STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EHR 0771, 0779, 0835 & 0836

NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK, INC., APPALACHIAN VOICES, ENVIRONMENTAL DEFENSE FUND, NATIONAL PARKS CONSERVATION ASSOCIATION, SIERRA CLUB, SOUTHERN ALLIANCE FOR CLEAN ENERGY, CAPE FEAR RIVERKEEPER, CATAWBA RIVERKEEPER, FRENCH BROAD RIVERKEEPER, LOWER NEUSE RIVERKEEPER, NEW RIVERKEEPER, PAMLICO-TAR RIVERKEEPER, UPPER NEUSE RIVERKEEPER, WATAUGA RIVERKEEPER, WACCAMAW RIVERKEEPER and YADKIN RIVERKEEPER,
Petitioners,

v.

N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF AIR QUALITY,
Respondent,

and

DUKE ENERGY CAROLINAS, LLC,
Intervenor-Respondent.

RESPONDENT DAQ'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS CO_2 PSD CLAIM

NOW COMES Respondent the Division of Air Quality of the North Carolina Department of Environment and Natural Resources ("DAQ"), by and through the undersigned counsel, and submits this memorandum of law. This

memorandum supports the pending motion to dismiss the Petitioners' claim regarding DAQ's alleged obligation to impose carbon dioxide (CO_2) emission controls in the permit ("the Permit") for Unit 6 of the Intervenor-Respondent's ("Duke") Cliffside facility under the Clean Air Act's ("CAA" or "the Act") Prevention of Significant Deterioration ("PSD") program.

The pending motion to dismiss was filed by Duke on July 18, 2008. See Duke Energy's Mot. to Dismiss Certain Claims of the Pet'rs. DAQ did not move to dismiss the CO_2 PSD claim. During initial briefing, DAQ elected not to present any argument on the issue except to note its view that DAQ was not required to impose CO_2 controls as the Petitioners suggest. Respondent DAQ's Reply in Support of Mot. to Dismiss at 19 (Sept. 29, 2008).

Since the close of briefing, the Petitioners and Duke have submitted several additional authorities for the ALJ's review. Because these authorities came to the ALJ in a haphazard manner which, in DAQ's view, tended to confuse the issues, DAQ moved for leave to file a brief, which motion was granted.

For the reasons stated below, the motion to dismiss the claim that DAQ was required to impose CO_2 controls through the PSD program should be granted.

SUMMARY OF ARGUMENT

The present motion turns on whether, with reference to the PSD program, the phrase "subject to regulation under this Act," as used in the CAA itself, or the phrase "otherwise is subject to regulation under the Act," as used in the U.S. Environmental Protection Agency's ("EPA") regulations (and DAQ's rules by reference) must be read to include CO_2. As demonstrated below, the answer to these questions is "No."

Congress used the terms "subject to" and "regulation" differently throughout the Act. CO_2 is not presently subject to actual emission controls under the Act. There is no clear indication in the PSD program that Congress intended the term "subject to regulation" to be read so broadly as to encompass pollutants such as CO_2 that are not subject to present, actual emissions controls. Several factors strongly indicate the opposite.

As used in the PSD rules, the scope of the phrase "otherwise is subject to regulation under the Act" is clear. The PSD rules define the term "regulated NSR pollutant" by listing categories of pollutants that are subject to actual limitations, not just monitoring and reporting requirements. The final category of that definition encompasses any pollutant that "otherwise is subject to regulation under the Act . . . ." Reading this final category broadly, as the Petitioners contend, would render the previous, limited categories superfluous – a highly disfavored

construction. The rule therefore must be read such that the phrase "otherwise is subject to regulation" is limited to the same types of pollutants regulated by the preceding, more specific categories. That is, the phrase "otherwise is subject to regulation" must refer only to those pollutants subject to present, actual control under the Act. Those pollutants do not include CO_2.

Even if this regulatory phrase were unclear, DAQ's interpretation is reasonable and therefore must be upheld. DAQ's consistent practice does not include CO_2 as a regulated pollutant under the PSD program. DAQ also can demonstrate that sweeping CO_2 into the PSD program would result in the regulation of an unwieldy number of relatively very small sources that have never been regulated in the PSD program or under any CAA program. For these reasons, deference to DAQ's interpretation is warranted. While such relevant facts are not alleged in the Petition and therefore are not before the ALJ at this time, DAQ raises these facts in order to caution the ALJ against any ruling as a matter of law that would foreclose consideration of this important and relevant evidence at a later time, for example on a motion for summary judgment.

Actions by EPA, other courts, etc. since DAQ issued the Unit 6 Permit do not impact the lawfulness of DAQ's decision. DAQ's PSD program is fully "approved" by EPA, meaning that DAQ can interpret and apply the program according to its own needs and judgment. Therefore, DAQ's interpretation may

differ from administrative and judicial interpretation by other States. As EPA has made clear, DAQ is not even required to agree with the federal government's interpretation, although currently EPA as well as DAQ interpret the PSD program not to encompass CO_2. Finally, on remand in Massachusetts v. EPA, 549 U.S. 497 (2007), EPA may ultimately regulate CO_2, rendering it subject to the PSD program, but EPA is only in the early stages of that process now and has not at this time made that decision.

ARGUMENT

I. STATUTORY, REGULATORY AND FACTUAL BACKGROUND

Pursuant to §109 of the CAA, EPA has established national ambient air quality standards ("NAAQS") for a number of air pollutants, known as "criteria" pollutants. See 42 U.S.C. §7401, 7409. A NAAQS is not an emission limitation; it is a concentration in the outside air that must not be exceeded. NAAQS have been established for sulfur dioxide, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead, but not for CO_2. 40 C.F.R. Part 50. In general, areas with ambient concentrations that exceed the NAAQS are designated as "nonattainment." Areas where ambient concentrations are below the NAAQS are designated as "attainment." 42 U.S.C. §7407(d). Different permitting requirements for new and significantly modified sources of air pollution apply based on the attainment status of the area in which the source is located. In

attainment areas, permits for new and modified sources are issued pursuant to the CAA's PSD requirements. 42 U.S.C. §7475. In nonattainment areas, the potentially more restrictive permitting requirements in §173, including requirements for "lowest achievable emissions rate[s]," apply. 42 U.S.C. §7503(a)(2). Because Duke's Cliffside facility is located in an area that is in attainment for all criteria pollutants, DAQ issued the Permit for Unit 6 under the PSD provisions.

The PSD provisions of the CAA serve to protect the public health and welfare from the potential adverse effects of air pollution "which in the Administrator's judgment may reasonably be anticipate[d] to occur" in areas that are in compliance with NAAQS. 42 U.S.C. §7470(1). But the PSD provisions also specifically allow for emissions increases in order "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources[.]" Id. §7470(3); see also id. §7473 (setting forth maximum allowable increases in certain pollutants).

Under the PSD program, no "major stationary source" may be constructed in an attainment area without a permit that conforms to the preconstruction requirements in CAA §165, id. §7475, and implementing regulations. See 40

C.F.R. §51.166.[1] A "major stationary source" is any stationary source that either (a) falls within specific enumerated categories of sources (including "[f]ossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input") and "emits, or has the potential to emit, 100 tons per year or more of any a [*sic*] regulated NSR pollutant" or (b) "emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant[.]" Id. §50.166(b)(1)(i)(a); see also 42 U.S.C. §7479(1) (similarly defining "major emitting facility").[2]

The regulations further define "major modification" as "any physical change in . . . a major stationary source that would result in[] a significant emissions increase . . . of a regulated NSR pollutant." 40 C.F.R. §51.166(b)(2)(i). An increase in emissions is "significant" if the increase exceeds a rate specified in the regulations for that pollutant, for example, 100 tons per year of carbon monoxide. Id. §51.166(b)(23)(i). If there is no rate specified for the pollutant then any emissions increase is considered "significant." Id. §51.166(b)(23)(ii). According

[1] DAQ concurs with the Petitioners' contention that Duke's citations to 40 C.F.R. §52.21 are "technically inaccurate" because North Carolina's program is controlled by §51.166, not §52.21. See Pet'rs' Response in Opp. to Duke Energy's Mot. to Dismiss. ("Pet'rs' Resp.") at 8 n.4. DAQ also agrees, for the reasons stated by the Petitioners, that this distinction does not affect the relevant analysis due to the similarities between §52.21 and §51.166 regarding relevant facets of the PSD program.

[2] A "major source" for the hazardous air pollutants ("HAP") program is defined quite differently. Compare 42 U.S.C. §7412(a)(1) (HAP definition of "major source") with id. §7479(1) (PSD definition of "major emitting facility"). A source may be "major" for one program and not the other.

to the Petition, Duke's Cliffside Unit 6 is a "major modification." Envtl. Defense Fund *et al.*, Pet. for a Contested Case Hearing ("EDF Pet.") at 11.

Pursuant to the PSD preconstruction requirements, a "major stationary source" cannot undertake a "major modification" unless the source "is subject to the best available control technology [('BACT')] for ***each pollutant subject to regulation under this Act*** emitted from, or which results from, such facility[.]" See 42 U.S.C. §7475(a)(4) (emphasis added). The federal regulations specify that the BACT requirement applies only to those pollutants that will experience emissions increases above the significance threshold as a result of the modification. 40 C.F.R. §51.166(j)(3).

BACT is defined in part as follows:

> [A]n emissions limitation . . . based on the maximum degree of reduction for a regulated NSR pollutant which would be emitted from any proposed major stationary source or major modification which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combination techniques for control of such pollutant.

Id. §51.166(b)(12).

In short, whenever a "major stationary source" undergoes a "major modification," it must be subject to BACT analysis and appropriate emission limitations for "each pollutant subject to regulation under this Act" that will have a

significant net increase in emissions as a result of the modification. The Petition implies that the construction of Unit 6 will result in a significant net increase in CO_2 emissions. See EDF Pet. at 11-12.

EPA has interpreted the phrase "subject to regulation under this Act" by developing the regulatory phrase "regulated NSR pollutant." "Regulated NSR pollutant" is defined as:

(i) Any pollutant subject to a NAAQS, and any identified constituent and precursor pollutants;

(ii) "[a]ny pollutant that is subject to any standard promulgated under section 111 of the Act [i.e. new source performance standards];"

(iii) "[a]ny Class I or II substance subject to a standard promulgated under or established by title VI of the Act [pertaining to stratospheric ozone protection];" and

(iv) "[a]ny pollutant that ***otherwise is subject to regulation under the Act***" and is not a hazardous air pollutant under CAA §112.

40 C.F.R. §51.166(b)(49) (emphasis added).[3]

None of the first three categories of the definition of "regulated NSR pollutant" apply to CO_2. The question in this case is whether CO_2, in the words of

[3] The definition summarized above was that in effect at the time DAQ issued the Permit in this case. The definition was revised effective July 15, 2008. See Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$), 73 Fed. Reg. 28,321 (2008). The revisions are not material to the outcome of this issue.

the CAA, is "subject to regulation under this Act," or, in the words of EPA's rule, "otherwise is subject to regulation under the Act." For the reasons set forth below, CO_2 is not within the scope of the PSD program, and DAQ was therefore correct in not imposing BACT limitations for CO_2.

While DAQ properly and reasonably determined that it did not have authority to limit CO_2 emissions from Unit 6 under applicable law, DAQ's interpretation cannot be characterized as being motivated by indifference on the part of DAQ or the Department of Environment and Natural Resources to the potential impacts of CO_2 as a global warming pollutant. In this case, permittee Duke was persuaded to request binding and enforceable CO_2 limitations in the Permit and DAQ put these unprecedented limitations in the Permit. Those limitations will result in the closure of 800 megawatts of coal-fired capacity at Duke's other facilities (in addition to the closure of the four smaller units at Cliffside). Ultimately, the Permit requires that Duke render Unit 6 "carbon neutral . . . ." See Permit at Attachment - Greenhouse Gas Reduction Plan. DAQ's interpretation of its authority was a recognition that the major decisions regarding CO_2 as a matter of course need to stem from appropriate changes in the laws and regulations that govern DAQ's permitting program.

II. THE PETITIONERS CANNOT PREVAIL BASED ON THE PLAIN LANGUAGE OF THE CLEAN AIR ACT

The first step in the statutory analysis is to determine if Congress has spoken to the precise question. "If the intent of Congress is clear, that is the end of the matter[.]" Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984). Congress has not spoken clearly on the precise issue in this case. The Petitioners' contention that the phrase "subject to regulation" leads necessarily to the conclusion that CO_2 must be considered in the BACT analysis is incorrect.

Step one of the Chevron analysis focuses on the text of the statute. Am. Forest & Paper Ass'n v. FERC, 550 F.3d 1179, 1180 (D.C. Cir. 2008). The phrase "subject to regulation" is comprised of two separate terms: "subject to" and "regulation."[4] "[S]ubject to" can mean, as the Petitioners contend, that the pollutant ***could be regulated*** under the Act, regardless of whether the Act itself contains any actual regulation of whatever type or whether EPA has promulgated any regulations. However, "subject to" can also be more narrowly construed to apply only if the pollutant is ***actually regulated***. Black's Law Dictionary (5th ed. 1979) defines "subject to" in part as "governed or affected by[.]" *Id.* at 1278. For a pollutant to be "governed . . . by" "regulation," that regulation must exist. See,

[4] The Petitioners also argue that CO_2 is an "air pollutant" as that term is defined in the Act. Pet'rs' Resp. at 8-9. DAQ agrees, and DAQ also agrees that the Supreme Court has foreclosed any other interpretation. See Massachusetts v. EPA, 549 U.S. 497, 532 (2007). However, that decision also leaves open whether CO_2 will actually be regulated, as that requires a decision by EPA first.

e.g., Gun Owners' Action League v. Swift, 284 F.3d 198, 207 (1st Cir.) (using the phrase "subject to regulation" to refer to existing regulation), cert. denied, 537 U.S. 827 (2002); Walcek v. United States, 303 F.3d 1349, 1352 (Fed. Cir. 2002) (using the terms "subject to regulation" and "regulated" interchangeably in context of Clean Water Act permit requirements).

In fact, the phrase "subject to" is used a second time in the BACT provision itself, and there the use embodies the more narrow interpretation. The statute states that a facility may not be constructed unless it "is ***subject to*** the best available control technology for each pollutant ***subject to*** regulation under this Act . . . ." 42 U.S.C. §7475(a)(4) (emphasis added). Because BACT is a pre-construction requirement,[5] the requirement that a facility be "subject to" BACT is more than a requirement that the facility could be required to install BACT; it is instead a requirement that the facility actually be controlled according to BACT limits.

Of course, EPA has the authority to regulate ***any*** "air pollutant" under the Act if it makes certain findings. See, e.g., 42 U.S.C. §7409(a) (allowing EPA to promulgate NAAQS). For example, EPA can directly control CO_2 emissions if it makes an "endangerment" finding; but EPA has not yet done so. See Massachusetts, 549 U.S. at 533. Had Congress intended the result that the

[5] The exact extent to which the BACT determination must be pre-construction has been briefed previously. See, e.g., Respondent DAQ's Reply in Support of Mot. to Dismiss at 14.

Petitioners desire, it could have made it crystal clear by simply referring to the statutorily defined term "air pollutant" instead of the using the undefined phrase "pollutant subject to regulation under this Act . . . ." After all, under the Petitioners' view, the phrases are coextensive.

The Petitioners cite nothing in the Act itself that requires the broader reading of the term "subject to." The Petitioners cannot sustain a plain language argument that "subject to" means only that EPA retains the unexercised authority to regulate.[6]

The Petitioners additionally argue that the term "regulation" means not only mandates to control actual emissions or ambient concentrations of CO_2 but also requirements merely to monitor and report CO_2 emissions. The plain language of the statute does not command the Petitioners' interpretation.

Various dictionary definitions of "regulation" have been urged in other venues on this issue. See, e.g., In Re Deseret Power Elec. Coop., 14 E.A.D. __, PSD App. No. 07-03, slip op. at 27-28 (Envtl. App. Bd. Nov. 13, 2008). Although the dictionary has been found helpful in resolving textual ambiguities, e.g., Pioneer Inv. Serv. Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 388 (1993), DAQ submits that the dictionary definitions in this case do not clarify the matter.

[6] Even if the broader reading were compelled, the Massachusetts case only establishes that EPA may regulate CO_2 if EPA makes certain preliminary findings. EPA has not made those findings yet. Although the ALJ need not reach the issue, even under the broad interpretation of "subject to," DAQ does not agree that Massachusetts rendered CO_2 "subject to" regulation presently.

The Act itself also does not use the word "regulation" consistently. For example, §206 requires the "prompt reporting of the emission of any unregulated pollutant . . . ." 42 U.S.C. §7525(a)(3)(B). Clearly in that context "unregulated" refers to a pollutant that is subject to reporting requirements, because the "unregulated pollutant[s]" to which the statute refers must be reported. This strongly implies that "regulated" means something other than being merely subject to reporting requirements.

Similarly, CAA §183(f)(4) bars a State from adopting "any standard respecting emissions from tank vessels subject to regulation under paragraph (1) unless such standard is no less stringent than the standards promulgated under paragraph (1)." Id. §7511b(f)(4). In turn, "paragraph (1)" mandates that EPA "promulgate standards applicable to the emission of VOCs and any other air pollutant from loading and unloading of tank vessels" and that such standards shall "require the application of reasonably available control technology . . . ." Id. §7511b(f)(1). The reference to "regulation" in §183(f)(4) thus contemplates rules that control emissions, not just monitoring and reporting.

Nevertheless, Congress has also used the term "regulation[]" at other times in the Act to refer to a requirement that a party "monitor emissions" and "report the results of such monitoring." Id. §7429(c). However, the Petitioners point to

nothing in the language that Congress employed in §165 that resolves this ambiguity in the context of the PSD program.[7]

In addition to analysis of the language of the Act, North Carolina courts permit the use of legislative history and the circumstances of a statute's enactment to determine whether a statute has addressed a specific issue. Shaw v. U.S. Airways, Inc., 362 N.C. 457, 460, 665 S.E.2d 449, 451-52 (2008). In this case, there is no formal legislative history that speaks to this issue directly. See Deseret, slip op. at 29 n.26 ("The parties have not drawn our attention to any relevant legislative history concerning the meaning of 'subject to regulation under this Act,' and we have found none."). The historical context indicates that CO_2's contribution to climate change was not an issue when §165 was enacted in 1977. This fact suggests that Congress did not intend to encompass CO_2 within the PSD program, see Shaw, 362 N.C. at 460-61, 665 S.E.2d at 460, but also can indicate that Congress simply did not address the question. It is also clear that Congress did not intend the scope of the CAA to be frozen in 1977; Congress meant for the Act to regulate other pollutants as information on their impacts became available.

[7] The Petitioners contend that §821 of the Clean Air Act Amendments of 1990 "regulates" CO_2 and does so "under this Act." Even if it is true that §821 is "under this Act," it does not inform the question of what Congress intended by the 1977 term "regulation" in §165. Although the phrase may be interpreted to "mean 'subject to *a* regulation' . . . the statute by its terms does not foreclose the narrower meaning . . . 'subject to control' (by virtue of a regulation or otherwise)." Deseret, slip op. at 33.

See 42 U.S.C. §7409(a)(2). The legislative history and historical context are therefore inconclusive.

In short, the CAA itself does not by its plain language compel the ALJ to conclude that the phrase "each pollutant subject to regulation under this Act" encompasses CO_2.

III. THE PLAIN LANGUAGE OF THE PSD RULES DEMONSTRATES THAT DAQ PROPERLY CONCLUDED THAT IT WAS NOT REQUIRED TO IMPOSE BACT FOR CO_2

Because the statute is unclear, the next step is to determine whether the agency's interpretation of the statute was reasonable. Am. Forest & Paper, 550 F.3d at 1180. In order to accomplish this, it must be determined whether, and if so, how the agency has addressed the issue.

The PSD rules define the term "regulated NSR pollutant." If CO_2 is a "regulated NSR pollutant," a BACT analysis for CO_2 must be performed if a "major modification" results in a significant net increase in CO_2 emissions. As discussed above, "regulated NSR pollutant" means any pollutant for which a NAAQS or §111 standard has been promulgated, certain substances controlled under CAA Title VI, and "[a]ny pollutant that ***otherwise is subject to regulation under the Act***" (except hazardous air pollutants under CAA §112). 40 C.F.R. §51.166(b)(49) (emphasis added).

This regulatory phrase on its face supports DAQ's decision not to impose BACT for CO_2. In its decision on the Cliffside Permit, DAQ explained its interpretation of the regulatory language by referring to EPA's August 2007 PSD decision regarding Deseret Power Electric Cooperative's power plant in Utah. (The appeal of that permit led to the Deseret opinion, which is discussed later.) DAQ agreed with EPA's articulation of the proper interpretation of the PSD rules. DAQ wrote:

> EPA states that "regulated NSR pollutant," means a pollutant regulated in one of three principal program areas -- NAAQS pollutants, pollutants subject to a section 111 NSPS, and class I or II substance under title VI of the Act -- and any pollutant "that otherwise is subject to regulation under the Act." 40 CFR 52.21(b)(50)(i)-(iv). As used in this provision, EPA interprets the phrase "subject to regulation under the Act" to refer to pollutants that are presently subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant. ***Because EPA has not established a NAAQS or NSPS for CO_2, classified CO_2 as a Title VI substance, or otherwise regulated CO_2 under any other provision of the Act, CO_2 is not currently a "regulated NSR pollutant."***

DAQ, Prevention of Significant Deterioration Rev. & Final Determination for Unit 6 at Duke Energy Carolinas LLC Cliffside Steam Station at 24 (Jan. 28, 2008) (emphasis added). This interpretation is mandated by the express terms of the rule.

The phrase "otherwise is subject to regulation under the Act" is not identical to the statute in that it includes the word "otherwise." Additionally, the phrase is preceded by three more detailed categories of pollutants that are subject to BACT requirements.

Under the doctrine of *ejusdem generis*, a court may "constru[e] the word 'otherwise' to mean 'in a similar manner' or 'similiarly [*sic*].'" Bd. of Educ. v. Harris, 444 U.S. 130, 153 (1979). The first three categories of the rule all are comprised of pollutants the emissions of which are actually controlled under the Act. That is, they are not merely subject to monitoring and reporting requirements. Categories (i), (ii) and (iii) in the definition of "regulated NSR pollutant" each specifically refer only to "national ambient air quality standard[s]" or "standard[s] promulgated under" specific provisions of the Act. The word "standard" is used repeatedly in §51.166, always in relation to emission or concentration limits, and never as a broad reference to monitoring and reporting rules. Categories (i), (ii) and (iii) being thus limited, the doctrine of *ejusdem generis* strongly suggests that the more generic category (iv) shares the common characteristics of its predecessors.

If the phrase "otherwise is subject to regulation under the Act" were as broad as the Petitioners argue, there would have been no need for the definition of "regulated NSR pollutant" to specifically include categories (i) through (iii). Under the Petitioners' interpretation, these categories are subsumed by the phrase "otherwise is regulated under the Act" and add nothing to the definition of "regulated NSR pollutant." Such interpretations are disfavored. See Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 581 n.8 (2007) (rejecting an interpretation of

EPA's PSD rules that would have rendered a portion a rule superfluous); see also Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). Under DAQ's interpretation, categories (i), (ii) and (iii) provide the necessary contours for category (iv).

Therefore, the phrase "otherwise is subject to regulation under the Act" admits of only one logical interpretation. "[R]egulated NSR pollutant" includes only those pollutants that are actually controlled under the CAA, and not those, like CO_2, that are only required to be monitored. Because DAQ adopted EPA's definition of "regulated NSR pollutant" by reference, see 15A N.C. Admin. Code 2D .0530(b), DAQ's interpretation is also clear.

The permissible scope of the statutory language has been discussed in the previous section. EPA's (and therefore DAQ's) interpretive rules are within the permissible scope of the statute and are therefore lawful.

IV. DAQ CAN DEMONSTRATE THAT ITS INTERPRETATION IS REASONABLE AND WITHIN THE PERMISSIBLE SCOPE OF THE RULE

Even if the regulatory definition of "regulated NSR pollutant" is unclear, DAQ's interpretation is entitled to deference so long as it is within the permissible scope of the regulations and not arbitrary. See Hospice at Greensboro, Inc. v. NC HHS Div. of Facility Servs., 185 N.C. App. 1, 13, 647 S.E.2d 651, 659, disc. rev. denied, 361 N.C. 692, 654 S.E.2d 477 (2007); Teasley v. Beck, 155 N.C. App.

282, 289, 574 S.E.2d 137, 141 (2002), disc. rev. denied, 357 N.C. 169, 581 S.E.2d 755 (2003). The question here is not, as Duke and the Petitioners argue, whether the ALJ must defer to EPA's interpretation, but only, if the regulation is unclear, whether DAQ's interpretation is permitted by the regulatory language and not unreasonable.

If the PSD rules are ambiguous (an argument DAQ makes here only in the alternative), DAQ's interpretation fits comfortably within the terms of the statute and the PSD rules, as shown above. The only issue under this alternative argument is thus whether DAQ's decision to refrain from regulating CO_2 under the PSD program was rationally based.

In evaluating an agency's interpretation of a regulation, the "agency's past pattern and practice in similar applications" is deserving of deference. See, e.g., Woodlief v. Mecklenburg County, 176 N.C. App. 205, 213, 625 S.E.2d 904, 909, review dismissed, 360 N.C. 492, 632 S.E.2d 775 (2006). There is no evidence yet before the ALJ of DAQ's consistent "past pattern and practice" and, given the posture of the case – Rule 12(b)(6) – DAQ cannot submit evidence of its historical practice at this stage of the litigation. To the extent that the ALJ deems that the regulations are unclear, such evidence would become relevant. DAQ requests that the ALJ refrain from foreclosing that option when ruling on the pending Rule 12(b)(6) motion because DAQ can produce such evidence.

DAQ's interpretation is also driven by the consideration that folding CO_2 into the PSD program would vastly increase the number of sources subject to regulation and would impose regulation on many types of sources previously not subject to control under the CAA. Again, the facts supporting this position are not in the record at this stage. However, data developed by EPA regarding its response to the Massachusetts decision indicate that interpreting "regulated NSR pollutant" to include CO_2 would result nationwide in sweeping into the PSD program an estimated 61,280 multi-family residential buildings, 88,000 commercial facilities and 85,788 industrial sources – a total of over 235,000 sources. See EPA Staff, Estimates of Facilities that Emit CO2 in Excess of 100 and 250 tpy Thresholds (May 2008) (EPA Doc. No. EPA-HQ-OAR-2008-318-0077).[8] PSD sources may undertake several actions each year that must be reviewed for PSD applicability and possibly permitted. For example, if CO_2 were regulated the addition of a hot-water heater at a large residential facility would need to be reviewed. Considering that North Carolina is currently home to only about 200 PSD sources, these numbers are daunting. Again, although the ALJ may not consider such facts when ruling on the pending Rule 12(b)(6) motion, DAQ asks that the ALJ appropriately frame any ruling on the pending motion so as to allow for the development of such facts on this issue if necessary.

[8] All documents identified in this memorandum with an "EPA Doc. No." are available at www.regulations.gov.

For these reasons, DAQ submits that if the ALJ determines that the PSD rules are not clear, a further development of the record will demonstrate that DAQ correctly interpreted applicable law and properly declined to address CO_2 through the PSD program.

V. DEVELOPMENTS SINCE DAQ ISSUED ITS PERMITTING DECISION SHOULD NOT AFFECT THE OUTCOME OF THIS CASE

Several formal opinions, EPA documents, etc. bearing on this question have been issued since DAQ granted the Cliffside Unit 6 Permit over a year ago. These documents, which will be discussed in turn, do not impact DAQ's final decision.

a. Longleaf

In Friends of the Chatahoochee, Inc. v. Longleaf Energy Assoc., LLC, No. 2008CV146398 (Ga. Super. June 30, 2008),[9] a trial court in Georgia held that the Georgia Environmental Protection Division erred by issuing a permit to a 1200 megawatt power plant without including CO_2 controls in its BACT determination. The trial court essentially concluded that the CAA was plain on its face and that CO_2 was "regulated" under the Act because EPA's rules contained numerous provisions requiring monitoring and reporting of CO_2 emissions. The court rejected the contention than EPA's rules applied only to pollutants for which EPA has promulgated actual controls. Slip op. at 6-9.

[9] A copy of the trial court's opinion is included in the record at Attachment 25 to Duke's Memorandum of Law in Support of its Motion to Dismiss Certain Claims of the Petitioners.

Georgia's air quality program is administered under its CAA state implementation plan ("SIP"). Like North Carolina, Georgia's SIP has been "approved" by EPA. 40 CFR §52.570(c) (indicating that Ga.'s PSD rules are "approved regulations"), §52.1775(c) (same for N.C.). "Approved" SIPs are tailored to meet the implementing State's needs and differ from State to State. See Virginia v. EPA, 108 F.3d 1397, modified, 116 F.3d 499 (D.C. Cir. 1997). It follows that administrative and judicial interpretations under "approved" SIPs also may vary by State, and that the interpretation given by Georgia's judiciary does not set national policy or control application of similar provisions in North Carolina. The trial court's opinion was also unreported. Therefore, it is, without a doubt, not binding authority on DAQ or the North Carolina Office of Administrative Hearings.

The Georgia court's analysis of the CO_2 BACT issue comprised only three pages. The bulk of the court's analysis is devoted to showing that monitoring and reporting requirements for CO_2 exist under the CAA. Id. at 7-8. But this is only a minor part of the inquiry. The court does little more than assume that "subject to" means potentially regulated by, and "regulation" refers to any regulations relating to CO_2 emissions, even those only dealing with monitoring and reporting. The only support the court cites in the text of the Act for its conclusion is that if Congress intended "regulation" to mean something narrower, it could have used

the more limited term "emission limitations." Id. at 8. This is hardly conclusive and fails to address Congress' competing uses of the terms "subject to" and "regulation" in the PSD sections and other parts of the Act, as discussed above. See Section II, supra. An opinion that is not binding authority is persuasive only by the power of its reasoning, which is far from compelling in this case.

The judgment is currently on appeal before the Georgia Court of Appeals. See Longleaf, No. A09A0387 (Ga. Ct. App. docketed Oct. 15, 2008). It has been submitted for decision without oral argument. Counsel for the plaintiffs in Longleaf has represented to the undersigned that the Georgia Court of Appeals must decide the matter before the end of the term, which is July 26, 2009.

The Petitioners assert that the Longleaf decision is not an outlier. Because this motion is being heard under Rule 12(b)(6), it is not appropriate for the ALJ to consider facts outside the Petition. However, DAQ submits that there is ample factual evidence that Longleaf is not the prevailing view. EPA Region 4, which covers an eight-state region in the Southeast, maintains a spreadsheet detailing coal-fired utility PSD projects.[10] According to EPA, 41 permits have been issued in the last 12 years – which is the entire period covered by EPA's spreadsheet – to the type of source under consideration in this case. These permits were issued by the State environmental agencies of Arkansas, Colorado, Florida, Georgia, Illinois,

[10] See www.epa.gov/region7/programs/artd/air/nsr/spreadsheets/national_coal_projects.xls.

Indiana, Iowa, Kentucky, Louisiana, Missouri, Montana, Nebraska, Nevada, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Utah, Wisconsin and Wyoming. Like DAQ, none of the 22 States listed above included CO_2 limitations in its PSD permits. DAQ does not ask that the ALJ consider this information at this stage. However, DAQ advises the ALJ of this information to request that the ALJ appropriately tailor his ruling on this issue so as not to foreclose the consideration of such relevant evidence at a more appropriate stage.

For all of these reasons, the Longleaf decision should not affect the outcome of this contested case.

b. EPA's Advanced Notice of Proposed Rulemaking

In Massachusetts, the Supreme Court held, *inter alia*, that (1) CO_2 is an "air pollutant" within the meaning of the CAA and (2) EPA could not reject a petition for rulemaking to control CO_2 emissions from motor vehicles on non-statutory grounds; that is, because the statute requires EPA to regulate emissions from motor vehicles that "may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. §7521(a)(1), EPA could not refuse to act for reasons unrelated to whether CO_2 causes an "endangerment." Neither of these holdings advances the Petitioners' contention that CO_2 is "subject to regulation."

Massachusetts was decided before DAQ issued the Cliffside PSD Permit. On July 30, 2008, EPA published in the Federal Register an Advanced Notice of

Proposed Rulemaking ("ANPR") regarding the regulation of greenhouse gases in direct response to the Court's Massachusetts judgment. 73 Fed. Reg. 44,354 (proposed).[11] In this ANPR, EPA stated: "EPA has historically interpreted the phrase 'subject to regulation under the Act' to describe air pollutants subject to CAA statutory provisions or regulations that require actual control of emissions of that pollutant." Id. at 44,420/2. However definitive this language appears to be, it is not a final agency statement. The ANPR is only an "***Advanced*** Notice of ***Proposed*** Rulemaking" (emphasis added). It is not conclusive as to EPA's interpretation and does not legally impact DAQ's decision.

The ANPR also offers regulatory options for the public to consider and comment on with regard to greenhouse gases. In doing so, it identifies pros and cons, one of which is particularly germane here. If CO_2 were a "regulated NSR pollutant" any new source that had the potential to emit more than 250 tons of CO_2 per year would require permitting. 40 C.F.R. §51.166(b)(1), (j). The 250 tons per year threshold is a statutory provision that EPA has no authority to alter. See 42 U.S.C. §7479(1). Moreover, any major source that underwent ***any*** physical change resulting in an increase of ***any*** amount of CO_2 would also need to be permitted. See New York v. EPA, 443 F.3d 880 (D.C. Cir. 2006). But see 40 C.F.R. §51.166(b)(2)(iii)(a) (excluding routine maintenance from PSD review). A

[11] The ANPR was submitted by Duke as Attachment A to its Reply in Support of Duke Energy Carolina's Motion to Dismiss Certain Claims of Petitioners.

physical change can be the replacement of dated parts which allows the source to operate with less interruption, thus causing an emissions increase on an annual basis. See Envtl. Def., 549 U.S. 561.

Of course, this would affect large industrial facilities such as Cliffside. However, CO_2 is emitted in far greater quantities than the traditional NSR pollutants, such as sulfur dioxide and nitrogen oxides.[12] In the ANPR, EPA estimated that a natural gas heater the size of a "very small commercial furnace" would trigger PSD review for CO_2. 73 Fed. Reg. at 44,498/3. This would vastly enlarge the regulatory sweep of the PSD program, as discussed in more detail in Section III, supra. The potential practical impacts of regulating CO_2 emissions from a large array of smaller sources through the PSD program are considerable, further demonstrating the problems inherent in subjecting CO_2 to the PSD program absent considered rulemaking or legislative input to guide the process.

c. Deseret and the Johnson Memorandum

Since DAQ issued the Cliffside Permit, EPA's Environmental Appeals Board ("EAB") has weighed in on the matter as well. In November 2008, the EAB[13] remanded to EPA a PSD permit for the Deseret Power Electric Cooperative

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[12] Simply because CO_2 is emitted in greater quantities does not mean that it is any more (or less) harmful than other pollutants. For example, polychlorinated biphenyls – PCBs – are toxic at exceptionally low quantities, quantities at which other harmful pollutants go unnoticed.

[13] Because North Carolina has an "approved" PSD program, the State issues PSD permits in its own capacity and those permits are appealed through the existing State process. In other

for a power plant in Utah.[14] The EAB concluded that the plain language of the statute did not compel the conclusion that CO_2 is "subject to regulation under this Act." Deseret, slip op. at 27-35. The EAB also found that the record did not support EPA's contention that EPA's own historical interpretation confined the agency to the conclusion that CO_2 is not "subject to regulation under this Act."[15] Id. at 35-54. The EAB remanded the case to EPA not with direction for EPA to include CO_2 BACT limits in its permit, but instead to allow EPA "to reconsider ***whether or not*** to impose a CO_2 BACT limit in light of the Agency's discretion to interpret, consistent with the CAA, what constitutes a 'pollutant subject to regulation under this Act.'" Id. at 63 (emphasis added); see also In re N. Mich. Univ. Ripley Heating Plant, 14 E.A.D. __, PSD App. No. 08-02 (Envtl. App. Bd. Feb. 18, 2009) (remanding to agency to reconsider CO_2 BACT issue in light of Deseret); EPA, Notice of Partial Withdrawal of Permit, In re Desert Rock Energy Co., LLC, PSD App. Nos. 08-03 *et al.* (Envtl. App. Bd. Jan. 7, 2009) (withdrawing

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states, EPA is the permitting authority or the State may issue permits as EPA's delegate. In those situations, permits are appealed to the federal EAB.

[14] The Deseret opinion was submitted to the record as part of the Petitioners' Motion for Leave to File Supplemental Authority in Further Opposition to Duke Energy Carolinas' Motion to Dismiss.

[15] The EAB reached the opposite conclusion than DAQ reached regarding the clarity of EPA's rule. However, the Deseret opinion omits some of the textual analysis set forth in Section III above. See slip op. at 43-46. The State respectfully disagrees with the EAB on this point.

decision not to include CO_2 BACT limits in a PSD permit because the decision relied on reasoning similar to Deseret).

The Deseret permit is currently pending again before EPA for a determination of whether CO_2 should be regulated under the PSD program. There is no schedule for a final disposition.

In light of the Deseret remand, EPA undertook to clarify its position regarding the meaning of "regulated NSR pollutant." On December 18, 2008, then-Administrator Johnson issued a detailed interpretive memorandum (the "Johnson Memo"),[16] by which he indicated that:

> As of the date of this memorandum, EPA will interpret this definition of "regulated NSR pollutant" to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant.

Mem. from Stephen L. Johnson, Adm'r, EPA, to Reg'l Adm'rs, EPA at 1 (Dec. 18, 2008). Then-Administrator Johnson expressly indicated that the purpose of the Memorandum was not to supersede the Deseret opinion, but instead to address the EAB's concern that the record in that matter contained insufficient indication of EPA's definitive interpretation. Id. at 2.

[16] A copy of the Johnson Memo was submitted to the ALJ as an exhibit with Duke Energy Carolinas, LLC's Notice of Supplemental Authority.

By its own terms, the Johnson Memo applies only to PSD permits issued by EPA directly or by States that issue permits on delegated authority from EPA. Id. at 2. As indicated above, North Carolina has an "approved" SIP. North Carolina's PSD permits are issued under its own authority and not as EPA's delegate. See Greater Detroit Resource Recovery Auth. v. EPA, 916 F.2d 317, 320-21 (6th Cir. 1990). Regardless, States with "approved" SIPs are free to interpret the phrase "regulated NSR pollutant" in the same manner reflected in the Johnson Memo. Johnson Memo at 3 n.1.

Notice of the Johnson Memo was published in the Federal Register. Clean Air Act Prevention of Significant Deterioration (PSD) Construction Permit Program, 73 Fed. Reg. 80,300 (2008). The Sierra Club and others then requested that EPA reconsider the Johnson Memo and stay its effectiveness. Administrator Jackson granted the petition for reconsideration, indicating that the reconsideration process would include a public comment period and that EPA would publish "a notice of proposed rulemaking in the Federal Register in the near future."[17] Ltr. from Lisa P. Jackson, Adm'r, EPA, to David Bookbinder, Sierra Club (Feb. 17, 2009). However, the Administrator specifically refused to stay the effectiveness of

[17] The petition of the Sierra Club *et al.* for reconsideration of the Johnson Memo was filed as an attachment to Petitioners' Response to Duke Energy Carolinas' Notice of Supplemental Authority. The Petitioners then filed Administrator Jackson's letter with their Second Response to Duke Energy Carolinas' Notice of Supplemental Authority

the Memorandum thus leaving in place EPA's position that CO_2 is not a "regulated NSR pollutant." Id. at 1.

Although Administrator Jackson observed that it should not be assumed "that the [Johnson M]emorandum is the final word on the appropriate interpretation of Clean Air Act requirements," she affirmed that the Johnson Memo "does not bind States issuing permits under their own State implementation plans." Id.

On January 19, 2009, the Johnson Memo was challenged in the United States Court of Appeals for the D.C. Circuit. See Sierra Club v. EPA, No. 09-1018 (D.C. Cir.). That matter has been held in abeyance pending the resolution of EPA's reconsideration process. Order, Sierra Club (No. 09-1018) (Feb. 19, 2009).

EPA's present interpretation of the extant regulatory text is that CO_2 is not a "regulated NSR pollutant." Should EPA alter its interpretation, the State is free to disagree. Therefore, these late authorities should not affect the ALJ's decision.

d. The Delaware SIP

On May 29, 2008, EPA incorporated into the Delaware SIP Delaware Regulation No. 1144. See Approval & Promulgation of Air Quality Implementation Plans; Delaware, 73 Fed. Reg. 23,101 (2008). This rule established emission limitations for stationary generators for the following pollutants: nitrogen oxides, nonmethane hydrocarbons, carbon monoxide, CO_2 and

particulate matter. All of these pollutants – except CO_2 – are subject to a NAAQS directly or as a precursor.

"[P]rovisions approved by EPA as part of states' SIPs should generally be related to attainment and maintenance of the NAAQS, consistent with the authority in section 110 of the CAA under which these plans are approved by EPA." Approval & Promulgation of Implementation Plans; Georgia, 71 Fed. Reg. 13,551, 13,552/1 (2006). In Regulation No. 1144, CO_2 is included in lists of other pollutants which are NAAQS-related. The rule is an integrated whole and EPA approved it as such, as a State always has the right to impose restrictions that are more stringent than federal law requires. See 42 U.S.C. §7416.

The fact that CO_2 emissions are directly limited in Delaware does not suggest that CO_2 is regulated under the CAA in all fifty States under the PSD program.[18] It would be both remarkable and antithetical to the CAA for one State

[18] Because this matter is pending on a Rule 12(b)(6) motion, the State must refrain from submitting evidence outside the pleadings. However, DAQ believes that it is advisable to inform the ALJ of the greater context of the Delaware SIP revision that is lost without a more developed record. Given the opportunity, the State can demonstrate that Delaware, in the process of promulgating Regulation No. 1144, observed "that CO_2 is not a federally regulated pollutant," that EPA's "decision to not regulate CO_2 does not prohibit Delaware from regulating its emissions," and that broad State authority allows Delaware "to control pollutants which may not be controlled federally, such as CO_2 . . . which . . . makes Delaware laws more stringent than federal laws." Mem. from Mark A. Prettyman to Lisa A. Vest at 3 (Dec. 6, 2005) (EPA Doc. No. EPA-R03-OAR-2007-1188-0002.7). In addition, the State can demonstrate that Regulation No. 1144 was specifically submitted as part of Delaware's attainment plan for ozone. Ltr. from John A. Hughes, Sec'y, Del. Dept. of Natural Resources & Envtl. Control, to Donald S. Welsh, Reg'l Adm'r, Region 3, EPA (Nov. 1, 2007) (EPA Doc. No. EPA-R03-OAR-2007-1188-0002). DAQ submits this information not for consideration on this Rule 12(b)(6) motion, but only to

to foist its policy preferences upon each of the United States in such a manner. The Act establishes specific mechanisms for States to directly influence the air pollution control programs of other States. E.g., 42 U.S.C. §7426(b)-(c) (allowing a downwind State to petition EPA for emission controls on sources in other states that unlawfully interfere with attainment or maintenance of ***national*** air quality standards in the downwind state); see also State of Connecticut v. EPA, 656 F.2d 902, 909 (2d Cir. 1981) ("Nothing in the Act . . . indicates that a state must respect its neighbor's air quality standards . . . if those standards are more stringent than the requirements of federal law."). Including an emission limit for CO_2 in a State rule, amidst a list of limits for pollutants otherwise controlled by the fundamental NAAQS process, is not one of those specific mechanisms for affecting regional or national policy.

Considering, as discussed above, that each State with an "approved" SIP is permitted to interpret the Act according to its needs (within the permissible scope of the Act), it is equally if not more relevant that CO_2 is not directly regulated in North Carolina. In 2005, the General Assembly created the Legislative Commission on Global Climate Change specifically to study global climate change and propose any "global warming pollutant reduction goal" it deemed "appropriate and desirable . . . ." 2005 N.C. Sess. L. 442, §5(2). The Commission is required to

caution the ALJ against a ruling at this stage that would foreclose the later development of such evidence.

report its findings and recommendations to the 2009 General Assembly. 2008 N.C. Sess. L. 81, §1. The North Carolina SIP, like the Delaware SIP, has been approved by EPA and indicates that CO_2 is not "regulated" in North Carolina.

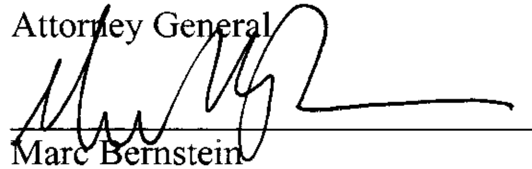
Therefore, the CO_2 provisions in the Delaware SIP do not require that DAQ submit all sources in North Carolina to PSD review for CO_2.

CONCLUSION

For all of the foregoing reasons, the motion to dismiss should be granted.

Respectfully submitted, this the 1st day of April 2009.

ROY COOPER
Attorney General



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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Respondent DAQ's Response to Appalachian Voices' Notice of Supplemental Authority has been served on the following counsel for the parties by first-class USPS mail, postage pre-paid and by electronic mail at the following addresses:

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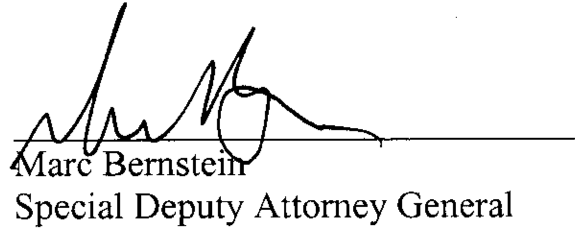

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