

Advisor M, who is a material advisor, advises C, an individual, in 2010 with respect to a transaction that is not a reportable transaction at that time. C files its return claiming the tax consequences of the transaction on April 15, 2011. The time for the IRS to assess tax against C under the general three-year period of limitations for C's 2010 taxable year would expire on April 15, 2014. The IRS identifies the transaction as a listed transaction on November 1, 2013. On December 5, 2013, the IRS hand delivers to Advisor M a section 6112 request related to the transaction. Advisor M furnishes the information to the IRS on December 30, 2013. The information contains all the required information with respect to Advisor M's clients, including C. C does not disclose the transaction on or before January 30, 2014, as required under section 6011 and the regulations under section 6011. Advisor M's submission under section 6112 satisfies the requirements of paragraph (g)(6) of this section even though it occurred prior to C's failure to disclose the listed transaction. Thus, under section 6501(c)(10), the period of limitations to assess tax against C with respect to the listed transaction will end on December 30, 2014 (one year after the requirements of paragraph (g)(6) of this section were satisfied), unless the period of limitations remains open under another exception.

*Example 13. Transaction removed from the category of listed transactions after taxpayer failed to disclose.*

D, a calendar year taxpayer, entered into a listed transaction in 2011. D did not comply with the applicable disclosure requirements under section 6011 for taxable year 2011; therefore, section 6501(c)(10) applies to keep the period of limitations on assessment open with respect to the tax related to the transaction until at least one year after D satisfies the requirements of paragraph (g)(5) of this section or a material advisor satisfies the requirements of paragraph (g)(6) of this section with respect to D. In 2016, the IRS removes the transaction from the category of listed transactions because of a change in law. Section 6501(c)(10) continues to apply to keep the period of limitations on assessment open for D's taxable year 2011.

*Example 14. Taxes assessed with respect to the listed transaction.*

(i) F, an individual, enters into a listed transaction in 2009. F files its 2009 Form 1040 on April 15, 2010, but does not disclose his participation in the listed transaction in accordance with section 6011 and the regulations under section 6011. F's failure to disclose relates to taxable year 2009. Thus, section 6501(c)(10) applies to keep the period of limitations on assessment open with respect to the tax related to the listed transaction for taxable year 2009 until at least one year after the date F satisfies the requirements of paragraph (g)(5) of this section or a material advisor satisfies the requirements of paragraph (g)(6) of this section with respect to F.

(ii) On July 1, 2014, the IRS completes an examination of F's 2009 taxable year and disallows the tax consequences claimed as a result of the listed transaction. The disallowance of a loss increased F's adjusted

gross income. Due to the increase of F's adjusted gross income, certain credits, such as the child tax credit, and exemption deductions were disallowed or reduced because of limitations based on adjusted gross income. In addition, F now is liable for the alternative minimum tax. The examination also uncovered that F claimed two deductions on Schedule C to which F was not entitled. Under section 6501(c)(10), the IRS can timely issue a statutory notice of deficiency (and assess in due course) against F for the deficiency resulting from (1) disallowing the loss, (2) disallowing the credits and exemptions to which F was not entitled based on F's increased adjusted gross income, and (3) being liable for the alternative minimum tax. In addition, the IRS can assess any interest and applicable penalties related to those adjustments, such as the accuracy-related penalty under sections 6662 and 6662A and the penalty under section 6707A for F's failure to disclose the transaction as required under section 6011 and the regulations under section 6011. The IRS cannot, however, pursuant to section 6501(c)(10), assess the increase in tax that would result from disallowing the two deductions on F's Schedule C because those deductions are not related to, or affected by, the adjustments concerning the listed transaction.

(9) *Effective/applicability date.* The rules of this paragraph (g) apply to taxable years with respect to which the period of limitations on assessment did not expire before the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. However, taxpayers may rely on the rules of this paragraph (g) for taxable years with respect to which the period of limitations on assessment expired before the date of publication of the Treasury decision. If an individual does not choose to rely on the rules of this paragraph (g), Rev. Proc. 2005-26 (2005-1 CB 965) will continue to apply to taxable years with respect to which the period of limitations on assessment expired on or after April 8, 2005, and before the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

**Linda E. Stiff,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. E9-24112 Filed 10-6-09; 8:45 am]

**BILLING CODE 4830-01-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-HQ-OAR-2009-0597; FRL-8966-6]

RIN 2060 AP87

### Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule; reconsideration.

**SUMMARY:** In a December 18, 2008 memorandum, EPA established an interpretation of the regulatory phrase "subject to regulation" that is applied to determine the pollutants subject to the federal Prevention of Significant Deterioration (PSD) program under the Clean Air Act (CAA or Act). On February 17, 2009, the EPA Administrator granted a petition for reconsideration of the regulatory interpretation in the memorandum. However, the Administrator did not grant a request to stay the memorandum, so the interpretation remains in effect for the federal PSD program pending completion of this reconsideration action. This document implements the grant of reconsideration by discussing and requesting public comment on various interpretations of the regulatory phrase "subject to regulation." The interpretations discussed in this document include our current and preferred interpretation, which would make PSD applicable to a pollutant on the basis of an EPA regulation requiring actual control of emissions of a pollutant, as well as interpretations that would make PSD applicable to a pollutant on the basis of an EPA regulation requiring monitoring or reporting of emissions of a pollutant, the inclusion of regulatory requirements for specific pollutants in an EPA-approved state implementation plan (SIP), an EPA finding of endangerment, and the grant of a section 209 waiver. This document also takes comments on related issues and other interpretations that could influence this reconsideration.

**DATES:** *Comments.* Comments must be received on or before December 7, 2009.

*Public Hearing.* If anyone contacts EPA requesting a public hearing by October 22, 2009, we will hold a public hearing approximately 30 days after publication in the **Federal Register**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-

OAR-2009-0597, by one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

- *E-mail*: [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov).
- *Mail*: Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

- *Hand Delivery*: Environmental Protection Agency, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions*: Direct your comments to Docket ID No. EPA-HQ-OAR-2009-0597. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web Site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail

address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

*Docket*: The December 18, 2008 interpretive memorandum, the petition for reconsideration, and all other documents in the record for this reconsideration are in Docket ID. No. EPA-HQ-OAR-2009-0597. All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to

4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air and Radiation Docket and Information Center is (202) 566-1742.

*Public Hearing*: If a hearing is held, it will be held at the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC 20004.

**FOR FURTHER INFORMATION CONTACT**: Mr. David J. Svendsgaard, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541-2380; fax number: (919) 541-5509; e-mail address [svendsgaard.dave@epa.gov](mailto:svendsgaard.dave@epa.gov).

To request a public hearing, please contact Ms. Pam Long, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541-0641; fax number: (919) 541-5509; e-mail address: [long.pam@epa.gov](mailto:long.pam@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. Does this action apply to me?*

Entities affected by this rule include sources in all industry groups. Entities potentially affected by this rule also include states, local permitting authorities, and tribal authorities. The majority of categories and entities potentially affected by this action are expected to be in the following groups:

Industry group	NAICS <sup>a</sup>
Utilities (electric, natural gas, other systems) .....	2211, 2212, 2213.
Manufacturing (food, beverages, tobacco, textiles, leather) .....	311, 312, 313, 314, 315, 316.
Wood product, paper manufacturing .....	321, 322.
Petroleum and coal products manufacturing .....	32411, 32412, 32419.
Chemical manufacturing .....	3251, 3252, 3253, 3254, 3255, 3256, 3259.
Rubber product manufacturing .....	3261, 3262.
Miscellaneous chemical products .....	32552, 32592, 32591, 325182, 32551.
Nonmetallic mineral product manufacturing .....	3271, 3272, 3273, 3274, 3279.
Primary and fabricated metal manufacturing .....	3311, 3312, 3313, 3314, 3315, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329.
Machinery manufacturing .....	3331, 3332, 3333, 3334, 3335, 3336, 3339.
Computer and electronic products manufacturing .....	3341, 3342, 3343, 3344, 3345, 4446.
Electrical equipment, appliance, and component manufacturing .....	3351, 3352, 3353, 3359.
Transportation equipment manufacturing .....	3361, 3362, 3363, 3364, 3365, 3366, 3366, 3369.
Furniture and related product manufacturing .....	3371, 3372, 3379.
Miscellaneous manufacturing .....	3391, 3399.
Waste management and remediation .....	5622, 5629.
Hospitals/Nursing and residential care facilities .....	6221, 6231, 6232, 6233, 6239.
Personal and laundry services .....	8122, 8123.
Residential/private households .....	8141.
Non-Residential (Commercial) .....	Not available. Codes only exist for private households, construction and leasing/sales industries.

<sup>a</sup>North American Industry Classification System.

*B. Where can I get a copy of this document and other related information?*

In addition to being available in the docket, an electronic copy of this proposal will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this notice will be posted on the EPA's New Source Review (NSR) Web site, under Regulations & Standards, at <http://www.epa.gov/nsr>.

*C. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404-02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA-HQ-OAR-2009-0597.

2. *Tips for preparing your comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

- Make sure to submit your comments by the comment period deadline identified.

*D. How can I find information about a possible public hearing?*

People interested in presenting oral testimony or inquiring if a hearing is to be held should contact Ms. Pam Long, New Source Review Group, Air Quality Policy Division (C504-03), U.S. EPA, Research Triangle Park, NC 27711, telephone number (919) 541-0641. If a hearing is to be held, persons interested in presenting oral testimony should notify Ms. Long at least 2 days in advance of the public hearing. Persons interested in attending the public hearing should also contact Ms. Long to verify the time, date, and location of the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning these proposed rules.

*E. How is the preamble organized?*

The information presented in this preamble is organized as follows:

- I. General Information
  - A. Does this action apply to me?
  - B. Where can I get a copy of this document and other related information?
  - C. What should I consider as I prepare my comments for EPA?
  - D. How can I find information about a possible public hearing?
  - E. How is the preamble organized?
- II. Background
- III. This Action
  - A. Overview
  - B. Actual Control of Emissions
  - C. Monitoring and Reporting Requirement
  - D. EPA-Approved State Implementation Plan
  - E. Finding of Endangerment
  - F. Granting of Section 209 Waiver
  - G. Timing of Regulation
  - H. Other Issues
- IV. Statutory and Executive Order Reviews
  - A. Executive Order 12866—Regulatory Planning and Review
  - B. Paperwork Reduction Act
  - C. Regulatory Flexibility Act
  - D. Unfunded Mandates Reform Act
  - E. Executive Order 13132—Federalism
  - F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments
  - G. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks
  - H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
  - I. National Technology Transfer and Advancement Act
  - J. Executive Order 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
- V. Statutory Authority

## II. Background

On December 18, 2008, in order to address an ambiguity that existed in the federal PSD regulations, then-EPA Administrator Stephen Johnson issued a memorandum setting forth the official EPA interpretation regarding which pollutants were “subject to regulation” for the purposes of the federal PSD permitting program. Memorandum from Stephen Johnson, EPA Administrator, to EPA Regional Administrators, RE: EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program (Dec. 18, 2008) (“PSD Interpretive Memo” or “Memo”); *see also* 73 FR 80300 (Dec. 31, 2008) (public notice of Dec. 18, 2008 memo). The Memo was necessary after issues were raised regarding the scope of pollutants that should be addressed in PSD permitting actions following the Supreme Court's April 2, 2007 decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

In *Massachusetts v. EPA*, the Supreme Court held that greenhouse gases (GHGs), including carbon dioxide (CO<sub>2</sub>), are air pollutants under the CAA. The case arose from EPA's denial of a petition for rulemaking filed by more than a dozen environmental, renewable energy, and other organizations requesting that EPA control emissions of GHGs from new motor vehicles under section 202 of the CAA. The Court found that in accordance with CAA section 202(a), the Administrator was required to determine whether or not emissions of GHGs from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision.<sup>1</sup>

On August 30, 2007, EPA Region VIII issued a PSD permit to Deseret Power Electric Cooperative, authorizing it to construct a new waste-coal-fired electric generating unit near its existing Bonanza Power Plant, in Bonanza, Utah. Final Air Pollution Control Prevention of Significant Deterioration (PSD) Permit to Construct, Permit No. PSD-OU-0002-04.00, Deseret Power Electric Cooperative (Aug. 30, 2007). The Deseret PSD permit did not include best available control technology (BACT)

<sup>1</sup> On April 17, 2009, the EPA Administrator took the first step in the CAA section 202 rulemaking process by proposing endangerment and cause or contribute findings for GHGs under the CAA. *See* 74 FR 18886 (April 24, 2009). On September 15, 2009, the U.S. Department of Transportation Secretary and EPA Administrator jointly signed a proposed rule establishing a national program that would improve fuel economy and reduce GHGs from motor vehicles.

limits for CO<sub>2</sub>. In responding to comments received during the permitting process, the Region acknowledged the *Massachusetts* decision but found that decision alone did not require PSD permits to include limits on CO<sub>2</sub> emissions. Region VIII explained that the requirement for PSD permits to contain BACT emissions limitations for each pollutant “subject to regulation” under the CAA, as found in the CAA section 165(a)(4) and 40 CFR 52.21(b)(12), did not apply to CO<sub>2</sub> emissions because the Agency had historically interpreted the phrase “subject to regulation” to “describe pollutants that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant.” Region VIII explained that EPA codified this approach by defining the term “regulated NSR pollutant” in 40 CFR 52.21(b)(50) and requiring BACT for “each regulated NSR pollutant” in 40 CFR 52.21(j)(2). See Response to Public Comments on Draft Air Pollution Control Prevention of Significant Deterioration (PSD) Permit to Construct, Permit No. PSD-OU-0002-04.00 (Aug. 30, 2007) at 5–6.

On November 13, 2008, the Environmental Appeals Board (EAB) issued a decision in a challenge to the *Deseret* PSD permitting decision. In *re Deseret Power Electric Cooperative*, PSD Appeal No. 07–03 (EAB Nov. 13, 2008) (“*Deseret*”). In briefs filed in that case, Region VIII and the EPA Office of Air and Radiation maintained the position that the Agency had a binding, historic interpretation of the phrase “subject to regulation” in the federal PSD regulations that required PSD permit limits to apply only to those pollutants already subject to actual control of emissions under other provisions of the CAA. Response of EPA Office of Air and Radiation and Region VIII to Briefs of Petitioner and Supporting Amici (filed March 21, 2008). Accordingly, these EPA offices argued that the regulations contained in 40 CFR Part 75, which require monitoring of CO<sub>2</sub> at some sources, did not make CO<sub>2</sub> subject to PSD regulation. The order and opinion issued by the EAB remanded the permit after finding that prior EPA actions were insufficient to establish a historic, binding interpretation that “subject to regulation” for PSD purposes included only those pollutants subject to regulations that require actual control of emissions. However, the EAB also rejected arguments that the CAA compelled only one interpretation of the phrase “subject to regulation” and found “no evidence of a Congressional intent to compel EPA to apply BACT to

pollutants that are subject only to monitoring and reporting requirements.” Thus, the Board remanded the permit to the Region to “reconsider whether or not to impose a CO<sub>2</sub> BACT limit in light of the ‘subject to regulation’ definition under the CAA.” The Board encouraged EPA to consider “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.” See *Deseret* at 63–64.

Shortly thereafter, in order to address the ambiguity that existed in the federal PSD program following the EAB’s *Deseret* decision, then-EPA Administrator Stephen Johnson issued the PSD Interpretive Memo. The Memo sets forth the official EPA interpretation regarding which pollutants are “subject to regulation” for the purposes of the federal PSD permitting program, interpreting the phrase to include pollutants “subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant,” while excluding pollutants “for which EPA regulations only require monitoring or reporting.” See Memo at 1. On December 31, 2008, EPA received a Petition for Reconsideration of the position taken in the PSD Interpretive Memo from Sierra Club and 14 other environmental, renewable energy, and citizen organizations. Petition for Reconsideration, In the Matter of: EPA Final Action Published at 73 FR 80300 (Dec. 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.” Petitioners argued that the PSD Interpretive Memo “was impermissible as a matter of law, because it was issued in violation of the procedural requirements of the Administrative Procedures Act \* \* \* and the Clean Air Act \* \* \*, 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.” See Petition at 2. Accordingly, Petitioners requested that EPA reconsider and retract the PSD Interpretive Memo. Petitioners later amended their Petition for Reconsideration to include a request to stay the effect of the Memo pending the outcome of the reconsideration request.

Amended Petition for Reconsideration (filed Jan. 6, 2009).<sup>2</sup>

On February 17, 2009, the EPA Administrator granted the Petition for Reconsideration on the PSD Interpretive Memo, citing to the authority under the Administrative Procedures Act, and announced her intent to conduct a rulemaking to allow for public comment on the issues raised in the Memo and on any issues raised by the opinion of the EAB’s *Deseret* decision, to the extent they do not overlap with the issues raised in the Memo.<sup>3</sup> Administrator Jackson did not stay the effectiveness of the PSD Interpretive Memo pending reconsideration, but she did reiterate that the Memo “does not bind States issuing [PSD] permits under their own State Implementation Plans.” See Letter from Lisa P. Jackson, EPA Administrator, to David Bookbinder, Chief Climate Counsel at Sierra Club (Feb. 17, 2009) at 1.

### III. This Action

#### A. Overview

In accordance with the Administrator’s February 17, 2009 letter granting reconsideration, in the sections that follow, we summarize the interpretation contained in the PSD Interpretive Memo regarding when a pollutant becomes “subject to regulation” for the purposes of applying PSD program requirements and the Memo’s arguments in support of that interpretation, as well as a summary of Petitioners’ main arguments in favor of alternative interpretations, and request public comment on those interpretations.<sup>4</sup> Specifically, this reconsideration action addresses five interpretations of the regulatory phrase “subject to regulation”—the actual control interpretation adopted by the PSD Interpretive Memo; the monitoring and reporting interpretation advocated

<sup>2</sup> On January 15, 2009, a number of environmental organizations that filed this Petition for Reconsideration also filed a petition challenging the PSD Interpretive Memo in U.S. Court of Appeals for the District of Columbia Circuit. *Sierra Club v. E.P.A.*, No. 09–1018 (D.C. Cir., filed Jan. 15, 2009).

Thereafter, various parties moved to intervene in that action or filed similar petitions challenging the Memo. The consolidated D.C. Circuit cases have been held in abeyance pending this reconsideration process. *Id.*, Order (filed March 9, 2009).

<sup>3</sup> Because Administrator Jackson’s grant of reconsideration directed the Agency to conduct this reconsideration using a notice and comment process, this action does not address the procedural challenge presented in the Petition for Reconsideration.

<sup>4</sup> While the sections below provide a summary of the primary arguments contained in the PSD Interpretive Memo and the Petition for Reconsideration, we advise the public to review the original documents contained in Docket EPA–HQ–OAR–2009–0597 in preparing their comments.

by Petitioners; the inclusion of regulatory requirements for specific pollutants in SIPs, which is discussed in both the PSD Interpretive Memo and the Petition for Reconsideration;<sup>5</sup> an EPA finding of endangerment, which is discussed in the PSD Interpretive Memo; and the grant of a section 209 waiver, which was raised by commenters in another EPA action. EPA is also addressing other issues raised in the PSD Interpretive Memo and related actions that may influence the present reconsideration and request for public comment, as necessary.

Of the five interpretations described in this reconsideration, the EPA continues to favor the “actual control interpretation,” which remains in effect at this time. As explained in the following section, the actual control interpretation best reflects our past policy and practice, is in keeping with the structure and language of the statute and regulations, and best allows for the necessary coordination of approaches to controlling emissions of newly identified pollutants. While the other interpretations described herein may represent alternatives for interpreting “subject to regulation,” no particular one is compelled by the statute, nor did the EAB determine that any one of them was so compelled. Because we have overarching concerns over the policy and practical application of each of the other interpretations, as discussed in more detail later in this notice, we are inclined to adopt the actual control interpretation as our final interpretation. Nevertheless, in this notice, we are requesting comment on a wide range of issues related to each of these interpretations and will carefully consider those comments before reaching a final decision.

As a general matter, the stated purpose of the PSD Interpretive Memo is to “establish[ ] an interpretation clarifying the scope of the EPA regulation that determines the pollutants subject to the federal Prevention of Significant Deterioration (PSD) program under the Clean Air Act (CAA or Act)” by providing EPA’s “definitive interpretation” of the definition of the term “regulated NSR pollutants” found at 40 CFR 52.21(b)(50) and resolving “any

ambiguity in subpart (iv) of that paragraph, which includes ‘any pollutant that otherwise is subject to regulation under the Act.’” See Memo at 1. As the Memo explains, the statute and regulation use similar language—the regulation defines a regulated NSR pollutant to include “[a]ny pollutant that otherwise is subject to regulation under the Act” and requires BACT for “each regulated NSR pollutant,” 40 CFR 52.21(b)(50) and (j), while the Act requires BACT for “each pollutant subject to regulation under this [Act],” CAA sections 165(a)(4) and 169. The EAB has already determined that “the meaning of the term ‘subject to regulation under this Act’ as used in [CAA] sections 165 and 169 is not so clear and unequivocal as to preclude the Agency from exercising discretion in interpreting the statutory phrase” in implementing the PSD program. See *Deseret* at 63.

The PSD Interpretive Memo seeks to resolve the ambiguity in implementation of the PSD program by stating that “EPA will interpret this definition of ‘regulated NSR pollutant’ to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant.” The Memo states that “EPA has not previously issued a definitive interpretation of the definition of ‘regulated NSR pollutant’ in section 52.21(b)(50) or an interpretation of the phrase ‘subject to regulation under the Act’ that addressed whether monitoring and reporting requirements constitute ‘regulation’ within the meaning of this phrase.” The Memo, however, explains that the interpretation reflects the “considered judgment” of then-Administrator Johnson regarding the PSD regulatory requirements and is consistent with both historic Agency practice and prior statements by Agency officials. See Memo at 1–2.

The Petition for Reconsideration generally argues that the interpretation in the Memo “misconstrues the plain language of the Act, adopts impermissible interpretations of existing regulations, and ignores the distinct purpose of the PSD program.” Petitioners assert that the PSD Interpretive Memo “attempts to revive a definition [of “subject to regulation”] that the EAB found was not supported by any prior interpretation of the statute.” The Petition also claims that CO<sub>2</sub> is a pollutant “subject to regulation” for the purposes of the PSD program because CO<sub>2</sub> emissions are

already regulated under an existing SIP and existing monitoring and reporting requirements. See Petition at 9–10.

Although EPA issued the Memo after the EAB’s *Deseret* decision, which specifically concerned whether CO<sub>2</sub> emissions should be considered “subject to regulation,” the PSD Interpretive Memo establishes an interpretation of “subject to regulation” that applies generally to the PSD program and the treatment of all pollutants under that program. Petitioners requested reconsideration of the entire PSD Interpretive Memo, but their arguments primarily address the Memo’s application to CO<sub>2</sub> and only address the broader applicability of the PSD program to other pollutants as a secondary matter. Issues of general and specific PSD applicability are somewhat interchangeable, but it is important to address the pollutant applicability issue for the PSD program as a whole. Accordingly, we will generally focus this reconsideration on the application of the interpretation of the definition of “subject to regulation” to all pollutants, instead of focusing on the specific applicability to CO<sub>2</sub> or GHGs, including particular actions that Petitioners argue have triggered PSD requirements for those pollutants. This will allow us to uniformly apply the final interpretation in the future as new pollutants become potentially “subject to regulation.”

#### B. Actual Control of Emissions

The PSD Interpretive Memo established that EPA will interpret the “subject to regulation” provision of the “regulated NSR pollutant” definition “to include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant.” (Hereinafter, referred to as the “actual control interpretation.”) In so doing, the Memo observes that the EAB rejected claims that the language of the CAA compelled only one interpretation of the phrase “subject to regulation,” and instead found that the phrase is ambiguous.

The PSD Interpretive Memo explains that the “structure and language of EPA’s definition of ‘regulated NSR pollutant’ at 40 CFR 52.21(b)(50)” supported the actual control interpretation. The Memo discusses how the first three parts of the definition describe pollutants that are subject to regulatory requirements that mandate control or limitation of the emissions of those pollutants, which suggests that the use of “otherwise subject to regulation” in the fourth prong also intended some prerequisite

<sup>5</sup> As noted previously, the only change between the original Petition (filed Dec. 31, 2008) and the Amended Petition (filed Jan. 6, 2009) is the addition of a request that EPA stay the effect of the PSD Interpretive Memo pending the outcome of the reconsideration request. Since the request for a stay was already denied in the February 17, 2009 letter granting reconsideration, the remainder of this notice references the original Petition when summarizing the arguments contained in those documents.

act or process of control. The Memo also explains that the definition's use of "subject to regulation" should be read in light of the primary meaning of "regulation" in various dictionaries, which each used or incorporated a control requirement. See Memo at 6–9.

The PSD Interpretive Memo observes that the actual control interpretation is consistent with EPA's broad responsibilities under the CAA. The Memo explains that the actual control interpretation gives a broad scope to the PSD permitting program while instilling "reasonable boundaries" for administration of the program in an "effective, yet manageable," way. The Memo also explains that important policy concerns support application of PSD requirements only after actual control requirements are in place under another part of the Act, because the actual control interpretation: (1) Allows the Agency to assess "whether there is a justification for controlling" those emissions based on relevant criteria in the Act; (2) provides an opportunity for public notice and comment when a new pollutant is proposed to be regulated under other portions of the Act; (3) promotes "the orderly administration of the permitting program by providing an opportunity for EPA to develop regulations to manage the incorporation of a new pollutant into the PSD program"; (4) preserves EPA's "ability to gather information to inform the Administrator's judgment regarding the need to establish controls on emissions"; and (5) safeguards the Administrator's authority to require such controls on individual pollutants under other portions of the Act before triggering PSD requirements. Finally, the Memo clarifies that while the "subject to regulation" interpretation issue had been raised in the context of CO<sub>2</sub> emissions, "adoption of [the actual control] interpretation is also necessary to preserve EPA's ability to collect emissions data on other pollutants for research and other purposes," both now and in the future, without triggering the requirements of the PSD permitting program. See Memo at 9–10.

The PSD Interpretive Memo next describes how an actual control interpretation of "subject to regulation" is "consistent with the historic practice of the Agency and with prior statements by Agency officials." The Memo explains that a review of numerous federal PSD permits shows that EPA has been applying the actual control interpretation in practice—issuing permits that only contained emissions limitations for pollutants subject to regulations requiring actual control of emissions under other portions of the

Act. The Memo also articulates that in 1998, well after promulgation of the CO<sub>2</sub> monitoring regulations, the EPA found CO<sub>2</sub> to be a pollutant under the Act and stated that EPA had the authority to regulate it, but found "the Administrator has made no determination to date to exercise that authority under the specific criteria provided under any provision of the Act."<sup>6</sup> The PSD Interpretive Memo explains that the 1978 **Federal Register** notice promulgating the initial PSD regulations, which stated that pollutants "subject to regulation" in the PSD program included "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations," is not inconsistent with the actual control interpretation because actual control could be inferred by the specific list of regulated pollutants that followed the reference to 40 CFR. See Memo at 10–13.

Finally, the PSD Interpretive Memo finds that the actual control interpretation is supported, and not precluded, by the language and structure of the CAA. The Memo notes that the EAB had already concluded that the CAA's use of the phrase "subject to regulation under this Act" was ambiguous and susceptible to various interpretations, and explains that the Board determined that "the terms of the statute do not preclude reading 'subject to regulations under this Act' to mean 'subject to control' by virtue of a regulation or otherwise." The Memo argues that the actual control interpretation was consistent with Congress' specification that BACT control under PSD "could be no less stringent than NSPS [i.e., New Source Performance Standards] and other control requirements under the Act indicates that Congress expected BACT to apply to pollutants controlled under these programs." The Memo also finds support for the actual control interpretation in the non-PSD portions of the Act, reasoning that similar to those CAA sections that authorized the Administrator to establish emissions limitations or controls under other programs, Congress "expected that pollutants would only be regulated for purposes of the PSD program after the Administrator has promulgated regulations requiring control of a particular pollutants. [sic]" See Memo at 13–14.

In contrast, the Petition for Reconsideration argues that in putting

forth the actual control interpretation, the PSD Interpretive Memo "attempts to revive" a definition of "subject to regulation" that was not supported by the EAB's *Deseret* decision. See Petition at 9–10. With regard to the Memo's assertion that the interpretation is supported by the language and structure of the "regulated NSR pollutant" definition, Petitioners disagree. The Petition argues that the Memo placed undue emphasis on the PSD regulation while "[i]n reality, the [PSD Interpretive] Memo is interpreting the language of the statute" because the regulation "simply parrots" the language contained in the Act. As such, Petitioners claim that the Agency's actual control interpretation is not entitled to any deference. Petitioners also argue that the Memo improperly relied on the other prongs of the definition in finding an actual control interpretation, contending that the EAB already rejected that type of analysis and that the first three prongs referred to a promulgated "standard" (and not to controls) such that the last prong should apply to pollutants regulated in some other way than a standard. See Petition at 18–20.

The Petition asserts that the PSD Interpretive Memo improperly relies on a number of Agency documents in arriving at the actual control interpretation. Petitioners argue that the EAB already determined that "the *only* relevant interpretation of the applicable statutory and regulatory language was to be found in EPA's 1978 PSD rulemaking" (emphasis in original) and that the 1978 preamble interpretation "directly contradicted EPA's theory" regarding an actual control interpretation. Petitioners also note that the EAB determined that the interpretation of "subject to regulation" found in the 1978 preamble language suggests that the phrase includes "any pollutant covered by a regulation in Subchapter C of Title 40 of the CFR, such as CO<sub>2</sub>." Petitioners argue that the Memo improperly attempts to alter the still-applicable 1978 interpretation because the EAB already rejected reliance on the types of control requirements identified following the "subject to regulation" sentence in the 1978 preamble, and because there is no ambiguity in the language used in the 1978 preamble's interpretation. See Petition at 3 and 15–18.

The Petition for Reconsideration also contends that the PSD Interpretive Memo ignores the plain language of the CAA because CO<sub>2</sub> is clearly "subject to regulation under the Act." With regard to the EAB's finding of ambiguity in the Act's use of "subject to regulation,"

<sup>6</sup> Memorandum from Jonathan Z. Cannon, General Counsel to Carol M. Browner, Administrator, entitled *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (April 10, 1998).

Petitioners simply note that “[t]o the extent the EAB declined to hold that the PSD provision requires use of BACT for CO<sub>2</sub> emissions, [Petitioners] disagree with the Board’s decision in that case.” See Petition at footnote 10. Petitioners assert that the Memo’s reliance on the structure of the CAA contradicts the broad purpose of regulation under the PSD program. The Petition asserts that Congress “deliberately established a much lower threshold” for requiring PSD control mechanisms than they did when “establishing generally applicable standards such as the NAAQS, [NSPS], or motor vehicle standard.” See Petition at 21.

With this reconsideration, we note the policy and legal arguments stated in the PSD Interpretive Memo, and summarized above, for the actual control interpretation. This interpretation remains our preference for a number of reasons. The Memo explains that this interpretation best reflects our past policy and practice, as applied consistently over the years. The Memo also describes why such an interpretation allows for a more practical development of regulations and guidance concerning control of pollutants once they are determined to endanger public health or welfare. Triggering PSD prior to a judicious review of the pollutant’s health and environmental effects, as well as its emission characteristics and control options for different source types, could lead to serious implementation consequences for the program as a whole. As part of this reconsideration, we request comment on whether the policy concerns EPA described in the PSD Interpretive Memo, as well as those noted in the Petition for Reconsideration, are also of concern to commenters.

For example, the Memo notes the importance of providing EPA the time to collect and assess data on newly identified pollutants prior to undertaking PSD reviews and determining emission control requirements. Without this time, the EPA’s ability to make regulatory decisions that are based on analysis of a robust and relevant dataset on a pollutant would be significantly hampered. Furthermore, without this prior review period, individual technical BACT reviews could be time-consuming due to the need to research and develop the generally available emission control options for a new pollutant about which this information is not well known. Triggering PSD with the actual control interpretation would also allow EPA to review and promulgate a significant emissions rate

for a pollutant before it would be subject to PSD permitting requirements, so that *de minimis* increases in emissions are not automatically captured, thus hindering efficient implementation of the program. Thus, the actual control interpretation allows the greatest opportunity for the EPA to address whether and how a pollutant should be “subject to regulation” based on the promulgation of more general control requirements.

This opportunity extends not only to CO<sub>2</sub> and other GHGs, but to non-GHG pollutants that may, in the future, become regulated NSR pollutants. Therefore, we request comment on the importance of affording EPA the necessary time to study and evaluate the emissions characteristics and control options for new pollutants prior to making emissions of those pollutants subject to PSD permitting requirements. Similarly, we ask for comment on the extent to which the availability of such time under the actual control interpretation should weigh in our consideration of whether to adopt this approach. Finally, we seek comment on any other policy factors we should consider that are not addressed in the Memo or the Petition for Reconsideration that would weigh for or against the actual control interpretation.

### C. Monitoring and Reporting Requirement

In addition to finding that the actual control interpretation should be applied to the federal PSD program, the PSD Interpretive Memo also rejects an interpretation of “subject to regulation” in the regulated NSR pollutant definition that would have applied to pollutants for which EPA regulations only require monitoring or reporting. (Hereinafter, referred to as the “monitoring and reporting interpretation.”). The Memo begins by noting that the EAB’s *Deseret* decision found “no evidence of a Congressional intent to compel EPA to apply BACT to pollutants that are subject only to monitoring and reporting requirements.” See Memo at 4. The Memo finds such an interpretation is inconsistent with important policy considerations, past Agency practice and statements, and an overall reading of the CAA.

In describing policy concerns arising from the monitoring and reporting interpretation, the PSD Interpretive Memo explains that “requiring [PSD emissions] limitations automatically for pollutants that are only subject to data gathering and study would frustrate EPA’s ability to accomplish several objectives of the Clean Air Act.” The

Memo explains that administration of the CAA’s pollutant control programs relies on reasoned decision-making that is often based on collection of emissions data under CAA section 114(a)(1). The Memo predicts that adopting the monitoring and reporting interpretation would impair EPA’s decision-making, leading to the “perverse result” of requiring PSD limits for a pollutant while the Agency is still deciding whether to establish controls on that pollutant under other parts of the Act. The Memo also stresses that the monitoring and reporting interpretation had broader implications than PSD limits for CO<sub>2</sub> because it would apply to other pollutants that may emerge in the future. See Memo at 9–10.

The PSD Interpretive Memo also finds that the monitoring and reporting interpretation is inconsistent with past agency practice because “EPA has not issued PSD permits containing emissions limitations for pollutants that are only subject to monitoring and reporting requirements,” including CO<sub>2</sub> emissions. The Memo determines that the monitoring and reporting interpretation is not required under the 1978 preamble language, explaining that the preamble language could be interpreted in a variety of ways and “did not specifically address the issue of whether a monitoring or reporting requirement makes a pollutant ‘regulated in’ [Subpart C of Title 40] of the Code of Federal Regulations.” See Memo at 11–12.

Finally, the PSD Interpretive Memo articulates that the monitoring and reporting interpretation is not required by the language of the CAA. The Memo emphasizes that the EAB rejected arguments that the language of the CAA required application of the monitoring and reporting interpretation, instead finding “no evidence of Congressional intent to compel EPA to apply BACT to pollutants that are subject only to monitoring and reporting requirements.” The Memo reasons that the overall regulatory direction given to EPA in the CAA is “evidence that Congress generally expected that EPA would gather emissions data prior to establishing plans to control emissions or developing emissions limitations” and finds rejection of the monitoring and reporting interpretation “fully consistent with Congressional design.” See Memo at 4.

The Petition for Reconsideration asserts that applying the monitoring and reporting interpretation to the PSD program is appropriate because “monitoring and reporting requirements clearly constitute regulation” and CO<sub>2</sub> emissions are subject to PSD permitting

requirements based on the existing requirement to monitor and report CO<sub>2</sub> emissions. Petitioners state that the policy concerns expressed in the Memo are a “red herring” because “EPA has not identified a single pollutant other than CO<sub>2</sub> that would be affected by an interpretation of ‘regulation’ in Section 165 to include monitoring and reporting regulations.” The Petition argues that EPA can gather pollutant information about pollutants under Section 114 without adopting regulations, and thus avoid triggering PSD requirements for those pollutants. *See* Petition at 13 and 22.

The Petition stresses that the PSD Interpretive Memo could not eliminate the monitoring and reporting interpretation based on concerns about applying it to future pollutants because Congress could choose to expressly exclude future pollutants from PSD requirements in express terms. Petitioners also argue that the Memo does not provide a statutory provision to support the claim that requiring BACT for pollutants under a monitoring and reporting interpretation would conflict with the information-gathering objectives of the CAA. The Petition also contends that the Memo fails to demonstrate anything “unworkable” about requiring PSD for pollutants subject to monitoring regulations. *See* Petition at 22–23.

Finally, Petitioners assert that CO<sub>2</sub> is clearly “subject to regulation” under the interpretation provided in the 1978 preamble language because the CO<sub>2</sub> monitoring and reporting regulations are contained in the Subpart C of Title 40 of the CFR. Petitioners contend that the CO<sub>2</sub> monitoring and reporting requirements meet the statutory and regulatory definition of “subject to regulation” and have the force of law in the same way as control requirements. The Petition also claims that each of the dictionary definitions of “regulation” relied upon in the Memo would include monitoring. Petitioners also contend that a monitoring and reporting interpretation is consistent with an actual control requirement because there must be some control of pollutant emissions in order to monitor them. *See* Petition at 14–16.

We note that the EAB already found “no evidence of Congressional intent to compel EPA to apply BACT to pollutants that are subject only monitoring and reporting requirements.” *See Deseret* at 63. In light of that finding, we request comment on the arguments made in the Memo and discussed further in this reconsideration proposal. Our review of the arguments in the PSD Interpretive

Memo indicates that a monitoring and reporting interpretation would be unlikely to preserve the Agency’s ability to conduct monitoring or reporting for investigative purposes to inform future rulemakings involving actual emissions control or limits. The Petition for Reconsideration argues that these concerns are a “red herring” because EPA has not identified a pollutant other than CO<sub>2</sub> that would be affected by the monitoring and reporting interpretation. We believe that additional comment would assist us in evaluating this concern.

However, we also note that EPA has issued regulations, such as NSPS, that require monitoring of noncriteria pollutant emissions in order to demonstrate compliance with the regulation on the criteria pollutant(s). For example, one of our NSPS stipulates that if a source uses Continuous Emissions Monitoring Systems (CEMS) to measure emissions of NO<sub>x</sub> and SO<sub>2</sub> from its boiler, the source must also have a CEMS to measure oxygen gas (O<sub>2</sub>) or CO<sub>2</sub>. 40 CFR 60.49Da(b) and (c). Clearly, there is no intent by the EPA to consider O<sub>2</sub> as “subject to regulation,” and therefore subject to PSD, as a result of this NSPS requirement, but the application of the monitoring and reporting interpretation as put forward in the Petition could require just that.

In addition, it is not always possible to predict when a new pollutant will emerge as a candidate for regulation. In such cases, the Memo’s reasoning is correct in that we would be unable to promulgate any monitoring or reporting rule for such a pollutant without triggering PSD under this interpretation. Nonetheless, we seek additional comment on the extent to which our interest in preserving the ability to investigate unregulated pollutants as stated in the memo is a real, rather than hypothetical, concern. We further seek comment on any other policy factors we should consider that are not addressed in the Memo or the Petition for Reconsideration that would weigh for or against the monitoring and reporting interpretation.

#### *D. EPA-Approved State Implementation Plan*

In discussing the application of the actual control interpretation to specific actions under the CAA, the PSD Interpretive Memo rejects an interpretation of “subject to regulation” in which regulatory requirements for an individual pollutant in the SIP for a single state would “require regulation of that pollutant under the PSD program nationally.” (Hereinafter, referred to as the “SIP interpretation.”) The Memo

reasons that application of the SIP interpretation would convert EPA’s approval of regulations applicable only in one state into a decision to regulate a pollutant on a nationwide scale for purposes of the PSD program. The PSD Interpretive Memo explains that the establishment of SIPs is better read in light of the “cooperative federalism” underlying the Act, whereby Congress allowed individual states to create and apply some regulations more stringently than federal regulations within its borders, without allowing individual states to set national regulations that would impose those requirements on all states. In rejecting the SIP interpretation, the PSD Interpretive Memo also explains that a similar position had been adopted in EPA’s promulgation of the NSR regulations for fine particulate matter (or “PM<sub>2.5</sub>”), without any public comments opposing that position. *See* Memo at 15–16.

The Petition for Reconsideration argues that the SIP interpretation is appropriate for the PSD program and applies to CO<sub>2</sub> emissions at this time. Petitioners note that the Delaware SIP established regulations limiting CO<sub>2</sub> emissions in 2008 and that, in approving that SIP provision, EPA stated it was doing so under the CAA, thus making the CO<sub>2</sub> standards enforceable under various provisions of the CAA. The Petition argues that the Memo rejected the SIP interpretation without providing a relevant statutory or regulatory basis for that position. Instead, Petitioners claim that the SIP interpretation is directly supported by the plain language of “subject to regulation under the Act” because those emissions are restricted under the CAA, whether in one state or all. Finally, the Petition asserts that because SIP regulations are incorporated into Subpart C of Title 40 of the CFR after approval by EPA, the SIP interpretation must apply given the 1978 preamble language interpreting “subject to regulation” for the PSD program. *See* Petition at 10–12.

EPA continues to believe that the CAA and our implementing regulations are intended to provide states flexibility to develop and implement SIPs to meet the air quality goals of their state. Each state’s implementation plan is a reflection of the air quality concerns in that state, allowing a state to dictate treatment of specific pollutants of concern (or their precursors) within its borders based on air quality, economic, and other environmental concerns of that state. As such, pollutant emissions in one state may not present the same problem for a state a thousand miles away. As expressed in the PSD

Interpretive Memo, we have concerns that the SIP interpretation would improperly limit the flexibility of states to develop and implement their own air quality plans because the act of one state to establish regulatory requirements for a particular pollutant would drive national policy by determining that a new pollutant is “subject to regulation,” thus requiring all states to subject the new pollutant to PSD permitting. Whether one state, five states, or 45 states make the decision that their air quality concerns are best addressed by imposing regulations on a new pollutant, we do not think those actions should trump the cooperative federalism inherent in the CAA. While several states may face similar air quality issues and may choose regulation as the preferred approach to dealing with a particular pollutant, we are concerned that allowing the regulatory choices of some number of states to impose PSD regulation on all other states would do just that.

The SIP interpretation could have significant negative consequences to the PSD program and the ability for states to manage their own air quality programs. One practical effect of allowing state-specific concerns to create national policy upon EPA’s approval of a state’s preferred implementation policy is that EPA’s review of SIPs would likely be much more time-consuming, since we would have to consider each nuance of the SIP as a potential statement of national policy. Thus, there would be heightened oversight of air quality actions in all states—even those regarding local and state issues that are best decided by local agencies—for fear of having a national policy compelled by the action of one state. Given the need for states to effectively manage their own air quality programs, we believe “subject to regulation under the Act” is best interpreted as those pollutants subject to a nationwide standard, binding in all states, that EPA promulgates on the basis of its CAA rulemaking authority.

Although we remain concerned about the consequences to the PSD program of the SIP interpretation as described in the Memo, we are seeking comment on the issues raised in the Petition for Reconsideration. However, our request for comment is limited because we have already finalized a position very similar to that in the Memo in our final NSR implementation rule for PM<sub>2.5</sub> (73 FR 28321, May 16, 2008). As we explained in the final rule, we adopted the position contained in the proposed rule without receiving any public comments opposing that position. That final rule did not require ammonia to be regulated

as a PM<sub>2.5</sub> precursor but did give states the option to regulate ammonia as a precursor to PM<sub>2.5</sub> in nonattainment areas for purposes of NSR on a case-by-case basis. In that final rule, we explained that if a state demonstrates to the Administrator’s satisfaction that ammonia emissions in a specific nonattainment area are a significant contributor to that area’s ambient PM<sub>2.5</sub> concentrations, the state would regulate ammonia as a PM<sub>2.5</sub> precursor under the NSR program in that nonattainment area. We explained that once this demonstration is made, ammonia would be a “regulated NSR pollutant” under nonattainment NSR for that particular nonattainment area. In all other nonattainment areas in that state and nationally, ammonia would not be subject to the NSR program. With regard to PSD, we specifically stated that “the action of any State identifying ammonia emissions as a significant contributor to a nonattainment area’s PM<sub>2.5</sub> concentrations, or [EPA’s] approval of a nonattainment SIP doing so, does not make ammonia a regulated NSR pollutant for the purposes of PSD” in any areas nationally. *See* 73 FR 28330 (May 16, 2008). Therefore, we request comment on the question of whether there is a basis that can be upheld under the Act and our CAA implementing regulations that would allow for application of a different SIP-based interpretation than the interpretation established in that final PM<sub>2.5</sub> NSR implementation rule. If so, we ask for comment on how the adoption of that different interpretation could be done in a way that addresses the specific policy concerns raised in the Memo.

#### *E. Finding of Endangerment*

In providing the reasoning as to which actions make a pollutant “subject to regulation” for the purposes of the PSD program, the PSD Interpretive Memo states that the “otherwise subject to regulation” prong of the regulated NSR pollutant definition should not be interpreted “to apply at the time of an endangerment finding.” *See* Memo at 14. (Hereinafter, referred to as the “endangerment finding interpretation.”) As explained in the Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the CAA, there are actually two separate findings involved in what is often referred to as an endangerment finding. 74 FR 18886 (April 24, 2009). First, whether air pollution may reasonably be anticipated to endanger public health or welfare, and second, whether emissions from the relevant source category cause or contribute to this air pollution. In that

proposal, we referred to the first finding as the endangerment finding, and the second as the cause or contribute finding. Often, however, both tests are referred to collectively as the endangerment finding. In this reconsideration package, we will consider the phrase “endangerment finding” to refer to both findings.

The only reference to an endangerment finding in the Petition for Reconsideration is in the argument that Congress “clearly intended that BACT apply regardless of whether an endangerment finding had been made for that pollutant.” However, the Petition does not argue that an endangerment finding itself should trigger PSD requirements. In fact, Petitioners argue against the endangerment finding interpretation, stating that Congress “deliberately established a much lower threshold for requiring BACT than an ‘endangerment finding.’” *See* Petition at 21.

The issue of whether “lower thresholds” (such as monitoring and reporting requirements) should make a pollutant “subject to regulation” within the meaning of the PSD program is already being addressed in other sections of this notice. However, in accordance with the February 17, 2009 grant of reconsideration, EPA has reconsidered the endangerment finding interpretation included in the PSD Interpretive Memo and proposes to reaffirm that an endangerment finding is not an appropriate trigger for PSD regulation. To be clear, this proposed affirmation applies to both steps of what is often referred to as the endangerment finding—the finding that air pollution may reasonably be anticipated to endanger public health or welfare and the finding that emissions of an air pollutant from a particular source category causes or contributes to this air pollution—regardless of whether the two findings occur together or separately.

As the PSD Interpretive Memo explains, an endangerment finding should not be construed as “regulating” the air pollutant(s) at issue. It is, rather, a prerequisite to issuing regulations that themselves impose control requirements. As such, it is unlike the other triggering actions identified in the “regulated NSR pollutant” definition, which set standards that require imposition of actual limitations on emissions that a source or sources must comply with. An endangerment finding, a cause or contribute finding, or both, on the other hand, do not contain or require source limits that are backed by rule of law; rather, they are often the

first step required before EPA may set specific emissions limits through a rule.

Furthermore, the other actions addressed in the “regulated NSR pollutant” definition weigh against the endangerment finding interpretation. Under the first prong of that definition, PSD regulation is triggered by promulgation of a National Ambient Air Quality Standard (NAAQS) under CAA section 109. However, in order to promulgate NAAQS standards under section 109, since 1970 EPA must list and issue air quality criteria for a pollutant under section 108, which in turn can only happen after the Administrator makes an endangerment finding and a version of a cause or contribute finding, in addition to meeting other requirements. See CAA sections 108(a)(1) and 109(a)(2). Thus, if we were to find that an endangerment finding and/or cause or contribute findings would make a pollutant “subject to regulation” within the meaning of the PSD program, it would read all meaning out of the first prong of the “regulated NSR pollutant” definition because a pollutant would become subject to PSD permitting requirements well before the promulgation of the NAAQS under section 109.40 CFR 52.21(b)(50)(i).

Similarly, the second prong of the definition of “regulated NSR pollutant” includes any pollutant that is subject to a standard promulgated under section 111 of the CAA. Section 111 requires the Administrator to list a source category, if in his or her judgment, “it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” See CAA section 111(B)(1)(A). After EPA lists a source category, it promulgates NSPS for that source category. For a source category not already listed, if we were to list it on the basis of its emissions of a pollutant that was not previously regulated, and such a listing made that pollutant “subject to regulation” within the meaning of the PSD program, this chain of events would result in triggering PSD permitting requirements for that pollutant well in advance of the point contemplated by the second prong of the regulated NSR pollutant definition. 40 CFR 52.21(b)(50)(ii).

In addition, as explained in the Memo, waiting to apply PSD requirements until after the actual promulgation of control requirements that follow an endangerment finding “makes sense.” The Memo explains that when promulgating the final regulations establishing the control requirements for a pollutant, EPA often makes decisions that are also relevant to decisions that

must be made in implementing the PSD program for that pollutant. See Memo at 14. For example, EPA often does not make a final decision regarding how to identify the specific pollutant subject to an NSPS standard until the NSPS is issued, which occurs after both the endangerment finding and the source category listing.

Accordingly, we believe that the prerequisite act of making an endangerment finding, a cause or contribute finding, or both, should not make a pollutant “subject to regulation” for the purposes of the PSD program. As explained above, EPA believes that there are strong legal and policy reasons for rejecting the endangerment finding interpretation. EPA seeks comment on any other policy factors or legal arguments that are not addressed above but could weigh for or against our consideration of the endangerment finding interpretation.

#### F. Granting of Section 209 Waiver

While neither the PSD Interpretive Memo nor the Petition for Reconsideration raise the issue of whether a decision to grant a waiver under the section 209 of the CAA would trigger PSD requirements under the CAA section 165(a)(4), EPA received comments in response to the proposed grant of a CAA section 209 waiver to the state of California to establish GHG emission standards for new motor vehicles that suggested that arguments might be made that the grant of the waiver made GHGs subject to regulation for the purposes of PSD. See 74 FR 32744, 32783 (July 8, 2009). Those commenters requested that EPA state clearly that granting the California Waiver did not render GHGs “subject to regulation” under the CAA, while others commented that the question of when and how GHGs should be addressed in the PSD program or otherwise regulated under the Act should instead be addressed in separate proceedings. At that time, EPA stated that the PSD interpretation issues were not a part of the waiver decision and would be more appropriately addressed in another forum.

Accordingly, we are taking this opportunity to state our position that a decision to grant a CAA section 209 waiver to the state of California to establish GHG emission standards for new motor vehicles does not trigger PSD requirements for GHGs. As explained below, EPA does not interpret the CAA or the Agency’s PSD regulations to make the PSD program applicable to pollutants that may be regulated by states after EPA has granted a waiver under section 209 of the CAA.

As the EPA Administrator previously explained to Congress, “a decision to grant a waiver under section 209 of the Act removes the preemption of state law otherwise imposed by the Act. Such a decision is fundamentally different from the decisions to establish requirements under the CAA that the Agency and the [EAB] have considered in interpreting the provisions governing the applicability of the PSD program.” Letter from Lisa P. Jackson to Senator James M. Inhofe (March 17, 2009). As explained more fully below, the decision to grant a CAA section 209 waiver is different from the other actions that have been alleged to trigger the statutory and regulatory PSD requirements, including the other interpretations of “subject to regulation” discussed above, in two key respects.

First, a waiver granted under CAA section 209(b)(1) simply removes the prohibition found in section 209(a) that forbids states from adopting or enforcing their own standards relating to control of emissions from new motor vehicles or new motor vehicle engines. Thus, the grant of the waiver simply allows California the authority to adopt and enforce state emissions standards for new motor vehicles that it would have otherwise had without the initial prohibition in section 209(a). As EPA previously explained, by removing the section 209(a) prohibition, the waiver “merely gives back to California what was taken away by section 209(a)—the ability to adopt and enforce its own state emission standards.” See 74 FR 32751 (July 8, 2009). Importantly, granting the waiver does not itself establish any federal emission standards or other federal requirements for the pollutants. Courts have recognized such a distinction. See *American Automobile Manufacturers Association v. Commissioner, Massachusetts Department of Environmental Protection*, 31 F.3d 18, 21 (1st Cir. 1994) (stating that “there can be only two types of cars ‘created’ under emissions regulations in this country: ‘California’ cars and ‘federal’ (that is, EPA-regulated) cars”). Thus, grant of a section 209 waiver to the California emissions standards does not render those standards to be federal standards and does not make a pollutant covered by the California standards “subject to regulation” under the CAA.<sup>7</sup>

<sup>7</sup> EPA recognizes that two courts have addressed the issue of whether the California motor vehicle standards have the effect of federal standards once a section 209 waiver is granted, but those cases are not applicable to our current determination because they did not involve interpretation of the CAA. Those cases were examining whether the California standards were “other motor vehicle standards of

Second, enforcement of any emission standard that might be established after a waiver is granted would occur pursuant to regulation under state law, not regulation “under the Act.” Specifically, section 209(b)(3) of the CAA provides that for any new motor vehicle to which state emission standards apply pursuant to a waiver granted under section 209(b)(1), “compliance with such State standards shall be treated as compliance with applicable Federal standards” for purposes of Title II of the Act. This provision was added when Congress amended section 209 to allow some California standards to be less stringent than federal standards as long as California’s standards are “in the aggregate” at least as protective of human health and the environment. Section 209(b)(3) ensures that a vehicle complying with California’s standards for which a waiver has been granted, but not necessarily all federal standards, is not subject to enforcement under the

the government” under the specific provisions of the Energy Policy and Conservation Act (EPCA). See *Century Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F.Supp. 2d 1151 (E.D. Cal. 2007), appeals pending Nos. 08–17378, 08–17380 (9th Cir., filed Oct. 30, 2008); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp. 2d 295 (D. Vt. 2007). In those cases, automobile dealers and manufacturers brought action challenging the validity of the California GHG emissions standards, arguing that the standards were preempted by the fuel economy standards established by EPCA. After examining the statutory language and legislative history of EPCA, the courts found that the EPCA fuel standards were not preemptive of the California standards. The courts noted that the term “Federal standards fuel economy reduction” as used in the original codification of section 502(d) of the Energy Policy and Conservation Act (EPCA), referred to EPA-approved California emission standards, and noted that “there is nothing in [EPCA] or in case law to support the proposition that a regulation promulgated by California and granted waiver of preemption under [CAA] section 209 is anything other than a ‘law of the Government’ whose effect on fuel economy must be considered by NHTSA in setting fuel economy standards.” *Century Valley Chrysler-Jeep*, 529 F.Supp. 2d at 1173. See also *Green Mountain Chrysler Plymouth Dodge Jeep*, 508 F.Supp. 2d at 347.

However, these Courts did not examine whether California standards were federal standards under the specific provisions of the CAA. Accordingly, their holdings are properly limited to interpretation of EPCA’s preemption provisions and are not binding on our present consideration of whether the California standards should be considered federal standards under the provisions of the CAA, in particular, provisions such as the PSD program. As noted above, a waiver granted to California motor vehicle emissions standards does not preempt the federal CAA standards but instead lifts the preemption that the Act would normally have under CAA § 209(a). Accordingly, we believe these courts’ determinations that the California emissions standards were a type of “Federal standards fuel economy reduction” that were not preempted by EPCA’s fuel economy provisions do not change the fact that the California standards are *not* federal standards that EPA adopts or enforces as part of its CAA regulatory program, and thus should not trigger PSD permitting requirements.

Act for failure to meet all federal standards. However, EPA would not enforce California’s standards as it would its own. Although the California standards for which EPA has granted a waiver include GHG emissions standards, EPA’s granting of a waiver does not promulgate those GHG standards as EPA standards, nor does it lead to EPA enforcement of those GHG standards. Therefore, the grant of a waiver to California does not render GHG emissions subject to regulation under the CAA.

We are also aware that some states have chosen, pursuant to section 177 of the CAA, to adopt the California low emission vehicle (CAL LEV) program into their state pollution control programs, including specific pollutant emissions standards that are included in CAL LEV after the grant of a section 209 waiver. However, for the same reasons as discussed above, the adoption of those standards by other states under section 177 does not change the fact that those standards are still state standards enforced under state law. Accordingly, we find that adoption of waived standards pursuant to CAA section 177 should not trigger PSD requirements for the pollutants included in those standards.<sup>8</sup>

Accordingly, we believe that neither the act of granting a section 209 waiver for emission standards nor the adoption of such standards pursuant to section 177 makes a pollutant “subject to regulation” for the purposes of the PSD program. EPA believes there is strong legal support for this position. EPA requests comment on this position and any other legal or policy factors that weigh for or against our consideration of the grant of a section 209 waiver interpretation.

#### G. Timing of Regulation

In a related matter concerning the final interpretation of the regulatory language found in 40 CFR 52.21(b)(50)(iv), we are seeking comment on whether the interpretation of “subject to regulation” should also more clearly identify the specific date

<sup>8</sup>To the extent that some states adopt the CAL LEV emission standards pursuant to section 177 and then incorporate by reference those standards into their SIPs, including the emission standards included in the CAL LEV program pursuant to a section 209 waiver, the PSD Interpretive Memo already expressed the view that inclusion of a pollutant standard in a SIP does not make that pollutant subject to the PSD program requirements. While we are taking comment on that SIP interpretation as part of this reconsideration, the current inclusion of the CAL LEV standards into state SIPs does not make the pollutants covered by those standards “subject to regulation” under the Act since the PSD Interpretive Memo remains in effect for the federal PSD program.

on which PSD regulatory requirements would apply. In the PSD Interpretive Memo, the Administrator stated that EPA interprets language in the definition of “regulated NSR pollutant” to mean that the fourth part of the definition should “apply to a pollutant upon promulgation of a regulation that requires actual control of emissions.” See Memo at 14. However, after evaluating the underlying statutory requirement in the CAA and the language in all parts of the regulatory definition more closely, EPA proposes to modify its interpretation of the fourth part of the definition with respect to the timing of PSD applicability.

In considering the actual application of PSD requirements to regulated NSR pollutants that are “subject to regulation,” we believe that the term “subject to regulation” in the statute and regulation is most naturally interpreted to mean that PSD requirements apply when the regulations addressing a particular pollutant become final and effective. The CAA requires PSD controls “for each pollutant *subject to regulation*” under the Act that are emitted from a source and does not mention promulgation. See 42 U.S.C. 7475(a)(4) and 7479(3) (emphasis added). The regulatory language of 40 CFR 52.21(b)(50)(iv) does not specify the exact time at which the PSD requirements should apply to pollutants in that class, whether upon promulgation or effective date of the underlying regulation. However, the use of “subject to” in the Act suggests that PSD requirements are intended to be triggered when those standards become effective for the pollutant. No party is required to comply with a regulation until it has become final and effective. Prior to that date, an activity covered by a rule is not in the ordinary sense “subject to” any regulation. Regardless of whether one interprets regulation to mean monitoring or actual control of emissions, prior to the effective date of a rule there is no regulatory requirement to monitor or control emissions.

In addition, applying PSD to a pollutant upon the effective date of a regulation would harmonize application of the PSD program with the requirements of the Congressional Review Act (CRA). Under the CRA, major regulations promulgated by EPA do not become effective until after Congress has had an opportunity to review them. See 5 U.S.C. 801 *et seq.* As part of that review, Congress can potentially disapprove final actions issued by federal agencies within a specified time period. Accordingly, under the CRA, a major rule cannot take

effect until 60 days after it is published in the **Federal Register**. Since an EPA regulation that would trigger PSD requirements for a pollutant could be disapproved by Congress after it is promulgated, it would be more consistent with the CRA to defer application of PSD requirements to a pollutant until the rule regulating the pollutant is final and effective, and not simply promulgated.

Since the fourth part of the definition of “regulated NSR pollutant” (40 CFR 52.21(b)(50)(iv)) does not use the word promulgated and uses the “subject to regulation” language from the CAA, the language in the fourth part of the definition can be interpreted to render PSD requirements applicable to a pollutant upon the effective date of a regulation. Because this is consistent with a more natural reading of the statutory language in the Clean Air Act, the application of the Congressional Review Act to EPA regulations, and the “actual control interpretation” favored by EPA at this time, we propose upon reconsideration to interpret 40 CFR 52.21(b)(50)(iv) to make PSD requirements applicable to a pollutant upon the effective date of a regulation covered by this part of the definition.

The PSD Interpretive Memo relied on other parts of the definition of “regulated NSR pollutant” to conclude that PSD requirements apply to a pollutant upon promulgation of a control requirement. However, a closer reading of the other parts of that definition indicates that the language used in several parts of the definition may in fact be construed to make PSD applicable upon the effective date of regulatory requirements, rather than the date of promulgation. The definition says that PSD requirements apply to NSPS or Title VI pollutants once they are “subject to a[n] standard promulgated under” particular provisions of the CAA. 40 CFR 52.21(b)(50)(ii)–(iii). While the word “promulgated” appears in the definition, this term qualifies the underlying standard and does not directly address the actual application of PSD requirements. Under the language in these two parts of the definition, PSD requirements apply when a pollutant becomes “subject to” the underlying standard, which is “promulgated under” a particular part of the Act. For the same reasons as discussed above, we think it is best to interpret these two provisions to apply PSD requirements to NSPS and Title VI pollutants on the effective date of the underlying standards.

However, different timing language is used for the first class of pollutants

described in the regulated NSR pollutant definition: PSD requirements apply once a “standard has been promulgated” for a NAAQS pollutant or its precursors. 40 CFR 52.21(b)(50)(i). The use of “has been” in the regulation indicates that a pollutant becomes a “regulated NSR pollutant,” and hence PSD requirements for the pollutant are triggered, on the date a NAAQS is promulgated. Thus, it may not be possible for EPA to read the regulatory language in this provision to make PSD applicable to a NAAQS pollutant upon the effective date of the NAAQS. Although our present view is that the Clean Air Act is most naturally read to make PSD requirements applicable upon the effective date of a rule that “regulates” the pollutant, we are not at this time proposing to modify the language in 40 CFR 52.21(b)(50)(i). Since EPA is not presently proposing to establish a NAAQS for any additional pollutants, the timing of PSD applicability for a newly identified NAAQS pollutant does not appear to be of concern at this time. If EPA adopts the interpretation proposed here with respect to the timing of PSD applicability, we will consider whether a revision of this regulatory language is needed at such time as EPA may be considering promulgation of a NAAQS for an additional pollutant.

Accordingly, in considering statutory language and the actual application of PSD requirements in practice, we believe the “subject to regulation” language in the fourth part of the regulated NSR pollutant definition should be interpreted such that PSD requirements would not apply to pollutants covered by this part of the definition until the effective date of the underlying regulation. EPA believes the underlying statutory requirements and the structure of the regulation support this position. EPA requests comment on our interpretation that a pollutant becomes “subject to regulation” under section 52.21(b)(50)(iv) upon the effective date of the underlying regulation, as well as any other legal or policy factors that that could inform this interpretation.

#### H. Other Issues

As a general matter, during the public comment period for other GHG rulemaking actions, such as the GHG Mandatory Reporting Rule (74 FR 16447, April 10, 2009) and the proposed Endangerment Finding (74 FR 18885, April 24, 2009), EPA received some comments that discussed the interpretation of the PSD applicability issues we are reconsidering here. The notices of proposed rulemaking for

those packages clearly indicated that the issue of how and when PSD permitting requirements would apply to GHG pollutants would be addressed during this reconsideration action (74 FR at 16456, n. 8 and 18905, n. 29), and EPA will not be searching other rulemaking dockets for comments that might be applicable to our current reconsideration of the PSD Interpretive Memo. Accordingly, we direct all parties that might have submitted comments regarding interpretation of the PSD applicability definitions in those other rulemakings to submit new comments in accordance with the requests in this reconsideration process. In particular, commenters should submit only those portions of their previously submitted comments that respond to the specific requests for comment in this action.

We believe the above summary of the PSD Interpretive Memo, the summary of Petitioners’ arguments for reconsideration of the Memo, and the requests for comments presented thus far provide an adequate basis for the public to comment on the Agency’s reconsideration of the PSD Interpretive Memo. However, in accordance with Administrator Jackson’s February 17, 2009 grant of reconsideration, EPA also seeks comment on any other interpretations of “subject to regulation” and any other issues that were not addressed in the PSD Interpretive Memo but may help to inform our present reconsideration of that Memo, including those raised by the EAB’s *Deseret* decision.

For example, there is an issue from the *Deseret* case that is relevant to our consideration of the monitoring and reporting interpretation. Briefs submitted by Region VIII and the EPA Office of Air and Radiation (OAR) in that case argued that even if the monitoring and reporting interpretation was adopted by the Board, PSD permitting requirements would not apply to CO<sub>2</sub> emissions. Region VIII and OAR reasoned that the existing CO<sub>2</sub> monitoring and reporting regulations were not promulgated “under the Act” because the text, context, and legislative history of the underlying statutory provision “demonstrate that Congress did not intend section 821 of the 1990 Public Law” amending the CAA to become part of the CAA. *See Deseret* at 55. The EAB found that the statutory text both supported and subverted this argument, and also that the Agency’s prior actions and statements were inconsistent with and contradictory to it. Accordingly, the Board declined to rely on this argument in deciding the case and directed Region VIII to

consider the issue more fully on remand. Should the EPA adopt the monitoring and reporting interpretation, it will be necessary for EPA to resolve whether or not the existing CO<sub>2</sub> monitoring and reporting regulations were promulgated “under the Act” since the position taken by Region VIII and OAR in the *Deseret* case would keep us from applying that interpretation in some instances. We therefore welcome comments on this issue. We note that there are several factors that make us less inclined to maintain the position advocated by Region VIII and OAR in the *Deseret* case on remand. Notably, the EAB found that EPA’s previous statements on whether section 821 was part of the Clean Air Act had been inconsistent and that EPA had taken actions that were contradictory to the position advocated by Region VIII and OAR. Although we are considering changing our position, we want our review of this issue to be informed by public comments. Accordingly, consistent with our grant of reconsideration, we seek comment on the section 821 issue and any other issues or interpretations to the extent they could inform our final interpretation of the regulatory phrase “subject to regulation.”

In addition, this reconsideration of the PSD Interpretive Memo is following the type of notice and comment process normally found in formal rulemaking proceedings. See CAA section 307(d). Accordingly, EPA is also seeking comment on whether or not, upon completion of this reconsideration, the Agency should codify the final interpretation of what makes a pollutant “subject to regulation” for the purposes of PSD applicability into the definitions section of the federal PSD regulations. 40 CFR 52.21(b). If a commenter supports EPA codifying its “subject to regulation” PSD applicability position, we request that the commenter include in their comment suggested amendatory language for inclusion in 40 CFR 52.21.

As we are requesting comment on whether to codify the Agency’s final interpretation in the federal PSD rules found at 40 CFR 52.21, we also request comment on whether that interpretation should be also codified in 40 CFR 51.166 for permitting authorities with approved implementation plans. We note that the PSD Interpretive Memo expressly limits the applicability of the interpretation to permitting jurisdictions that fall under the federal PSD program. Since the EAB determined that the interpretation adopted in this memorandum was not previously established by the Agency, that interpretation should not apply

retroactively to prior approvals of SIPs by EPA Regional Offices. However, the Memo gives discretion to EPA Regional Office authorities to apply the Memo’s interpretation prospectively when reviewing and approving new submissions for approval or revision of state plans under 40 CFR 51.166. The Memo also explains that when states use the same language in their approved implementation plans as contained in 40 CFR 52.21(b)(50), those states may interpret that language in their state regulations in the same manner as reflected in the Memo. See Memo at 3, n. 1. For the sake of consistent application of EPA’s final interpretation, we are soliciting comment on whether we should also codify the Agency’s final interpretation as a revision to 40 CFR 51.166.

Finally, we note that, in addition to the policy questions raised by each of the interpretations above, there is another overarching consideration upon which we seek comment: the consequence that a given interpretation would have on the scope and timing of the triggering of the PSD program for GHGs. Although the policy questions discussed earlier extend beyond the immediate issues surrounding triggering of PSD for GHGs, we also seek comment on whether these immediate issues, discussed below, warrant consideration in this reconsideration effort.

The actual control interpretation would mean that GHGs become “subject to regulation” upon final promulgation of the GHG Light Duty Vehicle Rule. We are concerned about millions of small and previously unpermitted sources becoming immediately subject to PSD permitting as a result of finalization of that rule. The basis for this concern, and EPA’s approach to addressing it, are explained in a separate notice published in the Proposed Rules section of this **Federal Register** known as the GHG Tailoring Rule. The GHG Tailoring Rule proposes to establish temporary applicability thresholds for PSD and Title V purposes to levels that reflect the administrative capabilities of permitting authorities to address GHG emissions from stationary sources. Without the GHG Tailoring Rule, PSD permitting requirements would apply to numerous small sources, resulting in a program that is impossible to administer due to a tremendous influx of permit applications accompanied by, at least initially, a shortfall of resources, training, and experience by permitting authorities, the regulated community, and other stakeholders.

The GHG Tailoring Rule is intended to address this problem in advance of regulation under the GHG Light Duty

Vehicle Rule. Therefore, under our preferred interpretation of “subject to regulation”, EPA will not face the administrative impossibility problem if the GHG Tailoring Rule is finalized according to this planned timing. However, if EPA adopts any other interpretation (which thereby would void the PSD Interpretive Memo), additional timing considerations arise. Finalizing any other interpretation prior to promulgating the GHG Light Duty Vehicle Rule would result in earlier triggering of PSD permitting requirements for future new and modified sources of GHGs including the large numbers of small sources addressed by the GHG Tailoring Rule. On the other hand, finalizing any other interpretation after EPA promulgates the GHG Light Duty Vehicle Rule would likely have a limited effect on triggering PSD permitting requirements for future new and modified sources of GHGs, because we expect that the GHG Light Duty Vehicle Rule would already have triggered PSD for the same pollutants and the GHG Tailoring Rule would be in place. Our strong preference is that these three actions—the GHG Light Duty Vehicle Rule, the GHG Tailoring Rule, and this reconsideration—work together with EPA’s other GHG-related actions to yield a common sense and efficient approach to GHG regulation that does not result in the imposition of an impossible administrative burden on permitting agencies. Our preferred approach has the added benefit of achieving this goal by triggering PSD only after the GHG Tailoring Rule can be put in place. We seek comment on whether and how this goal could be achieved were EPA to adopt any of the other four interpretations.

#### **IV. Statutory and Executive Order Reviews**

##### *A. Executive Order 12866—Regulatory Planning and Review*

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action.” The action was identified as a “significant regulatory action” because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

##### *B. Paperwork Reduction Act*

This action does not impose an information collection burden under the provisions of the Paperwork Reduction

Act, 44 U.S.C. 3501 *et seq.* We are not promulgating any new paperwork requirements (e.g., monitoring, reporting, and recordkeeping) as part of this proposed action. The OMB has previously approved the information collection requirements contained in the existing NSR regulations (40 CFR parts 51 and 52) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060-0003, EPA ICR number 1230.23. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

### C. Regulatory Flexibility Act

This proposed reconsideration of the PSD Interpretive Memo is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. In the case of this reconsideration process, public notice and comment was not required under the APA or CAA, but rather was voluntarily conducted in accordance with the February 17, 2009 letter granting reconsideration. Accordingly, an RFA analysis is not required.

However, EPA recognizes that some small entities continue to be concerned about the potential impacts of the statutory imposition of PSD requirements that may occur given the various EPA rulemakings currently under consideration concerning greenhouse gas emissions. As explained in the preamble to the proposed GHG Tailoring Rule, located in the Proposed Rules section of this **Federal Register**, EPA is using the discretion afforded to it under the RFA to consult with OMB and the Small Business Administration, with input from outreach to small entities, regarding the potential impacts of PSD regulatory requirements as that might occur as EPA considers regulations of GHGs. Concerns about the potential impacts of statutorily imposed PSD requirements on small entities will be the subject of deliberations in that consultation and outreach. Concerned small entities should direct any comments relating to potential adverse economic impacts on small entities from PSD requirements for GHG emissions, including any concerns about the impacts of this reconsideration action, to the docket for the GHG Tailoring Rule.

### D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538, requires federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Federal agencies must also develop a plan to provide notice to small governments that might be significantly or uniquely affected by any regulatory requirements. The plan must enable officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant federal intergovernmental mandates and must inform, educate, and advise small governments on compliance with the regulatory requirements.

This proposed reconsideration does not contain a federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. Thus, this proposed rule is not subject to the requirements of sections 202 or 205 of UMRA.

In developing this reconsideration notice, EPA consulted with small governments pursuant to a plan established under section 203 of UMRA to address impacts of regulatory requirements in the rule that might significantly or uniquely affect small governments.

### E. Executive Order 13132—Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action would ultimately simplify and reduce the burden on state and local agencies associated with implementing the PSD program by providing clarity on what pollutants are "subject to regulation" to the CAA for PSD applicability purposes. Therefore, this proposed rule will not impose substantial direct compliance costs on state or local governments, nor will it preempt state law. Thus, the requirements of sections 6(b) and 6(c) of the Executive Order do not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicits comment on this

proposed rule from state and local officials.

### F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

Subject to the Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA has concluded that this action may have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments nor preempt tribal law. There are no tribal authorities currently issuing major NSR permits; however, this may change in the future.

Although Executive Order 13175 does not apply to this proposed rule, EPA specifically solicits additional comment on this proposed action from tribal officials.

### G. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because this proposed reconsideration merely proposes to reconsider EPA's previous PSD applicability with regards to what constitutes a pollutant being "subject to regulation" under the CAA for the purposes of PSD applicability.

### H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action proposes options and positions that would clarify PSD applicability for pollutants "subject to regulation" under the CAA and does

not, in and of itself, pose any new requirements.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed reconsideration does not involve technical standards. Therefore, EPA is not considering the

use of any voluntary consensus standards.

*J. Executive Order 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the U.S.

EPA has determined that this proposed reconsideration of PSD applicability will not have a disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of

protection provided to human health or the environment. This proposed reconsideration merely proposes to reconsider EPA's previous PSD applicability with regards to what constitutes a pollutant being "subject to regulation" under the CAA for the purposes of PSD applicability.

**V. Statutory Authority**

The statutory authority for this action is provided by sections 101, 107, 110, and 301 of the CAA as amended (42 U.S.C. 7401, 7410, and 7601).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: September 30, 2009.

**Lisa P. Jackson,**  
*Administrator.*

[FR Doc. E9-24196 Filed 10-6-09; 8:45 am]

**BILLING CODE 6560-50-P**