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 REGION VIII AND OFFICE OF AIR AND RADIATION TO BOARD'S REQUEST FOR SUPPLEMENTAL BRIEFING

Exhibit 15

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Regulations

Introduction

As requested in the Board's order of June 16, 2008, Region VIII and the Office of Air and Radiation (OAR) of the Environmental Protection Agency (EPA)[1] submit this additional brief in support of the Prevention of Significant Deterioration (PSD) permit issued by Region VIII under the Clean Air Act (CAA or Act) to Deseret Power Electric Cooperative (Deseret) on August 30, 2007. The Board requested additional briefing on two specific issues: (1) the enforceability of section 821 of Public Law 101-549, and (2) the history and scope of EPA's interpretation of the statutory term "major emitting facility," as applied in PSD program regulations. With respect to the first issue, the language of section 821 of Public Law 101-549 (found at Pub. L. No. 101-549, 104 Stat. 2699) makes the carbon dioxide (CO_2) monitoring and reporting requirements resulting from this provision enforceable using the same penalty and enforcement authority granted to EPA and citizens under CAA § 113, 42 U.S.C. § 7413, and other provisions of the Act. However, the enforcement authority established in section 821 does not lead to the conclusion that the CO_2 monitoring and reporting requirements promulgated in Part 75 of EPA's regulations pursuant to section 821 of the Public Law are regulatory requirements established under the Clean Air Act. These requirements remain outside of the Act. Regarding the second issue, under long-standing EPA regulations, a facility with the potential to emit either 250 or 100 tons per year (depending on source type) of carbon dioxide is not a "major stationary source" requiring a PSD permit. Under the judicial doctrines discussed below, EPA has reasonably narrowed the scope of CAA §§ 165(a)

[1] In accordance with the Board's June 16 Order, Region 8 and OAR consulted with the Office of Enforcement and Compliance Assurance (OECA) in preparing this supplemental brief.

and 169(1), 42 U.S.C. §§ 7475(a) and 7479(1), to focus on regulated air pollutants, and this authority is not affected by the Supreme Court's decision in *Massachusetts v. EPA,* __ U.S. __, 127 S.Ct. 1438 (2007).

Status of the Case

On November 21, 2007, the Board granted review of one of the issues raised in the petition filed by Sierra Club (Petitioner) – whether the PSD permit at issue is required to contain a Best Available Control Technology limit for CO_2 emissions. Thereafter, the Board received opening and reply briefs from Petitioner and various amici in support of Petitioner, as well as response briefs from Region VIII and OAR and various amici in support of these EPA offices. After the conclusion of briefing, the Board heard oral arguments in this matter on May 29, 2008. On June 16, 2008, the Board issued an Order Requesting Further Briefing from Region VIII and OAR on two matters: (1) the enforceability of the CO_2 monitoring requirements set forth in section 821 of Public Law 101-549 and 40 C.F.R. §§ 75.1(b), 75.10(a)(3), and (2) the applicability of the PSD major source definition, as specified in section 169(1) of the CAA to facilities with the potential to emit CO_2.

Throughout this appeal, Region VIII and OAR have maintained that neither the Clean Air Act nor EPA regulations currently require that the Deseret PSD permit contain emissions limitations for carbon dioxide. As explained previously, *see generally* Region VIII and OAR Response Brief (filed March 21, 2008), the monitoring and reporting requirements issued pursuant to section 821 of Public Law 101-549 do not make CO_2

"subject to regulation under the Act."[2] Because such monitoring requirements do not require the actual control of emissions, carbon dioxide is not a pollutant "subject to regulation" under EPA's long-standing interpretation of the PSD program. *See id.* at 11-44. As Region VIII and OAR also explained, the CO_2 monitoring and reporting regulations issued pursuant to section 821 of Public Law 101-549 are not issued "under the Act," because Congress did not intend or direct section 821 of Public Law 101-549 to be included in the Clean Air Act. While EPA incorrectly identified section 821 of Public Law 101-549 as section 821 of the Clean Air Act in promulgating the Part 75 CO_2 monitoring and reporting regulations, this inartful drafting of language regarding section 821 in the course of a broader rulemaking implementing the Title IV Acid Rain program did not amend the Act or convert the CO_2 monitoring and reporting requirements into something Congress clearly did not intend them be – "regulation under the Act." *See id.* at 45-53.

Accordingly, Region VIII and OAR maintain that the absence of a carbon dioxide emissions limitation in the Deseret PSD permit does not establish grounds for a remand of that permit.

Supplemental Response

The language of section 821 of Public Law 101-549 makes the carbon dioxide monitoring and reporting requirements resulting from this provision enforceable using the same penalty and enforcement authority granted to EPA and citizens under section 113

[2] 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, all EPA briefs in this matter generally use "the Act" and the Clean Air Act section numbers rather than the U.S. Code citation.

and other provisions of the CAA. However, this does not lead to the conclusion that the CO_2 monitoring and reporting requirements promulgated in Part 75 pursuant to section 821 are regulatory requirements established under the Act. The direction of Congress to apply the requirements of section 821 "in the same manner and to the same extent" as the Title IV Acid Rain monitoring provisions of CAA §412, 42 U.S.C. § 7651k, is reasonably read either to incorporate the enforcement authority found in CAA §§ 412(e) and 113 into section 821 of the Public Law, or to provide for expansion of the enforcement authority found in CAA § 113 to cover enforcement of the requirements in section 821 of the Public Law. Either reading gives meaning to Congress' dual desire to exclude the requirements of section 821 of Public Law 101-549 from the CAA and also make them enforceable. EPA has relied on those authorities in the few administrative and judicial actions that have sought to enforce, among other things, the CO_2 monitoring requirements, but has not previously articulated the precise mechanism through which they apply. Nevertheless, such enforcement does not mean the CO_2 monitoring and reporting requirements are then brought under the Act, given the clear Congressional directive to exclude the requirements of Section 821 of Public Law 101-549 from the CAA.

Under existing EPA regulations, a facility with the potential to emit either 250 or 100 tons per year (depending on source type) of CO_2 is not a "major stationary source" requiring a PSD permit. Beginning immediately after enactment of the PSD provisions in the 1977 CAA Amendments, EPA has consistently interpreted the definition of "major emitting facility" to be limited to sources of any *regulated* air pollutant. This

interpretation is reasonable under judicial doctrines discussed below and is not affected by the *Massachusetts* decision.

I. The CO_2 Monitoring and Reporting Requirements Springing Out of Section 821 of Public Law 101-549 Are Enforceable Using The Same Enforcement Authority Contained Within the Clean Air Act

The language of section 821 of Public Law 101-549 makes the carbon dioxide monitoring and reporting regulations required by this provision enforceable using the same penalty and enforcement authority granted to EPA and citizens under section 113 and other provisions of the CAA. This result is achieved through one of two possible readings of section 821, but neither of these readings leads to the conclusion that the CO_2 monitoring and reporting requirements based on section 821 are regulatory requirements established under the Act. The statutory text of section 821 provides that "the provisions of section [412(e)] shall apply for purposes of this section in the same manner and to the same extent as such provision applies to the monitoring and data referred to in section [412] of the Clean Air Act."[3] The reference to what became CAA § 412(e) and use of the phrase "in the same manner and to the same extent" make it unlawful to operate without complying with section 821 and implementing regulations, and that § 412(e) reference and phrase authorize EPA to enforce these provisions in the same way as the Acid Rain monitoring provisions of section 412 and implementing regulations. Given clear Congressional intent not to include section 821 in the Clean Air Act, this language should not be read to mean that the CO_2 monitoring provisions in section 821 of Public Law

[3] While the text of Section 821 of Public Law 101-549 refers to section 511 and 511(e) of the CAA, as explained in the annotated version of the U.S. Code, this was probably intended to reference sections 412 and 412(e) of Title IV of the Clean Air Act, as finalized in the 1990 CAA Amendments. 42 U.S.C.A. § 7651k note.

101-549 actually became a part of the Act or that the implementation of section 821 by rule constitutes regulation "under" the Act.

A. The CO_2 Monitoring and Reporting Requirements May Be Enforced through Incorporation of Clean Air Act Authority into Section 821 of Public Law 101-549

One possible reading of the phrase "in the same manner and to the same extent," as used in section 821 of Public Law 101-549, is that it incorporates into section 821 all of the relevant provisions of the CAA that are necessary to enforce section 412(e). Section 412(e) of the CAA prohibits the owner or operator of a source subject to Title IV of the CAA from operating a source "without complying with the requirements of this section, and any regulations implementing this section." 42 U.S.C. § 7651k(e). However, section 412(e) does not contain explicit provisions to enforce this general prohibition against failure to monitor or report. Thus, it is reasonable to infer that enforcement of section 412(e) is based on the general CAA enforcement authority contained in section 113 of the Act and related provisions such as section 304. Section 113 provides that "whenever, on the basis of any information available to the [EPA] Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of...subchapter IV-A," the Administrator may take a number of enforcement actions, including issuing an administrative penalty order, issuing a compliance order, initiating a civil judicial enforcement action, or requesting that the Attorney General bring a criminal action. 42 U.S.C. § 7413(a)(3). Thus, to apply section 821 of Public Law 101-549 "in the same manner and to the same extent" as CAA § 412(e), the prohibition on operating without CO_2 monitoring that is incorporated into section 821 of the Public Law by reference to 412(e) should be enforced by also

incorporating the general enforcement authority contained in CAA § 113 into section 821 of the Public Law. Thus, the CO_2 monitoring requirements of section 821 (and the corresponding regulations) are enforceable using mechanisms identical to those contained in sections 412(e) and 113 of the Clean Air Act, by virtue of the incorporation of the language from sections 113, 304, and other provisions of the CAA into section 821 of the Public Law. Accordingly, the CO_2 monitoring provisions, therefore, are not directly enforceable under the CAA itself.

Unlike Petitioners' argument, this reading gives effect to both the language of section 821 of Public Law 101-549 and the underlying Congressional intent. *See* Petitioner's Reply Brief at 17-18 (arguing that section 821 "is an enforceable part of the Act," is "enforceable under the Act", and is "regulated under the Act" based on enforcement of the corresponding regulations). The Congressional intent is clear – section 821 of Public Law 101-549 was not included as a provision of the CAA. *See* Region VIII and OAR Response Brief at 46-50. If Congress had intended for the CO_2 monitoring requirements of section 821, including enforcement of those requirements, to be a part of the Act, they could have placed section 821 in the Act or included CO_2 in the CAA monitoring and enforcement provisions when drafting CAA § 412. But they did not. Instead, Congress kept section 821 of Public Law 101-549 outside of the CAA and provided that the CO_2 monitoring requirements of section 821 should be applied "in the same manner and to the same extent" as the Acid Rain provisions of CAA § 412 – thereby incorporating by reference both the general prohibition contained in section 412(e) and the relevant language from other provisions of the Act necessary to enforce that prohibition.

Interpreting the phrase "in the same manner and to the same extent" to incorporate by reference the prohibition contained in 412(e) and necessary enforcement authority contained in section 113 and elsewhere is consistent with general cannons of statutory interpretation and case law interpreting that phrase. Under established constructs of statutory interpretation, a specific reference to and incorporation of a statutory provision within another provision – such as section 821's reference to CAA § 412(e) – may be construed as a general reference to and incorporation of other laws relating to the subject – such as general CAA enforcement authority contained in CAA § 113 – when incorporation of both the specific provision and other law avoids absurd results and is consistent with legislative intent, as demonstrated by the statute, the legislative history, and the context in which the law was passed. *See U.S. v. Rodriguez-Rodriguez*, 863 F.2d 830, 831 (11th Cir. 1989) (citing Sutherland, *Statutes and Statutory Construction* § 51.08 (4th ed. 1984)); *E.E.O.C. v. Chrysler Corp.*, 546 F. Supp. 54, 74 (E.D. Mich. 1982).[4] For example, in *Director, Office of Workers' Compensation Programs v. Peabody Coal Co.* ("*Peabody*"), the Seventh Circuit held that Congress

[4] Courts are more reluctant to imply incorporation by reference when a criminal statute is involved. *See Jerome v. United States*, 318 U.S. 101, 104-08 (1943) (declining to read the word "felony" in the Bank Robbery Act as incorporating state law by reference, given scant evidence of legislative intent to include such an "expansion of federal criminal jurisdiction" and that such incorporation was neither necessary nor supported by the overall scheme of the act). While the issue before the *Jerome* Court was the wholesale incorporation of state criminal law into enforcement of a Federal statute, the criminal provisions of §113 are an integrated element of an overall CAA enforcement scheme. Thus, incorporating the criminal provisions of §113 would not represent the type of "expansion of federal criminal jurisdiction" which the *Jerome* Court sought to avoid. However, even if the incorporation of the criminal provisions CAA § 113 was considered inappropriate under *Jerome*, at most only those portions of 113 – and not the entire provision – should be excluded from the incorporation by reference contained in Section 821 of Public Law 101-549.

intended to incorporate the entire procedural scheme of the Longshoremen's and Harbor Worker's Compensation Act (LHWCA) into the Federal Coal Mine Health and Safety Act (FCMHSA). Even though the FCMHSA only referenced specific provisions of LHWCA, the court held that the FCMHSA was actually providing a general reference to all of the portions of the LHWCA necessary and relevant to carry out the FCMHSA. 554 F.2d 310, 323-24 (7th Cir. 1977) (relying on *George Williams College v. Village of Williams Bay*, 7 N.W.2d 891 (Wis. 1943)). Thus, the court found that subsequent amendments to the LHWCA were incorporated into the FCMHSA where consistent with legislative intent and the plain language of the FCMHSA. *Id.* at 331; a*ccord Pearce v. Director, Office of Workers' Compensation Programs*, 603 F.2d 763, 767 (9th Cir. 1979) (incorporation of the LHWCA in the Defense Base Act).

Peabody is particularly relevant to interpreting the incorporation by reference contained in section 821 of Public Law 101-549. In *Peabody*, the incorporating statute (the FCMHSA) used numerous cross-references to specific provisions within itself and in another statute (the LHWCA). 554 F.2d at 331. However, some of the cross-references contained in the FCMHSA were incorrect, some invoked repealed laws, and some would reach absurd results if actually incorporated entirely into the existing statute. After noting that "Congress occasionally enacts technically defective statutes," *id.* (internal quotations omitted), the Seventh Circuit went on to look at the language of the statute itself, the goals of the statute, and the legislative intent (as evidenced by the context in which the statute was passed as well as the structure of the statute itself) to determine the extent of the incorporation by reference. The court found that, despite references to only specific provisions of the LHWCA, Congress intended to incorporate the entire

compensation scheme of the LHWCA into the FCMHSA, wherever such incorporation did not conflict with the FCMHSA. *See, e.g., id.* at 330 (not adopting the referenced subsection "in toto" where it made "no rational sense" to do so).

Section 821 of Public Law 101-549 is similar to the "technically defective statutes" at issue in *Peabody* because it too includes an incorrect cross reference to section 511(e) of the CAA, which became section 412(e) in the final amendments to the CAA. As in *Peabody*, section 821 also incorporates section 412(e) with a general phrase ("in the same manner and to the same extent") rather than specific implementing language. The combination of the "technically defective" provision and the general incorporating phrase supports reading the specific reference to and incorporation of CAA § 412(e) into section 821 of the Public Law as a general reference to and incorporation of all necessary and relevant portions of the CAA.

Moreover, reading section 821 of Public Law 101-549 as incorporating only CAA § 412(e) would reach an absurd result by creating a general prohibition against failing to monitor and report CO_2 emissions without providing any mechanism to enforce that prohibition. The legislative history clearly shows the Congress intended to "require" carbon dioxide monitoring and reporting to gather data and help set a baseline for future credits. *See, e.g.*, 1990 CAA Leg. Hist. 2446, 2613; 1990 CAA Leg. Hist. 2667, 2986. The requirement to monitor CO_2 emissions that Congress enacted through section 821 of Public Law 101-549 is devoid of purpose without some mechanism for EPA to enforce it. Thus, the general incorporation of the prohibition contained in CAA § 412(e) into section 821 is best interpreted to also include a general incorporation of CAA § 113 and any other specific provisions of the CAA necessary to enforce CAA § 412.

Reading a broad incorporation of enforcement authority into section 821 of Public Law 101-549 through the general instruction to apply the provisions of CAA § 412(e) for purposes of section 821 "in the same manner and to the same extent" as it applies to the requirements in CAA § 412 is also supported by cases interpreting the phrase "in the same manner and to the same extent." For example, *U.S. v. Navistar International Transportation Corp.*, 152 F.3d 702 (7th Cir. 1998), involved claims by Federal and state governments to recover costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The case also included claims brought by the State of Indiana under a similar state law stipulating that a person liable for recovery costs under §107 of CERCLA "is liable in the same manner and to the same extent, to the state under this section." Ind. Code § 13-25-4-8. Defendants argued that the state law recovery claims were time barred under CERCLA's statute of limitations (SOL), because the state law expressly incorporated the provisions of CERCLA that limit liability, including the SOL, by creating liability under state law "in the same manner and to the same extent" as CERCLA. Indiana contended that because the state law provision did not contain any explicit provision regarding the SOL, the residual SOL period from general state law applied. The Seventh Circuit ruled in favor of defendants, finding that

> The plain language of the Indiana statute indicates that the provisions defining liability under CERCLA, *in all of its aspects*, provides the basis for the scope of liability under the Indiana cause of action. Indiana only modified slightly that scope of liability, *see* § 13-25-4-8(b)-(d), in the manner that it saw fit and otherwise appears to have contemplated *the complete adoption* of federal CERCLA law to govern the extent of liability under its statute. We think it likely, given the wholesale adoption of federal CERCLA law *necessary to effectuate* the Indiana statute as it is written, that if Indiana had decided to employ a statute of limitations other than that contained in CERCLA, it would have done so explicitly.

Id. at 714 (emphasis added). In this case, section 821 uses the phrase "in the same manner and to the same extent" to incorporate the prohibition contained in CAA§ 412(e). Much like the incorporation of federal CERLCA law into Indiana state law in Navistar, section 821's incorporation of CAA § 412(e) is "devoid [] of any definitional or other significant substantive provisions" and is thus, "workable only to the extent that it is read to incorporate all of the important aspects" of the CAA. *Id.* at 714. Accordingly, just as the Seventh Circuit read a state law's incorporation of CERCLA liability to include an incorporation of the CERCLA provisions limiting that liability, section 821's incorporation of a CAA prohibition should be read to include an incorporation of the CAA provisions necessary to enforce that prohibition.

In addition, courts have broadly interpreted the phrase "in the same manner and to the same extent" when determining waivers of government immunity for violations of various environmental laws. In cases brought against Federal agencies and facilities under those laws, the courts have consistently allowed claims to proceed against the Federal government when similar claims could be brought against non-government entities. *See East Bay Mun. Utility Dist. v. U.S. Dept. of Commerce*, 142 F.3d 479, 481-83 (D.C. Cir.1998) (finding that a broad reading of the government's liability was appropriate given the language of the CERCLA waiver provision and the overall structure and application of the statute); *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 515 F.3d 344, 352-353 (4th Cir. 2008) (finding a CAA waiver of immunity because "requirements" to control and abate air pollution included state common law tort claims); *Center For Native Ecosystems v. Cables*, 509 F.3d 1310, 1331-33 (10th Cir. 2007) (finding no waiver of CWA immunity where federal agency

implemented best management practices and those practices provided protection against enforcement actions to all facilities implementing those practices). The EAB has also broadly interpreted the phrase as used in the CAA's waiver of immunity. For example, in *In re U.S. Army, Fort Wainwright Central Heating & Power Plant*, the Board upheld a method of calculating CAA penalties for a U.S. Army facility, finding that specific penalty assessment factors should apply to federal entities based on the relevant legislative history and the fact that those factors "are routinely applied to non-governmental entities." 11 E.A.D. 126, 167 (EAB 2003). The Board found that application of the penalty factors to the U.S. Army facility was consistent with the requirement to apply CAA administrative sanctions to federal entities "in the same manner and to the same extent" as nongovernmental entities, even if those the factors had to be quantified differently for government entities. *Id.* Given these broad interpretations of "in the same manner and to the same extent" to find waivers of government immunity – especially in light of the general principle that waivers of sovereign immunity should be construed narrowly, *East Bay Mun. Utility Dist.*, 142 F.3d at 481-82 – it is reasonable to read that the language in section 821 of Public Law 101-549 also incorporates the general enforcement authority contained in CAA §113 and elsewhere.

For the reasons stated above, one reasonable interpretation is that the CO_2 monitoring requirements found in section 821 of Public Law 101-549 are enforceable using the authority provided in section 821, which incorporates the enforcement authority found in CAA §§ 412(e), 113, and other provisions of the Act such as section 304. Because the provisions of CAA § 412(e) should apply for purposes of section 821 of the Public Law "in the same manner and to the same extent" as the monitoring and

data requirements found in CAA § 412, section 821 can be interpreted to incorporate by reference the general prohibition against lack of monitoring contained in CAA § 412(e) and all of the relevant language contained in CAA §§ 113, 304, and other provisions of the Clean Air Act that would be necessary to enforce that prohibition.

B. The CO_2 Monitoring and Reporting Requirements May Also Be Enforced through Expansion of CAA Authority

A second possible reading of the phrase "in the same manner and to the same extent" and the cross-reference to CAA § 412(e) found in section 821 of Public Law 101-549 is that this language expands the reach of CAA § 412 – and hence the provisions of the Act necessary to enforce the prohibition in CAA § 412, including CAA §113 – to cover the CO_2 monitoring requirements in section 821 of the Public Law. By their terms, CAA § 412(e) only prohibits operation of a source not in compliance with § 412, and CAA § 113 only allows the Administrator to take administrative or judicial enforcement action upon finding a violation of a "prohibition of...subchapter IV-A," 42 U.S.C. § 7413(a)(3), which includes authority to enforce the prohibition contained in CAA § 412(e). Under this reading, however, since Congress specifically applied the prohibition in CAA § 412(e) "in the same manner and to the same extent" for purposes of section 821 of the Public Law, the authority in section CAA § 113 must be expanded to allow EPA to enforce the CO_2 monitoring requirements of section 821 of the Public Law.

However, the expansion of the enforcement authority found in sections 412(e) and 113 of the Act to allow enforcement of the CO_2 monitoring requirements contained in section 821 of Public Law 101-549 does not sweep either section 821 or the regulations implementing it into the Act. Given the clear Congressional intent not to make section 821 a part of the CAA, *see* Region VIII and OAR Response Brief at 46-50, expansion of

the enforcement authority in CAA §§ 412(e) and 113 to cover the non-CAA requirements in section 821 of Public Law 101-549 and implementing regulations does not bring section 821 into the CAA, or make the issuance of regulations implementing section 821 the equivalent of regulating a pollutant under the CAA. Congress directed only that the prohibition, and attendant enforcement, contained in CAA § 412 should apply "in the same manner and to the same extent" to the CO_2 monitoring requirements. Congress clearly did not include CO_2 in the list of pollutants or data in CAA § 412(a) itself or fold section 821 into the CAA. Since the prohibition contained in CAA § 412(e) is only enforceable using the authority contained in CAA §113 and other provisions of the Act, under this reading, it follows that in order to enforce the prohibition contained in section 821 "in the same manner and to the same extent" as CAA § 412(e), Congress intended to expand the authority contained in §113 and other provisions to cover enforcement of section 821 of Public Law 101-549.

C. Prior EPA Enforcement Actions Involving the CO_2 Monitoring and Reporting Requirements Have Not Precisely Articulated The Manner In Which Section 821 Is Enforced

EPA has generally cited CAA § 113, and sometimes section 821 of the Public Law, in the few administrative and judicial actions it has brought enforcing, in part, the CO_2 monitoring requirements. OAR and OECA have not identified any enforcement action brought solely for failure to monitor and report CO_2. All prior cases involving violations or claims based on a failure to monitor or report CO_2 emissions occurred in the context of enforcement actions in which the sources failed to comply with all of the monitoring and reporting requirements of Part 75. *See* Exhibit 1 (Chart summarizing

EPA enforcement actions identifying violations based, in part, on CO_2 emissions).[5] Because all enforcement actions that OAR and OECA have identified involving "carbon dioxide monitoring requirements springing out of or resulting in whole or in part from section 821 of Public Law 101-549, including but not limited to the requirements of 40 C.F.R. § 75.10(a)(3)," June 16 Order at 3, were brought in cases alleging violations of Part 75 generally, EPA's citation of section 113 in these cases does not necessarily demonstrate that the Agency adopted any specific interpretation regarding mechanism to enforce Section 821 and its implementing regulations. With respect to the CO_2 monitoring and reporting requirements in particular, EPA's pleadings in these enforcement actions generally exhibited the same imprecision found in EPA's references to the section 821 CO_2 requirements in the preamble and regulatory text promulgating the CO_2 requirements in the Part 75 regulations. *See generally* Region VIII and OAR Response Brief at 50-53. In all of the administrative and judicial enforcement cases that include violations of CO_2 monitoring requirements, EPA generally referred to the CAA § 113 authority to bring the claims but did not clarify exactly how the authority provided by CAA § 113 applied to enforce the specific requirements of section 821 of Public Law 101-549 and the corresponding regulations in Part 75 implementing these requirements.

---

[5] OAR and OECA also identified a number of enforcement actions that reference CO_2 monitoring requirements under 40 C.F.R. § 60.45, which requires either an oxygen or CO_2 monitor as a method to verify compliance with the NOx limits contained in the facility's permit. However, these cases were not included in the enforcement analysis for this briefing as they do not involve "carbon dioxide monitoring requirements springing out of or resulting in whole or in part from Section 821 of Public Law 101-549, including but not limited to the requirements of 40 C.F.R. §75.10(a)(3)."

In addition, EPA offices have identified other cases involving the general enforcement of the Part 75 Acid Rain provisions, but did not include these cases in this analysis because those cases made no specific mention of carbon dioxide, CO_2, or Section 821.

For example, EPA settled an administrative enforcement action in which the Consent Agreement and Final Order (CAFO) stated that "[t]he Acid Rain program requires, among other things, that the owner or operator of an affected unit monitor, record and report sulfur dioxide (SO_2), nitrogen oxides (NO_x) and carbon dioxide (CO_2) emissions, volumetric flow and opacity data." *In the Matter of City of Detroit, Department of Public Lighting, Mistersky Power Station, Detroit, Michigan,* Docket No. CAA-05-2004-0027, CAFO ¶7. Similarly, in *United States v. Block Island Power Co.*, CA-98-045 (D.RI), EPA alleged violations of all Part 75 monitoring requirements, including the CO_2 monitoring requirement, and obtained consent decree relief requiring compliance with the Part 75 requirements, without specific mention of CO_2 emissions.

In another case, EPA settled an administrative enforcement action in which it alleged that the respondent had violated the Part 75 requirements as well as "Sections 412 and 821 of the Act," mistakenly referring to section 821 as being a provision "of the Act." *In the Matter of Indiana Municipal Power Agency*, Docket No. CAA-05-2000-0016, Compl. ¶2. With similar imprecision, EPA filed an administrative complaint alleging violations of 40 C.F.R. Part 75, and the administrative complaint states that CAA § 412 requires an owner or operator of an affected unit to "install, certify, operate, and maintain continuous emission monitoring systems at each affected unit for sulfur dioxide, nitrogen oxides, opacity, and *carbon dioxide*," thus mistakenly referring to the CO_2 requirements as being found in CAA § 412. *In the Matter of IES Utilities, Cedar Rapids, Iowa*, Docket No. VII-95-CAA-111, Compl. ¶3 (emphasis added).

Despite the imprecise pleadings and lack of detailed discussion of how section 821 is enforced, EPA has complied with the Congressional intent to enforce the CO_2

monitoring requirements set forth in section 821 of Public Law 101-549 and the implementing regulations "in the same manner and to the same extent" as violations of section 412(e). Regardless of whether section 821 of Public Law 101-549 is enforced by incorporating CAA enforcement language into section 821 by reference or by expanding the enforcement authority found in the CAA to cover section 821, EPA's past enforcement actions do not convert the carbon dioxide monitoring and reporting provisions into requirements established "under the Act."

D. Enforcement of the CO_2 Monitoring and Reporting Requirements Does Not Make CO_2 Regulated "Under the Act"

As explained above, the language in section 821 of Public Law 101-549 authorizes enforcement of the CO_2 monitoring and reporting requirements using authority similar to that provided to EPA under section 113 and other provisions of the CAA. Region VIII and OAR (in consultation with OECA) have not identified "any applicable law…authorizing federal court jurisdiction and authority remedies or penalties for a violation of the CO_2 monitoring requirements." *See* June 16 Order at 3. In addition, these offices have not identified any general enforcement authority or any other alternative authority asserted in its prior enforcement of the CO_2 monitoring and reporting requirements. Instead, EPA has generally relied on section 113 and other authorities from the CAA in the few administrative and judicial actions that have sought to enforce the CO_2 monitoring requirements, as well as the Title IV Acid Rain monitoring and reporting requirements arising from CAA § 412. Such enforcement is consistent with the Congressional directive to apply the prohibition contained in CAA § 412(e) to the CO_2 monitoring and reporting requirements of section 821 of the Public Law "in the same manner and to the same extent" as it applies to §412 of the Act.

Given the Congressional intent, CO_2 monitoring requirements arising from section 821 of Public Law 101-549 (including the implementing regulations) are enforceable using authority similar to that provided to EPA under section 113 and other provisions of the CAA, either because the language in these parts of the Act are incorporated by reference into section 821 of Public Law 101-549, or by virtue of the expansion of the enforcement authority found in CAA §§ 412(e) and 113 to cover requirements promulgated under section 821 of the Public Law. However, enforcement of the CO_2 monitoring requirements under either of these readings of section 821 of the Public Law does not make carbon dioxide regulated "under the Act," because such a result would be inconsistent with the clear Congressional intent to exclude the requirements of section 821 of Public Law 101-549 from the Clean Air Act. [6]

[6] As a general matter, enforcement of a statutory provision does not necessarily make the pollutants covered by that provision "subject to regulation under the Act" for PSD purposes. Whether enforcement equates to "regulation" within the meaning of sections 165(a)(3) and 169(4) of the Act depends on the circumstances. In this instance, enforcement does not automatically equate to "regulation." EPA has long-interpreted the phrase "regulation" for PSD permitting purposes to require actual control of emissions of a pollutant. *See* Region 8 and OAR Response Brief 11-44. Thus, enforcement of an emissions control requirement arguably would be "regulation" under the PSD provisions. However, it follows that enforcement of a statutory provision does not require actual control of pollutant emissions cannot itself result in a requirement to control emissions of that pollutant. For example, while EPA has the authority to bring an enforcement action against a source that fails to monitor or report its CO_2 emissions as required by Section 821, that enforcement action does not require control of CO_2 emissions any more than the underlying requirement does, and Section 821 does not authorize EPA to bring any action against such a source for failing to control CO_2 emissions. Thus, enforcement of the CO_2 monitoring requirements does not make CO_2 "subject to regulation" for PSD purposes.

II. EPA's Definition of "Major Stationary Source" Is Based on A Reasonable Interpretation of the Statutory Definition of "Major Emitting Facility" That Is Not Affected by the Supreme Court Decision

The Board has requested that Region VIII and OAR address "whether, under section 165(a) of the Clean Air Act, 42 U.S.C. § 7475(a), a facility with the potential to emit at least the requisite number of tons per year (tpy), as specified in [CAA] § 169(1), 42 U.S.C. § 7479(1), of carbon dioxide is a major emitting facility requiring a PSD permit." June 16 Order at 4-5. The Board also asks that EPA address the relevant regulatory history and the effect of the Supreme Court's decision in *Massachusetts v. EPA,* __ U.S. __, 127 S.Ct. 1438 (2007).

A. The Board Need Not Resolve Questions Regarding the Definition of "Major Emitting Facility"

Region VIII and OAR welcome this opportunity to address the Board's questions regarding application of the definition of "major emitting facility," but wish to emphasize at the outset that these questions need not be decided by the Board to address the pending matter. It is undisputed that the Deseret Bonanza facility is a "major emitting facility" as defined in CAA § 169 and is a "major stationary source" under the definition in the implementing regulations at 40 C.F.R. § 52.21(b)(1)(i). Thus the only question before the Board is for which pollutants is BACT required under CAA §§ 165(a)(4) and 169(3). None of the briefs in this case have raised these "major emitting facility" issues. Thus, Region VIII's application of EPA's definition of "major stationary source" is not before the Board, and, as the Board stated at oral argument, the Board's review of this permit for a facility that is clearly major is not the appropriate forum for considering the merits of existing EPA regulations. *See* Transcript of Oral Argument of May 29, 2008, at 56 ("Transcript"). These regulations were promulgated many years ago, and are

binding on the Board as written. Instead, this case concerns only the applicability of the requirement for best available control technology (BACT) under CAA §§ 165(a)(4) and 169(3), and not the applicability of the PSD permit requirements under section 165(a) or the definition of "major emitting facility" under section 169(1).

B. EPA Has Reasonably Narrowed the Scope of Section 165(a) of the Clean Air Act Consistent With Judicial Doctrines That Are Not Affected by the *Massachusetts* Supreme Court Decision

CAA § 165(a)(1) provides that a permit for a new or modified "major emitting facility" must undergo PSD review and section 169(1) defines a "major emitting facility" by reference to the threshold amounts[7] of potential emissions of "any air pollutant." For thirty years, EPA has reasonably interpreted, as reflected in notice and comment rulemakings, the definition to be limited to sources of any *regulated* air pollutant. The regulatory history makes clear that EPA's consistent interpretation, beginning immediately after enactment of the PSD provisions in the 1977 Clean Air Act Amendments, is reasonable and is not affected by the *Massachusetts* decision. This interpretation, coupled with the view that CO_2 and other greenhouse gases are not currently regulated under the CAA, furnishes the basis for EPA's position that a source is not a "major source" solely by virtue of its emitting CO_2 at the threshold levels or higher.

[7] If a source belongs to one of 28 specifically identified source categories, it is considered a ''major emitting facility'' if it emits or has the potential to emit 100 tons per year (tpy) of a regulated air pollutant; if it does not belong to one of those source categories, its threshold is 250 tpy. CAA § 169(1).

1. A Review of the Regulatory History Makes Clear that from the Inception of the PSD Program, and Consistently Thereafter, EPA Has Interpreted "Major Emitting Facility" to Refer to Sources of Any Regulated Air Pollutant

EPA's interpretation that PSD applies only to regulated air pollutants was established at the inception of the PSD regulatory program that implemented the provisions of the 1977 CAA Amendments. In the 1977 Amendments, Congress enacted the PSD program, which included both the requirement to implement BACT and the requirement to obtain a permit, which in turn mandated an air quality review. At that time, Congress enacted both the provisions applying the permitting requirement to a major source of "any air pollutant" (CAA §§ 165(a), 169(1)) and the provisions applying the BACT component of the program to "each air pollutant subject to regulation under [the Act]" (CAA §§ 165(a)(4) and 169(3)). EPA's initial rulemaking implementing the PSD program, which was proposed and finalized in 1977-1978 after notice and comment, made explicit that the entire PSD program applied to only pollutants regulated under the Act.[8] EPA accomplished this by requiring each "major stationary source" to obtain a PSD permit, and by defining a "major stationary source" as a source that is included in a specified source category or that is of a specified size and that emits at least a specified

[8] The initial PSD program that EPA established in 1973-74, and which EPA built on in promulgating the PSD program necessary to implement the 1977 CAA Amendments, had an even narrower focus. In that initial program, in response to a court order to ensure that state implementation plans (SIPs) prevent significant deterioration of air quality, EPA imposed both a technology-based requirement and an air-quality-review requirement, which, in keeping with the focus on SIPs, were both limited to national ambient air quality standards (NAAQS) pollutants. This program did not cover hazardous air pollutants that were regulated under CAA § 112, much less air pollutants not regulated under any CAA provision. *See* 38 Fed. Reg. 18986 (July 16, 1973) (proposed rule), 39 Fed. Reg. 31000 (Aug. 27, 1974) (proposed rule), 39 Fed. Reg. 42510 (Dec. 5, 1974) (final rule).

amount of "any air pollutant regulated under the Clean Air Act." 43 Fed. Reg. 26380, 26403, 26406 (June 19, 1978) (promulgating 40 C.F.R. § 51.21(b)(1)(i)). *See* 42 Fed. Reg. 57479, 57480, 57483 (Nov. 3, 1977) (proposing 40 C.F.R. § 51.21(b)(1)(i)). Similarly, the regulations required each "major stationary source" to apply "best available control technology" for "each pollutant subject to regulation under the act." 43 Fed. Reg. at 26406 (promulgating 40 C.F.R. § 51.21(j), 52.21(b)(10)). EPA acknowledged that for regulatory purposes, it was replacing the term that appears in the statute – "major emitting facility," CAA § 169(l) – with the term "major stationary source," and explained that it was doing so in order "to reflect current EPA terminology." 42 Fed. Reg. at 57480 (Nov. 3, 1977). EPA did not discuss that the statutory term "major emitting facility" – which refers to "any air pollutant" – differs from EPA's regulatory term "major stationary source" – which refers more narrowly to "any air pollutant regulated under the [CAA]." In the preamble to the final rule, EPA did not indicate that it had received any comments on the issue. *See* 43 Fed. Reg. at 26388.

In 1979-1980, EPA revised the PSD program to conform to the seminal decision of the D.C. Circuit in *Alabama Power* v. *Costle*, 636 F.2d 232 (D.C. Cir. 1980); 44 Fed. Reg. 51924 (Sept. 5, 1979) (proposed rule); 45 Fed. Reg. 52676 (Aug. 7, 1980) (final rule). In this rulemaking, EPA did not disturb the pre-existing provisions (including the definitions of "major stationary source" and BACT) that limited the applicability of the PSD program to regulated air pollutants. In addition, EPA did not discuss – or indicate that commenters had raised – any issues concerning the difference between the narrower

definition of "major stationary source" in the regulations and the statutory definition that could be broader under a literal reading.[9]

In 1996 EPA proposed, and in 2002 finalized, a set of amendments to the PSD (and nonattainment new source review ("NSR")) provisions that included revisions to conform with the 1990 Clean Air Act Amendments, which, in relevant part, exempted hazardous air pollutants from PSD, under CAA § 112(b)(6). *See* 61 Fed. Reg. 38250 (July 23, 1996), 67 Fed. Reg. 80186 (Dec. 31, 2002). In the preamble to the final rule, EPA noted that based on a request from a commenter, EPA was amending the regulations to "clarify which pollutants are covered under the PSD program." EPA accomplished this by promulgating a definition for "regulated NSR pollutant," which listed categories of pollutants regulated under the Act, and by substituting that defined term for the phrase "pollutants regulated under the Act" that was previously used in various parts of the PSD regulations. 67 Fed. Reg. at 80240. EPA again did not address the difference between the definition of "major emitting facility" and its regulatory approach or indicate that it had received comments on this issue.

[9] In *Alabama Power,* the D.C. Circuit noted that the definition of "major emitting facility" under CAA § 169(1) could apply to air pollutants not regulated under other provisions of the Act, and discussed the contrast of this broad definition to the narrower application of the BACT provisions. 636 F.2d at 352-53 & n. 60. However, it appears that the Court made those statements as background information because none of the Court's holdings are based on those statements. In its rulemaking notices responding to *Alabama Power,* EPA discussed at length certain issues, such as the applicability of NSR to pollutants emitted below the "major" thresholds, which are based on the reference in "major emitting facility" to "any air pollutant." However, throughout its discussion, EPA interpreted that reference as "any *regulated* air pollutant," again without specifically acknowledging the difference or without acknowledging the above-noted statements in *Alabama Power. See* 45 Fed. Reg. at 52710 – 711. EPA did not indicate that it had received comments on this issue.

This review of the regulatory history makes clear that since the beginning of the PSD program, EPA has limited application to major sources of regulated air pollutants, as reflected in a series of notice and comment rulemakings. EPA's approach has been consistent and apparently has never been questioned by commenters, nor has it been questioned in any previous filing by Petitioners and amici in this case. Indeed, EPA's interpretation seems simply to have been assumed by all concerned to be the appropriate interpretation of "major emitting facility."

2. *EPA's Interpretation of "Major Emitting Facility" is Reasonable in Light of the Case Law, the PSD Provisions, Other Relevant Statutory Provisions, and the Legislative History*

EPA's interpretation of the definition of "major emitting facility" is reasonable considering the Congressional intent reflected in the context of CAA and legislative history. Although the term "major emitting facility," read literally, applies to "any air pollutant," the courts have held that the plain meaning of a statutory provision is not conclusive "in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters' ... [in which case] the intention of the drafters, rather than the strict language, controls." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (*"Ron Pair"*). To determine whether "the intentions of the drafters" differ from the result produced from "literal application" of the statutory provisions in question, the courts may examine whether there are related statutory provisions that either conflict or are consistent with that interpretation, whether there is legislative history of the provisions in question that exposes what the legislature meant by the terms in question, and whether a literal application of the provisions produces a result that the courts characterize variously as absurd, futile, strange, or

indeterminate. *See, e.g., Ron Pair*, 48 U.S. at 242; *Nixon v. Missouri Municipal League,* 541 U.S. 125 (2004) ("*Nixon*"); *United States v. American Trucking Associations, Inc.* 310 U.S. 534 (1940); *Rector of Holy Trinity Church v. U.S.,* 143 U.S. 457 (1892) ("*Holy Trinity Church*").

In several of these cases, the Supreme Court interpreted phrases with the term "any" and held that the phrases should be interpreted more narrowly than their literal meaning. Specifically, the Court has found that "'any' can and does mean different things depending on the setting," and has held that in certain settings, the term may not have as expansive a meaning. *See, e.g., Nixon,* 541 U.S. at 132-33 ("any entity" includes private but not public entities); *Raygor v. Regents of Univ. of Minn.,* 534 U.S. 533, 542-45 (2002) (("implying a narrow interpretation of … 'any claim asserted' so as to exclude certain claims dismissed on Eleventh Amendment grounds"); *Holy Trinity Church,* 143 U.S. at 516-17 ("any alien" does not include a foreign pastor). Although other Supreme Court cases addressing still other statutory settings held that "any" should be given an expansive meaning, these latter cases remain consistent with the proposition that the proper interpretation of a term – whether it is "any" or another term – depends on the context.[10] *See, e.g., Department of Housing and Urban Development v. Rucker,* 535 U.S. 125, 131, 132-34 (2002) (holding that "any drug-related criminal activity" is not limited to such activity of which the tenant had knowledge; examining related statutory

[10] Similarly, the D.C. Circuit's recent decision vacating the NSR equipment replacement rule gave a literal interpretation to the term "any" in the phrase "any physical change" – which, in turn, is a component of the definition of "modification" under sections 111(a)(4), 169(2)(C), and 171(4) of the CAA. But in that case the court based its interpretation on the context of the phrase and noted that its interpretation was consistent with congressional purpose and logical. *New York v. EPA,* 443 F.3d 880, 885-90 (D.C. Cir. 2006), *cert. den. sub nom Utility Air Regulatory Group v. New York,* __ U.S. __, 127 S. Ct. 2127 (2007)..

provisions and whether plain reading leads to "absurd results"); *U.S. v. Gonzales,* 520 U.S. 1, 5-6 (1997) (holding that "any other term of imprisonment" includes state as well as Federal sentences; examining related statutory provisions and whether plain reading leads to "irrational results").

With respect to the issue raised by the Board in this case, there are several indications that Congress did not intend that the PSD program apply to air pollutants that are not regulated, but rather that Congress intended to apply the program to only regulated air pollutants. First, putting BACT aside for a moment, another key substantive requirement of the PSD program is the requirement to demonstrate that a new or modified source will not cause or contribute to a violation of a NAAQS or PSD increment under section 165(a)(3) of the CAA. By its terms, this air quality provision applies only to the NAAQS pollutants and pollutants with PSD increments. This focus is consistent with a central purpose of the PSD program, reflected in its name, of preventing air quality that is better than the minimally permissible levels from deteriorating to a significant degree, since only pollutants covered by a NAAQS or increment have a standard by which significant deterioration can be quantitatively ascertained and measured. The BACT requirement applies more broadly because, since it is a technological requirement, there is nothing inherent to it that would limit it to pollutants for which ambient standards have been set. But Congress nevertheless explicitly limited the BACT requirement to pollutants already regulated under some other provision of the Act. Thus, the key substantive provisions of the PSD program cover only pollutants regulated under other provisions of the Act. Congress's explicit limitation of the key substantive provisions to the universe of air pollutants regulated elsewhere under the Act

indicates an intent to limit the overarching permitting requirement under CAA 165(a), including the definition of "major emitting facility," to cover the same universe of regulated air pollutants.

Second, it appears that Congress, in its 1977 drafting of "major emitting facility" broadly to cover "any air pollutant," was simply patterning the application of the PSD program on the application of the programs to establish New Source Performance Standards (NSPS) and National Emissions Standards for Hazardous Air Pollutants (NESHAP), as initially enacted in 1970. The latter programs (which Congress preserved in the 1977 CAA Amendments) broadly apply to sources of "any air pollutant."[11] Thus, the PSD definition of "major emitting facility" can be considered to be a conforming definition to its counterpart definitions in the NSPS and NESHAP provisions.

This view is buttressed by the fact that the PSD program broadly parallels the NSPS and NESHAP programs, as Congress adopted them in the 1970 CAA Amendments, in certain respects. Specifically, although the NSPS and NESHAP provisions included broad definitions of "stationary source," they covered only certain pollutants emitted from those sources. The NSPS requirements covered only pollutants emitted from a source category the emissions from which EPA had found to endanger

---

[11] In the 1970 CAA Amendments, Congress added CAA § 111 (NSPS), which defined, in section 111(a)(3), "stationary source" to include specified structures that emit or may emit "any air pollutant." Pub. L. 91-604, § 4(a), 84 Stat. 1683 (Dec. 31, 1970). Congress preserved this provision in the 1977 CAA Amendments, Pub. L. 95-95, title I, § 109(a)-(d)(1), (e), (f), title IV, § 401(b), 91 Stat. 697-703, 791 (and has not revised it since then). In the 1970 CAA Amendments, Congress added section 112 (NESHAP), which defined, in section 112(a)(3), "stationary source" to mean the same as under section 111(a)(3). Pub. L. 91-604, § 4(a), 84 Stat. 1685 (Dec. 31, 1970). Congress preserved this provision in the 1977 CAA Amendments, Pub. L. 95-95, title I, §§ 109(d)(2), 110, title I, § 401(c), 91 Stat. 701, 703, 791 (and has not revised it since then).

health or welfare and EPA promulgated a standard for the source category specifically regulating the pollutants at issue, while the NESHAP requirements initially covered only pollutants that EPA determined were hazardous.[12] Congress apparently designed the PSD provisions in the same manner: the PSD provisions include a broad definition of source (the definition of "major emitting facility" refers to a source of "any air pollutant"), but the key substantive requirements apply to only certain pollutants (the definition of BACT applies to only pollutants regulated under other provisions, and the air quality "cause or contribute" demonstration applies to only pollutants for which there is a NAAQS or increment). In the PSD provisions – unlike the NSPS and NESHAP provisions – a literal reading of the definition of "major emitting facility" could affect the requirement to obtain a PSD permit, but the overall parallel between the PSD provisions on the one hand and the NSPS and NESHAP provisions on the other suggests that Congress did not intend this literal reading because it did not intend that the broad definition have significance that is independent of the substantive requirements of the program.

Third, the legislative history confirms that in designing the PSD program, Congress was concerned with the NAAQS pollutants and BACT. For example, the principal committee reports, viewed together, focus extensively on the health impacts of the NAAQS pollutants and their derivatives, and do not disclose any recognition that a literal application of the definition of "major emitting facility" would result in a much broader application of the program. S. Rep. No. 95-127, 95th Cong., 2d Sess. 27-37, 96-98(1977); H Rep. No. 95-194, 95th Cong., 2d Sess. 103-78 (1977).

---

[12] *See* references to 1970 and 1977 CAA Amendments above. (The same approach is found in the current versions of CAA §§ 111 and 112.)

The legislative history further indicates that Congress was aware of the inventory of stationary sources and contemplated that PSD generally should be applied more narrowly so that it would cover only the larger sources within that inventory. As the D.C. Circuit stated in *Alabama Power*:

> Congress's intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air.

See Alabama Power, 636 F.2d. at 353-54 ("[s]chool buildings, shopping malls, and similar-sized facilities with heating plants of 250 million BTUs" would not be covered) (*citing* 122 Cong. Rec. S. 12775, 12812 (statement of Sen. Bartlett)). EPA's interpretation of the definition of "major emitting facility" to refer to regulated air pollutants is reasonable in this light; interpreting the definition to refer to all air pollutants would mean that Congress could not have known the universe of sources that could be swept in.[13]

Finally, interpreting the definition to refer to even unregulated air pollutants would produce a result that undermines the congressional intent to limit the PSD provisions to the universe of larger emitters, and, indeed, undermines the mandated

---

[13] By the same token, the prospect that smaller sources would be swept into the PSD program through a literal definition of "major emitting facility" supports EPA's narrower interpretation under the judicial doctrine of "administrative necessity." This doctrine authorizes relief from a literal application of statutory provisions that cause administrative burdens. As stated by the D.C. Circuit in *Alabama Power,* where the Court addressed administrative burdens resulting from application of the PSD statutory provisions, as well as efforts by EPA to provide regulatory relief: "Certain limited grounds for the creation of exemptions are inherent in the administrative process, and their unavailability under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent to foreclose them." 636 F.2d at 357.

thresholds of 100 or 250 tpy. If unregulated air pollutants, such as carbon dioxide, were covered, a much larger set of sources would be required to undertake the expense of obtaining a permit, in contravention of congressional intent to limit the regulatory burden. Those sources would not be subject to substantive requirements for their carbon dioxide emissions, but their permit obligations would now affect all of the other, conventional pollutants they emit in amounts greater than the significance levels.[14] Because carbon dioxide is emitted by many small sources, for many of those sources, this result would have the effect of nullifying the 100/250 tpy thresholds for their conventional pollutants.

3. The Massachusetts Decision Does Not Affect EPA's Longstanding Interpretation of "Major Emitting Facility"

The Supreme Court's decision in *Massachusetts v. EPA,* __ U.S. __, 127 S. Ct. 1438 (2007) (*Massachusetts*) does not affect EPA's long-standing position that the phrase "any air pollutant" in the definition of "major emitting facility" is reasonably interpreted to refer, in effect, to "any *regulated* air pollutant." *Massachusetts* concerned section 202(a)(1) of the Act, which required EPA to take certain actions with respect to emissions of "any air pollutant" from new motor vehicles, and the case turned on the definition of the term "air pollutant" used within that phrase. The term "air pollutant" is defined under CAA § 302(g) to include "*any* air pollution agent or combination of such agents, including *any* physical, chemical …substance or matter which is emitted into or otherwise enters the ambient air" (emphasis added). EPA had argued to the Supreme Court that Congress did not authorize EPA to regulate for climate change purposes under the CAA, thus the term "air pollution" within the definition of "air pollutant" could not

[14] EPA defines what emissions levels of a pollutant are ''significant'' through regulation, and the defined significance levels range from 0.6 tpy for lead to 100 tpy for CO. 40 C.F.R. § 52.21(b)(23(i).

encompass climate change and hence, greenhouse gases could not be "air pollution agent[s]" based solely on their climate change impacts. But the Court, relying on the repeated use of the word "any" in the definition of "air pollutant," found that definition to be "unambiguous," concluded that greenhouse gases "fit well" within that definition in light of its "sweeping" and "capacious" nature, and dismissed EPA's various arguments that congressional intent was to the contrary. 127 S. Ct. at 1459-62.

Massachusetts is of limited relevance to the present case. The Petitioners dispute EPA's longstanding interpretation of the phrase "pollutant subject to regulation" in sections 165(a)(4) and 169(3) of the CAA, and the Board has identified questions about the interpretation of the phrase "any air pollutant" used in CAA § 169(1). Unlike in *Massachusetts,* in this case before the Board, the meaning of the term "air pollutant" is not at issue. Region VIII and OAR are not taking the position in this case that CO_2 is not an "air pollutant" as defined under CAA § 302(g). Rather, Region VIII and OAR are maintaining the longstanding Agency position that the term "any air pollutant" in CAA § 169(1) can reasonably be interpreted to refer to "any *regulated* air pollutant." This interpretation means that CO_2 emissions are not currently covered under the PSD program, but this is because they are not otherwise regulated, and not because they are not "air pollutant[s]."

Although *Massachusetts* focused on the meaning of "any" as it appears in the phrases "any air pollution agent" and "any physical, chemical…substance or matter" and held that the term "air pollutant" should be given an expansive meaning, this decision did not overrule any of the Supreme Court case law discussed earlier. *Massachusetts* did not disturb the Court's case law finding that the statutory constructs at issue there – including

some involving the term "any" – qualified as among those "'rare cases' [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters' … [in which case] the intention of the drafters, rather than the strict language, controls." *Ron Pair,* 489 U.S. at 242.[15] EPA's position has always been – and Region VIII and OAR's position in this case remains – fully consistent with the proposition that the use of the term "any air pollutant" in section 169(l) is one of those rare cases.[16]

Conclusion

For the reasons described above, the carbon dioxide monitoring and reporting requirements in section 821 of Public Law 101-549 (and the corresponding implementing regulations) are enforceable under the terms of section 821, and enforcement of those requirements does not make CO_2 a pollutant "subject to regulation under the [Clean Air] Act." Furthermore, EPA's interpretation that the major source applicability provisions apply only to pollutants regulated under the Act is long-standing and reasonable. Thus, the Board should uphold the permit issued to Deseret Power because the Petitioner has failed to demonstrate clear error in Region VIII's permitting decision. Region VIII's

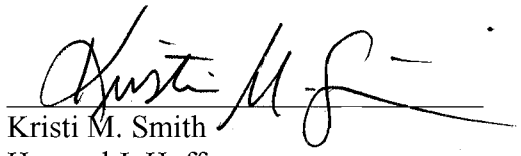
[15] Nor did the *Massachusetts* court address the "administrative necessity" exemption.

[16] In the Wegman memo that has been discussed throughout briefing and argument in this case, EPA took the position that "air pollutant" under section 302(g) refers to only "pollutants subject to regulation under the Act." *See* 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), Ex. 4 to Pet.'s Opening Brief, at 4 ("Wegman memo"). Even to the extent this interpretation contained in the Wegman memo is no longer good law following *Massachusetts,* which held that the definition of "air pollutant" under section 302(g) is "sweeping" and "capacious," Transcript at 60, for the reasons described above, the interpretation that "any air pollutant" under 169(l) was intended to refer to only regulated air pollutants remains valid.

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: August 8, 2008

Respectfully submitted,



Kristi M. Smith
Howard J. Hoffman
Brian L. Doster
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 VIII
1595 Wynkoop St.
Denver, CO 80202-1129
Telephone: (303) 312-6443
Facsimile: (303) 312-6859

CERTIFICATE OF SERVICE

I hereby certify that copies of the Response of EPA Region VIII and Office of Air and Radiation to Board's Request for Supplement Briefing were served on the following persons:

By U.S. Mail and electronic mail:

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

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

By U.S. Mail:

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

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

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

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

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

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

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

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

Date: August 8, 2008

Kristi M. Smith