BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: EPA Final Action Published at __ Fed. Reg. _____ (December 31, 2008), entitled "Clean Air Act Prevention of Significant Deterioration (PSD) Construction Permit Program; Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program"

PETITION FOR RECONSIDERATION

Pursuant to Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), the undersigned organizations petition the Administrator of the Environmental Protection Agency ("the Administrator" or "EPA") to reconsider the final action referenced above. This final action constitutes a *de facto* final rule because it purports to establish binding requirements under the Clean Air Act's Prevention of Significant Deterioration ("PSD") program and create new substantive law regarding the applicability of that program, the obligations of permitting authorities, and the rights of citizens, states, and regulated entities. Because EPA did not conduct a proper rulemaking proceeding prior to implementing this final action, as required by Section 307(d), Petitioners had no opportunity to raise objections to it through public comment. The objections raised in this petition are of central relevance to the outcome of the final action because they demonstrate that the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). With respect to each objection, moreover, the regulatory language and EPA interpretations that render the rule arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law appeared for the first time in the final action published on December 31, 2008, __ Fed. Reg. __. The Administrator must therefore "convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B).

INTRODUCTION

On December 18, 2008, EPA issued a document that purports to establish binding requirements under the Clean Air Act's PSD program and create new substantive law regarding the applicability of that program, the obligations of permitting authorities, and the rights of citizens, states, and regulated entities. Memorandum from Stephen L. Johnson, *EPA's Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program* (December 18, 2008) ("Johnson Memo" or "Memo"). EPA published notification of the Johnson Memo in the Federal Register on December 31, 2008. __ Fed. Reg. ______.

As discussed below, this final agency action was impermissible as a matter of law, because it was issued in violation of the procedural requirements of the Administrative Procedures Act ("APA"), 5 U.S.C. § 101 et seq., and the Clean Air Act ("CAA"), 42 U.S.C. § 7607, it directly conflicts with prior agency actions and interpretations, and it purports to establish an interpretation of the Act that conflicts with the plain language of the statute. Accordingly, the undersigned organizations request that EPA immediately reconsider and retract the Johnson Memo.

BACKGROUND

In 2007, EPA Region 8 issued a PSD permit for a proposed new 110 MW unit at Deseret Power Electric Cooperative's existing Bonanza coal-fired power plant in Utah. Although Section 165 of the Act requires Best Available Control Technology ("BACT") for "each pollutant subject to regulation under this Act," and although CO_2 is regulated under the Act, the permit contained no BACT limits for CO_2.

In response to comments filed by Sierra Club, EPA contended for the first time in issuing the permit that it was precluded from requiring BACT limits for CO_2 based on a "longstanding interpretation" of the CAA that limited pollutants "subject to regulation" to those subject to actual control of emissions, as opposed to the CO_2 monitoring and

reporting regulations in Subchapter C of Title 40 of the CFR. Sierra Club appealed the final permit to EPA's Environmental Appeals Board ("EAB" or "Board").[1]

The EAB rejected EPA's theory, vacated the permit and remanded it to Region 8: "[W]e conclude that the Region's rationale for not imposing a CO_2 BACT limit in the Permit – that it lacked authority to do so because of an historical Agency interpretation of the phrase 'subject to regulation under the 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." *In re Deseret Power Electric Cooperative*, PSD Appeal 07-03, slip op. at 63 (EAB Nov. 13, 2008), 13 E.A.D. __ *("Bonanza")*. To the contrary, the Board found that the **only** relevant interpretation of the applicable statutory and regulatory language was to be found in EPA's 1978 PSD rulemaking. That interpretation directly contradicted EPA's theory, and in fact "augurs in favor of a finding" that "subject to regulation under this Act" encompasses any pollutant covered by a regulation in Subchapter C of Title 40 of the CFR, such as CO_2. *Bonanza* at 41.

In addition, the Board also required an additional public notice and comment process addressing the question of CO_2 BACT limits for the Bonanza facility: "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*." *Id.* at 64 (emphasis added).

Due to the importance of the issue, the EAB suggested that EPA might want to undertake a proceeding of national scope to deal more broadly with the question of how to address CO_2 in the context of PSD permitting. Regardless of the chosen procedural

[1] The EAB has exclusive jurisdiction within EPA to review PSD permit decisions. 40 C.F.R. § 124.2(a) ("The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in RCRA, PSD, UIC, or NPDES permit appeals filed under this subpart, including informal appeals of denials of requests for modification, revocation and reissuance, or termination of permits under Section 124.5(b). An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered.").

mechanism, however, the Board was clear that additional notice and comment proceedings were necessary before EPA could adopt changes to the PSD program.

EPA responded to *Bonanza* by issuing the Johnson Memo, which states, "As of the date of this memorandum, EPA will interpret this definition of 'regulated NSR pollutant' to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision of the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant." Johnson Memo at 1. EPA published a notice in the Federal Register on December 31, 2008, stating that the Johnson Memo "contains EPA's 'definitive interpretation' of 'regulated NSR pollutant.'" ___ Fed. Reg. _____.

OBJECTIONS

I. BECAUSE THE JOHNSON MEMO IS NOT AN "INTERPRETIVE RULE," ITS ISSUANCE VIOLATES PROCEDURAL REQUIREMENTS THAT MANDATES AGENCY RECONSIDERATION

The Johnson Memo purports to be "establishing an interpretation clarifying the scope of the EPA regulation that determines the pollutants subject to" the PSD program. Johnson Memo at 1. Whatever else the Johnson Memo is, it is definitely not an "interpretive rule." As the D.C. Circuit has explained:

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

Assoc. of Amer. RR v. Dept. of Transp., 198 F.3d 944 at 947 (D.C. Cir. 1999) (emphasis added). It is clear that EPA has so characterized it solely to avoid the procedural requirements – most importantly, public notice and comment – that would otherwise be imposed by the Clean Air Act, the Administrative Procedures Act, and the *Bonanza* decision. The Johnson Memo is a substantive rule, and not an interpretive one, because it reverses a formal agency interpretation, overturns an EAB decision, and amends the substance of the PSD program.

A. <u>The Johnson Memo Reverses a Formal Agency Interpretation</u>

In 1978, EPA determined in a Federal Register preamble that the phrase "'subject to regulation under this Act' means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type." 43 Fed. Reg. 26,388, 26,397 (June 19, 1978). This earlier interpretation – which has never been withdrawn or modified – directly conflicts with the interpretation the Memo purports to adopt. As discussed more fully below (pp. 8 *et seq.*), because the Subchapter C regulations include, *inter alia*, regulations that require monitoring and reporting of CO_2 emissions, the EAB held that this language offers *no* support for an interpretation applying "BACT only to pollutants that are 'subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant.'" *Bonanza* at 41. The logical implication of the 1978 Preamble is that BACT applies to CO_2 emissions. At a minimum, the 1978 Preamble accords agency permitting offices discretion under the Act and under EPA's regulations (which merely parrot the language of the Act) to require CO_2 BACT limits in PSD permits. Either way, the Johnson Memo impermissibly seeks to change that interpretation so as to *preclude* consideration of CO_2, thereby significantly modifying the nature and scope of the PSD program without notice and comment rulemaking.

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

In an effort to bypass the procedures required by *Paralyzed Veterans*, the Memo claims that it is not actually refuting the 1978 Preamble's interpretation. It suggests, first, that because the 1978 Preamble did not itself "amplify the meaning of the term 'regulated in,'" EPA remains free to insert a wholly new definition of that term. Johnson Memo at 19. The Agency may not, however, evade the procedures mandated by *Paralyzed Veterans* by disguising a revision of governing law as an interpretation of its

previous interpretation. *Paralyzed Veterans*, 117 F.3d at 586 (refusing to allow revisions or modifications of agency interpretations without notice and comment).

Second, the Memo contends that "the 1978 statement referred to the language in the statute which said 'pollutant subject to regulation under this Act,'" while "the 2002 regulation I am interpreting here uses the phrase 'pollutant that otherwise is subject to regulation under the Act.'" Johnson Memo at 19. The latter phrase, however, is a component of the former, so that the Memo's interpretation of "pollutant[s] . . . otherwise . . . subject to regulation under the Act" necessarily limits its interpretation of "pollutant[s] subject to regulation under this Act." 40 C.F.R. § 52.21(b)(50)(iv).

B. The Johnson Memo Overturns the EAB's *Bonanza* Decision.

While the Johnson Memo states that it "is not intended to supersede the Board's decision," Johnson Memo at 2, that is exactly what it does, even though the Administrator has no jurisdiction to undo a statutory interpretation adopted in an EAB ruling or substitute his judgment for that of the Board. *See* 40 C.F.R. § 124.2(a). The Board held that to adopt a new interpretation of the PSD regulatory program, EPA *must* undertake a new notice and comment process. *Bonanza* at 64 ("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.") (emphasis added).

Thus, the EAB – the final agency decision-maker as to PSD permits – has already addressed whether a notice and comment process is required for EPA to change its position regarding the appropriate scope of analysis in PSD permits, and concluded that it is. Significantly, the Board also ruled that the existing record was inadequate to support the agency's attempted reinterpretation of the Act – directing the agency on remand to "develop an adequate record for its decision." *Id.*[2]

[2] The EAB also specifically *rejected* EPA's argument that its interpretation was supported by "historic practice," finding it insufficient to undo "the authority the Region admit[ed] it would otherwise have under the statute." *Bonanza* at 46. In its attempt to circumvent the Board's conclusion, the Memo appears to introduce new evidence that

While the Board suggested that "[t]he Region should consider whether interested persons, as well as the Agency, would be better served by the Agency addressing the interpretation of the phrase 'subject to regulation under this Act' in the context of an action of nationwide scope, rather than through this specific permitting proceeding," *id.*, the Board clearly anticipated a process involving public notice and comment. EPA simply can not excuse itself from its legal obligation to pursue additional notice and comment before finalizing a change to its PSD regulations merely by seeking to adopt its new interpretation of the Act through an "interpretive rule".

To the extent that the Johnson Memo attempts to rely on public participation in the specific adjudicatory proceeding regarding the Bonanza plant, or public participation in an advanced notice of proposed rulemaking ("ANPRM") (which broadly addressed the implications of any and all potential EPA regulatory actions regarding greenhouse gases, 73 Fed. Reg. 44353 (July 30, 2008)), such reliance is legally insufficient to cure the procedural failures of this illegal rulemaking. Among other things, the *Bonanza* proceeding addressed only a single facility, and the adjudicatory process associated with an individual permit proceeding cannot substitute for notice and comment on a legislative rule of broad national significance. Even the parties to that proceeding did not have the benefit of the agency's fully-developed litigation position until EPA filed its supplemental brief that the Board ordered after oral argument. As the Board's final order requiring notice and comment on remand clearly indicates, that proceeding did not provide sufficient public process to support a decision to omit a CO_2 BACT limit from that particular permit, much less serve as an adequate substitute for notice and comment on a rule of nationwide scope.

Similarly, in the ANPRM, EPA never indicated its intention to take imminent final action establishing new parameters for the PSD regulatory program. To the contrary, the ANPRM by its very nature was probing and exploratory, not a vehicle intended to result in a final and binding agency policy. Indeed, as the Administrator's preface to the ANPRM explained: "None of the views or alternatives raised in this notice represents

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has never been subject to scrutiny of any kind. Johnson Memo at 11 (referring to "the record of permits compiled to support this memorandum").

Agency decisions or policy recommendations. It is premature to do so." 73 Fed. Reg. at 44355. Moreover, neither the adjudicatory proceeding nor the ANPRM provided any notice of EPA's specific intent to reinterpret the agency's policy articulated in the 1978 preamble. Accordingly, these activities cannot serve to dispose of the agency's obligation to undertake notice and comment processes before adopting a final legislative rule amending the CAA's PSD program.

C. The Johnson Memo Substantively Amends the PSD Program

The Johnson Memo seeks to substantively amend EPA regulations to establish new legal rights, restrictions, and/or obligations under the Act's PSD program, without any associated notice and comment process. This 19-page memo also takes a large number of other regulatory steps, including establishing specific exceptions to this rule (*e.g.,* exempting pollutants that are subject to regulation under the Act through state implementation plans ("SIPs") (Johnson Memo at 15));[3] establishing Regional Office responsibilities with regard to future SIP submittals (*Id*. at 3 n.1); determining how pollutants will become subject to PSD permitting in the future on enactment of new congressionally-mandated emission limits (*Id*. at 6 n.5); imposing requirements that address when pollutants for which EPA has made a regulatory endangerment determination must be treated as PSD pollutants (*Id*. at 14); and defining when and how import restrictions will trigger PSD for a pollutant. The sheer breadth of issues addressed, regarding numerous and disparate regulatory programs, defies EPA's claim that this is a mere "interpretive rule."

Thus, EPA's action constitutes an unlawful rulemaking under the APA and the CAA. EPA's action in the Johnson Memo, according to its own terms, treats the conclusions in the Memo as binding on EPA itself, and on states implementing the federal PSD program through delegation agreements with EPA, and leads "private parties or . . . permitting authorities to believe that it will declare permits invalid unless

[3] We note, as EPA points out, that it has adopted a similar approach in at least one other regulatory program, *see* Johnson Memo at 15-16 (regarding the treatment of ammonia as $PM_{2.5}$ precursors), but that it did so – as it should have here – by notice and comment rulemaking. *See* 70 Fed. Reg. 65984; 73 Fed. Reg. 28321.

they comply with [its] terms." *Appalachian Power Co. v. EPA,* 208 F.3d 1015, 1021 (D.C. Cir. 2000). The Johnson Memo states that its newly established substantive parameters governing EPA's regulatory program, which significantly modify the federal PSD program, represent the agency's "settled position." *Id.* at 1022. It "reads like a ukase." *Id.* at 1023. Finally, the Memo certainly creates and/or changes the "rights," "obligations," and scope of authority of various parties, including EPA itself, citizens, regulated entities, and possibly delegated State permitting authorities, and "commands," "requires," "orders," or "dictates" a particular regulatory approach that will affect the rights of parties in currently pending and future permitting actions. *Id.* at 1023; *see also General Elec. Co. v. EPA,* 290 F.3d 377, 380 (D.C. Cir. 2002) (EPA risk assessment document was a legislative rule, "because on its face it purports to bind both applicants and the Agency with the force of law").

In sum, the Johnson Memo is a new regulation that adopts a substantially new interpretation of the Act and seeks to implement that interpretation through uncodified substantive changes to the PSD regulatory program. The D.C. Circuit has made clear that agencies may not avoid the procedural requirements by this sort of subterfuge:

> Although [our] verbal formulations vary somewhat, their underlying principle is the same: ***fidelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretative rule***.

U.S. Telecom Ass'n v. F.C.C., 400 F.3d 29, 35 (D.C. Cir. 2005) (emphasis added and citations omitted). Accordingly, EPA must withdraw the Johnson Memo, and proceed, if at all, through appropriate notice and comment procedures.

II. THE POSITIONS ASSERTED IN THE JOHNSON MEMO ARE IMPERMISSIBLE UNDER THE CLEAN AIR ACT

The Johnson Memo purports to adopt a binding interpretation of a regulation that parrots the Clean Air Act phrase, "pollutant subject to regulation under this Act." That interpretation would "exclude pollutants for which EPA regulations only require monitoring or reporting but . . . include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant." Johnson Memo at 1. The Memo thus attempts to

revive a definition that the EAB found was not supported by any prior EPA interpretation of the statute. The Memo misconstrues the plain language of the Act, adopts impermissible interpretations of existing regulations, and ignores the distinct purpose of the PSD program in a vain attempt to forestall CO_2 emissions limits. In so doing, the Memo runs contrary to the Clean Air Act's clear mandate and flouts the Supreme Court's direction to use the regulatory flexibility that Congress provided to address new threats, such as climate change. *Massachusetts v. EPA,* 127 S. Ct. 1438, 1462 (2007).

A. The Johnson Memo Ignores the Plain Language of the Clean Air Act Requiring BACT for CO_2 Emissions.

EPA must impose emissions limitations on CO_2 in PSD permits for new coal-fired power plants. Section 165(a)(4) of the Clean Air Act requires BACT "for each pollutant subject to regulation under this chapter emitted from . . . such facility." 42 U.S.C. § 7475(a)(4). As even EPA now acknowledges, CO_2 is a pollutant under the Clean Air Act. *Massachusetts* , 127 S. Ct. at 1462. It is emitted abundantly by coal-fired generators and is currently regulated under the Clean Air Act through the Delaware SIP, as well as under monitoring and reporting requirements established by Section 821 of the 1990 Clean Air Act Amendments and the CO_2 monitoring requirements established by Congress' 2008 Appropriations Act.[4]

1. The Delaware SIP

On April 29, 2008, EPA approved a State Implementation Plan revision submitted by the State of Delaware that establishes emissions limits for CO_2, effective May 29, 2008. AR 123.3, 12.3, 73 Fed. Reg. 23101. The SIP revision imposes such CO_2 limits on new and existing distributed generators. Delaware Department of Natural Resources and Environmental Control, Division of Air and Waste Management, Air Quality Management Section, Regulation No. 1144. AR 123.2, Ex. 12.2., § 3.0.

In EPA's proposed and final rulemaking notices, EPA stated that it was approving the SIP revision "under the Clean Air Act," 73 Fed. Reg. 11,845, and "in accordance

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[4] To the extent the EAB declined to hold that the PSD provision requires use of BACT for CO_2 emissions, the undersigned disagree with the Board's decision in that case. *American Bar Ass'n v. F.T.C.*, 430 F.3d 457, 468 (D.C. Cir. 2005) (reviewing courts "owe the agency no deference on the existence of ambiguity").

with the Clean Air Act," 73 Fed. Reg. at 23,101. EPA's approval made these CO_2 control requirements part of the "applicable implementation plan" enforceable under the Act, 42 U.S.C. § 7602(q), and numerous provisions authorize EPA to so enforce these SIP requirements, *e.g.*, 42 U.S.C. § 7413 (authorizing EPA compliance orders, administrative penalties and civil actions). In addition, EPA's approval makes these emission standards and limitations enforceable by a citizen suit under Section 304 of the Act. 42 U.S.C. § 7604(a)(1), (f)(3).

The Delaware SIP Revision constitutes regulation of CO_2 under the Clean Air Act because it was adopted and approved under the Act and is part of an "applicable implementation plan" that may be enforced by the state, by EPA, and by citizens under the Clean Air Act. Thus CO_2 is a pollutant "subject to regulation" under the Act for BACT purposes, **even under the definition put forth in the Johnson Memo** because it is "subject to . . . [a] regulation adopted by EPA under the Clean Air Act that requires actual control of emissions." Johnson Memo at 1.

Nevertheless, in an effort to evade the consequences of the Delaware SIP, the Memo purports to create an exception specifically designed to exclude the SIP from its definition of "regulation under the Act." *Id.* at 15. As support for its novel (and incorrect) interpretation, the Memo purports to rely on *Connecticut v. EPA*, 656 F.2d 902 (2d Cir. 1981). It construes that case as holding that the "Congress did not allow individual states to set national regulations that impose those requirements on all other states." Johnson Memo at 15. But *Connecticut* does not support that conclusion; indeed, it has nothing to do with the issue here, namely whether a particular pollutant is "subject to regulation" under the Act. Clean Air Act § 165(a)(4). Rather, *Connecticut* discusses only whether the quantitative limits imposed by one state on a particular pollutant apply to neighboring states under the "good neighbor" provision in § 110. *See Connecticut*, 656 F.2d at 909 (Section "110(a)(2)(E)(i) is quite explicit in limiting interstate protection to federally-mandated pollution standards.") (emphasis added). *Connecticut* provides no support to the Johnson Memo's arbitrary limitation on the scope of what constitutes a regulation under the Act – and demonstrates that the Memo's interpretation is driven not by the language or purpose of the statute, but rather by the agency's intractable refusal to address CO_2 emissions.

Nothing illustrates this better than the Memo's conclusion that "EPA does not interpret section 52.21(b)(50) of the regulations to make CO2 'subject to regulation under the Act' for the nationwide PSD program based solely on the regulation of a pollutant by a single state in a SIP approved by EPA." Johnson Memo at 15. In other words, conceding that the Delaware SIP constitutes "regulation under the Act", the Memo takes the position that such regulation by a single state is not enough. Neither the Act nor its regulations provide a basis for this position – indeed, the Memo makes no attempt to provide a basis.

Thus the Johnson Memo replaces the simple statutory test of whether a pollutant is "subject to regulation under the Act" with a test of whether the pollutant is "subject to regulation under the Clean Air Act in a sufficient number of states or, alternatively, in the state (or Region) where the facility is to be constructed."[5] But that is not what the Act says, nor does the Memo offer any support for the contention that regulation of CO_2 in another part of the country does not count as "regulation." Under the plain language of Section 165(a)(4), if CO_2 emissions are restricted under the Clean Air Act, whether in one state or all 50, they are "subject to regulation under the Act" – even under the Memo's improperly narrow definition of "regulation."

Finally, SIP regulations appear in "Subchapter C of Title 40 of the Code of Federal Regulations." 43 Fed. Reg. at 26,397. *See, e.g.,* 40 C.F.R. § 52.420 (2008) (incorporating by reference provisions of Delaware SIP). They are, accordingly, within the scope of the Agency's governing 1978 interpretation, even if that interpretation meant to say "regulated by requiring actual control of emissions" when it said "regulated." If the EPA wished to exclude SIP-based regulations, it would be required to modify its current interpretation, and provide the public with notice and an opportunity to comment upon that modification. *See Paralyzed Veterans,* 117 F.3d at 586.[6]

[5] The Memo does not disclose how many states Administrator Johnson believes would suffice. Two? Three? Six? Fourteen?

[6] The EAB did not reach the issue of whether CO_2 is regulated under the Clean Air Act because it is regulated in the Delaware SIP, instead directing EPA to consider this issue "along with other potential avenues of regulation of CO_2." *Bonanza* at 55 n.57.

2. Section 821

In addition to being regulated under the Delaware SIP, CO_2 is regulated under Section 821 of the Clean Air Act Amendments of 1990. Section 821 requires EPA to "promulgate regulations" requiring major sources, including coal-fired power plants, to monitor carbon dioxide emissions and report their monitoring data to EPA:

> The Administrator of the Environmental Protection Agency *shall promulgate regulations* within 18 months after the enactment of the Clean Air Act Amendments of 1990 *to require that all affected sources subject to Title [IV] of the Clean Air Act shall also monitor carbon dioxide emissions* according to the same timetable as in Sections [412](b) and (c). *The regulations shall require that such data be reported to the Administrator*. The provisions of Section [412](e) of title [IV] of the Clean Air Act shall apply for purposes of this Section in the same manner and to the same extent as such provision applies to the monitoring and data referred to in Section 412.

42 U.S.C. § 7651k note; Pub. L. 101-549; 104 Stat. 2699 (emphasis added). In 1993, EPA promulgated these regulations, which require sources to monitor CO_2 emissions, 40 C.F.R. §§ 75.1(b), 75.10(a)(3), prepare and maintain monitoring plans, *id.* § 75.33, maintain records, *id.* § 75.57, and report monitoring data to EPA, *id.* § 75.60-64. The regulations prohibit operation in violation of these requirements and provide that a violation of any Part 75 requirement is a violation of the Act. *Id.* § 75.5. Not only do the regulations require that polluting facilities "measure . . . CO_2 emissions for each affected unit," *id.* § 75.10(a), they also prohibit operation of such units "so as to discharge or allow to be discharged, emissions of . . . CO_2 to the atmosphere without accounting for all such emissions . . . . " *Id.* § 75.5(d).

In *Bonanza*, EPA argued that monitoring regulations are not actually regulation and that Section 821 did not actually amend the Clean Air Act. The EAB having rejected EPA's attempt to banish Section 821 from the Act, the Johnson Memo now depends solely on the flawed argument that regulation requiring monitoring and reporting is not regulation. On the contrary, monitoring and reporting requirements clearly constitute regulation. Against the backdrop of Section 165's use of "regulation," Congress explicitly used that exact same word in Section 821 to refer solely to monitoring and reporting requirements. Just like regulations restricting emissions

quantities, the regulations EPA promulgated implementing Section 821 have the force of law, and violation results in severe sanctions. 40 C.F.R. § 75.5; 42 U.S.C. § 7413(c)(2) (punishable by imprisonment of up to six months or fine of up to $10,000 for making false statement or representation or providing inaccurate monitoring reports under Clean Air Act).[7] Indeed, as the Region and OAR admitted in the supplemental brief (and exhibits) they filed with the EAB in *Bonanza*, EPA has enforced section 821 in a number of consent decrees that require the installation of CO_2 monitoring equipment.

In support of the interpretation of "regulation" to mean only a restriction on emissions quantity, the Johnson Memo recites the assorted dictionary definitions of "regulation" from the *Bonanza* briefing without any discussion of Section 821 and its use of this exact same word. Nor does the Memo appear to recognize that each of those definitions would include monitoring. Its preferred definition – "the act or process of controlling by rule or restriction" – encompasses regulations to monitor emissions just as easily as regulations that limit emissions quantities. Pursuant to Section 821, CO_2 is "controlled" by a "rule or restriction" because EPA's regulations require that emissions be monitored, which cannot be done if those emissions are freely emitted; by definition, monitoring requires that the flow of emissions be controlled. Indeed, monitoring creates more direct control over emissions of a pollutant than import restrictions, which involve only indirect control over emissions. Moreover, "control" is not synonymous with "cap" or "limit." The Memo clearly recognizes that distinction because it repeatedly supplements the original language of its interpretation ("actual control of emissions") by adding "limitation" ("actual control or limitation of emissions"). *See, e.g.,* Johnson Memo at 8. Finally, *Black's* defines "control" as "the power or authority to manage, direct, or

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[7] In addition to the monitoring requirements imposed by Section 821, Congress has specifically required monitoring of all greenhouse gases, including CO_2, economy-wide, in the 2008 Consolidated Appropriations Act. H.R. 2764; Public Law 110-161, at 285 (enacted Dec. 26, 2007). As a result, CO_2 monitoring and reporting is required under the Act separate and apart from Section 821. The Johnson Memo attempts to evade the consequences of the Appropriations Act requirement by, among other things, opining that a pollutant is not "subject to regulation" when Congress specifically tells EPA to regulate it, but only when EPA actually adopts regulations. Johnson Memo at 14. The deadline has passed for EPA to issue the proposed regulations required by the Appropriations Act with no action by EPA.

oversee." *Black's Law Dictionary* (8th ed. 2004). Monitoring and reporting regulations certainly constitute oversight.

The Johnson Memo serves to confuse rather than clarify the definition of regulation. EPA should withdraw it and comply with the plain language of the Act, which requires BACT limits for pollutants subject to monitoring and reporting regulations.

B. The Interpretation in the Johnson Memo is Inconsistent with the Only Relevant Regulatory History.

1. The 1978 Preamble

The Johnson Memo repudiates the only Agency interpretation of the words "subject to regulation under this Act" that the EAB identified as "possess[ing] the hallmarks of an Agency interpretation that courts would find worthy of deference" – the preamble to the Agency's 1978 Federal Register rulemaking, 43 Fed. Reg. 26,388, 26,397 (June 19, 1978). *Bonanza* at 39. In the 1978 Federal Register preamble, the Administrator established that "'subject to regulation under this Act' means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type." 43 Fed. Reg. at 26,397. As the Board recognized, that preamble offers *no* support for an interpretation applying "BACT only to pollutants that are 'subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant.'" *Bonanza* at 41. Instead (again, as expressly noted by the Board) it implies that "CO_2 became subject to regulation under the Act in 1993 when the Agency included provisions relating to CO_2 in Subchapter C." *Id.* at 42 n.43.

Under the 1978 preamble definition, CO_2 is "subject to regulation" for BACT purposes because it is regulated under Subchapter C of Title 40 of the Code of Federal Regulations. In its 1993 rulemaking to revise the PSD regulations, EPA did not withdraw its 1978 interpretation of "subject to regulation." *See Bonanza* at 42; *see also* Acid Rain Program: General Provisions and Permits, Allowance System, Continuous Emissions Monitoring, Excess Emissions and Administrative Appeals, 58 Fed. Reg. 3,590, 3,701 (Jan. 11, 1993) (final rule implementing § 821's CO_2 monitoring and reporting regulations). Nor has any subsequent rulemaking, including the 2002 rulemaking on which the Johnson Memo relies, disturbed the 1978 interpretation. *See*

Bonanza at 46. Thus, the only existing EPA interpretation of the phrase "subject to regulation" in Section 165(a)(4), 42 U.S.C. § 7465(a)(4), affirms that BACT is required for CO_2 emissions because it is regulated under the Act's implementing regulations.

The Johnson Memo seeks to change this interpretation. It purports to establish that henceforth, BACT will be required for "only those pollutants for which the Agency has established regulations requiring actual controls on emissions," Johnson Memo at 12 precisely the interpretation to which, according to the Board, "the 1978 Federal Register preamble *does not lend support." Bonanza* at 41 (emphasis added).

EPA seeks to elide its amendment of the 1978 interpretation via two routes. First, it asserts that "the specific categories of regulations identified in the second sentence of the passage quoted above are all regulations that require control of pollutant emissions." Johnson Memo at 12. *Bonanza* directly refutes that claim: "Nothing in the 1978 preamble . . . indicates that the Agency intended to depart from the normal use of 'includes' as introducing an illustrative, and non-exclusive, list of pollutants subject to regulation under the Act." *Bonanza* at 40 (holding that "we must reject" the "conten[tion] that only the pollutants identified in the preamble by general category defined the scope of the Administrator's 1978 interpretation).

Second, the Memo claims that the phrase "regulated in" as it appears in the 1978 Preamble is ambiguous and thus subject to clarification by the Agency, such that the 1978 Preamble may be understood to mean "regulated by actual control of emissions" by use of the term "regulated." Johnson Memo at 12. ("[I]t is still not clear that a monitoring or reporting requirement added to subchapter C would make that pollutant 'regulated in' Subchapter C because of the alternative meanings of the term regulation, regulate, and regulated discussed earlier").

This newly proposed understanding of the words "regulated in" fits so unnaturally with the text of the 1978 Federal Register preamble as to defy credibility. That understanding would, entirely *sub silentio,* impose an enormously substantive and restrictive qualification by use of the words "regulated in," while dismissing the far more prominent reference to "Subchapter C of Title 40 of the Code of Federal Regulations" as

irrelevant verbiage. Like Congress, agencies cannot be presumed to hide such "elephants in mouseholes." *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001). The words "regulated" and "regulation," appear pervasively throughout the 1978 Federal Register preamble, uniformly meaning (as they always do) *any* act of regulating or regulation. *See, e.g.*, 43 Fed. Reg. 26,389 ("The regulations made final today apply to any source . . ."), 26,398 ("In the regulations adopted today, EPA's assessment of the air quality impacts of new major sources and modifications will be based on" certain EPA guidelines), 26,401 ("Such offsets have always been acceptable under the agency's PSD regulations . . . ."), 26,402 ("Environmental groups pointed out that the proposed regulations did not specifically require Federal Land Managers to protect "affirmatively" air quality related values . . . .").

Those references demonstrate that the Agency in 1978 used "regulation" and "regulate" as they are generally used: to encompass all forms of regulation. In explaining the meaning of the phrase "subject to regulation," the Agency offered no hint that, merely by employing the words "regulated in," it was departing from that standard-English definition – much less that it was adopting the Johnson Memo's "alternative" definition. Under any plausible reading, the 1978 Federal Register preamble used "regulated in" to describe *all* the regulations contained "in Subchapter C of Title 40 of the Code of Federal Regulations." *See Bonanza* at 41-42 & n.43 (noting that "plain and more natural reading of the preamble's interpretative statement suggests a different unifying rule" than a rule that would limit "regulation" to actual control of emissions).[8]

The Johnson Memo's proposed interpretation of the term "subject to regulation" via the "regulated in" subterfuge is not only disingenuous, but absurd. The Memo claims that the Agency can freely substitute its new definition of "regulation" as "regulation requiring actual control of emissions" for the word "regulation" in whatever form the latter appears, apparently in any regulatory document. Johnson Memo at 11.

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[8] Indeed, in *Bonanza* EPA assumed that the 1978 Preamble used the word "regulated" in this most natural sense, hence its reliance on the enumerated examples as limiting "the scope" of the reference to the Code of Federal Regulations, and its citation of the preamble to the 1993 rulemaking as reflecting an intent to avoid including CO_2 among the pollutants regulated under the Act. *Bonanza* at 41-42.

Nor, logically, does it stop there: not only "regulation", but also "regulate" and "regulated" are now up for grabs; they now mean anything Administrator Johnson wants them to mean, wherever they might appear in any environmental statute or EPA regulation.

2. The 2002 Regulation

The Johnson Memo attempts to narrow the plain language of the Clean Air Act and EPA's 1978 interpretation of that language by purporting to interpret a 2002 implementing regulation rather than the statute itself. That regulation states:

> *Regulated NSR pollutant,* for purposes of this section, means the following:
>
> (i) Any pollutant for which a national ambient air quality standard has been promulgated and . . . any constituent[s] or precursors for such pollutant[s]. . . . identified by the Administrator [e.g., volatile organic compounds are precursors for ozone];
>
> (ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act;
>
> (iii) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; [or]
>
> (iv) **Any pollutant that otherwise is subject to regulation under the Act;** except that any or all hazardous air pollutants either listed in section 112 of the Act or added to the list pursuant to section 112(b)(2) of the Act, which have not be delisted pursuant to section 112(b)(3) of the Act, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Act.

40 C.F.R. § 52.21(b)(50) (emphasis added). The Memo declares that it is interpreting the phrase "any pollutant that otherwise is subject to regulation under the Act" in this definition when it excludes pollutants subject to monitoring regulations and pollutants regulated "solely . . . by a single state in a SIP approved by EPA." Johnson Memo at 15.

In reality, the Johnson Memo is interpreting the language of the statute. The agency's interpretation of its regulation is not entitled to deference because the regulation simply parrots the language of the statute.

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

Gonzales v. Oregon, 546 U.S. 243, 257 (2006). Moreover, because the regulation merely paraphrases statutory language that EPA already interpreted in 1978, that earlier interpretation applies to the language of both the statute and rule absent an indication in the 2002 rulemaking that EPA was abandoning it; as EAB found, that rulemaking contained no such indication. *Bonanza* at 46. EPA cannot now change its prior interpretation in a memo issued with complete disregard for the public notice and comment that the law requires. *See* pp. 4-9, *supra.*

The Johnson Memo rationalizes its narrow interpretation by relying on a canon of statutory construction known as *ejusdem generis*, which provides that "where general words follow the enumeration of particular classes of things, the general words are most naturally construed as applying only to things of the same general class as those enumerated." *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1189 (D.C. Cir. 1987) (quoted in *Bonanza* at 45). It reasons that EPA can construe "otherwise subject to regulation" in subsection (iv) to apply to the same class of pollutants allegedly covered by subsections (i) – (iii) of the "regulated NSR pollutant" definition—those "pollutants subject to a promulgated regulation requiring actual control of a pollutant." Johnson Memo at 8.

Numerous defects undermine this reasoning. Most importantly, it directly conflicts with the *Bonanza* decision because the EAB explicitly held that it is not appropriate to use *ejusdem generis* to interpret a parroting regulation "[w]ithout a clear and sufficient supporting analysis or statement of intent *in the regulation's preamble.*" *Bonanza* at 46 (emphasis added). The Memo attempts to remedy this omission by belatedly supplying "additional analysis and statement of intent regarding the regulation." Johnson Memo at 9. Analysis in a memo, however, is an inadequate substitute for the missing analysis in the rulemaking itself. The EAB held that the

analysis should be in the preamble, and the failure to include it deprives the public of proper notice and the opportunity to comment.

Indeed, *ejusdem generis* is entirely inapplicable in this situation. The fundamental dispute here concerns the meaning of a broadly-worded provision of the Clean Air Act, not the nearly identical language of a subsection of the regulation. The Act does not contain a list; it contains a single broad category of pollutants "subject to regulation." The Supreme Court has cautioned against narrowly interpreting the broad language of the Clean Air Act. *Massachusetts*, 127 S.Ct. at 1462. EPA may not restrict that language through the back door by interpreting a parroting regulation with a narrowing canon of construction not suited to the statute itself.

Even looking at only the regulation, applying *ejusdem generis* is inappropriate because "the whole context dictates a different conclusion." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991). The first three subsections of the regulation refer to pollutants subject to a "standard" that has been promulgated, while the fourth covers "[a]ny pollutant that is *otherwise* subject to *regulation* under the Act." 40 C.F.R. 52.21(b)(50) (emphasis added). The use of "otherwise" and "regulation" indicates that it applies to pollutants regulated in some other way than by a standard. Moreover, subsections (i) through (iii) are not so alike, since subsection (i) refers to ambient air quality standards that in and of themselves do not require control of emissions, (ii) refers to standards governing emissions from sources, and (iii) refers to standards that only indirectly control emissions. Tellingly, the "general class" that the Johnson Memo identifies ("pollutants that are subject to a promulgated regulation requiring actual control of a *pollutant*") differs from the other iterations of the interpretation (pollutants subject to a regulation "that requires actual control of *emissions* of that pollutant)," in a way evidently designed to minimize the differences among the three pollutant categories enumerated. Memo at 8, 1 (emphasis added).

C. The Johnson Memo Contravenes the Purpose and Structure of the Clean Air Act By Prohibiting BACT for CO_2 Emissions.

Limiting BACT as described in the Johnson Memo ignores the broad, protective purpose of the PSD program. Congress explicitly stated that the purpose of the PSD

program was to "protect public health and welfare from **any** actual or **potential adverse effect** which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution . . . notwithstanding attainment and maintenance of all national ambient air quality standards." 42 U.S.C. § 7470(1) (emphasis added). In stark contrast, Congress required EPA to make an endangerment finding before establishing generally applicable standards such as the NAAQS, New Source Performance Standards, or motor vehicle emissions standards. Each of these programs expressly require EPA to find that emissions of a pollutant "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" as a prerequisite to regulation. *Id.* § 7408(a)(1)(A); *id.* § 7521(a)(1); *see also id.* § 7411(b)(1).

In the PSD program, Congress used language showing that it clearly intended that BACT apply regardless of whether an endangerment finding had been made for that pollutant. Thus Congress – which was quite familiar with the "endangerment trigger" – deliberately established a much lower threshold for requiring BACT than an "endangerment finding." Thus requiring BACT for "each pollutant subject to regulation under the Act" meshes perfectly with the purpose of the PSD program to guard against any "potential adverse effect" as opposed to "endangerment of public health or welfare." And because the BACT analysis entails a case-by-case inquiry, it is more dynamic in assimilating new information than other statutory standards, such as New Source Performance Standards.

As the Johnson Memo's focus on endangerment demonstrates, *see, e.g.*, Johnson Memo at 18, the interpretation it adopts improperly limits the scope of the PSD program and the BACT requirement. It ignores the broader purpose of the PSD program by limiting the BACT requirement to pollutants already subject to limitations on emissions. *Id.* at 13. Strangely, it attempts to justify this interpretation by stating: "The fact that Congress specified in the Act that BACT could be no less stringent than NSPS and other control requirements under the Act indicates that Congress expected BACT to apply to pollutants controlled under these programs." *Id.* But, quite obviously, the fact that BACT *applies* to pollutants controlled under those programs does not mean that it

is *limited* to them. Instead, the congressional directive that BACT be no less stringent than those other control requirements is a further indication that BACT is meant to be ***more*** protective and apply more broadly. The Johnson Memo demonstrates a fundamental misperception of the role of the PSD program and its BACT requirement within the Act.

D. The Need to Study Pollutants Does Not Justify Prohibiting BACT for CO_2.

The Johnson Memo defends the decision to prohibit BACT limits for CO_2 by asserting that it would "frustrate the Agency's ability to gather information using Section 114 and other authority and make informed and reasoned judgments about the need to establish controls or limitations on individual pollutants." *Id.* at 9. This rationale is nothing but a red herring. Throughout the *Bonanza* proceeding, EPA has not identified a single pollutant other than CO_2 that would be affected by an interpretation of "regulation" in Section165 to include monitoring and reporting regulations. EPA is free to gather information about pollutants under Section 114 without adopting regulations. And Congress explicitly singled out CO_2 as a pollutant of special concern in Section 821. Nothing in that provision indicates that Congress intended CO_2 to be considered regulated under the Act for some purposes but not for other purposes. If Congress directs EPA to adopt monitoring regulations under the CAA for particular pollutants, it can choose to expressly exclude those pollutants from BACT requirements, but it did not do so in Section 821.

The Johnson Memo opines that "[t]he current concerns over global climate change should not drive EPA into adopting an unworkable policy of requiring emissions controls under the PSD program any time that EPA promulgates a rule under the Act that requires a source to gather or report emissions data under the Act for any pollutant." *Id.* at 10. But EPA has not demonstrated that anything is unworkable about requiring BACT for pollutants subject to monitoring regulations when Congress has expressly singled out specific pollutants for regulation without excluding them from BACT. And it has not demonstrated that BACT would be required in any other situation. EPA has pointed to nothing in the Act that supports its position that requiring BACT for pollutants subject to monitoring conflicts with Congress' information-gathering objectives

under the Act. *See Massachusetts,* 127 S.Ct. at 1460-61 ("And unlike EPA, we have no difficulty reconciling Congress' various efforts to promote . . . research to better understand climate change with the agency's pre-existing mandate to regulate 'any air pollutant' that may endanger the public welfare.") (footnote and citation omitted). As the Supreme Court has held, EPA cannot ignore its duties under the Clean Air Act to address pollutants that cause global climate change, and the statute offers the regulatory flexibility needed to do so. *Id.* at 1462.

The plain language of the Clean Air Act, its structure, and authoritative regulatory history of the phrase, "subject to regulation under this Chapter" all support the conclusion that BACT is required for *each* pollutant subject to any sort of regulation under the Act. The EAB has held that EPA has never established a contrary position in any action entitled to deference, and it may not now do so in an internal agency memorandum.

CONCLUSION

EPA must reconsider its final action for all of the reasons stated above.

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