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Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 50, 51, 70, and 71

[EPA–HQ–OAR–2009–0597; FRL–9133–6]

RIN 2060–AP87

Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs

AGENCY: Environmental Protection Agency.

ACTION: Final Action on Reconsideration of Interpretation.

SUMMARY: EPA has made a final decision to continue applying the Agency's existing interpretation of a regulation that determines the scope of pollutants subject to the Federal Prevention of Significant Deterioration (PSD) program under the Clean Air Act (CAA or Act). In a December 18, 2008 memorandum, EPA established an interpretation clarifying the scope of the phrase "subject to regulation" found within the definition of the term "regulated NSR pollutant." After considering comments on alternate interpretations of this term, EPA has decided to continue to interpret it to include each pollutant 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. Thus, this action explains that EPA will continue following the interpretation in the December 18, 2008 memorandum with one exception. EPA is refining its interpretation to establish that the PSD permitting requirements will not apply to a newly regulated pollutant until a regulatory requirement to control emissions of that pollutant "takes effect." In addition, this notice addresses several questions regarding the applicability of the PSD and Title V permitting programs to greenhouse gases (GHGs) upon the anticipated promulgation of EPA regulations establishing limitations on emissions of GHGs from vehicles under Title II of the CAA. Collectively, these conclusions result in an EPA determination that PSD and Title V permitting requirements will not apply to GHGs until at least January 2, 2011.

DATES: This final action is applicable as of March 29, 2010.

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SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected by this action include sources in various industry groups and State, local, and tribal governments.

B. How is this document organized?

This document is organized as follows:

II. Background

On December 18, 2008, then-EPA Administrator Stephen Johnson issued a memorandum setting forth EPA's interpretation regarding which pollutants were "subject to regulation" for the purposes of the Federal PSD permitting program. *See* 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 interprets the phrase "subject to regulation" 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. 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 GHGs, including carbon dioxide (CO_2), fit within the definition of air pollutant in 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(a) of the CAA. The Court found that, in accordance with CAA section 202(a), EPA 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.[1]

On November 13, 2008, the Environmental Appeals Board (EAB) issued a decision in a challenge to a PSD permit to construct a new electric generating unit in Bonanza, Utah. *In re Deseret Power Electric Cooperative,* PSD Appeal No. 07–03 (EAB Nov. 13, 2008) ("*Deseret*"). The permit was issued by EPA Region 8 in August 2007 and did not include best available control technology (BACT) limits for CO_2. At the time, the Region acknowledged *Massachusetts* but found that decision alone did not require PSD permits to include limits on CO_2 emissions. In briefs filed in the EAB case, EPA 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 8 to Briefs of Petitioner and Supporting Amici (filed March 21, 2008). Accordingly, EPA argued that the regulations contained in 40 CFR part 75, which require monitoring of CO_2 at some sources, did not make CO_2 subject

[1] On December 15, 2009, EPA published the final endangerment and cause or contribute findings for GHGs under section 202(a) of the CAA. *See* 74 FR 66495.

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_2 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.

EPA issued the PSD Interpretive Memo shortly after the *Deseret* decision with the stated purpose 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," per 40 CFR 52.21(b)(50) and (j), while the Act requires BACT for "each pollutant subject to regulation under this [Act]," per CAA sections 165(a)(4) and 169. The EAB had 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 PSD Interpretive Memo is not a substantive rule promulgated under section 307(d) of the CAA, but rather an interpretation of the terms of a regulation at 40 CFR 52.21(b)(50).[2] An interpretive document is one that explains or clarifies, and is consistent with, existing statutes or regulation. *See National Family Planning and Reproductive Health Ass'n* v. *Sullivan,* 979 F.2d 227, 236–37 (D.C. Cir. 1992). The PSD Interpretive Memo explains and clarifies the meaning of the definition of "regulated NSR pollutant" in section 52.21(b)(50) of the existing NSR regulations, and does not alter the meaning of the definition in any way that is inconsistent with the terms of the regulation. As a result, EPA concluded that the PSD Interpretive Memo was an interpretive rule that could be issued without a notice and comment rulemaking process.

However, the PSD Interpretive Memo observed that the adoption of an interpretation of a rule without a notice and comment process does not preclude subsequent action by the Agency to solicit public input on the interpretation. Indeed, given the significant public interest in the issue addressed in the December 18, 2008 memorandum, EPA subsequently elected to seek public input on the memorandum and alternative readings of the regulations.

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. *See* 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 [*sic*] 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).[3]

On February 17, 2009, EPA granted the Petition for Reconsideration, on the basis of the authority conferred by section 553(e) of the Administrative Procedure Act (APA), and announced its intent to conduct a rulemaking to allow for public comment on the issues raised in the Memo and on any issues raised by the EAB's *Deseret opinion,* to the extent they do not overlap with the issues raised in the Memo.[4] Because the Memo was not a substantive rule promulgated under section 307(d) of the APA, the reconsideration action was not a reconsideration under the authority of section 307(d)(7)(B) of the CAA. *See* Letter from Lisa P. Jackson, EPA Administrator, to David Bookbinder, Chief Climate Counsel at Sierra Club (Feb. 17, 2009). EPA did not stay the effectiveness of the PSD Interpretive Memo pending reconsideration, but the Agency did reiterate that the Memo

[2] The PSD Interpretive Memo also reflects EPA's interpretation of sections 165(a)(4) and 169(3) of the CAA, which use language similar to the EPA regulations that are based on these provisions of the statute. The Memo discusses the Agency's interpretation of the CAA and concludes that the Agency's interpretation of its regulations is not precluded by the terms of the CAA.

[3] 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).

[4] Because the grant of reconsideration directed the Agency to conduct this reconsideration using a notice and comment process, the proposal did not address the procedural challenge presented in the Petition for Reconsideration.

"does not bind States issuing [PSD] permits under their own State Implementation Plans." *Id.* at 1.

On October 7, 2009 (74 FR 51535), EPA proposed a reconsideration of the PSD Interpretive Memo that solicited comment on five possible interpretations of the regulatory phrase "subject to regulation"—the "actual control" interpretation (adopted by the Memo); the "monitoring and reporting" interpretation (advocated by Petitioners); the inclusion of regulatory requirements for specific pollutants in SIPs (discussed in both the Memo and the Petition for Reconsideration); an EPA finding of endangerment (discussed in the Memo); and the grant of a section 209 waiver interpretation (raised by commenters in another EPA action). EPA also addressed, and requested public comment on, other issues raised in the PSD Interpretive Memo and related actions that may influence this reconsideration.

Of the five interpretations described in the proposed reconsideration notice, EPA expressly favored the actual control interpretation, which has remained in effect since issuing the memorandum, notwithstanding the EPA's grant of reconsideration. The proposal explained that the actual control interpretation best reflects EPA's 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 may represent reasoned approaches 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 EPA had overarching concerns over the policy and practical application of each of the alternative interpretations, the Agency proposed to retain the actual control interpretation. Nevertheless, EPA requested comment on all five of the interpretations.

III. This Action

A. Overview

EPA has made a final decision to continue applying (with one limited refinement) the Agency's existing interpretation of 40 CFR 52.21(b)(50) that is articulated in the PSD Interpretive Memo. For reasons explained below, and addressed in further detail in the document "Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs: EPA's Response to Public Comments", after reviewing the comments, EPA has concluded that the "actual control interpretation" is a permissible interpretation of the CAA and is the most appropriate interpretation to apply given the policy implications. However, EPA is refining its interpretation in one respect to establish that PSD permitting requirements apply to a newly regulated pollutant at the time a regulatory requirement to control emissions of that pollutant "takes effect" (rather than upon promulgation or the legal effective date of the regulation containing such a requirement). In addition, this notice addresses several outstanding questions regarding the applicability of the PSD and Title V permitting programs to GHGs upon the anticipated promulgation of EPA regulations establishing limitations on emissions of GHGs from vehicles under Title II of the CAA.[5]

EPA received 71 comments on the proposed reconsideration notice published on October 7, 2009 (74 FR 51535).[6] Commenters represented a range of interests, including State regulatory agencies, corporations that may need to obtain PSD permits, trade associations representing various industrial sectors, and environmental and public interest groups. Commenters representing States and regulated entities generally expressed support for the actual control interpretation, while environmental and public interest groups generally favored the alternative interpretations. States and regulated entities also supported EPA's proposed action to apply PSD requirements at the point in time when an actual control requirement becomes effective, with many entities specifically requesting that EPA interpret "effective" to mean the compliance date of a rule. Environmental stakeholders supported retaining the position in the existing PSD Interpretive Memo that PSD requirements apply to a pollutant upon the promulgation of the relevant requirement for that pollutant.

EPA has not been persuaded that the Agency is compelled by the CAA, the terms of EPA regulations, or prior EPA action to apply any of the four alternatives to its preferred interpretation described in the October 7, 2009 notice—monitoring and reporting requirement, EPA-approved SIP, endangerment finding, or CAA section 209 waiver. EPA has likewise not been persuaded that all of the alternative interpretations are precluded by the CAA. However, since Congress has not precisely spoken to this issue, EPA has the discretion to choose among the range of permissible interpretations of the statutory language. Since EPA's interpretation of the regulations is not precluded by the statutory language, EPA is electing to maintain that interpretation on policy grounds. EPA has concluded that the "actual control" interpretation is not only consistent with decades of past practice, but provides the most reasonable and workable approach to developing an appropriate regulatory scheme to address newly identified pollutants of concern. Thus, except as to the one element that EPA proposed to modify, EPA is reaffirming the PSD Interpretive Memo and its establishment of the actual control interpretation as EPA's definitive interpretation of the phrase "subject to regulation" under the PSD provisions in the CAA and EPA regulations.

EPA has been persuaded by public comments on the proposed reconsideration to modify the portion of its interpretation regarding the timing of when a pollutant becomes subject to regulation under the CAA and thus covered by the requirements of the PSD permitting program. Specifically, EPA is modifying its interpretation of 40 CFR 52.21(b)(50) of its regulations, and the parallel provision in 40 CFR 51.166(b)(49), to establish that the PSD requirements will not apply to a newly regulated pollutant until a regulatory requirement to control emissions of that pollutant "takes effect." EPA has concluded that this approach is consistent with the CAA and a reasonable reading of the regulatory text.

Based on these final determinations, EPA will continue to apply the interpretation reflected in the PSD Interpretive Memo with one refinement. For the reasons discussed in more detail below, EPA has not generally found cause to change the discussion or reasoning reflected in the Memo. As a result, EPA does not see a need to either withdraw or re-issue the Memo. However, this notice refines one paragraph of that memorandum to reflect EPA's current view that a pollutant becomes subject to regulation

[5] On September 28, 2009, EPA proposed a rule establishing emissions standards for new motor vehicles, starting with Model Year 2012, that would reduce GHGs and improve fuel economy from motor vehicles. This proposal was a joint proposal by EPA and the U.S. Department of Transportation (DOT), with DOT proposing to adopt corporate average fuel economy (CAFE) standards for model years 2012 and after. *See* 74 FR 49453.

[6] In some cases, a commenter on the proposed reconsideration of the PSD Interpretive Memo addressed an issue or topic that is under consideration in the forthcoming PSD and Title V GHG Tailoring Rule. Accordingly, EPA refers the reader to that rulemaking for EPA responses to those comments.

at the time the first control requirements applicable to a pollutant take effect. Public comments raised several questions regarding the application of the PSD program and Title V permits to GHGs that EPA did not specifically raise in the October 7, 2009 proposed notice of reconsideration. Some of these comments raised significant issues that the Agency recognizes the need to address at this time to ensure the orderly transition to the regulation of GHGs under these permitting programs. Thus, this notice reflects additional interpretations and EPA statements of policy on topics not discussed in the October 7, 2009 notice. These interpretations and polices have been developed after careful consideration of the public comments submitted to EPA on this action and related matters. In subsequent actions, EPA may address additional topics raised in public comments on this action that the Agency did not consider necessary to address at this time.

Regarding GHGs, EPA has concluded that PSD program requirements will apply to GHGs upon the date that the anticipated tailpipe standards for light-duty vehicles (known as the "LDV Rule") take effect. Based on the proposed LDV Rule, those standards will take effect when the 2012 model year begins, which is no earlier than January 2, 2011. While the LDV Rule will become "effective" for the purposes of planning for the upcoming model years as of 60 days following publication of the rule, the emissions control requirements in the rule do not "take effect"— *i.e.,* requiring compliance through vehicular certification before introducing any Model Year 2012 into commerce—until Jan. 2, 2011, or approximately 9 months after the planned promulgation of the LDV Rule. Furthermore, as EPA intends to explain soon in detail in the final action on the PSD and Title V GHG Tailoring Rule (known as the "Tailoring Rule"),[7] in light of the significant administrative challenges presented by the application of the PSD and Title V requirements for GHGs (and considering the legislative intent of the PSD and Title V statutory provisions), it is necessary to defer applying the PSD and Title V provisions for sources that are major based only on emissions of GHGs until a date that extends beyond January 2, 2011.

[7] The proposed "Tailoring Rule" can be found at 74 FR 55291 (Oct. 27, 2009).

B. Analysis of Proposed and Alternative Interpretations for Subject to Regulation

1. Actual Control Interpretation

EPA has concluded that the "actual control" interpretation (as articulated in the PSD Interpretive Memo) is permissible under the CAA and is preferred on policy grounds. Thus, EPA will continue to interpret the definition of "regulated NSR pollutant" in 40 CFR 52.21(b)(50) to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the CAA or regulation promulgated by EPA under the CAA that requires actual control of emissions of that pollutant. As discussed further below, EPA will also interpret section 51.166(b)(49) of its regulations in this manner. This interpretation is supported by the language and structure of the regulations and is consistent with past practice in the PSD program and prior EPA statements regarding pollutants subject to the PSD program. The CAA is most effectively implemented by making PSD emissions limitations applicable to pollutants after a considered judgment by EPA (or Congress) that particular pollutants should be subject to control or limitation. The actual control interpretation promotes the orderly administration of the permitting program by allowing the Agency to first assess whether there is a justification for controlling emissions of a particular pollutant under relevant criteria in the Act before applying the requirements of the PSD permitting program to a pollutant.

Because the term "regulation" is susceptible to more than one meaning, there is ambiguity in the phrase "each pollutant subject to regulation under the Act"[8] that is used in both sections 165(a)(4) and 169(3) of the CAA. As discussed in the Memo, the term "regulation" can be used to describe a rule contained in a legal code, such as the Code of Federal Regulations, or the act or process of controlling or restricting an activity. The primary meaning of the term "regulation" in Black's Law Dictionary (8th Ed.) is "the act or process of controlling by rule or restriction." However, an alternative meaning in this same dictionary defines the term as "a rule or order, having legal force, usu. issued by an administrative agency or local government." The primary meaning in Webster's dictionary for the term "regulation" is "the act of regulating: The state of being regulated." Merriam-Webster's Collegiate Dictionary 983 (10th Ed. 2001). Webster's secondary meaning is "an authoritative rule dealing with details of procedure" or "a rule or order issued by an executive authority or regulatory agency of a government and having the force of law." Webster's also defines the term "regulate" and the inflected forms "regulated" and "regulating" (both of which are used in Webster's definition of "regulation") as meaning "to govern or direct according to rule" or to "to bring under the control of law or constituted authority." *Id.*

The PSD Interpretive Memo reasonably applies a common meaning of the term "regulation" to support a permissible interpretation that the phrase "pollutant subject to regulation" means a pollutant subject to a provision in the CAA or a regulation issued by EPA under the Act that requires actual control of emissions of that pollutant. Public comments have not demonstrated the dictionary meanings of the term "regulation" described in the Memo are no longer accepted meanings of this term. In light of the different meanings of the term "regulation," EPA has not been persuaded by public comments that the CAA plainly and unambiguously requires that EPA apply any of the other interpretations described in the October 7, 2009 notice. Moreover, the Memo carefully explains how the actual control interpretation is consistent with the overall context of the CAA in which sections 165(a)(4) and 169(3) are found. After consideration of public comment, EPA continues to find this discussion persuasive. The "subject to regulation" language appears in the BACT provisions of the Act, which themselves require actual controls on emissions. The BACT provisions reference the New Source Performance Standards (NSPS) and other control requirements under the Act, which establish a floor for the BACT requirement. *See* 42 U.S.C. 7479(3). Other provisions in the CAA that authorize EPA to establish emissions limitations or controls on emissions provide criteria for the exercise of EPA's judgment to determine which pollutants or source categories to regulate. Thus, it follows that Congress expected that pollutants would only be regulated for purposes of the PSD program after: (1) The EPA promulgated regulations requiring control of a particular

[8] The CAA requires BACT for "each pollutant subject to regulation under this Act." *See* CAA 165(a)(4), 169(3). The United States Code refers to "each pollutant regulated under this chapter," which is a reference to Chapter 85 of Title 42 of the Code, where the CAA is codified. *See* 42 U.S.C. 7475(a)(4), 7479(3). For simplicity, this notice generally uses "the Act" and the CAA section numbers rather than the U.S. Code citation.

pollutant on the basis of considered judgment, taking into account the applicable criteria in the CAA, or (2) EPA promulgates regulations on the basis of Congressional mandate that EPA establish controls on emissions of a particular pollutant, or (3) Congress itself directly imposes actual controls on emissions of a particular pollutant. In addition, considering other sections in the Act that require reasoned decision-making and authorize the collection of emissions data prior to establishing controls on emissions, it is also consistent with the Congressional design to require BACT limitations for pollutants after a period of data collection and study that leads to a reasoned decision to establish control requirements. Public commenters did not demonstrate that it was erroneous for EPA to interpret the PSD provisions in this manner, based on the context of the Act.

Furthermore, the actual control interpretation is consistent with the terms of the regulations EPA promulgated in 2002.[9] EPA continues to find the reasoning of the PSD Interpretive Memo to be persuasive. The structure and language of EPA's definition of "regulated NSR pollutant" at 40 CFR 52.21(b)(50) supports the actual control interpretation. 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 of the definition also intended some prerequisite act or process of control. The definition's use of "subject to regulation" should be read in light of the primary meanings of "regulation" described above, which each use or incorporate the concept of control.

One commenter stated that EPA's suggestion that its proposed interpretation will allow for a more practical approach to determining whether emissions of air pollutants endanger health and human welfare amounts only to a policy preference. The commenter argued that EPA's policy preference should be subordinate to statutory language and Congressional intent. Another commenter made similar comments and stated that EPA cannot avail itself of additional, non-statutory *de facto* extensions of time to fulfill its statutory obligations.

Where the governing statutory authority is susceptible to more than one interpretation, it is not impermissible for EPA to apply policy preferences when determining which interpretation to apply, so long as the interpretation EPA elects to follow is a permissible one. The PSD Interpretive Memo provides a persuasive explanation for why the interpretation reflected in that memorandum is consistent with the terms of the CAA and Congressional intent. In this instance, EPA's policy preferences are fully consistent with that intent. As explained above, Congress intended for EPA to gather data before establishing controls on emissions and to make reasoned decisions.

EPA continues to prefer the actual control interpretation because it ensures an orderly and manageable process for incorporating new pollutants into the PSD program after an opportunity for public participation in the decision making process. Several commenters who supported EPA's proposal to continue applying the "actual control" interpretation identified these considerations as important reasons that EPA should continue doing so. EPA agrees with these comments. As discussed persuasively in the PSD Interpretive Memo, under this interpretation, EPA may first assess whether there is a justification for controlling emissions of a particular pollutant under relevant criteria in the Act before imposing controls on a pollutant under the PSD program. In addition, this interpretation permits the Agency to provide notice to the public and an opportunity to comment when a new pollutant is proposed to be regulated under one or more programs in the Act. It also 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, for example, by promulgating a significant emissions rate (or *de minimis* level) for the pollutant when it becomes regulated. *See* 40 CFR 52.21(b)(23). Furthermore, this interpretation preserves the Agency's ability to gather data on pollutant emissions to inform their judgment regarding the need to establish controls on emissions without automatically triggering such controls. This interpretation preserves EPA's authority to require control of particular pollutants through emissions limitations or other restrictions under various provisions of the Act, which would then trigger the requirements of the PSD program for any pollutant addressed in such an action.

Some commenters who opposed the actual control interpretation argued that this deliberate approach leads to "analysis paralysis" and is subject to political manipulation. The commenter further noted that the case-by-case BACT requirement does not contemplate waiting years for EPA to conduct analyses and "develop" control options; rather, BACT must be based on control options that are available. Then, permitting agencies are to make "case-by-case" determinations "taking into account energy, environmental, and economic impacts and other costs," thereby ensuring that the decision is informed by the available solutions, their efficacy and costs.

While this analysis may sometimes take more time than the commenter would prefer, a deliberative and orderly approach to regulation is in the public interest and consistent with Congressional intent. It would be premature to impose the BACT requirement on a particular pollutant if neither EPA nor Congress has made a considered judgment that a particular pollutant is harmful to public health and welfare and merits control.

Once the Agency has made a determination that a pollutant should be controlled using one or more of the regulatory tools provided in the CAA and those controls take effect, EPA agrees that a BACT analysis must then be completed based on available information. As the commenter points out, the BACT process is designed to determine the most effective control strategies achievable in each instance, considering energy, environmental, and economic impacts. Thus, EPA agrees that the onset of the BACT requirement should not be delayed in order for technology or control strategies to be developed. Furthermore, EPA agrees with the commenter that delaying the application of BACT to enable development of guidance on control strategies is not necessarily consistent with the BACT requirement. The BACT provisions clearly contemplate that the permitting authority will develop control strategies on a case-by-case basis. Thus, EPA is not in this final action relying on the need to develop guidance for BACT as a justification for choosing to continue applying the actual control interpretation. However, in the absence of guidance on control strategies from EPA and other regulatory agencies, the BACT process may be more time and resource intensive when applied to a new pollutant. Under a mature PSD permitting program, successive BACT analyses establish guidelines and precedents for subsequent BACT determinations. However, when a new pollutant is regulated, the first permit applicants and permitting authorities that are faced with determining BACT for a new

[9] *See* 67 FR 80186–80289.

pollutant must invest more time and resources in making an assessment of BACT under the statutory criteria. Given the potentially large number of sources that could be subject to the BACT requirement when EPA regulates GHGs, the absence of guidance on BACT determinations for GHGs presents a unique challenge for permit applicants and permitting authorities. EPA intends to address this challenge in part by deferring, under the Tailoring Rule, the applicability of the PSD permitting program for sources that would become major based solely on GHG emissions. EPA is also developing guidance on BACT for GHGs.

Several commenters expressed concern with EPA's explanation that the actual control interpretation best reflects EPA's past practice. One commenter argued that the *Deseret* decision rejects the idea that "past policy and practice" is a sufficient justification for EPA's preferred interpretation. In addition, several commenters argued that the memorandum was in fact not consistent with past EPA practice, based on their interpretation of a statement made in the preamble to a rule which promulgated PSD regulations in 1978.

While the record continues to show that the actual control interpretation is consistent with EPA's historic practice, EPA agrees that continuity with past practice alone does not justify maintaining a position when there is good cause to change it. In this case, however, EPA has not found cause to change an interpretation that is consistent with Congressional intent and supported by the policy considerations described earlier. Thus, EPA is not retaining the actual control interpretation simply to maintain continuity with historic practice. The record reflects that EPA's past practice was grounded in a permissible interpretation of the law and supported by rational policy considerations. Commenters have not otherwise persuaded EPA to change its historic practice in this area.

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. Furthermore, in 1998, well after promulgation of the initial CO_2 monitoring regulations in 1993, EPA's General Counsel concluded that CO_2 would qualify as an "air pollutant" that EPA had the authority to regulate under the CAA, but the General Counsel also observed that "the Administrator has made no determination to date to exercise that authority under the specific criteria provided under any provision of the Act."[10] The 1978 **Federal Register** notice promulgating the initial PSD regulations 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." Commenters argue this statement illustrates that EPA has in fact applied the PSD BACT requirement to any pollutant subject to only a monitoring requirement codified in this portion of the Code of Federal Regulations. However, this comment overlooked the discussion in the PSD Interpretive Memo regarding the differing meanings of the term "regulation" and "regulate." The 1978 preamble did not amplify the meaning of the term "regulated in." Thus, commenters have not demonstrated that EPA had concluded in 1978 that monitoring requirements equaled "regulation" within the meaning of sections 165(a)(4) and 169(3) of the CAA, nor have commenters provided any examples of permits issued by EPA after 1978 that demonstrate EPA's interpretation was inconsistent with the practice described in the PSD Interpretive Memo.

Therefore, EPA affirms that the actual control interpretation expressed in the PSD Interpretive Memo continues be the operative statement for the EPA interpretation of the meaning of the regulatory phrase "subject to regulation" within the Federal PSD rules.

2. Monitoring and Reporting Interpretation

EPA is not persuaded that the monitoring and reporting interpretation is compelled by the CAA, and the Agency remains concerned that application of this approach would lead to odd results and make the PSD program difficult to administer. EPA continues to find the reasoning of the PSD Interpretive Memo persuasive.

The monitoring and reporting interpretation would make the substantive requirements of the PSD program applicable to particular pollutants based solely on monitoring and reporting requirements (contained in regulations established under section 114 or other authority in the Act). This approach would lead to the perverse result of requiring emissions limitations under the PSD program while the Agency is still gathering the information necessary to conduct research or evaluate whether to establish controls on the pollutant under other parts of the Act. Such a result would frustrate the Agency's ability to gather information using section 114 and other authority and make informed and reasoned judgments about the need to establish controls or limitations for particular pollutants. If EPA interpreted the requirement to establish emissions limitations based on BACT to apply solely on the basis of a regulation that requires collecting and reporting emissions data, the mere act of gathering information would essentially dictate the result of the decision that the information is being gathered to inform (whether or not to require control of a pollutant). Many commenters representing State permitting agencies and industry groups agree with the policy arguments advanced by EPA and others that EPA's critical information gathering activities will be constrained, with likely adverse environmental and public health consequences, if monitoring requirements are necessarily associated with the potentially significant implementation and compliance costs and resource constraints of the PSD program. Commenters expressed concern that without the ability to gather data or investigate unregulated pollutants, for fear of triggering automatic regulation under the CAA, EPA will not have the flexibility to review the validity of controlling new pollutants.

EPA agrees that a monitoring and reporting interpretation would hamper the Agency's ability to conduct monitoring or reporting for investigative purposes to inform future rulemakings involving actual emissions control or limits. 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 EPA would be unable to promulgate any monitoring or reporting rule for such a pollutant without triggering PSD under this interpretation.

An environmental organization disagreed with the proposed notice of reconsideration, and commented that EPA has issued monitoring and reporting regulations for CO_2 in 40 CFR part 75, promulgated pursuant to section 821 of the 1990 CAA Amendments. The commenter felt that these monitoring and reporting rules are "regulation" in that they are contained in a legal code, have the force of law, and bring the subject matter under the control of law and the EPA. Furthermore, the commenter says that EPA itself has characterized these

[10] 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).

monitoring and reporting requirements as "regulations." In contrast, another commenter argued that an agency's interpretation of a statute should focus first on the ordinary dictionary meaning of the terms used and that monitoring emissions does not fit within any of the types of activities understood to constitute "regulation" of those emissions in the ordinary meaning of that term. Each of these commenters focuses on only one of the two potential meanings of the term "regulation" described above.

The commenter that favors the "monitoring and reporting" interpretation appears to focus only on the dictionary meanings that describe a rule contained in a legal code. The commenter has not demonstrated that it is impermissible for EPA to construe the CAA on the basis of another common meaning of the term "regulation." In the context of construing the Act, the EAB observed in the *Deseret* case that a plain meaning could not be ascertained from looking solely at the word "regulation." The Board reached this conclusion after considering the dictionary definitions of the term "regulation" cited above. *See Deseret* slip op. at 28–29. EPA continues to find the reasoning of the EAB and the PSD Interpretive Memo to be persuasive. The EAB 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.

Comments have not convincingly shown that Congress clearly intended to use the term "regulation" in section 165(a)(4) and 169(3) to describe any type of rule in a legal code. Some commenters presented alternative theories of Congressional intent regarding the BACT provisions, but they have not persuasively demonstrated that the interpretation of Congressional intent based on the context of the CAA described in the PSD Interpretive Memo is erroneous.

For example, one commenter opposed to EPA's proposed action commented that the PSD Interpretive Memo ignores the Congressionally-established purpose of PSD to protect public health and welfare from actual and potential adverse effects. *See* CAA section 160(1). Specifically, this commenter stated that to limit application of BACT until after control requirements are in place following an endangerment finding ignores the broad, protective purpose of the PSD program. The commenter said that the emphasis on "potential adverse effect[s]" distinguishes PSD the requirement from the National Ambient Air Quality Standards (NAAQS) and NSPS programs, which require that EPA make an endangerment finding before establishing generally applicable standards such as the NSPS or motor vehicle emissions standards. According to this commenter, BACT's case-by-case approach provides the dynamic flexibility necessary to implement an emission limitation appropriate to each particular source. This commenter feels that the PSD program's ability to address potential adverse effects is hindered by the position that an endangerment determination and actual control limits must be first established.

EPA does not agree that the terms of section 160 cited by the commenter compel EPA to read sections 165(a)(4) and 169(3) to apply to a pollutant before the Agency has established control requirements for the pollutant. Section 160(1) describes PSD's purpose to "protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipated to occur from air pollution." Thus, this goal contemplates an exercise of judgment by EPA to determine that an actual or potential adverse effect may reasonably be anticipated from air pollution. In that sense, this goal is consistent with NAAQS and NSPS programs, which contemplate that regulation of a pollutant will not occur until a considered judgment by EPA that a substance or source category merits control or restriction. The commenter has not persuasively established that the "potential adverse effect" language in section 160(1) makes this provision markedly different than the language used in sections 108(a)(1)(A) and 111(b)(1)(A). All three sections use the phrase "may reasonably be anticipated." Furthermore, section 160 contains general goals and purposes and does not contain explicit regulatory requirements. The controlling language in the PSD provisions is the "subject to regulation" language in sections 165(a)(4) and 169(3). As discussed earlier, the "actual control" interpretation is based on a common and accepted meaning of the term "regulation." To the extent the goals and purpose in section 160 are instructive as to the meaning of other provisions in Part C of the Act, section 160(1) is just one of several purposes of the PSD program that Congress specified. The Act also instructs EPA to ensure that economic growth occurs consistent with the preservation of existing clean air resources. *See* CAA section 160(3). EPA's interpretation is consistent with this goal because it allows EPA to look at the larger picture by coordinating control of an air pollutant under the PSD program with control under other CAA provisions.

EPA finds the logic of the PSD Interpretive Memo more persuasive. The Memo considers the full context of the CAA, including the health and welfare criteria that generally must be satisfied to establish control requirements under other parts of the Act, information gathering provisions that contemplate data collection and study before pollutants are controlled, and requirements for reasoned decision making. While some commenters presented arguments for why it might be possible or beneficial to apply the BACT requirement before a control requirement is established for a pollutant elsewhere under the Act, these arguments do not demonstrate that the contextual reading of the CAA described in the Memo is erroneous. Thus, the comments have at most provided another permissible reading of the Act, but they do not demonstrate that EPA must require BACT limitations for pollutants that are not yet controlled but only subject to data collection and study.

EPA continues to believe that the monitoring and reporting interpretation is inconsistent with past agency practice because, as the Memo notes, "EPA has not issued PSD permits containing emissions limitations for pollutants that are only subject to monitoring and reporting requirements," including CO_2 emissions. Further, 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. Commenters have not demonstrated that the Agency specifically intended, through this statement, to apply the PSD requirements to pollutants that were covered by only a monitoring and reporting requirement codified in this part of the CFR.

One commenter questioned EPA's basis for rejecting the monitoring and reporting interpretation because they believe EPA has not identified a pollutant other than CO_2 that would be affected by the monitoring and reporting interpretation. However, EPA's GHG Reporting Rule covers six GHGs, not just CO_2. Further, EPA has promulgated regulations that require monitoring of oxygen (O_2) in the stack of a boiler under certain circumstances. *See* 40

CFR 60.49Da(d). These examples help demonstrate why monitoring and reporting requirements alone should not be interpreted to trigger PSD and BACT requirements.

For the reasons discussed above, EPA affirms the Memo's rejection of the monitoring and reporting interpretation for triggering PSD requirements for a new pollutant.

3. State Implementation Plan (SIP) Interpretation

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 a particular pollutant in the EPA-Approved State Implementation Plan (SIP) for a single State would "require regulation of that pollutant under the PSD program nationally." (Hereinafter, referred to as the "SIP interpretation.") In this action, EPA affirms and supplements the rationale for rejecting the SIP interpretation provided in the PSD Interpretive Memo and the reconsideration proposal. Since the meaning of the term "subject to regulation" is ambiguous and susceptible to multiple interpretations, the SIP interpretation is not compelled by the structure and language of the Act. Furthermore, there would be negative policy implications if EPA adopted this 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 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. *See Ellis* v. *Gallatin Steel Co.,* 390 F.3d 461, 467 (6th Cir. 2004). In rejecting the SIP interpretation, the Memo also explains that EPA adopted a similar position in promulgating the NSR regulations for fine particulate matter (or "$PM_{2.5}$"), without any public comments opposing that position. *See* Memo at 15–16.

EPA continues to believe that the CAA and EPA's implementing regulations are intended to provide States flexibility to develop and implement SIPs to meet the air quality goals of their individual State. Each State's implementation plan is a reflection of the air quality concerns in that State, allowing a State significant latitude in the 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, EPA continues to 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. If EPA determined that a new pollutant becomes "subject to regulation" nationally within the meaning of section 165 based solely on the provisions of an EPA-approved SIP, then all States would be required to subject the new pollutant to PSD permitting whether or not control of the air pollutant was relevant for improving that State's air quality. 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, EPA does 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, EPA is concerned that allowing the regulatory choices of some number of States to impose PSD regulation on all other States would do just that.

Some commenters support the SIP interpretation, and fault the Agency's rejection of the interpretation by stating that neither the Act, nor the Memo, provides a basis for a position that regulation by a single State is not enough to constitute "regulation under the Act" on a nationwide basis for purpose of section 165. Petitioners and another commenter also assert that CO_2 is already "subject to regulation under the Act" and take the position that any requirement EPA adopts and approves in an implementation plan makes the covered pollutant "subject to regulation under the Act" because it is approved by the EPA "under the Act," and because it becomes enforceable by the State, by EPA and by citizens "under the Act" upon approval.

EPA disagrees with the Petitioner and with this commenter that this reasoning necessarily means that a pollutant regulated in one SIP approved by EPA must automatically be regulated through the PSD program nationally. In fact, Congress demonstrated intent, in the language and structure of the Act, for SIP requirements to have only a local or regional effect.

In section 102(a) of the CAA, Congress directs EPA to encourage cooperative activities among States, and the adoption of uniform State and local laws for the control of air pollution "as practicable in light of the varying conditions and needs." This language informs the issue of whether SIP requirements have nationwide applicability in two ways. First, there would be no need for EPA to facilitate uniform adoption of standards in different air quality control regions, if the regulation of an air pollutant by one region would automatically cause that pollutant to be regulated in another region. Second, Congress bounded its desire to promote uniformity by recognizing that addressing local air quality concerns may preempt national uniformity of regulation.

Indeed, section 116 of the CAA grants States the right to adopt more stringent standards than the uniform, minimum requirements set forth by EPA. *See* 42 U.S.C. 7416. The legislative history of the 1977 CAA Amendments shows that Congress understood that States may adopt different and more stringent standards then the Federal minimum requirements. *See, e.g.,* 122 Cong. Rec. S12456 (daily ed. July 26, 1976) (statement of Sen. Randolph) ("[T]he States are given latitude in devising their own approaches to air pollution control within the framework of broad goals. * * * The State of West Virginia has established more stringent requirements than those which, through the Environmental Protection Agency, are considered as adequate * * *"); 122 Cong. Rec. S12458 (daily ed. July 26, 1976) (statement of Sen. Scott) ("The States have the right, however, to require higher standards, and they should have under the police powers.") Congress could not have intended States to have latitude to implement their own approaches to air pollution control, and simultaneously, require that air pollutants regulated by one State automatically apply in all other States.

Importantly, the legislative history also shows that Congress intended to limit the EPA's ability to disapprove a State's decision to adopt more stringent requirements in setting forth the criteria for approving State submissions under section 110. This intent is supported by the following passage:

> State implementation plans usually contain a unified set of requirements and frequently do not make distinctions between the controls needed to achieve one kind of

ambient standard or another. To try to separate such emission limitations and make judgments as to which are necessary to achieving the national ambient air quality standards assumes a greater technical capability in relating emissions to ambient air quality than actually exists.

A federal effort to inject a judgment of this kind would be an unreasonable intrusion into protected State authority. EPA's role is to determine whether or not a State's limitations are adequate and that State implementation plans are consistent with the statute. Even if a State adopts limits which may be stricter than EPA would require, EPA cannot second guess the State judgment and must enforce the approved State emission limit.[11]

123 Cong. Rec. S9167 (daily ed. June 8, 1977) (statement of Sen. Muskie).

This Congressional intent is reflected within the statutory language. Under section 110(k)(3), the EPA Administrator "shall approve" a State's submittal if it meets the requirements of the Act, and under section 110(l) "shall not" approve a plan revision "if the revision would interfere with any other applicable requirement of this Act." Courts have similarly interpreted this language to limit EPA's discretion to approve or disapprove SIP requirements. *See, e.g., State of Connecticut* v. *EPA,* 656 F.2d 902, 906 (2d. Cir. 1981) ("As is illustrated by Congress's use of the word 'shall,' approval of an SIP revision by the EPA Administrator is mandatory if the revision has been the subject of a proper hearing and the plan as a whole continues to adhere to the requirements of section 110(a)(2)") (referencing *Union Electric Co.* v. *EPA,* 427 U.S. 246, 257 (1976); and *Mission Indus., Inc.* v. *EPA,* 547 F.2d 123 (1st Cir. 1976)). These provisions of the statute do not establish any authority or criteria for EPA to judge the approvability of a State's submission based on the implications such approval would have nationally. The absence of such authority or criteria in the applicable standard argues against nationwide applicability of SIP requirements and the SIP interpretation.

Moreover, under section 307(b) of the CAA, Congress assigns review of specific regulations promulgated by EPA and "any other nationally applicable regulations promulgated or final action taken, by the Administrator under this Act" only to the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). In contrast, "the Administrator's action in approving and promulgating any implementation plan under Section 110 * * * or any other final action of the Administrator under this Act * * * which *is local or regionally applicable* may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. 7607(b) (*emphasis added*). Thus, Congress set forth its intended applicability of these regulations in assigning judicial venue and clearly articulated that requirements in a SIP are generally "local or regionally applicable."

Even if the Act could be read to support EPA review of the national implications of State SIP submissions, such an approach would be undesirable for policy reasons. As highlighted in the reconsideration proposal, one practical effect of allowing State-specific concerns to create national regulation is that EPA's review of SIPs would likely be much more time-consuming, because EPA would have to consider each nuance of the SIP as a potential statement of national policy. Thus, EPA would have heightened oversight of air quality actions in all States—even those regarding local and State issues that are best decided by local agencies. EPA approval of SIPs would be delayed, which would in turn, delay State's progress toward improving air quality. And, EPA would be required to defend challenges to the approval of a SIP with national implications in the D.C. Circuit Court of Appeals rather than the local Circuit Court of Appeals. The potential increased burden of reviewing and approving SIPs to analyze the national implications of each SIP, and the associated delay in improving air quality, creates a compelling policy argument against adoption of the SIP interpretation.

Petitioners also fault EPA's reliance on *Connecticut* v. *EPA,* 656 F.2d 902 (2d Cir. 1981) and assert that this case has nothing to do with the issue of whether a pollutant is "subject to regulation under the Act." In the PSD Interpretive Memo, EPA cited *Connecticut* to support the notion that while a State is free to adopt air quality standards more stringent than required by the NAAQS or other Federal law provisions, Congress precludes those stricter requirements from applying to other States. The Agency agrees with commenter that the circumstances involved in that case are not directly analogous, but, nevertheless, the case supports the inference that EPA has drawn from it. The Court concluded that "[n]othing in the Act, however, indicates that a State must respect its neighbor's air quality standards (or design its SIP to avoid interference therewith) if those standards are more stringent than the requirements of Federal law." If a State is not required to respect the more stringent requirements of a neighboring State in developing its own implementation plan, then by inference, the State would also not be compelled to follow the more stringent standards.

In sum, after reconsidering the legal and policy issues, EPA declines to adopt the SIP interpretation.

4. Endangerment Finding Interpretation

The PSD Interpretive Memo states that the fourth part of the regulated NSR pollutant definition ("[a]ny pollutant that otherwise is subject to regulation") 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."). After considering public comments, EPA is affirming the position expressed in the PSD Interpretative Memo that an endangerment finding alone does not make the requirements of the PSD program applicable to a pollutant. EPA maintains its view that the terms of EPA's regulations and the relevant provisions of the CAA do not compel EPA to conclude that an air pollutant becomes "subject to regulation" when EPA finds that it endangers public health or welfare without contemporaneously promulgating control requirements for that pollutant.

As explained in EPA's Endangerment and Cause or Contribute Findings for GHGs 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 66496 (Dec. 15, 2009). The first finding addresses whether air pollution may reasonably be anticipated to endanger public health or welfare. The second finding involves an assessment of whether emissions of an air pollutant from the relevant source category cause or contribute to this air pollution. In this notice, EPA uses the phrase "endangerment finding" to refer to EPA findings on both of these questions. The EPA interpretation described here applies to both findings regardless of whether they occur together or separately.

As explained in the proposed reconsideration, an interpretation of "subject to regulation" that does not include endangerment findings is consistent with the first three parts of the definition of "regulated NSR pollutant" in section 52.21(b)(50) of EPA's regulations. Unlike the first three parts of the definition, an endangerment finding does not itself contain any restrictions (*e.g.*, regarding the level of air pollution or emissions or use). Moreover, two parts of the definition involve actions that can occur only after

[11] Notably, the legislative record refers to "State" emission limit, and makes no note of this State emission limitation having broader applicability.

an endangerment finding of some sort has taken place. In other words, other parts of the definition already bypass an endangerment finding and apply the PSD trigger to a later step in the regulatory process.

Specifically, under the first part of that definition, PSD regulation is triggered by promulgation of a NAAQS under CAA section 109. However, in order to promulgate NAAQS standards under section 109, EPA must first list, and issue air quality criteria for a pollutant under section 108, which in turn can only happen after EPA 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 EPA were to conclude that an endangerment finding, cause or contribute finding, or both would make a pollutant "subject to regulation" within the meaning of the PSD provisions, this would read all meaning out of the first part 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. *See* 40 CFR 52.21(b)(50)(i).

Similarly, the second part 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 EPA 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 EPA 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 provisions, 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. *See* 40 CFR 52.21(b)(50)(ii).

Furthermore, as discussed in the Memo, waiting to apply PSD requirements at least until the actual promulgation of control requirements that follow an endangerment finding is sensible. 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.

Public comments echoed these concerns. One commenter said that subjecting the pollutant to PSD requirements, including imposition of BACT emission limits, before the Agency has taken regulatory action to establish emission controls would turn the CAA process on its head. Another commenter indicated that triggering PSD review upon completion of an endangerment finding, but potentially before the specific control requirement that flows directly from the endangerment finding, clearly undermines the orderly process created by Congress for regulation of new air pollutants. A third commenter added that establishing controls without having a standard to be achieved leads to uncertainty in the permitting program.

In further support of EPA's interpretation that an endangerment finding does not make an air pollutant "subject to regulation" is the fact that an endangerment finding is not a codified regulation; it does not contain any regulatory text. The PSD Interpretive Memo explains, and numerous commenters agree, that an endangerment finding should not be construed as "regulating" the air pollutant(s) at issue because there is no actual regulatory language applicable to the air pollutant at this time in the Code of Federal Regulations. Rather, the finding is a prerequisite to issuing regulatory language that imposes control requirements. This is true even if the endangerment finding is a "rule" for purposes of administrative processes; that does not alter the fact that there is no regulation or regulatory text attached to the endangerment finding itself. Since an endangerment finding does not establish "regulation" within the common meaning of the term applied by EPA, EPA does not believe the CAA compels EPA to apply PSD requirements to a pollutant on the basis of an endangerment finding alone.

EPA's interpretation is also consistent with the Supreme Court's decision in *Massachusetts.* In its decision, the Court acknowledged that EPA "has significant latitude as to the manner, timing, content and coordination" of the regulations that would result from a positive endangerment finding under section 202(a). *See* 549 U.S. at 532. Just as EPA has discretion regarding the timing of the section 202(a) control regulations that would flow from an endangerment finding under that section, it also has some discretion regarding the timing of the triggering of PSD controls that the statute requires based on those section 202(a) regulations. EPA has reasonably determined that PSD controls should not precede any other control requirements. Some commenters cited *Massachusetts* in support of EPA's position.

For the foregoing reasons, EPA affirms that the prerequisite act of making an endangerment finding, a cause or contribute finding, or both, does not make a pollutant "subject to regulation" for the purposes of the PSD program. This interpretation applies to both steps of 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 explained above, EPA believes that there are strong legal and policy reasons for rejecting the endangerment finding interpretation.

5. Section 209 Waiver Interpretation

EPA is affirming its position that an Agency decision to grant a waiver to a State under section 209 of the CAA does not make the PSD program applicable to pollutants that may be regulated under State authority following a grant of such a waiver. For the reasons discussed below, the granting of a waiver does not make the pollutants that are regulated by a State after obtaining a section 209 waiver into pollutants regulated under the CAA. Furthermore, EPA is also affirming the position that PSD requirements are not applicable to a pollutant in all States when a handful of States besides the one obtaining the waiver adopt identical standards under section 177 of the CAA that are then approved into State SIPs by EPA.

As explained in the proposal, 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 triggers PSD requirements for a pollutant regulated by a State after obtaining a waiver. EPA received comments in response to the notice of an application by California for a CAA section 209 waiver to the State of California to adopt and enforce 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

across the country 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 these interpretation issues were not a part of the waiver decision and would be more appropriately addressed in another forum.

In the proposed reconsideration notice, EPA proposed to affirm the following position that EPA 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, EPA Administrator, to Senator James M. Inhofe (March 17, 2009). Specifically, EPA proposed to find that neither the CAA nor the Agency's PSD regulations make the PSD program applicable to pollutants that may be regulated by States after EPA has granted a waiver of preemption under section 209 of the CAA. Accordingly, EPA said that the Agency's decision to grant a section 209 waiver to the State of California to establish its own GHG emission standards for new motor vehicles does not trigger PSD requirements for GHGs.

Several commenters disagreed with EPA's proposed position on the section 209 waiver provisions, and assert that EPA's granting of the waiver results in "actual control." According to these commenters, even under EPA's interpretation of "subject to regulation," CO_2 is now subject to BACT. One of these commenters argues that EPA's granting of a waiver is an EPA regulatory action that "controls" CO_2 by allowing California and 10 other States to "regulate" CO_2 under the Act. Another one of these commenters states that 10 States used section 177 of the CAA to adopt the California Standards into their SIPs, thus making these provisions enforceable by both EPA and citizens under the CAA. *See, e.g.*, 42 U.S.C. 7413; 42 U.S.C. 7604(a)(1), (f)(3). EPA has not been persuaded to change its proposed position based on these comments.

EPA does not disagree that the regulations promulgated by the State pursuant to the waiver will require control of emissions and thus constitute "regulation" of GHGs under the meaning applied by EPA. However, the principal issue here is whether this regulation occurs under the authority of the Clean Air Act (*i.e.*, "under the Act.").

In the proposed reconsideration notice, EPA explained that 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 does not lead to regulation "under the Act" because it simply allows California to exercise the same authority to adopt and enforce State emissions standards for new motor vehicles that California could have exercised without the initial prohibition in section 209(a). Several other commenters agreed with EPA's position and reasoning. They explained that a waiver constitutes a withdrawal of Federal preemption that allows a State to develop its own State standards to regulate vehicle emissions; the waiver does not transform these State standards into Federal standards. Other supporting commenters also assert that there is nothing in the legislative history that supports a conclusion that Congress intended section 209 waivers to result in application of PSD requirements. The opposing comments have not convincingly articulated a mechanism through which EPA's action granting the waiver in fact requires control of emissions (as opposed to the States action under State law). If EPA granted the waiver alone and the State ultimately decided not to implement its regulation, there would be no control requirement in effect under the CAA.

As explained in the proposed reconsideration notice, EPA also finds it instructive that enforcement of any emission standard by the State after EPA grants a section 209 waiver would occur pursuant to State enforcement authority, not Federal authority. EPA would continue to enforce the Federal emission standards EPA promulgates under section 202. EPA does not enforce the State standard. EPA only conducts testing to determine compliance with the Federal standard promulgated by EPA and any enforcement would be for violation of EPA standards, not the State standards. As one commenter noted, CAA section 209(b)(3) provides that where a State has adopted standards that have been granted a waiver "compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter," but does not say that such State standards actually become the Federal standards. Accordingly, EPA finds the absence of legislative history supporting the contrary position, and the language in section 209(b)(3) instructive as Congress clearly recognized the co-existence of the Federal and State standards. This shows Congress did not intend that State regulations replace, or transform State standards into Federal regulations "under the Act." EPA agrees with supporting commenters' conclusions summarized here, and is not persuaded to change the proposed position.

EPA has also concluded that the adoption of identical standards by several States under section 177 does not make a pollutant covered by those standards "subject to regulation under the Act" in all States. Like section 209, section 177 only grants States authority to regulate under State authority by removing Federal preemption. Adoption of California standards by other States does not change the fact that those standards are still State standards enforced under State law and Federal law is approved in a SIP. However, EPA agrees that when a State adopts alternate vehicle standards into its SIP pursuant to section 177, and EPA approves the SIP, these standards become enforceable by EPA and citizens under the CAA. Nonetheless, EPA does not agree that this compels an interpretation that any pollutant included in an individual State SIP requirement becomes "subject to regulation" in all States under the CAA. As discussed earlier, EPA rejects the theory that a regulation of a pollutant in one or more States in an EPA-approved implementation plan necessarily makes that pollutant subject to regulation in all States. Such an approach is inconsistent with the fundamental principle of cooperative federalism embodied in the CAA.

In summary, EPA concludes that neither the act of granting a section 209 waiver of preemption for State emission standards nor the EPA-approval of standards adopted into a SIP pursuant to section 177 makes a pollutant "subject to regulation under the Act" in all States for the purposes of the PSD program.

C. Other Issues on Which EPA Solicited Comment

1. Prospective Codification of Interpretation

Through the proposed reconsideration notice, EPA requested comment on whether the Agency should codify its final interpretation of the "subject to regulation" in the statute and regulation

by amending the Federal PSD rules at 40 CFR 52.21. EPA received a number of comments both in support of and opposing codification.

EPA does not believe it is necessary to codify its interpretation in the regulatory text. EPA feels it is important to promptly communicate and apply these final decisions regarding the applicability of the PSD program in light of recent and upcoming actions related to GHGs. More specifically, EPA recently finalized the "Mandatory Reporting of Greenhouse Gases" rule (known as the "Reporting Rule"),[12] which added monitoring requirements for additional GHGs not covered in the Part 75 regulations. Further, EPA is poised to finalize by the end of March 2010 the LDV Rule that will establish controls on GHGs that take effect in Model Year 2012, which starts as early as January 2, 2011. Thus, these actions make it important that EPA immediately apply its final interpretation of the PSD regulations on this issue (as refined in this action). Furthermore, even if EPA modified the text of the Federal rules, many States may continue to proceed under an interpretation of their rules. EPA thus believes overall implementation of PSD permitting programs is facilitated by this notice that describes how existing requirements in Federal regulations at 40 CFR 52.21 are interpreted by EPA and how similar State provisions may be interpreted by States.

Likewise, EPA does not believe it is necessary to re-issue the PSD Interpretive Memorandum. The Agency has not identified any legal requirement for the Agency to re-issue an interpretive rule after a process of reconsideration. No comparable procedure is required after the reconsideration of substantive rule. In the latter situation, a notice of final action is sufficient to conclude the reconsideration process and an Agency may simply decline to revise an existing regulation that remains in effect. EPA has therefore concluded that this notice of final action is sufficient to conclude the reconsideration process initiated on February 17, 2009 and that there is no need to re-issue the entire memorandum in order for EPA to continue applying the interpretation reflected therein, as refined in this notice.

2. Section 821 of the Clean Air Act Amendments of 1990

In the October 7, 2009 notice, EPA also solicited comment on the question of whether section 821 of the Clean Air Act Amendments of 1990 is part of the Clean Air Act. EPA indicated that the Agency was inclined against continuing to argue that section 821 was not a part of the CAA, as the Office of Air and Radiation and Region 8 had done in briefs submitted to the EAB in the *Deseret* matter. This question bears on the determination of whether the CO_2 monitoring requirements in EPA's Part 75 regulations are requirements "under the Act." In the proposed reconsideration notice, EPA explained that it would be necessary to resolve whether or not the CO_2 monitoring and reporting regulations in Part 75 were promulgated "under the Act" if EPA adopted the monitoring and reporting interpretation. EPA received public comments on both sides of this issue, with one environmental organization pressing EPA to drop the position that section 821 is not a part of the CAA and several industry parties requesting that EPA affirm it.

EPA has not yet made a final decision on this question, and it is not necessary for the Agency to do so at this time. Since EPA is not adopting the monitoring and reporting interpretation, the status of section 821 is not material to the question of whether and when CO_2 is "subject to regulation under the Act." Because there are currently no controls on CO_2 emissions, the pollutant is not "subject to regulation." Given that the provisions in Part 75 do not "regulate" emissions of CO_2, it is unnecessary determine whether such provisions are "under the Act" or not to determine PSD applicability. Furthermore, the promulgation of EPA's Reporting Rule makes this issue even less material. In that rule, which became effective in December 2009 and required monitoring to begin in January of this year, EPA established monitoring and reporting requirements for CO_2 and other GHGs under sections 114 and 208 of the CAA. Thus, there can be no dispute that monitoring and reporting of CO_2 (as well as other GHGs) is now occurring under the CAA, regardless of the status of section 821 of the 1990 amendments. At this point, the section 821 issue would only become relevant if a court were to find that the monitoring and reporting interpretation is compelled by the CAA and a party subsequently seeks to retroactively enforce such a finding against sources that had not obtained a PSD permit with any limit on CO_2 emissions. If this situation were to arise, EPA will address the section 821 issue as necessary.

3. Timing of When a Pollutant Becomes Subject to Regulation

The October 7, 2009 notice also solicited comment on whether the interpretation of "subject to regulation" should also more clearly identify the specific date on which PSD regulatory requirements would apply. In the PSD Interpretive Memo, EPA states that the language in the definition of "regulated NSR pollutant" should be interpreted 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. After evaluating the underlying statutory requirement in the CAA and the language in all parts of the regulatory definition more closely, EPA proposed to modify its interpretation of the fourth part of the definition with respect to the timing of PSD applicability. The Agency proposed to interpret the term "subject to regulation" in the statute and regulation to mean that PSD requirements apply when the regulations addressing a particular pollutant become final and effective.

Based on public comments and other considerations raised in the proposal, EPA has determined that it is necessary to refine the portion of the PSD Interpretive Memo that addresses the precise point in time when a pollutant becomes subject to regulation for purposes of the PSD program. As a result, while the Memo is otherwise unchanged by the reconsideration proceeding, this final notice will adjust the first paragraph of section II.F of the Memo (bottom of page 14) to reflect EPA's conclusion that it is more appropriate and consistent with the reasoning of the Memo to construe EPA regulations and the CAA to make a pollutant subject to PSD program requirements when the first controls on a pollutant take effect. This refines the approach proposed in the October 7, 2009 notice.

Like the PSD Interpretive Memorandum itself, the refinement to EPA's interpretation described in this final notice is an interpretation of the regulation at 40 CFR 52.21 and the CAA provisions that provide the statutory foundation for EPA's regulations. The refinement reflected in this notice explains, clarifies, and is consistent with existing statutes and the text of regulatory provisions at 40 CFR 52.21(b)(50)(ii) through (iv). Some commenters argued that courts have limited an Agency's ability to fundamentally change a long-standing, definitive, and authoritative interpretation of a regulation[13] without

[12] *See* 74 FR 56259 (Oct. 30, 2009).

[13] To EPA's knowledge, no court has required a rulemaking procedure when the Agency seeks to issue or change its interpretation of a statute. Nevertheless, EPA has completed this notice and comment proceeding before deciding to adopt the

Continued

engaging in a notice and comment rulemaking. *See, e.g., Alaska Professional Hunters Association* v. *FAA,* 177 F.3d 1030, 1033–34 (D.C. Cir. 1999); *Paralyzed Veterans of America* v. *D.C. Arena L.P.,* 117 F.3d 579, 586 (D.C. Cir. 1997). Since EPA's interpretation of the PSD program regulations is unchanged in most respects by this action, it is not clear that the particular refinement to that interpretation that EPA is making in this action would invoke the doctrine described in these cases. Even if this refinement is viewed as a fundamental change, EPA has completed the revision reflected in this action after a notice and comment process. Furthermore, since EPA initiated a process of reconsidering and soliciting comment on the PSD Interpretive Memo within three months of its issuance, the memorandum had not yet become particularly well-established or long-standing. *See MetWest Inc.* v. *Secretary of Labor,* 560 F.3d 506, 511 n.4 (D.C. Cir. 2009). Thus, the doctrines reflected in these cases do not preclude the action EPA has taken here to refine its interpretation of the regulations.

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 the fourth category of the definition of "regulated NSR pollutant." In the PSD Interpretive Memo, EPA states that EPA interprets the language in this definition 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 continuing to consider the underlying statutory requirement in the CAA and the language in all parts of the regulatory definition more closely, EPA proposed in the October 7, 2009 notice to modify its interpretation of the fourth part of the definition with respect to the timing of PSD applicability. In the proposed notice of reconsideration, EPA observed 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. In addition, EPA expressed a desire to harmonize the application of the PSD requirements with the limitation in the Congressional Review Act (CRA) that a major rule cannot take effect until 60 days after it is published in the **Federal Register.**

In this final notice on reconsideration, based on information provided in public comments, EPA is refining its interpretation of the time the PSD requirements will apply to a newly-regulated pollutant. Under the PSD program, EPA will henceforth interpret the date that a pollutant becomes subject to regulation under the Act to be the point in time when a control or restriction that functions to limit pollutant emissions takes effect or becomes operative to control or restrict the regulated activity. As discussed further below, this date may vary depending on the nature of the first regulatory requirement that applies to control or restrict emissions of a pollutant.

Several public comments observed that a date a control requirement becomes "final and effective" and the date it actually "takes effect" may differ. Some commenters supported these points with reference to Federal court decisions that suggest the date that the terms of a regulation become effective can take more than one form. In one case involving the Congressional Review Act, the United States Court of Appeals for the Federal Circuit observed that the date a regulation may "take effect" in accordance with the CRA is distinct from the "effective date" of the regulation. *See Liesegang* v. *Sec'y of Veterans Affairs,* 312 F.3d 1368, 1374–75 (Fed. Cir. 2002), *amended on reh'g in part on other grounds,* 65 Fed. Appx. 717 (Fed. Cir. 2003). In this opinion, the court observed that "[t]he ordinary meaning of 'take effect' is '[t]o be in force; go into operation'" *Id.* at 1375 (quoting Black's Law Dictionary at 1466 (7th ed. 1999). Based on this, the court reasoned that the CRA does not "change the date on which the regulation becomes effective" but rather "only affects the date when the rule becomes operative." *Id.* In another case, the Second Circuit Court of Appeals described a distinction between the date a rule may "take effect" under the CRA, the "effective date" for application of the rule to regulated manufacturers, and the "effective date" for purposes of modifying the Code of Federal Regulations. *See Natural Resources Defense Council* v. *Abraham,* 355 F.3d 179, 202 (2d Cir. 2004).

The Office of the Federal Register (OFR) uses the term "effective date" to describe the date that amendments in a rulemaking document affect the current Code of Federal Regulations. *See* **Federal Register** Document Drafting Handbook, at p. 2–10 (Oct. 10, 1998). However, OFR draws a contrast between such a date and the compliance or applicability date of a rule, which is described as "the date that the affected person must start following the rule." *Id.* at 2–11. Thus, the "effective date" of a regulation is commonly used to describe the date by which a provision in the Code of Federal Regulations is enacted as law, but it is not necessarily the same as the time when provision enacted in the Code of Federal Regulations is operative on the regulated activity or entity. The latter may be described as the "compliance," "applicability," or "takes effect" date.

The terms of the CAA also recognize a similar distinction in some instances. CAA section 112(i)(3)(A) provides that "after the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard, limitation, or regulation except, in the case of an existing source, the Administrator shall establish a compliance date or dates for each category or subcategory of existing sources, which shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard." Another example in section 202 of the Act is discussed in more detail below.

Another formulation may be found in Section 553(c) of the APA (5 U.S.C. 553(c)), which provides, with some exceptions, that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date." The APA does not define the term "effective date" or make precisely clear whether it is referring to the date a regulation has the force of law or the date by which a regulatory requirement applies to a regulated entity or activity. The APA also separately recognizes the concept of finality of Agency action for purposes of judicial review. *See* 5 U.S.C. 704.

In the October 7, 2009 notice, EPA did not clearly distinguish between the various forms of the date when a regulatory requirement may become effective. One commenter observed that the EPA analysis in the proposed reconsideration notice appeared to blur the distinction between the "effective date" set by EPA and the date that Congress allows a regulation to become effective under the CRA. EPA in fact discussed all of these concepts in its notice, with part of the discussion focused on the date a regulation becomes "final" and "effective" and a part on when a regulation may "take effect" under the CRA. EPA viewed these forms of the date when a regulation becomes "effective" to be essentially the same, but the case law

revised interpretation of the CAA described in this notice.

suggests that administrative agencies do not necessarily need to harmonize the date that regulatory requirements take effect with the "effective date" of a regulation, meaning the date a regulation has the force of law and amends the Code of Federal Regulations. Since these are distinct concepts, the effective date of a regulation for purposes of amending the CFR may precede the date when a regulatory requirement "takes effect" or when a regulated entity must comply with a regulatory requirement. A regulation may "take effect" subsequent to its stated "effective date" where it has been published in final form but does not require immediate implementation by the agency or compliance by regulated entities.

The key issue raised by EPA in the October 7, 2009 notice was determining which date should be determined by EPA to be the date when a pollutant becomes "subject to regulation" and, thus, the date when the requirements of the PSD permitting program apply to that pollutant. In recognition of the distinction between the "effective date" of the regulation for purposes of amending the CFR and the point at which a regulatory restriction may "take effect," EPA has considered whether it is permissible to construe sections 165(a)(4) and 169(3) of the CAA to mean that a pollutant becomes "subject to regulation" at the point that a regulatory restriction or control "takes effect." In the October notice, EPA observed that 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. EPA also said that 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.

The same reasoning applies to the date that a regulation "takes effect," as that term is used in the judicial decisions described above. Regulated entities are not required to comply with a regulatory requirement until it takes effect. Prior to the date a regulatory requirement takes effect, the activity covered by a rule is not in the ordinary sense subject to any regulation.

As discussed in the PSD Interpretive Memo, as used in the context of the PSD provisions in EPA regulations and the CAA, EPA interprets the term "regulation" in the context of sections 165(a)(4) and 169 of the CAA to mean the act or process of controlling or restricting an activity. This interpretation applies a common meaning of the term regulation reflected in dictionaries.

Thus, EPA agrees with commenters that the term "subject to regulation" used in both the CAA and EPA's regulations may be construed to mean the point at which a requirement to control a pollutant takes effect. The CAA does not necessarily preclude construing a pollutant to become subject to regulation upon the promulgation date or the date that a regulation becomes final and effective for purposes of amending the CFR or judicial review. However, EPA has been persuaded by public comments that the phrase "subject to regulation" may also be interpreted to mean the date by which a control requirement takes effect.

Indeed, EPA has concluded that the latter interpretation is more consistent with the actual control interpretation reflected in the PSD Interpretive Memo. As one commenter observed, a regulation would have to have become actually effective, in the sense that actual legal obligations created by the regulation have become currently applicable for regulated entities and are no longer merely prospective obligations, before that regulation could make a pollutant subject to actual control. Another commenter noted that a regulated entity has no immediate compliance obligations and cannot be held in violation of the regulation until a legal obligation becomes applicable to them on the "takes effect" date. Thus, based on this reasoning, EPA has decided that it will construe the point at which a pollutant becomes "subject to regulation" within the meaning of section 52.21(b)(50)(iv) of EPA's regulations to be when a control or restriction is operative on the activity regulated. EPA agrees with commenters that there is generally no legally enforceable obligation to control a pollutant when a regulation is promulgated or, in some instances, even when a regulation becomes effective for some purposes.

Thus, EPA currently interprets the time that a pollutant becomes a "regulated NSR pollutant" under section 52.21(b)(50)(iv) to be the time when a control or restriction on emissions of the pollutant takes effect or becomes operative on the regulated activity. Given EPA's conclusion that this is a permissible interpretation of the "subject to regulation" language in sections 165(a)(4) and 169(3) of the CAA, EPA will also interpret other parts of section 52.21(b)(50) to make a pollutant a regulated NSR pollutant on the date that a control requirement takes effect, provided such an interpretation is not inconsistent with the existing language of the regulations.

EPA does not agree with several commenters who suggested that EPA determine that a pollutant does not become subject to regulation until the time that an individual source engages in the regulated activity. EPA does not believe such a reading is consistent with the "subject to regulation" language in the CAA. Even if no source is actually engaged in the activity, once a standard or control requirement has taken effect, no source may engage in the regulated activity without complying with the standard. At this point, the regulated activity and the emissions from that activity are controlled or restricted, thus being subject to regulation within the common meaning of the term regulation used in EPA's regulations and section 165(a)(4) and 169(3) of the CAA.

Likewise, EPA does not agree with commenters who argued that a pollutant does not become subject to regulation until the date when a source must certify compliance with regulatory requirements or submit a compliance report. In some instances, a compliance report or certification of compliance may not be required until well after the point that a regulation operates to control or restrict the regulated activity. Thus, EPA does not feel that it would be appropriate as a general rule to establish the date when a source certifies compliance or submits its compliance report as the date that a pollutant becomes subject to regulation.

Since the fourth part of the definition of "regulated NSR pollutant" functions as a catch-all provision, it may cover a variety of different types of control requirements established by EPA under the CAA. These different types of regulations may contain a variety of different mechanisms for controlling emissions and have varying amounts of lead time before controls take effect under the particular regulatory framework. Thus, whenever the Agency adopts controls on a new pollutant under a portion of the CAA covered by the fourth part of the definition, EPA anticipates that it will be helpful to States and regulated sources for EPA to identify the date when a new pollutant becomes subject to regulation. In section IV.A of this notice, EPA provides such an analysis for the forthcoming LDV Rule that is anticipated to establish the first controls on GHGs.

EPA has also concluded that it is appropriate to extend the reasoning of this interpretation across all parts of the definition of the term "regulated NSR

pollutant." The reasoning described above is equally applicable to the regulation of additional pollutants under the specific sections of the Act delineated in the first three parts of the definition of "regulated NSR pollutant." While the date a control requirement may take effect could vary across sections 109, section 111, and Title VI, EPA does not see any distinction in the applicability of the legal reasoning above to these provisions of the CAA. There should be less variability among rules promulgated under the same statutory section, so EPA does not expect that it will be necessary for EPA to identify the date that a new pollutant becomes subject to regulation each time EPA regulates a new pollutant in a NAAQS or NSPS. EPA can more readily identify the specific dates when controls under such rules take effect.

By way of example, the NSPS under section 111 of the Act preclude operation of a new source in violation of such a standard after the effective date of the standard. *See* 42 U.S.C. 7411(e). Thus, the control requirements in an NSPS take effect on the effective date of the rule. Once such a standard takes effect and operates to preclude operations in violation of the standards, then EPA interprets the statute and EPA's PSD regulations to also require that the BACT requirement apply to a pollutant that is subject to NSPS. Consistent with the October 7, 2009 proposal, EPA has determined that the existing language in section 52.21(b)(50)(ii) of its regulations may be construed to apply to a new pollutant upon the effective date of an NSPS. This part of the definition covers "[a]ny pollutant that is subject to any standard promulgated under section 111 of the Act." *See* 40 CFR 52.21(b)(50)(ii). While the word "promulgated" appears in this part of the definition, this term modifies the term "standard" and does not directly address the timing of PSD requirements. Under the language in this part of the definition, the PSD requirements apply when a pollutant becomes "subject to" the underlying standard, which is "promulgated under" section 111 of the Act. Thus, this language can be interpreted to make an NSPS pollutant a regulated NSR pollutant upon the effective date of an NSPS. EPA did not receive any public comments that opposed reading this portion of the definition to invoke PSD requirements upon the effective date of an NSPS. This can logically be extended to be consistent with the general view described above that the time a pollutant becomes subject to regulation is the time when a control requirement "takes effect." As discussed above, the effective date of an NSPS is also that date when the controls in an NSPS "take effect."

Likewise, under section 169(a)(3) of the Act, a source applying for a PSD permit must demonstrate that it will not cause or contribute to a violation of the NAAQS in order to obtain the permit. Once a NAAQS is effective with respect to a pollutant, the standard operates through section 169(a)(3) of the Act and section 52.21(k) of EPA's regulations to preclude construction of a new source that would cause or contribute to a violation of such standard.

Using the effective date of a NAAQS to determine when a pollutant covered by a NAAQS becomes a regulated NSR pollutant is more consistent with EPA's general approach for determining when a new NAAQS applies to pending permit applications. EPA generally interprets a revised NAAQS that establishes either a lower level for the standard or a new averaging time for a pollutant already regulated to apply upon the effective date of the revised NAAQS. Thus, unless EPA promulgates a grandfathering provision that allows pending applications to apply standards in effect when the application is complete, a final permit decision issued after the effective date of a NAAQS must consider such a NAAQS. As described above, the effective date of the NAAQS is also the date a NAAQS takes effect through the PSD permitting program to regulate construction of a new or modified source.

Since a NAAQS covering a new pollutant would operate through the PSD permitting program to control emissions of that pollutant from the construction or modification of a major source upon the effective date of the NAAQS, a NAAQS covering a new pollutant takes effect on the effective date of the regulation promulgating the NAAQS. EPA does not agree with one commenter's suggestion that such a NAAQS would not take effect until the time a State first promulgates limitations for the pollutant in a SIP. Under section 165(a)(3) of the Act and the Federal PSD permitting regulations at 52.21(k), to obtain a PSD permit, a major source must demonstrate that the proposed construction will not cause or contribute to a violation of a NAAQS. Due to these requirements, the PSD program operates to incorporate the NAAQS as a governing standard for permitting construction of large sources. Thus, under the Federal PSD program regulations at least, a new pollutant covered by a NAAQS becomes subject to regulation at a much earlier date. These PSD provisions require emissions limitations for the NAAQS pollutant before construction at a major source may commence and thereby function to protect the NAAQS from new source construction and modifications of existing major sources in the SIP development period before a completion of the planning process necessary to determine whether additional standards for a new NAAQS pollutant need to be developed. The timing when the NAAQS operates in this manner under SIP-approved programs is potentially more nuanced and depends on whether State laws are sufficiently open-ended to call for application of a new NAAQS as a governing standard for PSD permits upon the effective date. EPA believes that State laws that use the same language as in EPA's PSD program regulations at 52.21(k) and 51.166(k) are sufficiently open-ended and allow such a NAAQS to "take effect" through the PSD program upon the effective date of the NAAQS. Notwithstanding this complexity in SIP-approved programs, the applicability of the Federal PSD program regulations to a new NAAQS pollutant upon the effective date of the NAAQS is sufficient to determine that a new pollutant is subject to regulation on this date.

In the October 7, 2009 notice, EPA observed that one portion of its existing regulations was not necessarily consistent with this reading of the CAA. For the first class of pollutants described in the definition of "regulated NSR pollutant," the PSD requirements apply once a "standard has been promulgated" for a pollutant or its precursors. *See* 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, EPA observed in the October 7, 2009 notice that 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. EPA did not propose to modify the language in 40 CFR 52.21(b)(50)(i) in the October 2009 notice because EPA had not yet reached a final decision to interpret the CAA to mean that a pollutant is subject to regulation on the date a regulatory requirement becomes effective. Since EPA was not proposing to establish a NAAQS for any additional pollutants, the timing of PSD applicability for a newly identified NAAQS pollutant did not appear to be of concern at the time. No public comments on the October 2009 notice addressed this issue. Since EPA is now

adopting a variation of the proposed interpretation with respect to the timing of PSD applicability, EPA believes it will be appropriate to propose a revision of the regulatory language in section 52.21(b)(50)(i) at such time as EPA may consider promulgation of a NAAQS for an additional pollutant. Until that time, EPA will continue to apply the terms of section 52.21(b)(50)(i) of the regulation. This is permissible because, even though EPA believes the better reading of the Act is to apply PSD upon the date that a control requirement "takes effect," the Agency has not determined in this action that the CAA precludes applying PSD requirements upon the promulgation of a regulation that establishes a control requirement (as a NAAQS does through the PSD provisions).

IV. Application of PSD Interpretive Memo to PSD Permitting for GHGs

A. Date by Which GHGs Will Be "Subject to Regulation"

Although the PSD Interpretive Memo and this reconsideration reflect a broad consideration of the most appropriate legal interpretation and policy for all pollutants regulated under the CAA, the need to clarify this issue as a general matter has been driven by concerns over the effects of GHG emissions on global climate and the contention made by some parties in permit proceedings that EPA began regulating CO_2 as early as the promulgation of monitoring and reporting requirements in EPA's Part 75 rules to implement section 821 of the CAA Amendments of 1990. The vast majority of public comments on the October 7, 2009 notice focused on the regulation of GHGs under the PSD program. As a result, EPA recognizes that it is critically important at this time for the Agency to make clear when the requirements of the PSD permitting program for stationary sources will apply to GHGs. For the reasons discussed below, GHGs will initially become "subject to regulation" under the CAA on January 2, 2011, assuming that EPA issues final GHG emissions standards under section 202(a) applicable to model year 2012 new motor vehicles as proposed. As a result, with that assumption, the PSD permitting program would apply to GHGs on that date. However, the Tailoring Rule, noted above, proposed various options for phasing in PSD requirements for sources emitting GHGs in various amounts above 100 or 250 tons per year. Since EPA has not yet completed that rulemaking, today's action concludes only that, under the approach envisioned for the vehicle standards, GHGs would not be considered "subject to regulation" (and no source would be subject to PSD permitting requirements for GHGs) earlier than January 2, 2011. The final Tailoring Rule will address the applicability of PSD requirements for GHG-emitting sources that are not presently subject to PSD permitting.

EPA's determination that PSD will begin to apply to GHGs on January 2, 2011 is based on the following considerations: (1) The overall interpretation reflected in the PSD Interpretive Memo; (2) EPA's conclusion in this notice that a pollutant becomes subject to regulation when controls "take effect," and (3) the assumption that the agency will establish emissions standards for model year 2012 vehicles when it completes the proposed LDV Rule.

As proposed, the LDV Rule consists of two kinds of standards—fleet average standards determined by the emissions performance of a manufacturer's fleet of various models, and separate vehicle standards that apply for the useful life of a vehicle to the various models that make up the manufacturer's fleet. CAA section 203(a)(1) prohibits manufacturers from introducing a new motor vehicle into commerce unless the vehicle is covered by an EPA-issued certificate of conformity for the appropriate model year. Section 206(a)(1) of the CAA describes the requirements for EPA issuance of a certificate of conformity, based on a demonstration of compliance with the emission standards established by EPA under section 202 of the Act. A certification demonstration requires emission testing, and must be done for each model year.

The certificate covers both fleet average and vehicle standards, and the manufacturer has to demonstrate compliance with both of these standards for purposes of receiving a certificate of conformity. The demonstration for the fleet average is based on a projection of sales for the model year, and the demonstration for the vehicle standard is based on emissions testing and other information.

Both the fleet average and vehicle standards in the LDV Rule will require that automakers control or limit GHG emissions from the tailpipes of these vehicles. As such, they clearly constitute "regulation" of GHGs under the interpretation in the PSD Interpretive Memo. This view is consistent with the position originally expressed by EPA in 1978 that a pollutant regulated in a Title II regulation is a pollutant subject to regulation. *See* 42 FR at 57481. However, the regulation of GHGs will not actually take effect upon promulgation of the LDV Rule or on the effective date of the LDV Rule when the provisions of the rule are incorporated into the Code of Federal Regulations.

Under the LDV Rule, the standards for GHG emissions are not operative until the 2012 model year, which may begin as early as January 2, 2011. In accordance with the requirements of Title II of the CAA and associated regulations, vehicle manufacturers may not introduce a model year 2012 vehicle into commerce without a model year 2012 certificate of conformity. *See* CAA section 203(a)(1). A model year 2012 certificate only applies to vehicles produced during that model year, and the model year production period may begin no earlier than January 2, 2011. *See* CAA section 202(b)(3)(A) and implementing regulations at 40 CFR 85.2302 through 85.2305. Thus, a vehicle manufacturer may not introduce a model year 2012 vehicle into commerce prior to January 2, 2011.

There will be no controls or limitations on GHG emissions from model year 2011 vehicles. The obligation on an automaker for a model year 2012 vehicle would be to have a certificate of conformity showing compliance with the emissions standards for GHGs when the vehicle is introduced into commerce, which can occur on or after January 2, 2011. Therefore, the controls on GHG emissions in the Light Duty Rule will not take effect until the first date when a 2012 model year vehicle may be introduced into commerce. In other words, the compliance obligation under the LDV Rule does not occur until a manufacturer may introduce into commerce vehicles that are required to comply with GHG standards, which will begin with MY 2012 and will not occur before January 2, 2011. Since CAA section 203(a)(1) prohibits manufacturers from introducing a new motor vehicle into commerce unless the vehicle is covered by an EPA-issued certificate of conformity for the appropriate model year, as of January 2, 2011, manufacturers will be precluded from introducing into commerce any model year 2012 vehicle that has not been certified to meet the applicable standards for GHGs.

This interpretation of when the GHG controls in the LDV Rule take effect, and therefore, make GHGs subject to regulation under the Act for PSD purposes, is consistent with the statutory language in section 202(a)(2) of the CAA. This section provides that "any regulation prescribed under paragraph (1) of this subsection (and

any revision thereof) shall *take effect* after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." *See* 42 U.S.C. 7521(a)(2) (emphasis added). The final LDV Rule will apply to model years 2012 through 2016. The time leading up to the introduction of model year 2012 is the time that EPA "finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." Model year 2012 is therefore when the GHG standards in the rule "take effect."

EPA does not agree with several commenters who have suggested that the GHG standards in the proposed LDV Rule would not take effect until October 1, 2011. The latter date appears to be based on how the National Highway Traffic Safety Administration (NHTSA) determines the beginning of the 2012 model year under the Energy Policy and Conservation Act (EPCA). Under EPCA, a more stringent CAFE standard must be prescribed by NHTSA at least 18 months before the beginning of the model year. For purposes of this EPCA provision, NHTSA has historically construed the beginning of the model year to be October 1 of the preceding calendar year. *See* 49 U.S.C. 32902(g)(2); 74 FR 49454, 49644 n.447 (Sep. 28, 2009). Although EPA has endeavored to harmonize its section 202(a) standards with the NHTSA CAFE standards, EPA's standards are promulgated under distinct legal authority in the CAA. Thus, the section 202(a) standards promulgated in the LDV Rule are not subject to EPCA or NHTSA's interpretation of when a model year begins for purposes of EPCA. Under EPA's planned LDV Rule, model year 2012 vehicles may be introduced into commerce as early as January 2, 2011. Although as a practical matter, some U.S. automakers may not begin introducing model year 2012 vehicles into commerce until later in 2011, they may nevertheless do so as early as January 2, 2011 under EPA's regulations. Consistent with the discussion above, EPA construes the phrase "subject to regulation" in section 165(a)(4) and 169(3) of the Act to mean that the BACT requirement applies when controls on a pollutant first apply to a regulated activity, and not the point at which an entity first engages in the regulated activity. In this instance, the regulated activity is the introduction of model year 2012 vehicles into commerce. As of January 2, 2011, a manufacturer may not engage in this activity without complying with the applicable GHG standards.

Likewise, EPA does not agree with commenters who argued that EPA should not consider the GHG controls in the LDV Rule to take effect until automakers have to demonstrate compliance with the fleet average standards at the end of the model year, based on actual vehicle model production. As discussed above, the LDV Rule includes both fleet average standards and vehicle standards that apply to individual vehicles throughout their useful lives. As discussed above, both of these standards for GHG emissions are operative on model year 2012 vehicles introduced into commerce on or after January 2, 2011. Thus, controls on GHG emissions from automobiles will take effect prior to the date that a manufacturer must demonstrate compliance with the fleet average standards. The fact that the manufacturer demonstrates final compliance with the fleet average at a later date, based on production for the entire year, does not change the fact that their conduct was controlled by both the fleet average and the vehicle standards, and subject to regulation, prior to that date.

B. Implementation Concerns

A substantial number of commenters requested that EPA defer application of the PSD program requirements to GHGs based on various practical implementation considerations, and several of these comments argued that the CAA affords EPA the discretion to set an implementation date based on such concerns. EPA agrees that application of PSD program requirements to GHGs presents several significant implementation challenges for EPA, States and other entities that issue permits, and the sources that must obtain permits. Indeed, many of the public comments have illustrated the magnitude of the challenge beyond what is described in the proposed notice on reconsideration of the PSD Interpretive Memo and the proposed Tailoring Rule.

In recognition of the substantial challenges associated with incorporating GHGs into the PSD program, EPA's preference would be to establish a specific date when the PSD permitting requirements initially apply to GHGs based solely on these practical implementation considerations. However, EPA has not been persuaded that it has the authority to proceed in this manner. While EPA may have discretion as to the manner and time for regulating GHG emissions under the CAA, once EPA has determined to regulate a pollutant in some form under the Act and such regulation is operative on the regulated activity, the terms of the Act make clear that the PSD program is automatically applicable.

Nonetheless, given the substantial magnitude of the PSD implementation challenges presented by the regulation of GHGs, EPA proposed in the Tailoring Rule to at least temporarily limit the scope of GHG sources covered by the PSD program to ensure that permitting authorities can effectively implement it. EPA based the proposal primarily on two legal doctrines: The "absurd results" doctrine, which EPA proposed to apply on the basis that Congress did not envision that the PSD program would apply to the many small sources that emit GHGs; and the "administrative necessity" doctrine, which EPA proposed to apply because of the extremely large administrative burdens that permitting authorities would confront in permitting the GHG sources. In comment on that action, as well as in comments on the PSD Interpretive Memo reconsideration proposal, EPA received numerous suggestions that it is necessary to limit the scope of sources covered at the time GHGs become subject to regulation. Commenters further stated that it is necessary to select a "trigger date" for GHG permitting that takes into account the time needed for permitting authorities to adopt any scope-limiting measures (including the need to amend State law), to secure the necessary additional financial and other resources, and to hire and train the staff needed to respond to the increase in permitting workload. These comments make clear that more time will be needed beyond January 2, 2011 before permitting of many GHG stationary sources can begin. Thus, EPA will be taking additional action in the near future in the context of the Tailoring Rule to address GHG-specific circumstances that will exist beyond January 2, 2011.

C. Interim EPA Policy To Mitigate Concerns Regarding GHG Emissions From Construction or Modification of Large Stationary Sources

While EPA has concluded that GHGs will not become subject to regulation (and hence the PSD BACT requirement will not apply to them) earlier than January 2, 2011, permitting authorities that issue permits before January 2, 2011 are already in a position to, and should, use the discretion currently available under the BACT provisions of the PSD program to promote technology choices for control of criteria pollutants that will also facilitate the reduction of GHG emissions. More specifically, the CAA

BACT definition requires permitting authorities selecting BACT to consider the reductions available through application of not only control methods, systems, and techniques, but also through production processes, and requires them to take into account energy, environmental, and economic impacts. Thus, the statute expresses the need for a comprehensive review of available pollution control methods when evaluating BACT that clearly requires consideration of energy efficiency. The consideration of energy efficiency is important because it contributes to reduction of pollutants to which the PSD requirements currently apply and have historically been applied. Further, although BACT does not now apply to GHG, BACT for other pollutants can, through application of more efficient production processes, indirectly result in lower GHG emissions.

Neither the statute nor EPA regulations specify precisely how to address energy efficiency in BACT determinations, nor has EPA fully articulated how to take climate considerations into account under the "energy, environmental, and economic impacts" considerations of BACT. Further, while EPA's BACT guidance for currently regulated pollutants has addressed some facets of these issues, EPA believes that, given the potential importance of the indirect GHG benefits, it will be useful for EPA to summarize this guidance and further clarify it as necessary in order to further illustrate where PSD permitting authorities should be using existing BACT authority for pollutants that are presently regulated in ways that can indirectly address concerns about GHG emissions from large stationary sources. EPA is developing such guidance and plans to issue it in the near future.

D. Transition for Pending Permit Applications

Some commenters requested that EPA address the question of how the application of PSD requirements to GHGs will affect applications for PSD permits that are pending on the date GHGs initially become "subject to regulation." These commenters generally asked that EPA establish an exclusion for any PSD permit application that was submitted in complete form before the date on which PSD begins to apply to GHGs.

In light of EPA's conclusion that pollutants become subject to regulation for PSD purposes when control requirements on that pollutant take effect and that such requirements will not take effect for GHGs until January 2, 2011 if EPA finalizes the proposed LDV Rule as anticipated, EPA does not see any grounds to establish a transition period for permit applications that are pending before GHGs become subject to regulation. As a general matter, permitting and licensing decisions of regulatory agencies must reflect the law in effect at the time the agency makes a final determination on a pending application. *See Ziffrin* v. *United States,* 318 U.S. 73, 78 (1943); *State of Alabama* v. *EPA,* 557 F.2d 1101, 1110 (5th Cir. 1977); *In re: Dominion Energy Brayton Point, LLC,* 12 E.A.D. 490, 614–616 (EAB 2006); *In re Phelps Dodge Corp.,* 10 E.A.D. 460, 478 n.10 (EAB 2002). Thus, in the absence of an explicit transition or grandfathering provision in the applicable regulations (and assuming EPA finalizes the LDV Rule as planned), each PSD permit issued on or after January 2, 2011 would need to contain provisions that satisfy the PSD requirements that will apply to GHGs as of that date.

Under certain circumstances, EPA has previously allowed proposed new major sources and major modifications that have submitted a complete PSD permit application before a new requirement becomes applicable under PSD regulations, but have not yet received a final and effective PSD permit, to continue relying on information already in the application rather than immediately having to amend applications to demonstrate compliance with the new PSD requirements. In such a way, these proposed sources and modifications were "grandfathered" or exempted from the new PSD requirements that would otherwise have applied to them.

For example, EPA adopted a grandfathering provision when it changed the indicator for the particulate matter NAAQS from total suspended particulate matter (TSP) to particulate matter less than 10 microns (PM10). The Federal PSD regulations at 40 CFR 52.21(i)(1)(x) provide that the owners or operators of proposed sources or modifications that submitted a complete permit application before July 31, 1987, but did not yet receive the PSD permit, are not required to meet the requirements for PM10, but could instead satisfy the requirements for TSP that were previously in effect.

In addition, EPA has allowed some grandfathering for permit applications submitted before the effective date of an amendment to the PSD regulations establishing new maximum allowable increases in pollutant concentrations (also known as PSD "increments"). The Federal PSD regulations at 40 CFR 52.21(i)(10) provide that proposed sources or modifications that submitted a complete permit application before the effective date of the increment in the applicable implementation plan are not required to meet the increment requirements for PM10, but could instead satisfy the increment requirements for TSP that were previously in effect. Also, 40 CFR 52.21(i)(9) provides that sources or modifications that submitted a complete permit application before the provisions embodying the maximum allowable increase for nitrogen oxides (NO_X) [14] took effect, but did not yet receive a final and effective PSD permit, are not required to demonstrate compliance with the new increment requirements to be eligible to receive the permit.

Under the particular circumstances presented by the forthcoming application of PSD requirements to GHGs, EPA does not see a justification for adopting an explicit grandfathering provision of the nature described above. Permit applications submitted prior to the publication of this notice should in most cases be issued prior to January 2, 2011 and, thus, effectively have a transition period of nine months to complete processing before PSD requirements become applicable. Additional time for completion of action on applications submitted prior to the onset of PSD requirements for GHGs therefore does not appear warranted to ensure a smooth transition and avoid delays for pending applications. To the extent any pending permit review cannot otherwise be completed within the next nine months based on the requirements for pollutants other than GHGs, it should be feasible for permitting authorities to begin incorporating GHG considerations into permit reviews in parallel with the completion of work on other pollutants without adding any additional delay to permit processing.

Furthermore, the circumstances surrounding the onset of requirements for GHGs are distinguishable from prior situations where EPA has allowed grandfathering of applications that were deemed complete prior to the applicability new PSD permitting requirements. First, this action and the PSD Interpretive Memo do not involve a revision of the PSD permitting regulations but rather involves clarifications of how EPA interprets the existing regulatory text. This action articulates what has, in most respects, been EPA's longstanding practice. It has been EPA's consistent position since

[14] The increments for emissions of the various oxides of nitrogen are expressed as concentrations of nitrogen dioxide (NO_2).

1978 that regulation of a pollutant under Title II triggers PSD requirements for such a pollutant. *See* 42 FR 57481. Thus, permitting authorities and permit applicants could reasonably anticipate that completion of the LDV Rule would trigger PSD and prepare for this action. Many commenters interpreted EPA's October 7, 2009 notice as proposing to trigger PSD requirements within 60 days of the promulgation of the LDV Rule rather than the January 2, 2011 date that EPA has determined to be the date the controls in that rule take effect. Second, there are presently no regulatory requirements in effect for GHGs. On the other hand, at the time EPA moved from using TSP to using PM10 as the indicator for the particulate matter NAAQS, grandfathered sources were still required to satisfy PSD requirements for particulate matter based on the TSP indicator. Likewise, when EPA later updated the PSD increment for particulate matter to use the PM10 indicator, the grandfathered sources were still required to demonstrate that they would not cause or contribute to a violation of the particulate matter increment based on TSP. In the case of the adoption of the NO_2 increment, grandfathered sources were still required to demonstrate that they would not cause or contribute to a violation of the NO_2 NAAQS. In contrast, for GHGs, there are no measures currently in effect that serve to limit emission of GHGs from stationary sources.

For these reasons, EPA does not intend to promulgate a transition or grandfathering provision that exempts pending permit applications from the onset of GHG requirements in the PSD program. As discussed above, in the absence of such a provision, PSD permits that are issued on or after January 2, 2011 (in accordance with limitations promulgated in the upcoming Tailoring Rule) will be required to contain provisions that fulfill the applicable program requirements for GHGs.

V. PSD Program Implementation by EPA and States

Consistent with the PSD Interpretive Memo, the refined interpretation reflected in this notice (that a pollutant subject to actual control becomes subject to regulation at the time such controls take effect) is an interpretation of the language in 40 CFR 52.21(b)(50) of EPA's regulations. EPA will apply the PSD Interpretive Memo, with the refinement described above, when implementing the Federal permitting program under 40 CFR 52.21. Furthermore, EPA will expect that States that implement the Federal PSD permit program under delegation from an EPA Regional Office will do the same.

In addition, EPA will apply the interpretation reflected in this notice and the PSD Interpretive Memo in its oversight of existing State programs and review and approval of new program submissions. Many States implement the PSD program pursuant to State laws that have been approved by EPA as part of the SIP, pursuant to a determination by EPA that such laws meet the PSD program criteria set forth in 40 CFR 51.166. The EPA regulation setting forth PSD program requirements for SIPs also includes the same definition of the term "regulated NSR pollutant" as the Federal program regulation. *See* 40 CFR 51.166(b)(49). Because this regulation uses the same language as contained in 40 CFR 52.21 and the same considerations apply to implementation of the PSD program under State laws, EPA will interpret section 51.166(b)(49) in the same manner as section 52.21(b)(50). However, in doing so, EPA will be mindful that permitting authorities in SIP-approved States have some independent discretion to interpret State laws, provided those interpretations are consistent with minimum requirements under the Federal law.

To the extent approved SIPs contain the same language as used in 40 CFR 52.21(b)(50) or 40 CFR 51.166(b)(49), SIP-approved State permitting authorities may interpret that language in State regulations in the same manner reflected in the PSD Interpretive Memo and this notice. However, EPA will not seek to preclude actions to address GHGs in PSD permitting actions prior to January 2, 2011 where a State permitting authority feels it has the necessary legal foundation and resources to do so.

EPA has not called on any States to make a SIP submission that addresses the interpretive issues addressed in this notice and the PSD Interpretive Memo. As long as States are applying their approved program regulations consistent with the minimum program elements established in 40 CFR 51.166, EPA does not believe it will be necessary to issue a SIP call for all States to address this issue. However, permitting authorities in SIP-approved States do not have the discretion to apply State laws in a manner that does not meet the minimum Federal standards in 40 CFR 51.166, as interpreted and applied by EPA. Thus, if a State is not applying the PSD requirements to GHGs for the required sources after January 2, 2011, or lacks the legal authority to do so, EPA will exercise its oversight authority as appropriate to call for revisions to SIPs and to otherwise ensure sources do not commence construction without permits that satisfy the minimum requirements of the Federal PSD program.

To enable EPA to assess the consistency of a State's action with any PSD program requirements for GHGs, States should ensure that the record for each PSD-permitting decision addresses whether the State has elected to follow EPA's interpretation or believes it is appropriate to apply a different interpretation of State laws that is nonetheless consistent with the requirements of EPA's PSD program regulations. In light of additional actions to be taken by EPA in the Tailoring Rule, States that issue permits in the near term may want to preserve the discretion to modify their approach after other EPA actions are finalized. In light of this contingency, one option States may consider is to establish that the State will not interpret its laws to require PSD permits for sources that are not required to obtain PSD permits under EPA regulations.

VI. Application of the Title V Program to Sources of GHGs

Although the PSD Interpretive Memorandum and the October 7, 2009 proposed reconsideration notice addressed only PSD permitting issues, EPA received several comments on the proposed reconsideration that also addressed the application of Title V permitting requirements to GHGs. Most of these comments urged EPA to apply the same approach for determining major source applicability for Title V permitting that EPA applies to PSD. EPA has in fact been following the PSD approach in many respects. As with the PSD program, currently GHGs are not considered to be subject to regulation and have not been considered to trigger applicability under Title V. EPA discussed this in the preamble to the proposed Tailoring Rule as described below. *See* 74 FR at 55300 n.8.

Title V requires, among other things, that any "major source"—defined, as relevant here, under CAA sections 302(j) and 501(2)(b), as "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant * * *"—apply for a Title V permit. EPA interprets this requirement to apply to sources of pollutants "subject to regulation" under the Act. EPA previously articulated its interpretation that this Title V permitting requirement applies to "pollutants subject to regulation" in a 1993 memorandum from EPA's air

program. Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, "Definition of Regulated Air Pollutant for Purposes of Title V" (Apr. 26, 1993) ("Wegman Memo"). EPA continues to maintain this interpretation. The interpretation in this memorandum was based on: (1) EPA's reading of the definitional chain for "major source" under Title V, including the definition of "air pollutant" under section 302(g) and the definition of "major source" under 302(j); (2) the view that Congress did not intend to require a variety of sources to obtain Title V permits if they are not otherwise regulated under the Act (*see also* CAA section 504(a), providing that Title V permits are to include and assure compliance with applicable requirements under the Act); and (3) consistency with the approach under the PSD program. While the specific narrow interpretation in the Wegman Memo of the definition of "air pollutant" in CAA section 302(g) is in question in light of *Massachusetts* (finding this definition to be "sweeping"), EPA believes the core rationale for its interpretation of the applicability of Title V remains sound. EPA continues to maintain its interpretation, consistent with CAA sections 302(j), 501, 502 and 504(a), that the provisions governing Title V applicability for "a major stationary source" can only be triggered by emissions of pollutants subject to regulation. This interpretation is based primarily on the purpose of Title V to collect all regulatory requirements applicable to a source and to assure compliance with such requirements—*see, e.g.,* CAA section 504(a)—and on the desire to promote consistency with the approach under the PSD program.

In applying this interpretation under Title V, the Wegman Memo also explains that EPA does not consider CO_2 to be a pollutant subject to regulation based on the monitoring and reporting requirements of section 821 of the Clean Air Act Amendments of 1990. As articulated in numerous orders issued by EPA in response to petitions to object to Title V permits, EPA views the Title V operating permits program as a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured. *See, e.g., In the Matter of Fort James Camas Mill,* Petition No. X–1999–1 at 3–4 (Dec. 22, 2000); *In the Matter of Cash Creek Generation, LLC,* Petition Nos. IV–2008–1 & IV–2008–2 at 2 (Dec. 15, 2009). The Wegman Memo points out that section 821 involves reporting and study of emissions, but is not related to actual control of emissions. Since the reporting requirements of section 821 have no connection to existing air quality control requirements, it is appropriate not to treat them as making CO_2 "subject to regulation" for purposes of Title V. *Cf.* Section 504(b) (providing EPA authority to specify requirements for "monitoring and analysis of pollutants regulated under this Act.").

EPA has not previously explicitly considered the question of when a pollutant becomes "subject to regulation" under this established interpretation of the Title V requirements.[15] EPA received comments in this reconsideration proceeding specifically on the question of when a pollutant becomes subject to regulation for purposes of Title V. In light of these comments, and the decision to adopt a "takes effect" approach for PSD, EPA believes it is appropriate to address this issue for Title V with respect to GHG.

EPA is mindful of the different purposes for the PSD and Title V programs under the statute. While PSD results in substantive control requirements as necessary to meet air quality goals, Title V is focused on identifying, collecting, and assuring compliance with other Act requirements (including PSD), and generally does not itself result in new control requirements. Nevertheless, as reflected in the Wegman Memo, the two programs have historically followed the same approach for determining when a pollutant is "subject to regulation."[16] EPA believes that a "takes effect" approach to the triggering of new pollutants is desirable and appropriate for Title V, for many of the reasons described above for PSD. EPA is therefore generally inclined to follow the approach adopted today for PSD, and concludes that GHGs are "subject to regulation," for purposes of determining whether a source of GHGs is a "major source" for Title V, no earlier than the date on which a control requirement for GHGs "takes effect." EPA currently anticipates that the LDV Rule will be the first control requirement for GHGs to take effect. Under this approach, as with PSD, if the LDV Rule takes effect as of January 2, 2011, a source that is not currently subject to Title V for its GHG emissions could become so no earlier than January 2, 2011.[17]

Finally, as with PSD, EPA expects that, beyond January 2, 2011, there will remain significant administrative and programmatic considerations associated with permitting of GHGs under Title V. In light of this, as discussed above with regard to PSD permitting, EPA will be further addressing in the final Tailoring Rule (to be promulgated in the near future) the manner in which sources can become subject to Title V as a result of their GHG emissions.

VII. Statutory Authority

The statutory authority for this action is provided by section 553 of the Administrative Procedure Act (5 U.S.C. 553) and the Clean Air Act (CAA), as amended (42 U.S.C. 7401 *et seq.*). Relevant portions of the CAA include, but are not necessarily limited to, sections 101, 165, 169, 301, 302, 307, 501, 502, and 504 (42 U.S.C. 7401, 7475, 7479, 7601, 7602, 7607, 7661, 7661a, and 7661d).

VIII. Judicial Review

This action is a nationally applicable final action under section 307(b) of the Act. As a result, any legal challenges to this action must be brought to the United States Court of Appeals for the District of Columbia Circuit by June 1, 2010.

Dated: March 29, 2010.

Lisa P. Jackson,

Administrator.

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[15] The preamble to the proposed Tailoring Rule implicitly assumed that a pollutant will become "subject to regulation" for PSD and Title V at the same time (and, in one case, suggests that time will be on promulgation of the LDV Rule). The latter statement was based on the interpretation in the current PSD Interpretive Memorandum, but failed to note that EPA had proposed to change that interpretation in the October 7, 2009 notice (signed the same day as the proposed Tailoring Rule). *See* 74 FR at 55300 and 55340–41.

[16] Wegman Memo at 5.

[17] This date is also when EPA expects the first CAA control program addressing GHGs at stationary sources (*i.e.,* the PSD program) to be in place.