

2	<p>1 APPEARANCES:</p> <p>2 On behalf of Christian County Generation:</p> <p>3 JAMES H. RUSSELL, ESQUIRE</p> <p>4 Winston & Strawn, LLP</p> <p>5 35 West Wacker Drive</p> <p>6 Chicago, Illinois 60601-9703</p> <p>7 (312) 558-5700</p> <p>8 On behalf of Environmental Protection Agency:</p> <p>9 BRIAN L. DOSTER, ESQUIRE</p> <p>10 Office of General Counsel</p> <p>11 U.S. Environmental Protection Agency</p> <p>12 1200 Pennsylvania Avenue, NW</p> <p>13 Room 7340 ARN; MC-2344A</p> <p>14 Washington, D.C. 20460</p> <p>15 (202) 564-1932</p> <p>16 ALSO PRESENT:</p> <p>17 BRUCE NILLES</p> <p>18 Sierra Club, Midwest Office</p> <p>19 122 West Washington Avenue, Suite 830</p> <p>20 Madison, Wisconsin 53703</p> <p>21 (608) 257-4994</p> <p>22</p>	4
3	<p>1 PROCEEDINGS</p> <p>2 CLERK: All rise. This hearing is</p> <p>3 now in session for oral argument, in re:</p> <p>4 Christian County Generation, Permit</p> <p>5 No. 021060ABC, PSD Appeal No. 07-01.</p> <p>6 The Honorable Judges, Anna Wolgast,</p> <p>7 Ed Reich, Kathie Stein, presiding.</p> <p>8 Please be seated.</p> <p>9 JUDGE REICH: Good morning. We're</p> <p>10 hearing a oral argument this morning in the</p> <p>11 matter of Christian County Generation, a PSD</p> <p>12 permit appeal, pursuant to the Board's order</p> <p>13 of September 25, 2007, as amended on</p> <p>14 October 15, 2007, and we'll proceed as</p> <p>15 follows:</p> <p>16 Sierra Club has been allocated 40</p> <p>17 minutes for its argument, and it may reserve</p> <p>18 up to 10 minutes of that time for rebuttal.</p> <p>19 Christian County Generation is</p> <p>20 allocated 30 minutes, and EPA's Office of Air</p> <p>21 and Radiation, as represented by EPA's Office</p> <p>22 of General Counsel, and appearing at the</p>	5
4	<p>1 Board's request, will have 20 minutes for its</p> <p>2 argument.</p> <p>3 Then Sierra Club may use its</p> <p>4 reserve time, if any, for rebuttal.</p> <p>5 Regrettably, the Board was notified</p> <p>6 by fax from Robb Layman, Assistant Counsel,</p> <p>7 Illinois Environmental Protection Agency on</p> <p>8 October 12th, that the Illinois EPA would not</p> <p>9 be able to participate in this argument due</p> <p>10 to unresolved issues of legal representation</p> <p>11 between the Illinois EPA and the Illinois</p> <p>12 Attorney General's Office.</p> <p>13 In response to this development,</p> <p>14 the time allocated to Christian County</p> <p>15 Generation, which is aligned with the</p> <p>16 Illinois EPA, although their arguments may</p> <p>17 not be identical in all respects, was</p> <p>18 increased to 30 minutes as previously noted.</p> <p>19 Let me also note primarily that the</p> <p>20 Board understands that IEPA, as well as</p> <p>21 Christian County Generation, have argued that</p> <p>22 the issues and arguments raised in the Sierra</p>	5
5	<p>1 Club petition were not preserved for review.</p> <p>2 Sierra Club, not surprisingly, disputes that</p> <p>3 assertion. I'd like to emphasize the fact</p> <p>4 that the Board that is hearing the argument</p> <p>5 on these issues does not reflect any</p> <p>6 determination either way as to whether the</p> <p>7 issues and arguments were preserved and are</p> <p>8 thus properly before the Board.</p> <p>9 Indeed, I expect the question of</p> <p>10 whether the issues and arguments were</p> <p>11 preserved will likely be part of the argument</p> <p>12 we have this morning. I would note further</p> <p>13 that since the scheduling of this argument,</p> <p>14 Sierra Club filed on October 9 a reply brief,</p> <p>15 which the Board accepted by order of</p> <p>16 October 16.</p> <p>17 As part of this reply brief, Sierra</p> <p>18 Club withdrew its collateral impacts analysis</p> <p>19 claim. Thus, that issue is no longer before</p> <p>20 the Board and will form no part of this</p> <p>21 morning's argument.</p> <p>22 Finally, I would note that on</p>	5

<p style="text-align: right;">6</p> <p>1 October 15, Christian County Generation filed 2 a letter requesting permission to discuss 3 three documents during this argument. In the 4 same order accepting the petitioner's reply 5 brief, the Board granted Christian County 6 Generation's request in part, and denied it 7 in part. 8 Without a lot of preamble, I would 9 like to begin by asking counsel to state 10 their names for the record and whom they 11 represent, in the order in which they will be 12 arguing, beginning with Sierra Club. 13 MR. NILLES: Good morning. Bruce 14 Nilles on behalf of the Sierra Club. 15 JUDGE REICH: Thank you, 16 Mr. Nilles. CCG. 17 MR. RUSSELL: Good morning. Jim 18 Russell, Christian County Generation. 19 MR. DOSTER: Good morning. Brian 20 Doster, EPA Office of General Counsel, Air 21 and Radiation Law Office, on behalf of the 22 Office of Air and Radiation.</p>	<p style="text-align: right;">8</p> <p>1 meaning and encompass the acid rain Title IV 2 regulations, or does it have an alternate 3 meaning. 4 Looking at this project, Christian 5 County is proposing to build a large power 6 plant with the primary fuel of Illinois coal. 7 Without any carbon dioxide controls, that 8 plant will emit, if constructed as proposed, 9 about 4 million tons of carbon dioxide a 10 year. That's the equivalent of about 700,000 11 new cars in Illinois every year for the next 12 50 years. 13 And unlike cars which may last 7 to 14 10 years on average, this coal plant, of 15 course, will last for about 50 years based on 16 the experience of other similar power plants. 17 That's abut 200 million tons of 18 carbon dioxide over the next 50 years. And 19 it's not being permitted in a vacuum. 20 According to the October 2007 report from the 21 Department of Energy, there are approximately 22 90 new coal-fired power plants, or power</p>
<p style="text-align: right;">7</p> <p>1 JUDGE REICH: Thank you, gentlemen. 2 Mr. Nilles, you can proceed, and please, let 3 us know upfront if you're reserving time for 4 rebuttal. 5 MR. NILLES: Thank you. Good 6 morning. Again, Bruce Nilles, on behalf of 7 petitioner Sierra Club, and at the outset, I 8 would like to reserve 10 minutes for 9 rebuttal, if that would be okay. 10 JUDGE REICH: Okay, fine. 11 MR. NILLES: What I'd like to do 12 this morning is give a quick overview of the 13 context of this case, and then turn quickly 14 to the two central legal issues in this 15 matter. 16 First of all, as the Court 17 indicated, did Sierra Club waive the right to 18 raise the question of carbon dioxide BACT 19 limit in this proceeding? 20 Secondly, does the word 21 "regulation" in the term subject to 22 regulation in Section 165 have its ordinary</p>	<p style="text-align: right;">9</p> <p>1 plants using coal proposed in the United 2 States currently either in the permitting 3 process today or right behind in the planning 4 and application process. 5 The consequence if we build all 6 these power plants -- and not a single one of 7 them is proposing at this point to do 8 anything about its carbon dioxide 9 emissions -- it would be an enormous increase 10 in carbon dioxide at a time when we are 11 wrestling with how do we solve the challenge 12 of global warming. 13 As we lay out on our reply brief, 14 there are some very simple things that can be 15 done to a power plant to minimize its carbon 16 dioxide emissions, increase the efficiency; 17 use of clean fuels, particularly including 18 biomass, combined heat and power, co-locating 19 this power plant with another industrial 20 process, such as an ethanol plant 21 dramatically increases the efficiency and 22 minimizes the carbon emissions, and lastly,</p>

10	<p>1 as the EPA itself has noted in recent</p> <p>2 comments on a draft environmental impact</p> <p>3 statement, carbon capture and storage may</p> <p>4 offer -- help with about up to 90 percent</p> <p>5 carbon control.</p> <p>6 Now, all these power plants are</p> <p>7 moving through the permitting process,</p> <p>8 including Christian County. If we wait until</p> <p>9 they're built and then try to come back and</p> <p>10 retrofit them and do something about carbon,</p> <p>11 it can be either infeasible or</p> <p>12 extraordinarily expensive. The power plant's</p> <p>13 not located in the right place to be</p> <p>14 co-located with an industrial process so that</p> <p>15 we can use combined heat and power -- it</p> <p>16 simply won't happen.</p> <p>17 It's not designed to use</p> <p>18 alternative fuels, cleaner fuels, including</p> <p>19 co-firing with biomass, and it may be for all</p> <p>20 intents and purposes impossible to come back</p> <p>21 and solve that problem later.</p> <p>22 So from the public policy</p>	12	<p>1 because I think that's the first time that I</p> <p>2 remember you mentioning good cause in</p> <p>3 addition to not being reasonably</p> <p>4 ascertainable. Are you saying that you have</p> <p>5 an independent good cause argument, and have</p> <p>6 you made that before?</p> <p>7 MR. NILLES: The reply brief lays</p> <p>8 out the reasonably ascertainable --</p> <p>9 JUDGE REICH: All right.</p> <p>10 MR. NILLES: Within that rubric, we</p> <p>11 would argue there is that good cause --</p> <p>12 JUDGE REICH: Uh-huh.</p> <p>13 MR. NILLES: Opportunity in the</p> <p>14 very narrow circumstances with the facts</p> <p>15 presented as they are here today.</p> <p>16 JUDGE REICH: Uh-huh.</p> <p>17 MR. NILLES: It is not as if Sierra</p> <p>18 Club didn't raise this issue. We were</p> <p>19 intimately involved in this permit process.</p> <p>20 On January 11, 2007, during the</p> <p>21 public comment period at the Taylorville High</p> <p>22 School, Sierra Club volunteer staff attended,</p>
11	<p>1 perspective, addressing this problem upfront</p> <p>2 makes an enormous amount of sense and should</p> <p>3 be done in this case.</p> <p>4 Turning to the legal issues, which</p> <p>5 of course are more important for today's</p> <p>6 review -- turning to the issue of waiver.</p> <p>7 Respondents argue that Sierra Club</p> <p>8 did not raise the issue of carbon dioxide</p> <p>9 BACT emission limits during the public</p> <p>10 comment period.</p> <p>11 As a technical matter, that is</p> <p>12 correct. However, the Board's rules and this</p> <p>13 case is -- do not hold that all issues have</p> <p>14 to be unequivocally raised in all</p> <p>15 proceedings. The test this Board has laid</p> <p>16 out both in the rules and in its case law is</p> <p>17 that only issues that were reasonably</p> <p>18 ascertainable -- and there may be good cause</p> <p>19 in some limited circumstances to not raise an</p> <p>20 issue.</p> <p>21 Sierra Club did raise the --</p> <p>22 JUDGE REICH: That's interesting,</p>	13	<p>1 raised questions and testified we have to do</p> <p>2 something about global warming, there are</p> <p>3 ways to minimize global warming, the Agency</p> <p>4 should raise -- should address this issue,</p> <p>5 and -- in this permit proceeding.</p> <p>6 In the public comments that were</p> <p>7 filed a month later in February -- 17 pages</p> <p>8 of single-spaced comments, half of those</p> <p>9 comments talk about the science of global</p> <p>10 warming and identify four specific ways the</p> <p>11 Agency could address carbon dioxide</p> <p>12 emissions, including consideration under the</p> <p>13 Endangered Species Act, setting regulations</p> <p>14 for carbon dioxide on its own consideration</p> <p>15 on the collateral impacts and under</p> <p>16 165(a)(2), under the Alternatives Analysis.</p> <p>17 JUDGE REICH: At the time you were</p> <p>18 providing these comments, what was the status</p> <p>19 of the case before the Supreme Court -- the</p> <p>20 Massachusetts case? Was it already before</p> <p>21 them and had it been argued?</p> <p>22 MR. NILLES: I believe it had been</p>

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<p>1 argued.</p> <p>2 JUDGE REICH: You believe it had.</p> <p>3 So at that point, basically you and everybody</p> <p>4 else was in a posture of waiting for a</p> <p>5 decision on the case that had been argued?</p> <p>6 MR. NILLES: That is correct.</p> <p>7 JUDGE REICH: Recognizing that the</p> <p>8 Supreme Court took that case -- recognizing</p> <p>9 that you were still waiting for a decision,</p> <p>10 did you not recognize that there was a</p> <p>11 possibility that the Supreme Court was going</p> <p>12 to rule in favor of the arguments you made?</p> <p>13 MR. NILLES: That was obviously a</p> <p>14 possibility and an outcome we were hoping</p> <p>15 for, which is why we argued it.</p> <p>16 JUDGE REICH: So this is not a</p> <p>17 circumstance -- and I can envision</p> <p>18 conceivably that these circumstances, but</p> <p>19 this is not a circumstance where the legal</p> <p>20 picture changed because there was some</p> <p>21 decision by a court that really nobody was</p> <p>22 anticipating and established a wholly</p>	<p>1 circumstance.</p> <p>2 EPA had taken position it was not a</p> <p>3 pollutant, and the only court that had</p> <p>4 reviewed this issue to date, the D.C.</p> <p>5 Circuit, hadn't even found that there was</p> <p>6 standing for Petitioners to raise this.</p> <p>7 JUDGE REICH: On the subject to</p> <p>8 regulation issue, Illinois now is controlled</p> <p>9 by the federal regs, not the EPA regulations.</p> <p>10 To the extent that you have this argument</p> <p>11 about acid rain, you wouldn't have had that</p> <p>12 irrespective of what Illinois thought about</p> <p>13 its own regulations.</p> <p>14 MR. NILLES: But we still have to</p> <p>15 overcome the hurdle of is it a pollutant.</p> <p>16 JUDGE REICH: Right. And that</p> <p>17 issue was -- clearly an open issue pending a</p> <p>18 decision. I mean, you knew where the Agency</p> <p>19 was coming from, but you knew that there was</p> <p>20 going to be a decision and there was a</p> <p>21 significant possibility that that decision</p> <p>22 was going to come down in a way that</p>
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<p>1 different test or something else.</p> <p>2 This is what it seems to me,</p> <p>3 basically an issue to which -- assuming I</p> <p>4 reach the merits, there were only two issues,</p> <p>5 yes or no on the question whether it's a</p> <p>6 pollutant, and had some confidence that there</p> <p>7 was a possibility that they would understand,</p> <p>8 as they indeed said, yes, it's a pollutant,</p> <p>9 and yet you didn't even think that it was</p> <p>10 worth making the argument, if not only to</p> <p>11 avoid this -- the issue of preservation that</p> <p>12 we're dealing with right now?</p> <p>13 MR. NILLES: In January and</p> <p>14 February of 2007, we were dealing with the</p> <p>15 legal framework that was before us in</p> <p>16 Illinois, and even today, Illinois EPA argues</p> <p>17 that Massachusetts EPA does have no bearing</p> <p>18 on this case. So the situation we were</p> <p>19 dealing with in January and February was a</p> <p>20 framework under which Illinois EPA had in</p> <p>21 prior permitting proceedings said we have no</p> <p>22 authority to address carbon dioxide under any</p>	<p>1 supported your position, and yet you still</p> <p>2 didn't think it worthwhile to make that</p> <p>3 argument?</p> <p>4 I mean, I can't -- I find it</p> <p>5 difficult to think you only make arguments</p> <p>6 that you know that the person you're making</p> <p>7 them to agree with. You know, at times you</p> <p>8 must make arguments knowing they may not</p> <p>9 agree with it, but it sets the pattern for a</p> <p>10 further appeal or other developments.</p> <p>11 It's just -- as I said, I can see</p> <p>12 circumstances where something comes out of</p> <p>13 left field. This one seems like it was a</p> <p>14 very focused issue that was one that was not</p> <p>15 resolved because, notwithstanding the</p> <p>16 position of the Agency, the Supreme Court had</p> <p>17 taken the case and the Supreme Court was</p> <p>18 going to issue a decision on it.</p> <p>19 And I think that's a context that</p> <p>20 you need to consider when dealing with</p> <p>21 reasonably ascertainable.</p> <p>22 MR. NILLES: Again, Your Honor, the</p>

<p style="text-align: right;">18</p> <p>1 comments and the testimony that was filed in 2 this proceeding was using the framework, and 3 it was the legal framework that was in place 4 back in the early part of this year. 5 IEPA still didn't agree with the 6 comments we made, but at least it was in the 7 framework that they had laid out for the 8 years before, and that was the framework 9 within which we're operating. And also the 10 significance of the Supreme Court ruling; it 11 was one of the most sweeping, emphatic 12 decisions about carbon dioxide and global 13 warming -- very serious issues, the Agency 14 cannot ignore it. And the emphatic language 15 it uses to establish standing for the State 16 of Massachusetts swept away the whole 17 framework that had been in place prior to 18 April 2, 2007. 19 JUDGE REICH: Can I see it, because 20 I didn't anything in the record that after 21 the Massachusetts decision but before the 22 permit was issued, you never contacted</p>	<p style="text-align: right;">20</p> <p>1 this office -- these are unique 2 circumstances, are very narrow circumstance 3 with -- the exception would apply, and at the 4 end of the day, I'm not sure if the Board has 5 ever determined whose burden that would be. 6 Given the facts in this case, it 7 would seem that given that Sierra Club had 8 raised the issue of CO2, the decision came 9 down, there is a good argument to be made 10 that it was on the permitting agency to 11 reopen the permit at that point, and to 12 consider the fact that the landscape had 13 changed. So I guess, in conclusion, the 14 burden would be on -- I'm not sure there 15 would be a burden if this is a strict legal 16 question. 17 JUDGE STEIN: Mr. Nilles, you 18 mentioned that this was a narrow 19 circumstance. And assuming we were to agree 20 with you if this issue was not reasonably 21 ascertainable, I am interested in 22 understanding what that would mean as a</p>
<p style="text-align: right;">19</p> <p>1 Illinois and asked them to reopen the comment 2 period, or reconsider the draft permit in 3 light of the Massachusetts decision? I'm not 4 saying you have a legal obligation to do 5 that, but I do want to confirm that there's 6 nothing there that is in the record that 7 suggests that you did that. 8 MR. NILLES: That is correct, Your 9 Honor. We were not aware of any procedure in 10 the Court's rules or 124 or otherwise for us 11 to do that. That is correct. 12 JUDGE REICH: Well, definitely, the 13 permit wasn't yet issues, so it really -- 14 MR. NILLES: Okay. 15 JUDGE WOLGAST: Do you agree that 16 it's your burden to show that this issue 17 could not have been reasonably ascertained? 18 MR. NILLES: We believe it's a 19 legal matter. It's the Agency's obligation 20 to establish BACT for CO2, regardless of what 21 we do. And then in the question of should we 22 have raised it, I think it's fair to say that</p>	<p style="text-align: right;">21</p> <p>1 practical matter. Does that mean that every 2 time an appellate court or a court reverses a 3 lower court on a legal issue, that the permit 4 proceeding gets reopened? I mean, I was 5 hoping you could help explain to me how broad 6 or how narrow a ruling that would be? 7 MR. NILLES: The facts in this case 8 are that the legal framework changed between 9 the close of the comment period and the 10 issuance of the permit. 11 JUDGE REICH: Doesn't that depend 12 on how you define a legal framework? I mean, 13 the act was the same. Nothing changed. I'm 14 sure in your view the world was the same 15 other than the fact that the Supreme Court 16 told the Agency its interpretation was wrong. 17 But I mean, there was not intervening change 18 in the law -- 19 MR. NILLES: That's correct. 20 JUDGE REICH: Other than correcting 21 a misunderstanding that EPA apparently had. 22 MR. NILLES: That's correct. But</p>

<p style="text-align: right;">22</p> <p>1 in this case, the permit wasn't final. So to 2 answer your question specifically, we are 3 arguing today that the narrow issue is that 4 the permit is not yet final, as it was not in 5 this case, because the Agency hadn't issued 6 the final permit. Under those circumstances, 7 if there is a change in the legal framework 8 such as a Supreme Court putting aside the 9 prevailing agency position about the 10 controlling law, under those facts, that's 11 the narrow exception that we're referring to 12 today.</p> <p>13 JUDGE REICH: In terms of not 14 contacting the state after the Massachusetts 15 decision, did your thought to the fact that, 16 as you seem to recognize in your reply brief, 17 that the arguments that you had actually made 18 them in that proceeding to date were are all 19 based on the assumption that it was an 20 unregulated pollutant, and therefore it 21 wasn't just a question of where are we 22 looking at.</p>	<p style="text-align: right;">24</p> <p>1 any idea how many permits potentially are 2 affected by your view of what constitutes 3 reasonably ascertainable? And I realize this 4 question may perhaps be more appropriately 5 directed to the Agency. But given that you 6 comment frequently on these coal-fired power 7 plants, how many permits are we talking 8 about?</p> <p>9 MR. NILLES: In that narrow window 10 between the close of the comment period and 11 the issuance of the final permit, I'm not 12 aware of any other proceeding I can think of 13 where some legal framework of this magnitude 14 was changed in the intervening period. So 15 I'm not aware of, for example -- so, I'm 16 not -- the answer is zero.</p> <p>17 JUDGE STEIN: I am troubled by the 18 breadth of the notion that you describe, in 19 the sense that these permit proceedings are 20 lengthy proceedings, sometimes taking years. 21 And then suddenly there's a court decision 22 where you're not merely looking at a</p>
<p style="text-align: right;">23</p> <p>1 It was a question of the fact that 2 while you had argued to that point, it no 3 longer seemed to be a correct interpretation 4 of the law. Did you not think about the fact 5 that they were reacting at that point to 6 comments that really no longer reflected your 7 position of what the law was?</p> <p>8 MR. NILLES: Again, there's -- the 9 Agency, if the onus was on anyone to reopen 10 because of the change in the legal framework, 11 it would be on the Agency. I'm not aware of 12 any procedures for us to, after the public 13 comment process is closed, but before the 14 issue, before the permit is closed -- before 15 the permit is issued, to petition the Agency 16 or do something at that point.</p> <p>17 JUDGE REICH: Okay.</p> <p>18 JUDGE STEIN: How many permits 19 under your theory of what is reasonably 20 ascertainable, in that whenever there is a 21 change in the law, that all of these 22 proceedings need to be opened -- do you have</p>	<p style="text-align: right;">25</p> <p>1 brand-new test that wasn't anticipated, 2 you're looking at a change in position. And 3 now we are suddenly talking about going back 4 to square one on potentially a host of 5 permits for the construction that are pending 6 around the country.</p> <p>7 And I'm not arguing for the 8 environmental ramifications that you're 9 pointing out, but from a practical 10 perspective, I think that it's not an 11 insignificant consideration.</p> <p>12 MR. NILLES: Again, Your Honor, we 13 are not -- the permits that are still in the 14 public comment process today, we are raising 15 this issue. So there is no ambiguity on 16 those. What we are dealing with is that very 17 narrow window where something as significant 18 as a Supreme Court ruling happens between the 19 close of the comment period and the issuance 20 of the permit. So that's a very, very narrow 21 slice of time. It's not years; it's 22 literally weeks or potentially a couple of</p>

<p style="text-align: right;">26</p> <p>1 three months. And that's what we are dealing 2 with. And again -- 3 JUDGE STEIN: Any change in the law 4 classifies under your view of what's 5 reasonably ascertainable? 6 MR. NILLES: That's not what we're 7 arguing, Your Honor. What we're dealing 8 with -- we can imagine there's something that 9 may be insignificant, but here we're dealing 10 with a fundamental question about the largest 11 pollutant being emitted from the source, the 12 legal status, legal framework, for how that 13 pollutant is regulated was changed in that 14 intervening period between -- 15 JUDGE STEIN: It was determined to 16 be a pollutant. 17 MR. NILLES: Correct. 18 JUDGE STEIN: But you mentioned you 19 were going to talk about why in fact that 20 translated since it being a regulated 21 pollutant. So I'd be interested in hearing 22 your arguments on that point.</p>	<p style="text-align: right;">28</p> <p>1 pipeline that are going to have to address 2 what do we do about CO2. And the sooner we 3 get some resolution of this, obviously, the 4 greater clarity for all the parties involved, 5 both the regulatees and the regulators. 6 Turning to the question of whether 7 carbon dioxide is a pollutant subject to 8 regulation. The statutory framework in this 9 case is very simple. In 1977, Congress 10 amended the Clean Air Act to add the PSD 11 program, and used the language BACT is 12 required for any pollutant "subject to 13 regulation." And to ensure that it was clear 14 as to what it was meaning, at Section 169, 15 the definition of BACT again uses that very 16 same language, "subject to regulation." 17 Thirteen years later, 1990, 18 Congress again amended the Clean Air Act, and 19 in that case specifically ordered EPA to 20 adopt regulations under Title IV of the Acid 21 Rain laws requiring monitoring, 22 recordkeeping, and reporting of carbon</p>
<p style="text-align: right;">27</p> <p>1 MR. NILLES: Okay. 2 JUDGE REICH: Okay. Let me just 3 make sure that we're prepared to move on to 4 the substance of the issue. Okay. Why don't 5 we address the substance of the issue. 6 MR. NILLES: Right before we leave 7 that, obviously, we're asking the Court to 8 remand this permit. But as the Court noticed 9 in its opening comments, there is another 10 permit proceeding right behind this involving 11 Deseret, and I believe also a ConocoPhillips 12 PSD permit appeal raising this very same 13 issue. 14 And so I would urge, if this Court 15 is weighing whether or not to address this 16 question, and the waiver issue is 17 recognized -- and the issue is coming at some 18 point very shortly -- again from a policy 19 perspective, it's not only in PSD-delegated 20 states where Agency is the permitting Agency 21 wrestling with this issue, there are 90 22 permit proceedings out there in the permit</p>	<p style="text-align: right;">29</p> <p>1 dioxide emissions from power plants. 2 If it intended to exclude carbon 3 dioxide from the PSD definition, Congress 4 obviously knew explicitly how to do that. In 5 1991, when it added carbon dioxide 6 requirements, it also added a whole suite of 7 requirements under the Hazardous Air 8 Pollutant Section 112 requirements, and 9 explicitly excluded Section 112 pollutants 10 from the PSD program. It did not do so for 11 carbon dioxide. 12 JUDGE REICH: There is a 13 distinction -- you may not see it as a 14 legally significant distinction, but there is 15 a distinction between pollutants subject to 16 Hazardous Air Pollutant regulations which 17 clearly do establish emission limitations for 18 those pollutants, and acid rain CO2 19 requirement, which is a monitoring 20 requirement? 21 MR. NILLES: Your Honor, you used 22 the exact term that the Congress used in the</p>

<p style="text-align: right;">30</p> <p>1 statute when it intended to mean actual 2 control. Emission standard and limitation 3 has a very specific meaning, and it's the 4 meaning that EPA put forward as to what 5 regulation means. 6 JUDGE REICH: I understand that 7 argument. I'm suggesting that CO2 may not 8 have been viewed in parallel with hazardous 9 air pollutants when they were dealing with 10 our regulation. 11 MR. NILLES: We would point out 12 that, or offer that, when Congress used the 13 word "regulation," there is no indication 14 that it meant to mean anything other than the 15 generic usual commonsense notion of 16 regulation. It used it in 1977, it used in 17 1990. And there was no indication at all 18 that Congress meant to prescribe or narrow 19 the definition of regulation of 1990, and 20 exclude monitoring, reporting, and 21 recordkeeping requirements. 22 Illinois EPA in their brief tries</p>	<p style="text-align: right;">32</p> <p>1 JUDGE REICH: Do you have it? 2 Okay, but what I'm curious about is, when you 3 proceed to 80240, where the Agency says the 4 following pollutants currently regulated 5 under the Act are subject to federal PSD 6 review, there's a listing of pollutants that 7 does not include CO2. And I don't see any 8 language here comparable to the "such as" 9 language that suggests that this is anything 10 other than a complete list. And I'm 11 wondering how you reconcile that. 12 MR. NILLES: Your Honor, the bigger 13 issue in the 2002 regulations is, when EPA 14 issued those final regulations, it was taking 15 what had been proposed back in 1996 and very 16 explicitly identified it wasn't addressing 17 all the 1996 rulemaking issues, it was 18 limiting it exclusively to five specific 19 issues that it was going to be adopting in 20 2002. 21 There is no mention of carbon 22 dioxide. There is no discussion about</p>
<p style="text-align: right;">31</p> <p>1 to make the argument that somehow those 2 regulations are diminutive regulations. And 3 of course, if we look at the history of 4 environmental protection, reporting 5 requirements, monitoring requirements, are 6 some of the most successful regulations we 7 have had in the United States over the last 8 30 years, toxic release inventory being the 9 best example. And again -- 10 JUDGE REICH: Let me ask about the 11 2002 Rhein Act (?) which is discussed in your 12 reply brief. You cite to language that lists 13 certain pollutants and indicate that because 14 that's prefaced by "such as," that indicates 15 that it's not an exhaustive list, and we 16 should look at it that way. And by that I 17 see you're looking at the language at the 18 bottom of 80239 -- it's the language quoted 19 in your brief. 20 I'll give you a chance to pull that 21 out. 22 MR. NILLES: Okay.</p>	<p style="text-align: right;">33</p> <p>1 narrowing the definition of "regulated 2 pollutant" to exclude carbon dioxide. And 3 it's sort of an implicit argument that 4 somehow this preamble, because it doesn't 5 talk about CO2, meant to explain the Agency 6 making a dramatic change in the framework, 7 and excluding carbon dioxide. 8 JUDGE REICH: So the issue is -- so 9 you think the five issues you referenced 10 discussed every one of the pollutants that 11 are listed on this list? 12 MR. NILLES: It did not, Your 13 Honor. It was changing the PSD program, and 14 there was no indication that they were 15 changing the definition of regulated 16 pollutant into -- 17 JUDGE REICH: But I mean, if they 18 had a list and it listed pollutants that 19 weren't relevant for the purposes of the five 20 issues you talked about, then why would it 21 not have listed CO2 as well? 22 MR. NILLES: Your Honor, it's not</p>

<p style="text-align: right;">34</p> <p>1 clear why they didn't list CO2. But if we 2 look at the actual regulation that was 3 adopted in 2002 and the definition of "NSR 4 regulated pollutant," the fourth category 5 is -- and there is a statutory language, "any 6 other pollutant otherwise subject to 7 regulation." It is a very broad definition. 8 When the Agency intended to 9 restrict the definition of regulated 10 pollutant, it did so in Title V. The 11 definition of "regulated air pollutant" in 12 Title V doesn't include this broad statutory 13 language from the PSD program otherwise 14 subject to regulation. 15 JUDGE STEIN: How do you address 16 the argument that I believe was made in the 17 briefs by IEPA that when you look at this 18 "any other pollutant" language, you need to 19 look at it in light of the three provisions 20 that precede it, which are much narrower and 21 much more specific? How do you respond to 22 that argument?</p>	<p style="text-align: right;">36</p> <p>1 reply brief, that point -- and you say the 2 permittee cites the Alabama Power for the 3 proposition that PSD applies to pollutants 4 "already regulated." 5 "Because carbon dioxide is already 6 regulated under the Act's Section 821 7 regulations, Sierra Club agrees with the 8 permitting on this point." I want to make 9 sure I understand that. Are you agreeing 10 that the universe of "pollutants subject to 11 PSD" are those that are already regulated for 12 some purpose? 13 MR. NILLES: For today's 14 proceeding, that's our argument, yes, Your 15 Honor. 16 JUDGE REICH: Does that mean you 17 are effectively withdrawing your argument 18 that "subject to regulation" also includes 19 pollutants that are not yet regulated but 20 that the Agency may have a legal ability to 21 regulate? 22 MR. NILLES: That's correct. For</p>
<p style="text-align: right;">35</p> <p>1 MR. NILLES: We mention in our 2 reply brief that when the Agency is simply 3 parroting the language of the statute, 4 Supreme Court in the Gonzales case, said look 5 to the statute. Unless the Agency is 6 explicitly doing something different in its 7 regulations, which it did not do in 2002, it 8 again adopted the specific language from the 9 Act that had been in place since 1977. We 10 should look to what the definition of that 11 statutory act is. 12 That takes to Alabama Power, which 13 back in 1980, was presented with the very 14 question of what does "subject to regulation" 15 mean. Industry was arguing, it doesn't mean 16 any pollutant that's regulated. 17 JUDGE REICH: I have a question on 18 that because that's interesting. In this 19 Christian County Generation brief, they also 20 refer to Alabama Power for the proposition 21 that "subject to regulation" means already 22 regulated. And you note in page 12 of your</p>	<p style="text-align: right;">37</p> <p>1 today's proceeding, it is that category of 2 pollutants which are regulated as of the date 3 of the permit being issued. 4 JUDGE REICH: Because when you say 5 today's proceeding, I am assuming that that 6 effectively means you are abandoning that 7 argument, and your argument is now limited to 8 arguing that CO2 is already regulated, either 9 because of the acid rain monitoring 10 requirement or the Illinois SIP. 11 MR. NILLES: That's correct. 12 JUDGE REICH: Is that a proper 13 interpretation? 14 MR. NILLES: That is, Your Honor. 15 JUDGE REICH: Okay. 16 MR. NILLES: Just to note, the 17 Alabama Power case, when presented with the 18 question of what is the scope of subject to 19 regulation mean, determined that -- or stated 20 that the EPA regulation, the one issued in 21 1978, applies immediately to "each type of 22 pollutant regulated for any purpose under any</p>

<p style="text-align: right;">38</p> <p>1 provision of the Act." It could not have 2 been more clear.</p> <p>3 And the Court goes on to note that 4 there is no ambiguity in the statutory 5 language. Again, the one quote that 6 is -- has really looked to this question back 7 when the PSD regulations were first adopted, 8 unequivocally states that if it is regulated, 9 it is subject -- if it is regulated anywhere 10 in the Act, it is regulated for purposes of 11 PSD.</p> <p>12 JUDGE REICH: Before we proceed, 13 can I ask you a question about your argument 14 that's based on the Illinois SIP. And it is 15 a little awkward not having Illinois here to 16 address this, but you basically made an 17 argument, as I recall, about the Illinois SIP 18 in your comments, although in that context it 19 was not that the Illinois SIP provision made 20 this subject to review. It is more whether 21 they had the authority to issue a permit 22 given that provision of the Illinois SIP.</p>	<p style="text-align: right;">40</p> <p>1 EPA. EPA went though notes and comments 2 before making it incorporated into the SIP. 3 It is therefore by definition a regulation.</p> <p>4 JUDGE REICH: So basically, 5 anything that is in the form of a regulation 6 qualifies?</p> <p>7 MR. NILLES: That is in the 8 regulation and that covers the pollutant at 9 issue. Correct.</p> <p>10 JUDGE WOLQAST: Its seems again, 11 going back to a sort of an issue of a 12 statutory regulatory interpretation, that 13 whatever chemicals are covered as a BACT 14 pollutant, as an NSR pollutant for purposes 15 of BACT, is cabined by the "subject to" 16 regulation that we're talking about now. But 17 also that it appears in -- at significant 18 levels. Could you speak to that, and how you 19 arrive at the conclusion that a significant 20 level should be anything greater than zero?</p> <p>21 MR. NILLES: The EPA definition of 22 the significance in the PSD regulation 5221</p>
<p style="text-align: right;">39</p> <p>1 And the Agency did respond to that. 2 You indicate that -- they haven't given a 3 reasoned explanation. But as I remember the 4 response to comments, they basically talk 5 about that provision at some length. They 6 indicate that it is more properly 7 characterized as a statutory prohibition; in 8 essence, a nuisance provision subject to 9 direct enforcement. They don't see it as a 10 regulation.</p> <p>11 Given the deference that we 12 normally afford to states in interpreting 13 their own laws, why shouldn't we accept that 14 as a definitive interpretation of the 15 Illinois law?</p> <p>16 MR. NILLES: The provision of the 17 Clean Air Act that we're dealing with, 18 "subject to regulation," and the key word 19 obviously being regulation, picks up the 20 Illinois SIP provision because the Illinois 21 SIP provision is a regulation. It was a 22 regulation proposed by the Agency to U.S.</p>	<p style="text-align: right;">41</p> <p>1 lays out significant levels for each of the 2 pollutant subject to regulation and has a 3 catchall phrase at the end -- if a 4 significant level has not been determined, 5 the significant level is zero. So that is 6 the simple interpretation of the Agency's own 7 regulations which are in place today.</p> <p>8 JUDGE WOLQAST: Could you speak to 9 how that then could or should in your view 10 work on the ground in terms of establishing a 11 BACT technology?</p> <p>12 MR. NILLES: EPA obviously has 13 discretion to set significance level for CO2. 14 It has not done so. So at this point, 15 pollutants that, for new major sources 16 of -- it has to me a major source in order to 17 be subject to the PSD program -- that is, it 18 has to be one of the categories of 100 tons 19 or one of the 250-ton catchall facilities. 20 And once it has done that, then BACT is 21 required for each pollutant subject to 22 regulation, regardless of amounts. So for</p>

<p style="text-align: right;">42</p> <p>1 example, for Beryllium, which is permitted in 2 pounds annually, there has to be a BACT 3 limit. And in this case, we would say carbon 4 dioxide, which is not admitted in pounds, is 5 admitted in millions of tons, similarly would 6 be subjected to a BACT limit.</p> <p>7 JUDGE WOLQAST: Let me just you one 8 other question just to make sure I understand 9 your position on the subject to regulation 10 issue. Do I understand it correctly that 11 your position is that EPA would not have the 12 discretion to prioritize whatever pollutants 13 that they think may be more hazardous to be 14 covered within the universe of an NSR 15 pollutant for BACT purposes?</p> <p>16 MR. NILLES: That is correct. In 17 terms of the discretion of which pollutants 18 are in or out, absolutely, because this is 19 a -- in the statute, it is any pollutant 20 subject to regulation. Congress has ordered 21 a regulation of carbon dioxide. At that 22 point, the Agency cannot say we can't address</p>	<p style="text-align: right;">44</p> <p>1 aware that Sierra Club has taken the position 2 since that regulation came on the books that 3 it was a regulated pollutant prior to your 4 assertion of your argument in this case?</p> <p>5 MR. NILLES: I'm not aware of 6 Sierra Club prior to this case; i.e., post 7 Mass EPA, arguing in the NSR context that CO2 8 is a regulated pollutant. That is correct.</p> <p>9 JUDGE STEIN: One other question, 10 again dealing with the 2002 rulemaking. And 11 again, back to the question I just asked you 12 of the correct interpretation of the universe 13 of NSR BACT pollutants. One of the things 14 that the December 31, 2002 regulation did was 15 to exempt Section 112(b)(6) HAP pollutants. 16 How, in your view, could that legally be 17 correct, if in fact those are pollutants that 18 are regulated?</p> <p>19 MR. NILLES: Congress exclusively 20 said in 112 -- I think it is (a)(4), but in 21 Section 112 Congress explicitly said these 22 pollutants will not be subject to PSD. So</p>
<p style="text-align: right;">43</p> <p>1 carbon dioxide. At that point, that 2 discussion is over. It can set a 3 significance level. And there are other 4 things it can do in terms of how it is 5 implemented, but the question of whether CO2 6 is an NSR regulated pollutant, that has 7 already been resolved by Congress.</p> <p>8 JUDGE STEIN: I have two questions. 9 One, EPA starts in its brief that there was 10 no appeal of the 2002 rulemaking. 11 Do you dispute that?</p> <p>12 MR. NILLES: There was an appeal, 13 but my understanding is that it did not raise 14 the issue of CO2.</p> <p>15 JUDGE STEIN: So there's no dispute 16 about whether the issue of CO2 was raised in 17 that appeal?</p> <p>18 MR. NILLES: Correct. To my 19 knowledge, it was not raised.</p> <p>20 JUDGE STEIN: Given that the acid 21 rain monitoring regulations have been on the 22 book since the early to mid '90s, are you</p>	<p style="text-align: right;">45</p> <p>1 what EPA was doing was taking the step 2 that -- statutory command from Congress and 3 excluding those pollutants.</p> <p>4 JUDGE REICH: Good. Thank you, 5 Mr. Nilles. 6 Mr. Russell?</p> <p>7 MR. RUSSELL: Good morning. My 8 name is Jim Russell. I'm with the law firm 9 of Winston & Strawn on behalf of Christian 10 County Generation. I would like first to 11 express our gratitude to the Court for going 12 ahead with this argument in the absence of 13 Illinois EPA. As you know, our Christian 14 County Generation's permit is ineffective 15 because of the mere filing of this appeal.</p> <p>16 And in a \$2 billion construction 17 project like this, delay is very costly for 18 financing reasons, construction reasons and 19 other reasons. And so any other further 20 delay in the proceeding itself is even more 21 detrimental to us. We thank you for 22 proceeding with the argument.</p>

<p style="text-align: right;">46</p> <p>1 We are here today to support the 2 Illinois EPA's response to the summary and 3 its response in this case, and we support 4 U.S. EPA, OAR/OGC brief. I believe it's fair 5 to say that at the moment, there are three 6 parties before you -- two of them government 7 agencies -- who agree on the standing on the 8 waiver issue. The U.S. EPA brief says that 9 it agrees but doesn't deal with it. The 10 Illinois brief says that it agrees and does 11 deal with it. We feel strongly about it, and 12 we deal with it in our brief.</p> <p>13 And we believe that the record 14 shows that the three parties before you: U.S. 15 EPA, Illinois EPA and Christian County 16 Generation, also agree on the so-called 17 merits of the claim, with one reservation, 18 and that being that the Illinois EPA brief in 19 a footnote reserved any comment on whether or 20 not Petitioner had raised a significant 21 policy consideration. But it certainly 22 agreed that Petitioner had raised no clearly</p>	<p style="text-align: right;">48</p> <p>1 then you can feel free to reference those. 2 MR. RUSSELL: I do, and I thank 3 you, and that is what I'm going to get into. 4 Our overarching reading of this 5 case, both as to standing and the merits, is 6 ubiquitous inconsistent statements, changing 7 theories, changing facts, factual 8 representations. And basically a difficulty 9 we have in getting a handle on what it is 10 that the Petitioner is really saying.</p> <p>11 I know that you were commenting and 12 this a little bit in Mr. Nilles' argument, 13 but I would like to take you through some 14 pieces of the reply brief and get into these 15 point in a little more detail.</p> <p>16 If you look at the reply brief 17 summary page 2 -- and I'm sure you are 18 familiar with it -- but third full paragraph, 19 "when the comment period closed for the draft 20 Christian County PSD permit, EPA, IEPA and 21 the D.C. Circuit Court, the only Court to 22 have ruled on the issue, were of the view</p>
<p style="text-align: right;">47</p> <p>1 erroneous conclusion of law. And it dealt 2 extensively with the merits as well.</p> <p>3 Before I start -- I'd like to start 4 with the question, Your Honor, and that is 5 about your ruling today that collateral 6 impacts will form no part of this discussion. 7 I assume that everything that Petitioner 8 commented on in its written comments in the 9 permit proceeding may still be commented on, 10 even though it was in connection with 11 collateral impacts. I have in mind several 12 references and its public comments --</p> <p>13 JUDGE REICH: You can certainly 14 reference it relative to the issues that are 15 before us.</p> <p>16 MR. RUSSELL: Okay.</p> <p>17 JUDGE REICH: All I was suggesting 18 is that we didn't want to waste everybody's 19 time talking about that issue itself since no 20 one was before us. But if you think that 21 there were comments made in that context that 22 have relevance to the issue still before us,</p>	<p style="text-align: right;">49</p> <p>1 that carbon dioxide is not a pollutant. The 2 only court to have ruled on the issue were of 3 the view that carbon dioxide is not a 4 pollutant."</p> <p>5 Well, Your Honor, the reason I 6 asked to comment on the Appellate Court 7 opinion in Massachusetts versus EPA is that 8 that is an untrue statement. As Your Honors 9 may note, neither of the majority opinions 10 said anything about that.</p> <p>11 And Judge Tatel's dissenting 12 opinion held the opposite. Petitioner was a 13 party to that case at the appellate level. 14 So it's difficult for us to understand why it 15 is that a party to the appellate court 16 litigation who obtains a dissenting opinion 17 from Judge Tatel, 20-page opinion, ruling 18 that CO2 could be a regulated pollutant, why 19 is that not reasonably ascertainable or 20 reasonably available for purposes of our 21 permit proceeding? 22 That ruling by the way was July 15,</p>

<p style="text-align: right;">50</p> <p>1 2005. Our comment period closed in 2007. 2 If we look at the next sentence in 3 the reply brief, "prior to the Supreme Court 4 ruling, which occurred after the comment 5 period closed, it was reasonable" -- he means 6 reasonably ascertainable -- "that the CO2 7 BACT issue was a viable argument." It was 8 not reasonably ascertainable. "But that it 9 was a viable argument that would have 10 received any attention from IEPA, EPA or any 11 reviewing entity including this Board." 12 So now, a test is changing. As you 13 well know, the reg says if there's a 14 reasonably available, reasonably 15 ascertainable, you must raise it. 16 But according to the reply brief, 17 that is not necessarily true if it's not a 18 viable argument. That's not necessarily true 19 if it wouldn't have received any attention 20 from Illinois EPA, EPA or any reviewing 21 entity. 22 JUDGE REICH: You're not suggesting</p>	<p style="text-align: right;">52</p> <p>1 permit issuer is given a chance to respond to 2 it, and that it's not thereafter raised here. 3 That is the purpose, I believe, of the waiver 4 doctrine, is to give the permit issuer a 5 chance to respond. Here, that didn't happen 6 because it wouldn't have received any 7 attention. 8 JUDGE STEIN: So then what happens? 9 Sierra Club or someone similarly situated 10 knows that the Massachusetts case is on 11 appeal. They raise the argument before 12 Illinois EPA. Illinois EPA says it's not 13 regulated. Sierra Club then takes that to 14 us. Massachusetts comes down. Then what do 15 we do with it? 16 MR. RUSSELL: I don't know that 17 Massachusetts changes anything. 18 Massachusetts is being used here as a pretext 19 for the lack of a prior argument that was 20 very reasonably available and reasonably 21 ascertainable. 22 JUDGE REICH: Apart from reasonably</p>
<p style="text-align: right;">51</p> <p>1 that that argument wasn't received positively 2 or are you -- you're just suggesting that 3 they had an obligation to raise it even if 4 they thought that they were going to be ruled 5 against. 6 MR. RUSSELL: Yes. The reg is very 7 clear. Your reg is very clear. Reasonably 8 ascertainable. Reasonably available, you 9 must raise it. 10 JUDGE STEIN: What's the practical 11 consequence of that? Are we now, if we were 12 to adopt your view of what "reasonably 13 ascertainable" is, what does that mean for 14 permit appeals and permit proceedings in the 15 future? Are they going to be cluttered with 16 arguments that have no practical chance under 17 the current legal framework of success, and 18 are we encouraging sort of -- sort of asking 19 the flip side of the question I asked 20 Mr. Nilles but -- but it is an issue I am 21 quite concerned about in both directions. 22 MR. RUSSELL: It means that the</p>	<p style="text-align: right;">53</p> <p>1 ascertainable, I'm confused by the comment 2 that Massachusetts doesn't change anything, 3 in that way before you ever get to this 4 subject to regulation language, you still 5 have to get through this hurdle about whether 6 or not it's an air pollutant. 7 And clearly in terms of the way the 8 Agency addressed it, Massachusetts 9 fundamentally did change things. So I 10 understand the argument about reasonably 11 ascertainable, but if you're suggesting that 12 the picture didn't change after 13 Massachusetts, I'm not understanding your 14 argument. 15 MR. RUSSELL: Massachusetts 16 authorized the Agency to regulate this air 17 pollutant. The significance, the real 18 significance, not for this case, but for 19 those of us in the environmental bar, is the 20 standing issue. That's what was 21 revolutionary about Massachusetts versus EPA. 22 And we support U.S. EPA's brief, insofar as</p>

<p style="text-align: right;">54</p> <p>1 it's now addressing the prospect of 2 regulating CO2, a global greenhouse gas. 3 So to answer Judge Stein's 4 question, it's unclear to me how future 5 judicial decisions would then change the 6 pleading status of arguments that were pled 7 because they were reasonably ascertainable or 8 reasonably -- but the point is that that 9 isn't relevant here. The permit issuer 10 should be given the chance to deal with that 11 one way or the other. And then it's up to 12 you to determine whether or not the Court has 13 somehow -- or the Supreme Court has somehow 14 raised a moot argument that was previously 15 not ascertainable or not available. 16 JUDGE REICH: But I do share to 17 some degree Judge Stein's concern because I 18 think, as I alluded to earlier, if you had 19 had what I think was a very crystallized 20 clear issue -- I mean, it may not have been 21 clear in terms of what the decision would 22 be -- but in terms of understanding what the</p>	<p style="text-align: right;">56</p> <p>1 pollutant and regulate it under Title II of 2 the Act. Yet somehow, it was not reasonable 3 to raise that until Massachusetts versus EPA 4 had been decided. Again, the Petitioner 5 being a party. It's troubling to us why 6 these arguments are not reasonably 7 ascertainable and reasonably available. 8 Let's go on. Page 4, and this goes 9 right to CFR 124.13. "Against this backdrop, 10 and even though the controlling statutory and 11 regulating law have not changed since 1993, 12 when EPA adopted the Section 821 regulations, 13 it was reasonable for Sierra Club to not 14 raise the CO2 BACT issue in this or any other 15 permit proceeding until the Supreme Court 16 resolved the issues in its favor." 17 Well, three points on that. Now, 18 we have another testing grafted onto 40 CFR 19 124. Viable, receive any attention, and now 20 whether it is reasonable to raise it. I 21 don't think that's the spirit a letter of 22 your regs. But secondly, they did raise it</p>
<p style="text-align: right;">55</p> <p>1 issue was, I think it was pretty clear. 2 There may be a whole host of court decisions 3 that have some relevance but are a little bit 4 more tangential. And I'm concerned about how 5 far in the direction we have to push people 6 to make arguments that might somehow suddenly 7 become relevant for purposes of preserving 8 that argument. 9 MR. RUSSELL: Well, you don't have 10 to push in this case, Your Honor, because as 11 I would like to explain, not only was it 12 available and ascertainable in the appellate 13 court litigation to which the Sierra Club was 14 a party, but the Sierra Club commented on 15 that point in the comments in this case, and 16 have commented in another prior case. So if 17 it is all right with you, may I go on to 18 that? 19 Again, page 3 of the summary, about 20 the sixth line from the bottom. For example, 21 Sierra Club was one of the original parties 22 that petitioned EPA to find carbon dioxide a</p>	<p style="text-align: right;">57</p> <p>1 in our case, and said the opposite. And that 2 goes to page 6 of the written comments in the 3 case. This is filed February 13 of this 4 year. Even in the absence of U.S. EPA 5 regulating carbon dioxide, Illinois EPA must 6 still consider carbon dioxide as a 7 non-regulated pollutant in the BACT analysis. 8 JUDGE REICH: But isn't that what 9 just reinforces the fact Mr. Nilles' 10 argument, whether you agree with it or not, 11 that they were -- at the time they were 12 commenting, they were dealing with the issue 13 within the framework that they understood the 14 EPA to be looking at the issue. 15 MR. RUSSELL: But again, Your 16 Honor, the question is who decides what's 17 reasonably ascertainable and what's 18 reasonably available? They were making the 19 argument in the Massachusetts case at the 20 appellate level, still making it on the reply 21 in the brief to Supreme Court, addressing it 22 in our comments and saying the opposite. And</p>

<p style="text-align: right;">58</p> <p>1 then as I will point out in a minute, a year 2 before addressing it in other comments -- 3 JUDGE REICH: But again, I -- 4 MR. RUSSELL: And saying -- again 5 the opposite. 6 JUDGE REICH: They were addressing 7 it in your comments and saying the opposite, 8 not necessarily because they thought 9 ultimately that was the correct answer, but 10 because they thought that was the framework 11 within which the Agency was approaching those 12 issues. 13 And Mr. Nilles can correct me if 14 I'm wrong on rebuttal, but it seems to me 15 that that's what he is suggesting. It wasn't 16 that they necessarily thought that that was 17 the right answer, but they thought that was 18 the framework the Agency was dealing with, 19 and they chose, correctly or otherwise, to 20 make their arguments solely within that 21 framework. 22 MR. RUSSELL: Who can say what a</p>	<p style="text-align: right;">60</p> <p>1 "It's not regulated." Why is it that in this 2 case, we should insist on giving IEPA an 3 opportunity to say just that? 4 MR. RUSSELL: Well, Your Honor, 5 respectfully, I suppose one can make educated 6 guesses about what a permit issuer is going 7 to do. Certainly, we advise clients based on 8 reasonable guesses of what a permit issuer is 9 going to do. But if you depart from a 10 regulation, you're into a very subjective 11 area as to what a Petitioner is or isn't 12 supposed to do. 13 JUDGE WOLQAST: To ask a related 14 question, does it matter that the comment 15 would have raised a legal, rather than a 16 factual or technical, issue to the permitting 17 entity? 18 MR. RUSSELL: Probably not. The 19 argument was reasonably ascertainable. 20 Whatever it was that they wanted to say could 21 have been said and was being said in court 22 and in another proceeding. And in this</p>
<p style="text-align: right;">59</p> <p>1 Petitioner's thought process was and whether 2 or not it was legitimate and reasonable or 3 viable or worthy of attention? I, as you 4 know, thought we had a regulation on the 5 point which is very clear. But -- 6 JUDGE STEIN: If the purpose of the 7 reason -- if among the purposes of the 8 reasonably -- or of needing to raise a 9 comment, is to allow the commenting authority 10 the first opportunity to respond, and if it's 11 reasonably clear in terms of the legal issue 12 how the permitting authority would have 13 responded prior to Massachusetts, how is it 14 that in this particular circumstance, it's 15 essential for that to have gone to the 16 permitting Agency in the first place? 17 We're dealing with the circumstance 18 where this issue is kicking around in at 19 least three permit appeals in one form or 20 another. There doesn't seem to be much 21 dispute that had this issue been raised 22 earlier, that Illinois EPA would have said,</p>	<p style="text-align: right;">61</p> <p>1 proceeding with an opposite message. So I 2 think you're correct. 3 But the permit issuer ought to be 4 given the chance to respond, and so should 5 the permittee. The permittee deals with the 6 permit issuer on a very collegial basis for 7 a long period of time. And if the Illinois 8 EPA says to the permittee, or the permit 9 applicant, we think we have a problem here, 10 permit applicant would like to be able to 11 solve it in advance rather than have it 12 litigated. 13 And that's where we are now, as we 14 can talk about in just a minute. Is CO2 15 controlled by litigation? That's where we 16 are going, apparently. Unless U.S. EPA's 17 view and Illinois view prevails, which we 18 agree with. 19 May I go on to one other comment? 20 JUDGE REICH: Please. 21 MR. RUSSELL: They did address it 22 in our comments, said the opposite. That was</p>

62	<p>1 this year. But July 2006, in Deseret, they</p> <p>2 addressed it in comments. We asked for</p> <p>3 permission to comment on their comments, if</p> <p>4 not the Agency's response. And what they</p> <p>5 said, July 2006, "We believe that the EPA has</p> <p>6 a legal obligation to regulate CO2 and other</p> <p>7 greenhouse gases as pollutants under the</p> <p>8 Clean Air Act. Indeed, 12 states, 14</p> <p>9 environmental groups in two cities filed</p> <p>10 suites stating that EPA must regulate</p> <p>11 greenhouse gas emissions under the Clean Air</p> <p>12 Act."</p> <p>13 This by the way is the second full</p> <p>14 paragraph of page 2 of their comments in</p> <p>15 Deseret, which are in your docket. "The</p> <p>16 parties appealed the U.S. EPA's decision to</p> <p>17 reject a position that sought to have the</p> <p>18 federal government regulate greenhouse gas</p> <p>19 emissions from new motor vehicles. The issue</p> <p>20 is now before the Supreme Court."</p> <p>21 And Judge Stein, "if the Supreme</p> <p>22 Court agrees that the greenhouse gases such</p>	64	<p>1 JUDGE REICH: I'd like to make sure</p> <p>2 we have all the time to address --</p> <p>3 MR. RUSSELL: And I'm --</p> <p>4 JUDGE REICH: The substance of the</p> <p>5 issue.</p> <p>6 MR. RUSSELL: I'm ready to do that.</p> <p>7 JUDGE WOLQAST: Could I ask you</p> <p>8 one on that?</p> <p>9 MR. RUSSELL: Yes, please.</p> <p>10 JUDGE WOLQAST: What is your best</p> <p>11 argument, as a matter of statutory</p> <p>12 interpretation, as to why the "subject to</p> <p>13 regulation" term, phrase, whatever, should</p> <p>14 not encompass the acid rain monitoring</p> <p>15 regulation?</p> <p>16 MR. RUSSELL: The acid rain</p> <p>17 monitoring regulations talk only about</p> <p>18 monitoring.</p> <p>19 JUDGE WOLQAST: But again, speaking</p> <p>20 to principles of statutory construction and</p> <p>21 the language subject to regulation --</p> <p>22 MR. RUSSELL: Plain language. The</p>
63	<p>1 as CO2 must be regulated under the Clean Air</p> <p>2 Act, such a decision may also require the</p> <p>3 establishment of CO2 emission limits in this</p> <p>4 permit."</p> <p>5 So which is it? What is the story?</p> <p>6 Is it reasonably ascertainable when you</p> <p>7 advocate it, but not reasonably ascertainable</p> <p>8 when you said the opposite? Is that where we</p> <p>9 are on the standing issue?</p> <p>10 It seems to me the regulation is</p> <p>11 very clear. If the regulation were not</p> <p>12 clear, that would be a different story. One</p> <p>13 other point on that, and that's summary</p> <p>14 page 4 -- strike that; I wanted to refer to</p> <p>15 page 5, and that is on Deseret, but following</p> <p>16 the Supreme Court's decision, the Sierra</p> <p>17 Club -- at the top of the page, following the</p> <p>18 Supreme Court's decision the Sierra Club had</p> <p>19 been raising this issue in subsequent permit</p> <p>20 proceedings. You just raised it in Deseret</p> <p>21 in July 2006. Supreme Court decision is</p> <p>22 2007.</p>	65	<p>1 language is plain. It also regulates oxygen</p> <p>2 monitoring, I believe. Does that mean we</p> <p>3 limit oxygen because we monitor it?</p> <p>4 JUDGE REICH: On that regard, in</p> <p>5 the reply brief, Sierra Club does discuss the</p> <p>6 fact that there's specific terminology used</p> <p>7 for when you're talking about an actual</p> <p>8 control of omissions. They talk about</p> <p>9 emission limitations, talk about emission</p> <p>10 standards. If what Congress was intending</p> <p>11 here was that something be subject to an</p> <p>12 actual control of regulations, why would they</p> <p>13 not have used a term like "emission</p> <p>14 limitations" or "emission standards" rather</p> <p>15 than "subject to regulation," which appears</p> <p>16 on its face to be potentially broader?</p> <p>17 MR. RUSSELL: We agree with U.S.</p> <p>18 EPA's views of the subject to regulation</p> <p>19 issue. By the way, there has been a new</p> <p>20 change on that point, as you know, as of</p> <p>21 today. Subject to further regulation is --</p> <p>22 JUDGE REICH: Oh.</p>

66	<p>1 MR. RUSSELL: So I've --</p> <p>2 JUDGE REICH: When you talk about</p> <p>3 plain language, are you saying that that's</p> <p>4 the only way to read it, that it's not even a</p> <p>5 question of ambiguity where we get into</p> <p>6 Chevron deference, (?) that it's just</p> <p>7 absolutely clear on the face of it?</p> <p>8 MR. RUSSELL: It doesn't make any</p> <p>9 sense to not use the plain language argument.</p> <p>10 JUDGE REICH: Uh-huh.</p> <p>11 MR. RUSSELL: If you don't use the</p> <p>12 plain language argument, what is the</p> <p>13 limitation? Well, there isn't one. If you</p> <p>14 don't use the plain language --</p> <p>15 JUDGE WOLQAST: But to be clear,</p> <p>16 are you saying that "subject to regulation"</p> <p>17 has no ambiguity, that you can only read it</p> <p>18 to say subject to an emission limitation?</p> <p>19 MR. RUSSELL: Subject to regulation</p> <p>20 is ambiguous, as was brought out in the</p> <p>21 petition for review in three different ways.</p> <p>22 In the reply brief, it's no longer ambiguous.</p>	68	<p>1 JUDGE WOLQAST: Categories?</p> <p>2 MR. RUSSELL: Yes. That's my</p> <p>3 point. It is rendered nonsensical otherwise,</p> <p>4 if I can use that word.</p> <p>5 JUDGE STEIN: How is it rendered</p> <p>6 nonsensical?</p> <p>7 MR. RUSSELL: Because then it takes</p> <p>8 on a -- you have to read it in the context of</p> <p>9 what that says. Otherwise --</p> <p>10 JUDGE STEIN: You could read it in</p> <p>11 context but I'm not sure that's the only</p> <p>12 reading of that provision.</p> <p>13 MR. RUSSELL: This is a --</p> <p>14 JUDGE STEIN: I mean, here --</p> <p>15 MR. RUSSELL: Our position is that</p> <p>16 you take the plain language, if it makes</p> <p>17 sense -- which this does. The Petitioner's</p> <p>18 arguments here are so stretched on "otherwise</p> <p>19 regulated" that they don't make common sense.</p> <p>20 JUDGE STEIN: What if we were</p> <p>21 agreed to you that the notion of otherwise</p> <p>22 regulated stretched to its limits may not</p>
67	<p>1 Subject to regulation can be read several</p> <p>2 ways. We like, and I believe it is correct,</p> <p>3 that the "otherwise" portion of "otherwise</p> <p>4 subject to regulation" shows what that means,</p> <p>5 in terms of the three prior categories that</p> <p>6 are regulated. So I -- I --</p> <p>7 JUDGE WOLQAST: You're referring to</p> <p>8 the Illinois --</p> <p>9 MR. RUSSELL: No, no. No. The --</p> <p>10 JUDGE WOLQAST: Argument of the</p> <p>11 general --</p> <p>12 MR. RUSSELL: And the --</p> <p>13 JUDGE WOLQAST: Pacifist --</p> <p>14 MR. RUSSELL: NSBS Title VI</p> <p>15 substances and those otherwise regulated.</p> <p>16 JUDGE WOLQAST: I understand, but</p> <p>17 what I'm trying to ask is, are you agreeing</p> <p>18 with the Illinois argument that the otherwise</p> <p>19 subject to regulation, the so-called catchall</p> <p>20 or more generic provision, is somehow linked</p> <p>21 to the specifics of the three specified --</p> <p>22 MR. RUSSELL: Yes.</p>	69	<p>1 make sense, but here we're dealing with</p> <p>2 Section 821 of the Clean Air Act, which was</p> <p>3 specifically put into the statute by Congress</p> <p>4 that thought it was sufficiently important.</p> <p>5 MR. RUSSELL: Right.</p> <p>6 JUDGE STEIN: That they put in a</p> <p>7 monitoring provision in the form of a</p> <p>8 regulation. I mean, let's take that example.</p> <p>9 MR. RUSSELL: Okay.</p> <p>10 JUDGE STEIN: Why is that that is</p> <p>11 not subsumed under category 4?</p> <p>12 MR. RUSSELL: Why then do you need</p> <p>13 Massachusetts versus EPA to authorize U.S.</p> <p>14 EPA to regulate carbon dioxide?</p> <p>15 JUDGE STEIN: But isn't that a</p> <p>16 separate question -- doesn't that then go to</p> <p>17 what did Congress mean by the term</p> <p>18 "pollutant" as opposed to what did Congress</p> <p>19 mean by the term "regulation"?</p> <p>20 MR. RUSSELL: It goes to the</p> <p>21 regulation point and whether or not it was</p> <p>22 already regulated. Why do we --</p>

70	72
<p>1 JUDGE REICH: Are you saying 2 Massachusetts somehow addressed the question 3 of subject to regulation, as opposed to 4 addressing the question of what a pollutant 5 is?</p> <p>6 MR. RUSSELL: I'm sorry. Say 7 again, Your Honor.</p> <p>8 JUDGE REICH: The way you phrased 9 that, I was not sure if you suggesting that 10 somehow the Court went beyond the issue of 11 whether CO2 is a pollutant and addressed the 12 question of subject to regulation?</p> <p>13 MR. RUSSELL: No, it did not. It's 14 a standing case. And it's an authorization 15 to regulate CO2 for mobile (?) sources. 16 Again -- my time is almost up. On the 17 merits, if you accept this point of view, we 18 will be in a patchwork quilt of stationary 19 source CO2 controls, dictated by litigants on 20 a localized basis much like product liability 21 is.</p> <p>22 There are regulations for</p>	<p>1 for the permitting authority to decide in the 2 first instance.</p> <p>3 MR. RUSSELL: That's my point. And 4 they would apply their SIP whether it's 5 approved or not. And the SIP is going to 6 have some requirements, some emission 7 limitations. But right now, yes, it's --</p> <p>8 JUDGE STEIN: I'm not disagreeing 9 with you that you may or may not want a 10 patchwork. All I'm saying is that BACT in 11 general is a process that takes a variety of 12 things into account, and that unlike some 13 other programs where what gets applied is a 14 little less case by case, it seems to me in 15 this particular circumstance when you're 16 dealing with PSD, it certainly is a program 17 that unlike some other purely 18 technology-based programs is more 19 susceptible.</p> <p>20 I mean, I understand your overall 21 point that you're sort of taking a leap from 22 no regulation into sort of a new area, case</p>
71	73
<p>1 automobiles, for example, automobile safety. 2 But if you go through the owners manual of 3 your vehicle, you will find with whatever 4 brand it is that it is filled with warning 5 labels on this point and that point and the 6 other point. All those warning labels came 7 from litigation rather than a statute or a 8 regulation.</p> <p>9 JUDGE STEIN: Wouldn't this just go 10 through --</p> <p>11 MR. RUSSELL: That's why the --</p> <p>12 JUDGE STEIN: The ordinary BACT 13 process? In other words, if this issue, if 14 we were to agree that the issue were ripe, if 15 we were to agree as a legal matter that a 16 BACT limit needed to be set, wouldn't it 17 simply go back to the permitting authority to 18 basically perform a BACT analysis, which by 19 definition is a case-by-case analysis?</p> <p>20 MR. RUSSELL: What would that be, 21 Your Honor?</p> <p>22 JUDGE STEIN: Presumably, that's</p>	<p>1 by case. But I still think that in the PSD 2 program, that is something you have done more 3 often than in some of the other programs.</p> <p>4 MR. RUSSELL: Well, I agree with 5 you. The statute says case by case.</p> <p>6 JUDGE REICH: Do you agree that 7 BACT is intended to be technology forcing?</p> <p>8 MR. RUSSELL: It can be. And we've 9 certainly -- Illinois (?) had --</p> <p>10 JUDGE REICH: Uh-huh.</p> <p>11 MR. RUSSELL: Going back to the 12 '70s, technology forcing regulations.</p> <p>13 JUDGE REICH: Uh-huh.</p> <p>14 MR. RUSSELL: I'm out of time, I'm 15 sorry. But the statutory language on case by 16 case I don't think equates to purely 17 individual ad hoc spontaneous. There is a 18 guidance process. There has been in the NSR 19 guidance process. The Agency is working on a 20 regulation -- U.S. EPA is working on a 21 regulation that has global implications. To 22 me, if you were to ask me about the policy,</p>

74	<p>1 the sense of it, I see it to be very 2 counterproductive to have individual 3 litigants dictating BACT site by site in the 4 absence of some level of guidance which a 5 permit issuer looks to but need not always 6 comply with.</p> <p>7 JUDGE REICH: Okay. Thank you, 8 Mr. Russell.</p> <p>9 MR. RUSSELL: That is all I had. 10 And I thank you for your time.</p> <p>11 JUDGE REICH: Appreciate that. 12 Mr. Doster. First of all, 13 Mr. Doster, I want to express our 14 appreciation for your appearing before us 15 since you're appearing at the Board's request 16 rather than your own initiative.</p> <p>17 MR. DOSTER: It's my pleasure. I 18 appreciate actually having the opportunity to 19 speak to these issues. I'm appearing here on 20 behalf of the Office of Air and Radiation, as 21 you requested. I'm prepared to address the 22 waiver issue if you would like to have</p>	76	<p>1 pollutant.</p> <p>2 Second, because EPA's long-standing 3 interpretation that has stood the test of 4 time is a permissible one, given the context 5 of the statute in which the phrase subject to 6 regulation appears in the context of a 7 controlled technology requirement based on 8 best available control technology.</p> <p>9 JUDGE REICH: When you say it's 10 permissible, does that mean that you're 11 suggesting that there is more than one 12 possible interpretation, and this is a case 13 of Chevron deference?</p> <p>14 MR. DOSTER: In one respect, there 15 is. In an other respect, there is not. 16 First and foremost, Section 821 of the 1990 17 Clean Air Act amendments is not a part of the 18 Clean Air Act, our brief in fact was mistaken 19 on that. An error that I would like to 20 correct for the record.</p> <p>21 Section 821 of the '90 amendments 22 had not been codified in the Clean Air Act.</p>
75	<p>1 questions from me on that, but since you 2 asked us to directly address the merits, I'm 3 going to move immediately to that.</p> <p>4 JUDGE REICH: Why don't you do 5 that, and then if any of the judges have 6 questions on the waiver, they can raise that 7 at the end.</p> <p>8 MR. DOSTER: Okay. On the merits, 9 the question before you here today is really 10 very simple. Should the Board reverse 11 30-year history of EPA interpreting the term 12 "subject to regulation under the Act"? The 13 only reasonable answer to this question is 14 no, for two principal reasons.</p> <p>15 First, since the 1977 amendments to 16 the Clean Air Act, the EPA has repeatedly and 17 consistently in a litany of examples that I 18 will run through with you here today 19 construed the phrase subject to regulation to 20 describe only air pollutants subject to a 21 statutory or regulatory provision that 22 requires actual control of emissions of that</p>	77	<p>1 It appears as the note to Section 412 of the 2 Clean Air Act. It was never codified. So in 3 that sense, this is not a Chevron II issue. 4 Under the Act -- the Section 821 monitoring 5 requirement is not under the Act. And that's 6 clear.</p> <p>7 On that question of the meaning of 8 "subject to regulation," or the term 9 "regulation" within that phrase, I do believe 10 that this is a Chevron II issue, where there 11 may be more than one potential 12 interpretation. However, EPA's 13 interpretation is a permissible one and a 14 reasonable one that has existed for 30 years 15 and is supported by many, many instances of 16 Agency precedent practice.</p> <p>17 Ever since the 1978 rulemaking when 18 Administrator Cossell first addressed this 19 issue, and issued the first PSD regulations 20 after the '77 amendments, it was clear, and 21 by the list of pollutants that were -- or the 22 list of things that were covered by the BACT</p>

<p style="text-align: right;">78</p> <p>1 at that time, that it was NAX pollutants, it 2 was NSPS pollutants and NISHAP pollutants or 3 Title II mobile source pollutants. 4 There's never been any question 5 since that time that that's what regulation 6 meant in the Agency's view, and that was a 7 reasonable interpretation. In the Alabama 8 Power case, the Court did not consider the 9 question before you here today. The issue in 10 that case was whether a much narrower 11 interpretation advocated by the -- the 12 industry petitioners in that case should have 13 been adopted by EPA. 14 In that case, the industry 15 petitioners advocated that subject to 16 regulation should be limited to only two 17 pollutants, PM and SO₂, which were the only 18 pollutants for which Congress had established 19 PSD increments at that time. So the court's 20 decision in that case rejected that 21 interpretation and upheld the Administrator's 22 1978 interpretation. It did not expand on</p>	<p style="text-align: right;">80</p> <p>1 that that is. We've been using this 2 interpretation for some time, including since 3 the 1990 amendments to the Clean Air Act. 4 There is no indication in the 5 legislative history on the 1990 amendment 6 that added Section 821 of the '90 amendments 7 that the sponsors of that amendment intended 8 for that to invoke NSR. In fact, they 9 specifically said in the legislative history 10 that it was not their intent -- I will quote 11 from a statement of Congressman Cooper, who 12 was one of the sponsors of that amendment on 13 May 17, 1990 -- said, "My amendment would not 14 force any reductions right now." It was 15 clearly not his intent to invoke the subject 16 to regulation phrase in the BACT definition. 17 JUDGE REICH: I saw the language, 18 but I know that it said "force any 19 reductions," which is suggestive of reducing 20 current emissions from an existing facility. 21 That's a little different in character than 22 really regulating a facility not yet built.</p>
<p style="text-align: right;">79</p> <p>1 the Administrator's interpretation, as the 2 Petitioners argue here. 3 Though it many have used somewhat 4 expansive language, all it was doing was 5 affirming the interpretation at that time 6 that Administrator Cossell had set forth in 7 the final rule under review, which was that 8 "subject to regulation" referred to 9 pollutants that were subject to an actual 10 emission standard at the time. 11 JUDGE STEIN: But surely you're not 12 suggesting that this Board, as the final 13 decisionmaker for the Agency, is constrained 14 in a way that a Court might be in a 15 Chevron II situation? 16 MR. DOSTER: No. No, I'm not 17 suggesting that the -- you know, you are 18 reaching a final decision on behalf of the 19 Agency. So the considerations for you are 20 also whether it's an appropriate 21 interpretation or a right interpretation from 22 a policy standpoint. History has suggested</p>	<p style="text-align: right;">81</p> <p>1 So I'm not sure if that language is 2 compelling. 3 MR. DOSTER: Maybe not dispositive, 4 but the overall context of the amendment was 5 also to ensure that our sources in the United 6 States were to get credit for any reductions 7 that were made as a result of regulation in 8 the future. The context of it was not with 9 the perspective that we were expecting there 10 to be regulation under the PSD program. 11 JUDGE REICH: Uh-huh. 12 MR. DOSTER: It was in the context 13 of in the event we were -- entering into an 14 international agreement that would call for 15 reductions in the future, that we would know 16 what our reductions were, what our baseline 17 was in 1990, and that was the intent of the 18 sponsors of the amendment at the time. 19 JUDGE WOLQAST: Could you speak to 20 Mr. Nilles' point, that if Congress had 21 intended "subject to regulation" to be more 22 narrowly construed to only include emission</p>

82	<p>1 limitations, it could readily have said that.</p> <p>2 MR. DOSTER: It could have readily</p> <p>3 have defined the term "regulation." It could</p> <p>4 have adopted the Webster's Dictionary</p> <p>5 definition that has been cited, but the</p> <p>6 Congress did not. I think if you look at</p> <p>7 Black's Law Dictionary, the definition of</p> <p>8 "regulation" in Black's Law Dictionary Eighth</p> <p>9 Edition is the act or process of controlling</p> <p>10 by rule or restriction.</p> <p>11 That's consistent with the</p> <p>12 interpretation that the EPA has followed for</p> <p>13 the last 30 years. So perhaps because</p> <p>14 Congress adopted no definition of the term</p> <p>15 regulation, that it felt it was not necessary</p> <p>16 to specify what it meant because under the</p> <p>17 Black's Law Dictionary, what it meant was</p> <p>18 clear. And how it had been used ever since</p> <p>19 the 1977 amendments was apparent.</p> <p>20 So I don't think it was necessary</p> <p>21 for -- regulation is not defined anywhere</p> <p>22 else. So it wasn't necessary for the</p>	84	<p>1 didn't they expand that to uncover CO2, given</p> <p>2 Section 821?</p> <p>3 MR. DOSTER: I'm not directly</p> <p>4 familiar with the exact reasons why Congress</p> <p>5 excluded HAPS, but I think it was just an</p> <p>6 administrative factor, that in fact HAPS had</p> <p>7 been covered, but they had amended</p> <p>8 Section 112 in 1990 and created a new</p> <p>9 framework for the MACT standard and the MACT</p> <p>10 requirement. So I would speculate that that</p> <p>11 was because it would be redundant to then</p> <p>12 require BACT for hazardous air pollutants,</p> <p>13 because they had established a technology</p> <p>14 mandate in the 1990 amendments that did not</p> <p>15 exist prior to the 1990 amendments.</p> <p>16 Prior to the 1990 amendments, HAPS</p> <p>17 were addressed under a risk-based framework</p> <p>18 which had been unsuccessful and had taken a</p> <p>19 great deal of time. So I would surmise,</p> <p>20 though I haven't seen the specific</p> <p>21 legislative history, that its intent was</p> <p>22 to avoid the redundancy between BACT and</p>
83	<p>1 Congress to specify differently or to</p> <p>2 explicitly say that emission limitations</p> <p>3 was --</p> <p>4 JUDGE WOLQAST: So are you saying</p> <p>5 that there's no ambiguity to the phrase</p> <p>6 "subject to regulation"?</p> <p>7 MR. DOSTER: No, I'm not, because</p> <p>8 they've cited another dictionary definition</p> <p>9 that that they purport to have a different</p> <p>10 meaning. But I think Congress's intent, that</p> <p>11 it intended it to be consistent with EPA's</p> <p>12 interpretation -- Congress did not change it</p> <p>13 in the 1990 amendments. Congress did not</p> <p>14 inform EPA after 13 years of history</p> <p>15 interpreting the term subject to regulation</p> <p>16 and the rules that we had written that we</p> <p>17 needed to interpret regulation to cover</p> <p>18 monitoring requirements. It had an</p> <p>19 opportunity to do that and did not do so.</p> <p>20 JUDGE STEIN: Why does Congress</p> <p>21 exclude HAPS from being considered NSR</p> <p>22 pollutants, point one. And point two, why</p>	85	<p>1 MACT. Sorry, you had a second part to your</p> <p>2 question.</p> <p>3 JUDGE STEIN: The second part of</p> <p>4 that was that given that in 1990 they were</p> <p>5 excluding a certain class of pollutants from</p> <p>6 regulation as NSR pollutants --</p> <p>7 MR. DOSTER: I would --</p> <p>8 JUDGE STEIN: At the same time that</p> <p>9 they -- you know, put in Section 821 as a</p> <p>10 note that they exclude CO2 from</p> <p>11 regulation -- from the NSR --</p> <p>12 MR. DOSTER: The same rationale</p> <p>13 that I surmise wouldn't exist then, that</p> <p>14 there wouldn't be redundancy with the MACT</p> <p>15 requirement, with the technology-based</p> <p>16 requirement for CO2. But there was -- you</p> <p>17 know, there's no indication of an intent by</p> <p>18 Congress at that time to have in fact</p> <p>19 contemplated that CO2 would immediately be</p> <p>20 covered by the PSD program as a result of the</p> <p>21 Section 821 addition to the 1990 amendments.</p> <p>22 So we don't really have any -- we</p>

<p style="text-align: right;">86</p> <p>1 have no clear indication that that was in 2 fact their intent. We have an amendment in 3 1990 that was not updating the Clean Air Act 4 itself -- not codified in the Act, that 5 followed the original definition, the 6 original language "subject to regulation, 7 under the Act" was issued in 1977. It was 8 passed by Congress in 1977.</p> <p>9 There was no indication of an 10 integration in that. Congress was not 11 amending Section 165 in the 1990 amendments. 12 So if they had intended for CO2 to have been 13 covered, they could have amended Section 165 14 at that time, rather than writing a provision 15 that didn't even get codified in the Act 16 itself.</p> <p>17 JUDGE STEIN: So in your view, 18 what's the significance of the fact that it 19 wasn't ultimately codified?</p> <p>20 MR. DOSTER: I think it reflects 21 somewhere in the history an intent to be very 22 clear that this was not a regulated</p>	<p style="text-align: right;">88</p> <p>1 pollutants but did not include CO2, you say a 2 list that did not include CO2, even though 3 EPA guidance existed at that time that 4 considered CO2 to be an air pollutant, you 5 don't reference what that guidance was.</p> <p>6 Was that the Cannon Memo?</p> <p>7 MR. DOSTER: Correct. Yes, it was 8 the Cannon Memo from 1998, which was 9 basically the interpretation that the Supreme 10 Court ultimately adopted. And at that time, 11 it -- General Counsel Cannon, in that memo, 12 also stated very clearly that CO2 was not a 13 regulated pollutant.</p> <p>14 And I would like to read a quote 15 from that memo that I think is very 16 instructive in terms of EPA's history on this 17 issue. The general counsel stated, "EPA has 18 a legal obligation to regulate CO2 and other 19 greenhouse gases as pollutants under the 20 Clean Air Act." Sorry, this is the wrong 21 quite. Different -- different one. That's 22 the one that Mr. Russell read earlier.</p>
<p style="text-align: right;">87</p> <p>1 pollutant. It certainly was not intended to 2 be incorporated into the NSR program. And we 3 have researched the issue and tried to figure 4 out the origins of that. And these things 5 are apparently done through a committee of 6 people that consider it, and they didn't deem 7 it to be sufficiently related to any 8 provision of the Act itself to be codified.</p> <p>9 JUDGE REICH: So basically you are 10 saying that it could not be covered by 11 Section 5221 B(50)(iv), because that says 12 that any pollutant that otherwise is subject 13 to regulation under the Act -- and this is 14 not subject to regulation under the Act, 15 because that provision is not codified.</p> <p>16 MR. DOSTER: Right.</p> <p>17 JUDGE REICH: Can I ask about 18 something a little bit different just for 19 clarification? In your brief, on page 5, 20 when you're talking about the 2002 21 rulemaking, and the list that I referred to 22 earlier that listed currently regulated</p>	<p style="text-align: right;">89</p> <p>1 If I could -- "EPA's regulatory 2 authority under the Clean Air Act extends to 3 air pollutants which as discussed above are 4 defined broadly under the Act and include 5 SO2, not CO2 and Mercury emitted into the 6 ambient air. EPA has in fact already 7 regulated each of these substances under the 8 Act, with the exception of CO2. While CO2 9 emissions are within the scope of the EPA's 10 authority to regulate, the administrator has 11 made no determination to date to exercise 12 that authority under the specific criteria 13 provided under any provision of the Act."</p> <p>14 JUDGE REICH: And as far as you 15 understand it as of the day of promulgation 16 of the 2002 Federal Register Notice of this, 17 that was still EPA's interpretation.</p> <p>18 MR. DOSTER: The Fabricant memo 19 that changed that interpretation was in 1993.</p> <p>20 JUDGE STEIN: In 2003.</p> <p>21 MR. DOSTER: I'm sorry. 2003.</p> <p>22 JUDGE REICH: 2003.</p>

90	<p>1 MR. DOSTER: Thanks. So it --</p> <p>2 JUDGE REICH: I'm assuming there</p> <p>3 was a period of evolution before the</p> <p>4 Fabricant memo was actually issued, and I</p> <p>5 just want confirmation and your understanding</p> <p>6 that as of December 21, 2002, that was still</p> <p>7 the operative interpretation.</p> <p>8 MR. DOSTER: As far as the Office</p> <p>9 of General Counsel was concerned, that is my</p> <p>10 understanding.</p> <p>11 JUDGE STEIN: I wanted to ask you a</p> <p>12 question about the 2002 amendments.</p> <p>13 Illinois, as I've mentioned before, made an</p> <p>14 argument that 5221(50)(iv) should be</p> <p>15 interpreted essentially narrowly, or in the</p> <p>16 light of the fact that (i), (ii), and (iii)</p> <p>17 are fairly specifically defined terms.</p> <p>18 What's the Agency's view?</p> <p>19 MR. DOSTER: We agree with that</p> <p>20 interpretation. That is consistent with what</p> <p>21 we have always done historically. If we read</p> <p>22 subject to regulation differently at the time</p>	92	<p>1 of are there any pollutants on that list, let</p> <p>2 me see if I can look at the list itself in</p> <p>3 our 2002 rule and see if I can identify one</p> <p>4 of those that would fit in that category.</p> <p>5 Actually, I don't think I can even</p> <p>6 do that by looking at the list. I'm not</p> <p>7 familiar with all the details of the NSPS,</p> <p>8 and which various provisions that those come</p> <p>9 from. So I don't --</p> <p>10 JUDGE STEIN: But nothing leaps out</p> <p>11 to mind of something that isn't on (i), (ii)</p> <p>12 or (iii) that fits into this catchall,</p> <p>13 however broad or narrow?</p> <p>14 MR. DOSTER: Nothing immediately</p> <p>15 comes to mind. I think one thing that is</p> <p>16 notable is that the catchall, the list that</p> <p>17 was promulgated does not include Title II,</p> <p>18 pollutants covered by Title II mobile</p> <p>19 sources, though in 1978, the Administrator</p> <p>20 recognized those as potential -- as an area</p> <p>21 that would be subject to regulation. So the</p> <p>22 2002 did not enumerate the Title II</p>
91	<p>1 we had adopted it, we presumably would have</p> <p>2 done what Petitioners are advocating here</p> <p>3 today. We understood subject to regulation</p> <p>4 in the context with that list. We understood</p> <p>5 it to be covering things that were like the</p> <p>6 things that are already in that list, that</p> <p>7 were pollutants, that were subject to a</p> <p>8 specific requirement for control.</p> <p>9 JUDGE STEIN: Can you identify for</p> <p>10 me any pollutants that are not covered in</p> <p>11 (i), (ii) or (iii) that are covered by (iv)?</p> <p>12 MR. DOSTER: Yes. But they are</p> <p>13 covered in the sense that they might -- well,</p> <p>14 okay. I -- I understand your question. I</p> <p>15 was thinking it was a different one.</p> <p>16 JUDGE STEIN: Answer that one, too.</p> <p>17 MR. DOSTER: What I thought you</p> <p>18 were asking is that there are other</p> <p>19 pollutants that are currently unregulated</p> <p>20 that are not subject to regulation.</p> <p>21 Pollutants like HAPS that we de-listed, and</p> <p>22 things of that nature. The specific question</p>	93	<p>1 pollutants. So that is a potential category,</p> <p>2 to the extent there was a pollutant that</p> <p>3 would be covered under Title II that is not</p> <p>4 covered under Title I anywhere. But I don't</p> <p>5 know. I can't identify one of these.</p> <p>6 JUDGE WOLQAST: What would you</p> <p>7 point us to as the Agency's most clear</p> <p>8 interpretation of subject to regulation?</p> <p>9 MR. DOSTER: The clearest</p> <p>10 interpretation -- in terms of this</p> <p>11 interpretation is what we stated in our</p> <p>12 papers is that it refers to something that is</p> <p>13 subject to -- actually subject to an</p> <p>14 emissions limitation.</p> <p>15 JUDGE WOLQAST: Other than your</p> <p>16 argument, the --</p> <p>17 MR. DOSTER: Are you --</p> <p>18 JUDGE WOLQAST: A past Agency --</p> <p>19 MR. DOSTER: Are you really asking</p> <p>20 what is our statutory -- what is our</p> <p>21 interpretation as to why it's a reasonable --</p> <p>22 JUDGE WOLQAST: Either --</p>

<p style="text-align: right;">94</p> <p>1 MR. DOSTER: Interpretation --</p> <p>2 JUDGE WOLQAST: Statutory or</p> <p>3 regulatory interpretation of 5221, a past</p> <p>4 clear statement of the Agency interprets</p> <p>5 subject to regulations.</p> <p>6 MR. DOSTER: In terms of a single</p> <p>7 interpretation, the clearest statement with</p> <p>8 respect to the issue before you is from the</p> <p>9 1993 Wegman memo, where the specific issue of</p> <p>10 Section 821 of the 1990 amendments was</p> <p>11 addressed in the context of the question of</p> <p>12 what does "subject to regulation" mean.</p> <p>13 JUDGE WOLGAST: I did want to ask</p> <p>14 you about that, because I'm wondering, what's</p> <p>15 the vitality of the Wegman memo</p> <p>16 post-Massachusetts? And I ask that because</p> <p>17 while I understand the logic of the Wegman</p> <p>18 memo, the premise of the analysis was a more</p> <p>19 narrow interpretation of the term</p> <p>20 "pollutant."</p> <p>21 MR. DOSTER: There were two</p> <p>22 premises of that analysis. One was what does</p>	<p style="text-align: right;">96</p> <p>1 is a specific consideration of the issue</p> <p>2 raised by Petitioner of the argument that</p> <p>3 Section 821 of the 1990 amendments has</p> <p>4 significance in this issue. In the 2002</p> <p>5 rulemaking, we did not get a comment -- even</p> <p>6 though this issue was clearly ascertainable,</p> <p>7 this issue was ascertainable since 1990.</p> <p>8 In 1996, EPA published a list in</p> <p>9 the proposal of those pollutants that it</p> <p>10 thought were regulated. We received no</p> <p>11 comment in that rulemaking that CO2 should be</p> <p>12 on that list. Or at least the final preamble</p> <p>13 shows no indication of that comment. I</p> <p>14 haven't scoured the record, but the final</p> <p>15 preamble shows no indication -- comment or</p> <p>16 put the issue of Section 821 directly to the</p> <p>17 agency.</p> <p>18 And so we listed those pollutants</p> <p>19 that were understood to be regulated at that</p> <p>20 time. But it's a definitive list, as Judge</p> <p>21 Reich pointed earlier, the prefatory language</p> <p>22 on that page of the 2002 rulemaking lists all</p>
<p style="text-align: right;">95</p> <p>1 the term "air pollutant" mean in the context</p> <p>2 of Title V, and that interpretation was it</p> <p>3 means a pollutant subject to regulation. But</p> <p>4 the second premise is what is a "pollutant</p> <p>5 subject to regulation." And on the first</p> <p>6 premise, we've stated in our brief -- and</p> <p>7 agree that the Supreme Court decision no</p> <p>8 longer makes that premise viable, that the</p> <p>9 reasoning of that memo was basically</p> <p>10 overruled by the Supreme Court decision, but</p> <p>11 on the second premise, what "does subject to</p> <p>12 regulation" mean, the Supreme Court decision</p> <p>13 has not addressed that issue.</p> <p>14 And the Agency's interpretation</p> <p>15 remains consistent with what it was in that</p> <p>16 memo, and has been for the last 30 years,</p> <p>17 including 17 since the 1990 amendments.</p> <p>18 JUDGE STEIN: How does the Wegman</p> <p>19 memo differ from the statement in the 2002</p> <p>20 preambular text? I mean, you've obviously</p> <p>21 pointed to the Wegman memo rather than the --</p> <p>22 MR. DOSTER: It differs because it</p>	<p style="text-align: right;">97</p> <p>1 of the pollutants that EPA considered to be</p> <p>2 subject to regulation at the time. So it is</p> <p>3 certainly not -- there's not an affirmative</p> <p>4 answer to the issue raised here by the Board,</p> <p>5 but it's clearly a recognition that there's</p> <p>6 no regulation in place under our prevailing</p> <p>7 interpretation of "subject to regulation"</p> <p>8 that would make CO2 an NSR pollutant.</p> <p>9 JUDGE STEIN: I asked a question I</p> <p>10 believe to our -- I had a colloquy with</p> <p>11 Mr. Russell about the practical consequences</p> <p>12 of treating CO2 as a pollutant or the</p> <p>13 regulatory -- and I'd be interested in the</p> <p>14 Agency's views on the matter -- view of the</p> <p>15 matter. In terms of permitting, what in</p> <p>16 practical terms that would mean. And</p> <p>17 certainly in the -- well, in the acid rain</p> <p>18 context in particular.</p> <p>19 MR. DOSTER: The practical</p> <p>20 consequences if this board were to determine</p> <p>21 that --</p> <p>22 JUDGE STEIN: Right, yeah, in other</p>

98	<p>1 words --</p> <p>2 MR. DOSTER: It is subject to</p> <p>3 regulation now?</p> <p>4 JUDGE STEIN: More from a</p> <p>5 permitting agency's perspective. I mean,</p> <p>6 what it would mean for the regions or for</p> <p>7 state permitting agencies if they were</p> <p>8 suddenly, in the absence of further guidance</p> <p>9 from the Agency, to have to grapple with what</p> <p>10 that means in the context of the individual</p> <p>11 department. I think --</p> <p>12 MR. DOSTER: We are currently</p> <p>13 in -- I'm not sure I'm the best person to</p> <p>14 speak to this issue. We have a number of</p> <p>15 staff in the Agency that are currently very</p> <p>16 actively studying those issues right now, and</p> <p>17 are considering a number of the implications</p> <p>18 of what they would be. There are issues with</p> <p>19 what the significance rate would be and how</p> <p>20 we would determine the number of sources.</p> <p>21 There are issues with what would BACT</p> <p>22 be -- there's no viable sequestration</p>	100	<p>1 will, by the framework laid in Chevron</p> <p>2 Step I. As an alternative -- and this goes</p> <p>3 to your point, Judge Wolgast, the Agency</p> <p>4 argues its ambiguity. Ambiguity, their</p> <p>5 interpretation has to be reasonable; cannot</p> <p>6 be arbitrary and capricious. There is simply</p> <p>7 no Agency explanation anywhere in the record</p> <p>8 that lays out in any meaningful language an</p> <p>9 analysis how do you get from the word</p> <p>10 "regulation" -- and Mr. Doster talked about</p> <p>11 regulation must mean something else.</p> <p>12 Well, Congress used the word</p> <p>13 "regulation" in 165, it used "regulation" in</p> <p>14 821, there's no indication of it using</p> <p>15 different terms, and if means regulation in</p> <p>16 one place, there's again, no indication they</p> <p>17 meant otherwise. The Agency doesn't explain</p> <p>18 how do you get from the definition of</p> <p>19 regulation as it is used in both the PSD</p> <p>20 program and the definition of BACT, to</p> <p>21 meaning something equivalent to emission</p> <p>22 control or emission standard.</p>
99	<p>1 technology at this moment, so what would BACT</p> <p>2 be, even if we could capture CO2, as we might</p> <p>3 with the particular facility at issue here,</p> <p>4 an IGCC facility, what would we do with it?</p> <p>5 How would -- where would we put it?</p> <p>6 Sequestration has not been</p> <p>7 established yet as a technology, so those</p> <p>8 questions are under review, and I don't know</p> <p>9 that I'm at liberty or have the expertise to</p> <p>10 really discuss them in more depth, but you</p> <p>11 know, we do believe there will be many</p> <p>12 significant implications if -- and sudden and</p> <p>13 drastic if this board were to agree with the</p> <p>14 Petitioners.</p> <p>15 JUDGE REICH: Thank you,</p> <p>16 Mr. Doster.</p> <p>17 Mr. Nilles, you have 10 minutes for</p> <p>18 rebuttal.</p> <p>19 MR. NILLES: Thank you, Your Honor.</p> <p>20 A couple of quick points. As we laid out, we</p> <p>21 believe this is a very simple question of</p> <p>22 statutory interpretation, controlled, if you</p>	101	<p>1 The Wegman memo, as you point out,</p> <p>2 has been -- the central core of that memo was</p> <p>3 tossed out by the Supreme Court in terms of</p> <p>4 what is a pollutant. And again, that memo</p> <p>5 was not getting at the core question in</p> <p>6 laying out and really parsing the language of</p> <p>7 the statute or the regulations, and answering</p> <p>8 the question, how does one interpret</p> <p>9 regulation at the end of the day to mean</p> <p>10 something less than that term is used in</p> <p>11 general parlance.</p> <p>12 That memo was dealing with Title V.</p> <p>13 It doesn't mention the language in 165, it</p> <p>14 doesn't explain how the Agency is getting to</p> <p>15 its conclusion that it enunciates today that</p> <p>16 somehow carbon dioxide is not a pollutant</p> <p>17 "subject to regulation." So at a minimum, if</p> <p>18 the Board determines that this is not a</p> <p>19 straight question of statutory</p> <p>20 interpretation, at a minimum, we recommend</p> <p>21 that the Board remandate that decision back</p> <p>22 to the Agency and ask for an explanation in</p>

<p style="text-align: right;">102</p> <p>1 light of Mass. v. EPA, in light of a lack of 2 a record demonstrating how it reached this 3 legal conclusion, and provide the opportunity 4 for public comment to have a full record on 5 which this board could make a more reasoned 6 decision. 7 A couple other quick points. 8 Mr. Russell referred to our comments in 9 Deseret, the bonanza (?) project that is 10 pending before this board. In our comments, 11 he failed to go to the next sentence where we 12 lay out, yes, the Supreme Court did in fact 13 have this case on review, but we go on to say 14 at a minimum, EPA should consider CO2 in the 15 BACT analysis and then go on to talk about 16 "as an unregulated pollutant." 17 So back when we filed these 18 comments in Deseret, we were again flagging 19 the Supreme Court maybe taking this issue up, 20 but the framework that was in place back 21 before the Supreme Court ruling was that it 22 was an unregulated pollutant.</p>	<p style="text-align: right;">104</p> <p>1 Agency's evolution in thinking was? 2 MR. NILLES: We do not have access 3 to those internal deliberations. No, Your 4 Honor. 5 JUDGE REICH: Okay. 6 JUDGE STEIN: Is there any dispute 7 between the parties that once the Title II 8 regulations come down, which I believe the 9 administrator has indicated would come down 10 in December of '08, that at that time there 11 would be no disagreement that CO2 would at 12 that time be a regulated pollutant? I mean, 13 I realize I'm asking you a question that I 14 know may go beyond your capacity to answer, 15 but -- 16 MR. NILLES: It's certainly beyond 17 my capacity because I can't speak for the 18 Agency. Our view of that would of course be 19 another trigger, and you heard Mr. Doster say 20 that may -- that fourth category that you 21 referred to, Judge Stein, may indeed pick up 22 Title II, but I didn't get an unequivocal</p>
<p style="text-align: right;">103</p> <p>1 And one final point on the 2002 2 preamble that we talked about that the Board 3 has asked questions about. EPA does list the 4 pollutants in the Federal Register notice 5 that are in its view subject to PSD, but at 6 that point, the Agency was of the view, as it 7 enunciated a few months later in the 8 Fabricant memo, CO2 was not a pollutant. 9 JUDGE REICH: So you're basically 10 saying that notwithstanding the 11 representation from Mr. Doster that as of 12 that date, even though the only published 13 guidance was the Cannon memo, that the Agency 14 had already changed its interpretation? 15 MR. NILLES: There had obviously 16 been a very strong signal from the 17 administration that it was taking a very 18 different tack on carbon dioxide, and that 19 was manifested months later with the 20 Fabricant memo. 21 JUDGE REICH: Is there something on 22 or before that date that documents where the</p>	<p style="text-align: right;">105</p> <p>1 sense from what he was saying that that was 2 the Agency's final determination of this 3 point. 4 JUDGE STEIN: But assuming that's 5 the case, isn't what we're dealing with here 6 is sort of a timing question? In other 7 words, we've got a category of facilities 8 that are sort of in this interim period prior 9 to the time at which those regulations come 10 down. And I'm not saying that the 11 environmental consequences may not be 12 insignificant in that interim period, but 13 from a permitting perspective, how do you 14 respond to the arguments that have been made 15 about the practicality of permitting these 16 individual facilities in the absence of 17 guidance? 18 MR. NILLES: Let me just touch on 19 the environmental significance. Two of these 20 power plants proposed in the Midwest are 21 equivalent to all the CO2 emissions that the 22 7 initials RGGIs, the northeast states that</p>

106	<p>1 are working on power plant reduction measures</p> <p>2 through the regional Greenhouse Gas</p> <p>3 Initiative, they're working to cut their</p> <p>4 emissions by about 24 million tons a year by</p> <p>5 2020. Seven Northeast states from all the</p> <p>6 power plants. Two coal plants proposed in</p> <p>7 the Midwest; 24 million tons.</p> <p>8 So the environmental consequences</p> <p>9 of waiting until the end of 2008 for another</p> <p>10 dozen, two dozen, three dozen coal plants to</p> <p>11 get approved without any CO2 controls, we're</p> <p>12 talking about tens -- dozens and dozens of</p> <p>13 millions of tons of carbon dioxide. And as a</p> <p>14 practical matter, these are projects that if</p> <p>15 they have to do some CO2 control in the</p> <p>16 future, it may be either infeasible or at</p> <p>17 huge, enormous costs. So from the practical</p> <p>18 matter, again, the sooner we do this, the</p> <p>19 better.</p> <p>20 In terms of the robustness of the</p> <p>21 BACT process, Judge Stein, as you indicated,</p> <p>22 the BACT process lays out a long-time</p>	108	<p>1 Section 821 wasn't actually codified in the</p> <p>2 Clean Air Act, it cannot be a regulation</p> <p>3 "subject to regulation" within the meaning of</p> <p>4 Section 165?</p> <p>5 MR. NILLES: Your Honor, it's the</p> <p>6 first time we've heard that argument. I</p> <p>7 guess I would go back to -- in 1978 when EPA</p> <p>8 adopted the first PSD regulations and was</p> <p>9 interpreting what does "subject to</p> <p>10 regulation" means, and I think Brian Doster</p> <p>11 mentioned that it's pollutants including the</p> <p>12 NAAQS, the NSPS has its air pollutants in</p> <p>13 Title II, but it also says, any pollutant</p> <p>14 regulated under Subchapter C of Title 40 of</p> <p>15 the CFR. That's where the 821 regulations</p> <p>16 are.</p> <p>17 So back in 1978, the regulations</p> <p>18 that EPA were saying at that point equaled</p> <p>19 subject to regulations were in fact added in</p> <p>20 1993 by EPA in 821. Honestly, I can't speak</p> <p>21 to was it in the act or out of the act, but</p> <p>22 as a practical matter, EPA has interpreted it</p>
107	<p>1 five-step process that considers energy,</p> <p>2 economics, and environmental consequences,</p> <p>3 and we believe that it would be very simple</p> <p>4 to plug in CO2 into that process and work out</p> <p>5 does it make economic sense, and identify at</p> <p>6 step one all the technologies, and then go</p> <p>7 through that rigorous process that has been</p> <p>8 done for all the other pollutants. And</p> <p>9 there's no reason we can't do that today for</p> <p>10 carbon dioxide emissions.</p> <p>11 I want to just go back to the</p> <p>12 waiver issue. It's clear that if we had</p> <p>13 raised this issue, the practical consequences</p> <p>14 would have been exactly the same. We would</p> <p>15 be in the same place today if we had raised</p> <p>16 it. So I just want to note that Illinois EPA</p> <p>17 and EPA and Christian County all argue it</p> <p>18 doesn't apply, we would be in the same place</p> <p>19 today whether or not we had raised it back</p> <p>20 before Mass. v. EPA.</p> <p>21 JUDGE WOLGAST: Could you speak to</p> <p>22 Mr. Doster's argument that because</p>	109	<p>1 obviously as part of the Clean Air Act, and</p> <p>2 it's a part of the CFR where EPA all of its</p> <p>3 other Clean Air Act regulations today.</p> <p>4 JUDGE REICH: Thank you,</p> <p>5 Mr. Nilles.</p> <p>6 MR. NILLES: Thank you.</p> <p>7 JUDGE REICH: I appreciate the</p> <p>8 argument of counsel. I think it was a very</p> <p>9 good argument, very helpful for the Board in</p> <p>10 understanding the issues being presented. We</p> <p>11 will obviously take this matter under</p> <p>12 advisement.</p> <p>13 This hearing is adjourned.</p> <p>14 (Whereupon, at approximately</p> <p>15 11:45 a.m., the HEARING was</p> <p>16 adjourned.)</p> <p>17 * * * * *</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>

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