ORAL ARGUMENT SCHEDULED FOR:
FEBRUARY 10, 1994

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 92-1569

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SANTA BARBARA COUNTY AIR POLLUTION CONTROL DISTRICT,

Petitioner,

v.

CAROL M. BROWNER, Administrator, U.S. Environmental Protection Agency, and U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

and

WESTERN STATES PETROLEUM ASSOCIATION,

Intervenor.

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ON PETITION FOR REVIEW OF A FINAL RULE
OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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# BRIEF FOR THE RESPONDENTS

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LOIS J. SCHIFFER
Acting Assistant Attorney General

JON M. LIPSHULTZ, Attorney
Environmental Defense Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-0461

OF COUNSEL:

JAN TIERNEY
Office of General Counsel
U.S. Environmental Protection Agency
Washington, D.C.

ROBERT MULLANEY
Office of Regional Counsel
U.S. Environmental Protection Agency, Region IX
San Francisco, California

CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 11(a)(1), Respondents, Carol M. Browner, Administrator, United States Environmental Protection Agency,[1] and the United States Environmental Protection Agency (hereinafter collectively "EPA") submit the following certificate as to parties, rulings and related cases:

(A) Parties.

(i) Parties, intervenors, and amici who appeared below.

This requirement is inapplicable to this petition for review of a final rule.

(ii) Parties and intervenors in this Court.

All parties and the intervenor in this Court are listed in the Brief of Petitioner.

(B) Ruling Under Review.

These petitions challenge a final rule promulgated by EPA under the Clean Air Act: "Outer Continental Shelf Air Regulations; Final Rule," 57 Fed. Reg. 40,791-40,818 (Sept. 4, 1992).

(C) Related Cases.

Respondents agree with Petitioner's statement regarding related cases. There are no related cases. However, four petitions for review have been filed regarding certain Corresponding Onshore Area ("COA") designations which were published concurrently with the final rule that is the subject of

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[1] Carol M. Browner is automatically substituted for her predecessor William K. Reilly pursuant to Rule 43(c), Fed. R. App. P.

this petition, but raise issues which are distinct and different from those which are raised in this petition. For the Court's reference, the COA petitions are:

Union Oil Co. v. EPA

-- No. 92-1570 (D.C. Cir.)
-- No. 92-70727 (9th Cir.)

Ventura County APCD v. EPA

-- No. 92-1572 (D.C. Cir.)
-- No. 92-70730 (9th Cir.)

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## TABLE OF AUTHORITIES



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[1] Authorities chiefly relied upon are marked with an asterisk.

**FEDERAL REGULATIONS**

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# BRIEF FOR THE RESPONDENTS

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the United States Environmental Protection Agency ("EPA"), in enacting a final rule regulating air pollution from sources on the Outer Continental Shelf ("OCS final rule" or "final rule"), properly interpreted section 328 of the Clean Air Act ("CAA" or the "Act"), 42 U.S.C. §§ 7401-7671q, as not providing for direct regulation of marine vessels in transit.

2. Whether EPA, in enacting the OCS final rule, properly interpreted section 328 of the Act as requiring the same regulatory treatment, as opposed to the same regulations, regarding the calculation of offsets for OCS sources, and whether the final rule's approach to offsets reasonably implemented this interpretation.

## STATUTES AND REGULATIONS

This petition for review challenges a final rule promulgated by EPA pursuant to section 328 of the CAA, 42 U.S.C. § 7627. The final rule, entitled "Outer Continental Shelf Air Regulations" ("OCS final rule"), was published in the Federal Register on September 4, 1992. 57 Fed. Reg. 40,792 (Sept. 4, 1992).[1] Statutes and regulations pertinent to this proceeding are set out in an addendum to this brief.

## JURISDICTION

This petition for review was timely filed on November 2, 1992, and the Court has jurisdiction over this proceeding pursuant to section 307(b) of the Act, 42 U.S.C. § 7607(b).

## STATEMENT OF THE CASE

### A. Nature of the Case

In this petition for review, Santa Barbara contends that the aspects of the final rule addressing control of emissions from marine vessels in transit and offset requirements

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[1] The OCS final rule will be (but has not yet been) published at 40 C.F.R. Part 55. In this brief, we will cite the final rule either at the location where it was published in the Federal Register, or, where more specificity is needed, to "40 C.F.R. § 55.__."

for OCS sources are inconsistent with the mandate of section 328 of the CAA, 42 U.S.C. § 7627. On the former point, Santa Barbara contends that EPA impermissibly failed to provide for direct air pollution regulation of marine vessels in transit. On the latter point, Santa Barbara contends that EPA impermissibly provided for the application of offset requirements to OCS sources that are not the same as offset requirements that apply to corresponding onshore sources.[2]

B. Statutory and Regulatory Background

1. Clean Air Act Overview

The Clean Air Act, first enacted in 1970 and extensively amended in 1977 and 1990, establishes a joint state and federal program to control the Nation's air pollution. Section 109 of the Act, 42 U.S.C. § 7409, calls for the establishment of primary and secondary national ambient air quality standards ("NAAQS") for certain pollutants. Primary standards are those necessary to protect public health with an adequate margin of safety (42 U.S.C. § 7409(b)(1)); secondary

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[2] Santa Barbara also raised a third issue in its brief, relating to the final rule's treatment of delegation of authority to states. See Brief of Petitioner ("Pet. Br.") at 2, 31-33. As described more fully in our Unopposed Motion For 14 Day Stay of Proceedings on Delegation Issue ("Motion for Stay"), filed concurrently herewith, EPA has decided to issue a clarification of certain preamble language regarding the delegation issue which will obviate the need for judicial proceedings on that issue at this time. The requested short stay of proceedings on the delegation issue will afford the parties an opportunity to attempt to reach agreement on an appropriate procedural disposition of this issue to propose to the Court in light of EPA's decision. The stay of proceedings on the delegation issue should not in any way disrupt the briefing or argument of the vessels and offsets issues.

standards are those necessary to protect the public welfare (42 U.S.C. § 7409(b)(2)). Under section 109, the Administrator of EPA is responsible for establishing both sets of standards. Generally speaking, Title I of the Act, 42 U.S.C. §§ 7401 to 7515, includes the substantive requirements that apply to stationary sources of air pollution, while Title II of the Act, 42 U.S.C. §§ 7521 to 7590, includes the requirements that apply to mobile sources.[3]

The Act contemplates that the measures necessary to attain the NAAQS will be applied to individual sources through a State Implementation Plan ("SIP") prepared by each state, subject to EPA review and approval,[4] for each "air quality control region" within the state. Section 110 of the Act, 42 U.S.C. § 7410. A SIP must specify emission limitations and other measures necessary to attain and maintain all standards. 42 U.S.C. § 7410(a)(2)(A)-(K).

Areas which do not meet the NAAQS are designated "nonattainment areas." See 42 U.S.C. § 7407(d) (designations generally); 42 U.S.C. § 7501(2) (definition of "nonattainment area"). Nonattainment designations are established with respect to each criteria pollutant; thus, an area may be designated as

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[3] The Act's additional titles relate to, inter alia, noise pollution, acid rain control, operating permit programs, and stratospheric ozone protection.

[4] EPA reviews all initial and revised SIPs to ensure that the Act's requirements are being met (42 U.S.C. § 7410(a)(2)-(3)), and EPA is to promulgate a federal implementation plan for a state that fails to submit a SIP meeting the Act's requirements. 42 U.S.C. § 7410(c).

nonattainment for one pollutant, but attainment for another. Id. Further, under the Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399, designated nonattainment areas are classified depending on the severity of the pollution problem. 42 U.S.C. §§ 7502(a), 7511(a), 7512(a), 7513. Once an area is designated as nonattainment for a particular pollutant, the SIP that includes the nonattainment area must be revised to include a variety of specified control measures. CAA sections 172-192, 42 U.S.C. §§ 7502-7514a.

Areas of the country that meet the NAAQS are termed "attainment areas," and areas for which information is unavailable to determine whether the NAAQS have been attained are designated "unclassifiable." 42 U.S.C. § 7407(d)(1)(A). Attainment areas and unclassifiable areas are subject to Part C of Title I, 42 U.S.C. §§ 7470 to 7492, which sets out "Prevention of Significant Deterioration of Air Quality" ("PSD") requirements. Under the PSD program, all attainment areas and unclassifiable areas are designated as Class I, Class II, or Class III areas, pursuant to the procedures outlined in sections 162-164 of the Act, 42 U.S.C. §§ 7472-7476. Class I areas are areas such as national parks and wilderness areas; all other areas are considered to be Class II areas unless the area is redesignated as a Class III area by a state pursuant to the procedures set out in section 164 of the Act, 42 U.S.C. § 7474. Each of these classes is assigned permissible increments for

designated air pollution parameters above the area's "baseline,"[5] and new sources can only be constructed in the area to the extent that the increment is not consumed. 42 U.S.C. § 7473. Generally speaking, permissible increments are the smallest for Class I areas and the largest for Class III areas. Id.

The provisions for the attainment and maintenance of NAAQS operate primarily through controls on existing sources of pollution. However, the Act requires that major new and modified sources of pollution meet more stringent emission standards. Section 111 of the Act, 42 U.S.C. § 7411, requires the Administrator to adopt technology-based new source performance standards ("NSPS") limiting the emissions from any new or modified facility in certain industrial categories. Section 111(e) makes it unlawful for such a new source to operate in violation of any applicable NSPS. While EPA has the initial responsibility for implementing NSPS requirements, section 111(c) allows such responsibility to be delegated to states which have enacted appropriate regulations. 42 U.S.C. § 7411(c).

All new major sources or major modifications of existing sources located in nonattainment areas are also subject to the Act's new source review ("NSR") procedures and permitting requirements. Under EPA's regulations, a major stationary source is a source "which emits, or has the potential to emit 100 tons

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[5] The term "baseline concentration" essentially is defined as the ambient concentration levels for each pollutant which exist at the time of the first application for a PSD permit after the CAA amendments of 1977. 42 U.S.C. § 7479(4).

per year or more of any pollutant subject to regulation under the Act." 40 C.F.R. § 51.165(a)(1)(iv)(A)(1). However, the CAA amendments of 1990 lowered the major stationary source threshold for criteria pollutants in certain areas. See, e.g., CAA §§ 182(c)-(e), 42 U.S.C. §§ 7511a(c)-(e). A major modification is any physical change or change in the method of operation of a major stationary source that would result in a net emissions increase of any pollutant subject to regulation under the Act, provided that the increase is "significant," i.e., that it equals or exceeds specified thresholds. 40 C.F.R. §§ 51.165(a)(1)(v)(A); 51.165(a)(1)(vi)(A); 51.165(a)(1)(x).

All new or modified major sources in attainment or unclassifiable areas, i.e., areas subject to PSD, must comply with the preconstruction permitting requirements in section 165 of the Act, 42 U.S.C. § 7475. Such sources in nonattainment areas must comply with the preconstruction permitting requirements in section 173 of the Act, 42 U.S.C. § 7503. Section 165 requires the source to achieve emission limits based on the best available control technology ("BACT").[6] 42 U.S.C. § 7475(a)(4). Under section 173, the source must achieve the

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[6] The Act defines "BACT" as an emission limit based on the "maximum degree of reduction" of each regulated pollutant "taking into account energy, environmental, and economic impacts and other costs" that are determined on a case-by-case basis "[to be] achievable for [the] facility." 42 U.S.C. § 7479(3). BACT standards must be at least as stringent as standards established under sections 111 and 112 of the Act. Id.

lowest achievable emission rate ("LAER")[7] and obtain emission reduction offsets from other sources. 42 U.S.C. § 7503. An offset is an emission reduction from an existing source that compensates for increased emissions from new or modified major sources; such compensation must be equal to or greater than the emissions that will result from the new or modified major source. See, e.g., 42 U.S.C. §§ 7503(c)(1), 7511(a), 7511(a)(4), 7511(b)(5), 7511(c)(10), 7511(d)(2), 7511(e)(1).

Section 173(c) of the Act requires that offsets shall be "in effect and enforceable" by the time the new or modified source begins operation, and makes clear that emission reductions otherwise required by the Act cannot be used to create an offset. 42 U.S.C. § 7503(c). In most cases, offsets can be obtained only from the same source or from another source in the nonattainment area. Id. However, offsets may be obtained from outside the nonattainment area if the offset is from a nonattainment area with a more severe classification and the emissions from the other area contribute to a violation of the NAAQS for the area in which the new or modified source is located. Id. EPA has promulgated an Emission Offset Interpretative Ruling setting out the agency's offset policies in detail. See 40 C.F.R. Part 51, App. S. The purpose of offset requirements is to ensure consistency with the area's reasonable further progress under the

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[7] "LAER" is defined as the rate of emissions which is the more stringent of: (1) the most stringent limitation contained in any SIP for the same type of source, or (2) the most stringent limitation which is achieved in practice by a source of the same type. 42 U.S.C. § 7501(3).

applicable SIP and to require a positive net air quality benefit in a nonattainment area while allowing industrial growth.[8] The offset requirements of section 173(c) are currently implemented through regulations which are adopted by each state and submitted to EPA for approval as part of its SIP pursuant to 42 U.S.C. § 7410 and 40 C.F.R. Part 51, Subpart I.

2. Outer Continental Shelf Provisions

The 1990 amendments to the CAA added section 328, 42 U.S.C. § 7627, to address air pollution from activities on certain parts of the OCS.[9] Prior to the enactment of section 328, regulation of air pollution from all OCS sources had been within the authority of the Department of the Interior pursuant

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[8] In December 1986, EPA issued an Emissions Trading Policy Statement that sets out conditions that EPA considers necessary for emissions trades under the CAA. See 51 Fed. Reg. 43,813, 43,830 (Dec. 4, 1986). The Emissions Trading Policy explains the rationale for emission offsets as follows:

> In nonattainment areas, major new stationary sources and major modifications are subject to a preconstruction permit requirement that they secure sufficient surplus emission reductions to more than "offset" their emissions. This requirement is designed to allow industrial growth in nonattainment areas without interfering with attainment and maintenance of ambient air quality standards.

Id. at 43,830.

[9] Section 328's air pollution requirements do not apply to most of the OCS located in the Gulf of Mexico; specifically, the OCS sources that EPA must regulate under section 328 are those "located offshore of the States along the Pacific, Arctic and Atlantic Coasts, and along the United States Gulf Coast off the State of Florida eastward of longitude 87 degrees and 30 minutes. . . ." 42 U.S.C. § 7627(a)(1). The Gulf Coast areas excluded from section 328's regulatory coverage are to be studied by EPA and the Department of the Interior to assess the need for further regulatory action. 42 U.S.C. § 7627(b).

to the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-1356.

Section 328 directed EPA to "establish requirements to control air pollution from Outer Continental Shelf sources . . . to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of part C of title I." 42 U.S.C. § 7627(a)(1). The Act further specifies that

> [f]or such sources located within 25 miles of the seaward boundary of [states within the coverage of section 328], such requirements shall be the same as would be applicable if the source were located in the corresponding onshore area,[10] and shall include, but not be limited to, State and local requirements for emission controls, emission limitations, offsets, permitting, monitoring, testing, and reporting.

Id. Section 328 also authorizes EPA to grant exemptions from OCS air requirements in certain circumstances, 42 U.S.C. § 7627(a)(2), and sets out procedures under which EPA may delegate authority to adjacent states to implement and enforce the requirements of the section. 42 U.S.C. § 7627(a)(3).

The Act defines the OCS sources subject to regulation under section 328 as "includ[ing] any equipment, activity, or facility which --

> (i) emits or has the potential to emit any air pollutant,

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10 The term "corresponding onshore area" is defined as "the onshore attainment or nonattainment area that is closest to the source, unless the Administrator determines that another area with more stringent requirements with respect to the control and abatement of air pollution may reasonably be expected to be affected by such emissions." 42 U.S.C. § 7627(a)(4)(B).

(ii) is regulated or authorized under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.], and

(iii) is located on the Outer Continental Shelf or in or on waters above the Outer Continental Shelf.

42 U.S.C. § 7627(a)(4)(C) (bracketed material in original). The definition further provides that "[s]uch activities include, but are not limited to, platform and drill ship exploration, construction, development, production, processing, and transportation." Id. Finally, with regard to vessels, the definition states that "[f]or purposes of this subsection, emissions from any vessel servicing or associated with an OCS source, including emissions while at the OCS source or en route to or from the OCS source within 25 miles of the OCS source, shall be considered direct emissions from the OCS source." Id.

3. The OCS Rulemaking Proceedings

EPA published a proposed OCS rule on December 5, 1991, after holding a number of workshops and soliciting comments from interested parties. 56 Fed. Reg. 63,774. With regard to the first of the two issues discussed in this brief, the definition of "OCS source" in the proposal did not explicitly address vessels. Id. at 63,787. However, the preamble to the proposal stated that EPA interpreted the statutory definition of "OCS source" to exclude marine vessels other than drill ships. Id. at 63,777. EPA stressed that vessel emissions related to an OCS

activity are accounted for by including vessel emissions in the "potential to emit"[11] of the associated OCS source. Id.

With regard to offsets, the proposal provided that offsets obtained from the landward side of the OCS source would be at the base ratio of the corresponding onshore area ("COA")[12], with no distance penalties, but that offsets obtained from the seaward side of the OCS source would be subject to all distance penalties required by the COA.[13] Id. at 63,779. The rationale of the proposal was that encouraging OCS sources to obtain offsets from the landward side of the source would have the greatest positive impact on onshore ambient air quality. Id.

After soliciting public comment and holding four public hearings on the proposal, EPA published the final rule on

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[11] "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. 40 C.F.R. § 51.166(b)(4). The determination of what new sources or modifications are "major" under the Act for purposes of PSD requirements or NSR requirements is determined by either the actual emissions of the source or the source's "potential to emit." See 42 U.S.C. § 7479(1) (definition of "major emitting facility"); 40 C.F.R. § 51.166(b)(1) (definition of "major stationary source"); 40 C.F.R. § 51.166(b)(23) (definition of "significant" emissions increases for purposes of determining whether modification is "major").

[12] See note 10, supra, for an explanation of the term "corresponding onshore area."

[13] A "base ratio" is the ratio of offsets to emissions that a SIP requires a source to obtain. In Santa Barbara, for example, the "base ratio" is 1.2:1, meaning that a source must obtain 1.2 units of offsets for every new single unit of emissions. Pet. Br. at 16, 29. Distance penalties (sometimes also referred to as distance discounting) are a common feature of offset requirements, and are applied to reduce the value of a potential offset to the source seeking the offset in a ratio proportionate to the distance the proposed offset is from the source.

September 4, 1992. 57 Fed. Reg. 40,792. In the final rule, EPA's view that the statutory definition of "OCS source" did not include marine vessels in transit did not change. However, in response to comments, EPA added explicit language to the definition of "OCS source" to clarify that vessels would be considered OCS sources only when they are "permanently or temporarily attached to the seabed" and are being used "for the purpose of exploring, developing or producing resources therefrom." Id. at 40,793-94, 40,807. In addition, the final rule provided that vessels would be considered OCS sources when they are physically attached to an OCS facility, in which case only the stationary source aspects of the vessels will be regulated. Id.

The final rule refined the regulatory treatment of offsets from the proposal, and created a three-zone approach to the issue. Id. at 40,796, 40,808. The first zone is the zone seaward of the OCS source; as in the proposal, offsets obtained in this zone are subject to any distance penalties required by the COA. Id. The second zone is the area from the OCS source to the state's seaward boundary (three miles from the coast except in the Florida panhandle, where it is approximately nine miles), and no distance penalties may be applied to offsets obtained in this zone. Id. The third zone is the area landward from the state's seaward boundary, and is the area in which the final rule changed the proposal most substantially. Offsets obtained in this zone are subject to any distance penalties required by the

COA; however, for purposes of calculating the distance between the OCS source and the offset, the OCS source is deemed to be located at the point where a straight line drawn between the source and the offset crosses the state's seaward boundary. Id. The purpose of zone 3 was to retain the proposal's intent to avoid penalizing the OCS source for the distance between the OCS source and the seaward boundary, while also preserving distance penalties that otherwise would apply within state boundaries. Id.

## SUMMARY OF ARGUMENT

EPA's interpretation of section 328 to exclude direct air emission regulation of mobile marine vessels as "OCS sources" -- and instead to provide for inclusion of the emissions from such vessels in the emissions of the OCS source(s) with which the vessels are associated -- clearly is reasonable. First, the statute provides that emissions from marine vessels "shall be considered direct emissions from the OCS source." In addition, the most reasonable construction of the statute's definition of "OCS source" is one which excludes marine vessels in transit. Section 328's definition of OCS source is expressly limited by reference to those sources regulated or authorized under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-1356, and the OCSLA does not provide for regulation of marine vessels in transit.

EPA also reasonably interpreted section 328 to require offset provisions that apply the same regulatory treatment -- as

opposed to the same literal regulations -- to OCS sources as to onshore sources. To apply the same literal offset regulations to OCS sources as apply to onshore sources, particularly with regard to distance penalties, would result in inequitable treatment of OCS (as compared to onshore) sources, and would insufficiently promote the goal of improving onshore air quality. The offset provisions enacted by the final rule faithfully implement the statutory intent to apply the same regulatory treatment to OCS sources as to onshore sources and are well-supported by the administrative record.

For these reasons, Santa Barbara's challenges to the provisions of the final rule relating to vessels and offsets should be rejected.

## STANDARD OF REVIEW

The final rule being challenged was promulgated in accordance with the special rulemaking provisions of section 307(d) of the CAA, 42 U.S.C. § 7607(d). Accordingly, judicial review is governed by section 307(d)(9) of the CAA, 42 U.S.C. § 7607(d)(9). Under this provision, the challenged portions of the final rule may not be set aside unless they are found to be:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

> (D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) [pertaining to exhaustion of administrative remedies] has been met, and (iii) the condition of the last sentence of paragraph (8) [pertaining to significance of procedural errors] is met.

42 U.S.C. § 7607(d)(9).

The "arbitrary and capricious" standard presumes the validity of agency actions and a reviewing court is to uphold an agency action if it satisfies minimum standards of rationality. Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 520-21 (D.C. Cir. 1983). Where EPA has "considered the relevant factors and articulated a rational connection between the facts found and the choices made," its regulatory choices must be upheld. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 105 (1983); American Petroleum Inst. v. EPA, 906 F.2d 729, 737 (D.C. Cir. 1990).

With regard to questions of statutory interpretation, in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Supreme Court stated a now-familiar two-part test for review of an agency's interpretation of a statute which it administers. Under the first part of this test, the court must consider whether the statute unambiguously addresses the particular question at issue. If so, "that is the end of the matter; for the court, as well as the agency, must

give effect to the unambiguously expressed intent of Congress." Id. at 842-43. However, if the statute is silent or ambiguous with respect to the specific issue, the court must accept the agency's interpretation if it is reasonable; the agency's interpretation need not represent the only permissible reading of the statute nor the reading that the court might originally have given the statute. Id. at 843 & n.11; see also, e.g., Ohio v. EPA, 997 F.2d 1520, 1527 (D.C. Cir. 1993); Inland Lakes Management, Inc. v. NLRB, 987 F.2d 799, 805 (D.C. Cir. 1993).

## ARGUMENT

### I. IN ADDRESSING MARINE VESSELS, EPA PROPERLY INTERPRETED SECTION 328 OF THE CLEAN AIR ACT

Section 55.2 of the OCS final rule provides that marine vessels will only be considered "OCS sources" (and hence subject to direct regulation under the final rule) when they are

> (1) Permanently or temporarily attached to the seabed and erected thereon and used for the purpose of exploring, developing, or producing resources therefrom, within the meaning of section 4(a)(1) of OCSLA [43 U.S.C. § 1331 et seq.]; or
>
> (2) Physically attached to an OCS facility, in which case only the stationary sources aspects of the vessels will be regulated.

57 Fed. Reg. at 40,807 (to be codified at 40 C.F.R. § 55.2) (bracketed material in original).

In situations other than these two, emissions from marine vessels servicing or associated with an OCS source are, while at the source or within 25 miles en route to or from the source, considered direct emissions from the source. Id. In

addition, emissions from marine vessels in these circumstances are also included in the associated source's "potential to emit," which means that these emissions from mobile vessels will be added to the emission inventory upon which PSD and nonattainment new source review is based.[14] Thus, while the final rule does not provide for direct regulation of marine vessels in transit, emissions from such vessels must be taken into account for purposes such as calculating offsets for new sources in nonattainment areas and increment analyses for new sources in PSD areas. See 57 Fed. Reg. at 40,794 (discussion in preamble to final rule); 56 Fed. Reg. at 63,777 (discussion in preamble to proposed rule).

Santa Barbara challenges the final rule's treatment of marine vessels in transit on the basis that EPA's approach allegedly conflicts with the plain meaning and legislative history of section 328. Pet. Br. at 21-29. Santa Barbara argues that section 328 should be read to require direct regulation of marine vessels in transit (as opposed to indirectly regulating such emissions by including vessel emissions in the emissions of the associated OCS facility). Id. Conspicuously missing from Santa Barbara's argument, however, is any contention that marine vessels in transit can themselves be considered "OCS sources" under the statute. Santa Barbara also offers no credible

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[14] See note 11, supra, for an explanation of the term "potential to emit."

explanation of how a source that is not an "OCS source" can be directly regulated under section 328.

As we explain more fully below, Congress explicitly limited direct application of section 328's air pollution requirements to "OCS sources," and explicitly excluded marine vessels in transit from the definition of "OCS source." Rather, Congress set out an alternative approach for addressing emissions from marine vessels in transit (i.e., that the vessel's emissions be included in the emissions from the associated OCS source), an approach which EPA faithfully followed in the final rule. EPA's action on this issue thus is fully consistent with the statute and should be upheld by the Court.

A. The Final Rule's Treatment of Marine Vessels Is Fully Consistent With the Language of Section 328 of The Clean Air Act.

1. The final rule is consistent with section 328's definition of "OCS source."

The definition of "OCS source" in section 328(a)(4)(C) first provides (in pertinent part) that such sources

> include any equipment, activity, or facility which --
>
> (i) emits or has the potential to emit any air pollutant,
>
> (ii) is regulated or authorized under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.], and
>
> (iii)is located on the Outer Continental Shelf or in or on waters above the Outer Continental Shelf.

42 U.S.C. § 7627(a)(4)(C) (bracketed material in original). The definition then goes on to state that

> [s]uch activities include, but are not limited to, platform and drill ship exploration, construction, development, production, processing, and transportation. For purposes of this subsection, emissions from any vessel servicing or associated with an OCS source, including emissions while at the OCS source or en route to or from the OCS source within 25 miles of the OCS source, shall be considered direct emissions from the OCS source.

Id. (emphasis added). Moreover, with regard to subpart (ii) of this definition, the Outer Continental Shelf Lands Act provides for federal regulation of "all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources." 43 U.S.C. § 1333(a)(1) (emphasis added).

EPA concluded that this statutory language limits the regulation of marine vessels as "OCS sources" under section 328 to: (1) those vessels (such as drill ships, for example) that are permanently or temporarily attached to the seabed and used for the purpose of exploring for, developing, or producing resources; and (2) vessels that are physically attached to an OCS facility (in which case only the stationary source aspects of the vessels will be regulated). 57 Fed. Reg. at 40,793. In other words, EPA's reading of section 328 (as reflected in the final rule) is that marine vessels in transit are not "OCS sources." For a

number of reasons, this interpretation of the statute should be upheld.

First, and most obviously, the final sentence of section 328's definition of OCS source directly addresses Congress' intent regarding the treatment of emissions from marine vessels in transit. As noted above, that sentence provides, inter alia, that emissions from marine vessels in transit to or from an OCS source (within 25 miles of the source) "shall be considered direct emissions from the OCS source." 42 U.S.C. § 7627(a)(4)(C). This explicit statutory directive regarding the treatment of vessel emissions precludes a construction of the statute that would provide for direct regulation of such vessels as OCS sources themselves. See 56 Fed. Reg. at 63,778. Had Congress intended marine vessels in transit to themselves be "OCS sources" (or otherwise directly regulated), there would have been no reason for Congress to provide that vessel emissions be included in the emissions from the associated OCS source. Therefore, EPA developed a rule that treated marine vessel emissions as part of the emissions of the associated OCS source, but did not directly regulate marine vessels in transit as OCS sources.

Second, despite Santa Barbara's arguments to the contrary, EPA reasonably interpreted subpart (ii) of section 328's definition of "OCS source" (which cross-references the OCSLA) to limit "OCS sources" under section 328 to only those sources which are regulated under the OCSLA. See 57 Fed. Reg. at

40,793 (preamble to final rule); 56 Fed. Reg. at 63,777 (preamble to proposed rule). While Santa Barbara does not challenge EPA's reading of the OCSLA, it argues that section 328(a)(4)(C)(ii) is merely illustrative in nature, and not a limitation, due to the fact that the definition uses the word "include[s]" instead of "means." Pet. Br. at 24.

Santa Barbara's approach is untenable, however, because it would render the definition of OCS source virtually limitless. Clearly the second sentence of the definition -- which states that activities included in the definition "include, but are not limited to, platform and drill ship exploration, construction, development, production, processing, and transportation" -- must be read as illustrative and not limiting in nature. In any event, the third sentence, discussed above, specifically addresses vessel emissions. Thus, unless subparts (i) through (iii) of the first sentence are read as limiting in nature, virtually any "equipment, activit[ies], or facilit[ies]" would constitute OCS sources within the meaning of the statute.

For these reasons, Congress clearly spoke to the issue of how EPA is to treat emissions from marine vessels in the OCS rule, and the final rule is completely consistent with this direction. Moreover, EPA's broader construction of the definition of OCS source and the rest of section 328 as it relates to marine vessels is clearly permissible and should be upheld in accordance with the second step of the Chevron decision.

2. The final rule is also consistent with section 328(a)(1) on the issue of marine vessels.

Santa Barbara also argues that direct regulation of marine vessels in transit is compelled by section 328(a)(1), which provides that OCS sources within 25 miles of a state's seaward boundary are subject to the same requirements as would be applicable if the source were located in the COA. Pet. Br. at 22. Santa Barbara contends that since "the plain and ordinary meaning of this language is that all requirements of the COA apply to sources of air pollution on the OCS," and that since "[n]o exception is made for marine vessels," then "if the COA has requirements for the control of air pollution from marine vessels in transit, those requirements shall be applied, 'as if the source were located in the [COA].'" Pet. Br. at 23.

However, the first sentence of section 328(a)(1) expressly states that the requirements of section 328 apply only to "OCS sources," which is explicitly defined in section 328(a)(4)(C). For this reason, the key question is simply whether the definition of "OCS sources" includes marine vessels in transit. See 56 Fed. Reg. at 63,777-78 (Dec. 5, 1991). As discussed above, the definition of "OCS sources" in section 328(a)(4)(C) clearly excludes marine vessels in transit. Therefore, EPA's treatment of marine vessels in the final rule is fully consistent with section 328(a)(1) (as well as the remainder of section 328).

B. EPA's Treatment of Marine Vessels is Fully Consistent With The Legislative History and Purpose of Section 328.

Despite Santa Barbara's arguments to the contrary, Pet. Br. at 26, EPA's construction of section 328 on the issue of marine vessels is confirmed by the statute's legislative history. The only portion of legislative history cited by Santa Barbara is the following excerpt from the Conference Report:

> Marine vessels emissions, including those from crew and supply boats, construction barges, tugboats, and tankers, which are associated with an OCS activity, will be included as part of the OCS facility emissions for the purpose of regulation. Air emissions associated with stationary and in transit activities of the vessels will be included as a part of the facility's emissions for vessel activities within a radius of 25 miles of the exploration, construction, development, or production location. This will ensure that the cruising emissions from marine vessels are controlled and offset as if they were part of the OCS facility's emissions.

136 Cong. Rec. S16,983 (Oct. 27, 1990); Pet. Br. at 26.

Santa Barbara's quotation of this language is curious, as it is fully consistent with the final rule (and the language of section 328, for that matter). Despite Santa Barbara's assertion, this legislative history in no way suggests that marine vessels in transit should be directly regulated or considered "OCS sources." Rather, it merely states that the emissions from marine vessels associated with an OCS facility "will be included as part of the OCS facility emissions for the purpose of regulation" and that this treatment "will ensure that the cruising emissions from marine vessels are controlled and

offset as if they were part of the OCS facility's emissions." 136 Cong. Rec. S16,983 (emphasis added). As the emphasized language makes clear, Congress recognized that marine vessels in transit are not themselves regulated as "OCS sources" under the statute, but rather that emissions from such vessels should be treated "as if" they were emissions of the associated OCS source. This is exactly the way in which the final rule treats emissions from marine vessels.

Santa Barbara maintains that including the emissions from marine vessels in transit in the emissions from an associated OCS facility does not "control" air pollution from such vessels and that only direct regulation accomplishes this result. Pet. Br. at 28-29. Thus, Santa Barbara contends that the final rule conflicts with the final sentence of the above-quoted legislative history, which states that section 328 will "ensure that the cruising emissions from marine vessels are controlled and offset as if they were part of the OCS facility's emissions." Id. at 28. Santa Barbara's argument lacks merit.

Even if the cited portion of the legislative history is taken at face value, it does not support Santa Barbara's position. At most, it merely states a general expectation that section 328 will have the result of "controll[ing] and offset[ting]" vessel emissions. The final rule clearly achieves this general goal. As EPA noted in the preamble to the proposed and final rule and in its response to comments, since the emissions from marine vessels in transit will be included in the

emissions of the OCS facility associated with the vessel, these emissions will be accounted for in a variety of ways, such as in offset calculations and impact analyses for the OCS facility. See 57 Fed. Reg. at 40,794 (discussion in preamble to final rule); 56 Fed. Reg. at 63,777 (discussion in preamble to proposed rule); Response to Comments Document at 25-27, A.R.[15] V-C-01 (J.A. at ___). As EPA stated in its response to comments on this issue, this treatment of vessel emissions does result in added "control" of emissions. Response to Comments Document at 25-27, A.R. V-C-01 (J.A. at ___).

It appears that Santa Barbara's true concern is that, in its view, direct regulation of marine vessels in transit under Section 328 is a desirable public policy objective. See, e.g., Pet. Br. at 14-15 & n.6, 28 & n.8. However, the choice of how and where to accomplish regulation of marine vessels is for Congress to make, and it clearly chose to authorize such controls under Title II of the Act, not section 328.[16] Moreover, even if Congress had not clearly spoken, the agency's approach is entitled to deference. See Chevron, 467 U.S. at 864-66.

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[15] The abbreviation "A.R.," as used herein, refers to the docket number of documents from the administrative record.

[16] Under Title II, Congress provides for the direct regulation of marine vessels (and other "nonroad engines or vehicles") through federal standards. CAA § 209, 42 U.S.C. § 7543. In general the statute preempts state regulation of vessels, but allows California to obtain authorization from EPA to adopt its own regulations after meeting certain conditions. CAA § 209(e); 42 U.S.C. § 7543(e).

For all of these reasons, the final rule's treatment of marine vessels is completely consistent with section 328, and should be upheld by the Court.

## II. THE FINAL RULE'S TREATMENT OF OFFSETS IS FULLY CONSISTENT WITH THE LANGUAGE AND INTENT OF SECTION 328

One of the principal requirements for construction of major new sources or modifications in nonattainment areas is that the source obtain offsetting emission reductions ("offsets") from other sources prior to construction. See generally pp. 7-8, supra. Section 55.5 of the final rule addresses the calculation of offsets for OCS sources. See 57 Fed. Reg. at 40,808. The final rule creates a uniform system to apply the offset requirements of the various COAs (COAs) in a manner that accounts for the complications of applying these requirements to offshore sources. See generally 56 Fed. Reg. at 63,779 (preamble to proposed rule); 57 Fed. Reg. at 40,796 (preamble to final rule).

As noted earlier, the principal problem faced by EPA in formulating the offsets portion of the final rule involved the application of distance penalties (sometimes also referred to as distance discounting), a common feature of the offset rules in the areas designated as the COAs for OCS sources. In their simplest form, distance penalties reduce the value of a potential offset to the source seeking the offset in a ratio proportionate to the distance the proposed offset is from the source. In Santa Barbara, for example, the "base ratio" for offsets is 1.2:1, and this ratio increases as the distance between the source and the

offset increases.[17] Pet. Br. at 16, 29. The specific purpose of distance penalties is to encourage the acquisition of offsets from an area as close to the source as possible. See 40 C.F.R. Part 51, App. S, § IV(D); see also Pet. Br. at 29. The larger purpose of these offset requirements is to control emissions from new sources in nonattainment areas to the greatest degree possible, while still allowing for industrial growth. 40 C.F.R. Part 51, App. S, § I; see also supra n.8 and accompanying text (discussing Emissions Trading Policy Statement).

The specific problem with the direct application of onshore distance discounting rules to offshore sources is that such an approach would have the result of encouraging the acquisition of emissions reductions from the sources closest to the offshore source, but not necessarily closest to the onshore nonattainment area which is to be protected. See 57 Fed. Reg. at 40,796 (preamble to final rule). In addition, direct application of onshore distance discounting rules to offshore sources would also penalize offshore sources by making the "cost" of onshore offsets prohibitive. Id. Such a result would conflict with Congress' intent in enacting section 328, which was to "minimize differences in air pollutant regulation . . . between OCS sources and sources located in the corresponding onshore area." 136

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[17] For example, assume a COA with a base ratio that is 1.2:1, but that the ratio doubles to 2.4:1 beyond a distance of 15 miles. In this situation, an offset within less than 15 miles of a new source generating 50 tons per year ("tpy") of a pollutant would need to provide emissions reductions of that pollutant of 60 tpy (1.2 x 50). Beyond 15 miles, that offset would need to provide emissions reductions of 120 tpy (2.4 x 50).

Cong. Rec. S16,983 (Oct. 27, 1990) (Conference Report). In addition, it would also conflict with the larger purpose of section 328, which is to protect and improve onshore ambient air quality. 57 Fed. Reg. at 40,796.

To address this problem, the OCS final rule incorporates the general offset requirements of the onshore areas but specifically establishes the procedures for applying the distance penalty requirements of the COA to OCS sources. To that effect, the OCS rule provides that while all offsets "shall be obtained based on the requirements imposed in the COA," 40 C.F.R. § 55.5(d), the application of such requirements is to be in accordance with certain provisions designed to address the geographic considerations mentioned above.

The final rule creates three zones for the purpose of applying distance penalties: (1) seaward of the OCS source ("zone 1"); (2) the area between the OCS source and the state seaward boundary (which is three miles from the coast in California) ("zone 2"); and (3) the area from the state seaward boundary extending inland ("zone 3"). 40 C.F.R. §§ 55.5(d)(3-5). Offsets obtained in zone 1 are subject to all the offset requirements of the COA, including any distance penalties. Id. § 55.5(d)(5). Offsets obtained in zone 2 are obtained at the base ratio required in the COA but no distance penalties apply. Id. § 55.5(d)(3). Offsets obtained in zone 3 are also subject to all the offset requirements of the COA, including any distance penalties. Id. § 55.5(d)(4). However, for the purpose of

calculating the distance between the OCS source and the source of offsets in zone 3, it is assumed that the OCS source is located at the state seaward boundary (as explained above, the state seaward boundary for most states is three miles from the coast). Id. Finally, the rule provides that no offset ratio applied to offshore sources shall be higher than the highest offset ratio required onshore provided that a net air quality benefit is obtained. 40 C.F.R. § 55.5(d)(1).[18]

Santa Barbara's challenge rests entirely on an argument that the plain meaning of section 328 requires application of exactly "the same" offset provisions to OCS sources as would apply to onshore sources in the COA, and that EPA's approach violates this statutory directive. Pet. Br. at 29-31. However, Santa Barbara's rigid reading of section 328 is mistaken. Further, Santa Barbara ignores the rationale for offsets and the inequitable situation that would occur if the COA offset rules were directly transferred to the OCS, concepts Santa Barbara recognized in its own comments in the development of the OCS final rule.

We now demonstrate that the final rule should be upheld by the Court as being fully consistent with section 328 and well-supported by the administrative record.

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[18] Other aspects of the offset provisions of the final rule, not directly relevant to Santa Barbara's challenge, pertain to the locations from which offsets may be obtained. Final Rule §§ 55.5(d)(6-7).

A. The Language of Section 328 Supports EPA's Approach to Offsets.

In pertinent part, section 328(a)(1) provides that for sources within 25 miles of the states' seaward boundaries, the requirements of the OCS rule (including offset requirements) "shall be the same as would be applicable if the source were located in the corresponding onshore area . . . ." 42 U.S.C. § 7627(a)(1) (emphasis added). In EPA's view, the directive of the above-quoted portion of the statute is that the regulatory treatment of the OCS source should be the same as if the source were located onshore in the same COA -- not that the actual regulations be precisely the same in all respects.

This reading of the statute is particularly appropriate with regard to offsets and distance penalties, where literal application of "the same" onshore regulations to OCS sources would result in regulatory treatment of OCS sources that is quite unequal. As we explain in more detail under Point B, infra, direct application of distance penalties for onshore sources to offshore sources without considering geographic factors will achieve results that are contrary to the statute and its legislative intent. As stated in the Conference Report on the 1990 amendments, section 328 was to "minimize differences in air pollutant regulation which currently exist between OCS sources and sources located in the corresponding onshore area." 136 Cong. Rec. S16,983 (Oct. 27, 1990). Moreover, as will be discussed in more detail below, the approach to offsets adopted in the final rule is also consistent with the broader intent of

section 328 to protect and improve onshore air quality, and with the intent of offsets in general, which is to improve air quality in nonattainment areas. See generally 57 Fed. Reg. at 40,796.

In short, Congress did not expressly address the precise manner in which the unique geographic factors involved in calculating appropriate offsets for offshore sources should be dealt with. In light of this lack of direction, EPA reasonably read the statute as providing that the regulatory impacts of offset provisions should be the same for onshore and offshore sources. This reading of section 328 as it applies to offset requirements is permissible and should be upheld.

B. The Final Rule's Approach for Applying The Same Offset Requirements to OCS Sources As Would Be Applicable If the Source Were Located in the Corresponding Onshore Area Is Reasonable and Well-Supported By The Administrative Record.

The purposes of section 328 to equalize the regulatory treatment of OCS and onshore sources and to protect ambient air quality standards onshore, is reflected in the statutory requirement that the air pollution requirements to be applied to OCS sources within 25 miles of a state's seaward boundary "shall be the same as would be applicable if the source were located in the corresponding onshore area . . . ." 42 U.S.C. § 7627(a)(1). The treatment of offsets in the final rule was the culmination of a thorough administrative process which evaluated numerous options before settling on an approach which best effectuated these goals.

EPA convened workshops and solicited extensive comments prior to issuance of the proposed OCS rule. During this period, several parties -- including Santa Barbara -- commented on the potential inequity of directly applying distance penalties, which were developed by local districts for onshore sources, to offshore sources. For example, the Western States Petroleum Association ("WSPA") noted that application of existing distance factors could result in an offset ratio of 7:1, which is much higher than the equivalent ratio for onshore sources. A.R. II-D-21 (J.A. at ___). The Minerals Management Service of the U.S. Department of the Interior noted that although the impact of emissions from an OCS source is lower for the COA than those emissions of an onshore source because of the OCS source's distance from shore, the OCS source would suffer a greater penalty because of the OCS source's distance from sources of potential offsets. A.R. II-F-06 (J.A. at ___). The U.S. Department of Energy expressed concern that no future OCS production would occur off the California coast due to the high level of offsets that would be required for OCS sources if the onshore requirements were applied under their literal terms. A.R. II-F-05 (J.A. at ___).

In its initial comments to EPA, Santa Barbara acknowledged that alternatives to direct application of onshore distance penalties to OCS sources might be appropriate. A.R. II-D-06 (J.A. at ___). One specific alternative that Santa Barbara suggested would use "ratios based on the distance between the

providing source and the nearest point on land from the source being offset." Id.

In response to these expressed concerns, EPA drafted a proposed rule that did not permit distance penalties if offsets were obtained on the landward side of the OCS source. See 56 Fed. Reg. at 63,779, 63,788. EPA reasoned that since the purpose of the OCS Rule is to protect onshore ambient air quality, offsets obtained closer to shore would have a greater positive impact on air quality. Id. at 63,779.

Some commentors on the proposed rule continued to support a relatively broad restriction on distance penalties landward of the OCS source.[19] Many others, however, advocated a middle ground. For example, the Ventura County Air Pollution Control District ("APCD") suggested that in order to protect OCS sources from unreasonably high offset ratios, EPA should prohibit discounting associated with the distance from the OCS source to the state seaward boundary, but should not prohibit distance discounting from the seaward boundary to the source of the offsets. A.R. IV-D-47 (J.A. at ___). Similarly, the California Air Resources Board ("CARB") commented that distance discounting

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[19] The Minerals Management Service (MMS) commented that based on its modeling, distance penalties were not necessary for any OCS sources because the normal offset ratio of 1.2:1 would provide net air quality benefits to onshore areas even under the worst meteorological conditions. See A.R. IV-H-11 (J.A. at ___). The MMS also stated that distance discounting was not necessary to reduce ozone pollution because of the regional nature of ozone pollution. Id. MMS' recommendation was to retain the bar on distance penalties landward of the OCS source, except in those situations where the proposed offset would be outside the onshore nonattainment area. Id.

may be necessary for some onshore sources of emission reductions, and suggested that the restriction on distance penalties should apply only in the area between the proposed OCS source and the state's seaward boundary. A.R. IV-D-49 (J.A. at ___). The San Diego County APCD also suggested a similar approach. A.R. IV-D-50 (J.A. at ____).

As demonstrated in the administrative record, Santa Barbara submitted two sets of comments on the proposed OCS Rule. In both, Santa Barbara objected to the restriction on distance penalties. A.R. IV-D-20 (J.A. at ___), IV-D-41 (J.A. at ___). At a meeting held on April 8, 1992, Santa Barbara indicated that it would prefer the OCS final rule simply to follow the onshore rule. However, Santa Barbara also suggested a compromise proposal that would eliminate distance discounting for the distance from the OCS source to the state seaward boundary by assuming that the OCS source is located at the state boundary for purposes of calculating offsets. A.R. IV-D-85 (J.A. at ___). Santa Barbara indicated that in its view, the compromise approach "[i]n the vast majority of cases . . . will ensure the offsets mitigate the maximum area of onshore impact." A.R. IV-D-85 (J.A. at ___).

EPA drafted the final OCS Rule with its three zones for offsets in response to such comments from Santa Barbara, other local APCDs, and CARB. 57 Fed. Reg. at 40,796. After review of the comments, EPA concluded that the blanket elimination of distance penalties landward of the OCS source in the proposed OCS

rule was inadequate to achieve a net air quality benefit for the onshore area consistently. Id. However, EPA retained the elimination of distance penalties for the distance between the OCS source and the state's seaward boundary. This latter aspect equalizes the regulatory treatment of onshore and offshore sources (and promotes air quality improvement in the onshore area) because it eliminates the disincentive for OCS sources to obtain offsets from the landward side of the OCS source. Id.

This equalization is achieved by the restriction on distance penalties for zone 2, the area between the proposed OCS source and the state's seaward boundary, as suggested by the comments of CARB and the local agencies discussed above. The purpose of the OCS Rule -- to protect the ambient air quality of the onshore area -- would not be accomplished if the distance penalties were identical for offsets obtained in zone 1 (the area seaward of the proposed OCS source) and zone 2. If distance penalties were identical, owners of a proposed source would seek the closest source of offsets regardless of whether the offset was landward or seaward of the source. If the closest offset is located on the seaward side of the proposed source, the ambient air quality in the onshore area is the loser in the transaction, as the most valuable offset to the source would be further from the onshore nonattainment area. As a result, the source's

incentive to choose an offset close to, or even within, the nonattainment area would be lost.[20]

As the above discussion makes clear, EPA carefully crafted section 55.5(d) of the OCS final rule to ensure equity between OCS and onshore sources. The offset provisions of the OCS Rule are a reasonable application of section 328 that ensures a net air quality benefit for the onshore area. Accordingly, the offset provisions should be upheld by the Court.

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[20] By way of example, assume that a proposed OCS source, "A", is to be constructed 20 miles from the California coast and that there are three potential offset providers (all, for the sake of simplicity, oriented along a straight line relative to each other). Provider source "B" is located two miles inside the onshore nonattainment area and 22 miles from "A"; provider source "C" is located 4 miles seaward from the California coast and 16 miles from "A"; and provider source "C" is located 28 miles from the California coast and 8 miles (seaward) from "A". If distance penalties applied equally to zones 1, 2 and 3 the wrong signal would be sent: the owner of source "A" would have an incentive to obtain the offsets from "D" as opposed to either "B" or "C" because the offset requirement from "D" would be the smallest. As a result, the offset to be provided would have a less beneficial impact on onshore ambient air quality.

## CONCLUSION

For all the above reasons, Santa Barbara's challenges to the vessels and offsets provisions in the OCS final rule should be denied.

Respectfully submitted,

LOIS J. SCHIFFER
Acting Assistant Attorney General

JON M. LIPSHULTZ
Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
Telephone: (202) 514-0461

OF COUNSEL:

JAN TIERNEY
Office of General Counsel
U.S.E.P.A.
401 M St., S.W.
Washington, D.C. 20460

ROBERT MULLANEY
Office of Regional Counsel
U.S.E.P.A. Region 9
75 Hawthorne St.
San Francisco, CA 94105

DATED: November 22, 1993

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| CENTER FOR BIOLOGICAL DIVERSITY,<br><br>Petitioner,<br><br>v.<br><br>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY<br><br>Respondent. | ) | 10-1115<br><br>Case No. |



## PETITION FOR REVIEW

Pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), the Center for Biological Diversity hereby petitions for review of the final action of respondent, the United States Environmental Protection Agency, published in the *Federal Register* at 75 Fed. Reg. 17004, *et seq.* on April 2, 2010, entitled "Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs" and attached hereto.

Respectfully submitted this 27th day of May, 2010,

Vera P. Pardee
Brendan R. Cummings
CENTER FOR BIOLOGICAL DIVERSITY
351 California Street, Suite 600
San Francisco, CA 94104
(415) 436-9682 x. 317

***Attorneys for Petitioner***

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| CENTER FOR BIOLOGICAL DIVERSITY, | ) | |
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| Petitioner, | ) | Case No. |
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| v. | ) | |
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| UNITED STATES ENVIRONMENTAL PROTECTION AGENCY | ) | |
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| Respondent. | ) | |
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## RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, petitioner Center for Biological Diversity provides the following corporate disclosure statement:

The above-named petitioner is a not-for-profit organization organized under the laws of the State of New Mexico focused on the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health. Petitioner's core organizational missions include securing protection for species threatened by the impacts of

climate change, ensuring compliance with applicable law in order to reduce greenhouse emissions and other air pollution, and educating and mobilizing the public on climate change and air quality issues. Petitioner has members who are directly and adversely affected by the final action under review. Petitioner does not have any outstanding shares or debt securities in the hands of the public nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public.

Vera P. Pardee
Brendan R. Cummings
CENTER FOR BIOLOGICAL DIVERSITY
351 California Street, Suite 600
San Francisco, CA 94104
(415) 436-9682 **x**. 317

*Attorneys **for** Petitioner*

Dated: May 27,2010

## CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Petition for Review and accompanying Rule 26.1 Corporate Disclosure Statement today by personal service on:

Office of General Counsel
U.S. Environmental Protection Agency
12000 Pennsylvania Ave, N.W. (2310A)
Washington, D.C. 20460

Honorable Lisa P. Jackson
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1101A
Washington, D.C. 20460

and that I served the same document by certified mail, return receipt requested, to:

Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
9th and Pennsylvania Ave, N.W.
Washington, D.C. 20530-0001

Environmental Defense Section
Environmental and Natural Resources Division
U.S. Department of Justice
P.O. **Box** 23986
Washington, D.C. 20026-3986

Dated: May 28, 2010

Bethany Cotton


# Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs

# EPA's Response to Public Comments

**U.S. Environmental Protection Agency**
**Office of Air Quality Planning and Standards**
**Air Quality Policy Division**
**Research Triangle Park, NC**

**March 29, 2010**

# FOREWORD

This document provides responses to public comments on the U.S. Environmental Protection Agency's (EPA's) Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs." EPA received comments on this Reconsideration proposal via mail, e-mail, and facsimile. Copies of all comment letters submitted are available at the EPA Docket Center Public Reading Room, or electronically through http://www.regulations.gov by searching Docket ID EPA-HQ-OAR-2009-0597.

This document provides a single response to each significant argument, assertion, and question contained within the totality of comments. Within each comment summary, EPA provides in parentheses, one or more lists of Docket ID numbers for commenters who raised particular issues; however, these lists are not meant to be exhaustive and EPA does not individually identify each and every commenter who made a certain point in all instances, particularly in cases where multiple commenters expressed essentially identical arguments.

# Table of Contents

# Acronyms and Abbreviations

| Acronym/Abbreviation | Definition |
|---|---|
| AEP | American Electric Power |
| APS | Arizona Public Service |
| AFBF | American Farmers Bureau Federation |
| AF&PA | American Forest & Paper Association |
| AMI | American Meat Institute |
| ANPR | Advance Notice of Proposed Rulemaking |
| APA | Administrative Procedures Act |
| API | American Petroleum Institute |
| APPA | American Public Power Association |
| BACT | Best Available Control Technology |
| CAA or Act | Clean Air Act |
| CAFE | Corporate Average Fuel Economy |
| CAIP | Clean Air Implementation Project |
| CAPCOA | California Air Pollution Control Officers Association |
| CARB | California Air Resources Board |
| CEMS | Continuous Emissions Monitoring System |
| CIBO | Council of Industrial Boiler Owners |
| $CO_2$ | Carbon Dioxide |
| CRA | Congressional Review Act |
| DfE | Design for the Environment |
| DHEC | Department of Health and Environmental Control |
| EAB | Environmental Appeals Board |
| EDF | Environmental Defense Fund |
| EEI | Edison Electric Institute |
| EPA | Environmental Protection Agency |
| FR | Federal Register |
| GHG | Greenhouse Gas |
| HAP | Hazardous Air Pollutants |
| HFC | Hydrofluorocarbon |
| ICR | Information Collection Request |
| IDEM | Indiana Department of Environmental Management |
| INGAA | Interstate Natural Gas Association of America |
| LDV | Light-Duty Vehicle |
| LDVR | Light-Duty Vehicle Rule |
| LPPC | The Large Public Power Council |
| MACT | Maximum Achievable Control Technology |
| MY 2012 | Model Year 2012 |
| NAAQS | National Ambient Air Quality Standard(s) |
| NACAA | National Association of Clean Air Agencies |
| NAM | National Association of Manufacturers |

| Acronym/Abbreviation | Definition |
|---|---|
| NEDA/CAP | National Environmental Defense Association/Clean Air Project |
| NHTSA | National Highway Traffic Safety Administration |
| NMA | National Mining Association |
| NRDC | Natural Resources Defense Council |
| NSPS | New Source Performance Standard |
| NSR | New Source Review |
| NRECA | National Rural Electric Cooperative Association |
| PFC | Perfluorocarbons |
| PM | Particulate Matter |
| PRA | Paperwork Reduction Act |
| PSD | Prevention of Significant Deterioration |
| PTE | Potential to Emit |
| RFA | Regulatory Flexibility Act |
| RIA | Regulatory Impact Analyses |
| RMA | Rubber Manufacturers Association |
| SBREFA | Small Business Regulatory Enforcement Fairness Act |
| $SF_6$ | Sulfur hexafluoride |
| SIP | State Implementation Plan |
| $SO_2$ | Sulfur Dioxide |
| TCC | Texas Chemical Council |
| TCEQ | Texas Commission on Environmental Quality |
| TIP | Texas Industry Project |
| TPY | Tons Per Year |
| UARG | Utility Air Regulatory Group |
| UMRA | Unfunded Mandates Reform Act |
| U.S. | United States of America |

# Chapter 1. Introduction

On December 18, 2008, then-EPA Administrator Stephen Johnson issued a memorandum setting forth EPA's interpretation regarding which pollutants were "subject to regulation" for the purposes of the federal Prevention of Significant Deterioration (PSD) permitting program. *See* Memorandum from Stephen Johnson, EPA Administrator, to EPA Regional Administrators, RE: EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program (Dec. 18, 2008) ("PSD Interpretive Memo" or "Memo"); *see also* 73 FR 80300 (Dec. 31, 2008) (public notice of Dec. 18, 2008 memo). The Memo interprets the phrase "subject to regulation" to include pollutants "subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant." The Memo was necessary after issues were raised regarding the scope of pollutants that should be addressed in PSD permitting actions following the Supreme Court's April 2, 2007 decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). The Memo also addresses a November 13, 2008 decision by the Environmental Appeals Board (EAB) in a challenge to a PSD permit to construct a new electric generating unit. *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB Nov. 13, 2008) ("*Deseret*"). The Deseret Power permit was issued by EPA Region 8 in August 2007 and did not include best available control technology (BACT) limits for carbon dioxide ($CO_2$).

The purpose of the PSD Interpretive Memo is to "establish[] an interpretation clarifying the scope of the EPA regulation that determines the pollutants subject to the federal PSD program under the Clean Air Act (CAA or Act)" by providing EPA's "definitive interpretation" of the definition of the term "regulated NSR pollutants" found at 40 CFR 52.21(b)(50) and resolving "any ambiguity in subpart ([iv]) of that paragraph, which includes 'any pollutant that otherwise is subject to regulation under the Act.'" As the Memo explains, the statute and regulation use similar language – the regulation defines a regulated NSR pollutant to include "[a]ny pollutant that otherwise is subject to regulation under the Act" and requires BACT for "each regulated NSR pollutant," 40 CFR 52.21(b)(50) and (j), while the Act requires BACT for "each pollutant subject to regulation under this [Act]," CAA sections 165(a)(4) and 169. The PSD Interpretive Memo seeks to resolve the ambiguity in implementation of the PSD program by stating that "EPA will interpret this definition of 'regulated NSR pollutant' to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant."

On December 31, 2008, EPA received a petition for reconsideration of the position taken in the PSD Interpretive Memo from Sierra Club and 14 other environmental, renewable energy, and citizen organizations. Petitioners argued that the PSD Interpretive Memo violated the Administrative Procedure Act and the CAA, conflicts with prior agency actions and interpretations, and attempts to establish an interpretation of the Act that conflicts with the plain language of the statute. On February 17, 2009, EPA granted the petition for reconsideration on the PSD Interpretive Memo and announced its intent to conduct a rulemaking to allow for public comment on the issues raised in the Memo and on any issues raised by *Deseret*, to the extent they do not overlap with the issues raised in the Memo. EPA did not stay the effectiveness of the

PSD Interpretive Memo pending reconsideration, but the Agency did reiterate that the Memo "does not bind States issuing [PSD] permits under their own State Implementation Plans."

On October 7, 2009 (74 FR 51535), EPA proposed a reconsideration of the PSD Interpretive Memo that solicited comment on five possible interpretations of the regulatory phrase "subject to regulation" – the "actual control" interpretation (adopted by the Memo); the "monitoring and reporting" interpretation (advocated by Petitioners); the inclusion of regulatory requirements for specific pollutants in SIPs (discussed in both the Memo and the Petition for Reconsideration); an EPA finding of endangerment (discussed in the Memo); and the grant of a section 209 waiver interpretation (raised by commenters in another EPA action). EPA also addressed, and requested public comment on, other issues raised in the PSD Interpretive Memo and related actions.

The comment period for the proposed reconsideration notice ended on December 7, 2009. EPA received 71 comments on the proposal. Commenters represented a range of interests, including regulatory agencies, corporations that may need to obtain PSD permits, trade associations representing various industrial sectors, and environmental and public interest groups. Table 1 identifies each public comment received on the proposal submitted to the Federal Register Docket Management System (FDMS). In this document, we identify each commenter by using its Docket Document ID number in Air Docket ID No. EPA–HQ–OAR–2009–0597. For example, "0065.1" identifies the specific comment document in the docket (i.e., Docket Document ID No. EPA–HQ–OAR–2009–0597–0065.1).

The purpose of this Response-to-Comments document (RTC) is to respond to comments received on EPA's October 7, 2009 proposal. This document contains summarized public comments and EPA responses to those comments. This document responds to all comments received, although it does not respond to comments on issues we did not seek comment on in the proposal, that were beyond the scope of the issues raised in the proposal, or that were otherwise not relevant to the proposal. The comments in this document are grouped into categories to reflect major issues discussed in the proposal and other related issues.

## *Table 1. Comment Letters Received on Proposed Reconsideration Notice*

The full text of each comment is available for public inspection and copying at EPA's Air and Radiation Docket and Information Center, Environmental Protection Agency, Room B102, 1301 Constitution Avenue, NW, Washington, DC (Docket ID No. EPA-HQ-OAR-2009–0597). The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566-1744 and the telephone number for the Air and Radiation Docket and Information Center is (202) 566-1742. Copies may also be mailed on request from the Air Docket by calling (202) 260-7548. A reasonable fee may be charged for copying. Electronic versions of public comments on the proposal are contained in Docket ID No. EPA–HQ–OAR–2009–0597, which can be accessed the federal-wide eRulemaking site at www.regulations.gov.

| Docket ID. No. | Commenter Name |
|---|---|
| 0048 | Anonymous Commenter |
| 0049 | National Association of Manufacturers (NAM) |
| 0050 | American Farm Bureau Federation (AFBF) |
| 0051 | BP America |
| 0052 | Ohio Environmental Protection Agency (EPA) |
| 0053 | American Petroleum Institute (API) |
| 0054 | Regional Air Pollution Control Agency |
| 0055 | Georgia-Pacific |
| 0056 | National Environmental Defense Association/Clean Air Project (NEDA/CAP) |
| 0057 | Alabama Department of Environmental Management |
| 0058 | California Air Pollution Control Officers Association (CAPCOA) |
| 0059 | Flexible Packaging Association |
| 0060 | Lilly |
| 0061 | The National Climate Coalition |
| 0062 | National Association of Clean Air Agencies (NACAA) |
| 0063 | Interstate Natural Gas Association of America (INGAA) |
| 0064 | The Large Public Power Council (LPPC) |
| 0065 | Midwest Ozone Group |
| 0066 | American Meat Institute (AMI) |
| 0067 | American Electric Power (AEP) |
| 0068 | Alliance of Automobile Manufacturers |
| 0069 | City Utilities of Springfield, Missouri |
| 0070 | The Class of 85 Regulatory Response Group |
| 0071 | American Forest & Paper Association (AF&PA) |
| 0072 | Calpine Corporation |
| 0073 | Edison Electric Institute (EEI) |

| Docket ID. No. | Commenter Name |
|---|---|
| 0074/0075 | U.S. Chamber of Commerce[1] |
| 0076 | Council of Industrial Boiler Owners (CIBO) |
| 0077 | California Air Resources Board (CARB) |
| 0078/0094 | Semiconductor Industry Association |
| 0079 | Nucor Corporation |
| 0080 | Peabody Energy |
| 0081 | Progress Energy |
| 0082 | Rubber Manufacturers Association (RMA) |
| 0083 | Consumers Energy |
| 0084 | Landmark Legal Foundation |
| 0085 | Air Permitting Forum |
| 0086 | American Chemical Council, American Iron and Steel Institute, Brick Industry Association, Corn Refiners Association, Institute of Shortening and Edible Oils, National Association of Manufacturers, National Oilseed Processors Association, and National Petrochemical and Refiners Association |
| 0087 | Clean Air Task Force, Indiana Wildlife Federation, Michigan Environmental Council, and the Ohio Environmental Council |
| 0088 | Jeff Walker, Private Citizen |
| 0089 | Utility Air Regulatory Group (UARG) |
| 0090 | Arizona Public Service (APS) |
| 0091 | South Carolina Department of Health and Environmental Control (DHEC) |
| 0092 | BCCA Appeal Groups |
| 0093 | ConocoPhillips |
| 0094 | Semiconductor Industry Association |
| 0095 | Sierra Club, Natural Resources Defense Council (NRDC) and Environmental Defense Fund (EDF) |
| 0096 | Missouri Joint Municipal Electric Utility Commission |
| 0097 | RRI Energy, Inc. |
| 0098 | Texas Industry Project (TIP) |
| 0099 | Sierra Club |
| 0100 | Coalition for Responsible Regulation, Inc. |
| 0101 | Center for Biological Diversity |
| 0102 | Texas Commission on Environmental Quality (TCEQ) |
| 0103 | Indiana Department of Environmental Management (IDEM) |
| 0104 | Texas Chemical Council (TCC) |
| 0105 | Dow Chemical Company |
| 0106/0107 | American Public Power Association (APPA) |
| 0108 | The National Rural Electric Cooperative Association (NRECA) |
| 0109 | Duke Energy Corporation |

[1] 0075 comments were comments submitted by U.S. Chamber of Commerce in response to the Advance Notice of Proposed Rulemaking "Regulating Greenhouse Gas Emissions Under the Clean Air Act" published in the Federal Register on July 30, 2008.

| Docket ID. No. | Commenter Name |
|---|---|
| 0110 | National Mining Association (NMA) |
| 0111 | Texas Oil & Gas Association |
| 0112 | Intel Corporation |
| 0113 | Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation |
| 0114 | National Association of Manufacturers |
| 0115 | SCANA Corporation |
| 0116 | South Carolina Chamber of Commerce |
| 0117 | National Association of Homebuilders |
| 0118 | Clean Air Implementation Project (CAIP) |

# Chapter 2. Procedural Issues

## *2.1. Codification of EPA Interpretation*

**Comment:**

One industry commenter (0104) does not support a codification of the final interpretation of when a pollutant is "subject to regulation" because it is not necessary. The commenter notes that because regulation under PSD already includes a stringent permitting analysis that requires the installation of BACT, the performance of an ambient air quality impacts analysis, an additional impacts analysis and thorough public participation throughout the process, there is no need to further codify the law in this area.

An industry commenter (0105) states that EPA should not codify its final interpretation in the federal PSD rules found at 40 CFR 52.21 and 51.166, and should leave the interpretation as a policy memo. The commenter believes the logic presented in support of the "actual control" interpretation was very reasonable and supported by existing regulatory language and case law. Further, the commenter states that given the dynamic nature of the GHG regulatory and legislative activity currently on-going in the U.S., leaving the interpretation in a policy memo would be preferred and more easily allow EPA to potentially respond to future scenarios. Commenter also states that if EPA determines it would like to codify these interpretations, they should publish specific regulatory language for review and comment.

Eight industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) took no position on codification of the actual control interpretation in 40 CFR 52.21 other than to note that (1) EPA should not delay final action on the proposed PSD Interpretation while it undertakes any codification, and (2) that interpretation should apply both to administration of the federal PSD permitting program under 40 CFR 52.21 and to EPA approval of (or other action on) new or revised state PSD plans under 40 CFR 51.166.

A state agency commenter (0091) states that it is absolutely essential that the definition of a regulated NSR pollutant, and when a pollutant is subject to NSR, be resolved, and that it is just as important that the resolution is a practical and scientifically justified approach that can be readily-implemented by the permitting agencies.

One industry commenter (0050) submits that EPA's interpretation (they support the "actual control" interpretation) should be codified in regulation so that it can be applied generally to any future "air pollutant."

Another industry commenter (0081) states that EPA should consider codifying its chosen interpretation. The commenter (0081) believes this would more formally clarify EPA's position, provide certainty to the regulated community, and help resolve the issue of the PSD requirements potentially applying retroactively. The commenter (0081.1) also recommended that EPA codify its position as to the specific regulatory event that triggers PSD, i.e., when a regulation

establishing actual controls takes effect. However, the commenter (0081.1) believes EPA should formally propose its various codifications through additional notice and comment rulemaking because this Reconsideration should not be seen as the equivalent of a formal regulatory process; rather, the commenter (0081) believes that through the Reconsideration EPA is requesting comment on whether it should undertake such a process.

One industry commenter (0093) urges EPA to continue the interpretation of "subject to regulation" per the PSD Interpretive Memo and perhaps, although unnecessary, codify the clarification in regulatory text.

One industry commenter (0108) states that it would be a positive step for EPA to codify its chosen interpretation, assuming EPA selects the actual control interpretation. The commenter (0108) believes this would more formally clarify EPA's position, provide certainty to the regulated community, and help resolve the issue of the PSD requirements potentially applying retroactively. The commenter (0108) adds that to ensure consistency in application of PSD by states that incorporate EPA regulatory language in their State Implementation Plan(s) (SIP[s]), EPA should also consider making similar codifications of its interpretation in 40 CFR 51.66. The commenter (0108) also recommends that EPA codify its position as to the specific regulatory event that triggers PSD, i.e., when a regulation establishing actual controls takes effect. However, the commenter (0108) believes EPA should formally propose its various codifications through additional notice and comment rulemaking because this Reconsideration should not be seen as the equivalent of a formal regulatory process.

**Response:**

EPA does not believe it is necessary to codify its interpretation in the regulatory text. The Agency feels it is more important to promptly communicate and apply our final decisions regarding the applicability of the PSD program in light of recent and upcoming actions related to GHGs. More specifically, EPA recently finalized the "Mandatory Reporting of Greenhouse Gases" rule (known as the "Reporting Rule"), 74 FR 56259 (Oct. 30, 2009), which added monitoring requirements for additional GHGs not covered in the Part 75 regulations. Further, EPA is poised to finalize by the end of March 2010 the LDV Rule that will establish controls on GHGs that take effect in Model Year 2012, which starts as early as January 2, 2011. Thus, these actions make it important that EPA immediately apply its final interpretation of the PSD regulations on this issue (as refined in this action). Furthermore, even if EPA modified the text of the federal rules, many states may continue to proceed under an interpretation of their rules. EPA thus believes overall implementation of PSD permitting programs is facilitated by this notice that describes how existing requirements in federal regulations at 40 CFR 52.21 are interpreted by EPA and how similar state provisions may be interpreted by states.

EPA finds merit in most of the points raised by commenters, but necessarily has to reconcile these competing considerations. EPA agrees that codification of the Agency's interpretation in the regulatory text, while not necessary, would provide some measure of additional certainty to all stakeholders (including regulated sources that must obtain PSD permits). Although not necessarily required here, we also agree that it is preferable that EPA publish specific regulatory language for review and comment. However, regardless of whether

codification of this interpretation is ultimately desirable, the Agency does not believe the national interest is served by delaying final action on the issues addressed in this notice pending additional procedural steps or by deferring the applicability of EPA's final interpretation. *See,* 5 U.S.C. §553(d). EPA is still considering the option of codifying its interpretation at a later date.

## *2.2. Issuance of Memorandum without Notice and Comment Process*

According to one environmental group commenter (0095), EPA chose not to respond to petitioners' early procedural challenges to the Memo (*see* 74 FR 51538 at n.3), and describes these notice and comment procedures as voluntary (*Id.* at 51548), a characterization that the commenter strongly disagrees with. These comments incorporate the Petition for Reconsideration, which argues that the PSD Interpretive Memorandum was a substantive rule and not an interpretive rule. To illustrate the nature of an interpretive rule, the Petition for Reconsideration quotes the following passage from a court decision:

> Interpretative rules "simply state[ ] what the administrative agency thinks the statute means, and only *remind[ ] affected parties of existing duties*." *General Motors Corp. v. Ruckelshaus,* 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (internal quotation marks omitted). Interpretative rules may also construe substantive *regulations*. *See Syncor Internat'l Corp. v. Shalala,* 127 F.3d 90, 94 (D.C. Cir. 1997).

*Assoc. of Amer. RR v. Dept. of Transp.*, 198 F.3d 944 at 947 (D.C. Cir. 1999) (emphasis added). The Petition argues that the PSD Interpretive Memo is a substantive rule, and not an interpretive one, because it reverses a formal agency interpretation, overturns an EAB decision, and amends the substance of the PSD program.

Another commenter (0087) incorporated by reference the arguments put forth in that Petition and in the Amended Petition for Reconsideration filed by Sierra Club on January 6, 2009.

Two industry commenters (0051, 0053) disagree with petitioners that claimed the PSD Interpretive Memo is invalid because EPA issued it without undergoing notice-and-comment procedures. The commenter states that EPA is undergoing notice-and-comment procedures and is thereby curing any possible procedural faults in the memorandum's issuance, and that the Memorandum is an interpretative action that is exempt from notice-and-comment procedures, rather than a substantive rulemaking.

Eight industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) notes that the petitioners raised procedural issues in their Petition for Reconsideration, arguing that the actual control interpretation established in the PSD Interpretive Memorandum represents a change in EPA's historical interpretation of the phrase "subject to regulation" and thus required a public notice-and-comment proceeding to alter that interpretation. The commenters disagree with arguments that the PSD Interpretive Memorandum represents a change in EPA's historical interpretation or practice, and noted that, in any event, EPA in the present rulemaking proceeding

is supplying the process petitioners argued is required, allowing all interested parties to provide comments on the established interpretation and various proposed alternative interpretations and providing a statement of basis and purpose for the actual control interpretation.

**Response:**

The PSD Interpretive Memo is not a substantive rule promulgated under section 307(d) of the CAA, but rather an interpretation of the terms of a regulation at 40 CFR 52.21(b)(50). An interpretive document is one that explains or clarifies, and is consistent with, existing statutes or regulation. *See National Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 236-37 (D.C. Cir. 1992). The PSD Interpretive Memo explains and clarifies the meaning of the definition of "regulated NSR pollutant" in section 52.21(b)(50) of the existing NSR regulations, and does not alter the meaning of the definition in any way that is inconsistent with the terms of the regulation. The memorandum construes substantive regulations and explains what EPA thinks sections 165(a)(4) and 169(3) of the CAA mean in the context of various other provisions of the statute. *See, Assoc. of Amer. RR v. Dept. of Transp.*, 198 F.3d 944 at 947 (D.C. Cir. 1999). In addition, since the memorandum does not require sources or permit writers to address a category of pollutants that have not been previously addressed in PSD permits, it functions only to remind affected parties of existing duties. As such, the Memo qualifies as an interpretive rule under the APA.

The three main arguments made in the Petition for reconsideration to support the view that the PSD Interpretive Memorandum is a substantive rule do not demonstrate that the PSD Interpretive Memorandum is not "interpretive" in nature. Even if the primary premise of these arguments was correct – that EPA's action reverses a prior interpretation and overturns an adjudication of the EAB – these points address only the question of whether the EPA Administrator may revise an interpretation without following a notice and comment process or adopt an interpretation in manner that does not strictly follow instructions or recommendations that the EAB gave to Region 8 upon remand of a particular permit. These two arguments do not address whether the memorandum in fact clarifies the meaning of the regulation or explains what EPA thinks the statute means. While the third argument – that EPA has substantively amended the requirements of the PSD program – does have bearing on the question of whether the memorandum contains any substantive rules, EPA does not agree that the memorandum establishes any new substantive requirements. The responses that follow address these three arguments from the Petition in more detail.

Since the PSD Interpretive Memo is interpretive in nature, EPA was not required to go through a notice and comment rulemaking process to issue the document. EPA's authority to make rules and interpret them derives from the CAA. Along with the APA, section 307(d) of the CAA establishes procedures for the exercise of rulemaking authority and exceptions to those procedures. Section 307(d) of the CAA establishes procedures for, among other things, "the promulgation or revision of any regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility)." However, that section of the CAA states clearly that it "shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5 of the United States Code." Under 5 U.S.C. 553(b)(A), interpretive rules are exempt from notice and comment

requirements. Thus, section 307(b) of the CAA preserves the Agency's authority to establish interpretations of regulations promulgated under the Act without engaging in a notice and comment rulemaking process that is otherwise required for the promulgation and revision of PSD regulations. Courts have frequently recognized that interpretive rules are exempt from notice and comment. *See, e.g., Devon Energy v. Kempthorne*, 551 F.3d 1030, 1040 (D.C. Cir. 2008).

Finally, EPA has now completed a notice and comment process with respect to the content of the PSD Interpretive Memorandum. Thus, even if EPA had in fact erred in its assessment of the procedural obligations associated with issuance of the memorandum, EPA has taken action that would cure this alleged error. The only procedural question remaining after the completion of this reconsideration process is whether EPA should codify its interpretation in the regulatory text. As discussed above, EPA has elected not to codify its interpretation at this time, but EPA has not ruled out the possibility of amending the regulations at a later date to explicitly reflect EPA's interpretation of the CAA.

### 2.2.1. Effect and Meaning of Previous EPA Interpretation Issued in 1978

The environmental group commenter (0095) emphasizes that the Agency's prior legally binding interpretation of the phrase "subject to regulation" (established in 1978) remains in effect until such time that the EPA completes a formal rulemaking procedure establishing a new interpretation. The commenter (0095) states that the Administrator's decision to conduct notice and comment rulemaking on the issues raised in the Memo does not change the status of the law until this rulemaking procedure is complete and a new legal interpretation has been finalized and taken effect, and cites a D.C. Circuit ruling that when an agency's purported interpretation of a statute or regulation "constitutes a fundamental modification of its previous interpretation," the agency "cannot switch its position" without following appropriate procedures. *Paralyzed Veterans of Am. v. D.C. Arena L.P.,* 117 F.3d 579, 586 (D.C. Cir. 1997).

The commenter (0095) further states that the interpretation of the phrase "subject to regulation under this Act" has been established since 1978. At that time, EPA clearly stated in a *Federal Register* preamble that the phrase "'subject to regulation under this Act' means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type." *See* 43 FR at 26388, 26397 (June 19, 1978). This earlier interpretation has never been withdrawn or modified and directly conflicts with both the interpretation the Memo purported to adopt and that proposed by EPA in its reconsideration. Because the Subchapter C regulations include, *inter alia*, regulations that require monitoring and reporting of $CO_2$ emissions, the logical implication of the 1978 Preamble is that BACT applies to $CO_2$ emissions. The Agency's effort to establish a different interpretation precluding consideration of $CO_2$ must be conducted via notice and comment rulemaking and until that process is complete the prior interpretation remains in effect.

The Petition for Reconsideration interprets EPA's position in the PSD Interpretive Memo to be that the Agency is free to adopt a wholly new definition of the term "regulated in" because the 1978 preamble does not "amplify the meaning" of this term. The Petition contends EPA

seeks to evade the procedures mandated by *Paralyzed Veterans* by disguising a revision of governing law as an interpretation of its previous interpretation. According to the Petition, the PSD Interpretive Memo claims that the phrase "regulated in" as it appears in the 1978 preamble is ambiguous and thus subject to clarification by the Agency, such that the 1978 Preamble may be understood to mean "regulated by actual control of emissions" by use of the term "regulated." The Petitioner argues that this is a newly-proposed understanding of the words "regulated in" that fits unnaturally with the text of the 1978 *Federal Register*. According to the Petition, this reading would impose an enormously substantive and restrictive qualification by use of the words "regulated in," while dismissing the far more prominent reference to "Subchapter C of Title 40 of the Code of Federal Regulations" as irrelevant verbiage.

The Petition argues that the words "regulated" and "regulation" appear pervasively throughout the 1978 *Federal Register* and always describe "*any* act of regulating or regulation." The Petitioners believe that the Agency used "regulation" and "regulate" in 1978 to encompass all forms of regulation and contends that, in the PSD Interpretive Memo, EPA departs from a standard-English definition of these terms. According to the Petition, the only plausible reading of the 1978 *Federal Register* preamble is that it described *all* the regulations contained "in Subchapter C of Title 40 of the Code of Federal Regulations." The Petitioners argue that EPA believes it can freely substitute its definition of "regulation" as "regulation requiring actual control of emissions" for the word "regulation" in whatever form the latter appears in any regulatory document.

The Petitioners also believe that various aspects of the EAB's decision in the Desert matter confirmed that EPA intended to apply the Petitioners' meaning of the term "regulated." The Petition argues that in the dispute before the EAB in the Deseret matter, EPA offices assumed that the 1978 preamble used the word "regulated" to describe any provision in the application portion of the CFR, which is why EPA tried limit the meaning of this phrase to just the types of pollutants listed in the 1978 rule preamble. The Petitioners also contend that the PSD Interpretive Memo continues to rely on a premise rejected by the Deseret decision that the list of specific categories of regulations in the 1978 preamble establishes a binding limitation on the meaning of the phrase "any pollutant regulated in Subchapter C of title 40 of the Code of Federal Regulations"

**Response:**

EPA agrees that the interpretation reflected in the 1978 preamble remains applicable, but disagrees with the meaning that these commenters and Petitioners ascribe to the Agency's 1978 statement. The PSD Interpretive Memorandum clearly and persuasively explains why the 1978 interpretive statement did not determine whether monitoring or reporting requirements make a pollutant "subject to regulation under the Clean Air Act." The 1978 preamble did not address whether any pollutant subject to a monitoring requirement promulgated in the appropriate part of the CFR is in fact "regulated in Subchapter C of Title 40 of the Code of Federal Regulations." The PSD Interpretive Memorandum and this final action on reconsideration add interpretive statements that speak to more particular questions not addressed in 1978 statement. These additional interpretations apply in parallel with the 1978 interpretation and are not inconsistent with the latter. In light of these considerations, the PSD Interpretive Memorandum did not

purport to change or supersede the 1978 statement, nor did EPA propose to supersede or change that interpretation in the October 7 notice of reconsideration.

The meaning these commenters and Petitioners assign to the 1978 interpretation is not supported by the terms of the interpretive statement or EPA's action since issuing the statement. The commenter argues that EPA impermissibly changed the 1978 interpretive statement because the commenter recognizes only one potential meaning of the term "regulation" or "regulate" and therefore assumes that the 1978 notice must have intended to applying this single meaning of the term "regulation" or "regulate." These commenters and Petitioners neglect to consider the ambiguity of the term "regulated" as a form of the word "regulate," and the primary dictionary meaning of the terms "regulation" and "regulate" cited by EPA. Each of the sections of the 1978 *Federal Register* document cited by the Petition uses the term "regulation" in the context of a sentence that describes a provision in the CFR. *See,* 43 FR at 26389 ("The regulations made final today apply to any source . . ."), 26398 ("In the regulations adopted today, EPA's assessment of the air quality impacts of new major sources and modifications will be based on" certain EPA guidelines), 26401 ("Such offsets have always been acceptable under the agency's PSD regulations . . . ."), 26402 ("Environmental groups pointed out that the proposed regulations did not specifically require Federal Land Managers to protect "affirmatively" air quality related values . . . ."). The context in which EPA used the term "regulation" in these sentences does not demonstrate that EPA intended the term "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type" to mean what the Petitioner argues it necessarily must mean (any pollutant covered for any reason in a regulation promulgated in Subchapter C of Title 40 of the CFR). The Petitioners charge EPA with neglecting to consider the standard English definitions of the term "regulation" and "regulate," but EPA considered commonly used meanings of these terms and applied the meaning that appears as the primary meaning of the term "regulate" that is used in Webster's dictionary.

Consequently, EPA does not agree that the PSD Interpretive Memo applies a substantive and restrictive qualification on the use of the words "regulated in." EPA has only applied an accepted meaning of the term regulate and not added any restriction or qualification that is not already inherent in the meaning of this term. EPA does not believe it can substitute any meaning for term "regulation," but rather that it may reasonably apply accepted meanings of terms found in standard English dictionaries that fit the context of the sentence in which the terms are used. The Petitioners do not substantiate their conclusion that the reference to "Subchapter C of Title 40 of the Code of Federal Regulations" is more prominent in the context of this sentence than the term "regulated in." It is unclear whether the Petitioner believes prominence is determined by the number of words in each phrase or some other criteria. Considering the full context of the sentence at issue, it is not obvious that the term "regulated in" is any less prominent or significant than other parts of that sentence. EPA does not agree that its identification of an unresolved question in the meaning of this sentence from the 1978 preamble makes the reference to Subchapter C of the Title 40 of the CFR meaningless. The BACT requirement still applies to any pollutant regulated in this portion of the CFR, but the question still remains what pollutants are in fact "regulated" through provisions in this portion of the CFR.

Commenters also appear to assume that this 1978 interpretative statement is the only example of EPA's past practice with respect to whether pollutants covered by, but not controlled under, regulations in the CFR make the PSD permitting requirements applicable to a pollutant.

These commenters have not provided any additional information to demonstrate that EPA (or another other PSD permitting authority) has in fact acted in accordance with the meaning that the commenters assign to the 1978 interpretation. The record shows that EPA has not in practice given the 1978 statement the meaning used by the commenter. A review of numerous federal PSD permits shows that EPA has been applying the actual control interpretation in practice – issuing permits that only contained emissions limitations for pollutants subject to regulations requiring actual control of emissions under other portions of the Act. If EPA had given the 1978 interpretation the meaning the commenter uses, the Agency would have previously issued PSD permits containing BACT emission limitations on $CO_2$ and oxygen. The argument that EPA's failure to do so was wrong does not establish that it has in fact been EPA's position since 1978 that PSD permits should cover pollutants subject to monitoring and reporting requirements that are promulgated anywhere in Subchapter C of the Title 40 of the CFR. Furthermore, in 1998, well after promulgation of the initial $CO_2$ monitoring regulations in 1993, EPA's General Counsel concluded that $CO_2$ would qualify as an "air pollutant" that EPA had the authority to regulate under the CAA, but the General Counsel also observed that "the Administrator has made no determination to date to exercise that authority under the specific criteria provided under any provision of the Act." Memorandum from Jonathan Z. Cannon, General Counsel to Carol M. Browner, Administrator, entitled EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (April 10, 1998).

Furthermore, with respect to the EAB's conclusion in the Deseret matter, the PSD Interpretive Memo highlights portions of the EAB decision that describe the ambiguity in the phrase "regulated in Subchapter C of Title 40 of the Code of Federal Regulations" and the term "regulation." The PSD Interpretive Memorandum references the "specific categories of regulations identified in the second sentence" of the passage quoted from the 1978 preamble only to illustrate that the PSD Interpretive Memorandum is not inconsistent with that 1978 statement. Consistent with the statements in the PSD Interpretive Memo, EPA agrees with and accepts the EAB's reasoning that the enumerated categories of pollutants do not establish a controlling limitation on the scope of pollutants subject to regulation. However, that reasoning still does not establish whether monitoring or reporting requirements make pollutants subject to regulation or whether a pollutant is "regulated in" the CFR when the code contains only a requirement to monitor and report, but not control, emissions of a pollutant. This has remained an open question since 1978 that EPA was free to address in the PSD Interpretive Memorandum without changing any prior EPA interpretive statement or acting inconsistent with the reasoning of the EAB's *Deseret* opinion.

### 2.2.2. Argument that PSD Interpretive Memo Overturns an EAB Decision

**Comment:**

The Petition for Reconsideration (which is incorporated in public comments) contends that the PSD Interpretive Memo supersedes the EAB's decision in the Deseret matter. The Petition contends, based on the terms of 40 CFR 124.2(a), that the Administrator has no jurisdiction to undo a statutory interpretation adopted in an EAB ruling or substitute his judgment for that of the Board. According to the Petitioners, the EAB held in its Deseret opinion that EPA must undertake a notice and comment process to adopt a new interpretation of the PSD regulatory program. The Petition asserts that the EAB is the final agency decision-maker as to PSD permits, and the EAB has already determined that a notice and comment process is required for EPA to address the appropriate scope of analysis in PSD permits. The Petitioners argued that the EAB clearly anticipated that EPA would follow a notice and comment process when it suggested that "[t]he Region should consider whether interested persons, as well as the Agency, would be better served by the Agency addressing the interpretation of the phrase 'subject to regulation under this Act' in the context of an action of nationwide scope, rather than through this specific permitting proceeding."

**Response:**

EPA does not agree that the PSD Interpretive Memorandum overturns or is in any way precluded by the EAB's decision in the Deseret matter. The record supports the conclusion that the PSD Interpretive Memorandum achieved its purpose to "build on the Board's Deseret opinion" and not to supersede it. Memo at 2.

The PSD Interpretive Memorandum does not undo any statutory interpretation adopted in the EAB ruling. In addressing the meaning of the CAA, the EAB concluded only that the meaning of the term "subject to regulation" in CAA sections 165 and 169 is not so clear and unequivocal that it precludes EPA from exercise its discretion to interpret the statute. Deseret at 63. The EAB also concluded there was "no evidence of Congressional intent to compel EPA to apply BACT to pollutants that are subject only to monitoring and reporting requirements." Deseret at 63. The EAB remanded the PSD permit in that case on the grounds that "the Region's rationale for not imposing a $CO_2$ BACT limit in the Permit – that is lacked the authority to do so because of an historical Agency interpretation of the phrase 'subject to regulation under this Act' as meaning 'subject to a statutory or regulatory provisions that require actual control of emissions of that pollutant' is not supported by the administrative record." Thus, the grounds for remand were not based on any statutory interpretation that EPA was compelled to apply BACT to pollutants subject to monitoring or reporting requirements. Furthermore, the Board's opinion did not discuss any specific procedural requirements of the Administrative Procedure Act or section 307(d) of the Clean Air Act.

EPA does not read the EAB's *Deseret* decision to contain any statutory interpretation or instructions that required the Administrator to undertake a notice and comment process to address the appropriate scope of analysis in PSD permits. The *Deseret* permit appeal involved the review of the rationale supplied by Region 8 to justify a decision not to establish emission limitations for $CO_2$ in a permit and the merits of EPA's contention that it had already established an interpretation of the applicable law that precluded such an action. The EAB's specific instructions in its remand order were directed to Region 8, which has not yet acted on those instructions in the context of the permit for the Deseret facility. Because the Board found the

record for this permit inadequate to support the rationale provided, the Board directed Region 8 to "reconsider whether or not to impose a $CO_2$ BACT limit in the Permit" and "develop an adequate record for its decision, including reopening the record for public comment." Id. at 64. In addition, the Board said that the Region should consider whether interested persons and EPA would "be better served by the Agency addressing the interpretation of the phrase 'subject to regulation in an action of nationwide scope, rather than through this specific permit proceeding." Id. The Board also said this analysis should "address whether an action of nationwide scope may be required in light of the Agency's prior interpretive statements made in various memoranda and published in the *Federal Register* and the Agency's regulations." The Board did not explicitly direct the Region or any other EPA office to take public comment on any action of nationwide scope that may result from this analysis. The Board's instructions regarding public comment applied to the record for Region 8's decision on the question of whether or not to impose a $CO_2$ BACT limit in the permit for the Deseret facility. EPA does not dispute that one might draw the inference that the EAB anticipated a subsequent EPA action of nationwide scope on this issue would entail a notice and comment process, but that was not an express instruction of the Board's order.

The instructions to EPA Region 8 in the Deseret opinion did not preclude the Administrator from taking subsequent action to adopt an interpretation of PSD regulations in accordance with the procedure that Administrator deemed appropriate under the circumstances. In the defining the term "Environmental Appeals Board," section 124.2(a) of EPA's regulations explains that "[t]he Administrator delegates authority to the Environmental Appeals Board to issue final decisions in RCRA, PSD, UIC, or NPDES permit appeals filed under this subpart." While this delegation implies some degree of authority on the EAB to interpret EPA regulations and the CAA, the Part 124 regulations do not divest the Administrator of the power to promulgate regulations to implement the PSD program or to interpret those regulations. Section 124(a) only delegates the power to adjudicate appeals PSD permits to the EAB and issue final decisions in those matters. This provision does not say that the Administrator has the delegated the authority to promulgate regulations under the PSD program to the EAB. The Administrator retains the authority to interpret the CAA and to promulgate and amend PSD program regulations. By extension, the Administrator also retains the authority to interpret those regulations and to determine the appropriate procedure to be followed when establishing a given interpretation. The fact that the EAB issues final decisions on particular PSD permit appeals does not mean that the EAB also issues final decisions on all matters relating to the PSD permitting requirements.

Furthermore, the Board did not clearly conclude that the prior interpretative statements of the Agency required that the Agency undertake a notice and comment process to address the issues covered in the PSD Interpretive Memorandum. The Board did say that the Region's analysis on remand "should address whether an action of nationwide scope may be required in light of the Agency's prior interpretive statements made in various memoranda and published in the *Federal Register* and the Agency's regulations." However, this was simply an instruction to assess the issue described, not a conclusion that Region 8's rationale in that case was inconsistent with any prior interpretive statements or that a notice and comment process was required to adopt such an interpretation in an action of nationwide scope. In addition, as discussed in the PSD Interpretive Memorandum, the EAB did appear to question whether subsequent EPA

memorandum could result in a change the interpretation set forth in the 1978 *Federal Register* notice. *Deseret* at 52. But the Board did not make a finding that the cited court cases in fact precluded EPA from issuing an additional memorandum that addressed the issue under consideration by the Board. The Board's analysis was specific to two particular memoranda that lacked characteristics that are present in the PSD Interpretive Memorandum, which references the relevant provisions of the CAA, announces an EPA interpretation of the PSD provisions, and discusses the Administrator's prior interpretive statement on this issue from the 1978 *Federal Register*.

Finally, even if the EAB had made a determination that notice and comment process was required to address this issue in an action of nationwide scope, EPA has now completed a notice and comment process before making a final decision to continue applying the PSD Interpretive Memorandum, as modified in this action.

### 2.2.3. Contention that PSD Interpretive Memo Amends the Substance of the PSD Program

The Petition for Reconsideration argues that the PSD Interpretive Memorandum seeks to substantively amend EPA regulations to establish new legal rights, restrictions, and/or obligations under the Act's PSD program. The Petition lists the following actions that are alleged to be newly established: (1) exempting pollutants that are subject to regulation under the Act through state implementation plans ("SIPs") (Memo at 15). On this point, the Petition acknowledged EPA's view that it has adopted a similar approach under the NSR program for the regulation of ammonia as a PM2.5 precursor, but the Petition contends that EPA was required to follow the model in that instance of adopting the position in the PSD Interpretive memo through a notice and comment rulemaking process; (2) Establishing Regional Office responsibilities with regard to future SIP submittals (Memo at 3 n.1); (3) determining how pollutants will become subject to PSD permitting in the future on enactment of new congressionally-mandated emission limits (Memo at 6 n.5); (4) imposing requirements that address when pollutants for which EPA has made a regulatory endangerment determination must be treated as PSD pollutants (*Id*. at 14); and (5) defining when and how import restrictions will trigger PSD for a pollutant. The Petition asserts the breadth of issues addressed in the memo (regarding what the Petitioner contend are numerous and disparate regulatory programs) rebuts the view that the PSD Interpretive Memo is an interpretive rule.

**Response:**

EPA does not agree that these portions of the memorandum established new legal rights, restrictions, or obligations under the PSD program. The memorandum does not require any additional emissions limitations or impose any additional criteria that a permit applicant must satisfy to obtain a permit. Likewise, the memorandum did not eliminate any permit terms or conditions that had previously been required by EPA. The memorandum preserved the status quo regarding the criteria for obtaining a PSD permit and the required terms and conditions of any permit.

The five examples of new matters addressed in the memo are each matters on which EPA explains and clarifies existing rights, restrictions, or obligations under the PSD program. These portions of the memo do not add requirements or limitations, but rather explain and clarify how EPA intends to apply existing requirements in the face of the uncertainty created by the EAB's decision in the Deseret case and related actions. The Agency's discussion of the significance of State Implementation Plan provisions that require controls on a pollutant not regulated outside the state follows an interpretation previously established by EPA in a prior rulemaking regarding precursors to PM2.5. The fact that EPA initially established this interpretation through a notice and comment rulemaking process did not necessitate that EPA employ the same process to apply this established approach to a comparable situation. Furthermore, the additional reasoning for this position supplied in the PSD Interpretation did not itself establish a new right, restriction, or obligation. The footnote on page 3 of the memorandum addressing EPA Regional office responsibilities with regard to SIP submittals merely explains how the Region's should handle this existing responsibility to review SIP submissions after the EAB's determination that EPA had not previously established the interpretation later adopted in the PSD Interpretive Memorandum. Another explanatory element is the discussion of the EPA's view that existing statutory instructions for EPA to promulgate emission limitations of various types do not trigger the PSD requirements until EPA promulgates the required limitations. This portion of the memo clarifies EPA's view of what the statute and regulations mean with respect to when a pollutant becomes subject regulation under such requirements. Likewise, the memo's discussion of the significance of an endangerment finding that is not accompanied by direct regulatory requirements is a variation on this same question regarding the particular stage in the regulatory process when a pollutant becomes "subject to regulation." This part of the memo does not create a limitation that is not already inherent in one accepted meaning of the term "regulation" used in the existing statute and regulations. Since the definition of "regulated NSR pollutant" in the PSD regulations expressly incorporates the pollutants covered by the production and import restrictions under Title VI of the CAA, the discussion of these import restrictions in the memorandum does not add new rights, obligations, or limitations on the application of the PSD program to these pollutants. At most, this portion of the memo clarifies and explains the time at which the PSD requirements are invoked by the application of these requirements to particular pollutants. Moreover, each of these issues pertains to one regulatory program – the PSD permitting. Each of these topics is an element or variation of the same basic question regarding the applicability of the phrase "subject regulation" to particular pollutants based on the EPA's implementation of other programs under the CAA.

## *2.3. Relevance of Related Public Participation Opportunities*

**Comment:**

The Petition for Reconsideration argues that public participation in the specific adjudicatory proceeding regarding the Deseret plant or public participation in EPA's advanced notice of proposed rulemaking ("ANPRM") on regulation of GHGs under the CAA is legally insufficient to cure the procedural failures of the PSD Interpretive Memo. The Petition argues that the EAB case not an adequate substitute for notice and comment on a rule of nationwide scope because it addressed only a single facility, and the adjudicatory process associated with an

individual permit proceeding cannot substitute for notice and comment on a legislative rule of broad national significance. The Petition argues that the ANPRM never indicated EPA's intention to take imminent final action establishing new parameters for the PSD regulatory program, nor specific intent to reinterpret agency policy articulated in the 1978 preamble.

**Response:**

EPA has never asserted that the opportunities for public input provided in the EAB appeal and the ANPRM were sufficient to cure any perceived procedural deficiency in the manner EPA issued the Memo. Since EPA maintains that the PSD Interpretive Memo is an interpretation that the Agency was authorized to issue without a notice and comment rulemaking process, there was no procedural deficiency that needed to cured by referencing these particular opportunities for the public to provide EPA with their views on this issue. Since EPA recognized that there was significant public interest in the issue addressed in the PSD Interpretive Memo, EPA's purpose in referencing the previous public comment opportunities was simply to illustrate that, even though public comment was not required by law, EPA had nevertheless considered the views of several interested stakeholders and all information available to EPA at that time. Even in circumstances where quick action by EPA is warranted and a formal public comment opportunity is not mandatory, EPA recognizes that the Agency is accountable to the citizens of the United States and should be responsive to public concerns. Furthermore, EPA understands that the best decisions are those that are well-informed and reflect an evaluation of all relevant considerations. EPA thus referenced these earlier opportunities for public input to show that the Agency's action was responsive to public concerns and reflected consideration of all information available to the Agency at that time.

## *2.4. Interpretation of Statute and Revisions Thereto*

**Comment:**

The Petition for Reconsideration argues that PSD Interpretive Memo is not entitled to deference because the regulation simply parrots the language of the statute. The Petition quotes the following statement from a Supreme Court decision:

> [T]he existence of a parroting regulation does not change the fact that the question here is . . . the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."

*Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

**Response:**

EPA does not contend that it can interpret the PSD regulations in a manner that is inconsistent with the requirements of the CAA. The PSD Interpretive Memorandum explains in

detail why the Agency's interpretation of the language in the regulation is not precluded by the language in the CAA that the regulation is modeled upon. EPA need not address the question of whether its interpretation of the regulation is entitled judicial deference to reach the conclusion that its interpretation of the regulation is permissible under the CAA.

**Comment:**

One state commenter (0057) asserts that a tenet of administrative law is that, if an agency seeks to change a previous, formal interpretation of the meaning and/or the implementation of a rule or statute, it must go through a rulemaking to do so.

The Petition for Reconsideration contends that the D.C. Circuit has held that "when an agency's purported interpretation of a statute or regulation constitutes a fundamental modification of its previous interpretation, the agency cannot switch its position without following appropriate procedures." Petition at 5 (citing *Paralyzed Veterans of Am. v. D.C. Arena L.P.,* 117 F.3d 579, 586 (D.C. Cir. 1997) (internal quotations omitted). According to the Petition, "[o]nce an agency provides an interpretation of a statute – as EPA did here, in 1978 – 'it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.'" Petition at 5.

**Response:**

These comments overextend the reach of this line of case law. The *Paralyzed Veterans* line of cases holds only that regulatory agencies cannot change a long-standing, definitive, and authoritative interpretation of its regulations without going through a notice and comment process. *See, Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Alaska Professional Hunters Ass'n Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999). To EPA's knowledge, no court has required a rulemaking procedure when the Agency seeks to issue or change its interpretation of a statute. Nevertheless, EPA has completed this notice and comment proceeding before deciding to adopt the revised interpretation of the CAA described in this final action.

## *2.5. Revisions to Interpretation in PSD Interpretive Memo*

**Comment:**

One state commenter (0057) asserts that a tenet of administrative law is that, if an agency seeks to change a previous, formal interpretation of the meaning and/or the implementation of a rule or statute, it must go through a rulemaking to do so. Based on this principle, the commenter argues that EPA cannot merely "re-interpret" its previous interpretation; it must undergo a rulemaking process and formally change the federal PSD rules to legally effect the change.

**Response:**

The commenter does not specify any specific change in interpretation that the commenter is concerned about. Since EPA's interpretation of the PSD program regulations is unchanged in most respects by this action, it is not clear that the particular refinement to that interpretation that EPA is making in this action would invoke the doctrine described by the commenter. Even if this refinement is viewed as a fundamental change, EPA has completed the revision to the interpretation in the PSD Interpretive Memo after a notice and comment process. Furthermore, since EPA initiated a process of reconsidering and soliciting comment on the PSD Interpretive Memo within three months of its issuance, the memorandum had not yet become particularly well-established or long-standing. *See Metwest v. Secretary of Labor*, 560 F.3d 506, 511 n.4 (D.C. Cir. 2009). Thus, the case law referenced by the commenter does not preclude the action EPA has taken here to refine its interpretation of the regulations.

As noted above, while this doctrine has been applied to some types of changes in the interpretation of a rule, EPA does not agree that any court has established a principle of administrative law that requires a notice and comment process before an agency can change its interpretations of a statute.

# Chapter 3. Actual Control of Emissions

## *3.1. Overview of Comments on Actual Control Interpretation*

**Comment:**

Forty industry and commerce commenters (0050, 0051, 0053, 0055, 0056, 0059, 0060, 0061, 0063, 0065, 0066, 0067, 0068, 0070, 0071, 0073, 0074, 0076, 0080, 0081, 0083, 0085, 0086, 0089, 0090, 0092, 0093, 0096, 0097, 0098, 0103, 0104, 0105, 0106/0107, 0108, 0109, 0110, 0112, 0115, 0116, 0118), one legal commenter (0084), and six state/local agency associations (0054, 0058, 0062, 0077, 0091, 0109) support EPA's position that the "actual control interpretation" established in the PSD Interpretive Memo is the proper interpretation of the phrase "subject to regulation."

Four industry and commerce commenters (0051, 0053, 0068, 0074) state that EPA must retain the "actual control" interpretation set forth in the PSD Interpretive Memo because the "actual control" interpretation is supported by the statutory text, is consistent with past EPA practice, and is sound public policy. These commenters said that alternatives to the "actual control" interpretations are not legally supportable, are contrary to past practice, and/or are contrary to public policy considerations.

The industry commenter (0118) reiterates the arguments made in the PSD Interpretive Memo and proposed PSD Interpretation notice, and states that the arguments strongly support the "actual control" interpretation, and asserts that the "actual control" interpretation is consistent with the EPA's longstanding interpretation of the phrase "subject to regulation" and is supported by legal and compelling policy reasons.

One of the industry commenters (0109) believes that this interpretation is consistent with EPA's longstanding practice, is reasonable and logical, and is supported by strong policy and legal rationales, while the other alternative interpretations examined by EPA are not required by law, are neither reasonable nor consonant with sound public policy, and could implicate retroactive liability concerns.

Industry commenter (0105) supports EPA's preferred interpretation of "subject to regulation" based on an EPA regulation requiring "actual control" of emissions of a pollutant, and agrees this interpretation is supported by EPA's past policy and practice and is in keeping with the language and structure of the CAA.

Three industry commenters (0067, 0073, 0083) similarly state that this interpretation is consistent with EPA's longstanding practice, is consistent with the language and structure of the CAA, and is supported by important policy concerns. These commenters (0067, 0073, 0083) believe that the alternative interpretations are fundamentally flawed for the reasons articulated by EPA in the proposed PSD Interpretation.

Under the circumstance that a lack of Congressional action essentially forces EPA to move forward with regulation of $CO_2$ under the CAA, an industry commenter (0097) supports and endorses the EPA's previous interpretation which is the "actual control interpretation" under a final national rule, agreeing that this interpretation best reflects past policy and practice, is in keeping the structure and language of the statute and regulations, best reflects Congressional intent in the CAA and best allows for the necessary coordination of approaches to controlling emissions of newly identified pollutants.

Ten of the industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) believe that this interpretation is consistent with EPA's longstanding practice, is reasonable and logical, and is supported by strong policy and legal rationales, while the other alternative interpretations examined by EPA, or put forward by other parties, are not required by law, are neither reasonable nor consonant with sound public policy, and could implicate retroactive liability concerns.

Three commenters (0092, 0093, 0098) representing several groups of companies (industry) and several other industry commenters recommend that EPA reaffirm the PSD Interpretive Memo's position (and also EPA's long-standing interpretation) that an air pollutant becomes "subject to regulation" at the point that regulations requiring actual controls of emissions are in place. These commenters believe the "actual control" interpretation is the only reasonable and rationale approach, and that other interpretations of "subject to regulation" would result in an unworkable and unreasonable PSD program.

One industry group commenter (0070) expresses support for the "actual control interpretation" because it best reflects EPA's past policy and practice and is keeping with the structure and language of the CAA and its regulations.

One industry group commenter (0071) states that the PSD interpretive memo is a logical and reasonable interpretation of the PSD regulations and the CAA. The approach in the Interpretive Memo is a reasonable one, and the other approaches proposed would be unreasonable.

For all the reasons stated in the PSD Interpretive Memorandum, nine other industry commenters (0065, 0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) fully agree with EPA's determination, as proposed to be reaffirmed in the proposed PSD Interpretation, that the "actual control" interpretation is, and should continue to be, the controlling interpretation on this issue.

Four commenters (0087, 0095, 0099, 0101), representing numerous environmental organizations, are opposed to EPA's "actual control" approach.

Although one environmental commenter (0087) applauds EPA's work in finalizing the Mandatory Reporting of Greenhouse Gas Rule; the effort and care EPA has taken in responding to the Supreme Court's mandate in *Massachusetts v. EPA*; and the Proposed and Final Endangerment and Contribution Findings and proposed CAFE standards for mobile sources; they express disappointment that, in the proposal, EPA has reaffirmed what the commenter

termed an unlawful decision made by the previous administration. The commenter (0087) then states that the positions taken by EPA in the Proposed Reconsideration are in contrast to the mandates of the CAA.

One environmental organization commenter (0095) asserts that EPA's Reconsideration of the PSD Interpretive Memo suffers from the same defects of the original Memo, and introduces new areas of concern. According to the commenter, the reconsideration proposal simply restates the policy preferences of the original Memo, while offering no legal support for EPA's decision to ignore the plain language of the CAA, and instead, it reiterates the agency's position that "past policy and practice" and a variety of administrative preferences somehow support the idea that Congress meant the term "regulation" in section 165 of the CAA to mean "actual control of emissions," even though Congress distinguished between "control" of emissions and "regulation" throughout the CAA.

**Response:**

EPA has made a final decision to continue applying (with one limited refinement) the Agency's existing interpretation of 40 CFR 52.21(b)(50) that is articulated in the PSD Interpretive Memo. For reasons explained further below, EPA has concluded that the "actual control interpretation" is a permissible interpretation of the CAA and is the most appropriate interpretation to apply given the policy implications. EPA has not been persuaded that the Agency is compelled by the CAA, the terms of EPA regulations, or prior EPA action to apply any of the four alternatives to its preferred interpretation described in the October 7, 2009 notice – monitoring and reporting requirement, EPA-approved SIP, endangerment finding, or CAA section 209 waiver. EPA has likewise not been persuaded that all of the alternative interpretations are precluded by the CAA. However, since Congress has not precisely spoken to this issue, EPA has the discretion to choose among the range of permissible interpretations of the statutory language. Since EPA's interpretation of the regulations is not precluded by the statutory language, we are electing to maintain that interpretation on policy grounds. We have concluded that the "actual control" interpretation is not only consistent with decades of past practice, but provides the most reasonable and workable approach to developing an appropriate regulatory scheme to address newly identified pollutants of concern. Thus, except as to the one element that EPA proposed to modify, EPA is reaffirming the PSD Interpretive Memo and its establishment of the actual control interpretation as EPA's definitive interpretation of the phrase "subject to regulation" under the PSD provisions in the CAA and EPA regulations.

The actual control interpretation is supported by the language and structure of the regulations and is consistent with past practice in the PSD program and prior EPA statements regarding pollutants subject to the PSD program. The CAA is most effectively implemented by making PSD emissions limitations applicable to pollutants after a considered judgment by EPA (or Congress) that particular pollutants should be subject to control or limitation. The actual control interpretation promotes the orderly administration of the permitting program by allowing the Agency to first assess whether there is a justification for controlling emissions of a particular pollutant under relevant criteria in the Act before applying the requirements of the PSD permitting program to a pollutant.

EPA responds to more specific points raised by these commenters elsewhere in this document.

## *3.2. Interpretation of the Clean Air Act*

**Comment:**

One commenter (0110) states that they generally agree with the conclusions EPA draws in the Reconsideration and those originally made by former EPA Administrator Stephen Johnson in his December 18, 2008 memorandum interpreting the applicability of CAA regulations that determine when pollutants become covered by the PSD permit program (PSD Interpretive Memorandum). Both documents appropriately interpret the phrase "subject to regulation" in sections 165(a)(4) and 169 of the CAA, and in the definition of "regulated [New Source Review (NSR)] pollutant" in 40 CFR 52.21(b)(50).

Commenter (0107) stated that, in *Massachusetts v. EPA,* the Supreme Court ruled that the definition of "pollutant" under the CAA is extremely broad and encompasses many substances that may or may not be necessary for EPA to regulate unless the Administrator determines that they endanger the public or the environment. Commenter (0107) further stated that, unless a pollutant has been subject to "actual controls," there would be no regulatory basis for determining that emissions of the pollutant should be reduced under another regulatory program such as PSD.

Another industry commenter (0080) supports the legal and policy rationales proffered by EPA in the proposed PSD Interpretation, but added that the legal rationale should focus more broadly on the meaning of the phrase "subject to regulation" within the PSD statutory program and the CAA as a whole. Referring to *Crandon v. U.S.,* 494 U.S. 152, 158 (1990), citing *K Mart Corp. v. Carrier, Inc.,* 486 U.S. 281, 291 (1988); *Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006); and *Holloway v. U.S.,* 526 U.S. 1, 6 (1999), this commenter (0080) indicated that a basic maxim of statutory construction is that one must look not only at the particular statutory language, but also consider the purpose and context of the whole statute. The commenter (0080) also noted that the purpose of the CAA is to "protect and enhance the quality of the Nation's air resources so as to promote public health and welfare and the productive capacity of its population." CAA section 101(b)(1).

The commenter (0080) asserts that interpreting the phrase "subject to regulation" as "subject to regulation that restricts emissions" fits within the statute because EPA is only authorized to restrict emissions of air pollutant where the EPA has made an endangerment finding (or where Congress has implicitly done so, as in the case of Title VI).

This industry commenter (0080) states that *Massachusetts v. EPA* confirmed the basic structure of the CAA under which first there is an EPA endangerment finding and then there is regulation. The commenter (0080) added that under *Massachusetts*, EPA may not regulate GHGs simply because they are "air pollutants" under the Act; it must first find a danger to public health or welfare. The commenter (0080) indicates that the *Massachusetts v. EPA* Petitioners

(which included some of the Petitioners in this reconsideration) specifically recognized the requirement for an endangerment finding under section 202, but now the Petitioners seek to convince EPA that EPA should engage in GHG regulation even without an endangerment finding. Considering the context of the PSD program and the CAA as a whole, the commenter (0080) finds absurd the Petitioners' contention that various actions taken by EPA, even before EPA determined that $CO_2$ endangers health or welfare and even before EPA decided to require that any emitter should be required to reduce emissions, should be interpreted as triggering $CO_2$ BACT for a potentially very large number $CO_2$ emitters.

One industry group commenter (0071) states that the placement of the phrase "subject to regulation" within the statute requiring BACT limits strongly suggest that the phrase refers to presently controlled (and thus "regulated") pollutants. *See* CAA §§165(a)(4), 169(3), 42 U.S.C. 7475(4), 7479(3). The commenter states that the approach that EPA has taken to implement the statutory PSD program in the PSD Interpretive Memo is well within the scope of EPA's authority to implement the PSD program (cited *Alabama Power Co. v. Costle*, 606F. 2nd 1068, 1077 (D.C. Cir 1979) (describing the "flexibility" and "latitude" EPA has in fashioning PSD regulations); and *Envtl. Def. v. Duke Energy Corp*., 127 S. Ct. 1423, 1433-1434 (2007) (legislative history does not suggest Congress "had details of regulatory implementation in mind when it imposed PSD requirements on modified sources").

A commenter (0093) points out that the term "subject to regulation" should not be applied more broadly than where referenced in the CAA at 42 U.S.C. §7475(a)(4) which applies to the determination of BACT for sources that have otherwise triggered PSD applicability. The commenter refers EPA to the comments of the American Petroleum Institute (API), the Texas Industry Project (TIP) and the National Environmental Development Association Clean Air Project (NEDA/CAP) for further discussion of the inferiority and unreasonableness of alternate potential interpretations of "subject to regulation."

One commenter (0086), representing several groups of companies (industry), states that the "actual control" interpretation is the most plausible reading to "subject to regulation" and gave counter-arguments to some other textual constructions.

One industry commenter (0056) states that the petitioners misread the decision by the U.S. EAB in the matter of the PSD permit appeal for the Deseret Power Plant, arguing that EPA lacked the authority to interpret the phrase "subject to regulation" in Subpart C of Title I of the CAA. Petitioners demanded that EPA reconsider and retract the PSD Interpretive Memo because it was inconsistent with the plain language of the CAA and it had not been issued consistent with public participation procedures in the law. This commenter states that petitioners also argue that when EPA's EAB reviewed the same issue in the permit proceeding for a construction of a new EGU at the Deseret power plant in Utah, EAB found that the EPA did not have discretion to make the "actual control" interpretation. The permit was remanded back to the permitting authority in Region 8 because EAB found that EPA improperly cited an interpretation for historical precedent which did not support a finding that EPA had historically interpreted the phrase as a pollutant subject to "actual control."

Ten industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) note that the only judicial decisions addressing this issue have adopted or affirmed EPA's actual control interpretation and have rejected other interpretations advanced by litigants that challenged application of that interpretation. *See*, e.g., *Longleaf Energy Associates v. Friends of the Chattahoochee,* 681 S.E.2d 203 (Ga. Ct. App. 2009) (reversing a lower court's decision to the contrary), *cert. denied*, Case No. S09C1879 (Ga. S. Ct., Sept. 28, 2009); *Appalachian Voices v. State Air Pollution Control Bd.*, Case No.: CL08-3530 (Cir. Ct. City of Richmond, Aug. 10, 2009), *appeal pending, Appalachian Voices v. State Air Pollution Control Bd.,* No. 2199-09-2 (Va. Ct. App., filed Oct. 1, 2009).

**Response:**

EPA agrees that the interpretation of the CAA described in the PSD Interpretive Memorandum is a permissible reading of the Act, considering the context of the PSD provisions within the Act as whole.

The PSD Interpretive Memo reasonably applies a common meaning of the term "regulation" to support a permissible interpretation that the phrase "pollutant subject to regulation" means a pollutant subject to a provision in the CAA or a regulation issued by EPA under the Act that requires actual control of emissions of that pollutant. Public comments have not demonstrated the dictionary meanings of the term "regulation" described in the Memo are no longer accepted meanings of this term. In light of the different meanings of the term "regulation," EPA has not been persuaded by public comments that the CAA plainly and unambiguously requires that EPA apply any of the other interpretations described in the October 7, 2009 notice.

Moreover, the Memo carefully explains how the actual control interpretation is consistent with the overall context of the CAA in which sections 165(a)(4) and 169(3) are found. After consideration of public comment, EPA continues to find this discussion persuasive. The "subject to regulation" language appears in the BACT provisions of the Act, which themselves require actual controls on emissions. The BACT provisions reference the New Source Performance Standards (NSPS) and other control requirements under the Act, which establish a floor for the BACT requirement. *See* 42 U.S.C. §7479(3). Other provisions in the CAA that authorize EPA to establish emissions limitations or controls on emissions provide criteria for the exercise of EPA's judgment to determine which pollutants or source categories to regulate. Thus, it follows that Congress expected that pollutants would only be regulated for purposes of the PSD program after: (1) the EPA promulgated regulations requiring control of a particular pollutants on the basis of considered judgment, taking into account the applicable criteria in the CAA, or (2) EPA promulgates regulations on the basis of Congressional mandate that EPA establish controls on emissions of a particular pollutant, or (3) Congress itself directly imposes actual controls on emissions of a particular pollutant. In addition, considering other sections in the Act that require reasoned decision-making and authorize the collection of emissions data prior to establishing controls on emissions, it is also consistent with the Congressional design to require BACT limitations for pollutants after a period of data collection and study that leads to a reasoned decision to establish control requirements. Public commenters did not demonstrate that it was

erroneous for EPA to interpret the PSD provisions in this manner, based on the context of the Act.

### 3.2.1. Arguments that Plain Language of Act Precludes Actual Control Interpretation

**Comment:**

The commenter (0087) states the proposed Reconsideration, like the original PSD Interpretive Memo, is devoid of legal support as it ignores the intent of Congress as evidenced by the plain language of the CAA.

One environment organization commenter (0095) claims that EPA's position is inconsistent with the plain language of the CAA. EPA proposes to adopt an interpretation of a regulation that parrots the CAA phrase, "pollutant subject to regulation under this Act." The commenter states that interpretation would "exclude pollutants for which EPA regulations only require monitoring or reporting but . . . include each pollutant subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant." The commenter (0095) continues that section 165(a)(4) of the CAA requires BACT "for each pollutant subject to regulation under this chapter emitted from . . . such facility." 42 U.S.C. §7475(a)(4). $CO_2$ is regulated under "this chapter" because section 821 of the CAA Amendments of 1990 required EPA to "promulgate regulations" requiring major sources, including coal-fired power plants, to monitor $CO_2$ emissions and report their monitoring data to EPA. In 1993, EPA promulgated these regulations, which require sources to monitor $CO_2$ emissions, 40 CFR 75.1(b), 75.10(a)(3), prepare and maintain monitoring plans, id. §75.53, maintain records, id. §75.57, and report monitoring data to EPA, id. §75.60-64.

The commenter (0101) states that attempting to distinguish the overwhelming evidence showing that $CO_2$ is now regulated under the CAA, EPA concludes that "subject to regulation under the Act" is best interpreted as those pollutants subject to a nationwide standard, binding in all states, that EPA promulgates on the basis of its CAA rulemaking authority." *See* 74 FR at 51543. The commenter (0101) opines that with each iteration of its position, EPA moves further away from the clear import of the CAA's language and structure. Neither the plain meaning of section 165(a)(4) nor the intent and purpose of the CAA permit such redefinition. This commenter believes that EPA should correct – not reaffirm – Administrator Johnson's erroneous interpretation. In accordance with the plain language of the statute, the PSD program becomes applicable to GHGs and other pollutants whenever they become "subject to regulation." The commenter (0101) opines that this already has occurred as a result of *Massachusetts v. EPA*. In the case of the PSD program, the statute mandates that permitting be required for any pollutant that is subject to regulation under this Act." CAA §165(a)(4), 42 U.S.C. §7475(a)(4); *see also* 40 CFR 52.21(b)(50)(iv) (a "regulated NSR pollutant" is "[a]ny pollutant that otherwise is subject to regulation under the Act"). Under *Massachusetts v. EPA*, GHGs are "subject to regulation" under the CAA in any normal sense of the phrase. Indeed, given that EPA has already "regulated" GHGs in a number of ways, the statute plainly requires that permitting for GHGs commence immediately. EPA has already regulated GHG in the various ways outlined in

the Petition: through a regulation to monitor or report emissions; through a regulation that approves the inclusion of regulatory requirements in a SIP; through a finding that pollutants endanger public health or welfare; or through a regulation that grants a section 209 waiver. By any of these measures, GHGs already are "subject to regulation" under the CAA, and the time to begin issuing PSD permits for these pollutants already has passed.

According to several other commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109), those opposing the "actual control" interpretation incorrectly assert that this interpretation is precluded by the CAA. To the contrary, as the EAB stated in *Deseret*, this interpretation is a reasonable construction of an ambiguous phrase, and no contrary interpretation is in any way legally compelled. *See Deseret* at 29. This is clearly an area where EPA has discretion to interpret the statute in a reasonable way, consistent with well-established historical practice, to make PSD implementation manageable and effective. Rejection of the "actual control" interpretation would cause the PSD program to apply in a way that frustrates the objectives and purposes of the CAA.

**Response:**

EPA has concluded that the plain language of the CAA does not preclude EPA from applying the actual control interpretation. EPA finds the EAB's reasoning of in the Deseret opinion to be the most persuasive and adopts that reasoning here. The EAB concluded that a statutory plain meaning cannot be ascertained from looking solely at the word "regulation" to determine whether Congress, in enacting the statute in 1977, intended "subject to regulation" to apply narrowly to mean a provision that prescribes actual control of emissions of the pollutant, or more broadly to embrace requirements for monitoring of pollutant emissions, among other things. It does not appear that, when it enacted CAA sections 165 and 169 in 1977, Congress considered this precise issue, or more significantly, drafted language sufficiently specific to address it. The phrase "subject to regulation under this Act" is not as clear and unequivocal as commenters argue.

The use of similar, but not identical, language in section 821 of the 1990 Public Law, which requires the Agency to promulgate "regulations," does not constrain the Agency's ability to interpret sections 165 and 169. Commenters argue that the only supportable reading of sections 165 and 169 mandates that PSD regulatory authority extends to any pollutant subject to "a" or "any" regulation promulgated in the CFR because that is the meaning of section 821's direction to promulgate regulations. The statutory language does not compel this meaning.

The argument that sections 165 and 169 have only one proper interpretation, ignores the fact that Section 821 uses different terminology, "regulations," from that used in the PSD provisions of sections 165 and 169, "subject to regulation." The difference in terminology is potentially significant. When read in the context of the phrases in which they are used, possible alternative meanings of "regulation" and "regulations" become apparent. In the phrase "the Administrator * * * shall promulgate regulations * * * to require [sources to monitor CO[2]]" in section 821, the term "regulations" is understood to be the end product of the administrative rule making process. Thus, Congress' direction that EPA promulgate "regulations" found at various places in the CAA and in section 821 is most naturally read to mean that Congress directed EPA

to use its legislative rule making authority to implement the statutory requirements, filling in necessary specificity and detail. Section 112 of the Act uses the term "subject to regulations," referring to "regulations" in the plural. CAA sections 112(r)(3) and 112(r)(7)(F). This evidences that Congress may not have meant "subject to regulation" (singular) to have the same meaning.

The Supreme Court has observed in other contexts that the same or similar words may be construed differently "not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Envtl. Def. v. Duke Energy Corp*., 549 U.S. 561, slip op. at 9 (2007) (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). In reviewing the meaning of the phrase "subject to regulation under this Act" we do not confine ourselves "to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132 (2000). Rather, "[t]he meaning -- or ambiguity -- of certain words or phrases may only become evident when placed in context * * *. It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" Id. at 132-33.

We find no evidence that Congress's addition of section 821 in 1990 was an attempt to interpret or constrain the Agency's interpretation of the broader phrase "subject to regulation" as used in sections 165 and 169. *See* 136 Cong. Rec. H2915, 2934 (1990) (statement of Rep. Moorhead), reprinted in S. Comm. on Env't and Public Works, Legislative History of Clean Air Act Amendments of 1990, at 2986-87 (1993); 136 Cong. Rec. H2511, 2578 (1990) (statement of Rep. Cooper), reprinted in S. Comm. on Env't and Public Works, Legislative History of Clean Air Act Amendments of 1990, at 2652-53 (1993); 136 Cong. Rec. H2511, 2561-62 (1990) (statement of Rep. Moorhead), reprinted in S. Comm. on Env't and Public Works, Legislative History of Clean Air Act Amendments of 1990, at 2612-14 (1993). Section 821 bears no facial relationship to the PSD provisions of sections 165 and 169. Congress's subsequent use of the word "regulations" in a section of the 1990 Public Law that bears no explicit relationship with the earlier-enacted sections would not appear sufficient, on its own, to implicitly constrain EPA's authority to interpret the PSD provisions of section 165 and 169. This is particularly true where, as here, the two sections were enacted 13 years apart, bear no obvious relationship, and are not even placed in close proximity. Moreover, the Agency did determine, in 1978 that the phrase "subject to regulation under this Act" used in the PSD provisions requires interpretation to properly implement the PSD program, and Congress did not evidence an intent in section 821 to alter the Agency's determination. Normally, more express terminology would be expected if Congress intended to alter an established meaning.

Moreover, since section 821 was enacted 13 years after sections 165 and 169, Congress' use of the term "regulations" in enacting section 821 in 1990 ordinarily would not be looked to as informative of what Congress intended when much earlier in 1977 it enacted the BACT requirement. *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 571 (1979) (Burger, C.J., concurring) (understanding of draftsman of amendment in 1970 "would have little, if any, bearing" on "construction of definitions enacted in 1933 and 1934"); *United States v. Price*, 361 U.S. 304,332(1960) ("The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.")

### 3.2.2. Meaning of the Term "regulation"

**Comment:**

One industry group commenter (0071) opines that an agency's interpretation of a statute should focus first on the ordinary dictionary meaning of the terms used (see, e.g., *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 225-28 (1994). This commenter states that monitoring emissions does not fit within any of the types of activities understood to constitute "regulation" of those emissions in the ordinary meaning of that term, and nothing in the phrase "subject to regulation" compels a contrary reading to the "actual control" interpretation.

A state/local agency association (0058) who agrees with EPA's position notes that the PSD Interpretive Memo relies in part on the Black's Law Dictionary definition of "regulation." The commenter (0058) reconciles that while EPA's $CO_2$ monitoring rule is a "regulation" in the second sense, the pollutant $CO_2$ is not "subject to" regulation because EPA's regulation does not in any way limit $CO_2$; instead, the source operator is the one subject to regulation because he is required to monitor $CO_2$ emissions. The commenter notes that while other EPA regulations may also take the form of applying to the source operator rather than to the pollutant, the difference is that in those cases the pollutant itself is in some way controlled, and thus "subject to" the regulation.

**Response:**

EPA agrees that its interpretation of the CAA should be informed by ordinary and accepted dictionary meanings of the applicable terms. As discussed in the PSD Interpretive Memo, the term "regulation" can be used to describe a rule contained in a legal code, such as the CFR, or the act or process of controlling or restricting an activity. The primary meaning of the term "regulation" in Black's Law Dictionary (8th Ed.) is "the act or process of controlling by rule or restriction." However, an alternative meaning in this same dictionary defines the term as "a rule or order, having legal force, usu. issued by an administrative agency or local government." The primary meaning in Webster's dictionary for the term "regulation" is "the act of regulating: the state of being regulated." Merriam-Webster's Collegiate Dictionary 983 (10th ed. 2001). Webster's secondary meaning is "an authoritative rule dealing with details of procedure" or "a rule or order issued by an executive authority or regulatory agency of a government and having the force of law." Webster's also defines the term "regulate" and the inflected forms "regulated" and "regulating" (both of which are used in Webster's definition of "regulation") as meaning "to govern or direct according to rule" or to "to bring under the control of law or constituted authority." *Id.* EPA thus agrees that monitoring of emissions does not necessarily fit within one ordinary meaning of the term regulation.

**Comment:**

The Petition for Reconsideration contends that, in the PSD interpretive Memo, EPA is interpreting the terms "regulation", "regulate," and "regulated" to mean anything the Administrator wants them to mean, wherever they might appear in any environmental statute or EPA regulation.

**Response:**

To the contrary, EPA has applied common and accepted meanings of these terms (based on several dictionaries), and EPA has carefully considered the context in which these terms are used in the CAA and EPA regulations. EPA does not purport to have the authority to define words to mean whatever EPA chooses.

### 3.2.3. Ambiguity of Statutory Language and EPA Discretion

One environmental group commenter (0101) states that EPA's redefinition of the phrase "subject to regulation" is unsupported and contrary to the CAA's purpose and intent. Confronted with a statute that requires it to take action more expeditiously than it would otherwise prefer, the commenter claims that EPA has found a regulatory ambiguity where none exists, and in the process has attempted to avail itself of a degree of discretion that the statute does not confer—and in fact precludes. The commenter (0101) states that the phrase "subject to regulation" is not ambiguous and it cannot be redefined to enlarge EPA's authority beyond the scope of the statute. EPA's interpretation—that a pollutant is not "subject to regulation" until EPA decides to subject it to nationwide, binding, numerical emissions control limits — effectively would allow the agency complete and exclusive control over whether and how GHGs are to be regulated under the Act. The commenter (0101) continues that although EPA might prefer an interpretation that would allow it to proceed only if and when it sees fit, the statute does not confer any such wide-ranging authority.

The commenter (0101) further provides definitions from multiple dictionaries in support of their interpretation of "subject to" and notes that of four definitions, only one even partially conveys immediate and actual control. The commenter (0101) continues that EPA has sought to avoid this conclusion by claiming that the term "regulation" is ambiguous and that the claim is incorrect. In the PSD Interpretive Memo, former EPA Administrator Johnson turned to dictionary definitions of "regulation" to support the claim of ambiguity, including "a rule contained in a legal code," "a rule or order, having legal force, [usually] issued by an administrative agency or local government," and "to bring under the control of law or constituted authority". The commenter contends that none of these definitions suggests that the term "regulation" is ambiguous or contradictory.

An industry commenter (0059) states that the EPA has argued successfully before EPA's EAB in the Deseret Permit Proceeding, that §§165(a)(4) and 169 of the PSD provisions in Part C of the CAA that refers to when a pollutant becomes "subject to regulation" are amenable to many interpretations. They assert that this is clearly the case where a Court reviewing the EPA's interpretation should find under the Supreme Court's decision in *Chevron USA v. Natural Resource Defense Council* that Congress did not speak on the issue that it will not disturb such an interpretation unless it finds that it is unreasonable. They opine that it is reasonable for EPA to interpret "subject to regulation" to mean when GHGs become subject to "actual control."

An industry commenter (0107) states that the Environmental Appeals Board (EAB) in the Deseret Permit Proceeding concluded that the phrase "subject to regulation" is ambiguous and that EPA's construing the term to mean when GHGs became subject to actual control was both "reasonable" and "permissible," and that EAB remanded the interpretation back to Region 8 (which had justified the interpretation based on historical EPA interpretations that EAB found were not supportive of that position). The commenter asserts, therefore, that under *Chevron*, the question before EPA in this action is whether it is reasonable to construct the statute to trigger PSD for GHGs when a requirement requires "actual control" of GHGs. The commenter (0107) believes that the "actual control" interpretation of the phrase "subject to regulation" in sections 165(a) (4) and 169 is consistent with the CAA and reasonable.

Several other commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) said that starting from the premise that the statutory phrase is ambiguous, a finding supported by the EAB in its *Deseret* decision, EPA has discretion to interpret the phrase in a manner that is reasonable and consistent with the Act and its implementation of the PSD program. *Deseret* at 29; *see also Chevron v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984). According to the EAB's *Deseret* decision, EPA's interpretation is "reasonable" and "'permissible' in light of the [statutory] ambiguity," and no contrary interpretation is compelled by the statute. *Deseret* at 29.

**Response:**

The presence of alternative meanings of the terms in the applicable phrase from the CAA illustrates ambiguity rather than establishing a plain meaning. Because the term "regulation" is susceptible to more than one meaning (described above), there is ambiguity in the phrase "each pollutant subject to regulation under the Act" that is used in both sections 165(a)(4) and 169(3) of the CAA. Commenters have not demonstrated that the different meanings of the term "regulation" considered by the EPA are not in fact accepted and commonly-applied meanings of this term. In addition, the term "subject to" is also susceptible to multiple meanings. One commenter (0101) cited several meanings of the latter term that give it a conditional or potential state, but also acknowledged the following meaning of the term "subject to": "being in a position or in circumstances that place one under the power or authority of another or others." There are also additional dictionary meanings similar to this last one, which incorporate the idea of "control." Several were cited by parties in briefs to the EAB in the Deseret matter. *See* Response Brief of Permittee Deseret Power Electric Cooperative, In re: Deseret Power Electric Cooperative, PSD Appeal No. 07-03, Page 8. Since neither the term "regulation" or "subject to" has a consistent and plain meaning, the combination of both these terms in the phrase "subject to regulation under the Act" results in an ambiguous phrase.

After considering the different dictionary meanings of the term "regulation," the EAB was likewise persuaded that "a statutory plain meaning cannot be ascertained from looking solely at the word 'regulation.'" *Deseret*, Slip Op. at 28-29. EPA continues to finds the EAB's opinion to be thoughtful and well-reasoned. Thus, EPA adopts that reasoning here. Commenters have not provided any information that demonstrates any error in the EAB's analysis or illustrates a plain meaning that was overlooked by the EAB or the Administrator.

### 3.2.4. Pollutants "Subject To" Regulation Are Pollutants That EPA Has the Authority to Regulate

**Comment:**

One environmental group commenter (0101) argues that GHGs are presently subject to regulation because EPA has the authority to regulate them. The Supreme Court has determined that EPA "*has the statutory authority to regulate the emission*" of GHGs. *Massachusetts v. EPA*, 549 U.S. at 532 (emphasis added). At a minimum, then, EPA is authorized to regulate GHGs. Where such authorization exists, it must be exercised "within defined statutory limits," and all of EPA's "reasons for action or inaction must conform to the authorizing statute." Id., at 532-33. In the case of the PSD program, the statute mandates that permitting be required for any pollutant that is subject to regulation under this Act." CAA §165(a)(4), 42 U.S.C. §7475(a)(4); *see also* 40 CFR 52.21(b)(50)(iv) (a "regulated NSR pollutant" is "[a]ny pollutant that otherwise is subject to regulation under the Act"). Under *Massachusetts v. EPA*, GHGs are "subject to regulation" under the CAA in any normal sense of the phrase. The commenter (0101) further provides definitions from multiple dictionaries in support of their interpretation of "subject to" and notes that of four definitions, only one even partially conveys immediate and actual control. The commenter (0101) continues that EPA has sought to avoid this conclusion by claiming that the term "regulation" is ambiguous and that the claim is incorrect.

In contrast, one state/local agency association (0062) argues that interpretation of the phrase "subject to" regulation advocated by some goes too far – EPA has very broad authority under section 309 of the CAA to regulate pollution in whatever form it may occur if there is an imminent and substantial endangerment, and so under section 309 one could argue that all pollutants are "subject to" regulation; however, Congress could not have intended the BACT obligation to apply today to all pollutants that EPA might theoretically have reason to regulate in the future. The commenter (0062) believes that this concept is reinforced by the language of the statute that appears to use the terms "subject to regulation" and "regulated" interchangeably.

An industry group commenter (0071) states that it is necessary to make the PSD program workable and to avoid adverse consequences. One of the most important practical implications of the PSD Interpretive Memo is that it relieves facility owners and permitting authorities from having to consider a virtually limitless set of chemicals that might be emitted by a source, but that are not subject to any emission limitation or other controls under the CAA.

**Response:**

In the context of the PSD provisions of the CAA, EPA believes it would be unworkable and contrary to Congressional intent for EPA to interpret the phrase "pollutants subject to regulation under the Act" to describe any pollutant that EPA has the authority to regulate. EPA does not dispute that, when read in isolation, the statutory language is susceptible to this meaning if one applies the particular dictionary definitions of "subject to" cited by Commenter 0101. In certain contexts, this meaning of "subject to regulation" may be appropriate. However, this is not plainly the meaning that Congress intended for EPA to apply in the context of CAA sections 165 and 169. Indeed, EPA believes that applying this meaning would frustrate Congressional

intent for reasoned decision making and a considered judgment by EPA before regulating a pollutant (see discussion above).

Under this reading of the phrase "subject to regulation," any emissions that could be considered an air pollutant, and thus could *potentially* be subject to regulation under the CAA at *any* time in the future, would require an emissions limitation under the PSD program now. This is clearly inconsistent with the EAB's previous observation that "[n]ot all air pollutants are covered by the federal PSD review requirements." *Knauf Fiber Glass*, 8 E.A.D. at 162. If section 165(a)(4) were interpreted to require EPA to establish PSD emission limits for all pollutants merely capable of regulation in the future, this would result in an administratively unworkable program. There would be almost no bounds to the substances for which permitting authorities would be required to set PSD limits, especially in light of the Supreme Court's reading of what constitutes an "air pollutant" under the Act. *See Massachusetts v. EPA*, 127 S. Ct. at 1460 (finding that the Act's "sweeping definition" of air pollutant "embraces all airborne compounds of whatever stripe").

The decision in *Massachusetts v. EPA* did not instantly render $CO_2$ "regulated" under the CAA, hold that $CO_2$ was already regulated, or direct EPA to regulate $CO_2$ and other GHG emissions under section 202 or any other section of the Act. The Supreme Court simply concluded that $CO_2$ and other GHG emissions are "air pollutants" under section 302(g) of the Act, 127 S. Ct. at 1460, and therefore found that EPA was not precluded from regulating these substances under section 202 of the Act, *id.* at 1462-63. The Court clearly indicated that the Agency would have to take additional steps on remand, including making a finding of endangerment to public health or welfare, before $CO_2$ could become regulated under CAA section 202. *Id*. at 1363.

In addition, we find it informative that Congress titled section 122 of the Act "listing of certain *unregulated pollutants*." 42 U.S.C. §7422 (emphasis added). In this section, Congress directs the Administrator to review relevant information on radioactive pollutants, cadmium, arsenic, and polycyclic organic matter, in the ambient air, to determine whether the pollutant will "cause or contribute to air pollution which may reasonably be anticipated to endanger public health." If the Administrator makes this endangerment type of finding, the Act directs the Administrator to add the pollutant to a list under Section 108(a)(1), 112(b)(1)(A), or 111(b)(1)(A). Section 122 shows that Congress recognized the existence of air pollutants that are "unregulated" and set forth a scheme wherein the pollutants would first be subject to an endangerment type finding, then a listing, and then promulgation of regulations under the appropriate sections of the Act. This process in Section 122, is entirely consistent with EPA's interpretation in the PSD Interpretive Memorandum. If any pollutant that EPA had the authority to regulate were in fact "subject to regulation," then the pollutants listed in section 122 would not have been "unregulated" at the time section 122 was enacted.

In order to carry out their administrative functions, federal agencies are often afforded broad discretion in interpreting the statutory requirements and setting regulatory priorities. *Sierra Club v. Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987) (finding that given Congress' broad mandate to EPA under the CAA, "the Agency cannot avoid setting priorities" in carrying out its regulatory duties). Interpreting sections 165 and 169 to invoke PSD requirements for any

substance that EPA could regulate, would usurp EPA's discretion to interpret and implement the PSD program under the CAA in an orderly and reasoned manner. *See generally, Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423 (2007) (finding that EPA has discretion to define relevant statutory terms in the context of implementing the overall PSD program). This is an unworkable interpretation of the Act that would have EPA establish emissions limitations under the PSD program on the basis of presumed decisions under other provisions of the Act that the Administrator has not yet made or developed a record to support.

**Comment:**

Commenter (0095) argues, to the extent EPA's references to past practice are referring to how it has interpreted the phrase "subject to regulation" elsewhere in the CAA, EPA -- by regulation -- has previously given the same phrase its plain meaning, a meaning that is in direct conflict with the interpretation EPA unlawfully promotes here. Section 209(e)(1) of the CAA provides:

> No state or political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from either of the following new nonroad engines or nonroad vehicles subject to regulation under this chapter - (A) New engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower. (B) New locomotives or new engines used in locomotives.

According to the commenter (0095), if "subject to regulation" means "subject to actual control of emissions" as EPA asserts it does here, then section 209(e)(1) must means that states (or localities) are preempted from imposing emission standards on these engines only after EPA imposes "actual control of emissions " from those engines. But in its regulations implementing section 209(e), EPA has repeatedly taken the position that states and localities are categorically preempted from regulating those engines, regardless of whether EPA has already subjected those engines to "actual control" of emissions.

Commenter (0095) adds that under section 209(e), all states are preempted from adopting emissions standards for ``[n]ew engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower'' or for ``[n]ew locomotives or new engines used in locomotives." 59 FR 36969, 36970 (July 20, 1994). This position is the justification for the formal regulatory definition (id. at 36986-87):

> Sec. 85.1603 Application of definitions; scope of preemption.
>
> (a) For equipment that is used in applications in addition to farming or construction activities, if the equipment is primarily used as farm and/or construction equipment or vehicles, as defined in this subpart, it is considered farm or construction equipment or vehicles.
> (b) States are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new engines smaller than 175 horsepower, that

> are primarily used in farm or construction equipment or vehicles, as defined in this subpart.
> (c) States are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new locomotives or new engines used in locomotives.
> (d) No state shall enforce any standards or other requirements relating to the control of emission from new nonroad engines or vehicles except as provided for in this subpart.

EPA then repeated this interpretation of that phrase three years later:

> Under section 209(e): (1) All states are preempted from adopting emission standards and other requirements for new nonroad engines used in construction or farm equipment or vehicles which are smaller than 175 horsepower and for new locomotives and new engines used in locomotives;

62 FR at 67733, 67734; December 30, 1997. At no point in either of these rulemakings did EPA discuss the phrase "subject to regulation" or in any way even hint that preemption of state authority hinged on whether EPA itself had imposed "actual control" of emissions from these sources. In fact, EPA did not promulgate emission controls or any other standard or control for these engines until years later: June 17, 1994 for the farm and construction equipment standards (59 FR 31306), and April 16, 1998 for locomotives. *See* 63 FR at 18978.

And, as currently codified in the CFR:

> States and localities are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new engines smaller than 175 horsepower that are primarily used in farm or construction equipment or vehicles, as defined in this part. For equipment that is used in applications in addition to farming or construction activities, if the equipment is primarily used as farm and/or construction equipment or vehicles (as defined in this part), it is considered farm or construction equipment or vehicles.

40 CFR Sec. 1074.10(a).

**Response:**

EPA's discussion of past practice was in reference to its application of the PSD permitting requirements, not this prior interpretation of CAA section 209(e). EPA does not dispute the commenters summary of EPA's previous interpretation of the phrase "subject to regulation" in the particular context of the preemption provision in CAA section 209(e). However, EPA does not agree that EPA's reading of section 209 establishes a plain meaning of the term "subject to regulation" that must be applied each time that phrase appears in the CAA.

Although there is often a presumption that identical words used in different parts of the same statute have the same meaning – *see*, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006); *Comm'r v. Lundy*, 516 U.S. 235, 249-50 (1996) – courts

recognize that this presumption can yield to a different interpretation in appropriate circumstances. EPA may interpret the same word differently based on statutory context. *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 127 S.Ct. 1423, 1433 (2007). The Supreme Court observed that the same or similar words may be construed differently "not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." Id. (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). In reviewing the meaning of the phrase "subject to regulation under this Act" EPA has not confined itself "to examining a particular statutory provision in isolation." *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Rather, "[t]he meaning -- or ambiguity -- of certain words or phrases may only become evident when placed in context * * *. It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" Id. at 132-33 (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

The context in which "subject to regulation" is used in section 209 and in sections 165 and 169 of the CAA are clearly distinguishable and support the different interpretations that EPA has applied in each case.

The CAA section 209(e) preemption provision addresses specific categories of nonroad engines and nonroad vehicles that EPA had the authority to regulate under section 213 of the Act and was required to regulate by a specific time. EPA read the preemption of state authority in 209(e)(1) as applying prior to issuance of EPA regulation, in a context where Congress had allocated authority to regulate to EPA, not to states, and where EPA was required to issue regulations for locomotives, and had just issued regulations the month before for farm and construction equipment. In the context of these provisions (sections 213 and 209(e)) allocating authority to EPA instead of the states, it naturally follows that the use of "subject to regulation" in section 209(e) would address something that EPA has the authority to regulate as opposed to something that EPA has in fact regulated.

In contrast, the phrase "subject to regulation" appears in the PSD provisions in a context that requires BACT emissions limitations for any pollutants that are "subject to regulation" under the Act. As discussed above, this provision appears in the context of other CAA provisions that establish specific criteria that governs the exercise of the Administrator's judgment as to whether to establish emissions limitations on particular pollutants or source categories. In this latter context, it is more appropriate to read the term "subject to regulation" to address whether something is actually covered by a control requirement or emissions limitations, rather than to describe something that EPA has the authority to regulate. As discussed above, reading "subject to regulation" to describe pollutants that EPA has the authority to regulate would lead to an unworkable situation in which the PSD program applied to any substance that could theoretically be regulated at some point in the future.

In comparison, the application of the actual control interpretation in CAA section 209(e)(1) would lead to peculiar result --- that Congress allowed temporary state controls that would later be totally preempted by mandatory EPA regulations. Section 209(e)(1) provides for total preemption, without any chance for a waiver, for the applicable subset of nonroad

equipment. This contrasts with the preemption under 209(e)(2) for the rest of nonroad, where EPA could issue a waiver of preemption and there was no reference to "subject to regulation."

### 3.2.5. Distinction Between Term "Control" and "Regulations" In Other Portions of the Clean Air Act

**Comment:**

An environmental group commenter (0087) states that EPA's interpretation conflates the concept of quantitative "control" or emissions "standards" with the more expansive term "subject to regulation." The commenter asserts that Congress clearly knew how to distinguish between pollutants subject to "control" or direct emissions standards and pollutants "subject to regulation" under the CAA. $CO_2$ is "regulated" under "this chapter" (i.e., Chapter 85 of Title 42) because section 821 of the CAA Amendments of 1990 require EPA to "promulgate regulations" requiring major sources to monitor $CO_2$ emissions and report them to EPA, and EPA has done so. The commenter cites as an example of Congress' deliberate distinction between emissions standards and "controls" of air pollutants is illustrated by section 307(b)(1), which provides for venue in the D.C. Circuit for actions challenging:

> *any emission standard or requirement* under section 7412 of this title, *any standard of performance or requirement* under section 7411 of this title, *any standard* under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, *any control or prohibition* under section 7545 of this title, any standard under section 7571of this title, *any rule* issued under section 7413, 7419, or under section 7420 of this title, or *any other nationally applicable regulations* promulgated, or final action taken, by the Administrator under this chapter . . . .

42 U.S.C. §7607(b) (emphasis added). According to this commenter, this section makes clear that Congress knew how to distinguish – and did distinguish – quantitative "controls" or "standards" of air pollutants with other types of regulations to which air pollutants may be subject, including monitoring and reporting requirements.

Similarly, another commenter (0095) claims EPA ignores the fact that throughout the CAA, Congress carefully differentiated "regulation" from "control," and indeed from numerous other terms that describe various types of agency actions. Instead, EPA seems to suggest that when Congress used the word "regulation" in section 821, Congress overlooked what it had written in section 165(a)(4). However, according to the commenter, if Congress had intended BACT to apply only when a pollutant was subject to "actual control," it would have said so. In fact, Congress uses the word "control" dozens of times in the CAA, including right there in section 165(a)(4), when it requires "best available control technology" for each such pollutant "subject to regulation under this chapter." 42 U.S.C. 7475(a)(4). Notably, Congress did not limit the requirement to impose "control" technology to only those pollutants that were already "subject to control" elsewhere in the CAA; Congress required "control" technology for any pollutants that were "subject to regulation."

The commenter (0095) also states that Congress was equally nuanced in section 307(d)(1), which established rulemaking procedures for certain agency actions and that section 307(d)(1) carefully and repeatedly distinguishes between "standards," "emission standard or limitation," "standards of performance," "requirement," and "regulations." Yet despite this, EPA insists that Congress used "regulation" in section 165(a)(4) to mean "control" of emissions:

> (A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,* * *
> (C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,
> (D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,
> (E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,
> (F) the promulgation or revision of any aircraft emission standard under section 7571 of this title, etc.

42 U.S.C. 7607. In particular, it is worth noting how Congress treats section 7545 in these two different provisions of section 307; after specifically limiting the applicability of 307(b)(1) to only a "control or prohibition" promulgated under section 7545, Congress made section 307(d) applicable to "any regulation pertaining to any fuel or fuel additive" under section 7545. Thus, Congress clearly knew how to distinguish between "control" and "regulation" – and did so when it wanted to.

**Response:**

EPA does not contend that Congress clearly and unequivocally intended to use the term "regulation" in section 165(a)(4) and 169(3) to describe a control or emissions limitation. Rather EPA's view is that sections 165(a)(4) and 169(3) are ambiguous and that Congress left EPA with a gap to fill. EPA agrees that if Congress had clearly intended for EPA read "subject to regulation" to mean "subject to control," Congress certainly could have used language to this effect. However, the fact that Congress did not use particular terms in sections 165(a)(4) and 169(3) that it used elsewhere does not demonstrate that Congress intended to preclude the meaning that EPA has applied to the words Congress did use, considering the potential meanings of various terms and the context in which they are used. Nor does Congressional failure to use particular words that would have plainly established the meaning EPA applies demonstrate the opposite proposition -- that Congress clearly intended for section 165(a)(4) and 169(a)(3) of the Act to mean what commenters argues these provisions mean. The logic employed by commenters -- that Congress knew how to use particular terms and could have used those terms in the PSD provisions if that is how Congress intended for EPA to read them – can also be applied to demonstrate that Congress did not clearly intend the PSD provisions to mean that PSD is triggered by a monitoring or reporting requirement or the promulgation of any regulation of

any type that covers a particular pollutant. Thus, this exercise simply leaves one with an ambiguous statutory provision that has no readily apparent plain meaning.

In all but one of the contrasting examples cited by commenters of Congressional usage of the term "regulation," Congress in fact used the plural term "regulations" rather than the singular "regulation." There are many examples in the CAA where Congress uses the plural term "regulations" in a context with the verb "promulgate" or a similar verb to describe the product of the rulemaking process. *See*, e.g., CAA section 110(5)(B) (authorizing the Administrator to "promulgate, implement and enforce *regulations*" for indirect source review); Section 111(b)(1)(B) (requiring the Administrator to propose "*regulations*" establishing Federal standards of performance for new sources); Section 111(d) (directing the Administrator to promulgate "*regulations*" for categories of air pollutants); Section 165(e)(1) (describing "regulations" implementing analytical requirements of the PSD program); Section 166 (directing the Administrator to "promulgate *regulations*" to prevent the significant deterioration of air quality by specific pollutants); Section 301(a) (requiring the Administrator to "promulgate *regulations*" setting forth the general criteria for regional officers and employees). This Congressional direction that EPA promulgate "regulations" found at various places in the CAA and in section 821 of the 1990 amendments is most naturally read to mean that Congress directed EPA to use its legislative rule making authority to implement the statutory requirements, filling in necessary specificity and detail. Likewise, section 112 of the Act uses the term "subject to regulations," referring to "regulations" in the plural. CAA sections 112(r)(3) and 112(r)(7)(F). In the one example cited by commenters where Congress used the singular form of the term "regulation," Congress added the word "any" in front of the word "regulation."

If, as commenters argue, Congress could have used the term "control" in section 165(a)(4) or 169(3) of the Act, it certainly would not have been any harder for Congress to add an "S," "A," or "ANY" to the phrase "subject to regulation," as it did elsewhere in the Act to establish a particular meaning, if Congress had intended for EPA to read sections 165(a)(4) and 169(3) to apply to any pollutant covered by a regulation promulgated by EPA. The phrase "promulgate regulations" fits best with the adoption of a "rule or practice" or "rule of order," as used in the dictionary meanings from Black's and Webster's cited by Petitioners. Pet. at 6. The phrasing "subject to regulation**s** under the Act" or "subject to a regulation under the Act" would have been more consistent with the dictionary meanings that describe a regulation as a "rule" such as would be contained in the CFR.

Following commenters reasoning, the language in section 307(d)(1)(E) of the Act can be read to show that Congress did not clearly intend for the PSD provisions to apply to any regulation pertaining to any pollutant. If Congress had specifically intended for sections 165 and 169(3) to apply to "the promulgation of any regulation" covering any pollutant, then Congress could have written sections 165(a)(4) and 169(3) of the Act to use the same or similar language as section 307(d)(1)(E). Congress did not in fact write language that applies the BACT requirement to a pollutant upon "the promulgation or revision of any regulation pertaining to" that pollutant. If this is what Congress had clearly intended, it could have just as easily included this language in section 165(a)(4) and 169(3) as it could have used the term "control" or "emissions limitation"

Instead, Congress used the term "regulation" in a context that is ambiguous, but that permits the application of the dictionary meaning applied by EPA that refers to an "act or process" rather than a "rule." In context, the "subject to regulation" terminology reflected in sections 165(a)(4) and 169(3) may be read to describe an "act or process," which supports EPA's application of the meaning from Black's Law Dictionary (8th Ed.) that emphasizes "controlling by rule or restriction."

Thus, EPA has not been persuaded by this line of argument that the PSD Interpretive Memorandum is inconsistent with the plain meaning of the Act or Congressional intent.

### 3.2.6. EPA Elevates Policy Preference Over Plain Statutory Meaning

According to the commenter (0087), EPA does not ground its proposed interpretation in the language of the CAA, at all. Rather, after making a cursory reference to statutory text at the outset of the proposal, the commenter opines that EPA offers only that its position "best reflects our past policy and practice" and "allows for a more practical development for regulations and guidance concerning control of pollutants once they are determined to endanger public health or welfare."

Finally, the commenter (0087) states that EPA's suggestion that its proposed interpretation will allow for a more practical approach to determining whether emissions of air pollutants endanger health and human welfare amounts only to a policy preference. Given the clear Congressional intent to distinguish between air pollutants "subject to regulation" and air pollutants subject to quantitative controls, EPA's policy preference must be subordinate.

One environmental group commenter (0101) notes that EPA's primary justification for the preference for the current definition of the phrase "subject to regulation" is not the statutory language, as nothing there can be found to support it. Rather, according to the commenter, it is clear that EPA's argument is almost entirely grounded in a practical desire to go about regulating GHGs in a particular manner. This commenter states that EPA, long prone to ignoring deadlines explicitly spelled out in the CAA until finally forced to proceed by court decree, cannot avail itself of additional, non-statutory de facto extensions of time to fulfill its statutory obligations. Nor can the agency simply choose by fiat to implement mandatory CAA requirements seriatim when the statute requires that they be contemporaneous and complementary.

**Response:**

Where the governing statutory authority is susceptible to more than one interpretation, it is not impermissible for EPA to apply policy preferences when determining which interpretation to apply, so long as the interpretation EPA elects to follow is a permissible one. The PSD Interpretive Memo provides a persuasive explanation for why the interpretation reflected in that memorandum is consistent with the terms of the CAA and Congressional intent. In this instance, EPA's policy preferences are fully consistent with that intent. Congress intended for EPA to gather data before establishing controls on emissions and to make reasoned decisions.

## *3.3. Interpretation of Regulations*

**Comment:**

Ten industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) believe that EPA reasonably construes the definition of the phrase "regulated NSR pollutant," as contained in the Agency's regulations, to require actual control of emissions in light of the fact that 40 CFR 52.21(b)(50)(i)-(iii) describes pollutants that are subject to actual emission control requirements under the CAA's NAAQS, NSPS, and stratospheric ozone programs and that the phrase "otherwise is subject to regulation" in 40 CFR 52.21(b)(50)(iv) is therefore properly understood to require actual control of emissions by regulations promulgated under other provisions of the CAA that are not described in the first three clauses. *See* 74 FR 51539-51540; *In re: Deseret Power Electric Cooperative*, Brief Amicus Curiae of the Utility Air Regulatory Group in Support of Respondent Environmental Protection Agency ("UARG Amicus Brief") at 31 & n.21.

Another commenter (0080) asserts that interpreting the phrase "subject to regulation" as "subject to regulation that restricts emissions" fits within the statute because EPA is only authorized to restrict emissions of air pollutant where the EPA has made an endangerment finding (or where Congress has implicitly done so, as in the case of Title VI). The commenter (0080) adds that defining the term "regulated NSR pollutant" at 40 CFR 52.21(b)(50) as a pollutant that is actually subject to emission controls makes sense for the same reason.

**Response:**

EPA agrees that the actual control interpretation is consistent with the terms of the regulations EPA promulgated in 2002. *See* 67 FR 80186-80289. EPA continues to find the reasoning of the PSD Interpretive Memo to be persuasive. The structure and language of EPA's definition of 'regulated NSR pollutant' at 40 CFR 52.21(b)(50) supports the actual control interpretation. The first three parts of the definition describe pollutants that are subject to regulatory requirements that mandate control or limitation of the emissions of those pollutants, which suggests that the use of "otherwise subject to regulation" in the fourth prong of the definition also intended some prerequisite act or process of control. The definition's use of "subject to regulation" should be read in light of the primary meanings of "regulation" described above, which each use or incorporate the concept of control.

**Comment:**

The Petition for Reconsideration criticizes EPA's application of a canon of statutory construction known as *ejusdem generis*, which provides that "where general words follow the enumeration of particular classes of things, the general words are most naturally construed as applying only to things of the same general class as those enumerated." *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1189 (D.C. Cir. 1987). Petitioners argue that the PSD Interpretive Memo conflicts with the Deseret decision because the EAB explicitly held that it is not appropriate to use *ejusdem generis* to interpret a parroting regulation "[w]ithout a clear and sufficient supporting analysis or statement of intent *in the regulation's preamble*." *Deseret* at 46

(emphasis added). The Petition states analysis in a memo is an inadequate substitute for the missing analysis in the rulemaking itself. In addition, the Petitioners argue that this *ejusdem generis* canon of construct is inapplicable in this situation because the dispute concerns the meaning of a provision of the CAA, not the nearly identical language of a subsection of the regulation. Finally, the Petition argues that the first three subsections of the regulation at 40 CFR 52.21(b)(50) are more dissimilar than similar and that the "otherwise" language in the fourth part of the definition suggests a contrast to the other three parts rather than a similarity.

Ten industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) believe that EPA may apply the canon of statutory interpretation that states that general words that follow a description of a particular class of things are naturally construed as applying to things in the same class that is enumerated. PSD Interpretive Memorandum at 8-9. Although the EAB in *Deseret* declined to apply this canon, it did so in the absence at that time of any clear, definitive evidence of Agency intent to so cabin the terms of the regulation. *See Deseret* at 45. In the PSD Interpretive Memorandum, EPA provided the necessary analysis and statement of intent.

The commenter (0080) states that the use of *esjudem generis* in construing the meaning of 40 CFR 52.21(b)(50)(iv) is appropriate (contrary to the assertion of the Petitioners) because it advances the purposes of the statute as a whole – to interpret it otherwise would confound the purpose of the statute to require emission reductions where there is endangerment.

**Response:**

The Petition for Reconsideration correctly notes that the EAB decision in *Deseret* declined to apply this canon of statutory construction in part based on the absence of a statement of intent in regulation's preamble. However, the EAB did not have before it the question of whether an after-the-fact memorandum of the Administrator, could supply sufficient intent to apply this principle. Thus, the EAB decision itself does not definitely preclude the approach applied in the PSD Interpretive Memo to supply a clearer statement of EPA intent. It is also not clear that this portion of the EAB's decision was grounded on any controlling judicial decision. This part of EAB decision in Deseret does, however, support the commenters argument that this doctrine is not appropriately applied to regulations that parrot the statutory language, since EPA has the power to write the regulations in more explicit terms. Thus, upon reconsideration, EPA agrees that this element of the PSD interpretive memorandum is not particularly persuasive. However, we do not consider the weakness in this part of the memorandum significant enough to undermine the merits of the memorandum as a whole. The discussion of the dictionary meanings of the term regulation and the context in which this term is used in the regulations is sufficiently persuasive to justify continuing to apply that interpretation, even without application of the *ejusdem generis* principle.

The Petitioners argument that the use of the term "otherwise" is intended to convey a contrast rather than a similarity, even if plausible, does not demonstrate that the reasoning of the PSD Interpretive Memo is erroneous. At most, Petitioners have presented an alternative reading of this same language. Petitioners have provided no additional information to demonstrate that EPA in fact intended the regulation to be interpreted in this manner when that regulation was

adopted in 2002. The factual record does not reflect that EPA has ever interpreted "otherwise" in the fourth part of this definition to mean that the PSD BACT requirement applies to pollutants that were not subject to a control requirement.

**Comment:**

One commenter (0086) presents detailed arguments that the regulatory history of the PSD program can only be squared with the "actual control" interpretation in which the commenter discusses the 1978 preamble to the PSD regulations, the Wegman and Cannon memoranda, the MSW NSPS, the 2002 regulation defining "regulated NSR pollutant," the 2008 GHG ANPR, and longstanding EPA permitting practices.

Four industry and commerce commenters (0051, 0053, 0068, 0074) assert that the primary regulation is the most plausible textual reading of sections 165 and 169 which suggests that BACT limits are required for pollutants subject to requirements that actually control or limit emissions. This commenter cites the 1978 preamble to PSD regulations, the 1980 Regulatory Impact Analyses (RIA), the 2008 ANPR on whether and how GHGs might be regulated under the CAA, and regulatory history, policy and permitting practices to support their position.

**Response:**

The EAB discussed this regulatory history cited by the commenters at length in the *Deseret* decision. The PSD Interpretive Memo described the EAB's opinion as thoughtful and well-reasoned and built on that reasoning. EPA continues to find the EAB decision thoughtful and well-reasoned. With regard to the significance of the regulatory history cited by commenters, EPA adopts the reasoning of the EAB's Deseret decision. With respect to the significant of the 1978 to preamble to the PSD regulations, EPA is applying the reasoning of the EAB's Deseret decision and the additional analysis provided in the PSD Interpretive Memorandum.

**Comment:**

The Petition for Reconsideration asserts that the PSD Interpretive memo "attempts to revive a definition that the EAB found was not supported by any prior EPA interpretation of the statute." Petition at Pages 9-10.

**Response:**

The EAB's conclusion that EPA had not previously adopted the particular interpretation does not itself preclude EPA from taking subsequent action to do so. The record for the PSD Interpretive Memorandum supports the interpretation reflected there.

## *3.4. Policy Considerations Raised by Actual Control Interpretation*

### 3.4.1. Orderly and Deliberative Decision Making Process

One (0109) states that each of the other proposed alternative interpretations would short circuit what the CAA envisions as an orderly process, starting with information gathering about emissions of a pollutant, determinations regarding the effect of the pollutant on public health and welfare, and if determined to be necessary, the issuance of proposed control regulations, followed by final regulatory controls on emissions of the pollutant.

Another commenter (0110) opines that the alternative interpretations (to the "actual control" interpretation) contemplated by EPA in the Reconsideration proposal would not allow for the agency to gather emissions information on GHG air pollutants in an orderly way, nor assess that information adequately to determine whether to impose controlling regulations of those emissions under the CAA.

One commenter (0085) adds that the "actual control" interpretation comports with the deliberate process of evaluation and eventual regulation that is contemplated by the CAA.

Another commenter (0105) adds that this interpretation provides the agency with much needed flexibility to review a pollutant's effects without triggering PSD, and also ensures the PSD is not triggered until EPA has truly determined that a pollutant should be controlled by regulation.

Three commenters (0067, 0073, 0083) state that any of the alternatives would be damaging to the efficient and orderly operation of the Act, and an efficient and orderly transition to regulation of GHGs under the CAA is essential for both regulated sources and permitting authorities.

Another commenter (0097) also agrees with the important policy concerns stated in the proposed reconsideration (and in the original PSD Interpretive Memo) that support application of PSD requirements only after actual control requirements are in place under another part of the Act. According to this commenter, to deviate from the "actual control interpretation" would actually create much more difficulty in determining if it is appropriate to regulate other compounds.

One commenter (0070) notes that the "actual control interpretation" is the only interpretation that provides EPA with a meaningful opportunity to collect and analyze crucial data and information before subjecting sources to PSD permitting requirements for newly identified pollutants.

Industry commenter (0090) believes this is the correct interpretation because it allows for EPA to gather emissions data on air pollutants through monitoring and reporting.

A commenter (0104) representing a group of industry associations, generally agrees with EPA's approach and also supports the "actual control" interpretation outlined in the PSD Interpretive Memo over the four other possible interpretations outlined in the EPA proposal. This commenter concurs with EPA that this interpretation is the most reasonable because it

allows for a more practical development of regulations and guidance concerning control of pollutants.

Ten industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) said that the "actual control" interpretation safeguards the Administrator's authority to require such controls on individual pollutants under other portions of the Act before triggering PSD requirements. In other words, EPA has and should retain flexibility "to address whether and how a pollutant should be 'subject to regulation' based on the promulgation of more general control requirements." *See* 74 FR 51541.

Some commenters (0095) who opposed the actual control interpretation argued that this deliberate approach leads to "analysis paralysis" and is subject to political manipulation.

**Response:**

EPA continues to prefer the actual control interpretation because it ensures an orderly and manageable process for incorporating new pollutants into the PSD program after an opportunity for public participation in the decision making process. EPA agrees with the commenters who identified these considerations as important reasons that EPA should continue applying the "actual control" interpretation. As discussed persuasively in the PSD Interpretive Memo, under this interpretation, EPA may first assess whether there is a justification for controlling emissions of a particular pollutant under relevant criteria in the Act before imposing controls on a pollutant under the PSD program. In addition, this interpretation permits the Agency to provide notice to the public and an opportunity to comment when a new pollutant is proposed to be regulated under one or more programs in the Act. It also promotes the orderly administration of the permitting program by providing an opportunity for EPA to develop regulations to manage the incorporation of a new pollutant into the PSD program, for example, by promulgating a significant emissions rate (or *de minimis* level) for the pollutant when it becomes regulated. *See* 40 CFR 52.21(b)(23). Furthermore, this interpretation preserves the Agency's ability to gather data on pollutant emissions to inform their judgment regarding the need to establish controls on emissions without automatically triggering such controls. This interpretation preserves EPA's authority to require control of particular pollutants through emissions limitations or other restrictions under various provisions of the Act, which would then trigger the requirements of the PSD program for any pollutant addressed in such an action.

While this analysis may sometimes take more time than some commenters would prefer, a deliberative and orderly approach to regulation is in the public interest and consistent with Congressional intent. It would be premature to impose the BACT requirement on a particular pollutant if neither EPA nor Congress has made a considered judgment that a particular pollutant is harmful to public health and welfare and merits control.

### 3.4.2. Public Participation Concerns

One commenter (0050) observed that the "actual control" interpretation best implements the procedures and requirements for regulating pollutants under the CAA and the public

participation requirements of the APA. Section 202(a)(1) of the CAA provides that the Administrator shall "by regulation" prescribe standards applicable to motor vehicle emissions "which, in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health and welfare." This section reinforces the two required findings —the finding of endangerment, and the finding that the pollutant from the source "cause or contribute" to the pollution that is the subject of the proposed regulation. The "actual control" approach is the only alternative considered that incorporates both of these requirements. Further, it is the only approach being considered that provides for public participation under the APA on both endangerment and cause or contribute. Because PSD and Title V affect all sectors of the economy, the commenter asserts that transparency and public participation are extremely important elements of the regulatory process.

Industry commenter (0090) believes this is the correct interpretation because it provides the opportunity for public notice and comments associated with a proposed new regulated pollutant.

Ten industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) said that the "actual control" interpretation provides an opportunity for public notice and comment when a new pollutant is proposed to be regulated under other provisions of the CAA, which is very important to allow the potentially regulated entities and other affected members of the public to participate in the development of any emission control regulations, including by submitting comments on the potential impacts of the regulations and the timeframe necessary to allow compliance before the regulations could take effect.

One industry commenter (0050) observed that if the EPA were to adopt any interpretation other than "actual control," it would completely change the regulatory design for GHGs and likely cause severe economic disruption. Adoption of any of the other options would automatically make PSD and Title V applicable to GHGs without public notice or opportunity for public comment, and without agency analyses of the economic or small business impacts. The commenter states that such an outcome would violate both the letter and spirit of the notice and comment requirements of the Administrative Procedures Act (APA).

**Response:**

EPA agrees that one significant benefit of the actual control interpretation is that it permits the Agency to provide notice to the public and an opportunity to comment when a new pollutant is proposed to be regulated under one or more programs in the Act. This was one of the important policy considerations that EPA cited in its justification for the interpretation adopted in the PSD Interpretive Memo, and it remains an important ground for EPA's decision to continue following the interpretation reflected in that memorandum. EPA thus agrees that it would not be good policy to allow automatic triggering of PSD permitting requirements for additional pollutants without an opportunity for public comment on EPA's initial decision to regulate a pollutant.

### 3.4.3. Development of Control Strategies

One commenter (0110) emphasizes that regulated entities need adequate time to analyze and implement technologies and strategies to comply with new requirements. The requirement for entities seeking permits for new construction of major stationary sources or for major modifications to existing stationary sources to install BACT for regulated pollutants imposes significant costs and burdens on those entities. The commenter states that EPA's "actual control" interpretation is the most reasonable option considered by EPA in the Reconsideration in terms of allowing permitting authorities and regulated entities appropriate time to implement appropriate controls. The commenter also discusses the need to allow permitting authorities time to rationally and adequately develop emission control programs for regulated pollutants prior to subjecting facilities to PSD requirements.

Another commenter (0107) argues that until actual control measures are required, there is no requisite information about a pollutant for a permit authority to issue a PSD permit or evaluate alternative pollution controls that may represent BACT. The proposed PSD Interpretation and companion proposed PSD/Title V Tailoring rule both underscore the need to provide the EPA, state permitting authorities, and industries with the time necessary to develop controls and establish control strategies for GHGs. Before a pollutant has been subject to "actual controls," there would have been no examination of the technological feasibility and capabilities that are appropriate to reduce such a pollutant. This information is critical before a source can be subject to BACT review. Once a control requirement is effective, however, and an affected source has time to evaluate compliance with the requirement, purchase or design the control required, and install and test it, it would be reasonable to require BACT for that pollutant. As evidenced by EPA's creation of the GHG BACT Workgroup and other efforts, EPA has only begun to evaluate potential available technologies for the control of GHGs from various industries that emit GHGs, the cost of such technologies, and whether the application of such technologies will have a positive impact on the build-up of GHGs in the atmosphere. Congress did not intend for EPA to impose economic hardships on businesses and their customers if regulations of a pollutant did not yield an environmental benefit.

Another commenter (077) agrees that the "actual control" interpretation allows for sensible development of regulations and guidance following an endangerment finding – control options can be better evaluated and BACT can be explored in an orderly and efficient manner.

Ten industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) said that EPA has underscored that it needs time to gather information on emissions of an air pollutant and to research and evaluate various emission control options and technologies for that pollutant before any PSD requirements for the pollutant are imposed. This concern is important not only for EPA and states, but also for the sources of emissions of that pollutant that will have to comply with the PSD requirements because the PSD program imposes potentially very costly and burdensome requirements (including but not limited to BACT requirements). Thus, it is vital that any interpretation by EPA of the phrase "subject to regulation" provide the Agency, states, and affected sources with the time necessary to establish appropriate compliance strategies and to prepare to satisfy compliance obligations.

One environmental group commenter (0095) states that EPA's desire to have "time to study and evaluate the emissions characteristics and control options for new pollutants prior to making emissions of those pollutants subject to PSD permitting requirements" (74 FR 51541) flies in the face of both the language and purpose of the BACT requirement. The case-by-case BACT requirement does not contemplate waiting years for EPA to conduct analyses and "develop" control options. *See* 74 FR at 51541. Rather, BACT must be based on control options that are available, and it applies "immediately to each type of pollutant regulated for any purpose under any provision of the Act." *Alabama Power v. Costle*, 636 F.2d 323, 403 (D.C. Cir. 1979). And, permitting agencies are instructed to make this "case-by-case" determination "taking into account energy, environmental, and economic impacts and other costs" and thereby ensuring that the decision is informed by the available solutions, their efficacy and costs. *See* CAA §169(3).

**Response:**

Once the Agency has made a determination that a pollutant should be controlled using one or more of the regulatory tools provided in the CAA and those controls take effect, a BACT analysis must then be completed based on available information. As one commenter (0095) points out, the BACT process is designed to determine the most effective control strategies achievable in each instance, considering energy, environmental, and economic impacts. Thus, EPA agrees that the onset of the BACT requirement should not be delayed in order for technology or control strategies to be developed. Furthermore, EPA agrees with the commenter that delaying the application of BACT to enable development of guidance on control strategies is not necessarily consistent with the BACT requirement. The BACT provisions clearly contemplate that the permitting authority will develop control strategies on a case-by-case basis. Thus, EPA is not in this final action relying on the need to develop guidance or control strategies for BACT as a justification for choosing to continue applying the actual control interpretation. However, in the absence of guidance on control strategies from EPA and other regulatory agencies, the BACT process may be more time and resource intensive when applied to a new pollutant. Under a mature PSD permitting program, successive BACT analyses establish guidelines and precedents for subsequent BACT determinations. However, when a new pollutant is regulated, the first permit applicants and permitting authorities that are faced with determining BACT for a new pollutant must invest more time and resources in making an assessment of BACT under the statutory criteria. Given the potentially large number of sources that could be subject to the BACT requirement when EPA regulates GHGs, the absence of guidance on BACT determinations for GHGs presents a unique challenge for permit applicants and permitting authorities. EPA intends to partially address this challenge under the Tailoring Rule by deferring the applicability of the PSD permitting program for various categories of sources that would become major based solely on GHG emissions. EPA is also developing guidance on BACT for GHGs.

### 3.4.4. Past Policy and Practice

**Comment:**

According to the commenter (0095), the *Deseret* decision rejects the idea that "past policy and practice" is a sufficient justification for EPA's position, and in any event, such policy preferences cannot trump the clearly expressed intent of Congress. *Engine Mfrs. Ass'n,* 88 F.3d 1075, 1089 (D.C. Cir. 1996) (EPA cannot "avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.").

One industry commenter (0055) agrees with EPA's current policy and preferred interpretation that GHGs are not currently "regulated NSR pollutants" that are "subject to regulation" under the CAA. This commenter (0055) states that EPA has historically and consistently interpreted PSD regulations to apply to only those pollutants subject to actual emission limitations or control measures, without previous objection, is significant justification for the current proposal to continue in that regard.

One industry commenter (0050) supports the "actual control" interpretation because it best reflects EPA's past policy and practice.

Another of the industry commenters (0090) believes this is the correct interpretation because it is consistent with past policy and practice.

One industry group (0070) commenter expresses support for the "actual control interpretation" for because it best reflects EPA's past policy.

Ten industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) states that the "actual control" interpretation is also reasonable because it "best reflects [EPA's] past policy and practice, as applied consistently over the years." *See* 74 FR 51541; PSD Interpretive Memorandum at 10-13. The EPA is correct that it has never taken the position that $CO_2$ or other GHGs are "subject to regulation" under the CAA. The commenter cites EPA discussion at 74 FR 51540 & n.6 (discussing Memorandum from Jonathan Z. Cannon, EPA General Counsel, to Carol M. Browner, EPA Administrator (Apr. 10, 1998)), and *Deseret* UARG Amicus Br. at 24-27 (citing statements by EPA officials in testimony and memoranda that the Agency had not decided to regulate $CO_2$ emissions). This history is fully consistent with the legislative history of the CAA and its 1990 amendments, in which Congress clearly declined to take any action that would have required EPA to establish or impose any emission controls for $CO_2$ under the CAA at that time. (The commenter provided several citations to the legislative history of the 1990 CAA Amendments.)

**Response:**

While the record continues to show that the actual control interpretation is consistent with EPA's historic practice under the PSD program, EPA agrees that continuity with past practice alone does not justify maintaining a position when there is good cause to change it. In this case, however, EPA has not found cause to change an interpretation that is consistent with Congressional intent and supported by the policy considerations described earlier. Thus, EPA is not retaining the actual control interpretation simply to maintain continuity with historic practice. The record reflects that EPA's past practice was grounded in a permissible interpretation of the

law and supported by rational policy considerations. Public commenters have not otherwise persuaded EPA to change its historic practice in this area.

A review of numerous federal PSD permits shows that EPA has been applying the actual control interpretation in practice – issuing permits that only contained emissions limitations for pollutants subject to regulations requiring actual control of emissions under other portions of the Act. Furthermore, in 1998, well after promulgation of the initial $CO_2$ monitoring regulations in 1993, EPA's General Counsel concluded that $CO_2$ would qualify as an "air pollutant" that EPA had the authority to regulate under the CAA, but the General Counsel also observed that "the Administrator has made no determination to date to exercise that authority under the specific criteria provided under any provision of the Act." Memorandum from Jonathan Z. Cannon, General Counsel to Carol M. Browner, Administrator, entitled EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (April 10, 1998).

**Comment:**

An environmental group commenter (0095) claims that EPA's interpretation of "subject to regulation" does not reflect EPA's past policy and contradicts its own regulations. The commenter disagrees with EPA's assertion that its preferred interpretation of "subject to regulation" to mean "actual control of emissions" is justified on the basis that it "best reflects our past policy and practice". According to the commenter, EPA's interpretation repudiates the Agency's most direct previous statement interpreting "subject to regulation." In the preamble to the Agency's 1978 *Federal Register* rulemaking, 43 FR at 26388, 26397 (June 19, 1978), the Administrator established that "'subject to regulation under this Act' means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type." 43 FR at 26397. This interpretation is the sole instance of past practice identified by the EAB as "possess[ing] the hallmarks of an Agency interpretation that courts would find worthy of deference." *Deseret* at 39. The commenter states that as the Board recognized, that preamble offers no support for an interpretation applying "BACT only to pollutants that are 'subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." Instead (again, as expressly noted by the Board) it implies that "$CO_2$ became subject to regulation under the Act in 1993 when the Agency included provisions relating to $CO_2$ in Subchapter C." *Id.* at 42 n.43. Under the 1978 preamble definition, $CO_2$ is "subject to regulation" for BACT purposes because it is regulated under Subchapter C of Title 40 of the CFR. In its 1993 rulemaking to revise the PSD regulations, EPA did not withdraw its 1978 interpretation of "subject to regulation." *See Deseret* at 42; *see also* Acid Rain Program: General Provisions and Permits, Allowance System, Continuous Emissions Monitoring, Excess Emissions and Administrative Appeals, 58 FR at 3590, 3701 (Jan. 11, 1993) (final rule implementing §821's CO2 monitoring and reporting regulations). Nor has any subsequent rulemaking, including the 2002 rulemaking on which the PSD Interpretive Memo relies, disturbed the 1978 interpretation. *See Deseret* at 46. Thus, the only existing EPA interpretation of the phrase "subject to regulation" in section 165(a)(4), 42 U.S.C. §7465(a)(4), affirms that BACT is required for $CO_2$ emissions because it is regulated under the Act's implementing regulations. In both the Memo and the Reconsideration, the Agency suggests that the "actual control" interpretation is not inconsistent with the 1978 preamble "because actual control could be inferred by the specific list of regulated pollutants that followed reference to 40 CFR." *See* 74

FR at 51540. *Deseret* directly refutes that claim: "Nothing in the 1978 preamble . . . indicates that the Agency intended to depart from the normal use of 'includes' as introducing an illustrative, and nonexclusive, list of pollutants subject to regulation under the Act." *Deseret* at 40 (holding that "we must reject" the "conten[tion] that only the pollutants identified in the preamble by general category defined the scope of the Administrator's 1978 interpretation.) Under any plausible reading, the 1978 *Federal Register* preamble used "regulated in" to describe all the regulations contained "in Subchapter C of Title 40 of the Code of Federal Regulations." *See Deseret* at 41-42 & n.43 (noting that "plain and more natural reading of the preamble's interpretative statement suggests a different unifying rule" than a rule that would limit "regulation" to actual control of emissions).

Ten industry commenters ((0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) dispute the argument that EPA's interpretation of "subject to regulation" in the 1978 PSD rulemaking is clear that any regulations found in 40 CFR Subchapter C, including those implementing section 821 of Public Law 101-549, are thereby "subject to regulation." The EPA has properly clarified that the 1978 statement does not support this interpretation because that statement referred to specific categories of pollutants for which emission controls existed as of that date, a clarification that is consistent with the EAB's decision in *Deseret*. To adopt petitioners' view would irrationally elevate procedure – the mere fortuity of future placement of a newly promulgated regulatory provision in a particular part of a codification of a large body of rules – over substance.

**Response:**

The 1978 *Federal Register* notice promulgating the initial PSD regulations stated that pollutants "subject to regulation" in the PSD program included "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations." Commenters argue this statement illustrates that EPA has in fact applied the PSD BACT requirement to any pollutant subject to only a monitoring requirement codified in this portion of the CFR. However, this comment overlooked the discussion in the PSD Interpretive Memo regarding the differing meanings of the term "regulation" and "regulate." The 1978 preamble did not amplify the meaning of the term "regulated in." Thus, commenters have not demonstrated that EPA had concluded in 1978 that monitoring requirements equaled "regulation" within the meaning of sections 165(a)(4) and 169(3) of the CAA, nor have commenters provided any examples of permits issued by EPA after 1978 that demonstrate EPA's interpretation was inconsistent with the practice described in the PSD Interpretive Memo.

Commenters assume that this 1978 interpretative statement is the only example of EPA's past practice with respect to whether pollutants covered by, but not controlled under, regulations in the CFR make the PSD permitting requirements applicable to a pollutant. These commenters have not provided any additional information to demonstrate that EPA (or another other PSD permitting authority) has in fact acted in accordance with the meaning that the commenters assign to the 1978 interpretation. The record shows that EPA has not in practice given the 1978 statement the meaning used by the commenter.

A review of numerous federal PSD permits shows that EPA has been applying the actual control interpretation in practice – issuing permits that only contained emissions limitations for pollutants subject to regulations requiring actual control of emissions under other portions of the Act. If EPA had given the 1978 interpretation the meaning the commenter uses, the Agency would have previously issued PSD permits containing BACT emission limitations on $CO_2$ and oxygen. Commenters have provided no information that contradicts the following analysis from the PSD Interpretive Memorandum:

> As a matter of practice, EPA has not issued PSD permits containing emissions limitations for pollutants that are only subject to monitoring and reporting requirements. PSD permits issued by the Agency (and delegated states authorized to issue federal permits on EPA's behalf) have only contained emissions limitations for pollutants subject to regulations requiring actual control of emissions. EPA staff have reviewed permits issued under this program and have not identified any federal PSD permits that establish limitations on the emissions of pollutants that were only subject to monitoring and reporting requirements established under the Act at the time the permit issued. Since 1993, EPA has had regulations in place requiring monitoring and reporting of carbon dioxide emissions. *See* Acid Rain Program: General Provisions and Permits, Allowance System, Continuous Emissions Monitoring, Excess Emissions and Administrative Appeals (final rule), 58 FR at 3590 (Jan. 11, 1993). I am not aware of any PSD permits containing emissions limitations for carbon dioxide issued by either the Agency or its delegates since that time. During at least part of this time period, EPA made clear that it considered $CO_2$ to be an air pollutant under the Act. *See* Memorandum from Jonathan Z. Cannon, General Counsel to Carol M. Browner, Administrator, entitled *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (April 10, 1998) ("Cannon Memo"). **…** The record of permits compiled to support this memorandum is sufficient to demonstrate that EPA has not in practice issued PSD permits establishing emissions limitations for pollutants that are subject to only monitoring and reporting requirements.

The argument that EPA's failure to do so was wrong does not establish that it has in fact been EPA's position since 1978 that PSD permits should cover pollutants subject to monitoring and reporting requirements that are promulgated anywhere in Subchapter C of the Title 40 of the CFR.

Furthermore, in 1998, well after promulgation of the initial $CO_2$ monitoring regulations in 1993, EPA's General Counsel concluded that $CO_2$ would qualify as an "air pollutant" that EPA had the authority to regulate under the CAA, but the General Counsel also observed that "the Administrator has made no determination to date to exercise that authority under the specific criteria provided under any provision of the Act." Memorandum from Jonathan Z. Cannon, General Counsel to Carol M. Browner, Administrator, entitled EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (April 10, 1998).

With respect to the EAB's conclusion in the Deseret matter, the PSD Interpretive Memo highlights portions of the EAB decision that describe the ambiguity in the phrase "regulated in Subchapter C of Title 40 of the Code of Federal Regulations" and the term "regulation." The

PSD Interpretive Memorandum references the "specific categories of regulations identified in the second sentence" of the passage quoted from the 1978 preamble only to illustrate that the PSD Interpretive Memorandum is not inconsistent with that 1978 statement. Consistent with the statements in the PSD Interpretive Memo, EPA agrees with and accepts the EAB's reasoning that the enumerated categories of pollutants do not establish a controlling limitation on the scope of pollutants subject to regulation. However, that reasoning still does not establish an EPA's historic position has been that monitoring or reporting requirements make pollutants subject to regulation or "regulated in" the CFR when the code contains only a requirement to monitor and report, but not control, emissions of a pollutant.

**Comment:**

According to one commenter (0095), to the extent EPA's reference to "past policy and practice" is referring to its previous failure to impose the BACT requirement for pollutants only subject to monitoring and reporting, that assertion is irrelevant and, moreover, its "actual control of emissions" interpretation was first put forth by Region 8 in the *Deseret* permitting proceeding and, as the EAB found, was entirely unsupported by past policy and practice. *Deseret* at 37-54.

Commenter (0087) notes that the EAB in *re Deseret Power Electric Cooperative*, PSD Appeal No. 07–03 (EAB Nov. 13, 2008) (''Deseret'') found nothing in the administrative record supporting EPA's position that the agency's historical interpretation mandated EPA's interpretation of the statutory term.

**Response:**

EPA's reference to past practice was supported in the proposal by the record of PSD permits that EPA compiled to support the PSD Interpretive Memo. EPA has not identified any permits that contain an emissions limitation for a pollutant subject only to a monitoring and reporting requirement, nor has any public commenter produced such a permit. Commenters have not substantiated their conclusory assertion that EPA's previous failure to impose irrelevant consideration. Extensive evidence of EPA's past practice is available in the permits issued under the PSD program. EPA does not rely upon arguments made in the Deseret permit proceeding to support its conclusion that the actual control interpretation is consistent with past practice.

In the *Deseret* matter, the EAB held "the Region's rationale for not imposing a $CO_2$ BACT limit in the Permit -- that it lacked the authority to do so because of an historical Agency interpretation of the phrase "subject to regulation under this Act" as meaning "subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant" -- is not supported by the administrative record." This analysis pertained to the administrative record for the particular permit at issue, and it did constitute a conclusion that no such record could be found anywhere. The EAB decision did not prevent EPA from developing a more thorough record to show the agency's traditional practice under the PSD program, as EPA did when it issued the PSD Interpretive Memorandum. Despite the weakness of the particular administrative record for the Deseret permit, the EAB observed that broad statements in the 1998 memorandum cited above by the Agency's then General Counsel suggested that the Agency has not, as a

matter of practice, treated $CO_2$ as a "regulated" pollutant under any provisions of the Act, including those establishing the PSD program. Slip op. at 53-54.

# Chapter 4. Monitoring and Reporting Requirement

## *4.1. Overview of Comments on Monitoring and Reporting Interpretation*

**Comment:**

Twenty-nine industry and commerce commenters (0050, 0051, 0053, 0056, 0059, 0065, 0066, 0067, 0068, 0070, 0071, 0073, 0074, 0076, 0079, 0081, 0083, 0085, 0086, 0089, 0090, 0092, 0096, 0098, 0105, 0106/0107, 0108, 0109, 0118) and six state/local agency associations (0054, 0058, 0062, 0091, 0102, 0103) agree with EPA's position that the "monitoring and reporting interpretation" is not the proper interpretation of the phrase "subject to regulation" for purposes of PSD.

Ten of the industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) agree that the EPA should reject the "monitoring and reporting" interpretation for all of the reasons stated in the PSD Interpretive Memorandum and the proposed PSD Interpretation.

Three commenters (0087, 0095, 0101) representing several environmental organizations support applying PSD to $CO_2$ at the present time on the basis of regulations that require monitoring of $CO_2$. These commenters argue that the CAA requires this outcome.

**Response:**

EPA is not persuaded that the monitoring and reporting interpretation is compelled by the CAA, and the Agency remains concerned that application of this approach would lead to odd results and make the PSD program difficult to administer. EPA continues to find the reasoning of the PSD Interpretive Memo persuasive. EPA responds to more specific points raised by these commenters elsewhere in this document.

## *4.2. Statutory Interpretation*

### 4.2.1. Meaning of the Term Regulation

**Comment:**

The Petition for Reconsideration argues that $CO_2$ is regulated under Section 821 of the Clean Air Act Amendments of 1990. According to the Petition, Section 821 requires EPA to "promulgate regulations" requiring major sources, including coal-fired power plants, to monitor $CO_2$ emissions and report their monitoring data to EPA. 42 U.S.C. §7651(k) note; Pub. L. 101-

549; 104 Stat. 2699 (emphasis added). In 1993, EPA promulgated these regulations, which require sources to monitor $CO_2$ emissions, 40 CFR 75.1(b), 75.10(a)(3), prepare and maintain monitoring plans, *id.* §75.33, maintain records, *id.* §75.57, and report monitoring data to EPA, *id.* §75.60-64. The regulations prohibit operation in violation of these requirements and provide that a violation of any Part 75 requirement is a violation of the Act. *Id*. §75.5. Not only do the regulations require that polluting facilities "measure . . . $CO_2$ emissions for each affected unit," *id*. §75.10(a), they also prohibit operation of such units "so as to discharge or allow to be discharged, emissions of . . . $CO_2$ to the atmosphere without accounting for all such emissions . . . . " *Id*. §75.5(d).

One environmental commenter (0101) notes that EPA has issued monitoring and reporting regulations for $CO_2$ in 40 CFR 75, promulgated pursuant to section 821 of the CAA. *See* 42 U.S.C. §7651(k) note; Pub. L. 101-549; 104 Stat. 2699 (1990). Under the definitions advanced in the PSD Interpretive Memo, these monitoring and reporting rules are "regulation": they are contained in a legal code, have the force of law, and bring the subject matter under the control of law and the EPA. EPA itself has characterized these monitoring and reporting requirements as "regulations." *Id.*

The state/local agency association (0062) notes that EPA has broad authority under sections 114 and 208 of the CAA to require monitoring of emissions, by regulation or otherwise, and has historically done so well in advance of any decision to limit emissions of any pollutant. The commenter opines that such monitoring requirements do not regulate emissions of pollutants; instead, they govern other conduct by the operator in a way that does not constrain emissions, just as the obligation to identify a contact person at a facility may be required of a Title V source, but does not constitute an emissions limitation.

Two industry commenters (0051, 0053) opine that the text of the CAA refutes a "monitoring and reporting" interpretation. This commenter asserts that, contrary to the view of some (who believe that regulations requiring monitoring and reporting of $CO_2$, promulgated pursuant to section 821 of the CAA, cause $CO_2$ to be "subject to regulation" under the PSD program), because section 821 of the CAA does not call for controls of emissions, it does not subject $CO_2$ or other GHGs to regulation for purposes of the PSD program.

**Response:**

Each of these commenters focuses on only one of the two potential meanings of the term "regulation" described elsewhere in this document. The commenter that favors the "monitoring and reporting" interpretation appears to focus only on the dictionary meanings that describe a rule contained in a legal code. The commenter has not demonstrated that it is impermissible for EPA to construe the CAA on the basis of another common meaning of the term "regulation." In the context of construing the Act, the EAB observed in the Deseret case that a plain meaning could not be ascertained from looking solely at the word "regulation." The Board reached this conclusion after considering the dictionary definitions of the term "regulation" cited above. *Deseret* slip op. at 28-29. EPA continues to find the reasoning of the EAB and the PSD Interpretive Memo to be persuasive. The EAB found "no evidence of Congressional intent to

compel EPA to apply BACT to pollutants that are subject only monitoring and reporting requirements." *See Deseret* at 63.

### 4.2.2. Effect of Section 821 of the Clean Air Act

**Comment:**

The Petition for Reconsideration contends that monitoring and reporting requirements clearly constitute regulation. Against the backdrop of Section 165's use of "regulation," Congress explicitly used that exact same word in Section 821 to refer solely to monitoring and reporting requirements.

Ten commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) add that this interpretation should be rejected specifically with regard to $CO_2$ because the legislative histories of the CAA and of Public Law 101-549, which enacted, among other things, amendments to the CAA, clearly demonstrate that Congress did not intend monitoring and reporting requirements for $CO_2$ to have any consequences in terms of triggering emission control requirements under any part of the CAA. According to these commenter, the legislative history of Public Law 101-549 shows that Congress simply intended the $CO_2$ monitoring and reporting provisions to allow EPA to gather scientific evidence of U.S. contributions to GHGs, to establish a baseline to allow utilities to seek credit for emission reductions in any possible future regulatory program, and to inform the United States' position in international negotiations. The commenters assert that the legislative history demonstrates that Congress did not intend those provisions to have any further regulatory impact. (*See*, e.g., 103rd Cong., 1st Sess., S. Print 103-38, Legis. Hist. at 2612, 2652, 2987. Members of Congress expressly referred to section 821 as a "simple data collection" provision that was not intended to "force any reductions" of $CO_2$ emissions. Legis. Hist. at 2651-52, 2653, 2985; *see also* UARG Amicus Brief at 12-15.). Congress clearly declined to take any action that would have required EPA to establish or impose any emission controls for $CO_2$ under the CAA at that time.

One industry commenter (0107) said that section 821 does not make $CO_2$ subject to permitting. According to this commenter, it is hard to believe that such monitoring, in a provision titled "Information Gathering on Greenhouse Gases Contribution to Global Climate Change," was added to the Act for the purpose of regulating GHGs under PSD. In fact, Congress rejected attempts by senators to require control of GHGs as part of the 1990 CAA Amendments. As EPA discussed, the collection of data about a pollutant is necessary before EPA can make decisions about "regulating" that pollutant under any CAA program that requires controls. This means that Congress did not intend BACT for $CO_2$ to apply before collection of monitoring information for $CO_2$ or other GHGs took place. Given that Congress rejected control requirements for GHGs in 1990 on the basis that not much was then known about climate change, it would be unreasonable to conclude that Congress intended such sources including multi-unit apartment buildings, shopping malls, and hospitals to obtain PSD and/or Title V permits.

One of the commenters (0086) presented detailed arguments that the monitoring and reporting interpretation cannot be squared with the legislative or regulatory history .

**Response:**

EPA agrees with the analysis of the EAB (summarized below) that section 821 of the CAA does not compel EPA to apply the monitoring and reporting interpretation. The use of similar, but not identical, language in section 821 of the 1990 Public Law, which requires the Agency to promulgate "regulations," does not constrain the Agency's ability to interpret sections 165 and 169 to exclude monitoring and reporting requirements.

The argument that sections 165 and 169 have only one proper interpretation based on section 821, ignores the fact that Section 821 uses different terminology, "regulations," from that used in the PSD provisions of sections 165 and 169, "subject to regulation." The difference in terminology is potentially significant. When read in the context of the phrases in which they are used, possible alternative meanings of "regulation" and "regulations" become apparent. In the phrase "the Administrator * * * shall promulgate regulations * * * to require [sources to monitor CO[2]]" in section 821, the term "regulations" is understood to be the end product of the administrative rule making process. Thus, Congress' direction that EPA promulgate "regulations" found at various places in the CAA and in section 821 is most naturally read to mean that Congress directed EPA to use its legislative rule making authority to implement the statutory requirements, filling in necessary specificity and detail. Section 112 of the Act uses the term "subject to regulations," referring to "regulations" in the plural. CAA sections 112(r)(3) and 112(r)(7)(F). This evidences that Congress may not have meant "subject to regulation" (singular) to have the same meaning.

The Supreme Court has observed in other contexts that the same or similar words may be construed differently "not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, slip op. at 9 (2007) (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). In reviewing the meaning of the phrase "subject to regulation under this Act" we do not confine ourselves "to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Rather, "[t]he meaning -- or ambiguity -- of certain words or phrases may only become evident when placed in context * * *. It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" Id. at 132-33.

We find no evidence that Congress's addition of section 821 in 1990 was an attempt to interpret or constrain the Agency's interpretation of the broader phrase "subject to regulation" as used in sections 165 and 169. *See* 136 Cong. Rec. H2915, 2934 (1990) (statement of Rep. Moorhead), reprinted in S. Comm. on Env't and Public Works, Legislative History of Clean Air Act Amendments of 1990, at 2986-87 (1993); 136 Cong. Rec. H2511, 2578 (1990) (statement of Rep. Cooper), reprinted in S. Comm. on Env't and Public Works, Legislative History of Clean Air Act Amendments of 1990, at 2652-53 (1993); 136 Cong. Rec. H2511, 2561-62 (1990) (statement of Rep. Moorhead), reprinted in S. Comm. on Env't and Public Works, Legislative History of Clean Air Act Amendments of 1990, at 2612-14 (1993). Section 821 bears no facial

relationship to the PSD provisions of sections 165 and 169. Congress's subsequent use of the word "regulations" in a section of the 1990 Public Law that bears no explicit relationship with the earlier-enacted sections would not appear sufficient, on its own, to implicitly constrain EPA's authority to interpret the PSD provisions of section 165 and 169. This is particularly true where, as here, the two sections were enacted 13 years apart, bear no obvious relationship, and are not even placed in close proximity. Moreover, the Agency did determine, in 1978 that the phrase "subject to regulation under this Act" used in the PSD provisions requires interpretation to properly implement the PSD program, and Congress did not evidence an intent in section 821 to alter the Agency's determination. Normally, more express terminology would be expected if Congress intended to alter an established meaning.

Since section 821 was enacted 13 years after sections 165 and 169, Congress' use of the term "regulations" in enacting section 821 in 1990 ordinarily would not be looked to as informative of what Congress intended when much earlier in 1977 it enacted the BACT requirement. *See Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 571 (1979) (Burger, C.J., concurring) (understanding of draftsman of amendment in 1970 "would have little, if any, bearing" on "construction of definitions enacted in 1933 and 1934"); *United States v. Price*, 361 U.S. 304,332 (1960) ("The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.")

### 4.2.3. Effect of 2008 Consolidated Appropriations Act and Mandatory Greenhouse Gas Reporting Rule

**Comment:**

The Petition for Reconsideration also suggests that GHGs are regulated because Congress has specifically required monitoring of all GHGs, including $CO_2$, economy-wide, in the 2008 Consolidated Appropriations Act. H.R. 2764; Public Law 110-161, at 285 (enacted Dec. 26, 2007). As a result, $CO_2$ monitoring and reporting is required under the Act separate and apart from Section 821. According to Petitioner, the PSD Interpretive Memo, attempts to evade the consequences of the Appropriations Act requirement by, among other things, opining that a pollutant is not "subject to regulation" when Congress specifically tells EPA to regulate it, but only when EPA actually adopts regulations.

The commenter (0107) believes for the same reasons as describe above for section 821 of the 1990 Clean Air Act Amendments that it would be unreasonable to conclude that Congress intended EPA to regulate GHGs under PSD or other provisions of the Act for establishing standards when it charged EPA in the 2008 Omnibus Budget Amendment to require GHG monitoring and reporting from the largest sources of GHG by 2010. This statute states that it intended EPA to use the information collection authority in the CAA, not any of the Act's substantive regulatory authorities for setting emission standards, to collect and analyze GHG emissions data from the largest sources.

Eight industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) note that, while they are not aware that environmental advocacy groups or others have expressly

argued that EPA's promulgation of the Mandatory Reporting of Greenhouse Gases Final Rule ("GHG Reporting Rule"), 74 FR 56260 (Oct. 30, 2009) makes GHGs subject to the PSD program, they have argued that the statute that authorized promulgation of that rule, the Fiscal Year 2008 Consolidated Appropriations Act, Pub. L. No. 110-161 ("Appropriations Act"), triggered PSD for GHGs. The commenters assert that that argument, and any related argument that the GHG Reporting Rule triggered PSD requirements, should be rejected for the same reasons the PSD Interpretive Memorandum rejected – and the proposed PSD Interpretation would continue to reject – the monitoring and reporting interpretation discussed above.

The industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) also argue that any such argument is meritless for an additional reason: the Appropriations Act is not the CAA, and the GHG Reporting Rule was not promulgated under the CAA. Thus, even if the GHG Reporting Rule did constitute "regulation," it still could not be considered regulation "under the Act."

**Response:**

Similar to section 821 of the CAA, the 2008 Omnibus Budget Amendment contains a directive that EPA promulgate regulations that establish monitoring and reporting requirements for GHGs. As with section 821 and the regulations promulgated to satisfy this law (Part 75), EPA does interpret the 2008 Omnibus Budget Amendment or the EPA regulation promulgated to implement this law to be sufficient to make GHGs subject to regulation for the purposes of CAA sections 165(a)(4) and 169(3). EPA's reasoning for this conclusion is the same as for section 821, because the 2008 enactment does not require any controls on emissions. Furthermore, since EPA has now promulgated GHG reporting regulations to address its responsibilities under the 2008 law, the Petitioners criticism of EPA's conclusion that a pollutant becomes subject to regulation upon EPA promulgation of rules mandated by Congress is no longer material. In this Reporting Rule (which became effective in December 2009 and required monitoring to begin in January of this year), EPA established monitoring and reporting requirements for $CO_2$ and other GHGs under CAA sections 114 and 208. Thus, there can be no dispute that monitoring and reporting of $CO_2$ (as well as other GHGs) is now occurring under the CAA, regardless of the status of the 2008 Omnibus Budget Amendment.

### 4.2.4. Effects Threshold for PSD Permitting

**Comment:**

One environmental group commenter (0095) claims that EPA ignores the Congressionally-established purpose of PSD to protect public health and welfare from actual and potential adverse effects. Specifically, this commenter states that to limit BACT (as described in the PSD Interpretive Memo and favored by EPA in the reconsideration) ignores the broad, protective purpose of the PSD program as explicitly stated by Congress (the purpose of the PSD program is to "protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution notwithstanding attainment and maintenance of all national ambient air quality

standards." 42 U.S.C. §7470(1) (emphasis added). In contrast, Congress required EPA to make an endangerment finding before establishing generally applicable standards such as the NSPS or motor vehicle emissions standards. Each of these programs expressly require EPA to find that emissions of a pollutant "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" as a prerequisite to regulation. *Id.* §7408(a)(1)(A); id. §7521(a)(1); *see also id*. §7411(b)(1). This commenter opines that the policy arguments cited in the reconsideration are not consistent with the statutory purpose of PSD. It is the emphasis on "potential adverse effect[s]" that distinguishes PSD from the national ambient air NAAQS and NSPS programs that EPA looks to bolster its "actual control" position. As new pollutants are identified, BACT's case-by-case approach provides the dynamic flexibility necessary to implement an emission limitation appropriate to each particular source and pollutant. PSD's Congressionally-enacted power to address potential adverse effects is dramatically hindered by EPA's suggestion that endangerment determinations and actual control limits must be first established. The PSD Interpretive Memo's focus on endangerment – *see, e.g.,* Memo at 18 – and EPA's consistent position in the reconsideration improperly limit the scope of the PSD program and the BACT requirement. The commenter asserts that the "actual control" view ignores the broader purpose of the PSD program by limiting the scope of the PSD program and the BACT requirement. According to the commenter, the congressional directive that BACT be no less stringent than those other control requirements is a further indication that BACT is meant to be more protective and apply more broadly. Further, commenter states that the PSD Interpretive Memo and EPA's reconsideration demonstrates a fundamental misperception of the role of the PSD program and its BACT requirement within the CAA.

Ten industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) argue that the Petitioners incorrectly assert that the CAA provides a "lower threshold" for regulation under the PSD program than it does under the Act's NAAQS and NSPS provisions. To the contrary, the criteria for regulation under the NAAQS and NSPS provisions are, in effect, imported by reference into EPA's definition of "regulated NSR pollutant." Moreover, evidence does not exist that Congress intended to create – or that EPA established by regulation – a subset of potential regulated NSR pollutants for which similar regulatory preconditions would not have to be met before they could become subject to PSD requirements. In fact, in the preamble to its proposed Tailoring Rule, EPA appropriately cited legislative history supporting the view that Congress designed the PSD program to address conventional criteria pollutants and to promote and safeguard attainment of the NAAQS. *See* 74 FR 55308/2-55309/3.

**Response:**

EPA does not agree that the terms of section 160 compel EPA to read sections 165(a)(4) and 169(3) to apply to a pollutant before the Agency has established control requirements for the pollutant. Section 160(1) describes PSD's purpose to "protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipated to occur from air pollution." Thus, this goal contemplates an exercise of judgment by EPA to determine that an actual or potential adverse effect may reasonably be anticipated from air pollution. In that sense, this goal is consistent with NAAQS and NSPS programs, which contemplate that regulation of a pollutant will not occur until a considered judgment by EPA that

a substance or source category merits control or restriction. The commenter has not persuasively established that the "potential adverse effect" language in section 160(1) makes this provision markedly different than the language used in sections 108(a)(1)(A) and 111(b)(1)(A). All three sections use the phrase "may reasonably be anticipated" Furthermore, section 160 contains general goals and purposes and does not contain explicit regulatory requirements. The controlling language in the PSD provisions is the "subject to regulation" language in sections 165(a)(4) and 169(3). As discussed earlier, the "actual control" interpretation is based on a common and accepted meaning of the term "regulation." To the extent the goals and purpose in section 160 are instructive as to the meaning of other provisions in Part C of the Act, section 160(1) is just one of several purposes of the PSD program that Congress specified. The Act also instructs EPA to ensure that economic growth occurs consistent with the preservation of existing clean air resources. CAA §160(3). EPA's interpretation is consistent with this goal because it allows EPA to look at the larger picture by coordinating control of an air pollutant under the PSD program with control under other CAA provisions.

EPA finds the logic of the PSD Interpretive Memo more persuasive. The Memo considers the full context of the CAA, including the health and welfare criteria that generally must be satisfied to establish control requirements under other parts of the Act, information gathering provisions that contemplate data collection and study before pollutants are controlled, and requirements for reasoned decision making. While some commenters presented arguments for why it might be possible or beneficial to apply the BACT requirement before a control requirement is established for a pollutant elsewhere under the Act, these arguments do not demonstrate that the contextual reading of the CAA described in the PSD Interpretive Memo is erroneous. Thus, the comments have at most provided another permissible reading of the Act, but they do not demonstrate that EPA must require BACT limitations for pollutants that are not yet controlled but only subject to data collection and study.

## *4.3. Policy Considerations Raised by Monitoring and Reporting Interpretation*

**Comment:**

One commenter (0062) agrees with the policy arguments advanced by EPA and others that EPA's critical information gathering activities will be constrained, with likely adverse environmental and public health consequences, if monitoring requirements are necessarily associated with the potentially significant implementation and compliance costs and resource constraints of the PSD and Title V programs.

Another commenter (0102) expresses concern that without the ability to gather data or investigate unregulated pollutants, for fear of triggering automatic regulation under the CAA, EPA will not have the flexibility to review the validity of controlling additional or fewer GHGs.

A state agency commenter (0102) also expresses concern that a permitting program triggered by a monitoring and reporting requirement with no established federal emission standard would be subject to continuous legal challenges based on the concept of the program

and the restrictions of individual permits. The commenter (0102) believes that such a program could not be effectively administered.

Commenters (0092, 0067, 0081, 0083, 0089, 0096, 0090, 0106/0107, 0108, 0109) representing several companies (industry), state that an interpretation of "subject to regulation," that would be applied to pollutants based on monitoring and reporting requirements would effectively eliminate the ability of EPA to conduct investigative monitoring, necessary if the EPA wishes to develop informed, appropriate, and legally defensible regulations for controlling emissions, and could prevent EPA from monitoring unregulated surrogate emissions, which are monitored to demonstrate compliance with emission standards of associated regulated pollutants.

Ten industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) state that subjecting a pollutant to the PSD program because of a requirement to gather information on emissions would reverse the logical order of CAA regulation, requiring sources to control a pollutant through BACT even before Congress or EPA could determine whether that pollutant should be subject to emission controls at all. The commenters stress that Congress established the PSD program for the purpose of preventing emissions of pollutants that are already subject to CAA regulation from degrading air quality that meets the NAAQS. The commenters indicate that EPA has consistently rejected the "monitoring and reporting" interpretation, and cite as an example a memorandum issued contemporaneously with its 1993 section 821 regulations (the Wegman memorandum). The commenters also agree with EPA that adopting the "monitoring and reporting" interpretation would hamper EPA's consideration of whether to adopt emission control regulations for any additional pollutant in the future if a requirement merely to measure and report emissions of that pollutant subjected those emissions to PSD requirements.

Ten industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) seek to rebut Petitioners argument that EPA has failed to demonstrate that there is anything "unworkable" about requiring PSD to be met for pollutants that are subject only to monitoring and reporting requirements. The EPA has demonstrated that this would pose serious problems of administrability, e.g., by hampering the gathering of information to allow factually grounded determinations of whether and how emission control requirements should be developed and imposed.

One industry commenter (0085) agrees with EPA that monitoring and reporting are normal preceding steps to actual regulation under the CAA. The commenter (0085) adds that if EPA were to adopt the interpretation that gathering information triggered PSD, the Agency would clearly be reluctant to even begin the information gathering process for a pollutant.

One of the commenters (0086) agrees with EPA's rationale for this conclusion and that the monitoring and reporting interpretation would create perverse incentives.

One industry commenter (0050) states that the CAA allows EPA to promulgate requirements for monitoring and reporting emissions of pollutants prior to a finding of endangerment, and that the Greenhouse Gas Reporting Rule was recently finalized by the EPA. This commenter opines that the application of PSD/Title V upon implementation of monitoring

and reporting requirements would stifle the collection of data necessary to make informed decisions. In addition, applying PSD/Title V would render the statutorily-required endangerment finding unnecessary. This commenter also believes that adoption of the "monitoring and reporting requirement" option would deter EPA from further studying the possible impacts of a substance on public health and welfare, thereby preventing the agency from much needed information on addressing possible health or welfare effects.

One industry commenter (0059) submits that it would be unreasonable to conclude that requiring monitoring of GHG emissions on January 1, 2010 or reporting of GHGs on March 31, 2011 under the Mandatory GHG Reporting Rule, subjects GHGs to the PSD program. They assert that collection of such information is intended to help the EPA determine which industry sources should be regulated and how, and to construe that collection as subjecting GHGs to regulation under PSD did not make sense.

This industry commenter (0050) states that the "monitoring and reporting requirement" option was not acceptable from the standpoint of the regulated community because they believed it would subject all sectors of the economy burdensome PSD and Title V requirements for substances that may not cause problems for public health or welfare and thus should not be subject to regulation.

One industry commenter (0097) argues that if an interpretation that a monitoring requirement triggered control standards, every request for data or monitoring requirement, excepting a program which is established to demonstrate compliance with an existing regulation, would be expected to be challenged in court because of the potential outcome that such actions would constitute a control requirement and set in motion a further chain of regulatory action. On this point, the commenter argues that if, as now seems the case, regulation of environmental matters occurs via the judicial system, the analyses and demonstration of need through the use of scientific information and policy decisions will be lost. Further, the commenter claims this could include information collection requests (ICR) under section 114 of the CAA. The potential for this to occur is a circumstance that must be recognized and considered.

One industry group (0071) commenter opines that industry would be much more resistant to proposed monitoring requirements and EPA would be less likely to impose monitoring requirements if they would trigger PSD BACT requirements.

**Response:**

The monitoring and reporting interpretation would make the substantive requirements of the PSD program applicable to particular pollutants based solely on monitoring and reporting requirements (contained in regulations established under section 114 or other authority in the Act). This approach would lead to the perverse result of requiring emissions limitations under the PSD program while the Agency is still gathering the information necessary to conduct research or evaluate whether to establish controls on the pollutant under other parts of the Act. Such a result would frustrate the Agency's ability to gather information using section 114 and other authority and make informed and reasoned judgments about the need to establish controls or limitations for particular pollutants. If EPA interpreted the requirement to establish emissions

limitations based on BACT to apply solely on the basis of a regulation that requires collecting and reporting emissions data, the mere act of gathering information would essentially dictate the result of the decision that the information is being gathered to inform (whether or not to require control of a pollutant).

We agree that a monitoring and reporting interpretation would hamper the Agency's ability to conduct monitoring or reporting for investigative purposes to inform future rulemakings involving actual emissions control or limits. In addition, it is not always possible to predict when a new pollutant will emerge as a candidate for regulation. In such cases, the Memo's reasoning is correct in that we would be unable to promulgate any monitoring or reporting rule for such a pollutant without triggering PSD under this interpretation.

**Comment:**

According to an environmental organization commenter (0095), requiring BACT for pollutants subject to monitoring and reporting regulations does not impair EPA's ability to gather information about pollutants. The EPA can gather such information without triggering BACT because neither section 114 nor the general regulations governing agency information collection efforts require EPA to promulgate regulations in order to collect information. *See*, e.g., 5 CFR 1320.5(c),1320.8(d) (indicating that information may be collected with or without a formal rulemaking).

**Response:**

EPA understands that the monitoring and reporting interpretation would not result in application of the PSD BACT requirement when EPA exercises its section 114 authority to collect information without promulgating a regulation. However, EPA's ability to gather information by rulemaking would still be hampered by the application of the monitoring and reporting interpretation. EPA wishes to preserve all its potential information gathering tools, even those that may be used less frequently.

**Comment:**

This commenter (0095) further asserts that as a practical matter, EPA has still not identified even one pollutant other than GHGs that would become "subject to regulation" as a result of monitoring or reporting requirements. In the reconsideration, EPA attempts to provide a single example, claiming that certain stationary sources "must" monitor oxygen gas ($O_2$) or $CO_2$ – at 74 FR 51542 – citing 40 CFR 60.49Da(b) and (c). According to the commenter, EPA is simply wrong: one of these subsections (40 CFR 60.49Da(c)) deals solely with NOx monitoring, and says nothing about $O_2$, and the other permits -- but does not require -- such monitoring. 40 CFR 60.49Da(b)(4) provides that:

> If the owner or operator has installed and certified a $SO_2$ continuous emissions monitoring system (CEMS) according to the requirements of Sec.75.20(c)(1) of this chapter and appendix A to part 75 of this chapter, and is continuing to meet the ongoing quality assurance requirements of Sec. 75.21 of this chapter and appendix B to part 75 of

this chapter, that CEMS may be used to meet the requirements of this section, provided that: (i) A $CO_2$ or $O_2$ continuous monitoring system is installed.

One of the state agency commenters (0102) responds to the Petitioners contention that EPA has not identified a pollutant other than $CO_2$ that would be affected by the monitoring and reporting interpretation by noting that EPA's endangerment finding covers six GHGs, not just $CO_2$.

Further, commenter (0071) says that EPA has, in the past, imposed monitoring and/or reporting requirements for chemicals that EPA does not intend to regulate, nor is likely to want to do so in the future. For example, monitoring $O_2$ in the stack of a boiler, which EPA provides at 74 FR at 51542, is a very real example that demonstrates that monitoring and reporting requirements alone cannot reasonably be interpreted to trigger PSD and BACT requirements.

A state agency commenter (0091), citing the example described by EPA of the NSPS subpart Da requirement to "measure" $O_2$ or $CO_2$, states that since EPA is not considering the measuring of $O_2$ as "subject to regulation," it should therefore not interpret $CO_2$ to be regulated in this manner. The commenter also states that this interpretation would not preserve the EPA's ability to collect emissions data on other pollutants for research or other purposes such as evaluating the need for emissions controls or limitations.

One industry group commenter (0070) argues that adopting a "monitoring and reporting interpretation" could prevent EPA from monitoring unregulated surrogate emissions, which are monitored to demonstrate compliance with emission standards of associated regulated pollutants. Under such a scenario, the mere monitoring of environmentally-benign surrogate emissions could require pointless control of their emissions.

Commenter (0097) states that if compounds such as oxygen are measured or monitored to allow quantification of emissions, that gas would also be "regulated" under this policy, which the commenter does not believe is the desire of EPA or in the best interest of the Country.

**Response:**

EPA's GHG Reporting Rule covers six GHGs, not just $CO_2$. Further, EPA has promulgated regulations that require monitoring of oxygen ($O_2$) in the stack of a boiler under certain circumstances. *See* 40 CFR 60.49Da(d). In the proposal, EPA mistakenly cited 60.49Da(c) of this regulation. As the commenter points out, this provision does not address O2 monitoring. However, section 60.49Da(d) says that "[t]he owner or operator of an affected facility not complying with an output based limit shall install, calibrate, maintain, and operate a CEMS, and record the output of the system, for measuring the O2 or carbon dioxide (CO2) content of the flue gases at each location where SO2 or NOx emissions are monitored." These examples help demonstrate why monitoring and reporting requirements alone should not be interpreted to trigger PSD and BACT requirements. Even if EPA only establishes monitoring and reporting requirements for only a small number of pollutants, this does not alter the undesirable outcome of the PSD program requiring emissions limitations on the basis of regulations designed for information gathering.

## *4.4. Monitoring Equipment Captures and Controls Emissions*

**Comment:**

Even if EPA's "preferred" interpretation of "actual control of emissions" is applied to its monitoring and reporting regulations, the commenter (0101) states that the processes that must be utilized to monitor and report on $CO_2$ emissions require actual and physical "control" of them, as the amount of emissions cannot be determined unless the gases are first in some way captured and controlled.

Commenter (0095). The Part 75 regulations prohibit operation in violation of these requirements and provide that a violation of any Part 75 requirement is a violation of the Act. Id. §75.5. Not only do the regulations require that polluting facilities "measure . . . $CO_2$ emissions for each affected unit," id. §75.10(a), they also prohibit operation of such units "so as to discharge or allow to be discharged, emissions of . . . $CO_2$ to the atmosphere without accounting for all such emissions . . . . " Id. §75.5(d). According to the commenter (0095), in arguing that these regulations do not make $CO_2$ "subject to regulation" because they do not require "actual control of $CO_2$ emissions", EPA appears to really mean "quantitative control" or "limitation" of emissions, as opposed to "actual control." In fact, this commenter (0095) asserts that one cannot accurately monitor emissions without "controlling" them.

Ten industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) argue that this contention that any monitoring requires some level of "control" would, without any basis in logic, simply erase the distinction between monitoring and emission controls.

**Response:**

The actual control interpretation contemplates a regulatory action that serves to limit or restrict emissions of a pollutant. The containment of emissions in a stack or a monitoring device for the purposes of monitoring does not function to limit or restrict emissions. Even if some small percentage of emission are captured for purposes of analysis, a monitoring requirement provides no assurance that pollutants captured for purposes of monitoring alone will not eventually be emitted to the ambient air without limitation after the necessary analysis is complete. Thus, EPA is not persuaded by the argument that monitoring devices are equivalent to emissions control devices or techniques and would actually control emissions.

## *4.5. Applicability of Title V Requirements Based on Monitoring and Reporting*

**Comment:**

One of the industry commenters (0067) and two of the state/local agency associations (0054, 0062) added that monitoring and reporting obligations also do not give rise to permitting obligations under Title V of the CAA.

**Response:**

Title V requires, among other things, that any "major source" – defined, as relevant here, under CAA sections 302(j) and 501(2)(b), as "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant..." – apply for a Title V permit. EPA interprets this requirement to apply to sources of pollutants "subject to regulation" under the Act. EPA previously articulated its interpretation that this Title V permitting requirement applies to "pollutants subject to regulation" in a 1993 memorandum from EPA's air program. Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, "Definition of Regulated Air Pollutant for Purposes of Title V" (Apr. 26, 1993) ("Wegman Memo"). EPA continues to maintain this interpretation. The interpretation in this memorandum was based on: (1) EPA's reading of the definitional chain for "major source" under Title V, including the definition of "air pollutant" under section 302(g) and the definition of "major source" under 302(j); (2) the view that Congress did not intend to require a variety of sources to obtain Title V permits if they are not otherwise regulated under the Act (*see also* CAA section 504(a), providing that Title V permits are to include and assure compliance with applicable requirements under the Act); and (3) consistency with the approach under the PSD program. While the specific narrow interpretation in the Wegman Memo of the definition of "air pollutant" in CAA section 302(g) is in question in light of Massachusetts (finding this definition to be "sweeping"), EPA believes the core rationale for its interpretation of the applicability of Title V remains sound. EPA continues to maintain its interpretation, consistent with CAA sections 302(j), 501, 502 and 504(a), that the provisions governing Title V applicability for "a major stationary source" can only be triggered by emissions of pollutants subject to regulation. This interpretation is based primarily on the purpose of Title V to collect all regulatory requirements applicable to a source and to assure compliance with such requirements – *see*, e.g., CAA section 504(a) – and on the desire to promote consistency with the approach under the PSD program.

In applying this interpretation under Title V, the Wegman Memo also explains that EPA does not consider $CO_2$ to be a pollutant subject to regulation based on the monitoring and reporting requirements of section 821 of the Clean Air Act Amendments of 1990. As articulated in numerous orders issued by EPA in response to petitions to object to Title V permits, EPA views the Title V operating permits program as a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured. *See*, e.g., In the Matter of Fort James Camas Mill, Petition No. X-1999-1 at 3-4 (Dec. 22, 2000); In the Matter of Cash Creek Generation, LLC, Petition Nos. IV-2008-1

& IV-2008-2 at 2 (Dec. 15, 2009). The Wegman Memo points out that section 821 involves reporting and study of emissions, but is not related to actual control of emissions. Since the reporting requirements of section 821 have no connection to existing air quality control requirements, it is appropriate not to treat them as making $CO_2$ "subject to regulation" for purposes of Title V. *Cf.* Section 504(b) (providing EPA authority to specify requirements for "monitoring and analysis of pollutants regulated under this Act.").

## *4.6. Practice of Distinguishing Pollutants Covered by Control Requirements and Monitoring Requirements*

**Comment:**

One industry commenter (0079) states that it is a long standing practice in the air pollution community to distinguish between those pollutants subject to control requirements – NAAQS, NSPS, NESHAP, and SIP requirements – versus those pollutants that are subject only to generic emission inventory or similar reporting requirements. The first set of pollutants is considered "subject to regulation." The second set of pollutants is "potentially" subject to regulation in the future.

The commenter (0062) indicates that EPA has issued fairly clear guidance over the years concerning what constitutes an emissions limitation, as opposed to a monitoring requirement, and states that EPA should incorporate those concepts in its final guidance.

**Response:**

EPA agrees there is a distinction between pollutants subject to control requirements and pollutant subject only to emissions inventory and monitoring requirements. This distinction illustrated by commenters supports EPA's final action to continue applying the actual control interpretation under the PSD program.

## *4.7. Enforceability of Monitoring Regulations*

**Comment:**

The Petition for Reconsideration says that, just like regulations restricting emissions quantities, the regulations EPA promulgated implementing Section 821 have the force of law, and violation results in severe sanctions. 40 CFR 75.5; 42 U.S.C. §7413(c)(2) (punishable by imprisonment of up to six months or fine of up to $10,000 for making false statement or representation or providing inaccurate monitoring reports under CAA).

Ten industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) argue that fact that EPA may enforce the section 821 regulations using enforcement mechanisms authorized by the CAA does not support petitioners' interpretation. Section 821 expressly incorporates by reference the CAA's

enforcement mechanisms, but neither that incorporation nor the use of those mechanisms transforms the section 821 requirement for monitoring and reporting into an actual emission control under the CAA. *See In Re: Deseret Power Electric Cooperative*, Response of *Amicus Curiae* Utility Air Regulatory Group to the Board's Request for Supplemental Briefing, at 3-10 (Sept. 12, 2008) ("UARG Supplemental Amicus Brief"); *see also* infra Section VII.

**Response:**

EPA agrees that the Part 75 regulations are enforceable and that a violation of these requirements could lead to the imposition of penalties where appropriate. However, this similarity with other EPA regulations that restrict emissions does not demonstrate that monitoring and reporting requirements themselves restrict emissions or constitute "regulation" within the meaning of that term that EPA has applied considering the context of the CAA. EPA agrees with the second set of commenters that the particular enforcement mechanism of the Part 75 regulations does not transform these regulations into actual control requirements.

# Chapter 5. EPA-Approved State Implementation Plan (SIP)

## *5.1. Overview of Comments on the SIP Interpretation*

**Comment:**

Thirty industry commenters (0050, 0051, 0053, 0056, 0059, 0065, 0066, 0067, 0068, 0070, 0071, 0073, 0074, 0076, 0079, 0081, 0083, 0085, 0086, 0089, 0090, 0092, 0096, 0097, 0098, 0105, 0106/0107, 0108, 0109, 0118) and four state/local agency associations (0058, 0062, 0091, 0102) agree with EPA's position that the "SIP interpretation" is not the proper interpretation of the phrase "subject to regulation" for purposes of PSD.

Ten of these industry commenters (0089 and others incorporating this submission (0065, 0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109)) express full support for the rationale provided by EPA in the PSD Interpretive Memorandum and the proposed PSD Interpretation for rejecting the SIP interpretation as unwarranted and unreasonable. These commenters assert that the petitioners' arguments in favor of the SIP interpretation (i.e., that the Delaware SIP is enforceable under the CAA, that the SIP interpretation is supported by the plain language of the CAA, and that the approved SIP's provisions are codified under 40 CFR Subchapter C) are not significantly different from those raised under the monitoring and reporting interpretation, and that this interpretation should be rejected for the same reasons.

Environmental group commenters (0095, 0101) who incorporate the Petition for Reconsideration in their comments support the SIP interpretation.

**Response:**

After reconsidering the legal and policy issues, we decline to adopt the SIP interpretation. Since the meaning of the term "subject to regulation" is ambiguous and susceptible to multiple interpretations, the SIP interpretation is not compelled by the structure and language of the Act. Furthermore, there would be negative policy implications if EPA adopted this interpretation. EPA responds to more specific points in the responses that follow.

## *5.2. Consistency with the Statute and Congressional Intent*

**Comment:**

Several commenters expressed that the SIP interpretation is inconsistent with the CAA. One commenter (0079) opines that the SIP interpretation belies 35 years of practice to the contrary, and is inconsistent with section 110(a)(1) of the CAA, which limits the effect of a SIP to "air quality control regions" "within such state." 42 U.S.C. §7410(a)(1). States are only required to prevent interference with other states' compliance with NAAQS or measures required to be included in the PSD portions of their SIP. 42 U.S.C. §7410(a)(2)(D). Section 126 of the

CAA is similar in limiting its effects to NAAQS and the required elements of the PSD program. *See* 42 U.S.C. §7426. Commenter (0085) also states that the SIP interpretation would ignore extensive provisions in the CAA for addressing interstate air pollution by allowing one state to create national policy. Three commenters (0059, 0097, 0058, 0107) point to CAA section 116 as evidence that a state can set more stringent CAA regulations in its jurisdiction to advance the state's own public policy goals and Congress expressed no intent that such state regulations would trigger nationwide requirements. Commenters argue that the SIP interpretation establishes a situation that would allow the actions in a single state to define policy in other states and nationally, which may be contrary to the best interests of the nation or other states.

Three commenters (0070, 0086, 0092, 0098) state that the SIP interpretation conflicts with the core principle of cooperative federalism on which the CAA is based, and that this interpretation would strip Congress and EPA of their authority to set the minimum standards and instead, would allow individual states to control the federal permitting program's baseline requirements. Commenter 0086 notes that although EPA-approved SIP requirements become enforceable by EPA and citizens under certain provisions of the CAA, it does not follow that such enforcement authority renders the pollutant subject to regulation under the CAA. Rather, this enforcement authority promotes the CAA of providing federal assistance to States in preventing air pollution under their own programs. Moreover, Section 304 that provides for citizen enforcement specifically defines the term "emission standard or limitations" to include SIP requirements, but Congress limited the application of this definition to only Section 304. This suggests that Congress meant for a different definition that does not include SIP requirements, to apply for other purposes under the CAA. Another industry commenter (0068) opines that the SIP interpretation would unconstitutionally delegate authority to States to substitute their judgment for EPA's when the CAA clearly gives States authority to only address local air quality concerns. Finally, commenter 0086 notes that courts have already recognized that the CAA does not require a state to "respect its neighbor's air quality standards (or design its SIP to avoid interference therewith) if those standards are more stringent than the requirements of federal law." *Connecticut v. EPA*, 656 F.2d 902, 909 (2d Cir. 1981).

Several industry commenters (0089 and others incorporating this submission (0065,0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109)) add that no interpretation is defensible whereby a state's SIP provision would establish national regulatory policies and bind EPA and other states. One state's SIP provisions cannot impose on EPA an obligation to regulate all other states the same way. *See Vermont v. Thomas*, 850 F.2d 99, 102-04 (2d Cir. 1988) (holding that Vermont cannot, through inclusion of a state ambient air quality standard in a revision to a SIP, impose that standard on upwind states). Rather, EPA establishes the rules, based on the CAA, which states then implement through their SIPs.

Another commenter (0085), while ceding that that SIP regulations become federally-enforceable once approved by EPA, asserts that such approval does not constitute an affirmative decision to subject GHGs to regulation under the Act; rather, EPA's criteria for approving SIPs is wholly different from the criteria required to establish national regulations. Another commenter (0059) states that EPA would be required to analyze the impacts from a state SIP amendment on a national scale because the impacts of PSD/Title V would be national in scope.

This would create an unwarranted and unnecessary burden on the agency and could lead to significant delays in the approval of SIP amendments.

Another commenter (0086) notes that although, EPA-approved SIP requirements become enforceable by EPA and citizens under certain provisions of the CAA, it does not follow that such enforcement authority renders the pollutant subject to regulation under the CAA. Rather, this enforcement authority promotes the CAA purpose of providing federal assistance to States in preventing air pollution under their own programs.

One industry commenter (0068) opines that, to delegate, unconstitutionally, the power of federal regulation to the states by enabling one state to take action triggering the regulation of a pollutant on a nation-wide scale would be contrary to the structure of the CAA, which clearly gives states autonomy to tailor their programs to achieve local air quality requirements but only limited authority for states to substitute their judgment for EPA's.

Some environmental commenters, who incorporate the Petition for Reconsideration in their comments (95, 101) and support the SIP interpretation, fault the Agency's rejection of this interpretation by stating that neither the Act, nor the PSD Interpretive Memo, provides a basis for a position that regulation by a single state is not enough to constitute "regulation under the Act" on a nationwide basis for purpose of section 165. Petitioners and another commenter also assert that $CO_2$ is already "subject to regulation under the Act" and take the position that any requirement EPA adopts and approves in an implementation plan makes the covered pollutant "subject to regulation under the Act" because it is approved by the EPA "under the Act," and because it becomes enforceable by the state, by EPA and by citizens "under the Act" upon approval.

**Response:**

While EPA does not agree that the SIP interpretation is inconsistent with the CAA, we nonetheless decline to adopt the interpretation. We believe that the actual control interpretation better unifies the multiple purposes of the CAA and the concept of cooperative federalism. Congress allowed individual states to create and apply some regulations more stringently than federal regulations within its borders, without allowing individual states to set national regulations that would impose those requirements on all states. *See Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 467 (6th Cir. 2004).

EPA continues to believe that the CAA and our implementing regulations are intended to provide states flexibility to develop and implement SIPs to meet the air quality goals of their individual state. Each state's implementation plan is a reflection of the air quality concerns in that state, allowing a state significant latitude in the treatment of specific pollutants of concern (or their precursors) within its borders based on air quality, economic, and other environmental concerns of that state. As such, pollutant emissions in one state may not present the same problem for a state a thousand miles away. As expressed in the PSD Interpretive Memo, we continue to have concerns that the SIP interpretation would improperly limit the flexibility of states to develop and implement their own air quality plans, because the act of one state to establish regulatory requirements for a particular pollutant would drive national policy. If EPA

determined that a new pollutant becomes "subject to regulation" nationally within the meaning of section 165 based solely on the provisions of an EPA-approved SIP, then all states would be required to subject the new pollutant to PSD permitting whether or not control of the air pollutant was relevant for improving that state's air quality. Whether one state, five states, or 45 states make the decision that their air quality concerns are best addressed by imposing regulations on a new pollutant, we do not think those actions should trump the cooperative federalism inherent in the CAA. While several states may face similar air quality issues and may choose regulation as the preferred approach to dealing with a particular pollutant, we are concerned that allowing the regulatory choices of some number of states to impose PSD regulation on all other states would do just that.

EPA disagrees with the commenters and petitioners who contend that a pollutant regulated in one SIP approved by EPA must automatically be regulated through the PSD program nationally. In fact, Congress demonstrated intent, in the language and structure of the Act, for SIP requirements to have only a local or regional effect.

In CAA section 102(a), Congress directs EPA to encourage cooperative activities among states, and the adoption of uniform state and local laws for the control of air pollution "as practicable in light of the varying conditions and needs." This language informs the issue of whether SIP requirements have nationwide applicability in two ways. First, there would be no need for EPA to facilitate uniform adoption of standards in different air quality control regions, if the regulation of an air pollutant by one region would automatically cause that pollutant to be regulated in another region. Second, Congress bounded its desire to promote uniformity by recognizing that addressing local air quality concerns may preempt national uniformity of regulation.

Indeed, section 116 of the CAA grants States the right to adopt more stringent standards than the uniform, minimum requirements set forth by EPA. *See* 42 U.S.C. 7416. The legislative history of the 1977 CAA Amendments shows that Congress understood that States may adopt different and more stringent standards then the federal minimum requirements. *See, e.g.*, 122 Cong. Rec. S12456 (daily ed. July 26, 1976) (statement of Sen. Randolph) ("[T]he States are given latitude in devising their own approaches to air pollution control within the framework of broad goals. ... The State of West Virginia has established more stringent requirements than those which, through the Environmental Protection Agency, are considered as adequate..."); 122 Cong. Rec. S12458 (daily ed. July 26, 1976) (statement of Sen. Scott) ("The states have the right, however, to require higher standards, and they should have under the police powers.") Congress could not have intended states to have latitude to implement their own approaches to air pollution control, and simultaneously, require that air pollutants regulated by one State automatically apply in all other States.

Importantly, the legislative history also shows that Congress intended to limit the EPA's ability to disapprove a State's decision to adopt more stringent requirements in setting forth the criteria for approving state submissions under section 110. This intent is supported by the following passage:

> State implementation plans usually contain a unified set of requirements and frequently do not make distinctions between the controls needed to achieve one kind of ambient standard or another. To try to separate such emission limitations and make judgments as to which are necessary to achieving the national ambient air quality standards assumes a greater technical capability in relating emissions to ambient air quality than actually exists.
>
> A federal effort to inject a judgment of this kind would be an unreasonable intrusion into protected State authority. EPA's role is to determine whether or not a State's limitations are adequate and that State implementation plans are consistent with the statute. Even if a State adopts limits which may be stricter than EPA would require, EPA cannot second guess the State judgment and must enforce the approved State emission limit.[2]

123 Cong. Rec. S9167 (daily ed. June 8, 1977) (statement of Sen. Muskie).

This Congressional intent is reflected within the statutory language. Under section 110(k)(3), the EPA Administrator "shall approve" a state's submittal if it meets the requirements of the Act, and under section 110(l) "shall not" approve a plan revision "if the revision would interfere with any other applicable requirement of this Act." Courts have similarly interpreted this language to limit EPA's discretion to approve or disapprove SIP requirements. *See, e.g., State of Connecticut v. EPA*, 656 F.2d 902, 906 (2d. Cir. 1981) ("As is illustrated by Congress's use of the word 'shall,' approval of an SIP revision by the EPA Administrator is mandatory if the revision has been the subject of a proper hearing and the plan as a whole continues to adhere to the requirements of section 110(a)(2)") (referencing *Union Electric Co. v. EPA*, 427 U.S. 246, 257 (1976); and *Mission Indus., Inc. v. EPA*, 547 F.2d 123 (1st Cir. 1976)). These provisions of the statute do not establish any authority or criteria for EPA to judge the approvability of a state's submission based on the implications such approval would have nationally. The absence of such authority or criteria in the applicable standard argues against nationwide applicability of SIP requirements and the SIP interpretation.

Moreover, under section 307(b) of the CAA, Congress assigns review of specific regulations promulgated by EPA and "any other nationally applicable regulations promulgated or final action taken, by the Administrator under this Act" only to the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). In contrast, "the Administrator's action in approving and promulgating any implementation plan under Section 110 ... or any other final action of the Administrator under this Act ... which <u>is local or regionally</u> <u>applicable</u> may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. §7607(b) (<u>emphasis added</u>). Thus, Congress set forth its intended applicability of these regulations in assigning judicial venue and clearly articulated that requirements in a SIP are generally "local or regionally applicable."

We agree that EPA's approval of a state requirement into that State's implementation plan has the effect of making that requirement enforceable under the CAA. In addition, we agree

[2] Notably, the legislative record refers to "State" emission limit, and makes no note of this State emission limitation having broader applicability.

with the commenter who notes that the enforcement provisions of the Act further the concept of federalism by providing federal support to States' unique programs, and do not necessarily define the scope of the PSD permitting program. However, the fact that EPA has authority to enforce SIP provisions against regulated entities in one state does not establish that EPA has the power to enforce these provisions against entities in other states that are not subject to the state laws incorporated into the SIP. Thus, it does not follow that the enforceability of particular SIP provisions by EPA makes a pollutant regulated under such state's laws into a pollutant that is subject to regulation on a nationwide basis.

## *5.3. Implications of Applying State-specific Decisions to the Nation*

**Comment:**

Several commenters indicate that state actions to regulate local air quality concerns should not establish national pollution control policy. One State commenter (0091) expressed that States should have flexibility in their implementation plans to take action, but that one state's decision to regulate GHG emissions does not obligate another state to do so. Several industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) argue that no interpretation is defensible whereby a state's SIP provision would establish national regulatory policies and bind EPA and other states. One state's SIP provisions cannot impose on EPA an obligation to regulate all other states the same way. *See Vermont v. Thomas*, 850 F.2d 99, 102-04 (2d Cir. 1988) (holding that Vermont cannot, through inclusion of a state ambient air quality standard in a revision to a SIP, impose that standard on upwind states.)

Two commenters (0107, 0105) state that EPA's approval of a SIP revision only approves that state developing and implementing its own regulations and only allows EPA to enforce the regulation in a state as part of that state's overall effort to attain it policies within its own jurisdiction. Commenter (0059, 0107) believes it would be unreasonable to interpret the CAA as requiring PSD permitting of a source that emitted GHGs in Montana simply because Delaware chose to regulate emissions from combustion turbines locally. Commenter 0059 notes that CAA clearly recognizes in section 116 that a state can set more stringent CAA regulations in its jurisdiction to advance the state's own public policy goals. Another industry commenter (0050) states that States often apply to EPA to add substances to their SIP that may be an issue within the state. The commenter (0050) opines that EPA's consideration of these applications extends only to the impacts on the particular state, and not nationally, and that problems that one state seeks to address may not be problems in the other 49 states. A state/local agency association and industry commenter (0058, 0086) also concurs with EPA's concern that taking the opposite view would set a precedent for other pollutants, such as ammonia, which EPA currently allows, but does not require, a state to treat as a precursor to $PM_{2.5}$.

Several commenters (0062, 0102, 0059, 0085, 0051, 0053) noted that the process for EPA to approve an individual State's SIP is not the appropriate process for establishing nationally applicable requirements. One state/local agency associations (0062) states that PSD and Title V applicability should arise only after a EPA makes a conscious decision to broadly regulate a pollutant under the CAA. Another state agency commenter (0102) states that it is

appropriate and necessary that regulations, particularly those with significant economic effect, not be indiscriminately applied throughout an individual state or the nation.

Finally, two commenters (0051, 0053) state that because EPA's approval of a SIP does not constitute a NAAQS, a NSPS, or a federal standard regulating ozone-depleting substances (*see* 40 CFR 52.21(b)(50)(i)-(iii)), and is merely an approval of state laws as meeting federal requirements, that approval does not make GHGs regulated pollutants under the CAA.

**Response:**

We are concerned that adopting the SIP interpretation would subject a pollutant to regulation before EPA finds that the pollutant warrants national regulation, and by-pass the opportunity for judicial review of that finding for each individual pollutant. As one commenter notes, the process for the Administrator to establish national regulations is different than the process for approving SIPs. For example, before establishing a new NAAQS, the Administrator must find that the pollutant "causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare." *See* 42 U.S.C 7408. The CAA requires the Administrator to make similar findings before regulating pollutants under other sections of the Act. *See*, for example, CAA sections 111, 112(b), 112(f) that require the Administrator to find that a pollutant "presents or may present… a threat of adverse human health effects;" or is "known to cause or may… cause death, injury, or serious adverse effects to human health and the environment."

In contrast, the statutory process for EPA to approve SIPs does not directly contemplate that EPA conduct a finding or national impact analysis of an individual state's decision to regulate a new pollutant. Specifically, Congress limited the EPA's ability to disapprove a State's decision to adopt more stringent requirements in setting forth the criteria for approving state submissions under section 110. *See* CAA section 110(k)(3). Accordingly, under the SIP interpretation, a new pollutant could become nationally regulated upon EPA's approval of a SIP, and the ability of any party to challenge the national implications of such approval would be limited. EPA believes such an outcome raises public policy concerns because it by-passes these meaningful steps in the regulatory development process.

Even if the Act could be read to support EPA review of the national implications of state SIP submissions, such an approach would be undesirable for policy reasons. As we highlighted in our reconsideration notice, one practical effect of allowing state-specific concerns to create national regulation is that EPA's review of SIPs would likely be much more time-consuming, because we would have to consider each nuance of the SIP as a potential statement of national policy. Thus, we would have heightened oversight of air quality actions in all states – even those regarding local and state issues that are best decided by local agencies. Our approval of SIPs would be delayed, which would in turn, delay state's progress toward improving air quality. And, EPA would be required to defend challenges to the approval of a SIP with national implications in the D.C. Circuit Court of Appeals rather than the local Circuit Court of Appeals. The potential increased burden of reviewing and approving SIPs to analyze the national implications of each SIP, and the associated delay in improving air quality, creates a compelling policy argument against adoption of the SIP interpretation.

The Memo reasons that application of the SIP interpretation would convert EPA's approval of regulations applicable only in one state into a decision to regulate a pollutant on a nationwide scale for purposes of the PSD program. The Memo explains that the establishment of SIPs is better read in light of the "cooperative federalism" underlying the Act, whereby Congress allowed individual states to create and apply some regulations more stringently than federal regulations within its borders, without allowing individual states to set national regulations that would impose those requirements on all states. *See Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 467 (6th Cir. 2004). In rejecting the SIP interpretation, the Memo also explains that EPA adopted a similar position in promulgation of the NSR regulations for fine particulate matter (or "$PM_{2.5}$"), without any public comments opposing that position. *See* Memo at 15-16.

## *5.4. Content of "Applicable Implementation Plan"*

**Comment:**

Several industry commenters (0089 and others incorporating this submission (0065, 0067, 0083, 0090, 0096, 0106/0107, 0108, 0109) argue that only those portions of EPA-approved state regulations that implement CAA requirements can be part of an applicable implementation plan under the CAA. (*See* CAA section 302(q) (defining the "applicable implementation plan" as "the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 110 of this Act, . . . and which implements the relevant requirements of this Act") (emphasis added).) Because emission controls for $CO_2$ and other GHGs have not been established as relevant requirements of the Act to be implemented through SIPs, any state regulation that imposes emission controls on these substances would not be an applicable implementation plan under the CAA. Thus, the fact that Delaware established emission controls for $CO_2$ in state regulations and included those state-law provisions in a document that it labeled a SIP, which subsequently was approved by EPA, does not thereby render $CO_2$ subject to regulation for PSD purposes. In fact, in its submittal information to EPA, Delaware made clear it had included $CO_2$ provisions solely as a matter of state law and those provisions were not within the scope of the state's implementation of the federal CAA (Doc. No. EPA-R03-OAR-2007-1188-0002.7).

An environmental group commenter (0101) argues that approval of a regulation into a SIP makes that requirement part of the "applicable implementation plan." The commenter's notes that EPA has approved a SIP revision submitted by the State of Delaware that directly establishes emissions limits for $CO_2$. *See* Approval and Promulgation of Air Quality Implementation Plans; Delaware; Control of Stationary Generator Emissions, 73 FR 23101 (April 29, 2008). Specifically, Delaware's SIP revision imposed $CO_2$ limits on new and existing distributed generators. Section 110 of the CAA mandates that EPA approve or disapprove SIPs; upon EPA's approval, these $CO_2$ emission control requirements became part of an "applicable implementation plan" under the Act, and thus enforceable "regulations" under the Act.

**Response:**

EPA did not propose in this action to reconsider whether it should have approved the Delaware $CO_2$ provisions included in the state's SIP submission. Thus, it would not be appropriate for EPA to revisit that determination here. Furthermore, since we have otherwise declined to interpret the PSD provisions to apply to pollutants regulated in a SIP, it is not necessary for EPA to address the commenter's argument that the Delaware $CO_2$ provisions are not a part of the applicable implementation plan notwithstanding EPA's approval of a SIP submission that included those provisions. Under the interpretation affirmed by EPA in this action, the Delaware $CO_2$ provisions are insufficient to trigger PSD requirements for $CO_2$ on a nationwide basis.

## *5.5. Implementation Considerations of a SIP Interpretation for GHGs*

**Comment:**

One industry group (0071) noted that the SIP interpretation would lead to unacceptable consequences. Specifically the commenter states that if States are allowed to decide that the CAA PSD subtitle, and their SIP provisions implementing the PSD subtitle, apply to GHGs even before GHGs are subject to any emission limitation or other control requirement, then the adverse consequences of overloading the PSD permitting system, causing unacceptable delays in processing PSD permits and thereby impeding economic development, efficiency and other improvements, and innovation, would be felt despite EPA's intention to try and avoid such permitting gridlock.

**Response:**

We agree that the SIP interpretation could cause a delay in obtaining preconstruction permits for major stationary sources that emit GHGs. Moreover, we agree that we do not know what consequences any of our proposed interpretation would have on PSD permitting for future pollutants. The potential for a delay in obtaining PSD permits, while undesirable, does not, by itself, necessitate that we reject the SIP interpretation or any other proposed interpretation. Nonetheless, we decline to adopt the SIP interpretation in favor of the actual control interpretation for all the reasons summarized above and in our *Federal Register* notice.

## *5.6. Reliance on Connecticut Decision*

**Comment:**

An environmental group commenter (0095), who incorporated by reference the Petition for Reconsideration, faults EPA's reliance on *Connecticut v. EPA,* 656 F.2d 902 (2d Cir. 1981), and asserts that this case has nothing to do with the issue of whether a pollutant is "subject to regulation under the Act."

Another commenter (0086) notes that courts have already recognized that the CAA does not require a state to "respect its neighbor's air quality standards (or design its SIP to avoid

interference therewith) if those standards are more stringent than the requirements of federal law." *Connecticut v. EPA*, 656 F.2d 902, 909 (2d Cir. 1981).

**Response:**

In the PSD Interpretive Memo, EPA cited *Connecticut* to support the notion that while a state is free to adopt air quality standards more stringent than required by the NAAQS or other federal law provisions, Congress precludes those stricter requirements from applying to other states. The Agency agrees with commenter 0095 that the circumstances involved in that case are not directly analogous, but, nevertheless, the case supports the inference that EPA has drawn from it. The Court concluded that "[n]othing in the Act, however, indicates that a state must respect its neighbor's air quality standards (or design its SIP to avoid interference therewith) if those standards are more stringent than the requirements of federal law." If a state is not required to respect the more stringent requirements of a neighboring State in developing its own implementation plan, then by inference, the state would also not be compelled to follow the more stringent standards.

# Chapter 6. Finding of Endangerment

## *6.1. Appropriateness of Triggering PSD Requirements from an Endangerment Finding*

**Comment:**

Twenty-nine industry commenters (0050, 0051, 0053, 0056, 0059, 0065, 0066, 0067, 0068, 0070, 0071, 0073, 0074, 0076, 0081, 0083, 0085, 0086, 0089, 0090, 0092, 0096, 0098, 0100, 0105, 0106/0107, 0108, 0109, 0118) and four state/local agency associations (0058, 0062, 0091, 0102) agree with EPA's proposed position that the "endangerment finding interpretation" is not the proper interpretation of the phrase "subject to regulation" for purposes of PSD. One of the state/local agency associations (0062.1) added that an endangerment finding also does not give rise to permitting obligations under Title V of the CAA. Eight industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) note that the Petition for Reconsideration also disavows the endangerment finding interpretation, and agrees with EPA's analysis showing that the endangerment finding interpretation would be inconsistent with the other parts of the definition of "regulated NSR pollutant" at 40 CFR 52.21(b)(50)(i) and (ii). The industry commenter (0085) adds that EPA's conclusion in prior actions that endangerment finding alone does not trigger PSD should be reaffirmed in this action.

The commenters believe that subjecting the pollutant to PSD requirements, including imposition of BACT emission limits, before the Agency has taken regulatory action to establish emission controls would turn the CAA process on its head. The industry commenter (0067) similarly indicated that endangerment finding interpretation clearly undermines the orderly process created by Congress for regulation of new air pollutants. A state agency (0102) commenter (0102) adds that establishing controls without having a standard to be achieved leads to uncertainty in the permitting program.

Three industry commenters (0067, 0092, 0098) representing several groups of companies (industry), states that an interpretation of "subject to regulation" that would be applied to pollutants simply because they have been subject to an "endangerment finding" would be completely irrational and unworkable since an endangerment finding is only the first of many necessary steps when developing NSPS under section 111 of the CAA and thus it would be premature and inappropriate to subject sources to PSD permitting requirements for pollutants after only undergoing the very first step in the NSPS development process.

One environmental groups commenter (0101) contends that an endangerment finding is sufficient to make a pollutant subject to regulation. In particular, they point to the December 2009 endangerment and cause or contribute findings under section 202(a), and argue that because control requirements under section 202(a) are mandatory (e.g., inevitable) for a particular air pollutant (here, greenhouse gases) once EPA has made a positive endangerment finding for an air pollutant, at that point the air pollutant becomes "subject to" regulation.

**Response:**

EPA maintains its view that the terms of EPA's regulations and the relevant provisions of the CAA do not compel EPA to conclude that an air pollutant becomes "subject to regulation" when EPA finds that it endangers public health or welfare without contemporaneously promulgating control requirements for that pollutant.

As explained in EPA's Endangerment and Cause or Contribute Findings for GHGs under section 202(a) of the CAA, there are actually two separate findings involved in what is often referred to as an endangerment finding. *See* 74 FR 66496 (Dec. 15, 2009). The first finding addresses whether air pollution may reasonably be anticipated to endanger public health or welfare. The second finding involves an assessment of whether emissions of an air pollutant from the relevant source category cause or contribute to this air pollution. In this action, EPA uses the phrase "endangerment finding" to refer to EPA findings on both of these questions. The EPA interpretation described here applies to both findings regardless of whether they occur together or separately.

As explained in the proposed reconsideration, and as several commenters noted, an interpretation of "subject to regulation" that does not include endangerment findings is consistent with the first three parts of the definition of "regulated NSR pollutant" in section 52.21(b)(50) of EPA's regulations. Unlike the first three parts of the definition, an endangerment finding does not itself contain any restrictions (e.g., regarding the level of air pollution or emissions or use). Moreover, two parts of the definition involve actions that can occur only after an endangerment finding of some sort has taken place. In other words, other parts of the definition already bypass an endangerment finding and apply the PSD trigger to a later step in the regulatory process.

Specifically, under the first part of that definition, PSD regulation is triggered by promulgation of a NAAQS under CAA section 109. However, in order to promulgate NAAQS standards under section 109, EPA must first list, and issue air quality criteria for a pollutant under section 108, which in turn can only happen after EPA makes an endangerment finding and a version of a cause or contribute finding, in addition to meeting other requirements. CAA sections 108(a)(1) and 109(a)(2). Thus, if EPA were to conclude that an endangerment finding, cause or contribute finding, or both would make a pollutant "subject to regulation" within the meaning of the PSD provisions, this would read all meaning out of the first part of the "regulated NSR pollutant" definition because a pollutant would become subject to PSD permitting requirements well before the promulgation of the NAAQS under section 109. *See* 40 CFR 52.21(b)(50)(i).

Similarly, the second part of the definition of "regulated NSR pollutant" includes any pollutant that is subject to a standard promulgated under section 111 of the CAA. Section 111 requires EPA to list a source category, if in his or her judgment, "it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." *See* CAA section 111(b)(1)(A). After EPA lists a source category, it promulgates NSPS for that source category. For a source category not already listed, if EPA were to list it on the basis of its emissions of a pollutant that was not previously regulated, and such a listing made that pollutant "subject to regulation" within the meaning of the PSD provisions, this chain of

events would result in triggering PSD permitting requirements for that pollutant well in advance of the point contemplated by the second prong of the regulated NSR pollutant definition. *See* 40 CFR 52.21(b)(50)(ii).

Furthermore, waiting to apply PSD requirements at least until the actual promulgation of control requirements that follow an endangerment finding is sensible. When promulgating the final regulations establishing the control requirements for a pollutant, EPA often makes decisions that are also relevant to decisions that must be made in implementing the PSD program for that pollutant. For example, EPA often does not make a final decision regarding how to identify the specific pollutant subject to an NSPS standard until the NSPS is issued, which occurs after both the endangerment finding and the source category listing.

Finally, we disagree with commenters who argue that EPA must adopt an interpretation of its regulations that has PSD triggered by a positive endangerment finding. While such an interpretation may be available to EPA, given the ambiguity in the statute and the language "subject to" and "regulation," it is not mandated by the statutory or regulated text. *See* section 3.2.4 of this document for response to comments regarding "subject to regulation." Section6.3 below contains EPA's response to comments regarding whether a final endangerment finding is "regulation." In addition, as noted above, it would be inconsistent with other parts of the definition of "regulated NSR pollutant," which are linked to action that can occur only after (or concurrently with) an endangerment finding is made. Moreover, also as noted above, relevant considerations for implementation of the PSD program often do not occur until the actual control requirements are finalized, and establishing a PSD trigger before this last step would deprive the PSD program of potentially important and necessary information. For these and other reasons provided in the final notice and this Response to Comments document, EPA reasonably interprets the regulations to include each pollutant subject to a regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant.

## *6.2. Endangerment Finding Must be Specific to Stationary Sources to Trigger PSD Requirements*

**Comment:**

One commenter (0068) suggests that EPA should make a "cause and contribute" finding, specific to stationary sources, before GHGs are considered "subject to regulation." This commenter stated that the endangerment and cause or contribute finding process for vehicles, regulated under Title II of the CAA did not consider whether emissions from stationary sources also cause and contribute to the endangerment from GHGs. They assert that to comply with the APA and ensure constitutional safeguards, a "cause and contribute" process for stationary sources, regulated under Title I of the CAA must be followed.

**Response:**

Absent specific Congressional direction, we do not believe EPA is compelled to conduct a "cause or contribute" finding for stationary sources before applying PSD requirements to a pollutant that is otherwise subject to regulation under the Act. In contrast to the specific inclusion of a "cause and contribute" finding requirement in Section 202 of the CAA, Congress did not include a similar requirement within the definition of major emitting facility (section 169 of the CAA) such that the term would be necessarily limited to only those stationary sources found to "cause or contribute." Likewise, Congress did not include a "cause or contribute" requirement directly in Section 165. For reasons discussed in section 9.8 of this document, EPA is unable in this action to change its interpretation that the regulation of a pollutant under Title II of the Clean Air Act is sufficient to make a pollutant subject to regulation under the Act for PSD purposes.

We disagree with commenter that the APA and constitutional safeguards compel EPA to make a "cause or contribute" finding for stationary sources before regulating stationary sources under the PSD provisions in Title I of the CAA. As discussed elsewhere in this document, the actual control interpretion applied by EPA ensures that there is an opportunity for public comment before EPA establishes controls on a pollutant that trigger PSD permitting requirements.

## *6.3. Endangerment Finding as Prerequisite to Regulation or as a Regulation Itself*

**Comment:**

One industry commenter (0105) that supports EPA's preferred interpretation of "subject to regulation" states that although a finding of endangerment may be one of the first steps in EPA regulating a pollutant it can not trigger PSD; the finding in itself is not even a regulation and certainly does not impact or regulate the pollutant.

One commenter (0050) expresses that EPA acknowledges that the petition for reconsideration does not propose that a pollutant be considered "subject to regulation" upon a finding of endangerment. They express that EPA has repeatedly stated (as it does in the proposed endangerment finding for GHG) that it does not consider the endangerment finding as a "regulation" under the CAA. The commenter (0050) asserts that an endangerment finding has been construed as requiring regulation under the CAA, and not the regulation itself.

One state/local agency association (0058) and one state agency commenter (0102) states that it seems self-evident that an endangerment finding does not by itself make a pollutant "subject to regulation" because it is a prerequisite to regulation.

Industry commenters (0067, 0083, 0089, 0090, 0106/0107, 0108, 0109) note that the CAA sets out a process under which EPA first makes a determination whether emissions of a pollutant should be regulated (a determination that, under several provisions of the CAA, includes an endangerment determination) and later promulgates regulations regarding control of

emissions of that pollutant. Industry commenters (0105, 0050) assert that an endangerment finding requires regulation under the CAA, but is not itself a regulation.

**Response:**

EPA agrees that the fact that an endangerment finding is not a codified regulation in the Code of Federal Regulations further supports the view that an endangerment finding does not make an air pollutant "subject to regulation." The PSD Interpretive Memo explains that an endangerment finding should not be construed as "regulating" the air pollutant(s) at issue because there is no actual regulatory language applicable to the air pollutant at this time in the CFR. Rather, the finding is a prerequisite to issuing regulatory language that imposes control requirements. This is true even if the endangerment finding is a "rule" for purposes of administrative processes; that does not alter the fact that there is no regulation or regulatory text attached to the endangerment finding itself. Since an endangerment finding does not establish "regulation" within the common meaning of the term applied by EPA, we do not believe the CAA compels EPA to apply PSD requirements to a pollutant on the basis of an endangerment finding alone.

As noted elsewhere in this document, the existence of a regulation or rule covering a pollutant in the Code of Federal Regulation is also not determinative of whether a pollutant is "subject to regulation" within the meaning of the PSD provisions in the Clean Air Act and EPA regulations.

## *6.4. Consistency with Supreme Court Ruling*

**Comment:**

Industry commenters (0085, 0070, 0107,0105, 0050, 0067, 0092, 0098) and one state/local agency association commenter (0058) and two state agency commenter (0102,0091) state that an endangerment finding does not by itself make a pollutant "subject to regulation" because it is a prerequisite to regulation. Commenter (0107) notes that the Supreme Court acknowledged the difference between a finding of endangerment and regulation in *Massachusetts v. EPA*, in which Justice Stevens, writing for the majority, observed that while the judgment to find that an air pollutant "causes(s) or contribute(s) to air pollution which may reasonably be anticipated to endanger public health or welfare (cite omitted)," is not a "roving license to ignore the Agency's responsibility to regulate, EPA "has significant latitude as to the manner, timing, content and coordination of its regulations with those of other agencies." The commenter (0107) believes that this shows that the Supreme Court clearly distinguished between a finding of endangerment and ensuing regulations which subject pollutants to control.

**Response:**

We agree with commenters that EPA's interpretation is also consistent with the Supreme Court's decision in *Massachusetts*. In its decision, the Court acknowledged that EPA "has significant latitude as to the manner, timing, content and coordination" of the regulations that

would result from a positive endangerment finding under section 202(a). *See* 549 U.S. at 532. Just as EPA has discretion regarding the timing of the section 202(a) control regulations that would flow from an endangerment finding under that section, it also has some discretion regarding the timing of the triggering of PSD controls that the statute requires based on those section 202(a) regulations. EPA has reasonably determined that PSD controls should not precede any other control requirements.

# Chapter 7. Granting of Section 209 Waiver

## *7.1. Granting Waiver of State Preemption*

**Comments:**

As summarized below, a majority of commenters agreed with EPA's proposal to find that neither the CAA nor the Agency's PSD regulations require that EPA's grant of a waiver of preemption to state standards under section 209 of the CAA result in the application of the PSD program to pollutants subject to those state standards. These commenters agreed that the Agency's decision to grant a section 209 waiver to the state of California to establish its own GHG emission standards for new motor vehicles does not trigger PSD requirements for GHGs. While two commenters disagreed with that proposal, EPA has not been persuaded to change its proposed position based on these comments, as explained below.

Twenty-seven industry commenters (0050, 0051, 0053, 0056, 0059, 0065, 0067, 0068, 0070, 0071, 0073, 0074, 0076, 0079, 0081, 0083, 0085, 0086, 0089, 0090, 0096, 0097, 0105, 0106/0107, 0108, 0109, 0118) and two state/local agency association (0058, 102) agree with EPA's position that a decision to grant a CAA section 209 waiver to the State of California to adopt and enforce establish GHG emission standards for new motor does not trigger PSD requirements for GHGs. Most of the industry commenters state that California standards are not regulations under the CAA, and therefore do not trigger PSD for pollutants regulated under California standards.

Eight of the industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) expressly concur with EPA's analysis and conclusions regarding this issue as presented in the proposed PSD Interpretation. One of these commenters (0089) also noted that his organization had submitted detailed comments on this issue in comments on EPA's proposed reversal of its 2008 denial of California's request for a section 209 waiver to enforce state regulatory limits on GHG emissions from new motor vehicles, which can be found in Docket ID No. EPA-HQ-OAR-2006-0173-8960.1.

One industry commenter (0085) supports EPA's reasoning and added that it is well-established that if Congress intends to accord a state law the status of a federal law (or allow an agency like EPA to do so), it must state its intentions clearly. The commenter (0085) asserts that Congress made no such plain statement here; therefore section 209(b) of the Act does not convert an EPA-approved state emissions standard into federal law.

One industry commenter (0118) and one commenter representing several groups of companies (industry) (0086) agrees with EPA's position that a decision to grant a CAA section 209 waiver to the State of California to establish GHG emission standards for new motor does not trigger PSD requirements for GHGs. This commenter provides detailed analyses of the statutory text and Congressional intent to support EPA's position.

One industry commenter (0105) that supports EPA's preferred interpretation of "subject to regulation" states that the granting of a section 209 waiver allows a state to develop its own regulations, but does not in itself regulate any pollutant.

One industry commenter (0107) supports the reasoning EPA provided when rejecting the SIP interpretation in the proposal. The commenter added that this was a state choice and for the same reasons that Delaware's SIP particulars do not establish that a pollutant is subject to federal regulation, California law and policy does not extend to other jurisdictions. The industry commenter (0107) asserts that under our federalist system, not only may a state regulate a pollutant that is not regulated elsewhere in the country under its autonomous authority, but the provision of the CAA allowing EPA to grant a waiver from a national vehicle emissions program to California does not subject other sources to a national emission control requirement.

A couple of the industry commenters (0050, 0070) opine that granting a waiver merely removes a barrier to allowing a state to set its own standard in a particular area, and only applies in and to the state that requests it, and should not be construed as applying or creating a federal standard.

One industry commenter (0079) states that EPA's decision to grant a CAA section 209 waiver to the State of California to establish GHG emission standards for new motor does not trigger nation-wide PSD requirements for GHGs for the same reasons that adoption of such a standard in a state SIP does not trigger those requirements.

One commenter (0097) states that regulation upon issuance of a section 209 waiver is inappropriate because the granting of a waiver does not establish any federal emission standards or other federal requirement, and the action of one state or political jurisdiction should not direct the actions of other states or jurisdictions.

One state/local agency association (0058) notes that CAA section 209(b)(3) provides that where a state is subject to rules which have been granted a waiver, "compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter," but does not say that such state standards actually become the federal standards, which would have been easy to say had it been Congress's intent. The commenter (0058) adds that a contrary interpretation would mean that California had the power to dictate what pollutants are subject to PSD throughout the entire nation, which could not have been the intent of Congress in adopting the waiver provision.

One commenter (0101) notes several instances that support GHGs as already being "subject to regulation," including EPA's authorization for California to implement its own $CO_2$ emissions limitations under section 209(b) of the Act, 42 U.S.C. §7509(b). *See* California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of CAA Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles; 74 FR at 32744 (July 8, 2009). The commenter argues that this authorization immediately allowed California and 10 other states to "regulate" CO2 under the Act. In this case, "regulation" entails not only the control, but the drastic curtailment of $CO_2$ emissions. The commenter (0101) also argues that throughout years of litigation, EPA has vehemently insisted that California is prohibited from controlling GHG emissions unless EPA

first issues a "regulation" (the waiver) permitting those emissions controls. This commenter states that EPA has now issued the waiver, and thus stopped claiming, as it did in the proposed reconsideration notice, that it has not actually controlled these emissions.

Another environmental organization commenter (0099) contends that even under the "actual control" theory, a waiver under section 209 triggers BACT. The EPA authorized the state of California to implement its motor vehicle GHG emission standards pursuant to section 209(b) of the CAA, 42 U.S.C. §7543(b), on July 8, 2009. *See* 74 FR 32744. As a result, $CO_2$ was immediately subject to emission limits not only in California, but also in ten of the 14 other states that have imposed these same standards pursuant to their independent authority under Section 177 of the Act, 42 U.S.C. §7507. Therefore, according to the commenter, even under EPA's unduly narrow interpretation of the phrase "subject to regulation" in CAA section 165(a)(4) to mean "subject to actual control of emissions," $CO_2$ is now "subject to regulation" and, accordingly, $CO_2$ emissions from major emitting facilities are now unambiguously subject to BACT.

The commenter (0099) adds that two federal courts have found that these very $CO_2$ emission limits are indeed federal CAA standards (citations provided with comment). When confronted with these two decisions, EPA turns again to its touchstone of congressional confusion, opining that what those courts actually held was that Congress intended that such standards be federal regulations under the CAA for purposes of Energy Policy and Conservation Act, but nonetheless they remain state standards for purpose of the CAA. *See* 74 FR 51544 n. 7. EPA has made its reluctance to have states determine what additional pollutants -- even ones subject to "actual control" -- are "subject to regulation" clear in its discussion of the Delaware SIP. *Id.* at 51542-43. But EPA's reluctance should not stand in the way of clear congressional intent in the case of California's emission standards. In 1970, Congress specifically carved out a regulatory role for California vehicle emission standards under the CAA, and over the years has endorsed and expanded that role by allowing other states to adopt California standards. Given how Congress has enshrined this role in the Act, it is hard to see how pollutants regulated under these provisions are somehow not regulated "under the Act." (Even more telling is the fact that each time California has chosen to regulate a pollutant under this provision, EPA has followed suit. (e.g., for carbon monoxide (CO), Nitrogen Oxide (NOx), hydrocarbons, and evaporative emissions), the exact same scenario as with $CO_2$. The commenter adds that apropos of these specific standards, EPA's position is doubly unfounded, because these standards are an integral part of EPA's own proposed GHG vehicle emission standards. In fact, by agreement between California and EPA, EPA's has proposed regulations that explicitly incorporate these standards in order to create "a single, nationwide program to reduce light duty vehicle GHG emissions." *See* 74 FR 49460. Commenter (0091) concludes that EPA should interpret pollutants "subject to regulation" in both CAA §165(a)(4) and 40 CFR 52.21(b)(50)(iv) (a) to include pollutants that are regulated by California and other states pursuant to §§177 and 209(b) of the CAA.

**Response:**

EPA is affirming its position that an Agency decision to grant a waiver to a state under section 209 of the CAA does not make the PSD program applicable to pollutants that may be regulated under state authority following a grant of such a waiver. For the reasons discussed

below, the granting of a waiver does not make the pollutants that are regulated by a state after obtaining a section 209 waiver into pollutants regulated under the CAA. Furthermore, EPA is also affirming the position that PSD requirements are not applicable to a pollutant in all states when a handful of states besides the one obtaining the waiver adopt identical standards under section 177 of the CAA that are then approved into state SIPs by EPA. EPA agrees with the majority of commenters on this issue that this final interpretation is consistent with the statutory and regulatory structure of the waiver program and is also consistent with the position that we previously explained to Congress. As the Administrator stated last year, "a decision to grant a waiver under section 209 of the Act removes the preemption of state law otherwise imposed by the Act. Such a decision is fundamentally different from the decisions to establish requirements under the CAA that the Agency and the [EAB] have considered in interpreting the provisions governing the applicability of the PSD program." Letter from Lisa P. Jackson, EPA Administrator, to Senator James M. Inhofe (March 17, 2009).

With regard to the commenters that disagreed with EPA's proposed position on the section 209 waiver provisions, and assert that EPA's granting of the waiver results in "actual control," EPA has not been persuaded to change its proposed position based on these comments. EPA does not disagree that the regulations promulgated by the state pursuant to the waiver will require control of emissions and thus constitute "regulation" of GHGs under the meaning applied by EPA. However, the principal issue here is whether this regulation occurs under the authority of the Clean Air Act (i.e., "under the Act."). As explained in our reconsideration notice, a waiver granted under CAA section 209(b)(1) simply removes the prohibition found in section 209(a) that forbids states from adopting or enforcing their own standards relating to control of emissions from new motor vehicles or new motor vehicle engines. Thus, the grant of the waiver does not lead to regulation "under the Act" because it simply allows California to exercise the same authority to adopt and enforce state emissions standards for new motor vehicles that California could have exercised without the initial prohibition in section 209(a).

Consistent with a number of the comments that support our position and reasoning with regard to the section 209 waiver, we note that a waiver constitutes a withdrawal of federal preemption that allows a state to develop its own state standards to regulate vehicle emissions; the waiver does not transform the pollutants regulated by these state standards into pollutants regulated under the CAA for purpose of sections 165 and 169. As a number of the comments summarized above note, there is nothing in the legislative history that supports a conclusion that Congress intended section 209 waivers to result in application of PSD requirements. The opposing comments have not convincingly articulated a mechanism through which EPA's action granting the waiver in fact requires control of emissions (as opposed to the states action under state law). If EPA granted the waiver alone and the state ultimately decided not to implement its regulation, there would be no control requirement in effect under the CAA.

As we explained in our reconsideration notice, we also find it instructive that enforcement of any emission standard by the State after we grant a section 209 waiver would occur pursuant to state enforcement authority, not federal authority. EPA would continue to enforce the federal emission standards we promulgate under section 202. EPA does not enforce the state standard. EPA only conducts testing to determine compliance with the federal standards promulgated by EPA, and any enforcement would be for violation of EPA standards,

not the state standards. As noted in some of the comments, CAA section 209(b)(3) provides that where a state has adopted standards that have been granted a waiver "compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter," but does not say that such state standards actually become EPA standards. A review of the relevant legislative history reveals nothing that would indicate that Congress intended for such state standards to generally become EPA standards under the CAA when it gave EPA the authority to grant a section 209 waiver, especially in light of the fact that if a manufacturer fails to comply with a state standard adopted pursuant to a section 209 waiver, EPA only has authority to bring an enforcement action if the EPA standards are violated. Simply put, while compliance with a state standard adopted pursuant to a section 209 waiver may be treated as compliance with the EPA standard, violation of the state standard is not enough to show violation of the EPA standard. Accordingly, we find the absence of legislative history supporting the contrary position and the language in section 209(b)(3) instructive, as they indicate that Congress clearly recognized the co-existence of the EPA and state standards. This shows Congress did not intend that state regulations replace, or transform state standards into EPA regulations "under the Act."

Contrary to the commenter's assertions, this position is also consistent with the two federal court decisions noted in the comments. As EPA explained in the preamble to the proposed reconsideration, these Courts did not examine whether California standards were EPA standards under the specific provisions of the CAA. Rather, those decisions turned on an interpretation of the corporate average fuel economy (CAFE) standard setting and preemption provisions found in the Energy Policy and Conservation Act (EPCA). These courts determined that the California GHG emissions standards are a type of "other motor vehicle standards of the Government" as that term is used in EPCA such that NHTSA had to consider the effect of these state standards on fuel economy in determining the appropriate CAFE standard. The Court relied on legislative history indicating Congress specifically intended to include California emissions standards in this EPCA provision for setting CAFE standards, and NHTSA had historically treated California emissions standards as included in this provision. Based on this legislative history and past practice, the Court concluded that California's GHG emissions standards are not included in the scope of EPCA's preemption provision. Nothing in the comments has persuaded EPA to change its position that these determinations apply only to these EPCA preemption provisions and do not apply to an interpretation of very different provisions, sections 165 and 169 of the CAA. EPA continues to believe that these courts' interpretations of an EPCA provision did not change the California standards into EPA standards under the CAA regulatory program, and thus should not trigger PSD permitting.

It is important to note that in this action EPA is not interpreting EPCA, the standard setting or preemption provisions of EPCA, or the interplay between GHG standards adopted by EPA under section 202(a) of the CAA, state GHG standards that receive a waiver under section 209(b) of the CAA, and consideration by NHTSA of "other motor vehicle standards of the Government" under EPCA. While those issues were before the District Courts discussed by commenters, EPA is interpreting a different and separate provision, section 165, and the relationship of that specific CAA provision and state GHG standards that receive a waiver under CAA section 209(b). That is a very different issue than the EPCA issues before the District Courts, and EPA is not in any way intending to imply or indicate that the interpretation

announced today is based on or is in any way related to the very different issues considered in those District Court cases.

Moreover, EPA is not aware of any position in previous litigation that is inconsistent with this position, and the commenter fails to site any specific litigation, statements, or positions to the contrary. While EPA agrees that it was required to grant the section 209 waiver before standards regulating GHGs emissions from new motor vehicles could be enforced in California, EPA did not assert that the grant of such a waiver would constitute "regulation under the Act" or impose control of GHG emissions pursuant to federal emissions standards. Rather, as explained above, EPA's grant of the section 209 waiver simply removed a federal prohibition and thereby allowed California to impose state regulations that control GHG emissions pursuant to state law.

Finally, EPA finds no merit in commenter's assertion that GHGs are clearly "subject to regulation" as a matter of the federal PSD program after the grant of the section 209 waiver because the California standards are an integral part of EPA's own proposed GHG emission standards for light duty vehicles (LDV) or because there is an asserted agreement between EPA and California regarding such integration. At the outset, the "agreement" to which the commenter is referring are several individual commitments made by various vehicle manufacturers, trade associations, and California that are conditional in nature. There is no "agreement" between these parties. Instead each of these commitment letters states the intentions of the signatory and states that if certain things occur then they will take certain actions. Many of the conditions relate to future actions that were under consideration by EPA, such as the then pending reconsideration of the California waiver and EPA's intention to propose GHG standards for LDV. EPA made no "commitments" or "agreement" and had no obligation to take any action. Instead EPA announced that it planned to conduct a notice and comment rulemaking proposing GHG emissions from LDV. The various parties announced their support for such a proposed rule, and their intention to take various actions if EPA in fact finalized such GHG standards. Nothing in the actions by these various parties somehow transformed or changed the legal effect of a waiver of emissions standards under section 209.

Moreover, EPA has not incorporated California's GHG standards into our proposed LDV Rule. EPA's proposed standards are in fact very different from the California standards, and do not incorporate or duplicate California's regulations. EPA did not propose to adopt the California standards as federal standards in the LDV Rule. EPA's actions in adopting such a LDV Rule would not have any relevance to whether the prior grant of the 209 waiver made GHG "subject to regulation" under federal law. In fact, promulgation of an EPA standard in the LDV Rule would itself establish a federal "regulation" of GHG emissions under the CAA, which was not achieved through issuance of the waiver.

Furthermore, as explained in the proposed LDV Rule, once EPA's rule is promulgated, California will make a final decision on whether it will accept a manufacturer's compliance with the federal GHG standards as compliance with the California standards. California's acceptance of this compliance approach under California's regulations is not because California's standards are incorporated into the federal standards but would be based on California's view that the federal standards would achieve comparable performance to the California standards. As discussed elsewhere in this RTC, EPA agrees that issuance of final GHG emissions standards in

a LDV Rule will make GHGs subject to regulation under the Act. However, we emphasize that this result would occur regardless of whether California was granted a section 209 waiver for GHG regulations and regardless of how standards and regulations in the California state program take into account any federal GHG standards established in the LDV Rule.

## *7.2. Adoption of California Standards by Other States*

**Comment:**

The commenter (0099) states that the $CO_2$ emission limits are in effect not only in California, but also in ten other states that have also promulgated these standards for Model Years 2009 or 2010: Connecticut, Maine, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. Each of these states adopted the $CO_2$ Emission Limits pursuant to section 177 of the CAA, 42 U.S.C. §7507, which expressly grants other states the authority to adopt California's vehicle emission standards. Commenter (0099) notes that states have been exercising their section 177 authority for almost two decades; the first to do so was New York, adopting California's original Low Emission Vehicle standards in 1992, and adds that in three more states and the District of Columbia, these standards will come into effect in subsequent model years. Once incorporated into a SIP, the commenter notes that numerous provisions authorize both EPA and citizens to enforce such requirements, e.g., 42 U.S.C. §7413; 42 U.S.C. §7604(a)(1), (f)(3). Because the $CO_2$ Emission Limits are no different than any other vehicle emission standards that states have been adopting and enforcing under the CAA for decades, it is clear that $CO_2$ is now "subject to regulation" under the CAA.

**Response:**

EPA has also concluded that the adoption of identical standards by several states under section 177 does not make a pollutant covered by those standards "subject to regulation under the Act**"** in all states. Like section 209, section 177 only grants States authority to regulate under state authority by removing federal preemption. Adoption of California standards by other States does not change the fact that those standards are still state standards enforced under state law and federal law is approved in a SIP. While EPA agrees that when a state adopts alternate vehicle standards into its SIP pursuant to section 177, and EPA approves the SIP, these standards become enforceable by EPA and citizens under the CAA, we do not agree that this compels an interpretation that any pollutant included in an individual state SIP requirement becomes "subject to regulation" in all states under the CAA. As discussed in response to comments above, EPA rejects the theory that a regulation of a pollutant in one or more states in an EPA-approved implementation plan necessarily makes that pollutant subject to regulation in all states. Such an approach is inconsistent with the fundamental principle of cooperative federalism embodied in the CAA.

# Chapter 8. Timing of Regulation

EPA received many comments on the appropriate interpretation of "subject to regulation" as it relates to the actual date by which PSD permitting requirements will be triggered. As discussed more fully below (and also in Chapter 9 of this RTC), those comments suggested trigger dates ranging from promulgation of the underlying actual control regulation (0099) to more than two years after that event (0067, 0073). Overall, many commenters agreed with EPA's proposal to change from an interpretation of "subject to regulation" under which PSD permitting requirements would become applicable upon the promulgation date of the underlying "actual control" regulation to an interpretation in which PSD requirements would become applicable on the effective date of that regulation. However, a majority of the commenters argued that EPA had improperly limited the proposal of "effective date" to the end of the 60 day review period afforded by the Congressional Review Act (CRA). Instead, they argued that a more natural reading of "subject to regulation – as supported by the CAA, various policy and implementation concerns, and the CRA itself – was that the underlying "actual control" regulation does not become effective until it "takes effect" for the sources affected by that regulation.

The specific basis for the various interpretations and trigger dates, as provided for in the comments, will be discussed in more detail below. However, we note that in arguing for a specific interpretation of the triggering date, many commenters discussed how various implementation concerns supported that interpretation. Some of those concerns are summarized below in order to provide the context in which the specific timing interpretation comments were provided, but we primarily address the various implementation concerns in Chapter 9 of this RTC.

## *8.1. Effective Date of Control Requirements*

### 8.1.1. Legal analysis for the "takes effect" reading for the effective date interpretation:

**Comments:**

Eight of the industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) agree with EPA's statement in the proposed PSD Interpretation that PSD requirements should not be considered to apply to emissions of a pollutant before an actual emission control regulation for that pollutant has become "final and effective." However, the commenters believes that such a regulation would have to have become actually effective, in the sense that actual legal obligations created by the regulation have become currently applicable for regulated sources and are no longer merely prospective obligations, before that regulation could make a pollutant subject to actual control and thus be "subject to regulation" for PSD purposes. The commenters therefore state that if EPA promulgates its proposed motor vehicle GHG rules in final form, those rules could not have any PSD triggering effect before the beginning date of the

first model year to which those rules apply (i.e., October 1, 2011). (A second industry commenter (0067) concurs with this interpretation of when the motor vehicle rules should be considered to "become effective.") The commenters provide an extensive legal analysis of this issue, which is presented below.

The industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) state that the date a regulation becomes "final and effective" and the date it actually "takes effect" may differ, and that the "take effect" date may occur after the "final and effective" date. *See Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368, 1374-75 (Fed. Cir. 2002) (recognizing that the two dates are not necessarily the same and stating that "[t]he ordinary meaning of 'take effect' is '[t]o be in force; go into operation'" (quoting Black's Law Dictionary at 1466 (7th ed. 1999)), amended on reh'g in part on other grounds, 65 Fed. Appx. 717 (Fed. Cir. 2003). The commenters argue that a regulation may "take effect" subsequent to its stated "effective date" where it has been published in final form but does not require immediate implementation by the agency or compliance by regulated entities. The commenters note that in this situation, a regulated entity has no immediate compliance obligations and cannot be held in violation of the regulation until such a legal obligation becomes applicable to them on the "takes effect" date. *See,* e.g., *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 201-02 (2d Cir. 2004) ("takes effect" means the point at which the "rule becomes applicable," a point that may not be reached until "several years" after the final rule is issued); *Liesegang*, 312 F.3d at 1376 (agency must wait for rule to become operative before it can implement it); cf. *Natural Res. Def. Council v. EPA,* 22 F.3d 1125, 1137-39 (D.C. Cir. 1994) (recognizing that where a provision of the CAA (section 182(c)(3)(B)) required a program of emission controls to "take effect" by a given date, it did not thereby require the program to "be fully implemented" by that date).

The industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) went on to state that under the CRA, a major rule does not necessarily "take effect" on the date that the rule or authorizing statute states as the "effective date." *See Abraham*, 355 F.3d at 201-02 ("take effect" under the CRA signifies when a rule becomes applicable, even if that occurs several years after the rule is prescribed in final form); *Liesegang*, 312 F.3d at 1375 (recognizing that the CRA affects the date when a rule is operative, i.e., enforceable).

The industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) note that section 202(a)(2) of the CAA uses the "takes effect" formulation, stating that a regulation under that provision "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period" (emphasis added). Thus, the commenters believe, even if EPA issues final motor vehicle GHG rules by the end of March 2010, those standards would not take effect on that date or 60 days after publication of those rules in the *Federal Register* because EPA is both authorized and, given the mandatory "shall" in section 202(a)(2), required to ensure that the rules' requirements will not "take effect" until after motor vehicle manufacturers have had an adequate period of time to develop and apply the technology necessary to meet those requirements, giving appropriate consideration to compliance costs within that lead-time period. *See Am. Motors Corp. v. Blum*, 603 F.2d 978, 981 (D.C. Cir. 1979) (EPA's Administrator is "bound by section 202(a)(2) to allow such lead time as he finds necessary to satisfy the requirements of section 202(a)(2).").

The industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) point out that the proposed motor vehicle GHG rules do not require actual compliance until model year 2012, which does not begin until October 1, 2011; thus, by the very nature of EPA's proposed motor vehicle rules, and consistent with section 202(a)(2), the rules' compliance obligations would begin several months later than 60 days after the rules' *Federal Register* publication date. The commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) believe that it would make no sense for EPA to subject stationary sources to immediate regulation of GHG emissions, based on a regulation promulgated for automobile manufacturers, at a time when the regulation is not yet even operative for those primarily regulated entities.

Based on points discussed above, the industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) indicate that EPA should clarify that PSD for GHGs could not be triggered by EPA's motor vehicle GHG rules before those rules "take effect" within the meaning of section 202(a)(2). The commenter states that this conclusion not only is required by the clear implication of the PSD provisions' "subject to regulation" language, as EPA's statements in the proposed PSD Interpretation reflect, but also is supported by compelling policy reasons: major stationary sources would need time to prepare to meet any newly applicable PSD compliance obligations in a cost-effective way, and EPA and state permitting authorities would need time to prepare to satisfy their permitting obligations. Other industry commenters (0067, 0073) concur with this policy rationale and added that the Agency needs time to develop its own technical capability and provide guidance to the regulated community and permitting authorities.

**Response:**

EPA has reviewed the federal court decisions and other arguments presented in the comments above, and we agree that they support the idea that the date a regulation becomes "final and effective" and the date it actually "takes effect" may differ. The federal court decisions referenced in the comments that suggest the date that the terms of a regulation become effective can take more than one form. In one case involving the Congressional Review Act (CRA), the United States Court of Appeals for the Federal Circuit observed that the date a regulation may "take effect" in accordance with the CRA is distinct from the "effective date" of the regulation. *See Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368, 1374-75 (Fed. Cir. 2002), amended on reh'g in part on other grounds, 65 Fed. Appx. 717 (Fed. Cir. 2003). In this opinion, the court observed that "[t]he ordinary meaning of 'take effect' is '[t]o be in force; go into operation.'" Id. at 1375 (quoting Black's Law Dictionary at 1466 (7th ed. 1999). Based on this, the court reasoned that the CRA does not "change the date on which the regulation becomes effective" but rather "only affects the date when the rule becomes operative." *Id.* In another case, the Second Circuit Court of Appeals described a distinction between the date a rule may "take effect" under the CRA, the "effective date" for application of the rule to regulated manufacturers, and the "effective date" for purposes of modifying the CFR. *See Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004).

The Office of Federal Register (OFR) uses the term "effective date" to describe the date that amendments in a rulemaking document affect the current CFR. *See* Federal Register Document Drafting Handbook, at p. 2-10 (Oct. 10, 1998). However, OFR draws a contrast

between such a date and the compliance or applicability date of a rule, which is described as "the date that the affected person must start following the rule." Id. at 2-11. Thus, the "effective date" of a regulation is commonly used to describe the date by which a provision in the CFR is enacted as law, but it is not necessarily the same as the time when provision enacted in the CFR is operative on the regulated activity or entity. The latter may be described as the "compliance," "applicability," or "takes effect" date.

The terms of the CAA also recognize a similar distinction in some instances. Section 112(i)(3)(A) of the CAA provides that "after the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard, limitation, or regulation except, in the case of an existing source, the Administrator shall establish a compliance date or dates for each category or subcategory of existing sources, which shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard." Another example is section 202 of the Act, which is discussed in more detail in section 9.2 below.

Another formulation may be found in Section 553(c) of the APA (5 U.S.C. §553(c)), which provides, with some exceptions, that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date." The APA does not define the term "effective date" or make precisely clear whether it is referring to the date a regulation has the force of law or the date by which a regulatory requirement applies to a regulated entity or activity. The APA also separately recognizes the concept of finality of Agency action for purposes of judicial review. *See* 5 U.S.C. §704.

In the October 7, 2009 notice, EPA did not clearly distinguish between the various forms of the date when a regulatory requirement may become effective. One commenter observed that the EPA analysis in the proposed reconsideration appeared to blur the distinction between the "effective date" set by EPA and the date that Congress allows a regulation to become effective under the CRA. EPA in fact discussed all of these concepts in its notice, with part of the discussion focused on the date a regulation becomes "final" and "effective" and a part on when a regulation may "take effect" under the CRA. EPA viewed these forms of the date when a regulation becomes "effective" to be essentially the same, but the case law suggests that administrative agencies do not necessarily need to harmonize the date that regulatory requirements take effect with the "effective date" of a regulation, meaning the date a regulation has the force of law and amends the CFR. Since these are distinct concepts, the effective date of a regulation for purposes of amending the CFR may precede the date when a regulatory requirement "takes effect" or when a regulated entity must comply with a regulatory requirement. A regulation may "take effect" subsequent to its stated "effective date" where it has been published in final form but does not require immediate implementation by the agency or compliance by regulated entities.

The key issue raised by EPA in the October 7, 2009 notice was determining which date should be determined by EPA to be the date when a pollutant becomes "subject to regulation" and, thus, the date when the requirements of the PSD permitting program apply to that pollutant. In recognition of the distinction between the "effective date" of the regulation for purposes of amending the CFR and the point at which a regulatory restriction may "take effect," EPA has

considered whether it is permissible to construe section 165(a)(4) and 169(3) of the CAA to mean that a pollutant becomes "subject to regulation" at the point that a regulatory restriction or control "takes effect." In the October notice, EPA observed that the use of "subject to" in the Act suggests that PSD requirements are intended to be triggered when those standards become effective for the pollutant. We also said that no party is required to comply with a regulation until it has become final and effective. Prior to that date, an activity covered by a rule is not in the ordinary sense "subject to" any regulation. Regardless of whether one interprets regulation to mean monitoring or actual control of emissions, prior to the effective date of a rule there is no regulatory requirement to monitor or control emissions.

The same reasoning applies to the date that a regulation "takes effect," as that term is used in the judicial decisions described above. Regulated entities are not required to comply with a regulatory requirement until it takes effect. Prior to the date a regulatory requirement takes effect, the activity covered by a rule is not in the ordinary sense subject to any regulation.

As discussed in the PSD Interpretive Memo, as used in the context of the PSD provisions in EPA regulations and the CAA, EPA interprets the term "regulation" in the context of sections 165(a)(4) and 169 of the CAA to mean the act or process of controlling or restricting an activity. This interpretation applies a common meaning of the term regulation reflected in dictionaries.

Thus, EPA agrees with the commenters above that the term "subject to regulation" used in both the CAA and EPA's regulations may be construed to mean the point at which a requirement to control a pollutant takes effect. The CAA does not necessarily preclude construing a pollutant to become subject to regulation upon the promulgation date or the date that a regulation becomes final and effective for purposes of amending the CFR or judicial review. However, EPA has been persuaded by public comments that the phrase "subject to regulation" may also be interpreted to mean the date by which a control requirement takes effect.

Indeed, EPA has concluded that the latter interpretation is more consistent with the actual control interpretation reflected in the PSD Interpretive Memo. As one commenter observed, a regulation would have to have become actually effective, in the sense that actual legal obligations created by the regulation have become currently applicable for regulated entities and are no longer merely prospective obligations, before that regulation could make a pollutant subject to actual control. Another commenter noted that a regulated entity has no immediate compliance obligations and cannot be held in violation of the regulation until a legal obligation becomes applicable to them on the "takes effect" date. Thus, based on this reasoning, EPA has decided that it will construe the point at which a pollutant becomes "subject to regulation" within the meaning of section 52.21(b)(50)(iv) of EPA's regulations to be when a control or restriction is operative on the activity regulated. EPA agrees with commenters that there is generally no legally enforceable obligation to control a pollutant when a regulation is promulgated or, in some instances, even when a regulation becomes effective for some purposes.

Thus, in this final action, EPA chooses to adopt an interpretation of "subject to regulation" in section 52.21(b)(50)(iv) under which a pollutant becomes a "regulated NSR pollutant at the time when a control or restriction on emissions of the pollutant takes effect or becomes operative on the regulated activity.

EPA has also concluded that it is appropriate to extend the reasoning of this interpretation across all parts of the definition of the term "regulated NSR pollutant." The reasoning described above is equally applicable to the regulation of additional pollutants under the specific sections of the Act delineated in the first three parts of the definition of "regulated NSR pollutant."

### 8.1.2. General comments on the effective date interpretation:

**Comment:**

Seventeen commenters (0050, 0051, 0053, 0064, 0067, 0069, 0070, 0074, 0081, 0083, 0089, 0090, 0096, 0105, 0106/0107, 0108, 0109) believe the interpretation of "subject to regulation" is most naturally interpreted as when a regulation becomes "final and effective", and that entities should thus be subject to the proposed regulation no earlier than the date by which the underlying "actual control" regulations apply to sources covered by the regulations (i.e., for the GHG Light Duty Vehicle Rule, this is model year 2012 [the first model year to which the regulation applies]).

Ten commenters (0067, 0071, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109, 0110) state that the time frame for "final and effective" and when a regulation actually "takes effect" may be different, and that the "takes effect" date may occur well after the "final and effective" date. Eight of these commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) suggest that EPA confirm that PSD requirements do not begin to apply before the latter of a) the date when the actual control requirement is "final and effective" or 2) the date when the control requirement "takes effect", i.e., the requirement becomes operative with current applicable compliance obligations for the regulated sources.

Two commenters (0080, 0100) disagreed with EPA's proposed interpretation that a pollutant become "subject to regulation" upon the CRA effective date of the "actual control" regulation, citing policy and implementation concerns. One commenter (0080) states that EPA's interpretation of when the LDV Rule is final and effective (i.e., 60 days after promulgation as per the Congressional Review Act) is wrong because it will result in stationary sources reducing GHG emissions almost a year and a half in advance of when motor vehicles begin reducing emissions.

Another commenter (0100) disagrees with EPA's decision to make GHGs "subject to regulation" upon the effective date of the proposed LDV Rule. The commenter (0100) states that by the time the tailpipe standards are adopted (presumably March 2010), EPA will not have been able to decide that PSD review for stationary sources of GHG is appropriate, as no information has been presented by EPA on this issue (such as available BACT for GHGs), nor has EPA provided an opportunity for public comment on the costs and benefits of regulating GHGs through the permit process. The commenter (0100) further asserts that including GHG emissions in the PSD permit program will be highly disruptive to state permitting programs.

One industry commenter (0050) states that the appropriate timing for application of PSD/title V should be no earlier than the effective date that the regulation is applied. To that

extent, the commenter agrees with EPA that "the term 'subject to regulation' is most naturally interpreted to mean that PSD requirements apply when the regulation addressing a pollutant becomes final and effective." The commenter notes however, that a regulation becoming "final" and becoming "effective" can mean two different dates. A regulation can become "effective" 60 days after publication in the *Federal Register*. The Congressional Review Act (5 U.S.C. 801 et seq) (CRA) allows Congress 60 days to review major regulations and to disapprove them within that time. Regulations not acted upon by Congress within that time can go into effect, and in a great many cases the end of the review period is the effective date. Thus, the commenter argues that the interpretation of "subject to regulation" should be a regulation that is "final and effective" and not one in which the review period under the CRA has ended. The commenter (0050) also states that the proposed rule would be "final" after the CRA period has ended and "effective," at the earliest, in the fall of 2011, as the Administrator states that model year 2012 is the time when it is "necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such a period."

One industry commenter (0085) believes that an air pollutant should not become "subject to regulation" for purposes of the PSD program until the regulation providing actual control of emissions become effective and enforceable. The commenter states that this date would be with the MY 2012 compliance date for the section 202 regulations, not the issuance of those regulations. The commenter (0085) states that just as manufacturers need time to produce compliant cars, stationary sources need time to prepare for applicability. The commenter (0085) points out that many facilities have applications for PSD permits pending at this time, and such sources are largely at the mercy of the resources available to the state permitting authority in terms of the timing of permit issuance. The commenter (0085) holds that it is unreasonable to impose the PSD BACT requirements suddenly upon issuance of a wholly separate regulation, such as the GHG motor vehicles regulations. If EPA adopts an interpretation that applies upon the date the underlying regulation is effective and enforceable, the commenter (0085) believes that in most cases, facilities will have sufficient notice and time for compliance with PSD requirements.

The commenter representing several groups of companies (0086) states that EPA's language – about when rules become "final and effective" – dovetails with the lead time requirement in section 202(a)(2), that tailpipe regulations do not "take effect" until the model year to which the standards apply. The commenter (0086) believes that this interpretation is also dictated by policy considerations, i.e., to delay implementation of the PSD requirements for GHGs to account for administrative difficulties (as was done for $PM_{2.5}$ as a result of adequate modeling techniques).

A state agency commenter (0091), while agreeing that EPA has the leeway to interpret "subject to regulation" as the effective date (not the promulgation date), believes other more fitting interpretation options exist. In particular, the commenter believes EPA could also interpret the full implementation date, or the date controls must be in place and operational as a trigger for PSD applicability. According to the commenter, this could mean the PSD applicability date could be extended 15-19 months for the proposed mobile source tailpipe standards, and for several years in the case of an NSPS, giving states the time they need to adjust state regulations, statutes if needed, and fee structures, and also give time for cost effective GHG

control technologies to be explored and put in practice. This commenter also believes EPA can use exemptions and approaches similar to the 1992 exemption for sources subject to the risk management program made in the title V program (*see* 40 CFR 70.3(a)(3)), and the clarification in the recent Mandatory Reporting of Greenhouse Gases rule preamble (74 FR 56288) that this monitoring and reporting requirement is not an "applicable requirement" under title V, to lessen the PSD and title V permitting burden from regulating GHG, by excluding or exempting stationary sources from being affected by the promulgation of the "tailpipe rule." This commenter notes that EPA has a long history of giving states and the regulated community time to implement resource intensive programs, citing examples such as the three years given to states to develop and submit title V operating programs for approval, the three years given to SIP approved states in 2008 to develop state rules and begin implementing the $PM_{2.5}$ NSR Implementation rule, and the NESHAP program where existing sources are given up to three years to comply with a control standard. The commenter suggests EPA could take a similar approach for GHG emissions by issuing an interim policy (similar to the 1997 $PM_{10}$ surrogate policy for $PM_{2.5}$) that would temporarily define the "presumptive BACT" for GHG emissions from combustion sources while EPA takes the time to develop essential GHG guidance through rulemaking and state make adjustments to their state rule.

An industry commenter (0105) states that the timing of PSD being triggered should be based on when the control regulation first actually controls emissions of the pollutant. In addition to the EPA view in *Federal Register* notice EPA that the regulation must be final and effective, the commenter states that determining the timing of PSD being triggered should also be based upon the language at 40 CFR 52.21(b) (50) (iv): "[a]ny pollutant that otherwise is subject to regulation under the Act…" Expanding on the concept that a control regulation must be final and effective, the commenter (105) suggests that EPA should also consider a more flexible interpretation and make clear that PSD would be triggered at the time when the rule first actually controls emissions of the pollutant, and a pollutant should not be considered subject to a regulation until the time that the rule actually controls the pollutant of concern. This commenter notes that depending on the specific rule in question, this may or may not coincide with the 60 day review period for congressional review, and in the case of EPA's proposed mobile source rule, this date would coincide with the production of model year 2012 vehicles that are subject to the EPA's mobile source rules.

One industry commenter (0108) believes that the applicability interpretation (when the LDVR takes effect) would not lead to an inappropriate delay because if EPA actually decided to regulate GHG emissions from major stationary sources directly, rather than through the PSD program, it presumably would allow these sources more than 60 days to comply following publication of a final rule, given the inherent complexities that would be involved in terms of implementation and compliance. Consequently, the commenter (0108) asserts that EPA should either amend its proposed interpretation to use the language "takes effect" rather than "final and effective," or use both and clarify that the PSD program begins to apply with the later of the two periods, which would resolve the issue for regulations not only under section 202 of the CAA but also for other CAA provisions where EPA could decide to postpone the date of compliance beyond the date of the regulation's publication.

One of the industry commenters (0109) states that the "takes effect" interpretation is within EPA's discretion under the CAA, would provide more certainty, and would provide more time for permitting authorities to structure their programs than EPA's proposed interpretation. The commenter (0109) also adds that "subject to regulation" should also be defined as when the regulation providing actual control of emissions is effective and enforceable. The commenter (0109) states that this definition provides more certainty and allows more time for regulating agencies to structure (or re-structure) their permitting programs.

One industry commenter (0110) urges EPA to amend its proposed interpretation to clarify that PSD program requirements begin to apply when GHG regulations "take effect" and not automatically when the regulations become "final and effective" 60 days after publication of the rule. This will allow time for EPA to resolve the significant PSD issues that will be created for major stationary sources if the motor vehicle regulations are finalized. The EPA has not adequately analyzed the implications the motor vehicle proposal and the proposed PSD tailoring rule will have on major stationary sources. Adopting an interpretation that allows for the most time and flexibility for all parties is reasonable and consistent with key policy goals.

**Response:**

As discussed in response to the legal comments above, we are persuaded that EPA should interpret that time that a pollutant becomes a "regulated NSR pollutant" under section 52.21(b)(50)(iv) to be the time when a control or restriction on emissions of the pollutant takes effect or becomes operative on the regulated activity. The general comments summarized above provide additional support for that interpretation. EPA has reviewed these general comments in light of that interpretation and finds no issues raised in these comments that must be addressed through further refinement of that interpretation, although we do believe a few points of clarification are necessary.

A number of the comments argue that the "takes effect" interpretation is appropriate because it will allow for more time to prepare for implementation of the PSD program for newly regulated pollutants, including GHGs. As discussed in response to comments in section 9.1(a) above, we do not construe the language of the CAA to provide the Agency with the discretion to choose a date when PSD program requirements apply based on the implementation considerations for the PSD program. Accordingly, we are re-iterating that our adoption of this interpretation is based on the specific language of the PSD provisions and structure of the PSD program as provided for in the CAA and our corresponding implementing regulations, as described above, and not on the implementation concerns noted in these comments.

With regard to the comment that "subject to regulation" should also be defined as when the regulation providing actual control of emissions is effective and enforceable, we note that there is generally no legally enforceable obligation to control a pollutant when a regulation is promulgated or, in some instances, even when a regulation becomes effective for some purposes. Consistent with our interpretation, the enforceable obligation to control a newly regulated pollutant only exists when the regulation of the pollutant takes effect or becomes operative on the regulated activity. Until that time, regulated entities are generally not required to comply

with the control requirements and thus cannot be found in violation of those requirements. *See generally,* CAA section 113(a)(3) (prohibiting violation of a "requirement" of a rule).

To the extent that the comments above have suggested specific interpretations of when regulations "take effect" under the language of CAA section 202 or have provided specific dates upon which they believe control requirements for GHG emissions would "take effect" under the proposed LDV Rule, EPA provides a response to these specific section 202 timing issue in Chapter 9 of this RTC.

## *8.2. Compliance Date*

**Comments:**

Three commenters (0051, 0053, 0074) state that PSD should not become applicable to a pollutant until controls are actually required by an EPA regulation, i.e., model year 2012 for the proposed rule. The three commenters (0051, 0053, 0074) refer to section 202 regulations, which do not take effect immediately upon promulgation, although the PSD Interpretive Memo states that "a pollutant becomes a regulated NSR pollutant at an earlier point upon promulgation of a regulation that requires actual control of emissions," similarly to the proposed PSD tailoring rule. The two commenters (0051, 0053) state that to use this interpretation of "subject to regulation" would "directly conflict with the [CRA]". The commenters (0051, 0053) state that "subject to regulation" is most naturally interpreted to mean that PSD requirements apply when a regulation becomes "final and effective", which in the case of the proposed Light Duty Vehicle (LDV) rule, is the first compliance date for model year 2012 standards. Three commenters (0051, 0053, 0081) also state precedence in delaying implementation of PSD requirements, such as enforcement of BACT requirements for $PM_{2.5}$ due to the lack of adequate modeling techniques.

Other industry commenters (0069, 0096, 0106/0107) state that that EPA should use its discretion to determine that a pollutant becomes "subject to regulation" when the regulated entity must actually comply with an emission limit or other emission standard for control, not when a regulation becomes effective. The commenters made the following points in support of this position:

- Under the CAA there is generally no legally enforceable obligation to control a pollutant when a regulation is promulgated or even when it becomes effective; instead, a great deal of consideration is given to how long it will take a facility to evaluate the applicability of the requirement, to design and engineer or purchase the equipment, to install the equipment, and to operate the source until it shakes down and can be tested for compliance. It is only at that point that an affected source becomes "subject to the regulation" in the sense that it is legally obligated by the Act to effect "actual control." Therefore, consistent with EPA's interpretation in the proposed PSD Interpretation, a pollutant is regulated when a source must actually comply with such regulation – not when the regulation becomes effective for purposes of judicial review.
- There are very important logistical and other policy reasons for delaying the applicability of PSD to municipal utilities and other sources. The EPA is obligated to provide sources

with more information on available control technologies and provide the market a reasonable opportunity to bring such technologies to market. An additional 7 months to a year-and-a-half may help this nation, in a deep economic crisis, more adequately address the technical and financial challenges of controlling GHGs.

- The EPA's assertions regarding why the doctrines of "absurd results" and "administrative necessity" support phasing in PSD over 6 years compel the Administrator to delay regulation of GHGs under the PSD program as long as is reasonable. Unfortunately for the members of the commenter's association, nearly all of our cities' electric utilities both have the PTE greater than 25,000 tons of GHGs annually and are small businesses that meet the Small Business Regulatory Enforcement Fairness Act (SBREFA). These sources need the relief that EPA suggests that it is providing to small sources in the PSD Tailoring Rule. The commenter urges EPA to provide further and more effective relief from PSD by not only interpreting the phrase "subject to regulation" in this rulemaking to when a regulated entity must "actually comply" with GHG emission standards, but by also deferring regulation under the PSD program. The commenter asks that these comments be considered by the EPA and OMB under UMRA, Executive Order 12866, and SBREFA.

One commenter (0050) states that the proposed rule would be "final" after the CRA period has ended and "effective," at the earliest, in the fall of 2011, as the Administrator states that model year 2012 is the time when it is "necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such a period."

One commenter (0056) states there is a substantial difference between a finding that PSD is applicable to GHGs on the "first substantive compliance date of a regulation" and a finding that PSD is applicable on the "effective date" of a regulation. The commenter (0056) emphasizes that a source becomes "subject to regulation" specifically after the "first substantive compliance date" in an effort to provide some temporal relief to sources and allowing EPA to provide technical and permitting assistance to sources and permitting authorities. The commenter (0056) also states that the Interpretation memo on the meaning of "subject to regulation" does not need to be re-proposed as there is adequate basis for such an interpretation in the October 7th proposal.

One local agency commenter (0062) states that the need for more time to facilitate implementation of the GHG Tailoring Rule for PSD and title V requirements justifies the MY 2012 compliance date for the GHG mobile source regulations.

One industry commenter (0076) states that in the maximum achievable control technology (MACT) program, EPA uses the "first substantive compliance date" for a standard to distinguish when a source may become an area source after the effective date of a control requirement. This commenter asserts that the use of the "first substantive compliance date" would be a logical way to define when "actual control" of a pollutant occurs.

Another of the industry commenter (0080) states that interpreting "actual control" to occur at the beginning of MY 2012 harmonizes the requirements that will be triggered by the

GHG motor vehicle rule with the requirements that will be triggered under the PSD program. The industry commenter (0080) asserts that EPA's proposed interpretation would create the anomalous result that stationary sources would have to begin reducing GHG emissions as much as a year-and-a-half in advance of the time when motor vehicles begin reducing emissions, even though it is the regulation of motor vehicles that triggers the requirements for stationary sources.

One commenter (0088), while generally agreeing with the December 18, 2008 EPA Memorandum, states the "actual control of emissions" date should be established by the actual compliance date of any pertinent regulatory requirement. The commenter states that, if this is the LDVR, the date should be the actual implementation of the MY 2012 requirements (in Calendar Year 2011 or 2012).

Commenters (0092, 0098) representing several groups of companies state that EPA should adopt a more reasonable approach to the timing of PSD applicability and conclude that PSD does not apply until the compliance date (not the promulgation date) of a regulation requiring emission controls.

One commenter (0097) states that while the "effective date" of a rule is better than the promulgation date, it still does not properly identify the date on which a pollutant is actually controlled. Rather, "actual control" is the first compliance date for achieving a standard or implementation of control equipment under a formal national rule. Consistent with EPA, this commenter (0097) believes that this interpretation best reflects past policy and practice, is in keeping the structure and language of the statute and regulations and best allows for the necessary coordination of approaches to controlling emissions of newly identified pollutants.

One state agency commenter (0102) notes that the LDVR provides a certain amount of time for those vehicles to come into compliance and asserts that this compliance date also should determine the effective date that the pollutant must be regulated under the CAA.

Two commenters (0115, 0116) encourage EPA to maintain the interpretation that PSD permitting requirements would be triggered only when compliance is required with a final regulation requiring actual control of the pollutant's emissions.

One industry commenter (0118) and one commenter representing several groups of companies (industry) (0086) urges EPA to interpret "actual control" as the date that a source has an actual compliance obligation under a regulation, that is, when controls must first be in place for the pollutant. One of these commenters (0118) indicate that allowing additional time after a regulation is adopted before BACT must be determined in PSD permitting will provide a more reasonable period for sources to identify and evaluate control options for the newly regulated pollutant, which the commenter (0118) believes is particularly desirable when, as is the case with GHGs, the initial regulation will require controls that are not appropriate for stationary sources.

One industry commenter (0083) states that the CAA regulations contain many examples where active controls are deferred for many months or years after the effective date of a regulation. However, the comments did not provide any specific examples.

**Response:**

As discussed in response to the legal comments above, we are persuaded that EPA should interpret that time that a pollutant becomes a "regulated NSR pollutant" under section 52.21(b)(50)(iv) to be the time when a control or restriction on emissions of the pollutant takes effect or becomes operative on the regulated activity. In so doing, we generally note that date at which a regulation "takes effect" and "becomes operative" is functionally equivalent to the "compliance date" for that regulation. As such, EPA acknowledges that the general "compliance date" comments above provide additional support for the interpretation we are adopting in this final action. We have also reviewed these general comments in light of that interpretation and find no issues raised in these comments that must be addressed through further refinement of that interpretation, although we do believe a few points of clarification are necessary.

A number of comments note that under EPA's regulatory program for HAP pollutants, EPA uses the "first substantive compliance date" to determine when a new MACT standard becomes applicable for the purpose of applying an area source designation. While our response to the legal comments in section 8.1.1. above discussed how CAA section 112(i)(3)(A) requires the Administrator to establish a date for compliance with a new HAP emission standard within 3 years after the effective date of the standard, it did not use the term "first substantive compliance date" because it is not contained in the language of CAA section 112. Rather, "first substantive compliance date" is the term EPA has used in policy documents relating to the timing of application of particular HAP regulatory requirements. *See* Memorandum from John S. Seitz, Director OAQPS, to Regional Air Directors, "Potential to Emit for MACT Standards – Guidance on Timing Issues" (May 16, 1995). As used in this guidance, the term is equivalent to the use of "takes effect" or "becomes operative" as used in the interpretation EPA is adopting here.

Similar to the comments received for the "takes effect" interpretation above, a number of the comments here argue that the "compliance date" interpretation is appropriate because it will allow for more time to prepare for implementation of the PSD program for newly regulated pollutants, including GHGs. However, our adoption of the "takes effect" interpretation is based on the specific language of the PSD provisions and structure of the PSD program as provided for in the CAA and our corresponding implementing regulations, as described above, and not on the implementation concerns noted in these comments.

As explained above, we agree with the comment that there is generally no legally enforceable obligation to control a pollutant when a regulation is promulgated or, in some instances, even when a regulation becomes effective for some purposes. Consistent with our interpretation, the enforceable obligation to control a newly regulated pollutant only exists when the regulation of the pollutant takes effect or becomes operative on the regulated activity. Until that time, regulated entities are generally not required to comply with the control requirements and thus cannot be found in violation of those requirements. *See generally,* CAA section 113(a)(3) (prohibiting violation of a "requirement" of a rule).

To the extent that the comments above have suggested specific interpretations of the applicable "compliance date" under the language of CAA section 202 or have provided specific dates upon they believe auto manufacturer would have to comply with control requirements for

GHG emissions under a final LDV Rule, EPA provides a response to these specific section 202 timing issue in section 9.2 below.

## *8.3. Promulgation Date*

**Comment:**

An environmental organization commenter (0099) claims that even under the "actual control" theory, $CO_2$ will be "subject to regulation" upon *Federal Register* publication of the appropriate standards. The commenter (0099) states that EPA should interpret the phrase "subject to regulation" to mean that pollutants become so regulated on the date of *Federal Register* publication of EPA's section 209(b) determination (for section 209(b) pollutants) or EPA regulations. The commenter (0099) opposes EPA's proposal to interpret "subject to regulation" to mean that PSD requirements apply when the regulations addressing a particular pollutant become final and effective, as opposed to their date of promulgation. The commenter (0099) argues that the reasons EPA gives for choosing effective date are not persuasive. First, the commenter (0099) argues that there is no need to "harmonize" the PSD requirements with the Congressional Review Act (CRA), because Congress has used the CRA process exactly once to overturn a regulation. Second, the environmental commenters notes that EPA incorrectly finds that the "effective date" interpretation best fits the regulatory language describing two of the other three categories of "regulated NSR pollutant" in 40 CFR 52.21(b)(50), because EPA's rationale ignores the language of section 111(b)(1)(B) of the CAA, which specifically provides that "Standards of performance or revisions thereof shall be effective upon promulgation." Thus, the commenter argues that both the section 111 and the NAAQS regulatory categories supports the better interpretation that a pollutant becomes "subject to regulation" upon promulgation, not the effective date.

This environmental organization commenter (0099) also argues against a later interpretation of the triggering date – such as "takes effect" or compliance date – by noting that such an interpretation would potentially postpone, for many years, PSD regulation of a pollutant that EPA had already determined threatened health or welfare. The commenter (0099) also notes that if the PSD regulatory requirements are triggered at the time a source must comply with the actual control regulations, there is no such "actual control" until the source begins operation and emitting that pollutant, which not only adds additional years to the delay, but there is no way for anyone else to know when this would happen as the "actual control" status would be known only to the operator of a single source in one state. According to the commenter (0099), even worse is the suggestion that the "actual control" trigger be defined not by the imposition of such emissions limits, but only when the source is subsequently required to demonstrate compliance with that limit. The commenter notes that for a stationary source, such an interpretation would (presumably) mean when it reports its emissions, which could easily be months or even years after it begins operations, and for mobile sources, this would mean at the final determination of compliance with fleet average standards may, which not occur until several years after the close of the model year in which the standards apply.

**Response:**

The regulatory language of 40 CFR 52.21(b)(50)(iv) does not specify the exact time at which the PSD requirements should apply to pollutants in the fourth category of the definition of "regulated NSR pollutant." While the PSD Interpretive Memo states that EPA interprets the language in this definition to mean that the fourth part of the definition should "apply to a pollutant upon promulgation of a regulation that requires actual control of emissions," Memo at 14, EPA proposed to modify that interpretation in the reconsideration notice after continuing to consider the underlying statutory requirement in the CAA and the language in all parts of the regulatory definition more closely. EPA acknowledges, and the comment does not dispute, that the regulatory language of 40 CFR 52.21(b)(50)(iv) could be interpreted to apply PSD requirements to a newly regulated pollutant at either the date the underlying control regulation is promulgated or the date which the control requirement takes effect. After considering the comments received on this timing issue, as well as other issues and policy concerns raised in the reconsideration notice, EPA has determined that the term "subject to regulation" in the statute and regulation is most naturally interpreted to mean that PSD requirements apply at the point in time when a control or restriction that functions to limit pollutant emissions takes effect or becomes operative to control or restrict the regulated activity, as explained above, and nothing in the comment has persuaded us to change that interpretation.

With regard to the comment's first point – that harmonization of the PSD requirements with the Congressional Review Act (CRA) is unnecessary because Congress has only used the CRA once to overturn a regulation – we note that the commenter only finds reliance on the CRA unpersuasive but does not argue that such reliance is prohibited by the regulatory or statutory language. As explained in the response to comments provided above, the potential for the CRA process to affect the date at which a rule requiring control of a new pollutant becomes operative, or takes effect, is relevant to determining when PSD requirements shall apply to newly regulated pollutants.

With regard to the commenter's argument that EPA incorrectly tries to rely on the NAAQS and NSPS categories of "regulated NSR pollutant" found in 40 CFR 52.21(b)(50)(i) and (ii) to interpret PSD requirements as applying at a point later than promulgation of underlying regulation to which the new pollutant is subject, we are also unpersuaded. We find that the reasoning we provide in section 8.1 above in applying the "takes effect" interpretation for timing of PSD requirements for new pollutants "subject to regulation" under 40 CFR 52.21(b)(50)(iv) is equally applicable to the regulation of additional pollutants under the specific sections of the Act delineated in the first three parts of the definition. While the date a control requirement may take effect could vary across sections 109, section 111, and Title VI, we do not see any distinction in the applicability of the legal reasoning above to these provisions of the CAA. There should be less variability among rules promulgated under the same statutory section, so EPA does not expect that it will be necessary for EPA to identify the date that a new pollutant becomes subject to regulation each time EPA regulates a new pollutant in a NAAQS or NSPS. EPA can more readily identify the specific dates when controls under such rules take effect.

With specific regard to the NSPS concerns raised in the comments, we note that the NSPS under section 111 of the Act preclude operation of a new source in violation of such a

standard after the effective date of the standard. *See* 42 U.S.C. §7411(e). Thus, an NSPS takes effect on the effective date of the rule. Once such a standard takes effect and operates to preclude operations in violation of the standards, then EPA interprets the statute and EPA's PSD regulations to also require that the BACT requirement apply to a pollutant that is subject to NSPS. Consistent with our October 7, 2009 proposal, EPA has determined that the existing language in section 52.21(b)(50)(ii) of its regulations may be construed to apply to a new pollutant upon the effective date of an NSPS. This part of the definition covers "[a]ny pollutant that is subject to any standard promulgated under section 111 of the Act." 40 CFR 52.21(b)(50)(ii). While the word "promulgated" appears in this part of the definition, term modifies the term "standard" and does not directly address the timing of PSD requirements. Under the language in this part of the definition, the PSD requirements apply when a pollutant becomes "subject to" the underlying standard, which is "promulgated under" section 111 of the Act. Thus, section 52.21(b)(50)(ii) can be interpreted to make an NSPS pollutant a regulated NSR pollutant upon the effective date of an NSPS. Accordingly, the effective date of an NSPS is also that date when the controls in an NSPS "take effect."

Likewise, with regard to the NAAQS pollutant arguments raised in the comments, under section 169(a)(3) of the Act, a source applying for a PSD permit must demonstrate that it will not cause or contribute to a violation of the NAAQS in order to obtain the permit, as required by section 169(a)(3) of the Act. Once a NAAQS is effective with respect to a pollutant, the standard operates through section 169(a)(3) of the Act and section 52.21(k) of EPA's regulations to preclude construction of a new source that would cause or contribute to a violation of such standard. Using the effective date of a NAAQS to determine when a pollutant covered by a NAAQS becomes a regulated NSR pollutant is more consistent with EPA's general approach for determining when a new NAAQS applies to pending permit applications. EPA generally interprets a revised NAAQS that establishes either a lower level for the standard or a new averaging time for a pollutant already regulated to apply upon the effective date of the revised NAAQS. Thus, unless EPA promulgates a grandfathering provision that allows pending applications to apply standards in effect when the application is complete, a final permit decision issued after the effective date of a NAAQS must consider such a NAAQS. As described above, the effective date of the NAAQS is also the date a NAAQS takes effect through the PSD permitting program to regulate construction of a new or modified source.

EPA does not agree that a NAAQS would not take effect until the time a state first promulgates limitations for the pollutant in a SIP. Since a NAAQS covering a new pollutant would operate through the PSD permitting program to control emissions of that pollutant from the construction or modification of a major source upon the effective date of the NAAQS, a NAAQS covering a new pollutant takes effect on the effective date of the regulation promulgating the NAAQS. Under section 165(a)(3) of the Act and the federal PSD permitting regulations at 52.21(k), to obtain a PSD permit, a major source must demonstrate that the proposed construction will not cause or contribute to a violation of a NAAQS. Due to these requirements, the PSD program operates to incorporate the NAAQS as a governing standard for permitting construction of large sources. Thus, under the federal PSD program regulations at least, a new pollutant covered by a NAAQS becomes subject to regulation at a much earlier date. These PSD provisions require emissions limitations for the NAAQS pollutant before construction at a major source may commence and thereby function to protect the NAAQS from

new source construction and modifications of existing major sources in the SIP development period before a completion of the planning process necessary to determine whether additional standards for a new NAAQS pollutant need to be developed. The timing when the NAAQS operates in this manner under SIP-approved programs is potentially more nuanced and depends on whether state laws are sufficiently open-ended to call for application of a new NAAQS as a governing standard for PSD permits upon the effective date. EPA believes that state laws that use the same language as in EPA's PSD program regulations at 52.21(k) and 51.166(k) are sufficiently open-ended and allow such a NAAQS to "take effect" through the PSD program upon the effective date of the NAAQS. Notwithstanding this complexity in SIP-approved programs, the applicability of the federal PSD program regulations to a new NAAQS pollutant upon the effective date of the NAAQS is sufficient to determine that a new pollutant is subject to regulation on this date.

In the October 7, 2009 notice, EPA observed that one portion of its existing regulations was not necessarily consistent with this reading of the CAA. For the first class of pollutants described in the definition of "regulated NSR pollutant," the PSD requirements apply once a "standard has been promulgated" for a pollutant or its precursors. *See* 40 CFR 52.21(b)(50)(i). The use of "has been" in the regulation indicates that a pollutant becomes a "regulated NSR pollutant," and hence PSD requirements for the pollutant are triggered, on the date a NAAQS is promulgated. Thus, EPA observed in the October 7, 2009 notice that it may not be possible for EPA to read the regulatory language in this provision to make PSD applicable to a NAAQS pollutant upon the effective date of the NAAQS. EPA did not propose to modify the language in 40 CFR 52.21(b)(50)(i) in the October 2009 notice because EPA had not yet reached a final decision to interpret the CAA to mean that a pollutant is subject to regulation on the date a regulatory requirement becomes effective. Since EPA was not proposing to establish a NAAQS for any additional pollutants, the timing of PSD applicability for a newly identified NAAQS pollutant did not appear to be of concern at the time. No public comments on the October 2009 notice addressed this issue. Since EPA is now adopting a variation of the proposed interpretation with respect to the timing of PSD applicability, we believe it will be appropriate to propose a revision of the regulatory language in section 52.21(b)(50)(i) at such time as EPA may consider promulgation of a NAAQS for an additional pollutant. Until that time, EPA will continue to apply the terms of section 52.21(b)(50)(i) of the regulation. This is permissible because, even though EPA believes the better reading of the Act is to apply PSD upon the date that a control requirement "takes effect," the Agency has not determined in this action that the Clean Air Act precludes applying PSD requirements upon the promulgation of a regulation that establishes a control requirement (as a NAAQS does through the PSD provisions).

However, we do not believe that this present limitation prohibits us from applying such an interpretation to non-NAAQS pollutants covered by the 40 CFR 52.21(b)(50)(iv).

As described above, EPA has chosen a "takes effect" interpretation of when a pollutant becomes "subject to regulation" under the PSD program because it is a permissible interpretation of the relevant statutory and regulatory language. EPA recognizes that the fourth part of the definition of "regulated NSR pollutant" as used in 52.51(b)(50) functions as a catch-all provision and may cover a variety of different types of control requirements established by EPA under the CAA. These different types of regulations may contain a variety of different mechanisms for

controlling emissions and have varying amounts of lead time before controls take effect under the particular regulatory framework. Thus, in order to avoid the type of uncertainty and potential delay that concern the commenter, EPA anticipates that it will be helpful to states and regulated sources for EPA to identify the date when a new pollutant becomes subject to regulation whenever the Agency adopts controls on a new pollutant under a portion of the CAA covered by the fourth part of the definition. With regard to GHGs, the Agency has determined that date to be January 2, 2011, or a similar date as finalized in the LDV rulemaking, as described in section 9.2 below. Accordingly, the adoption of the "takes effect" interpretation will not result in the uncertainty regarding the exact date of PSD applicability or the prolonged delay of such applicability described by the commenter.

EPA is not adopting the view that a pollutant becomes subject to regulation at the time that an individual source engages in the regulated activity. EPA does not believe such a reading is consistent with the "subject to regulation" language in the CAA. Even if no source is actually engaged in the activity, once a standard or control requirement has taken effect, no source may engage in the regulated activity without complying with the standard. At this point, the regulated activity and the emissions from that activity are controlled or restricted, thus being subject to regulation within the common meaning of the term regulation used in EPA's regulations and section 165(a)(4) and 169(3) of the CAA.

Likewise, EPA does not accept the view that a pollutant does not become subject to regulation until the date when a source must certify compliance with regulatory requirements or submit a compliance report. In some instances, a compliance report or certification of compliance may not be required until well after the point that a regulation operates to control or restrict the regulated activity. Thus, EPA does not feel that it would be appropriate as a general rule to establish the date when a source certifies compliance or submits its compliance report as the date that a pollutant becomes subject to regulation.

## *8.4. Apply PSD only after Significance Level has been promulgated*

One commenter (0072) requests that EPA revise the PSD regulations to prevent application of PSD to a pollutant until EPA has developed a significance level for that pollutant for the following reasons:

- Both potentially regulated facilities and state and federal permitting agencies would know which pollutants they had to consider in determining whether there would be a new major emitting facility or a major modification.
- It would give permit writers and sources preparing permit applications some criteria to apply to emissions of a pollutant, rather than asking them to start applying PSD permitting to a pollutant without any guidance as to when that pollutant's emissions are significant enough that they should be analyzed in greater detail.
- It would avoid the current PSD regulations from considering any increase significant for a pollutant EPA has never evaluated for significance under the PSD program.

**Response:**

EPA does not construe the CAA or existing regulations to permit the agency to prevent applicability of PSD requirements to a pollutant based on the absence of a significance level. Significance levels identify de minimis levels of emissions that do not warrant scrutiny in permitting reviews. They do not serve to "regulate" or require control of the pollutant for which they are established. EPA's regulations contemplate the application of PSD requirements in the absence of a significance level. *See* 40 CFR 52.21(b)(23)(ii). However, as discussed elsewhere in this document, one of the policy reasons EPA prefers the actual control interpretation is that it provides the opportunity for EPA to promulgate significance levels in a timely manner when the agency proposes to regulate an additional pollutant. In the Tailoring Rule, EPA took comment on significance levels for GHGs. As explained above, we fully expect the Tailoring Rule to be promulgated prior to the GHG LDV Rule's "take effect" date of January 2, 2011.

## *8.5. Timing Based on Economic and Technical Feasibility of Controls*

**Comments:**

One industry commenter (0083) asserts that certain statutory provisions require EPA to defer the application of controls until economically or technically feasible. Another industry commenter (0081) made the same point specifically for GHG sources.

**Response:**

The economic and technical feasibility of available control options are assessed in setting the BACT limit for each specific facility under review. *See* CAA §169(3); 40 CFR 52.21(b)(12). Thus, EPA does not believe this would be a permissible basis for deferring the applicability of the BACT requirements in the first instance.

# Chapter 9. Regulation of Greenhouse Gases

## *9.1. GHG and CO2 are Air Pollutants*

**Comment:**

Commenter (0101) argues that it is now beyond dispute that GHGs are "pollutants" under the CAA. The CAA defines "air pollutant" as "[a]ny air pollution agent or combination of such agents, including any physical, chemical, biological, [and] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." CAA §302(g), 42 U.S.C. §7602(g). In *Massachusetts v. EPA*, the Supreme Court held that greenhouse gases, including CO2, are "without a doubt" physical chemical substances emitted into the ambient air and thus pollutants. Id., 549 U.S. at 529. Similarly, in its final "Endangerment and Cause or Contribute Finding for Greenhouse Gases" (Dec. 7, 2009) ("Endangerment Finding"), EPA has stated unequivocally that GHGs are air pollutants.

One industry commenter (0069) expresses that comments on the PSD Interpretive Memorandum should not be construed as admitting that GHGs are, individually or in combination, a "pollutant" subject to regulation under the CAA.

**Response:**

EPA recognizes that the Supreme Court has held that GHGs fit within the definition of "air pollutant" under CAA section 302. *Massachusetts v. EPA, 549 U.S. 497 (2007).*

## *9.2. Date When PSD Permitting Requirements Apply to GHGs*

**Comments:**

Several commenters discussed the specific date upon which PSD requirements for GHG should be triggered based on the GHG standards in EPA's proposed motor vehicle regulations, which are proposed to begin with the 2012 model year (MY 2012), including:

- The beginning of MY 2012 (Commenter 0080)
- MY 2012, as being either Spring 2011 or Late 2011 (Commenter 0076)
- At the earliest January 2, 2011 and at the latest by March 30, 2013 (0056, 0059, 0064, 0096, and 0106/0107)
- March 2011 (0062)
- Summer 2011, while acknowledging possibility as early as January 2, 2011 (0062)
- Fall of 2011 (0050)
- October 2011 (0067, 0073, 0083, 0089, 0090, 0096, 0106/0107, 0108, and 0109)
- Late 2011 (0081)

- May 1, 2012 (0067, 0073)

Eight industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109), in asserting that EPA should clarify it is adopting the "takes effect" interpretation, state that if EPA promulgates its proposed motor vehicle GHG rules in final form, those rules could not have any PSD triggering effect before the beginning date of the first model year to which those rules apply (i.e., October 1, 2011).

Some industry commenters (0069, 0096, 0106/0107) note that U.S. automakers are not required to comply with the MY 2012 GHG mobile vehicle regulations before an LDV is manufactured on January 2, 2011, and because compliance with these regulations is based on fleet averaging, automakers will not have to certify compliance until March 2013. For these reasons, it is more reasonable to conclude that GHGs are not actually controlled until 2011 at the earliest and 2013 at the latest. Because this is the logical construction of EPA's own interpretation, the commenters (0069, 0096, 0106/0107) assert that EPA can take final action and conclude that one of these dates and not the effective date of the GHG mobile vehicle regulations is when GHGs become subject to regulation for purposes of triggering PSD without additional rulemaking.

One commenter (0058) requests that EPA establish an effective date for the PSD and title V programs for GHGs no earlier than one year after the effective date of the LDVR. The commenter (0058) states that EPA has the authority for such a postponement under the legal doctrine of "administrative necessity" and "absurd results." The commenter (0058) also requests that EPA postpone applicability for non-$CO_2$ GHGs for at least another year to allow for further understanding of workload impacts of PSD and title V applicability to those non-$CO_2$ GHG pollutants.

One of the industry commenters (0064) notes that, in the case of the regulation of GHG emissions from motor vehicles, the compliance obligation occurs when manufacturers introduce into commerce vehicles that are required to comply with GHG standards, which will begin with MY 2012 and will not occur before January 2, 2011. The commenter (0064) also indicates that another interpretation on the timing for the compliance obligation in the context of the GHG motor vehicle regulations could be when the manufacturer is required to meet the fleet-wide average, which occurs for the first time at the close of MY 2012 and is based on actual production figures for each model and on model-level emissions data collected through testing over the course of the model year. Thus, the commenter (0064) believes that some point after the end of MY 2012 could be considered the date there is a compliance obligation or "actual control" of GHG pollutants for purposes of the GHG motor vehicle regulations. The commenter believes that these are reasonable interpretations of an ambiguous statute, entitling EPA deference under *Chevron*. Other industry commenters (0067, 0073) use a similar rationale to arrive at alternative dates of October 2011 and May 1, 2012.

One commenter (0067) supports EPA's proposal that the "effective" date is the date sources are obliged to meet the requirements for new pollutants in PSD and title V permit applications. No actual control obligations will be imposed until at least October 2011. One commenter (0067) states that delaying the effective date until October 2011 will provide

adequate time to receive information from the first year of EPA's GHG reporting rule, develop additional information for the RACT/BACT/LAER clearinghouse, and supplement other necessary information sources.

**Response:**

A majority of the comments EPA received in this action, as summarized above and elsewhere in this RTC, addressed the specific issue of when GHG-PSD permitting requirements would be applied under the various interpretations discussed above. EPA has determined that GHGs will initially become "subject to regulation" under the CAA on January 2, 2011 based on the following considerations: (1) the overall interpretation reflected in the PSD Interpretive Memo; (2) EPA's conclusion in this notice that a pollutant becomes subject to regulation when controls "take effect," and (3) the assumption that the agency will establish emissions standards for model year 2012 vehicles when it completes the proposed LDV Rule.

As proposed, the LDV Rule consists of two kinds of standards — fleet average standards determined by the emissions performance of a manufacturer's fleet of various models, and separate vehicle standards that apply for the useful life of a vehicle to the various models that make up the manufacturer's fleet. CAA section 203(a)(1) prohibits manufacturers from introducing a new motor vehicle into commerce unless the vehicle is covered by an EPA-issued certificate of conformity for the appropriate model year. Section 206(a)(1) of the CAA describes the requirements for EPA issuance of a certificate of conformity, based on a demonstration of compliance with the emission standards established by EPA under section 202 of the Act. A certification demonstration requires emission testing, and must be done for each model year.

The certificate covers both fleet average and vehicle standards, and the manufacturer has to demonstrate compliance with both of these standards for purposes of receiving a certificate of conformity. The demonstration for the fleet average is based on a projection of sales for the model year, and the demonstration for the vehicle standard is based on emissions testing and other information.

Both the fleet average and vehicle standards in the LDV Rule will require that automakers control or limit GHG emissions from the tailpipes of these vehicles. As such, they clearly constitute "regulation" of GHGs under the interpretation in the PSD Interpretive Memo. This view is consistent with the position originally expressed by EPA in 1978 that a pollutant regulated in a Title II regulation is a pollutant subject to regulation. *See* 42 FR at 57481. However, the regulation of GHGs will not actually take effect upon promulgation of the LDV Rule or on the effective date of the LDV Rule when the provisions of the rule are incorporated into the CFR.

Under the LDV Rule, the standards for GHG emissions are not operative until the 2012 model year, which may begin as early as January 2, 2012. In accordance with the requirements of Title II of the CAA and associated regulations, vehicle manufacturers may not introduce a model year 2012 vehicle into commerce without a model year 2012 certificate of conformity. CAA Section 203(a)(1). A model year 2012 certificate only applies to vehicles produced during that model year, and the model year production period may begin no earlier than January 2,

2011. *See* CAA section 202(b)(3)(A) and implementing regulations at 40 CFR 85.2302 through 85.2305. Thus a vehicle manufacturer may not introduce a model year 2012 vehicle into commerce prior to January 2, 2011

There will be no controls or limitations on GHG emissions from model year 2011 vehicles. The obligation on an automaker for a model year 2012 vehicle would be to have a certificate of conformity showing compliance with the emissions standards for GHGs when the vehicle is introduced into commerce, which can occur on or after January 2, 2011. Therefore the controls on GHG emissions in the Light Duty Rule will not take effect until the first date when a 2012 model year vehicle may be introduced into commerce. In other words, the compliance obligation under the LDV Rule does not occur until a manufacturer may introduce into commerce vehicles that are required to comply with GHG standards, which will begin with MY 2012 and will not occur before January 2, 2011. Since section 203(a)(1) of the CAA prohibits manufacturers from introducing a new motor vehicle into commerce unless the vehicle is covered by an EPA-issued certificate of conformity for the appropriate model year, as of January 2, 2011, manufacturers will be precluded from introducing into commence any model year 2012 vehicle that has not been certified to meet the applicable standards for GHGs.

This interpretation of when the GHG controls in the LDV Rule take effect, and therefore, make GHGs subject to regulation under the Act for PSD purposes, is consistent with the statutory language in section 202(a)(2) of the CAA. This section provides that "any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." *See* 42 U.S.C. 7521(a)(2) (emphasis added). The final LDV Rule will apply to model years 2012 through 2016. The time leading up to the introduction of model year 2012 is the time that EPA "finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." Model year 2012 is therefore when the GHG standards in the rule "take effect."

EPA does not agree with several commenters who have suggested that the GHG standards in the proposed LDV Rule would not take effect until October 1, 2011. The latter date appears to be based on how the National Highway Traffic Safety Administration (NHTSA) determines the beginning of the 2012 model year under the Energy Policy and Conservation Act (EPCA). Under EPCA, a more stringent CAFE standard must be prescribed by NHTSA at least 18 months before the beginning of the model year. For purposes of this EPCA provision, NHTSA has historically construed the beginning of the model year to be October 1 of the preceding calendar year. *See* 49 U.S.C. §32902(g)(2); 74 FR 49454, 49644 n.447 (Sep. 28, 2009). Although EPA has endeavored to harmonize its section 202(a) standards with the NHTSA CAFE standards, EPA's standards are promulgated under distinct legal authority in the CAA. Thus, the section 202(a) standards promulgated in the LDV Rule are not subject to EPCA or NHTSA's interpretation of when a model year begins for purposes of EPCA. Under EPA's planned LDV regulations, model year 2012 vehicles may be introduced into commerce as early as January 2, 2011. Although as a practical matter, some U.S. automakers may not begin introducing model year 2012 vehicles into commerce until later in 2011, they may nevertheless do so as early as January 2, 2011 under EPA's regulations. Consistent with the discussion

above, EPA construes the phrase "subject to regulation" in section 165(a)(4) and 169(3) of the Act to mean that the BACT requirement applies when controls on a pollutant first apply to a regulated activity, and not the point at which an entity first engages in the regulated activity. In this instance, the regulated activity is the introduction of model year 2012 vehicles into commerce. As of January 2, 2011, a manufacturer may not engage in this activity without complying with the applicable GHG standards.

Likewise, EPA does not agree with commenters who argued that EPA should not consider the GHG controls in the LDV Rule to take effect until automakers have to demonstrate compliance with the fleet average standards at the end of the model year, based on actual vehicle model production. As discussed above, the LDV Rule includes both fleet average standards and vehicle standards that apply to individual vehicles throughout their useful lives, and both of these standards for GHG emissions are operative on model year 2012 vehicles introduced into commerce on or after January 2, 2011. Thus, controls on GHG emissions from automobiles will take effect prior to the date that a manufacturer must demonstrate compliance with the fleet average standards. The fact that the manufacturer demonstrates final compliance with the fleet average at a later date, based on production for the entire year, does not change the fact that their conduct was controlled by both the fleet average and the vehicle standards, and subject to regulation, prior to that date.

With regard to the comment suggesting that EPA rely on the doctrines of administrative necessity and absurd results to delay PSD implementation for GHG emissions beyond January 2, 2011, EPA has proposed to apply these doctrines in a separate EPA rulemaking, known as the Tailoring Rule, to at least temporarily limit the scope of GHG sources covered by the PSD program to ensure that permitting authorities can effectively implement it. EPA will be taking additional action in the near future in the context of that rule to address GHG-specific circumstances that will exist beyond January 2, 2011.

In addition to the specific comments regarding PSD applicability for GHGs based on finalization of the proposed LDV Rule, we also received general comments arguing that a pollutant does not become "subject to regulation" until the date when a source must certify compliance with regulatory requirements or submit a compliance report. For the same reasons as provided in response to specific comments addressing the LDV Rule compliance demonstrations – namely the delay between the demonstration and the requirement to operate the underlying control or restrict the regulated activity – EPA declines to adopt this general interpretation. Likewise, EPA does not agree with general comments suggesting that EPA determine that a pollutant does not become subject to regulation until the time that an individual source engages in the regulated activity. EPA does not believe such a reading is consistent with the "subject to regulation" language in the CAA. Even if no source is actually engaged in the activity, once a standard or control requirement has taken effect, no source may engage in the regulated activity without complying with the standard. At this point, the regulated activity and the emissions from that activity are controlled or restricted, thus being subject to regulation within the common meaning of the term regulation used in EPA's regulations and section 165(a)(4) and 169(3) of the CAA.

**Comment:**

One commenter (0091) states that for the proposed LDVR, an interpretation of timing of PSD requirements could be the full implementation date (or the date controls must be in place and operation), which would extend the PSD applicability date by 15 to 19 months. For the NSPS for GHG emissions triggering PSD applicability, an interpretation of the full implementation date could extend the PSD applicability date by several years.

**Response:**

Insofar as the commenter requests that EPA adopt an interpretation which applies PSD requirements on the "full implementation date" of the underlying control regulation, we believe this interpretation is substantively identical to the interpretation using the "takes effect" PSD implementation date that we are adopting in this final action. However, as described above, we have identified that date as January 2, 2011, or a similar date applicable under the final LDV Rule, which is less than the 15 to 19 months extension of applicability stated in the comment. To the extent that timeframe is based upon a misunderstanding of the LDV Rule applicability or the reliance on some other applicability event, we direct the commenter to our response provided to similar comments above. As for the comment that an NSPS for GHG emissions would delay PSD implementation for several years, we find no reason that an NSPS would produce such a delay in PSD applicability. As we have explained in section 8.3, we find the NSPS effective date and takes effect date to be functionally equivalent such that PSD requirements for a pollutant covered by an NSPS would apply once such a standard takes effect and precludes operation of any stationary source in violation of the standard.

**Comment:**

One commenter (0104) agrees with EPA that the term "subject to regulation" in the CAA and corresponding regulations is most naturally interpreted to mean that PSD requirements apply when the regulations addressing a particular pollutant become final and effective. According to the commenter, neither the effective date, nor the promulgation date, are the appropriate interpretations for the term "subject to regulation." From the commenter's perspective, regulations are final and effective at such time when all legal challenges to a proposed regulation have been exhausted through the court system.

**Response:**

EPA rejects the argument that a pollutant does not become "subject to regulation" until all legal challenges to the underlying control regulation for that pollutant have been exhausted. The commenter does not provide (and EPA is not aware of) any legal authority or past agency guidance that would require such an interpretation, and we find it inconsistent with the actual control interpretation we are upholding in this action. We also note such an interpretation would add uncertainty with regard to the timing of PSD applicability for new pollutants. There is no way of knowing whether an underlying regulatory requirement to control a new pollutant will be the subject of a legal challenge, and even if such a regulation were challenged, the length of time that would be necessary to resolve the case is also unknown. Challenges to agency regulations can take months, if not years, to be "exhausted" by the courts based on a variety of issues,

including the complexity of the arguments in the case and whether additional appeals are sought, including Supreme Court review. Under the interpretation suggested in the comment, even if the underlying control regulation where upheld on appeal, the applicability of PSD requirements for the new pollutant subject to that requirement could be delayed until many years after those emissions have been controlled under other CAA programs. Not only would such an interpretation have the perverse effect of encouraging legal challenges to control requirements in other CAA programs in order to delay or avoid application of PSD requirements for stationary sources, but it is inconsistent with the policy grounds EPA has articulated in upholding the actual control interpretation, namely orderly administration of the PSD program following considered judgment by Congress or EPA that a particular pollutant should be subject to control requirements. Accordingly, EPA declines to adopt an interpretation of PSD applicability timing which is determined by the possibility of a legal challenge to the underlying control regulation.

## *9.3. Need More Time Before PSD/Title V Applies to GHGs*

In addition to providing specific comments on the appropriate interpretation of "subject to regulation" as it relates to the actual date by which PSD permitting requirements will be triggered, many comments also expressed a general need for more time before PSD permitting requirements are triggered for GHGs and specifically set-out what they believe the appropriate time should be.

### 9.3.1. Impacts from GHG Regulation Support Actual Control Interpretation

One commerce commenter (0074) asserts that the most important policy-based reason against the trigger of PSD by other interpretations set out in the proposal is the impact those interpretations would on the millions of small and medium-sized stationary sources that surpass the statutory "major source" threshold for GHGs (cited U.S Chamber of Commerce statistics under a report entitled "A Regulatory Burden: The Compliance Dimension of Regulating $CO_2$ as a Pollutant"). Even with the proposed Tailoring Rule (which they opine rests on shaky legal ground), tens of thousands of entities will become exposed to PSD (cites statistics set out in the Tailoring Rule proposal preamble).

Another commenter (0080) states that the necessity of adopting the proposed interpretation is emphasized by the very large number of small emitting sources who could otherwise be required to control $CO_2$ emissions.

One industry commenter (0112) believes that EPA's "actual control" interpretation is necessary to avoid the premature and ill-considered application of PSD requirements to sources in the commenter's industry that would result under the other interpretations under EPA consideration. The commenter adds that their process (semiconductor manufacturing) is far more complex than those traditionally regulated under the PSD permit program and further, new manufacturing processes are typically introduced every two years with expansions or upgrades in between to respond to changing market conditions or resolve process problems. Because frequent permitting actions would impede their ability to make needed changes at the times

necessary to meet market demand, the commenter's company has invested considerable money and effort over the years through design for the environment (DfE) and other programs to eliminate or minimize criteria pollutant emissions and keep our emissions below PSD/NSR and title V permitting thresholds. As a result, emissions of criteria pollutants from this commenter's facilities have held steady or in some cases declined over the years in spite of substantial growth in manufacturing capacity during that time. The commenter states that EPA's current "actual control" interpretation is therefore necessary to avoid "blindsiding" sources like theirs with unforeseen PSD requirements for GHG emissions and reversing years of planning and extensive resources devoted to managing regulatory obligations.

Two commenters (0115, 0116) representing industry and a state chamber of commerce (both from South Carolina), do not believe it is proper for the EPA to attempt to regulate GHGs under the CAA with respect to either the PSD or the title V programs; however, for the purposes of responding to EPA's request for comments on the various options for when a pollutant can become "subject to regulation," they encourage EPA to maintain the interpretation that PSD permitting requirements would be triggered only when an EPA rule is promulgated requiring control of emissions of a pollutant in the form of a final national rule. These commenters (0115, 0116) believe the other interpretations suffer from multiple flaws. Specifically, the commenters feel that EPA has grossly underestimated the number and types of facilities that will be impacted by the LDVR standards proposal by becoming subject to NSR pollutants and the Title V and NSR/PSD permitting requirements. The commenters note that their state agency has identified over 800 of the currently permitted small sources that would subject to title V and NSR permitting as soon as GHGs are regulated under LDVR Standards as compared to 281 title V currently permitted facilities. In addition to this impact, the commenters contend that even the smallest modification or expansion activity may trigger a PSD technology review and modeling analysis. The technology review would encompass all of the triggered NSR pollutants, not just GHG. Economically, these facilities would have no choice but to abandon any new project or modification.

One commenter (0100) representing industry claims that the PSD Interpretive Rule Reconsideration proposal demonstrates that the "actual control interpretation" is insufficient because (according to the commenter) even with it in place, EPA had to do substantial rewriting of the CAA in order to allow it to proceed with an endangerment finding and the car rules without causing even more problems under the PSD program. The commenter (0100) contends that at a minimum, EPA should endorse the meaning of "subject to regulation" that best forestalls "absurd results." However, the commenter states that if EPA were to proceed, it should do so as slowly as possible by forestalling as long as possible the conclusion that GHGs have become "subject to regulation." Of the ranges of timing possibilities laid out in the proposal, this commenter believes the "actual control interpretation" currently favored by EPA is "the least of these evils," but believes that EPA could do better.

One state/local agency association (0058) states that if EPA adopts any of the alternatives to the actual control interpretation, the results would be disastrous because PSD and title V would already be applicable throughout the nation for GHGs. The commenter (0058) cites EPA's estimates of the permitting burden absent the Tailoring Rule and states that it is unreasonable to assume that state and local permitting agencies could absorb such an increase in

workload. The commenter (0058) concludes that EPA needs to adopt an interpretation which would avoid this result by allowing sufficient time to implement federal and local mechanisms to scale down this anticipated workload to something both more reasonable and manageable.

One state agency commenter (0077) believes that EPA has provided sound policy and practical reasons for the actual control interpretation. The commenter (0077) states that were EPA to adopt any of the alternative interpretations, it would unleash a hasty, inefficient, and unpredictable sequence of events that would impose impossible administrative burdens on state and local permitting authorities nationwide, and especially in California (the commenter's state). The commenter adds that EPA's legal rationale for the actual control interpretation is reasonable in light of the EAB's *Deseret* ruling, and should withstand legal scrutiny.

One industry group (0063) commenter states that it is imperative that EPA adopt the interpretation contained in the "Actual Control" Memorandum, as amended, to provide that a pollutant does not become "subject to regulation" under the PSD program until a regulation actually controlling that pollutant takes effect through compliance at applicable sources. This commenter explains that exposing natural gas pipelines to PSD permitting for GHGs would disrupt project schedules and their underlying commercial, legal, financial, engineering and operational arrangements. Prevention of Significant Deterioration permits for critical gas pipeline projects could be delayed by a year or more as state permitting authorities struggle with an influx of new PSD applications.

**Response:**

For the reasons discussed in Chapter 3 of this RTC, EPA is continuing to apply the "actual control" interpretation. EPA addresses the broader concerns with regard to incorporating GHGs into the PSD program in the following response.

### 9.3.2. Implementation Concerns Warrant More Time

**Comments:**

Several commenters, including many representing state and local agencies, (0054, 0056, 0058, 0064, 0083, 0089, 0091, 0102, 0108, 0109, 0112) generally express the need for more time before PSD and/or title V permitting requirements are triggered for "regulated pollutants"/GHGs.

A local agency commenter (0054) supports EPA's preferred option under normal circumstances when EPA is considering the adoption of emissions standards for pollutants for which EPA has adopted a NAAQS under CAA section 108 or a standard under section 112. However, this commenter questions the triggering of PSD (and title V) permitting requirements at the time of EPA's promulgation of emissions standards for GHG for mobile sources, anticipated for about March 30, 2010. According to this commenter, the impact of such a triggering will be overwhelming with little, if any, environmental benefits, stating that permitting agencies will be inundated with permit responsibilities, industries will be faced with significant

delays in permit processing, and the lack of effective controls will make the BACT determination process fraught with legal challenges.

This state and local agency commenter (0054) states that they are not confident that the EPA's tailoring rule will succeed in avoiding the burden that it aims to avoid, especially in SIP-approved states, which will need up to two years to change state definitions for major sources. This commenter suggests that EPA find a legally-defensible method to defer for at least two years, or even to totally exempt, the triggering of PSD and title V requirements for stationary sources of $CO_2$ until such time as is necessary for Congress to address the issue.

One industry commenter (0056) submits that there are many significant logistical and other policy reasons for delaying the applicability of PSD to GHGs. The commenter's industry members report that there is a critical difference to the successful implementation of the PSD regulations for GHGs between a finding that PSD is applicable to GHGs on the "first substantive compliance date of a regulation" and a finding that is applicable on the "effective date" of regulation. The commenter asserts that the proposed "PSD and Title V Tailoring Rule" is based on avoiding some of the impacts on businesses, a goal that could be achieved by adopting a trigger date that delays these impacts through reasonable interpretation of the CAA.

Two state/local agency associations (0058, 0062) made similar assertions. One of these commenters (0062) notes that the proposed tailoring rule would not modify PSD and Title V programs that are SIP-approved and argued that states must be provided a sufficient opportunity to modify those state programs under applicable state laws so that they will be consistent with EPA's final tailoring rule; otherwise, there is a substantial risk that the overwhelming number of permitting actions forecast by EPA will be required.

Two commenters (0056, 0058) request additional time before promulgation. One commenter (0056) states that an additional six months to a year and a half delay in the applicability of PSD to GHGs is necessary for sources to more adequately address the technical and financial challenges of controlling their GHG emissions. One commenter (0058) requests an additional year. The commenter (0058) felt EPA may have significantly underestimated the increased PSD workload resulting from the promulgation of the proposed Tailoring Rule, especially considering the workload the commenter has faced with the current PSD regulations. The commenter (0058) requests that EPA fully examine the effect of including non-$CO_2$ GHGs in the PSD and title V programs before the programs become applicable.

Two commenters (0056, 0058) state that additional time for the implementation of title V to GHG sources will be necessary. One commenter (0056) stated that additional time will be necessary as thousands of sources will be newly subject to title V. Both commenters (0056, 0058) assert that states will need additional time to tailor their administrative and/or statutory requirements for PSD and title V permitting.

One state/local agency association (0062) states that EPA should consider adopting different interpretations of the "subject to regulation" provisions for the title V program as distinct from the PSD program, as EPA asserted that it could in its implementation of programs regulating $PM_{2.5}$. The commenter (0062) indicates that the administrative burden and

environmental benefit associated with incorporating GHGs are substantially different in these programs and may provide a basis for establishing a priority in application of these programs to GHG emissions. The commenter also suggests that deferring implementation of the PSD and title V GHG programs until after the GHG emission reports are received under the new GHG reporting requirements (i.e., March 2011) will also greatly facilitate implementation of those programs by state and local permitting authorities.

Another second state/local agency association (0058) indicates that EPA may have seriously underestimated the permitting workload associated with PSD and title V for GHGs, even with the Tailoring Rule, and gave illustrative estimates from two local agencies in California. Accordingly, this commenter (0058) believes immediate applicability at the time the GHG mobile sources regulations are finalized will overwhelming. On this basis, the commenter (0058) urges EPA to establish an effective date for the PSD and title V programs for GHGs at no earlier than 1 year after the effective date of a rule controlling GHG emissions under the CAA (i.e. EPA's motor vehicle rule) and to postpone applicability for GHGs other than $CO_2$ for at least another year. Regarding the latter, the commenter (0058) does not believe EPA or permitting agencies currently have sufficient information to accurately assess the impact of and implement a program applicable to relatively small sources of high global warming potential pollutants. The commenter asserted that EPA has authority to postpone applicability of the PSD and title V programs to GHGs, for a limited period of time, under the same theories as it has proposed to adopt higher interim thresholds of applicability than that provided by statute: the legal doctrines of "administrative necessity" and "absurd results."

Another industry commenter (0064) believes that it is imperative that EPA give states the time to put in place staff and allocate resources needed to handle the additional permitting that will be necessary once GHG emissions are regulated pollutants for PSD purposes and resolve fundamental programmatic issues such as what constitutes BACT for GHGs.

One state agency commenter (0077) agrees that while EPA has the latitude to make PSD requirements for GHGs apply on the effective date of the GHG motor vehicle regulations rather than on its promulgation, EPA should apply the "absurd results" and "administrative necessity" doctrines to provide the implementation onset and phase-in periods, and stated that comments to that effect would be submitted on the Tailoring Rule proposal.

Another state agency commenter (0102) supports allowing the necessary time to study and evaluate emissions characteristics and control options before making a pollutant subject to PSD requirements through promulgation of control requirements – they assert that this is the only way meaningful emissions limits and BACT are developed, creating regulatory certainty and ensuring an enforceable permitting program. The commenter (0102) also states that individual permit reviews would take an inordinate amount of time due to the necessity for developing emissions standards and controls for individual facilities.

Several additional reasons are cited by a state agency commenter (0091) as to why additional time is needed before implementing PSD and title V requirements for GHG:

- Many existing facilities may be willing to take federally-enforceable limits to avoid being subject to PSD and title V permitting, citing as an example the options provided to states by EPA in the early stages of the title V program for limiting potential to emit of stationary sources that greatly reduced the number of facilities needing title V permits. States will need time to process these types of permit applications before title V and PSD applications are due.
- Facilities subject to the Mandatory Reporting of GHG rule will submit their first annual reports in March 2011. The commenter asks EPA to consider delaying any GHG permitting requirements until there is accurate monitoring and reporting data and states have additional time (at least one year after March 2011, but preferably 3 years) to assess the reporting data and plan for any additional permitting needs. This data will also be critical for conducting PSD netting analyses and BACT determinations.
- Like many states, the commenter needs time to adjust their regulations to increase the major source thresholds for Title V and PSD to be consistent with the Tailoring Rule, if finalized.
- Time is needed to create new fee structures more suitable for GHG. The state's current mandatory fee is $43.75 per ton of each "regulated pollutant" which, without an adjustment to the current state fee statute, would result in excessive fees applied to hundreds of small businesses in the state.
- Prior to putting in place any new permitting program for $CO_2$ and other GHG, states will need time to educate and train small and medium size businesses newly subject to title V and PSD permitting requirements. EPA also needs time to develop compliance assistance tools.
- Regulatory changes in the state require a lengthy stakeholder involvement process, agency board review and approval, and legislative approval. This normally takes about 18 months.
- As a result of significant budget issues over the last 1½ years, their state budget has been decreased by over 40%, requiring a reduction in the number of permitting positions. Positions are carefully controlled by a board under the state's appropriations act, and the creation of new positions is difficult in tough economic times.

The end result for this commenter (0091) is that their state will not be ready to implement title V and PSD programs for GHG emissions by March or May 2010, and strongly urge EPA to explore and find ways to give states the time they need to plan, prepare, and begin permitting GHG emissions in an orderly and timely manner. The commenter believes that if EPA interprets the PSD applicability date to be triggered by the promulgation or effective date of the final mobile source GHG tailpipe standards, many states will be forced to default their permitting programs to the EPA Regional Offices until state statutes or regulations are adjusted and more resources can be obtained.

Nine industry commenters (0067, 0081, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) state that EPA should carefully consider the timeframe in which it seeks to impose PSD requirements on major stationary sources of any newly regulated pollutants where actual emission controls may trigger such requirements and should structure its plans to allow permitting authorities and sources the maximum time available to prepare for compliance with any such requirements. These commenters also state that the need for flexibility in timing of

triggering PSD for GHGs is critical because major stationary sources need an appropriate period of time to develop the requisite technologies to meet BACT standards in a cost-effective way, and the Agency needs time to develop its own technical capacity and provide guidance to the regulated community and to states with permitting authority.

One of the industry commenters (0109) believes that in the case of $CO_2$, having this additional time will be critically important to all stakeholders involved considering that EPA has expressed concerns about having adequate time to assess emissions of a pollutant and determine appropriate controls before PSD and BACT requirements are required for a pollutant.

This industry commenter (0112) is also concerned that adding a large number of newly covered sources to the PSD program would create substantial administrative and resource burdens for state and local air permit control agencies, which are not staffed to handle such an exponential increase in workload. Also, according to the commenter, there are important unanswered questions that would have to be addressed by these state and local agencies in issuing PSD permits. The commenter cites as an example that EPA's recently promulgated Mandatory Reporting of Greenhouse Gases Final Rule did not set recordkeeping and reporting requirements for PFCs emitted from semiconductor operations and as such, state and local agencies would be forced to take on this challenge of defining recordkeeping and reporting requirements on a case-by-case basis in PSD and title V permits. Commenter adds that similarly, the PSD permitting program would require the application of BACT for GHG emissions and to date, there are few, if any BACT analyses of GHG emissions. While recognizing that EPA has proposed some options to address some of these concerns in the Tailoring Rule, the commenter believes EPA should for purposes of "administrative necessity" and avoiding "absurd results," maintain its current "actual control" interpretation to allow time to resolve these critical implementation issues. Finally, the commenter notes that opportunities their industry provides for key building blocks for the energy-efficient and "green" technologies the Administration suggests will launch our economic recovery and create new jobs could be lost if EPA does not maintain its current "actual control" interpretation.

**Response:**

EPA agrees that application of PSD program requirements to GHGs presents several significant implementation challenges for EPA, states and other entities that issue permits, and the sources that must obtain permits. Indeed, many of the public comments summarized above have illustrated the magnitude of the challenge beyond what is described in the notices on reconsideration of the PSD Interpretive Memo and the proposed Tailoring Rule. In recognition of the substantial challenges associated with incorporating GHGs into the PSD program, EPA's preference would be to establish a specific date when the PSD permitting requirements initially apply to GHGs based solely on these practical implementation considerations. However, EPA has not been persuaded that it has the authority to proceed in this manner. While EPA may have discretion as to the manner and time for regulating GHG emissions under the CAA, once EPA has determined to regulate a pollutant in some form under the Act and such regulation is operative on the regulated activity, the terms of the Act make clear that the PSD program is automatically applicable. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 403-406 (C.A.D.C.,

1979) (rejecting arguments that Section 165 should not automatically apply to all pollutants subject to regulation under the Act.).

Nonetheless, given the substantial magnitude of the PSD implementation challenges presented by the regulation of GHGs, EPA proposed in the Tailoring Rule to at least temporarily limit the scope of GHG sources covered by the PSD program to ensure that permitting authorities can effectively implement it. EPA based the proposal primarily on two legal doctrines: the "absurd results" doctrine, which we proposed to apply on the basis that Congress did not envision that the PSD program would apply to the many small sources that emit GHGs; and the "administrative necessity" doctrine, which we proposed to apply because of the extremely large administrative burdens that permitting authorities would confront in permitting the GHG sources. In comment on that action, as well as in comments on the PSD Interpretive Memo reconsideration notice, EPA received numerous suggestions that it is necessary to limit the scope of sources covered at the time GHGs become subject to regulation. These comments make clear that more time will be needed beyond January 2, 2011 before permitting of many GHG stationary sources can begin. Thus, EPA will be taking additional action in the near future in the context of the Tailoring Rule to address GHG-specific circumstances that will exist beyond January 2, 2011.

In addition, to the extent that commenters are specifically arguing that additional time is necessary for development of guidance regarding application of PSD requirements, including BACT, to GHG emissions, we recognize that the BACT process may be more time and resource intensive when applied to a new pollutant the absence of guidance on control strategies from EPA and other regulatory agencies. Under a mature PSD permitting program, successive BACT analyses establish guidelines and precedents for subsequent BACT determinations. However, when a new pollutant is regulated, the first permit applicants and permitting authorities that are faced with determining BACT for a new pollutant must invest more time and resources in making an assessment of BACT under the statutory criteria. Given the potentially large number of sources that could be subject to the BACT requirement when EPA regulates GHGs, the absence of guidance on BACT determinations for GHGs presents a unique challenge for permit applicants and permitting authorities. EPA intends to address this challenge in part by deferring, under the Tailoring Rule, the applicability of the PSD permitting program for sources that would become major based solely on GHG emissions. EPA is also developing guidance on BACT for GHGs.

In the context of the Tailoring Rule, EPA is considering whether additional time may therefore be justified for some sources due in part to the administrative implications that would be caused by an absence of additional BACT guidance specific to GHGs. The issuance of further guidance will assist with, and potentially ease the burden of, incorporation of GHGs into the existing PSD program, including the BACT determination process. We believe that GHG emissions present unique issues that may not have been previously addressed in Agency guidance and development of further guidance may be necessary. Accordingly, EPA is currently working to develop such guidance and is committed to issue it in advance of January 2, 2011.[3]

[3] For example, EPA has already assembled a workgroup consisting of members of the Clean Air Act Advisory Committee (CAAAC) to discuss and identify the major issues and potential

(We also note, however, that our existing BACT guidance for currently regulated pollutants has addressed many facets of PSD permitting that will not be unique to its application to GHG emissions.) Furthermore, as the comments note, there may be additional information available in future that could assist in those determinations.

Nonetheless, for reasons described elsewhere in this document, except under the rationales that will be discussed in the tailoring rule, the EPA does not believe that we would have the discretion to delay the application of BACT for all sources beyond the date that a control requirement takes effect. This would be true even if were not committing to issue guidance, and even though it will initially be harder to make GHG BACT determinations that will become easier over time. Moreover, if the EPA determines in the tailoring rule that some sources will not be excluded from the BACT requirement as of January 2, 2011, it would not be appropriate to further delay the BACT reductions for such sources simply because more guidance or experience could be helpful in applying it. BACT process is itself designed to determine the most effective control strategies achievable in each instance, considering energy, environmental, and economic impacts.

### 9.3.3. Provide More Time by Delaying Final Action on the GHG LDV Rule

**Comments:**

Three industry commenters (0067, 0073, 0083) indicate that EPA could address its stated policy goals to have sufficient time to formulate an efficient approach to GHG stationary source regulation by using its available discretion to delay final action on the section 202 GHG motor vehicle regulations rulemaking, thereby putting off the "triggering" event. The commenters (0067, 0073, 0083) summarized their organizations' prior comments to this effect on the proposed GHG motor vehicle regulations, and one (0073) attached those comments to this comment letter.

One commenter (0084) states that *Massachusetts v. EPA* is clear that EPA has substantial discretion regarding the timing of issuing rules and, thus, is under no obligation to issue the

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barriers to implementing the PSD program for GHGs, with a focus on the BACT determination. The workgroup presented their initial recommendations to the CAAAC at the CAAAC's February 3, 2010, meeting, and the CAAAC unanimously voted to pass the recommendations on to EPA. EPA is currently reviewing those recommendations and developing guidance addressing the issues raised therein. The workgroup is continuing to meet to assess issues that were deferred in their initial recommendations, including GHG-specific consideration of netting similar to that identified in the comments above, and EPA anticipates that the we will also issue guidance in accordance with the additional recommendations that arise from the workgroup's continued deliberations, as well as other issues that it might be necessary to address that arise from inquiries by permitting authorities and the regulated community. (Additional information regarding the workgroup and its work in this area are available at http://www.epa.gov/air/caaac/climatechangewg.html.)

LDVR. Therefore, the commenter (0084.1) opposes EPA's attempt to move GHGs into the category of "actual control" via regulatory action. The commenter (0084) believes that finalizing the LDVR will trigger a massive bureaucratic nightmare that EPA cannot avoid because the Tailoring Rule rests on flimsy legal foundations. Instead, the commenter (0084) believes that EPA should hold all the proposed GHG actions in abeyance until Congress determines whether it will formulate a new and appropriate statutory framework for GHG regulations.

One state agency commenter (0102) states that promulgation of any rules triggering PSD for GHG (such as the LDVR) should only be pursued after EPA has comprehensively resolved all issues necessary for states to implement the GHG control rules, especially issues surrounding proper BACT review.

**Response:**

As discussed elsewhere in this RTC and in the October 7 reconsideration notice, EPA acknowledges that the final light duty vehicle (LDV) rule, if finalized to require control of GHG emissions from light duty vehicles, it will have the effect of triggering PSD requirements for GHGs under the interpretation of "subject to regulation" described in this action. However, EPA's present reconsideration action is merely finalizing the agency's interpretation of a specific provision of the PSD rules and is not the proper forum for addressing the issue raised in the comment. In this reconsideration action, EPA is not making any decisions or taking any action with respect to the issuance of a LDV Rule - the content and timing of the LDV Rule is the subject of a separate rulemaking action, and that rulemaking is the proper place to address comments on the timing of any final LDV Rule. In addition, we did, in fact, receive similar comments in response to the proposed light duty vehicle rulemaking. Thus, EPA will respond to this issue in the record for that rule.

## *9.4. Identifying the Greenhouse Gases "Subject to Regulation" Under LDV Rule*

**Comment:**

One commenter (0056) submits for the Tailoring Rule, that regulating GHG compounds for those compounds that EPA has not yet established an emission standard would be unreasonable and inconsistent with the "subject to regulation"/"actual control" test. In the Mandatory GHG Reporting rule, the EPA stated that they cannot presently give guidance to industries with regard to calculating sulfur hexafluoride ($SF_6$), hydrofluorocarbons (HFC), or perfluorocarbons (PFC) emissions and deferred mandatory GHG reporting obligations on industries for these pollutants. Further, because the EPA has not established or proposed any "regulation" for $SF_6$, HFC, and PFC, it is difficult to interpret that the statutory language in the PSD BACT provision or elsewhere is applicable to these compounds since they are not (and will not be on the effective date of the LDVR) "subject to regulation."

**Response:**

As identified by the commenter, this issue is specifically addressed in the Tailoring Rule proposal and will be resolved in EPA's final action on that rule, consistent with the regulations contained in the final LDV Rule.

## *9.5. Permit Application Transition*

**Comment:**

Eight industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) state that EPA also should be prepared to clarify what the "takes effect" date means, in practical terms, for implementation of requirements for PSD permit applications. The commenters believe that EPA should, for example, confirm that if a PSD permit application is submitted in complete form before the date on which PSD begins to apply to a pollutant, then that permit application is not subject to any requirement to address that pollutant (regardless of the date on which the submitted permit application is determined to be complete) and that such an application could not be deemed "incomplete" on the grounds that it does not address that pollutant.

Another industry commenter (0067) stated that if EPA determines that the legal "effective date" of its proposed motor vehicle GHG rule should be used, then a specific transition period should be adopted that at least will allow applications submitted prior to the date Administrator Jackson granted reconsideration of the PSD Interpretive Memo to be processed without consideration of GHGs. (The commenter (0067) notes that another period may be more appropriate and reserved the right to submit additional comments on this issue as part of the tailoring rule.) The commenter (0067) indicates that a similar process should also be provided for incorporating GHGs into the title V permitting program.

One industry commenter (0072) requests that if EPA decides to finalize the interpretations of PSD applicability reflected by the PSD Interpretive Memo and GHG Tailoring Rule, that EPA make clear that source owners who have already obtained construction permits for a proposed stationary source or modification under a SIP-approved permitting program will not now need to obtain a PSD permit due solely to their emissions of GHGs, so long as the source owner commences construction within 18 months from the date when GHGs become subject to regulation under the CAA or any earlier date as may be required by the SIP. This commenter stated that EPA has historically provided clear relief upon promulgating new requirements under PSD which would cause facilities that had already applied for or obtained valid permits either to become subject to PSD for the first time or, if already subject to PSD, to become subject to new or additional requirements. Failing to provide the requested transitional relief would jeopardize the continued viability of a substantial number of "shovel-ready" construction projects at a time when the U.S. economy is in crisis and unemployment rates are high.

The industry commenters (0067, 0073) similarly indicates that whatever date is finally established for "actual control," the requirement to conduct BACT for GHGs should not attach to projects (1) that have a completed permit application before the effective date of GHG

regulation, or (2) for which a determination has already been made before the effective date of GHG regulation that a PSD permit was not required.

One commenter (0071) suggests that EPA should make clear in the PSD Interpretive Memo that once a GHG becomes subject to PSD permitting requirements, those requirements are applied prospectively.

Another commenter (0058) requests that when GHGs become subject to regulation, EPA allow permitting authorities a chance to adopt a method of limiting a source's potential to emit (PTE) (when the source's actual emissions are lower than the applicable thresholds) and thus keep it out of the PSD and title V program, rather than adopt this method after authorities have begun implementing the title V and PSD.

**Response:**

In light of EPA's conclusion that pollutants become subject to regulation for PSD purposes when control requirements on that pollutant take effect and that such requirements will not take effect for GHGs until January 2, 2011 if EPA finalizes the proposed LDV Rule as anticipated, EPA does not see any grounds to establish a transition period for permit applications that are pending before GHGs become subject to regulation. As a general matter, permitting and licensing decisions of regulatory agencies must reflect the law in effect at the time the agency makes a final determination on a pending application. *See Ziffrin v. United States*, 318 U.S. 73, 78 (1943); *State of Alabama v. EPA*, 557 F.2d 1101, 1110 (5th Cir. 1977); *In re: Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 614-616 (EAB 2006); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 478 n.10 (EAB 2002). Thus, in the absence of an explicit transition or grandfathering provision in the applicable regulations (and assuming EPA finalizes the LDV Rule as planned), each PSD permit issued on or after January 2, 2011 would need to contain provisions that satisfy the PSD requirements that will apply to GHGs as of that date.

Under certain circumstances, EPA has previously allowed proposed new major sources and major modifications that have submitted a complete PSD permit application before a new requirement becomes applicable under PSD regulations, but have not yet received a final and effective PSD permit, to continue relying on information already in the application rather than immediately having to amend applications to demonstrate compliance with the new PSD requirements. In such a way, these proposed sources and modifications were "grandfathered" or exempted from the new PSD requirements that would otherwise have applied to them.

For example, EPA adopted a grandfathering provision when it changed the indicator for the particulate matter NAAQS from total suspended particulate matter (TSP) to particulate matter less than 10 microns (PM10). The federal PSD regulations at 40 CFR 52.21(i)(1)(x) provide that the owners or operators of proposed sources or modifications that submitted a complete permit application before July 31, 1987, but did not yet receive the PSD permit, are not required to meet the requirements for PM10, but could instead satisfy the requirements for TSP that were previously in effect.

In addition, EPA has allowed some grandfathering for permit applications submitted before the effective date of an amendment to the PSD regulations establishing new maximum allowable increases in pollutant concentrations (also known as PSD "increments"). The federal PSD regulations at 40 CFR 52.21(i)(10) provide that proposed sources or modifications that submitted a complete permit application before the effective date of the increment in the applicable implementation plan are not required to meet the increment requirements for PM10, but could instead satisfy the increment requirements for TSP that were previously in effect. Also, 40 CFR 52.21(i)(9) provides that sources or modifications that submitted a complete permit application before the provisions embodying the maximum allowable increase for nitrogen oxides (NOx)[4] took effect, but did not yet receive a final and effective PSD permit, are not required to demonstrate compliance with the new increment requirements to be eligible to receive the permit.

Under the particular circumstances presented by the forthcoming application of PSD requirements to GHGs, EPA does not see a justification for adopting an explicit grandfathering provision of the nature described above. Permit applications submitted prior to the publication of this notice should in most cases be issued prior to January 2, 2011 and, thus, effectively have a transition period of nine months to complete processing before PSD requirements become applicable. Additional time for completion of action on applications submitted prior to the onset of PSD requirements for GHGs therefore does not appear warranted to ensure a smooth transition and avoid delays for pending applications. To the extent any pending permit review cannot otherwise be completed within the next nine months based on the requirements for pollutants other than GHGs, it should be feasible for permitting authorities to begin incorporating GHG considerations into permit reviews in parallel with the completion of work on other pollutants without adding any additional delay to permit processing.

Furthermore, the circumstances surrounding the onset of requirements for GHGs are distinguishable from prior situations where EPA has allowed grandfathering of applications that were deemed complete prior to the applicability new PSD permitting requirements. First, this action and the PSD Interpretive Memo do not involve a revision of the PSD permitting regulations but rather involves clarifications of how EPA interprets the existing regulatory text. This action articulates what has, in most respects, been EPA's longstanding practice. It has been EPA's consistent position since 1978 that regulation of a pollutant under Title II triggers PSD requirements for such a pollutant. *See* 42 FR 57481. Thus, permitting authorities and permit applicants could reasonably anticipate that completion of the LDV Rule would trigger PSD and prepare for this action. Many commenters interpreted EPA's October 7, 2009 notice as proposing to trigger PSD requirements within 60 days of the promulgation of the LDV Rule rather than the January 2, 2011 date that EPA has determined to be the date the controls in that rule take effect. Second, there are presently no regulatory requirements in effect for GHGs. On the other hand, at the time EPA moved from using TSP to using PM10 as the indicator for the particulate matter NAAQS, grandfathered sources were still required to satisfy PSD requirements for particulate matter based on the TSP indicator. Likewise, when EPA later updated the PSD

[4] The increments for emissions of the various oxides of nitrogen are expressed as concentrations of nitrogen dioxide ($NO_2$).

increment for particulate matter to use the PM10 indicator, the grandfathered sources were still required to demonstrate that they would not cause or contribute to a violation of the particulate matter increment based on TSP. In the case of the adoption of the $NO_2$ increment, grandfathered sources were still required to demonstrate that they would not cause or contribute to a violation of the $NO_2$ NAAQS. In contrast, for GHGs, there are no measures currently in effect that serve to limit emission of GHGs from stationary sources.

For these reasons, EPA does not intend to promulgate a transition or grandfathering provision that exempts pending permit applications from the onset of GHG requirements in the PSD program. As discussed above, in the absence of such a provision, PSD permits that are issued on or after January 2, 2011 (in accordance with limitations promulgated in the upcoming Tailoring Rule) will be required to contain provisions that fulfill the applicable program requirements for GHGs.

In addition, to the extent commenters are raising specific applicability and implementation issues regarding PSD requirements for GHGs, as discussed in section 9.3.2, EPA is currently working to develop general guidance on key PSD-GHG issues and will continue to develop guidance as necessary to address issues that arise from inquiries by permitting authorities and the regulated community.

## *9.6. Potential Retroactive Liability*

**Comment:**

Nine industry commenters (0067, 0080, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) raise the possibility of retroactive liability under the alternative interpretations other than the actual control interpretation.

Specifically, eight of the industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) indicate that the monitoring and reporting interpretation (and the other alternative interpretations) could unfairly result in retroactive liability. The commenters note that if $CO_2$ were "subject to regulation" based on EPA's 1993 regulations implementing section 821, any source of GHG emissions at or above the statutory PSD threshold of 100 to 250 tons per year that underwent construction or a major modification since that time might theoretically (putting aside the statute of limitations) be considered in violation of PSD requirements. The commenters state that this is not mere conjecture; environmental advocacy groups filed one citizen suit alleging this exact sort of violation. *See Sierra Club v. Otter Tail Power Corp.*, CIV 08-1012 (D.S.D., filed June 10, 2008), Complaint at ¶¶ 92-96. (The case was dismissed on other grounds, 608 F. Supp. 2d 1120 (D. S.D. 2009), and has been appealed by plaintiffs, *see* No. 09-2862 (8th Cir., filed Aug. 10, 2009).)

The other industry commenter (0080) notes that the proposed Tailoring Rule is not retroactive and asked whether a ruling in favor of the Petitioners would mean that any source that undertook activity after passage of the 1990 CAA Amendments that made it a new or modified major source for $CO_2$ (under the statutory definition) is in violation of the CAA because it did

not apply for a PSD permit. The commenter (0080) notes that a very large number of sources could be at risk.

**Response:**

Given that EPA is finalizing an interpretation in which GHG emissions would not be "subject to regulation" for the purposes of PSD until the specific GHG emission control requirements in the final LDV Rule take effect, there is not an issue of retroactivity that is raised by this final action.

## *9.7. Clean Air Act Is Poorly Suited to Greenhouse Gas Regulation*

**Comment:**

Sixteen industry and commerce commenters (0061, 0066, 0067, 0071, 0073, 0074, 0081, 0085, 0097, 0100, 0102, 0104, 0105, 0115, 0116, 0117) and one legal commenter (0084) believe that the CAA is poorly suited to GHG regulation.

One industry group (0085) believes that comprehensive climate legislation is far preferable to using the existing CAA case-by-case permitting programs to address GHG emissions because these permitting programs are resource-intensive for both regulated entities and regulators. The industry group (0085) states that, in an arena in which efficiency is the key to reducing impacts, the case-by-case nature of the Prevention of Significant Deterioration (PSD) and title V programs indicates that they are perhaps the least efficient mechanisms to mitigate the effects of climate change.

One legal commenter (0084) believes that the CAA was not designed (and is poorly equipped) to accommodate the regulation of GHGs, and that it is incumbent on Congress, not EPA, to craft original legislation. The commenter (0084) urges EPA to halt issuance of all new regulations pertaining to GHGs, and argues that this reconsideration action will somehow shield EPA from litigation regarding its other GHG regulations (i.e., Endangerment Finding, GHG Motor Vehicle Rule, and Tailoring Rule).

Commenter (0086) added that national and international issues related to GHGs should be settled in a comprehensive legislative or administrative proceeding, not through individual permitting decisions.

One commenter (0104) strongly disagrees that the CAA is the appropriate mechanism to regulate GHGs and adamantly oppose the regulation of GHG emissions under the PSD program or any other federal permitting program authorized under the CAA.

An industry commenter (0105), referring to its comments to EPA relative to its Advanced Notice of Proposed Rulemaking (ANPR) for regulating GHGs under the CAA, believes that the CAA is clearly unsuitable for reducing GHGs, and that the best approach to address climate change is new legislation for a market-driven program to reduce GHGs, and that a cap and trade

program must be carefully designed to avoid disproportionate impacts on the manufacturing sector in general, and the chemical sector in particular.

One commenter (0116) believes that (if EPA regulates GHG emissions under the PSD or title V programs) many existing facilities will need new title V or PSD permits to replace, repair or improve the efficiency of aging equipment, including energy efficiency projects, and that permitting delays will force facilities to evaluate the possibility of shutting down domestic operations and relocating to beyond the U.S. borders. Furthermore, small businesses, such as asphalt and concrete batch plants, metals manufacturing, the remaining textile industry, food packaging, wood products, even hospitals will be subject to many more requirements than they currently are (not just GHGs but also all other new source review [NSR] pollutants), and it will be significantly more costly for them to receive a permit and they will experience significant permit delays, discontinued construction and loss of jobs. The commenter predicts that the permitting process will grind economic development and industrial growth to a halt causing adverse consequences to an already struggling economy.

One industry group (0061) comment letter expresses that the CAA is flawed and new national legislation is the best mechanism for GHGs. They assert that regulation under the CAA has historically focused on control of criteria and hazardous air pollutants (HAP) to address local or regional human health, welfare and environmental impacts. The architecture of the CAA is thus premised on the concept that state, regional and federal control of emissions will improve air quality in the corresponding area. The GHG effect is global – and localized emissions reduction will not result in environmental benefits to the U.S. in absence of corresponding international action.

One commerce commenter (0074) expresses belief that EPA has ignored options to avoid a regulatory cascade through piecemeal regulation of GHGs under the CAA. They state that they suggested that EPA not undertake an endangerment finding; suggested that EPA use a combination of corporate average fuel economy (CAFE) standards and title VI of the CAA in its response to the Light Duty Vehicle Rule (LDVR) proposal; and suggested potential approaches to regulation under section 115 of the CAA, as well as the "no PSD without a National Ambient Air Quality Standards (NAAQS)" and "GHGs are not subject to regulation" approaches in these comments. The commenter requests that EPA avoid the CAA's regulatory cascade and instead allow Congress to craft comprehensive climate legislation. This commenter provides copies of comment letters submitted to EPA from the other EPA GHG-related rulemakings.

One industry commenter (0097) believes that first and foremost, the CAA in its current form was not designed to regulate GHGs, including $CO_2$, for various reasons. This commenter argues that consequently, national legislation is the best mechanism for regulating GHGs, including $CO_2$, because "absurd results" can be avoided and concerns addressed in a fashion that provides the most certainty that the regulations can move forward in a fashion which can be defended in the judicial process. This commenter believes that this is properly the work of Congress through comprehensive market-based climate legislation, although the commenter recognizes that the Supreme Court's decision in *Massachusetts v. EPA* may require the Agency to commence regulatory action for $CO_2$ in absence of, or in the face of delayed, Congressional action.

One state agency commenter (0102) states that the CAA is not an appropriate vehicle for the regulation of GHGs and that such regulation will result in significant impacts on the economy without measurable environmental benefits. The commenter (0102) notes that the endangerment finding and subsequent proposals of the PSD Interpretation, the GHG mobile sources regulations, and the Tailoring Rule interconnected, and asserted that the piecemeal GHG proposals prevent adequate opportunity to evaluate and effectively comment on the proposals. The commenter (0102) states that EPA should withdraw all the GHG proposals.

Commenters (0092, 0098) representing several groups of companies state that, with regard to all of EPA's recent GHG rulemakings under the CAA, the Agency should proceed with caution going forward by allowing both the international community and Congress time to develop a comprehensive and sensible approach to the global problem of climate change.

**Response:**

Regardless of whether the CAA is the preferred mechanism for GHG regulation, the U.S. Supreme Court determined that GHGs fit within the definition of air pollutant in the Act and directed EPA to take actions in accordance with that determination. EPA is responding to the Court's decision by following the statutory requirements of the CAA. Accordingly, EPA finalized its endangerment and cause and contribute findings for GHGs under section 202(a) of the CAA and proposed corresponding GHG controls for light duty vehicles. As explained in various responses above, a final vehicle rule will trigger PSD requirements for GHGs. Thus, EPA is taking appropriate action in this reconsideration and the proposed Tailoring Rule to ensure a common sense and efficient approach to GHG regulation. This reconsideration action is not the appropriate forum for addressing whether the CAA is suited to GHG regulation or opining on potential Congressional action with regard to GHG regulation.

## *9.8. Arguments That PSD Cannot Apply to Pollutants Regulated Only Under Title II of Clean Air Act*

**Comment:**

Twenty-six industry and commerce commenters (0051, 0053, 0056, 0060, 0061, 0066, 0067, 0068, 0069, 0071, 0072, 0073, 0074/0075, 0076, 0085, 0086, 0088, 0092, 0093, 0096, 0098, 100, 0104, 0106/0107, 0111, 0118) opine that a GHG NAAQS is a prerequisite for PSD to be triggered based solely on emissions of GHGs and EPA must interpret the CAA and PSD regulations consistent with this requirement.

One commenter (0086), representing several groups of companies, believes that the PSD Interpretive Memorandum and the Reconsideration Proposal reflect a major oversight on EPA's part in that EPA has been focused on whether the phrase "subject to regulation" in section 165(a) refers only to actual control, concluding in the end that it does and then merely assuming, without analysis, that the "any pollutant" component of the total phrase "any pollutant subject to regulation" has no bounds and therefore potentially includes GHGs. However, the commenter

believes that the 100/250 TPY thresholds in the statute must have some meaning, as EPA has recognized, because they are an integral part of the statutory fabric, and they cannot be reconciled programmatically with an unbounded reading of "any pollutant subject to regulation." The commenter states that, while EPA has chosen to try to weave new thresholds into that fabric specifically for GHGs, it has ignored the possibility that the 100/250 TPY thresholds actually signal that the 95th Congress intended applicability of the section 165(a) PSD program to be based on conventional pollutants, and that the 95th Congress did not mean to authorize EPA to base section 165(a) PSD applicability on GHG emissions. The commenter urges EPA, at a minimum, to address that probability through a detailed and thoughtful legal analysis, because without such an analysis, any final decision to base PSD on GHG emissions can have no legitimacy. The commenter states that if EPA fails to adopt the interpretation that PSD intended only to apply to conventional pollutants, its PSD Interpretive Memorandum, along with the LDV rule, will be arbitrary and capricious for failure to adequately consider their consequences. The commenter (0086) adds that failure to account for the PSD and title V implications of EPA's actions also violates the Regulatory Flexibility Act (RFA), the Unfunded Mandates Act (UMA), and the Paperwork Reduction Act (PRA).

According to one commenter (0094) representing an industry trade association, EPA's reconsideration proposal does not reflect the robust legal analysis required to support an interpretation with such far-reaching legal, policy, technical and economic consequences. The commenter notes that the proposal begins with the starting premise that the phrase in section 165(a)(4) -- "subject to regulation under this Act" -- operates as an independent and powerful PSD permitting trigger. According to the commenter, the proposal rests on the proposition that treating this phrase as a permitting trigger accords with longstanding Agency practice, but the *Deseret* case found otherwise, and besides, longstanding Agency practice alone cannot provide sufficient legal basis for the interpretation. This commenter contends that the reconsideration proposal offers no evidence to indicate that U.S. EPA, in arriving at the interpretation, evaluated any of the following:

(1) The entire statutory provision at issue in the context of the CAA and with reference to its legislative and regulatory history;

(2) A potentially more appropriate triggering phrase -- "in any area to which this part applies" -- at the beginning of section 165(a); and

(3) Other potential meanings of the "subject to regulation under this Act" phrase in section 165(a)(4), including based upon comparison to other provisions with similar scope and status to section 165(a)(4) -- i.e., sections 165(a) (1), (2), (3), (5), (6), (7) and (8). The commenter claims that the absence of such evaluation is material, and concludes that the Reconsideration Proposal, therefore, does not satisfy the Agency's obligation for rational, fully reasoned and explained analysis.

One industry commenter (0100) claims that adherence to the statute will save everyone a lot of trouble. The commenter, referring to the Tailoring Rule proposal, states that EPA leans most heavily on *Alabama Power* to support its claim of authority to adjust the statute out of "impossibility" or "administrative necessity," but asserts that this case instructs EPA not to do exactly what it proposes to do with the regulation of GHGs. According to the commenter, what *Alabama Power* tells us is that EPA cannot create its own "administrative necessity" by ignoring one provision of the CAA, and then solve that manufactured necessity by ignoring another.

Commenter cites resolution of the "potential to emit" issue in *Alabama Power*, and EPA's attempt (then) to exempt from PSD review any source with actual (controlled) emissions below 50 tons over year. Commenter claims that this attempt at a tailoring rule ignored the very same specific 100/250 ton-per-year thresholds set by statute and was an 'expansion' of the limited exemption provided in section 165(b) of the Act. Further, commenter argues that EPA tried to defend its tailoring of the PSD thresholds in 1979 the same way it now tries 30 years later, claiming that EPA's present plans with respect to CAA regulation of GHG are little different from those found defective and remanded in *Alabama Power* in that EPA intends to (1) manufacture CAA overbreadth in direct violation of CAA language, structure, and legislative history, in this case by declaring GHGs to be an air pollutant that endangers public health and welfare, (2) adopt rules to limit such emissions from mobile sources, and (3) in this Docket, conclude that these limits on mobile source emissions instantly trigger air permitting requirements for stationary sources.

This industry commenter (0100) argues that EPA should decide to leave GHGs out of the PSD program (at least before completing the process required by section 166) and states that such a decision would not only comport with the law, but with good policy in that the currently proposed decisions do not reflect a policy that a rational legislature would have intended (e.g., it makes no sense to have a pollutant regulated for one purpose, from one category of sources, under one section of the statute, based on one set of findings, to cause that pollutant automatically to become regulated for an entirely different purpose, from a wholly separate category of sources, under a totally different regulatory scheme.

This industry commenter (0100) states that proper "tailoring" could be undertaken in the design of a future PSD program for GHGs. In support, this commenter states that Congress left EPA relatively free to fashion — by rule — a sensible PSD program for those unknown future pollutants and, consequently, EPA — in the event EPA could justify and promulgate a NAAQS for GHGs — has the freedom to craft a PSD program appropriate to GHGs. Section 166(c) tells EPA that it may choose some other means of technology-forcing appropriate to GHGs. Further, commenter points out that section 166(e) also would be handy in that unlikely future, as it leaves EPA without the obligation to undertake any geographical classifications that are rather pointless for GHGs and that EPA arguably even could set the permitting thresholds at a sensible level, as section 166(c) allows. The commenter claims that EPA proceeds at odds with the statute with any rule that declares GHGs "subject to regulation" under Part C by any means other than the one prescribed in section 166.

The commenter (0100) argues that the proper interpretation of Part C (if followed by EPA as commenter claims it must) allows for orderly administration respectful of the State Implementation Planning process, and that another major advantage of complying with the statute is that it allows for orderly implementation.

The commenter (0100) asserts that EPA's request for comments posits only a very limited range of possibilities, asking narrowly and only about the meaning of the section 165(a)(4) phrase, "subject to regulation," and then suggesting a range of nuances in that phrase having to do with whether the pollutant is regulated by monitoring, by constituent, or by numeric limit, and whether by the date of adoption of the limit or its effective date. This commenter

points out that section 165(a)(4) is but one sub-subsection of an entire part of the CAA, "Prevention of Significant Deterioration of Air Quality, " states that the entirety of the statute should be examined to find a sensible interpretation that gives full effect to the purpose of the Act, to each of its provisions, and avoids "absurd results."

The commenter (0100) asserts that the "absurd results" documented in the proposed Tailoring Rule establish that Congress did not intent for GHG to be regulated under Part C. The commenter notes that EPA makes quite clear its intent to ignore clear statutory thresholds and state prerogatives in the implementation of the PSD program, all out of a claimed need to avoid the "absurd results" and impossible burdens befalling the PSD program as a result of EPA's choice to invite GHGs into it, overnight. The commenter suggests that EPA's view is incorrect, and that the statute — at section 166 — prescribes a very different, longer and more thoughtful path to possible regulation of GHGs under the PSD program. Further, the commenter contends that the statute does not compel the "absurd results" that cause EPA to propose rules that violate the statute. The commenter notes that the phrase "subject to regulation" appears in the subsection of section 165 that enumerates the criteria for review and issuance of PSD permits, notes that section appears in a Part of the Act enacted in 1977 to prevent significant deterioration of air quality, and so claims that the meaning of that one subsection should be understood in the context in which it was adopted. The commenter states that the PSD provisions were enacted to address a limited number of criteria pollutants – those "subject to regulation" to regulation in 1977 – certainly not including "greenhouse gases."

The commenter (0100), based on their review of the PSD program (Part C of Title I) statute and legislative history, contends that everything about Part C was drafted with the intention of governing emissions of the criteria pollutants regulated at the time of enactment (in 1977) and that nothing about Part C suggests an intent to apply PSD to anything other than criteria pollutants, or to pollutants that might be regulated in the future, after enactment. Commenter notes that the PSD program was established in 1977 as reaction to concerns about the possibility that areas cleaner than the national ambient air quality standards might be allowed to degrade to bare compliance with those standards. The PSD provisions of the CAA establish in detail the requirements for EPA to establish the maximum amount of degradation allowed from "baseline" air quality relative to the existing NAAQS, at least for two out of the six criteria pollutants, sulfur dioxide and particulate matter. Commenter also observes that Part C is extremely prescriptive, not only in its quantification of allowable deterioration of the two covered pollutants (the "increments"), but also in its designation of geographic areas of applicability, and its special concern for national parks and visibility, and notes one criteria for issuance of a required permit is the imposition of BACT for "each pollutant subject to regulation." The commenter also points out that throughout Part C, it completely relies on state implementation. To this commenter it is no surprise that none of the Part C provisions make any sense as applied to emissions of GHG, especially for the purpose of regulating those emissions so as to minimize a trace, natural, uniformly distributed constituent of clean air presumed to be associated with modulating global temperatures. The commenter provides a review of sections 161 through 172 to support the contention that everything about Part C was drafted with the intention of governing emissions of the criteria pollutants regulated at the time of enactment, with detailed instructions on $SO_2$ and PM, and generalized instructions to adapt a PSD program for the others of the time (hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen

oxides) and that nothing about Part C suggests an intent to apply PSD to anything other than criteria pollutants, or to pollutants that might be regulated in the future, after enactment. Further, the commenter (0100) claims that before EPA can add a new pollutant subject to review under Part C, it must undertake a rulemaking to create a PSD program appropriate to that pollutant.

The commenter (0100) further contends that EPA's pending proposals to sweep GHGs into the PSD program on the day of its regulation under section 202(a) of the CAA could not more clearly violate Congress' instructions on how to handle "other pollutants" under Part C: Section 166(a) limits PSD to new criteria pollutants, and, as to those, it requires rules specific to that new pollutant to be developed within two years after adopting its NAAQS.

One commenter (0104) representing industry states that they support EPA's "actual control alternative," but that, in addition, the PSD Interpretive Memo should be amended to clarify that the process for PSD regulation under the "actual control" interpretation must include a determination that a pollutant is a criteria pollutant and the establishment of corresponding NAAQS. The commenter further states that that only criteria pollutants with an established NAAQS are subject to PSD, and in cases where there is no NAAQS for a pollutant, PSD is not triggered because there is no "attainment" or "unclassifiable" determination to be made. The commenter believes that regulation of any pollutant under the PSD program without first determining that the pollutant is a criteria pollutant and establishing a corresponding NAAQS would be a violation of the rule of law as outlined in the CAA. In the alternative, the commenter urges EPA to revise the memo to make it clear that GHGs are not pollutants "subject to regulation" under the PSD permitting program.

One commenter (0111) states that the CAA limits PSD applicability for GHGs to (1) areas designated as attainment or unclassifiable under a GHG NAAQS or (2) sources that require a PSD permit based on emissions of a criteria pollutant that also will experience a significant increase in GHG emissions. According to the commenter, a NAAQS for GHGs is necessary for PSD to be triggered solely on the basis of a source's GHG emissions (i.e., for GHGs emitted from otherwise minor sources, or for significant increases of GHGs from major sources that are not otherwise experiencing a significant increase of a NAAQS pollutant for which the area is designated attainment or unclassifiable). Importantly, CAA sections 161 and 165 precondition applicability of the PSD program to those areas designated as attainment or unclassifiable under section 107. Section 161 provides that EPA is to promulgate regulations "to prevent significant deterioration of air quality in each region . . . designated pursuant to section 107 [NAAQS designations] as attainment or unclassifiable." Section 165(a) prohibits construction of a major emitting facility "in any area to which this part applies" unless the PSD permit requirements are met. National Ambient Air Quality Standard designations are made on a pollutant-by-pollutant basis. The applicability of the PSD program in a given area must be based on the attainment status of the area for the pollutant in question. If there is no NAAQS, there can be no attainment status and therefore the fact that a source has major emissions of a non-NAAQS pollutant does not make it a PSD major source.

The commenter (0111) argues that the existence of section 166 supports the conclusion that the applicability of PSD under the CAA is based on the existence of a NAAQS for the

pollutant in question. This section requires EPA to develop PSD regulations within two years of establishing a new NAAQS. Under section 166, EPA is also required to approve plan revisions for the new regulations within 25 months after EPA promulgates applicable rules. Thus, under Section 166, PSD is triggered by adoption of a NAAQS, not by a pollutant becoming subject to regulation. Through this section, Congress recognized the need for a mechanism for incorporating new pollutants into the PSD program. This more reasonable approach to regulation can be compared to EPA's interpretation that BACT for GHGs would be determined under section 165(a)(4) without reference to any standard for calculating the impact of GHGs on local air quality. The existence of both sections 166 and 165 of the CAA strongly suggests that PSD applicability is not "triggered" by a new pollutant becoming "subject to regulation" under the CAA. Rather, the more reasonable interpretation of both these provisions suggests that PSD is only applicable after the establishment of a new NAAQS pursuant to sections 108 and 109 of the CAA and the designation of new areas for that NAAQS under section 107.

The commenter (0111) continues that the only part of the PSD statutory scheme that imposes requirements broadly on pollutants "subject to regulation" is the requirement for BACT. Thus, if a source makes a modification that increases emissions significantly of a NAAQS pollutant, all pollutants "subject to regulation" must be controlled. Those facilities that trigger PSD for a non-GHG NAAQS pollutant would also have to consider BACT for GHGs if a significant increase in GHG emissions occurs. However, if a major source does not have a significant increase of a NAAQS pollutant in an area designated attainment or unclassifiable, nothing in the statute requires the source to be subject to the significance levels for non-NAAQS pollutants.

One industry commenter (0085) states that EPA is incorrect in assuming that that the section 202 rule will automatically trigger PSD permitting for sources solely based on their emissions of GHGs. The commenter believes that the text of the statute is more naturally read to limit PSD applicability to sources that are major for a NAAQS pollutant only and, then, within that group, to those projects that result in a significant net emissions increase of a NAAQS pollutant – only when PSD is triggered by a major NAAQS pollutant source for a NAAQS pollutant would the statute impose BACT on pollutants "subject to regulation." The commenter indicates that EPA's approach is inconsistent with the statutory and regulatory language because it completely bypasses the core applicability provisions and renders their inclusion in the statute superfluous. The commenter argues that sections 161 and 165(a) of the CAA limit PSD applicability based on the location of the source and case law confirms this limitation, as follows:

- The text of sections 161 and 165(a) plainly limits application of PSD to certain areas – those designated attainment or unclassifiable pursuant to section 107 of the CAA, which applies only to NAAQS pollutants. It is only section 165(a)(4) – defining the pollutants subject to BACT once PSD permitting is already required – that uses the phrase "pollutants subject to regulation."
- This plain language reading is also consistent with the holding in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), where the court found that location is the key determinant for PSD applicability and rejected EPA's contention that PSD should apply in all areas of the country, regardless of attainment status.

- The EPA gave this ruling only grudging effect by an interpretation of PSD requirements in the preamble to the 1980 PSD regulations. 45 FR 52675, 52,676 (Aug. 7, 1980). The 1980 preamble stated that PSD requirements still apply to any area that is "designated . . . as 'attainment' or 'unclassifiable' for any pollutant for which a national ambient air quality standard exists."
- This interpretation of the "location-limiting language" of the statute results in no limitation at all since every area of the country is and always has been in attainment with at least one criteria pollutant. Congress must be presumed to have been aware of this fact when it enacted the PSD provisions, making EPA's construction inconsistent with canons of statutory construction requiring all words in the statute to be given meaning.
- While this reading was inconsistent with the CAA, industry had no reason at the time to challenge it. There were very few regulated pollutants that were not subject to NAAQS at that time and even for those, it was unlikely that those pollutants would be the sole reason that a PSD permit would be required.
- Now, with EPA's decision to regulate GHGs, this interpretation could trigger a host of results that contravene congressional intent. The EPA has itself recognized that the practical result of the 1980 interpretation is not desirable, specifically soliciting comment on an approach in which BACT would be applied to GHGs only in those cases where PSD permits are otherwise required for a source. *See* Proposed Tailoring Rule, 74 FR 55327.
- The EPA can only rely on the "administrative necessity" rationale in its proposed PSD Tailoring Rule so long as it is strictly necessary to avoid absurd consequences that result from "the literal application of a statute." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989). Here the "absurd results" are not driven by the statute, but rather by an EPA interpretation that is not consonant with the statutory language. Where a statute can be interpreted to avoid "absurd results," it must be so interpreted rather than relying on judicially created exceptions. (Numerous citations given.)
- Accordingly, to give effect to unambiguous terms of the statute (and regulations), EPA cannot require a source to undergo PSD permitting solely on the basis of emissions of a pollutant for which there is no NAAQS. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984) (agency must give effect to the unambiguously expressed intent of Congress).

The industry commenter (0085) adds that EPA can implement the interpretation advocated above without changing its regulations because 40 CFR 52.21(a)(2) includes the location limitation of the statutory provisions and EPA's historic interpretation is contained only the preamble to the 1980 PSD rules. The commenter (0085) believes that all that is necessary is for EPA to announce its new interpretation in the *Federal Register*, which is sufficient because it is a logical outgrowth of the request for comments on this issue (in this action and in the companion GHG proposals) and the comments received.

One industry commenter (0118) states that the PSD program only applies to those pollutants for which EPA has promulgated a NAAQS, not to all pollutants "subject to regulation" under the CAA. Citing the language of sections 161 and 165 of the Act, the commenter argues that the Act limits applicability of the PSD program to new and existing major sources that trigger PSD for NAAQS pollutants in areas designated as "attainment" or "unclassifiable." Thus, the commenter believes that a change resulting in a significant increase

of a non-NAAQS pollutant (such as GHGs) that does not trigger PSD for a NAAQS pollutant is not subject to PSD preconstruction requirements.

The industry commenter (0118) notes that, in its 1979 PSD regulations, EPA initially interpreted part C of title I of the Act to require PSD permitting for nonattainment pollutants, but the Court rejected this interpretation in *Alabama Power*. The commenter further explained that, in the 1980 PSD regulations, EPA excluded nonattainment pollutants from PSD but took the position that PSD applies to any regulated pollutant (other than a nonattainment pollutant) as long as an area is attainment or unclassifiable for any pollutant. The commenter (0118) urges EPA to reinterpret the PSD regulations to be consistent with the Court's decision and rule that PSD applies only to major new or existing sources that trigger PSD for a NAAQS pollutant in an attainment or unclassifiable area.

The industry commenter (0118) concedes that under section 164(a)(4) of the CAA, if a major source or major modification is subject to PSD for a NAAQS pollutant, BACT is to be installed to control emissions of all pollutants "subject to regulation" under the Act. Thus, the commenter states that even though the full range of PSD requirements do not apply to a non-NAAQS pollutant "subject to regulation" under the Act, BACT is required for such a pollutant when the construction is otherwise subject to the PSD preconstruction requirements. The commenter notes that by so interpreting the CAA, the regulation of non-NAAQS pollutants will not increase the number of PSD permits that will be required, which alleviates greatly one of the "absurd results" that the proposed Tailoring Rule is intends to address. However, the commenter believes that the BACT requirement for those sources that do require PSD permits would still be an enormous burden. Also, the commenter (0118) notes that this changed interpretation of PSD applicability would not affect the applicability of title V permitting to the approximately 6.1 million sources of GHGs estimated by EPA.

Three industry commenters (0069, 0096, 0106/0107) contend that, based on the language of sections 161 and 165(a), the CAA only applies PSD review for pollutants that have the potential to result in deterioration of air quality in an area that meets a NAAQS or is undesignated. One commenter (0107) adds that if applicable at all, the only possible interpretation of the applicability of PSD would be limited to situations when criteria pollutants or their precursors might cause significant deterioration of air quality and BACT would apply to other pollutants "subject to regulation" if a significant increase would be projected to result from the project. On this basis, one commenter (0107) asserts that EPA's intent to regulate GHGs under the PSD program by requiring PSD review and permitting of new "major" GHG emitting facilities and "major modifications" of major GHG emitting facilities based on GHG emission increases alone violates Title I of the CAA. Commenter (0096) also states that PSD rules apply only to pollutants for which a NAAQS exist and certainly not to a Title II motor vehicle standard for which there is no NAAQS.

Commenters (0092, 0098) representing several groups of companies (industry) contend that the plain language of the CAA and EPA's corresponding regulations condition PSD applicability in the first instance on emissions of a pollutant for which there is a NAAQS. The commenters state that EPA should correct this error and state that whether a pollutant is "subject to regulation" is relevant only to whether a source that is subject to PSD requirements for a

NAAQS-pollutant must install BACT for other pollutants. Alternatively, the commenters recommend that EPA exercise its discretion by interpreting "subject to regulation" to exclude CAA section 202 regulation of GHG emissions from motor vehicles. The commenters contend that *Alabama v. Costle* supports the NAAQS prerequisite interpretation of the CAA, and that EPA's response to this decision misinterpreted the Court's opinion. The commenters further claim that even if the statutory language were ambiguous, EPA could not apply PSD to GHGs, because such an interpretation does not represent a reasonable balancing of the goals Congress established for the PSD program, and the "absurd results" of EPA's proffered interpretation show that the language must be interpreted to require a GHG NAAQS before GHGs can be the sole trigger for PSD. The commenters add that to the extent EPA applies the "absurd results" doctrine to support the PSD Tailoring Rule, the Agency's approach is inconsistent with the law because it applies PSD to GHGs notwithstanding the absurdity of doing so.

One commerce commenter (0074) states that revising the PSD Interpretive Memo to state that PSD is not triggered without a NAAQS would be consistent with the plain meaning of sections 161 and 165 of the CAA, section 52.52 of the regulations, and the holding in *Alabama Power Co. v. Costle* (where the court found that location is the key determinant for PSD applicability and rejected EPA's contention that PSD should apply in all areas of the country, regardless of attainment status). CAA sections 161 and 165 precondition applicability of the PSD program to those areas designated as attainment or unclassifiable under section 107 for a NAAQS. This and other commenters opine that PSD permitting requirements can only be triggered in the first instance by pollutants for which there is a NAAQS. Section 52.21(a)(2) of the regulations provides "applicability procedures" for PSD, stating that PSD applies to "the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act." It is only in defining and requiring BACT that the statute imposes requirements on pollutants "subject to regulation." The commenter opines that nothing in the statute or regulations requires a source that is major to be subject to the significance levels for non-NAAQS pollutants if there is no significant increase of a NAAQS pollutant for which the source is designated attainment or unclassifiable.

One industry group commenter (0066) requests that EPA revise the interpretive memo to clarify that PSD is limited to criteria pollutants for which a NAAQS has been set.

Two commenters (0051, 0053) request that EPA interpret PSD applicability provisions of the statute and regulations to avoid triggering PSD for the vast majority of sources rather than relying on the "absurd results" and "administrative necessity" doctrines to rewrite statutory thresholds. This commenter states that the GHG-PSD problem is created by interpreting the statute and regulations to require that PSD applicability as being dictated solely through the phrase "subject to regulation." Prior to resorting to the "administrative necessity" and "absurd results" doctrines to rewrite statutory thresholds, they opine that EPA is obliged to consider statutory interpretations that eliminate the GHG-PSD problem. The statute does not state that PSD applies to all pollutants subject to regulation; the statute only requires BACT apply to all pollutants subject to regulation fro sources that trigger PSD. Under the suggested interpretation, sources and modifications will not be classified as major requiring a PSD permit based on GHG emissions unless: (1) EPA issues a NAAQS for GHGs; or (2) a facility is already major for

traditional pollutants triggers PSD for a non-GHG pollutant (e.g., for ozone ($O_3$, $SO_2$)(and the facility experiences a significant GHG emissions increase). Under this approach, GHG emissions would still be regulated. Any new or existing source that triggers PSD for a non-GHG pollutant will also be subject to BACT, if the source also experiences a significant GHG emission increase. This would limit the number of PSD permits and BACT determinations for GHGs to larger sources that trigger PSD for other pollutants. Nothing in the statute requires a source that is major to be subject to significance levels for non-NAAQS pollutants if there is no significant increase of a NAAQS pollutant for which the area is designated attaining in the statute requires a source that is major to be subject to significance levels for non-NAAQS pollutants if there is no significant increase of a NAAQS pollutant for which the area is designated attainment or unclassifiable. The commenter asserts that there are no "absurd results" under their suggested NAAQS prerequisite approach, and it is consistent with *Alabama Power v. Costle*.

One industry commenter (0068) states that based on the requirements outlined in the statute regarding the applicability of PSD and the decision in *Alabama Power*, PSD would not be triggered solely on the basis of GHG emissions. The commenter opines that such an approach would prevent the EPA from having to rely on the "administrative necessity" and "absurd results" legal doctrines which are exceptions to a statutory mandate as fewer sources would be subject to permit requirements and states would not be forced to handle massive increases in the number of PSD permits and could still require BACT in PSD permits that are triggered for attainment pollutants.

One industry commenter (0056) believes that PSD review is only triggered by the emissions/emissions increases of pollutants for which a NAAQS has been established. They state that the CAA prohibits applying PSD to a GHG unless PSD review is triggered by a significant increase in a NAAQS pollutant that could contribute to a violation of a NAAQS or a NAAQS increment. Since there is no NAAQS for a GHG, PSD applicability to a proposed project cannot be triggered by GHG emissions alone. If a BACT review is allowed for a GHG, it is only if a criteria pollutant triggers PSD review and the projected actual emissions of GHGs exceeded the major source threshold or the definition of a "significant emissions increase." This commenter asserts that their statutory construction is consistent with the purposes of the Act and provides a technology-forcing function for regulated pollutants for which EPA has not established a NAAQS or an increment.

One industry commenter (0060) believes that section 161 and 165 of the CAA clearly limit the applicability of the PSD program in such a way to reflect the most basic aspect of applicability of the PSD program: Prevention of Significant Deterioration review is triggered only for pollutants for which a NAAQS has been established. As an example, they state that if EPA were to establish an emission control requirement for a previously unregulated substance pursuant to an NSPS standard, then the substance would be "subject to regulation under the Act." But because the substance is not a criteria pollutant for which a NAAQS has been established, the level of the substance's emissions is not a factor in determining whether a source is a major source or whether a project is a major modification under the PSD program. Only the pollutants for which there are NAAQS may be used to make that determination. They opine that if a project is not major for any NAAQS pollutant, and it has emissions of a previously unregulated

substance, it should not be subject to PSD, regardless of the amount of the substance emitted by the project.

One industry group commenter (0061) states that section 161 of the CAA and section 52.21(a)(2) of the CFR limit applicability of the PSD program to those areas "designated" as attainment or unclassifiable pursuant to section 107 of the CAA. *See also,* section 165(a) (requiring demonstration that air quality requirements are met). Section 107 applies only to sources that are major for a NAAQS pollutant and those major sources that have modifications that result in a significant net emissions increase of a NAAQS pollutant. Stated differently, this commenter (0061) asserts that emissions of a non-NAAQS pollutant cannot trigger PSD applicability.

One industry commenter (0072) urges EPA to adopt an "alternative interpretation" of the existing stationary and regulatory provisions, so PSD is not triggered for a source by its emissions of a regulated NSR pollutant for which no NAAQS has been promulgated. They assert that, because section 161 and 165 of the CAA make clear that the PSD program only applies to construction projects in an area designated as attainment or unclassifiable for a NAAQS, PSD applicability should not be triggered by emissions of a pollutant for which no NAAQS has been promulgated. Once a source becomes subject to PSD due to emissions of any NAAQS pollutant in excess of the statutory major source thresholds of 100 or 250 TPY, the source must achieve BACT for every pollutant "subject to regulation" under the CAA that will be emitted in significant amounts, which, for GHGs, would be any amount (absent promulgation of a higher *de minimis* threshold, as proposed by the GHG Tailoring Rule). As other commenters opine, this commenter believes that EPA could completely avoid the "absurd results: and "administrative necessity" it claims as the basis for establishing a higher PSD applicability threshold in the GHG Tailoring Rule. By modifying this interpretation, so that a source does not trigger PSD based on its emissions of non-criteria pollutants, the commenter states that EPA could begin requiring BACT for GHGs under existing PSD rules, without any resulting negative impacts. The commenter asserts that this interpretation is consistent with *Alabama Power v. Costle*, 636 F.2d 232 (D.C. Cir. 1979).

An industry commenter (0093) urges EPA to clarify that the applicability of PSD to pollutants "subject to regulation" properly triggers a BACT analysis for sources that otherwise trigger requirements of the existing PSD program, but does not trigger PSD applicability, in and of itself, for pollutants which do not have, nor are precursors to, a NAAQS.

One state agency commenter (0102) believes that the PSD applies only to pollutants or precursors for which a NAAQS exists, and not to non-NAAQS emissions regulated by a Title II motor vehicle standard. The state agency commenter indicates that EPA's policy should state that PSD is not triggered automatically or otherwise upon GHGs becoming controlled under title II of the CAA because PSD applies only to pollutants for which a NAAQS has been established. The PSD program and the NAAQS assume that some areas of a state or the country have higher concentrations of a criteria pollutant than another (hence attainment and nonattainment areas), but GHG concentrations are generally uniform throughout the world. Thus, the commenter believes that preventing deterioration of an area's GHG concentrations below a certain ambient air quality standard through permitting controls is virtually impossible where the standard to

achieve is a global one. The commenter concludes that EPA's interpretation that PSD is applicable to GHGs at any time is not legally supportable and no amount of tampering with the Tailoring Rule or ordering of federal actions will change this.

Nine industry and commerce commenters (0051, 0053, 0066, 0072, 0074, 0076, 0079, 0085, 0086) suggest that EPA clarify in the PSD Interpretive Memo that the term "Pollutants Subject to Regulation" exclude GHGs. They assert that Congress did not intend such pollutants to trigger PSD. In order to secure passage in 1977, supporters of the PSD program stressed that it would not impact smaller sources, such as residential, commercial, or agricultural facilities.

One commenter (0111) noted that EPA should construe the phrases "any pollutant" in section 169(1) and "any pollutant subject to regulation" in section 165(a) to refer only to conventional pollutants whose emissions have regional or local impact, rather than any pollutant subject to regulation under the CAA. Such an interpretation would automatically exclude GHGs, which are "global in nature because the GHG emissions emitted from the United States . . . become globally well-mixed." In the PSD Tailoring Rule, EPA's own analysis—which demonstrates that Congress could not have intended those CAA sections to require PSD applicability for GHGs, because, if they did, the number of sources requiring PSD permits would rise to absurd and unanticipated levels— supports this interpretation. EPA proposes only one solution to avoid the absurdity of triggering PSD for GHGs: rewriting the statutory PSD and title V applicability thresholds and significance levels.

The commenter (0111) states that strong evidence supports an interpretation of the CAA that excludes GHGs from PSD. First, the original 28 source categories listed by Congress constitute the sources EPA regarded as posing the greatest potential for air quality degradation due to conventional pollutants. The 100 TPY threshold for these source categories makes sense only in terms of conventional pollutants. Second, the air quality monitoring and impact analysis provisions of CAA sections 165(a) and (e) focus on local and regional impacts. For example, Section 165(e)(1) requires an analysis of "the ambient air quality at the proposed site and in areas which may be affected by emissions from [the proposed] facility for each pollutant subject to regulation under the [CAA] which will be emitted from such facility." The focus on the "proposed site" and affected areas implies that Congress was focused on regional and local concerns.

In addition, according to the commenter (0111), the legislative history of sections 165(a) and 169(l) under the 1977 CAA amendments makes clear that Congress had only conventional pollutants in mind when creating those provisions. Both the Senate and the House were engaged primarily in continuing the work that a prior Congress had begun, through the 1970 CAA, to rid the Nation, especially urban areas, of unhealthy levels of smog, particulates, sulfur dioxide, and other conventional pollutants. The air quality problems of concern to the 95$^{th}$ Congress in 1977 simply did not include global warming. It is simply not possible, in light of this legislative history and the legislative history EPA references, to make a credible argument that the 95$^{th}$ Congress intended that GHG emissions could be a basis for applicability of the PSD permitting program as defined by sections 165(a) and 169(1). Additional evidence of Congress' intent for the CAA not to apply to GHGs is Section 166, which provides EPA with a separate mechanism for adding pollutants for PSD applicability. The commenter (0111) notes that the consequences

of applying PSD to GHGs are perhaps the best evidence that such an interpretation runs contrary to congressional intent. If PSD applies to GHG emissions, EPA estimates that 40,000 new PSD permits will be required annually, including permits for small entities not previously subject to PSD, such as hospitals, churches, schools, and small businesses. This vast and unprecedented expansion in permitting will halt the nation's economic growth with little if any improvement in local air quality.

One industry commenter (0085) argues that the endangerment finding under title II is distinctly different from the air quality purposes of the PSD program – the former is triggered where, in the Administrator's judgment, such emissions "may reasonably be anticipated to endanger public health or welfare" (CAA section 202(a)(1)), while the latter is specifically directed towards the protection of "air quality" (CAA section 161), i.e., the air that people breathe. Consequently, the commenter asserts that the regulation of $CO_2$ emissions – where it is intended to address the effects that $CO_2$ has on global climate change, rather than its effect on local "air quality" – does not constitute a measure to control $CO_2$ emissions which is "necessary" to "prevent significant deterioration" of local "air quality" (CAA section 161); therefore, it does not follow from an endangerment finding under title II that EPA is thereby authorized, much less compelled, to regulate $CO_2$ emissions from stationary sources under the PSD program.

Rather than seeking to justify rewriting the CAA's 100/250 TPY thresholds for PSD applicability, the industry commenter (0085) believes that EPA could rely on the fact that Congress never intended the PSD program to apply to emissions of a substance such as $CO_2$ that, while it may constitute an "air pollutant" under the broad definition of CAA section 302(g), does not pose any threat to "air quality." To that end, the commenter (0085) asserts that EPA should recognize that the CAA's PSD provisions, including the Best Available Control Technology (BACT) requirement "for each pollutant subject to regulation" under the Act, must be understood in the context of the fundamental purpose and scope of the PSD program, as is made clear on the face of CAA section 161; that is, the BACT requirement should be read as applying only to regulated pollutants that have an adverse impact on "air quality" – i.e., air that people breathe.

The industry commenter (0085) observes that the preamble to the proposed Tailoring Rule is replete with statements by the EPA that point out how inconsistent with Congressional intent would be the regulation of thousands of small stationary sources of $CO_2$, and opines that EPA has drawn the wrong conclusion as to how it should proceed in the face of this anomalous situation. The commenter asserts that, rather than attempting to rewrite the PSD threshold limits, which are set forth in the Act in unambiguous terms, EPA should instead conclude that Congress never intended the regulation of $CO_2$ under the PSD program because emissions of $CO_2$ do not degrade air quality.

Another commenter (0086), representing several groups of companies, asserts that (in absence of the alternative to applying PSD only to pollutants for which there is a national ambient air quality standard [NAAQS]) EPA should interpret the phrases "any pollutant" in section 169(1) and "any pollutant subject to regulation" in section 165(a) to refer only to pollutants whose emissions have local or regional impacts, and hence not GHGs. The commenter believes that EPA should find that Congress intended applicability to be based only

on "conventional" pollutants, i.e., pollutants whose emissions have predominantly local or regional impact such as pollutants subject now to NAAQS and new source performance standards (NSPS) for the following reasons:

- The 28 source categories that Congress listed in section 169(1) in 1977 are the ones EPA regarded at the time as posing the greatest potential for air quality degradation due to conventional pollutants. The only way to explain the selection of those particular categories is to posit a concern only with conventional pollutants. Indeed, the only way to understand the 100/250 TPY cutoffs is also in terms of conventional pollutants.
- The provisions of sections 165(a) and (e) that call for air quality monitoring and air quality impact analysis in connection with PSD permitting are oriented on their face to local or regional impacts.
- Other relevant provisions of the CAA demonstrate the same mindset. An example is the system for area designations in section 107(d) and the underlying system for establishing air quality control regions in section 107(b), which make sense only from the standpoint of managing emissions of conventional pollutants, in particular NAAQS pollutants. The objective of the PSD program, to prevent significant deterioration of air quality in areas designated as attainment or unclassifiable under section 107(d), makes sense only from the standpoint of emissions having a local or regional impact, not emissions of GHGs.
- Congress kept the door open for a PSD program geared to other pollutants, such as GHGs, through section 166. That section requires EPA, in the event it creates a NAAQS for a "new" pollutant (i.e., a pollutant not subject to a NAAQS in 1977), to create a PSD system that is tailored to that pollutant's unique profile, but that need not necessarily conform to the blueprint of sections 165(a) and 169(1). Thus, EPA potentially could create for GHGs a PSD permitting system with a 25,000 TPY $CO_2$ equivalent cutoff, but it would first have to establish a NAAQS for GHGs.
- The legislative history of the CAA Amendments of 1977, the origin of sections 165(a) and 169(1), reveals that Congress had in mind only conventional pollutants. Both the Senate and the House saw themselves as engaged primarily in continuing the work that a prior Congress had begun, through the 1970 CAA, to rid the Nation, especially urban areas, of unhealthy levels of smog, particulates, sulfur dioxide, and other conventional pollutants. The air quality problems of concern to the 95th Congress in 1977 did not remotely include global warming.

One industry commenter (0079), and others, express that section 163, as enacted by the 1977 Amendments, addresses baseline concentrations and increments for sulfur dioxide ($SO_2$) and particulate matter (PM), *see* §163(b), and to any other pollutant for which a national primary or secondary NAAQS exists, *see* §163(c). This emphasis, the commenter opines, is carried on in CAA section 169, which provides:

> Not later than one year after the date of enactment of this Act, the Administrator shall publish a guidance document to assist the States in carrying out their functions under part C of title I of the Clean Air Act (relating to prevention of significant deterioration of air quality) with respect to pollutants, other than sulfur oxides and particulates, for which national ambient air quality standards are promulgated. Such guidance document shall

include recommended strategies for controlling petrochemical oxidants on a regional or multistate basis for the purpose of implementing part C and section 110 of such Act.

§169(c). This subsection omits consideration of additional pollutants beyond the NAAQS. The commenter asserts that section 166 of the CAA also provides further limiting of "pollutants subject to regulation under the Act" to those pollutants subject to NAAQS. *See* §166(a) & (e). This commenter asserts that the only condition that suggests a broader reading is in §165(a)(3):

> The owner or operator of such facility demonstrates that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality region, or (C) any other applicable emission standard or standard of performance under this Act;

The commenter asserts that (A) and (B) apply to NAAQS pollutants, consistent with the argument outlined above. (C) applies to "any other applicable emission standard or standard of performance under the Act." This language is susceptible to a broader reading, though §169(a)(3) clarifies that the "applicable emission standards" are those issued pursuant to subsection 111 or 112 of the CAA. This commenter adds that in the 1990 CAA Amendments, Congress provided evidence of its intent not to broaden the NAAQS and NSPS focus of the PSD program by specifically mandating that HAPs are not "subject to regulation" under the CAA for purposes of the PSD program. *See* 42 U.S.C. §7412(b)(6).

This commenter (0079) further states that the legislative history of the PSD program also supports "pollutants subject to regulation under the Act" as being limited to NAAQS pollutants and NSPS pollutants (cites discussion by The House Committee on Interstate and Foreign Commerce, in its discussion of a bill that ultimately became part of the CAA Amendments of 1977.

In addition to statute and legislative support for limiting "pollutants subject to regulation under the Act," this commenter (0079) asserts that there are practical economic and burden considerations to limiting the PSD program to NAAQS and NSPS pollutants.

Another state agency commenter (0103) agrees with the "actual control" interpretation to the extent that it excludes pollutants subject only to monitoring or reporting requirements, but does not believe that the interpretation goes far enough. The commenter advocates an interpretation that requires EPA to establish an NSPS or NAAQS for the pollutant (if the pollutant is not considered a HAP subject to section 112 of the CAA) and also requires the ability to control the pollutant by means of an add-on control device.

One commenter (0088), while generally agreeing with the December 18, 2008 EPA Memorandum, states that interpretation must be further clarified to state that the PSD permitting program should only apply to air pollutants with NAAQS.

**Response:**

We agree with these commenters that the appropriate scope of the PSD program is an important issue in evaluating the level of administrative necessity and the need to tailor the PSD program with respect to GHG emissions, but comments on this topic are beyond the scope of this action. This reconsideration action sought comment on EPA's interpretation of the phrase "subject to regulation under the Act" used the fourth part of an existing regulatory definition of "Regulated NSR Pollutant" at 40 CFR 52.21(b)(50). EPA requested comment on whether this part of the regulation (and similar provisions in the CAA) should apply to any pollutant that may be subject to a monitoring and reporting requirement, SIP provision, endangerment finding, or a waiver under section 209 of the Act. While this raised issues of how EPA's definition should be interpreted in light of a variety of statutory provisions, EPA did not propose to amend or remove from this definition the description of the categories of pollutants listed in the first three parts. *See* 40 CFR 52.21(b)(50)(ii)-(vi). Nor did EPA propose to reconsider its interpretive statement in 1978 that a pollutant subject to regulation includes "all pollutants regulated under Title II of the Act." *See* 43 FR at 26397. EPA requested comment only on whether it should amend the text of the definition to expressly incorporate EPA's interpretation that pollutants subject to regulation are those subject to an actual control requirement, like those described in the first three parts of the definition. As discussed elsewhere in this document, EPA is not changing the regulatory definition in this action at this time. Because, for the reasons described below, we believe that the interpretations of the CAA advocated by these commenters are inconsistent with the plain language of the portions of the regulation that EPA did not propose to reconsider, we are therefore not addressing them as part of this action. We note, however, that to the extent that these comments are directed at the need to tailor the PSD program with respect to GHGs, we believe these interpretive issues are more appropriately addressed in the context of the tailoring rule, where we received similar comments.

These commenters urged a variety of interpretations by focusing on the statute itself but largely ignore the applicable rules in the CFR, which govern PSD applicability until such time as they are changed pursuant to a rulemaking under Section 307 of the CAA. Moreover, those comments that do acknowledge that there are applicable regulations that govern which pollutants are subject to the PSD program only focus on the original EPA rules adopted in 1980 and ignore the comprehensive definition of "regulated NSR pollutant" adopted in 2002.The phrase "pollutants otherwise subject to regulation" is just one part of that definition. That definition provides that Regulated NSR pollutant includes:

> (i) Any pollutant for which a national ambient air quality standard has been promulgated and any pollutant identified under this paragraph (b)(50)(i) as a constituent or precursor for such pollutant. Precursors identified by the Administrator for purposes of NSR are the following:
>
> (ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act;
>
> (iii) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act;

> (iv) Any pollutant that otherwise is subject to regulation under the Act; except that any or all hazardous air pollutants either listed in section 112 of the Act or added to the list pursuant to section 112(b)(2) of the Act, which have not been delisted pursuant to section 112(b)(3) of the Act, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Act.

Based on the plain language of the first three parts of this provision (and other regulations that incorporate this definition), we are unable within the scope of this action to adopt the interpretations advocated by commenters.

EPA's regulations are not susceptible the interpretation that "pollutants subject to regulation" are limited to NAAQS pollutants. As NAAQS pollutants and precursors are spelled out as a specific line item in the definition of "Regulated NSR Pollutant," this interpretation would render the remainder of the definition meaningless. Furthermore, this interpretation would be inconsistent with the plain language in parts (ii) and (iii) of the definition, which presently incorporate pollutants regulated in an NSPS and under Title VI of the Act that are not covered by a NAAQS. Accordingly, we decline to adopt this interpretation in this action.

While some commenters present as a separate argument, based on section 166 of the Act, that the Agency should interpret "subject to regulation" as requiring that EPA undertake a PSD implementation rulemaking prior to regulating a pollutant under PSD, we do not view this as a distinct argument. As the commenters acknowledge, Section 166 requires certain actions be taken with respect to a new NAAQS, and thus this interpretation would act to ensure that "any future application of Part C is limited to criteria pollutants." (commenter 100 page 8-9). In addition, the argument that pollutants are not subject to regulation for PSD purposes until EPA promulgates regulations for each pollutant under section 166 was previously rejected by the D.C. Circuit. *Alabama Power Co. v. Costle,* 636 F. 2d 323, 406 (D.C. Cir. 1979).

Furthermore, the definition of regulated NSR pollutant affects more than just the applicability of the BACT requirements under the PSD regulations. The term "regulated NSR pollutant" is also incorporated in the definitions of "major stationary source" and "major modification." 40 CFR 52.21(b)(1)-(2). Because of the references to "regulated NSR pollutant," both of those provisions contemplate that PSD may be triggered based upon non-NAAQS pollutants (e.g. a modification occurs if there is a significant increase in any "regulated NSR pollutant" not "any pollutant for which an area has been designated attainment."). Accordingly, the interpretation urged by these commenters is inconsistent with the language and structure of the existing PSD regulations.

EPA is not persuaded that it can limit the scope of PSD to NAAQS pollutants through an interpretation of 52.21(a)(2) on the ground that this provision limits the scope of PSD to areas that have been designated "attainment or unclassifiable." As some of these commenters acknowledge, adopting this approach would require that the Agency reverse a long standing interpretation of 52.21(a)(2) that PSD applies if the source is locating in an area that is designated as attainment for any pollutant. Thus, commenters' request that EPA adopt this interpretation of 52.21(a)(2) is beyond the scope of this immediate action as we did not seek

comment on this provision, or this long standing interpretation. However, as noted above, we do intend to address the underlying substantive claim in the tailoring rule. We do not agree with one commenter's (0086) argument that 52.21(a)(2) unambiguously limits applicability of all PSD requirements to only those pollutants for which the area has been designated attainment or unclassifiable. The language of that provision in the regulation, that the "requirements of this section apply to the construction of any new major stationary source … or any project at an existing major stationary source in an area designated as attainment or unclassifiable," does not contain the express limitation "for that pollutant," which commenters are reading into it.

As with other commenters, the commenters that cite 52.21(a)(2) failed to address the adoption of the definition of "regulated NSR pollutant" in 2002 and instead chose to focus on provision enacted as part of the original 1980 PSD rulemaking. Accordingly, these commenters have made no attempt to show how the urged interpretation of 52.21(a) is consistent with the broader definitions of "major stationary source" and "major modification" which incorporate the definition of "regulated NSR pollutant," and which we have explained above cannot be so narrowly construed as to be limited to NAAQS pollutants.

The claims of some commenters that these are new issues upon which they had no reason to comment in 1980 also ignores the existence of the 2002 rulemaking and the revisions to various parts of section 52.21 made therein. While the potential for regulation of GHGs, and the implications of such regulation, may have been outside of the commenters' contemplation in 1980, the potential for GHG regulation and the implication of the language that the agency was adopting was evident by 2002. Thus, commenters could have challenged the adoption of the definition at that time.

EPA is also unable to interpret the existing PSD provisions as being limited to pollutants whose effects are primarily local or that only affect "air quality" (defined by one commenter as the "air that people breathe"). Such a limitation does not appear in the definition of "regulated NSR pollutant." Furthermore, the language of that definition in the current regulation demonstrates that EPA has already taken a position on this issue that is contrary to one commenters recommend. Specifically the inclusion of ozone depleting substances (ODS), which are regulated because of their global, not local, impacts, as a specific category of pollutants that are regulated NSR pollutants demonstrates EPA has previously rejected the local effects view. Thus, we believe that reading such a limitation into the fourth part of the definition would be inconsistent with the definition as a whole. The notice of reconsideration did not raise the issue of whether EPA should amend section 52.21(b)(50) to exclude ozone depleting substances.

EPA is also unable in this action to adopt the interpretation that the phrase "subject to regulation" requires control only for sources that are regulated under a MACT or NESHAP (or similar regulation) covering the pollutant. This interpretation is inconsistent with portions of the existing definition of "regulated NSR pollutant" that EPA did not address in the reconsideration notice. First, MACT standards and NSPS are covered by specific provisions of the definition of "regulated NSR pollutant." NSPS pollutants are covered in section 52.21(b)(50)(ii), while MACT pollutants are exempt under the last sentence in section 52.21(b)(50) due to a statutory exemption of MACT pollutants from PSD (42 U.S.C. §7412(b)(6)). Second, the NSPS provision in the definition of "regulated NSR pollutant" provides that the definition includes "any pollutant

that is subject to any standard promulgated under section 111." *See* 40 CFR 52.21(b)(50)(ii). Since it applies to any pollutant regulated in any NSPS, this provision is not susceptible to an interpretation that it means "any pollutant for which an NSPS has been promulgated for the source category of the source obtaining a PSD permit."

**Comments:**

A state agency commenter (0091) supports EPA's preferred option of "actual control" or a regulated NSR pollutant as being "subject to regulation under the Act," and also supports EPA in their interpretation that the remaining four options are not viable. However, this commenter believes that the actual control should be the control of a stationary source, and not a mobile source tailpipe emissions limitation. The commenter understands that EPA is considering development of an NSPS for GHG emissions from several industry sectors, and states that promulgation of an NSPS for stationary sources would be the most appropriate trigger for PSD applicability.

Ten industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) said that the "actual control" interpretation safeguards the Administrator's authority to require such controls on individual pollutants under other portions of the Act before triggering PSD requirements. This is important because it properly recognizes that promulgation of emission control requirements with respect to a pollutant (such as $CO_2$) under another provision of the CAA (e.g., a provision in Title II of the Act) does not automatically trigger PSD.

One commenter (0088), while generally agreeing with the December 18, 2008 EPA Memorandum, states that clearly the interpretation must be further clarified, and strongly suggests EPA's interpretation must clarify that the PSD permitting program actions should be activated upon stationary source regulations and the actual control of stationary sources of missions – not a mobile source control rule such as the LDVR

Commenters (0092, 0098) representing several groups of companies (industry) argue that the proposed reconsideration implicitly promotes EPA's erroneous belief that the LDVR would automatically trigger PSD permitting requirements for stationary sources, and this is by no means the correct or the preferable interpretation of the CAA. According to these commenters, under a more logical interpretation of the CAA, the LDVR would not trigger PSD, eliminating the need for millions of new sources to obtain PSD permits and for much of the PSD Tailoring Rule.

**Response:**

EPA has already established an interpretation that a pollutant "subject to regulation" includes "all pollutants regulated under Title II of the Act regarding emission standards for mobile sources." 43 FR at 26397. Thus, EPA has not previously considered PSD to be limited only to pollutants regulated in stationary source standards. Nor has EPA previously taken the position that Title II standards do not automatically trigger PSD. Since EPA's reconsideration

notice did not address this precedent, EPA is unable to modify this interpretation through this final action.

The Agency interprets the provisions of Section 165 to apply to any pollutant that becomes "subject to regulation" under the Act. The D.C Circuit Court upheld this position. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 403-406 (C.A.D.C., 1979) (rejecting arguments that Section 165 should not automatically apply to all pollutants subject to regulation under the Act.). We have continued to assert this position since this time. *See, e.g.,* 67 FR 80240 (stating that The PSD program applies automatically to newly regulated NSR pollutants); 61 FR 38307 (stating that the PSD regulations apply to all pollutants regulated under the Act), and Memo. From John S. Seitz, Director Office of Air Quality Planning and Standards to Regional Air Directors, "Interim Implementation of New Source Review Requirements for PM2.5," April 5, 2005 (stating that Section 165(a)(1) of the Act provides that no new or modified major source may be constructed without a PSD permit.). We are not changing our regulations, and did not open this interpretation for reconsideration in this action.

## *9.9. Need for Additional Process and Analysis Before Regulating Stationary Source GHG Emissions*

### 9.9.1. Requests for More Orderly Process and Judgment Before EPA Regulates GHGs Emissions from Stationary Sources

**Comment:**

Eight industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) state that the orderly regulatory process contemplated by the CAA starts with information-gathering concerning the pollutant's emissions, continues with determinations (under the CAA's non-PSD provisions) regarding the effect of the pollutant on public health and welfare and with development and issuance of proposed control regulations, and ultimately culminates in final regulatory controls on emissions of the pollutant, if justified and necessary. The commenters express concern that EPA's recent proposals to regulate GHG emissions from major stationary sources through PSD would undermine the orderly approach contemplated by the CAA. The commenters believe that establishing GHG emission control requirements for stationary sources through the back door of GHG rules for motor vehicles promulgated under Title II simply does not allow the time necessary to assess emissions and available controls and to prepare for compliance with any new regulatory requirements. Two of the commenters (0081, 0083) add that if EPA wants to establish GHG emission controls on stationary sources, it should do so through the orderly regulatory process set forth in the CAA, which would allow sufficient time to assess emissions and controls and provide sources the ability to work with the Agency in shaping the regulations and time to meet any new requirements.

One industry commenter (0109) state that the concerns expressed by EPA, that it have adequate time to assess emissions of a pollutant and determine appropriate controls before PSD and BACT requirements are required for a pollutant, would seem to be at odds with EPA's

recent efforts to regulate GHG emissions from large stationary sources through the back door of GHG emission standards for motor vehicles promulgated under Title II of the CAA, an approach which would appear to skip all of the regulatory steps that EPA states are important. The commenter (0109) believes that if EPA believes it is necessary to establish emission controls on large stationary sources of GHGs, it should heed its own pronouncements and proceed directly through the orderly regulatory process set forth under the CAA, which would allow the Agency sufficient time to assess emissions and available controls and provide major stationary sources with the ability to work with the Agency in shaping the regulation, as well as giving those sources the necessary time to meet any new requirements.

Another industry commenter (0107) states that the PSD program is very different than new motor vehicle standards, and pollutants regulated under Title I have a different purpose than Title II national vehicle standards. On this basis, the commenter (0107) concludes that it is logical and reasonable to conclude that Congress could not have intended that a LDVR would operate as a trigger for the PSD program.

One industry commenter (0113) states that EPA's proposed regulation of GHGs is one of the most consequential regulatory actions ever taken, and the agency has deliberately taken it without consideration of the consequences. EPA's response is, in effect, that it did not and does not have to inform itself (or others) of the relevant environmental and economic facts because it has had and will have no opportunities to make use of facts— no opportunities for judgment and thus no need to inform that judgment. The outcome, under the CAA, was "triggered," "automatic" or "self-effectuating." According to the commenter EPA's opinion is that the statute made them do it. The agency's defense, in effect, is that it made no choices—committed no acts of judgment— that would have benefited from facts and analysis with respect to the environmental and economic consequences of this historic, contentious, intrusive and inefficient new frontier in regulation. It was only doing what the law required. The commenter contends that the agency had innumerable opportunities to do other than what it has done. It could have shaped, conditioned delayed or phased this outcome. Or, it could have decided not to do this at all, and the Clean Air Act would not have stood in the way – so long as its judgment was considered and supported. Informed judgment has been needed from the first step on this regulatory path to PSD regulation, and the remaining steps likewise require it. Each of various EPA opportunities for judgment – opportunities for action or inaction – would have benefited from consideration of the environmental and economic consequences of their exercise. According to the commenter, an agency cannot decide whether to try to avoid, mitigate or prudentially delay a problem if it does not assess the problem, and it cannot take an action without considering its most fundamental aspects. The commenter concludes that even if that trigger operates just as automatically as the agency says it does (and it clearly does not), the agency is not excused from informing itself of the consequences of pulling the trigger. The alleged mechanistic and determinate character of that one step cannot be ascribed to the rest of the decisional process. At some point, before it effectuates it, the agency had and has obligation to consider the impact of the outcome.

**Response**:

EPA understands commenters' concerns but disagrees with how commenters have characterized EPA's efforts to implement the mandate delivered by the United States Supreme Court in *Massachusetts v. EPA*. EPA acknowledges that there are challenges to using the existing CAA to addressing the challenge of global climate change. EPA supports Congressional efforts to adopt comprehensive energy climate change legislation, but under the circumstances has exercised its judgment with great thought and care within the framework of the CAA to respond to the Court's direction and the Act's provisions. EPA is working within the constraints of the Act to promulgate an approach that addresses sources of GHGs in a common sense way that responds to the policy and practical issues that have been raised in comments submitted on both this action and proposed tailoring rule.

EPA has an obligation to respond to the Supreme Court remand in *Massachussetts v. EPA* and make a determination regarding whether GHG emissions from motor vehicles (i.e., on-highway vehicles) endanger public health and welfare. In response to that obligation, EPA carefully reviewed the available science on climate change, proposed a determination for public comment, and made an affirmative determination after considering the information and comments provided by the public. Having made a determination, based on sound science, that GHG emissions from mobile sources endanger public health and welfare, EPA has an obligation under the relevant CAA provision (section 202(a)) to promulgate standards to address emissions from those sources. As discussed above, once GHGs are "subject to regulation under the Act," EPA does not believe it can wholly defer application of the PSD program to GHG emissions from stationary sources until EPA can address whether to promulgate categorical GHG standards for stationary sources under other provisions in the CAA.

Under Title II or other provisions of the CAA, EPA is authorized to make decisions to control pollutants (and regulate various categories of sources) that the Agency (or Congress) has found endanger public health or welfare. The PSD program works to ensure that the same pollutants are controlled when new major stationary sources are constructed or major existing stationary sources are modified. The case-by-case nature of PSD control determinations ensures that these stationary source emissions are limited based on real-world considerations of technological availability, costs, energy impacts and other relevant factors. While there may be some advantages to PSD being triggered by a decision to control stationary source GHG emissions, the statute and practicality do not require it. In fact, best available control technology determinations in PSD can provide information and experience that is useful in setting generally applicable stationary source requirements under other CAA provisions. Moreover, given the wide variety of stationary sources that emit GHGs, it would take some time before the Agency could promulgate national standards for all the potentially relevant source categories. PSD provides a basis for limiting emissions when a large emitting facility constructs or modifies in a way that significantly increases emissions, and so allows permitting authorities, permit applicants and the public to consider what controls make sense for that facility considering costs and other relevant factors.

## 9.9.2. Analysis of Effects on Large Stationary Sources

**Comment:**

Nine industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109, 0080) assert that EPA has not adequately analyzed the impacts of GHG regulation on large stationary sources of GHG emissions.

Eight of these industry commenters (primary comment by 0089; incorporated or referenced by 0067, 0083, 0090, 0096, 0106/0107, 0108, 0109) assert that EPA should not proceed with actions that the Agency believes will trigger PSD requirements for GHG emissions in the absence of proper analysis of the effects of doing so, and public notice of opportunity for comment on that analysis. The commenters do not agree that the proposed motor vehicle GHG rules, if made final, would necessarily have PSD effects or that they would take place in the timeframe discussed in the Reconsideration proposal package (i.e., 60 days after publication of the final GHG vehicle rules). In addition, these industry commenters believe that none of EPA's current proposed GHG-related rules addresses in any meaningful way how EPA believes those rules would affect large stationary sources of GHG emissions and why EPA believes it should use motor vehicle rules – rules that it has no statutory obligation to promulgate at this time – to trigger enormously complex, expensive, and burdensome PSD requirements. The commenters assert this is not good policy, and argue that the problem is compounded by EPA's failure to assess what the Agency believes the effects of that policy will be on this nation's large stationary sources, including its electricity generating and manufacturing sectors, and on the nation's economy and international competitiveness.

These industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) state that, although EPA properly recognizes in the proposed PSD Interpretation that the need for adequate time to assess emission levels and determine appropriate emission controls supports reaffirmation of its actual control interpretation, EPA seems at the same time wholly to ignore the dramatic implications of its plan to impose – in the very near term – PSD requirements for GHGs on large stationary sources, in the absence of guidance on and without time to prepare for implementation of those requirements. The commenters believe that, at a minimum, EPA should make clear that any final motor vehicle GHG rules under section 202(a) of the Act do not trigger PSD requirements before those rules take effect, an event that would not occur before October 2011.

**Response:**

EPA included an extended discussion on the economic impacts of PSD regulation for GHG emissions in the preamble to the proposed Tailoring Rule and also prepared a cost-benefit analysis under EO 12866 for that proposal. *See* 55292 FR at 55337-340, 55343. As part of the Tailoring Rule docket, EPA also conducted the appropriate analysis required by the RFA and undertook additional discretionary RFA outreach to further assess the impacts of that rule. *See* id. at 55349 and docket EPA-HQ-OAR-2009-0517-19130 (summary of discretionary outreach available in the docket for the Tailoring Rule). These analyses were available for comment as part of the Tailoring Rule proposal. In that proposal, EPA also took comment regarding the final permitting thresholds that could be adopted for implementing the PSD program for GHG emissions, including matters related to the selection of those thresholds. Commenters that felt EPA's analyses did not fully consider the costs and/or benefits of GHG regulation for large

sources were able to address that issue in their comments on the proposed Tailoring rule. EPA will address concerns regarding the scope of these analyses in the final action on the Tailoring Rule.

For response to the concerns raised by commenters regarding EPA's interpretation of "subject to regulation" as it relates to applicability of PSD regulation following promulgation of the light duty vehicle rule for GHG emissions, see EPA's responses to related comments in Chapters 8 and 9 of this RTC.

## *9.10. Combustion of Biomass-Derived Fuels*

**Comment:**

Two industry commenters (0055, 0071) request that EPA exempt $CO_2$ emissions from the combustion of fuels derived from biomass ("biofuels") from both counting towards the threshold for major emitting facilities or major modification status from BACT analyses for $CO_2$ emissions. These commenters stated that $CO_2$ emissions from combustion of biomass, because of the principle of carbon neutrality and best carbon accounting practices, do not contribute climate change and should not be counted as increasing emissions of a pollutant regulated under the CAA. Biomass $CO_2$ neutrality is an inherent property of biomass based on the natural carbon cycle. The neutrality of $CO_2$ emissions from biomass combustion has been recognized for many years by an abundance of studies and is widely accepted by agencies, institutions, regulations and legislation. This is true for IPCC Guidelines and Guidance for the UN Framework Convention on Climate Change UNFCCC reporting protocols and an innumerable other agencies and institutions (cites agencies and countries whose accounting practices quantify biomass as $CO_2$ -neutral). EPA recently confirmed its position that the combustion of biomass should be considered $CO_2$-neutral, regardless of the source of the biomass, in its proposed rule to implement the Energy Independence and Security Act of 2007 through a new Renewable Fuel Standard, RFS2. In EPA's Mandatory GHG Reporting Rule, EPA clearly and intentionally excludes biomass $CO_2$ emissions for the calculation of thresholds for determining regulated facilities.

Another industry commenter (0071) stated that excluding $CO_2$ emissions from the oxidation of biomass would:

- Avoid imposing PSD requirements on emissions that do not cause or contribute to the air quality impact (increased CO2 concentration in the global atmosphere) that application of PSD permitting is supposed to be addressing, and
- Encourage substitution of renewable fuels for fossil fuels, which EPA is already seeking to accomplish through other measures, such as provisions in the proposed GHG tailpipe standards that give manufacturers extra credit for alternative fuel vehicles.

**Response:**

As explained elsewhere in this RTC, this action reconsiders an interpretation of general regulatory text found in 40 CFR 52.21(b)(50) and is not the appropriate forum to address the specific PSD applicability and implementation issues presented by the regulation of GHGs. . Similar comments and issues were raised in the context of the Tailoring Rule. EPA will respond, as appropriate, to those comments in that forum and in guidance that EPA is developing to address issues raised by the CAAAC workgroup, permitting authorities, and the regulated community

# Chapter 10. State Program Implementation

## *10.1. Applicability of PSD Interpretive Memo to State PSD Programs*

**Comment:**

One industry commenter (0055) requests that EPA make the PSD interpretive memo binding on state PSD programs. They state that if states have the freedom to apply PSD permitting requirements to GHGs even before they are subject to control measures under the CAA, the harmful effects of overloading the PSD permitting system with thousands of new PSD permit applications would be realized anyway, despite EPA's attempt to try to avoid the result.

One industry group (0071) commenter states that it is imperative to make the PSD Interpretive Memo binding on state PSD programs.

Eight industry commenter (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) said that EPA's interpretation should apply both to administration of the federal PSD permitting program under 40 CFR 52.21 and to EPA approval of (or other action on) new or revised state PSD plans under 40 CFR 51.166.

**Response:**

EPA will apply the PSD Interpretive Memo, with the refinement described in this action, when implementing the federal permitting program under 40 CFR 52.21. Furthermore, we will expect that states that implement the federal PSD permit program under delegation from an EPA Regional Office will do the same.

In addition, EPA will apply the interpretation reflected in this notice and the PSD Interpretive Memo in its oversight of existing state programs and review and approval of new program submissions. Many states implement the PSD program pursuant to state laws that have been approved by EPA as part of the SIP, pursuant to a determination by EPA that such laws meet the PSD program criteria set forth in 40 CFR 51.166. The EPA regulation setting forth PSD program requirements for SIPs also includes the same definition of the term "regulated NSR pollutant" as the federal program regulation. *See* 40 CFR 51.166(b)(49). Because this regulation uses the same language as contained in 40 CFR 52.21 and the same considerations apply to implementation of the PSD program under state laws, EPA will interpret section 51.166(b)(49) in the same manner as section 52.21(b)(50). However, in doing so, EPA will be mindful that permitting authorities in SIP approved states have some independent discretion to interpret state laws, provided those interpretations are consistent with minimum requirements under the federal law.

To the extent approved SIPs contain the same language as used in 40 CFR 52.21(b)(50) or 40 CFR 51.166(b)(49), SIP-approved state permitting authorities may interpret that language in state regulations in the same manner reflected in the PSD Interpretive Memo and this notice.

However, EPA will not seek to preclude actions to address GHGs in PSD permitting actions prior to January 2, 2011 where a state permitting authority feels it has the necessary legal foundation and resources to do so.

EPA has not called on any states to make a SIP submission that addresses the interpretive issues addressed in this notice and the PSD Interpretive Memo. As long as states are applying their approved program regulations consistent with the minimum program elements established in 40 CFR 51.166, EPA does not believe it will be necessary to issue a SIP call for all states to address this issue. However, permitting authorities in SIP-approved states do not have the discretion to apply state laws in a manner that does not meet the minimum federal standards in 40 CFR 51.166, as interpreted and applied by EPA. Thus, if a state is not applying the PSD requirements to GHGs for the required sources after January 2, 2011, or lacks the legal authority to do so, EPA will exercise its oversight authority as appropriate to call for revisions to SIPs and to otherwise ensure sources do not commence construction without permits that satisfy the minimum requirements of the federal PSD program.

To enable EPA to assess the consistency of a state's action with any PSD program requirements for GHGs, states should ensure that the record for each PSD permitting decision addresses whether the state has elected to follow EPA's interpretation or believes it is appropriate to apply a different interpretation of state laws that is nonetheless consistent with the requirements of EPA's PSD program regulations.

## *10.2. Need to Complete SIP Revision Process*

**Comment:**

One industry commenter (0086) states that, because the federal and state PSD rulemakings that established the regulatory language that is now being interpreted as requiring GHGs to be subject to PSD did not contemplate or address the massive impacts of that interpretation, the PSD Interpretive Memorandum is, in effect, a new rule that has important implications for timing and the CAA's cooperative federalism. The commenter (0086) believes that EPA has overlooked the necessity of the SIP revision process in this case where the existing state PSD rules and EPA's approval process for those rules did not construe the rules as applying to GHGs. The commenter (0086) believes, therefore, that the normal SIP pattern under section 110 must be used: (1) 3 years for adoption and submission of the necessary SIP revisions; (2) 1-2 years for EPA action on the submission; and (3) possible 40 CFR 52.21 FIP rulemakings. While the commenter (0086) believes that the CAA requires EPA to follow that pattern with respect to GHG emissions, the commenter believes it is beyond doubt that the CAA at least affords EPA discretion to follow it. The commenter (0086) states that the alternative would be for EPA to trigger a GHG-based PSD system initially in only those states subject to 40 CFR 52.21, which would create huge adverse differences between the states, at least for several years, an outcome Congress strongly disfavored in establishing the PSD program in its present form in 1977. The commenter (0086) urges EPA to adopt the usual section 110 pattern because the commenter believes it is the only lawful pattern, and would be more orderly.

Another industry commenter (0100) states that no matter what federal pronouncements EPA may issue about whether and when it intends to subject a pollutant to PSD permitting, it cannot purport to make GHG emissions regulated until states have legally required time (through the SIP call process) to amend their construction and operating permit rules to include GHG as a regulated pollutant, and the process (in section 110(k) of the CAA) is followed for aligning state rules with changes in EPA rules. This commenter asserts that a change in federal law (i.e., adoption of the car rules) does not automatically result in a new "pollutant" called "greenhouse gases" to be governed by state permit rules and that further, any state rules that purport to regulate new pollutants at the will of EPA without intervention by or guidance from the state are unconstitutional because such provisions would delegate lawmaking powers to a federal agency.

**Response:**

The applicability of PSD permitting requirements to a newly regulated pollutant under SIP-approved PSD programs depends on whether states have previously adopted laws that are sufficiently open-ended to apply to additional pollutants without subsequent action by the state. Many States do not need to revise their SIPs or state laws to begin implementing PSD for new pollutants. Absent a unique requirement of state law, EPA believes that state laws that use the same language that is contained in EPA's PSD program regulations at 52.21(b)(50) and 51.166(b)(50) are sufficiently open-ended to incorporate GHGs as a regulated NSR pollutant at the appropriate time consistent with EPA's interpretation of these regulations. As noted above, SIP-approved state permitting authorities may interpret the same language in state regulations in the same manner reflected in the PSD Interpretive Memo and this notice.

The Agency interprets the provisions of Section 165 to apply to any pollutant that becomes "subject to regulation" under the Act. The D.C Circuit Court upheld this position. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 403-406 (C.A.D.C., 1979) (rejecting arguments that Section 165 should not automatically apply to all pollutants subject to regulation under the Act.). We have continued to assert this position since this time. *See, e.g.,* 67 FR 80240 (stating that The PSD program applies automatically to newly regulated NSR pollutants); 61 FR 38307 (stating that the PSD regulations apply to all pollutants regulated under the Act), and Memo. From John S. Seitz, Director Office of Air Quality Planning and Standards to Regional Air Directors, "Interim Implementation of New Source Review Requirements for PM2.5," April 5, 2005 (stating that Section 165(a)(1) of the Act provides that no new or modified major source may be constructed without a PSD permit.). We are not changing our regulations, and did not open this interpretation for reconsideration in this action.

The provisions in section 110 of the Act must be reconciled with the requirements of section 165 of the Act, which preclude construction of a major emitting facility without obtaining a permit in compliance with the requirements of section 165. EPA does not interpret CAA section 110 to preclude states from applying state laws that are sufficiently open-ended to incorporate a pollutant that is subject to regulation at the time of a permitting decision. Furthermore, EPA has not promulgated a NAAQS for GHGs that would implicate many of the procedural requirements of section 110. At the same time, EPA does not interpret section 110 to mean that the requirements of 165 may be delayed for a pollutant that is subject to regulation. Thus, our approach provides maximum flexibility for states to expeditiously adopt our

interpretation of subject to regulation, but does not allow for interpretation of that phrase in a way that would circumvent section 165.

Specifically, as discussed above, EPA has not called on any states to make a SIP submission that addresses the interpretive issues addressed in this notice and the PSD Interpretive Memo. As long as states are applying their approved program regulations consistent with the minimum program elements established in 40 CFR 51.166, EPA does not believe it will be necessary to issue a SIP call under section 110(k) for all states to address this issue. However, EPA will exercise its oversight authority as appropriate to call for revisions to the PSD permitting provisions of SIPs and to otherwise ensure sources do not commence construction without permits that satisfy the minimum requirements of the federal PSD program.

In those cases where state laws are not sufficiently open-ended to incorporate new PSD permitting requirements at the appropriate time, EPA has often recognized and provided time for States to revise their existing SIPs to implement new requirements. *See* 67 FR 80240. However, EPA has also worked with States by issuing interim transition policies that provide means for states to use existing state regulatory authorities to assure that CAA requirements are met in the period before any state that needs to do so may revise its SIP. The PSD Interpretive Memo and this final action on reconsideration of the memo does not involve a revision of the PSD permitting regulations but rather involves clarifications of how EPA interprets the existing regulatory text. These actions articulate what has, in most respects, been EPA's longstanding practice. Thus, many states may continue to proceed under an interpretation of their rules after this action. In light of additional actions to be taken by EPA in the Tailoring Rule, states that issue permits in the near term may want to preserve the discretion to modify their approach after other EPA actions are finalized. In light of this contingency, one option states may consider is to establish that the state will not interpret its laws to require PSD permits for sources that are not required to obtain PSD permits under EPA regulations.

**Comment:**

An industry commenter (110) claims that EPA cannot, as it proposes in its Tailoring Rule, retroactively change a SIP on the grounds that it is the correction of a mistake without following all applicable procedural requirements, citing a the Third Circuit decision in *Concerned Citizens of Bridesburg v. EPA* that held that, because a state must have an opportunity to pass first upon the mechanics of achieving compliance with air quality standards, EPA cannot unilaterally revise a SIP without following the CAA's revision provisions.

**Response:**

Since this action does not involve the action described, this comment is outside the scope of this reconsideration action.

# Chapter 11. Other Issues

## 11.1. Combination of Interpretations

**Comment:**

One private citizen commenter (0048) believes that there should be a combination of the proposed interpretations of "subject to regulation." This commenter opines that monitoring and reporting is necessary to interpreting pollutants that are "subject to regulation." They state that with a combination of monitoring and reporting, there should also be an EPA-approved SIP and a finding of endangerment to develop limits.

**Response:**

For reasons discussed elsewhere in this document, EPA has decided to continue applying the actual control interpretation and has rejected the options of triggering PSD permitting requirements based solely on a finding of endangerment or on regulation of a pollutant in an EPA-approved SIP. Thus, EPA is not adopting the commenters suggestion to employ a combination of these interpretations.

## 11.2. Municipal Solid Waste (MSW) Landfill Gas Emission Standards

**Comment:**

Eight industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) indicate that environmental advocacy groups have alleged in permit challenges that $CO_2$ **is** subject to regulation for purposes of the PSD program because $CO_2$ is one of the constituents of MSW landfill emissions that are regulated by EPA under section 111 of the CAA and 40 CFR 60.33c and 60.751. The commenters state that EPA made clear in its Deseret briefing that this argument has no merit. The commenters assert that both the regulatory text of, and the preamble to, the proposed section 111 rules for MSW landfill emissions explicitly address the issue and clarify that the term "MSW landfill emissions" refers to a single designated composite pollutant, not its various individual constituents, and that MSW landfill emissions is the only pollutant subject to regulation. *See Deseret* Surreply Brief of EPA Office of Air and Radiation and Region VIII at 1-6.

The industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) further note that the specific control options in the MSW landfill regulations focus on control of NMOC emissions, which are used as a surrogate for MSW landfill emissions, and that EPA recognized in issuing the standards that control options identified as reducing overall MSW landfill emissions may actually increase the secondary emissions of individual components, including $CO_2$. Based on this, the commenters state that EPA did not intend for the MSW landfill emission

regulations to address climate change considerations, but rather ambient ozone problems, air toxic concerns, and potential explosion hazards.

The industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) assert that EPA's MSW landfill gas emission regulations do not make $CO_2$ or other GHGs "subject to regulation" under the CAA for purposes of the PSD program, and that EPA in effect concurred with this conclusion in the PSD Interpretive Memorandum, where it stated that MSW landfill gas is an example of a pollutant regulated as a collective group of emissions, and not by its individual components. The commenters suggest that EPA reaffirm its position on this issue in its final action in the present proceeding.

**Response:**

The PSD Interpretive Memorandum contains the following statement in footnote 6 (page 6) that relates to this issue:

> This memorandum does not seek to further define the specific nature or scope of any individual "pollutant" that is subject to such controls. Any ambiguity as to whether some part, component, or constituent of a substance or category of substances is controlled under a regulation should be resolved in the context of interpreting the individual rule that gives rise to the issue. *See, e.g.,* Regulating Greenhouse Gas Emissions Under the Clean Air Act, Advance Notice of Proposed Rulemaking ("ANPR"), 73 FR 44354 (July 30, 2008) at 44420-421 (describing the various consequences that could arise given the definition of the "pollutant" that EPA may establish in a regulation of one or many GHGs). For example, in adopting the New Source Performance Standard (NSPS) for municipal solid waste (MSW) landfills, EPA was explicit that it was regulating only MSW landfill emissions collectively, and not the individual components of those emissions. 56 FR at 24468, 24470 (May 30, 1991) ("The pollutant to be regulated under the proposed standards and guidelines is "MSW landfill emissions."); *id*. at 24474 ("The EPA views these emissions as a complex aggregate of pollutants which together pose a threat to public health and welfare based on the combined adverse effects of the various components. . . . The EPA thus views the complex air emission mixture from landfills to constitute a single designated pollutant.").

Since EPA is not withdrawing the PSD Interpretive Memorandum, EPA's position on this issue is unchanged by this action.

## *11.3. Section 821 of Public Law 101-549*

**Comment:**

Ten industry commenters (0067, 0073, 0083, 0085, 0089, 0090, 0096, 0106/0107, 0108, 0109) asserts that section 821 of Public Law 101-549 is not part of the CAA, and section 821 implementing regulations do not constitute regulation under the CAA. Eight of the commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) state that no basis exists for EPA to

change its carefully considered and well-supported determination that section 821 is not part of the CAA and that section 821 implementing regulations do not constitute regulation under the CAA. The commenters state that EPA should confirm that determination in this proceeding.

One industry commenter (0085) stated that section 821 was deliberately excluded from the Act even though it was part of the overall bill that amended the CAA in 1990. The commenter (0085) asserts that this exclusion was clearly intentional and cannot be ignored by interpreting the CAA to include section 821.

As a threshold matter, the industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) note that the section 821 issue is moot, assuming that EPA continues to maintain the actual control interpretation – this issue becomes relevant only if the Agency determines that monitoring and reporting requirements alone can make a pollutant subject to the PSD program. Nevertheless, the commenters strongly disagree with any suggestion that EPA should change its position on the issue of whether section 821 is part of the CAA. The commenters believe that it is clear that Congress did not make and never intended to make section 821 part of the CAA. *See In re Deseret Power Electric Coop.*, Response of EPA Office of Air and Radiation and Region VIII to Briefs of Petitioner and Supporting Amici, at 45-46 (Mar. 21, 2008) (explaining why section 821 is not part of the CAA); *Deseret* UARG Amicus Brief at 7-11 (same). The commenters state that for several reasons, specifically discussed by EPA and UARG in their submissions to the EAB in *Deseret*, this conclusion is clear both from the language of section 821 itself, which refers to the CAA as separate legislation, and from contemporaneous Congressional statements. The commenters add that even a cursory review of the CAA makes clear that section 821 is not part of that statute; the CAA begins with section 101 and continues through section 618 and no further; it includes no section 821. CAA sections 101-618, 42 U.S.C. 7401-7671q. The industry commenters (0067, 0073) similarly note that the language of Public Law 101-549 and the legislative history clearly indicate that section 821 did not amend the CAA and is not part of the CAA.

The industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) state that no weight should be given to past assertions by EPA that section 821 is part of the CAA. The commenters note that those statements did not address the point that is germane here, i.e., whether the requirements of section 821 and section 821 regulations constitute regulation under the CAA that may trigger PSD obligations. In addition, the commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) believe that ill-considered, incorrect past Agency characterizations of section 821 or its implementing regulations could not possibly form the basis for a new Agency interpretation concerning the effect of that section or those regulations. The industry commenters similarly noted EPA's inconsistent references to the legal status of section 821 cannot change the provisions of Public Law 101-549.

An environmental organization commenter (0095) states that EPA properly recognizes section 821 of the CAA. Commenter notes that the Reconsideration states that in light of EPA's contradictory statements in assorted federal court proceedings as to this point, EPA is now "less inclined to maintain" the position that section 821 did not amend the CAA.. The commenter agrees that EPA should abandon this theory. The commenter adds that EPA has consistently enforced the $CO_2$ monitoring, reporting and recordkeeping obligations imposed by section 821

and EPA's own Part 75 regulations through the enforcement provisions of the CAA. (Case references are included and attached.) In four of these five cases, EPA has used section 113 of the CAA to enforce the section 821 regulations. In three of those cases, it has assessed civil administrative penalties. Thus, in those three cases, EPA alleged that violations of section 821 and the implementing regulations were violations of various parts "of this chapter", i.e., the Clean Air Act, and then imposed hundreds of thousands of dollars in penalties for those violations. EPA also enforced section 821 under section 113(b)(2), wherein the Administrator is authorized "to commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both." And, consistent with its practice in the administrative penalty cases, in at least one instance of violations of section 821 (*United States v. Block Island Power Co.*), EPA duly invoked federal court jurisdiction for violations "of this chapter."

Finally, commenter (0095) asserts that EPA has also invoked its right under Section 304(c)(2) to intervene in an ongoing citizen suit that was, in turn, brought under Section 304(a)(1)(A) for violations of "an emission standard or limitation under this chapter." Thus EPA has consistently contended that Section 821 is a regulatory provision of the CAA and/or that violations of the Section 821 regulations are violations of the CAA.

**Response:**

In the October 7, 2009 notice, EPA solicited comment on the question of whether section 821 of the CAA Amendments of 1990 is part of the CAA. EPA indicated that the Agency was inclined against continuing to argue that section 821 was not a part of the CAA, as the Office of Air and Radiation and Region VIII had done in briefs submitted to the EAB in the Deseret matter. This question bears on the determination of whether the $CO_2$ monitoring requirements in EPA's Part 75 regulations are requirements "under the Act." In the proposed reconsideration notice, EPA explained that it would be necessary to resolve whether or not the $CO_2$ monitoring and reporting regulations in Part 75 were promulgated "under the Act" if EPA adopted the monitoring and reporting interpretation.

EPA has not yet made a final decision on this question, and it is not necessary for the Agency to do so at this time. Since EPA is not adopting the monitoring and reporting interpretation, the status of section 821 is not material to the question of whether and when $CO_2$ is "subject to regulation under the Act." Because there are currently no controls on $CO_2$ emissions, the pollutant is not "subject to regulation." Given that the provisions in Part 75 do not "regulate" emissions of $CO_2$, it is unnecessary determine whether such provisions are "under the Act" or not to determine PSD applicability. Furthermore, the promulgation of EPA's Reporting Rule makes this issue even less material. In that rule, which became effective in December 2009 and required monitoring to begin in January of this year, EPA established monitoring and reporting requirements for $CO_2$ and other GHGs under sections 114 and 208 of the CAA. Thus, there can be no dispute that monitoring and reporting of $CO_2$ (as well as other GHGs) is now occurring under the CAA, regardless of the status of section 821 of the 1990 amendments. At this point, the section 821 issue would only become relevant if a court were to find that the monitoring and reporting interpretation is compelled by the CAA and a party subsequently seeks to retroactively enforce such a finding against sources that had not obtained a PSD permit with

any limit on $CO_2$ emissions. If this situation were to arise, EPA will address the section 821 issue as necessary.

## *11.4. Alternatives Analysis Under Section 165 of the CAA*

**Comment:**

Eight industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) observe that EPA did not address in the proposed PSD Interpretation the argument that GHG emissions should be considered in the alternatives analysis for a PSD permit under CAA section 165(a)(2), and petitioners did not raise it in their Petition for Reconsideration. The commenters note that EPA observed in the PSD Interpretive Memorandum (at 4 n.4) that the EAB disposed of this argument in the *Deseret* litigation. The commenters opine that no legal support exists for any argument that a PSD permit applicant or PSD permitting authority has an affirmative obligation at this time to consider GHGs in an alternatives analysis under section 165(a)(2) or EPA's PSD regulations.

**Response:**

As noted in the October 7 notice for this reconsideration, EPA's present action is focused on the interpretation of "subject to regulation" as contained in 40 CFR 52.21(b)(50) (iv) and CAA sections 165(a)(4) and 169. As such, this action is not the proper forum for deciding whether GHGs may or may not be considered in the alternatives analysis under CAA section 165(a)(2) or EPA's PSD regulations. While we are declining to resolve this issue in this reconsideration action, we want to clarify one aspect of the EAB Deseret decision referenced in the comment. The EAB's decision found only that Region 8 was not required to consider a particular alternative that may have reduced GHG emissions on the grounds that this alternative was not identified in public comments and that there is no affirmative duty to consider an alternative not identified in public comments under section 165(a)(2) or EPA's PSD regulations. EPA does not read the EAB's decision to conclude that there is never a duty to respond to GHG issues associated with an alternative that is raised in public comments. If it becomes necessary, EPA will address the scope of consideration of GHG emissions in the alternatives analysis when such an issue arises in a permitting action or by issuing specific guidance on the issue.

## *11.5. Broad Focus of Proposal*

**Comment:**

Two industry commenters (0065, 0067) state that EPA has properly focused on the application of the proposed interpretation to all pollutants, instead of limiting the applicability to $CO_2$ or GHGs.

In contrast, one state/local agency association (0062) believes that PSD Interpretive Memo was crafted more narrowly than the proposed reconsideration. The commenter (0062) the

proposed broadening of the interpretation is unwise and recommended that any future determinations of whether a pollutant is "subject to regulation" be made on a case-by-case basis, considering all of the relevant facts. The commenter (0062) states that in discussing the proposed PSD Interpretation, EPA has revived issues that were resolved (such as the ammonia $PM_{2.5}$ issue) and seeks to address a number of issues that will be moot (such as the approval of the California waiver and the endangerment finding issue) or are unrelated to the current issues (such as whether a rule that only affects 49 states is sufficient to trigger PSD and title V permitting). The commenter (0062) believes that EPA's proposed standard for when a pollutant is subject to regulation ("[t]hose pollutants subject to a nationwide standard, binding in all states, that EPA promulgates on the basis of its CAA rulemaking authority") is at once too narrow and too broad. As an illustration, the commenter (0062) notes that California-certified vehicles do not have to meet federal emissions standards, so it could be argued that the federal motor vehicle GHG standard is not binding in all 50 states. On the other hand, the commenter (0062) asserts that it will likely be argued that such a standard is impermissible under the CAA because the statutory limitation would be too subject to gaming by the Agency (e.g., if EPA were to exempt a single state from an otherwise federally imposed national control strategy for a pollutant); that is, if PSD applicability for a pollutant is imposed only when EPA explicitly chooses to do so, CAA section 165(a)(4) has no meaning.

The state/local agency association (0062) agrees that PSD and title V applicability should only arise based on a conscious decision to broadly regulate emissions of a pollutant under the CAA, but expressed concern that attempting to limit the form of future regulation will have adverse consequences – one of the largest concerns is the amount of litigation it is likely to engender. The commenter (0062) asserts that EPA is far more likely to achieve what is needed under these circumstances by limiting its interpretation to the $CO_2$ monitoring and light-duty vehicle GHG rules at issue rather than issuing a sweeping pronouncement that establishes a single factor that attempts to govern all future pollutants; decisions respecting such future pollutants are better left to a review at the time they arise based on all of the relevant facts at the time. The commenter (0062) believes that in the present circumstance – where EPA is pursuing a rulemaking that clearly would meet any reasonable reading of the term "subject to regulation" – such a broad interpretation is not necessary, may produce inappropriate results in the future, and may delay the overall implementation of the program if it is challenged and overturned.

**Response:**

In accordance with the position taken in the PSD Interpretive Memo and supported by the first commenter above, EPA continues to believe it is best to determine the full scope of pollutants "subject to regulation" under the federal PSD program, in order to "resolve ambiguity and reduce confusion among permitting authorities, the regulated community, and other interested stakeholders." *See* Memo at 2. Accordingly, this reconsideration action represents a broad consideration of the most appropriate legal interpretation and policy rationales for potentially applying PSD permitting requirements to all pollutants regulated under the CAA.

At the outset, we disagree with the comment above that characterizes the reconsideration as being broader than the original Memo. In fact, this reconsideration is seeking comment on issues specifically raised in the Memo itself, such as the effect of an endangerment finding,

control of a pollutant in one SIP, and the interplay of this interpretation with our PM2.5 rulemaking (*see* Memo at 14-16), and on related issues brought to EPA's attention in other actions, such as comments in the California waiver action seeking clarification of the impact of a waiver on PSD implementation (*see* 74 FR 32744, 32783 (July 8, 2009). Accordingly, EPA disagrees that the issues addressed in this reconsideration have been resolved, will be moot, or are unrelated to the current issues. As the discussions in the notice of reconsideration and the resulting comments make clear, each of these issues could have important impacts on our consideration of PSD implementation for pollutants "subject to regulation" under the relevant regulatory and statutory provisions.

With regard to the specific illustration raised in the comment, we note that the commenter has misconstrued the impact of the grant of a section 209 waiver in California. As explained in response to specific comments regarding whether a pollutant addressed by a section 209 waiver is "subject to regulation" above, while an automobile in compliance with state standards is treated as in compliance with federal standards under CAA section 209(a)(3), the federal standards are still applicable – if a manufacturer fails to comply with a state standard adopted pursuant to a section 209 waiver, EPA can still bring an enforcement action if the federal standards are violated.

EPA also disagrees that the interpretation presented in this action is either too narrow or too broad. Rather we believe that it is an interpretation that resolves general ambiguity in the PSD regulatory program. To the extent that the commenter requests that EPA interpret "subject to regulation" on a case-by-case basis to avoid speculated impacts of the chosen interpretation on future actions , we note that in adopting the "takes effect" interpretation regarding the timing of PSD implementation, the response to comments provided earlier in this document acknowledged that it will be helpful in some contexts for EPA to provide additional implementation information specific to each new pollutant that becomes subject to regulation and we have provided such information with regard to the forthcoming LDV Rule that is anticipated to establish the first controls on GHGs. Moreover, EPA has no desire to conduct a case-specific notice and comment process each time there is the potential for PSD requirements to apply to a newly regulated pollutant. We believe it is best to provide an overall interpretation that can used to provide future consistency in PSD regulatory actions, and reject the notion that we should limit the current action to consideration of GHGs.

## *11.6. Adequacy of Comment Opportunity*

**Comment:**

One industry commenter (0111) states that the close timing of the GHG Rulemakings made it difficult for them to submit meaningful comments on these rulemakings, particularly on the Motor Vehicle GHG Rule. Problematically, the GHG rulemakings were all published in the *Federal Register* within just one month of each other. Meanwhile, many stakeholders, including the commenter (0111), were focused on and have allocated substantial resources towards analyzing and preparing to comply with the final mandatory GHG Reporting Rule, which was finalized in the midst of all three GHG rulemaking comment periods, on October 30, 2009.

Further compounding the already tight timeline, the GHG rulemaking comment deadlines fall within the holiday season—the Motor Vehicle GHG Rule comments were due during the Thanksgiving holiday and the PSD Tailoring Rule comments are due immediately after Christmas. The GHG rulemakings are legally and technically complex, with significant and likely unprecedented consequences for its members. Each rulemaking on its own requires significant time and resources to fully evaluate, develop data and analyses, and formulate appropriate comments. Given the close timing of the publication of the GHG rulemakings, the current comment periods were simply insufficient to allow the commenter (0111) a fair opportunity to do so.

One industry organization representing many industries (0049, 0114) requested an extension of the comment period for the LDVR, PSD and title V GHG Tailoring Rule on, and this proposed "PSD Interpretive Memo Reconsideration" on November 18, 2009 because the closing of the comment periods and close timing of the GHG rulemakings makes it difficult to fully analyze the rules, develop useful data, and submit comments on all relevant aspects of the rule. This commenter received a reply from EPA's Assistant Administrator (on November 25, 2009) denying the extension request in its entirety. The commenter (0114) requested, on December 22, 2009, that EPA reconsider its denial.

One industry commenter (0078/0094) adds that the Reconsideration Proposal, being framed as a stand alone section 307(d) rulemaking, but not containing any proposed regulations to implement the interpretation by force of law, may not be entitled to *Chevron* deference. The commenter claims that there is not sufficient opportunity to comment on the Reconsideration Proposal, claims that U.S. EPA's process bifurcates the proposal from the proposed Tailoring Rule and any other rulemaking necessary for its implementation, and argues that such rulemaking is essential to evaluate and address the Reconsideration Proposal's legal, policy, technical and economic implications. The commenter (0078/0094) concludes that as a result, the proposal, standing alone, does not embody the notice legally required to provide a fair opportunity for comment.

**Response:**

As explained in the Nov. 25, 2009 response from Assistant Administrator Gina McCarthy to the National Association of Manufacturers (described above) we were not able to extend the normal comment period for this and the EPA's other GHG actions. We have reviewed the comments on related actions and made every effort to understand comments on each of these important packages. In addition, as explained in Chapter 2 of this RTC, since the PSD Interpretive Memo is interpretive in nature, EPA was not required to go through a notice and comment rulemaking process to issue the document. EPA's action to take comment on reconsideration of the memorandum was voluntary. Nevertheless, EPA has taken the appropriate steps to provide an adequate opportunity for comment on the issue raised in the PSD Interpretive Memorandum, including providing twice the amount of time for comment described in CAA section 307(h).