4. Even if Petitioner Had Raised and Preserved This Issue for Review, Facility-Wide Emissions Are Addressed Elsewhere in the Permit and Are Subject to BACT.

While suggesting that plantwide emissions have not been properly accounted for in this permit and therefore must be accounted for at the point of combustion in the superheaters, Petitioner identifies no emission points at the Power Holdings facility for which IEPA failed to establish appropriate emissions limits, controls, work practices or other requirements. In fact, the Permit includes hundreds of provisions limiting all significant emission sources as well as plant-wide emissions.

Furthermore, plantwide emissions were modeled and found to result in an ambient air impact below Significant Ambient Air Quality Impact Levels. As discussed above, to count SNG production emissions both at the production units and at the superheater fuel combustion units, would *double count* those emissions in the plantwide emission total and skew the modeling. If Petitioner's suggested approach were the law of the land, air modeling all over of the country would be riddled with error and drastically overstate emissions.

5. IEPA Performed a Proper "Top Down" BACT Analysis and Selected the Cleanest Fuel Option as BACT.

EPA's NSR Manual establishes a "top-down" BACT analysis as a preferred approach to evaluating alternative control technologies. *NSR Manual* (Power Holdings Ex. 2 at B.5-B.9 (summarizing the top-down process)). Only if the "top" alternative is not selected does the analysis continue to the next step of evaluating other alternatives. *Id.* By selecting natural gas and SNG as BACT clean fuel, IEPA chose the cleanest known combustion fuel. In addition, IEPA took the unusual step of also requiring installation and operation of an SCR system to further reduce emissions from the superheaters. Therefore, IEPA was not required to go any further in a "top down" BACT analysis.

The Board recently plainly and accurately described the "top down" BACT approach in *In re Northern Michigan University Ripley Heating Plant*, PSD Appeal No. 08-02, Slip Op. at 13 (EAB, Feb. 18, 2009):

> [A]ssemble all available control technologies, rank them in order of control effectiveness, and select the best. So fixed is the focus on identifying the 'top,' or most stringent alternative, that the analysis presumptively ends there and the top is selected...

Id.

Notably, in the *Northern Michigan University* case, there were substantial differences between the fuel options at issue, i.e. sulfur content, costs, availability. In contrast, Petitioner in this case is contesting IEPA's selection of two fuels which are essentially identical in all of these respects and are also the cleanest combustion fuels.

Natural gas is universally recognized as a clean fuel and typically constitutes the "top" alternative for BACT purposes. *See, e.g., Id.* at 20, n.17; *Responsiveness Summary* (Pet. Ex. 7 at 30). Here, IEPA selected natural gas and its chemical equivalent as BACT for the superheaters, which could have ended IEPA's inquiry under the accepted "top-down" approach. IEPA, however, IEPA also required operation of the SCR system.

IEPA also comprehensively addressed Petitioner's suggestions regarding the use of biomass as a fuel and the contention that biomass is cleaner than natural gas. *Responsiveness Summary* (Pet. Ex. 7 at 29-34). IEPA explained that natural gas is cleaner than biomass, which emits more particulate matter, carbon monoxide, volatile organic material, nitrogen oxides, and sulfur dioxide. (Pet. Ex. 7 at 30.) In addition, as discussed above, IEPA found that SNG is as clean, and in fact "purer" methane, than natural gas. (*Id.*) In short, IEPA conducted the appropriate BACT analysis and reached the correct conclusion – either natural gas or SNG constitute BACT for the superheaters.

The cases cited by Petitioner regarding when cleaner fuels must be considered in a "top down" BACT analysis, *Northern Michigan University, Id.* and *InterPower of New York*, 5 E.A.D. 130, 134 (EAB 1994), are inapposite because the Power Holdings permit requires the use of the natural gas (or its chemical equivalent) which is the cleanest alternative. *Petition at 7.* Similarly, the cases cited by Petitioner that discuss whether use of an alternative fuel would "redefine the basic end, object, aim or purpose of the applicant," *In re Prairie State*, 13 E.A.D. ___, PSD Appeal No.05-05, Slip. op. at 29, 32 (EAB Aug. 24, 2006); *Hibbing Taconite Co.*, 2 E.A.D. 833, 843 (Adm'r 1989); *Northern Michigan University*, Id. Slip. op. at 26 27, *Desert Rock Energy Co.*, 14 E.A.D. ___, PSD Appeal Nos. 08-03, 08-04, 08-05, and 08-06, Slip. op. at 61-64 (EAB, Sept. 24, 2009), have no relevance in this case because IEPA selected the cleanest fuel option as BACT. *Petition at* 7-8.

6. IEPA Made the Changes Requested by Petitioner and the Final Permit Prohibits the Use of Syngas, Therefore that Issue is Moot.

The proposed permit would have allowed Power Holdings the additional option of fueling the superheaters with synthesis gas, known as "syngas," which is an intermediate form of the gas that has been through significant clean-up, but which has not been completely processed to produce constituents identical to natural gas. Syngas refers to the gas prior to processing via methanation which converts carbon monoxide (CO) and hydrogen (H2) into methane (CH4).

At the hearing and in its written comments, Petitioner argued that BACT required that the cleanest available fuel be used, and, since natural gas is a cleaner available fuel, IEPA should not allow "syngas" to be used to fire the superheaters. *Petitioner's Comments* (Pet. Ex. at 38).

In response to Petitioner's comments, IEPA modified the proposed permit to state that only natural gas or SNG may be used to fuel the superheaters:

> In response to this comment, the issued permit restricts the superheater to use only natural gas, rather than syngas or natural

> gas as would have been provided by the draft permit. (See Condition 4.2.5(a) of the issued permit.) Note that use of either 'natural' natural gas or product synthetic natural gas (SNG) from the plant is allowed. This is because the properties of NSG as related to emissions, i.e., the heat content, sulfur content and ash content of SNG, are and must be essentially identical to those of natural gas.

Responsiveness Summary (Ex. 7 at 30).

Since IEPA changed the permit to prohibit use of "syngas," as requested by Petitioner, that issue should be considered moot. Contrary to Petitioner's contention, the Responsiveness Summary did not re-open the door for use of "syngas" in lieu of natural gas or SNG. Referring to page 30 of the Responsiveness Summary, Petitioner states:

> IEPA speculates that (pre-methanation) syngas could be allowed to fuel the superheaters if it can be shown that is "result[s] in lower overall emissions if it enabled the productive use of syngas during an upset, thereby eliminating the flaring of such syngas..." Response to Comments at 30 n.60. In other words, if the applicant could show that using raw syngas reduces plant-wide emissions, the applicant could be allowed to use raw syngas rather than natural gas or SNG. However, where the plant-wide emissions are greater from SNG, IEPA failed to require the use of natural gas."

(Petition at 10.)

This is an entirely inaccurate statement containing a half-quote taken out of context and a flatly untrue statement of the Permit terms. The final Permit clearly distinguishes SNG and syngas and expressly states that only natural gas or SNG may be used to fuel the superheaters. Permit Conditions 4.2.1 and 4.2.5.a. (Pet. Ex. 1 at 34, 37). IEPA was not suggesting that the final Permit would allow Power Holdings to fuel the superheaters with syngas in the course of normal operation or at any other time.

The footnote to which the Petitioner refers does not result in or even imply an exception to this restriction. In the paragraph to which the footnote is appended, IEPA explains that the reason why syngas must be disallowed is because Power Holdings' application "does not

explicitly address the difference in the composition and properties of natural gas and syngas" nor does the application "demonstrate that use of syngas in the superheaters would be accompanied by lower overall emissions from the proposed plant." *Responsiveness Summary* (Pet. Ex. 7 at 30). The footnote simply makes an observation, likely for the benefit of future permit applicants, that Power Holdings might have been able to demonstrate that use of syngas in the superheaters during a malfunction would actually reduce emissions. The full quote is as follows:

> Use of syngas as fuel in the superheaters could result in lower overall emissions if it enabled the productive use of syngas during an upset, thereby eliminating the flaring of such syngas while at the same time using natural gas to maintain the operation of the superheaters." *Responsiveness Summary* (Pet. Ex. 7 at 30, n.60).

Because Power Holdings did not make this demonstration, the IEPA provided no exception in the Permit to the requirement that the superheaters be operated using only natural gas or SNG. Rather than opening a door for even limited use of syngas, the IEPA's comments were designed to explain the Permit's prohibition on the use of any fuel other than natural gas or SNG in the superheaters.

7. Requiring the Use of Purchased Natural Gas, In Lieu of SNG Produced at the Power Holdings Plant, Would Not Reduce Either Combustion Emissions From the Plant or Plantwide Emissions at the Plant.

As a final point, Petitioner's premise that using SNG in the superheaters has any impact on plantwide emissions is based on a fundamental fallacy. Petitioner states:

> Producing SNG at Power Holdings results in different emission streams at the facility ...Using NG in the superheaters, rather than SNG, avoids the emissions created to manufacture the SNG for use in the superheaters. IEPA's failure to consider plant-wide emissions associated with manufacturing SNG for use in the superheaters, rather than burning NG, is clear error.

(Pet. at 10-11.)

Rather than being clear error on IEPA's part, this is unclear thinking on Petitioner's part. Prohibiting use of SNG in the superheaters would not reduce Power Holdings' SNG production capacity or permitted emissions limits. If Power Holdings does not use its own SNG product, it would simply use pipeline natural gas to fuel the superheaters and export more SNG to the marketplace. Thus there would be no impact on facility emissions. Since natural gas and SNG are commercially interchangeable commodities which are distributed through the same pipeline, there would actually be no effect on emissions.

In conclusion, there are a number of reasons to reject Petitioner's new claim regarding the use of SNG to fuel the superheaters. However, the Board need not rule on these various points because neither Petitioner nor any other party raised the question of whether fuel manufacturing emissions must be considered when a fuel is selected as BACT for a combustion unit in comments before IEPA. Therefore, this issue is not reviewable by the Board.

C. CONTRARY TO PETITIONER'S CONTENTION, NO ILLINOIS REGULATIONS, INCLUDING 35 ILL. ADMIN. CODE § 201.141, HAVE BEEN APPROVED FOR OR INCORPORATED INTO THE ILLINOIS SIP FOR PURPOSES OF PSD PERMITTING, THEREFORE THE BOARD LACKS JURISDICTION TO REVIEW PETITIONER'S STATE LAW CLAIM.

Petitioner argues that the IEPA must make a determination of federal PSD "Best Available Control Technology" for Greenhouse Gases ("GHGs"), including CO2 and methane[7], because such gases constitute "contaminants" causing or contributing to "air pollution" under Illinois law. Petitioner stitches together an attenuated federal and Illinois law argument that is legally incorrect on multiple levels, but which can be disposed of easily based on a simple

[7] Note that while methane (SNG) is the end product of the Power Holdings gasification process, there will be no methane emissions from the Power Holdings facility – even during malfunctions. This is because the Facility has no methane emission points. Once it has created SNG, it is immediately transported from the Facility via pipeline – much as electricity from a powerplant is immediately fed into the electrical transmission grid.

review of the Illinois State Implementation Plan ("SIP"). The SIP is incorporated in EPA regulations at 40 C.F.R. § 52.720, *et seq.*

Petitioner argues that the CAA and corresponding PSD regulations require a PSD-permitted facility to meet "applicable emissions limitation under the State Implementation Plan." (Pet. 11); 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 52.21(j)(1). This is true. But Petitioner then blithely and erroneously states that the Illinois SIP contains an Illinois regulation, 35 Ill. Admin. Code § 201.141, which prohibits the emission of "any contaminant," including greenhouse gases, into the environment. (Pet. 11); 35 Ill. Adm. Code § 201.141. This is not true.

Quite apart from the sound analysis of Illinois law provided in the Responsiveness Summary, Petitioner's novel Illinois law claim must fail because, as a threshold matter, Illinois has not been approved by U.S. EPA to administer its own PSD program. Therefore, Petitioner's state law claim does not fall within the jurisdiction of the Board in this appeal.

The following is established federal law which is well-known to the Board:

(1) The approved Illinois SIP for the PSD program consists solely of the federal PSD regulations. *In re: West Suburban Recycling & Energy Center ("WSREC")*, 6 E.A.D. 692, 707 (EAB 1996);

(2) A state that has been delegated PSD permitting authority "stands in the shoes" of the U.S. EPA and cannot include a state regulation in its PSD permits without expressly stating that such regulation is *not* a federally enforceable PSD requirement. *Delegation of Authority to State Agencies*, 46 Fed. Reg. 9580 (Jan. 29, 1981); *In re: Amerada Hess Corp. Port Reading Refinery*, 12 E.A.D. 1, 10 14 (EAB 2005); *In re: Knauf Fiber Glass, GmbH ("Knauf I")*, 8 E.A.D. 121, 162 (EAB 1999); *WSREC*, 6 E.A.D. at 707 08; and

(3) The Board has no jurisdiction to review questions of Illinois law, including Section 201.141. *In re Sutter Power Plant*, 8 E.A.D. 680, 688, 690 (EAB 1999); *Knauf I*, 8 E.A.D. at 162; *Hillman Power Co.*, 10 E.A.D. 673, 698 (EAB 2002); *Amerada Hess*, E.A.D. at 13.

Furthermore, as is discussed below, the cases cited by Petitioner are inapposite and fail to substantiate its argument.

1. The Approved Illinois SIP for the PSD Program Consists Solely of the Federal PSD Regulations.

Petitioner asserts that the Illinois SIP incorporates Section 201.141, and that IEPA is bound to assure compliance with Section 201.141 when it issues PSD permits. *See* 40 C.F.R. § 52.720. From this assertion, it is clear that Petitioner misunderstands the Illinois SIP and the federal SIP regulations. The Illinois SIP incorporates the Illinois General Permitting regulations in Part 201, including Section 201.141, solely for purposes of implementing Illinois's federally-approved Title I Subpart D non-attainment area regulations and Illinois's federally approved Title V Operating Permit regulations. See 40 C.F.R. 52.720, *et seq.*

Although Illinois has a federally approved SIP for Title I non-attainment area permitting and Title V operating permits, Illinois does not have a federally approved SIP for Title I PSD permitting. For PSD program purposes, the Illinois SIP expressly states that the requirements of Sections 160 to 165 of the CAA were not met by the plan submitted by Illinois because it did not include "approvable procedures for preventing the significant deterioration of air quality." 40 C.F.R. § 52.738. To fill this void, the federal regulation states, "The provisions of Section 52.21 . . . are hereby incorporated and made a part of the applicable State plan for the State of Illinois." *Id.* As the Board has previously explained, "The Illinois SIP has not been approved with respect to a PSD program, and therefore, the federal PSD program remains in force and effect in

Illinois." *WSREC*, 6 E.A.D. at 695-96, n.5 (explaining that U.S. EPA approved the Illinois SIP for new source permits in nonattainment areas, but not PSD permits in attainment areas).

Because the Illinois SIP incorporates the Illinois General Permit Provisions in Part 201 only for purposes of implementing Illinois's EPA approved Subpart D non-attainment area program and Illinois' EPA approved Title V permit program, Section 201.141 is not an applicable PSD requirement for the Power Holdings permit.

2. As a State That Has Been Delegated PSD Permitting Authority, Illinois "Stands in the Shoes" of the U.S. EPA.

U.S. EPA has delegated its PSD permitting to IEPA pursuant to a PSD Delegation Agreement. *Delegation of Authority to State Agencies*, 46 Fed. Reg. 9580 (Jan. 29, 1981). As a delegated federal PSD program administrator, IEPA "stands only in the shoes" of U.S. EPA in administering the federal PSD program and cannot require compliance with state law as a PSD program requirement.

In *WSREC*, IEPA had denied a PSD permit based solely on failure to comply with a state Facility siting law. 6 E.A.D. at 11, 13 IEPA argued that the PSD Delegation Agreement "essentially instructed IEPA to perform its delegated PSD authority in a manner *consistent with the Illinois statutes and rules that implement the SIP.*" *Id.* at 707 (emphasis added). But the Board found IEPA's interpretation of the Delegation Agreement "unsupported by the plain terms of the document." *Id.* The Board returned to the concept of IEPA standing in U.S. EPA's shoes: "Obviously, U.S. EPA would not be free to deny a federal PSD permit solely on the basis of failure to comply with state permitting requirements. Therefore, IEPA may not do so." *Id.* The same result is mandated here.

3. Because Section 201.141 Is Purely a State-Based Requirement, the Board Has No Jurisdiction in this Area.

When a delegated state issues a PSD permit, such permits are considered EPA-issued permits and therefore are subject to the Board's jurisdiction. *See Amerada Hess*, 12 E.A.D. at 11, 13. But the Board's jurisdiction to review state-based requirements is limited to the federal PSD program requirements.

While a delegated state may include non-PSD, state-based requirements in a PSD permit as a part of an integrated state/federal permitting process, the Board may only review the elements of a PSD permit that originate in the federal PSD program – not the permit requirements that are adopted solely pursuant to state law. *Id.; Knauf I*, 8 E.A.D. at 162. Because Section 201.141 is solely a state-based requirement that has not been incorporated into the Illinois SIP for PSD purposes, the Board has no jurisdiction to interpret or otherwise consider this state regulation in PSD permit appeals.[8]

The Board's lack of jurisdiction to consider state-based requirements as part of its PSD review process is well-established. In a case that involved a Michigan rule that is very similar to Illinois's Section 201.141, *Hillman Power Co.*, 10 E.A.D. 673, 698 (EAB 2002), the Michigan Department of Environmental Quality issued a PSD permit that included a general condition requiring that the facility shall not emit an "air contaminant" that causes, *inter alia*, "injurious effects to human health or safety." The Board noted that this permit condition paraphrased a Michigan air pollution control rule found in Michigan's administrative code. *Id.* "That rule, and the permit condition itself, essentially prohibit emissions that cause a public nuisance. This is a

[8] Although not directly relevant in this case, this issue is also moot for non-attainment NSR permits. As EPA has not promulgated national air quality standards except for current CAA criteria pollutants, there are no non-attainment areas for GHGS, odors, ammonia or any other substance that is not a CAA criteria pollutant. Thus, Section 201.141 creates no grounds for GHG regulation in either the PSD program or the NAA new source review program in Illinois.

state-specific issue that is not subject to regulation under the federal PSD program." *Id.* Therefore, the Board denied the petition because it lacked jurisdiction to consider this state-based requirement. *See also Knauf I*, 8 E.A.D. at 165-68.

As stated by the Board in *Amerada Hess*:

> In general, the Board's jurisdiction to review state-issued permit is limited to those elements of the permit that find their origin in the federal PSD program – for example, the Board lacks authority to review conditions of a state-issued permit that are adopted solely pursuant to state law. *See In re Sutter Power Plant*, 8 E.A.D. 680, 688, 690 (EAB 1999) (explaining that..."[t]he Board may not review, in a PSD appeal, the decision of a state agency made pursuant to non-PSD portions of the CAA or to state or local initiatives and not otherwise relating to the permit conditions implementing the PSD program.") (citing *Knauf I*, 8 E.A.D. at 167 68).

12 E.A.D. at 5.

As explained in *Knauf I*, the Board will not "assume jurisdiction" over issues that were not "explicit requirements of the PSD provisions" or that had not been "otherwise linked to the federal PSD program in the context of [that] case." 8 E.A.D. at 162; *See also Amerada Hess*, 12 E.A.D. at 14, n.27.

The PSD review process is not "an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bares on air quality." *In re: Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999). Here, Petitioner seeks to improperly use the PSD review process as its open forum to debate and regulate carbon dioxide emissions. Because Section 201.141 is solely a state-based requirement and not an element of the Illinois SIP for the PSD permit program, IEPA did not error by not considering it in this PSD permit proceeding. Indeed, it would have been error for it to do so. Furthermore, the Board has no jurisdiction here to review Petitioner's claim that IEPA erred by not ensuring compliance with Section 201.141 in this PSD permit. Not having the authority to review a non-PSD state rule or condition, the Board

clearly does not have the authority to *require* that a delegated state demonstrate compliance with a state regulation in a PSD permit.

4. Cases Cited by the Petitioner Are Inapposite and Fail to Substantiate Its Argument.

The assorted enforcement documents and single Title V permit Petitioner cites are inapposite to the facts here. If anything, these documents confirm that PSD permits are *not* the source of EPA's or the State's authority to enforce Section 201.141 of the Illinois regulations.

i. *The cited EPA enforcement documents and Title V Permit do not involve the Illinois PSD program.*

Petitioner cites one federal complaint, one Federal Consent Agreement and Final Order ("CAFO"), and one Title V permit in support of its position. Neither of these is authoritative, instructive or analogous to the facts at issue here. Each is merely an example of U.S. EPA's authority to enforce the Illinois Part 201 regulations which are incorporated in the SIP for Title V permitting and enforcement purposes. Neither of these documents demonstrates U.S. EPA or its state delegate have the authority to insert Illinois Section 201.141 in a PSD permit.

The Complaint in *U.S. v. Bunge*, Complaint, Civil Action No. ___ (Oct. 26, 2006) ("Bunge") (Pet. Ex. 9) involved twelve plants in eight states – some located in states with approved PSD programs and some located in states with delegated PSD programs. As stated above, Illinois has a delegated PSD program that consists of the federal Section 52.21 regulations which are incorporated in the Illinois SIP by 40 C.F.R. § 52.238. Thus, the reference to "corresponding SIP regulations," in Illinois' PSD case, means Section 52.238 and the federal regulations. Illinois does have an applicable SIP provision that includes Illinois regulations for PSD – rather it consists solely of the federal PSD regulations.

While many of the allegations in the *Bunge* Complaint involve new source issues (PSD and NSPS), the section of the *Bunge* Complaint that uniquely addresses the Illinois SIP and

Illinois Rule 201.141 is different. It states that the basis of that claim is the "EPA approved Illinois' Operating Permits program as consistent with the requirements of the Act, Title V, at 40 C.F.R. 70, Appendix A." (Pet. Ex. 9 at 12, ¶ 35.) Notably, 40 C.F.R. § 52.23 cited in paragraph 36 of the Complaint, provides EPA with broad authority to enforce "any *approved* regulatory provisions of a State implementation plan." (Pet. Ex. 9 at 12, ¶ 36 (emphasis added).) In these paragraphs, the Complaint is referring to the SIP corresponding to the *approved* Illinois Title V permit program. There is no reference to the *delegated* CAA Title I, Subtitle C PSD program provisions.

The *Bunge* Complaint is not evidence of EPA authority to require compliance with state regulations in a delegated state's PSD permit. Rather, the careful distinctions EPA makes regarding its Title V authority to enforce the Illinois SIP is evidence that EPA is well aware that it does *not* have that authority under the Illinois PSD program.

The second federal document cited by the Petitioner is a CAFO entered between U.S. EPA and IFCO-Chicago, Inc. (Pet. Ex. 8.), *In re IFCO ICS-Chicago, Inc.*, USEPA Region 5, Docket No. CAA-05-2002-0011, Consent Agreement and Final Order (Aug. 29, 2002) ("IFCO"). This CAFO is simply another example of U.S. EPA using its Title V SIP authority to enforce Illinois Section 201.141 in a Title V permit enforcement proceeding. U.S. EPA enforced this state provision solely as a SIP regulation approved by EPA as a part of Illinois' Title V operating permit program. Once again, this is not an example of U.S. EPA or IEPA, as its delegate, having the authority to insert Illinois Part 201 regulations in a PSD construction permit.

Finally, the Veolia Environmental Services Title V permit cited by Petitioner (Pet. Ex. 11) is just that - a Title V permit. Again, this permit is solely evidence of EPA's authority to include Illinois law provisions in Title V permits.

ii. *The cited state enforcement cases simply affirm Illinois's authority to enforce its own regulations.*

The two state enforcement documents that Petitioner cites are even more irrelevant than the federal enforcement documents discussed above. In the complaint in *People ex rel. Madigan v. ExxonMobil Corp.*, Complaint for Injunctive Relief and Civil Penalties, Ill.Cir.Ct., 12 Dist. (Sept. 28, 2009) (Pet. Ex. 10), the State brought an action for injunctive relief and civil penalties against ExxonMobil based on a hydrogen fluoride and liquefied petroleum gas leak at its petroleum refinery. (Pet. Ex. 10 at 3, ¶ 8.) In *People ex rel. Ryan v. IBP, Inc.*, 743 N.E.2d 370 (Ill.App.Ct. 1999), the State also brought an action for injunctive relief and penalties against IBP, an owner of a beef slaughtering and processing facility, based on releases of ammonia and sulfuric acid into the environment. 723 N.E.2d 370, 372 (Ill. App. Ct. 1999). Both of these cases alleged violations of Section 9(a) of the Illinois Environmental Protection Act and Section 201.141. (Pet. Ex. 10 at 5, ¶ 22); *IBP*, 723 N.E.2d at 372. Neither case involved PSD permits or any other state or federal permit. Rather, these are rule-based enforcement cases. These cases simply show that Section 201.141 is a state law enforceable by the State.

While Petitioner contends these complaints demonstrate Illinois has interpreted § 201.141 as applying to non-criteria pollutants, even in the enforcement arena Petitioner has failed to cite any case in which U.S. EPA or Illinois has brought a Section 201.141 claim based on carbon dioxide or any other greenhouse gas emission. Moreover, Petitioner has failed to cite any case in which the Illinois General Assembly, IEPA, the Illinois Pollution Control Board (the state's rulemaking body), or any Illinois court has found carbon dioxide or any other greenhouse gas to constitute an "air pollutant" under Illinois Section 201.141.

Petitioner continues its reliance on inapposite case law by citing *Alton Packaging Corp. v. Pollution Control Board*, 516 N.E. 255 (Ill.App.Ct. 1987), for the proposition that Section

201.141 is an emissions limit. (Pet. 16); 516 N.E.2d 275, 277 (Ill. App. Ct. 1987). In that case, a manufacturer of paperboard and packaging products appealed the denial of its application for renewal of an *operating* permit, not a PSD permit. 516 N.E.2d at 276. The EPA denied the operating permit based on a showing that the manufacturer's sulfur dioxide emissions would violate Illinois' primary ambient air quality standard for sulfur dioxide, 35 Ill. Admin. Code § 243.122(a)(2), and Section 201.141. 516 N.E.2d at 277. The Pollution Control Board and the Illinois Appellate Court affirmed this denial. *Id.* at 280. This case is again irrelevant. The permit at issue was an operating permit, not a PSD permit, and the emissions were sulfur dioxide, not GHGs. Furthermore, a potential violation of Section 201.141 was not the only reason for denial of the permit -- Section 243.122, the primary ambient air quality standard for sulfur dioxide, was cited as well.

Finally, Petitioner's contorted argument regarding the similarity of the U.S. Supreme Court's interpretation of the Clean Air Act term "air pollutant" in *Massachusetts v. EPA*, 549 U.S. 497 (2007) and the Illinois regulatory definition of "air contaminant" is simply irrelevant since neither IEPA nor EPA has the authority to include state law in an Illinois PSD permit and the Board lacks jurisdiction to even consider this question.

In conclusion, it is telling that Petitioner is unable to point to a single Illinois PSD permit or PSD program enforcement action involving Section 201.141 or any other Illinois regulation. Indeed, this is because neither EPA nor IEPA has the authority to include Illinois regulations in Illinois PSD permits. While Power Holdings believes it would be error for the Board to consider Illinois law in this case, if it were to do so, it would find no support for Petitioner's contention. On this point, we further direct the Board to the IEPA Responsiveness Summary which addresses the Illinois law in greater detail. Pet. Ex. 7, p. 88, ¶ 157.

D. PURSUANT TO THE BOARD'S DIRECTIVE IN DESERET POWER, EPA ISSUED A DEFINITIVE INTERPRETATION OF THE CAA'S "SUBJECT TO REGULATION" LANGUAGE ON DECEMBER 18, 2009, AND EXPRESSLY FOUND THAT CARBON DIOXIDE AND METHANE ARE NOT CURRENTLY PSD REGULATED POLLUTANTS UNDER THE CAA. GIVEN THIS DEFINITIVE EPA INTERPRETATION, THE BOARD LACKS JURISDICTION TO REVIEW PETITIONER'S CLAIM THAT IEPA ERRED BY FAILING TO INCLUDE BACT LIMITS FOR CO2 AND METHANE IN POWER HOLDINGS PERMIT.

Petitioner's claim that IEPA erred by failing to include BACT limits for CO2 and methane in Power Holdings permit should be dismissed because it pertains to a pollutant which is not a "regulated NSR pollutant" under 40 C.F.R. 51.21(b)(50) and therefore does not fall within the scope of Board review of a PSD permit. As is discussed below, EPA has now issued a binding interpretation which resolves the ambiguity in the CAA identified by the Board in *In re Deseret Power Cooperative*, 14 E.A.D. ___ (EAB 2008); Slip op. PSD Appeal No. 07-03 (Nov. 13, 2008). As discussed below, EPA has also issued several documents, including Proposed and Final Rules, which reaffirm this interpretation as applicable at the time of the IEPA permit decision and right now. IEPA properly relied upon and, indeed, was bound by that EPA interpretation in issuing Power Holdings Permit. Furthermore, EPA has taken no actions which subject carbon dioxide or methane to "actual control." Therefore, Petitioner's claim regarding these GHGs is no different from the many other claims that the Board has dismissed in other cases regarding other non-PSD pollutants and must be dismissed here.

1. Following the Board Directive in Deseret Power, EPA Has Now Published an Administrative Agency Interpretation of National Scope Finding That Carbon Dioxide, Methane and Other Greenhouse Gases Are Not Subject to Regulation Under the Clean Air Act.

In *Deseret Power*, the Board "rejected the Petitioner's argument that either the plain meaning of "regulation," or the wording of section 821, compels a particular interpretation of the phrase "subject to regulation under this Act" for purposes of the PSD provisions of Section 165

and 169." *In re Deseret Power Electric Cooperative, Id.* Slip op. at 35. The Board found "no evidence of a Congressional intent to compel EPA to apply BACT to pollutants that are subject only to monitoring and reporting requirements" and also found that the "the meaning of the term 'subject to regulation under this Act' as used in sections 165 and 169 is not so clear and unequivocal as to preclude the Agency from exercising its discretion in interpreting the statutory phrase." *Id.* Slip op. at 63.

However, the Board found that EPA had not identified any Agency document expressly stating that subject to regulation under this Act means "subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant (or any other clearly worded statement expressly connecting the meaning of statutory phrase 'actual control of emissions')." *Id.* Slip op. at 35-36.

The Board remanded the Deseret Power permit back to Region 8 EPA "to reconsider whether or not to impose a CO2 BACT limit in light of the Agency's discretion to interpret, consistent with the CAA, what constitutes a "pollutant subject to regulation under this Act." The Board recognized that this is an issue of national scope having implications beyond the Deseret Power permit and encouraged EPA to address "the interpretation of 'subject to regulation under this Act' in the context of an action of nationwide scope." *Id.* Slip. op. at 63-64.

Since the issuance of the *Deseret Power* decision much has happened. Most significantly, EPA followed the Board's directive and issued a definitive interpretation of the phrase "subject to regulation under this Act" which expressly connects that phrase to "actual control of emissions." Furthermore, EPA issued this interpretation in an action of nation wide scope.

On December 18, 2008, Administrator Johnson issued *"EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant*

Deterioration (PSD) Permit Program." ("Johnson Memo") (Power Holdings Ex. 3). This memorandum, known as the "Johnson Memo," was published in the Federal Register on December 31, 2008. 73 F.R. 80,300. The Johnson Memo recites the Board's finding in *Deseret Power* and expressly states:

> "This memorandum contains EPA's definitive interpretation of 40 C.F.R. 52.21(b)(50) and is intended to resolve any ambiguity in subpart (vi) of that paragraph, which includes 'any pollutant that otherwise is subject to regulation under the Act.' As of the date of this memorandum, EPA will interpret this definition of 'regulated NSR pollutant" to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant." Johnson Memo (Power Holdings Ex. 3 at 1).

Since the issuance of the Johnson Memo, EPA has applied the Johnson Memo in a specific permit challenge, issued a proposed rule upon reconsideration of the Johnson Memo's "actual control" interpretation, and discussed the Johnson Memo in both its proposed "Tailoring Rule" and its Final Rule on the Endangerment Finding. Each of these EPA documents expressly state that the Johnson Memo is current binding Agency interpretation.

In an Administrator's Order, *In re Louisville Gas & Electric Co.*, EPA Adm. Order, August 12, 2009 (Pet. Ex. 15), Administrator Jackson referred to the Johnson Memo as establishing an interpretation of "subject to regulation" within the federal PSD regulations, noted that while EPA had granted a request for reconsideration of the Johnson Memo, it did not stay its effectiveness pending reconsideration, and found that the Kentucky Department of Air Quality ("KDAQ") had not erred by not including BACT limits for CO2 in a permit. *Id.* p. 15-17. Petitioner attempts to distinguish EPA's clear position in *Louisville Gas & Electric* by saying that it was limited to a statement that the KDAQ didn't err, given the EPA briefing in the *Deseret*

Power and Christian County cases at that time, but that this is not the same as saying that EPA actually has an established interpretation. Petition p. 37. But, in fact, what EPA said was:

> "The position taken in KDAQ's permitting decision rests on the interplay of its SIP and the federal PSD program, and *that decision is consistent with the EPA's present position* regarding which pollutants are subject to federal PSD permitting requirements.". *Id.* at 16, Footnote 17. [emphasis added]

As discussed above, "EPA's present position" at the time of the *Louisville Gas & Electric* Administrator's Order was and is the position articulated in the Johnson Memo. The Administrator's Order spends a full paragraph discussing the Johnson Memo and refers to that memo saying "The Johnson Memo established an interpretation of 'subject to regulation' within the federal PSD regulations..." EPA also makes it clear that the Johnson Memo is in full force and effect. Regarding the effect of Petitioner's motion for reconsideration that is referred to in the Petition in this case, the Administrator's Order states:

> "...Administrator Jackson announced the intent to conduct a rulemaking to take public comment on the issues raised in the memo, but she did not stay the effectiveness of the Johnson memo pending reconsideration." Id. p. 16

In its Proposed Rule titled *Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program*, 74 F.R. 51535 (Oct. 7, 2009), ("Proposed Rule") (Power Holdings Ex. 4), EPA provided a detailed analysis of the Johnson Memo and other alternative interpretations of "subject to regulation" and reiterated its continuing belief that the interpretation set forth in the Johnson Memo best reflects the intent of the CAA. EPA also clearly stated that the Johnson Memo remains effective EPA interpretation throughout the reconsideration process:

> "On February 17, 2009, the EPA Administrator granted a petition for reconsideration of the regulatory interpretation in the memorandum. However, the Administrator did not grant a request to stay the memorandum, so the interpretation remains in effect for

> the federal PSD program pending completion of this reconsideration action." Proposed Rule (Power Holdings Ex. 4 at 51535).

It is telling that Petitioner did not even mention EPA's Proposed Rule in the Petition in this case – despite the fact that the Proposed Rule was issued almost two months before Petitioner's Petition was filed and despite the fact that it was directly responsive to Petitioner's own Petition for Reconsideration of the Johnson Memo. Clearly, Petitioner knew of EPA's Proposed Rule and its extensive discussion supporting the interpretation in the Johnson Memo, but seeks to minimize its significance.

In its Proposed "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" 74 FR 55292 (Oct. 27, 2009), ("Tailoring Rule") (Power Holdings Ex. 5) announced on September 30, 2009, EPA again reiterated that the Johnson Memo interpretation remains in effect during the pendency of the EPA reconsideration:

> "2. Current Applicability of the PSD Program to Sources of GHG Emissions
>
> As explained earlier in this preamble, EPA treats sources as subject to PSD requirements only if they emit "regulated NSR pollutants" at specified threshold levels. Currently, EPA does not consider GHG emissions to be "regulated NSR pollutants" under the PSD program because GHG emissions have not, thus far, been subject to regulation requiring control under the CAA....
>
> ....Administrator Jackson made clear that the current interpretations in the PSD Interpretive Memorandum remain in effect during the reconsideration process.

74 FR 55292, 55299-55300 (Oct. 27, 2009)

It is once again telling that Petitioner failed to mention the "Tailoring Rule" in its Petition even though it was announced almost two months before the Petition was filed in this case.[9]

[9] The EAB can also take notice that the continuing validity of the Johnson Memo was confirmed even more recently in EPA's Endangerment Finding. *74 FR 66496*, 66516, Ftnt 17. [Power Holdings Ex. 6].

The fact is that the Johnson Memo is EPA's clear, binding interpretation of the CAA – indeed it is hard to imagine a clearer statement of EPA policy. Thus the defect that the Board identified in EPA's prior statements on this subject has now been corrected. As recognized by the Board, EPA is the agency charged with implementing and interpreting the CAA and PSD program provisions, including its own regulations. *Deseret Power*, Slip. op. at 63-64. Thus, whether the Petitioner or even the Board itself disagrees with the interpretation in the Johnson Memo, that interpretation is current, binding EPA interpretation which resolves the ambiguity in the law identified by the Board in *Deseret Power*. As a state that "stands in the shoes" of EPA in issuing PSD permits, Illinois was obligated to follow EPA's interpretation as established in the Johnson Memo when issuing the Power Holdings permit.

2. EPA Has Directly Addressed and Rejected Petitioner's Contention That Various EPA Actions In Other Contexts Have Imposed "Actual Control" on GHGs.

The Johnson Memo not only provides a clear Agency interpretation of the statutory phrase "subject to regulation under this Act," it also provides EPA's interpretation of how that interpretation pertains to other regulatory actions which the Petitioner contends imposed "actual control" on carbon dioxide or methane.

In its Petition in this case, Petitioner tacitly recognizes that the Johnson Memo puts an end to the question of whether "subject to regulation under this Act" means "actual control". Instead of arguing about whether "actual control" is required, Petitioner now contends that several of EPA's past regulatory actions, designed for entirely different purposes, resulted in a backdoor through which EPA has inadvertently triggered a nationwide requirement for regulation of greenhouse gas emissions under the PSD program. This is an unreasonable and unsupported reading of the CAA and the referenced regulatory actions.

In the Johnson Memo, EPA found:

> "The language in Sections 165(a)(4) and 169(3) of the CAA requiring technology-based emission limitations for 'each pollutant subject to regulation under the Act' is permissibly construed in context to call for emission limitations under the PSD program only for those pollutants that are otherwise subject to controls on emissions based on *express EPA determinations* or Congressional directive that such control is appropriate."

Johnson Memo, Power Holdings Ex. 3 at 13. [emphasis added]

EPA based its conclusion that "actual control" is required on a careful analysis of CAA Sections 165(a)(4) and 169(3) and of the express requirements in the other provisions in the Act that authorize EPA to establish emission limitations or controls on emissions. See e.g. 42 U.S.C. 7408(a)(1)(A); 42 U.S.C. 7411(b)(1)(A); 42 U.S.C. 7521(a)(1). Each of those other provisions provide criteria for the exercise of EPA's judgment, e.g. public health or welfare. *Johnson Memo*, (Power Holdings Ex. 3 at 13). EPA found that Congress did not intend PSD program emission limitation or control requirements, i.e. "actual control," to apply to pollutants for which EPA has never considered these criteria.

In the Johnson Memo, EPA interprets the CAA as reflecting Congress' intent that EPA exercise "considered judgment" and make "reasoned decisions," not inadvertently trigger "actual control" under the PSD program for pollutants for which it has never considered "actual control."

> " ...[I]t follows that Congress likewise expected that pollutants would only be regulated for purposes of the PSD program after the Administrator has promulgated regulations requiring control of a particular pollutant on the basis of a *considered judgment applying the applicable criteria in the Act*, after EPA promulgates regulations on the basis of Congressional mandate that EPA establish controls on particular pollutants, or after Congress itself directly imposes actual controls on a particular pollutant." *Johnson Memo*, p. 14.

Indeed, an opposite conclusion would effectively read out of the CAA all of the standards and criteria which are designed to ensure that EPA's decisions to actually control a pollutant are

based on sound science, effective techniques, and a transparent public process. Not the least of these, Section 202(a)(1) of the CAA (42 U.S. C. 7521(a)(1)) , requires that EPA make an "endangerment finding" addressing specific criteria before it is authorized to regulate an air pollutant for new motor vehicles. See *Massachusetts* v. EPA, 127 S.Ct. 1438 (2007).

EPA rightly found that the listing of a source category or the promulgation of an endangerment finding or any other determination which is a prerequisite to issuing actual control requirements also does not constitute "actual control" and does not trigger PSD program requirements under 40 CFR 52.21(b)(50)(ii). *Id.* p. 14 In fact, the many prerequisites, standards and requirements that EPA must meet before it promulgates a CAA regulation of any type are all evidence that Congress did not intend EPA to stumble into controlling emissions of a new pollutant on a national basis by way of an unintentional backdoor – such as the various regulatory actions Petitioner has cited as triggering greenhouse gas BACT controls in the Petition in this case.

In the Johnson Memo, EPA thoroughly explained the important policy and programmatic considerations underlying its interpretation. Johnson Memo (Power Holdings Ex. 3 at 9-10). Among those considerations are the need to justify controlling emissions of a particular pollutant "under the relevant criteria in the Act," to provide notice and opportunity for public comment, and to provide for "the orderly administration of the permitting program by providing 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)." *Id.* at 10.

It must be understood that Petitioner is asking the Board to re-characterize EPA's past regulatory actions in a manner that is inconsistent with the purpose for which they were adopted

and EPA's own interpretation of those actions in the Johnson Memo, the Proposed Rule, the Tailoring Rule, and the Endangerment Finding. This is something the Board should undertake only with great care.

As the Board has stated many times, a PSD permit will not be reviewed by the Board unless the decision of the permitting authority was based either on a clearly erroneous finding of fact or conclusion or law, or involves an important matter of policy or exercise of discretion that warrants review. See *Standard of Review Section* above. Here Petitioner is not only asking the Board to review an Illinois EPA or EPA permitting action for conformity with law, it is asking the Board to question EPA's stated intent behind its own regulatory actions. While the Board may appropriately review EPA's actions against statutory and regulatory standards --- and may review whether or not EPA has actually adopted a binding interpretation or policy, as it did in *Deseret Power* -- it is not within the Board's purview to re-make clear EPA interpretations or to make EPA policy.

In this case, there is particularly good reason for the EAB to be cautious in its review of EPA's policy determination. As stated by EPA in its Proposed Rule:

> Triggering PSD prior to a judicious review of the pollutant's health and environmental effects, as well as its emission characteristics and control options for different source types, could lead to serious implementation consequences for the program as a whole. Proposed Rule (Power Holdings Ex. 4 at 51541).

In its Proposed "Tailoring Rule" (Power Holdings Ex. 5), EPA outlined the potential consequences of interpreting the PSD program as applying to GHGs under the current PSD and Title V regulatory thresholds:

> Evidence we have collected to this point makes it clear that if PSD and Title V applicability requirements are triggered at those threshold levels, an enormous influx of permits would occur—tens of thousands of PSD permits and millions of title V permits—which would create enormous administrative burdens for

> permitting authorities that would far exceed their current capacity to administer the PSD and title V programs....
>
> Based on our GHG threshold data analysis, we estimate that almost 41,000 new and modified facilities per year would be subject to PSD review, based on the current rate of modifications at major sources, if a GHG major source threshold of 250 tpy CO2e were applied. Compared to the 280 PSD permits currently issued per year, this would be an increase in permits of more than 140- fold...
>
> Based on these assumptions, the additional annual permitting burden for permitting authorities, on a national basis, is estimated to be 3.3 million hours at a cost of $257 million to include all GHG emitters above the 250- tpy threshold.

Id. at 55301.

Again, the Petitioner ignores the Tailoring Rule. But the Board should not ignore EPA's express reiteration of its support for the Johnson Memo interpretation or the very significant policy concerns and programmatic impacts documented by EPA in the Tailoring Rule.

Furthermore, the Board should take note that in its Final Rule on the Endangerment Finding, 74 Fed Reg. 66496 (Dec. 15, 2009), EPA attempted to assuage concerns that the Finding itself would "lead to the panoply of adverse consequences that commenters predict," by explaining that the Finding was not immediately enforceable and reiterating its intent to address GHGs nationwide in a deliberate "tailored" regulation to avoid some of the same adverse consequences that would occur if Petitioner's argument in this case were to be sustained. [Endangerment Finding (Power Holdings Ex. 6 at 66516)].

In light of EPA's clear interpretation in the Johnson Memo, the Proposed Rule on reconsideration, the Proposed Tailoring Rule, and the Final Endangered Finding and the profound consequences of an opposite conclusion, the Board should not deem EPA to have stumbled into nationally regulating GHGs in the PSD program through actions such as approval of an individual state's regulations as a part of its SIP, the 1990's era Landfill Gas NSPS, or the

Section 821 waiver for new motor vehicles in the State of California. See 74 Fed Reg. 66496, 66516, ftnt 17.

a. Contrary to Petitioner's contention, EPA's approval and incorporation of the Delaware regulations as a part of the Delaware SIP is not an action that either generally regulates greenhouse gases under the CAA or that imposes Delaware law on sources in other states. (SC Review, page 25.)

Contrary to Petitioner's contention, Petition, p. 27, there is an *enormous difference* between regulations adopted pursuant to the SIP and those promulgated by EPA for application in one or more state. As stated by the EPA in the Johnson Memo, the SIP program reflects the principle of "cooperative federalism" on which the CAA is based. *Johnson Memo*, (Power Holdings Ex. 3 at 15), citing *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 467 (6th Cr. 2004) The CAA SIP program is not a system in which one state's laws are made applicable in another state. Rather, it is a program that recognizes the primacy of states in regulating within their own boundaries and provides an avenue for state laws to operate in lieu of the CAA regulations – but only within that state's boundaries.

The phrase "applicable implementation plan" is used throughout Section 110 of the CAA, which established the SIP program, as well as 40 CFR Part 52 which provides for the Approval and Promulgation of implementation Plans. Even the provisions of the CAA cited by the Petitioner, including the citizen suit definition of "emission standard or limitation" (42 U.S.C. 7604(f)(4)) and several of the cases Petitioner cites, refer to conditions and requirements under an "applicable implementation plan." Petition at 27-28. A SIP with state provisions approved by EPA for one state is the "applicable implementation plan" for that state and is enforceable by EPA within that state, but it is not the "applicable implementation plan" for another state.

This can be seen quite clearly by reviewing any of the fifty SIPs which are incorporated in Part 52. They are each unique and each refers to regulations and laws that are applicable

within the boundaries of its own state. In the case of the Illinois PSD SIP program, 40 C.F.R.52.738 (b) plainly states:

> "Regulations for preventing significant deterioration of air quality. The provisions of 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Illinois."
>
> [emphasis added]

In the case of the Delaware regulations that Petitioner would like to impose in Illinois, the federal regulations incorporating the Delaware SIP are equally clear that those regulations apply only in Delaware:

> § 52.420 Identification of plan.
>
> (a) *Purpose and scope*. This section sets forth the applicable State implementation plan *for Delaware* under section 110 of the Clean Air Act, 42 U.S.C. 7410, and 40 CFR Part 51 to meet national
>
> ambient air quality standards.
>
> [emphasis added]

Section 110 of the CAA, which mandates and defines the scope and content of SIPs, is clear and unequivocal in stating that a SIP is applicable only within the state that authors it, Section 110(a)(1) states:

> "Each State shall, after reasonable notice an public hearings, adopt and submit to the Administrator, within 3 years…after the promulgation of a national primary ambient air quality standard under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) *within such State*." 42 U.S.C. 7410(a)(1) [emphasis added]

Section 110(a)(2) states:

> "…Each such plan shall –
>
> (A) include enforceable emission limitations and other control measures …as may be necessary or appropriate to meet applicable requirements under this chapter.

***

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source *within the areas covered by the plan* as necessary to assure that national ambient air quality standards are achieved including a permit program as required in parts C and D of this subchapter.

(D) contain adequate provisions –

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity *within the State* from emitting any air pollutant in amounts which will –

***

(II) interfere with measures required to be included in the applicable implementation plan *for any other State* under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility."

42 U.S.C. 7410 (a)(2) [emphasis added]

While the CAA does allow a state to regulate more stringently than EPA and to incorporate its more stringent regulations in its SIP, EPA approval of a state regulation as a part of a state SIP does not convert that single state's different or more stringent regulation into a requirement that is applicable nationally under the PSD program. In support of its conclusion on this point in the Johnson Memo, EPA cites *State of Connecticut v. U.S. EPA*, 656 F.2d 902, 909 (2d Cir. 1981) which held 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. Johnson Memo, (Power Holdings Ex. 3 at 15).

Petitioner attempts to distinguish *Connecticut* saying it pertains to only CAA Section 110(a)(2)(E), but once again this is incorrect. The relevant portions of the Second Circuit Opinion in *Connecticut* directly address the effect of one state's more stringent SIP approved

regulations on another state. In that case, Connecticut and New Jersey both claimed that EPA, in approving a New York's SIP revision, failed to take into account their own adopted state standards for sulfur dioxide emissions, standards which were more stringent than the relevant federal rules. The Second Circuit held:

> "CAA § 116, 42 U.S.C. § 7416, provides that the states shall be free to adopt air quality standards more stringent than required by the NAAQS or other federal law provisions. Nothing in the Act, however, indicates that a state must respect its neighbor's air quality standards (or design its SIP to avoid interference therewith) if those standards are more stringent than the requirements of federal law. Indeed, § 110(a)(2)(E) appears to have been carefully drafted to preclude any such interpretation. It [**21] provides that each SIP must assure that nearby states will not be hindered in attaining any "national primary or secondary ambient air quality standard" or implementing any "measures required to be included in (its SIP) under part C of (the Act) to prevent significant deterioration of air quality ..." The clear intent of the statute is to require interstate comity only insofar as is necessary to allow each state to comply with the NAAQS and the Act's PSD provisions."

Contrary to Petitioner's suggestion that this case is limited to interpreting CAA Section 110(a)(2)(E), it is clear from the full quote in this case that the Second Circuit's holding rests on an interpretation of the nature and scope of state implementation plans under Section 110 as a whole, and Section 110(a)(2)(E) is referenced only by way of showing how limited the circumstances are in which one state is obligated to consider another state's SIP.

Finally, we note that in EPA's proposed rule on reconsideration of the Johnson Memo, EPA affirmed its analysis of the SIP question saying:

> "Given the need for states to effectively manage their own air quality programs, we believe 'subject to regulation under the Act' is best interpreted as those pollutants subject to a nationwide standard, binding in all states, that EPA promulgates on the basis of its CAA rulemaking authority." Proposed Rule (Power Holdings Ex. 4 at 51543).

b. Contrary to Petitioner's contention, EPA's New Source Performance Standard (NSPS) regulations for municipal

landfills do not subject carbon dioxide or methane to regulatory control. (SC Review, page 30.)

As explained by IEPA in its Responsiveness Summary, the municipal solid waste landfill regulations set emission standards for organic compounds and hazardous air pollutants found in landfill gas, but are not designed to control GHGs. The fact that other non-regulated pollutants are indirectly reduced by an EPA regulation does not convert that pollutant into a regulated pollutant. *Responsiveness Summary*, p. 80.

Petitioner has included as Petitioner's Exhibit 14 only 4 pages from of a lengthy technical support document entitled "Air Emissions from Municipal Solid Waste Landfills – Background information for Proposed Standards and Guidelines," March 1991. Petitioner offers this document as evidence that EPA intended to regulate methane and carbon dioxide when it adopted NSPS Subparts Cc and WWW. But, in fact, the rule EPA actually adopted tells a different story.

The preamble to the Landfill Gas NSPS Final Rule, 61 Fed. Reg. 9905 ("Landfill Gas NSPS"), notes that landfill gas emissions contain methane, carbon dioxide, and more than 100 different NMOC, such as vinyl chloride, toluene, and benzene. Landfill Gas NSPS (Power Holdings Ex. 7 at 9906). While Petitioner is correct that landfill gas is largely methane and CO2 and EPA did consider the ancillary benefit of reducing methane emissions in promulgating these standards, the Landfill Gas NSPS expressly addresses "MSW landfill emissions" collectively by actually controlling "non-methane organic compounds" ("NMOC") in the gas.[10] Indeed, EPA established a PSD threshold of 50 tons per year for NMOC in the same rulemaking.

[10] As previously mentioned, there will be no direct emissions of methane from the Power Holdings facility and fugitive emissions at the Power Holdings facility are highly unlikely. Methane (SNG) is the final product of Power Holdings process and produced only after the methanation process at which point it is piped directly into the commercial pipeline for distribution. There are no vents or other means for the escape of methane. Even fugitive emissions of methane from the pipeline are no more likely to occur than would natural gas leaks from any

Under NSPS Subpart Cc –Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, landfills are subject to the NSPS only if they emit NMOC at a rate of 50 megagrams per year or more. 40 CFR 60.33c . State plans must include provisions for control of landfill gas through the use of control devices that either meet the general flare standards in 40 C.F.R. 60.18 or "are designed and operated to reduce NMOC by 98 weight percent" or "an enclosed combustor designed and operated to reduce the outlet NMOC concentration to 20 parts per million as hexane by volume, dry basis at 3 percent oxygen, or less." 40 CFR 60.33c (c)(2) and (3). There is no emission threshold or control requirement for methane or carbon dioxide or any other component of MSW landfill emissions.

The Subpart WWW- Standards of Performance for Municipal Solid Waste Landfills prescribes the same NMOC emission rate of 50 megagram as the applicability threshold and requires that the same 98% reduction of NMOC or 20 parts per million concentration of NMOC as hexane be achieved by the control devices. 40 C.F.R. 60.752 It also prescribes NMOC test methods and procedures, NMOC monitoring and NMOC reporting. 40 C.F.R. 60. 756 and 60.757. No such requirements apply to methane or carbon dioxide or any other component of MSW landfill emissions.

Subpart WWW does establish "Operational Standards for Collection and Control Systems," which include operating well heads in the collection system with specified landfill gas temperatures, nitrogen levels, and oxygen levels and operating the collection system such that the methane concentration is less than 500 parts per million above background level at the surface of the landfill. 40 C.F.R 60.753 (c) and (d) But these are parameters that are specified to

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commercial pipeline. Indeed, methane as a commodity is highly regulated for safety purposes because of the explosion hazard posed by methane gas leaks.

ensure that the collection and control systems are working properly to "actually control" NMOC. These standards are not designed to control temperature, nitrogen, oxygen or methane.

While "MSW landfill emissions" are addressed collectively under this rule, the individual component pollutants in this group, except NMOC, are not subject to "actual control" unless regulated elsewhere under the CAA. *Id.* p. 9912. As explained in the *Johnson Memo*, "EPA was explicit that it was regulating only MSW landfill emissions collectively, and not the individual components of those emissions. 56 Fed. Reg. 24468, 24470 (May 30, 1991) . . . The EPA views these emissions as a complex aggregate of pollutants which together pose a threat to public health and welfare based on the combined adverse effects of the various components...the EPA thus views the complex air emission mixture from landfills to constitute a single designated pollutant." *Johnson Memo* (Power Holdings Ex. 3 at 6, Ftnt 6).

EPA does state that an "ancillary benefit from regulating air emissions from MSW landfills is a reduction in the contribution of MSW landfill emissions to global emissions of methane." 61 *Fed. Reg. 9905*, 9917. (Power Holdings Ex. 7 at 9917) But EPA also discusses the ancillary benefits of reducing fire explosion hazards through reduction of methane and the ancillary benefit of reducing offensive odors. *Id.* at 9917. These are all characterized as "social benefits of the rule [which] have not been quantified." *Id.* at 9917 But EPA has not prescribed individual "actual control" for GHGs, malodorous gases, or explosive gases in this regulation. If the Landfill Gas NSPS were found to have triggered PSD BACT for every component of "MSW landfill emissions," EPA would have not only stumbled into PSD BACT for methane and carbon dioxide, but also for malodorous or explosive emissions. This was clearly not EPA's intent.

c. Contrary to Petitioner's contention, CO2 did not become regulated under the Clean Air Act by virtue of EPA's approval of the California Waiver under Section 209 of the CAA. (SC Review, page 33.)

EPA's 2009 approval of a waiver for the state of California under Section 209 of the CAA, like EPA's approval of a particular state's law as a part of that state's SIP, is not equivalent to EPA promulgation of regulations under the CAA. Although this novel argument was not addressed in the Johnson Memo, it was expressly addressed by EPA in response to comments on the waiver. In the Preamble to the waiver, EPA stated its agreement that the "[California] waiver does not render GHGs 'subject to regulation," basing its conclusion on the different criteria applicable to the waiver decision. 74 F.R. 32744, 32783 (Power Holdings Ex. 8).

EPA also addressed this contention at length in the Proposed Rule on Reconsideration of the Johnson Memo, stating:

> "[W]e are taking this opportunity to state our position that our decision to grant a CAA section 209 waiver to the state of California to establish GHG emission standards for new motor vehicles does not trigger PSD requirements for GHGs. As explained below, EPA does not interpret the CAA or the Agency's PSD regulations to make the PSD program applicable to pollutants that may be regulated by states after EPA has granted a waiver under section 209 of the CAA.... As the EPA Administrator previously explained to Congress, 'a decision to grant a waiver under section 209 of the Act removes the preemption of state law otherwise imposed by the Act. Such a decision is fundamentally different from the decisions to establish requirements under the CAA that the Agency and the [EAB] have considered in interpreting the provisions governing the applicability of the PSD program.' Letter from Lisa P. Jackson to Senator James M. Inhofe (March 17, 2009)." Proposed Rule (Power Holdings Ex. 4 at 51544).

EPA's interpretation is consistent with a straight-forward reading of Section 209 and Section 177. Section 209 (a) expressly preempts state regulation of emissions from new motor vehicles or new motor vehicle engines subject to regulation. 42 U.S.C. 7543(a). Section 209(b) provides a mechanism for EPA to grant case-by-case waivers from that preemption "to any State which has adopted standards...for the control of emissions from new motor vehicles of new

motor engines prior to March 330, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. 7543(b)(1). Thus, by its own terms, a Section 209 waiver clearly does not create sweeping new federal GHG regulation which devour the Section 209 federal preemption entirely. On the contrary, the waiver is limited to the one state - California - that had regulations in place in March 1966. The Administrator's role in granting a Section 209 waiver is limited to making a finding that the state's determination is not "arbitrary and capricious," that the state needs the waiver based on "compelling and extraordinary conditions," and the state standards and enforcement procedures are not inconsistent with CAA enforcement procedures. These are state specific findings.

Furthermore, as Petitioner itself argues, Section 177 creates a special pathway for other states to expressly "opt-in" to the same waiver provided to California in section 209 by adopting state regulations that are identical to the California standards for which a waiver has been granted under Section 209. Contrary to Petitioner's contention, nothing about the Section 209 or Section 177 preemption waiver is automatic or immediate as Petitioner contends.

Nothing in these sections converts state regulations into federal regulations. Rather, a waiver under Section 209 simply lifts the federal preemption to allow state's to regulate in the field of motor vehicle emissions. For pollutants for which EPA has adopted CAA regulations regulating motor vehicle emissions, a waiver state's regulations may operate in lieu of CAA regulations. Section 209(b)(3) provides that where State standards apply pursuant to a waiver, "compliance with such State standards shall be *treated as* compliance with applicable Federal standards for purposes of this subchapter." Notably, EPA has not yet adopted GHG regulations

for new motor vehicles or any other emissions sources, therefore California's GHG regulations for motor vehicles are simply state requirements.

As is discussed by EPA at length in the Proposed Rule on Reconsideration, the Energy Policy and Conservation Act (EPCA) cases cited by Petitioner do not hold that California's state standards are nationally applicable CAA standards. See Proposed Rule (Power Holdings Ex. 4 at 51544-51545, Ftnt 7). Indeed, those cases are based on entirely different language in the EPCA. They do not address Petitioner's contention that California state regulations are transformed into nationally applicable federal CAA standards simply due to a Section 209 preemption waiver.

The Section 209 waiver, like the SIP provisions of the Act, reflects the "cooperative federalism" embodied in the CAA, but does not relinquish to any state the authority to establish nationally binding federal regulations.

3. Contrary to Petitioner's Contention, the Johnson Memo is a Valid and Binding Agency Interpretation Under Well Established Principles of Administrative Law.

As discussed above, in *Deseret Power* the Board found that the CAA was ambiguous as to certain terms and that while EPA had the authority to interpret these terms, it had not previously articulated a definitive administrative interpretation. *In re Deseret Power*, Slip. Op. at 35-36.

In response, EPA issued the Johnson Memo, stating:

> " ...This memorandum is intended to reduce ambiguity by setting forth an initial interpretation of EPA regulations at 40 C.F.R. 52.21(b)(50)... EPA has not previously issued a definitive interpretation of the phrase 'regulated NSR pollutant' in section 52.21(b)(50) or an interpretation of the phrase 'subject to regulation under the Act' that addressed whether monitoring and reporting requirements constitute 'regulation' within the meaning of this phrase." Johnson Memo (Power Holdings Ex. 3 at 2).

The Johnson Memo for the first time formally interprets the meaning of the phrase "subject to regulation under this Act" and the regulatory term "regulated NSR pollutant," and explains the basis for distinguishing regulations requiring "actual control" from regulations prescribing lesser actions such as monitoring and reporting. It also articulates the textual basis of its interpretation in the CAA and the significant policy and programmatic considerations underlying its interpretation.

Recognizing that under well-established administrative law formal rulemaking is not required when an agency establishes an initial interpretation of law, Petitioner now argues that the Johnson Memo is not an initial agency interpretation and therefore it is invalid unless promulgated after public notice and comment.

Neither the CAA nor the Administrative Procedure Act require that agency interpretation be incorporated in formal regulations. Indeed, EPA has issued many interpretive guidance documents – including the repeatedly cited and highly substantive New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting, Draft Oct. 1990 – which have never been incorporated into formal regulations. Also see, for example, Region 7's Air Program Policy & guidance webpage at http://www.epa.gov/region07/air/policy/policy.htm.

Agency interpretive documents that explain or clarify enabling statutes and regulations have long been held to be both valid and useful. *National Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 236-237 (D.C. Cir. 1992) While courts have found that changes in established interpretation should be subject to public notice and comment, it is well established that an initial interpretive document can be issued without public notice and

comment. *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C.Cir 1999); *Paralyzed Veterans of America v. D.C. Arena* LP, 117 F.3d 579, 586 (D.C. Cir. 1997)

In this instance, the Board's decision in *Deseret Power* that key terms of the CAA were ambiguous and that EPA had not formally articulated its interpretation of those terms created a void in the law that derailed several pending permit proceedings before the Board and delayed the associated new project construction. EPA very appropriately acted quickly to fill this void with a well-articulated statement of Agency interpretation and now has undertaken a formal notice and comment rulemaking to lay out its reasoning and take comment on its interpretation. These actions are both completely legal, and, indeed, together they represent a commendable effort to respond quickly to serious breakdown in the law and also provide public input to agency interpretation.

Contrary to Petitioner's assertion, the Johnson Memo did not prejudge the outcome of the EPA endangerment finding proceeding or otherwise impose "substantive duties" on any party. It simply interpreted language in the CAA and its regulations which the Board had found to be ambiguous. Furthermore, it did so in a fashion that is consistent with EPA's past permitting practices. Proposed Rule (Power Holdings Ex. 4 at 51540). As of the date of the Johnson Memo, the Administrator knew of no instance in which GHG's have been regulated under Federal requirements in a PSD permit. Johnson Memo (Power Holdings Ex. 3 at 11). Therefore, although the Johnson Memo is EPA's first definitive interpretation of the phrase "subject to regulation under the Act," it is not an interpretation that is inconsistent with current practice and will not impose new unexpected requirements on any party. EPA appropriately discussed how the EPA Regional Offices and PSD authorized states should implement this interpretive guidance, but did not impose any new substantive or procedural permitting requirements.

4. The Administrative Record Reflects IEPA's Full Consideration of the Board's Decision in Deseret Power and EPA's Binding Interpretation of the Key Statutory and Regulatory Terms Governing When a Pollutant is Subject to Regulation Under the CAA.

In *Deseret Power*, the Board found EPA's rationale for not imposing a CO2 BACT limit in the Deseret Power permit was "not supported by the administrative record as defined by 40 C.F.R. 124.18." In several subsequent PSD cases, the Board also found that the administrative record was incomplete on this point. *In re Northern Michigan University Ripley Heating Plant*, PSD Appeal No. 08-02, Slip op. at 66 (EAB, Feb. 18, 2009); *In re Desert Rock Energy Co.*, PSD Appeal No. 08-03, 08-04, 08-05 and 08-06, Order Granting Review, Staying the Carbon Dioxide BACT Issue, and Granting Motions to File Amicus/Non-Party Briefs and Motions to File Reply Briefs (Jan. 22, 2009).

Each of theses cases is distinguished by the fact that EPA had not adopted a binding interpretation of the phrase "subject to regulation under this Act" prior to the issuance of the permits at issue. Thus, the permits were remanded, in part, for reconsideration of the CO2 BACT issue in light of the *Deseret Power* decision.

Unlike those cases, the administrative record in the Power Holdings' case includes extensive discussion of the Johnson Memo, of EPA's application of the memo in the subsequent *Louisville Gas & Electric* case, and of every argument raised by the Petitioner regarding other EPA actions purported to regulated greenhouse gas emissions under the CAA.

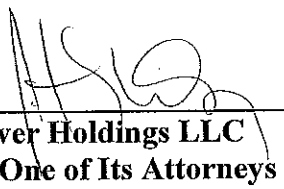
In conclusion, the Johnson memo reflects EPA's definitive interpretation which has now been reaffirmed by EPA repeatedly. While EPA has agreed to take public comment on the points raised in its Proposed Rule reconsidering the Johnson Memo, it has also firmly stated that the Johnson Memo is the governing EPA interpretation at this time. IEPA, as a delegate of EPA, was bound to follow this interpretation. Furthermore, none of the various administrative and

regulatory actions cited by Petitioner represent EPA regulation designed to control GHG emissions at the national level. In light of EPA's own interpretation of those actions, the facts in each case, as well as the high importance of this policy issue, EPA should not be deemed to have inadvertently triggered PSD requirements for GHGs. Since neither carbon dioxide, methane, nor any other GHG is "subject to regulation under the Act," under authoritative EPA interpretation, the Board has no jurisdiction to review Petitioner's GHG claims in this PSD permit proceeding.

CONCLUSION

Because Petitioner has failed to allege claims which are properly before the Board and has otherwise failed to carry its burden of demonstrating clear error on the part of IEPA, Power Holdings respectfully requests that the Board deny the Petition.

Respectfully submitted,



Power Holdings LLC
By One of Its Attorneys

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