BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

IN THE MATTER OF:	)	
BASIN ELECTRIC POWER COOPERATIVE	)	Docket No. 07-2801
DRY FORK STATION,	)	Presiding Officer, F. David
	)	Searle
AIR PERMIT CT–4631	)	
	)	

NOTICE OF SUPPLEMENTAL AUTHORITY AND MOTION TO RECONSIDER ORDER GRANTING RESPONDENT DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION TO DISMISS

Last week, on November 13, 2008, the Environmental Appeals Board ("EAB") of the U.S. Environmental Protection Agency ("EPA") issued a landmark decision rejecting EPA's justifications for not requiring BACT analysis for CO_2 in a PSD permit for a coal-fired power plant. In re Deseret Power Electric Cooperative, PSD Appeal No. 07-03 (EAB Nov. 13, 2008) (Order attached as Exh. 1) (hereinafter "Deseret"). As discussed below, this decision addresses the exact issues the Council ruled on in its Order Granting Respondent DEQ's Motion to Dismiss. Because the EAB's decision in Deseret supports a different outcome, Protestants respectfully request the Council reconsider its Order and remand the permit to DEQ consistent with the holding in Deseret.

In Deseret, EPA argued that although Section 821 of the Clean Air Act requires monitoring and reporting of CO_2 emissions, this provision does not make CO_2 "subject to regulation" under the Act because it imposes no actual emission controls. EPA claimed it lacked the discretion to impose BACT limits for CO_2 because the agency had previously interpreted "subject to regulation" as requiring "actual control of emissions." Id. at 3, 8-9. However, the EAB examined each of EPA's justifications for equating "subject to regulation" with "actual

control of emissions" and rejected them. In particular, the EAB rejected EPA's reliance on a 2002 rulemaking in which EPA established a definition for "regulated NSR pollutant" and included a list of pollutants "currently regulated under the Act" that did not include CO_2. Id. at 42-49. The EAB also rejected EPA's interpretation of "subject to regulation" based on the statutory construction principle of *ejusdem generis*, id. at 45-46, as well as the agency's reliance on the Wegman and Cannon memos, id. at 49-53. Additionally, the EAB rejected EPA's reliance on prior EAB decisions, finding that they did not address the relevant issue and do not support EPA's argument that CO_2 is not subject to BACT analysis. Deseret at 49 n.52 (discussing In re Inter-Power of N.Y., Inc., 5 E.A.D. 130 (EAB 1994) and In re Kawaihae Cogeneration Project, 7 E.A.D. 107 (EAB 1997)).

In fact, the EAB held, to the extent that EPA has expressed any official position, it has determined a pollutant is "subject to regulation" under the Clean Air Act if it is subject to regulations promulgated in Title 40, Subchapter C of the Code of Federal Regulations. Id. at 38-42 (relying on EPA's statements in a 1978 Federal Register Preamble). The monitoring and reporting regulations required under Section 821 of the Act are found in Title 40, Subchapter C. Because EPA's initial interpretation of "subject to regulation" would include CO_2 and EPA failed to provide any valid support in the record for a contrary position, the EAB remanded the permit to the agency. Id. at 63. On remand, EPA must reconsider the issue, develop an adequate record for its decision, and reopen the permit for public comment. Id. at 64.

Consistent with the EAB's decision, the Council should also remand the Dry Fork Station air permit to DEQ. Indeed, DEQ's permitting decision suffers from the same flaws as the EPA's in Deseret. Like EPA, DEQ took the position that it cannot regulate CO_2 because the pollutant is not currently "subject to regulation" because it is not "subject to emission controls." DEQ Mem.

in Support of Motion to Dismiss at 4 ("CO_2 emissions are not currently regulated under either the CAA and corresponding EPA regulations, the WEQA or the WAQSR, and therefore the DEQ is currently unable to perform such determinations or impose attendant CO_2 emission limits."); id. at 14 ("A pollutant is only 'subject to regulation' for purposes of PSD permitting when it is subject to an emission control regulation or standard."). In support of this position, DEQ relies on the 2002 rulemaking and its list of currently regulated polluants as well as prior EAB decisions. Id. at 10-12, 17. DEQ also relies on the statutory construction principle of *ejusdem generis*. DEQ's Reply in Support of Motion to Dismiss at 6-7. Basin supports DEQ's interpretation by relying on the Wegman and Cannon memos. Basin Mem. in Support of DEQ's Motion to Dismiss at 9-10. However, the EAB rejected each of these justifications in Deseret. Accordingly, DEQ has failed to provide in the record any legitimate justification for its decision to equate "subject to regulation" with "subject to emission control." The appropriate remedy under these circumstances is to remand the permit to DEQ to reconsider whether CO_2 is subject to BACT analysis and allow the public the opportunity to comment on this decision. Deseret at 64.

Although the Council's regulations require Protestants to file a Motion for Reconsideration within 20 days, the EAB did not issue the Deseret decision until one week ago, well after this deadline had passed. See DEQ Rules of Practice and Procedure, Chpt. IV, § 1. Therefore, Protestants ask the Council to exercise its discretion to reconsider this issue and remand the permit to DEQ.

Dated: November 19, 2008

Respectfully submitted,

/s/ Robin Cooley
Robin Cooley (admitted *pro hac vice*)
James S. Angell (WY Bar No. 6-4086)
Andrea L. Zaccardi (admitted *pro hac vice*)
Earthjustice
1400 Glenarm Place, Suite 300
Denver, CO 80202
Tel: (303) 623-9466
Fax: (303) 623-8083

/s/ Reed Zars
Reed Zars
Attorney at Law
910 Kearney St.
Laramie, WY 82070
Tel: (307) 745-7979

Attorneys for Protestants

CERTIFICATE OF SERVICE

I certify that on November 19, 2008, I served a copy of the foregoing Notice of Supplemental Authority and Motion to Reconsider Order Granting Respondent Department of Environmental Quality's Motion to Dismiss, and accompanying exhibit via e-mail, addressed to:

Nancy Vehr
Jay A. Jerde
Luke Esch
Office of the Attorney General
123 State Capitol
Cheyenne, WY 82002
nvehr@state.wy.us
jjerde@state.wy.us
lesch@state.wy.us

Patrick R. Day
Mark R. Ruppert
Holland & Hart LLP
2515 Warren Avenue, Suite 450
Cheyenne, WY 82003
pday@hollandhart.com
mruppert@hollandhart.com

/s/ Robin Cooley

EXHIBIT 1

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

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

In re:	)	
Deseret Power Electric Cooperative	)	PSD Appeal No. 07-03
PSD Permit No. PSD-OU-0002-04.00	)	

[Decided November 13, 2008]

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

IN RE DESERET POWER ELECTRIC COOPERATIVE

PSD Appeal No. 07-03

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided November 13, 2008

Sierra Club seeks review of a prevention of significant deterioration ("PSD") permit that U.S. Environmental Protection Agency, Region 8 ("Region") issued to Deseret Power Electric Cooperative ("Deseret") on August 30, 2007. The permit would authorize Deseret to construct a new waste-coal-fired electric generating unit at Deseret's existing Bonanza Power Plant, located near Bonanza, Utah.

Sierra Club's petition raises two issues. First, Sierra Club argues that the Region's permitting decision violates the public participation provisions of Clean Air Act ("CAA" or "Act") section 165(a)(2), which require the Agency to consider "alternatives" to the proposed facility. Sierra Club contends that the Region erred by failing to consider alternatives to the proposed facility that are similar to alternatives U.S. EPA Region 9 recommended in comments on the draft environmental impact statement for a different facility, the White Pine Energy Station Project in Nevada.

Second, Sierra Club argues that the Region violated CAA sections 165(a)(4) and 169(3) by failing to apply "BACT," or best available control technology, to limit carbon dioxide ("CO_2") emissions from the facility. Sierra Club points to the Supreme Court's April 2007 decision in *Massachusetts v. EPA,* 549 U.S. 497 (2007), as establishing that CO_2 is an "air pollutant" within the meaning of the Act. Sierra Club contends that because CO_2 is an air pollutant, the permit violates the requirement to include a BACT emissions limit for "each pollutant subject to regulation under [the Clean Air] Act."

Sierra Club relies on Part 75 of Title 40 of the Code of Federal Regulations, which requires monitoring and reporting of CO_2 emissions and was adopted in accordance with section 821 of the Clean Air Act Amendments of 1990 ("1990 Public Law"). Sierra Club asserts that the word "regulation" has a "plain and unambiguous" meaning and that, consistent with this plain meaning, CAA sections 165 and 169, section 821 of the 1990 Public Law, and EPA's Part 75 regulations make CO_2 "subject to regulation" under the CAA.

The Region disagrees that the statutory text has a plain meaning and argues instead that the Agency had discretion to interpret the term "subject to regulation" and did so by adopting an historical interpretation of the term that was "reasonable" and

"permissible." The Region maintains that "EPA has historically interpreted the term 'subject to regulation under the Act' to describe pollutants that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." The Region contends that, notwithstanding the Supreme Court's decision, it does not have the authority to impose a CO_2 BACT limit because the Part 75 regulations only require monitoring and reporting of CO_2 emissions, not actual control. The Region argues further that the Part 75 regulations implementing section 821 of the 1990 Public Law are not "under" the CAA within the meaning of CAA sections 165 and 169 because section 821 is not part of the CAA.

By order dated November 21, 2007, the Board granted review of the CO_2 BACT issue while holding under advisement the "alternatives" issue. The Board received briefs on this issue from Sierra Club, the Region, and Deseret, and six amici briefs supporting Sierra Club's petition, and six amici briefs supporting the Region's decision. The Board held oral argument on May 29, 2008. The Board subsequently requested clarification of certain questions arising at the oral argument, and the parties completed briefing on September 12, 2008.

Held: The Board denies review of the Region's alleged failure to consider alternatives" to the proposed facility, but remands the permit to the Region for it to reconsider whether to impose a CO_2 BACT limit and to develop an adequate record for its decision.

- CAA section 165(a)(2), on which Sierra Club's alternatives argument relies, provides that a PSD permit may not be issued unless "a public hearing has been held with opportunity for interested persons * * * [to] submit written or oral presentations on the air quality impact of such source, *alternatives thereto* * * * and other appropriate considerations." This requirement, which the statute ties to the opportunity to comment on the draft permit, does not oblige the permit issuer to conduct an independent analysis of alternatives not identified by the public during the comment period. Here, Sierra Club does not contend that it or any other person identified during the public comment period the alternatives it raises in its petition. Further, Region 9's comments, although submitted in the White Pines Energy Center case after the close of the public comment period in the present case, do not, in any event, present grounds for raising this new issue or argument for the first time on appeal in this case.

- The Board rejects Sierra Club's contention that the phrase "subject to regulation" has a plain meaning and that this meaning compels the Region to impose a CO_2 BACT limit in the permit. On the contrary, the Board finds that the statute is not so clear and unequivocal as to preclude Agency interpretation of the phrase "subject to regulation under this Act," and therefore the statute does not dictate whether the Agency must impose a BACT limit for CO_2 in the permit. It does not appear that, when it enacted CAA sections 165 and 169 in 1977, Congress considered the precise issue before the Board in this case, or more significantly, drafted language sufficiently specific to address it. The Board also finds no evidence that Congress's use of the term "regulations" in

section 821 of the 1990 Public Law was an attempt to interpret or constrain the Agency's interpretation of the phrase "subject to regulation" as used in sections 165 and 169.

- The administrative record of the Region's permitting decision, as defined by 40 C.F.R. section 124.18, does not support the Region's view that it is bound by an Agency historical interpretation of "subject to regulation" as meaning "subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." The Region did not identify in its response to comments any Agency document expressly stating that "subject to regulation under this Act" has this meaning.

- The Board examines the two authorities the Region relied upon in its response to comments to support its contention that an historical interpretation exists. The Region argues that the constraining historical interpretation may be discerned by inference from the pollutants listed by name or descriptive category in the preamble to a 1978 Federal Register document in which the Agency first established an interpretation of the term "subject to regulation under this Act." The Region observes that all of these pollutants were subject to emissions control and none of the listed pollutants were subject only to monitoring and reporting requirements. However, the Board finds that this interpretation provides little, if any, support for the contention that the phrase applies only to provisions that require actual control of emissions. Instead, the preamble as a whole augers in favor of a finding that the Agency expressly interpreted "subject to regulation under this Act" to mean "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type." In the 1978 preamble, the Administrator stated he was making "final" an "interpretation" he believed to be correct. While the Region correctly observes that the reference to Subchapter C was not repeated in the preamble to the 1993 rulemaking adding the Part 75 regulations, neither did the preamble expressly clarify or withdraw that earlier interpretation. Thus, whatever the Agency's intentions were relative to the Subchapter C reference in the 1978 preamble when it adopted the 1993 regulations, it did not express them.

- The second authority the Region relied upon in its response to comments as allegedly creating an historical interpretation was a 2002 rulemaking that codified the defined term "regulated NSR pollutant" to replace the previous regulatory language that was functionally equivalent to the statutory phrase "pollutant subject to regulation under this Act." The regulatory definition added in 2002 of "regulated NSR pollutant," however, is not limited to "actual control of emissions." The regulatory definition contains, as its fourth part, essentially the same phrase – "that otherwise is subject to regulation under the Act" – that the Region argues is ambiguous as a matter of statutory interpretation. There is no public notice in the 2002 final preamble (or in the 1996 preamble for the proposed rulemaking) of the interpretation the Region

now advocates, let alone anything approaching the same level of express notice and clear statement that is found in the preamble for the 1978 rulemaking. The preamble's list of pollutants, which the Region again argues creates the interpretation by inference, does not indicate that the list was provided as an interpretation of the defined term "regulated NSR pollutant." Neither the 2002 preamble nor the 1996 preamble for the proposed rulemaking expressly withdrew the 1978 interpretation. Thus, this rulemaking fails to establish or even support any binding historical interpretation.

- The Board also examines two memoranda not cited in the response to comments but set forth in the Region's appeal briefs that it contends made the Agency's interpretation "apparent to the regulated community and other stakeholders." These are a memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, *Definition of Regulated Air Pollutant for Purposes of Title V* (Apr. 26, 1993) and a memorandum from Jonathan Z. Cannon, General Counsel, U.S. EPA, to Carol M. Browner, Administrator, U.S. EPA, *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (Apr. 10, 1998). These memoranda, however, do more to confuse the historical record of the Agency's interpretation than they do to show that it has been long-standing and consistent. They clearly are not sufficient to form an alternative basis for sustaining the Region's conclusion that its authority was constrained by an historical Agency interpretation.

- The Board rejects as not sustainable in this proceeding the Region's alternative argument – that any regulation arising out of section 821 cannot, in any event, constitute regulation "under this Act" because section 821 is not part of the CAA. While the Region now cites textual distinctions and legislative history to argue that the term "regulations" under section 821 does not constitute regulation "under this Act" for purposes of CAA sections 165 and 169, this argument is at odds with the Agency's prior statements regarding the relationship between section 821 and the CAA, including statements in EPA's Part 75 regulations, and these inconsistencies preclude the Board's acceptance of the Region's argument in this proceeding.

- Having determined that the Region has discretion under the statute to interpret the term "subject to regulation under this Act" and that the Region wrongly believed that its discretion was limited by an historical Agency interpretation, the Board remands the permit to the Region for it to reconsider whether to impose a CO_2 BACT limit and to develop an adequate record for its decision.

- In remanding this permit to the Region for reconsideration of its conclusions regarding application of BACT to limit CO_2 emissions, the Board recognizes that this is an issue of national scope that has implications far beyond this individual permitting proceeding. The Board suggests that the Region consider whether interested persons, as well as the Agency, would be better served by

the Agency addressing the interpretation of the phrase "subject to regulation under this Act" in the context of an action of nationwide scope, rather than through this specific permitting proceeding.

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Reich:

I. *INTRODUCTION*

Sierra Club seeks review by the Environmental Appeals Board ("Board") of a prevention of significant deterioration ("PSD") permit, number PSD-OU-0002-04.00 ("Permit"), that U.S. Environmental Protection Agency ("EPA"), Region 8 ("Region") issued to Deseret Power Electric Cooperative ("Deseret") on August 30, 2007. The Permit would authorize Deseret to construct a new waste-coal-fired electric generating unit at Deseret's existing Bonanza Power Plant, located near Bonanza, Utah.[1]

Sierra Club's petition raises two issues. Sierra Club argues that the Region violated the Clean Air Act ("CAA" or "Act") because its permitting decision failed to consider certain "alternatives" to the proposed facility that are similar to alternatives U.S. EPA Region 9 recommended in comments on a draft environmental impact statement in a different matter. Sierra Club also argues that the Region violated the Act because its permitting decision failed to require a best available control technology ("BACT") emissions limit for control of carbon dioxide ("CO_2") emissions. By order dated November 21, 2007, the Board granted review of the CO_2 BACT issue.[2] Order Granting Review

[1] The Region has the responsibility for issuing this permit because the Bonanza Power Plant is located within the Uintah and Ourah Indian Reservation. CAA § 301(d)(4), 42 U.S.C. § 7601(d)(4).

[2] The procedural regulations governing this case allow any person who filed comments on the draft permit or participated in a public hearing on the draft permit to petition the Board to review any condition of the permit decision. 40 C.F.R. § 124.19(a).
(continued...)

(Nov. 21, 2007). The Board did not grant review of the "alternatives" issue but instead has held it under advisement.

As explained below in Part III.A, we now deny review of the first issue that the Region violated the Act by failing to consider the "alternatives" to the proposed facility that Sierra Club identifies in its petition. The statutory section Sierra Club relies upon, CAA section 165(a)(2), does not require the permit issuer to independently raise and consider alternatives that the public did not identify during the public comment period. Here, Sierra Club did not identify during the public comment period the alternatives it raises in its petition.

When the Board granted review of the second issue identified above, the CO_2 BACT issue, it set a briefing schedule to provide an opportunity, pursuant to 40 C.F.R. § 124.19(c), for interested persons to file briefs either in support of, or in opposition to, Sierra Club's contention that the Permit must contain a CO_2 BACT limit. The Board initially received a total of seven briefs in support of Sierra Club's Petition and eight briefs in support of the Region's permitting decision. The interested persons who filed briefs are identified below in Part II.B (Procedural Background). The Board held oral argument on May 29, 2008, and received additional post-argument briefing, which was completed on September 12, 2008.

As explained below in Part III.B, we conclude that we cannot sustain the Region's CO_2 BACT decision on the present administrative record, and therefore we remand this issue to the Region. Briefly, Sierra Club points to the Supreme Court's April 2007 decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), as establishing that CO_2 is an "air pollutant" within the meaning of the Act. Pet. at 3. Sierra Club contends that the Permit violates CAA sections 165(a)(4) and 169(3), which prohibit the issuance of a PSD permit unless the permit includes

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[2](...continued)
When the Board decides to grant review, section 124.19(c) provides that the persons who received notice of the draft permit shall be given notice of the Board's order and any interested person may file an amicus brief with the Board.

a BACT emissions limit for "each pollutant *subject to regulation under this Act*." CAA §§ 165(a)(4), 169(3), 42 U.S.C. §§ 7475(a)(4), 7479(3) (emphasis added).

Sierra Club preserved this issue for review[3] by stating in its comments on the draft permit that a requirement to set a CO_2 BACT emissions limit might be an outgrowth of the *Massachusetts v. EPA* case that was then still pending before the Supreme Court.[4] The Region responded to Sierra Club's comment by discussing the April 2007 Supreme Court decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which held that CO_2 fits within the CAA's definition of "air pollutant," and explaining why it believed, notwithstanding this decision, that no CO_2 BACT limit was required in the Permit.

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[3] In order for an issue to be preserved for consideration on appeal, the regulations governing PSD permitting provide that the petitioner must demonstrate that "all reasonably ascertainable issues and * * * all reasonably available arguments" were raised by the close of the public comment period. 40 C.F.R. §§ 124.13, 19(a); *see also In re Kendall New Century Dev.*, 11 E.A.D. 40, 55 (EAB 2003) (denying review of a new argument raised for the first time on appeal). On this basis, we generally deny review where an issue was raised either not at all, or in only a general manner during the public comment period and new or much more specific arguments are introduced for the first time on appeal. *See In re Steel Dynamics*, *Inc.*, 9 E.A.D. 169, 230 (EAB 2000); *In re Florida Pulp & Paper Ass'n.*, 6 E.A.D. 49, 54-55 (EAB 1995); *In re Pollution Control Indus. of Ind.*, *Inc.*, 4 E.A.D. 162, 166-69 (EAB 1992); *see also In re Maui Elec. Co.*, 8 E.A.D. 1, 11-12 (EAB 1999).

[4] *See* E-mail from Utah Chapter of the Sierra Club, et al., to Mike Owens, U.S. EPA, Region 8, regarding Draft PSD Permit for Major Modifications to the Bonanza Power Plant in Utah, at 2. In our January 2008 decision in *Christian County Generation*, *LLC*, which also considered the Supreme Court's *Massachusetts* decision, we noted that petitioner's complete failure in that case to raise concerns during the public comment period regarding a BACT emissions limit for CO_2 precluded the petitioner from raising the issue for the first time on appeal. *In re Christian County Generation*, *LLC*, PSD Appeal No. 07-01, slip op. at 13, 19 (EAB Jan. 28, 2008), 13 E.A.D. at ___. We explained, by way of contrast, that Sierra Club's comments regarding Deseret's proposed facility modification in the present *Deseret* case were sufficient to alert the Region that the Supreme Court's decision in the pending *Massachusetts* case should be taken into account in its permitting decision. *Id.*, slip op. at 16.

Sierra Club, the Region, Deseret, and their supporting amici developed many of their arguments for the first time on appeal, and those arguments have continued to evolve during the course of this administrative appellate proceeding. While the Board normally will not entertain arguments raised for the first time on appeal, we have tailored our approach and somewhat relaxed that limitation because of the unique circumstances of this case. We have done this for two reasons. First and most important, during the comment period on the draft permit, the Supreme Court was still considering the threshold issue of whether CO_2 is an air pollutant. This led the parties to address the CO_2 BACT issue in a more cursory fashion than would otherwise be expected. Second, our order granting review recognized that this matter potentially raises issues of national significance and concluded that our decision may benefit from further briefing and argument, including from interested persons not yet before the Board in this matter. Order Granting Review at 2. The applicable procedural regulations require that the order granting review set a briefing schedule allowing any interested person to submit an amicus brief, 40 C.F.R. § 124.19(c), which implies that the Board may consider some augmentation of arguments when making its decision after granting review of a permitting decision. However, any augmentation must still be consistent with the regulatory requirement that the permit decision must be based on the administrative record defined by 40 C.F.R. § 124.18, which "shall be complete on the date the final permit is issued." *Id.* § 124.18(c). As we explain below, while we consider a number of legal arguments and supporting historical Agency legal memoranda that were not part of the record for the Region's permitting decision, ultimately we conclude that the Region's permitting decision cannot be sustained on the administrative record defined by section 124.18.

Although the Supreme Court determined that greenhouse gases, such as CO_2, are "air pollutants" under the CAA, the *Massachusetts* decision did not address whether CO_2 is a pollutant "subject to regulation" under the Clean Air Act. *Massachusetts v. EPA*, 549 U.S. 497, slip op. at 29-30 (2007); *In re Christian County Generation, LLC*, PSD Appeal No. 07-01, slip op. at 7 n.12 (EAB Jan. 28, 2008), 13 E.A.D. at ___. The Region maintains that it does not now have the

authority to impose a CO_2 BACT limit because "EPA has historically interpreted the term 'subject to regulation under the Act' to describe pollutants that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." U.S. EPA Region 8, Response to Public Comments (Permit No. PSD-OU-0002-04.00) at 5-6 (Aug. 30, 2007) ("Resp. to Comments"). We hold that this conclusion is clearly erroneous because the Region's permitting authority is not constrained in this manner by an authoritative historical Agency interpretation.

By our holding today, we do not conclude that the CAA (or an historical Agency interpretation) requires the Region to impose a CO_2 BACT limit. Instead, we conclude that the record does not support the Region's proffered reason for not imposing a CO_2 BACT limit – that although EPA initially could have interpreted the CAA to require a CO_2 BACT limit, the Region no longer can do so because of an historical Agency interpretation. Accordingly, we remand the Permit to the Region for it to reconsider whether or not to impose a CO_2 BACT limit and to develop an adequate record for its decision.

We also decline to sustain the Region's permitting decision on the alternative grounds the Region argues in this appeal. Sierra Club contends that regulations EPA promulgated in 1993 to require monitoring and reporting of CO_2 emissions, as required by section 821 of the public law known as the Clean Air Act Amendments of 1990, constitute "regulation" of CO_2 within the meaning of CAA sections 165 and 169. The Region argues that we should reject Sierra Club's contention on the grounds that those regulations are not "under" the CAA within the meaning of CAA sections 165 and 169 because section 821 is not part of the CAA. As we explain below, this argument is at odds with the Agency's prior statements regarding the relationship between section 821 and the CAA, including statements in EPA's Part 75 regulations, and these inconsistencies preclude our acceptance of the Region's argument in this proceeding.

In remanding this permit to the Region for reconsideration of the CO_2 BACT issue, we recognize that the issue of whether CO_2 is "subject

to regulation under [the] Act" is an issue of national scope and that all parties would be better served by addressing it in the context of an action of nationwide scope rather than in the context of a specific permit proceeding. We elaborate on this point below.

II. *BACKGROUND*

A. *Statutory and Regulatory Background and Identification of Issues*

Congress enacted the PSD permitting provisions of the CAA in 1977 for the purpose of, among other things, "insur[ing] that economic growth will occur in a manner consistent with the preservation of existing clean air resources." CAA § 160(3), 42 U.S.C. § 7470(3). The statute requires EPA approval in the form of a PSD permit before a "major emitting facility"[5] may be constructed in any area EPA has classified as either in "attainment" or "unclassifiable" for attainment of the national ambient air quality standards ("NAAQS"). CAA §§ 107, 160-169B, 42 U.S.C. §§ 7407, 7470-7492; *see also In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 59 (EAB 1997); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 766-67 (EAB 1997). EPA's regulations further provide that a PSD permit is required before a "major modification" of an existing major stationary source. *See* 40 C.F.R. § 52.21(a)(2), .21(I).

The NAAQS are "maximum concentration 'ceilings'" for particular pollutants, "measured in terms of the total concentration of a pollutant in the atmosphere."[6] U.S. EPA Office of Air Quality Planning

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[5] A "major emitting facility" is any of certain listed stationary sources (including electric generating units) that emit, or have the potential to emit, 100 tons per year ("tpy") or more of any air pollutant, or any other stationary source with the potential to emit at least 250 tpy of any air pollutant. CAA § 169(1), 42 U.S.C. § 7479(1).

[6] EPA designates areas, on a pollutant-by-pollutant basis, as being in either attainment or nonattainment with the NAAQS. An area is designated as being in attainment with a given NAAQS if the concentration of the relevant pollutant in the ambient air within the area meets the limits prescribed by the applicable NAAQS. CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A). A nonattainment area is one with ambient concentrations of a criteria pollutant that do not meet the requirements of the applicable

(continued...)

& Standards, *New Source Review Workshop Manual* at C.3 (draft Oct. 1990) ("NSR Manual").[7] NAAQS have been set for six pollutants: sulfur oxides,[8] particulate matter ("PM"),[9] nitrogen dioxide ("NO_2"),[10] carbon

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[6](...continued)
NAAQS. *Id.* Areas "that cannot be classified on the basis of available information as meeting or not meeting the [NAAQS]" are designated as unclassifiable areas. *Id.* PSD permitting covers construction in unclassifiable areas, as well as construction in attainment areas. CAA §§ 160-169B, 42 U.S.C. §§ 7470-7492; *see In re Christian County Generation*, *LLC*, PSD Appeal No. 07-01, slip op. at 5, (EAB Jan. 28, 2008), 13 E.A.D. at ___ (citing *In re EcoEléctrica*, *L.P.*, 7 E.A.D. 56, 59 (EAB 1997); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 766-67 (EAB 1997)).

[7] The NSR Manual has been used as a guidance document in conjunction with new source review workshops and training and as a guide for state and federal permitting officials with respect to PSD requirements and policy. Although it is not a binding Agency regulation, the NSR Manual has been looked to by this Board as a statement of the Agency's thinking on certain PSD issues. *E.g.*, *In re RockGen Energy Ctr.*, 8 E.A.D. 536, 542 n.10 (EAB 1999); *In re Knauf Fiber Glass*, *GmbH*, 8 E.A.D. 121, 129 n.13 (EAB 1999).

[8] Sulfur oxides are measured as sulfur dioxide ("SO_2"). 40 C.F.R. § 50.4(c).

[9] "Particulate matter, or 'PM,' is 'the generic term for a broad class of chemically and physically diverse substances that exist as discrete particles (liquid droplets or solids) over a wide range of sizes.'" *In re Steel Dynamics*, *Inc.*, 9 E.A.D. 165, 181 (EAB 2000) (quoting 62 Fed. Reg. 38,652, 38,653 (July 18, 1997)). For purposes of determining attainment of the NAAQS, particulate matter is measured in the ambient air as particulate matter with an aerodynamic diameter of 10 micrometers or less, referred to as PM_{10}, and particulate matter with an aerodynamic diameter of 2.5 micrometers or less, referred to as $PM_{2.5}$. 40 C.F.R. §§ 50.6(c), .7(a).

[10] A facility's compliance with respect to nitrogen dioxide is measured in terms of emissions of any nitrogen oxides ("NO_x"). 40 C.F.R. § 52.21(b)(23); *see also In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 69 n.4 (EAB 1998). "'The term nitrogen oxides refers to a family of compounds of nitrogen and oxygen. The principal nitrogen oxides component present in the atmosphere at any time is nitrogen dioxides. Combustion sources emit mostly nitric oxide, with some nitrogen dioxide. Upon entering the atmosphere, the nitric oxide changes rapidly, mostly to nitrogen dioxide.'" *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 470 n.1 (2004) (quoting Preservation of Significant Deterioration for Nitrogen Oxides, 53 Fed. Reg. 40,656, 40,656 (Oct. 17, 1988)).

monoxide ("CO"), ozone,[11] and lead. *See* 40 C.F.R. §§ 50.4-50.12. There is no NAAQS for CO_2.

Deseret's Bonanza facility is an existing "major stationary source," and Deseret's proposed new waste-coal combustion unit will be a "major modification" of that source as defined in 40 C.F.R. § 52.21. Final Statement of Basis for Permit No. PSD-OU-0002-04.00, Deseret Power Electric Cooperative, at 1 (Aug. 30, 2007) (hereinafter "Statement of Basis"). In addition, the Bonanza facility is located in an area designated as attainment for all pollutants covered by a NAAQS. *Id.* at 6. As such, the PSD permitting requirements apply to Deseret's proposed major modification of its Bonanza facility. There is no dispute as to any of these propositions.

Sierra Club's argument regarding the Region's consideration of "alternatives" to the proposed facility arises out of the Act's public participation provisions. Specifically, the Act requires that the PSD permitting decision must be made after an opportunity for public comment on the proposed permitting decision. In particular, the decision is to be made only after careful consideration of all consequences of the decision and "after adequate procedural opportunities for informed public participation in the decisionmaking process." CAA § 160(5), 42 U.S.C. § 7470(5). The CAA also requires the permitting authority to consider all comments submitted "on the air quality impacts of such source, *alternatives thereto*, control technology requirements, and other appropriate considerations." CAA § 165(a)(2), 42 U.S.C. § 7475(a)(2) (emphasis added).

The statute also prohibits the issuance of a PSD permit unless it includes "best available control technology," or BACT, to control emissions of "each pollutant subject to regulation" under the Act. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4). A central issue raised in Sierra Club's petition and subsequent briefing is whether CO_2 is a "pollutant

[11] A facility's compliance with respect to ozone is measured in terms of emissions of volatile organic compounds ("VOCs") or NO_X. 40 C.F.R. § 52.21(b)(23).

subject to regulation under [the Clean Air Act]." *Compare* Pet. at 4 *with* Region's Resp. to Pet. at 1.

Determination of the PSD permit's BACT conditions for control of pollutant emissions is one of the central features of the PSD program.[12] *In re BP West Coast Prods. LLC*, *Cherry Point Co-Generation Facility*, 12 E.A.D. 209, 213-14 (EAB 2005); *In re Knauf Fiberglass*, *GmbH*, 8 E.A.D. 121, 123-24 (EAB 1999). "BACT is a site-specific determination resulting in the selection of an emission limitation that represents application of control technology or control methods appropriate for the particular facility." *In re Cardinal FG Co.*, 12 E.A.D. 153, 161 (EAB 2005); *In re Three Mountain Power*, *L.L.C.*, 10 E.A.D. 39, 47 (EAB 2001); *accord Knauf*, 8 E.A.D. at 128-29; *see also In re CertainTeed Corp.*, 1 E.A.D. 743, 747 (Adm'r 1982) ("It is readily apparent * * * that * * * BACT determinations are tailor-made for each pollutant emitting facility.").

The BACT permitting requirements are pollutant-specific, which means that a facility may emit many air pollutants, but only one or a few may be subject to BACT review, depending upon, among other things, the amount of projected emissions of each pollutant. NSR Manual at 4. Regulated pollutants emitted in amounts defined by the regulations as "significant" must be subject to a BACT emissions limit. *Id.* Deseret's proposed major modification to its facility will emit total PM, PM_{10}, SO_2,

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[12] Other PSD permitting requirements include a review of new major stationary sources or major modifications prior to construction to ensure that emissions from such facilities will not cause or contribute to an exceedance of either the NAAQS or any applicable PSD ambient air quality "increments." CAA § 165(a)(3), 42 U.S.C. § 7475(a)(3); 40 C.F.R. §§ 52.21(k)-(m). Air quality increments represent the maximum allowable increase in a particular pollutant's concentration that may occur above a baseline ambient air concentration for that pollutant. *See* 40 C.F.R. § 52.21(c) (increments for six regulated air pollutants). The performance of an ambient air quality and source impact analysis, pursuant to the regulatory requirements of 40 C.F.R. § 52.21(k), (l) and (m), as part of the PSD permit review process, is the central means for preconstruction determination of whether the source will cause an exceedance of the NAAQS or PSD increments. *See Haw. Elec.*, 8 E.A.D. at 73. There are no NAAQS or PSD increments for CO_2. In the present case, Sierra Club has not sought review of the Region's ambient air quality and source impact analysis.

NO_X, sulfuric acid mist ("H_2SO_4"), and CO in amounts qualifying as "significant" under 40 C.F.R. § 52.21(b)(23)(I). Statement of Basis at 18. There is no dispute that these pollutants are subject to regulation under the CAA, and the Permit contains BACT emissions limits for these air pollutants. Sierra Club does not challenge the Region's BACT determination for any of these pollutants. Instead, Sierra Club contends that the modification to Deseret's facility will emit a significant amount of CO_2 and that CO_2 is a regulated pollutant and, thus, the Permit must also contain a BACT emissions limit for CO_2. Deseret did not submit a proposed BACT determination for CO_2 in its permit application, and the Region did not make a CO_2 BACT determination as part of its permitting decision. Sierra Club argues that this constitutes clear error.

The PSD provisions were enacted as part of the Clean Air Act Amendments of 1977. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977). Central to the parties' arguments in this case is a statutory phrase that appears in both CAA sections 165(a)(4) and 169(3), which provide that the permit must contain a BACT emissions limit for "each pollutant subject to regulation under this Act."[13] In 1978, the Agency promulgated regulations governing the PSD permitting process and, as part of the preamble for that 1978 rulemaking, the Agency stated it was making final an interpretation of what "subject to regulation under this Act" means relative to BACT determinations. *Part 52 – Approval and Promulgation of State Implementation Plans*, 43 Fed. Reg. 26,388, 26,397 (June 19, 1978). EPA set forth this interpretation in the preamble, but did not make it part of the regulatory text. Subsequently, Congress amended the CAA in 1990 and, as part of the public law enacting those amendments, in section 821, Congress required EPA to promulgate regulations providing for monitoring and reporting of CO_2 emissions.

Thereafter, EPA promulgated regulations in 1993 and in 2002. *Acid Rain Program: General Provisions and Permits*, *Allowance System*, *Continuous Emissions Monitoring*, *Excess Emissions and Administrative*

[13] Clean Air Act Amendments of 1977, Pub. L. No. 95-95 § 127(a), 91 Stat. 685, 735, 741.

Appeals, 58 Fed. Reg. 3590 (Jan. 11, 1993); *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination*, *Actual-to-Future-Actual Methodology*, *Plantwide Applicability Limitations*, *Clean Units*, *Pollution Control Projects*, 67 Fed. Reg. 80,186 (Dec. 31, 2002). Among other things, the 1993 rulemaking imposed in Part 75 monitoring and reporting requirements for CO_2, and the 2002 rulemaking created the regulatory defined term "regulated NSR pollutant." 67 Fed. Reg. at 80,240.

The parties' arguments in this case focus on these and other Agency historical statements allegedly interpreting the meaning of the statutory phrase "subject to regulation under this Act." We consider those arguments below in Part III.B.

B. *Procedural Background*

On November 1, 2004, Deseret submitted to the Region a revised application for a PSD permit to construct its proposed waste-coal-fired electric generating unit at its existing Bonanza power plant. The Region and Deseret exchanged information through June 2006, and, on June 27, 2006, the Region issued the draft permit and published notice of the opportunity for the public to submit comments on the draft permit. The public comment period closed on July 29, 2006. During the public comment period, the Utah Chapter of the Sierra Club, among others, submitted comments on the draft permit. In its public comments, Sierra Club stated, among other things, as follows:

> We believe that the EPA has a legal obligation to regulate CO_2 and other greenhouse gases as pollutants under the Clean Air Act. * * * This issue is now before the U.S. Supreme Court. If the Supreme Court agrees that greenhouse gases, such as CO_2, must be regulated under the Clean Air Act, such a decision may also require the establishment of CO_2 emission limits in this permit * * *.

E-mail from Utah Chapter of the Sierra Club, et al., to Mike Owens, U.S. EPA, Region 8, regarding Draft PSD Permit for Major Modifications to the Bonanza Power Plant in Utah, at 2.

On August 30, 2007, the Region issued its decision to grant Deseret's application for a PSD permit authorizing Deseret to construct its proposed waste-coal-fired electric generating unit at the Bonanza facility. The Region provided a response to Sierra Club's comments explaining, among other things, why the Region concluded that it is not required to establish a BACT emissions limit for CO_2 in the Permit. *See* Resp. to Comments at 5-9. The Region's response to public comments included a discussion of the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which determined that greenhouse gases, including CO_2, "fit well within the Clean Air Act's capacious definition of 'air pollutant.'" *Id.*, slip op. at 29-30. The Region stated that the *Massachusetts* decision "does not require the Agency to set CO_2 emission limits," Resp. to Comments at 5, and that "EPA does not currently have the authority to address the challenge of global climate change by imposing limitations on emissions of CO_2 and other greenhouse gases in PSD permits," Resp. to Comments at 5.

On October 1, 2007, Sierra Club timely filed its Petition seeking review of the Region's decision to issue the Permit. On November 2, 2007, the Region filed its response to the Petition, and on November 16, 2007, Deseret filed a motion requesting that it be allowed to participate in this proceeding and file a response to the Petition (hereinafter, these documents will be referred to as the Region's or Deseret's "Resp. to Pet.," as appropriate). By order dated November 21, 2007, the Board granted Deseret's request, granted review, and set a schedule for further briefing and argument on Sierra Club's issue regarding BACT for controlling CO_2 emissions. *See* Order Granting Review (Nov. 21, 2007). The Board did not grant review of Sierra Club's issue regarding "alternatives" and, instead, has held that issue under advisement. *Id.* at 2 n.4.

The Board's order granting review invited briefing and argument on the CO_2 BACT issue from interested persons as provided in 40 C.F.R.

§ 124.19(c). Pursuant to that briefing schedule (as extended by subsequent order), in January 2008, the Board received from the following persons or groups a total of seven briefs in support of Sierra Club's contention that the Region erred by not requiring a CO_2 BACT limit: 1) Sierra Club, filing a brief further developing the arguments it made in its Petition; 2) Dr. James E. Hanson; 3) National Parks Conservation Association; 4) Physicians for Social Responsibility; 5) Center for Biological Diversity; 6) the Attorneys General of the States of New York, California, Connecticut, Delaware, Maine, Massachusetts, Rhode Island, and Vermont; and 7) a group of organizations that refer to themselves as the "Utah and Western Non-Governmental Organizations," which include Mom-Ease, Utah Physicians for a Healthy Environment, Wasatch Clean Air Coalition, Post Carbon Salt Lake, Grand Canyon Trust, Montana Environment Information Center, Wyoming Outdoor Council, and Western Resource Advocates. (Hereinafter, briefs filed by these persons will be referred to as the particular person's "Jan. Brief.")

The Board received from the following persons or groups a total of eight briefs in opposition to Sierra Club's contention that the Permit must contain a CO_2 BACT limit: 1) the Region (in which EPA's Office of Air and Radiation joined); 2) Deseret; 3) ConocoPhillips and WRB Refining; 4) The Heartland Institute; 5) National Rural Electric Cooperative Association; 6) the Utility Air Regulatory Group (hereinafter "UARG"); 7) a group of organizations with the American Petroleum Institute as the first named organization;[14] and 8) another group of organizations with the Competitive Enterprise Institute as the

[14] Other organizations in the group are as follows: American Chemistry Council, American Royalty Council, Chamber of Commerce of the United States, National Association of Manufacturers, National Oilseed Processors Association, and National Petrochemical & Refiners Association.

first named organization.[15] (Hereinafter, briefs filed by these persons will be referred to as the particular person's "Mar. Brief.")

In April 2008, the Board received reply briefs from Sierra Club and Physicians for Social Responsibility (hereinafter, Sierra Club's or Physician's for Social Responsibility's "April Reply"). On May 8, 2008, the Region moved to strike a portion of the April Replies to the extent that those briefs for the first time argued that CO_2 is regulated under landfill emission regulations promulgated under CAA section 111. The Board granted the motion to strike by order dated May 20, 2008.

On May 29, 2008, the Board held oral argument on Sierra Club's contention that the Permit must contain a CO_2 BACT limit. To obtain further clarification of questions arising during oral argument, the Board issued an order dated June 16, 2008, requesting further briefing from the Region and EPA's Office of Air and Radiation, which after requesting additional time, those offices filed on August 8, 2008 (hereinafter, the "Region's August Brief"). Responses to the Region's August Brief were received on or about September 12, 2008, from Sierra Club, Deseret, the American Petroleum Institute, Utah and Western Non-Governmental Organizations, and UARG.

C. *Part 124 Procedural Regulations and Standard of Review*

The regulations found at 40 C.F.R. part 124 govern EPA's processing of permit applications, including PSD permits, and appeals of those permitting decisions. *See generally* 40 C.F.R. pt. 124. The Part 124 regulations cover the processing of the permit application, including issuing a draft permit and providing notice to the public and opportunity for the public to submit comments on the draft permit. *Id.* §§ 124.3(a), .6(c), .10(a)(ii), .10(b), .12(a). The permit issuer must

[15] Other organizations in the group are as follows: Freedomworks, National Center for Public Policy Research, American Conservative Union, American Legislative Exchange Council, Americans for Prosperity Foundation, Americans for Tax Reform, Citizens Against Government Waste, Congress of Racial Equality, Independent Women's Forum, Frontiers of Freedom Foundation, National Center for Policy Analysis, National Taxpayers Union, and The 60 Plus Association.

respond to all significant comments, *id*. § 124.17(a), and issue a final permit decision based on the "administrative record" as defined by regulation, *id*. §§ 124.15(a), .18(a). The administrative record for the final permitting decision must contain the administrative record for the draft permit as well as a number of other items, including all comments received during the public comment period, any written materials submitted at a hearing (if one is conducted), and the document setting forth the permit issuer's response to comments, all of which must be collected and considered by the permit issuer before the final permitting decision is made. *Id*. § 124.18(b)(1)-(7).

The regulations specifically provide that "[t]he record shall be complete on the date the final permit is issued." *Id.* § 124.18(c). Questions regarding completeness of the administrative record have arisen in situations where the permit issuer either failed to issue its responses to comments until after issuing its permitting decision or where the permit issuer has sought to introduce on appeal a new or additional rationale for its permitting decision or additional information supporting its permitting decision. In rare cases, the Board has allowed a rationale to be supplemented on appeal where the missing explanation was fairly deducible from the record. *See In re Steel Dynamics*, *Inc.*, 9 E.A.D. 165, 191 (EAB 2000). More typically, the Board has remanded the permit. *See*, *e.g.*, *In re Conocophillips Co.*, PSD Appeal No. 07-02, slip op. at 24-25 (EAB June 2, 2008), 13 E.A.D. __ (explaining that "allowing the permit issuer to supply its rationale after the fact, during the briefing for an appeal, does nothing to ensure that the original decision was based on the permit issuer's 'considered judgment' at the time the decision was made" (citing *In re Indeck-Elwood LLC*, PSD Appeal No. 03-04, slip op. at 29 (EAB Sept. 27, 2006), 13 E.A.D. at __)); *In re Prairie State Generation Station*, 12 E.A.D. 176, 180 (EAB 2005); *In re Gov't of D.C. Mun. Separate Sewer Syst.*, 10 E.A.D. 323, 342-43 (EAB 2002) ("Without an articulation by the permit writer of his analysis, we cannot properly perform any review whatsoever of that analysis * * *."); *In re Chem. Waste Mgmt*, 6 E.A.D. 144, 151-52 (EAB 1995); *In re Amoco Oil Co.*, 4 E.A.D. 954, 964 (EAB 1993); *In re Waste Techs. Indus.*, 4 E.A.D. 106, 114 (EAB 1992).

Within thirty days of the issuance of the final permit decision, any person who filed comments on the draft permit or who participated in the public hearing may appeal the Region's final permit decision to the Board. 40 C.F.R. § 124.19(a). "The Board's review of PSD permitting decisions is governed by 40 C.F.R. part 124, which 'provides the yardstick against which the Board must measure' petitions for review of PSD and other permit decisions." *In re Prairie State Generating Co.*, PSD Appeal No. 05-05, slip op. at 13 (EAB Aug. 24, 2006), 13 E.A.D. at ___ (quoting *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997)), *aff'd sub nom. Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007). The standard for review of a permit under part 124 requires the Board to determine whether the permit issuer based the permit on a clearly erroneous finding of fact or conclusion of law. 40 C.F.R. § 124.19(a); *In re Dominion Energy Brayton Point*, *LLC*, 12 E.A.D. 490, 509 (EAB 2006); *In re Inter-Power of N.Y.*, *Inc.*, 5 E.A.D. 130, 144 (EAB 1994); *accord*, *e.g.*, *In re Zion Energy*, *LLC*, 9 E.A.D. 701, 705 (EAB 2001); *In re Knauf Fiber Glass*, *GmbH*, 8 E.A.D. 121, 126-27(EAB 1999); *Commonwealth Chesapeake*, 6 E.A.D. at 769. The Board, in its discretion, may also evaluate conditions of the permit that are based on the permit issuer's "exercise of discretion or an important policy consideration." 40 C.F.R. § 124.19(a)(2). The petitioner must describe each objection it is raising and explain why the permit issuer's previous response to each objection is clearly erroneous or otherwise deserving of review.[16] *Indeck-Elwood*, slip op. at 23, 13 E.A.D. at ___ (citing *In re Tondu Energy Co.*, 9 E.A.D. 710, 714 (EAB 2001); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 252 (EAB 1999)).

III. *DISCUSSION*

Sierra Club argues that the Region's permitting decision in the present case violates two PSD permitting requirements: the requirement

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[16] The Agency stated in the Federal Register preamble to the part 124 regulations that the "power of review 'should be only sparingly exercised,' and that 'most permit conditions should be finally determined at the [permit issuer's] level.'" *In re Cardinal FG Co.*, 12 E.A.D. 153, 160 (EAB 2005) (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)); *accord In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997).

set forth in the public participation requirements of CAA section 165(a)(2) to consider "alternatives" to the proposed facility, and the requirement pursuant to CAA sections 165(a)(4) and section 169(3) to apply BACT, or best available control technology, to limit CO_2 emissions from the facility. We discuss the "alternatives" issue next in Part III.A and the BACT issues below in Part III.B.

A. *Alternatives*

Sierra Club argues that the Permit should be remanded on the grounds that "in it, EPA has taken positions contrary to those it has recently taken in another coal-fired power plant permitting matter." Pet. at 9. Sierra Club argues that the Region erred by failing to consider, pursuant to CAA section 165(a), certain "alternatives" to the proposed facility that are similar to alternatives U.S. EPA Region 9 recommended in a different type of proceeding. Specifically, Sierra Club points to comments Region 9 submitted on the draft environmental impact statement for the White Pine Energy Station Project in Nevada.

Sierra Club does not argue that it, or any other person, submitted comments during the public comment period in this case identifying the "alternatives" to the proposed facility that it raises in its Petition. Instead, Sierra Club argues that it is entitled to raise the issue for the first time in its Petition on the grounds that Region 9 submitted its comments in the White Pine Energy Station case after the public comment period in the present case had closed.

The Region argues that Sierra Club has not satisfied the standards for granting review of this issue. Region's Resp. to Pet. at 21-30. We agree and deny review for the following reasons.

Sierra Club's argument relies on CAA section 165(a)(2), which provides that a PSD permit may not be issued unless "a public hearing has been held with opportunity for interested persons * * * to appear and submit written or oral presentations on the air quality impact of such source, *alternatives thereto*, control technology requirements, and other appropriate considerations." CAA § 165(a)(2), 42 U.S.C. § 7475(a)(2)

(emphasis added). In *In re Prairie State Generating Co.*, PSD Appeal No. 05-05, slip op. at 37-44 (EAB Aug. 24, 2006), 13 E.A.D. at __, *aff'd sub nom. Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007), we held that section 165(a)(2)'s requirement to consider alternatives, tied as it is by the statute to the opportunity for interested persons to comment on the draft permit, does not create an obligation for the permit issuer to "conduct an independent analysis of available alternatives" that were not identified by the public during the comment period. *Id.* at 39, 13 E.A.D. __. In contrast to the PSD provisions at issue in this case, the CAA clearly requires an independent review of alternatives for permits issued in nonattainment areas. CAA § 173(a)(5), 42 U.S.C. § 7503(a)(5). In *Prairie State*, we explained that "[b]ecause the CAA contains specific language for permits in nonattainment areas requiring the permit issuer to perform an analysis of alternative sites, sizes, and production processes, among other things, to determine whether the benefits of the proposed source outweigh its costs, and because similar specific language is not included for the issuance of a PSD permit, *compare* 42 U.S.C. § 7503(a)(5) *with id.* § 7475(a), the PSD permit issuer therefore is not required to perform an independent analysis of alternatives" in PSD proceedings. *Prairie State*, slip op. at 39, 13 E.A.D. at __.

Here, Sierra Club does not contend that the "alternatives" it identifies in its Petition were raised or identified by any interested person during the public comment period.[17] Pet. at 9-11. Notably, Region 9's comments submitted in the White Pine Energy Station matter were submitted to comply with Region 9's affirmative duty under CAA section 309 and section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(c). In contrast, as discussed above, CAA section 165(a)(2) does not impose a similar affirmative duty on the Region in the present PSD permitting context. Accordingly, we reject Sierra Club's Petition and deny review of this issue because CAA

[17] Whether or not a petitioner raised an issue during the comment period is a threshold question that the Board considers prior to granting review. *In re City of Phoenix*, 9 E.A.D. 515, 524 (EAB 2000); *In re Rockgen Energy Ctr.*, 8 E.A.D. 536, 540 (EAB 1999).

section 165(a)(2)[18] does not impose upon the Region a duty to conduct an analysis of "alternatives" that were not identified by an interested person during public comment.[19]

B. *Best Available Control Technology Emissions Limit for Carbon Dioxide*

1. *Background and Overview*

CAA sections 165(a)(4) and 169(3) prohibit the construction of a major emitting facility unless, among other things, the permit for the facility contains a BACT emissions limit for "each pollutant subject to regulation under this Act." Clean Air Act Amendments of 1977, Pub. L. No. 95-95 § 127(a), 91 Stat. 685, 735, 741.[20] Sierra Club argues that the

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[18] Region 9's comments, although submitted in the White Pines Energy Station matter after the close of the public comment period in the present case, would not, in any event, present grounds for raising a new issue or argument for the first time on appeal in this case. All reasonably ascertainable issues or reasonably available arguments must be raised by the petitioner or another commenter by the close of the public comment period in order for such issues or arguments to be preserved for consideration on appeal. 40 C.F.R. §§ 124.13, .19(a); *see also In re Christian County Generation*, *LLC*, PSD Appeal No. 07-01, slip op. at 12 (EAB Jan. 28, 2008), 13 E.A.D. __; *In re Shell Offshore*, *Inc.*, OCS Appeal Nos. 07-01 & -02, slip op. at 52-53 (EAB Sept. 14, 2007), 13 E.A.D. __; *In re Kendall New Century Dev.*, 11 E.A.D. 40, 55 (EAB 2003). Sierra Club does not contend that the "alternatives" it identifies in its Petition became "reasonably available" or "reasonably ascertainable" for the first time after the close of the public comment period. The mere fact that Region 9 raised the same "alternatives" in comments that it submitted in another proceeding after the close of public comment in this proceeding is not sufficient to show that Sierra Club could not have raised those same alternatives during this proceeding's public comment period.

[19] Since we are denying review on procedural grounds, we need not address the significance, or even the relevance, of Region 9's comments on a different facility in a different legal context.

[20] The phrase "each pollutant subject to regulation under this Act" appears both in section 165(a)(4) and in section 169(3)'s definition of BACT, the latter of which states:

> The term "best available control technology" means an emission

(continued...)

Region clearly erred in its permitting decision by failing to require a BACT emissions limit for control of CO_2 emissions under CAA sections 165 and 169. Pet. at 4.

In 2003, EPA reversed a position it took in 1998 and concluded that CO_2 is not an "air pollutant" as defined by CAA section 302(g) and, therefore, CO_2 falls outside the scope of EPA's authority to regulate under any of the CAA's programs, including the PSD provisions in the present case. *Compare* Memorandum from Robert E. Fabricant, General Counsel, U.S. EPA, to Marianne L. Horinko, Acting Administrator, U.S. EPA, *EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act*, at 10 (Aug. 23, 2003) ("Fabricant Memo") *with* Memorandum from Jonathan Z. Cannon, General Counsel, U.S. EPA, to Carol M. Browner, Administrator, U.S. EPA, *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (Apr. 10, 1998) ("Cannon Memo").

In April 2007, the Supreme Court rejected EPA's interpretation that CO_2 is not an "air pollutant" within the CAA's section 302(g) definition. *Massachusetts v. EPA*, 549 U.S. 497 (2007). The Court explained that CO_2, and other greenhouse gases, "fit well within the Clean Air Act's capacious definition of 'air pollutant,'" and thus "EPA

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[20](...continued)
limitation based on the maximum degree of reduction of *each pollutant subject to regulation under this Act* emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

CAA § 169(3) (emphasis added). The Clean Air Act Amendments of 1977 used the article "this" in front of "Act." Pub. L. No. 95-95 § 127, 91 Stat. 735, 741. The parties in the present case frequently use the article "the" instead, or cite to the U.S. Code, which refers to "Chapter" instead of "Act."

has the statutory authority to regulate the emissions of such gases." *Id.*, slip op. at 29-30.

The *Massachusetts* case spoke directly to EPA's authority to limit air pollutant emissions from mobile sources under CAA section 202(a)(1). In the mobile source context, before limiting pollutant emissions, the Administrator must make a "judgment" that air pollution caused by the pollutant "'may reasonably be anticipated to endanger public health or welfare.'" *Id.*, slip op. at 30 (quoting CAA § 202(a)(1), 42 U.S.C. § 7521(a)(1)). The Court remanded the *Massachusetts* case for EPA to make further determinations with respect to that judgment and to "ground its reasons for action or inaction in the statute." *Id.*, slip op. at 32.

The provisions that Sierra Club points to in the present case, CAA sections 165 and 169, do not contain similar language requiring a public health or welfare "endangerment" finding under the PSD program as a precondition for the CAA's requirement that EPA apply BACT. Rather, as all parties recognize, for PSD purposes, the statutory language requires BACT "for each pollutant subject to regulation under this Act." *See*, *e.g.*, Sierra Club's Pet. at 4; Region's Resp. to Pet. at 5-6.

The parties and amici, however, vigorously dispute what "subject to regulation under this Act" means. The Region stated in its response to comments (which the Region issued after the Supreme Court issued the *Massachusetts* decision) that "EPA does not currently have the authority to address the challenge of global climate change by imposing limitations on emissions of CO_2 and other greenhouse gases in PSD permits." Resp. to Comments at 5. The Region explained that "EPA has historically interpreted the term 'subject to regulation under the Act' to describe pollutants that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." *Id.* at 5-6.

Sierra Club contends that this response to comments constitutes clear error. It asserts that "EPA can and must impose emissions limitations on CO_2 in PSD permits for new coal-fired power plants."

Sierra Club's Jan. Brief at 1. Sierra Club maintains that the "plain and unambiguous" meaning of "regulation" is broader than actual control of emissions and that "carbon dioxide has been *regulated* under the Clean Air Act since 1993." Pet. at 4. Sierra Club points to EPA's 1993 amendment of 40 C.F.R. Part 75 to, among other things, require monitoring and reporting of CO_2 emissions. *Id.* EPA promulgated the Part 75 regulations in response to Congress' direction in section 821 of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2699 [hereinafter, "1990 Public Law"]. Sierra Club thus contends that the combination of CAA sections 165 and 169, section 821 of the 1990 Public Law, and EPA's Part 75 regulations makes CO2 "subject to regulation" under the CAA and therefore requires that the Permit contain a CO_2 BACT limit.

The basic question before the Board is whether the Region clearly erred by stating that it lacked the authority to impose a CO_2 BACT limit in the Permit. As explained more fully in Part III.B.2 below, we find that the statute is not so clear and unequivocal as to preclude Agency interpretation of the phrase "subject to regulation under this Act," and therefore does not dictate whether the Agency must impose a BACT limit for CO_2 in the Permit. More particularly, we reject Sierra Club's contentions that either the plain meaning of the statutory phrase "subject to regulation" as used in sections 165 and 169 or the meaning of the term "regulations" as used in section 821 negates the Agency's authority to interpret "subject to regulation" for purposes of the PSD program and compels an interpretation of the statute that necessarily requires that the Permit contain a CO_2 BACT limit.

In Part III.B.3, we conclude that the record of the Region's permitting decision does not support its contention that its authority is constrained by an historical Agency interpretation of the phrase "subject to regulation under this Act." The administrative record of the Region's permitting decision, as defined by 40 C.F.R. section 124.18, does not support the Region's view that the Agency's historical interpretation of "subject to regulation" means "subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant."

In Part III.B.4, we reject as not sustainable in this proceeding the Region's alternative argument – that any regulation arising out of section 821 cannot, in any event, constitute regulation "under this Act" because section 821 is not part of the CAA. While the Region now cites textual distinctions and legislative history to argue that the term "regulations" under section 821 does not constitute regulation "under this Act" for purposes of CAA sections 165 and 169, the Agency's historical statements regarding section 821 are at odds with, and preclude our acceptance in this proceeding of, the interpretation the Region now advocates on appeal.

Finally, in Part III.B.5, we provide a summary of our conclusion that a remand is required, and we provide some direction to the Region regarding issues to consider on remand.

2. *Meaning of the Statutory Text*

We first "must decide, using the traditional tools of statutory construction, 'whether Congress has directly spoken to the precise question at issue.'" *Pharmanex v. Shalala*, 221 F.3d 1151, 1154 (10th Cir. 2000) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). The question before us is whether the text compels a particular meaning in the context of this case.

We begin by considering whether the statutory phrase "each pollutant subject to regulation under this Act," found at two places in the statute,[21] has a plain meaning. *Lee v. Mukasey*, 527 F.3d 1103, 1106 (10th Cir. 2008). Here, the parties and amici point to different dictionaries and definitions in arguing various potential "plain" meanings of "regulation."

For example, Sierra Club argues that "Webster's defines 'regulation' as 'an authoritative rule dealing with details or procedure; (b) a rule or order issued by an executive authority or regulatory agency

[21] CAA §§ 165(a)(4), 169(3), 42 U.S.C. § 7475(a)(4), 7479(3).

of a government and having the force of law.'" Pet. at 6.[22] Sierra Club thus argues that CO_2 is a regulated pollutant because of various requirements published in the Code of Federal Regulations calling for monitoring and reporting of CO_2 emissions. *Id.* at 5 n.2. In contrast, Deseret argues that because "*Black's Law Dictionary* defines 'regulation' as '[t]he act or process of *controlling* by rule or restriction,'" therefore, "[t]he 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." Deseret's Mar. Brief at 7-8[23] (quoting *Black's Law Dictionary* 1311 (8th ed. 1999) (emphasis and alteration by Deseret)).[24]

In its appellate briefs, the Region rejects the efforts of both Sierra Club and Deseret to press subtle variations in the dictionary definitions as the "plain meaning" of the statutory text. Instead, the Region states that the "citation of an alternative meaning from the same dictionary and a different definition from Webster's dictionary simply illustrates the ambiguity of the term rather than establishing a plain meaning." Region's Mar. Brief at 13. The Region explains that "[s]ince Congress adopted neither the Black's nor the Webster's definitions,

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[22] The Petition does not provide the citation for the quotes attributed to Webster's. However, Sierra Club's subsequent January Brief cites Merriam-Webster's Collegiate Dictionary 1049 (11th ed. 2005) for this quote.

[23] *See also* Deseret's Resp. to Pet. at 4-5.

[24] Deseret also points to *Webster's II New College Dictionary* as using the word "controlling" in defining "regulation." Deseret's Mar. Brief at 8 (discussing *Webster's II College Dictionary* 934 (1995)). Deseret also argues that the dictionary cited by Petitioner includes an alternative definition of "regulation" that, among other things, refers to regulation as meaning bringing "'under the *control* of law or constituted authority.'" *Id.* (quoting *Merriam-Webster's Collegiate Dictionary* 1049 (11th ed. 2005) (emphasis added by Deseret)). Deseret also argues that "[t]he plain meaning of the phrase 'subject to' also requires control * * *." Deseret's Mar. Brief at 8. Deseret observes that Webster's defines "subject" as "'being under domination, control, or influence (often fol. by *to*).'" *Id.* (quoting *Random House Webster's Unabridged Dictionary* 1893 (2d ed. 2001).

Congress clearly left a gap for EPA to fill in defining the meaning of the term 'regulation' as used in the phrase 'pollutant subject to regulation.'" Region's Resp. to Pet. at 13; *see also* UARG Mar. Brief at 22-23 (arguing that the phrase "'subject to regulation' is not clear on its face'"). Thus, on appeal, the Region does not contend that the interpretation it views as the Agency's historical interpretation is required by the statutory text, but instead is "reasonable" or "permissible" in light of the ambiguity identified by the alternative dictionary definitions Sierra Club and Deseret discussed. Region's Resp. to Pet. at 13; Region's Mar. Brief at 14-15; EAB Oral Argument Transcript at 51.

Upon consideration, we are persuaded that the Region's appellate contention is correct. A statutory plain meaning cannot be ascertained from looking solely at the word "regulation" to determine whether Congress, in enacting the statute in 1977, intended "subject to regulation"[25] to apply narrowly as Deseret contends to mean a provision that prescribes actual control of emissions of the pollutant, or more broadly as Sierra Club argues to embrace requirements for monitoring of pollutant emissions, among other things. It does not appear that, when it enacted CAA sections 165 and 169 in 1977, Congress considered[26] the precise issue before us, or more significantly, drafted language sufficiently specific[27] to address it.

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[25] The critical term here is "subject to regulation under this Act," and we do not accept Sierra Club's argument that the single word "regulation" can be extracted and parsed separate from that phrase, rather than focusing on the meaning of the phrase as a whole.

[26] The parties have not drawn our attention to any relevant legislative history concerning the meaning of "subject to regulation under this Act," and we have found none.

[27] As part of its argument, Sierra Club contends that the phrase "subject to regulation under this Act" must mean something different than what Congress defined "emissions limitation" and "emissions standard" to mean. *See* Pet. at 8 (discussing 42 U.S.C. § 7602(k)). It asserts the fact that Congress enacted both these two defined terms – which specifically speak to control of "the quantity, rate, or concentration of emissions

(continued...)

We reject Sierra Club's contention that the Region's interpretation "runs afoul of the holding in *Alabama Power Co. v. Costle*, 636 F. 2d 323, 403 (D.C. Cir. 1979)." Pet. at 9. *Alabama Power* rejected the "Industry Groups" effort to compel EPA "to lessen the regulatory burden" because, in their view, "subject to regulation" meant that BACT applied immediately only to the two pollutants, sulfur dioxides and particulates, which were already regulated by EPA's pre-existing PSD regulations. *Id.* The "Industry Groups" argued that, because CAA section 166 required EPA to complete studies before promulgating PSD regulations for certain pollutants identified in section 166, Congress did not intend those additional pollutants to be "subject to regulation" for purposes of applying BACT until those studies were completed. *Id.* The D.C. Circuit rejected the "Industry Groups" effort to compel a narrow interpretation, stating that "[t]he statutory language leaves no room for limiting the phrase 'each pollutant subject to regulation' to sulfur dioxides and particulates." *Alabama Power*, 636 F.2d at 406. All of the pollutants identified in section 166 and at issue in *Alabama Power* were already subject to regulation under other (non-PSD) provisions of the CAA. Region's Mar. Brief at 16 n.6 & at 28. The *Alabama Power* court thus did not consider, and therefore did not decide, Sierra Club's argument here in which it seeks to compel the Region to apply the PSD Program to a pollutant that is neither mentioned in CAA section 166 nor subject to emissions control under another provision of the Act.

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[27](...continued)
of air pollutants" – and did not use those terms in establishing the BACT requirement implies that Congress meant something different by the phrase it chose to use in sections 165 and 169. Even if this observation were correct, an issue we do not decide, it does not lead to the conclusion that the much broader meaning Sierra Club has put forward for the phrase "subject to regulation under this Act" is necessarily what Congress intended. As the Region observes, the meaning of "subject to regulation under this Act" that the Region has put forward differs from the defined terms without embracing the full breadth of the meaning that Sierra Club advocates. Region's Resp. to Pet. at 14 (noting that its interpretation would apply the control of ozone depleting substances through production or import restrictions that do not limit the quantity, rate, or concentration of emissions); Region's Mar. Brief at 22.

Further, we find that the lack of clarity of the phrase "subject to regulation under this Act" as applied in these circumstances is not definitively resolved by the terms of section 821 of the 1990 Public Law, as Sierra Club argues. *See* Pet. at 5-9; Sierra Club's April Reply at 3. As explained below, we conclude that in enacting section 821, Congress did not negate the Agency's authority or discretion to interpret CAA sections 165 and 169. This determination is distinct from the question of whether section 821 is part of the CAA, an issue that we do not decide here.

As noted above, the scope of PSD regulatory authority, as set forth in sections 165 and 169 of the CAA, extends to "any pollutant subject to regulation under this Act." Sierra Club argues that the use of similar, but not identical, language in section 821 of the 1990 Public Law, which requires the Agency to promulgate "regulations," constrains the Agency's ability to interpret sections 165 and 169.[28] Pet. at 5-9; Sierra Club's Jan. Brief at 16-18; Sierra Club's Apr. Reply at 3. That is, according to Sierra Club, the only supportable reading of sections 165 and 169 mandates that PSD regulatory authority extends to any pollutant subject to "a" or "any" regulation promulgated in the Code of Federal Regulations because that is the meaning of section 821's direction to promulgate regulations. The question before us is not whether this is a plausible reading, but rather whether Sierra Club's interpretation is compelled under the statutory terms. We conclude that the statutory language does not compel this meaning.

Our conclusion that the statutory language is broad enough to embrace different meanings, or shades of meaning, is consistent with the Supreme Court's observation in other contexts that the same or similar words may be construed differently "'not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.'" *Envtl. Def. v. Duke Energy Corp.*, 549 U.S.

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[28] Although Sierra Club's argument primarily focuses on Congress's directive in section 821 of the 1990 Public Law that EPA promulgate "regulations" to implement that section's requirements, Sierra Club also points to Congress' similar instructions elsewhere that EPA promulgate "regulations" to implement various CAA provisions. *See*, *e.g.*, Pet. at 7-8 (citing references to "regulations" in CAA § 165(e)(1), 42 U.S.C. § 7475(e)(1)).

561, slip op. at 9 (2007) (quoting *Atl. Cleaners & Dyers*, *Inc. v. United States*, 286 U.S. 427, 433 (1932)). In reviewing the meaning of the phrase "subject to regulation under this Act" we do not confine ourselves "to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Rather, "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context * * *. It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id.* at 132-33 (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, __ U.S. __, 127 S.Ct. 2518, 2534 (2007) (explaining the Court would not construe the statute in that case to "implicitly abrogate or repeal" the operation of many mandatory agency directives and thereby create differing mandates). Here, the parties contest whether section 821 of the 1990 Public Law[29] 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.

Although there is a presumption that identical words used in different parts of the same statute[30] have the same meaning,[31] courts recognize that this presumption can yield to a different interpretation in appropriate circumstances. As Sierra Club acknowledges, "EPA may interpret the same word differently based on statutory context." Sierra Club's April Reply at 4 (citing *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 127 S.Ct. 1423, 1433 (2007)); *see also* Sierra Club's Jan. Brief at 16.

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[29] Section 821 of the 1990 Public Law is included in the United States Code as a note attached to 42 U.S.C. § 7651k.

[30] For purposes of facilitating our analysis of Sierra Club's position on this issue, we assume that section 821 is part of the CAA although, as discussed subsequently in section III.B.4, we actually do not decide that issue.

[31] *Merrill Lynch*, *Pierce*, *Fenner & Smith*, *Inc. v. Dabit*, 547 U.S. 71, 86 (2006); *Comm'r v. Lundy*, 516 U.S. 235, 249-50 (1996).

As discussed above, the phrase "subject to regulation under this Act" is not so clear and unequivocal as Sierra Club suggests. While it may mean "subject to *a* regulation" as Sierra Club argues, the statute by its terms does not foreclose the narrower meaning suggested by the Region and Deseret, "subject to control" (by virtue of a regulation or otherwise). *Compare* Pet. at 5 n.2 & at 6 *with* Deseret's Mar. Brief at 7-8; Region's Mar. Brief at 13.

In arguing that sections 165 and 169 have only one proper interpretation, Sierra Club ignores the fact that section 821, which was enacted 13 years after sections 165 and 169,[32] uses different terminology, "regulations," from that used in the PSD provisions of sections 165 and 169, "subject to regulation."[33] We find no evidence that Congress's addition of section 821 in 1990 was an attempt to interpret or constrain the Agency's interpretation of the broader phrase "subject to regulation"

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

[33] We agree with the Region that the difference in terminology is potentially significant. Notably, when read in the context of the phrases in which they are used, possible alternative meanings of "regulation" and "regulations" become apparent. In the phrase "the Administrator * * * shall promulgate regulations * * * to require [sources to monitor CO_2]" in section 821, the term "regulations" is understood to be the end product of the administrative rule making process. Thus, Congress' direction that EPA promulgate "regulations" found at various places in the CAA and in section 821 is most naturally read to mean that Congress directed EPA to use its legislative rule making authority to implement the statutory requirements, filling in necessary specificity and detail. Section 112 of the Act uses the term "subject to regulations," referring to "regulations" in the plural. CAA sections 112(r)(3) and 112(r)(7)(F). This evidences that Congress may not have meant "subject to regulation" (singular) to have the same meaning.

as used in sections 165 and 169.[34] Sierra Club does not address the fact that section 821 bears no facial relationship to the PSD provisions of sections 165 and 169. Congress's subsequent use of the word "regulations" in a section of the 1990 Public Law that bears no explicit relationship with the earlier-enacted sections would not appear sufficient, on its own, to implicitly constrain EPA's authority to interpret the PSD provisions of section 165 and 169. This is particularly true where, as here, the two sections were enacted 13 years apart, bear no obvious relationship, and are not even placed in close proximity. Moreover, the Agency did determine, in 1978 that the phrase "subject to regulation under this Act" used in the PSD provisions requires interpretation to properly implement the PSD program, and Congress did not evidence an intent in section 821 to alter the Agency's determination.[35] Normally, more express terminology would be expected if Congress intended to alter an established meaning.[36]

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[34] *See* 136 Cong. Rec. H2915, 2934 (1990) (statement of Rep. Moorhead), *reprinted in* S. Comm. on Env't and Public Works, *Legislative History of Clean Air Act Amendments of 1990*, at 2986-87 (1993); 136 Cong. Rec. H2511, 2578 (1990) (statement of Rep. Cooper), *reprinted in* S. Comm. on Env't and Public Works, *Legislative History of Clean Air Act Amendments of 1990*, at 2652-53 (1993); 136 Cong. Rec. H2511, 2561-62 (1990) (statement of Rep. Moorhead), *reprinted in* S. Comm. on Env't and Public Works, *Legislative History of Clean Air Act Amendments of 1990*, at 2612-14 (1993).

[35] The preamble to the 1978 rulemaking stated that the Agency was advancing an interpretation, at least in part, to address inquiries from the public as to the meaning of the phrase "subject to regulation." *Part 52 – Approval and Promulgation of State Implementation Plans*, 43 Fed. Reg. 26,388, 26,397 (June 19, 1978). As explained below, we do not agree with the constrained reading of the 1978 interpretation that the Region now advances.

[36] *See Catron County Bd. of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1438-39 (10th Cir. 1996) (noting the difficulty in ascertaining Congressional intent from subsequent legislative action in the face of a pre-existing administrative or court precedent). We note that the circumstances of this case are an inverse of those at issue in a case cited by Sierra Club, *Merrill Lunch*, *Pierce*, *Fenner & Smith*, *Inc. v. Dabit*, 547 U.S. 71, 86 (2006). There, the Court found that a subsequently enacted legislative provision should be interpreted in light of, and consistent with, a pre-existing judicial interpretation of an earlier enacted phrase used in the same statute. To follow that logic, section 821 should be read consistently with any definitive interpretation of sections 165

(continued...)

Thus, we reject Sierra Club's argument that either the plain meaning of "regulation," or the wording of section 821, compels a particular interpretation of the phrase "subject to regulation under this Act" for purposes of the PSD provisions of sections 165 and169.

Accordingly, we next turn to the Region's arguments regarding the allegedly constraining effect of the Agency's "historical" interpretation.

3. *The Agency's Historical Interpretation of "Subject to Regulation"*

Because the statute does not compel Sierra Club's proffered interpretation, we now consider whether the Region correctly stated in its response to comments that a historical Agency interpretation of the phrase "subject to regulation" constrained its discretion to impose a CO_2 BACT limit in the Permit. As we explain below, the record for the Region's permitting decision is insufficient to support the Region's conclusion that its discretion is constrained in this manner.

Notably, the Region did not identify in its response to comments any Agency document expressly stating that "subject to regulation under this Act"[37] means "subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant" (or any other clearly worded statement expressly connecting the meaning of the

[36](...continued)
and 169. This also is not a circumstance where the language of the later enactment makes plain a Congressional intent to express an interpretation of the earlier enactment. *See*, *e.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380 (1969).

[37] A memorandum issued on April 26, 1993, by Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, discussed below, did refer to the absence of "actual control of emissions" in connection with CO_2. Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, *Definition of Regulated Air Pollutant for Purposes of Title V* (Apr. 26, 1993). The Region did not identify this memorandum in the Region's response to comments as support for the Region's decision, and we explain below in Part III.B.3.c that, at best, it provides only weak support for the interpretation the Region advocates.

statutory phrase to "actual control of emissions"). Instead, the response to comments derives by inference what the Region views as the Agency's historical interpretation. The Region, in its response to comments, cited as sources for what it referred to as the Agency's historical interpretation the Federal Register preambles for two Agency rulemakings – one issued in 1978 and the other issued in 2002. Resp. to Comments at 5-6.[38] Among other things, these rulemaking preambles listed pollutants, either by name or by descriptive category, that the Agency considered at the time to be subject to regulation for purposes of PSD permitting. The Region explains in its appellate briefs that the historical interpretation it believes constrains its authority may be discerned by observing that the listed pollutants were subject to emissions control and none of the listed pollutants were subject to only monitoring and reporting requirements. Region's Mar. Brief at 31, 43. In other words, the logic the Region apparently relied upon in its response to comments was an inference based on the regulatory status of the pollutants listed in the two rulemaking preambles and is not found in any affirmative or direct Agency statement. *See*, *e.g.*, *Id.* at 31 ("This list did not include carbon dioxide or any other pollutant that was not subject

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[38] In its response to comments, the Region identified the following as sources for what the Region characterized as EPA's historical interpretation: *Part 52 – Approval and Promulgation of State Implementation Plans*, 43 Fed. Reg. 26,388, 26,397 (June 19, 1978) (describing pollutants then subject to BACT requirements); *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR)*, 61 Fed. Reg. 38250, 38,309-10 (proposed July 23, 1996) (listing pollutants then subject to PSD review); *Final Rule: Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination*, *Actual-to-Future-Actual Methodology*, *Plantwide Applicability Limitations*, *Clean Units*, *Pollution Control Projects*, 67 Fed. Reg. 80,186, 80,240 (Dec. 31, 2002) (defining term "regulated NSR pollutant" and stating that BACT is required for each regulated NSR pollutant).

In its response to comments, the Region also pointed to *In re North County Res. Recovery Assocs.*, 2 E.A.D. 229, 230 (Adm'r 1986), for the proposition as stated in that decision that "EPA lacks the authority to impose [PSD permit] limitations or other restrictions directly on the emission of unregulated pollutants." Resp. to Comments at 5 (quoting *North County*, 2 E.A.D. at 230); *see also* Region's Mar. Brief at 9. This quote from *North County* does not answer the question of what "pollutant subject to regulation" means.

to a statutory or regulatory provision that requires actual control of emissions of that pollutant.").

The Region is correct that none of the Agency's historical pollutant lists included pollutants that were regulated solely by monitoring or reporting requirements. Thus, such lists are not facially inconsistent with the interpretation that the Region articulated in its response to comments. However, the mere absence of inconsistency does not demonstrate that those historical lists constrained the Region to adhere to the interpretation it advocates, especially where, as here, the two preambles at issue do not purport to limit EPA's PSD regulatory authority to those lists.

On appeal, the Region further asserts that "EPA has never interpreted" the phrase subject to regulation under the Act "to cover pollutants subject only to monitoring and reporting requirements." Region's Resp. to Pet. at 7-8. The Region also cites a number of additional documents not identified in its response to comments that it contends show the Agency had a "traditional practice" of treating "subject to regulation" as meaning "actual control of pollutant emissions." Significantly, the Agency did not develop the factual predicates for these statements in the record of this permitting proceeding.

Thus, for the reasons explained in detail below, we cannot conclude on the record for the Permit in this case that the historical Agency statements the Region identified in its response to comments are sufficiently clear and consistent articulations of an Agency interpretation to constrain the authority the Region acknowledges it would otherwise have under the terms of the statute. Thus, we must find that the Region committed clear error.

a. *The Agency's 1978 Federal Register Preamble*

We begin our analysis of the Agency's historical interpretation by looking first at the statements the Agency made in 1978, essentially contemporaneous with the enactment of CAA sections 165 and 169.

Courts often accord a high degree of deference to agency interpretations that are made contemporaneous with the legislative enactment, especially when the agency clearly articulates and consistently follows the interpretation over a long period of time. *Rosette*, *Inc. v. United States*, 277 F.3d 1222, 1230 (10th Cir. 2002) ("great deference is given to the interpretation of a statute by the agency charged with its administration, this respect is particularly due where the administrative practice is a contemporaneous construction of the statute"); *New Mexico Envtl. Improvement Div. v. Thomas*, 789 F.2d 825, 831-32 (10th Cir. 1986) ("The court will defer to the agency's interpretation when an agency is charged with enforcing a statute, when such an interpretation is not contrary to clear statutory intent or the plain language of the statute, when the interpretation is contemporaneous with the legislation's enactment, and when such interpretation has been consistently adhered to by the agency over time.").

In 1978, soon after Congress amended the CAA to add the PSD provisions at issue in this case, the Administrator set forth in the preamble to a final rulemaking an interpretation of the meaning of "subject to regulation under this Act" as used in CAA sections 165 and 169. In the 1978 preamble, the Administrator stated as follows:

> Some questions have been raised regarding what "subject to regulation under this Act" means relative to BACT determinations. The Administrator believes that the proposed interpretation published on November 3, 1977, is correct and is today being made final. As mentioned in the proposal, "subject to regulation under this Act" means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type. This then includes * * *.

Part 52 – Approval and Promulgation of State Implementation Plans, 43 Fed. Reg. 26,388, 26,397 (June 19, 1978).[39] The preamble went on to describe in general categories the pollutants then regulated in Subchapter C of Title 40. *Id.*

The Region's response to comments correctly pointed to the 1978 Federal Register preamble as establishing an Agency interpretation of "subject to regulation under this Act"[40] – the 1978 preamble expressly states that it "made final" an "interpretation" the Administrator concluded was correct. *Id.* This statement in the 1978 Federal Register also possesses the hallmarks of an Agency interpretation that courts would find worthy of deference – the Agency issued it with a high degree of formality (the Agency published notice of the proposed interpretation in the Federal Register, followed by a subsequent Federal Register notice finalizing the interpretation); the Agency received questions on the interpretation as part of the rulemaking process thus indicating that the Agency carefully considered the interpretation; the Administrator who is charged with implementing and enforcing the statute issued the interpretation; and the Administrator issued the interpretation relatively contemporaneous with the statutory enactment and along with the original regulations implementing the statute. *See*,

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[39] As background, in the preamble issued in 1977 for the proposed rule, the Administrator stated as follows:

> The Amendments require BACT for all pollutants regulated under this Act. Thus, any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations will be subject to a case-by case BACT determination. These include * * *.

Approval and Promulgation of Implementation Plans, 42 Fed. Reg. 57,479, 57,481 (proposed Nov. 3, 1977). The preamble went on to describe pollutants then regulated in Subchapter C of Title 40 with somewhat greater detail than the description in the 1978 final rulemaking preamble.

[40] The Region cited this 1978 Federal Register preamble as authority for what the Region described as the Agency's historical interpretation of the phrase "subject to regulation under this Act." Resp. to Comments at 5-6.

e.g., *Rosette*, 277 F.3d at 1230; *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Nevertheless, we must reject the Region's current characterization of the Agency's 1978 preamble statement. The Region now contends that only the pollutants identified in the preamble by general category define the scope of the Administrator's 1978 interpretation. Region's Resp. to Pet. at 11 & n.6. However, as quoted above, the 1978 preamble stated that "'subject to regulation under this Act' means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations" and introduced the list of pollutant categories with the word "includes."[41] That word generally "is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941); *see also Chickasaw Nation v. United States*, 534 U.S. 84 (2001); *Penncro Assoc., Inc. v. Sprint Spectrum, L.P.*, 499 F.3d 1151, 1156 (10th Cir. 2007) ("Webster's defines the term 'to include' as meaning 'to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate.'" (quoting Webster's Third New International Dictionary 1143 (2002)). "We note that, generally, to say A includes B does not exclude the possibility that A also includes C and D." *Dishman v. UNUM Life Ins. Co. of Am.*, 269 F.3d 974, 989 (9th Cir. 2001). Nothing in the 1978 preamble (or the 1977 preamble to the proposed rule) indicates that the Agency intended to depart from the normal use of "includes" as introducing an illustrative, and non-exclusive, list of pollutants subject to regulation under the Act.

Thus, it strikes us as inappropriate to look to the pollutant categories that follow the word "includes" as providing a comprehensive list from which to discern an unstated, unifying rule (such as "actual control of emissions"). This is especially true where, to the contrary, a plain and more natural reading of the preamble's interpretative statement suggests a different unifying rule, i.e., the one expressly stated in the text

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[41] The preamble to the proposed rule issued in 1977 also introduced the pollutant list with the word "include." *See* note 39 above.

immediately preceding the list: "'subject to regulation under this Act' means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type." 43 Fed. Reg. at 26,397.

Accordingly, the 1978 Federal Register preamble does not lend support to the Region's conclusion that its authority was constrained by an historical Agency interpretation to apply BACT only to pollutants that are "subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." Instead, the 1978 Federal Register notice augers in favor of a finding that, in 1978, the Agency interpreted "subject to regulation under this Act" to mean "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type." 43 Fed. Reg. at 26,397.

When EPA issued regulations in 1993 implementing the 1990 Public Law and in particular section 821's CO_2 monitoring and reporting requirements, EPA did so by amending Subchapter C of Title 40 of the Code of Federal Regulations. *Acid Rain Program: General Provisions and Permits*, *Allowance System*, *Continuous Emissions Monitoring*, *Excess Emissions and Administrative Appeals*, 58 Fed. Reg. 3590, 3650 (Jan. 11, 1993). As a result of that rulemaking, the Subchapter C regulations now require CO_2 emissions monitoring (40 C.F.R. §§ 75.1(b), .10(a)(3)), preparing and maintaining monitoring plans (40 C.F.R. § 75.53), maintaining records (40 C.F.R. § 75.57), and reporting such information to EPA (40 C.F.R. §§ 75.60-.64), and those regulations provide that a violation of any Part 75 requirement "is a violation of the Act" (40 C.F.R. § 75.5(a)). Sierra Club points to this rulemaking in arguing that "carbon dioxide has been *regulated* under the Clean Air Act since 1993." Pet. at 4; *see also id.* at 5 n.2.

The Region observes that the reference the 1978 preamble made to Subchapter C of Title 40 of the Code of Federal Regulations was not repeated in the preamble to the 1993 rulemaking. The Region contends that this "is consistent with the Agency view that 'subject to regulation' describes only pollutants subject to regulations requiring actual control of emissions." Region's Resp. to Pet. at 11 n.6. The preamble to the 1993 rulemaking did not reaffirm the Agency's earlier 1978 statement

that "subject to regulation under this Act" means "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type."[42] However, the 1993 preamble also did not expressly clarify or withdraw that earlier interpretation.[43] Whatever the Agency's intentions were relative to the Subchapter C reference in the 1978 preamble when it adopted the 1993 regulations, it did not express them.[44] Moreover, for the reasons discussed earlier in this section, the 1978 preamble provides little, if any, support for the Region's argument that it is bound by an historical interpretation. Because the Region did not rely on the 1978 preamble as the sole support for its characterization of the historical EPA interpretation, but also referred to the Agency's 2002 rulemaking, we consider it next.

b. *The Agency's 2002 Rulemaking*

In its response to comments, the Region pointed to the Agency's 2002 rulemaking as further support for its conclusion that an historical Agency interpretation of "subject to regulation under this Act" as meaning "subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant" constrains its authority to impose a BACT emissions limit for CO_2. Resp. to Comments at 5-6.

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[42] 43 Fed. Reg. at 26,397.

[43] Without more, one could argue, as does Sierra Club, that based on the Agency's public interpretive statements and regulations as of the effective date of the 1993 rulemaking, CO_2 became subject to regulation under the Act in 1993 when the Agency included provisions relating to CO_2 in Subchapter C. We also recognize that one could argue, as does the Region, that the reference to Subchapter C in the 1978 preamble was only intended to apply to the then-current Subchapter C and not necessarily to any future additions to that Subchapter.

[44] In any event, in 1993, the Agency apparently would not have viewed CO_2 as a pollutant subject to regulation under the Act. As discussed in the following subpart, on April 26, 1993, Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, issued a memorandum stating, among other things, that CO_2 is not an "air pollutant" as defined by CAA section 302(g). Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, *Definition of Regulated Air Pollutant for Purposes of Title V* (Apr. 26, 1993).

The Region explained that the 2002 rulemaking "codified" the Agency's historical interpretation "by defining the term 'regulated NSR pollutant.'" *Id.* at 6. As we explain in this subpart, although the 2002 rulemaking did codify a definition for "regulated NSR pollutant," we are not persuaded that the Agency's 2002 rulemaking restricts the permitting authority the Region would otherwise have under the statute.

i. *The 2002 Rulemaking's Regulatory Text*

EPA included a definition for "regulated NSR pollutant" in the 2002 rulemaking and explained in the preamble that this definition "replaces the terminology 'pollutants regulated under the Act." *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination*, *Actual-to-Future-Actual Methodology*, *Plantwide Applicability Limitations*, *Clean Units*, *Pollution Control Projects*, 67 Fed. Reg. 80,186, 80,240 (Dec. 31, 2002). Thus, the 2002 rulemaking did codify the term "regulated NSR pollutant" to replace the previous regulatory language that was functionally equivalent to the statutory phrase "pollutant subject to regulation under this Act." However, the regulatory text does not clearly articulate a definition limited to "actual control of emissions." Upon consideration, we are not persuaded that the Agency's statements regarding the regulatory definition have been sufficiently clear and consistent to limit the regulation's meaning and constrain the Region's authority in the manner the Region argues.

As the Region summarizes, the definition's text identifies pollutants falling within its scope "by referencing pollutants regulated in three principal program areas * * * as well as any pollutant 'that otherwise is subject to regulation under the Act.'" Region's Resp. to Pet. at 7 (quoting 40 C.F.R. § 52.21(b)(50)(i) - (iv)). The Region stated in its response to comments that "[a]s used in this provision, EPA continues to interpret the phrase 'subject to regulation under the Act' to refer to pollutants that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." *Id.* The Region's response to comments did not explain its rationale for reaching

this conclusion.[45] In its appellate briefs, although the Region contends that its interpretation of the definition can be discerned from the regulatory text, the Region also appears to acknowledge that the regulatory text is not sufficient, on its own, to establish the meaning the Region advocates. *Compare* Region's Resp. to Pet. at 7-8[46] *with* Region's Mar. Brief at 32.[47]

The difficulty the Region faces in relying on the regulatory definition's text is aptly described by Sierra Club: the definition "says nothing about CO_2 specifically" and the fourth part of the definition "merely parrots the statutory language, requiring BACT for '[a]ny pollutant that otherwise is subject to regulation under the Act.'" Sierra Club's Jan. Brief at 23 (quoting 40 C.F.R. § 52.21(b)(50)(iv)). The regulatory text simply does not refer to "actual control of emissions," and it contains essentially the same phrase – "subject to regulation under the Act" – that the Region argues is ambiguous as a matter of statutory interpretation. *See*, *e.g.*, Region's Resp. to Pet. at 13; Region's Mar. Brief at 13.

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[45] The Region stated, without elaboration, that "[b]ecause EPA has not established a NAAQS or NSPS for CO_2, classified CO_2 as a title VI substance, or otherwise regulated CO_2 under any other provision of the Act, CO_2 is not currently a 'regulated NSR pollutant' as defined by EPA regulations." Resp. to Comments at 6.

[46] In responding to the Petition, the Region states that "EPA has never interpreted" the regulatory provision "to cover pollutants subject only to monitoring and reporting requirements" and that when EPA adopted the regulatory definition, it published a list of pollutants described as "'currently regulated under the Act,'" which "did not include carbon dioxide or any other pollutant that was not subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." Region's Resp. to Pet. at 7-8. The Region argues that "[t]hrough the contemporaneous adoption of the regulatory language and publication of a definitive list of pollutants subject to regulation at the time, EPA established its interpretation of the phrase 'pollutant that otherwise is subject to regulation' in section 52.21(b)(50)(iv)." *Id.* at 8.

[47] In its March brief, the Region argues that the general words used in the last of the four- part regulatory definition are most naturally construed as applying only to pollutants similar to those identified by the first three parts of the definition.

The Region appears to contend that, although the phrase "subject to regulation" is ambiguous as a matter of statutory construction, the Agency resolved the ambiguity in the regulatory definition by including the statutory phrase as the last of a four-part definition. In particular, the Region argues that "EPA's interpretation of the last clause in the definition of 'regulated NSR pollutant' has *consistently* followed the rule of construction known as *ejusdem generis*, which provides that 'where general words follow the enumeration of particular classes of things, the general words are most naturally construed as applying only to things of the same general class as those enumerated.'" Region's Mar. Brief at 32 (emphasis added) (quoting *Am. Mining Congr. v. U.S. EPA*, 824 F.2d 1177, 1189 (D.C. Cir. 1987)).

The Region, however, has provided no evidence or citation supporting its assertion that, prior to the Region's appellate briefs in this case,[48] the Agency ever, much less "consistently," followed the *ejusdem generis* canon when interpreting the last clause of the regulatory definition. Accordingly, without any support for the Region's assertion, we cannot find that application of the *ejusdem generis* canon to the term "regulated NSR pollutant" has been the Agency's historical interpretation of this provision.

Moreover, the Supreme Court has recently explained that *ejusdem generis* and other similar statutory interpretive principals should not be "woodenly" applied every time a general phrase is used along with more limiting ones. *Ali v. Fed. Bureau of Prisons*, 128 S.Ct. 831, 841 (2008). Like other statutory interpretive canons, *ejusdem generis* should not be followed if there are good reasons not to apply it. *E.g.*, *Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991). In other words, as a matter of statutory interpretation (or, here, regulatory interpretation), *ejusdem generis* functions as only one, and not necessarily the best, means for discerning the text's intent where the words do not have a plain meaning.

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[48] The Region introduced this argument for the first time in its March Brief – it did not include it in its response to comments or in its initial response to the Petition.

In the present context, we do not think it is appropriate to use the *ejusdem generis* canon to interpret an otherwise ambiguous or indeterminate[49] regulatory text. The Supreme Court observed recently that "the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

The Region essentially argues that by "parroting" the statutory language as the last part of a four-part definition, EPA both exercised its expertise as to the first three parts of the definition and narrowed the meaning that could otherwise be accorded the parroted statutory phrase thereby supplanting its earlier interpretation of the statutory phrase set forth in the 1978 preamble. Without a clear and sufficient supporting analysis or statement of intent in the regulation's preamble, we cannot ground our decision on the *ejusdem generis* canon of interpretation to determine that the Agency did in fact exercise expert judgment in that manner. We thus conclude that the regulatory text, standing alone, is not sufficient to establish that the authority the Region admits it would otherwise have under the statute is constrained by the 2002 rulemaking such that the Region was required to apply BACT only to pollutants "subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." Resp. to Comments at 5-6.

ii. *Regulatory Text and Preamble Read Together*

In its appellate briefs, the Region does not rely solely on the regulatory text, but also argues that the meaning it advocates is apparent from reading the regulatory text in conjunction with statements made in the preamble to the 2002 rulemaking. Specifically, in responding to the

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[49] The *ejusdem generis* canon of interpretation is triggered only by uncertain text. *E.g.*, *Garcia v. United States*, 469 U.S. 70, 74-75 (1984); *Gooch v. United States*, 297 U.S. 124, 128 (1936).

Petition, the Region states that when EPA adopted the regulatory definition of "regulated NSR pollutant," it published a list of pollutants described as "'currently regulated under the Act,'" which "did not include carbon dioxide or any other pollutant that was not subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." Region's Resp. to Pet. at 7-8. The Region also cited, in its response to comments, the preamble to the proposed rulemaking, which contained a similar list of pollutants described as currently regulated under the Act. Resp. to Comments at 6 (citing *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR)*, 61 Fed. Reg. 38250, 38,309-10 (proposed July 23, 1996)); *see also* Region's Resp. to Pet. at 9. Based on this background, the Region argues that "[t]hrough the contemporaneous adoption of the regulatory language and publication of a definitive list of pollutants subject to regulation at the time, EPA established its interpretation of the phrase 'pollutant that otherwise is subject to regulation' in section 52.21(b)(50)(iv)." Region's Resp. to Pet. at 8.

We are not persuaded that the publication of this pollutant list was sufficient to establish a definitive Agency interpretation of the fourth and last part of the regulatory definition allegedly constraining the authority the Region admits it would otherwise have under the same language in the statutory text. We do not see in either the 2002 final preamble, or in the 1996 preamble for the proposed rulemaking, any public notice of the interpretation the Region now advocates,[50] let alone anything approaching the same level of express notice and clear statement that is found in the preamble for the 1978 rulemaking, in which the Administrator stated he was making "final" an "interpretation" he believed to be correct. 43 Fed. Reg. at 26,397. Moreover, as explained *infra*, because the Agency did not seek comment on the regulatory definition, and in particular on part (iv) of the definition, it

[50] We reject the Region's contention that Sierra Club is barred from contesting the Region's interpretation of 40 C.F.R. § 52.21(b)(50)(iv) on the grounds that it had an opportunity to contest that interpretation at the time the regulations were promulgated. Region's Resp. to Pet. at 8. As explained below, we find instead that the preamble did not provide notice of the interpretation the Region now advocates.

was reasonable for the public to conclude that the Agency was merely mirroring the statutory language, not narrowing or putting a particular gloss on it.

The Region explains in its appellate briefs that the Agency's use of an "actual control of pollutant emissions" interpretation in creating the 2002 preamble's pollutant list is apparent by observing that the listed pollutants were subject to emissions controls and that none of the listed pollutants were subject to only monitoring and reporting requirements. *See*, *e.g.*, Region's Mar. Brief at 31 ("This list did not include carbon dioxide or any other pollutant that was not subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant."). The Region correctly states that the 2002 preamble's pollutant list did not include any pollutants that were regulated solely by monitoring or reporting requirements and, standing alone, the list is not inconsistent with the interpretation that the Region articulated in its response to comments. However, as noted in the previous section, the mere absence of inconsistency is not sufficient to show that the Region's permitting authority was constrained by the interpretation the Region advocates, particularly since the 2002 preamble does not contain any language clearly and unambiguously stating that the list was intended to be exclusive or to be an interpretation of the defined term.

The context of the pollutant list also does not indicate that the list was provided as an interpretation of the defined term "regulated NSR pollutant." Both the 1996 preamble for the proposed rulemaking and the 2002 preamble for the final rule included the pollutant list under a general discussion of regulatory changes made to exclude hazardous air pollutants listed under CAA section 112 from PSD review as required by the 1990 Public Law. 61 Fed. Reg. at 38,309-10; 67 Fed. Reg. at 80,239-40. Because the 1996 proposed rulemaking did not propose to promulgate "regulated NSR pollutant" as a defined term, the inclusion of the pollutant list in a discussion of hazardous air pollutants in the 1996 Federal Register cannot be viewed as indicating the Agency's interpretation of regulatory text. In the 2002 preamble, the pollutant list appears several paragraphs *before* the preamble discusses a commenter's suggestion to "amend the regulations to include a definition of pollutants

regulated under the Act." 67 Fed. Reg. at 80,239-40. Indeed, the 2002 preamble does not even mention in its narrative description the last part of the four-part definition. *Id.* at 80,240. This context, divorced as it is from any mention of the last clause of the regulatory definition, does not support the Region's contention that the pollutant list constituted the Agency's interpretation of the phrase "pollutant that otherwise is subject to regulation" in section 52.21(b)(50)(iv).[51] Because the Agency apparently chose not to make its interpretation explicit in the wording of the last part of the four-part definition, but instead chose to parrot the statutory language, which it now admits is potentially subject to a broader interpretation, the Agency failed to articulate, or give clear notice of its interpretation.

c. *The Wegman Memo and the Cannon Memo*

In its appellate briefs, the Region discusses two memoranda[52] EPA issued over the years that the Region describes as making the Agency's interpretation "apparent to the regulated community and other stakeholders." Region's Resp. to Pet. at 9; Region's Mar. Brief at 35-38, 41-42. The Region cites the following documents: 1) Memorandum

[51] We reject the Region's contention that the list of pollutants set forth in the preamble provided notice to the public, as the Region now contends, of all pollutants falling within the definition of "regulated NSR pollutant." Region's Resp. to the Pet. at 8 & n.3.

[52] In its appellate briefs, the Region also cites two previous Board decisions as support for its interpretation of a historical Agency interpretation. Region's Resp. to Pet. at 10 (citing *In re Inter-Power of N.Y., Inc.*, 5 E.A.D. 130 (EAB 1994); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107 (EAB 1997)); Region's Mar. Brief at 38-41; *see also* UARG Mar. Brief at 34-36. We reject the Region's characterization of these decisions. The *Inter-Power* case involved a permit that was issued before EPA promulgated the part 75 CO_2 monitoring and reporting requirements in 1993. *Inter-Power*, 5 E.A.D. at 131 (noting that the permit was issued on October 26, 1992). The *Kawaihae* case also does not represent a determination by this Board regarding the meaning of "subject to regulation under this Act" in CAA sections 165 and 169 – the petitioner in that case raised concerns that the permit ignored greenhouse gas emissions "contrary to international agreements concerning global warming." *Kawaihae*, 7 E.A.D. at 132. The *Kawaihae* decision was also issued at a time when the Wegman Memo would suggest the EPA viewed CO_2 as not being an "air pollutant."

from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, *Definition of Regulated Air Pollutant for Purposes of Title V* (Apr. 26, 1993) ("Wegman Memo"); and 2) the 1998 Cannon Memo. *See* Region's Resp. to Pet. at 9-11. These memoranda, however, do more to confuse the historical record of the Agency's interpretation than they do to show that it has been long-standing and consistent.

The Region characterizes the Wegman Memo as describing "the scope of pollutants covered by the Title V program on the basis of a two-step line of reasoning." Region's Mar. Brief at 35. The Region acknowledges that, since the first step "interpreted the section 302(g) definition of 'air pollutant' more narrowly than the broad reading recently adopted by the Supreme Court, OAR and Region VIII do not dispute that Supreme Court decision casts doubt on the first premise of that memorandum." *Id.* at 36. The Region argues that the *Massachusetts* decision did not address the second step of the Wegman Memo's discussion and, thus, the second step "remains a viable interpretation of the phrase 'subject to regulation.'" *Id.*[53]

The Wegman Memo, however, offered no legal support or reasoned analysis for what the Region describes as the second step. The Region describes the second step as "starting after the first sentence in the second paragraph" of the Wegman Memo's discussion of the meaning of "air pollutant." Significantly, the second step, as the Region identifies it, is still part of the analysis of why CO_2 and methane do not come within the meaning of "air pollutant" as defined by CAA section 302(g). This is precisely the issue addressed by the Supreme Court in *Massachusetts*, and on which the Supreme Court held that a broader meaning was intended by Congress. *Massachusetts v. EPA*, 549 U.S. 497, slip op. at 29-30 (2007).

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[53] The Wegman Memo may also have been effectively negated, at least as to what the Region terms the first premise, by General Counsel Jonathan Z. Cannon's 1998 memo, which concluded that CO_2 falls within the definition of "air pollutant" under CAA section 302(g). Cannon Memo at 2-3.

Moreover, the Wegman Memo's second step, as the Region identifies it, began by stating that the memo's approach "would include, of course, all *regulated air pollutants* plus others specified by the Act or EPA rulemaking." Wegman Memo at 4 (emphasis added). The term "regulated air pollutants" as used in the Wegman Memo specifically referred to the definition set forth in 40 C.F.R. § 70.2. *Id.* at 1. The definition of "regulated air pollutant" in 40 C.F.R. § 70.2, by its plain terms, applies only to Part 70 permits and does not include the catch-all phrase at issue in this case specifically included in 40 C.F.R. § 52.21(b)(50)(iv). Thus, at best, the Wegman Memo does not appear to provide an interpretation that can be applied beyond the specific circumstances of the Title V program it expressly addressed.

The Wegmen Memo did state that because section 821 of the 1990 Public Law only required monitoring and reporting of CO_2 and did not require actual control of emissions, "these provisions do not preempt EPA's discretion to exclude these pollutants" from the definition of "air pollutant." Wegman Memo at 5. The memo then compared its approach to "the traditional practice of the prevention of significant deterioration (PSD) program," but provided no legal support or analysis for what it terms "the traditional practice" of the PSD program. *Id.* at 5. At bottom, the complete absence of any legal analysis supporting its conclusory statements, its questionable status in light of the *Massachusetts* decision, and its grounding in the Title V program rather than PSD make the Wegman Memo a weak reed to support an Agency historical interpretation.

The Cannon Memo, issued in 1998, stated that "[w]hile CO_2 emissions are within the scope of EPA's authority to regulate, the Administrator has made no determination to date to exercise that authority under the specific criteria provided under any provision of the Act." Cannon Memo at 5.[54] That memo arguably could support the Region's position that despite the CO_2 monitoring and reporting requirements promulgated in Part 75 in 1993, the Agency did not

[54] General Counsel Gary S. Guzy defended the Cannon Memo during his tenure. UARG Mar. Brief at 25.

consider CO_2 to be "regulated" for purposes of the PSD program. However, the Cannon Memo was "formally" withdrawn by General Counsel Robert E. Fabricant. *See* Memorandum from Robert E. Fabricant, General Counsel, U.S. EPA, to Marianne L. Horinko, Acting Administrator, U.S. EPA, *EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act* at 1 (Aug. 23, 2003). The Fabricant Memo concluded that EPA did not have the statutory authority to regulate CO_2. The reasoning of the Fabricant Memo was subsequently rejected and overruled by the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497, slip op. at 29-30 (2007). Thus, at bottom, both the Wegman and Cannon memos were either expressly withdrawn or in some manner subsequently significantly undermined.

Tellingly, the Region states on appeal that "[t]he Supreme Court decision effectively forced EPA to return to the interpretation (and distinction) reflected in the [Cannon Memo]." Region's Resp. to Pet. at 17. The Region, however, has not pointed to any instance where the Agency has announced its decision to return to, or to re-adopt, the Cannon Memo's analysis prior to the Region's appellate brief in this case. This chronology consists of the Fabricant Memo's reversal of the earlier Cannon Memo, followed by a Supreme Court decision that negated the Fabricant Memo. This history does not support an historical Agency interpretation.

In addition, it is questionable whether the Wegman Memo or the Cannon Memo can be viewed as articulating the Agency's interpretation of CAA sections 165 and 169, particularly since the Agency had already articulated an interpretation of those provisions in 1978. *See*, *e.g.*, *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 Cannon Memo did not mention the PSD provisions at issue in this case, and the Wegman Memo mentioned the PSD program only in passing as support for its approach, and did not state that it was announcing an Agency interpretation of the provisions at issue here.

Neither mentioned the Administrator's interpretation announced and made final in the 1978 Federal Register.

In sum, the Wegman Memo, the Cannon Memo, the 1996 preamble, and the 2002 rulemaking 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 CO_2 BACT limit is constrained by an historical Agency interpretation of CAA sections 165 and 169. Accordingly, for the foregoing reasons, we conclude that the Region's rationale for not imposing a CO_2 BACT limit in the Permit – that it lacked the authority to do so because of an historical Agency interpretation of the phrase "subject to regulation under this Act" as meaning "subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant" – is not supported by the record. Thus, we cannot sustain the Region's permitting decision on the grounds stated in its response to comments.

On appeal, but not in its response to comments, the Region suggests that its approach is grounded in a traditional practice of the PSD program. Specifically, the Region argues that its conclusion regarding the meaning of "the Agency's regulatory definition of 'regulated NSR pollutant' * * * is consistent with nearly *30 years of EPA practice* and is not precluded by the terms of the Clean Air Act." Region's Mar. Brief at 12 (emphasis added); *see also id.* at 6.[55] Authorities the Region cites do make reference to a "traditional practice." For example, the Wegman Memo states that its approach "is similar to the *traditional practice*" of the PSD program. Wegman Memo at 5 (emphasis added). Likewise, although the Cannon Memo does not specifically mention the PSD program, or sections 165 and 169, the broad statements of that memo also suggest the Agency has not treated CO_2 as a "regulated" pollutant

[55] Similarly, the Region argues that "EPA has never interpreted" the phrase subject to regulation under the Act "to cover pollutants subject only to monitoring and reporting requirements." Region's Resp. to Pet. at 7-8.

under any of the CAA provisions, including PSD.[56] Significantly for our purposes, however, neither memo cites to specific evidence of such a practice and the factual predicate for such a finding has not been developed in the record of the Region's permitting decision as defined by 40 C.F.R. § 124.18. *See*, *e.g.*, *In re ConocoPhillips Co.*, PSD Appeal No. 07-02, slip op. at 24-25 (EAB June 2, 2008), 13 E.A.D. __; *In re Indeck-Elwood*, *LLC*, PSD Appeal No. 03-04, slip op. at 29 (EAB Sept. 27, 2006), 13 E.A.D. __; *In re Gov't of D.C. Mun. Separate Sewer Sys.*, 10 E.A.D. 323, 342-43 (EAB 2002); *In re Chem. Waste Mgmt*, 6 E.A.D. 144, 151-52 (EAB 1995); *In re Amoco Oil Co.*, 4 E.A.D. 954, 964 (EAB 1993); *In re Waste Techs. Indus.*, 4 E.A.D. 106, 114 (EAB 1992).

Moreover, to the extent such a practice exists, the record for the Region's permitting decision does not include an analysis of whether recognizing such a practice as the Agency's interpretation of sections 165 and 169 would require withdrawal, amendment, modification, or clarification of the Agency's earlier interpretive statements. To the extent that any practice upon which the Region now relies is inconsistent with the Agency's previous interpretive statements published in the Federal Register, there is no analysis in the record regarding whether formalizing such a practice as a controlling interpretation may be accomplished through this permitting proceeding, which falls within the definition of an adjudication and licensing proceeding under the Administrative Procedure Act, 5 U.S.C. § 551, or whether a rulemaking under APA section 553 may be required. *See*, *e.g.*, *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). Accordingly, we conclude that the Wegman Memo and Cannon Memos are not sufficient to form an alternative basis for sustaining the Region's conclusion that its authority was constrained by an historical agency interpretation.

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[56] UARG argues a similar point that "[s]ince at least 1993, [EPA] has consistently rejected any notion that CO_2 is subject to regulation for PSD purposes[.]" UARG Mar. Brief at 32.

4. *Whether EPA's CO_2 Monitoring and Reporting Regulations Are Not "Under" the CAA*

The Region argues, "even if the Board were to find error in EPA's historic interpretation and consider pollutants for which sources need only monitor and report emissions to be 'subject to regulation,' that premise alone would not make carbon dioxide regulated 'under the Act' for PSD purposes * * *." Region's Mar. Brief at 46. In particular, the Region argues that EPA's CO_2 monitoring and reporting regulations are not "under this Act" within the meaning of CAA sections 165 and 169 because section 821's text and context, including legislative history, demonstrates that Congress did not intend section 821 of the 1990 Public Law to amend the CAA and thus became part of the CAA. *Id.* at 45-53. If this interpretation were correct, it would support the Region's contention that section 821 is not a basis for finding that CO_2 is subject to regulation "under the Act."[57]

While section 821's text contains some features that support the Region's argument that Congress intended section 821 not to be part of the CAA, the text also contains some features that subvert the Region's contention. Significantly, as we explain below, the Agency's prior statements interpreting and applying section 821, including statements made in the Agency's regulations, are inconsistent with or contradict the interpretation advocated by the Region in this proceeding. Because the Region's and Sierra Club's arguments regarding section 821 have continued to evolve during the course of this appellate proceeding, it is clear that the Region did not fully consider these issues regarding section 821 in making its permitting decision. Further, the Agency has

[57] This argument would not dispose of Sierra Club's contention that CO_2 is regulated under the CAA because CO_2 is regulated in some form under several State Implementation Plans promulgated under the CAA and approved by the EPA. Because, as discussed in the text, we do not sustain the Region's permitting decision on the alternative ground it argues, and because the Region did not have the opportunity to fully consider Sierra Club's arguments regarding the State Implementation Plans, we do not rule on Sierra Club's argument at this time, but instead direct that the Region consider in the first instance on remand the State Implementation Plans, along with other potential avenues of regulation of CO_2.

published in the regulations themselves interpretive statements that conflict with, or contradict, the interpretation the Region advocates on appeal. For these reasons, as well as the reasons articulated below, we decline to rely on the Region's interpretive arguments regarding section 821 as grounds to sustain the Region's permitting decision, and we remand the section 821 issues to the Region to consider more fully in making its permitting decision on remand.

In considering the parties' arguments regarding the import of section 821 in this proceeding, we observe at the outset that section 821 is not a model of drafting clarity. The reporter's notes for the United States Code compilation indicate that, in a number of respects, section 821's literal words are not what Congress apparently intended. For example, section 821 refers to Title V, which the reporter's notes state was probably intended to be Title IV; likewise, section 821 refers to CAA section 511, which the reporter's notes state was probably intended to be section 412. 42 U.S.C. § 7651k note. These obvious errors make more difficult the task of analyzing whether textual features the parties identify support the inferences regarding congressional intent they advocate.

In addition, section 821's text contains features both supporting and subverting the arguments the Region advances. For example, the language of the statute contains some indication that Congress did not intend section 821 to amend the CAA. Specifically, the Region correctly observes that numerous provisions of the 1990 Public Law expressly state an intention to amend the CAA, but that section 821 did not contain such language. Region's Mar. Brief at 47-48 (observing that sections 822 and 801 of the 1990 both stated "the Clean Air Act is amended * * *" but that no similar language is included in section 821); *see also* Deseret's Mar. Brief at 26-27; UARG's Mar. Brief at 8.[58] Similarly,

[58] The Region argues that these distinctions show that "in passing the public law known as the Clean Air Act Amendments of 1990, Congress gave clear indication which sections were and were not to be treated as a part of the Clean Air Act, and this clear language trumps any presumption that section 821 is a part of the Act." Region's Mar. Brief at 48. The Region observes that this Congressional intent is recognized both (continued...)

Deseret correctly observes that many of the 1990 Public Law's provisions containing language expressly amending the CAA also referred to the CAA as "this Act," whereas section 821 refers to the CAA as "the Clean Air Act," which may suggest that the CAA is a separate statute from section 821. Deseret's Mar. Brief at 27 (citing section 701 of the 1990 Public Law as an example of a provision that expressly amended the CAA and referred to it as "this Act"); *see also* UARG's Mar. Brief at 9-10. The Region, Deseret, and UARG also point to statements in the legislative history and other statements made after the 1990 Public Law was enacted, which they argue show that Congress did not intend section 821 to amend the CAA. Region's Resp. to Pet. at 18; Region's Mar. Brief at 46; Deseret Mar. Brief at 28-29; UARG Mar. Brief at 11-20.[59]

Sierra Club, however, correctly points out, based on the statutory text, that Congress intended section 821 to be enforceable under and otherwise entwined with the CAA, and in that sense arguably a part of the CAA. Specifically, section 821 of the 1990 Public Law made an enforcement provision of the CAA, section 412(e), "apply for purposes of this section [821] in the same manner and to the same extent as such provision applies" to monitoring and reporting required under CAA section 412. 1990 Public Law § 821(b). Based on this enforcement provision, Sierra Club argues that "Congress clearly intended section 821

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[58](...continued)
in the United States Code treatment of section 821 as a note attached to 42 U.S.C. § 7651k and in a publication issued by the House Energy and Commerce Committee in 2001. *Id.* (referring to H. Comm. on Energy and Commerce, *Compilation of Selected Acts within the Jurisdiction of the Committee on Energy and Commerce* 451-52 (Comm. Print 2001)); *see also* Deseret's Mar. Brief at 29-30.

[59] Deseret points to a statement by Congressman Cooper that section 821 "does not force [carbon dioxide] reductions." Deseret Mar. Brief at 28 (quoting W. Hein, *A Legislative History of the Clean Air Act Amendments of 1990* at 2985 (1998) (alterations made by Deseret)); *see also* Region's Resp. to Pet. at 18. Deseret also points to a letter that Congressman John Dingell sent to Congressman David McIntosh in 1999. Deseret Mar. Brief at 29 (citing Letter from John Dingell, Ranking Member, H. Energy and Commerce Comm., to Hon. David McIntosh, Chairman, Senate Subcomm. on Nat'l Econ. Growth, Natural Res. and Regulatory Affairs (Oct. 5, 1999)).

to be an enforceable part of the Act." Sierra Club's April Reply Brief at 17. Sierra Club argues further that section 821's monitoring requirements are intrinsic to the CAA in that they apply to sources regulated under CAA Title IV and are "inextricably tied to the framework in section 412 of the Act." *Id.* at 16-17.

In its appellate briefs, the Region responds to Sierra Club's observations regarding section 821's enforcement provision by suggesting that enforcement may proceed either under a theory that section 821 incorporates by reference the CAA's enforcement mechanisms or under a theory that section 821 expands the CAA's enforcement provisions to cover section 821's monitoring requirements. The Region contends that neither of these interpretations "make carbon dioxide regulated 'under the Act,' because such a result would be inconsistent with the clear Congressional intent to exclude the requirements of section 821 of [the 1990 Public Law] from the Clean Air Act." Region's Aug. Brief at 24.[60]

Against this background of a lack of legislative clarity as described above, the Agency's historical statements regarding section 821 preclude our acceptance of the interpretation the Region now advocates, at least in the context of this appeal. While the Agency has not heretofore expressly addressed the relationship between section 821 and the Clean Air Act, its past actions certainly seem to treat section 821 as if it were part of the Act. For example, the Agency did not distinguish between section 821 of the 1990 Public Law and the CAA (1) in statements EPA made when it issued regulations implementing the 1990 Public Law, (2) in the text of those regulations, and (3) in enforcing the regulation's CO_2 monitoring and reporting requirements. In a number of

[60] The Region argues further that "enforcement does not automatically equate to 'regulation'" because "EPA has long-interpreted the phrase 'regulation' for PSD permitting purposes to require actual control of emissions of a pollutant." Region's Aug. Br. at 24 n.6. This argument, of course, begs the very question which we consider in Part III.B.3 above, namely whether the Agency in fact has clearly and consistently articulated an interpretation of "subject to regulation" as tied to "actual control of emissions." As discussed in that Part, we find that the record of the Region's permitting decision is not sufficient to support the Region's contention.

instances, EPA referred to section 821 of the 1990 Public Law as part of the CAA. For example, in EPA's 1991 notice of proposed rulemaking to implement part of the 1990 Public Law, EPA stated that the rule would "establish requirements for the monitoring and reporting of CO_2 emissions pursuant to *Section 821 of the Act*." *Acid Rain Program: Permits*, *Allowance Sys. Continuous Emissions Monitoring*, *and Excess Emissions*, 56 Fed. Reg. 63,002, 63,291 (proposed Dec. 3, 1991) (emphasis added).[61]

Further, in the text of the rule EPA promulgated in 1993, EPA referred to section 821 as part of the CAA: "The purpose of this part is to establish requirements * * * pursuant to *Sections 412 and 821 of the CAA*, 42 U.S.C. 7401-7671q as amended by Public Law 101-549 (Nov. 15, 1990)." 40 C.F.R. § 75.1(a) (emphasis added). The regulations also provide that a violation of the regulations is "a violation of the Act." 40 C.F.R. § 75.5(a).

In its brief before the Supreme Court in the *Massachusetts* case, the United States stated that "[t]hree provisions *added to the CAA in 1990* specifically refer to carbon dioxide or global warming," and the Agency identified "Section 821 of the CAA Amendments of 1990" as one of those provisions. Brief of the Federal Respondent at 26 in *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120) (emphasis added).

The Region also acknowledges that EPA's enforcement actions have not distinguished section 821 as separate from the CAA. The Region states as follows:

> With respect to the CO_2 monitoring and reporting requirements in particular, EPA's pleadings in these enforcement actions generally exhibit the same imprecision found in EPA's references to section 821

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[61] In a subsequent rulemaking, EPA also referred to "Sections 412 and *821 of the Act*." 60 Fed. Reg. 26,510, 26,510 (May 17, 1995) (emphasis added); *see also Acid Rain Program: Continuous Emissions Monitoring*, 59 Fed. Reg. 42,509 (Aug. 18, 1994).

> CO_2 requirements in the preamble and regulatory text promulgating the CO_2 requirements in the Part 75 regulations. * * * EPA generally referred to the CAA § 113 authority to bring the claims but did not clarify exactly how the authority provided by CAA § 113 applied to enforce the specific requirements of section 821 of [the 1990 Public Law] and the corresponding regulations in Part 75 implementing these requirements.

Region's August Brief at 21. For example, in *In re Indiana Municipal Power Agency*, Docket No. CAA-05-2000-0016, Compl. ¶¶ 1, 4 (Sept. 29, 2000), U.S. EPA Region 5 stated that the case was "an administrative proceeding to assess a civil penalty *under* Section 113(d) of the Clean Air Act (the Act)" and that "[p]ursuant to *Section 412 and 821 of the Act*, 42 U.S.C. §§ 7401-7671q, as amended by Public Law 101-549 (November 15, 1990) the Administrator established requirements for the monitoring, record keeping, and reporting of * * * carbon dioxide emissions * * *." *Id.* (emphasis added); *see also In re IES Utilities*, *Cedar Rapids*, *Iowa*, Docket No. VII-95-CAA-111, Compl. ¶ 3 (June 15, 1995) (alleging that carbon dioxide emissions monitoring is required "*[u]nder Section 412 of the Act*, 42 U.S.C. § 7651k, and 40 C.F.R. Part 75" (emphasis added)).

We recognize that the Region argues in its August Brief that each of the enforcement actions it has identified arises in a context where the emissions source failed to comply with all of the Part 75 monitoring and reporting requirements and not just the CO_2 requirements and that, therefore, "EPA's citation of section 113 in these cases does not necessarily demonstrate that the Agency adopted any specific interpretation" regarding the precise relationship between section 821's enforcement authority and the Part 75 regulations. Region's Aug. Brief at 20-21. In its brief, the Region offers alternative theories to fill the gap: the Region suggests that enforcement may proceed either under a theory that section 821 incorporates by reference the CAA's enforcement mechanisms or alternatively under a theory that section 821 expands the CAA's enforcement provisions to cover section 821's monitoring requirements. *Id.* at 11-20.

With respect to the second of these alternatives, the Region argues that "expansion of the enforcement authority found in sections 412(e) and 113 of the Act * * * does not sweep either section 821 or the regulations implementing it into the Act." *Id.* at 19; *see also id.* at 24. The Region makes this argument despite the fact that EPA has invoked section 113 as the jurisdictional basis for enforcing Part 75 monitoring and reporting violations, including violations with respect to CO_2. The Region's proposition is not self-evident, and the only legal support the Region offers for this contention is that, in its view, "such a result would be inconsistent with the clear congressional intent to exclude the requirements of section 821 of [the 1990 Public Law] from the Clean Air Act." *Id.* at 24. This, of course, begs the very questions at issue regarding whether a Congressional intent on this question can be determined from the textual features identified above and whether the Agency's own previous interpretive statements that conflict with or contradict the interpretation the Region now advocates precludes our acceptance of the Region's current position.

In view of the foregoing, including the Agency's admission that even now it has not yet determined on what jurisdictional theory enforcement of Part 75 CO_2 requirements may proceed, we question how much respect or deference a reviewing court would give the interpretation the Region now advocates, particularly given the history of previous Agency statements regarding "section 821 of the Act."[62] It is well recognized that "the consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981))); *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 411 n.11 (1979) (fact that the agency's interpretation was "neither consistent nor longstanding" which "substantially diminishes the deference to be given to [the agency's] present interpretation of the statute"); *Gen. Elec. Co.*

[62] 56 Fed. Reg. at 63,291.

v. Gilbert, 429 U.S. 125, 143 (1976) ("We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency."); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of such [an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

At the same time, we are mindful that the law does not require an agency to stand by its initial interpretations or policy decisions in all circumstances.[63] Instead, "an agency changing its course * * * is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). However, as to the statements made in the text of the regulations, themselves, we question (but do not decide) whether such statements constitute "legislative rules," which Administrative Procedure Act section 553, 5 U.S.C. § 553, requires EPA to change only through a notice and comment rulemaking; or, alternatively, we question (but do not decide) whether the combined effect of these Agency statements constitutes an authoritative "interpretive rule" meeting the characteristics for which a notice and comment rulemaking would be required in any event if the Agency were to change the interpretation. *See*, *e.g.*, *Farmers Tele. Co., Inc. 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);

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[63] We do, of course, recognize that if we were to adopt the Region's interpretation, that interpretation would not be a post hoc rationalization, but instead would be the final Agency action. *See*, *e.g.*, *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) ("The Secretary's interpretation of OSH Act regulations in an administrative adjudication, however, is agency action, not a post hoc rationalization of it."). Although we have the authority to resolve legal questions on behalf of the Agency in issuing the Agency's final decision, even legal and interpretive questions are best resolved on the basis of a well-developed record. Here, the parties' arguments have continued to evolve and be refined during the course of this appeal, which presents a less than full foundation for resolving such questions.

Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997).

5. *Summation Regarding the CO_2 BACT Limitation Issue*

As explained above, we conclude that the meaning of the term "subject to regulation under this Act" as used in sections 165 and 169 is not so clear and unequivocal as to preclude the Agency from exercising discretion in interpreting the statutory phrase. Thus we find no evidence of a Congressional intent to compel EPA to apply BACT to pollutants that are subject only to monitoring and reporting requirements. Nevertheless, as explained in detail above, we conclude that the Region's rationale for not imposing a CO_2 BACT limit in the Permit – that it lacked the authority to do so because of an historical Agency interpretation of the phrase "subject to regulation under this Act" as meaning "subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant" – is not supported by the administrative record as defined by 40 C.F.R. § 124.18. Thus, we cannot sustain the Region's permitting decision on the grounds stated in the Region's response to comments.

We also decline to sustain the Region's permitting decision on the alternative grounds it argues in this appeal, that regulations promulgated to satisfy Congress' direction set forth in section 821 of the 1990 Public Law are not "under" the CAA. As we explain above, this argument is at odds with the Agency's prior statements regarding the relationship between section 821 and the CAA, including statements in EPA's Part 75 regulations, and those statements preclude our acceptance of the Region's argument in this proceeding.

Accordingly, we remand the Permit for the Region to reconsider whether or not to impose a CO_2 BACT limit in light of the Agency's discretion to interpret, consistent with the CAA, what constitutes a "pollutant subject to regulation under this Act." In remanding this Permit to the Region for reconsideration of its conclusions regarding application of BACT to limit CO_2 emissions, we recognize that this is an issue of national scope that has implications far beyond this individual

permitting proceeding. The Region should consider whether interested persons, as well as the Agency, would be better served by the Agency addressing the interpretation of the phrase "subject to regulation under this Act" in the context of an action of nationwide scope, rather than through this specific permitting proceeding.[64] In any event, the Region's analysis on remand should address whether an action of nationwide scope may be required in light of the Agency's prior interpretive statements made in various memoranda and published in the Federal Register and the Agency's regulations. The Region should also consider whether development of a factual record to support its conclusions may be more efficiently accomplished through an action of nationwide scope, rather than through this as well as subsequent permitting proceedings. *See*, *e.g.*, Kenneth C. Davis & Richard J. Pierce, Jr., 1 *Administrative Law Treatise* at 262-64 (3rd ed. 1994).

IV. CONCLUSION

For the reasons discussed above, we remand the PSD Permit U.S. EPA Region 8 issued to Deseret Power Electric Cooperative for its proposed new waste-coal-fired electric generating unit at its existing Bonanza Power Plant. On remand, the Region shall reconsider whether or not to impose a CO_2 BACT limit in the Permit. In doing so, the Region shall develop an adequate record for its decision, including reopening the record for public comment. Petitioners or other participants in the remand proceeding who are not satisfied with the Region's decision on remand may appeal the Region's determination to this Board pursuant to 40 C.F.R. § 124.19. Pursuant to 40 C.F.R. § 124.19(f)(1)(iii), appeal of the remand decision will be required to

[64] Since these same issues have been raised in a multiplicity of permit proceedings, an action of nationwide scope would also seem more efficient than addressing the issues in each individual proceeding. Once the Agency's position is clearly established, it could then be implemented in the various individual permit proceedings, current and future, through the Part 124 procedures.

exhaust administrative remedies. Finally, for the reasons stated above, we deny review of the "alternatives" analysis issue Sierra Club raised in its Petition.

So ordered.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Order Denying Review In Part And Remanding In Part* in the matter of Deseret Power Electric Cooperative, PSD Appeal No. 07-03, were sent to the following persons in the manner indicated:

By Inter-Office Mail:

Brian L. Doster
Kristi M. Smith
Elliot Zenick
Air and Radiation Law Office
Office of General Counsel
MC 2344A
Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

By Pouch Mail:

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

By First Class Mail:

David Bookbinder, Esq.
Sierra Club
400 C Street, N.E.
Washington, DC 20002

Steffen N. Johnson, Esq.
Susan A. MacIntyre, Esq.
Luke W. Goodrich
Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006

James H. Russell, Esq.
35 W. Wacker Drive
Chicago, IL 60601

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

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

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

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

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

Stephanie Kodish, Esq.
National Parks Conservation Association
1300 19th Street, N.W., Suite 300
Washington, D.C. 20036

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

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

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

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

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

Stephanie Kodish, Esq.
National Parks Conservation Association
706 Walnut Street, Suite 200
Knoxville, TN 37902

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

Peter S. Glaser, Esq.
Troutman Sanders LLP
401 9th Street, N.W., #1000
Washington, D.C. 20004

Katherine D. Hodge, Esq.
Hodge Dwyer Zeman
3150 Roland Avenue
Post Office Box 5776
Springfield, Ill 62705-5776

Russell S. Frye, Esq.
FryeLaw PLLC
1101 30th St., N.W., Suite 220
Washington, D.C. 20007-3769

Rae E. Cronmiller, Esq.
Environmental Counsel
National Rural Electric Cooperative Assoc.
4301 Wilson Boulevard
Arlington, VA 22203

Maureen Martin, Esq.
W3643 Judy Lane
Green Lake, Wisconsin 54941

Kenneth A. Reich, Esq.
Richard A. Sugarman, Esq.
WolfBlock LLP
One Boston Place, 40th Floor
Boston, MA 02108

Norman W. Fichthorn, Esq.
Allison D. Wood, Esq.
James W. Rubin, Esq.
Hunton & Williams LLP
1900 K Street, N.W.
Washington, DC 20006

Dated: NOV 13 2008

Annette Duncan
Secretary