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

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

RESPONSE OF AMICUS CURIAE UTILITY AIR REGULATORY GROUP TO THE BOARD'S REQUEST FOR SUPPLEMENTAL BRIEFING

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INTRODUCTION

Pursuant to an order of the Environmental Appeals Board ("Board") of June 16, 2008, amicus curiae Utility Air Regulatory Group ("UARG") hereby files this response to the supplemental brief of the Environmental Protection Agency's Region VIII and Office of Air and Radiation (collectively "EPA" or "Agency") in the above-captioned case. UARG, a voluntary, not-for-profit association of individual electric utilities and other electric generating companies and organizations and four national trade associations, is participating as an amicus in this matter, filing a brief in support of EPA and participating in oral argument by order of the Board. Therefore, under the terms of the Board's June 16 order, UARG is permitted to file this response.

In that order, the Board asked EPA to address two issues: (1) the enforceability of section 821 of Public Law No. 101-549; and (2) whether, under section 165(a) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7475(a), a facility with the potential to emit at least the requisite number of tons per year, as specified in section 169(1) of the Act, 42 U.S.C. § 7479(1), of carbon dioxide ("CO_2") is a major emitting facility requiring a PSD permit. June 16 Order at 2-5.

As discussed below, UARG generally agrees with the conclusion stated in EPA's supplemental brief ("EPA Supp. Br.") that section 821 of Public Law No. 101-549 is enforceable through certain mechanisms set out in the CAA, which section 821 in effect borrows. UARG agrees with the Agency that this borrowing of CAA enforcement mechanisms does not and cannot make section 821 part of the CAA or make CO_2 "subject to regulation" under the CAA. Moreover, UARG agrees that EPA has properly construed sections 165(a) and 169(1) as addressing air pollutants whose emissions are controlled under the Act, and that the section 169(1) definition of "major emitting facility" does not sweep CO_2 and other substances that are not subject to mandatory emission control requirements into the PSD program. UARG also

agrees with EPA that *Massachusetts v. EPA*, __ U.S. __, 127 S. Ct. 1438 (2007), does not undermine the validity of EPA's interpretation.

The Board should not lose sight of the clear conclusions articulated in previous briefs and at oral argument in this case: Congress chose not to impose controls -- and did not mandate regulations to control -- emissions of CO_2 under the CAA; no such CAA regulations exist for CO_2; and Congress enacted section 821 as a separate statutory provision, outside the CAA, to gather information on how much CO_2 was emitted from certain facilities. For these reasons, CO_2 is not "subject to regulation" under the CAA for purposes of the PSD program, including that program's Best Available Control Technology ("BACT") provisions.

Petitioner Sierra Club's identification of occasional and inadvertent EPA misstatements (as well as isolated provisions in state law[1]) cannot change the fact that Congress did not

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[1] Sierra Club argued in its initial brief, and may argue in any supplemental brief that it files, that state law provisions purportedly included in state implementation plans ("SIPs") concerning CO_2 make CO_2 subject to regulation under the CAA because those provisions were approved by EPA and are federally enforceable. *See* Pet. Opening Br. at 38-39. UARG's Amicus Brief (at 32 n.23) explains that a state's SIP provisions cannot bind other states and, more fundamentally, that only those portions of EPA-approved state regulations that "implement[]"CAA requirements, and that are therefore federally enforceable, can be part of an applicable implementation plan under the CAA. *See* CAA § 302(q), 42 U.S.C. § 7602(q) (defining the "applicable implementation plan" as "the portion (or portions) of the implementation plan, or more recent revision thereof, which has been approved under section 110 of this Act, . . . *and which implements the relevant requirements of this Act*") (emphasis added). Because CO_2 emission controls have not been established as relevant requirements of the Act, any state regulation that purports to impose emission controls on CO_2 -- whatever that provision's enforceability under state law -- would not be an applicable implementation plan under the CAA.

A case in point is an action of EPA Region 3 (referred to by EPA counsel in this case in a September 9, 2008 letter to the Clerk of the Board) approving what Delaware described to EPA as a "revision to the State of Delaware State Implementation Plan (SIP) for the Attainment and Maintenance of the National Ambient Air Quality Standards for Ozone." Letter from John A. Hughes, Sec'y, Del. Dep't of Natural Res. and Envtl. Control, to Donald S. Welsh, Reg'l Adm'r, EPA Region 3, Nov. 1, 2007, available at www.regulations.gov as Doc. No. EPA-R03-OAR-2007-1188-0002 (Attachment A hereto). The Delaware regulation included limitations on emissions of precursors to ozone and fine particulates and also addressed CO_2, but Delaware made clear it had included CO_2 provisions solely as a matter of state law and those provisions were not within the scope of the state's implementation of the CAA:

> It is correct that *CO_2 is not a federally regulated pollutant*, but *the Environmental Protection Agency's (EPA) decision to not regulate CO_2* does not prohibit *Delaware* from regulating *its* [CO_2] emissions. . . . The broad definition of "air contaminants" in the

mandate or provide for CO_2 regulation under the CAA by enacting section 821 of Public Law No. 101-549. It also does not change the fact that EPA has long applied an interpretation of the term "subject to regulation" that comports with congressional intent by excluding CO_2 from the scope of pollutants that are subject to PSD requirements.

As UARG observed in its initial brief, Sierra Club would have the Board force the "elephant" of a massive and unprecedented CAA regulatory program for CO_2 through the "mousehole[]" of a narrowly limited information-gathering provision that is not part of the CAA. *Whitman v. American Trucking Ass'ns,* 531 U.S. 457, 468 (2001). For the reasons given below, in UARG's initial brief, and in EPA's briefs, Sierra Club's arguments should be rejected.

ARGUMENT

I. That Section 821 Borrows Enforcement Mechanisms from the CAA Does Not Make Section 821 Part of the CAA But Reinforces that It Is *Not* Part of the CAA.

Section 821 of Public Law No. 101-549 expressly states that "[t]he provisions of section [412(e)] of Title [IV] of the Clean Air Act shall apply for purposes of this section in the same manner and to the same extent as such provision applies to the monitoring and data referred to in

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> Delaware statute allows the Department to *control pollutants which may not be controlled federally, such as CO_2*, which, in this singular incidence, makes Delaware laws more stringent than federal laws. The fact that *EPA has not chosen to address CO_2*, does not impact the Delaware statute.

AQM [Delaware Air Quality Management] Response Document to Comments Submitted on the Proposed Adoption of Regulation No. 1144 and the Proposed Amendment to Regulation No. 1102, at 3 (Dec. 6, 2005) (emphases added), Doc. No. EPA-R03-OAR-2007-1188-0002.7 (Attachment B hereto). Accordingly, when Region 3 later proposed and took final action on the regulation submitted, it never referred to CO_2 emission limitations, 73 Fed. Reg. 11845 (Mar. 5, 2008) (Attachment C); 73 Fed. Reg. 23101 (Apr. 29, 2008) (Attachment D); it received "[n]o public comments" at all, *id.* at 23102; and it explained that its action "is not a 'significant regulatory action'" and "will not have a significant economic impact on a substantial number of small entities." 73 Fed. Reg. at 11846 (Attachment C); *accord* 73 Fed. Reg. at 23102 (Attachment D). Thus, consistent with the CAA, and as the state and Region 3 rulemaking records make clear, Region 3's action did not and could not make Delaware's state-law-only CO_2 provisions part of the CAA.

section [412]."[2] Thus, as EPA's supplemental brief notes, section 821 may properly be viewed as borrowing, for purposes of enforcement of that section's requirements, mechanisms available in the CAA for enforcement of "[t]he provisions of" section 412 of the CAA.[3]

As EPA observes, the incorporation of selected provisions of one statute into another is not at all unique to these provisions. *See, e.g.*, 29 U.S.C. § 794a(a)(1) (providing that plaintiffs in suits under the Rehabilitation Act shall be entitled to "[t]he remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964"); *id.* § 152(2) (defining "employer" for purposes of the National Labor Relations Act to exclude persons "subject to the Railway Labor Act, as amended from time to time"); *see also* EPA Supp. Br. at 13-14 (citing cases concerning provisions of the Longshoremen's and Harbor Worker's Compensation Act incorporated into the Federal Coal Mine Health and Safety Act and the Defense Base Act). Such references by one

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[2] Although the literal references in section 821 to CAA section numbers are to sections 511 and 511(e), it is understood that these references reflect scrivener's errors and that the intended references are to sections 412 and 412(e). 42 U.S.C. § 7651k note.

[3] EPA explains the basis for concluding that the Agency's civil enforcement mechanisms in section 113 of the CAA, 42 U.S.C. § 7413, are available for use in enforcing the provisions of section 412 of the CAA and (in light of section 821's language) section 821 of Public Law No. 101-549 as well. EPA Supp. Br. at 11-12 (quoting 42 U.S.C. § 7413(a)(3)). In addition, EPA correctly notes that a question exists whether its section 113 criminal enforcement authority is available to enforce section 821, *see id.* at 13 n.4, but, as EPA suggests, given the availability of section 113 civil enforcement authority, resolution of that question is unnecessary to permit a conclusion that *some* mechanisms are available to enforce section 821.

EPA does not, however, explain its suggestion that citizen suits may be filed under section 304 of the Act, 42 U.S.C. § 7604, to enforce section 412(e) (and thus, through incorporation by reference, may be filed to enforce section 821). *See, e.g.*, EPA Supp. Br. at 11. In making that suggestion, EPA's supplemental brief does not acknowledge that the scope of section 304 is not coextensive with that of section 113(a)(3). For example, section 113(a)(3) refers to "any . . . requirement or prohibition of" Title IV of the CAA, which includes section 412(e), while section 304(a)'s description of CAA citizen suit jurisdiction against persons other than the Administrator both omits any such reference and is drawn in more limited terms than those of section 113. *See* 42 U.S.C. § 7604(a)(1), (3) (authorizing suits only for violations of emission standards or limitations under the CAA and orders with respect to such standards or limitations, and for violations of preconstruction permitting requirements); *id.* § 7604(f) (defining "emission standard or limitation under this chapter" for purposes of section 304). As with the question regarding the availability of criminal enforcement of section 821, however, the question whether section 304 provides an "enforcement" mechanism for section 412(e) (or section 821) violations need not be resolved in the present case.

statute to another plainly do not make the referring statute part of the referred-to statute. By definition, each of the two statutes retains its own identity; otherwise, Congress would have had no need to include in one statute a reference to a separate, distinctly identified statute, rather than making, as it commonly does, internal cross-references *within* a single statute. Compare Pub. L. No. 101-549, § 821(a) (referring to "[t]he provisions of section [412(e)] . . . of *the Clean Air Act*") (emphasis added) *with* CAA § 412(b), 42 U.S.C. § 7651k(b) (referring to "section 7651c of *this* title" (*i.e.*, section 404 of *this* Act)) (emphasis added).

Thus, section 821's borrowing of CAA enforcement provisions neither renders section 821 part of the CAA nor makes CO_2 "subject to regulation" under the CAA. That section 821 refers to the CAA for enforcement purposes reflects the fact that section 821 is not part of the CAA. Congress could have inserted, but did not insert, the text of section 821 into section 412 of the CAA, without need to make any textual reference to that CAA provision. Congress referred in section 821 to section 412(e) "of the Clean Air Act" (not to section 412(e) "of this Act") precisely because section 821 is *not* part of the Clean Air Act. Hence, it stated that section 412(e) "of the Clean Air Act" applies to section 821 "in the same manner and to the same extent as such provision applies to the monitoring and data referred to in [section 412 of the Clean Air Act]." To conclude that that referring language makes section 821 itself part of the CAA (or to conclude for any other reasons that section 821 is part of the CAA) would render that language superfluous, an interpretation the Board should not make. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'. . . . We are 'reluctant to treat statutory terms as surplusage in any

setting.'") (quoting *Duncan v. Walker,* 533 U.S. 167, 174 (2001)).[4] It is, moreover, implausible in the extreme to conclude that, as Sierra Club argues, Congress intended to take the momentous step of drawing CO_2 into the ambit of the PSD program through the circuitous route of enacting section 821's "borrowing" language -- when far more direct avenues were available to achieve that result -- while simultaneously making efforts to avoid establishing, or mandating the establishment of, any limitations, standards or controls for CO_2 emissions under the CAA. *See* UARG Amicus Br. at 15-20.

Likewise, EPA's decision to implement section 821 through regulations that also *implement* CAA section 412 did not and could not abrogate congressional intent to avoid mandating CO_2 emission controls under the CAA or reverse the Agency's longstanding position that pollutants without emission control requirements are not subject to PSD. It appears that, in promulgating 40 C.F.R. Part 75, EPA chose to combine separate monitoring and reporting requirements as a matter of efficient regulatory practice; for example, the mechanisms for monitoring CO_2 are closely related to those for monitoring sulfur dioxide ("SO_2") and nitrogen oxides ("NOx"), and CO_2 monitoring is one means to determine NOx emissions. *See* 40 C.F.R. § 75.10(a)(2). EPA had no need to create a wholly separate regulatory monitoring scheme for CO_2. But EPA's streamlining of its regulations in this fashion did not somehow, *sub silentio,* make CO_2 subject to PSD, a result plainly incompatible with congressional intent and EPA's own statutory construction. In fact, when proposing the CO_2 provisions of 40 C.F.R. Part 75, EPA explained that the statutory authority for those provisions was section 821, not section 412 of the CAA, and the Agency distinguished that authority from the authority provided by CAA section 412. *See, e.g.*, 56 Fed. Reg. 63002, 63062 (Dec. 3, 1991) (noting that there was

[4] *See* UARG Amicus Br. at 9-10 (noting that section 821's reference to "the Clean Air Act," as opposed to "this Act," reinforces the conclusion that section 821 is not part of the CAA).

"statutory authority" under section 821 "to monitor CO_2 emissions" and that CAA section 412 provided authority for promulgating monitoring and reporting requirements "for SO_2, NO_x, opacity, and volumetric flow").

In its supplemental brief, EPA suggests that section 821 requirements are enforceable either through broad incorporation of section 113 of the CAA, under which section 412 is enforceable, EPA Supp. Br. at 11-19, or by "expand[ing]" the scope of section 113, *id.* at 19-20. Although either possible interpretation leads to the same conclusion -- *i.e.*, that section 821 is enforceable through use of enforcement mechanisms described in the CAA -- incorporation by reference is more clearly compatible with the text of section 821, which makes the provisions of section 412(e) of the CAA applicable for section 821's purposes "in the same manner and to the same extent" as they are for section 412.

In either event, as EPA correctly points out, section 821's reference to CAA authority does not and cannot make section 821 part of the CAA or make CO_2 subject to regulation under the Act. EPA Supp. Br. at 6, 9, 19-20, 24. As UARG observed in its amicus brief, Congress did not enact section 821 as part of the CAA and did not make CO_2 subject to regulation for PSD purposes. UARG's brief referred, *inter alia*, to:

- Clear evidence of legislative intent that section 821 is not part of the CAA;
- Legislative history of section 821 showing that Congress did not intend enactment of that statutory provision to have any emission control consequences;
- Legislative history of the 1990 Clean Air Act Amendments showing that Congress did not intend to trigger requirements for CO_2 emission controls or to mandate imposition of such controls;
- A longstanding and statutorily sound Agency interpretation, reflected in guidance and rulemakings, of "subject to regulation" as requiring actual control of emissions;
- Consistent views by EPA General Counsel and other Agency officials over time that CO_2 is not subject to any emission control regulation under the CAA;

- Decisions by the Board concerning CO_2 and other unregulated pollutants and holding that these substances are outside the scope of pollutants subject to PSD; and

- State administrative decisions that reinforce the conclusion that CO_2 is not subject to regulation for PSD purposes.[5]

Indeed, since oral argument in this case, EPA has further clarified, in its Advanced Notice of Proposed Rulemaking ("ANPR") on possible regulation of CO_2 emissions under the CAA, 73 Fed. Reg. 44354 (July 30, 2008), that it may have authority to regulate CO_2 under various provisions of the CAA but that it has not done so. In the ANPR, EPA notes that setting emissions limits, standards or controls for CO_2 under any provision of the CAA would subject CO_2 to PSD requirements for the first time. *See id.* at 44420, 44498-500. EPA notes that such a result would be extraordinary because it would create "an *unprecedented* expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch

[5] Sierra Club filed with the Board on July 8, 2008, a notice that a state trial-level court in Georgia had ruled that CO_2 was subject to regulation under the CAA based largely on the definition of "regulated NSR pollutant" at 40 C.F.R. § 52.21(b)(50). *Friends of the Chattahoochee, Inc. v. Georgia Dep't of Natural Res.*, No. 2008CV146398 (Ga. Super. Ct. June 30, 2008). That opinion, which adopted Sierra Club and its co-litigant's proposed order nearly verbatim without providing further analysis, was based on far more limited presentations than are before the Board here. For example, the court did not consider the argument that section 821 is not part of the CAA. In any event, the Georgia Court of Appeals granted permissive appeal of this case on August 20, 2008, and that appeal is pending. *Longleaf Energy v. Friends of the Chattahoochee* (Georgia Ct. App., No. A08D0472, Discretionary Application Granted, Aug. 20, 2008), available at http://www.gaappeals.us/docket/results-one-record.php?docr_case_num=A08D0472. Since the UARG amicus brief was filed, additional state administrative agencies have rejected Sierra Club's argument that CO_2 is "subject to regulation" under the CAA, although some of these agency decisions are now on appeal in state courts. *See, e.g., In the Matter of Proposed Title V Air Quality Permit and Acid Rain Permit No. 28-0801-29 for the Big Stone Facility and In the Matter of Proposed PSD Permit No. 28-0803-PSD for the Big Stone II Facility* (South Dakota Bd. of Minerals and Env't, Dep't of Env't & Natural Res.) (CO_2 challenge denied orally at July 17, 2008 hearing); *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 2007-07-AQ, available at http://www.deq.mt.gov/ber/ (on appeal to the 8th Judicial District Court of Cascade County, Montana, No. DDV.08-820, petition filed June 27, 2008); *In the Matter of Sevier Power Co. Power Plant, Sevier County, Utah*, DAQE-AN2529001-04 (Utah Air Quality Bd., Jan. 9, 2008), available at http://www.airquality.utah.gov/Air-Quality-Board/packets/2008/January/january.htm (on appeal to Utah Ct. App., No. 20080113-CA).

every household in the land." *Id.* at 44355 (emphasis added). In the ANPR, EPA reiterates its long-held view that CO_2 is not subject to regulation under the CAA for PSD purposes:

> EPA has historically interpreted the phrase 'subject to regulation under the Act' to describe air pollutants subject to CAA statutory provisions or regulations that require actual control of emissions of that pollutant. PSD permits have not been required to contain BACT emissions limit [sic] for [greenhouse gases] because [these gases] (and CO_2 in particular) have not been subject to any CAA provisions or EPA regulations issued under the Act that require actual control of emissions.

Id. at 44420 (footnote omitted). Thus, EPA continues to adhere to its consistent position that Congress did not compel inclusion of CO_2 in the PSD program and that EPA has taken no action that would bring that pollutant within that program's scope.[6]

Moreover, none of the enforcement cases listed in EPA's supplemental brief (and none of the Agency statements cited in Sierra Club's brief) was directed at the question whether section 821 is part of the CAA for purposes of determining whether CO_2 is subject to PSD.[7] EPA Supp. Br. at 20-23. Further, EPA has identified no enforcement cases that addressed alleged CO_2 monitoring violations alone. *Id.* at 20. Rather, the cases described by EPA generally concern sources that allegedly did not properly implement 40 C.F.R. Part 75 requirements for other pollutants, so it is not surprising that EPA cited section 412 and the CAA generically in some enforcement documents.

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[6] Furthermore, a provision in the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007), also reflects the fact that CO_2 is not currently within the scope of the PSD provisions in section 165 of the CAA. Section 210(b) of that statute, 121 Stat. 1532, amends the CAA to add section 211(o)(12), which provides that "[n]othing in this subsection, or regulations issued pursuant to this subsection, shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas, or to expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas, for purposes of other provisions (including section 165) of this Act." If, as Sierra Club argues, CO_2 is clearly subject, and has been subject for many years, to regulation for purposes of section 165 of the CAA, there would have been no need for Congress to enact such a provision, and in particular no need for its reference to section 165.

[7] And, as UARG's Amicus Brief notes (at 10 n.8), EPA has also characterized section 821 accurately.

In sum, because the section 821 CO_2 data gathering provisions (and the corresponding EPA implementing rules) are not part of the CAA and because CO_2 emissions are not controlled under the CAA in any event, the enforceability of -- and enforcement of -- section 821 and the CO_2 provisions of Part 75 cannot make CO_2 subject to regulation under the CAA for purposes of PSD. *See id.* at 24 n.6, 38.

II. EPA's Interpretation of Section 169(1) Is Reasonable and Entitled to Deference.

UARG agrees with EPA that the Board has no need to consider the definition of "major emitting facility" to decide this case because neither Sierra Club nor others raised it in their briefs here and because the permit that is the subject of appeal indisputably addresses a major emitting facility, or a major modification of a major emitting facility, due to its potential emissions of pollutants other than CO_2. Thus, EPA's interpretation of the definition of that term is not properly before the Board. *See* EPA Supp. Br. at 25-26. In any event, any resolution of this issue could not contradict clear congressional intent not to mandate regulation of CO_2 emissions and should give deference to EPA's long-standing and statutorily sound interpretation of "subject to regulation" as meaning currently subject to actual emission control requirements. Thus, this issue does not and should not affect the Board's resolution of the question regarding the applicability of BACT requirements for CO_2 that is posed by this case.

UARG agrees with EPA that the Agency has properly interpreted CAA sections 165(a) and 169(1) as addressing air pollutants whose emissions are *regulated* under the Act and that this interpretation is not affected by *Massachusetts v. EPA*. EPA Supp. Br. at 6-7, 26-38. Indeed, the Supreme Court's sweeping definition of "air pollutant" under section 302(g) of the Act, 42 U.S.C. § 7602(g), as including "all airborne compounds of whatever stripe," 127 S. Ct. at 1460, would make a contrary interpretation wholly unworkable and unreasonable.

EPA's interpretation of "any air pollutant," as that term is used in section 169(1)'s definition of "major emitting facility," as meaning, for purposes of the section 165 PSD requirements, any "regulated" air pollutant is reasonable and longstanding. EPA adopted this interpretation in the rules implementing section 169 immediately after that section's enactment in 1977, and EPA has followed it ever since. *See* EPA Supp. Br. at 27-30. That interpretation is consistent with its interpretation of "pollutant subject to regulation under this Act" in section 165(a)(4) as encompassing only pollutants that are subject to emission controls and not other air pollutants that are emitted to the atmosphere, such as oxygen or water vapor. EPA's interpretation deserves deference and, at a minimum, is not clearly erroneous. *See In re Howmet Corp.*, PSD Appeal No. 05-04, slip op. at 14 (EAB May 24, 2007); *In re Tondu Energy Co.*, 9 E.A.D. 710, 719 (EAB 2001); *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 340 (EAB 1999); *see also Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423, 1433-34 (2007) (holding that EPA had discretion in defining relevant CAA terms, in the context of implementing the PSD program, "by looking to the surroundings of the defined term").

If, however, EPA's interpretation of "any air pollutant" in section 169(1) were invalidated and superseded by a more expansive interpretation, it is at best doubtful that EPA could use administrative means to forestall the dramatic impacts of such a new interpretation[8] by somehow evading the statutory "major source" thresholds of 100 and 250 tons of potential emissions per year. Given the plain statutory language -- in section 169(1) itself -- establishing those thresholds, there is at the very least strong reason to question Sierra Club's suggestion at oral argument that EPA has broad administrative authority to adjust or circumvent those

[8] *See* EPA Supp. Br. at 35-36.

thresholds to avoid treating an enormous number of small facilities of every description as "major emitting facilities" subject to PSD.[9]

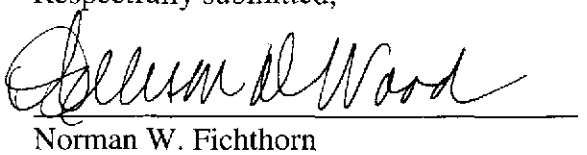
Moreover, Sierra Club's suggestion at oral argument that EPA has administrative discretion to depart from statutory language undercuts its argument that EPA must be *compelled* to interpret section 165(a)(4) in the way Sierra Club prefers. At the same time, it bears emphasis that the Board's acceptance of Sierra Club's arguments concerning section 821 and what it claims is the compulsory interpretation of section 165(a)(4) would make CO_2 "subject to regulation under this Act" and thus effect, in one stroke, the vast expansion of the universe of sources subject to PSD that, Sierra Club implied at oral argument, can and should be avoided. That expansion is, of course, a step the Board should not and need not take, because Sierra Club's arguments are not meritorious and it has not demonstrated clear error in EPA's decision.

[9] At oral argument, counsel for Sierra Club stated: "[EPA] can either address [this issue] administratively or by seeking some sort of a fix from Congress. And to the extent that the EPA has discretion, it should be taking this [100/250 ton] limit into consideration in the public process and invite public input." Transcript of Oral Argument at 16 (May 29, 2008).

CONCLUSION

For the foregoing reasons and those stated by EPA in its supplemental brief, the issues identified by the Board in its June 16, 2008 order do not support Sierra Club's arguments, and the Board should affirm the issuance of the permit.

Respectfully submitted,



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