

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

IN THE MATTER OF:)	Appeal No. PSD 09-___
POWER HOLDINGS OF)	
ILLINOIS, LLC)	Illinois PSD Approval No. 081801AAF
)	

PETITION FOR REVIEW

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the Sierra Club (“Petitioner”), petitions for review of the conditions of the Prevention of Significant Deterioration (PSD) Approval Number 081801AAF which the Illinois Environmental Protection Agency (“IEPA”) issued on October 26, 2009 for a plant that will produce so-called “synthetic natural gas” known as “Power Holdings of Illinois, LLC” (“PHIL”) on Tomahawk Lane, 5 miles south of Illinois Route 15, west of Waltonville, Illinois. A copy of the PSD permit is attached as Sierra Club **Exhibit 1**.

The Illinois Environmental Protection Agency (“IEPA”) is authorized to administer the PSD permit program pursuant to a delegation of authority by the United States Environmental Protection Agency (“EPA” or “U.S. EPA”). The Permit authorizes PHIL to construct a new source of air pollution that consist of six gasifiers, two gas processing trains (including synthesis gas cleanup units and methanation units), two sulfuric acid plants, two steam superheaters, a cooling tower, an auxiliary boiler, and feedstock (coal) storage and handling. Exhibit 1 at 1.

Because the permit fails to include necessary permit conditions, fails to make certain necessary findings, is based on erroneous legal interpretations, and raises important policy considerations that the Board should address, review is appropriate pursuant to 40 C.F.R. pt. 124.

THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner Sierra Club satisfies the threshold requirements for filing a petition for review under Part 124. Sierra Club has standing to petition for review of the permit decision because Sierra Club and its members participated in the public comment period on the draft permit. 40 CFR § 124.19(a). *See* Comments on behalf of the Sierra Club, attached as Sierra Club **Exhibit 2**; Transcript of Public Hearing, attached as Sierra Club **Exhibit 3**. The issues raised by Petitioner below were either raised with IEPA during the public comment period, or are directly related to the

IEPA's response to public comments. Consequently, the Board has jurisdiction to hear Petitioner's timely request for review.

ISSUES PRESENTED FOR REVIEW

Petitioner respectfully requests Board review of the following issues:

1. IEPA committed clear error because the final permit fails to include the "Flare Minimization Plans" that define best available control technology ("BACT") for gas flaring, because IEPA failed to subject those plans to the public participation process, and because the permit provides for off-permit modifications to those plans once they are developed.
2. IEPA committed clear error by allowing either "synthetic natural gas" or natural gas to be used to fire the "superheaters" at the plant, without addressing the additional emissions associated with synthetic natural gas manufacturing before firing in the superheaters.
3. IEPA committed clear error by refusing to ensure that carbon dioxide and methane emissions comply with 35 Ill. Admin. Code § 201.141, despite the requirement in 42 U.S.C. § 7475(a)(3) and 40 C.F.R. § 52.21(j)(1) that IEPA ensure compliance with all emission standards contained in the State Implementation Plan ("SIP").
4. IEPA committed clear error by failing to include BACT limits for carbon dioxide and methane emissions, both of which are pollutants subject to regulation under the Clean Air Act through the New Source Performance Standard ("NSPS") for landfills, EPA's approval of the Delaware State Implementation Plan, and through EPA's grant of the California Cars Waiver.

ARGUMENT

I. IEPA'S FAILURE TO INCLUDE THE FLARE MINIMIZATION PLAN IN THE PERMIT AND TO ALLOW FOR FULL PUBLIC PARTICIPATION IN DEVELOPING THAT PLAN IS CLEAR ERROR.

One of the largest sources of emissions at the proposed PHIL plant is gas flaring during startup, shutdown, and malfunction periods. *See* October 2007 Application, p. 1-13 Table 3 (showing emissions from each emission point). The Permit establishes Best Available Control Technology (BACT) limits for the gasification block during startup, shutdown and malfunction

permits based on the use of flaring. *See* Permit (Ex. 1) at p. 15 § 4.1.2(c)(iii), p. 19 § 4.1.5-3; Statement of Basis at 9 (attached as **Exhibit 4**). As part of this BACT requirement, to minimize emissions from flaring, a “flare minimization plan” is required. *Id.* The IEPA’s Statement of Basis explained the “flare minimization plan” as a work practice BACT requirement:

Work practice requirements and secondary emission limits are proposed as BACT to address startup, shutdown and malfunction.

The required BACT work practices for startup, shutdown and malfunction are intended to assure that appropriate measures are taken to minimize emissions from startup, shutdown and malfunction. For this purpose, the draft permit establishes certain basic measures that must be used to minimize emissions. It also establishes a general approach to minimization of emissions through formal operating and maintenance procedures and flare minimization planning, which may be refined based on actual operating experience at the plant.

Statement of Basis (Ex. 4) at p.9; *see also id.* at 24 (“BACT requires that flaring from the plant be minimized.”). The Permit does not include the Plan, however. Instead, the permit requires PHIL to conduct “flare minimization planning” and to prepare and maintain a “Flare Minimization Plan” in the future. Permit (Ex. 1) p.19 § 4.1.5-3(a). The Permit further provides that the future Plan will be revised after the “shakedown” period. Permit (Ex. 1) p. 20 § 4.1.5-3(b).

A. IEPA’s Deferral of the BACT-Based Flare Minimization Plan And Allowance For Off-Permit Changes of That Plan Violates The Public Participation Provisions of the PSD Program.

Despite the Flare Minimization Plan’s central importance to emissions and BACT limits, the Flare Minimization Plan is not part of the permit and is not subject to public notice and comment. While the Permit requires that IEPA be given a copy of the initial Plan and an opportunity to comment, Permit (Ex. 1) p. 21 § 4.1.5-3(c)(i), the public is given no such opportunity. Additionally, the Permit requires PHIL to revisit and revise the Plan annually. Permit (Ex. 1) p. 21 § 4.1.5-3(c)(ii). This is unlawful. The permit requirements constituting BACT must

be made part of the permit and must be subject to the public participation rights provided under the PSD program (including public notice and comment and right to review by the Board).

IEPA is required to comply with the procedures in 40 C.F.R. part 124 when issuing PSD permits. 40 C.F.R. § 52.21(q). Among the public participation requirements is the requirement that the public be given adequate notice, that the statement of basis for the permit be available to the public, and that the public be given an opportunity to comment on the permit. 40 C.F.R. §§ 124.6(e), 124.10, 124.11. The statement of basis or fact sheet accompanying a draft permit must explain the origin and reasons for each permit requirement. 40 C.F.R. §§ 124.7, 124.8(4). EPA has long interpreted these provisions to include a requirement that substantive plans—especially those affecting emission limits and rates—be included in the draft and final permit and that the public be given an opportunity to review and comment on those plans. In *RockGen Energy Center*, the Board held that if a permitting agency defines BACT during periods of startup and shutdown based on the contents of a startup and shutdown plan, that plan must be subject to public notice and comment and must be included in the permit. 8 E.A.D. 536, 553-55 (EAB 1999); *see also In re We Energies Oak Creek Power Plant*, Order Objecting to State Issued Operating Permit at 24-27 (Adm’r June 12, 2009) (objecting to a Title V operating permit that failed to incorporate various plans related to emission limits and operating requirements and failed to provide public comment opportunities) (attached as **Exhibit 5**).

Like the startup and shutdown plan at issue in *RockGen*, the Flare Minimization Plan in this case defines the BACT limits and should have been subject to notice and comment and should have been included in the permit. In fact, EPA Region 8 commented on a proposed PSD permit for a source in South Dakota that a flare minimization plan must be part of the permit, cannot be developed later, and that it cannot be changed at a later date without public process. *See* EPA

Region 8 Air Program's Comments Submitted to the South Dakota Department of Environment and Natural Resources on the Draft PSD Permit for the Hyperion Energy Center at 9 (November 14, 2008) (attached as **Exhibit 6**). For the same reasons that the Board remanded the permit in *RockGen* and the reasons given in Region 8's comments to South Dakota, IEPA's decision to require a flare minimization plan be developed after the permit, exempt from public participation, and revised annually outside of the PSD permit revision process is unlawful. *See also* 42 U.S.C. § 7475(a)(1), (4) (requiring that BACT limits be included in the permit, not developed later through a "plan").

B. Sierra Club's Comments and IEPA's Response.

Sierra Club preserved this issue in its public comments. *See* Sierra Club Comments (Ex. 2) at 35. In response, IEPA admits that the "Flare Minimization Plan" will be developed in the future, after the permit is issued. Response to Comments at 21 ("...Flare Minimization Plans must be prepared describing various equipment and operational aspects of the flares at the plant, with the development of the initial plan to occur in the future prior to startup of the plant.") (attached as **Exhibit 7**). However, IEPA attempts to distinguish the Board's *RockGen* decision. IEPA states that a Flare Minimization Plans must be "periodically prepared," which, IEPA speculates, is different than the plans at issue in the *RockGen* case. Response to Comments (Ex. 7) at 21. Additionally, IEPA argues that the Board's *RockGen* holding only applies where a plan would exempt a facility from BACT. *Id.* at n.38. Specifically, IEPA argues that the plan in *RockGen* would have allowed the applicant "to exceed the BACT limits during start-up or shut-down," which IEPA contends "is much different than the required flare minimization planning, whose purpose is to further reduce emissions and does not relax any established emission limits." *Id.* IEPA's response misses the point of the *RockGen* holding and the applicable public process requirements.

The Board's decision in *RockGen* held that periods of startup and shutdown must be subject to BACT and that the permit agency can only rely on work practices in a startup and shutdown plan, rather than the numeric emission limits applicable at other times, under limited circumstances. 8 E.A.D. at 553-54. The Board further held that if a startup and shutdown plan is used to define BACT during startup and shutdown periods, the permit agency "must provide the public with an opportunity to submit comments and file a petition for review with the Board in accordance with the procedures of 40 C.F.R. part 124" regarding the contents of that plan. *Id.* at 554-55. Similarly here, because the Flare Minimization Plans represent a central component to the BACT limits for the plant, they must be subject to the same public participation rights as other BACT limits. This is confirmed by Region 8's comments regarding the South Dakota PSD permit, which state:

The flare minimization plan is not part of the permit. Given that this is part of BACT, it should be included in the permit and not developed later. In *In re Rockgen Energy Center*, EPA's Environmental Appeals Board (EAB) held that a PSD permit was deficient because the startup/shutdown emissions minimization plan was not included in the permit. See 8 E.A.D. 536, at 551-555, 1999. The plan should be enforceable and not be changeable without public process. *Id.* We note that condition 12.3 of the proposed permit says the minimization plan will be revised once a year.

Exhibit 6 at 9. The requirement to include the substantive requirements of the Flare Minimization Plan in the permit and to subject the Plan to public notice and comment is also consistent with judicial decisions rejecting attempts to develop plans to implement and define substantive requirements after permits are issued. See e.g., *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 500-04 (2nd Cir. 2005) (holding that permits issued to large animal feeding operations under the Clean Water Act violated the public participation requirements of the Act by allowing for submission of nutrient management plans, which provide the substantive steps taken to reduce pollution, after permit issuance); *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 857-58 (9th Cir. 2003)

(holding that the public comment and hearing procedures under the Clean Water Act are intended to provide an opportunity for participation as to the substance of the requirements that reduce pollution). Here, because the Flare Minimization Plan is not part of the permit, is not subject to public participation procedures, and will be changed annually outside the PSD permit revision process, IEPA's decision is clear legal error.

II. IEPA'S BACT ANALYSIS FOR THE SUPERHEATERS FAILED TO FULLY ACCOUNT FOR CLEANER FUELS AND CLEANER PRODUCTION PROCESSES.

A. Background on Clean Fuel Consideration During a BACT Analysis.

BACT is an emission limit that must be established based on the maximum degree of reduction achievable through, among other options, pollution control devices, available cleaner processes, and clean fuels. 42 U.S.C. §§ 7475(a)(4), 7479(3); *accord* 40 C.F.R. § 52.21(b)(12). Clean fuels are central to this definition. *In re Northern Michigan University Ripley Heating Plant*, PSD Appeal No. 08-02, Slip. Op. at 17-18 (E.A.B. 2009); *see also In re Inter-Power of New York*, 5 E.A.D. 130, 134 (EAB 1994) (discussing the requirement to consider clean fuels in the BACT definition). Therefore, the Board and EPA have required BACT limits to be based on clean fuels when available and cost effective, unless doing so would require "basic purpose" or "basic design" (to the extent those are "objectively discernable"), or would "fundamental[ly] change" or "call into question [the facility's] existence."¹ *In re Prairie State Generating Co.*, 13 E.A.D. ____, PSD Appeal No. 05-05, Slip Op. at 29, 32 (EAB August 24, 2006); *re Hibbing Taconite Co.*, 2 E.A.D. 833, 843 (Adm'r 1989); *see also In re Northern Michigan University Ripley Heating Plant*, 14 E.A.D. ____, PSD Appeal No. 08-02, Slip Op. 26-27 (EAB February 18, 2009); *see also In re Desert*

¹ A choice of fuels for mere cost savings is not a "basic design" or "basic purpose." *Prairie State*, Slip Op. at 30 n.23.

Rock Energy Co., 14 E.A.D. ___, PSD Appeal Nos. 08-03, 08-04, 08-05 and 08-06, Slip Op. at 61-64 (EAB, September 24, 2009) (explaining that the requirement to apply cleaner fuels and production processes can only be limited where doing so would redefine the basic end, object, aim, or purpose of the applicant, and provided such object, aim or purpose is independent of air permitting). Therefore, for example, where natural gas can be used to satisfy an applicant's purpose of creating steam for electricity and heating, it must be considered in a top-down BACT analysis. *Northern Michigan*, Slip Op. at 20 n.17; accord *Sierra Club v. EPA*, 499 F.3d 653, 656-57 (7th Cir. 2007).

B. Sierra Club's Comments and IEPA's Response.

Sierra Club's comments on the draft permit noted that BACT analysis must consider clean fuels and asked IEPA to require natural gas to be used as the fuel for the superheaters and auxiliary boiler. Sierra Club Comments (Ex. 2) at 38-39. Specifically, Sierra Club noted that "natural gas is 'cleaner' - meaning it will result in fewer emission of at least one pollutant subject to BACT— compared to... coal-based [synthetic gas]." *Id.* In its response to comments, IEPA states that the auxiliary boiler will be limited to burning only natural gas and that the superheaters will limited to "either 'natural' natural gas or product synthetic natural gas (SNG)..." Response to Comments (Ex. 7) at 30. IEPA justifies use of either "natural" natural gas (NG) or synthetic natural gas (SNG)² "because the properties of SNG as related to emissions, i.e., heat content, sulfur content and ash content of SNG, are and must be essentially identical to those of natural gas." Response to Comments (Ex. 7) at 30. It is clear from this discussion, the context, and IEPA's footnote 59 that IEPA is referring only to emissions from combustion of NG compared to SNG in the superheaters.

² IEPA refers to processed synthetic gas as SNG in this section. This product, which follows the methanation unit, is different from synthetic gas that has not been subjected to the methanation process. IEPA refers to the pre-methanation product as "syngas."

However, emissions from combustion in the superheaters are not the only emissions associated with SNG. Using SNG in the superheaters requires manufacturing SNG for the superheaters, which in turn results in additional emissions at the Power Holdings facility. For every unit of SNG used, emissions are created at the PHIL plant to manufacture the SNG. In comparison, NG is not manufactured at the PHIL plant (or anywhere) and therefore is not associated with the same emissions. IEPA's analysis failed to account for the additional emissions related to SNG manufacturing when comparing the relative emission profiles of SNG and NG.

A BACT analysis is typically applied to each emission unit separately. *NSR Manual* at B.4. This is to ensure that the full range of available control options are identified and considered for each emission unit. *See Id.* at B.5 (“first step in a “top-down” analysis is to identify, for the emissions unit in question (the term “emissions unit” should be read to mean emissions unit, process or activity), all “available” control options.”). However, this typical process cannot be used to avoid review of the facility-wide emissions from each applicable pollution control option. BACT is an emission limit based on the “maximum degree of reduction” of each pollutant “which would be emitted from any proposed major stationary source...” 40 C.F.R. § 52.21(b)(12); *see also* 42 U.S.C. § 7479(3) (similarly defining BACT as an emission limit for emissions from the “major emitting facility”); *NSR Manual* at B.23 (directing permitting agencies to rank options in Step 3 based on “an estimate of the annual pollutant emissions that *the source* or emissions unit will emit.” (emphasis added)). Where a production process can be made less polluting—as the PHIL process here can be by using NG and avoiding the emissions associated with manufacturing SNG for use in the superheaters—that control option is to be considered in the BACT analysis. E.g., *NSR Manual* at B.13-.14.

It should also be noted that IEPA agrees with the need to look at the emissions from the entire facility when doing a BACT analysis of clean fuels. IEPA speculates that (pre-methanation) syngas could be allowed to fuel the superheaters if it can be shown that is “result[s] in lower overall emissions if it enabled the productive use of syngas during an upset, thereby eliminating the flaring of such syngas...” Response to Comments at 30 n.60. In other words, if the applicant could show that using raw syngas reduces plant-wide emissions, the applicant could be allowed to use raw syngas rather than natural gas or SNG. However, where the plant-wide emissions are greater from SNG, IEPA failed to require the use of natural gas.

C. Firing Natural Gas Rather Than SNG In the Superheaters Will Reduce SNG Consumption and Therefore Emissions.

Producing SNG at Power Holdings results in different emission streams at the facility. In addition to the emissions created when NG or SNG is combusted in the superheaters, the production of SNG creates emissions. These upstream emissions for producing SNG from the facility’s production and emission rates can be calculated as follows. Approximately 73,049 MMscf/year of SNG will be produced annually. See Application at Table 1, p. 1-4 (stating SNG production capacity in MMBtu/day and heating value of SNG in Btu/scf). This production rate is associated with annual emissions as shown below.

	Plantwide Emissions, TPY	lbs/MMscf SNG produced	Emissions from Production of SNG Used in Superheaters, TPY
Nox	215.17	5.89	3.51
CO	775.74	21.24	12.65
VOM	36.20	0.99	0.59
SO2	515.61	14.12	8.41
PM10	63.82	1.75	1.04

See Application at p. 8-1 and 8-2 (stating plant-wide emissions in tons per year). The superheaters will use approximately 1,191 MMscf of SNG per year. See Application at Table 2, p. 1-7 (stating

combined superheater heat input in MMBtu/hr). Therefore, the emissions of NO_x, CO, VOM, SO₂, and PM₁₀ (total) attributable to making SNG for use in the superheaters is shown above. Using NG in the superheaters, rather than SNG, avoids the emissions created to manufacture the SNG for use in the superheaters. IEPA's failure to consider plant-wide emissions associated with manufacturing SNG for use in the superheaters, rather than burning NG, is clear error.

III. IEPA FAILED TO SATISFY THE REQUIREMENTS OF 42 U.S.C. § 7475(a)(3) AND 40 C.F.R. § 52.21 BY ENSURING THAT GREENHOUSE GAS EMISSIONS DO NOT VIOLATE THE ILLINOIS SIP'S EMISSION STANDARD IN 35 Ill. Admin. Code § 201.141.

A PSD permit cannot issue unless “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... applicable emission standard or standard of performance under [the Clean Air Act].” 42 U.S.C. § 7475(a)(3). Additionally, 40 C.F.R. § 52.21(j)(1) requires each major source to meet “each applicable emissions limitation under the State Implementation Plan.” One such emission standard is 35 Ill. Admin. Code § 201.141, which provides:

No person shall cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as, either alone or in combination with contaminants from other sources, to cause or tend to cause air pollution in Illinois, or so as to violate the provisions of this Chapter, or so as to prevent the attainment or maintenance of any applicable ambient air quality standard.

For purposes of this standard, the Illinois SIP provides the following relevant definitions:

- 1) An "Air Contaminant" is defined as “any solid, liquid or gaseous matter, any odor or any form of energy, that is capable of being released into the atmosphere from an emission source.” 35 Ill. Admin. Code § 201.102.
- 2) “Air pollution” is defined as “the presence in the atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.” 35 Ill. Admin. Code § 201.102.

Thus, in addition to prohibiting emissions of criteria pollutants in amounts that would violate ambient air quality standards, the Illinois SIP further prohibits the emission of any solid, liquid or gas (or order) in any volume that, when combined with emissions from other sources, results in the presents of quantities and characteristics that cause injury to human, plant or animal life, or that cause a nuisance.

This emission standard was adopted into the Illinois State Implementation Plan (“SIP”) in 1972, and has been enforced in numerous cases, including federal and state enforcement actions for non-criteria pollutant emissions. 40 C.F.R. §52.720(b), (c)(2); 37 Fed. Reg. 10862 (May 31, 1972); *In re IFCO ICS-Chicago, Inc.*, Docket No. CAA-05-2002-0011, Consent Agreement and Final Order ¶¶ 14-15, 31 (August 28, 2002) (enforcing 35 Ill. Admin. Code § 201.141 for emission of, *inter alia*, odors) (attached as **Exhibit 8**); *see also* Complaint¶¶ 37, 84, *U.S. v. Bunge North America, Inc.*, Case No. 2:06-cv-2209 (Oct. 26, 2006) (attached as **Exhibit 9**); Complaint, *People ex rel. Madigan v. ExxonMobile Corp.*, Case No. 09CH4527 (Will Co. Ill. Chancery Ct., Sept 28, 2009) (asserting violations of 35 Ill. Admin. Code § 201.141 for emissions of Hydrogen Fluoride) (attached as **Exhibit 10**); *People ex rel. Ryan v. IBP, Inc.*, 723 NE 2d 370, 372 (Ill. App. Ct. 1999) (discussing an enforcement action brought for emissions of ammonia in violation of 35 Ill. Admin. Code § 201.141). U.S. EPA Region 5 has also included the emission limit in 35 Ill. Admin. Code § 201.141 as an applicable requirement in the operating permit it issued to the facility pursuant to 40 C.F.R. pt. 71. *See* Air Pollution control Title V Permit to Operate No. V-IL-1716300103-08-01 at p. 155 (September 12, 2008) (attached as **Exhibit 11**).

Here, IEPA erred in granting the permit to Power Holdings without ensuring, pursuant to 42 U.S.C. § 7475(a)(3) and 40 C.F.R. § 52.21(j)(1), that emissions of greenhouse gases would comply with the emission standard/emission limit in 35 Ill. Admin. Code § 201.141 of the Illinois SIP.

Notably, IEPA does not disagree that greenhouse gases cause and will continue to cause global warming. In response to Sierra Club’s public comments that “[t]he scientific debate about whether humans cause climate change and whether it is a problem is over and has been for a while,” and that “further consensus is emerging that present atmospheric levels of CO₂ (386 ppm and rising) are already in the danger zone,” IEPA responded:

The Illinois EPA agrees. This is why it is important that regulatory programs to control emissions of GHG be adopted on a national and international level be taken to address emissions of GHG and climate change.

Response to Comments (Ex. 7) at 90; *see also id.* at 60 (IEPA “agrees with the conclusions of the IPCC” that global warming is “unequivocal” and continued release of greenhouse gases will lead to irreversible impacts), 91 (“global warming and climate change, as caused by anthropogenic GHG emissions, will have devastating consequences on the natural environment...”).³ Nor does IEPA

³ The United States Supreme Court noted more than two years ago that the “enormity of the potential consequences associated with man-made climate change” and its resultant “harms . . . are serious and well recognized.” *Massachusetts v. EPA*, 127 S.Ct. 1438, 1455, 1458 (2007). U.S. EPA recently agreed in its proposed endangerment finding for CO₂ (and other greenhouse gases):

Concentrations of greenhouse gases are at unprecedented levels compared to the recent and distant past. These high atmospheric levels are the unambiguous result of human emissions, and are very likely the cause of the observed increase in average temperatures and other climatic changes. The effects of climate change observed to date and projected to occur in the future—including but not limited to the increased likelihood of more frequent and intense heat waves, more wildfires, degraded air quality, more heavy downpours and flooding, increased drought, greater sea level rise, more intense storms, harm to water resources, harm to agriculture, and harm to wildlife and ecosystems—are effects on public health and welfare within the meaning of the Clean Air Act.

...

The Administrator concludes that, in the circumstances presented here, the case for finding that greenhouse gases in the atmosphere endanger public health and welfare is compelling and, indeed, overwhelming. The scientific evidence described here is the product of decades of research by thousands of scientists from the U.S. and around the world. The evidence points ineluctably to the conclusion that climate change is upon us as a result of greenhouse gas emissions, that climatic changes are already occurring that harm our health and welfare, and that the effects will only worsen over time in the absence of regulatory action. The effects of climate change on public health include

argue that the PHIL plant will not emit greenhouse gases. *Id.* at 61 (PHIL will emit 8 million tons of CO₂ annually). Rather, IEPA offers various legal arguments for why 35 Ill. Admin. Code § 201.141 should not be applied to greenhouse gas emissions from the PHIL plant. None of these reasons can be squared with the plain language of the regulation or the United States Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

A. IEPA’s Arguments for Refusing to Apply 35 Ill. Admin. Code § 201.141 to Greenhouse Gas Emissions Are Without Merit.

1. IEPA’s assertion that CO₂ is not an air contaminant is unsupportable and directly conflicts with the Supreme Court’s decision in *Massachusetts v. EPA*.

IEPA attempts to avoid application of 35 Ill. Admin. Code § 201.141 to greenhouse gases by arguing that “treating CO₂ emissions as a regulated air pollutant under Illinois law would be wholly unconventional,” because CO₂ can be beneficial in low concentrations. Response to Comments (ex. 7) at 89. From this premise, IEPA asserts that courts would never construe the definition of an “air contaminant” literally, because such an interpretation would not have been contemplated by the legislature⁴. *Id.* IEPA’s argument is identical to the argument that U.S. EPA made and lost in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

sickness and death. It is hard to imagine any understanding of public health that would exclude these consequences. The effects on welfare embrace every category of effect described in the Clean Air Act’s definition of “welfare” and, more broadly, virtually every facet of the living world around us. And, according to the scientific evidence relied upon in making this finding, the probability of the consequences is shown to range from likely to virtually certain to occur. This is not a close case in which the magnitude of the harm is small and the probability great, or the magnitude large and the probability small. In both magnitude and probability, climate change is an enormous problem. The greenhouse gases that are responsible for it endanger public health and welfare within the meaning of the Clean Air Act.

74 Fed. Reg. 18886, 18898-904 (April 24, 2009).

⁴ IEPA conflates 35 Ill. Admin. Code § 201.141, a regulation adopted by the Illinois Pollution Control Board and adopted into the Illinois SIP by U.S. EPA, with an Illinois statute. Response to Comments at 89.

Greenhouse gases, including Methane and Carbon Dioxide, are undeniably “air contaminants” within the meaning of the Illinois SIP. 35 Ill. Admin. Code §§ 201.102, 201.141. In *Massachusetts v. EPA*, the Supreme Court interpreted 42 U.S.C. § 7602(g)’s definition of “air pollutant,” which provides:

The term “air pollutant” means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air....

This is almost identical to the definition of “air contaminant” in the Illinois SIP: “any solid, liquid or gaseous matter, any odor or any form of energy, that is capable of being released into the atmosphere from an emission source.” 35 Ill. Admin. Code § 201.102. The Supreme Court explained:

The Clean Air Act’s sweeping definition of ‘air pollutant’ includes ‘any air pollution agent or combination of such agents, including any physical, chemical... substance or matter which is emitted into or otherwise enters the ambient air...’ § 7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word ‘any.’ Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt ‘physical [and] chemical... substance[s] which [are] emitted into... the ambient air.’ The statute is unambiguous.

Massachusetts, 549 U.S. at 529 (emphasis, ellipses and brackets original). So to here, “air contaminant” means “any solid, liquid or gaseous matter...” 35 Ill. Admin. Code § 201.102 (emphasis added). Carbon dioxide and methane are undeniably “gaseous matter.” They are also capable of being released into the atmosphere since IEPA concedes that they will be released into the atmosphere. In short, carbon dioxide and methane, are “air contaminants” for purposes of applying the emission standards/limitations in 35 Ill. Admin. Code § 201.141.

2. 35 Ill. Admin. Code § 201.141 Is An Emission Limit Not Merely An Enforcement Authorization.

IEPA next attempts to avoid application of 35 Ill. Admin. Code § 201.141 in the permitting action at issue in this case by arguing that the emission standard “is geared towards enforcement, not regulation.” Response to Comments (Ex. 7) at 88-89.⁵ This argument is wrong on its face. Section 201.141 is a SIP provision that limits the emissions of each air contaminant to rates that will not, together with emissions from other facilities, cause air pollution. There is nothing in 35 Ill. Admin. Code § 201.141 that limits its application to enforcement proceedings. In fact, in an operating permit issued by U.S. EPA Region 5 pursuant to 40 C.F.R. part 71, EPA included the limitation in 35 Ill. Admin. Code § 201.141 as an applicable permit limit. *See* Permit to Operate No. V-IL-1716300103-08-01 (Ex. 11) at p. 155. That permit is U.S. EPA’s conclusive interpretation that 35 Ill. Admin. Code § 201.141 is an emission limit that can be applied in permitting actions. *See* 40 C.F.R. §§ 71.6(a)(“Each permit issued under this part shall include the following elements: (1) Emission limitations and standards... that assure compliance with all applicable requirements...”), 70.2 (defining “applicable requirement” to include, in relevant part, “[a]ny standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act...”). Furthermore, IEPA, itself, applies 35 Ill. Admin. Code § 201.141 as a permitting standard. IEPA denied an air pollution permit to an applicant who failed to demonstrate that its emissions would comply with 35 Ill. Admin. Code § 201.141. *Alton Packaging Corporation v. Pollution Control Board*, 516 N.E.2d 275, 277 (Ill.App.Ct. 1987). Therefore, not

⁵ IEPA also inconsistently argues that 35 Ill. Admin. Code § 201.141 is not actually enforceable. *Id.* at 92 (“35 IAC 210.102 [sic] and 201.141, as they directly address and prohibit air pollution, do not set an emission standard and are not amenable to enforcement as an emission standard under the Clean Air Act.”). The regulation cannot be both applicable only in enforcement and unenforceable. Here, neither is true: it is a regulation that applies independent of enforcement and can also be enforced.

only does the plain language of 35 Ill. Admin. Code § 201.141 apply outside of enforcement actions, but both U.S. EPA and IEPA have applied it in permitting actions.

3. IEPA's Argument that 35 Ill. Admin. Code § 201.141 Does Not Address Future Pollution Conflicts With the Plain Language of the Regulation.

IEPA also argues that 35 Ill. Admin. Code § 201.141 does not apply to “prospective” emissions and injury. However, on its face, § 201.141 provides that no person “shall cause or threaten or allow” creation of air pollution. The verbs “cause,” “threaten” and “allow” all refer to future events. The emission standard in 35 Ill. Admin. Code § 201.141 is intended to prevent emissions that bring about pollution in the future. In fact, IEPA has denied permits based on projections of future air pollution. *See Alton Packaging*, 516 N.E.2d at 277-79 (discussing a review of IEPA’s decision not to grant a permit based on projected future air pollution).

In sum, greenhouse gases are air contaminants for purposes of 35 Ill. Admin. Code § 201.141. There is no dispute about the cause and dire impacts of global climate change. Therefore, emissions of greenhouse gases from PHIL “in combination with contaminants from other sources” will tend to cause air pollution in violation of the emission standard in 35 Ill. Admin. Code § 201.141. IEPA’s refusal to ensure compliance with this emission standard, which is contained in the Illinois SIP, violates 42 U.S.C. § 7475(a)(3) and 40 C.F.R. § 52.21(j)(1) and constitutes clear error.

IV. IEPA FAILED TO INCLUDE BACT LIMITS FOR METHANE OR CO₂ EMISSIONS.

As noted above, carbon dioxide and methane are greenhouse gases. There is no dispute in this case that emissions of these pollutants are causing and will continue to cause global warming, which will have increasingly dire consequences for human health and welfare. Yet, despite the PHIL plant’s ability to capture the majority of these pollutants, the permit does not set any emission

standard for them. The PSD permit for the PHIL plant must be remanded because it lacks BACT limits for CO₂ and methane.

Every PSD permit must contain BACT limits “for each regulated NSR pollutant that it would have the potential to emit in significant amounts.” 40 C.F.R. § 52.21(j)(2). A “significant” amount is the value expressed in 40 C.F.R. § 52.21(b)(23)(i). For pollutants not specifically listed, a “significant” amount is “any” amount. 40 C.F.R. § 52.21(b)(23)(ii). There is no dispute that Methane and CO₂ will be emitted from the PHIL plant. Response to Comments (Ex. 7) at 21, 62. There is also no dispute that there are no BACT limits for Methane or CO₂ in the Permit. *See generally*, Ex. 1. Therefore, if methane and/or CO₂ is a “regulated NSR pollutant,” the Permit is deficient and must be remanded for a BACT limit for Methane emissions. 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 52.21(j)(2); *see also e.g., In re Northern Michigan University Ripley Heating Plant*, PSD Appeal No. 08-02, Slip Op. at 31-32 (EAB Feb. 18, 2009) (remanding permit for consideration of whether BACT for CO₂ and N₂O is required).

A. Historical Background on BACT Limits for Greenhouse Gases.

EPA has considered whether carbon dioxide is a “regulated NSR pollutant” for purposes of requiring a BACT limit in several prior cases and in guidance documents. *In re Christian County Generation, LLC*, 13 E.A.D. ___, PSD Appeal No. 07-01, Slip Op. 13-19 (EAB January 28, 2008) (finding that petitioner did not preserve this issue through sufficiently specific public comments); *In re ConocoPhillips Co.*, 13 E.A.D. ___, PSD Appeal No. 07-02, Slip Op. at 44-52 (EAB June 2, 2008) (same); *In re Deseret Power Electric Cooperative*, 14 E.A.D. ___, PSD Appeal No. 07-03 (EAB Nov. 13, 2008) (addressing merits of parties’ arguments regarding EPA’s historic interpretations and requirement of BACT for CO₂) (“Deseret”); *Northern Michigan*, Slip Op. at 31-32 (remanding permit based on reasoning set forth in *Deseret* decision) (“Northern Michigan”);

Notice of Partial Withdrawal of Permit, *In re Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03, 08-04, 08-05, 08-06 (January 7, 2009) (withdrawing responses to comments and portions of EPA Region 9’s “basis for not including limitations on emissions of carbon dioxide” pursuant to 40 C.F.R. § 124.19(d) in order “to prepare a new statement of basis addressing the issue of whether the permit should contain an emissions limitation for carbon dioxide”).

In the *Deseret* case, the Board held that the EPA Region had not demonstrated a historical interpretation of term “subject to regulation under the Act” that would preclude its application to carbon dioxide. Slip Op. at 9. Specifically, the Board found that EPA had not interpreted BACT as applying only to pollutants “subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant.” *Id.*

The petition in *Deseret* was premised on the monitoring requirements in section 821 of the 1990 Clean Air Act Amendments and EPA’s implementing regulations in part 75, which Sierra Club believes rendered CO₂ “subject to regulation under” the Act for purposes of establishing BACT limits under 42 U.S.C. § 7475(a)(4). *Id.* at 26 (summarizing petitioners’ argument that CO₂ is regulated through section 821 and part 75), 32 (“Here, the parties contest whether section 821 of the 1990 Public Law must be viewed as part of the CAA and whether the terms of section 821 compel a particular meaning of the phrase “subject to regulation” for purposes of implementing sections 165 and 169.”). Other bases for “regulation” of carbon dioxide, and regulation of pollutants other than carbon dioxide, were not considered. *Id.* at 18 (striking Sierra Club’s other arguments regarding regulation of carbon dioxide).

The Board’s *Deseret* decision held that EPA’s 1978 PSD rulemaking provided the only definitive agency interpretation of the phrase “subject to regulation.” *Id.* at 39. In that rulemaking, EPA “expressly states that it ‘made final’ an ‘interpretation’ the Administrator concluded was

correct” for the meaning of “subject to regulation.” *Id.* EPA’s interpretation was that “subject to regulation” to mean any pollutant regulated in “Subchapter C of Title 40 of the Code of Federal Regulations for any source type.” *Id.* at 38 (quoting 43 Fed. Reg. 26,388, 26,397 (June 19, 1978))⁶. Unlike other interpretations urged by the Region and others supporting the permit in *Deseret*, this 1978 interpretation was definitive and “possesses the hallmarks of an Agency interpretation that courts would find worthy of deference,” such as published notice of the proposed interpretation in the Federal Register prior to publishing a final interpretation, that it represented considered judgment by the Administrator, and that it was issued “relatively contemporaneous with the statutory enactment and along with the original regulations implementing the statute.” *Id.* at 39. EPA has not changed this interpretation through later rulemakings. *Id.* at 42-49.⁷ The Board dismissed other potentially conflicting interpretations contained in guidance memos because such memos cannot change EPA’s 1978 interpretation of the phrase “subject to regulation under the Act” in 42 U.S.C. § 7475(a)(4) and 40 C.F.R. § 52.21(b)(50). *Id.* at 52 (citing *Farmers Tel. Co., v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999); *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997)). The Board subsequently followed the *Deseret* decision when it remanded a permit in *Northern Michigan*, PSD Appeal No. 08-02, Slip Op. at 31.

Between the Board’s *Deseret* and *Northern Michigan* decisions, the prior EPA Administrator, Johnson, issued a memorandum that purports to interpret the phrase “subject to regulation” for purposes of determining which pollutants are “regulated NSR pollutants” and are subject to BACT requirements. See Memorandum from Stephen Johnson to Regional

⁶ Title 40, Chapter I, Subchapter C of the Code of Federal Regulations includes parts 50 through 97.

⁷ A prior EPA Administrator has attempted to change this interpretation through a memorandum that was not subject to notice and comment rulemaking. See discussion, *infra*.

Administrators, *EPA's Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program* (December 18, 2008) (hereinafter

“Johnson Memo”). In the memo, the former Administrator made the following assertions:

- The memo is “not intended to supersede the Board's decision” in *Deseret*. Johnson Memo at 2.
- The memo can set forth an interpretation of “subject to regulation under the Act” without notice and comment because EPA has never previously interpreted that phrase. *Id.* at 2, 16.
- Through the Memo, EPA would interpret “regulation” to mean “control,” rather than “a rule contained in a legal code.” *Id.* at 7-8.
- The rule of *ejusdem generis* supports the memo’s interpretation, despite the Board’s explicit rejection of that theory in the *Deseret* decision. *Id.* at 8-9 (citing *Deseret*, Slip. Op. at 45-46).
- Unidentified permits issued or reviewed by EPA have generally not included CO₂ BACT limits. Therefore, by omission, EPA has not interpreted monitoring and reporting requirements for CO₂ to constitute “regulation under the Act.” *Id.* at 11.⁸
- The interpretation proposed in the memo is consistent with the 1978 preamble’s definition of “subject to regulation” because that interpretation “said only that the PSD BACT requirement applies to ‘any pollutant regulated in Subpart C of Title 40 of the Code of Federal Regulations,’ but it did not amplify the meaning of the term ‘regulated in.’” *Id.* at 12. Therefore, EPA is free to interpret “regulation” to mean “actual control,” and to exclude monitoring and reporting while remaining consistent with the 1978 interpretation. *Id.* at 19.
- Because states cannot adopt regulations under the Act to apply in other states, EPA’s approval and adoption of regulations into a State Implementation Plan do not make the pollutants controlled by such regulations “subject to regulation.” *Id.* at 15 (citing *Connecticut v. EPA*, 656 F.2d 902, 909 (2d Cir. 1981).)

⁸ The Johnson Memo also attempts to change the meaning of the Board’s *Deseret* decision by attributing to the Board an observation that “the 1998 memorandum... by the Agency's then General Counsel [Cannon] suggest[s] that the Agency has not, as a matter of practice, treated carbon dioxide as a "regulated" pollutant under any provisions of the Act, including those establishing the PSD program.” Johnson Memo at 11 (citing *Deseret*, Slip Op. at 53-54). However, what the Board’s *Deseret* decision actually states on the pages cited in the Johnson Memo is that “[t]he Cannon Memo did not mention the PSD provisions at issue in this case,” and that the Cannon memo, together with other memos and rule preambles, “are, at best, weak authorities upon which to anchor the Region’s conclusion stated in its response to comments that its authority to require a CO₂ BACT limit is constrained by an historical Agency interpretation of CAA sections 165 and 169.” *Deseret*, Slip Op. at 53-54.

While purporting to address the issue of which pollutants are “subject to regulation,” and therefore subject to BACT requirements, the Johnson Memo suffers numerous procedural, legal, and logical problems, each of which counsels against reliance on it as an authoritative interpretation.

B. Sierra Club’s Comments and IEPA’s Response To Comments.

Sierra Club’s comments on the draft permit for Power Holdings raised the issue of BACT limits for carbon dioxide and methane. Sierra Club Comments (Ex. 2) at 3-10, 11-17. In response, IEPA denied that carbon dioxide and methane are “subject to regulation” under the Clean Air Act:

CO2 and other GHG are not pollutants that are currently regulated under the federal PSD program, and therefore are not subject to the requirement for BACT under the PSD program... The Illinois EPA was legally bound when processing the permit application for the proposed plant to follow USEPA’s current guidance with respect to the pollutants that qualify as regulated pollutants under the PSD program. In addition, given the timing of rulemaking by USEPA under federal law and the likelihood of legal challenges that might delay the effectiveness of rules that are not adopted, it is not appropriate to delay action on the application for the proposed plant pending completion of rulemaking by USEPA.

The Johnson Memorandum

USEPA does not consider that the monitoring and reporting of CO2 emissions pursuant to Section 821 of the Clean Air Act Amendments of 1990 and certain provisions under 40 CFR Part 75 is sufficient for CO2 to be considered a regulated pollutant under the PSD program. This position is memorialized in a memorandum by Stephen Johnson, Administrator of the USEPA, dated December 18, 2008... As explained in the memorandum, for a pollutant to be considered subject to regulation under the Clean Air Act, a pollutant must be subject to requirements that control or limit emissions of the pollutant, not simply requirements related to the monitoring or reporting of emissions...

...

Delaware SIP Argument.

In the Johnson Memorandum, USEPA also responded to the contention that USEPA’s approval of a Delaware SIP addressing CO2 emissions was tantamount to USEPA regulation of CO2 under the CAA. The Johnson Memorandum recognizes the

difference between SIP regulations under the Clean Air Act, which derive from principles of cooperative federalism, and national regulations, which generally apply in all states and are developed through USEPA rulemaking. Based on this distinction, USEPA does not consider pollutants that are only regulated by individual state SIPs to be pollutants subject to regulation under the Clean Air Act for purposes of the PSD program...

USEPA's Proposed Endangerment Finding

In addition, the USEPA, under the leadership of Administrator Jackson, has begun a separate legal proceeding whereby emissions of CO₂ would be regulated under the Clean Air Act. It has done this by formally proposing to make a finding under Section 202 of the Clean Air Act that emissions of six greenhouse gases...

Louisville Gas & Electric Order (Trimble County Order)

USEPA also recently spoke to the issue whether GHG are regulated pollutants in a proceeding concerning the permitting of Louisville Gas and Electric Company's Trimble County power plant. In its Order in that proceeding, USEPA specifically denied the petitioners claim that USEPA must object to the permit because the permit failed to include requirements addressing emissions of CO₂ and other GHGs, including a BACT determination for emissions of CO₂. This confirms that GHG emissions are not currently regulated under the Clean Air Act.

The Deseret Power Decision

... [T]he EAB rejected the petitioner's contention that the statutory phrase "subject to regulation" was sufficiently clear and unambiguous as to compel USEPA to impose a CO₂ BACT limit under the PSD program. However, the EAB also rejected USEPA's position in that case that it could not impose a CO₂ BACT limit by reason that its historical interpretation of this phrase precluded such a limit... The issuance of the Johnson Memorandum on December 18, 2008, as previously discussed, was directly responsive to the EAB's ruling in the Deseret Case.

Other EAB Decisions following Deseret Power

In two other EAB decisions following the November 13, 2008 Deseret Power decision, the EAB has remanded the permit to either allow the permitting authority to address the USEPA GHG BACT policy questions raised in Deseret Power (Northern Michigan University Ripley Heating Plant, PSD Appeal No. 08-02, Feb. 18, 2009) or allowed the permitting authority to voluntarily withdraw the GHG BACT portion of its permit record to address

the Deseret Power questions on the record (Desert Rock Energy Company, PSD Appeal No. 08-03, 08-04, 08-05 & 08-06). This was necessary because both these cases involved permitting actions that were taken before USEPA's interpretation was questioned by the EAB's decision in the Deseret Power and before the Johnson Memorandum firmly established EPA's interpretation...

Conclusion

USEPA's proposed endangerment finding, proposed rulemaking for GHG emissions from certain motor vehicles, and proposal to establish thresholds for GHG PSD applicability all indicate the USEPA's willingness to proceed to regulate GHG's under the Clean Air Act in an orderly fashion in the future. At the same time, they show that GHG are not currently regulated under the Clean Air Act... [U]ntil appropriate regulatory action is taken by USEPA or national legislation is adopted, the Illinois EPA is bound to follow existing law and established USEPA policy on the status of GHG under the federal PSD program.

Response to Comments (Ex. 7) at 62-67. The IEPA's response to comments misconstrues the law in various ways, as set forth below. The law requires a BACT limit for carbon dioxide and for methane emissions because both are subject to regulation under the Clean Air Act. IEPA's failure to apply this law is clear error.

C. Carbon Dioxide and Methane are "Subject to Regulation" Pursuant to Various Regulations, Including the Delaware SIP, a New Source Performance Standard, and EPA's California Car Waiver and Various States' Resulting Regulation of Greenhouse Gas Auto Emissions Under the Clean Air Act.

The proposed PHIL facility will emit millions of tons of CO₂ emissions each year. *See* Response to Comments (Ex. 7) at 61 (plant will emit 8 million tons of carbon dioxide annually). Similarly, the PHIL facility will emit fugitive methane. *Id.* at 62 (noting that methane emissions will be controlled, but not that all methane releases will be prohibited). The Clean Air Act prohibits the construction of a new major stationary source of air pollutants except in accordance with a prevention of significant deterioration ("PSD") construction permit, which in turn requires the permitting agency to conduct a BACT analysis and include in the PSD permit a BACT emission

limitation “for each pollutant subject to regulation [under the Clean Air Act] emitted from or which results from” the facility. 42 U.S.C. §7475(a), (a)(4), 7479(3).

Even if “subject to regulation” is given a narrow interpretation meaning “subject to actual control,” CO₂ and methane meet the definition because both pollutants are subject to limits adopted under the Clean Air Act through rules located in 40 C.F.R. Ch. I, Subchapter C. As the Board noted in *Deseret*, the fact that CO₂ is regulated by rules contained in 40 C.F.R. Subchapter C “augers in favor” of a conclusion that CO₂ is “subject to regulation under the Act,” based on EPA’s official interpretation in its 1978 rulemaking. *Deseret*, Slip Op. at 41.

1. CO₂ is subject to “actual control” through 40 C.F.R. Subchapter C.

a) The Delaware SIP includes “actual control” of CO₂ and is included in Subchapter C.

CO₂ is subject to regulation under the Act through EPA’s approval of amendments adding various CO₂ regulations to the SIP for the State of Delaware. 73 Fed. Reg. 23,101 (April 29, 2008); 40 C.F.R. § 52.420(c); *see also Deseret*, PSD Appeal No. 07-03, Letter from Brian L. Doster, U.S. EPA Office of General Counsel, to Eurika Durr, EAB, Document # 93 (Sept. 9, 2008) (“...Office of General Counsel... believe that it is incumbent on them, in recognition of a duty of candor, to inform the Board of a recent action by the Agency... EPA Region 3 issued a final approval of a Delaware State Implementation Plan (SIP) revision incorporating state regulations which include specific limitations on the rate of several pollutants, including carbon dioxide”) (attached as **Exhibit 12**). Therefore, section 52.420(c) of Part 40 limits emissions of CO₂ in addition to establishing operating requirements, record keeping and reporting requirements, and CO₂ emissions certification, compliance, and enforcement obligations for new and existing stationary electric generators. 40 C.F.R. § 52.420(c) (adopting Del. Admin. Code 7 1000 1144 by

reference). U.S. EPA’s approval was made “in accordance with the Clean Air Act,” 73 Fed. Reg. 23,101, and included the rule in Part 52.

The approved Delaware SIP limits emissions of CO₂ from certain electric generators to the following rates:

Existing Distributed Generators	1,900 lbs/MWh
New Distributed Generators	1,900 lbs/MWh (if installed between effective date and 1/1/2012)
	1,650 lbs/MWh (if installed on or after 1/1/2012)
New Distributed Generators that use Waste, landfill or digester gases	1,900 lbs/MWh

Delaware Department of Natural Resources and Environmental Control, Division of Air and Waste Management, Air Quality Management Section, Regulation No. 1144 § 3.2.1 – 3.2.2. (attached with Ex. 12). The regulated generators must certify compliance with the CO₂ emission limits, monitor, and keep records. *Id.* at §§ 4.0, 6.0, 7.0.

Delaware Regulation 1144 is “under the Act.” Delaware submitted Regulation 1144, including the CO₂ emission limits contained therein, for EPA approval on November 1, 2007. 73 Fed. Reg. 11845, 11846 (March 5, 2008). EPA determined that the submission satisfied the requirements under CAA § 110(a), and published notice of its approval of the SIP revision in the Federal Register on March 5, 2008. 73 Fed. Reg. 11845. EPA allowed for public comment and, on April 29, 2008, EPA published notice of its Final Rule approving the SIP revision, effective May 29, 2008, in the Federal Register. 73 Fed. Reg. 23101 (April 29, 2008). Both the proposed and final rule notices state that EPA’s approval of Delaware’s Regulation 1144 was “under” and “in accordance with the Clean Air Act.” 73 Fed. Reg. at 11845; 73 Fed. Reg. at 23101.

b) There is no basis for IEPA's dismissal of the Delaware SIP.

IEPA offers two bases for ignoring the regulation of CO₂ under the Delaware SIP. First, citing the Johnson Memo, IEPA states that there is a difference “between SIP regulations under the Clean Air Act, which derive from principles of cooperative federalism, and national regulations, which generally apply in all states and are developed through USEPA rulemaking.” Response to Comments (Ex. 7) at 62. Thus, IEPA reasons, CO₂ emission limits—i.e., “actual control”—through the Delaware SIP is not regulation under the Clean Air Act because regulation through a SIP does not make a pollutant “subject to regulation under the Clean Air Act for purposes of the PSD program.” *Id.* IEPA appears to distinguish between SIPs and federal standards under the Act. Second, IEPA argues that the Delaware SIP's CO₂ regulations should not count because they were intended only to address ozone and because there was no opportunity for public comment. *Id.* at n.145. Both of IEPA's bases are wrong as a matter of fact and as a matter of law.

There is no significant distinction in the Clean Air Act between regulations adopted pursuant to a SIP and those promulgated by EPA for application in more than one state. Both mandate emission limits, both are federal law, and both are equally enforceable by EPA and citizens under federal law. 42 U.S.C. §§ 7413(a)(1), (2), (b), 7602(q), 7604(a)(1) (providing citizens the right to enforce any “emission standard or limitation”), 7604(f)(3), (4) (defining “emission standard or limitation” to include “any condition or requirement under an applicable implementation plan relating to... air quality maintenance program” and “any other standard, limitation, or schedule established under... any applicable State implementation plan approved by the Administrator...”); *General Motors Corp. v. United States*, 496 U.S. 530, 540 (1990) (“the language of the Clean Air Act plainly states that EPA may bring an action for penalties or injunctive relief whenever a person is in violation of any requirement of an applicable

implementation plan. § 113(b)(2), 42 U.S.C. § 7413(b)(2) (1982 ed.)”); *see also El Comite Para El Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1066 (9th Cir. 2008); *Espinosa v. Roswell Tower, Inc.*, 32 F.3d 491, 492 (10th Cir. 1994); *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 335 (6th Cir. 1989). Perhaps more importantly, both are promulgated into federal law in 40 C.F.R. Subchapter C by federal rulemaking. 73 Fed. Reg. 23101 (adopting the Delaware SIP); *Deseret*, Slip Op. at 38-39 (holding that EPA has interpreted “subject to regulation” to mean regulation through a rule promulgated in 40 C.F.R. Subchapter C).

The BACT provision speaks only in terms of whether a pollutant is subject to regulation under the Act—it does not distinguish between subsections of the Act or between SIPs and nationally-applicable standards. Indeed, as the D.C. Circuit reasoned in *Alabama Power Company v. Costle*: BACT applies “immediately to each type of pollutant regulated *for any purpose under any provision of the Act.*” 636 F.2d 323, 403 (D.C. Cir. 1979) (emphasis added). The *Alabama Power* court specifically rejected the idea that BACT applies only to a subset of pollutants subject to regulation in the various places throughout the Act:

The only administrative task apparently reserved to the Agency . . . is to identify those . . . pollutants subject to regulation under the Act which are thereby comprehended by the statute. The language of the Act does not limit the applicability of PSD only to one or several of the pollutants regulated under the Act

Id. at 404.

IEPA’s second basis for dismissing the Delaware SIP is equally without merit. EPA was clear in its intent when promulgating the Delaware SIP that it was approving the CO₂ limitations.

EPA’s rulemaking record for approval of the CO₂ limits states:

Regulation No. 1144 contains provisions to control the emissions of nitrogen oxides (NO_x), nonmethane hydrocarbons (NMHC), particulate matter (PM), sulfur dioxide (SO₂), carbon monoxide

(CO), and carbon dioxide (CO₂) from stationary generators in the State of Delaware.

Regulation No. 1144 establishes emission standards in pounds per megawatt-hour (lbs/MWh) of electricity output under full load design conditions or at the total load conditions specified by the applicable testing methods.

...

CONCLUSIONS AND RECOMMENDED AGENCY ACTION:

Regulation No. 1144 adopted by the State of Delaware will result in the control of NO_x, NMHC, PM, SO₂, CO, and CO₂ emissions from stationary generators and will help the State in attaining compliance with the 8-hour ozone NAAQS. EPA approval of the SIP revision is recommended.

Memorandum from Rose Quinto, Environmental Engineer Air Quality Planning Branch, U.S. EPA

Region 3, Re: Technical Support Document - Delaware; Regulation No. 1144 – Control of

Stationary Generator Emissions (January 25, 2008) (emphasis added) (attached as **Exhibit 13**).

There was also a full opportunity for public comment. 73 Fed. Reg. 23101 (April 29, 2008).

Therefore, if IEPA had reviewed the rulemaking docket that approved the Delaware SIP, it would have known that CO₂ limits were being adopted into federal law. That IEPA failed to take advantage of the opportunity to review the rulemaking record at the time and to determine that CO₂ limits were being adopted into federal law under the Clean Air Act is not a valid basis to now ignore that rulemaking in this proceeding. *See e.g.*, 42 U.S.C. § 7607(b)(1) (A petition for review of the Administrator’s action in approving or promulgating any implementation plan... may be filed only in the United States Court of Appeals for the appropriate circuit.”).⁹

⁹ Ironically, IEPA argues that EPA’s approval of the Delaware SIP should not count because the public notice was not sufficient, in IEPA’s view, to give the public an opportunity to comment. Yet, IEPA relies almost entirely on the Johnson Memo that included *no* public comment period *at all*.

Furthermore, contrary to the Johnson Memo's illogical conclusion on this point¹⁰, the reasoning behind the Memo supports a finding that CO₂ is subject to BACT limits. The Johnson Memo is explicit that it was proposing an interpretation of "subject to regulation" that means "subject to actual control." Johnson Memo at 7-8. The Delaware SIP is undeniably "actual control" of CO₂ emissions. In short, the Johnson Memo's underlying logic would find that CO₂ is subject to regulation because it is subject to "actual control." The *non sequitur* conclusion to the opposite in the memo has no legal or logical basis and cannot support IEPA's refusal to include CO₂ BACT limits in the permit.

c) CO₂ and methane are also both subject to "actual control" as two of the landfill gases limited by the New Source Performance Standards located in Subchapter C.

EPA also promulgated emission standards for municipal solid waste (MSW) landfill emissions in Subchapter C. 40 C.F.R. §§ 60.33c, 60.752. "MSW landfill emissions" are defined as "gas generated by the decomposition of organic waste deposited in an MSW landfill or derived from the evolution of organic compounds in the waste." 40 C.F.R. § 60.751. EPA has specifically identified CO₂ and methane as the two primary components of the regulated "MSW landfill emissions." *See* Air Emissions from Municipal Solid Waste Landfills – Background Information for Final Standards and Guidelines, U.S. EPA, EPA-453/R-94-021 (Dec. 1995) (explaining "MSW

¹⁰ The Johnson Memo attempts to make a similar distinction as IEPA does here, between a SIP regulating pollutants under the Act and other regulations under the Act. The Memo cites a single, inapposite, case: *Connecticut v. EPA*, 656 F.2d 902, 909 (2d Cir. 1981). *Connecticut* does not support the argument. That case merely addressed whether EPA was required under 42 U.S.C. § 7410(a)(2)(E) (1977) (now 42 U.S.C. § 7410(a)(2)(D)) to deny a SIP revision for two power plants in New York, based on the fact that Connecticut and New Jersey have more stringent state standards that apply in their own states. The *Connecticut* court's decision was limited to interpreting the language of 42 U.S.C. § 7410(a)(2)(E), which prohibited emissions that "prevent maintenance of *national* primary or secondary ambient air quality standard," and held that the language of the statute refers to national standards and not state-specific standards. *Id.* at 909. Unlike the statute at issue in *Connecticut*, section 165(a)(4), 42 U.S.C. § 7475(a)(4), and 40 C.F.R. §§ 52.21(b)(50)(iv) and (j)(2) in this case contain no qualification that each pollutant must be subject to regulation "in the implementation plan for the state in which the source is to be located," "applicable nationally," or any other similar qualification. Rather, the plain language of the statute and regulations require a BACT limit for *any* pollutant subject to regulation under the Act.

landfill emissions, or [landfill gas], is composed of methane, CO₂, and NMOC.”).¹¹ Thus, these pollutants are regulated through the landfill emission regulations at 40 C.F.R. Part 60 Subparts Cc, WWW. *See also* 56 Fed. Reg. 24468 (May 30, 1991) (“Today’s notice designates air emissions from MSW landfills, hereafter referred to as ‘MSW landfill emissions,’ as the air pollutant to be controlled”).

IEPA asserts that because the landfill emission regulations do not “directly regulate GHG[s],” they do not count as regulations under the Act. Response to Comments at 78. IEPA is wrong. First, the NSPS for landfill gases does regulation GHGs, including carbon dioxide and methane. Second, while IEPA is vague as to what constitutes a “direct regulation,” any such distinction is irrelevant; the NSPS limits emissions of carbon dioxide and methane.

IEPA is incorrect that the NSPS does not limit emissions of greenhouse gases, including carbon dioxide and methane. Quite the contrary, EPA explicitly intended to control greenhouse gases, including methane and carbon dioxide, through the NSPS for landfills. In a background technical document for the NSPS standard, EPA acknowledged that air emissions of greenhouse gases, including carbon dioxide and methane “contribut[ed] to the phenomenon of global warming,” and that the “global warming effects” of those emissions posed “potential adverse health and welfare effects.” *See* Air Emissions from Municipal Solid Waste Landfills- Background Information for Proposed Standards and Guidelines at 2-15, EPA Office of Air Quality Planning and Standards, EPA-450/3-90-011a (March 1991) (attached as **Exhibit 14**). In fact, any limit on landfill emissions necessarily limits carbon dioxide and methane because those two pollutants constitute nearly 100% of landfill gases—with other non-methane organic compounds constituting less than 1%. Therefore, EPA explained that one of the specific justifications for regulating landfill

¹¹ Available at <http://www.epa.gov/ttn/atw/landfill/landflpg.html>.

gases, and particularly for the level of stringency, was to limit emissions of methane to avoid global warming impacts. *See* 56 Fed. Reg. 24468, 24481 (March 12, 1996) (“[i]n considering which alternative to propose as BDT, EPA decided to consider both NMOC’s and methane reductions”); 61 Fed. Reg. 9905, 9906 (“Briefly, specific health and welfare effects from [landfill gas] emissions are as follows . . . methane emissions . . . contribute to global climate change as a major greenhouse gas”); *id.* at 9914 (anticipated “methane reductions . . . are also an important part of the total carbon reductions identified under the Administration’s 1993 Climate Change Action Plan”). EPA further noted in the rule’s preamble to the final rule that “[c]arbon dioxide is also an important greenhouse gas contributing to climate change,” and quantified the benefits of the rule based on “equivalent reduction in CO₂.” 56 Fed. Reg. at 24472 (stating that “1.1 to 2.0 billion trees would need to be planted . . . to achieve an equivalent reduction in CO₂ as achieved by today’s proposal”). A rule limiting landfill gas emissions—consisting of 50% carbon dioxide and 50% methane—is clearly a rule limiting emissions of those two pollutants.

Furthermore, EPA has never said that a pollutant must be subject to an emission rate limit specific to that pollutant to be regulated under the Act. The NSPS standard for landfill gases includes various requirements intended to reduce emissions of landfill gases, including CO₂. EPA has argued previously that reduction and prevention, through enforceable steps, is “regulation”—even absent an emission rate limit. *See e.g., Deseret, Slip Op.* at n.27 (citing the Region’s briefs, which argued that “regulation under the Act” “would apply the control of ozone depleting substances through production or import restrictions that do not limit the quantity, rate, or concentration of emissions.”). Moreover, EPA and state regulatory agencies often regulate numerous pollutants—such as volatile organic compounds (“VOCs”)—by reference to them

categorically, rather than listing each separately. No one reasonably argues, however, that the individual VOCs are not regulated.

d) CO₂ is also regulated under the Clean Air Act through the special regulation of auto emission by numerous states pursuant to the Act's California Car waiver.

EPA authorized the state of California to implement its motor vehicle greenhouse gas emission standards, pursuant to Section 209(b) of the Clean Air Act, 42 U.S.C. § 7609(b), on June 30, 2009. 74 Fed. Reg. 32744.¹² As a result, CO₂ 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. As a result, carbon dioxide and methane now "subject to regulation" under the "California Car Waiver" provisions of the Clean Air Act.

¹² Section 209(b), 42 U.S.C. § 7543(b), provides:

(b) Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—

(A) the determination of the State is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

(C) such State standards and accompanying enforcement procedures are not consistent with section 7521 (a) of this title.

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

(3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter.

The EPA's approval of new motor vehicle standards unequivocally requires "actual control" of CO₂ and methane emissions:

California's greenhouse gas emissions standards establish allowable grams per mile ("gpm") levels for greenhouse gas emissions, including tailpipe emissions of carbon dioxide (CO₂), nitrous oxide (N₂O), and methane (CH₄), as well as emissions of CO₂ and hydrofluorocarbons (HFCs) related to operation of the air conditioning system.

74 Fed. Reg. 32752. California's grams-per-mile standards (the "CO₂ Emission Limits") are effective for model years 2009 through 2016:

[California's] regulation covers large-volume motor vehicle manufacturers beginning in the 2009 model year, and intermediate and small manufacturers beginning in the 2016 model year and controls greenhouse gas emissions from two categories of new motor vehicles -- passenger cars and the lightest trucks (PC and LDT1) and heavier light-duty trucks and medium-duty passenger vehicles (LDT2 and MDPV).

Id. at 32746. Because Model Year 2010 began on January 2, 2009 (and Model Year 2009 began on January 2, 2008, see 40 CFR 85.2304), the "CO₂ Emission Limits" are currently in effect and govern CO₂ and methane emissions from all new motor vehicle sales and registrations. Moreover, these limits are in effect in 10 states beyond California: Connecticut, Maine, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.¹³ Each of these states adopted the CO₂ and methane limits pursuant to Section 177 of the Clean Air Act, 42 U.S.C. § 7507. Section 177 expressly grants other states the authority to adopt California's vehicle emission standards:

¹³ Cal. Code RTEC. tit. 13, § 1961.1(a); Conn. Agencies RTEC. § 22a-174-36b(b)(3); 06-096-127 Me. Code R. § 1(B)(4); 310 Mass. Code RTEC. 7.40(2)(a)(6); N.J. Admin. Code § 7:27-29.13; N.Y. Comp. Codes R. & RTEC tit. 6, § 218-8.2; Or. Admin. R 340-257-0050(2)(e); 25 Pa. Code 124.412; *see also* 36 Pa. Bull. 7424; 12-031 R.I. Code R. § 37.2.3; 12-031-001 Vt. Code R. § 5-1106(a)(5); Wash. Admin. Code 173-423-090(2). In three more states and the District of Columbia, these standards will come into effect in subsequent model years. Ariz. Admin. Code § R18-2-1801; Md. Code RTEC. 26.11.34.03; N.M. Code R. § 20.2.88.101; D.C. Law 17-0151.

Section 177 of the Act contains an “opt-in” provision that allows any other state to “adopt and enforce for any model year standards relating to control of emissions from new motor vehicles” if “such standards are identical to the California standards for which a waiver has been granted for such model year” and are adopted “at least two years before commencement of such model year.” 42 U.S.C. § 7507.

American Automobile Manufacturers Association v. Cahill, 152 F.3d 196, 198 (2d Cir. 1998). But for this provision of the Clean Air Act, states would not have been allowed to limit tailpipe emissions of CO₂ and methane. In short, the auto emission standards are regulations under the Clean Air Act. In fact, two federal courts have found that these very CO₂ Emission Limits are indeed federal Clean Air Act standards. In *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F.Supp.2d 1151, 1165 (E.D. Cal. 2007), the court rejected the notion that even when approved under Section 209 of the Act, the CO₂ Emission Limits are and remain state regulations and therefore subject to preemption by the federal Energy Policy and Conservation Act (“EPCA”): “The court can discern no legal basis for the proposition that an EPA-promulgated regulation or standard functions any differently than a California-promulgated and EPA-approved standard or regulation.” *Id.* at 1173. Faced with the identical argument, the court in *Green Mountain Chrysler v. Crombie*, 508 F.Supp.2d 295, 350 (D.Vt. 2007)(emphasis added), also rejected the idea that the CO₂ Emission Limits were not federal standards, concluding “that the preemption doctrine does not apply to the interplay between Section 209(b) of the CAA and EPCA, in essence a claim of conflict between two federal regulatory schemes.”

Moreover, 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. *Motor Vehicle Manufacturers Association v. New York State Department of Environmental Conservation*, 17 F.3d 521, 529 (2d. Cir. 1994). Not only have states adopted these emission

standards under their Section 177 authority, but typically each state will then incorporate the more stringent auto emission standards into its SIP under Section 110 of the Act, 42 U.S.C. § 7410. See, e.g., 40 C.F.R. § 52.370(c)(79) (EPA approval of §177-adopted standards as part of Connecticut's SIP); 40 C.F.R. § 52.1020(c)(58) (Maine); 40 C.F.R. § 52.1120(c)(132) (Massachusetts); 40 C.F.R. §52.1570(c)(84)(i)(A) (New Jersey); 40 C.F.R. § 52.2063(c)(141)(i)(C) (Pennsylvania). Once incorporated into a SIP, these requirements become CAA standards, and numerous provisions authorize both EPA and citizens to enforce such SIP requirements, e.g., 42 U.S.C. § 7413; 42 U.S.C. § 7604(a)(1), (f)(3).¹⁴

2. The Administrator's Title V decision regarding the Trimble Power Plant is inapposite.

IEPA's attempt to rely on the EPA Administrator's order responding to a Title V petition for the Louisville Gas & Electric Company's Trimble power plant ignores the context of the order and what the order actually decided. The order responded to two citizen petitions seeking an objection to various operation permits and subsequent revisions, which were filed pursuant to 42 U.S.C. § 7661d(b)(2). The petition related to a revision to the Title V operating permit for the plant (to incorporate PSD requirements) dated December, 2004, a minor revision dated January, 2005, and a significant revision dated January, 2006. *In re Louisville Gas & Elec. Co.*, Order at 6 (EPA Adm'r, August 12, 2009) (attached as **Exhibit 15**). The petition asserted that EPA should object to the state-issued Title V permit because a BACT limit for CO₂ has not been included. *Id.* at 14. The petition argued that CO₂ was regulated through Clean Air Act sections 202 and 821 and through 40 C.F.R. part 75 and Kentucky law. *Id.* There was no argument in the petition that CO₂ was subject to regulation under the Clean Air Act pursuant to the Delaware SIP or the New Source Performance

¹⁴ Because the CO₂ Emission Limits also provide significant criteria pollutant benefits (74 FR 32758) California has already included these emissions reductions into its 2007 ozone and PM SIP submittals to EPA. <http://www.arb.ca.gov/planning/sip/2007sip/2007sip.htm>. Other states will presumably now begin doing so as well.

Standard for landfill emission. Nor was there any argument about methane. Therefore, the issues in this petition for Board review were not addressed on the Trimble order.

Moreover, even as to the issues that were raised in the Trimble case, the Administrator's decision did not decide them on their legal merits. Instead, the Administrator held that the state was reasonable in assuming that EPA did not consider CO₂ subject to regulation under the Clean Air Act sections at issue in the Trimble petition at the time of the last Trimble permit revision—January 2008. *Id.* at 15. The Administrator reasoned that, since the EPA Regions were arguing in their briefs to the Board in the *Deseret* and *Christian County* cases at the time, the state could have believed that those briefs set forth EPA's position. *Id.* ("Thus, it was not implausible for KDAQ to assume that the federal PSD program did not require permits to include limits for CO₂ emission[s] because, at the time KDAQ issued Revision 3, two EPA offices... had taken that position."); *see also id.* at 16 (While KDAQ's implicit assumption at the time Revision 3 was issued—that there was an established federal standard that did not require PSD permits to include limits for CO₂ emissions—was later overturned by the EAB, it does not mean that the Petitioners have demonstrated that KDAQ's reliance on this assumption that led to a permit that is deficient...). In other words, even as to the limited arguments raised in the Trimble petition, the Administrator decided the case based on whether the state permitting agency had a rational basis to assume that, at the time the permit was issued, EPA's position was that CO₂ was not subject to regulation. In contrast, this case raises different issues and reviews IEPA's legal interpretations for clear error. The Trimble decision provides no support for IEPA's decision in this case.

3. IEPA's attempted reliance on the Johnson Memo to find that the Delaware SIP and the NSPS for landfill emissions are not regulations for purposes of requiring BACT limits is misplaced.

As noted above, IEPA relies on the Johnson Memo as requiring IEPA to refuse to impose

BACT limits on carbon dioxide and methane emissions. Response to Comments at 63 (“the Illinois EPA, as a permit authority that administers the federal PSD program in a delegated capacity, is obliged to implement USEPA’s interpretation” in the Johnson Memo). For the reasons set forth above, the Memo’s assertions that the Delaware SIP did not make carbon dioxide subject to regulation is inconsistent with the Memo’s own reasoning. Moreover, for a number of reasons, the Memo cannot be relied upon in this case.

a) The Johnson Memo Is Procedurally Defective.

The Johnson Memo attempts to change a prior authoritative interpretation by outside of the notice and comment process. An interpretative rule can only state what EPA believes a statute means and, therefore, remind the public of existing regulatory requirements. *Assoc. of Amer. RR v. Dept. of Transp.*, 198 F.3d 944, 947 (D.C. Cir. 1999) (citing *Syncor Internat’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc)). In contrast, the Johnson Memo purports to create a new substantive rule that alters the duties and obligations in PSD permitting, including establishing an exception to its announced rule that “subject to regulation” means “subject to actual control” whereby SIP requirements do not count. *See* Johnson Memo at 15.¹⁵ The memo also purports to create substantive duties for Regional Offices with regard to future SIP submittals (*Id.* at 3 n.1); for determining how pollutants become subject to PSD permitting in the future (*Id.* at 6 n.5); imposing requirements for instances when EPA makes a future regulatory endangerment finding (*Id.* at 14); and defining when and how import restrictions will trigger PSD for a pollutant. These are the types of “commands,” “require[ment]s,” “orders,” or “dictates” that will affect the rights of parties in

¹⁵ It is telling that, as the memo points out, EPA has adopted an interpretation preventing control of a pollutant (ammonia) in one state’s SIP from making that pollutant “subject to regulation” for PSD, *see* Johnson Memo at 15-16 (regarding the treatment of ammonia as PM_{2.5} precursors). The memo fails to recognize, however, that EPA did so – as required by law – through notice and comment rulemaking. *See* 70 Fed. Reg. 65984; 73 Fed. Reg. 28321.

currently pending and future permitting actions. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). The Memo's blatant attempt to avoid the rulemaking requirement through by its *ipse dixit* assertion that is interpretative and not substantive is meritless. *U.S. Telecom Ass'n v. F.C.C.*, 400 F.3d 29, 35 (D.C. Cir. 2005) ("fidelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretative rule"). Prior similar attempts have being stricken, ignored, or rendered void by courts. *E.g.*, *Alaska Professional Hunters*, 177 F.3d at 1034; *Paralyzed Veterans of Am.* 117 F.3d at 586; *see also Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 239 (D.C. Cir. 1992). The memo should similarly be ignored here.

b) The Johnson Memo Does Not Represent EPA's Final Position.

While the Johnson Memo may be disregarded as an improper substantive rule change, and comes to opposite conclusions as the Board's *Deseret* decision, EPA has also made clear that it does not represent the agency's final position. *See* Letter from Lisa Jackson to David Bookbinder (February 16, 2009) (attached as **Exhibit 16**). That grant of reconsideration went further, however, and warned "PSD permitting authorities" such as IEPA that they "should not assume that the memorandum is the final word on the appropriate interpretation of Clean Air Act requirements." *Id.* Thus, the non-final status of the Memo weakens any persuasive authority it might otherwise have.

Carbon dioxide and methane are subject to regulation under the Clean Air Act and, therefore, BACT limits were required in the final permit these pollutants. Because IEPA failed to include such a limit, its permit decision is clearly erroneous and a remand is appropriate.

CONCLUSION

For these reasons we respectfully urge the Board to review and remand the PSD permit.

Respectfully submitted, this 25th day of November, 2009.

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Sierra Club Petition Exhibits

1.	Construction Permit—PSD Approval (October 26, 2009)
2.	Sierra Club Comments on the Draft Permit
3.	Transcript of Public Hearing, held March 3, 2009
4.	Statement of Basis (a/k/a Project Summary) (January 17, 2009)
5.	Order, <i>In re We Energies Oak Creek Power Plant</i> (Adm'r, June 12, 2009)
6.	EPA Region 8 Air Program's Comments Submitted to the South Dakota Department of Environment and Natural Resources on the Draft PSD Permit for the Hyperion Energy Center (November 14, 2008)
7.	IEPA Response to Public Comments (a/k/a/ Responsiveness Summary) (October 2009)
8.	<i>In re IFCO ICS-Chicago, Inc.</i> , Docket No. CAA-05-2002-0011, Consent Agreement and Final Order (August 28, 2002)
9.	<i>U.S. v. Bunge North America, Inc.</i> , Complaint, Case No. 2:06-cv-2209 (Oct. 26, 2006).
10.	<i>People ex rel. Madigan v. ExxonMobile Corp.</i> , Complaint, Case No. 09CH4527 (Will Co. Ill. Chancery Ct., Sept 28, 2009)
11.	Air Pollution control Title V Permit to Operate No. V-IL-1716300103-08-01, Veolia Environmental Services (September 12, 2008)
12.	<i>Deseret</i> , PSD Appeal No. 07-03, Letter from Brian L. Doster, U.S. EPA Office of General Counsel, to Eurika Durr, EAB, Document # 93 (Sept. 9, 2008)
13.	Memorandum from Rose Quinto, Environmental Engineer Air Quality Planning Branch, U.S. EPA Region 3, Re: Technical Support Document - Delaware; Regulation No. 1144 – Control of Stationary Generator Emissions (January 25, 2008)
14.	Air Emissions from Municipal Solid Waste Landfills- Background Information for Proposed Standards and Guidelines at 2-15, EPA Office of Air Quality Planning and Standards, EPA-450/3-90-011a (March 1991)
15.	<i>In re Louisville Gas & Elec. Co.</i> , Order (EPA Adm'r, August 12, 2009)
16.	Letter from Administrator Jackson to David Bookbinder (February 17, 2009).