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

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

RESPONSE BRIEF OF PERMITTEE DESERET POWER ELECTRIC COOPERATIVE

WINSTON & STRAWN LLP

James H. Russell
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-6084
(312) 558-5700 (fax)
JRussell@winston.com

Steffen N. Johnson
Susan A. MacIntyre
Luke W. Goodrich
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000
(202) 282-5100 (fax)
SJohnson@winston.com

Counsel for Permittee Deseret Power Electric Cooperative

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INTRODUCTION

The Board should deny Sierra Club's request for a remand. Sierra Club has failed to demonstrate any error in EPA's issuance of a Prevention of Significant Deterioration ("PSD") permit to Permittee Deseret Power Electric Cooperative ("Deseret"). Sierra Club claims that EPA should have conducted a Best Available Control Technology ("BACT") analysis for carbon dioxide because certain provisions of law require monitoring and reporting of carbon dioxide emissions, thus rendering carbon dioxide a "pollutant subject to regulation under [the Clean Air] Act." 42 U.S.C. § 7475(a)(4), CAA § 165(a)(4). But this argument cannot be squared with the text, structure, or regulatory history of the Act, and it is foreclosed by D.C. Circuit precedent, the Board's own decisions, and considerations of public policy. Indeed, EPA's interpretation is the only reasonable way to read the Act. But even if Sierra Club were correct that there is another reasonable interpretation thereof, that would not carry Sierra Club's heavy burden of demonstrating "clear error" in Region VIII's decision.

First, carbon dioxide is not "subject to regulation" because the plain meaning of the terms "subject to" and "regulation" require *actual control of carbon dioxide emissions.* The monitoring and reporting requirements cited by the Sierra Club, however, do nothing to control carbon dioxide emissions. Indeed, the Clean Air Act currently allows new and existing stationary sources to emit carbon dioxide without limitation.

Second, the structure and purpose of the Act confirm that "subject to regulation" requires actual control of emissions. Section 165(e), for example, presupposes "maximum allowable increases" or a "maximum allowable concentration" of a pollutant before BACT limits may be applied, while Section 169(3) presupposes existing standards of performance promulgated under Section 111. Because EPA has never regulated carbon dioxide, however, there are no "maximum allowable increases" or existing standards of performance in place, and it is impossible to

conduct a BACT analysis in accordance with these statutory provisions. In a similar vein, the express purpose of the PSD program is to protect the public from "any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution." CAA § 160(1), 42 U.S.C. § 7470(1). Imposing BACT on carbon dioxide emissions thus presupposes that the Administrator has made a "judgment" that carbon dioxide is a threat to public health—it presupposes study and an endangerment finding that EPA has yet to make. Indeed, Sierra Club has failed to point to any pollutant in the history of the Clean Air Act that has ever been subject to a BACT emission limit before being subject to control elsewhere in the Act. In short, Sierra Club's reading puts the cart before the horse.

Third, Region VIII's interpretation of the Act is supported by 30 years of consistent regulatory practice. In the preamble to the first PSD regulations promulgated in 1978, EPA explained that the term "subject to regulation . . . includes all criteria pollutants subject to NAAQS [National Ambient Air Quality Standard] review, pollutants regulated under the Standards of Performance for new Stationary Sources (NSPS), pollutants regulated under the National Emission Standards for Hazardous Air Pollutants (NESHAP), and all pollutants regulated under Title II of the Act regarding emission standards for mobile sources"—all provisions involving actual control of emissions. Approval and Promulgation of State Implementation Plans, 43 Fed. Reg. 26,388, 26,397 (June 19, 1978) (to be codified at 40 C.F.R. Part 52). Similarly, a 1993 EPA Memorandum considered and rejected the same argument Sierra Club advances here, concluding that the monitoring provisions cited by Sierra Club did not "subject" carbon dioxide to "regulation" because they "involve[d] actions such as reporting and study, *not actual control of emissions*." Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, *Definition of Regulated Air Pollutant for Purposes of Title V*, at 5 (Apr. 26, 1993)

(emphasis added). EPA has consistently adhered to this interpretation in later pronouncements (in 1998 and 2002), even in the face of changes in the Agency's views on whether carbon dioxide is a "pollutant." Sierra Club has offered no persuasive reason to abandon 30 years of regulatory practice, and, in any event, the Board has repeatedly explained that it gives "deference to a position when it is supported by Agency rulings, statements, and opinions that have been consistent over time." *Howmet Corp.*, 13 E.A.D. __, PSD Appeal No. 05-04, slip op. at 14 (EAB May 24, 2007).

Fourth, several decisions of the Board have squarely held that carbon dioxide is not "subject to regulation" under the Clean Air Act, and the D.C. Circuit has confirmed that "subject to regulation" requires a statutory or regulatory provision requiring actual control of emissions. As the Board explained in *Kawaihae Cogeneration Project*, 7 E.A.D. 107, 132 (EAB 1997), the permitting authority properly concluded that "'[c]arbon dioxide is not considered a regulated air pollutant for permitting purposes'" because "'at this time *there are no regulations or standards prohibiting, limiting or controlling the emissions of greenhouse gases.*'" *Id.* (emphasis added).

Fifth, important policy considerations counsel strongly against adopting Sierra Club's strained interpretation of the Act. EPA is now in the process of deciding whether to make an endangerment finding for carbon dioxide, as well as weighing how such a finding might affect the New Source Review program. Sierra Club's approach, however, would preempt this process, imposing nationwide limits on carbon dioxide emissions not through notice-and-comment rulemaking—with the attendant benefits of public participation and broad factual development—but by means of an isolated permit proceeding. Moreover, Sierra Club's interpretation of the Act would have drastic, unintended consequences. Because EPA has not had an opportunity to promulgate a significance threshold emissions level for carbon dioxide, any source emitting

more than the regulatory-default of 250 tons per year would be a "major" source subject to PSD permitting requirements. *See* 40 C.F.R. § 52.21(b)(1)(i)(b). This would trigger the PSD permitting process for all sorts of fixed installations with a boiler or furnace—such as hospitals, office buildings, small factories, small industrial plants, schools, or shopping malls, to name a few. And because oxygen and water vapor must be monitored under the same Part 75 "regulations" as carbon dioxide, Sierra Club's interpretation of the Act would trigger PSD requirements for those gases as well. Sierra Club's opening brief simply ignores the extraordinary implications of its proposed reading of the statute.

Finally, even assuming that monitoring and reporting provisions did "subject" carbon dioxide to "regulation" in the broadest possible sense, the requirement to monitor carbon dioxide emissions is not part of the Clean Air Act, and Congress did not intend that those monitoring requirements lead to controls or limits of carbon dioxide. The same is true of the State Implementation Plans (SIPs) now mentioned for the first time (and therefore waived) in Sierra Club's Opening Brief. Because these provisions are not part of the Clean Air Act, they do not render carbon dioxide "subject to regulation *under this Act*," and EPA lacks authority to impose a BACT emissions limit on carbon dioxide.

FACTUAL BACKGROUND

The challenged permit authorizes Deseret to build a waste-coal-fired generating unit at its existing power plant near Bonanza, Utah. Because the plant will be located on land within Indian country, EPA Region VIII is the permitting authority. The new 110-megawatt unit will fire waste coal obtained from Deseret's nearby mine (a significant energy resource that would otherwise be wasted), and will supply much-needed electricity to several Utah municipalities.

Region VIII issued the draft permit on June 22, 2006, and received public comments until July 29, 2006. Seven Utah municipalities submitted comments supporting the project, highlight-

ing the region's significant need for increased generating capacity. Sierra Club and a coalition of other environmental organizations submitted the only comments opposing the project. After considering the public comments over the course of a year, Region VIII issued the final permit on August 30, 2007, imposing a number of stringent emissions limitations on the new unit. Sierra Club now challenges the permit on the ground that EPA failed to impose a BACT emissions limit on carbon dioxide.

STANDARD OF REVIEW

Neither the Sierra Club nor its *amici* discuss the stringent standard of review governing PSD permit appeals. The Board's earlier grant of review in this case, however, does not alter "the heavy burden [the Sierra Club] face[s] in proving that [it] [is] entitled to the relief [it] request[s]." *Inter-Power of New York, Inc.*, 5 E.A.D. 130, 140 (EAB 1994). Even where (as here) the Board has granted review, "the Board will defer to the permit issuer's judgment absent evidence of a *clear error of fact or law*." *Id.* at 144 (emphasis added) (citing 40 C.F.R. § 124.19(a)). This is consistent with the Board's policy of "exercis[ing] its authority to review [PSD] permits sparingly," *Westborough and Westborough Treatment Plant Board*, 10 E.A.D. 297, 304 (EAB 2002), and "favor[ing] final adjudication of most permits at the regional level." *Hecla Mining Co., Lucky Friday Mine*, 13 E.A.D. __, slip op. at 10 (EAB 2006) (citing 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)).

In *Inter-Power*, for example, the Board "was careful to note [in its grant of review] that further briefing was needed because of 'the importance and factual complexity' of the issues presented and not because of any identifiable error" on the part of the permitting authority. 5 E.A.D. at 144. The Board therefore held that the petitioner must demonstrate "a clear error of fact or law" before the permit would be remanded. *Id.* Here, too, the Board's Order Granting Relief noted that "it may benefit from further briefing" because "this matter may be of national

significance"—not because of any error on the part of Region VIII. Order of 11/21/07 at 2. The standard set forth in 40 C.F.R. § 124.19(a) therefore applies, and the Sierra Club must demonstrate "a clear error of fact or law" before the Board can grant relief. *Inter-Power*, 5 E.A.D. at 144.[1]

Moreover, although the Board does not give *Chevron* deference to the statutory interpretation of any particular branch of the EPA because "the Board serves as the final decisionmaker for EPA," *Lazarus, Inc.*, 7 E.A.D. 318, 351 n. 55 (EAB 1997), the Board *does* give "deference to a position when it is supported by Agency rulings, statements, and opinions that have been consistent over time." *Howmet Corp.*, 13 E.A.D. __, PSD Appeal No. 05-04, slip op. at 14 (EAB May 24, 2007); *see also Tondu Energy Co.*, 9 E.A.D. 710, 719 (EAB 2001) ("the Board has previously deferred to [EPA's] long-established PSD polic[ies]"); *AES Puerto Rico L.P.*, 8 E.A.D. 324, 340 (EAB 1999) (deferring to EPA's "established policy" relating to PSD permits). The rationale for this deference is the same as that underlying *Skidmore v. Swift*—namely, that an interpretation's "consistency with earlier and later pronouncements" gives it the "power to persuade," even if it lacks the formal "power to control." 323 U.S. 134, 140 (1944); *see Howmet*, 13 E.A.D. __, slip op. at 35 (quoting *Skidmore*). Moreover, such deference is especially appropriate where "the prior EPA interpretations cited by the parties directly address[] [Petitioner's] creative argument" about a disputed statutory term. *Id.* at 35. As shown below, not only has EPA's interpretation of the relevant statutory language remained "consistent over long periods of time," *id.*, but the prior interpretation cited by Region VIII has "directly addressed" (and refuted) the Sierra Club's arguments. Deference to EPA's longstanding interpretation is therefore doubly appropriate.

[1] Sierra Club tacitly concedes this point by characterizing the issue presented for review as a question of whether EPA's decision constituted "a clearly erroneous conclusion of law." Sierra Club Brief 4.

ARGUMENT

I. EPA Correctly Declined to Impose a BACT Emissions Limit on Carbon Dioxide Because Carbon Dioxide Is Not a "Pollutant Subject to Regulation" Under the Clean Air Act.

EPA correctly rejected Sierra Club's request to impose a BACT emissions limit on carbon dioxide because a BACT limit is appropriate only if carbon dioxide is a "pollutant subject to regulation under [the Clean Air Act]." 42 U.S.C. § 7475(a)(4); CAA § 165(a)(4). Although all parties agree that, in the wake of *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), carbon dioxide is a "pollutant," carbon dioxide is not "subject to regulation" under the Act because no provision of the Act requires control of carbon dioxide emissions. This interpretation is supported not only by the plain language and structure of the Clean Air Act, but also by longstanding EPA practice, decisions of the Board and D.C. Circuit, and important policy considerations. Sierra Club's petition should therefore be denied.

A. The plain meaning of the phrase "pollutant subject to regulation" requires actual control of emissions.

Sierra Club argues that carbon dioxide is "subject to regulation" by virtue of Section 821 of Public Law 101-549 ("Section 821"), which required EPA to "promulgate regulations . . . to require that all affected sources subject to Title V of the Clean Air Act . . . shall also monitor carbon dioxide emissions . . . [and to] require that such data be reported to the Administrator." 42 U.S.C. § 7651k note (a). According to Sierra Club, because "Congress ordered EPA 'to promulgate regulations'" requiring certain facilities to monitor and report their carbon dioxide emissions, carbon dioxide is "subject to regulation" under the Act. Sierra Club Brief ("Br.") 11.

Mere monitoring and reporting provisions, however, do not "subject" carbon dioxide to "regulation" because the plain meaning of those terms requires *control* of carbon dioxide emissions. *Black's Law Dictionary* defines "regulation" as "[t]he act or process of *controlling* by rule

or restriction." *Id.* at 1311 (8th ed. 1999) (emphasis added); *see also Webster's II New College Dictionary* 934 (1995) (defining "regulation" as "[a] principle, rule, or law designed for *controlling* or governing behavior") (emphasis added). Even Sierra Club's dictionary (Br. 12) lists as its *first* definition of "regulation" "the act of regulating," and defines the verb "regulate" as "to *govern* or *direct* according to rule" or "to bring under the *control* of law or constituted authority." *Merriam-Webster's Collegiate Dictionary* 1049 (11th ed. 2005) (emphasis added). Petitioner's reliance on the secondary definition of "regulation" does not change the result. The plain meaning of "regulation" requires control over what is regulated, and because monitoring and reporting procedures do not control carbon dioxide emissions, they do not subject carbon dioxide to "regulation" for purposes of BACT.

Even assuming, *arguendo*, that "regulation" simply means any "rule or order" (Br. 12-13) without any form of "control," Sierra Club ignores the additional statutory requirement that the pollutant be "subject to" regulation. The plain meaning of the phrase "subject to" also requires control (and Sierra Club does not contend otherwise). *Webster's*, for example, defines "subject" as "being under domination, control, or influence (often fol. by *to*)" *Random House Webster's Unabridged Dictionary* 1893 (2d ed. 2001); *see also, e.g., Webster's II New College Dictionary* 1097 (1995) (defining "subject" as "[b]eing under the authority, *control*, or power of another <*subject* to the law>" (emphasis added)). A pollutant is not "subject to" regulation, then, unless a regulation "controls" emissions of the pollutant. In the case of monitoring and reporting conditions, however, the only thing "controlled" is the facility that must monitor and report; carbon dioxide emissions can be unlimited. Thus, even accepting Sierra Club's definition of "regulation," it is the emitting *facility*, not carbon dioxide, that is "subject to" regulation.

The foregoing analysis also comports with everyday usage. For example, if EPA required power plants to monitor and report their hours of operation, but did nothing to limit those hours, one would say that *the power plants* were subject to regulation—not that their *hours of operation* were "subject to regulation." In the same way, facilities that must monitor and report their carbon dioxide emissions may themselves be "subject to regulation," but their emissions of *carbon dioxide*—which can be unlimited—are not.[2]

Lacking any substantive response to this interpretation of the Act, the Sierra Club argues that it is procedurally barred because "it is not a rationale on which EPA has ever relied." Br. 15 n.4. But this procedural objection ignores the fact that the Board—not "any individual component of the EPA"—"serves as the final decisionmaker for EPA." *Lazarus, Inc.*, 7 E.A.D. 318, 351 n. 55 (EAB 1997). Thus, the fact that there are limits on the Administrator's ability to rely on an alternative rationale when a final decision is appealed to the courts is irrelevant to this permit proceeding—where there has been no final decision. Instead, the Board is free to "accept, reject, *or modify* a legal interpretation presented to it by another component of the Agency based upon the Board's independent analysis of the merits of the interpretation." *Genesee Power Station Limited Partnership*, Order on Motion for Clarification, 1993 WL 473846, PSD Appeal Nos. 93-1 to 93-7 (Oct. 22, 1993) (emphasis added). The Board's authority in this regard is analogous to that of an appellate court, which can affirm the decision of a district court on any ground supported by the record. *Cf. In re Swine Flu Immunization Prods. Liability Lit.*, 880 F.2d 1439, 1444 (D.C. Cir. 1989) ("[I]t is settled law that an appellate court can affirm a district court

[2] Even Section 821, by its terms, requires regulation only of "affected sources," not of carbon dioxide emissions: "The Administrator of the Environmental Protection Agency shall promulgate regulations. . . *to require that all affected sources* subject to Title V of the Clean Air Act shall also monitor carbon dioxide emissions." Pub. L. 101-549, § 821(a).

judgment on the basis of 'any grounds which . . . support [it].'"). In short, nothing prevents the Board from affirming this straightforward interpretation of the Act.

The Sierra Club's only attempt to answer this argument is that, because "there could be no emissions without an emitter[,] [t]he pollutant and the source are inextricably regulated together." Br. 15 n.4. This is true but irrelevant. Of course one cannot regulate a pollutant without regulating the source. But it is a logical fallacy to say that the converse is also true—i.e., that one cannot regulate a source without also regulating a pollutant. Indeed, the Clean Air Act repeatedly distinguishes whether it is referring to a "*pollutant* subject to regulation" or a particular "*source*" or "*activity* subject to regulation."[3] Congress did just that in Section 165, ensuring that BACT would apply only when Congress had subjected a "pollutant" to regulation, not just a "source."

In short, Sierra Club would have the Board eliminate the critical distinction between a pollutant and its source, interpreting Section 165 to impose BACT not only on each pollutant "subject to" regulation, but also on any pollutant "mentioned in" a regulation—even if emissions of the pollutant itself can be unlimited. The Board should reject this attempt to re-write the Act.

B. The structure, context, and purpose of the Clean Air Act presume actual control of emissions before the imposition of BACT.

The structure, context, and purpose of the Clean Air Act also confirm that "subject to regulation" requires actual control of emissions. Section 165(a)(4) (which provides for BACT) does not purport to define which pollutants must be subject to regulatory control, let alone bring

[3] *See, e.g.*, 42 U.S.C. § 7412(a)(2) ("*vehicles* subject to regulation"); *id.* at § 7412(b)(2) ("*releases* subject to regulation"; "*substance, practice, process or activity* . . . subject to regulation"); *id.* at § 7412(c)(3) ("*sources* . . . subject to regulation"); *id.* at § 7412(f)(1)(A) ("*sources* subject to regulation"); *id.* at § 7412(j)(5) ("*hazardous air pollutants* subject to regulation"); *id.* at § 7412(r)(3) ("*substance, practice, process, or activity* . . . subject to regulations"); *id.* at § 7412(r)(7)(F) ("*source* . . . subject to regulations"); *id.* at § 7475(e)(1) ("*pollutant* subject to regulation"); *id.* at § 7479(3) ("*pollutant* subject to regulation"); *id.* at § 7511b(f)(4) ("*tank vessels* subject to regulation"); *id.* at § 7543(e)(1) ("*nonroad engines or nonroad vehicles* subject to regulation").

new pollutants under control. It merely establishes one means of reducing emissions (i.e., BACT) for pollutants already "subject to regulation" under the Act. Viewed in this context, the plain meaning of the phrase "pollutant subject to regulation" contemplates, as a pre-requisite, a clear expression of intent elsewhere in the Act to *control* emissions of the pollutant in question. Otherwise, section 165(a)(4) would lead to an absurd result: it would require the use of "*best available control technology*" for carbon dioxide emissions even without any mandate, either in law or regulation, to control those emissions (through technology *or* other means). Indeed, Sierra Club's interpretation of section 165(a)(4) would make the narrow PSD permitting context the *only* context in which control of carbon dioxide emissions was required. All other sources in all other contexts would be free to emit carbon dioxide without limits. Sierra Club has failed to point to any other pollutant in the history of the Act that has ever received such treatment, and nothing in Section 165 suggests that Congress intended this strange result.

Other provisions of the Act also presuppose control of carbon dioxide emissions before BACT analysis applies. For example, Section 165(e) states that the BACT analysis "*shall be preceded* by an analysis . . . of the ambient air quality at the proposed site . . . for each pollutant subject to regulation under this Act . . . for purposes of determining *whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration [of the pollutant] permitted under this part.*" CAA § 165(e)(1)-(2), 42 U.S.C. § 7475(e)(1)-(2) (emphasis added). Before any pollutant may be subjected to BACT analysis, then, there must be existing limits—i.e., "maximum allowable increases" or a "maximum allowable concentration"—for that pollutant. But EPA has not made any endangerment finding for carbon dioxide, and thus has not proposed "maximum allowable" increases or concentrations for carbon dioxide.

It is therefore impossible to conduct BACT analysis for carbon dioxide while still satisfying the other requirements of Section 165(e).

Similarly, the definition of "best available control technology" (contained in Section 169(3)) states that "[i]n no event shall application of 'best available control technology' result in emissions of any pollutants which will exceed *the emissions allowed by any applicable standard established pursuant to section 111 or 112 of this Act.*" CAA § 169(3), 42 U.S.C. § 7479(3) (emphasis added). Again, the application of BACT presupposes an *existing standard* imposed elsewhere in the Act—this time a standard of performance under Section 111 or a hazardous air pollutant standard under Section 112. But EPA has not made an endangerment finding for carbon dioxide, let alone promulgated standards of performance under Section 111. Sierra Club's interpretation of "subject to regulation" thus renders this critical portion of the definition of BACT in Section 169(3) meaningless.

More fundamentally, the stated 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." CAA § 160(1), 42 U.S.C. § 7470(1). The imposition of BACT thus presupposes that the Administrator has made a "judgment" that certain pollutants are a threat to public health and welfare, a conclusion that can be reached only *after* EPA makes an endangerment finding. The Sierra Club, by contrast, *assumes* that carbon dioxide endangers public health and welfare and argues that imposing BACT limits on carbon dioxide makes sense because it will help "generate useful information about the costs of achieving carbon reductions." Br. 20. Even assuming that were true, however, Sierra Club's cart-before-the-horse approach would prevent EPA from gathering information necessary for an endangerment finding without immediately triggering stringent BACT controls. Nothing in the

Act suggests that Congress intended such a result. To the contrary, the logic of *all* of the foregoing CAA provisions is that BACT requirements—which by definition evolve with improvements in technology—will operate if at all as a supplement to, not in place of, other emission controls (such as NAAQS review, New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants (NESHAP), and emission standards for mobile sources), which set a ceiling above which the emissions of a particular pollutant may not rise.[4]

Nor is there any merit to Sierra Club's contention that EPA's interpretation gives a different meaning to the term "regulation" in different parts of the Act. Br. 16-18. According to Sierra Club, because Section 821 calls for "regulations" requiring certain sources to monitor their carbon dioxide emissions, anything promulgated pursuant to Section 821 must also subject carbon dioxide to "regulation." Br. 11. Again, however, Sierra Club ignores the fact that it is not just any "regulation" that triggers BACT, but a provision that renders carbon dioxide a "*pollutant subject to* regulation." CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4) (emphasis added). Absent control of carbon dioxide emissions, then, there is no inconsistency in concluding that "regulations" promulgated pursuant to Section 821 do not "subject" *carbon dioxide* to regulation under Section 165(a)(4). In other words, this is not a different use of the term "regulation"; it is a difference in what is "subject to" regulation.

Sierra Club's argument, by contrast, would eliminate any distinction between regulations that actually control emissions and administrative regulatory requirements that impose a wide

[4] For the same reason, Sierra Club's casual assertion that BACT analysis is always a unique, local, creative process because it is "inherently a case-by-case standard setting process" also misses the mark. Br. 19. "Case by case" decisionmaking is certainly an element of BACT analysis, but permit issuers routinely conduct BACT analysis that refers to EPA's New Source Review Manual, previous BACT determinations in the RACT/BACT/LAER Clearinghouse, PSD increments, SIPs, and other existing regulations. The absence of such guidance for carbon dioxide thus presents a significant barrier to conducting a sensible BACT analysis.

variety of programs, procedures, or practices having nothing to do with limiting or controlling emissions—a distinction Congress maintained throughout the Act. *See, e.g.*, n.3 supra.[5]

Sierra Club also argues that, if Congress intended to require actual control of emissions, it could have simply substituted the defined terms "emission limitation," "emission standard," and "standard of performance" for "regulation" in Section 165(a)(4). Br. 14-15. But Congress would have had to include many more terms than those to cover all means of controlling emissions. Section 172(c)(6), for example, permits the use in non-attainment areas of "other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances)." 42 U.S.C. § 7602(y).[6] Of course, Congress *could* have used the term "each pollutant subject to an emission limitation, emission standard, standard of performance, or other control measures, means or techniques for controlling emissions (including economic incentives, such as marketable permits or auctions of emissions allowances) under this Act." But using the term "subject to regulation" is a much simpler means of achieving the same result, and the Sierra Club has offered no reason why Congress could not choose to adopt it.

C. EPA's longstanding interpretation of the Act is entitled to deference and is not "clearly erroneous."

Not only does the plain language and structure of the Act indicate that "subject to regulation" requires actual control of emissions, but this has also been EPA's consistent interpretation of the Act for thirty years. EPA Resp. to Pet. 12. Sierra Club quibbles with a few examples of

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[5] While EPA is correct that it has discretion to interpret the same terms differently where the context so permits, EPA Resp. to Pet. 14-15 (citing *Environmental Defense v. Duke Energy Corp.*, 127 S.Ct. 1423, 1432 (2007)), that argument is not necessary here. The plain language of section 165 ("pollutant subject to") requires control of emissions regardless of whether one adopts the plain meaning of "regulation" throughout the statute, or adopts Sierra Club's broader interpretation of that term.

[6] It is beyond the scope of this permit appeal to determine whether, for purposes of section 165(a)(4), a scheme such as economic incentives or auctioned carbon dioxide allowances, if adopted, would necessarily trigger BACT for carbon dioxide. Nevertheless, these provisions further demonstrate that the defined terms "emissions limitation" or "emissions standard" are much narrower than the interpretation of "regulation" that has been adopted and followed by EPA.

EPA's early interpretations, calling them "equivocal" or irrelevant, but fails to put forward a single instance in all of EPA history in which the Agency interpreted "subject to regulation" to mean anything less than actual control of emissions.[7]

In the preamble to the very first PSD regulations promulgated in 1978, EPA explained that the term "subject to regulation . . . includes all criteria pollutants subject to NAAQS review, pollutants regulated under the Standards of Performance for new Stationary Sources (NSPS), pollutants regulated under the National Emission Standards for Hazardous Air Pollutants (NESHAP), and all pollutants regulated under Title II of the Act regarding emission standards for mobile sources." 43 Fed. Reg. at 26,397 (June 19, 1978). Sierra Club does not dispute (nor could it) that each of these provisions involves actual control of emissions. Br. 25-26 & n.9.

In 1993, shortly after EPA promulgated regulations implementing Section 821 of Public Law 101-549, the Office of Air and Radiation issued an interpretation specifically considering whether the carbon dioxide monitoring program instituted under Section 821 rendered carbon dioxide "subject to regulation" under the Act. Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, *Definition of Regulated Air Pollutant for Purposes of Title V* (Apr. 26, 1993) (available at http://www.epa.gov/Region7/programs/artd/air/title5/t5memos/rapdef.pdf). The Wegman memo concluded that carbon dioxide was not a "pollutant subject to regulation" *both* because it was not a "pollutant," *and* because section 821 "involve[d] actions such as reporting and study, *not actual control of emissions*." *Id.* at 5 (emphasis added). Although Sierra Club argues that the Court in *Massachusetts* "completely under-

[7] Sierra Club's real complaint is not any inconsistency on the part of EPA, but Sierra Club's perception that EPA adopted its interpretation of the Act "without adequate opportunity for public input." Br. 21. As explained in Part I.E below, however, Sierra Club is barking up the wrong tree. If it wants "opportunity for public input," it should not attempt to sneak nationwide PSD permitting requirements through the back door of a single permit proceeding; it should petition EPA to conduct a rulemaking. That, of course, is what EPA is already considering in the wake of *Massachusetts v. EPA*. But Sierra Club is apparently unwilling to await the outcome.

mined [the Wegman Memo's] rationale," Br. 21-22, *Massachusetts* addressed only whether carbon dioxide is a pollutant. 127 S. Ct. at 1460. The Court left the question of whether Section 821 "subjects" carbon dioxide to regulation—and the Wegman Memo's ultimate conclusion—undisturbed.

Even when EPA changed course in 1998 and decided that carbon dioxide was a "pollutant," it still maintained that carbon dioxide was not "subject to regulation" under the Act. As EPA's General Counsel explained:

> EPA's regulatory authority under the Clean Air Act extends to air pollutants . . . includ[ing] SO_2, NO_x, ***CO_2***, and mercury emitted into the ambient air. EPA has in fact already regulated each of these substances under the Act, *with the exception of CO_2*. While CO_2 emissions are within the scope of EPA's authority to regulate [as an air pollutant], 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, *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources*, at 5 (Apr. 10, 1998) (emphasis added). In short, even as EPA's interpretation of "pollutant" has changed—sometimes including carbon dioxide, sometimes not—its interpretation of "subject to regulation" has remained consistent for 30 years, never requiring anything less than actual control of emissions. As the Cannon memo explains, until "the Administrator has made [a] determination . . . to exercise [his] authority [to regulate carbon dioxide] under the specific criteria provided under" the Act—including an endangerment finding—carbon dioxide is not "subject to regulation."

Furthermore, in PSD rules proposed in 1996, and in final rules promulgated in 2002, EPA listed every pollutant that it considered "currently regulated under the Act." PSD and NSR: Baseline Emissions Determination, 67 Fed. Reg. 80186, 80240 (Dec. 31, 2002) (to be codified at 40 C.F.R. Parts 51 and 52). Every pollutant on the list was subject to a statutory or regulatory

provision requiring actual control of emissions, and carbon dioxide was not on the list—again confirming that "subject to regulation" requires actual control of emissions. *Id.*; EPA Resp. to Pet. 8-9. Indeed, Sierra Club then had the opportunity to comment on this interpretation, but failed to do so. The Board should not permit Sierra Club to mount a belated collateral attack on EPA's interpretation of "subject to regulation" here, in the context of an individualized decision whether to grant a PSD permit. *See* 42 U.S.C. § 7607(b)(1) (providing a 60-day period for bringing a D.C. Circuit challenge to nationally applicable agency rules); *National Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1150 (D.C. Cir. 2002) (holding that a challenge to the Tier 2 Rule establishing new emission standards for light-duty vehicles was time-barred because it was not brought within sixty days of promulgation).

EPA's longstanding interpretation is entitled to significant weight. As explained above, "the Board serves as the final decisionmaker for EPA"—and thus does not give *Chevron* deference to the statutory interpretation of "any individual component of the EPA." *Lazarus, Inc.*, 7 E.A.D. 318, 351 n. 55 (EAB 1997). But the Board *does* give "deference to a position when it is supported by Agency rulings, statements, and opinions *that have been consistent over time*." *Howmet Corp.*, 13 E.A.D. __, PSD Appeal No. 05-04, slip op. at 14 (EAB May 24, 2007) (emphasis added). Moreover, such deference is especially appropriate where "the prior EPA interpretations cited by the parties directly address[] [Petitioner's] creative argument" about the disputed statutory term. *Id.* at 35.

Here, not only has EPA's interpretation of "subject to regulation" been "consistent over time," *id.* at 14, it has remained unchanged even when the Agency took new positions on closely related terms—such as whether carbon dioxide falls within the definition of "pollutant." More-

over, the 1993 Wegman memo "directly addresses" the specific argument that Sierra Club raises here. *Id.* at 35. Deference to EPA's longstanding interpretation is therefore appropriate.

Finally, even if EPA's interpretation were not required by the plain language of the Act and supported by longstanding practice (as explained above), Sierra Club has failed to show that it is "clearly erroneous." *See* 40 C.F.R. § 124.19(a)(1); *Inter-Power*, 5 E.A.D. at 144 (even after a grant of review, the Petitioner seeking remand must demonstrate "a clear error of fact or law"). At most, Sierra Club has offered an alternative interpretation of the Act that might be permissible. Sierra Club's request for a remand should therefore be denied. *National Pollutant Discharge Elimination System Permit For: Collier Carbon and Chemical Corporation*, 1 E.A.D. 267 (EAB 1976) (denying review because EPA's statutory interpretation was not "clearly erroneous").

D. Decisions of the EAB and D.C. Circuit support EPA's interpretation.

EPA's interpretation is also supported by decisions of the EAB and D.C. Circuit. In *Inter-Power*, 5 E.A.D. 130, 151 (EAB 1994), shortly after EPA promulgated regulations implementing Section 821, the petitioner argued that the permitting authority should have imposed a BACT emissions limit on carbon dioxide and hydrogen chloride. The EAB, however, rejected this argument, explaining that "[b]oth carbon dioxide and hydrogen chloride are . . . *unregulated* pollutants. In such circumstances, the Region was not required to examine control technologies aimed at controlling these pollutants." *Id.* (emphasis added). Importantly, the Board did not rest its decision on the conclusion that carbon dioxide was not a pollutant, but on the fact that it was "unregulated." Sierra Club glibly dismisses the Board's analysis as "perfunctory," Br. 27, but that does not make it any less correct—let alone any less binding.

Even more tellingly, in *Kawaihae Cogeneration Project*, 7 E.A.D. 107, 132 (EAB 1997), the EAB again rejected the argument that a PSD permit should have included controls for carbon

dioxide. As the Board explained, the permitting authority did not err (let alone clearly so) in concluding that "[c]arbon dioxide is not considered a regulated air pollutant for permitting purposes" because "at this time *there are no regulations or standards prohibiting, limiting or controlling the emissions of greenhouse gases.*" *Id.* (emphasis added). Again, the decision rested not on the fact that carbon dioxide was not a pollutant, but on the fact that there were no "regulations . . . controlling the emissions of greenhouse gases." *Id.* The Board thus affirmed the same interpretation that EPA advances here.

Finally, *Alabama Power v. Costle*, 636 F.2d 323, 405-06 (D.C. Cir. 1979), strongly supports EPA's longstanding interpretation of "subject to regulation." There, industry groups argued that newly enacted PSD provisions covered only the two pollutants for which Congress had previously established PSD increments (sulfur dioxide and particulate matter), not pollutants for which EPA was required to promulgate emission controls but had not yet done so. *Id.*

In rejecting this argument, the court explained that "[t]he statutory language leaves no room for limiting the phrase 'each pollutant subject to regulation' to sulfur dioxide and particulates" because "the Act does not limit the applicability of PSD only to one or several of the pollutants *regulated under the Act*." *Id.* at 406, 404 (emphasis added). In other words, once Congress has "regulated" a pollutant under the Act—by unequivocally requiring EPA to promulgate regulations controlling the emissions of that pollutant—PSD limits apply, even if EPA is still conducting the studies required to determine the appropriate *level* of emissions control. As the court explained, "pollutants become 'subject to regulation' within the meaning of section 165(a)(4), 42 U.S.C. [§] 7475(a)(4) (1978), the provision requiring BACT prior to PSD permit approval" "[*o*]*nce a standard of performance has been promulgated* for [those pollutants]." *Id.*

at 370 n.134 (emphasis added). *Alabama Power* thus supports EPA's position that all pollutants subject to rules requiring actual control of emissions under the Act are "subject to regulation."[8]

Each pollutant at issue in *Alabama Power* was either already subject to emission controls or was governed by a provision of the Clean Air Act expressly requiring emission controls once EPA had conducted the requisite studies. Here, by contrast, there is no statutory requirement to control emissions of carbon dioxide, and the Agency itself has not made any endangerment finding that would independently support subjecting carbon dioxide to such limitations. Indeed, the Supreme Court itself emphasized in *Massachusetts* that EPA need not (and cannot) regulate carbon dioxide unless and until it "makes a finding of endangerment." 127 S. Ct. at 1462. Much as the Sierra Club might like it to be, that finding is not a foregone conclusion. It is therefore unclear when, if ever, carbon dioxide will become subject to emission controls under the Act.[9]

E. Policy considerations support EPA's interpretation.

A wide variety of policy considerations also counsel against Sierra Club's attempt to jump the endangerment-finding gun. Most importantly, as Sierra Club and its *amici* have amply pointed out, EPA is in the process of deciding whether to make an endangerment finding, as well as weighing how such a finding might affect the New Source Review program. *See* Br. 31 n.10;

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[8] *Alabama Power* highlights Congress's intent in enacting Section 165(a)(4). Even though NAAQS had not yet been promulgated for all of the regulated pollutants (such as "hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides" covered in Section 166(a)), Congress created the "best available control technology" standard to be applied as an additional, independent control on emissions of regulated pollutants from new sources under the Act. If, through implementation of BACT, emissions at any given source could be controlled at a level *lower* than that required to attain the NAAQS for a regulated pollutant, then section 165(a)(4) required that level of control, regardless of what NAAQS had been adopted. Likewise, as technology improves and becomes commercially and economically viable, BACT becomes more stringent independently of the NAAQS. That is why, as the court decided in *Alabama Power*, there was no need to wait for promulgation of the NAAQS before requiring BACT for those pollutants for which Congress had unequivocally required EPA to control emissions.

[9] Assuming, *arguendo*, EPA *does* make an endangerment finding, "the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles." *Massachusetts*, 127 S. Ct. at 1462 (citing CAA § 202(a)(1), 42 U.S.C. § 7521(a)(1)). Stationary sources are subject to different provisions of the Act. But at a minimum, unless and until EPA makes an endangerment finding, *Alabama Power* provides no support to the Sierra Club; rather, it confirms that a pollutant is not "subject to regulation" unless a statutory or regulatory provision requires actual control of emissions.

Brief of *Amici Curiae* States of New York *et al.* 8-9 & 4 n.1. Sierra Club's petition would short circuit this process—not to mention 30 years of consistent regulatory practice—by imposing nationwide limits on carbon dioxide emissions without the benefit of notice and public comment rulemaking. Indeed, despite Sierra Club's complaints about the lack of "meaningful public participation," Br. 31-33, it is not Region VIII, but rather Sierra Club, that is attempting to change the status quo—and it is attempting to do so not in a participatory forum such as notice-and-comment rulemaking, but through remand of a single PSD permit.[10]

Moreover, imposing BACT requirements before EPA has had an opportunity to complete notice-and-comment rulemaking may have a number of unintended consequences. If, as Sierra Club and its *amici* predict, EPA made an endangerment finding for carbon dioxide under Section 202(a)(1), carbon dioxide would become subject to statutory provisions requiring actual control of emissions (and, thus, arguably "subject to regulation" even under EPA's interpretation of that term). But if the Board adopts Sierra Club's broad reading of "subject to regulation," its decision could have sweeping consequences that far outlast the present dispute over carbon dioxide.

For example, because EPA has not made an endangerment finding, it has not had an opportunity to promulgate a significance threshold emissions level for carbon dioxide. That means that any source emitting more than 250 tons of carbon dioxide per year would be a "major"

[10] Although EPA may have discretion to interpret the Clean Air Act through adjudication rather than notice and comment rulemaking, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), that discretion is not unlimited. A decision to proceed by adjudication is still subject to review and reversal under the Administrative Procedure Act if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Michigan v. EPA*, 268 F.3d 1075, 1087-88 (D.C. Cir. 2001). It is also subject to the constitutional constraints of due process. *Id.* Overturning 30 years of EPA practice and adopting broad new PSD rules without any opportunity for notice or public comment might well run afoul of those provisions. *See, e.g., NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (agency may not avoid "[t]he rule-making provisions of th[e] Act . . . by the process of making rules in the course of adjudicatory proceedings."). And even if it does not, notice-and-comment rulemaking makes far more sense as a policy matter. It ensures not only that the regulated public will receive a fair opportunity to participate, but also "that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions." *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987). The Board should therefore reject Sierra Club's attempt to make sweeping new regulatory changes through *ad hoc* PSD permit challenges.

source subject to PSD permit requirements. *See* 40 C.F.R. § 52.21(b)(1)(i)(b). Sierra Club does not dispute that this low threshold could trigger the PSD permitting process for all sorts of fixed installations with a boiler or furnace—such as hospitals, small factories, small industrial plants, large office buildings, schools, or shopping malls, to name a few. Br. 20 n.6; *see also* Testimony of Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency, Before the Select Committee on Energy Independence and Global Warming, U.S. House of Representatives, at 4 (March 13, 2008) (available at http://globalwarming.house.gov/tools/assets/files/0425.pdf) ("Using a 250-ton per year threshold, examples of facilities that could be newly subject to Clean Air Act permitting requirements [if CO2 were made subject to regulation under the CAA] include large apartment buildings, schools, hospitals and retail stores.").[11] Natural gas-fired and other combustion-based installations would be equally susceptible to BACT for their units, possibly including retrofitting with BACT for any major modifications to existing units. EPA should have an opportunity to consider these potentially sweeping changes through notice-and-comment rulemaking, fully involving the public, before they are imposed preemptively through litigation. And Deseret and the regulated community should be given notice and an opportunity to be heard before such a change is implemented.

Sierra Club's interpretation, if accepted, would also render oxygen and water vapor subject to PSD permitting requirements and BACT analysis. Under the Supreme Court's interpretation of "pollutant" in *Massachusetts*, "all airborne compounds of whatever stripe" are pollutants, as long as they are "physical and chemical substances which are emitted into the ambient air."

[11] As an illustration, according to EPA's web-based "personal emissions calculator," a "significance" level of 250 tons per year, would be triggered by any source which burned at least 4,147 decatherms of natural gas annually, or about $4,780 per month (at typical U.S. utility rates for residential customers). For larger consumers, at current market prices of $7 per decatherm for wholesale supply, that equates to only $29,029 per year worth of natural gas (about $2,419 per month). Many if not most heated spaces in larger commercial, educational, governmental, military, and industrial settings would satisfy that threshold. *EPA Website Calculator available at:* http://www.epa.gov/climatechange/emissions/ind_calculator.html.

127 S.Ct. at 1460 (alterations omitted). Oxygen and water vapor, of course, fit this definition (a point Sierra Club does not dispute). *Id.* at 1476 n.2. Indeed, water vapor is a more significant greenhouse gas than carbon dioxide. USEPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2005* at 1-3 (Apr. 15, 2007) ("Overall, the most abundant and dominant greenhouse gas in the atmosphere is water vapor.") (available at http://www.epa.gov/climatechange/emissions/downloads06/07CR.pdf.); *Encyclopaedia Britannica*, Greenhouse Effect, Encyclopaedia Britannica Online (2008) (available at http://www.britannica.com/eb/article-9037976/greenhouse-effect) (stating that "water vapour has the largest effect" of all of the greenhouse gases).

Oxygen and water vapor would also be "subject to regulation" under Sierra Club's interpretation because the same Part 75 regulations that require monitoring and reporting of carbon dioxide also require monitoring and reporting of oxygen and water vapor emissions. Oxygen is used as a diluent released along with other gases and must be monitored, among other things, to help track carbon dioxide emissions. *See, e.g.*, 40 C.F.R. § 75.10(a)(3)(iii) ("The owner or operator shall install, certify, operate, and maintain . . . a flow monitoring system and a CO_2 continuous emission monitoring system that uses an *O_2 concentration monitor* to determine CO_2 emissions (according to the procedures in appendix F of this part) with *an automated data acquisition and handling system for measuring and recording O_2 concentration* (in percent), CO_2 concentration (in percent), volumetric gas flow (in scfh), and CO_2 mass emissions (in tons/hr) discharged to the atmosphere.") (emphasis added).

Water vapor, similarly, is released together with NO_X and must be monitored and recorded as a means of tracking NO_X emissions. *See, e.g.*, 40 C.F.R. § 75.19(c)(1)(iv)(H)(1) ("Owners or operators must include in the [NO_X] monitoring plan the acceptable range of the

water-to-fuel or steam-to-fuel ratio, which will be used to indicate hourly, proper operation of the NO_X controls for each unit. The water-to-fuel or *steam-to-fuel ratio shall be monitored and recorded during each hour of unit operation.*") (emphasis added). Under Sierra Club's interpretation, these monitoring and reporting requirements would render oxygen and water vapor "subject to regulation" under the Act, thus triggering PSD permitting and BACT requirements for both constituents.

Sierra Club's lone answer to this point is that "[o]xygen and water vapor are only mentioned in the implementing regulations, simply as markers to calculate emissions of other gases and are not themselves '*subject to*' any form of regulation." Br. 20 n.6 (emphasis added; citations omitted). But Sierra Club's belated reliance on the phrase "subject to" provides no reasoned basis for distinguishing carbon dioxide from oxygen or water vapor. All three must be monitored under the same Part 75 "regulations" and all three are subject to the same enforcement provisions on which Sierra Club places so much weight. Br. 11 n.2, 13 & 35 (citing 40 C.F.R. § 75.5). There is simply no basis for giving "subject to regulation" one meaning when applied to carbon dioxide and another when applied to oxygen or water vapor, and the Board should reject an interpretation of "subject to regulation" that leads to such unintended consequences.[12]

[12] Indeed, if mere monitoring or reporting requirements are sufficient to render a pollutant "subject to regulation under this Act," the Administrator might trigger PSD permitting requirements for any number of pollutants simply by exercising his broad authority under Section 114 of the Act to gather information on emission sources. Section 114 authorizes the Administrator to "require any person who owns or operates an emission source . . . to . . . (A) establish and maintain such records; (B) make such reports; (C) install, use, and maintain such monitoring equipment, . . . ; (D) sample such emissions . . . ; (E) keep records on control equipment parameters, production variables or other indirect data when direct monitoring of emissions is impractical; (F) submit compliance certifications in accordance with subsection (a)(3) of this section; and (G) provide such other information as the Administrator may reasonably require." CAA § 114(a)(1); 42 U.S.C. § 7414(a)(1); *United States v. Tivian Laboratories, Inc.*, 589 F.2d 49 (1st Cir. 1978) (discussing EPA's authority). On Sierra Club's theory, if the Administrator required a source to "install . . . monitoring equipment" and report emissions of a particular pollutant under Section 114, that pollutant would become "subject to regulation"—and, thus, subject to full PSD permitting requirements—even if it was not subject to control anywhere else under the Act.

II. Carbon Dioxide Is Not Regulated "Under the Clean Air Act" Because Neither Section 821 of Public Law 101-549 Nor State Implementation Plans Are Part of the Act.

Even if Sierra Club's interpretation of "subject to regulation" were correct, requiring a BACT analysis here would nonetheless be unlawful. Section 165(a)(4) requires BACT analysis for each pollutant subject to regulation "*under [the Clean Air] Act*." CAA § 165(a)(4) (emphasis added); 42 U.S.C. § 7475(a)(4) ("pollutant subject to regulation *under this chapter*") (emphasis added). But it is undisputed that the phrase "under this Act" (or "under this chapter") unambiguously refers to the Clean Air Act—not to other legislative enactments or state activities that may address air pollution but are not part of the Clean Air Act—and neither Section 821 nor State Implementation Plans (SIPs) are part of the Clean Air Act. Indeed, Sierra Club's reading of Section 165(a)(4) effectively replaces the phrase "subject to regulation under this Act" with "subject to regulation *by the Administrator or a State*."

A. Section 821 is not part of the Clean Air Act.

What Sierra Club calls "Section 821 of the [Clean Air] Act," Br. 2, 10, is actually Section 821 of Public Law 101-549, sometimes referred to as the Clean Air Act Amendments of 1990.[13] Recognizing this fact, Sierra Club nevertheless argues that Section 821 is part of the Clean Air Act for two reasons: (1) as part of the 1990 Clean Air Act Amendments, "the logical presumption is that the provisions of this enactment became a part of the Clean Air Act absent some indication that Congress intended otherwise"; and (2) "separating [Section 821] from the [rest of the Clean Air] Act would render it incoherent" because the monitoring requirements of Section 821

[13] The Clean Air Act, as enacted by Congress, does not contain a section numbered "821"—it begins with Section 101 and continues through Section 618 and no further. Moreover, as arranged and codified by the Office of Law Revision Counsel of the U.S. House of Representatives, the language of Section 821 was never incorporated into the codification of any portion of the Clean Air Act itself. For ease of reference, the codifiers placed it *with* the sections of the U.S. Code that contain the Clean Air Act's provisions, likely because of its relation to the subject matter involved, but included it only as an explanatory note following 42 U.S.C. § 7651k. By law, of course, while the U.S. Code may be used as "*prima facie* evidence" of the law in effect, the U.S. Statutes at Large, consisting of the publication, in chronological order, of the Public Laws passed by Congress and signed by the President, remains the ultimate authority. 1 U.S.C. § 112.

are inextricably linked to the enforcement provisions of Section 412 of the Clean Air Act. Br. 34-35. Neither argument has merit.

First, Congress *did* indicate, in plain language, that Section 821 was not part of the Clean Air Act. Public Law 101-549 obviously contained many provisions amending the Clean Air Act, but not every provision did so. Throughout the legislation, Congress made clear when it was adding or altering a provision of the Clean Air Act and when it was not. When it wanted to amend the Clean Air Act, Congress used specific amendatory language: e.g., "Title III of the Clean Air Act is amended by adding the following new section after section 327: . . ." § 801, Pub. L. 101-549; *see also, e.g.*, § 802(a) ("Subparagraphs (A) and (B) of section 105(a)(1) of the Clean Air Act are amended to read as follows: . . .").

Section 821, by contrast, contains no expression of amendatory intent. It is included as a freestanding provision in Title VIII of the Public Law, entitled "Miscellaneous Provisions":

> (a) MONITORING.—The Administrator of the Environmental Protection Agency shall promulgate regulations within 18 months after the enactment of the Clean Air Act Amendments of 1990 to require that all affected sources subject to title V of the Clean Air Act shall also monitor carbon dioxide emissions according to the same timetable as in section 511(b) and (c). The regulations shall require that such data be reported to the Administrator. The provisions of section 511(e) of title V of the Clean Air Act shall apply for purposes of this section in the same manner and to the same extent as such provision applies to the monitoring and data referred to in section 511.[14]

Many other "Miscellaneous Provisions" of Title VIII were likewise freestanding provisions and made no changes to the Clean Air Act. *See, e.g.*, Section 807 (ordering EPA and NASA to conduct a study on the development of a hydrogen fuel cell electric vehicle), Section 808 (ordering FERC and EPA to study the benefits of renewable energy), Section 809 (ordering EPA to conduct a study of the causes of degraded visibility in southwestern New Mexico), and Section 814

[14] The Reporter's notes indicate that references to Title V are meant to refer to Title IV, and references to Section 511 are meant to refer to Section 412.

(expressing the sense of Congress that equipment and technology used to comply with the Clean Air Act should be manufactured in America). The absence of amendatory language indicates that none of these provisions—including Section 821—ever became part of the Clean Air Act.

Another textual difference between the freestanding provisions, such as Section 821, and those provisions that actually amended the Clean Air Act is how each set of provisions referred to the Act itself. The provisions that actually amended and were incorporated into the Clean Air Act refer to the Act as "this Act." *See, e.g.*, § 701, Pub. L. 101-549 (amending Section 113(a)(4) of the Clean Air Act to state that "[n]o order issued under this subsection shall prevent the State or the Administrator from assessing any penalties nor otherwise affect or limit the State's or the United States authority to enforce under other provisions of *this Act*, nor affect any person's obligations to comply with any section of *this Act*") (emphasis added). Because these provisions were made part of the Act, it is clear that "this Act" refers to the Clean Air Act. Section 821, by contrast, refers not to "this Act" but to "the Clean Air Act." *See, e.g.*, § 821(a), Pub. L. 101-549 (stating that the Administrator "shall promulgate regulations . . . to require that all affected sources subject to title [IV] of *the Clean Air Act* shall also monitor carbon dioxide emissions . . .") (emphasis added). If the drafters had intended Section 821 to be part of the Clean Air Act, however, it would have been unnecessary to specify "the Clean Air Act"; they could have simply said "this Act." This is further evidence that Section 821 was never intended to be part of the Clean Air Act.

Second, Sierra Club argues that the reference in Section 821 to Section 412 of the Clean Air Act renders Section 821 part of the Clean Air Act. Br. 34-35. Section 821 states that EPA must promulgate regulations requiring the monitoring of carbon dioxide "according to the same timetable as in section [412](b) and (c)," and that "[t]he provisions of section [412](e) of title

[IV] of the Clean Air Act [which make it 'unlawful' to violate the monitoring provisions] shall apply for purposes of this section in the same manner and to the same extent as such provision applies to the monitoring and data referred to in section [412]." Pub. L. 101-549 § 821(a). In other words, Sierra Club says, Section 821 "borrows" the timetables and enforcement provisions of Section 412 of the Clean Air Act, making the implementation and enforcement of Section 821 dependent on Section 412, and thus rendering Section 821 part of the Act. Br. 34.

The problem with this argument is that if Congress had wanted to make Section 821 part of the Clean Air Act, it easily could have done so simply by amending Section 412 to include a short subsection on monitoring and reporting carbon dioxide emissions. Indeed, this approach would have been far easier and clearer than enacting a separate provision referencing certain portions of Section 412. The fact that Congress did not take this approach strongly suggests that it did *not* intend that Section 821 would be part of the Act.

The legislative history surrounding Section 821 explains why: the proponents of the amendment faced significant opposition to any suggestion that Section 821 might require reductions of carbon dioxide emissions. By enacting Section 821 as a freestanding provision, the proponents of that section made clear to its opponents that it would not be used as a pretext for requiring such emissions controls. During the House debate on H.R. 3030 on May 23, 1990, for example, Congressman Cooper (D-TN) emphasized that Section 821:

> does not force [carbon dioxide] reductions. Also, this amendment [to Public Law 101-549] does not require installation of expensive monitoring equipment. You can fulfill the requirements of this amendment by fuel sampling or fuel analysis, so this is not an expensive amendment.

W. Hein, *A Legislative History of the Clean Air Act Amendments of 1990* at 2985 (1998). Other proponents of Section 821 likewise made clear that it was not designed to require emissions controls on carbon dioxide but merely to gather information in anticipation of the possibility of fu-

ture regulation. *See* Brief *Amicus Curiae* of the Utility Air Regulatory Group at 12-20 (discussing the legislative history of Section 821 and the 1990 Clean Air Act Amendments); EPA Resp. to Pet. 18 (citing Statements of Congressman Moorhead, House Debates on May 17 and 23, 1990, *reprinted in* Senate Committee on Environment and Public Works, Legislative History of Clean Air Act Amendments of 1990 (Comm. Print, Nov. 1993), at 2613 and 2985-87; Statement of Congressman Cooper, House Debates on May 17, 1990, *id.* at 2563).

Perhaps even more tellingly, Congressman John Dingell (D-MI), the Chairman of the House Energy and Commerce Committee when Section 821 was enacted, has emphasized that Section 821 was never intended to be part of the Clean Air Act. In a 1999 letter to Congressman David McIntosh, of the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, Congressman Dingell explained that "Public Law 101-549 . . . includes some provisions, such as sections 813, 817 and 819-821, that were enacted as free-standing provisions *separate from the CAA*. Although the Public Law often refers to the 'Clean Air Act Amendments of 1990,' the Public Law does not specify that reference as the 'short title' of all of the provisions included in the Public Law." Letter from John Dingell, Ranking Member, House Energy and Commerce Committee, to Hon. David McIntosh, Chairman, Senate Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs (Oct. 5, 1999) (emphasis added) (available at http://energycommerce.house.gov/press/106ltr60.shtml). Similarly, the House Committee on Energy and Commerce, which publishes a compilation of acts within its jurisdiction (including the Clean Air Act), includes Section 821 in a section among "Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) *That Did Not Amend the Clean Air Act.*" *See* House Committee on Energy and Commerce, Compilation of Selected Acts within the Jurisdiction of the Committee on Energy and Commerce (Comm. Print, May 2001), at

441, 457-58 (emphasis added). In short, both contemporaneous and subsequent statements of Congress confirm that Section 821 was never intended to be part of the Clean Air Act.

Lacking any answer to these contentions, Sierra Club points to several instances where EPA has loosely referred to Section 821 as part of the Clean Air Act. Br. 35. But none of these examples gives any indication that EPA actually considered the question whether Section 821 is part of the Clean Air Act (let alone the sweeping implications that Sierra Club would attribute to an affirmative answer). That question is now squarely presented for the first time before the Board. Because the language of Section 821 indicates that it was never intended to be part of the Clean Air Act (an intent confirmed by key supporters of the section), EPA regulations implementing section 821 are not "regulation[s] under this Act." CAA § 165(a)(4). A BACT emissions limit for carbon dioxide, therefore, is not required. Indeed, unless EPA legally promulgates regulations of general applicability that control carbon dioxide emissions pursuant to an express provision of the Act, EPA lacks authority to impose any BACT emissions limits on carbon dioxide. *North County Resource Recovery Associates*, 2 E.A.D. 229 (1986) ("EPA lacks the authority to impose limitations or other restrictions directly on the emission of unregulated pollutants.")

B. State Implementation Plans do not render carbon dioxide subject to regulation under the Clean Air Act.

Recognizing that EPA's Section 821 argument is not "truly specious," Br. 3, Sierra Club attempts to inject an entirely new issue into its appeal, arguing that even if carbon dioxide is not regulated "under this Act" by virtue of Section 821, it is regulated "under this Act" by virtue of Wisconsin's State Implementation Plan (SIP). Br. 38. This argument, too, fails for several reasons.

First, the argument is waived. The Board will review an issue on appeal only if the issue was either "raised during the public comment period" or "not reasonably ascertainable" before

the close of the public comment period. *Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 708 n.18 (EAB 2002); 40 C.F.R. §§ 124.13 & 124.19(a). Sierra Club's public comments nowhere suggest that carbon dioxide is "subject to regulation under this Act" by virtue of the Wisconsin SIP (or any other SIP). Moreover, even if the issue were somehow "not reasonably ascertainable" before the close of the public comment period, it is not properly before the Board because Sierra Club failed to raise it in its Petition for Review. This failure is all the more inexcusable in light of the fact that Sierra Club *did* argue that carbon dioxide was "subject to regulation" by virtue of a SIP in two other permit appeals filed *before* this appeal. *See* Petition for Review at 8-10, *Christian County Generation, LLC*, PSD Appeal No. 07-01 (July 9, 2007) (arguing that carbon dioxide is "subject to regulation" under the Illinois SIP); Petition for Review at 29-32, *ConocoPhillips Co.*, PSD Appeal No. 07-02 (Aug. 22, 2007) (same). The issue is therefore doubly waived. *See Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 653 n.266 (EAB 2006) ("[T]his particular argument was not raised in the Petition and thus is procedurally barred.").

Even assuming the issue were not waived, it is meritless. Sierra Club cites no statutory provision that renders regulation under a SIP "regulation under [the Clean Air] Act." Br. 38-39. The fact that SIPs appear in the Federal Register or are, in certain circumstances, federally enforceable, does not make them part of the Clean Air Act. Indeed, the need for a statutory provision specifically rendering SIPs federally enforceable, 42 U.S.C. § 7413, suggests that SIPs are *not* "regulation under th[e] Act"—otherwise, there would be no need for special provisions allowing federal enforcement.

Most importantly, Sierra Club's sweeping interpretation of the Act would destroy the very "cooperative federalist design" on which Sierra Club purports to rely. Br. 38. Interpreting Section 110 of the Act, the D.C. Circuit has held that the Act embodies a "federalism bar," ac-

cording to which "each state retains the power, in its SIP, to determine how it will achieve the NAAQS, and . . . *the EPA may not dictate to a state a particular 'source-specific means' to that end.*" *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1046 (D.C. Cir. 2001) (emphasis added). Sierra Club's position turns this principle on its head, allowing not just EPA but any individual state to "dictate" source-specific means of controlling carbon dioxide emissions for every other state. That is, according to the Sierra Club, a single carbon dioxide monitoring provision covering a single source in a single state is sufficient to trigger full-blown BACT analysis for *every* major source of carbon dioxide in *every* state—regardless of what the SIPs for those states provide. Nothing in the Act—and especially nothing in the "cooperative federalism" embodied in Section 110—suggests that Congress intended to allow a single state to dictate environmental policy for the entire nation. The Board should therefore reject the argument that regulation under a SIP constitutes "regulation under [the Clean Air] Act" for purposes of BACT.

CONCLUSION

For the foregoing reasons, Sierra Club's request for a remand should be denied.

Respectfully Submitted,

Dated: March 21, 2008

James H. Russell by Luke Goodrich

WINSTON & STRAWN LLP

James H. Russell
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-6084
(312) 558-5700 (fax)
JRussell@winston.com

Steffen N. Johnson
Susan A. MacIntyre
Luke W. Goodrich
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000
(202) 282-5100 (fax)
SJohnson@winston.com

Counsel for Permittee Deseret Power Electric Cooperative

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2008, a true and correct copy of this Response Brief was served by U.S. Mail to:

Brian L. Doster
Kristi M. Smith
Elliot Zenick
Air and Radiation Law Office
Office of General Counsel
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Kimberly Massicotte, Esq.
Matthew Levine, Esq.
Assistant Attorneys General
P. O. Box 120, 55 Elm Street
Hartford, CT 06106-1774

Sara L. Laumann
Office of Regional Counsel (R8-ORC)
Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

Gerald D. Reid, Esq.
Assistant Attorney General
Department of the Attorney General
State House Station #6
Augusta, Maine 04333-0006

David Bookbinder, Esq.
Sierra Club
408 C Street, N.E.
Washington, D.C. 20002

Michael McCally, M.D. Ph.D.
Executive Director
Physicians for Social Responsibility
1875 Connecticut Avenue, N.W.
Suite 1012
Washington, D.C. 20009

Kristen Welker-Hood, D.Sc. M.S.N. R.N.
Director of Environment and Health Programs
Physicians for Social Responsibility
1875 Connecticut Avenue
Suite 1012
Washington, D.C. 20009

Edward Lloyd, Esq.
The Columbia Environmental Law Clinic
Morningside Heights Legal Services, Inc.
Columbia University School of Law
425 West 116th Street
New York, NY 10027

Joanne Spalding, Esq.
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105

Michael J. Myers, Esq.
Morgan A. Costello, Esq.
Assistant Attorneys General
Environmental Protection Bureau
The Capitol
Albany, NY 12224

Susan L. Durbin, Esq.
Deputy Attorney General
California Department of Justice
1300 I Street, P.O. Box 9442550
Sacramento, CA 94244-2550

James R. Milkey
Assistant Attorney General
Environmental Protection Division
One Ashburton Place
Boston, MA 02108

Tricia K. Jedele, Esq.
Special Assistant Attorney General
Department of Attorney General
150 South Main Street
Prividence, RI 02903-2907

Kassia R. Siegel
Center for Biological Diversity
P. O. Box 549
Joshua Tree, CA 92252

Kevin O. Leske, Esq.
Scot Kline, Esq.
Assistant Attorneys General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001