STATE OF INDIANA) BEFORE THE INDIANA OFFICE OF
) ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF)
SIGNIFICANT SOURCE MODIFICATION)
PERMIT NO. 089-25484-00453 TO)
BP PRODUCTS NORTH AMERICA INC.,)
WHITING BUSINESS UNIT)
)
SAVE THE DUNES COUNCIL, INC.,)
SIERRA CLUB, INC., HOOSIER)
ENVIRONMENTAL COUNCIL,) CAUSE NO. 08-A-J-4115,
08-A-J-4142
TOM TSOURLIS, SUSAN ELEUTERIO,)
)
Petitioners,)
)
BP PRODUCTS NORTH AMERICA, INC.,)
)
Respondent/Permittee)
)
INDIANA DEPARTMENT OF)
ENVIRONMENTAL MANAGEMENT,)
)
Respondent)
)

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

Preliminary Statement

Petitioners Save the Dunes Council, Inc ("Save the Dunes"), Sierra Club, Inc. ("Sierra Club"), and Hoosier Environmental Council ("HEC"), Tom Tsourlis, and Susan Eleuterio (collectively "Petitioners") submit this memorandum in opposition to Respondent BP Products North America, Inc.'s ("BP") motion to dismiss the counts of their Petitions requesting vacatur and remand of the subject permits for failure to comply with Clean Air Act ("CAA") requirements concerning greenhouse gas ("GHG")

emissions. The motion is grounded in a determination by the United States Environmental Protection Agency ("USEPA") that USEPA has since explicitly reversed. Absent that now-defunct determination, the remainder of BP's motion has no merit.

Petitioners' claims regarding the need to include GHGs in the Prevention of Significant Deterioration ("PSD") netting analysis is grounded squarely in the applicable statutes. The CAA expressly provides that PSD requirements apply to any pollutant that is "subject to regulation" under the CAA. GHGs fall within this definition both because they are capable of being regulated under the CAA, and because they actually are regulated – and have been since regulations were promulgated in 1993 – under Section 821 of the CAA Amendments of 1990, which expressly require monitoring of carbon dioxide ("CO_2").

BP asserts that, notwithstanding these statutory requirements, CO_2 need not be included in PSD netting analysis because of a recent USEPA administrative interpretation to the contrary. That interpretation, however, was expressly reversed by USEPA in a determination rendered February 17, 2009 granting reconsideration and announcing a full notice and comment rulemaking process. Thus, the only USEPA interpretation of the subject question is the USEPA Environmental Appeals Board ("EAB") determination cited by Respondent in Deseret Power Electric Cooperative, PSD Appeal No. 07-03 (USEPA EAB, Nov. 13, 2008), in which the EAB declined to hold that GHGs are exempt from PSD requirements. This controlling opinion in fact rejected the very notion put forth by BP and IDEM, i.e., that PSD requirements only apply to pollutants subject to a statutory or regulatory provision that requires actual control of emissions. Id., slip op. at 41.

BP's contention that Petitioners lack standing for the GHG claims has no merit. First, a motion to dismiss is an inappropriate procedural context for this contention, as BP has grounded it in unsubstantiated factual allegations regarding the nature of climate change impacts that are not found in, or supported by, the Petitions. Second, standing for a permit challenge is determined with respect to the permit as a whole, not on a pollutant-by-pollutant basis. There is no legal support for the notion that Petitioners can have standing to challenge the manner in which a single permit addresses one pollutant, but not another. And third, to the extent facts extraneous to the Petitions are considered at all (and they should not be), BP is simply wrong in its unsubstantiated contention that climate change affects all parts of the globe – and hence injures all people – equally and in the same manner. On the contrary, much scientific research has been devoted to understanding the manner in which some localities may be impacted in different and more severe ways than others, and Northwest Indiana – whose citizens will suffer particularized injury from, e.g., more frequent and severe storms and dropping Lake Michigan levels – is one such locality.

STATEMENT OF FACTS

BP's motion concerns an individual claim set forth in two companion permit challenges filed by Petitioners, one to the permit to construct issued to BP on May 1, 2008 (Significant Source Modification No. 089-25484-00453), OEA Cause No. 08-A-J-4115), and the other to the CAA Title V permit to operate issued to BP on June 16, 2008 (Significant Permit Modification No. 089-25488-00453, OEA Cause No. 08-A-J-4142) (collectively, the "Permits"), in connection with a proposed expansion of BP's Whiting, Indiana refinery (the "Project").

In these challenges, Petitioners raised multiple issues concerning both the determination by the Indiana Department of Environmental Management ("IDEM") that BP had "netted out"[1] of significant increases in particulate matter (PM/ PM_{10} and $PM_{2.5}$), nitrogen oxides (NO_x), sulfur dioxide (SO_2), carbon monoxide (CO), and volatile organic compounds (VOCs); and concerning IDEM's failure to perform any netting analysis at all for $PM_{2.5}$, mercury, beryllium, and GHGs. Petitioners also alleged that the Permits are not enforceable as a practical matter; and that they cause or contribute to a violation of the National Ambient Air Quality Standards (NAAQS)," or are "not protective of the public health" in contravention of 326 IAC 2-1.1-5(a)(1).

The parties are in the process of completing fact and expert discovery on these issues. In response to the initial written discovery requests received from BP, Petitioners identified members of each of the Petitioner organizations who can testify regarding harm from the Project for purposes of standing. In addition, in response to various interrogatories concerning the substance of Petitioners' claims, Petitioners incorporated by reference their comments submitted to IDEM following issuance of the draft Permits. See relevant excerpts from Petitioners response to BP's First Set of Interrogatories, Requests for Admission, and Request for Production of Documents (Appendix 1) and Petitioners' Comments dated March 24, 2008 (Appendix 2). Following the exchange of written discovery, BP took the depositions of several of the witnesses concerning standing identified by Petitioners, and of the two individual Petitioners.

[1] A more complete description of the PSD "netting" process is set forth in Count 1 of both Petitions. In brief, the law requires PSD analysis and Best Available Control Technology for any major modification that increases a regulated pollutant above specified significance thresholds. However, a source may "net out" of a significant increase if it can demonstrate that the sum of all contemporaneous increases and decreases is below those thresholds.

Point I

PETITIONERS HAVE STANDING TO CHALLENGE THE PERMITS, AND TO RAISE ISSUES RELATED TO GHG EMISSIONS IN THAT CHALLENGE

A. BP Cannot Defeat Petitioners' Standing through a Motion to Dismiss based on Unsubstantiated Factual Allegations

BP's burden on a motion to dismiss is high, and the granting of such a motion is "rarely appropriate." State v. American Family Voices, Inc., 898 N.E.2d 293 (Ind. 2008) (citations omitted). A motion to dismiss "tests the legal sufficiency of a complaint," such that "the facts alleged in the complaint must be taken as true and only where it appears that under no set of facts could plaintiffs be granted relief is dismissal appropriate." Ogden v. Premier Properties USA, Inc., 755 N.E.2d 661, 665 (Ind. App. 2001). "A court should accept as true the facts alleged in the complaint, and should not only consider the pleadings in the light most favorable to the plaintiff, but also draw every reasonable inference in favor of the non-moving party." Babes Showclub v. Lair, No. 49A05-0805-CV-262, 2009 WL 368583 (Ind.App. 2009). Thus, in deciding BP's motion to dismiss, this Court must assume all facts pleaded in the Petitions to be true and must draw every reasonable inference from those pleaded facts in Petitioners' favor.

Notwithstanding this clear rule, BP seeks dismissal of the Petitions based upon extraneous factual allegations that are found nowhere within the four corners of the Petitions; contradict all appropriate favorable inferences that may be drawn from the Petitions; and, to the extent they may be considered at all, are wholly contrary to fact. Specifically, BP's contention that Petitioners lack standing to bring their claims related to GHGs is grounded in factual assertions set forth in their legal memorandum that "[g]lobal warming is, by definition, a global problem," and that the harm from global warming is

"indistinguishable from the harm (if any) suffered by hundreds of millions of people worldwide"; and "indistinguishable from the harms (if any) that a citizen of Bangla Desh [sic] or Hong Kong or Brazil, or in fact any person in the *world*, might suffer as a result of the Project." BP Memorandum in Support of Motion to Dismiss ("BP Memorandum") at 3, 6.

As discussed in more detail in subsection C. below, these assertions are factually wrong. But in the first instance, they simply have no place in a motion to dismiss. The Petitions allege that Petitioners residing in Northwest Indiana near the subject refinery will be "adversely impacted by the impacts of global climate change, which carbon dioxide emissions from the Project will exacerbate." Nothing in the Petitions can be construed to support a contention that the particularized impacts of climate change on Petitioners' members in Northwest Indiana, where Petitioners reside, are identical in kind and degree to the impact on citizens in Bangladesh, Hong Kong, and Brazil.

Underlying BP's contentions, moreover, appears to be an incorrect assumption regarding the nature of the standing injury that Petitioners have alleged. It is not, as BP suggests, the general phenomenon of "global warming" that gives rise to Petitioners' injury, but rather the *impacts* of that phenomenon on Petitioners, and the particularized injury caused by those impacts. Climate change impacts, as discussed below, take different forms in different geographic locations (a fact documented by Petitioners in discovery and, at minimum, representing an appropriate inference from the facts pleaded in the Petitions).

BP has thus failed to meet its burden to demonstrate the absence of any set of facts under which Plaintiffs could prove standing for their GHG claims. Accordingly, BP has no basis to object to Petitioners' standing via a motion to dismiss.

B. Standing to Challenge a Permit Before the OEA is Conferred as a Whole, Not on a Pollutant-by-Pollutant Basis

BP's seeks a determination not that Petitioners lack standing generally, but that they lack standing specifically to assert their claims regarding GHG pollutants, and BP and IDEM's failure to conduct netting and BACT analysis for these pollutants. This attempt to break apart Petitioners' claims and piecemeal their entitlement to standing finds no support in the law.

The Indiana Administrative Orders and Procedures Act ("AOPA") expressly defines the standing requirements for the Office of Environmental Adjudication ("OEA"), and judicial requirements for standing do not apply. Huffman v. OEA, 811 N.E.2d 806, 809 (2004). Under the AOPA, Petitioners have standing to challenge an administrative order – here, the granting of the Permits – if they are "aggrieved or adversely affected by the order." Ind. Code § 4-21.5-3-7(a)(1) (1998). The plain language of this administrative standing provision does not allow the piecemealing of standing advocated by BP in a challenge to an administrative order. To the extent Petitioners can demonstrate that they are aggrieved or adversely affected by the order in any cognizable manner – e.g., by anticipated Project emissions of CO, NO_x, SO_2, VOCs, and other pollutants that can clearly have a localized impact – they have standing to challenge that order. Nothing in the AOPA purports to limit the issues that may be raised that challenge.

BP does not assert for purposes of this motion that Petitioners lack standing to

challenge other aspects of IDEM's order issuing the permit, i.e., Petitioners' multiplicity of claims regarding pollutants other than GHGs and other aspects of the netting analysis. Nor could it, as Petitioners have sufficiently alleged particularized harm from multiple pollutants associated with the Project in the Petitions. Specifically, for example, the Petitions state with respect to Petitioner Save the Dunes Council, Inc. as follows:

> Save the Dunes has approximately 200 members who live in Lake County near the Project and will be adversely affected by the Project's air emissions, as well as additional members in Illinois and Indiana who will also be adversely affected by the Project's air emissions. Some of these members' households include children, elderly citizens, and others who are particularly sensitive to the health impacts of the air pollution that will be emitted by the Project. These members and their households, particularly those among them who are sensitive to the health impacts of air pollution, will suffer significant harm if the Project's air emissions are not limited in the manner requested in this petition.

Amended Petition for Review and Stay of Effectiveness ¶ 1.[2] The Petitions contain similar allegations with respect to the other organizational Petitioners. The Petitions further state,

> The proposed facility will emit large amounts of air pollutants that pose a threat to human health and welfare, including but not limited to particulate matter (PM/ PM_{10} and $PM_{2.5}$), nitrogen oxides (NO_x), sulfur dioxide (SO_2), carbon monoxide (CO), and volatile organic compounds (VOCs). It also emits large amounts of carbon dioxide (CO_2), which contributes to global climate change. These pollutants will adversely affect the health and welfare of Petitioners who are thus aggrieved by IDEM's decision to issue the Permit.

Id. ¶ 12.

Thus, since Petitioners have unchallenged standing to file their Petitions based on a harm they allege they will suffer as a result of IDEM's orders granting the Permits for the Project, there is no basis in the AOPA to further confine the bases for that challenge

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[2] The standing allegations are identical in both of the companion Petitions challenging the construction and operating permits.

so as to foreclose Petitioners' claims regarding GHG emissions associated with the Project.

Since, as discussed above, the AOPA exclusively governs standing before the OEA rather than judicial doctrines, BP's reliance on federal caselaw on that issue is inappropriate. See BP Memorandum at 4, citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006). Moreover, DaimlerChrysler is substantively inapposite, as it concerned an attempt to bootstrap standing for a challenge to one government action through standing to challenge an entirely separate (albeit contemporaneous) action, rather than a unitary challenge to a single administrative action. The DaimlerChrysler Court drew precisely that distinction:

> In defending the contrary position, plaintiffs rely on three cases from the Courts of Appeals. But two of those cases hold only that, once a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all grounds on which the agency may have " 'failed to comply with its statutory mandate.' " Sierra Club v. Adams, 578 F.2d 389, 392 (C.A.D.C.1978) (quoting Sierra Club v. Morton, 405 U.S. 727, 737, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)). . . . They do not establish that the litigant can, by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him.

Id.,547 U.S. at 353 (citations omitted).

In the Sierra Club v. Adams decision cited and expressly distinguished by the Court, the plaintiffs challenged the inadequacy of an environmental impact statement ("EIS") prepared in connection with a highway construction project, alleging that the EIS neglected to evaluate multiple types of environmental impacts. The Court rejected the government's contention that the Sierra Club had standing to challenge only failure to evaluate the specific impacts that would injure Sierra Club members, and not other types of impacts that would not. The Court held that, "having established standing to challenge

the adequacy of the FEIS on at least one ground, they are entitled to raise other inadequacies in the FEIS based upon the 'public interest' in requiring government officials to discharge faithfully their statutory duties." 578 F.2d at 392. Accord Citizens Committee Against Interstate 365 v. Lewis, 542 F. Supp. 496 (S.D. Ohio 1982) (citizens challenging sufficiency of environmental impact statement in connection with a highway project had standing to challenge failure to consider all impacts of the project, not only those impacts that harm them specifically). Similarly, in Alaska Center for the Environment v. Browner, 20 F.3d 981 (9th Cir. 1994), where the plaintiffs challenged failure of the United States EPA to implement certain water quality protection measures in water bodies throughout Alaska, the court rejected the contention that plaintiffs needed to prove injury to their use and enjoyment of each and every water body in the state. It was sufficient, the court held, that they had made such a showing with respect to some such water bodies, since the injury flowed from a single governmental failure. Id. at 985.

C. Impacts from Climate Change Will Have a Particularized Impact on Citizens of Northwest Indiana

As noted above, BP is inappropriately basing its motion to dismiss on unsubstantiated factual assertions that the impacts of climate change are uniform throughout the world. Aside from the fact that these assertions are inappropriate in the context of a motion to dismiss, they are also wrong. To the extent they may be considered at all (and they should not be), they are roundly disproven by information already provided to BP in discovery.

In Petitioners' comments to IDEM produced to BP in response to its initial interrogatories and document requests, Petitioners explained as follows:

> [E]mission of GHGs such as CO_2 are a threat to public health and welfare nationwide, including and especially in Indiana. See section III.G of this comment. See also George L. King et al., "Confronting Climate Change in the Great Lakes Region," Union of Concerned Scientists 2003 (available at http://www.ucsusa.org/greatlakes/glchallengereport.html) and Indiana State Summary (available at http://www.ucsusa.org/assets/documents/global_warming/ucssummaryINfinal.pdf) (both incorporated by reference). According to these reports, among other things, water levels in Indiana are expected to decline in both inland lakes and Lake Michigan as a result of climate change, as more moisture evaporates due to warmer temperatures and less ice cover. Moreover, reduced summer water levels are likely to diminish the recharge of groundwater and cause small streams to dry up – thereby increasing the pressure to extract more water from the Great Lakes. The duration of summer stratification of lakes will increase, adding to the risk of oxygen depletion and formation of deep-water "dead zones" for fish and other organisms.

Petitioners' Comments at 17 n. 19 (Appendix 2). The Union of Concerned Scientists Indiana State Summary to which Petitioners provided a link (Appendix 3) sets forth extensive information concerning specific harms to Indiana – and, in some cases (e.g., dropping Lake levels) to Northwest Indiana in particular – associated with climate change in terms of human health, agriculture, and property and infrastructure damage.

Although federal law does not govern standing before the OEA, the U.S. Supreme Court's 2006 decision in Massachusetts v. EPA, 549 U.S. 497 (2006) concerning authority under the CAA to regulate GHGs provides helpful analysis of standing based on harm associated with climate change. In that case, the Supreme Court granted standing based on such harm, holding, "That these climate-change risks are 'widely shared' does not minimize [Plaintiff's] interest in the outcome of this litigation." 549 U.S. at 522. The plaintiff state in question had alleged, inter alia, that rising sea levels would impact its coasts locally, and allegations of that nature were deemed sufficient to confer standing. Id. Here, as in Massachusetts v. EPA, the fact that many throughout the

world will suffer from the impacts of global climate change does not alter the fact that citizens of Northwest Indiana will be impacted in a particularized manner. The existence of many different types of harm from climate change elsewhere on Earth should not deprive Indiana citizens of their right to seek redress for climate change injuries particular to them.

Point II

THE CAA REQUIRES THAT GHGS BE EVALUATED IN NETTING ANALYSIS AND CONTROLLED WITH BEST AVAILABLE CONTROL TECHNOLOGY

BP's motion is grounded in the argument that (i) USEPA and IDEM have rejected the reading of the CAA set forth by Petitioners, and (ii) the agencies' interpretation is consistent with the language of the statute. This argument suffers from the significant twin problems that, with respect to (i), USEPA reversed informal and erroneous interpretation after BP filed its initial motion papers, leaving in place only the controlling interpretation of the Environmental Appeals Board in the Deseret decision discussed below; and with respect to (ii), BP never actually addresses at all the substance of the statutory interpretation proffered by Petitioners, much less demonstrates how its own reading is consistent with the CAA.

A. USEPA has Reversed Its Informal Interpretation of the CAA Relied on by BP

BP's motion relies heavily upon the "USEPA Memo" issued by former USEPA Administrator Stephen L. Johnson in December, 2008. BP Memorandum at 8. Unfortunately for BP, that Memorandum and its flawed position no longer represent USEPA's view on the matter.

The USEPA Memo was issued in response to the USEPA Environmental Appeals Board ("EAB") decision in Deseret Power Electric Cooperative, PSD Appeal No. 07-03 (USEPA EAB, Nov. 13, 2008) BP Memorandum Appendix 1. In that decision, the EAB rejected USEPA Region 8's interpretation of the CAA as precluding application of PSD permitting requirements to CO_2 emissions based on historical interpretation, and ordered the Region to determine whether CO_2 should have been part of the PSD permitting analysis. Deseret, slip op. at 63. The EAB cited the preamble to the PSD program added by Congress in 1978 as the best and only credible prior agency interpretation on point. Id., slip op. at 38. As the EAB emphasized, this preamble read "subject to regulation" as meaning "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type." Id. The EAB then found no other prior USEPA statements supporting the argument relied on by BP and IDEM that "subject to regulation" means a regulation or statutory provision requiring actual control of emissions. See id., slip. op. at 42-49, 53-54, and 55. Accordingly, the EAB ordered the Region to re-open the matter for public comment and develop a record on the matter, and suggested the possibility of an agency-wide rulemaking as well. Id., slip op. at 64.

Shortly thereafter, former Administrator Johnson signed the USEPA Memo, purporting to unilaterally interpret the relevant CAA language addressed in Deseret. However, since USEPA had completely disregarded EAB's requirement that the determination be based on development of a record through notice and comment rulemaking, multiple citizens' organizations filed a Petition for Reconsideration on January 6, 2009 (Appendix 4).

On February 17, 2009, USEPA Administrator Lisa P. Jackson issued a determination granting the motion for reconsideration (Appendix 5). In it, Administrator Jackson noted that the USEPA Memo not only fails to bind states issuing permits under their own implementation plans (as does Indiana), but that "given the Agency's decision to grant reconsideration of the [USEPA Memo], other PSD permitting authorities should not assume that the memorandum is the final word on the appropriate interpretation of Clean Air Act requirements."

Accordingly, pending the rulemaking that Administrator Jackson stated will soon commence, there is now no current definitive USEPA interpretation of the relevant statutory language. The only legitimate statement interpreting "subject to regulation" therefore is the 1978 Preamble, as held by the controlling EAB opinion in Deseret. Thus, to the extent there is any ambiguity in that language – as discussed in subsection B., Petitioners believe there is not – there is no valid and extant USEPA interpretation that would contravene a finding that IDEM was required to include GHGs in its BACT analysis. Regardless of any incorrect agency interpretation of the relevant CAA language – but particularly in the absence of any such language – the CAA must be given its plan meaning.

B. The CAA Unambiguously Requires Evaluation of CO_2 Emissions in PSD Permitting.

With respect to substantive statutory interpretation issue at the heart of this motion – the question whether the CAA requires evaluation of GHGs (specifically CO_2) in PSD permitting – BP confines itself to a cursory reference to Petitioners' description of the statute's requirements. BP Memorandum at 7; and centers its argument around brief

quotations of contrary interpretations set forth in USEPA's (no longer extant) informal interpretation and from IDEM's response to comments concerning the Permits.

BP acknowledges, and cites authority, for the longstanding principle that agency interpretations of a statute are valid only to the extent that they are not inconsistent with the statute itself. BP Memorandum at 9-10. However, the only case that BP actually makes as to why its preferred interpretation comports substantively with the language of the statute is an argument of convenience, not law – i.e., that the interpretation would cause substantial inconvenience to the regulated community. BP Memorandum at 10.

As discussed below, a focus on the language of the CAA itself, rather than on erroneous agency interpretations and BP's policy concerns, reveals that CO_2 is an NSR pollutant "subject to regulation" under the CAA as currently written. BP and IDEM were therefore required to include netting analysis and, as necessary, BACT analysis, for CO_2.

The construction of a new major stationary source of air pollutants is prohibited except in accordance with a PSD permit issued by IDEM. 42 U.S.C. § 7475(a); 326 IAC 2-2. The PSD provisions require netting analysis "for each pollutant subject to regulation" under the Act. 42 U.S.C. § 7475(a)(4); 326 IAC 2-2-1(uu). CO_2 is an air pollutant "subject to regulation" under the Act and, therefore, must be controlled by a BACT limit. As the U.S. Supreme Court recently found, it is "unambiguous" that CO_2 falls within the Act's "sweeping definition" of "air pollutant," which includes "any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters into the ambient air." Massachusetts v. EPA, 127 S. Ct. 1438, 1460 (2007); 42 U.S.C. § 7602(g).

i. CO_2 is "subject to regulation" even under BP and IDEM's strained and unsupported reading, as the EPA-approved Delaware State Implementation Plan requires actual control of CO_2 emissions.

CO_2 is "subject to regulation" even taking the exceedingly narrow and unsupported reading of this language advocated by IDEM and BP. Respondent claims that "'subject to regulation' [refers to] pollutants that are subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant." BP Memorandum at 8. The Delaware State Implementation Plan ("SIP") includes USEPA-approved regulations establishing, among other things, *CO_2 emission limits.* Del. Admin. Code 7 1000 1144 (imposing an emission standard on carbon dioxide of 1,900 lb/MWh and including other regulations of CO_2 such as operating requirements, recordkeeping and reporting requirements, and emission certification, compliance, and enforcement obligations for new and existing stationary generators); 73 Fed. Reg. 23,101 (Apr. 29, 2008); 40 C.F.R. § 52.420(c). By approving inclusion of these provisions into Delaware's SIP, USEPA has confirmed through its formal rulemaking powers that CO_2 is "subject to regulation" under the Act, as SIPs are developed pursuant to Sections 110 and 113 of the Act, 42 U.S.C. §§ 7410, 7413, and become federally enforceable parts of federal law upon approval by USEPA. El Comite Para El Bienestar de Earlimart v. Warmerdam, 539 F.3d 1062, 1066 (9th Cir. 2008); Espinosa v. Roswell Tower, Inc., 32 F.3d 491, 492 (10th Cir. 1994); Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 335 (6th Cir. 1989).

In any event, however, this truncated interpretation of "subject to regulation" offered by IDEM and BP violates basic rules of statutory construction in two respects. It

reads the words "subject to" out of the Act, in contravention of basic rules of statutory interpretation requiring that "every word in the statute must be given effect and meaning, with no part being held meaningless." State v. Universal Outdoor, Inc., 880 N.E.2d 1188 (Ind. 2008). Had Congress wished to limit the applicability of PSD to pollutants that are "actually regulated," it could have done so. It did not. Friends of the Chattahoochee, Inc. v. Couch, Docket No. 2008CV146398, slip. op. at 7 (Ga. Sup. Ct. June 30, 2008) (Appendix 6) (holding that the plain language of the CAA requires CO_2 be included in PSD permitting analysis). In addition, Congress could have limited the term "regulation" to "actual control of emissions," but did not. Limiting Congress' language in this manner would inject words impermissibly where none were included. See City of Crown Point v. Misty Woods Properties, LLC, 864 N.E.2d 1069, 1076 (Ind.Ct.App. 2007) ("courts will not add something to a statute that the legislature has purposely omitted"). Instead, by using the phrase "subject to regulation," the CAA applies PSD permitting requirements both to pollutants for which regulations have been promulgated, and to pollutants for which the USEPA and states possess as yet unexercised authority to regulate.

ii. CO_2 is actually regulated under Sections 821 and 111 of the CAA and the Indiana SIP.

As put forth above, the phrase "subject to regulation" does not include – and cannot be read to include – an artificial limitation on the meaning of "regulation" such that the term encompasses only actual control of emissions. The term instead encompasses other regulations such as monitoring and reporting requirements. Thus, PSD requirements apply to CO_2 because CO_2 currently is regulated in numerous ways under several provisions of the CAA.

Section 821 of the CAA Amendments of 1990 directed USEPA to "promulgate regulations" requiring certain sources, including coal-fired electric generating stations, to monitor CO_2 emissions and report monitoring data to EPA. 42 U.S.C. § 7651k note. In 1993, USEPA promulgated regulations to implement Section 821, which generally require monitoring of CO_2 emissions through installation, certification, operation and maintenance of a continuous emission monitoring system or an alternative method, 40 C.F.R. §§ 75.1(b), 75.10(a)(3); preparation and maintenance of a monitoring plan, 40 C.F.R. § 75.33; maintenance of certain records, 40 C.F.R. § 75.57; and reporting of certain information to EPA, including electronic quarterly reports of carbon dioxide emissions data, 40 C.F.R. §§ 75.60 – 64. Operation of a covered source in absence of compliance with these provisions is prohibited, 40 C.F.R. § 75.5, and the knowing submission of false monitoring reports is subject to criminal sanction, 42 U.S.C. § 7413(c)(2). Therefore, CO_2 is plainly "subject to regulation" under the Act because it is actually regulated pursuant to Section 821 of the 1990 Clean Air Act amendments.[3] Friends of the Chattahoochee, slip. op. at 7.

Indiana has adopted these regulations in its approved SIP, 326 Ind. Admin. Code 21, and included them as requirements in permits issued to other facilities in the state. See Permit T083-7243-00003 § E.1 p. 88 (January 25, 2008) (the Edwardsport coal

[3] Additionally, In the Fiscal Year 2008 Consolidated Appropriations Act, Congress specifically required EPA to undertake rulemaking to establish monitoring and reporting requirements for all greenhouse gases (including CO2), economy wide. H.R. 2764; Public Law 110–161, at 285 (enacted Dec. 26, 2007). Congress made clear that the agency is "to use its existing authority under the Clean Air Act" including "existing reporting requirements for electric generating units under section 821 of the Clean Air Act" in adopting these regulations. Conference Report for the Consolidated Appropriations Act, at 1254.109 This action by Congress not only confirms that Section 821 is part of the Clean Air Act, but also establishes a separate and distinct statutory obligation to regulate CO_2 through mandatory emission monitoring requirements under the Act. In fact, the EPA's regulatory obligations under the Appropriations Act are much broader than the agency's duties under Section 821 as the Appropriations Act requires *economy wide* reporting. Such requirements are further evidence that CO_2 is actually regulated under the Clean Air Act.

plant's Title V permit, providing that "the Permittee shall comply with all provisions of the Acid Rain permit issued for this source, and any other applicable requirements contained in 40 CFR 72 through 40 CFR 78.") (attached in relevant part hereto as Appendix 7); Permit 083-7243-00003 § E.1 p. 54 (August 10, 2004) (Title V permit issued to PSI Energy, Inc. (now Duke Energy Indiana) Edwardsport Generating Station, providing that "the Permittee shall comply with all provisions of the Acid Rain permit issued for this source, and any other applicable requirements contained in 40 CFR 72 through 40 CFR 78.") (attached in relevant part as Appendix 8). Such Title V permit requirements are enforceable pursuant to the Clean Air Act. See, e.g., 42 U.S.C. §§ 7413(a)(1), (a)(3), and (b) (providing enforcement authority and authorizing civil actions for violations of any permit).

Petitioners note, in this regard, that Congress used the same word – regulation – in Section 821 as it did in Section 165. Typically, "identical words used in different parts of the same statute are . . . presumed to have the same meaning." Merrill Lynch v. Dabit, 547 U.S. 71, 86 (2006). Therefore, by requiring "regulation" of CO_2 in Section 821, Congress clearly made CO_2 "subject to regulation" for purposes of Section 165. Nothing in the statutory language "subject to regulation" provides that only certain types of regulation triggers PSD permitting requirements, and to hold to the contrary would add words to the statute that are not there. See City of Crown Point at 1076. IDEM's interpretation therefore is not a permissible reading of the statute and regulations, but rather an erroneous limitation on the plain language.

In addition to the Section 821 regulations, CO_2 is also regulated in the landfill emission regulations promulgated under section 111 of the Clean Air Act. 40 C.F.R. §

60.33c (requiring control of "MSW landfill emissions). Landfill gas emissions include CO_2. 40 C.F.R. § 60.751 (defining "landfill emissions" as all "gas generated by the decomposition of organic waste deposited in an MSW landfill or derived from the evolution of organic compounds in the waste."); 63 Fed. Reg. 2154-01 (Jan. 14, 1998) (approving state plan for implementing landfill gas guidelines); Office of Air Quality Planning & Standards, U.S. EPA, Publ'n No. EPA-453/R-94-021, *Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines* (1995) (identifying landfill emissions as including methane and CO_2) (attached as Appendix 9). In other words, because landfill gases are regulated, and CO_2 is a landfill gas, CO_2 is regulated under the Act.

iii. CO_2 is "subject to regulation" because EPA has the authority to regulate this pollutant.

Nor is "subject to regulation" limited only to pollutants for which regulations currently exist. In related contexts, the U.S. Supreme Court has made clear that the phrase "subject to regulation" used in Section 165 of the CAA requires only that a pollutant is "capable of being regulated." In evaluating whether an employee is "subject to deduction" in pay for purposes of the Fair Labor Standards Act, the Court has rejected the contention that such phrase requires a showing that the employee's pay was *actually* deducted. Auer v. Robbins, 519 U.S. 452, 460-61 (1997); see also Kennedy v. Commonwealth Edison, 410 F.3d 365, 371 (7th Cir. 2005); Klein v. Rush-Presbyterian – St. Luke's Medical Center, 990 F.2d 279, 286 (7th Cir. 1993). Given that CO_2 has been found to be an air pollutant that may be regulated by USEPA, it is clear that CO_2 is "subject to regulation" for purpose of Section 165 of the CAA.

Any future decision by USEPA on an "endangerment finding" for CO_2 – i.e., a finding pursuant to CAA section 202, 42 U.S.C. § 7251(a)(1) that CO_2 "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare" – will not alter the plain meaning of the statute regarding the current applicability of PSD requirements to CO_2. An endangerment finding would result in CO_2 being regulated under Section 111 of the CAA. Pollutants regulated under Section 111 and pollutants "otherwise subject to regulation," however, are identified as two separate categories of "regulated NSR pollutants" under applicable regulations. 40 C.F.R. § 51.166(b)(49); 326 IAC 2-2-1(uu). As such, pollutants "subject to regulation" cannot be limited to those for which an endangerment finding has been made, or else the "otherwise subject to regulation" provision of that regulatory definition would be rendered meaningless. Friends of the Chattahoochee, slip. op. at 7 ("in enacting a statute, it is presumed that . . . the entire statute is intended to be effective"); Nishikawa Standard Co. v. Van Phan, 703 N.E.2d 1058, 1060 ("a statute should not be interpreted in such a manner so as to render any words, phrases or terms ineffective or meaningless").

Because CO_2 is actually regulated pursuant to emission standards enforceable under the CAA and other CAA-enforceable regulations, and the authority exists under the CAA to otherwise regulate CO_2, BP was plainly required to include in its application – and IDEM in the Permits – a netting analysis for CO_2 and other regulated GHGs. Moreover, since the significance threshold for GHGs is anything above zero, the application and Permits were required to include BACT analysis for controlling GHG emissions to the extent the Project results in any increase in GHG pollution. 40 C.F.R. § 51.166(b)(23)(ii); 326 IAC 2-2-1(xx)(V).

Conclusion

For the foregoing reasons, BP's motion to dismiss should be denied.

Dated: March 9, 2009

Respectfully submitted,

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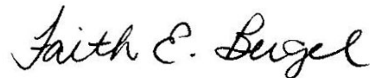

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CERTIFICATE OF SERVICE

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