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

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

BRIEF *AMICUS CURIAE* OF THE UTILITY AIR REGULATORY GROUP IN SUPPORT OF RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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I. Statement of Interest

UARG is a voluntary, not-for-profit association of individual electric utilities and other electric generating companies and organizations and four national trade associations: the Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), and the National Mining Association ("NMA"). UARG's purpose is to participate on behalf of its members in rulemakings of the Environmental Protection Agency ("EPA" or "Agency") and in other proceedings under the Clean Air Act ("CAA" or "Act") that affect the interests of electric generators and in litigation arising from or otherwise related to those proceedings.

The electric utilities and other electric generating companies that are members of UARG own and operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, institutional, and governmental customers. EEI is the association of the nation's investor-owned electric utilities. NRECA is the association of nonprofit electric cooperatives supplying central station service through generation, transmission, and distribution of electricity to rural areas of the United States. APPA is the national trade association that represents publicly owned (municipal and state) electric utilities in the United States. NMA is the national association that represents the producers of most of the nation's coal (the fuel that constitutes a large portion of the fossil fuel used by UARG members to generate electricity), as well as metals and industrial and agricultural minerals, and the equipment manufacturers, suppliers, engineering consulting firms, and financial institutions that serve the mining industry. Members of UARG, and members of trade associations that are UARG members, provide the vast majority of electric utility generation in the United States and own and operate a large percentage of the nation's fossil fuel-fired power plants. The generation

of electric power at these plants from the combustion of fossil fuels results in carbon dioxide ("CO_2") emissions.

UARG members would be significantly affected if petitioner Sierra Club prevailed in this appeal. A ruling in petitioner's favor would harm UARG members' interests, as well as the interests of entities across all economic sectors, because it would establish a precedent for imposing "best available control technology" ("BACT") emission limits under the Act's existing Prevention of Significant Deterioration ("PSD") program with respect to major stationary sources' CO_2 emissions, even in the absence of any CAA provision or EPA rule establishing or requiring CO_2 emission controls. That result in turn could be expected to impose substantial additional costs on electricity generators and their customers.

In UARG's view, no basis exists for petitioner's argument that CO_2 emissions are subject to BACT limits under the PSD program. The Environmental Appeals Board ("EAB" or "Board") therefore should reject that argument and affirm the decision of EPA Region VIII to grant the permit with no such limits.

II. Introduction and Summary of Argument

The sole issue within the scope of the present review is whether Region VIII erred by failing to require a BACT limit to control CO_2 emissions in a permit issued for Deseret Power Electric Cooperative's Bonanza facility under the Act's PSD program.[1] Order Granting Review at 2 (Nov. 21, 2007); *see id.* at 3-4 (ordering briefing on "Sierra Club's contention that the permit must contain a CO_2 BACT limit" and stating that "[n]o further briefing shall be permitted except

[1] Other issues raised by *amici* in support of petitioner, including whether Region VIII should have conducted a collateral impacts analysis that examined CO_2 emissions or considered alternatives, *see* Brief of *Amici Curiae* States of New York, *et al.*, and whether EPA should promulgate regulations establishing limits on CO_2 emissions, are beyond the present proceeding's scope. Order Granting Review at 3-4.

by order of the Board"). Petitioner bases its assertion that BACT is required for CO_2 emissions under the PSD program entirely on the premise that Congress intended in 1990 to make CO_2 subject to mandatory emission controls. Specifically, petitioner posits that Congress intended to make CO_2 "subject to regulation" under the CAA for purposes of triggering PSD, CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4), when, in 1990, it enacted section 821 of Public Law No. 101-549, 104 Stat. 2399, 2699 (1990). That law included amendments to the CAA but also enacted section 821 and other non-CAA provisions. Section 821 directed EPA, within 18 months after its enactment, to promulgate rules requiring monitoring and reporting of CO_2 emissions from certain electric generating sources, *i.e.*, affected sources under Title IV of the Act.

Thus, according to petitioner, Congress, by approving 18 years ago a statutory provision aimed at "[i]nformation [g]athering"[2] on certain sources' CO_2 emissions in fact established, *sub silentio*, a sweeping new program of CO_2 regulation for potentially hundreds of thousands of sources in all economic sectors. Despite its continued and aggressive advocacy of CAA regulation of CO_2, petitioner did not disclose this purported 1990 congressional plan to regulate CO_2 emissions through PSD until about a year ago, even though in 1998 EPA's then-general counsel announced his determination that CO_2 is an "air pollutant" that EPA could regulate under the Act provided certain statutory criteria were met.

The ramifications of petitioner's novel theory are truly extraordinary. If the Board accepts their theory, it would mean that any stationary source emitting as little as 100 or 250 tons of CO_2 a year must seek a PSD preconstruction permit and apply any controls determined to be BACT for its CO_2 emissions. Under petitioner's theory, potentially hundreds of thousands of

[2] Pub. L. No. 101-549, § 821, 104 Stat. 2699 (1990) (section heading).

sources, from office and apartment buildings to nursing homes and commercial establishments such as restaurants, supermarkets, and bakeries -- most of which have never been subject to PSD requirements for any pollutant -- would be subject to lengthy and complex PSD permit proceedings, requirements, and analyses. Petitioner asks the Board to accept that Congress's 1990 enactment of section 821 effected a momentous and profound "alter[ation] [of] the fundamental details of [the CAA] regulatory scheme" through what was, at the very most, an "ancillary provision[]" -- that Congress, in other words, hid the "elephant[]" of a massive and unprecedented CO_2 regulatory program in the "mousehole[]" of an "information gathering" provision. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Congress, of course, did nothing of the sort. Petitioner's argument is refuted by contemporaneous statements by section 821's authors, who intended that deliberately modest provision to have no reach beyond measurement and reporting of emission data. Petitioner's theory also cannot be squared with the legislative history of the 1990 Clean Air Act Amendments, which is replete with statements showing that Congress rejected proposals that would have required CO_2 emission controls and was anxious to ensure that nothing in those amendments would be taken as a directive to establish such controls.

Furthermore, EPA has never construed the Act to require PSD BACT for emissions of air pollutants that, like CO_2, are not already subject to emission controls through another provision of the Act. To the contrary, a review of nearly two decades of Agency practice and interpretation demonstrates that EPA has considered pollutants "subject to regulation" under the CAA for PSD purposes only if they are "presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." EPA Region VIII, *Response to Public Comments on Draft Air Pollution Control Prevention of Significant Deterioration (PSD) Permit*

to Construct, Permit No. PSD-OU-0002-04.00, at 6 (Aug. 30, 2007) ("EPA Region VIII Response"). EPA's long-standing interpretation, which is consistent with this Board's precedents and uncontradicted by any judicial decision, is plainly reasonable and entitled to deference. At the very least, that interpretation is not clearly erroneous, and, therefore, no basis exists to overturn it.

The Supreme Court's decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), gives no support to petitioner's claims. Under petitioner's theory, CO_2 became subject to PSD 17 years *before* the Supreme Court issued that decision, which in any event holds merely that EPA has *authority* under the Act to adopt CO_2 emission control regulations if it makes certain prerequisite findings -- none of which have been made. The Court did not hold that the Agency was legally required to regulate CO_2 emissions or that these emissions were already regulated under the Act, and it never even discussed section 821. *See In Re Christian County Generation, LLC*, PSD Appeal No. 07-01 (Jan. 28, 2008), slip op. at 7 n.12, 17 (observing that "[w]hether CO_2 is a pollutant 'subject to regulation' under the Clean Air Act remains a matter of considerable dispute" and was not decided by *Massachusetts*); *see also Massachusetts*, 127 S. Ct. at 1463 (making clear that the Court "need not and [was] not reach[ing] the question whether on remand EPA must make an endangerment finding" that would trigger regulation under the Act).

The Board should also reject petitioner's alternate relief requested -- a remand to EPA to "fully develop the record related to CO_2 and allow the public the opportunity to respond to EPA's positions," Pet. Op. Br. at 3-4, 31-33 -- as a thinly veiled request for this Board to compel the Agency to conduct the functional equivalent of notice-and-comment rulemaking to include CO_2 among the "NSR pollutants" that are subject to PSD BACT review. If, as petitioner contends, CO_2 is, and has been for nearly two decades, "subject to regulation" under the CAA

within the meaning of the PSD provisions, there would be little point to rulemaking or other administrative proceedings to add CO_2 to the list of NSR-regulated pollutants. If, on the other hand, as EPA properly determined, CO_2 is not "subject to regulation" under the Act for PSD purposes, petitioner has the right at any time to petition the Administrator of EPA to conduct rulemaking to make it so. The Board would, however, far exceed its limited appellate jurisdiction over permit decisions if it acceded to petitioner's request that it order notice-and-comment proceedings to afford petitioner a vehicle to accomplish its policy goals.

The extraordinary nature of petitioner's alternative requested relief belies any notion that it seeks here merely a decision by the Board to *apply* the law; rather, petitioner asks the Board to *make* law. The Board must decline that invitation and affirm Region VIII's action in full.

III. Argument

A. Congress's Enactment of the Section 821 Information Gathering Provisions Did Not Make CO_2 Subject to PSD Requirements.

Petitioner premises its argument that CO_2 is "subject to regulation" under the CAA entirely on the theory that Congress intended that result when it enacted section 821 of Public Law No. 101-549. A review of that provision, its context, and its legislative history demonstrates the baselessness of that argument.

First, unlike many other provisions of Public Law No. 101-549, section 821 includes no provisions that amended or added language to the CAA. Section 821 is a statutory provision that is separate from, not part of, the CAA. Because section 821's requirements are not imposed under the CAA,[3] even if measurement and reporting requirements imposed under the CAA

[3] CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4) (PSD BACT requirements apply to "each pollutant subject to regulation *under this Act*") (emphasis added).

sufficed to render CO_2 "subject to regulation" under the CAA for PSD purposes, CO_2 could not become subject to regulation for PSD because of section 821 of Public Law No. 101-549.

Second, the legislative history of section 821 demonstrates that Congress did not intend that provision to have any consequences with respect to CO_2 emission control or regulation, let alone the dramatically expansive consequences entailed by petitioner's argument. Rather, Congress intended for section 821 simply to collect information on amounts of CO_2 emissions to facilitate future development of global climate science and policy.

Moreover, in this regard, the legislative history of section 821 is consistent with that of the CAA Amendments of 1990, which shows that Congress eschewed any intent to compel CO_2 emission controls, intending instead to address CO_2 emissions by only nonregulatory means and expressly rejecting amendments that would require controls on those emissions. Particularly in light of the radical implications of petitioner's argument -- *i.e.*, that any new stationary source of CO_2 emissions above an extremely low threshold must meet PSD permitting and BACT requirements -- it is inconceivable that Congress would have enacted such a fundamental reshaping of the CAA through a carefully and narrowly limited information collection provision.

1. Section 821 Is Not Part of the CAA.

Petitioner's argument fails at the outset because its premise -- that section 821 is part of the CAA -- is demonstrably wrong. Thus, even if CO_2 emission monitoring and reporting requirements such as those in section 821 could make CO_2 "subject to regulation," CO_2 would not be "subject to regulation *under this Act*," *i.e.*, under the CAA. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4). This fact alone is fatal to petitioner's argument.

Congress's contemporaneous and later treatment of section 821 shows that it has never viewed that provision as being part of the Act. As early as April 1991, Congress published (as part of a "Compilation of Selected Acts Within the Jurisdiction of the [House] Committee on

Energy and Commerce") a collection of statutory provisions entitled "Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) that Did Not Amend the Clean Air Act" (excerpts of these congressional publications, dated between 1991 and 2001, are Attachments A through E to this Brief). The list of non-CAA provisions includes section 821.[4] Petitioner's attempt to dismiss this congressional document as irrelevant post-enactment legislative history is unavailing; it is in fact highly relevant, *contemporaneous* evidence of congressional intent from the House committee with primary jurisdiction over Public Law No. 101-549.[5] The House committee document gathers disparate provisions of that law that do not amend or add to the text of the CAA. Many of the provisions of Public Law No. 101-549 found in this compilation resemble section 821 in that they call for studies, research, and information gathering -- not

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[4] Appendix B, "Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) that Did Not Amend the Clean Air Act," House Comm. on Energy & Commerce, 102nd Cong., Compilation of Selected Acts Within the Jurisdiction of the Committee on Energy and Commerce (As Amended Through December 31, 1990), Environmental Law, 431, 444-45 (Comm. Print 102-A 1991) (Attachment A to this Brief).

[5] Moreover, subsequent versions of this document have continued to list section 821 as a non-CAA provision. *See* Appendix B, "Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) that Did Not Amend the Clean Air Act," House Comm. on Energy & Commerce, 103rd Cong., Compilation of Selected Acts Within the Jurisdiction of the Committee on Energy and Commerce, Environmental Law, 448 (Comm. Print 103-B 1993) (Attachment B to this Brief); Appendix B, "Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) that Did Not Amend the Clean Air Act," House Comm. on Commerce, 104th Cong., Compilation of Selected Acts Within the Jurisdiction of the Committee on Commerce, Environmental Law, 448 (Comm. Print 104-F 1995) (Attachment C to this Brief); Appendix B, "Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) that Did Not Amend the Clean Air Act," House Comm. on Commerce, 105th Cong., Compilation of Selected Acts Within the Jurisdiction of the Committee on Commerce As Amended Through December 31, 1996, Environmental Law, 449 (Comm. Print 105-L 1997) (Attachment D to this Brief); Appendix, "Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) that Did Not Amend the Clean Air Act," House Comm. on Energy & Commerce, 107th Cong., Compilation of Selected Acts Within the Jurisdiction of the Committee on Energy and Commerce as Amended Through December 31, 2000, Environmental Law, Vol. 1, 451-52 (Comm. Print 107-H 2001) (Attachment E to this Brief).

regulation.[6] Other provisions pertain to obligations of agencies under a variety of federal statutes and programs.[7]

Where Public Law No. 101-549 did amend the CAA, Congress used language expressing its intent to do so in unmistakable terms. Thus, for example, the section of the public law (section 401) that amended the CAA by adding Title IV of the Act, including the emission monitoring and reporting requirements of section 412 of the Act for sulfur dioxide and nitrogen oxides, 42 U.S.C. § 7651k, lays out the provisions of Title IV and prefaces those with the statement, "The Clean Air Act is amended by adding the following new title after title III: . . . ." Furthermore, provisions of the CAA that were added by Public Law No. 101-549 repeatedly refer to the CAA as "this Act." For example, where Congress, in the newly added Title IV of the CAA, referred to the CAA, it used the phrase "*this* Act." *See, e.g.*, CAA § 403(f) (fourth sentence), 42 U.S.C. § 7651b, *as added by* Pub. L. No. 101-549, § 401 ("Nothing in this section relating to [emission] allowances shall be construed as affecting the application of, or compliance with, any other provision of *this* Act to an affected unit or source, including the

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[6] *See, e.g.*, Pub. L. No. 101-549, §§ 231 (report on ethanol), 233 (study of aircraft engines), 234 (authorizing analysis and revision of models and emissions factors for fugitive dust), 303 (creation of Risk Assessment and Management Commission, which is to issue report on risk assessment and management under various federal laws), 405 (creation of national acid lakes registry), 408 (monitoring acid rain program in Canada), 409 (report on clean coal technologies export programs), 413 (special clean coal demonstration project), 807 (hydrogen fuel cell vehicle study and test program), 808 (renewable energy and energy conservation studies, reports, and proposed model regulations), 809 (clean air study of southwestern New Mexico), 811 (report on economic effects of U.S. air quality standards vis-à-vis those of trading nations), 813 (study and report on combustion of contaminated used oil in ships), 815 (establishment of a program to monitor and improve air quality in regions along the U.S.-Mexico border), 820 (report on magnetic levitation).

[7] *See, e.g.*, Pub. L. No. 101-549, §§ 304 (authorizing the Secretary of Labor to take actions under the Occupational Safety and Health Act), 306 (barring EPA from regulating ash from solid waste incineration under the Solid Waste Disposal Act for a period of years), 410-411 (authorizing appropriations to the U.S. Fish and Wildlife Service).

provisions related to applicable National Ambient Air Quality Standards and State implementation plans.") (emphasis added).

In contrast, section 821 of Public Law No. 101-549 neither contains nor is prefaced by any language stating that "[t]he Clean Air Act is amended . . . ." Moreover, section 821 refers to "the Clean Air Act" as separate legislation, *not* as "this Act." Thus, for example, subsection (a) of section 821 states that the Administrator "shall promulgate regulations within 18 months after the enactment of the Clean Air Act Amendments of 1990 to require that all affected sources subject to title [IV] of the Clean Air Act shall also monitor carbon dioxide emissions . . . ."[8]

Moreover, petitioner does not and cannot explain how section 821 of Public Law No. 101-549 *could* be a provision of the CAA, given that the progression of the CAA's sections begins with section 101 and continues through section 618 and no further. CAA §§ 101-618, 42 U.S.C. §§ 7401-7671q. Very simply, there *is* no section 821 of the CAA (and, as discussed above, section 821 of Public Law No. 101-549 did not add any provision to, or amend any provision of, the CAA).

Congress's intent to enact section 821 as a "free-standing" provision separate from the CAA was explained by House Energy and Commerce Committee Chairman (and House-Senate conferee) John Dingell, one of the chief architects of what became Public Law No. 101-549 and

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[8] Although there are instances, in circumstances in which the distinction between section 821 and the CAA was immaterial, where EPA may have incorrectly cited or referred to section 821 as if it were part of the CAA, see Pet. Op. Br. at 34-35, EPA has also noted correctly that section 821 is *not* part of the CAA. *See, e.g.*, 68 Fed. Reg. 52922, 52926 (Sept. 8, 2003) (characterizing "uncodified section 821 of the CAA Amendments" as "nonregulatory" and not "authoriz[ing] the imposition of mandatory requirements"); 66 Fed. Reg. 12974 n.1 (Mar. 1, 2001) ("*See also* section 821 of the Clean Air Act Amendments of 1990, 42 U.S.C. 7651k note (concerning monitoring of CO_2)."). In any event, the manner of EPA's citations to section 821 cannot change the fact that, as discussed above, Congress itself, in the text of its legislative enactments, distinguished section 821 from the CAA.

its floor manager in the House (the chamber in which section 821 originated). Chairman Dingell wrote in 1999:

> Public Law 101-549 of November 15, 1990, which contains the 1990 amendments to the [Clean Air Act], includes some provisions, such as sections 813, 817 and 819-821, that were enacted as *free-standing provisions separate from the [Clean Air Act]*. Although the Public Law often refers to the "Clean Air Act Amendments of 1990," the Public Law does not specify that reference as the "short title" of all the provisions included in the Public Law.
>
> One of these free-standing provisions, section 821, entitled "Information Gathering on Greenhouse Gases Contributing to Global Climate Change," appears in the United States Code as a "note" (at 42 U.S.C. 7651k). It requires regulations by the EPA to "monitor carbon dioxide emissions" from "all affected sources subject to title V" [sic] of the CAA and specifies that the emissions are to be reported to the EPA. That section does not designate carbon dioxide as a "pollutant" for any purpose.[9]

In sum, section 821 of Public Law No. 101-549 -- the statutory provision on which petitioner's argument exclusively relies -- is not part of the CAA. Accordingly, section 821 provides no basis for petitioner's argument that CO_2 is subject to regulation under the CAA.[10]

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[9] *Is CO_2 a Pollutant and Does EPA Have the Power to Regulate It?: Joint Hearing Before the Subcomm. on National Economic Growth, Natural Resources, and Regulatory Affairs of the H. Comm. on Government Reform and the Subcomm. on Energy and Environment of the H. Comm. on Science*, 105th Cong. 65 (1999) ("House Transcript") (attaching Letter from the Hon. John D. Dingell, Ranking Member, House Energy and Commerce Committee, to the Hon. David M. McIntosh, Oct. 5, 1999 ("Dingell Letter")) (emphasis added) (Attachment F to this brief).

[10] The cases cited by petitioner for the proposition that the display of a public law provision as a note in the United States Code is not indicative of congressional intent does not change the analysis above. The conclusion that section 821 is separate from the CAA in no way depends on the fact that it appears in the U.S. Code as a note to a provision of the CAA. Rather, what matters is that Congress enacted section 821 as a free-standing provision, not as a provision of the CAA. *Cf. United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) (explaining that a provision of an act must be read "in the context of the entire Act, rather than in the context of the 'arrangement' selected by the codifier"). Petitioner's citation of *New York v. EPA*, 413 F.3d 3, 19 (D.C. Cir. 2005), is unavailing. That case describes in passing a statutory provision, reproduced in a note to 42 U.S.C. § 7502, as being part of the CAA without any discussion as to its context or history, and the provision's status as a CAA or a non-CAA provision was not at issue.

2. The Legislative History of Section 821 Shows that Congress Did Not Intend it to Have Emission Control Consequences.

Even if Congress had included section 821 in the CAA (which, for the reasons discussed above, it did not), section 821 would not have the PSD-triggering effect petitioner urges. The legislative history of section 821 shows that Congress intended it to have no emission control consequences.

Section 821 was introduced on the floor of the House as an amendment to the committee-reported legislation that became Public Law No. 101-549. The amendment was entitled, "Section 709. Information Gathering on Greenhouse Cases [sic] Contributing to Global Climate Change," by its sponsors, Congressmen Jim Cooper and Carlos Moorhead. They made clear that its sole purposes were to gather data to inform scientific understanding of global climatic phenomena and the CO_2 emissions that may be associated with those phenomena, to establish a baseline against which to measure any future electric utility emission reductions, and to help the federal government formulate foreign and diplomatic policy in the area of global climate change:

> The purpose of this [provision] is threefold. First, in order to furnish better scientific evidence so that we will know exactly what the U.S. contribution to the problem [of global warming] is. Of course it is a worldwide problem. Our share of the problem is really very small.
>
> Second, Mr. Chairman, we need to form a baseline so that we know what the utility effort is in cleaning up the problem so that we know when to give them credit for their reductions, and when we know they are not, perhaps moving as quickly as we would like.
>
> Finally, we need to know in order to form a proper role in international negotiations so that we know what the U.S. contributions to the problem is [sic] so that we can accurately frame our response in international negotiations.

A Legislative History of the Clean Air Act Amendments of 1990, 103rd Cong., 1st Sess., S. Prt. 103-38, at 2652 (1993) ("Legis. Hist."). In other words, section 821 was intended as a means to

help fill scientific and information gaps and position the United States for international negotiations.[11]

Moreover, the amendment's sponsors made clear to members that section 821 would not have the effect of triggering emission control requirements -- the effect that petitioner asks the Board to give that provision. Congressman Cooper stated that:

> My amendment *would not force any reductions* right now. It would *simply require a monitor* on each utility unit so that not only would we be monitoring sulphur dioxide and nitrogen oxide, we would also be monitoring the other major utility gas, carbon dioxide, the major global warming gas.

Legis. Hist. at 2653 (emphasis added). Congressman Cooper further explained that:

> This is *a simple data collection amendment* having to do with carbon dioxide emissions. We seek to get utilities across America to collect and report data on carbon dioxide emissions. Right now this data is not available and it needs to be collected. *Mr. Chairman, it is important to stress that this amendment does not force CO_2 reductions.*

Id. at 2985 (emphasis added). In a letter to their colleagues, the amendment's authors reemphasized that:

> *Cooper-Moorhead does not force reductions in CO_2*, but it does begin the process of measuring CO_2 so that we can better understand the global threat, so that we can more intelligently fashion U.S. policy, and so that we can better negotiate with other nations.

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[11] *See also* Legis. Hist. at 2612 (remarks of Rep. Moorhead) ("Scientists have disagreed about the scope and magnitude of global climate change from manmade air pollution, and much of that disagreement stems from lack of necessary data to assess the impact these emissions may have on the Earth's climate. The Cooper-Moorhead amendment helps fill this information gap."); *id.* at 2986 (remarks of Rep. Moorhead) (describing the provision as "a simple, but important amendment that will give scientists a critical tool to use to measure the impact of one of the most serious potential problems facing our planet: global warming"); *id.* at 2987 (remarks of Rep. Moorhead) ("[T]he President has recognized the importance of understanding the scope of global climate change by launching an aggressive program to collect the information we need to assess the magnitude of this potentially serious problem. The Cooper-Moorhead amendment will directly further that effort.").

Id. (emphasis added). Thus, Congress plainly intended that the amendment not have the control-forcing effect petitioner would have this Board ascribe to it. Indeed, in light of the emphasis repeatedly given by its sponsors to the essential point that section 821 would *not* have *any* control-forcing effect, the conclusion is inescapable that *Congress would not have approved section 821 if it had the effect that petitioner claims it does.*

Significantly, after the House approved the amendment (by voice vote) on May 23, 1990, section 821 barely received notice in the legislative record. The conference report on Public Law No. 101-549 simply describes section 821 as "CO_2 data collection" and "[t]he intent of the managers" as establishing "a data collection policy on carbon dioxide (CO_2) emissions in this country." Conference Report To Accompany H.R. Rep. No. 101-952, at 348 (1990), Legis. Hist. at 1798. Tellingly, section 821 and its description in the conference report are classified under "Miscellaneous Provisions" of the 1990 law, *id.*, not, for example, under CAA Title IV ("Acid Rain Provisions"), *see id.* at 342-45, or any other CAA provisions. No mention is made -- no hint is even given -- of section 821 triggering PSD or any other emission control requirements.

Had Congress intended section 821 to have the sweeping and dramatic effect petitioner asks the Board to give it, *something* would appear in the legislative history to suggest that intent. But petitioner points to nothing, and, as discussed above, the legislative history that does address this section indicates the exact opposite intention to what petitioner now asserts.

Petitioner and its supporting *amici* claim that section 821 triggers PSD emission control requirements because its monitoring and reporting provisions are central to regulation under the CAA and because those provisions are enforceable under the Act. Pet. Op. Br. at 34. That claim might arguably have a semblance of plausibility if, like sulfur dioxide and nitrogen oxides, CO_2 were subject to CAA emission limits for which the monitoring and reporting would help to

determine compliance. But Congress did not fashion section 821 as a component of, or even a precursor to, CAA emission control regulation. To the contrary, as its legislative history makes clear, Congress intended this "data collection" provision simply as a means to gather information on CO_2 emissions to analyze the possible association between those emissions and global climate change and to help formulate U.S. policy to address global warming through international negotiations. Moreover, as discussed above, the legislative history is abundantly clear on what Congress did *not* mean section 821 to do: Congress expressly did not intend it to "force CO_2 reductions" under the CAA. *See* Legis. Hist. at 2653, 2985. The legislative history thus refutes petitioner's argument that Congress intended CO_2 emissions to be controlled under the PSD program based on section 821's monitoring and reporting requirements.

3. The Legislative History of the CAA Amendments of 1990 Shows No Intent to Trigger Requirements for CO_2 Emission Controls, Through the PSD Provisions or Otherwise.

The clear statements by the authors of section 821 that the provision was not intended to trigger any emission control requirements for CO_2 is fully consistent with and underscored by the legislative history of the CAA Amendments of 1990. It is clear from this legislative history that when it enacted section 821 in 1990, Congress considered several proposals to set regulatory limits on CO_2 emissions but ultimately rejected all of those proposals. Rather, Congress settled on what it described as "nonregulatory" provisions that called for studies of CO_2 emissions and publication of "global warming potentials." It is utterly implausible that Congress would have so carefully and expressly emphasized the nonregulatory character of its specific 1990 amendments to the CAA addressing CO_2 or climate change while at the same time enacting a provision that -- as petitioner would have it -- triggered a massive and unprecedented program of CO_2 emission

control regulation, without any acknowledgement of that design by even a single member of Congress.[12]

During its consideration of the 1990 CAA amendments, Congress specifically declined to approve proposals that would have required or specifically authorized regulatory limits on emissions of CO_2 or other greenhouse gases for global climate change purposes. For example, Congress declined to require regulation of CO_2 emissions from motor vehicles. The responsible Senate committee in December 1989 reported a bill to amend the Act that included a provision requiring EPA to promulgate regulations establishing CO_2 emission standards for automobiles. *See* S. Rep. No. 101-228, at 98-100, 644-45 (1989), Legis. Hist. at 8338, 8438-405 (describing and setting out the text of proposed CAA § 206.) This controversial provision was removed from the legislation on March 5, 1990, by a substitute bill on which the full Senate voted. Legis. Hist. at 7339. That deletion, too, was controversial -- Senator Lieberman, for example, expressed concern about "elimination of the [motor vehicle] carbon dioxide standard from the committee bill, *with no substitute provision*," Legis. Hist. at 5410 (emphasis added) -- but senators recognized that that decision was made deliberately as part of an overarching compromise needed to pass the legislation. Noting that a compromise had been reached, Senator

[12] The analysis in the text above addresses petitioner's fatally flawed premise that Congress in 1990 intended to require CO_2 emission controls. *Massachusetts v. EPA* holds, of course, that under the CAA's terms, CO_2 meets the Act's definition of "air pollutant," and EPA *could* regulate CO_2 emissions if it made the requisite statutory findings. But the fact that the CAA's "air pollutant" definition is broad enough to encompass CO_2 does not mean that Congress in 1990 (or at any other time) *required* imposition of regulatory emission controls on CO_2. Indeed, the Supreme Court did not discuss, more than in passing, the legislative history of the CAA Amendments of 1990, *but see Massachusetts*, 127 S. Ct. at 1450 (referring to the fact that Congress "declined in 1990 to enact proposed amendments to force EPA to set carbon dioxide emission standards for motor vehicles"), and did not hold that Congress required CO_2 emission controls. To the contrary, the Court recognized that Congress has "eschewed enacting binding emissions limitations to combat global warming. . . ." *Id.* at 1460.

Chafee observed that "all gave up something," including, in his case, "in connection with carbon dioxide emissions." *Id.* at 5189-90.

Other senators' remarks during debate on the 1990 CAA Amendments reinforce the conclusion that Congress did not intend anything in the legislation to have the result of mandating control of CO_2 or other greenhouse gas emissions. For example, Senator Gore offered an amendment that proposed to add a provision on "Transportation Control Measures" to section 108(f)(1) of the CAA by inserting "carbon dioxide" in the proposed revision of that section. This would have had the effect of directing EPA to publish information regarding the emission reduction potential of transportation control measures related to CO_2 to deal with the growth of CO_2 emissions. *Id.* at 5487. Senator Gore then stated that "[l]ater this year I hope we will have a major piece of legislation dealing with the core of this problem [global warming], but to me it is unimaginable that this body would take up a Clean Air Act and revisit the questions as extensively as we are doing *without grappling at least in some way with the problem of CO_2 emissions*." *Id.* at 5489 (emphasis added).

In response, Senator Baucus, floor manager of the bill, noted what he viewed as the need to "address" global warming and said Senator Gore's amendment was "a good beginning," but recognized that the amendment had not been discussed during the development of the compromise referred to above. *Id.* at 5492. Senator Baucus added that the "essence" of the compromise discussions was an "agree[ment] [that] there should be no carbon dioxide [provision]. Any amendment that would require carbon dioxide standards be included in tailpipe emissions . . . would be a deal-breaker amendment, would be contrary to the agreement that the leadership and the managers and the administration reached." *Id.* Although the Senate approved the Gore amendment by voice vote, *id.* at 5494, it was ultimately deleted in the final conference

agreement by the conferees in favor of the phrase "criteria pollutants and their precursors," CAA § 108(f)(1), 42 U.S.C. § 7408(f)(1), which, of course, do not include CO_2. *See* H.R. Rep. No. 101-952 at 70-71, Legis. Hist. at 1449, 1520-21.

Finally, the Senate version of the proposed 1990 CAA Amendments (S. 1630) included a title VII of the Act, entitled "Stratospheric Ozone and Climate Protection Act," that stated that stratospheric ozone depletion and global climate change were occurring due to emissions of chlorofluorocarbons, hydrochlorofluorocarbons, methane, and CO_2, and that emissions of these substances should be controlled. The House version addressed only stratospheric ozone depletion. In conference, Title VI of the Act was adopted, addressing only stratospheric ozone depletion, and all references to CO_2 and other greenhouse gases were deleted except for language addressing substances' global warming potential -- language that, as discussed below, expressly precludes regulatory control of emissions for purposes of addressing global climate change. *See* H.R. Rep. No. 101-952 at 262-87, Legis. Hist. at 1449, 1712-37.

Although Congress in 1990 rejected amendments to the CAA that would have required controls for CO_2 emissions, it did adopt a few narrowly limited provisions relating to CO_2. In those few instances, however, Congress carefully limited EPA's authority to "nonregulatory" means. For example, section 103(g) of the Act directs EPA to establish a "basic engineering research and technology program to develop, evaluate, and demonstrate" strategies and technologies to address emissions from a non-exhaustive list of substances that includes CO_2. 42 U.S.C. § 7403(g). Congress expressly required, in the statutory text, that these strategies and technologies be "nonregulatory" in nature and emphasized that "[n]othing" in section 103(g)

"shall be construed to authorize the imposition on any person of air pollution control requirements."[13]

Moreover, section 602(e) of the Act directs EPA to publish, after public notice and comment, "the global warming potential of each listed substance" set forth in Title VI of the Act or added thereafter. Like section 103(g), however, this provision states expressly that this directive "shall not be construed to be the basis of any additional regulation under this Act."[14]

Clearly, Congress took great care in 1990 to describe the few provisions it adopted regarding CO_2 as "nonregulatory." This was consistent with members' statements and actions in the 1990 legislative debate, showing that Congress considered but ultimately rejected any statutory provision that would compel imposition of regulatory controls on CO_2 emissions. Congress did not delete or disapprove mandatory control provisions, and did not adopt language expressly proscribing interpretation of CO_2-related provisions as mandating controls, because it deemed CO_2 already regulated under the Act. To the contrary, as part of an overall compromise to allow passage of the legislation, members of Congress agreed to delete any provision requiring CO_2 controls. Moreover, the legislative history provides no basis to argue that Congress's intent to avoid triggering mandatory emission controls was limited to transportation measures or stratospheric ozone provisions. Rather, as illustrated by the above-quoted statement during floor debate by a plainly frustrated Senator Gore, Congress -- with the express if reluctant

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[13] *See* Dingell Letter at 2 ("While [section 103(g)] refers . . .to carbon dioxide as a 'pollutant,' House and Senate conferees [in 1990] never agreed to designate carbon dioxide as a 'pollutant' for regulatory or other purposes."), House Transcript at 66 (Attachment F to this brief).

[14] In addition, when EPA promulgated regulations to implement provisions of Title VI, EPA acknowledged that Congress had affirmatively decided against imposing regulatory authority over greenhouse gas emissions to address climate change. 59 Fed. Reg. 13044, 13046 (Mar. 18, 1994) (noting "[t]he fact that Congress . . . deleted authority for EPA to phase out use of substances based solely on their global warming potential").

acquiescence of the most ardent advocates of CO_2 controls -- made a deliberate decision not to act in a way that would mandate such controls. *See INS v. Cardozo-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded."); *see also* House Transcript at 65-66 (attaching Dingell Letter at 1-2) (detailing legislative history discussed above and concluding that House and Senate conferees did not contemplate requiring regulation of greenhouse gas emissions in 1990) (Attachment F to this Brief).

In sum, the legislative history confirms that Congress in 1990 did not intend or contemplate that the legislation it enacted at that time would trigger mandatory CO_2 emission controls. Petitioner's theory that Congress meant, through enactment of section 821's CO_2 *measurement and reporting* provisions, to extend CO_2 *emission control* requirements under the CAA across the entire economic spectrum is not only implausible on its face but wholly incompatible with all indicia of congressional intent. The Board should therefore deny the petition at issue.

B. EPA's Position that CO_2 Is Not "Subject to Regulation" Under the CAA for Purposes of Triggering PSD Controls Is Reasonable, Long-Standing, and Entitled to Deference and Should Be Affirmed.

As the discussion above demonstrates, petitioner's claim that CO_2 is "subject to regulation" under the CAA because of section 821's monitoring and reporting provisions is invalid because Congress did not include section 821 in the CAA. Even if section 821 were part of the CAA, however, petitioner's argument would nevertheless fail because section 821 -- the only statutory provision on which petitioner relies -- does not require, or even authorize, imposition of emission controls.

Petitioner asserts that the term "subject to regulation" plainly encompasses the information-gathering provisions of section 821, Pet. Op. Br. at 12-13, and challenges as unsupported EPA's contrary interpretation of "subject to regulation" as "presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." EPA Region VIII Response at 6; Pet. Op. Br. at 11-12. Petitioner further suggests that EPA has advanced this interpretation only during this and other recent PSD permit challenges and argues that the Agency's interpretation is not entitled to deference. Pet. Op. Br. at 32, 37. Petitioner's argument rests on its assertion that "regulation" is a broad term under the CAA that includes provisions such as section 821 and that Congress must use more specific terms -- "emission limitation" and "emission standard" -- only when referring to emission controls. *Id.* at 13-14. Petitioner's argument is without merit.

The Board has rejected as "flawed" the argument that "when Congress uses dissimilar language the phrases chosen can never under any circumstances have similar meaning, even though they may be used in different contexts for different purposes." *In re Mobil Oil Corp.*, 5 E.A.D. 490, 503 (EAB 1994). In *Mobil Oil*, the Board addressed arguments that turned on interpretation of the term "subject to" in the definition of "federally permitted release" as applied to air releases exempted from reporting under the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11004, and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601(10)(H). The term "subject to" differs from "in compliance with" and other, more specific terms found in relevant, parallel provisions in those statutes that apply to exempted releases to other environmental media. Holding that Congress used "subject to" for "purely pragmatic purposes," the Board rejected an alternative, broader reading of the

term that it concluded did not comport with the legislative purposes and history. *Mobil Oil*, 5 E.A.D. at 504.

The petitioner in *Mobil Oil* asserted that "subject to" for air releases conveyed a broad meaning that even included within the exemption's scope air releases that did not comply with a permit, while EPA interpreted the term as having the narrower meaning of "in compliance with" -- notwithstanding that Congress used that term with respect to non-air releases and could have, but did not, use it with respect to air releases. Rejecting the petitioner's argument and affirming EPA's view, the Board noted that Mobil's broad reading would create an "extreme" result, that, if intended by Congress, would have been expressed in the statute "in much more explicit terms." *Id.* at 507.

Further, as it appears in CAA § 165(a)(4), "subject to regulation" is not clear on its face; it is undefined in the Act and is ambiguous. *Cf. id.* at 500 (finding that "subject to" under the statutory "federally permitted release" definitions "is inherently ambiguous" and has little independent meaning).[15] The term "subject to regulation" can be understood only in the context of the CAA's provisions, legislative history, and relevant regulatory history. *See In re U.S. Army, Fort Wainright Cent. Heating & Power Plant,* 11 E.A.D. 126, 141 (EAB 2003) ("'The meaning -- or ambiguity -- of certain words or phrases may only become evident when placed in context.'") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)); *In*

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[15] The Board noted that:

> Even though the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing, it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of a dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Mobil Oil, 5 E.A.D. at 505 (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945)).

re Howmet Corp., PSD Appeal No. 05-04, slip op. at 14 (EAB May 24, 2007) ("[J]ust as legislative history can be helpful in interpreting a statute, regulatory history, such as preamble statements, assist[s] us in interpreting regulations."); *Mobil Oil*, 5 E.A.D. at 504. The EAB gives "deference to a position when it is supported by Agency rulings, statements, and opinions that have been consistent over time." *Howmet*, slip op. at 14; *see also Mobil Oil*, 5 E.A.D. at 501.

EPA's position, articulated as early as 1993 and continuing through 2003 to the present, has been that "subject to regulation" for purposes of PSD means that a pollutant is regulated in the form of CAA limitations or standards that establish controls on emissions of that pollutant. Moreover, EPA has never considered CO_2 to be a pollutant that is "regulated" for this purpose. From 1998 to 2003, EPA construed the CAA to give it authority to establish regulatory emission controls for CO_2 if the Agency made the requisite findings under the Act, a construction of the Act that the Supreme Court ultimately affirmed in *Massachusetts*. Yet EPA has never articulated an interpretation of the Act as triggering PSD for a pollutant for which the authority to impose emission controls remains unexercised. Furthermore, EPA has never expressed the view that section 821 is anything more than an information-gathering and reporting provision that does not establish PSD-triggering emission controls. To the contrary, when EPA has cited section 821, it has emphasized that that provision does *not* control CO_2 emissions. *See supra* note 8.

As discussed in greater detail below, EPA's position that CO_2 is not "subject to regulation" for purposes of PSD because it is not subject to emission limits or standards under the Act is long-standing, reasonable, and compatible with the statutory text and legislative intent. It is, therefore, entitled to substantial deference by the Board. *See, e.g., Howmet*, slip op. at 14; *In re Tondu Energy Co.*, 9 E.A.D. 710, 719 (EAB 2001) (noting that "the Board has previously deferred to [EPA's] long-established PSD policy. . . ."); *In re AES Puerto Rico L.P.*, 8 E.A.D.

324, 340 (EAB 1999) (finding EPA decision not to require multi-source modeling in a PSD context supported, in part, by EPA's "established policy"); *see also Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423, 1433-1434 (2007) (finding that EPA had discretion to define relevant CAA terms in the context of implementing the PSD program). At the very least, EPA's interpretation of "subject to regulation," as applied in this case, is not clearly erroneous. Accordingly, no basis exists to overturn it. *See, e.g., In re Inter-Power of New York, Inc.*, 5 E.A.D. 130, 144 (1994) ("the Board will defer to the permit issuer's judgment absent evidence of a clear error of fact or law").

1. EPA General Counsel Opinions

EPA's long-held view that CO_2 is not a *regulated* pollutant under the CAA because it is not subject to emission standards or limitations is reflected in the opinions and testimony of three of the Agency's recent general counsel. Although these general counsel disagreed regarding whether the CAA gives the Agency authority to regulate CO_2 emissions to address climate change (an issue now resolved by *Massachusetts*), none of these general counsel (or any other EPA general counsel) has claimed that CO_2 has been a regulated pollutant under the CAA since 1990 or that section 821 was relevant to that question.

EPA first asserted the legal view that it could regulate CO_2 in 1998, in a memorandum from then-General Counsel Jonathan Cannon written in response to a request by Congress after then-EPA Administrator Carol Browner testified that the CAA provides EPA with authority to regulate CO_2 emissions under the CAA. *See* House Transcript at 21-26 (attaching Memorandum, *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation* (Apr. 10, 1998) ("Cannon Memorandum")) (Attachment F to this Brief). The Cannon Memorandum found support for regulatory authority not based on section 821 but on the definition of "air pollutant" in section 302(g) of the CAA and the reference in section 103(g) of the Act to CO_2 as a

"pollutant." *Id.* at 23 & n.1 (Attachment F). The Cannon Memorandum did not mention section 821. Moreover, the Memorandum opined only that EPA *could* regulate CO_2 as an air pollutant under the CAA, not that it *was* regulated under the Act. Indeed, the Cannon Memorandum emphasizes that EPA could regulate it only upon determining that it met the relevant criteria for regulation under the potentially applicable sections of the Act.[16]

Similarly, when EPA General Counsel Gary Guzy testified on October 6, 1999, at a joint hearing of the House Committees on Government Reform and Science on the question, "Is CO_2 a Pollutant and Does EPA Have the Power To Regulate It?," he made no reference to section 821, even as he defended the logic and conclusions of the Cannon Memorandum. What Mr. Guzy did emphasize, however, was that EPA had made no decision *whether* to regulate CO_2 under the CAA; rather, he said, EPA had authority to do so only if it made the requisite findings under the relevant CAA provisions, which it had not done. *See, e.g.*, House Transcript at 11 (Attachment F) ("But let me emphasize that this analysis is largely theoretical. EPA currently has no plans to regulate carbon dioxide as an air pollutant, and, despite statement [sic] by others to the contrary, *we have not proposed to regulate* CO_2.") (emphasis added); *id.* at 12 ("While carbon dioxide as an air pollutant is within the scope of regulatory authority provided by the Clean Air Act, this by itself does not lead to regulation. Before EPA can actually issue regulations through a rulemaking process governing a pollutant, the Administrator must first make a formal finding that the pollutant in question meets specific criteria laid out in the Act.").

Thus, at a time when EPA had concluded it had authority to regulate CO_2 as a pollutant under the CAA, it expressly recognized that CO_2 was not already "subject to regulation" under the Act because EPA had not made the necessary prerequisite findings. Moreover, EPA did not

[16] The Supreme Court affirmed that EPA can regulate only after the relevant criteria under the Act are met. *Massachusetts*, 127 S. Ct. at 1463.

even mention section 821, let alone deem it to make CO_2 subject to regulation under the Act. Had EPA believed that, as petitioner now claims, section 821 brings all significant emitters of CO_2 within the PSD emission control program, it would have said so to support its then-contested interpretation of CO_2 regulatory authority. But even at a time when EPA sought to defend and bolster its view of regulatory authority over CO_2, it never suggested that CO_2 was already regulated under the Act.[17] The House committees did address briefly a concern that, if CO_2 were regulated under Part C (PSD) and Part D (nonattainment) of Title I of the CAA, more than one million small- and medium-sized entities might become "major stationary sources" with corresponding obligations to address CO_2 emissions. House Transcript at 163 (attaching Letter from Gary S. Guzy, General Counsel, EPA, to the Hon. David M. McIntosh, Chairman, Subcomm. on National Economic Growth, Natural Resources and Regulatory Affairs, H. Comm. on Government Reform, at 10 (Dec. 1, 1999)) (Attachment F). In response, Mr. Guzy stated that "[t]hese provisions of the CAA would only apply to a source of an air pollutant only if EPA had regulated the pollutant pursuant to other provisions of the CAA (e.g. if it were a criteria pollutant under section 108)." *Id.* If EPA had believed that section 821 made CO_2 "subject to regulation," Mr. Guzy would have provided a very different response on that issue. *See* House Transcript at 169-70 (attaching Letter from Chairman McIntosh, H. Subcomm. on National Economic Growth, Natural Resources, and Regulatory Affairs, and Chairman Calvert, H. Subcomm. on Energy and Environment, to the Hon. Gary Guzy, General Counsel, EPA, at 6-7 (Mar. 10, 2000)) (expressing concern that applying CO_2 controls to "several hundred thousand small and mid-sized businesses and farms" would "dramatically expand EPA's control over the U.S. economy generally and the small business sector in particular") (Attachment F).

[17] Moreover, Sierra Club, a petitioner in *Massachusetts*, never raised this point in that case.

In 2003, EPA changed its position on its authority to regulate CO_2 under the CAA and withdrew the Cannon Memorandum. Memorandum from R. Fabricant, General Counsel, EPA, to M. Horinko, Acting Administrator, EPA, *EPA's Authority to Impose Mandatory Controls to Address Global Climate Change Under the Clean Air Act* (Aug. 28, 2003) ("the Fabricant Memorandum") (Attachment G to this brief). Unlike the Cannon Memorandum, the Fabricant Memorandum cites section 821, but not as evidence that the CAA requires regulation of CO_2 emissions. Rather, the memorandum lists section 821 as an "uncodified section . . . of the CAA Amendments of 1990" and also discusses sections 103(g) and 602 of the Act. *Id.* at 5. The Fabricant Memorandum states that "[n]one of these provisions authorizes regulation [of greenhouse gases], and two of them [sections 103(g) and 602] expressly preclude their use for authorizing regulation" of those gases, and characterizes all three provisions as examples of nonregulatory provisions. *Id.* ("Congress enacted the three provisions . . ., calling on EPA to conduct research and collect information related to global climate change and develop 'non-regulatory' strategies for reducing CO_2 emissions.").[18]

Therefore, although EPA general counsel opinions have varied on the question whether EPA has *authority* to regulate CO_2 emissions under the Act, they have uniformly stated that those emissions are not in fact regulated under the Act. None of them has interpreted section 821 as having the effect petitioner now asks this Board to give it -- triggering CO_2 emission control provisions under the PSD provisions of the Act.

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[18] Although the Supreme Court in *Massachusetts* rejected the Fabricant Memorandum's ultimate conclusion -- that the CAA does not authorize regulation of CO_2 as an air pollutant -- that decision does not contradict the memorandum's characterization of section 821 of Public Law No. 101-549 or of CAA sections 103(g) and 602 as nonregulatory with respect to CO_2 and other greenhouse gases. Indeed, the Supreme Court's decision does not discuss section 821 at all.

2. The Wegman Memorandum

EPA's long-standing view that CO_2 is not regulated under the CAA, notwithstanding the existence of section 821, is reflected in an even earlier document than the Cannon Memorandum: a 1993 Agency internal memorandum from Lydia N. Wegman, Deputy Director of the Office of Air Quality Planning and Standards, entitled "Definition of Regulated Air Pollutant for Purposes of Title V" (Apr. 26, 1993) ("Wegman Memorandum") (Attachment H to this brief). This memorandum, which primarily addressed the definition of "regulated air pollutants" for purposes of Title V of the Act, also set out EPA's interpretation of the term "subject to regulation" as including all "regulated air pollutants plus others specified by the Act or by EPA rulemaking." It then referred to section 821 of Public Law No. 101-549 (and to section 603 of the Public Law, with respect to methane) but distinguished those provisions from other provisions under which pollutants are subject to regulatory controls; the former category of provisions, including section 821, "involve[s] actions such as reporting and study, not actual control of emissions." Wegman Memorandum at 4-5. The Wegman Memorandum concluded that its interpretation "is similar to the traditional practice of the prevention of significant deterioration (PSD) program under part C of title I of the Act. . . ." Accordingly, the Wegman Memorandum affirms that EPA historically has not viewed CO_2 as "subject to regulation" under the CAA for purposes of PSD, does not consider section 821 an emission control provision, and has defined "subject to regulation" to mean requiring "actual control of emissions" for PSD (and Title V) purposes.

Petitioner argues that the Wegman Memorandum is undercut by the Supreme Court's *Massachusetts* holding that CO_2 is indeed an air pollutant. According to petitioner, the Wegman Memorandum "justifie[d] EPA's approach solely on the basis that Congress did not intend regulation of CO_2," a premise invalidated by the Supreme Court. Pet. Op. Br. at 2. That the Wegman Memorandum is no longer valid regarding whether CO_2 is an air pollutant in no way

undermines its separate point regarding interpretation of "subject to regulation" and the distinction between provisions that establish emissions standards and limits and those, such as section 821, that require only monitoring, reporting, or study. As the Wegman Memorandum recognizes, the latter are not provisions that do or could make pollutants "subject to regulation" for PSD purposes, and nothing in *Massachusetts* is to the contrary.

3. Interpretations in Rulemakings

EPA's long-standing position that pollutants "subject to regulation" under the Act are pollutants whose emissions are controlled under the Act is consistent with its historic practice in PSD rulemakings. In these rulemakings, EPA has indicated its view that pollutants with emission controls set under other provisions of the CAA are "subject to regulation" for PSD purposes, and the Agency has never listed CO_2 as meeting these criteria. *See, e.g.*, 61 Fed. Reg. 38249, 38309-10 (July 23, 1996) (listing pollutants subject to PSD review and including only those pollutants actually regulated under existing emission control provisions of the CAA); 45 Fed. Reg. 52676, 52723 (Aug. 7, 1980) (noting that BACT is required for criteria pollutants and for pollutants whose emissions are controlled under new source performance standards ("NSPS") and national emission standards for hazardous air pollutants ("NESHAP"): "In this manner, BACT can complement the NSPS process by extending coverage to additional source types and units and perhaps identifying candidates for future NSPS and NESHAP regulations"); 43 Fed. Reg. 26388, 26397 (June 19, 1978) (describing pollutants subject to BACT requirements as those pollutants actually regulated under various CAA provisions).[19]

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[19] *See also* EPA, *New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting* (Oct. Draft) (1990) ("NSR Manual"), at A.18-A.21 & Table A-4 (identifying pollutants "regulated by the Clean Air Act" as those having emission rates in tons/year and listing those pollutants; CO_2 is not listed).

EPA never considered pollutants to be "subject to regulation" because of monitoring and reporting obligations.

In sum, EPA consistently has maintained a long-standing interpretation of the statutorily undefined term "subject to regulation" for PSD purposes. Specifically, EPA has interpreted that term to refer to pollutants that are subject to regulatory emission controls, limitations, or standards under the Act. Since at least 1993, it has consistently rejected any notion that CO_2 is subject to regulation for PSD purposes and has made clear that section 821 of Public Law No. 101-549 is a nonregulatory provision. EPA did not change this interpretation even at a time when it had adopted and publicly articulated an unequivocal view that it had authority to regulate CO_2 as a pollutant under the Act.[22] This interpretation is reasonable, fully in harmony with the Act and its regulations, and should be affirmed by the Board.[23]

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[22] Moreover, EPA's long-standing interpretation of the term is fully consistent with the legislative history of section 821 and of the 1990 CAA amendments, which, as discussed above, makes clear that Congress did not intend to mandate regulatory emission controls for CO_2.

[23] Petitioner asserts that CO_2 is subject to regulation because a CO_2 monitoring and reporting requirement was incorporated into Wisconsin's state implementation plan ("SIP") and thereby purportedly made federally enforceable. Pet. Op. Br. at 38-39. Assuming *arguendo* that a monitoring requirement could indeed make CO_2 "subject to regulation" under the CAA for purposes of triggering PSD (which it cannot, for the reasons discussed herein), petitioner's assertion still fails. First, petitioner's argument gets the federal-state relationship under the CAA backwards; one state cannot by its own regulations impose on EPA an obligation to regulate all other states the same way. *See Vermont v. Thomas*, 850 F.2d 99, 102-04 (2d Cir. 1988) (Vermont cannot, through inclusion of a state ambient air quality standard in revisions to a SIP, impose that standard on upwind states). Rather, EPA establishes the rules, based on the CAA, that states then implement through their SIPs. Moreover, only those portions of SIPs that are submitted in response to regulations promulgated by EPA are federally enforceable. *Id.* at 102; *see* CAA § 302(q), 42 U.S.C. § 7602(q) (defining an "applicable implementation plan" for purposes of the CAA as "the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved [by EPA] . . . *and which implements the relevant requirements of this Act*") (emphasis added). Because EPA has not promulgated regulations requiring CO_2 emission controls, any SIP provision imposing such controls would not be an applicable SIP within the terms of the CAA.

C. Case Law Confirms that CO_2 Is Not Subject to Regulation.

A review of relevant case law in federal courts, the EAB, and state administrative tribunals fully supports EPA's interpretation that CO_2 is not "subject to regulation" for purposes of the PSD program because CO_2 is not subject to any emission standards or controls under the Act.

Even though section 821 has been law since 1990, and even though EPA in 1998 adopted the position that the CAA authorizes regulation of CO_2, it appears that neither petitioner nor anyone else argued that section 821 made CO_2 "subject to regulation under the Act" for PSD purposes until after the Supreme Court decided *Massachusetts* in April 2007. This is so even though the argument was "reasonably ascertainable or reasonably available" before then. *See Christian County*, slip op. at 4, 12-13 (holding that petitioner Sierra Club in that case waived its arguments regarding CO_2 being "subject to regulation" by not raising them during the public comment period for the permit in that case, a period that preceded the Supreme Court's decision in *Massachusetts*). Therefore, the specific issue has not been decided on the merits by this Board.[24]

As discussed further below, the Board has, however, considered CO_2's regulatory status for other purposes and deemed it to be unregulated. It also has held more generally that no BACT requirements apply to "unregulated" pollutants under the PSD program. Moreover, two state administrative tribunals have heard and denied the same argument asserted by petitioner here. Although these tribunals' decisions do not bind the Board, the rejection by other

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[24] The Board in *Christian County* expressly offered no opinion on petitioner Sierra Club's contention that CO_2 is currently subject to regulation under the CAA. *Christian County*, slip op. at 18 n.22. The question "[w]hether CO_2 is a pollutant 'subject to regulation' under the Clean Air Act remains a matter of considerable dispute" and was not decided by *Massachusetts*. *Id.*, slip op. at 7 n.12, 17.

administrative tribunals of the identical claim submitted in this case is relevant to the Board's consideration of the issue.

Further, the two federal judicial cases that petitioner cites in support of its view that CO_2 is "subject to regulation," *Massachusetts v. EPA* and *Alabama Power Co. v. Costle*, in fact support EPA's view that CO_2 is not subject to regulation under the CAA in the absence of regulations imposing controls or limitations on CO_2 emissions.

1. EAB Decisions

The EAB has held in two cases that CO_2 is not a regulated pollutant under the CAA. In *Inter-Power*, 5 E.A.D. at 151 & n.36, the Board held that CO_2 is an "unregulated pollutant[]" and that EPA "was not required to examine control technologies aimed at controlling these pollutants." Although the Board did not provide extensive analysis of the issue, and the relevance of section 821 may not have been put at issue, the fact remains that petitioner in that case argued that the Region erred by failing to evaluate BACT for CO_2. The case's importance here is that the Board affirmatively recognized the existence of a category of unregulated pollutants that are not subject to BACT and placed CO_2 in that category.

Similarly, in *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107 (EAB 1997), the Board upheld a PSD permitting decision in which the permitting authority found that CO_2 was not "'a regulated air pollutant for permitting purposes'" because there were "'no regulations or standards prohibiting, limiting or controlling the emissions of greenhouse gases from stationary sources.'" *Id.* at 132 (quoting State of Hawaii Department of Health Response to Comments on Draft Permit). Petitioner argues that the Board denied review without "reaching the merits" because the petitioners in that case offered no information to support their position. Pet. Op. Br. at 27. But the Board had before it the permitting authority's rationale for concluding that BACT does not apply to CO_2 -- *i.e.*, that CO_2 is not regulated because no regulations or standards prohibit,

limit, or control its emissions. *Kawaihae*, 7 E.A.D. at 132. The Board would have rendered a contrary decision had it deemed that conclusion in error, particularly because the case was decided seven years after enactment of section 821.

The Board likewise generally has supported EPA's differentiation between regulated and unregulated pollutants in the PSD and other contexts, agreeing that only the former require consideration in PSD BACT decisions or other regulatory programs. As the Board stated in *In re Knauf Fiber Glass*, 8 E.A.D. 121, 163-64 (EAB 1999), "[n]ot all air pollutants are covered by the federal PSD review requirements"; those that are not included are "so-called 'unregulated pollutants.'" In that case, the Board held that PSD BACT limits for emissions of respirable glass fibers were not required because those fibers were "unregulated pollutants" not specifically addressed by CAA emission control requirements; they were to be addressed only to the extent they were components of PM_{10}, a regulated criteria pollutant. *See also In re Indeck-Elwood*, PSD Appeal No. 03-04, slip op. at 8 n.10 (Sept. 27, 2006) (noting that EPA's rules define "regulated pollutants" as those "subject to regulations under the CAA," including NAAQS, NSPS, and Title VI); *In re Umetco Minerals Corp.*, 6 E.A.D. 127, 127-28 (EAB 1995) (noting that radon emissions from uranium byproducts that result from uranium milling are subject to regulation under the CAA and, more specifically, that EPA has designated radon and other radionuclides as hazardous air pollutants subject to CAA § 112 standards); *In the Matter of Genesee Power Station*, 4 E.A.D. 832, 848 (EAB 1993) (stating that "unregulated pollutants generally do not form part of the BACT analysis, since by statute and regulation BACT is defined as an emissions limitation for a regulated pollutant" and noting that "the environmental impact of unregulated pollutants" becomes relevant only when it comes to "the selection of an appropriate control technology for regulated pollutants"); *In the Matter of North County*

Resource Recovery Associates, 2 E.A.D. 229, 230 (Adm'r 1986) ("EPA lacks the authority to impose [PSD permit] limitations or other restrictions directly on the emission of unregulated pollutants.").

Far from being irrelevant to the definition of "subject to regulation," as petitioner asserts, this case law demonstrates the Board's consistent recognition of a clear distinction between those air pollutants that are regulated pollutants under the CAA, *i.e.*, those pollutants that are subject to regulatory emission limits under the Act, and "unregulated" pollutants, *i.e.*, those pollutants not subject to such limits. Indeed, as discussed above, the Board in two cases held that CO_2 falls in the latter category. *Kawaihae,* 7 E.A.D. at 132; *Inter-Power*, 5 E.A.D. at 151 & n.36.[25] EPA's interpretation in the present case (and historically) of "subject to regulation" makes the same critical distinction and thus is consistent with and supported by the Board's precedents.

2. State Administrative Cases

The arguments petitioner asserts in the instant case have been rejected in the two administrative proceedings in which state tribunals have reviewed similar claims. In *Friends of the Chattahoochee, Inc. v. Couch*, Docket No. OSAH-BNR-AQ-0732139-60-Howells, 2007 Ga. ENV. LEXIS 60 (Ga. OSAH Dec. 18, 2007),[26] an administrative law judge of the Georgia Office of State Administrative Hearings summarily disposed of a claim that was essentially identical to petitioner's claim here. In that case, petitioners, which included Sierra Club (the petitioner here), alleged that a PSD permit was invalid because the Georgia Environmental Protection Division failed to include in the permit a BACT emission limitation for CO_2. Petitioners had claimed that

[25] *See also Christian County*, slip op. at 8 & n.14 (citing the NSR Manual as illustrating the principle that "[t]he PSD permitting requirements . . . are pollutant-specific, which means that a facility may emit any air pollutants, but only one or a few may be subject to PSD review, depending upon a number of factors including the amount of projected emissions of each pollutant").

[26] A copy of this decision is Attachment I to this brief.

CO_2 was "subject to regulation" under the PSD rules and thus required a BACT analysis. The administrative law judge rejected this argument, holding that CO_2 is not subject to any of the regulatory requirements set out in 40 C.F.R. § 52.21(b)(50) and therefore no BACT analysis or determination for CO_2 was required. Significantly (and correctly), the opinion cites *Massachusetts* as "inherently recognizing that EPA has not, to date, regulated CO_2 emissions...." *Friends of the Chattahoochee*, 2007 Ga. ENV LEXIS 60, at *8-12 (also citing *Kawaihae* for the holding that CO_2 is not a regulated pollutant for PSD permitting purposes).[27]

Similarly, environmental organizations recently opposed issuance of a PSD permit in proceedings before Montana's Board of Environmental Review. *In the Matter of the Appeal by Southern Montana Electric Regarding Its Air Quality Permit No. 3423-00 for the Highwood Generation Station*, Case No. BER, 2007-06-AQ, 2007-07-AQ.[28] In that proceeding, petitioners alleged largely the same claims as petitioner raises here: that CO_2 emissions are "regulated" pursuant to section 821's monitoring and reporting requirements and therefore are "subject to regulation" for purposes of PSD BACT requirements. *See, e.g.*, Montana Environmental Information Center ["MEIC"] *et al.*'s Reply in Support of Motion for Summary Judgment at 4-9.[29] A majority of the Board rejected that and other related arguments. *See* Montana Order at 1 (referring to the Board's January 11, 2008 decision that "CO_2 is not a regulated pollutant, 'subject to regulation' and BACT requirements").

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[27] *Friends of the Chattahoochee* is now on appeal in the Fulton County Superior Court. *Friends of the Chattahoochee, Inc. v. Couch*, No. 2008cv146398 (Sup. Ct. Fulton Co. (GA), filed Feb. 11, 2008).

[28] A copy of the Montana board's Third Order Setting Hearing and Denying Motion To Strike Portions of Affidavit of Appellants (filed Jan. 28, 2008) ("Montana Order"), is Attachment J to this brief.

[29] A copy of this document is Attachment K to this brief.

3. *Alabama Power Co. v. Costle*

Contrary to petitioner's argument, *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir 1979), supports rather than undermines EPA's interpretation of "subject to regulation" as requiring that a pollutant be subject to emission standards or limitations. The D.C. Circuit in *Alabama Power* rejected the argument that only the pollutants mentioned in CAA section 165, 42 U.S.C. § 7475, *i.e.*, sulfur dioxide and particulate matter, were subject to PSD and BACT requirements and that other pollutants listed in CAA section 166, 42 U.S.C. § 7476, were outside the coverage of those requirements. But the Court's ruling did not define "subject to regulation" as meaning *any* pollutant that is mentioned anywhere in the Act. Rather, the D.C. Circuit said that a pollutant had to be subject to some kind of requirement for emission standards under the Act to be "subject to regulation" under the Act. For example, "[o]nce a standard of performance has been promulgated for [certain particulates], those pollutants become 'subject to regulation' within the meaning of section 165(a)(4), 42 U.S.C. § 7475(a)(4) (1978), the provision requiring BACT prior to PSD permit approval." *Alabama Power,* 636 F.2d at 370 n.134.

In contrast to the monitoring-and-reporting-only provisions of section 821 of Public Law No. 101-549, section 166 of the CAA required EPA to adopt emission control requirements for four specific pollutants (not including CO_2) listed in the statutory text.[30] *See Alabama Power*, 636 F.2d at 406; *cf. Christian County*, slip op. at 5-6 (noting that EPA established NAAQS for six pollutants but not for CO_2). The court held that PSD BACT was triggered for the pollutants subject to section 166 in light of the fact that section 166 imposed emission control requirements for those pollutants. *Alabama Power*, 636 F.2d at 406. Thus, *Alabama Power* is perfectly

[30] Petitioner is right that section 821 "does not impose immediate emissions reductions," Pet. Op. Br. at 30, but quite wrong to say that section 821 is "[l]ike Section 166" of the CAA, *id.* Unlike section 821, CAA section 166 on its face requires promulgation of emission control requirements.

consistent with EPA's interpretation of "subject to regulation" as requiring that, for a pollutant to be subject to PSD BACT requirements, it must be subject to a CAA requirement for emission controls. Because CO_2 is not subject to such a requirement, no basis exists to apply PSD BACT requirements to that pollutant.

4. *Massachusetts v. EPA* Does Not Subject CO_2 to Regulation.

Petitioner argues that the Supreme Court's decision in *Massachusetts* "undermines EPA's entire approach to CO_2 regulation" by establishing CO_2 as an air pollutant. Pet. Op. Br. at 6-7. Far from undermining EPA's interpretation of "subject to regulation," the Court's holding supports the conclusion that CO_2 has not been subjected to CAA emission control regulation by Congress or EPA. The Court determined that CO_2 falls within the definition of "air pollutant" in section 302(g) of the Act, 42 U.S.C. § 7602(g), which, the Court held, encompasses "all airborne compounds of whatever stripe." 127 S. Ct. at 1460. Having concluded that CO_2 is an "air pollutant," however, the Court explained that EPA has authority to regulate CO_2 under [CAA] section 202(a)(1) *only* "[i]f EPA makes a finding of endangerment" under that provision. *Id.* at 1462. Although the Court rejected EPA's reasons for denying a petition to regulate CO_2 from new motor vehicles as outside the scope of the relevant statutory text, it emphasized the limited nature of its decision: "We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding." *Id.* at 1463.

Thus, the Supreme Court plainly did not consider CO_2 already regulated under the Act and did not require EPA to make a finding that would trigger regulation. Indeed, the Court did not discuss section 821 or address whether CO_2 is a pollutant "subject to regulation" for PSD purposes. *See Christian County*, slip op. at 7 n.12, 17 ("Here, the interpretation of federal law

announced by the Supreme Court in its *Massachusetts* decision, standing alone, does not compel application of a CO_2 BACT limit in the present case.").

D. Petitioner Seeks Relief that Exceeds the Board's Authority To Grant.

The nature of the relief sought by petitioner -- and the arguments advanced by petitioner itself -- demonstrate why its appeal is misdirected and its claims should be dismissed. Through this challenge to a single permit, petitioner and its supporting *amici* ask the Board to reject EPA's long-standing interpretations (and, not incidentally, to overturn the Board's own precedents) by requiring the Agency to apply PSD permitting and BACT control requirements to any new stationary source that will emit a significant amount of CO_2. Alternatively, on the grounds that this matter is too momentous to be decided on the record before the Board, petitioner and its supporting *amici* seek a remand for new proceedings to decide the issue. Petitioner states that "[a] ruling from the EAB on the critical issue of how EPA must treat CO_2 as a PSD pollutant would be based on an inadequate record and opportunity for public participation." Pet. Op. Br. at 3. This request for relief highlights further that petitioner should not prevail in its attempt to use this appeal of one individual source's PSD permit to achieve petitioner's sweeping policy goal.

Although petitioner ostensibly challenges EPA Region VIII's grant of a PSD permit to Deseret Power for the Bonanza plant, it aims higher: to establish a new and broadly applicable PSD regulatory regime in which, for the first time, BACT emission limits would be required for CO_2. The breadth of petitioner's policy objective is underscored by the arguments of *amici* briefs supporting petitioner. For the most part, these *amici* present policy and scientific arguments for EPA regulation of CO_2 emissions -- some even asserting that EPA should make an

"endangerment" finding under the CAA with respect to CO_2.[31] These are matters indisputably outside the scope of review in this permitting case and beyond the Board's authority as an adjudicatory body.[32] As the Board itself has stated concerning this very issue, "[t]o the extent that [petitioner] contends that EPA should regulate . . . carbon dioxide under the PSD program . . . its arguments . . . fail. *The Board is not the proper forum for 'challenging the validity of applicable regulations.'*" *Inter-Power*, 5 E.A.D. at 151 n.36 (quoting *In re Ford Motor Co.*, 3 E.A.D. 677 n.2 (Adm'r 1991)) (emphasis added); *see also In re Suckla Farms, Inc.*, 4 E.A.D. 686, 698 (EAB 1993) (holding that a permit appeal may not be used as a vehicle for collaterally

[31] For example, the brief of *amicus* National Parks Conservation Association ("NPCA Br.") addresses nearly exclusively the alleged effects of climate change in national parks and why limitations on CO_2 emissions are important to management of park resources. It argues that EPA should "take every reasonably available action to immediately reduce greenhouse gas emissions" and that, for this reason, "the permitting agency must establish CO_2 BACT emissions limitations for each new and modified source." NPCA Br. at 10, 13. The *amicus* brief of Physicians for Social Responsibility ("PSR Br.") largely discusses scientific information on climate change and possible health effects and asserts, based on its view on these matters, that EPA has "a legal obligation to establish BACT limits for CO_2 in PSD permits" and that the Board "should direct EPA to take immediate steps to ensure that every available measure (consistent with the BACT requirements of the CAA) is employed to reduce or eliminate emissions of CO_2 in connection with the approval of every new coal-fired power plant." PSR Br. at 13, 34. In addition, the *amicus* brief of Dr. James E. Hansen ("Hansen Br.") specifically argues that EPA "should have already made an endangerment finding" and that asserted effects associated with climate change "obligate[] the EPA to develop complementary emissions limits for various significant sources." Hansen Br. at 8-10.

[32] Indeed, one *amicus* overtly argues that "[t]he fact that [EPA has] not yet made industry-wide regulations does not make application of these requirements to the Bonanza plant unfair, but rather points to the need for formal industry-wide regulation by the agency." Hansen Br. at 13. Although some *amici* restate petitioner's legal argument, state *amici* take a different tack, arguing that CO_2 is an air pollutant "subject to regulation" under the CAA not because of section 821 of Public Law No. 101-549 (petitioner's argument) but by virtue of evidence of CO_2's contribution to climate change which, in those *amici*'s view, endangers public health and welfare. Brief of Amici Curiae States of New York, *et al.*, at 6-9 & n.2. This argument is meritless on its face because EPA has not made an endangerment decision or imposed regulations. Moreover, the states' argument emphasizes the intent to use this permit appeal as a vehicle to seek to compel the EPA Administrator to make an endangerment finding and then to promulgate CO_2 emission control regulations under the Act -- steps that of course, under the (invalid) theory of petitioner itself, need not be taken in order to apply PSD BACT emission limits to CO_2.

challenging the distinction EPA has drawn in its Underground Injection Control program regulations between "hazardous" and "nonhazardous" injection wells). The Board's role in a PSD permit appeal is to review the determinations of EPA on the particular permit at issue, not to make programmatic regulatory determinations for the Agency or to order EPA to undertake the development and promulgation of new, generally applicable rules.

A ruling in this matter from this Board that, for the first time, PSD BACT requirements apply to CO_2 would be based on what petitioner itself considers "an inadequate record and lack of opportunity for public participation." Pet. Op. Br. at 3. As petitioner's statement recognizes, the central issue raised in this appeal inescapably implicates a vast array of fundamental legal, policy, and technical issues that EPA would have to address through a process that ensures full public participation. The potential ramifications of a ruling in petitioner's favor are astounding: CO_2 is emitted, in amounts above the PSD "major source" threshold of 100 or 250 tons per year, CAA § 169(1), 42 U.S.C. § 7479(1), by hundreds of thousands of stationary sources, including apartment and office buildings, shopping centers, sports arenas, and houses of worship, as well as factories, power plants, refineries, and other industrial sources of many sizes. *See generally* Testimony of Stephen L. Johnson, Administrator, EPA, Before the H. Select Comm. on Energy Independence and Global Warming, at 4 (Mar. 13, 2008) ("Using a 250-ton per year threshold, examples of facilities that could be newly subject to Clean Air Act permitting requirements [if CO2 were made subject to regulation under the CAA] include large apartment buildings, schools, hospitals and retail stores.") (Attachment L to this brief). Most of these sources never have been subject to PSD at all. Putting to one side the societal and economic dimensions of the effects on regulated sources and their owners, employees, and customers, the effects on state and local permitting agencies' limited resources -- and those agencies' ability to respond to the

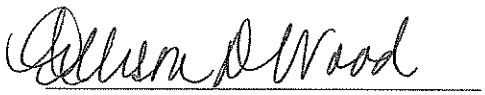
deluge of PSD permit applications that could be expected if petitioner prevails here -- would be, to say the least, unprecedented.

These are, of course, not matters that need to or should be opened as a result of this permit appeal because, for the reasons described above, petitioner's arguments have no merit and PSD BACT requirements do not apply to CO_2. Although petitioner may, if it chooses, seek rulemaking[33] (or legislation) to try to achieve its objective of changing the law if it believes a basis exists for doing so, it may not properly pursue that objective through this, or any other, permit appeal.

IV. Conclusion

For the foregoing reasons, the Board should affirm issuance of the permit.

Respectfully submitted,



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[33] *See* CAA § 307(d)(1)(J), 42 U.S.C. § 7607(d)(1)(J) (applying specific notice-and-comment and other procedural requirements for any "revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality . . .)"). There is no basis for petitioner's assertion that "[i]f the Board were to resolve this case in the Region's favor, without a remand, it would foreclose public participation." Pet. Op. Br. at 33.