to regulate carbon dioxide and other greenhouse gases from automobiles, the Office of Air and Radiation is actively evaluating additional petitions to regulate carbon dioxide from mobiles sources under Title II and public comments submitted in other rulemakings under section 111 that advocate controls on carbon dioxide on stationary sources. The Agency appreciates the complexity and interrelationship of potential approaches to regulating greenhouse gases (including carbon dioxide) under the Clean Air Act and the resulting importance of developing a sound overall strategy for addressing climate change. A remand of the Deseret PSD permit is not necessary to ensure that EPA considers these matters.

V. The Board Should Not Consider Arguments By Amici Addressing Extraneous Issues and Matters Not Preserved for Review

In accordance with the Board's specific grant of review, Region VIII has responded only to those arguments of amici directly relating to whether carbon dioxide is "subject to regulation under the Act" and thus should be addressed in a BACT limit carbon dioxide emission in Deseret PSD permit. To the extent the Board intends to entertain any of the extraneous arguments made by these parties, Region VIII requests a

clarification of the Board's Order Granting Review and an opportunity to file a supplemental response addressing those issues on which the Board would like a response from Region VIII.

In particular, the State Attorneys General make two additional arguments with respect to the Deseret PSD permit that do not pertain to issues on which the Board granted review. These amici argue that Region VIII failed to appropriately consider the collateral environmental and economic impacts of carbon dioxide emissions from the Deseret facility and that EPA should have considered alternatives to the proposed Deseret facility. *See* States' Brief at 11-15 and 15-17, respectively. While the Sierra Club's original Petition for Review asserted that EPA erred by failing to consider certain alternatives to the proposed source in this case, and Region VIII fully addressed the "alternatives" issue raised by Sierra Club in its November 2, 2007 Response to the Petition for Review, *see id.* at 17-30, the Board's order of November 21, 2007 did not grant review of this issue. Thus, arguments from amici on this issue should not be heard. With respect to the collateral impacts argument of the States, the Board should not entertain these arguments because the states did not file a timely Petition for Review raising these issues. Such issues have not been preserved for review, and the Board should not permit amici to circumvent the filing requirements in its regulations for a Petition for Review. 40 C.F.R. § 124.19.

Several of the amici also discuss at length the scientific evidence they believe justifies immediate regulatory action by the EPA under the Clean Air Act to address the

challenge of global climate change. *See generally* CBD Brief at 4-17;[22] Hansen Brief at 3-8; NPCA Brief at 3-10; PSR Brief at 7-11, 15-33. While the views of these stakeholders on such matters are generally helpful as the Agency deliberates about its overall approach to climate change, these scientific arguments are not material to the issue on which the Board granted review in this case. The question on which the Board granted review can be resolved on the basis of the terms of the Clean Air Act, EPA's regulations, and prior adjudications and interpretative statements by the Agency. Since this is not the appropriate forum for a discourse on the science of global climate change, Region VIII has not attempted to respond to the various scientific observations in the amicus briefs. The absence of response to these scientific observations and arguments regarding the merits of an endangerment finding under other provisions of the Act should not be construed as acceptance or denial by Region VIII or other EPA offices of any arguments made by amici that are not disputed in this Response. The appropriate EPA offices will consider these matters in due course in the context of other Agency proceedings in which those issues are appropriately raised.

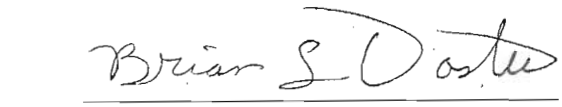
[22] There is no factual or statutory support for the additional argument by amicus National Parks and Conservation Association (NCPA) that an emissions limitation for carbon dioxide is necessary in order for a Federal Land Manager (FLM) to fulfill its responsibility to evaluate the impact of a project on Air Quality Related Values (AQRV) in a Class I area. *See* NPCA Brief at 12-13. Although it is appropriate for an FLM's assessment of potential impacts on AQRVs to consider the allowable rate of emissions from a facility after imposition of the technology-based emissions limitations require for PSD permits, the absence of an emissions limitation does not preclude the FLM from characterizing the uncontrolled emissions from a facility and considering any impacts such emissions may have on an AQRV of concern. NCPA has not pointed to any specific language in section 165(d) of the Act supporting the notion that evaluating effects on AQRVs requires an emissions limitation for every pollutant that may be emitted by a facility subject to permitting.

CONCLUSION

For the reasons explained above, the Board should uphold the permit issued to Deseret Power because the Petitioner has failed to demonstrate clear error in Region VIII's decision to grant the permit. Region VIII's treatment of carbon dioxide emissions in the Deseret PSD permitting process was appropriate given the requirements of the Act, corresponding implementing regulations, and EPA's longstanding interpretation of those requirements. Region VIII was not required to include an emission limit for carbon dioxide emissions in the PSD permit for the Deseret facility.

Date: March 21, 2008

Respectfully submitted,



Brian L. Doster
Kristi M. Smith
Elliott Zenick
Air and Radiation Law Office
Office of General Counsel
Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, DC 20460
Telephone: (202) 564-7606
Facsimile: (202) 564-5603

Sara L. Laumann
Office of Regional Counsel (R8-ORC)
Environmental Protection Agency, Region 8
1595 Wynkoop St.
Denver, CO 80202-1129
Telephone: (303) 312-6443
Facsimile: (303) 312-6859

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached was sent to following in the manner indicated:

By U.S. Mail and electronic mail:

David Bookbinder
Sierra Club
400 C Street, NE
Washington, DC 20002
david.bookbinder@sierraclub.org

By U.S. Mail:

Joanne Spalding
Sierra Club
85 Second St., Second Floor
San Francisco, CA 94105

James H. Russell
Steffen N. Johnson
Luke W. Goodrich
Winston & Strawn LLP
1700 K. Street N.W.
Washington, D.C. 20006

Vickie Patton
Deputy General Counsel
Environmental Defense
2334 North Broadway
Boulder, CO 80304

Katherine Kennedy
Michael J. Myers
Morgan A. Costello
Environmental Protection Bureau
The Capitol
Albany, NY 12224

Kimberly Massicotte
Matthew Levine
Assistant Attorneys General
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120
Tom Greene
Theodora Berger

Susan L. Durbin
California Department of Justice
1300 I Street, P.O. Box 944255
Sacramento, CA 94244-2550

Valerie S. Csizmadia
Attorney General's Office
Third Floor, 102 W. Water Street
Dover, DE 19904

James R. Milkey
Environmental Protection Division
One Ashburton Place
Boston, MA 02108

Gerald D. Reid
Depart of the Attorney General
State House Station #6
August, Maine 04333-0006

Tricia K. Jedele
Department of Attorney General
150 South Main Street
Providence, RI 02903-2907

Kevin O. Leske
Scot Kline
Office of Attorney General
109 State Street
Montpelier, VT 05609-1001

Stephanie Kodish
National Parks and Conservation Association
1300 19th Street N.W., Suite 300
Washington, DC 20036

Kassia R. Siegel
Center for Biological Diversity
P.O. Box 549
Joshua Tree, CA 92252

Michael McCally
Kristen-Welker-Hood
Physicians for Social Responsibility
1875 Connecticut Ave. N.W., Suite 1012
Washington, DC 20009

Edward Lloyd
Columbia Environmental Law Clinic
Columbia University School of Law
425 West 116th Street
New York, NY 10027

Brian L. Doster