



April 20, 2012

U.S. Environmental Protection Agency
Attention Docket ID No. EPA-HQ-OAR-2009-0517
Air and Radiation Docket and Information Center
Mailcode: 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments on EPA's Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3, GHG Plantwide Applicability Limitations and GHG Synthetic Minor Limitations, 77 Fed. Reg. 14,226 (Mar. 18, 2012)

Dear Sir or Madam:

The American Chemistry Council, American Fuel & Petroleum Manufacturers, American Iron and Steel Institute, American Petroleum Institute, National Association of Home Builders, the National Association of Manufacturers, National Oilseed Processors Association, and the Portland Cement Association (collectively, "the Associations"), hereby submit comments on EPA's proposed rule on Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3, GHG Plantwide Applicability Limitations and GHG Synthetic Minor Limitations, 77 Fed. Reg. 14,226 (March 8, 2012) ("Step 3 proposed rule").

The **American Chemistry Council** ("ACC") is a nonprofit trade association whose member companies represent the majority of the productive capacity of basic industrial chemicals within the United States. The business of chemistry is a \$720 billion enterprise and a key element of the nation's economy.

American Fuel & Petrochemical Manufacturers ("AFPM") (formerly known as NPRA, the National Petrochemical & Refiners Association) is a national trade association whose members comprise more than 400 companies, including virtually all United States refiners and petrochemical manufacturers. AFPM's members supply consumers with a wide variety of products and services that are used daily in homes and businesses.

The **American Iron and Steel Institute** ("AISI") serves as the voice of the North American steel industry and represents member companies accounting for over three quarters of U.S. steelmaking capacity with facilities located in forty-three states.

American Petroleum Institute (“API”) is a national trade association representing more than 500 member companies involved in all aspects of the oil and natural gas industry. API members are dedicated to meeting environmental requirements while developing and economically supplying the energy resources needed by consumers. API members provide the fuels that keep America running.

The **National Association of Home Builders** (“NAHB”) is the voice of the homebuilding industry. NAHB represents over 140,000 individuals and firms who develop land, and construct homes and multifamily dwellings, as well as light commercial and industrial projects. NAHB’s builder members will construct most of the new housing units built in 2012.

The National Association of Manufacturers (the “NAM”) is the largest industrial trade organization in the United States, representing over 13,000 small, medium, and large manufacturers in all 50 states. The NAM is the leading voice in Washington, D.C. for the manufacturing economy, which provides millions of high-wage jobs in the U.S. and generates more than \$1.7 trillion in GDP. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The **National Oilseed Processors Association** (“NOPA”) is a national trade association comprised of 15 companies engaged in the production of vegetable meals and oils from oilseeds, including soybeans. NOPA’s member companies process more than 1.7 billion bushels of oilseeds annually at 65 plants located throughout the country, including 60 plants which process soybeans.

Based in Skokie, Illinois, the **Portland Cement Association** (“PCA”) represents cement companies in the United States and Canada. PCA conducts market development, engineering, research, education, and public affairs programs for the portland cement industry.

EXECUTIVE SUMMARY

The Associations, collectively, represent a tremendous range of U.S. industrial, manufacturing and other commercial interests, all of whom share grave concerns about the legality of EPA’s regulation of greenhouse gases (“GHG”) under the Clean Air Act’s Prevention of Significant Deterioration (“PSD”) and Title V programs and the efficacy of EPA’s implementation of such regulations (not to mention implementation by the state and local jurisdictions approved or delegated to operate these programs under the Act’s system of cooperative federalism). While the breathtaking scope of EPA’s program would give rise to serious concerns at any economic time, it is particularly troubling during the highly sensitive economic climate that exists now, with the country poised for recovery but held back in part by unlawful and unreasonable regulations that inhibit investment in both new development and modernization of existing facilities and create incentives to instead invest elsewhere. The Associations urge EPA to make every effort to eliminate and reduce burdens arising from its regulation of GHGs as quickly and decisively as possible.

The Associations maintain, as they have in prior comments, petitions for reconsideration, and litigation filings, that EPA’s regulation of GHGs under the PSD and Title V programs is

unlawful. Their position has not changed. The Associations are participants in litigation currently pending in the United States Court of Appeals for the District of Columbia Circuit challenging EPA's original Tailoring Rule and other GHG regulations promulgated by EPA. They believe that the Tailoring Rule will be struck down after judicial review, along with EPA's historic interpretation that the PSD program can be triggered by emissions of pollutants for which there is no National Ambient Air Quality Standard ("NAAQS"). The Associations therefore believe that the Step 3 proposed rule is unlawful for the same reasons, because it perpetuates an unlawful regulatory regime. In the event some or all of the Tailoring Rule and EPA's historic interpretation survive judicial review, however, the Associations offer a series of recommendations on EPA's proposed Step 3 rule in the alternative:

First, in no event should EPA lower the current major source and modification thresholds. A reduction in the thresholds is not justified based on any measure of additional benefit and will only exacerbate the strain that these permitting regimes are placing on state and local permitting authorities, not to mention the sources themselves. In fact, more recent data from EPA's GHG reporting rule suggest that the thresholds could be increased while still maintaining the coverage EPA originally anticipated in the Tailoring Rule.

Second, the Associations do not support EPA's plantwide applicability limit ("PAL") program proposals in the absence of any specific proposed regulatory language. The Associations welcome the opportunity to continue to work with EPA to draft regulatory language that will add certainty and increase PSD permit streamlining for permitting authorities and sources alike. The PAL proposals, however, are simply too vague without any accompanying proposed regulatory language. In addition, the Associations note that these proposals add complexity to an already burdened permit program and are unlikely to have any real streamlining effect. Therefore, these changes should not take priority over other, more efficacious streamlining efforts.

Third, EPA should not adopt a federal synthetic minor source program at this time for areas subject to a GHG Federal Implementation Plan ("FIP"). EPA has assumed, without inquiring of the individual states and local jurisdictions, that areas subject to a GHG FIP lack the authority to issue synthetic minor permits. As with the Tailoring rule, EPA must first ask the State and local jurisdictions to determine themselves whether they possess adequate synthetic minor authority. The Associations believe EPA is likely to discover that many, if not all, of such jurisdictions already can issue practical and enforceable synthetic minor permits that effectively limit GHG emissions. The Associations also believe EPA should clarify its synthetic minor authority in Indian Country where EPA is the sole permitting authority, and we have suggested changes to EPA's proposed regulatory language, as described below.

Finally, the Associations suggest that EPA focus its streamlining efforts on mechanisms that truly have the potential to make the permit programs less burdensome on permitting authorities and regulated sources. The only two actual rule proposals, PALs and synthetic minor permitting in certain jurisdictions, discussed in the Step 3 proposal are very limited in scope and applicability. The Associations make a number of streamlining suggestions, some of which were touched on briefly in the Step 3 rule, but not proposed by EPA.

COMMENTS

I. EPA's Regulation of GHGs under PSD and Title V Is Unlawful.

At the outset, EPA's regulation of GHGs under the PSD and Title V programs is unlawful. The Step 3 proposed rule only strengthens the reasons why EPA's regulatory approach to GHGs is fundamentally flawed under the Clean Air Act, and it does nothing to address the overarching weaknesses in EPA's legal authority and justification for its approach. The Associations have discussed fully the reasons why EPA's regulatory approach violates the Clean Air Act in prior comments to the Tailoring Rule and the other components of EPA's suite of GHG rules, in administrative petitions regarding those rules and EPA's historic interpretation of the PSD provisions of the Clean Air Act, and in briefs filed in the D.C. Circuit challenging those rules.¹ These reasons include:

- EPA ignored compelling interpretations of the Clean Air Act that would have avoided the need to re-write Congress's statutory thresholds for triggering PSD permitting requirements. In particular, EPA should have recognized that PSD requirements are not triggered by emissions of every pollutant subject to regulation under the Clean Air Act, but only by emissions of pollutants subject to a NAAQS above the major source threshold in areas that are in attainment for that pollutant. *See, e.g.,* Opening Petitioners' Brief, at 21-26 *Coalition for Responsible Regulation, Inc. v. EPA*, No. 10-1073 and consolidated cases, Doc. #1314204 (D.C. Cir. June 20, 2011) ("Br."); Opening Petitioners' Brief, at 30-45, *American Chem. Council v. EPA*, No. 10-1167 and consolidated cases, Doc. # 1322724 (D.C. Cir. (Aug. 5, 2011); Comments of Air Permitting Forum, et al., Docket ID No. EPA-HQ-OAR-2009-0517-5181 (Dec. 28, 2009) ("Comments"), at 3-13. Thus, facilities that emit GHGs but not major amounts of criteria pollutants would not be subject to PSD.
- Similarly, EPA also could have avoided re-writing the statutory thresholds by interpreting the Clean Air Act and its own regulations in a manner that would have avoided subjecting GHGs to PSD permitting at all—for example, by recognizing the distinction between CAA § 302(g)'s "capacious" definition of "air pollutant," and

¹ *See, e.g.,* Briefing in *Coalition for Responsible Regulation, Inc. v. U.S. EPA*, No. 10-1073 and consolidated cases (D.C. Cir.) and in *American Chem. Council v. EPA*, No. 10-1167 and consolidated cases (D.C. Cir.); National Association of Manufacturers, et al., Petition to Reconsider, Rescind, and/or Revise EPA's Prevention of Significant Deterioration Regulation (July 6, 2010) ("Petition") (*see* attachment); American Chemistry Council, Petition to Reconsider, Rescind, and/or Revise EPA's Prevention of Significant Deterioration Regulations: 40 C.F.R. Sections 51.166 and 52.21 (July 6, 2010) (*see* attachment); Comments of Air Permitting Forum, et al., Docket ID No. EPA-HQ-OAR-2009-0517-5181 (Dec. 28, 2009) (Tailoring Rule); Comments of American Chemistry Council, Docket ID No. EPA-HQ-OAR-2009-0517-5181 (Dec. 28, 2009) (Tailoring Rule); Comments of Portland Cement Association, Docket ID No. EPA-HQ-OAR-2009-0517 (Dec. 28, 2009) (*see* attachment); Comments of American Chemistry Council, et al., Docket ID No. EPA-HQ-OAR-2009-0597 (Dec. 7, 2009) (Reconsideration Rule); Comments of American Chemistry Council, et al., Docket ID Nos. EPA-HQ-OAR-2009-0472 and NHTSA-2009-0059 (Nov. 25, 2009) (Light Duty Vehicle Rule); Comments of American Chemistry Council, Docket ID Nos. EPA-HQ-OAR-2009-0472 and NHTSA-2009-0059 (Nov. 25, 2009) (Light Duty Vehicle Rule); Comments of National Association of Home Builders, Docket ID No. EPA-HQ-OAR-2009-0171 (June 23, 2009) (Endangerment Finding); Comments of National Association of Manufacturers, Docket ID No. EPA-HQ-OAR-2009-0171 (June 23, 2009) (Endangerment Finding).

CAA § 169(1)'s more limited term, "any air pollutant," the latter of which is subject to the scope of PSD coverage. *See, e.g.,* Br. at 27-41; Comments at 13-15.

- By enacting its suite of GHG regulations, EPA essentially added new pollutants to those regulated by the PSD program. EPA did so, however, without following the statutory requirements for regulating new pollutants in CAA § 166. *See, e.g.,* Br. at 41-46.
- EPA unlawfully included six GHGs as subject to PSD permitting requirements in its Tailoring Rule, even though only four GHGs were made "subject to regulation" by the Tailpipe Rule. Br. at 55-56; Comments at 27.
- The manner in which EPA imposed the Tailoring Rule upon the states through their SIPs was unlawful. Br. at 46-55; Comments at 21-26.
- As in all of its GHG rules, EPA has failed to conduct an analysis of the economic burdens imposed by the Tailoring Rule. Br. 56-57; Comments at 28-33.
- In the Tailoring Rule, EPA violated the Clean Air Act's express command that EPA may not exempt any source from Title V permitting requirements. Br. at 46-47.

The above summary is not exhaustive. The Associations re-adopt the arguments in their comments to the Tailoring Rule, attached herein, and comments on the other GHG rules, and incorporate by reference all of the arguments raised in their briefing before the D.C. Circuit on the illegality of the Tailoring Rule and EPA's historic PSD interpretations, and their administrative petitions for reconsideration of EPA's historic PSD interpretations.

The Step 3 proposed rule only provides further evidence that EPA acted illegally in promulgating the original Tailoring Rule. EPA's purported legal justifications of absurd results, administrative necessity, and one-step-at-a-time procedures are made no more meritorious at Step 3 than in the original rulemaking. EPA still is acting in violation of the Clean Air Act.

Given the Tailoring Rule is inconsistent with the Clean Air Act and should be vacated, the Associations' comments below pertaining specifically to the Step 3 proposed rule are presented *only* in the event neither EPA nor the D.C. Circuit vacates, remands, or otherwise reconsiders EPA's approach under the Tailoring Rule. The Associations expect the Tailoring Rule and other portions of EPA's suite of GHG regulations, as well as its historic interpretation of the PSD program, to be declared unlawful in the pending D.C. Circuit challenges. But in the event that some or all of the Tailoring Rule survives judicial review, the Associations offer the following comments in the alternative to encourage EPA to implement Step 3 in a manner that works to mitigate adverse impacts to existing and future permittees, state permitting agencies, and economic development while avoiding new and further contradictions with the law. Nothing in these comments, therefore, constitutes a waiver of any argument raised by the Associations in their prior comments, administrative petitions, and petitions for review, nor do these comments in any way express consent of the Associations or their members to being regulated by the Tailoring Rule or by any part of EPA's GHG regime.

II. If EPA Continues to Implement the Tailoring Rule Following Judicial Review, In No Event Should EPA Lower The GHG Major Source Thresholds.

For the reasons above, the Associations believe the Tailoring Rule and EPA's related historic interpretations of the PSD provisions of the Clean Air Act are unlawful and anticipate that the court will vacate them. If the Tailoring Rule and EPA's historic interpretations remain in effect following judicial review, however, in no event EPA should lower the major source and significance GHG thresholds. Furthermore, EPA should undertake an analysis of the burdens imposed by these programs.

A. In No Case Should EPA Lower The Thresholds.

If the Tailoring Rule and EPA's historic interpretations remain in effect following judicial review, in no event should EPA lower the thresholds set forth in the Tailoring Rule for the following reasons and those articulated by EPA in the Step 3 proposed rule.

First, the regulatory burden of GHG permitting under the current Tailoring Rule demonstrate that the thresholds should not be lowered. In its Step 3 proposed rule, EPA recognizes that state and federal permitting authorities have had limited success in building up infrastructure to accommodate GHG permitting. *See* 77 Fed. Reg. at 14,234 (“[T]he states confirmed that ... they have not been able to build up their GHG permitting infrastructure.”). EPA also notes that it believes the volume of GHG permitting activity will increase substantially in the coming year due to a number of factors such as economic recovery and increased applications for state synthetic minor permits. *See id.* at 14,235, 14,236. Moreover, EPA notes that its proposed streamlining provisions will actually *increase* the workload on permitting authorities, at least in the short term. *Id.* at 14,236 (permitting authorities “expect workloads to double or triple as a result of applications for synthetic minor limits), 14,239 (PALs may increase the immediate short term workload). Despite the worrisome prospect of increased demands on an already underdeveloped regulatory system, EPA suggests that the coming increased volume will actually make things easier on permitting authorities because the agency “expects that more permitting authorities will further develop the necessary specialized expertise” to review GHG permit applications. *Id.* at 14,235.

EPA's confidence that increased permit applications will make things easier, not harder, is misplaced. For evidence, one need only look at the current backlog of GHG permit applications within EPA's own Region 6. To date, the region has issued only one GHG-related PSD permit, and has a backlog of approximately twenty (20) other permit applications. *See* EPA Region 6 Air Permits, available at <http://1.usa.gov/hb503i> (last visited April 10, 2012). Similarly, in EPA's survey of state permitting authorities, it asked the states whether they were experiencing a backlog of GHG permits under the current thresholds, and if so, by what amount. *See* Memorandum from Michael S. Brooks, Environmental Protection Specialist, EPA, “Information Gathering Exercise for Tailoring Rule Step 3, Docket ID No. EPA-HQ-OAR-2009-0517-19235 (Feb. 24, 2012), at 3. While EPA apparently has not seen fit to publish the specific backlog information it gathered, even the summary information the agency has released shows that many of the states reported additional burdens due to GHG permitting. *Id.* at 5. All this is in addition to backlogs caused by non-GHG permitting requirements; one recent study, for instance, found that less than one-third of all Title V permit renewals are issued within the

federally mandated 18-month window. See U.S. EPA, Timely Issuance of Permit Renewals and Significant Permit Modifications Under Title V: An Evaluation of the Permit Issuance Process (Feb. 2007), at ES-1, available at <http://1.usa.gov/IASe4Y> (last visited April 12, 2012). Thus, even when permitting authorities are not lacking for work, they still have great difficulty meeting demand.

EPA has highlighted the fact that the number of GHG permits requested is smaller than anticipated. The Associations submit there are several reasons for this phenomenon. The Associations are aware of a number of permit actions that were expedited in order to be completed before Step 1 or 2 became effective. In addition, because PSD permitting is so burdensome and difficult to accomplish, facilities often do not approach regulatory agencies with desired projects which would be required to go through PSD permitting. In some cases, facilities simply add the costs of applying BACT technology to the project cost, and the resulting payout is insufficient to fund. In other cases, preliminary modeling shows that meeting the PSD modeling requirements will be more than a little challenging. In these situations, many facilities simply do not submit permit applications.

In light of the already burdensome regulatory demands of the Tailoring Rule, and the likely worsening of the problem in the years ahead, reducing the GHG permitting thresholds will only exacerbate the existing problems.

Second, EPA notes in the Step 3 proposed rule, *id.* at 14,237-38, that lowering the GHG thresholds from 100,000/75,000 tons per year (“tpy”) GHG emissions to as low as 60,000/60,000 tpy or even 50,000/50,000 tpy would yield very limited additional coverage. EPA estimated, using the same data it used for the Tailoring Rule, that such a decrease in the thresholds “would bring with the potential ambit of the PSD program less than an additional 1 percent of all GHG emissions from all stationary sources above the statutory thresholds while potentially adding a significant number of sources into the permitting programs. This is because of the large amount of GHG emissions that comes from very large sources, coupled with the relatively small number of additional sources that emit between the 100,000/75,000 and the 60,000/60,000 levels.” *Id.* at 14,237. The minuscule additional coverage EPA could achieve by decreasing the thresholds does not justify the significant additional burden to sources and already-stressed state and local permitting authority resources.

Third, the Associations believe that an analysis of actual stationary source GHG emissions data EPA has received pursuant to the GHG reporting rule will show that significantly more facilities and GHG emissions are covered at the current thresholds than EPA believed when it promulgated the Tailoring Rule. In other words, the Tailoring Rule thresholds are *over-inclusive*, even using the EPA’s own original projections. An analysis of the data would show that EPA could substantially increase the thresholds for new PSD sources, major modifications, and Title V sources and still cover the same amount of GHG emissions under the PSD and Title V programs, while at the same time significantly reducing the number of facilities actually subject to those programs. Furthermore, significantly increased PSD thresholds would lead to a tighter “fit” between PSD regulation of facilities based on emissions of criteria pollutants and GHG emissions, reconciling EPA’s interests in ameliorating climate change with the goals of minimizing unnecessary permitting burdens on industry and state agencies. *Cf.* Comment from Carbo Ceramics, Docket ID No. EPA-HQ-OAR-2009-0517-5077 (Dec. 28, 2009) (250,000 tpy

threshold would mostly capture sources already subject to PSD permitting for criteria pollutants); Comment from Ameren Corporation, Docket ID No. EPA-HQ-OAR-2009-0517-5082 (Dec. 28, 2009) (250,000 tpy threshold would match PTE CO₂ emissions of a 250 MMBtu/hr boiler).

As articulated in our previous comments, and as shown below, even at the current threshold of 100,000 tpy, a well controlled new facility can be minor for all criteria pollutants but exceed the threshold for GHG emissions. Indeed, facilities with CO₂ emissions over 250,000 tpy would often be minor for other PSD pollutants. EPA should consider the following two examples, one generic and one actual.

- A facility with 200 million British thermal units per hour (“MMBtu/hr”) aggregate total combustion capacity burning natural gas would emit approximately 100,000 tpy CO₂e, but using emission factors for low NO_x (equivalent to 40 ppm) that facility would emit well under 50 tpy of NO_x². Presuming a CO limit of 200 ppm, emissions of CO for that facility would be less than 130 tpy³. Further, with a CO limit of 100 ppm, which is readily achievable for gas combustion, emissions of CO would be 65 tpy⁴. Emissions of all other pollutants from gas (SO₂, VOC and PM 2.5) are substantially lower than NO_x emissions, since emission factors for each of these pollutants from natural gas are much smaller than the emission factor for NO_x and CO. Thus, it follows that a facility subject to the 250 tpy PSD major source threshold could readily be minor for conventional PSD pollutants but could emit over 250,000 tpy CO₂e.⁵
- One of the Associations’ member companies recently installed a well-controlled new facility that would ordinarily be subject to the 250 tpy statutory threshold for major sources. This facility has a PTE of 215 tpy of NO_x and VOC, 230 tpy CO, with PM 2.5 emissions of 140 tpy and less than 10 tpy SO₂. However, the facility’s PTE for GHG emissions at this facility is just over 300,000 tpy CO₂e. Thus, but for GHG emissions, it would not be a major facility for PSD purposes.

Triggering PSD for GHG at well-controlled units is a significant road block to clean energy projects such as combined cycle power plants and inside-the-fence cogeneration.

² For natural gas combustion, 40 ppm NO_x is equivalent to an emission factor of 50.9 lb/million cubic feet (“MMCF”). Using this factor across a facility with 200 MMBtu/hr aggregate total combustion capacity using natural gas yields NO_x emissions of 42.5 tpy. (50.9 lb/MMBtu*1 ton/2000 lb*1CF/1050 Btu* 200 MMBtu/hr*8760 hrs/yr).

³ For natural gas combustion, 200 ppm CO is equivalent to an emission factor of 155 lb/MMCF. Using this factor across a facility with 200 MMBtu/hr aggregate total combustion capacity using natural gas yields CO emissions of 129.3 tpy (155 lb/MMCF *1 ton/2000 lb*1 CF/1050 Btu* 200 MMBtu/hr*8760 hrs/year).

⁴ Similarly, a 200 MMBTU/hr facility with CO emissions of 100 ppm results in annual emissions of 65 tpy CO. (CO EF for 100 ppm = 77.5 lb/MMCF).

⁵ Using the 100 ppm CO limit and presuming CO emissions to be the limiting factor as in the prior example, a facility combusting natural gas with an aggregate 600 MMBTU/hr of combustion capability would emit less than 200 TPY of CO (600 MMBtu/hr * 77.7 lb/MMCF*1 CF/1050 Btu*8760 hrs/yr*1 ton/2000 lb = 194 tpy CO). That same facility, would emit over 250,000 tpy of CO₂e using the emission factor for CO₂ only for simplicity (i.e. 600 MMBtu/hr *8760hrs/yr*1 CF/1050Btu*120066 lb CO₂/MMCF* 1 ton/2000 lb = 300,508 tpy CO₂e).

Creating obstacles for newer, efficient energy sources is directly in opposition to EPA's GHG policy.

Finally, beyond these reasons which EPA already recognizes for not lowering GHG thresholds further, the Associations further contend that lowering thresholds in a manner designed to impact trade sensitive sectors such as the petroleum, manufacturing, and chemical industries would simply create a problem of "leakage" of both jobs and carbon emissions overseas. The manufacturing sector, including operations of the Associations' members, already has every incentive to operate in an energy efficient manner, due in substantial part to the cost of energy. A more restrictive GHG permitting regime, therefore, would not improve the industry's operations, but merely lead to the delay or cancelation of projects. For industries susceptible to trade exposure, that simply means production would shift to less regulated and more energy intensive regions and lead to a net increase in global GHG emissions.

In sum, the additional very modest gain in coverage (such as 1%) that would be occasioned by decreasing the thresholds would come at the price of drawing in many more relatively small facilities. Given the complexity of the federal permitting requirements – both the PSD and Title V programs would impose a tremendous yet unnecessary burden on these small facilities.

B. EPA Must Analyze the Economic Impact of the Tailoring Rule.

Closely related to the level at which EPA will set the Step 3 major source thresholds is the crucial issue of the economic analysis EPA is obligated to undertake as part of that decision. Throughout the GHG rulemaking process, EPA has avoided conducting any analysis of the economic burden of interpreting the Clean Air Act as requiring PSD and Title V permitting for GHG emissions. Thus far, EPA has justified its evasion by claiming that the Tailoring Rule only provides regulatory "relief," and not new burdens upon regulated sources. *See, e.g.,* Tailoring Rule, 75 Fed. Reg. at 31,595-97 (asserting that Tailoring Rule has no economic expense, because it provides "regulator relief"). EPA's justification is wrong. As the Associations have pointed out in their comments and D.C. Circuit briefing, EPA made the affirmative choice to regulate GHGs in the manner prescribed by the Tailoring Rule through its decision to adopt an erroneous interpretation of the CAA. *See, Part I, supra.* But even if EPA could have avoided conducting an analysis of the burdens of its initial Tailoring Rule, it cannot do so in the Step 3 rulemaking.

Unlike the original Tailoring Rule, which imposed initial major source thresholds for GHG permitting, Step 3 involves *reconsidering* the thresholds already in place. Certainly, if EPA were to lower the existing thresholds, that action could no longer be considered regulatory "relief," even under EPA's mistaken understanding of the term. Quite the opposite: by limiting its purported "relief," EPA would be making a clear decision to increase the burden upon regulated sources. Yet, the same principle applies when, as here, EPA proposes to maintain current thresholds. No longer offering an initial form of "relief" from the CAA's mandates, EPA is now in the position of determining what will be the regulatory burdens on GHG sources going forward and the scope of such sources that would be burdened by such regulations. In determining what those ongoing burdens should be, EPA is obligated to consider the economic impact of its actions and cannot proceed ignorant of those impacts.

In the Tailoring Rule, EPA recognized its obligation to consider the economic impact on industry at the Step 3 stage. Specifically, EPA committed to considering three criteria in assessing the major source thresholds, only two of which it has even referenced in the Step 3 proposed rule: (1) EPA's ability to develop streamlining measures; (2) states' ability to ramp up resources for increased permitting; and (3) sources' abilities to meet the requirements of the PSD program and states' abilities to process permits efficiently. 75 Fed. Reg. at 31,559. In particular, EPA again avoids any analysis of the economic impact of GHG major source threshold levels upon *sources*. Instead, EPA, in a sleight of hand, suggests that the Tailoring Rule's impact on *sources* can be tracked by looking at the ability of state *regulators* to implement PSD permitting for GHGs. In a truly bizarre chain of logic, EPA suggests that because some sources will depend upon receiving information from state regulators about GHG permitting obligations, therefore the impact of GHG thresholds on all sources can be measured solely by states' abilities to provide this kind of "outreach and education." 77 Fed. Reg. at 14,232.

Missing from this analysis, of course, is the impact that the cost of GHG permit applications has upon sources. Those costs are not insubstantial. For example, EPA has observed that the current Tailoring Rule creates the burden of "empty" Title V permits (*i.e.*, Title V permits required because of major source status, but without any PSD requirements to incorporate). *See id.* at 14,255. EPA has estimated that the annualized cost of such a permit for a small major source is \$11,373. *See* Title V Task Force, Final Report to the Clean Air Act Advisory Committee (April 2006), at 21, available at <http://1.usa.gov/HvFaOu> (last visited April 12, 2012). Furthermore, as noted above, additional costs arise from the fact that GHG PSD requirements also trigger permitting requirements for other pollutants. *See* 75 Fed. Reg. at 31,520 & n.7. The Associations are aware of facilities foregoing valuable expansion projects simply because of the risk of triggering these additional obligations. In addition, small sources or facilities have been subject to unnecessary delays in initiating commercial operation due to additional and significant delays in obtaining construction authorization resulting from this additional PSD review. The full burden of GHG permitting requirements, of course, is far greater than any of these individual examples, extending to substantial lost business opportunities and job creation. To fulfill the obligations it undertook in the Tailoring Rule, EPA must undertake an economic analysis of sources' abilities to obtain and comply with GHG permitting requirements in a timely manner, and any other burdens associated with the program.

III. While the Associations Encourage EPA to Adopt Effective Flexibility and Permit Streamlining Measures, EPA Generally Should Not Adopt Its Limited Proposals at this Time.

In addition to its proposal not to lower GHG permitting thresholds, EPA also proposes two streamlining measures: (1) extending EPA's plantwide applicability limits ("PAL") program to include GHG emissions, and (2) creating a new federal synthetic minor program that would allow certain sources in federal permitting areas to avoid GHG permitting regulations by agreeing to limit actual GHG emissions below the PSD and Title V applicability thresholds. While the Associations welcome and support any effective efforts to streamline the PSD and Title V permit programs, as a practical matter the PAL and synthetic minor proposals take only limited steps toward this goal and are unlikely to realize the significant efficiencies EPA purports to pursue. In addition, each of these proposals suffers from serious shortcomings, which prevents the Associations from supporting them at this time.

Below, the Associations explain their reasoning for objecting to EPA's proposals and offer recommendations for how to move forward not only on EPA's proposed PAL and synthetic minor provisions, but also on other suggestions for streamlining provisions to GHG permitting.

A. EPA Should Not Adopt its GHG PAL Proposal at this Time.

In the absence of proposed regulatory language, the Associations currently cannot support EPA's proposal to extend its existing PAL program to include GHGs. Without such language, it is not possible for the Associations to determine the full impact of EPA's proposal. Accordingly, EPA would need to re-notice any regulatory changes to extend PALs to GHG emissions. The Associations also point out that of all the streamlining proposals and ideas, this one seems to have the least potential for actually materially reducing burdens, as it is not likely to be widely used. For example, a source that would qualify for a synthetic minor permit would, in all likelihood, accept such a permit over participating in the PAL program. Thus, EPA's efforts may best be prioritized towards other streamlining measures.

Under the current PAL program, sources that apply for and are granted a PAL for a particular pollutant may make changes to the source without triggering PSD permitting requirements for that pollutant, so long as the total emissions at the source remain below the applicable PAL limit. 77 Fed. Reg. 14,226, 14,240 (March 8, 2012). EPA interprets its current PAL regulations, however, as effectively precluding any useful GHG-based PAL. *Id.*

To remedy that situation, EPA proposes to amend its regulations to offer the same opportunity to apply the PAL program to GHG emissions as to other pollutants. In particular, EPA makes four proposals: (1) to issue PALs to GHG-only sources; (2) to issue either a mass-based (tpy) or a CO₂e-based PAL to a particular source; (3) to allow CO₂e-based PALs to include the 75,000 tpy CO₂e significance threshold; and (4) to allow compliance with a GHG PAL to be used as an alternative approach for determining whether a project is a major modification that would make GHG emissions subject to regulation.

Not all of EPA's four proposals apply to existing minor sources. For existing minor sources, EPA has proposed two options for implementing a GHG PAL program. Under the first option, which EPA terms the "Major Source Opt-in Approach," EPA would only issue PALs to existing major stationary sources, but would give minor sources the option to voluntarily become major sources ("opt-in") and thus be eligible to apply for the PAL. Under the second approach, which EPA calls the "Minor Source Approach," EPA would issue GHG PALs to minor sources who wish to make modifications that without a PAL, would trigger major source PSD obligations.⁶ *See id.* at 14,241. EPA also asks whether it should adopt both approaches. Either approach appears to the Associations to be complicated and in the absence of specific regulatory language, the Associations cannot discern whether it supports either proposal.

As an example, the Major Source Opt-in Approach appears to have significant unintended consequences, none of which are discussed in the proposed Step 3 rule. A source that chooses to switch from a minor source to a major source would experience changes to the

⁶ Note that this minor facility also would be eligible for a synthetic minor permit. As the Associations indicate above, a synthetic minor permit is likely to be less complex and to be issued more promptly.

PSD applicability thresholds from the major source levels to the lower significance thresholds. A minor source that proposed to add 50 tpy of NO_x remains minor. A major source that proposes to add 50 tpy of NO_x triggers PSD for NO_x. Accordingly, forcing sources into major source status in order to obtain a GHG PAL likely will discourage participation in the program, which presumably is counter to the behavior EPA is attempting to incentivize. Yet, without any proposed regulatory language, the Associations cannot tell with any certainty whether EPA intends to remedy this problem. For example, EPA could choose not to extend its “major-for-one-major-for-all” policy in the GHG context. Thus, a source could simply opt-in to a major source PAL for GHGs but remain minor for other pollutants.

Similarly, it is not clear whether EPA is proposing under either approach that GHG PALs be *both* mass-based and CO₂e-based or whether a mass or CO₂e based PAL is sufficient. The Associations would prefer the latter, were EPA to move forward with a specific PAL proposal. Again, in the absence of proposed language, it is difficult to tell whether we should be supporting or opposing EPA’s proposal due to the uncertainty.

Further, given the prospect that the GHG permitting applicability thresholds may change in the future, EPA also should clarify in any future proposal that an issued PAL will remain in effect through the PAL term regardless of whether one or more applicability thresholds change.

Finally, in discussing the Major Source Opt-in Approach, the EPA suggests that a source that obtains a PAL under that approach must remain a major source under PSD and Title V at the expiration of the PAL. *See id.* While the Associations understand the need for any appropriate emission limitations to remain in effect after expiration of the PAL, if the source is minor, then it should be treated as so. There is no justification here for a “once in-always in” type of policy. Yet, without regulatory language to review, it is unclear whether EPA is actually referring to sources that are truly minor.

As we are sure EPA can see from these few examples, the speculation here could continue. The Associations welcome the opportunity to work with EPA on this and other streamlining ideas, but we must have an opportunity to review any regulatory text before it is finalized.

B. EPA Should Not Adopt a New Federal Synthetic Minor Program at this Time.

Before establishing a new federal permitting program, EPA must inquire of the affected jurisdictions whether they currently have the authority to issue practical and enforceable permits that limit GHG emissions and otherwise undertake a meaningful analysis to determine whether federal regulation is necessary. The Associations believe EPA is likely to discover that many, if not all, of such jurisdictions already can issue practical and enforceable synthetic minor permits that effectively limit GHG emissions. The Associations also believe EPA should clarify its synthetic minor authority in Indian country where EPA is the sole permitting authority, and we have suggested changes to the regulatory language.

1. *EPA's Gap-Filling Synthetic Minor Program Likely is Unnecessary.*

EPA proposes to establish a new federal synthetic minor program for GHGs for the purpose of issuing “subject to regulation” limitations on a CO₂e basis. These new regulations would apply only in the few state and local jurisdictions subject to a GHG FIP and in Indian country where EPA is the sole permitting authority.

The Associations support EPA's administration of the synthetic minor program in Indian country, where EPA is the sole permitting authority. For areas subject to a GHG FIP, however, EPA has simply assumed that a new federal program is necessary. There is nothing in the Step 3 proposed rule suggesting that EPA has inquired of the state and local jurisdictions subject to a GHG FIP whether the jurisdictions currently have adequate authority or that EPA has undertaken any other such analysis. This is in stark contrast to EPA's actions in promulgating the Tailoring rule. For that rule, EPA asked the States whether they had authority to implement EPA's proposed Tailoring rule. EPA must conduct a more thorough review of the need for a new, wholly-federal permit program and only implement such a program where specifically needed. State and local agencies have been issuing synthetic minor permits for decades. EPA is likely to learn that while some jurisdictions did not have authority to *compel* PSD and Title V permitting of GHGs, such jurisdictions have broadly applicable synthetic minor permitting programs that can include limitations, even GHG limitations, requested by permittees.

In addition, synthetic minor permits may contain direct emission limitations (*e.g.*, 10 lbs/hr from unit X) and/or indirect limitations on throughput, production or hours of operation. EPA long has recognized that limitations that are effective and practically enforceable are sufficient. Thus, a limit on volatile organic compounds (“VOCS”), for example, may also effectively limit hazardous air pollutant emissions. *See* Memorandum from John Seitz and Robert Van Heuvelen to Regional Air Directors, “Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)” (Jan. 25, 1995), at 6-7, available at <http://1.usa.gov/IIBL4X> (last visited April 13, 2012). Similarly, an hours of operation, production or throughput limit may be used for calculating the PTE of any pollutant, not just the one pollutant that may have been at issue and driven the permit's issuance. Thus, before embarking on a completely new permit program for GHG FIP jurisdictions, EPA should investigate whether state and local agencies already have adequate authority for issuing effective synthetic minor limitations for GHGs by limiting the hours of operation, production or throughput of sources. The Associations believe that state and local jurisdictions likely can fashion effective synthetic minor permits already.

2. *Even if a Federal Synthetic Minor Program is Needed, EPA Should Delegate Authority and Avoid Conflicts for any Such Program Whenever Possible.*

Should EPA determine that there are any “gaps” to be filled with respect to synthetic minor permits for GHGs in GHG FIP states, EPA should explicitly establish the goal of delegating authority over the synthetic minor program to state and local jurisdictions as soon as possible. The Associations see no reason why the program could not be delegated, even to local permitting authorities that do not otherwise have jurisdiction over GHGs, because delegated

agencies act as EPA's agent rather than under state law per se. There are multiple reasons to delegate responsibility to state authorities.

Delegating implementation of the federal synthetic minor program to state agencies would avoid adding needless complexity in the synthetic minor process. Layering another permitting program onto sources in those jurisdictions subject to a FIP will subject sources to multiple permitting authorities, and as noted above, this may be unnecessary. In the case of construction permits, these sources will have to submit multiple applications and experience two separate administrative processes, including possible appeals, simply to obtain the necessary air permits to limit their emissions.

Some state/local jurisdictions that currently possess synthetic minor authority have adopted EPA's PSD regulations by reference. EPA and state/local jurisdictions would need to investigate whether EPA's new regulations cause regulatory conflicts. It is unclear, for example, whether the public notice requirements and other administrative processes would be in harmony with existing state synthetic minor programs. EPA also would need to ensure that it does not require this new delegated permitting authority as a "requirement" in 40 C.F.R. Part 51 since these are the minimum requirements necessary for state/local SIPs.

3. *EPA's Proposal Does Not Adequately Address Sources that Would Seek Synthetic Minor Operating Permits.*

Most, if not all, jurisdictions have the authority to issue synthetic minor operating permits as well as construction permits. Many sources that might be interested in obtaining a synthetic minor permit may wish to avoid Title V, too, by obtaining a synthetic minor operating permit. EPA is proposing only to issue construction permits through its PSD authority. It is not clear that EPA can issue such construction permits to sources that are not proposing any construction projects, but wish to limit their PTE to avoid Title V. Thus, EPA also should investigate whether the few jurisdictions subject to a GHG FIP have authority to issue synthetic minor operating permits to limit the PTE of GHG, and otherwise clarify the agency's proposal for addressing operating sources that simply wish to limit their PTE without engaging the construction project.

4. *EPA Should Make Additional Improvements to the Proposed Synthetic Minor Regulations.*

The Associations also recommend EPA make changes to its proposed regulatory language for synthetic minor permits, should it determine to go forward based on evidence of "gaps" to be filled.

First and foremost, EPA should clearly state in the preamble to any final rule that while it is issuing regulations under its PSD permitting authority providing for synthetic minor permits for GHG emissions, this does not alter the definition of "subject to regulation" for purposes of determining PSD or Title V applicability and does not mean that GHG emissions below the major source and significance levels set by EPA in the Tailoring rule are "regulated air pollutants." See Definitions of "subject to regulation" at 40 C.F.R. §§ 52.21(b)(49) and 70.2. In other words, EPA must clarify that even though it is using the PSD provisions of the Clean Air

Act to issue synthetic minor permits, it will interpret the PSD and Title V provisions only to apply when the Tailoring rule conditions are met. The alternative interpretation would defeat the primary purpose of the Tailoring Rule and could create other unintended consequences.

Second, EPA should remove its requirement that federal synthetic minor permits contain numeric limitations on GHG emissions. The proposed rule requires that each synthetic minor permit must contain an “emissions limitation” and that such limitation “must consist of one or more numerical limitations on the quantity, rate, or concentration of GHG emissions on either a mass or CO₂e basis that is expressed over the shortest practical time period” 77 Fed. Reg. at 14261 (proposed § 52.21(dd)(5)(ii)(b)). Only if such a limit is impractical may EPA issue a work practice or operational limitation. *Id.* Many synthetic minor permits, however, contain restrictions on hours of operation, throughput, fuel type, and the like, and these limitations make the permit no less stringent. There is no reason why a synthetic minor permit for GHG must depart from this established practice and must contain a numeric limitation on GHG emissions. Given that many states, even those subject to a GHG FIP, likely have this authority already, nonnumeric restrictions provide a primary pathway for issuance of synthetic minor limitations. Furthermore, such limitations should not have to be “expressed over the shortest practical time period.” In fact, the most logical time period for a limitation designed to limit ton per year (“tpy”) emissions is one expressed over a 12-month rolling period. For example, consider a combustion source that seeks to obtain a synthetic minor limit to avoid Title V permitting. The issue for this source is its annual (12-month rolling emissions), not the hourly emission rate of GHGs. As an alternative, the definition could simply state that such limitations shall be expressed no shorter than on an annual, 12-month rolling basis.

A similar issue arises in the definition of “emissions limitation” where EPA proposes that the limitation must be one that restricts emissions “on a continuous basis.” 77 Fed. Reg. at 14259 (proposed § 52.21(dd)(2)(i)). This concept is particularly misplaced for GHGs because many synthetic minor permits for GHGs are likely to be based on limited hours, throughput, or other parameters given that there are few, if any, current options for add-on control devices. Thus, it is doubtful that any source will limit GHG emissions “on a continuous basis.” In any event, this language in the definition is superfluous as long as the limitations expressed in the permit are met.

The permit application requirements contain several irrelevant and unnecessary requirements.

- Section 52.21(dd)(3)(ii) requires the applicant to provide information on *future* planned construction activity that involves certain units or new units;
- Section 52.21(dd)(3)(iii) requires a list of all GHG emitting sources *including future ones*;
- Section 52.22(dd)(3)(v)(g) requires actual emissions estimates; and
- Section 52.21(dd)(3)(v)(i) requires an identification of other federal requirements applicable to each unit.

None of this information is relevant to determining the source's PTE or to writing effective and enforceable limits on the PTE GHGs and should not be required.

Finally, EPA proposes in Section 52.2(dd)(4)(ii) and (iii) two alternative timelines for determining whether the application is administratively complete: a 60-day period and a 30-day period. However, under the 30-day option the application is not automatically deemed administratively complete if EPA does not timely respond, which makes the deadline irrelevant. Whichever time line EPA selects should include an automatic determination of completeness if there is no request for additional information within the prescribed time period.

IV. If the Tailoring Rule Is Upheld, EPA Should Adopt Additional Streamlining Proposals and Techniques for GHG Permitting.

In the event that the Tailoring Rule is upheld, EPA should prioritize other streamlining techniques that would be more broadly applicable and effective in reducing permitting burdens. As the Associations have discussed above, *see* Part II.A.2, permitting authorities already face severe economic constraints and a backlog of permit applications under the current Tailoring Rule regime. Additionally, the Associations' members are delaying or foregoing expansion projects in certain cases due to uncertainties relating to permitting. Streamlining the permit review and issuance process would enable permit authorities to focus their limited resources on the most challenging projects while removing delays from the existing process. Thus, the Associations strongly recommend that EPA consider the following additional measures.

A. The Agency Should Expand the Availability and Use of General Permits and Similar Permits by Rule.

One of the best ways to streamline GHG permitting is to expand the use of General Permits and Permits by Rule ("PBR"),⁷ which state agency experience has shown to be effective tools in easing the permitting process.

1. General Permits Are Useful Streamlining Tools.

General Permits allow sources to emit pollutants below specified thresholds for classes of sources without obtaining an individual permit so long as facilities meet all conditions (*i.e.*, standards and requirements for monitoring, recordkeeping, or reporting) specified for the source class. There is no individual case-by-case review, and public notice is limited to rule development and adoption. Development and implementation of a general permit or permit by rule program would ultimately free resources in both the FIP states and the SIP states, which could elect to use the federal General Permits and/or use them as models. EPA essentially acknowledges this conclusion in its final rulemaking establishing minor source permitting authority for Indian Country. *See* 76 Fed. Reg. 38,748 (July 1, 2011). In that rule, EPA included explicit authority for issuing general permits.

The Associations therefore urge the agency to develop and adopt General Permits. The development of General Permits would enable permitting authorities to avoid the lengthy review

⁷ For convenience, the term "General Permit" is used to encompass both concepts herein.

of each application for an affected source or project, would reduce facility expense and time in permit application preparation, shorten review time, and would assist in assuring national consistency for affected source classes. The public would have the ability to comment on each class of General Permit as it is developed. If EPA adopts General Permits, it should consider source classes that include, but are not limited to, certain classes of boilers, heaters, engines, turbines, electric-generating units, storage tanks, loading operations, oil and gas handling and production facilities, and pollution control equipment. We note, however, that General Permits are useful only to the extent that they actually streamline the permit process and are beneficial to all involved. Loading these permits with unnecessary and burdensome or overly complex conditions will only discourage their use, thereby defeating their purpose.

General Permits could help alleviate the problem of “empty” Title V permits, which EPA discusses in its proposed Step 3 rule. 77 Fed.Reg. 14,226, 14,232-33 (March 8, 2012). Given the applicability levels in the Tailoring Rule, there are many sources now subject to Title V that have no specific applicable requirements. GHG-only General Permits for these circumstances could remove all of these sources from the permitting queue.

In cases where the SIP permitting authorities apply the federal General Permit for affected sources, EPA could, under the provisions 42 U.S.C. § 7661d, specifically waive certain notification requirements (and comment periods). This approach could significantly abbreviate permit application preparation and review times and the effort required by the SIP permitting agencies, and result in consistent application of the program.

2. *State Experience Demonstrates the Value of General Permits.*

The ability of General Permits to streamline the permit review process is well documented, and many States have implemented permit streamlining alternatives such as General Permits and Permits by Rule. In Texas, for example, there are currently six classes of Title V General Operating Permits (“GOP”) – four cover oil and gas facilities in different groups of counties, and the other two – for air curtain incinerators and municipal solid waste landfills – are statewide. New Jersey and Pennsylvania also have successfully implemented these programs. New Jersey has 24 separate General Permit categories and issued 6,803 General Permits in the past year. Online registration is available which provides instantaneous approval. Pennsylvania has 18 General Permit categories and has issued several hundred in the past year. Pennsylvania’s regulations guarantee an approval in less than 30 days for General Permits.

Figure 2 compares permit processing times for various approaches as reported in 2008 by the Texas Commission on Environmental Quality (Biennial Report 2007-2208, Appendix B, Permit Time-Frame Reduction and Tracking). As shown in the table, the average permitting time for a federal PSD permit (pre-GHG permitting requirements) was 364 days versus 27 to 32 days for PBRs and Standard Permits (which are akin to General Permits).

Figure 1 – Permit Time-Frames

Air Permits (Uncontested)
Permit Time-Frame Reductions
(as of September 1, 2008; based on rolling 12-month averages)

Priority 1				
Application Type	Average Processing Time (days)	Total under Review	Target Maximum	Number under Review Exceeding Target
New source review (NSR) permit, new	200	170	240	25
NSR permit, amendment	216	531	270	76
NSR permit, new - federal timeline	189	11	330	5
NSR permit, amendment - federal timeline	410	8	330	4
Federal NSR (<i>prevention of significant deterioration, nonattainment, 112g</i>), new and major modification	364	80	330	25
Permit by rule	27	259	45	5
Standard permit (<i>without notice</i>), SB 1126, and relocation	32	51	45	6
Concrete batch plant standard permit (<i>with notice</i>)	61	38	150	0

This information demonstrates that General Permits can be a highly efficacious means of dramatically cutting permitting cost and delay.

3. *EPA Should Provide Flexibility in Implementing a General Program.*

Because General Permits have such dramatic ability to streamline the review process, permits should be available for any source in a category regardless of whether the source is at a Greenfield site. General Permits for GHG should be developed so that SIP permitting authorities can use the permit in its entirety or can incorporate the general permit requirements into a jurisdictional-specific permit that contains appropriate requirements addressed in the agency's regulatory authority. The Associations do not anticipate that EPA would develop different requirements for a specific source type based on its size, *i.e.*, at a major source or a minor source, so there is no rationale for limiting the use of the General Permit based on whether the source is major or minor.

Use of General Permits developed by EPA should not, however, be mandatory for states and local jurisdictions, because in many jurisdictions there is no reason to supplant established local programs. Unique considerations also may limit a permitting authority's use of General Permit requirements. In these cases, the permit authority should be able to process permits consistent with its established, approved permit program, understanding the timing and review and public comment issues that result from that approach.

EPA, in consultation with state and local permitting authorities and the regulated community, should define and prioritize the sources/source classes appropriate for General Permits. Development of General Permits should be a collaborative process involving the regulators, regulated community and the public.

B. EPA Should Set Explicit Schedules for its Handling of Permit Applications and Adopt Proven Streamlining Techniques.

Another way for EPA to more effectively streamline the GHG permitting process at the federal level is to adopt proven state streamlining practices such as setting explicit schedules for permit application reviews and approvals. The timing of the current federal permit review process is subject to too much uncertainty, notwithstanding the Clean Air Act's mandate that permitting not exceed one year. EPA often provides comments on applications after the close of the public comment period and appears to have little incentive to assure expeditious processing of permit applications.

Many states have adopted formal goals for permit processing time. Figure 1 (*see above*) includes Texas' overall targets for various classes of permits. Based on the Associations' members' experience with state agencies throughout the country, we have prepared Figure 2 which provides our estimate of reasonable permit processing times for most permits. We urge the agency to adopt this schedule, as applicable to EPA's permit related activities in individual jurisdictions, as standard policy to remove much of the uncertainty associated with the process.

Figure 2 - Recommended Timeline for EPA GHG Permitting Actions

Permit Type	Actions	EPA Review Timeline
Major Source Permit <i>GHG-only; non-General Permit</i>	Determination of Administrative Completeness	By no later than the 30 th day
	Notice for Public Hearing	By no later than the 150 th day
	Public Hearing	By no later than the 180 th day
	Issue Permit	By no later than the 235 th day
Major Source Permit <i>GHG-only; General Permit</i>	Determination of Administrative Completeness	By no later than the 30 th day (post-project notification is allowed in some instances)
	Notice for Public Hearing	Not Applicable for individual permitting action
	Public Hearing	Not Applicable for individual permitting action
	Issue Permit	By no later than the 60 th day

Minor Source / Synthetic Minor	Determination of Administrative Completeness; Notice to request public hearing (w/in 15 days)	By no later than the 30 th day
	Notice for Public Hearing	By no later than the 60th day (if applicable)
	Public Hearing	By no later than the 90th day (if applicable)
	Issue Permit	By no later than the 135th day (w/public hearing) By no later than the 90th day (w/o public hearing)
Minor Source / Synthetic Minor General Permit	Determination of Administrative Completeness	By no later than the 15th day (post-project notification is allowed in some instances)
	Notice for Public Hearing	Not Applicable for individual permitting action
	Public Hearing	Not Applicable for individual permitting action
	Issue Permit	By no later than the 45th day
Permit-by-Rule No additional permit required	If emissions are below certain threshold(s) and equipment meets any exclusions, etc., no formal permit issues	Not applicable

EPA has recent experience adopting specific timeframes for reviewing permits in its Indian Country permit rule. *See* 76 Fed. Reg. 38,763 (July 1, 2011). In particular, EPA established specific periods for determining whether applications are complete and for granting or denying such permits. For synthetic minor sources, for example, EPA allowed 60 days for the completeness review and one year for granting or denying the permit. While the Associations believe that this one year period is excessive, the Indian Country rule at least provides some level of certainty and serves as a guide for a further EPA proposal on managing the Title V and PSD process.

In addition to explicit timeframes for permit processing, state and regional permitting authorities also have developed other innovative approaches to assure more expeditious and predictable handling of permit applications that add certainty to the regulatory process. In areas

where EPA is the air permitting authority, the agency should study and adopt streamlining techniques developed by the state agencies that have proven to be effective. For example, the Louisiana Department of Environmental Quality has implemented an “expedited” review program in which an applicant can choose to pay an additional fee to cover the overtime effort (*i.e.*, after hours and weekends, but not during normal working hours). EPA also could move away from processing permits in the order received, as EPA Region 6 currently does, and instead implement parallel processing, in which smaller, similar, or more straight-forward applications are handled by one group of reviewers, while a separate group handles the larger, more complex applications. Both of these techniques would streamline the process and offer advantages to EPA and the regulated community.

C. EPA Should Forgo Unnecessary Endangered Species Act Review.

EPA also can streamline the GHG permitting process by forgoing needless review under the Endangered Species Act (“ESA”). In areas where EPA acts as the GHG permitting authority, EPA has taken the position that it may not issue a permit until it establishes the permit will have no impact on endangered species pursuant to Section 7 of the ESA even when the only reason the source is seeking a PSD permit is because of GHG emissions. Yet, in those circumstances, the ESA review has nothing to do with GHG emissions. In addition, EPA must complete a consultation in accordance with Section 106 of the National Historic Preservation Act. To expedite these consultations, EPA requests that the permit applicants provide a biological assessment and cultural resources report covering the project and action area. EPA has requested that this information be submitted as early as possible so that the EPA may issue a permit at the earliest possible time, and within the timeframes required by statute.

EPA should drop these requirements because ESA consultation is not legally required when there is no federal action, *i.e.*, no PSD permit authorizing an increase in regulated pollutants other than GHGs. EPA acknowledges that GHG emissions do not have local impacts. Yet, EPA is requiring such reviews for associated emissions species such as particulate matter and ozone even when there is no proposed significant net increase in such emissions. EPA’s ESA review policy creates a drag on permit application preparation and review process with little or no associated environmental benefit. The delays associated with these requirements are evident from EPA’s recent permit experience. In Texas, for example, the state with the largest population of major stationary sources and where EPA is the permitting authority for GHG gases, only one GHG PSD permit has been issued (for the Lower Colorado River Authority (“LCRA”)) while more than 20 permit applications remain on hold and in process.⁸

Because GHG emissions do not impact local habitats, the Associations urge EPA to revisit this policy and eliminate the need for such assessments where emissions of other constituents are not significant, as defined in the permitting regulations and where EPA is not the permitting authority for emissions other than a GHGs.

⁸ A simple review of the Table of Contents for the LCRA Biological Assessment, *see* Attachment 5, demonstrates how complicated these assessments are and why they create significant permitting delays.

D. CCS Is Not a Commercially Available Technology at this Time, and EPA Should Not Require Its Analysis as Part of a BACT Review.

In its PSD and Title V Permitting Guidance for Greenhouse Gases, EPA 457/B-11-001; March 2011, the agency stated that carbon capture and sequestration (“CCS”) is an “available” technology,⁹ which if true would trigger a full scale case-by-case evaluation of its potential applicability to many new PSD major source and major modifications with emissions over the GHG thresholds.

In the limited GHG PSD permitting experience to date, EPA’s nonbinding suggestion in guidance to treat CCS as “available” has resulted only in permit review delays and excess costs. The Associations are not aware of any BACT assessment resulting in the requirement to implement CCS. This is because there is universal agreement that CCS is *not* currently a commercially available technology and will not be commercially available until a much later date, possibly not before 2030. The scientific and engineering knowledge necessary to create CCS may exist, but that does not make the technology “available.” EPA’s insistence that CCS be considered in every BACT review comes at the cost of considerable delay in both the

⁹ EPA stated in that guidance: “For the purposes of a BACT analysis for GHGs, EPA classifies CCS as an add-on pollution control technology that is “available” for facilities emitting CO₂ in large amounts, including fossil fuel-fired power plants, and for industrial facilities with high-purity CO₂ streams (*e.g.*, hydrogen production, ammonia production, natural gas processing, ethanol production, ethylene oxide production, cement production, and iron and steel manufacturing). For these types of facilities, CCS should be listed in Step 1 of a top-down BACT analysis for GHGs. This does not necessarily mean CCS should be selected as BACT for such sources. Many other case-specific factors, such as the technical feasibility and cost of CCS technology for the specific application, size of the facility, proposed location of the source, and availability and access to transportation and storage opportunities, should be assessed at later steps of a top-down BACT analysis. However, for these types of facilities and particularly for new facilities, CCS is an option that merits initial consideration and, if the permitting authority eliminates this option at some later point in the top-down BACT process, the grounds for doing so should be reflected in the record with an appropriate level of detail.” (footnotes omitted). EPA also included two caveats:

First, “EPA recognizes that CCS systems may have some unique aspects that differentiate them from the types of equipment that have traditionally been classified as add-on pollution controls (*i.e.*, scrubbers, fabric filters, electrostatic precipitators). However, since CCS systems have more similarities to such devices than inherently lower-polluting processes, EPA believes that CCS systems are best classified as add-on controls for purposes of a top-down BACT analysis.”

Second, “a control option is “available” if it has a potential for practical application to the emissions unit and the regulated pollutant under evaluation. Thus, even technologies that are in the initial stages of full development and deployment for an industry, such as CCS, can be considered “available” as that term is used for the specific purposes of a BACT analysis under the PSD program. In 2010, the Interagency Task Force on Carbon Capture and Storage was established to develop a comprehensive and coordinated federal strategy to speed the commercial development and deployment of this clean coal technology. As part of its work, the Task Force prepared a report that summarizes the state of CCS and identified technical and non-technical challenges to implementation. EPA, which participated in the Interagency Task Force, supports the Task Force’s recommendations concerning ongoing investment in demonstrations of the CCS technologies based on the report’s conclusion that: “Current technologies could be used to capture CO₂ from new and existing fossil energy power plants; however, they are not ready for widespread implementation primarily because they have not been demonstrated at the scale necessary to establish confidence for power plant application. Since the CO₂ capture capacities used in current industrial processes are generally much smaller than the capacity required for the purposes of GHG emissions mitigation at a typical power plant, there is considerable uncertainty associated with capacities at volumes necessary for commercial deployment.” See “Report of the Interagency Task Force on Carbon Capture and Storage” (August 2010), at 50, available at <http://1.usa.gov/cxT26W> (last visited Apr. 19, 2012).

preparation of permit applications and associated BACT analyses. It also results in delays in the processing of applications as the reviewing authorities are obliged by this guidance to collect and analyze data regarding CCS BACT. The Associations recommend that EPA presumptively determine that CCS *does not* need to be considered in GHG BACT evaluations until such time that the technology is truly commercially available.

While there is common agreement among industry and governmental sectors that CCS technologies may be an important GHG mitigation option for the future, they are not currently available at an economically viable, commercial scale. Several CCS projects are progressing currently at varying scales, most of which are in the pilot to demonstration range. The U.S. Department of Energy (“DOE”), which runs several programs designed to advance CCS technology, provides funding for the majority of the CCS research and demonstration projects in the U.S. According to DOE’s April 2012 report titled, *Advanced Carbon Dioxide Capture R&D Program Accomplishments*, the successful commercial deployment of cost effective CCS technologies will occur after 2030.

Interestingly, EPA agrees with DOE’s analyses regarding CCS commercial availability. Recently, in EPA’s proposed Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22,392 (April 13, 2012), EPA accommodates the fact that CCS technologies are not currently available by proposing a standard that has a 30 year averaging period. It proposes to allow companies to rely on future CCS installation, sometime over a 30 year period, to reduce the 30-year average emission rate to below the proposed NSPS standard of 1,000 lb CO₂/MWh. *Id.* at 22,406. This is consistent with what EPA said in 2008, in the Advanced Notice of Proposed Rulemaking for the Tailoring Rule 73 Fed. Reg. 44,354, 44,370 (July 30, 2008) with respect to CCS:

[I]ntegrated systems for new plants will be available for full commercial deployment—that is, will have completed the demonstration and early deployment phase—in the 2025 timeframe. Of course, there are inherent uncertainties in these projections and long-term research, development, demonstration and deployment goals.

It would be arbitrary and capricious for EPA to take a different view under the PSD program for purposes of BACT.

The commercial state of CCS is summarized by DOE and NETL in the *DOE/NETL CCS Roadmap* (Dec. 2010), available at <http://1.usa.gov/hcZOkNas> (last visited April 13, 2012):

At their current state of development, CCS technologies are not ready for widespread deployment on coal-based power plants. The three primary reasons for this are:

- (1) they have not been demonstrated at a large enough scale necessary for power plant application;
- (2) the parasitic loads (steam and power) required to support CO₂ capture would significantly decrease power generating capacity; and
- (3) if successfully scaled-up, they would not be cost effective at their current level of process development.

DOE/NETL estimates that the deployment of current state-of-the-art, post-combustion CO₂ capture technology (chemical absorption with an aqueous solution) on a new pulverized coal power plant would increase the cost of electricity (“COE”) by approximately 80% and de-rate the plant’s net generating capacity by as much as 30% due to the steam and auxiliary power required to operate the CCS system. Considering that EGUs are the largest source of GHG emissions and the priority focus for CCS technology development, the fact that CCS technology is not readily available for that source category means that this is clearly not a commercially available technology.

EPA, DOE, and industry all agree that CCS is not a realistic near-term solution for GHG emission reduction. Requiring evaluation of CCS in each present-day BACT analysis creates an unnecessary burden and delays permitting decisions for important projects. EPA should clarify in its rules and guidance that CCS does not need to be included in BACT evaluations until the technology is commercially available. This action will streamline both the application preparation process and the permit authority review process.

E. Definition of Potential to Emit

During the 1990s, EPA, state and local agencies implemented the Title V program for the first time. One of the methods of layering this requirement into effect was through guidance which extended the timeframe for applications for sources with actual emissions of 50% or less of the applicability threshold. *See, e.g.*, Memorandum from J. Seitz Re: Options for Limiting the PTE of a Stationary Source Under Section 112 and Title V of the Clean Air Act, Jan. 25, 1995. According to EPA, the agency utilized this policy in Indian Country where EPA was the permitting authority until last year. 76 Fed. Reg. 38,748, 38,769 (July 1, 2011). While the Step 3 proposed rule preamble discusses the concept of “redefining PTE” and source category rules on PTE, it ignores the more broadly applicable methods from EPA’s 1995 memorandum. Without conducting unit specific studies or adopting source specific rules, EPA could redefine PTE in the Step 3 rule such that sources that emit less than 50% of the Title V threshold for GHGs need not submit Title V permits until such time as actual emissions exceed that level (or some other threshold). This concept has the potential to limit the number of synthetic minor permits that are necessary and thus could aid in the efficient implementation of the Title V program.

F. Significant GHG Emissions from Required Control Devices

EPA should consider methods for streamlining the installation of required control devices that by themselves create significant increases in GHG emissions. There is no reason why installation of a device that an environmental agency has determined to be necessary in order to protect human health or the environment, such as a MACT or NSPS control, must go through PSD review because of GHG emissions caused by the control device. The Associations recognize and respect the D.C. Circuit decision on the pollution control project exclusion, *New York v. EPA*, 413 F.3d 3, 41-42 (D.C. Cir. 2005), but there are other ways to facilitate installation of such devices, such as General Permits.

CONCLUSION

The Tailoring Rule is unlawful. If EPA continues to implement its PSD and Title V GHG regulations following judicial review, however, then the agency should use the Step 3 rulemaking process as an opportunity to establish sensible streamlining provisions to make permitting less burdensome on regulators and sources alike. Furthermore, EPA should continue to pursue streamlining options beyond the two specifically proposed, which the Associations oppose at this time, and implement additional measures as quickly as possible. In no event, however, should EPA lower the existing GHG thresholds, as such a change is unjustified.

The undersigned Associations appreciate the opportunity to comment on this proposal.

American Chemistry Council

**American Fuel & Petrochemical
Manufacturers**

American Iron and Steel Institute

American Petroleum Institute

National Association of Home Builders

The National Association of Manufacturers

National Oilseed Processors Association

Portland Cement Association

Attachments

ATTACHMENT 1

Associations' Comments to the Tailoring Rule

**COMMENTS ON EPA'S
PROPOSED PREVENTION OF SIGNIFICANT DETERIORATION
AND TITLE V GREENHOUSE GAS TAILORING RULE**

**74 Fed. Reg. 55,292 (Oct. 27, 2009)
Docket No. EPA-HQ-OAR-2009-0517**

submitted by:

AIR PERMITTING FORUM

AMERICAN CHEMISTRY COUNCIL

AMERICAN COKE & COAL CHEMICALS INSTITUTE

AMERICAN IRON AND STEEL INSTITUTE

CORN REFINERS ASSOCIATION

INSTITUTE OF SHORTENING AND EDIBLE OILS

NATIONAL ASSOCIATION OF MANUFACTURERS

NATIONAL OILSEED PROCESSORS ASSOCIATION

RENEWABLE FUELS ASSOCIATION

DECEMBER 28, 2009

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**COMMENTS ON EPA’S PROPOSED PREVENTION OF SIGNIFICANT DETERIORATION
AND TITLE V GREENHOUSE GAS TAILORING RULE**

**74 Fed. Reg. 55,292 (Oct. 27, 2009)
Docket No. EPA-HQ-OAR-2009-0517**

INTRODUCTION

The following organizations (“the Associations”)¹ jointly submit these comments on the Environmental Protection Agency’s (“EPA” or “the Agency”) Proposed Rule regarding Prevention of Significant Deterioration (“PSD”) and Title V Greenhouse Gas (“GHG”) Tailoring Proposed Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009) (“Proposed Tailoring Rule”):

Air Permitting Forum

American Chemistry Council

American Coke & Coal Chemicals Institute

American Iron and Steel Institute

Corn Refiners Association

Institute of Shortening and Edible Oils

National Association of Manufacturers

National Oilseed Processors Association

Renewable Fuels Association

The Associations and their members represent a sizeable and diverse collection of commercial interests. The Associations believe that comprehensive climate change legislation is the preferred approach to addressing GHG emissions and that the Clean Air Act (“CAA” or “the Act”) is not well-suited to addressing GHGs. Nonetheless, because the issues addressed by the Proposed Rule will have substantial and direct implications for the Associations’ members, we are providing detailed comments on this Proposed Rule.

The following summarizes the primary points raised in these comments:

First, the need for regulatory relief for the PSD program is premised on a faulty interpretation of the PSD provisions of the statute and regulations. We believe that Congress

¹ A brief description of each filing association is provided in Attachment A.

clearly intended *only* national ambient air quality standards (“NAAQS”) pollutants to be the basis for a stationary source to require a PSD permit, and we urge EPA to reconsider its interpretation of the statute in this regard. Under Sections 161 and 165 of the Act, it is clear that PSD must be applied only when a source is major for a NAAQS pollutant for which the area is designated as attainment or unclassifiable, and then, within that group, only when there is a significant increase in such a NAAQS pollutant. EPA has skipped over this important step in the PSD applicability analysis to answer only the question of whether GHGs are subject to regulation and, therefore, must consider BACT under Section 165(a)(4). EPA has essentially *and incorrectly* equated the pollutants for which BACT must be considered and the pollutants that may trigger the PSD permit requirement in the first instance. In the final rule, EPA should correct this error in the applicability analysis because doing so will (1) more faithfully implement the statute and (2) limit the universe of sources that must consider BACT for GHGs to those sources that actually require a PSD permit for a project significantly increasing a NAAQS pollutant (for which the area is designated attainment or unclassifiable).²

Second, we request that the Agency reconsider its interpretation of Title V applicability prior to invoking the doctrines of administrative necessity and absurd results. If EPA interprets the statute to limit applicability for these programs, the Agency can substantially limit the burdens that it seeks to alleviate in this Proposed Rule. Indeed, interpreting the statute to avoid an absurd result, such as 40,000 PSD permits or 6 million Title V permits, is a prerequisite to invoking these narrow doctrines to rewrite a statute.

Third, we urge EPA to conduct a more accurate and more specific evaluation of the burdens of triggering PSD and Title V for sources. Because EPA treats this proposal as providing relief, it has not analyzed the *burdens* of triggering PSD and Title V. Because EPA did not analyze these burdens in the Section 202 rule, it must do so here.

Fourth, EPA must reconsider its proposal to revise its prior approvals of State Implementation Plans (“SIPs”) and Title V programs to limit those approvals to the new major source and significance levels. In addition to being unsound legally, this proposal illustrates the fact that the Proposed Rule would not actually reduce the regulatory burdens for sources. EPA has stated that its PSD and Title V regulations must be interpreted to apply PSD and Title V to sources with potential emissions of GHGs at or above the 250 tons per year (“tpy”) and 100 tpy levels.³ State programs have adopted the very same regulatory language in their PSD programs that EPA says compels this interpretation. Because state regulations will remain in place, and because sources must comply with state law, the proposed raising of the federal thresholds does not actually change the permitting obligation for sources. EPA’s need to use this questionable-at-best regulatory approach to achieve the tailoring result further illustrates the wisdom of interpreting the statute to require as a prerequisite to PSD applicability that a source be triggering PSD permitting for a NAAQS pollutant for which the area is designated attainment or unclassifiable.

We appreciate the Agency’s consideration of these points as well as consideration of the numerous additional concerns raised below.

² EPA has stated that it does not intend to issue a NAAQS for GHGs, a decision with which the Associations agree.

³ 74 Fed. Reg. at 55,300.

I. EPA's Conclusion That PSD Is Automatically Triggered by GHG Regulation Under Section 202 Is Fundamentally Flawed.

EPA assumes in the Proposed Rule that the CAA and the PSD regulations *require* the Agency to subject to PSD review any source that is major and any modification of a major source above significance levels for *any* pollutant, including GHGs. The only exception EPA would allow is for nonattainment pollutants.

The PSD applicability provisions of the statute and regulations do not have to be interpreted this way, however. In fact, the text of the statute is more naturally read to limit PSD applicability to sources that are major (or will be for a greenfield facility) for a NAAQS pollutant for which the area is designated attainment or unclassifiable and then, within that group of NAAQS major sources, to those projects that result in a significant net emissions increase of a NAAQS pollutant. Once PSD is triggered by a major NAAQS pollutant source for a NAAQS pollutant for which the area is designated attainment or unclassifiable, the statute would require consideration of BACT for pollutants “subject to regulation.” EPA’s analysis puts the cart before the horse, by asking first what pollutants are “subject to regulation” and then basing *all applicability determinations* of the PSD program *solely on this criterion*. Such an approach is inconsistent with the statutory and regulatory language because it completely bypasses the core applicability provisions, rendering their inclusion in the statute superfluous.

A. Relevant Statutory and Regulatory Applicability Provisions.

EPA incorrectly bases all applicability of the PSD program solely on the scope of “pollutants subject to regulation” under Section 165(a)(4). While this language is certainly relevant to the PSD program because it determines the scope of the BACT requirement, skipping directly to this phrase bypasses important statutory language that defines applicability of PSD in the first instance. Specifically, the following statutory and regulatory provisions act to constrain *at the outset* the applicability of the PSD program: CAA § 161 states:

In accordance with the policy of section 101(b)(1), each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) *designated pursuant to section 107 as attainment or unclassifiable*.⁴

⁴ 42 U.S.C. § 7471 (emphasis added).

CAA § 165(a) states:

No major emitting facility on which construction is commenced after the date of the enactment of this part, may be constructed *in any area to which this part applies* unless—

- (1) a [PSD] permit has been issued ...;
- (2) [notice, comment, and opportunity for hearing provided];
- (3) [there is a demonstration of meeting air quality requirements];
- (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter...;
- (5) [class I area requirements are met as applicable];
- (6) there has been an analysis of any air quality impacts ... as a result of growth ...;
- (7) the [owner or operator] ... agrees to conduct such monitoring as may be necessary to determine [facility emissions'] ... effect ... ; and
- (8) [certain requirements pertaining to class II and class III areas are met if applicable].⁵

Section 52.21(a)(2) of EPA's regulations provides:

Applicability procedures. (i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source *in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act*.⁶

B. Sections 161 and 165(a) Limit PSD Applicability Based on the Location of the Source, Thus Imposing a “NAAQS Prerequisite Requirement.”

The text of Sections 161 and 165(a) plainly limits application of PSD to certain areas – those designated as attainment or unclassifiable *pursuant to Section 107 of the Act*. Section 107 is applicable only to NAAQS pollutants. Thus, Sections 161 and 165(a) act to limit applicability by location and this “location-limiting language” must be given meaning in the Agency's application of the statute. EPA's analysis skips directly to subparagraph (4) of Section 165(a), which defines the pollutants that are subject to BACT *once PSD permitting is already required*. Subparagraph (4) uses the phrase “pollutants subject to regulation” – and is the only part of the statute that does so.⁷ Yet, EPA incorrectly assumes that it is *this* subparagraph that dictates applicability of the entire program.

⁵ 42 U.S.C. § 7475(a) (emphasis added).

⁶ 40 C.F.R. § 52.21(a)(2) (emphasis added).

⁷ 42 U.S.C. § 7475(a)(1). We note further that EPA's assumed applicability approach also bypasses subparagraph (1), which requires that a PSD permit be issued and required, before a BACT requirement is imposed. *Id.*

By “skipping ahead” in this manner, EPA has failed to effectuate the applicability limitation in Sections 161 and 165(a) by interpreting that language as mere surplusage. Under EPA’s interpretation, the location-limiting language of the Act would simply require that a source be located in an area that is attainment for *any* pollutant. But that is no limitation at all since every area of the country is and always has been in attainment with at least one criteria pollutant. Congress must be presumed to have been aware of this fact when it enacted Part C (the PSD provisions), making EPA’s construction inconsistent with canons of statutory construction requiring all words in the statute to be given meaning.⁸

C. Case Law Confirms the NAAQS Prerequisite Requirement — That PSD Is Triggered Solely by Pollutants for Which EPA Has Established a NAAQS.

The NAAQS Prerequisite Requirement of the Act is also consistent with the holding in *Alabama Power Co. v. Costle*,⁹ where the court found that *location* is the key determinant for PSD applicability and rejected EPA’s contention that PSD should apply in all areas of the country, regardless of attainment status. EPA had argued that PSD permitting requirements should apply not only to attainment areas for a given pollutant, but to anywhere that a new emitting facility would “adversely affect the air quality of an area to which” PSD requirements apply.¹⁰ The court held that this interpretation violated the CAA’s plain language.¹¹ The court stated: “The plain meaning of the inclusion in [42 U.S.C. § 7475] of the words ‘any area to which this part applies’ is that Congress intended *location* to be the key determinant of the applicability of the PSD review requirements.”¹² In its regulatory response to the *Alabama Power* decision, EPA gave this ruling only grudging effect. Specifically, EPA provided an exemption from PSD for nonattainment pollutants in Section 52.21(i)(2), stating that PSD “shall not apply to a major stationary source or major modification *with respect to a particular pollutant* if ... the source or modification is located in an area designated as nonattainment under section 107.”¹³ But, in the preamble to regulations, EPA otherwise maintained its position.¹⁴ The 1980 Preamble stated that PSD requirements still apply to any area that is “designated ... as ‘attainment’ or ‘unclassifiable’ for *any* pollutant for which a national ambient air quality standard exists.”¹⁵ This is inconsistent with the Act, which compels the contrary interpretation that PSD is triggered only when a major source is located in an attainment area or unclassifiable area for the pollutant that the source will emit in major amounts.

⁸ *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); see also *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995); *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (“‘[C]ardinal principle of statutory construction’ [instructs that a court has a duty] ‘to give effect, if possible, to every clause and word of a statute... .’”)(internal citations omitted).

⁹ 636 F.2d 323 (D.C. Cir. 1980).

¹⁰ *Id.* at 364.

¹¹ *Id.* at 364–68.

¹² *Id.* at 365 (emphasis added).

¹³ 40 C.F.R. § 52.21(i)(2) (emphasis added).

¹⁴ 45 Fed. Reg. 52,675, 52,676 (Aug. 7, 1980).

¹⁵ *Id.* at 52,677.

D. Reading Title I as a Whole Further Confirms that Congress Has Imposed a NAAQS Prerequisite Requirement for PSD to Be Triggered.

Other provisions in Title I provide further support for limiting PSD program applicability to new major sources of NAAQS pollutants for which an area is designated attainment or unclassifiable and to existing major sources of NAAQS pollutants undertaking a major modification for a NAAQS pollutant in such an area. Section 110(a)(2)(C) sets forth the requirements for SIPs, stating that the plans shall “include a program to provide for ... regulation of the modification and construction of any stationary source within the areas covered by the plan *as necessary to assure that [NAAQS] are achieved, including a permit program as required in parts C [PSD] and D [nonattainment New Source Review]*.”¹⁶ This language again explicitly indicates that the purpose of the PSD program is to assure the NAAQS continue to be achieved. It is therefore inconsistent with this language to apply PSD in situations when there is no significant increase of a NAAQS pollutant for which an area is designated attainment or unclassifiable. Moreover, Section 107 provides insight into the meaning of the term “air quality” in Section 161 because it requires SIPs to “specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.”¹⁷ Finally, Section 163(b)(4) specifies that the maximum allowable concentration of “any air pollutant” in “any area” to which Part C applies shall not exceed the NAAQS, further indicating that the PSD program is focused on attaining the NAAQS.¹⁸

EPA’s overly broad interpretation of PSD applicability in the preamble to the 1980 regulations has attracted little scrutiny because, to date, it has had negligible practical import. Until now, sources rarely, if ever, triggered PSD based solely on emissions of a non-NAAQS pollutant. Now, however, this incorrect interpretation could trigger a host of absurd results that contravene congressional intent. EPA has itself recognized that the practical result of the 1980 interpretation is not desirable, specifically soliciting comment on an approach in which BACT would be applied to GHGs only in those cases where PSD permits are otherwise required for a source (*i.e.*, where a source is triggering PSD for a NAAQS pollutant).¹⁹ EPA can only rely on the administrative necessity rationale so long as it is strictly necessary to avoid absurd consequences that result from “the literal application of a statute.”²⁰ That is not the case here, since the absurd consequences flow, not from a literal interpretation of the Act, but from EPA’s flawed interpretation of it. EPA thus can follow a straightforward, legally sound approach to avoid the assumed administrative and legal problems presented by the promulgation of the Section 202 rule by administering the statute under its plain terms.

Accordingly, to give effect to unambiguous terms of the statute (and regulations), EPA cannot require a source to undergo PSD permitting solely on the basis of emissions of a pollutant for which there is no NAAQS.²¹

¹⁶ 42 U.S.C. § 7410(a)(2)(C) (emphasis added).

¹⁷ *Id.* at § 7407(a).

¹⁸ *Id.* at § 7473(b)(4).

¹⁹ 74 Fed. Reg. at 55,327.

²⁰ *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

²¹ *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (agency must give effect to the unambiguously expressed intent of Congress).

E. EPA Can Implement the Proper Scope of PSD Applicability Under the Existing Regulations.

EPA's interpretation of the PSD provisions as requiring only that an area be designated as attainment or unclassifiable for *some* pollutant (for which an area is designated attainment or unclassifiable) is referenced only in the preamble to the 1980 PSD rules.²² As noted above, Section 52.21(a)(2) properly and faithfully includes the location limitation of the statutory provisions. Therefore, the *only* change that is needed for EPA to properly limit the scope of PSD applicability consistent with the statute is to announce its interpretation in the *Federal Register*. Since EPA has solicited comment on the effect of this rule regarding PSD applicability, not only in the Section 202 proposal but also in the companion proposals regarding PSD applicability,²³ it is a logical outgrowth of this and those actions for the Agency to announce that, in response to comments, it is adopting the proper scope of applicability for the PSD program.

F. The Statute's NAAQS Prerequisite Requirement Means That EPA Does Not Need to Rely on the Administrative Necessity and Absurd Results Doctrines to Set Appropriate GHG Significance Levels.

Under the NAAQS Prerequisite Requirement, EPA must still establish a significance level for GHGs because sources that are obtaining a PSD permit and increasing GHG emissions would need to determine the level of increase that triggers the BACT requirement under Section 165(a)(4). Unlike the major source threshold for PSD applicability of 100 or 250 tpy, the statute does not specify the significance levels for determining whether BACT is required for a pollutant. Thus, EPA can set a significance level without reference to the major source thresholds, as they are not relevant. The sources for which a GHG BACT analysis would be conducted would, by definition, be major emitting facilities by virtue of their emissions of a NAAQS pollutant for which an area is designated attainment or unclassifiable. The only question for EPA to answer at that point is what level of GHG emissions increase is significant enough to warrant imposition of BACT.²⁴ This approach would be consistent with EPA's request for comment on whether it should require BACT for GHGs only when a source is otherwise required to obtain a PSD permit.²⁵ Importantly, it would also leave EPA with significantly greater flexibility under the statute to set an appropriate significance level for GHGs to determine the level of emissions increase above which BACT analysis is appropriate. EPA would not be departing from a specified numerical value in the statute – *i.e.*, because the statute does not specify significance levels.

²² 45 Fed. Reg. at 52,699-52,700, 52,710-52,713.

²³ Proposed Tailoring Rule, 74 Fed. Reg. at 55,294; Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, 74 Fed. Reg. 51,535, 51,547 (Oct. 7, 2009) (PSD Interpretive Memo Reconsideration).

²⁴ The appropriate significance levels to be issued by EPA are addressed in Section VI.B.

²⁵ EPA specifically seeks comment on a transition approach that would allow only those sources that are otherwise required to obtain a PSD permit to consider BACT for GHGs. 74 Fed. Reg. at 55,327. The NAAQS Prerequisite Requirement is identical in result and provides EPA with a solid statutory basis for implementing such an approach on a permanent basis.

II. When an Alternative Interpretation of the Statute Avoids the Need to Rely on the “Absurd Results” and “Administrative Necessity” Doctrines, EPA Must Consider and Adopt Such Interpretation.

EPA’s two notice-and-comment proceedings specifically addressing the applicability of PSD to GHG emissions (*this* Proposed Rule and the Proposed Reconsideration of the PSD Interpretive Memo) posit a conflict between the Agency’s reading of Sections 165(a) and 169(1) and the practical realities of the PSD permitting program. The Agency has proposed to resolve that conflict solely through an essentially legislative transmutation of the 100/250 tpy applicability thresholds in Section 169(1). Specifically, in the Johnson Memo and PSD Interpretive Memo Reconsideration, EPA construes Sections 165(a) and 169(1) as requiring PSD applicability to turn on levels of emissions of *any* pollutant subject to actual CAA controls, including potentially GHGs.²⁶ In the Proposed Tailoring Rule, however, EPA shows convincingly that Congress could not have intended those sections to operate that way in the case of GHGs because, if they did, the number of construction projects requiring PSD permits would rise to absurd levels. Indeed, EPA’s supporting analysis of the relevant statutory text and legislative history on this score is irrefutable.²⁷ In the face of that conundrum, EPA proposes only one solution – to change the PSD applicability thresholds in the case of GHGs from “greenfield” construction projects of 100/250 tpy to 25,000 tpy of carbon dioxide equivalent (“CO₂e”).

To offer only this one solution is strikingly odd. The solution in its legislative character is extreme and unprecedented. But, more importantly, it ignores the logical implication of EPA’s own analysis, namely, that Congress actually had a different vision for the PSD permitting program as defined by Sections 165(a) and 169(1) – a vision that excluded GHGs. Thus, both this Proposed Rule and EPA’s Proposed Reconsideration of the PSD Interpretive Memo fail to provide any serious analysis of alternative constructions of the statutory scheme. The Associations urge EPA to undertake such an analysis. Without it, EPA cannot claim to have conducted a fully-reasoned and adequately-supported rulemaking.

As explained above, this vision is consistent with the natural reading of the statutory language limiting PSD applicability for GHGs to a BACT requirement when a source is otherwise required to obtain a PSD permit for a NAAQS pollutant. If EPA adopts this interpretation, the scope of the administrative burden and the absurd result of EPA’s estimated 40,000 PSD permits per year would not occur. Where a statute can be interpreted to avoid absurd results, it must be so interpreted rather than relying on judicially created exceptions.²⁸

²⁶ 74 Fed. Reg. at 51,539.

²⁷ See 74 Fed. Reg. at 55,308-55,310.

²⁸ See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982) (Interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available); *Comm’r of Internal Revenue v. Brown*, 380 U.S. 563, 571 (1965) (same); *United States v. Am. Trucking Ass’n., Inc.*, 310 U.S. 534, 543-44 (1940) (same); *Kaseman v. District of Columbia*, 444 F.3d 637, 642 (D.C. Cir. 2006) (same); *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 385-86 (2d Cir. 2004) (same); *Towers v. United States (In re Pac.-Atl. Trading Co.)*, 64 F.3d 1292, 1303 (9th Cir. 1995) (same); 2A Norman Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 45:12, at 94 (7th ed. 2007).

If EPA had analyzed this – or any other – alternatives under the statute, it would have concluded, as argued above, that Congress intended applicability of the PSD permitting program as defined by Sections 165(a) and 169(1) to be based only on NAAQS pollutants. EPA would also find that Congress intended applicability to be based only on criteria pollutants (*i.e.*, pollutants whose emissions have predominantly local or regional impact).

The statutory evidence for concluding that PSD permitting can only be triggered by a criteria pollutant is strong. First, the 28 source categories that Congress listed in Section 169(1) in 1977 are the very ones EPA regarded at the time as posing the greatest potential for air quality degradation due to conventional pollutants. The only way to explain the selection of those particular categories is to posit a concern only with criteria pollutants. Indeed, the only way to understand the 100/250 tpy cutoffs is also in terms of criteria pollutants.

Second, the provisions of Sections 165(a) and (e) that require air quality monitoring and air quality impact analysis in connection with PSD permitting are oriented on their face to local or regional impacts. A prime example is Section 165(e)(1), which calls for an analysis of “the ambient air quality at the proposed site *and in areas which may be affected by emissions from [the proposed] facility for each pollutant subject to regulation under the [CAA] which will be emitted from such facility.*”²⁹

Third, other relevant provisions of the CAA demonstrate the same focus. A prime example is the entire system for area designations in Section 107(d) and the underlying system for establishing air quality control regions in Section 107(b). Those systems make sense only from the standpoint of managing emissions of criteria pollutants, not GHGs. Indeed, Section 161 is the provision in Part C that dictates that each SIP must contain a PSD program and that the program be designed to prevent significant deterioration of air quality in areas designated as attainment or unclassifiable under Section 107(d). That objective makes sense only from the standpoint of emissions having a local or regional impact, not emissions of GHGs.

Finally, the legislative history of the Clean Air Act Amendments of 1977, the origin of Sections 165(a) and 169(1), reveals without doubt that Congress in creating those provisions had in mind only NAAQS pollutants. Both the Senate and the House saw themselves as engaged primarily in continuing the work that a prior Congress had begun, through the 1970 Clean Air Act, to rid the Nation, especially urban areas, of unhealthy levels of smog, particulates, sulfur dioxide, and other criteria pollutants. The air quality problems of concern to the 95th Congress in 1977 did not remotely include global warming.³⁰ It is simply not possible, in light of this legislative history and the legislative history EPA references, to make a credible argument that the 95th Congress intended that GHG emissions could be a basis for applicability of the PSD permitting program as defined by Sections 165(a) and 169(1).

The question of whether Congress did or did not have that intention, and what effect that intention should have on the interpretation of the CAA and stationary source authorities, has yet

²⁹ 42 U.S.C. § 7465(e)(1) (emphasis added).

³⁰ See, e.g., 123 Cong. Rec. S9162-86 (daily ed., June 8, 1977) (stage-setting remarks of Senator Muskie, the lead floor manager); *id.* at H8662-65 (daily ed., Aug. 4, 1977) (stage-setting remarks of Congressman Rogers, the lead floor manager).

to be adjudicated by any federal court. In *Massachusetts v. EPA*, the U.S. Supreme Court decided that GHGs fit within the CAA’s definition of “air pollutant” for the purposes of Section 202(a)(1), which authorizes EPA to make endangerment findings as a predicate to setting tailpipe emission standards.³¹ Whether GHGs are within what can be considered “air pollutants” under the Act and can be candidates for regulation under Section 202(a)(1), however, are completely different questions from the one at hand.

In sum, EPA’s PSD applicability Federal Register notices for this Proposed Rule and the PSD Interpretive Memo and Reconsideration reflect a major oversight on EPA’s part. EPA has been focused on whether the phrase “subject to regulation” in Section 165(a) refers only to actual control, concluding in the end that it does and then merely assuming, without analysis, that the “any pollutant” component of the total phrase “any pollutant subject to regulation” has no bounds and therefore potentially includes GHGs. But, as EPA has recognized, the 100/250 tpy thresholds *must* have some meaning. They are an integral part of the statutory fabric, and they cannot be reconciled programmatically with an unbounded reading of “any pollutant subject to regulation.” While EPA has chosen to try by itself to weave new thresholds into that fabric specifically for GHGs, at the same time it has ignored the possibility – indeed the virtual certainty – that the 100/250 tpy thresholds actually signal that the 95th Congress intended applicability of the Section 165(a) PSD program be based on criteria pollutants, and that the 95th Congress did not mean to authorize EPA to base Section 165(a) PSD applicability on GHG emissions. The Associations urge EPA, at a minimum, to address that probability through a detailed and thoughtful legal analysis. Without such an analysis, any final decision to base PSD on GHG emissions can have no legitimacy.

Further, the Associations believe that, based on their own analyses as detailed in Section I above and in this Section II, the far better reading of Sections 161, 165(a), and 169(1) is that Congress did not intend to base applicability of the Section 165(a) PSD permitting program on GHG emissions.

III. The Agency Should Apply the NAAQS Prerequisite Requirement to Avoid Relying on the “Administrative Necessity” and “Absurd Results” Doctrines Because They Are, at Best, Legally Tenuous.

EPA’s reliance on the administrative necessity doctrine to justify the PSD Tailoring Rule’s broad departure from the plain language of the CAA is highly questionable. First, the administrative necessity doctrine is more theory than reality — while courts have occasionally cited the doctrine, EPA does not cite a single instance in which a court upheld use of the doctrine. Second, *Alabama Power* and other cases interpreting the doctrine do not support the proposal’s massive “tailoring” of the PSD program.

³¹ 549 U.S. 497, 528-29 (2007).

A. The Scope of the Administrative Necessity Doctrine is Narrow and its Use Poses Legal Risks if the Rule Is Challenged Such That a Reviewing Court Will Likely Strike Down the Rule.

In *Alabama Power*, a case involving a *de minimis* exemption, the D.C. Circuit articulated the doctrine of administrative necessity, recognizing that “[c]onsiderations of administrative necessity may be a basis for finding implied authority for an administrative approach not explicitly provided in the [CAA].”³² However, the Court explained that “there exists no general administrative power to create exemptions to statutory requirements based upon the agency’s perceptions of cost and benefits.”³³ Furthermore, where an agency seeks a “prospective exemption ... from a statutory command based upon the agency’s prediction of the difficulties of undertaking regulation,” rather than a relief after good faith effort, the agency’s burden is “especially heavy.”³⁴ The case law following the *Alabama Power* decision similarly reflects the very limited nature of the administrative necessity doctrine.³⁵

While EPA certainly engages in a thorough discussion of case law in the PSD Tailoring Rule, the Agency cannot cite a *single case* to support such a broad and prospective application of the administrative necessity doctrine. In fact, EPA cannot and does not cite a single case in which a court actually relied on this doctrine in upholding a deviation from a statute. In every case relied on by the Agency, the court rejected attempts by administrative agencies to invoke the doctrine. EPA concludes the discussion of each successive case cited in the PSD Tailoring Rule with a statement such as the following: “[t]he court went on to find, however, that in this case, EPA’s justification for ‘administrative necessity’ was not sufficient.”³⁶ Yet, somehow, the Agency unreasonably views these cases as “reiterat[ing] the validity of the ‘administrative necessity doctrine’” and “affirm[ing] that the doctrine of ‘administrative necessity’ c[an] be used to allow an agency to depart from the requirements of a statute.”³⁷ EPA’s own presentation of the law demonstrates that the administrative necessity doctrine is a disfavored legal theory, one unlikely to be sustained by a court.

EPA acknowledges that the D.C. Circuit “has stated that the administrative necessity doctrine is particularly difficult to assert when the agency ha[s] not yet tried to enforce the statutory requirements.”³⁸ Furthermore, EPA admits that the Court does not favor “[c]ategorical exemptions from the clear commands of a regulatory statute.”³⁹ Yet, in the PSD Tailoring Rule, EPA seeks to both prospectively tailor the PSD program prior to implementation and categorically exempt a broad swath of the economy, including millions of sources, from what EPA believes to be a clear command of the CAA.

³² 636 F.2d at 358.

³³ *Id.* at 357.

³⁴ *Id.* at 359-360.

³⁵ See e.g., *Env'tl. Def. Fund, Inc. v. EPA*, 636 F.2d 1267, 1283 (D.C. Cir. 1980) (“EDF”); *Public Citizen v. FTC*, 869 F.2d 1541, 1556-57 (D.C. Cir. 1989).

³⁶ 74 Fed. Reg. at 55,313.

³⁷ *Id.*

³⁸ *Id.* at 55,318 (citing *Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C. Cir.1983)).

³⁹ *Id.* (quoting *Alabama Power*, 636 F.2d at 358) (alteration in original).

Incredibly, EPA “believe[s] that the facts here are much more supportive of an administrative necessity application than in [all of the prior administrative necessity cases].”⁴⁰ In the PSD Tailoring Rule, EPA seeks to broaden a 250 tpy statutory cut-off to 25,000 tpy — an exemption 100 times greater than the statutory language and impacting millions of sources. On the other hand, in *Alabama Power*, EPA sought to exempt major emitting facilities with actual emissions of 50 tpy or less from PSD, a “*de minimis* exception” from the PSD program.⁴¹ Similarly, in *EDF v. EPA*, EPA sought to exempt materials containing 50 ppm or less of a TSCA regulated substance from a prohibition on manufacture, processing, and distribution of that substance — again, a *de minimis* exception to TSCA’s prohibition.⁴² Yet, in both *Alabama Power* and *EDF*, the D.C. Circuit found that the Agency had not met the heavy burden of justifying administrative necessity.⁴³ It is difficult to imagine how the facts here are more supportive of this rare doctrine than these attempted *de minimis* exceptions to statutory requirements.

B. EPA Has Misapplied the Doctrine of Absurd Results.

EPA asserts that the effects of a literal application of the PSD thresholds and their collateral consequences “bring into play the ‘absurd results’ doctrine.”⁴⁴ However, EPA has fundamentally misapplied the doctrine of absurd results to reach this conclusion. First, the doctrine of “absurd results” should be applied to guide EPA’s interpretation of the statute in the first instance, not to support the need for rules designed to avoid a result based on an interpretation of the statute that creates an absurd result. Second, the “absurd results” doctrine simply does not support EPA’s attempt to dramatically rewrite the CAA.

Moreover, as the Agency correctly states in the PSD Tailoring Rule, “[i]n cases in which the ‘absurd results’ doctrine of statutory construction authorizes an agency to depart from the literal meaning of the statute, the agency must do so in as limited a manner as possible to effectuate underlying congressional intent.”⁴⁵ In *Mova Pharm. Corp. v. Shahala* (cited by EPA in the PSD Tailoring Rule),⁴⁶ the court applied this principle to an FDA regulatory requirement:

We conclude that the FDA’s successful-defense requirement is inconsistent with the unambiguously expressed intent of Congress. The rule is gravely inconsistent with the text and structure of the statute. Nor can the FDA show that the successful-defense requirement is needed to avoid “a result demonstrably at odds with the intentions of [the] drafters.” ... The FDA could have adopted a more narrow solution to the problem ... It instead adopted the broad win-first rule, which it cannot show is needed to implement congressional intent. In effect, the FDA has embarked upon an

⁴⁰ 74 Fed. Reg. at 55,316.

⁴¹ *Alabama Power Co.*, 636 F.2d 323.

⁴² 636 F.2d 1267.

⁴³ *Alabama Power Co.*, 636 F.2d at 356-57; *EDF*, 636 F.2d at 1283.

⁴⁴ 74 Fed. Reg. at 55,308.

⁴⁵ *Id.* at 55,307.

⁴⁶ *Id.*

adventurous transplant operation in response to blemishes in the statute that could have been alleviated with more modest corrective surgery.⁴⁷

Like FDA, EPA “could have adopted a more narrow solution to the problem,” (*i.e.*, the NAAQS Prerequisite Requirement) but instead chose to draft a broad exemption from CAA requirements. EPA fails to mention, let alone analyze, alternative CAA interpretations that would avoid the need to completely rewrite the PSD provisions of the statute. Instead, EPA decides to rewrite the statutory applicability thresholds as the only potential solution to the anticipated administrative burdens. The more sound and reasonable interpretation of the statute, as discussed in Section I above, would avoid a wholesale rewriting of the statute. Under the case law cited by EPA itself, if EPA finds that the results of literal application of Section 165 are truly absurd, the Agency is obligated to adopt the most limited departure from the statute. The alternative approach discussed above would solve all of the problems associated with the effect of the Section 202 Rule on the PSD program without any departure from the statute.

Furthermore, the Agency’s dramatic rewriting of the CAA is not supported by absurd results case law. Courts rely on the absurd results doctrine to justify limiting or construing a particular statutory provision to apply in a manner different than the “literal application of the statute.”⁴⁸ The doctrine is available for “statutory language which, at least to some degree, [is] open to interpretation” — it does not justify creating entirely new law.⁴⁹ For example, the Supreme Court has held that a provision of the bankruptcy code “which provides that ‘the trustee may abandon any property of the estate that is burdensome to the estate,’ does not give a trustee the authority to violate state health and safety laws by abandoning property containing hazardous wastes.”⁵⁰ This is a classic application of the absurd results doctrine — the Court found that Congress clearly did not intend the abandonment clause to apply to hazardous wastes, because that would conflict with numerous environmental laws. To avoid this “absurd result,” the court merely construed the law as inapplicable in a circumstance that would directly conflict with environmental law.

The unambiguous 100 tpy and 250 tpy statutory limits at issue here are not open to interpretation. In fact, the PSD applicability thresholds could not be clearer. Instead of attempting to limit or construe the CAA in a manner more in line with the “absurd results doctrine,” the proposal rewrites the Act itself — which only Congress has the authority to do.

IV. Even Applying the NAAQS Prerequisite Requirement, EPA Must Interpret the Phrase “Pollutant Subject to Regulation” and Should Interpret it to Exclude GHGs.

As discussed in Section III.B above, the “absurd results doctrine” dictates that, to avoid absurd results, an agency may only depart from the literal meaning of the statute in as limited a

⁴⁷ 140 F.3d 1060, 1069 (D.C. Cir. 1998) (quoting *Ron Pair Enters.*, 489 U.S. at 242).

⁴⁸ See *e.g.*, *Ron Pair Enters.*, 489 U.S. at 242-43; *In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991); *Midlantic Nat’l Bank v. New Jersey Dept. of Env’tl. Prot.*, 474 U.S. 494, 507 (1986).

⁴⁹ *Ron Pair Enters.*, 489 U.S. at 245.

⁵⁰ *Id.* at 243 (quoting *Midlantic Nat’l Bank*, 474 U.S. at 507).

manner as possible to effectuate underlying congressional intent. Congress created the CAA to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”⁵¹ With the PSD program, Congress struck a delicate balance between environmental protection and economic growth.⁵² EPA’s interpretation – that the designation of an area as attainment or unclassifiable for any pollutant means PSD applies to all pollutants – is fundamentally inconsistent with the purpose of the Act. The repercussions created by applying PSD to GHGs are perhaps the best evidence that such an interpretation runs contrary to congressional intent. Given this, EPA could reasonably interpret the term “subject to regulation” to exclude GHGs.

This is supported by the clear indications that Congress did not intend for the PSD program to effectively authorize a national permitting system for newly classified air pollutants. If PSD applies to GHG emissions, the Agency estimates that without the proposed tailoring approach 40,000 new PSD permits will be required annually,⁵³ including permits for small entities not previously subject to PSD, such as hospitals, churches, schools, and small businesses. This vast expansion in permitting will do little to “protect and enhance the quality of the Nation’s air resources,” yet will significantly weaken the “productive capacity of the population.” In addition, it will certainly stifle if not completely halt the nation’s economic growth. Currently, PSD permitting requires 12-18 months *after* a complete application is filed. With this new burden, EPA and state permitting agencies will face such severe backlogs of PSD permit applications that companies will be forced to wait decades for a permit. Faced with such delays and uncertainty, many companies may forgo new projects and expansions altogether. Congress never intended to create a program of such magnitude, particularly where the expansion in permitting will do little, if anything, to improve *local* air quality. Furthermore, EPA’s interpretation requires it to reinterpret historical approvals of SIPs so that they do not apply to GHGs below the new thresholds, a result that defies common sense and is at odds with the numerical thresholds in state regulations. All in all, the absurd results of EPA’s proffered interpretation show that the language must be interpreted to require that EPA has issued a GHG NAAQS before GHGs can be the sole trigger for PSD.⁵⁴ Since EPA has stated in this proposal that it does not intend to issue a GHG NAAQS (and we concur that it would be inappropriate to do so), PSD permitting requirements should *not* be triggered based solely on emissions of GHGs.

As to timing, the Associations urge EPA to affirm that the BACT analysis requirement does not apply until a control regulation requires *actual compliance*. Accordingly, if EPA finalizes the Section 202 rule, under EPA’s current interpretation, that rule would not trigger the PSD program until its compliance date – given fleet average requirements, ***the end of the 2012 model year***. Under the NAAQS Prerequisite Requirement of the Act, this would mean that sources otherwise obtaining a PSD permit would not be required to consider BACT for GHGs until the end of the 2012 model year, allowing permits that are currently being processed to be completed and an orderly transition. Furthermore, EPA must follow the regular SIP revision

⁵¹ 42 U.S.C. § 7401(b)(1).

⁵² One purpose of the PSD program is “to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.” 42 U.S.C. § 7470(3).

⁵³ 74 Fed. Reg. at 55,295.

⁵⁴ The Associations concur with EPA’s statement in the Proposed Rule that it is not appropriate to establish a NAAQS for GHGs. *Id.* at 55,297.

process if it intends to require GHG regulation under the PSD program; states must have an opportunity to respond to EPA's new controls before they go into effect.

V. To the Extent Title V Would Require Imposition of the 100 tpy Threshold on GHGs, Increasing Statutory Major Source Thresholds for Title V Is More Properly Based on the Legal Theories of Administrative Necessity and Absurd Results.

EPA should consider interpreting Title V's applicability provisions consistent with the intended scope of the program. Congress clearly did not intend for Title V's reference to "any air pollutant" to address pollutants like GHGs, the required monitoring for which was addressed in a statutory provision outside the Act.⁵⁵

EPA correctly notes that Title V applicability is based on potential emissions of 100 tpy or greater of an "air pollutant." However, EPA has long recognized that the Title V program's applicability is intended to be narrower and has interpreted it as not being applicable based on emissions of CO₂.⁵⁶ EPA should conclude that it can reasonably interpret the Title V applicability provisions consistent with congressional intent regarding the scope of the Title V program. Congress' understanding of the scope of the Title V program is evidenced in the legislative history of the Clean Air Act Amendments of 1990, in which the costs of that program was considered to be so modest that they were not broken out in either the Administration's analysis or subsequent congressional analyses of the bill. Thus, there is no possibility that Congress envisioned the overwhelming costs that would be incurred, by regulators and the regulated community, if GHGs, at an emissions level of 100 tpy were pollutants for which Title V applicability could be considered. And, while EPA correctly interprets the statute as not requiring GHGs to be included in the presumptive minimum fee collection requirements of Section 502(b)(3)(B) at this time because there is no NSPS regulating GHGs, EPA also appropriately recognizes that states are mandated to demonstrate their fees will be adequate to cover the costs of the permit program. The presumptive minimum fees that Congress set for regulated pollutants would clearly be insufficient to cover the costs of a Title V permitting program that includes GHGs – at 100 or even 25,000 tpy. EPA points out in the proposal that states will clearly incur additional costs to cover the permitting of Title V sources even with the 25,000 tpy threshold and that the statute requires that these costs be passed through to regulated sources in the form of increased fees – whether based on tpy or some other metric.⁵⁷ Given these facts and the lack of benefit that would be provided by triggering Title V requirements for GHGs, EPA should consider adopting an interpretation that the Title V program does not apply based solely on emissions of GHGs.⁵⁸

To the extent that EPA continues to interpret the Title V program as potentially applying once GHGs are regulated under Title II, the Agency's reliance on the administrative necessity

⁵⁵ Pub. L. No. 101-549, § 821, 104 Stat. 2399, 2699 (1990).

⁵⁶ Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, *Definition of Regulated Air Pollutant for Purposes of Title V* (Apr. 26, 1993) ("Wegman Memo").

⁵⁷ 74 Fed. Reg. at 55,347.

⁵⁸ We note that Congress specifically excluded substances regulated under Section 112(r)'s accidental release program from determining Title V applicability and it is reasonable to assume that Congress would have made a similar determination had it considered CO₂ as potentially triggering Title V applicability.

doctrine to increase the statutory major source threshold is more legally defensible than for the PSD program.⁵⁹ When the Title V regulations were first issued, the question of whether GHGs were required to be considered in determining Title V applicability was raised and the Agency issued a determination that GHGs were not considered air pollutants that could trigger Title V applicability.⁶⁰ If EPA had interpreted the statute differently, the 6 million sources that EPA now estimates would trigger Title V under a 100 tpy threshold would have been immediately subject to Title V permitting.⁶¹ Congress clearly did not envision that the Title V program would cover 6 million sources when it approved the program as part of the Clean Air Act Amendments of 1990. Indeed, then-Chairman Dingell characterized the program as “a modest tool for bringing some clarity to the world of stationary source regulations under the federal and state clean air programs.”⁶² And, the Bush I Administration’s EPA that authored the Title provided no separate cost estimate for the Title V program in its analysis of the Administration’s bill.⁶³ Surely, if Congress had contemplated a program that could cover 6 million sources, these costs would have been explicitly addressed.⁶⁴ If EPA proceeds in this manner, it must provide a proper analysis of the fee implications of triggering Title V in terms of administrative costs and permit fees as discussed in more detail in Section XII below regarding the Regulatory Impact Analysis (“RIA”).

VI. The Proposed Major Source and Significance Levels Are Arbitrary and Capricious.

A. The Proposal’s Assumption That it Is Excluding Most Small Businesses by Adopting a 25,000 tpy Threshold Is Incorrect.

Even if EPA’s proposed interpretation of the statute were correct, which it is not, the Proposed Tailoring Rule’s claim that it only targets “large” sources is simply inaccurate. The proposed threshold of 25,000 tpy would still capture many small businesses. According to a California Air Resources Board list of businesses and other entities that have the potential to emit over 25,000 tpy of CO₂e, the list of sources in California that would be entangled in CAA permitting would be long and varied. Examples include: dairies, breweries, wineries, landfills, universities, food production plants and packing companies, water pollution control plants, paper

⁵⁹ It is surprising that EPA has not proposed an approach similar to that implemented for Title V and Section 112 in the 1990s, in which the Agency assumed that sources with actual emissions below a set percentage of the major source threshold would be considered minor sources for Title V purposes until states could issue synthetic minor permits to allow these sources to be minor under Title V. This approach did not require any regulatory action by the state, EPA, or the source and allowed smaller sources the time they needed to complete minor source permitting.

⁶⁰ See Wegman Memo.

⁶¹ This burden would likely have been substantially greater at that time because many sources have since accepted limits on their criteria pollutant emissions which have also lowered GHG emissions.

⁶² Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Commerce, U.S. House of Representatives on Title V, No. 104-32, 104th Cong. at 31 (May 18, 1995) (statement by Chairman Dingell).

⁶³ The Congressional Research Service indicated in its analysis of the Administration bill that the costs were unknown for the Title V program. CRS Report for Congress, Clean Air Amendments: Permits and Market-Oriented Provisions in the Administration Bill, Aug. 18, 1989.

⁶⁴ EPA’s final Title V regulations estimated the number of Title V sources at 34,000 with an annual cost of \$526 million.

plants, pharmaceutical factories, military installations, irrigation facilities, and farms, among others.

To illustrate, one of the Associations' member companies with over 40 U.S. facilities analyzed the impact of the proposed thresholds on its facilities and found that, while about 30% of its facilities are currently subject to Title V and PSD for current NAAQS pollutants and only 25% of its facilities will be subject to EPA's GHG reporting rule based on actual emissions, about 70% of its U.S. facilities would be subject to PSD and Title V at the proposed thresholds. The GHG Reporting Rule would only capture ten facilities based on actual emissions. Under the proposed thresholds in this rule, some 30 sites, including five technical centers and other small sites, would be subject to Title V and PSD. This is because Title V and PSD thresholds are based on *potential* emissions.⁶⁵ The types of smaller sources at this company that would be brought into the program illustrate that EPA's estimation that its 25,000 tpy threshold targets "larger sources" is incorrect.

B. The Proposal Fails to Provide (1) a Rational Basis for Selecting a 25,000 tpy Major Source Threshold as Compared with Higher Thresholds; and (2) Sufficient Information for the Public to Meaningfully Comment.

EPA proposes a major source threshold of 25,000 tpy⁶⁶ for both the PSD and the Title V operating permit program. As discussed above, reliance on the doctrines of administrative necessity and absurd results poses problems given statutory language that can be interpreted to avoid the need for raising the thresholds for the PSD program; for Title V, the administrative necessity case is stronger given the potential for 6 million sources to trigger Title V permitting requirements. To the extent that the increase in thresholds is supported by these legal doctrines, selection of a 25,000 tpy threshold is inconsistent with the record and is arbitrary and capricious.

1. The selected thresholds are not based on a health and welfare analysis.

EPA's selected major source thresholds of 25,000 tpy for PSD and Title V and significance level of 10,000-25,000 tpy for PSD are arbitrary and capricious because there is no health or welfare basis for these cut-offs. GHGs, such as CO₂, are distributed roughly equally throughout the global atmosphere. As a result, localized emissions, unlike emissions of other pollutants currently regulated under the Act, have no direct effect on the region that is the source of the emissions. This stands in sharp contrast to the pollutants currently regulated under the CAA (*e.g.*, ozone), which create local air quality problems. Therefore, GHG emissions should

⁶⁵ The difference between actual and potential emission is striking – smaller facilities had actual CO₂ emissions as low as 2,000 tpy but had potential CO₂ emissions greater than 25,000 tpy. Based on that company's analysis EPA would have to raise the thresholds to at least 100,000 tpy to avoid capturing many of these small sources. While some of these sources may be able to apply for permit modifications to limit potential emissions, many would not be able to restrict PTE to the low 25,000 tpy threshold without forgoing necessary business flexibility. The 25,000 tpy threshold is the equivalent of less than 50 MMBTU/hr of total facility boiler/combustion capacity on the cleanest fuel – natural gas.

⁶⁶ We note that EPA proposes the major source threshold and significance level in short tons. Any thresholds or significance levels should be in terms of metric tons to be consistent with other GHG regulatory programs, such as the GHG Reporting Rule.

be viewed on a global scale for purposes of setting applicability thresholds and significance levels.

On a global scale, U.S. sources with 25,000 tpy of GHG emissions are just as *de minimis* as sources with 250 tpy of GHG emissions. Yet, EPA ignores this key distinction, viewing the problem solely through a U.S.-centric lens in terms of which sources to exclude and which to include. Throughout the proposal, the Agency indicates that the thresholds have an environmental basis — the Agency reasons that sources that emit between 250 and 25,000 tpy of GHG only account for 7% of U.S. stationary source GHG emissions, noting that excluding that “smaller amount of emissions coverage would not jeopardize the environmental protection goals of PSD.”⁶⁷ However, a 25,000 tpy PSD and Title V threshold no more advances the environmental protection goals of PSD than a 250 tpy threshold, because both levels are *de minimis* on a global scale. How can the Agency view 7% of U.S. stationary source GHG emissions as unworthy of regulation, yet view regulating the emissions regulated by the mobile source rule, which are about 4% of global GHGs, as essential? If EPA truly seeks to select thresholds that make sense from an environmental perspective, the chosen thresholds are completely arbitrary. This further supports adopting an interpretation of the PSD provisions that limits applicability for GHGs to instances in which a source is otherwise required to obtain a PSD permit for a criteria pollutant and of Title V that would limit applicability.

2. *The proposal’s failure to explain the basis for selection of proposed thresholds deprives the public of a meaningful opportunity to comment.*

EPA states in the preamble that its goal was to create a threshold which minimizes administrative burden while still capturing “68 percent of national CO₂e stationary source GHG emissions (including approximately 87 percent of CO₂).”⁶⁸ However, the Agency has not justified why it selected a 25,000 tpy threshold when a 50,000 tpy or 100,000 tpy level would exclude significantly more sources from the programs while reducing emissions coverage by only a very small percentage. EPA stated in the preamble to the final GHG Reporting Rule that “based on our review, EPA has determined that the selected 25,000 metric ton CO₂e threshold will cover many of the types of facilities and suppliers typically regulated under the CAA, while appropriately balancing emission coverage and burden.”⁶⁹ However, the following EPA chart (used in an overview PowerPoint presentation regarding the proposed GHG Reporting Rule)⁷⁰ shows that, based on the actual emissions analysis of the GHG Reporting Rule, a threshold of 100,000 tpy of CO₂e would eliminate over 6,600 reporters while the national downstream emissions coverage would only decrease by 2.5%. This minor drop in emissions coverage would have eliminated half of the reporters and simultaneously reduced an enormous administrative burden. Similar coverage differences should be expected for potential emission thresholds under the PSD and Title V provisions.

⁶⁷ 74 Fed. Reg. at 55,311.

⁶⁸ *Id.* at 55,332-55,333.

⁶⁹ 74 Fed. Reg. 56,260, 56,272-56,273 (Oct. 30, 2009).

⁷⁰ EPA, *Proposed Mandatory GHG Reporting Rule: Overview*, at slide 12 available at <http://www.epa.gov/climatechange/emissions/downloads/GHG Mandatory Reporting Rule-Overview.pdf>.

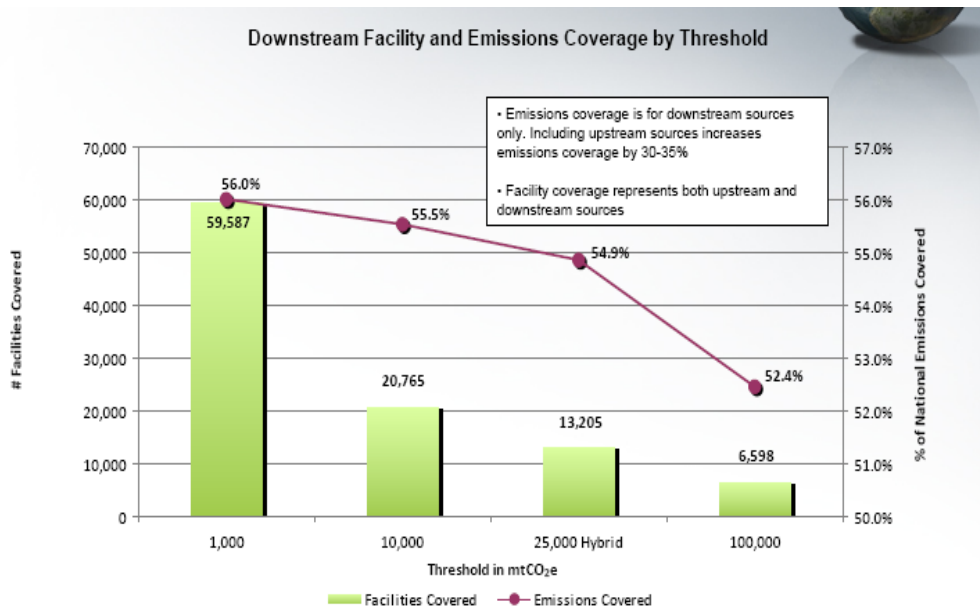


Figure 1. EPA Comparison of Number of Facilities and Emissions Covered between 1,000 and 100,000 tpy Using a 50-57% Scale

This minor change in coverage, which is obscured by EPA’s choice of the scale on the right-hand side of its chart, is highlighted when the right-hand scale is normalized to 0-100% (see Figure 2, below). Based on this actual emissions data and assuming a comparable result for potential emissions, EPA’s own data indicates that a much higher threshold would be appropriate.

We note that EPA’s charts in the docket related to the coverage that would occur at the various thresholds do not explain why the Agency believes that the 25,000 tpy threshold is appropriate for the *potential emissions levels that would trigger PSD* based on EPA’s reading of the statute. The only explanation found in the RIA for the Proposed Tailoring Rule is the statement that “the proposed threshold of 25,000 tpy CO₂e is also superior to the 50,000 tpy CO₂e because there is evidence that permitting authorities can run programs for the levels of permitting that would be required at 25,000 tpy CO₂e.”⁷¹ EPA does not provide any basis for this conclusion in the Proposed Rule or in the docket or indication of what this evidence might be. Moreover, state agencies have indicated that they are not prepared to address PSD for the numerous sources that would be subject to it or that would require minor New Source Review (“NSR”) permits to avoid it.

Even more striking about the selection of the 25,000 tpy threshold for a major source level is EPA’s explanation of why it selected that level for the GHG Reporting Rule. In that rule, EPA attempted to justify its 25,000 tpy threshold as necessary to collect the facility-specific data needed *to evaluate potential policies and regulatory programs that could have a single emission*

⁷¹ EPA, *Regulatory Impact Analysis for the Proposed Greenhouse Gas Tailoring Rule, Final Report* at 13-14 (Sept. 2009) (EPA-HQ-OAR-2009-0517-0006) (RIA).

*threshold across source categories (e.g., PSD permitting).*⁷² Rather than allow for the data to be collected, and then evaluate the appropriate levels for triggering requirements under PSD and Title V, EPA proposes to establish a 25,000 tpy threshold for PSD and Title V. Thus, the Agency is promulgating the *lowest* possible threshold that could be established based on the data it will gather in the future. This approach is inconsistent with the very administrative necessity and absurd results doctrines the Agency invokes to justify the increased thresholds. Further, this fails to recognize the significant difference between the basis for the GHG Reporting Rule (*i.e.*, actual emissions) and the potential emissions basis used in Title V and PSD rules. This factor typically ranges between 2:1 for many larger sources of GHGs, to as high as 10:1 for smaller-to-mid-sized sources.

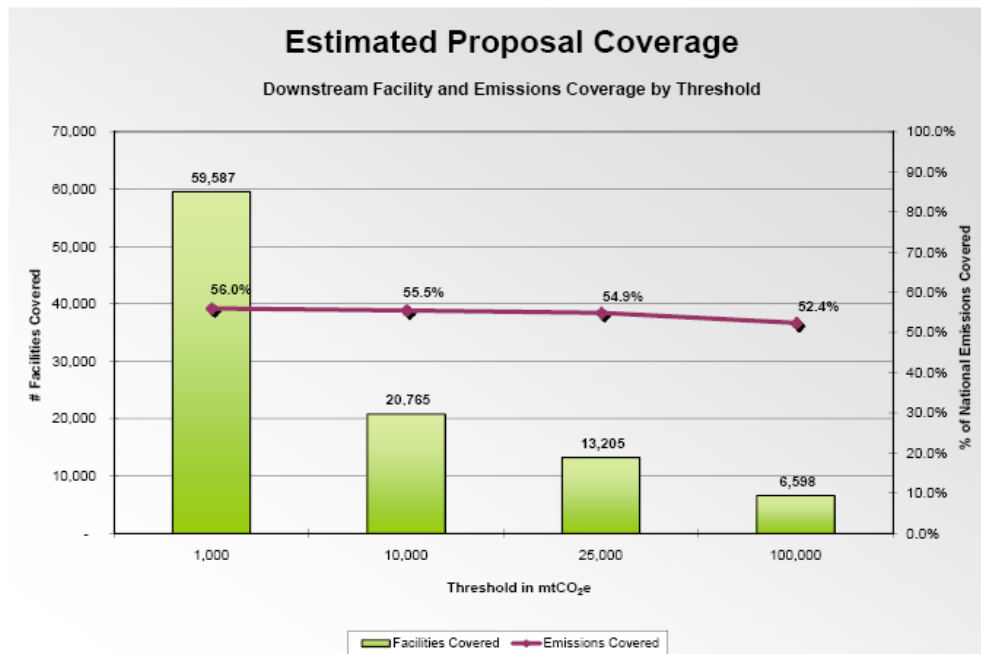


Figure 2. EPA Comparison of Number of Facilities and Emissions Covered from 1,000 and 100,000 tpy Using a 0-100% Scale for National Emissions Covered

Ultimately, EPA's analysis in the Proposed Rule's docket does not reveal how it selected the 25,000 tpy threshold. Without this information, we have been forced to look for information in EPA's other dockets. EPA must provide a reasoned explanation of how it picked the levels it has proposed for the public to meaningfully comment on the proposal.

C. The Proposal's Assumption of a 2% Modification Rate, Which Underlies its Selection of Significance Level, Is Arbitrary and Capricious.

In the proposal, EPA indicates that existing PSD facilities have a 2% modification rate. EPA based this on the existence of about 14,000 major PSD sources currently and an application rate of about 280 permits per year.⁷³ EPA states that it assumed that the major source

⁷² 74 Fed. Reg. at 56,271-56,272.

⁷³ 74 Fed. Reg. at 55,331.

modification rate of 2% per year would be the same rate at which GHG sources would trigger PSD.⁷⁴ Given that the level of GHG emissions in tons per year is orders of magnitude higher than emissions of criteria pollutants, it is not valid to simply assume the same rate of modification. Indeed, because combustion sources are typically replaced more often than process lines, and given EPA's narrow interpretation of the routine maintenance, repair and replacement exclusion, the likelihood is that a significantly higher rate of modification would apply when considering GHG emissions.⁷⁵

In reviewing the RIA, no justification for the 2% modification rate is provided there either. Indeed, the only mention of modification rates is found in the preamble to the Proposed Rule. The RIA confines itself to "new sources," which it estimates by applying growth rates in the number of units or facilities in a source category to the number of existing facilities at the respective thresholds. It is unclear from the RIA whether "new sources" includes new units at existing sources or just new greenfield plants. Assuming that the reference to "new sources" includes new units at existing plants, the growth rate approach referenced in the RIA is inappropriate. Growth rates were determined based on Economic Census data, EIA energy survey data, and various EPA regulatory impact analyses and information collection requests. As an example, EPA indicated that if the annual growth rate in a category was 1%, the number of existing facilities above a threshold was multiplied by the fractional growth rate to estimate the number of new facilities at that threshold per year. This approach is flawed because the "growth rate" does not account for the variety and types of modifications that routinely require permit analysis and would easily be more frequent than the assumed "growth rate." Neither the preamble nor the RIA explain why this is a valid approach to determining modification rates.

VII. EPA's Tailoring Rule Is Facially Invalid Because it Proposes to Illegally Rewrite SIP and Title V Approvals.

To implement its proposed PSD tailoring approach, EPA proposes a series of SIP revisions in which EPA would reach back in time to revise its approvals of SIPs to limit the federally enforceable elements to the major source and significance thresholds EPA will finalize. EPA proposes similar revisions to its Title V program approvals. EPA nowhere suggests that any state has asked for such a revision. Instead, EPA is announcing an assumption — that states lack the resources to implement EPA's view of the new challenge it is creating — and inserting into the states' plans *EPA's chosen approach* to managing the challenge, (for EPA to rewrite the states' SIPs). This approach, however, turns on its head the structure that Congress established for SIP planning. The implications of this approach would reach well beyond the current issue, and would contravene settled law on the relative roles of EPA and the states in SIP planning.

The provisions for SIPs in Section 110 establish a policy behind the SIP approach — that EPA sets the standards, but leaves states with the discretion to determine their own individual

⁷⁴ *Id.*

⁷⁵ Even under the 2002 NSR Reform regulations which clearly adopted an actual-to-projected actual emissions methodology, EPA requires new emissions units to project future emissions at the PTE level.

path for attaining those standards.⁷⁶ In fact, as the U.S. Court of Appeals for the Fifth Circuit recently stated, “the EPA has no authority to question the wisdom of a State’s choices of emissions limitations if they are part of a SIP that otherwise satisfies the standards set forth in 42 U.S.C. § 7410(a)(2).”⁷⁷

A. The PSD Tailoring Rule’s Retroactive Re-interpretation of SIP Submittals and Approvals That Occurred Years (and in Some Cases Decades) Ago Violates Established CAA SIP Revision Procedures and Is Unlikely to Be Sustained by the Courts.

EPA’s proposal to “redo” the state programs in a single rulemaking conflicts with CAA requirements for state rules submitted to EPA for approval. With respect to EPA-approved SIPs, EPA proposes to limit retroactively its approval of PSD permitting threshold level and significance level provisions that the Agency previously fully approved.⁷⁸ To accomplish this, EPA intends to add boilerplate statements limiting its prior approval to the record of all previously approved SIPs in a single rulemaking. The Agency claims to have authority to limit prior SIP approvals under Section 110(k)(6)’s provisions regarding error correction and alternatively, under Section 301(a)’s general rulemaking authority. These provisions do not provide such authority, however, because the Agency may only “limit” its prior approval of a SIP through the SIP revision process.

Section 110(k) of the Act sets forth the procedures for submittal, revision, and approval of SIPs. Nowhere does this provision authorize the novel approach that EPA offers in the proposal to revise its original approval of a SIP. To the contrary, the statute specifically provides procedures for changing a SIP that does not comply with the requirements of the Act by providing a “SIP-call” process in which EPA can call for a revision of a SIP when a plan is substantially inadequate to attain or maintain a NAAQS.⁷⁹ Moreover, Section 110(k)(6), as EPA points out in the preamble, provides for “corrections” when EPA determines that the action to approve, disapprove, or promulgate a plan or plan revision was in error, *through the same procedures as an original action would require*.⁸⁰ Section 110(l) states that any revision to a SIP must be adopted by a state after reasonable notice and public hearing.

EPA’s proposal to invoke Section 110(k)(6) to “correct” its original approval of SIPs as being in error is legally tenuous at best because EPA’s action at the time of approval was not a mistake. EPA intended to approve the language that the states submitted. Indeed, the states, in

⁷⁶ *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 470 (2001) (“[The CAA SIP] provisions enable the Administrator to assist the States in carrying out their statutory role as primary *implementers* of the NAAQS. It is to the States that the CAA assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources.”).

⁷⁷ *CleanCOALition v. TXU Power*, 536 F.3d 469, 472 n.3 (5th Cir. 2008); *see also Virginia v. EPA*, 108 F.3d 1397, 1404, 1410 (D.C. Cir. 1997) (holding that section 110 of the CAA does not give EPA the authority to condition approval of a state’s plan on the state’s adoption of control measures chosen by EPA).

⁷⁸ These comments address EPA’s lack of ability to redo prior approval of all SIP-approved PSD thresholds and significance levels. To avoid repetition, the comments do not specifically address EPA’s authority to redo approval of Title V thresholds, because the Agency also bases its authority for these revisions on CAA Section 301(a).

⁷⁹ 42 U.S.C. § 7410(k)(5).

⁸⁰ *Id.* § 7410(k)(6).

most cases, adopted the very same regulatory language that EPA had included in its own PSD regulations. Thus, the approval of this language cannot reasonably be considered a “mistake” on the Agency’s part. The Agency did exactly what it intended to do. The mistake would be that the Agency did not understand the potential implications of its action. Given this, it is unlikely any court would allow EPA to revise its original action in approving these SIPs without following the procedures explicitly provided in the Act.

The proposed approach has already been held invalid in an analogous situation. The Agency made a similar attempt to evade the SIP revision process when it deleted odor regulations from Pennsylvania’s federally-approved SIP. In *Concerned Citizens of Bridesburg v. EPA*, the Third Circuit rejected the Agency’s contention that its approval of the odor regulations, some 13 years prior, was a “mistake,” or alternatively, merely a “revision of EPA’s own prior action.”⁸¹ Regarding EPA’s contention that the prior approval of the odor regulations was a mistake, the Court stated: “[n]either are we persuaded by the EPA’s reference to the revisions as “corrections” We are not dealing here with typographical errors.”⁸² The original SIP approval must have been contrary to Agency policy at the time it approved the SIP, in order for the approvals to constitute “mistakes.”⁸³ In addition, the Court held that all SIP modifications must occur through the designated revisions process.⁸⁴ Hence, EPA was required to suggest proposed revisions to the state, which must then hold public hearings and respond.⁸⁵ Only if the state did not suitably respond was the Agency free to alter the terms of a plan itself.⁸⁶

In this Proposed Rule, the Agency similarly claims to be “limiting its prior approval” or, alternatively, correcting a mistake. As in *Concerned Citizens of Bridesburg*, EPA’s approval of the current SIP regulations was no “mistake” — the applicability thresholds and significance levels are not typographical errors contrary to Agency policy. These thresholds have been federal law for years. And alternatively, if EPA seeks to limit its approval, it must do so through the SIP revision process set out in CAA Section 110(k)(5), which includes notifying the states of the SIP inadequacies and establishing reasonable deadlines for state submission of revisions.⁸⁷ Only after completing those steps may EPA possibly alter a currently approved SIP provision.

EPA also seeks to rely on its general rulemaking authority under Section 301 to justify its revision of the SIPs. This reliance is similarly misplaced. Section 301 provides in pertinent part:

(a) Regulations; delegation of powers and duties; regional officers and employees
(1) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter...⁸⁸

⁸¹ 836 F.2d 777, 789 (3rd Cir. 1987).

⁸² *Id.* at 786.

⁸³ *Id.*

⁸⁴ *Id.* at 780.

⁸⁵ *Id.* at 789.

⁸⁶ Citing Judge Posner, the Court there stated, “EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states.” *Id.* (citing *Bethlehem Steel Corp v. EPA*, 723 F.2d 1303, 1309-10 (7th Cir. 1983)).

⁸⁷ 42 U.S.C. § 7410(k)(5). The SIP revision process was amended in the CAA 1990 Amendments and now differs slightly from the revision process in existence at the time *Concerned Citizens of Bridesburg* was decided.

⁸⁸ 42 U.S.C. § 7601(a)(1).

Courts have held, however, that where specific provisions “define[] the relevant functions of EPA in a particular area,” “EPA cannot rely on its general authority to make rules necessary to carry out its functions....”⁸⁹ Section 110 already addresses the SIP revision-and-approval process and there is no apparent gap for the Agency to fill with its general rulemaking authority. Moreover, usurping state decision-making in this manner is plainly contrary to the structure of Title I and is unlikely to be upheld.

B. The Proposal’s Retroactive Re-interpretation of Title V Submittals and Approvals Is Similarly Risky.

Like SIPs, state Title V operating permit programs are approved after notice and comment at the state level, submission to EPA, and publication of proposed approval, disapproval, or interim approval in the Federal Register and issuance of a final approval.⁹⁰ Again, there is no apparent authority for EPA to retroactively undo its approval of state program provisions without following the notification-and-revision procedures established in the statute. Moreover, even if EPA could rely on the SIP “correction” provision in Section 110(k)(6), there is no similar provision for EPA to “correct” an error in its original approval for a Title V program.

C. The Retroactive Revision of SIPs and Title V Permitting Obligations Places Sources at Risk.

The approach that EPA offers in the proposal is particularly problematic for companies that are operating facilities because the requirement to hold a permit under Part C and Title V is a *source obligation*.⁹¹ This means that if EPA’s legally risky approach is invalid, sources may have to defend citizen suits under federal law for failure to hold required permits. While a source may raise EPA’s rule as a defense to a citizen suit, a court that believes EPA was not authorized to retroactively revise its SIP approvals could similarly disregard EPA’s Tailoring Rule. EPA’s proposal thus places sources at an unacceptable risk of enforcement through citizen suits.

Given that the plain meaning of the statutory provisions would not expand the PSD program, EPA should abandon its retroactive revised SIP approval approach and interpret the Act consistent with the NAAQS prerequisite approach explained above. Moreover, EPA should evaluate statutory interpretations that avoid the absurd results of triggering Title V as well.

⁸⁹ *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (1995).

⁹⁰ 42 U.S.C. § 7661a.

⁹¹ *Id.* § 7661a(a).

D. EPA’s Approach to Ask States to Quickly Revise Their SIPs to Comport with the Increased Significance Thresholds Is Likely to Be Challenged by Activist Groups Citing to the Act’s Anti-Backsliding Provisions.

The CAA contains “anti-backsliding” provisions that limit relaxation in certain rules.⁹² Under EPA’s interpretation of PSD applicability, once the Section 202 rule requires PSD to apply to GHGs, the existing thresholds contained in SIPs could be alleged by activist groups to become binding on GHGs under the anti-backsliding arguments that these groups are currently advancing in various court cases.⁹³ Thus, even if a state wanted to revise its regulations similar to the federal tailoring rule and, thereby, relax the threshold, the anti-backsliding provision might prevent it. However, if EPA adopted the proper interpretation of the statute’s applicability provisions, these actions would largely be unnecessary and a state would only need to adopt a significance threshold for GHGs – an action that would not be vulnerable to anti-backsliding arguments.

VIII. Even if EPA’s Retroactive Revision of its SIP and Title V Approvals Could Be Effective for Purposes of Federal Law, the Proposed Rule Offers No Relief to Regulated Entities Obligated to Comply With State Law and With Minor NSR Permitting Requirements.

The Proposed Rule states clearly that EPA is only revising the SIPs and Title V programs for purposes of *federal law and enforcement*. The Agency’s action will leave in place the thresholds and regulatory applicability provisions for purposes of state law. Moreover, EPA’s proposed revision of its approvals would simply revise what EPA *intended to approve*, not what the states intended to submit for approval. Specifically, EPA states:

[E]ach federally approved PSD program will have a PSD threshold level for GHG emissions of 25,000 tpy CO₂e and a significance levels [sic] for GHG emissions of [10,000 to 25,000] tpy CO₂e; and although each State PSD program—as established by the State law provisions that comprise the SIP—will have a lower threshold and significance level, those lower levels will not be federally approved and therefore not federally enforceable. To reiterate, EPA is not proposing to disapprove those provisions; rather, EPA will take no further action with respect to them.⁹⁴

As a result, sources will apparently continue to be subject to state law provisions that impose: (1) a 100 or 250 tpy major source threshold for PSD and a 100 tpy major source threshold for Title V; and (2) a PSD significance level between 10,000-25,000 tpy. Thus, to the extent EPA could characterize this action as a relief rule, which it cannot, it actually provides no relief at all.

⁹² 42 U.S.C. §§ 7502(e), 7515.

⁹³ While the Associations disagree with these arguments, the fact is that the potential for challenge exists, creating uncertainty.

⁹⁴ 74 Fed. Reg. at 55,343. EPA notes that “the lower thresholds remain on the books under state law, and sources therefore remain subject to them as a matter of state law.” *Id.*

State laws will still require sources to comply with the lower thresholds. These states do not have the luxury of side-stepping the procedural requirements for adopting revised regulations that EPA attempts to invoke for purposes of federal law. That this is true is shown in the comments submitted on EPA's PSD Interpretive Memo Reconsideration by the National Association of Clean Air Agencies ("NACAA").⁹⁵ In those comments, NACAA told EPA that most states would need to revise their state laws to accommodate the new proposed thresholds; NACAA urged EPA to find another way to avoid triggering PSD based solely on GHG emissions.

There is no indication that all states are willing or able to adopt EPA's new thresholds in a timeframe that will provide relief to regulated entities. Even if willing, states must comply with their own administrative procedure requirements – revisions that reasonably can be expected to take at least a year to implement, if the states expedite action.

IX. The Proposed Definition of "Carbon Dioxide Equivalent" Improperly Relies on Documents That Have Not Been Subject to Notice and Comment and Places Sources in Ongoing Enforcement Jeopardy Should Global Warming Potentials Change.

The proposed thresholds for major source and significance levels are defined on a carbon dioxide equivalent, or CO₂e, basis as follows:

Carbon dioxide equivalent, or CO₂e, means a metric used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). The CO₂e for a gas is determined by multiplying the mass of the gas by the associated GWP. The applicable GWPs and guidance on how to calculate a source's GHG emissions in tpy CO₂e can be found in EPA's "Inventory of U.S. Greenhouse Gas Emissions and Sinks," which is updated annually under existing commitment under the United Nations Framework Convention on Climate Change (UNFCCC).⁹⁶

Under this proposed definition, the GWP would be updated annually. Before EPA utilizes a new GWP, that GWP must be subject to notice and comment to comply with the requirements of CAA Section 307 and the Administrative Procedure Act.

In addition, an annual update of GWP would effectively create a moving target for sources conducting applicability determinations and assessing compliance with minor NSR and PSD emission limits.

PSD applicability depends on whether a new source is considered "major," and whether a change at an existing source will cause a "significant" increase. The major source and significance determinations, in turn, depend on the size of any emissions increase from the new

⁹⁵ See NACAA Comments dated December 7, 2009, EPA-HQ-OAR-2009-0597-0062.1.

⁹⁶ 74 Fed. Reg. at 55,351, 55,352 (to be codified at 40 C.F.R. §§ 51.166(b)(58)), 52.21(b)(60)).

or modified source. Sources are required to determine if a change will result in a significant increase prior to undertaking a project. If the project will increase emissions above significance levels, the source must obtain a PSD permit. If the source projects an increase between 50% and 100% of the significance level, it must track emissions and keep records for 5-10 years following the change.⁹⁷ If emissions later exceed the significance level notwithstanding the initial projection of an insignificant increase, the source must report to EPA and may be required to obtain a PSD permit.

If EPA changes the GWP values annually, an activity that resulted in an insignificant increase in 2011 could be considered to have caused a significant increase if the GWP is increased in 2012. Similarly, if a facility accepts a permit limit to avoid PSD, such a limit will necessarily be based on the GWP that applies when the limit was established. If the GWP increases, the facility could suddenly be considered to have made a major modification and be subject to PSD. Moreover, if a source obtains a PSD permit, it is likely that any BACT limits will be expressed in terms of CO₂ equivalence. If the GWP changes, however, a facility's actions that achieved compliance with BACT in one year may no longer "meet the limit." This type of enforcement jeopardy creates substantial uncertainty and will chill investment in more efficient technologies. At a minimum, EPA needs to ensure that applicability and compliance with limits is based on the GWP that existed when the determination was made or the limit was established.

X. EPA Should Clarify That the Pollutants it Is Addressing in This Action Are the Four Pollutants Actually Being Regulated in the Section 202 Rule.

There is some confusion in the Proposed Rule regarding which pollutants EPA believes are subject to regulation under the PSD and Title V programs when a final Section 202 rule is issued (or on the compliance date at the end of the 2012 model year as recommended above) and EPA deems these pollutants to trigger PSD and Title V permitting requirements. It appears at some points in the proposal that EPA is addressing the "group of six GHGs, on a CO₂e-basis."⁹⁸ Because the Section 202 rule will only regulate four of the six GHGs addressed in the endangerment finding (CO₂, methane, nitrous oxide, and hydrofluorocarbons), it seems clear that the scope of stationary source regulation cannot exceed that set of pollutants. Even if EPA could reasonably justify regulating all six pollutants under these programs on a discretionary interpretation, the Agency cannot simultaneously invoke the administrative necessity and "absurd results" doctrines to then tailor the scope of applicability. As the Agency is aware, these doctrines only apply where the Agency has availed itself of all reasonable discretion afforded to it and must act in the face of a clear statutory requirement that yields an absurd result or presents an administrative necessity. As a result, EPA must interpret the statute to limit applicability to those pollutants for which regulation has in fact occurred.

⁹⁷ 40 C.F.R. § 52.21(r)(6).

⁹⁸ 74 Fed. Reg. at 55,328.

XI. EPA’s Analysis of Minor NSR Obligations Fails to Consider That State Minor NSR Programs Generally Parallel the Federal PSD Program Coverage.

EPA states in the Proposed Rule that minor NSR programs pursuant to Section 110(a)(2)(C) are not affected by this action because the Act “does not require that minor source programs apply to GHGs because there are no NAAQS for GHGs.”⁹⁹ While it may be true that the Act does not require minor NSR programs to address non-NAAQS pollutants — as EPA should recognize is also true for the PSD program — the fact is that states have adopted applicability provisions identical to the PSD program for minor NSR. EPA has approved those programs as part of SIPs — SIPs that EPA deemed “necessary to attain and maintain” a NAAQS pursuant to Section 110. Given this approval and federalizing of the state regulations, EPA cannot now claim that minor NSR implications are irrelevant to this action. To the extent EPA interprets the Act and its PSD regulations to *require* that PSD be triggered based on a non-NAAQS pollutant, EPA cannot ignore the implications for SIP-approved minor NSR programs using the same language. Even if this was not the case, as a practical matter, EPA must address and resolve the enormous and unreasonable burden imposed by regulating GHGs under state minor NSR programs.

XII. EPA’s Choice to Apply PSD and Title V to GHGs Means That the Proposed Tailoring Rule Is Not a “Relief Rule” as EPA Suggests but Rather an Affirmative Regulatory Action Requiring a Full RIA.

Rather than perform the requisite burden analysis, the Proposed Rule disowns the PSD burdens and instead claims that it “provides regulatory relief rather than regulatory requirements.”¹⁰⁰ This is a breathtaking claim and one that is simply false — it is only due to the fact that EPA has *chosen* to interpret PSD applicability in the PSD Tailoring Rule that the motor vehicle GHG emission standards will trigger PSD permitting requirements for GHGs. Because the Act’s NAAQS Prerequisite Requirement avoids any need to tailor the PSD applicability threshold, EPA must conduct a full RIA. EPA cannot simply estimate the number of sources that it has allowed to avoid an otherwise applicable burden and claim a benefit therefrom. EPA must determine how many sources it is now subjecting to PSD and Title V due to its discretionary action and assess the costs and benefits of so doing.

A. The Failure to Estimate the Impacts of the PSD Tailoring Rule on Stationary Sources Deprives Affected Sources and State Permitting Authorities of a Meaningful Opportunity to Comment on the Rule in Violation of CAA Section 307(d) and the Administrative Procedure Act.

The proposal’s assessment of the number of new major sources and annual modifications appears to dramatically underestimate the costs of the rule and does not provide a rational assessment of the impacts. Determining the burdens caused by applicability of PSD based solely on GHG emissions requires EPA to estimate the number of: (1) major sources that will exist

⁹⁹ 74 Fed. Reg. at 55,298.

¹⁰⁰ 74 Fed. Reg. 55,337; *see also* RIA, at 4.

based solely on GHG emissions (*i.e.*, those sources that are currently minor for PSD but will become major by virtue of their GHG emissions); (2) new major sources that will be built or otherwise created each year (*e.g.*, through expansion), including the burdens associated with PSD permitting for GHGs and for any other PSD pollutant the source emits above significance levels; (3) major modifications that will trigger PSD based on another pollutant but will now require BACT for significant GHG emissions increases and the associated burden of BACT determination and installation; (4) major modifications at sites that would be major only due to GHGs but that will now be subject to significance levels for criteria pollutants and require BACT and PSD permitting for projects causing significant increases in such pollutants; (5) major modifications that will trigger PSD based on GHG emissions increases alone, including the burdens associated with obtaining PSD permits for GHGs and for any other PSD pollutant the source emits in significant amounts; (6) sources that must accept permit limits or otherwise restrict operations to avoid triggering PSD, including the cost of obtaining a minor NSR permit with such limits and the ongoing administrative burdens associated with these permits; and (7) sources that would trigger the requirement to keep 5 or 10 years of emissions records because, although PSD is not triggered, there is a reasonable possibility that PSD could be triggered. None of this information is in the docket. EPA has not even attempted to analyze it.

Moreover, to the extent information is included in the docket that would be relevant to these analyses (which is provided to show the “relief” given), it appears to dramatically understate the impacts. For example:

Underestimated 2% Modification Rate: As discussed in Section VI.C., above, the estimation of modification rates in the proposal appears to be derived by simply taking the existing major source modification rate of 2% per year for current criteria pollutants and applying it to GHGs.¹⁰¹ For the reasons stated above, this approach is not valid and a realistic modification rate must be estimated and used to evaluate the burdens of the Proposed Rule.

Failure to Recognize that Sources Major Only for GHGs Would Now Be Subject to the Significance Levels for Criteria Pollutants: EPA’s analysis does not consider the very significant implications of making a tremendous number of facilities major for PSD and triggering PSD modifications for criteria pollutants. As stated in Section VI, above, the implications of EPA’s proposal are much more significant than simply requiring BACT for GHGs at facilities that would in the future be considered major for PSD and Title V simply because of their GHG potential emissions. Under EPA’s PSD policies, if a source is major for any pollutant that can trigger PSD, it may be considered to trigger PSD for a project with a significant emissions increase for any other pollutant. Thus, a source that is major for sulfur dioxide (SO₂) in an SO₂ and particulate matter (PM₁₀) attainment area can trigger PSD for a significant increase in PM₁₀ emissions even if its SO₂ emissions will not increase significantly. The same would be true under EPA’s interpretation of the statute if it allows GHGs to be the basis for a source to be classified as major. A source that is “major” for GHGs — based on whatever threshold EPA establishes — could then trigger PSD for any significant increase in a criteria pollutant, even if the source’s potential to emit (“PTE”) is below major source thresholds for every criteria pollutant. The consequence is that many changes that facilities currently permit under the minor NSR program in a matter of weeks would now be subject to PSD and would

¹⁰¹ 74 Fed. Reg. at 55,331.

trigger the full range of air quality analysis and modeling for the increases in NAAQS pollutants, even though those facilities are not major for any NAAQS pollutant for which the area is designated attainment or unclassifiable.¹⁰² It appears that EPA has failed altogether to consider these consequences in its RIA. EPA could of course avoid these consequences by applying the NAAQS Prerequisite Requirement.

Lack of Basis for Assumption That “Larger Sources” Will Incur No Additional Costs: EPA states in the RIA that “larger sources” of GHGs will not be economically impacted because requirements to obtain a Title V operating permit or to adhere to NSR requirements are already mandated by existing rules and are not imposed as a result of this Proposed Rule.¹⁰³ This is simply not true. It is clear that otherwise minor modifications will now trigger PSD solely based on GHG emissions due to EPA’s overly broad interpretation of the PSD applicability provisions. Moreover, many facilities will now be required to include GHG requirements in existing permits, imposing permit modification, monitoring, recordkeeping, and reporting burdens. EPA stated in the proposed Section 202 rule that it would be evaluating the impacts of triggering PSD and Title V in this rulemaking. Now EPA claims that it does not need to analyze these impacts.

Complete Failure to Assess the Burdens to Regulated Entities: EPA has failed to estimate *at all* the burdens on regulated entities for (1) obtaining permits, (2) conducting reasonable possibility analyses, (3) maintaining documentation, or (4) complying with BACT. These impacts must be accounted for in the rulemaking process.

Understated Impacts Due to Inaccurate Assumptions Regarding Potential Emissions: According to the RIA, potential emissions were estimated in the residential and commercial sectors for heating equipment and appliances by adjusting actual emissions upwards by a range of 85-90%.¹⁰⁴ But, EPA apparently did not similarly adjust upwards for industrial sectors. A similar adjustment for industrial sectors should be made because combustion equipment is sized to satisfy short-term demand due to the variability in weather and production. Thus, EPA’s coverage estimates at various thresholds is understated, perhaps dramatically. Because EPA did not provide a breakdown for specific industries, the public is unable to comment on the specific elements of the analysis.

B. EPA’s Failure to Assess the Costs (and Benefits) of the PSD Tailoring Rule — Which Applies PSD and Title V to Sources That Would Not Otherwise be Required to Obtain a PSD and/or Title V Permit — Violates a Host of Statutes and Executive Orders That Require Analysis and Public Review of the Regulatory Burdens.

EPA’s failure to estimate the full costs of the effects of its interpretation of PSD applicability in the Proposed Rule violates several statutes and executive orders that require

¹⁰² For example, a project causing an 11 tpy increase in PM_{2.5} emissions today at a minor source for criteria pollutants would not trigger PSD and would be permitted quickly under the state’s minor NSR program. Under EPA’s interpretation of the statute, once GHGs are “subject to regulation” within the meaning of Section 165(a)(4), the source would require a PSD permit for PM_{2.5}, complete with BACT, modeling, and increment analysis.

¹⁰³ *Id.* at 8.

¹⁰⁴ *Id.* at 10-11.

analysis and public review of regulatory burdens. Specifically, EPA's Proposed Rule fails to comply with the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and Executive Orders 12866, 13132, 13175, and 13211. This failure deprives sources and permitting authorities of a meaningful opportunity to comment on the rule in violation of CAA Section 307(d) and the Administrative Procedure Act. Furthermore, and more fundamentally, EPA has thwarted the public interest by ignoring the enormous implications that the PSD Tailoring Rule poses for the U.S. economy.

1. The Proposed Rule does not comply with the Paperwork Reduction Act.

The Paperwork Reduction Act ("PRA") requires the Agency to seek approval from the Office of Management and Budget ("OMB") prior to engaging in rulemaking that will involve information collection requirements.¹⁰⁵ EPA may not "conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information ... the Director [of OMB] has approved the proposed collection of information."¹⁰⁶ Contrary to the PRA's clear mandate, the Agency neglected to submit this Proposed Rule to OMB for approval on the basis that "this action does not impose any new information collection burden."¹⁰⁷ Rather, EPA claims that "this proposed action would significantly reduce costs incurred by sources and permitting authorities relative to the costs that would be incurred if EPA did not revise the rule."¹⁰⁸ In fact, in the RIA to the Proposed Rule, the Agency estimates that the Rule will save small sources and permitting authorities around \$54 billion.¹⁰⁹

To the contrary, EPA's decision to interpret the statute such that motor vehicle emission standards will trigger PSD applicability for 40,000 new PSD permit applications and 6 million Title V permits¹¹⁰ is responsible for these burdens and additionally, burdens to sources with emissions over the proposed thresholds. EPA cannot evade the PRA's requirements on the basis that this Proposed Rule will lessen those burdens. EPA must at least analyze the actual burdens of imposing PSD and Title V at the thresholds it proposes. Moreover, since the Proposed Rule does not actually eliminate the PSD burdens at the state level, and unless and until states "tailor" the PSD and Title V thresholds in existing state law, the same 6 million plus sources will be subject to PSD and Title V even if a 25,000 tpy threshold is finalized.¹¹¹ Finally, it is no answer that EPA has previously submitted the PSD and Title V regulations to OMB under the PRA and has received approval based on existing criteria pollutant emissions.¹¹² Those approvals were based on the burdens created at that time, not the dramatic expansion of the program that EPA proposes in this rulemaking (even with the lower thresholds, doubling the number of Title V-subject sources).

¹⁰⁵ See 44 U.S.C. § 3507.

¹⁰⁶ *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 28-29 (D.C. Cir. 1998) (quoting 44 U.S.C. § 3507(a)).

¹⁰⁷ 74 Fed. Reg. at 55,349.

¹⁰⁸ *Id.*

¹⁰⁹ See RIA, at 16.

¹¹⁰ See 74 Fed. Reg. at 55,295.

¹¹¹ As discussed in Section VIII, above, as even EPA admits, the PSD Tailoring Rule does nothing to change state law: "the lower thresholds remain on the books under State law, and sources therefore remain subject to them as a matter of State law." 74 Fed. Reg. at 55,343.

¹¹² 74 Fed. Reg. at 55,349.

Therefore, EPA's submission to OMB under the PRA was deficient for failure to include the costs of these additional information collection requirements on newly regulated entities. The Agency should resubmit the information collection approval request to OMB with a proper and fully inclusive analysis. Otherwise, the Agency will lack authority to collect information from stationary sources for PSD and Title V GHG emissions permitting.

2. *The Proposed Rule does not comply with the Regulatory Flexibility Act.*

The Regulatory Flexibility Act ("RFA") requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.¹¹³ A small entity is defined as a small business, small organization and/or a small governmental jurisdiction.¹¹⁴ EPA failed to conduct a regulatory flexibility analysis of the Proposed Rule because it proposes to "certify that the rule would not have a significant economic impact on a substantial number of small entities."¹¹⁵ The Agency reasoned that rather than impose burdens on small entities, the "proposed rule would relieve regulatory burden for a substantial number of small entities"¹¹⁶ However, EPA utterly neglected to consider the millions of small businesses, hospitals, schools, small government entities, and others that will be dramatically impacted by the rule's unprecedented and direct effect on small entities, because as discussed above, the rule imposes these burdens in the first instance, is ineffective to change state law, and will inevitably be struck down by the courts. Moreover, even at the 25,000 tpy threshold level, numerous small businesses will be affected by this rule. Therefore, it simply defies logic to state that "the program changes provided in the proposed rule are not expected to result in any increases in expenditure by any small entity."¹¹⁷ EPA cannot state on the one hand that it was not obligated to address the PSD burdens raised in the Section 202 rule and on the other claim that it is not required to conduct a regulatory flexibility analysis in this rule because it "relieves" the burdens on small entities.

In this Proposed Rule, EPA "recognizes that some small entities continue to be concerned about the potential impacts of the statutory imposition of PSD requirements that may occur given the various EPA rulemakings currently under consideration concerning GHG emissions."¹¹⁸ Yet, rather than actually account for these impacts as required under the RFA, EPA claims to use "the discretion afforded to it under the RFA to consult with OMB and SBA, with input from outreach to small entities, regarding the potential impacts of PSD regulatory requirements that might occur as EPA considers regulations of GHGs."¹¹⁹

That response does not satisfy the RFA and is even belied by EPA's own statements. In the RFA discussion, EPA minimizes the PSD trigger implications of the PSD Tailoring Rule to small entities. Yet, EPA elsewhere in the Proposed Rule unequivocally states that: "[the]

¹¹³ 5 U.S.C. §§ 603(a), 605(b).

¹¹⁴ *Id.* § 601(6).

¹¹⁵ 74 Fed. Reg. at 55,349.

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

proposal is necessary because EPA expects soon to promulgate regulations under the CAA to control GHG emissions from light-duty motor vehicles and, as a result, trigger PSD and title V applicability requirements for GHG emissions. When the light-duty vehicle rule is finalized, the GHGs subject to regulation under that rule *would become immediately subject to regulation under the PSD program ...*.¹²⁰ Furthermore, EPA admits that the Proposed Rule would do nothing to “fix” the thresholds as a matter of state law, which remain in effect.¹²¹ In failing to include the impacts of triggering PSD and Title V in the regulatory flexibility analysis, the Agency has failed to comply with the RFA’s explicit statutory requirements.

3. *The Proposed Rule does not comply with the Unfunded Mandates Reform Act.*

Similarly, the Agency has failed to comply with the requirements of the Unfunded Mandates Reform Act (“UMRA”), pursuant to which EPA must assess the effects of the Proposed Rule on state, local, and tribal governments and the private sector.¹²² Specifically, Section 202 of the UMRA requires EPA to prepare a written statement, including a cost-benefit analysis, for proposed rules with “federal mandates” that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year.¹²³ In concluding that “the revisions would ultimately reduce the PSD and title V program administrative burden that would otherwise occur in the absence of this rulemaking,” EPA has not accounted for the billions of dollars that permitting authorities and stationary sources will soon be required to spend once PSD is triggered for GHGs.¹²⁴

4. *The Proposed Rule does not comply with Executive Orders 12866, 13132, 13175, and 13211.*

Finally, EPA neglected to include the impacts of making GHGs subject to regulation under the Act and thereby triggering PSD in the analysis required by Executive Orders 12866, 13132, 13175, and 13211. Executive Order 12866 directs EPA to submit to OMB new significant regulations under consideration by the Agency.¹²⁵ In the Section 202 rule, EPA failed to analyze the effect on stationary sources in the cost benefit analysis and there is no indication that EPA included these impacts in its submission to OMB. In this Proposed Rule, EPA has similarly failed to analyze the costs and benefits of triggering PSD for stationary sources. Without this key information, OMB could not fully review the impacts of the Proposed Rule. Likewise, the Agency has failed to satisfy the requirements of Executive Orders 13132 (federalism),¹²⁶ 13175 (consultation and coordination with Indian tribal governments), and 13211 (energy effects), by neglecting to include impacts of the PSD trigger.¹²⁷

¹²⁰ 74 Fed. Reg. at 55,294 (emphasis added).

¹²¹ *Id.* at 55,343.

¹²² 2 U.S.C. § 1531.

¹²³ *Id.* § 1532(a).

¹²⁴ 74 Fed. Reg. at 55,349.

¹²⁵ Exec. Order 12866 § 6(a), 58 Fed. Reg. 51,735, 51,740 (Oct. 4, 1993).

¹²⁶ Remarkably, EPA states that “this action does not have federalism implications” and “will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.”

CONCLUSION

The Associations appreciate the opportunity to submit comments on this Proposed Rule and urge the Agency to reconsider its statutory interpretations and other aspects of the proposal in accordance with the comments above.

74 Fed. Reg. at 55,349. This statement ignores the tremendous permitting burdens that EPA's unnecessary interpretation of the PSD applicability provisions would have to increase state permitting burdens.

¹²⁷ The reasons that EPA must account for the PSD trigger consequences are similar for these Executive Orders and, therefore, are not reiterated.

ATTACHMENT A

Air Permitting Forum: The Air Permitting Forum is a group of companies focused on implementation issues related to permitting issues under the Clean Air Act, with a particular focus on Title V and PSD permitting concerns. Forum members own and operate facilities throughout the country that are subject to Title V and PSD requirements.

American Chemistry Council: The American Chemistry Council is a nonprofit trade association whose member companies represent the majority of the productive capacity of basic industrial chemicals within the United States. The business of chemistry is a \$689 billion enterprise and a key element of the nation's economy.

American Coke & Coal Chemicals Institute: The American Coke & Coal Chemicals Institute represents companies comprising over 90% of the U.S. production of metallurgical coke for iron and steelmaking and 100% of the U.S. production of chemicals produced from coke byproducts.

American Iron and Steel Institute: The American Iron and Steel Institute represents approximately 28 member iron and steel companies, and 138 associate and affiliate members who are suppliers to or customers of the steel industry. These members operate and hold ownership interests in various steel manufacturing and related operations across the United States and its producer, associate and/or affiliate members supply various customers and projects in the United States.

Corn Refiners Association: The Corn Refiners Association is the national trade association representing the corn refining (wet milling) industry of the United States. Corn refiners manufacture sweeteners, ethanol, starch, bioproducts, corn oil, and feed products from corn components such as starch, oil, protein, and fiber.

Institute of Shortening and Edible Oils: The Institute of Shortening and Edible Oils, Inc. is a trade association representing the refiners of edible fats and oils in the U.S. Its member companies process approximately 90% of the edible fats and oils produced in the U.S., which are used in baking and frying fats, salad and cooking oils, margarines and spreads, confectionary fats and as ingredients in a wide variety of foods.

National Association of Manufacturers: The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states.

National Oilseed Processors Association: The National Oilseed Processors Association is a national trade association comprised of 15 companies engaged in the production of vegetable meals and oils from oilseeds, including soybeans. NOPA's member companies process more than 1.7 billion bushels of oilseeds annually at 65 plants located throughout the country, including 60 plants which process soybeans.

Renewable Fuels Association: The Renewable Fuels Association (RFA) is the leading trade association for America's ethanol industry. Its mission is to advance the development, production, and use of ethanol fuel by strengthening America's ethanol industry and raising awareness about the benefits of renewable fuels. Founded in 1981, RFA represents the majority of the U.S. ethanol industry and serves as the premier meeting ground for industry leaders and supporters. RFA's 300-plus members are working to help America become cleaner, safer, energy independent and economically secure.

ATTACHMENT 2

Portland Cement Association's Comments to the Tailoring Rule

December 28, 2009

Environmental Protection Agency
EPA Docket Center (EPA/DC)
EPA West (Air Docket)
Mailcode 2822T
Attention Docket ID No. EPA-HQ-OAR-2009-0517
1200 Pennsylvania Avenue, NW.
Washington, DC 20460

Re: Comments on Proposed Prevention of Significant Deterioration and Title V
Greenhouse Gas Tailoring Rule, Docket ID No. EPA-HQ-OAR-2009-0517

Dear Sir or Madam:

I am writing to offer the comments of the Portland Cement Association (PCA) on a proposed rule, published October 27, 2009 (74 Fed. Reg. 55,292), which would modify the thresholds for greenhouse gases for applicability of the Clean Air Act Prevention of Significant Deterioration (“PSD”) permitting and Title V operating permit programs (the “Tailoring Rule”).

PCA offers these comments on behalf of its members. PCA is a trade association representing cement companies in the United States and Canada. PCA’s U.S. membership consists of 45 companies operating 106 plants in 35 states and distribution centers in all 50 states servicing nearly every Congressional district. PCA members account for more than 95% of cement-making capacity in the United States. Facilities operated by PCA members would be directly affected by the permitting requirements addressed by the Tailoring Rule.

Introduction and Overview

PCA and its members for years have been at the forefront of industries seeking to understand and reduce their greenhouse gas (“GHG”) emissions and to promote energy security. In fact, PCA members already have made significant reductions in the GHG emission rate required to manufacture Portland cement. In addition, the cement industry plays an increasingly important role in reducing GHG emissions thorough the promotion of concrete in product applications, including road construction. The use of concrete improves vehicles’ rolling resistance and decreases solar heat absorption by the roadway as compared to other road construction materials.

PCA’s members strongly believe that the Clean Air Act (“CAA”) is not the appropriate regulatory mechanism to address the challenges of climate change. In our view, the best way to arrive at the right climate change solution for our nation is to develop a single

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national program purposefully designed to deal with the issue of climate change, and addressing as well the interrelated issues of energy policy. It is essential as well that climate change regulatory policy promote the health and welfare of Americans by not causing severe adverse economic impacts domestically and placing U.S. industry at a severe international competitive disadvantage.

We believe this is best accomplished through the careful development of a new national law, separate and distinct from the CAA. The Supreme Court's decision in *Massachusetts v. EPA* that EPA has authority to consider regulation of GHGs under the CAA did not require EPA to take any particular regulatory action with respect to GHG emissions from motor vehicles, let alone for stationary sources. As EPA has recognized, because of the near-ubiquitous nature of CO₂ and methane, and the fact that CO₂ in particular is emitted by many types of combustion sources in quantities far greater than other, "criteria" pollutants, applying the same annual emissions thresholds for application of PSD and Title V permitting to GHG emissions that apply to emissions of criteria pollutants and other air pollutants would create enormous burdens for businesses and regulatory agencies, far beyond what Congress was contemplating when it enacted those provisions.

While PCA appreciates EPA's efforts to reduce those burdens, the Tailoring Rule as written is a convoluted, dubious approach that falls far short of accomplishing that goal. PCA believes that instead it would be in the best interests of all involved if EPA, rather than trying to adjust the threshold for major sources and modifications, simply deferred applicability of PSD and Title V permitting to GHG emissions for at least 4-5 years while Congress is proceeding to consider comprehensive legislation to address climate change. During this deferral period, EPA will be able to gather more information on GHG emissions and (if necessary) develop reasonable mechanisms to reduce any permitting burden should a national law not preempt application of these CAA programs to GHGs. Deferring applicability of PSD and Title V for a number of years also could help address the huge burden that State permitting agencies would face, many of which would have to amend State statutes or regulations to establish new applicability criteria for GHGs, a process that alone could take a year or two. Deferral of PSD and Title V applicability to GHG emissions could be accomplished either by adopting amendments to the PSD and Title V regulations, excluding GHGs for the time-being, or (at least until EPA adopts some other CAA regulation limiting GHG emissions) by dropping or deferring the CAA-based portion of the recently proposed rules to increase motor vehicle fuel economy and reduce motor-vehicle GHG emissions.¹

¹ EPA has suggested that the GHG tailpipe emissions standards for motor vehicles that it recently proposed in conjunction with National Highway Transportation Safety Administration motor vehicle fuel economy standards would, once applicable, constitute regulation under the CAA that would trigger application of the PSD and Title V permitting programs to vastly increased numbers of stationary sources because of their GHG emissions. 74 Fed. Reg. at 55,294. In the preamble to the proposed GHG tailpipe emission standards, however, EPA acknowledges that the only technology currently available to reduce GHG emissions from motor vehicles is increasing their fuel economy, which NHTSA proposed to require in a joint proposal with the EPA tailpipe emission standards. See 74 Fed. Reg. at 49,465 col.3, 49,470 n. 49, 49,539. Promulgation of the proposed fuel economy

Application of PSD and Title V to GHGs would be unworkable and inconsistent with congressional intent.

In the preamble to the proposed Tailoring Rule, EPA indicates that its anticipated promulgation next spring of GHG tailpipe emission standards for motor vehicles will trigger PSD permitting requirements, including potentially costly Best Available Control Technology (“BACT”) emission controls, for GHG emissions for tens of thousands of new and modified stationary sources every year that would not otherwise be covered by the PSD program. EPA also asserts that promulgation of the GHG tailpipe standards would result in millions of stationary sources exceeding the current major source emission threshold, thereby requiring them to obtain CAA Title V operating permits for the first time. See 74 Fed. Reg. at 55,294. EPA recognizes that this huge expansion in the number of facilities subject to PSD and Title V permitting requirements would result in PSD requirements that produce “absurd results,” “run contrary to expressed congressional intent for the PSD and Title V provisions, and, in fact, severely undermine both programs.” *Id.* at 55,303; see also, e.g., *id.* at 55,330. PCA agrees with these conclusions.

It is difficult to overstate the problems that would result, for businesses, permitting authorities, and the nation as a whole, if PSD and Title V permits were required for orders-of-magnitude greater numbers of facilities and projects. Even under the current PSD regulations, which do not apply to GHGs, obtaining a PSD permit takes many months, and often more than a year. This already creates a significant impediment to economic development and innovation. It took more than a decade to issue Title V permits to the sources currently affected, and Title V permit modifications that can be required for changes to the facility also generally take many months (and in some cases years) to process. It is obvious from this experience that State and EPA permitting authorities would be completely overwhelmed by the expansion of current PSD and Title V permitting programs to encompass sources whose GHG emissions exceed the applicability thresholds in the current regulations.

Congress certainly did not intend for the PSD program to require tens of thousands of new and modified sources to obtain PSD permits every year (and for EPA and State agencies to process tens of thousands of such permits). See, e.g., *Alabama Power Co. v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1980) (“Congress’s intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation’s air.”); *id.* at 354 (“a further look at the legislative history reveal[s] that Congress was concerned with large industrial enterprises—major actual emitters of air pollution. The draftsmen were of the view that certain small industrial facilities within these categories might actually and potentially emit less than the threshold

standards by NHTSA would achieve the motor vehicle GHG emission reductions EPA is seeking, without GHG tailpipe emission standards promulgated by EPA under the CAA that would trigger application of PSD and Title V and all the unacceptable consequences that follow.

amount.”).² Even more importantly, Congress did not intend the PSD program to produce the kind of severe restrictions on development and refinement of industrial and commercial facilities that would necessarily result from the permitting gridlock that a huge expansion of PSD permitting applicability would produce. For example, during congressional consideration of 1977 amendments to the CAA to incorporate PSD permitting, Senator Randolph, chairman of the Senate Committee on the Environment and Public Works, said: “I assure Members of the Senate that this program—which would be almost totally administered by the States—will not bring a halt to industrial and commercial activity in this country. It will not prohibit the development of needed energy resources. It will not impose Federal land-use planning on communities. It will not result in high costs to individual citizens.” Senate Debate on S. 252, June 9, 1977 (reprinted in 1977 Legis. Hist. 910).

PCA suggests that, in the absence of EPA action, the overwhelming burden of applying for and obtaining permits for a vastly increased number of sources would not just render the permitting programs unworkable and vastly more expensive. It also would have a very real detrimental effect on measures to reduce atmospheric GHG loadings. If the nation is going to make the kinds of dramatic changes in GHG emissions that EPA has indicated will be necessary in the coming years, it will be especially important to assure that modifications to facilities, for purposes such as fuel switching, energy efficiency, and so forth—which will be essential to reducing or mitigating GHG loadings—can proceed in a timely fashion, unimpeded by lengthy permitting delays and costly application procedures. Businesses will have little or no incentive to identify and engineer projects to reduce GHG emissions if they know that those projects will be delayed for years by permitting gridlock. And to almost as great an extent, companies will be unwilling to embark on projects that could reduce GHG loadings if there is great uncertainty about what will be required in order for them to get the permits needed for the project. In short, in ways that are obvious and undeniable, application of the current PSD and Title V applicability thresholds to GHG emissions would produce absurd results, creating permitting gridlock that is contrary to what Congress intended and that would stifle even environmentally beneficial projects.

² In that regard, we are not aware of any basis for EPA’s statement that such seemingly minor sources as small boilers in the 15-20 mmBtu/hr. range and internal combustion engines of 2000 horsepower are the types of sources that “should be subject to PSD.” See 74 Fed. Reg. 55,334 cols. 1-2. Compare that statement to the D.C. Circuit’s conclusion, in rejecting an approach to PSD applicability under which the heating plant in a large high school or a small community college would be subjected to PSD: “We have no reason to believe that Congress intended to define such obviously minor sources as “major” for the purposes of the PSD provision.” *Alabama Power*, 636 F.2d at 354. To the contrary, an essential design element of the PSD program is that it involve relatively few, large sources: “Though the costs of compliance with section 165 requirements are substantial, they can reasonably be borne by facilities that actually emit, or would actually emit when operating at full capacity, the large tonnage thresholds specified in section 169(1). The numbers of sources that meet these criteria, as we delineate them, are reasonably in line with EPA’s administrative capability.” *Id.*

The Tailoring Rule does not go far enough to mitigate the absurd results and administrative infeasibility of applying PSD and Title V regulations to GHG emissions.

The Tailoring Rule EPA has proposed certainly would help mitigate some of the adverse impacts of triggering PSD and Title V permitting requirements for sources of GHGs. The Tailoring Rule does not go nearly far enough, however, with the result that implementation of the PSD and Title V programs for GHGs would still be infeasible and impracticable. EPA suggests that, with application of the Tailoring Rule, the number of PSD permit applications that regulatory agencies will have to process will still more than double. See 74 Fed. Reg. at 55,331 col. 1. While this is certainly better than the 140-fold increase in permits that would result if GHGs were subject to PSD permitting at the same 100/250 tons per year (tpy) threshold as other pollutants, see 74 Fed. Reg. 55,349, it nevertheless represents an unreasonable burden that would stifle economic development and innovation. As noted above, the requirement to obtain a PSD permit, with the cost and lengthy delay involved, already prevents many companies from going forward with many important projects. A doubling of the time required to get a PSD permit would present a much greater disincentive. Similarly, while we certainly agree with EPA that increasing the number of facilities requiring Title V permits by 400-fold (and therefore increasing the number of projects that might require Title V permit modifications to a similar degree) would be entirely unworkable, see *id.*, the doubling of Title V permitted facilities that EPA projects would occur under the proposed Tailoring Rule, see 74 Fed. Reg. 55,335 col. 1, also would produce unworkable results and would be counterproductive to goals of reducing GHG atmospheric loadings and otherwise controlling air pollution.

Even at that, we believe EPA has greatly underestimated the number of additional new sources and modification projects that would be subject to PSD and Title V permitting at a 25,000 tpy CO₂e threshold for new/major sources and 10,000-25,000 tpy CO₂e threshold for PSD major modifications, as proposed in the Tailoring Rule. For example, according to EPA's compilation of emission factors, AP-42, a gas-fired boiler has a potential to emit 120,000 lbs. of CO₂ per million standard cubic feet (mmscf) of natural gas burned, but only 7.6 lbs. per mmscf of particulate matter, the pollutant emitted at the next-highest rate,. A gas-fired boiler thus could burn over 65,000 mmscf/yr before exceeding the 250 tpy threshold for PSD applicability for smaller boilers for pollutants currently regulated, but only 416 mmscf/yr before exceeding a threshold of 25,000 tpy CO₂e. See AP-42 p. 1.4-6, Table 1.4-2. Emission factors compiled recently by the Department of Energy's Argonne National Laboratory indicate that emissions from small boilers of NO_x, the conventional pollutant emitted at the highest rate in that analysis, are around 50 g of NO_x/mmBtu heat input, but those same boilers emit about 60,000 g of CO₂/mmBtu, or more than 1000 times more CO₂ than the next-highest-emitted pollutant. See http://www.transportation.anl.gov/modeling_simulation/GREET/pdfs/esd_av2.pdf. These comparisons do not even take into account the fact that, in many cases, the applicant may be subject to or propose emission limits—for pollutants other than GHGs—that reduce the “potential to emit” those pollutants to much less than the uncontrolled emission factors would

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indicate. (For example, under Subpart Db New Source Performance Standards, a low heat release rate boiler would have to have a permit limit no higher than 45 g of NO_x/mmBtu.)

EPA says that it expects that a large majority of the impact of GHG permitting under the terms of the Tailoring Rule would be for boilers and similar fossil-fuel combustion units. 74 Fed. Reg. at 55,334, col. 1. PCA agrees that small boilers and other fossil-fuel combustion units are likely to be the sources that push facilities for the first time into the PSD or Title V “major source” category. It also seems that these types of emission units are likely to be the trigger for a “major modification,” requiring a PSD permit, for a project that is adding such a unit or increasing its operation but that would not be subject to PSD, but for its GHG emissions. But as demonstrated above, although EPA has proposed a major stationary source threshold for CO₂e that is 100 times higher than for other pollutants, the small boilers most likely to be affected emit on the order of 1000-1500 times more CO₂ than other pollutants. This suggests that the Tailoring Rule could easily result in businesses needing to obtain, and regulatory agencies needing to process, 10 times as many PSD permits than they do now. This is a recipe for permitting overload and gridlock almost as devastating as that which EPA has attributed to applying PSD and Title V permitting without the Tailoring Rule.

EPA should defer application of PSD and Title V programs to GHGs altogether.

EPA must not implement the PSD and Title V programs in a way that would have such an unacceptable burden and unworkable implementation. If EPA has authority, as it has argued, to depart from statutory and regulatory thresholds in order to avoid “absurd results” and “administrative infeasibility” when applied to GHGs, then for the same reasons EPA can and should simply defer application of PSD and Title V to GHGs altogether.

As PCA sees it, it is almost impossible under the circumstances for EPA to come up with a version of the Tailoring Rule that would apply PSD and Title V to some sources without creating widespread confusion and delay, at best, in the permitting programs. Moreover, it is irrational to try to force GHG emissions, where the concern is achieving a broad reduction in total GHG loadings to the global atmosphere, into Clean Air Act programs designed to prevent unacceptable deterioration of relatively high-quality air in the vicinity of the new or modified source (in the case of PSD) and to collect and clarify the applicable limitations and conditions for a source’s air emissions (in the case of Title V). Unlike the emissions for which the PSD program was designed, reducing GHGs emissions in New York City contributes just as much to reducing atmospheric loadings as reducing GHG emissions in Alaska. Moreover, there is no reason to think that requiring the Best Available Control Technology to reduce GHG emissions from new and modified major sources is anywhere near a cost-effective means to achieve a given GHG atmospheric loading reduction goal, and to achieve the ambitious GHG reduction targets EPA has suggested are needed it would be imperative for the nation’s resources to be focused on the most cost-effective ways to reduce GHGs. Title V permitting for GHGs makes even less sense, since the Title V permit is not intended to impose new compliance obligations, and there are almost no existing federally

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applicable GHG compliance obligations to be consolidated into a Title V permit (other than those that would be created by PSD permits addressing GHG emissions).

Rather than rush ahead and impose the PSD and Title V permitting obligations on sources of GHGs, EPA should defer those obligations while Congress is considering comprehensive climate change legislation, and while EPA is learning more about stationary source GHG emissions (through the recently promulgated mandatory GHG emission reporting regulations) and developing and evaluating ways to mitigate the tremendous administrative and financial burdens if PSD or Title V permitting has to be imposed on some sources based on their GHG emissions. There is ample authority for EPA to do so.

First, EPA could rightly conclude that Congress never intended the PSD and Title V permitting provisions of the CAA to apply to GHGs. As noted above, the legislative history of the CAA indicates clearly that Congress did not want these permitting programs to be a barrier to economic development and innovation and did not expect that they would apply more broadly than to the largest sources. With respect to PSD in particular, the PSD permitting requirements in the statute are in the context of new major sources and major modifications in areas that are classified as attainment or unclassifiable for National Ambient Air Quality Standards. PSD, under the terms of the statute, is not a catch-all requirement that applies in all circumstances, and in fact it makes no sense to apply it to GHGs, where the concern is aggregate GHG loadings to the global atmosphere, as opposed to changes that might deteriorate local air quality in high-air-quality areas or might cause an exceedance of a National Ambient Air Quality Standard. EPA would have ample grounds for interpreting the CAA not to require PSD and Title V permits based on a source's GHG emissions.

Second, EPA has substantial discretion in implementing the PSD program, and EPA has taken steps in the past to delay implementation of aspects of the PSD program in order to avoid administrative impracticability. The 1980 PSD regulations contained a number of transition provisions, for example, that delayed applicability to certain classes of sources. And EPA has for a decade effectively deferred application of PSD provisions based on PM_{2.5} emissions, despite adoption of National Ambient Air Quality Standards for PM_{2.5} in 1997, relying on PM₁₀ instead because of problems measuring and modeling PM_{2.5} emissions. See 73 Fed. Reg. 28,321, 28,324 (May 16, 2008).

Third, the same arguments EPA offers to explain why it can depart from a literal application of CAA PSD and Title V requirements to all sources that emit more than 100/250 tpy of GHGs could be applied to deferring application of PSD and Title V to GHGs altogether. As noted above, requiring Title V permits even for only the larger sources of GHGs would not produce any environmental benefit (because there are no GHG emission limitations to consolidate into a Title V permit, and GHG monitoring and reporting is already required under the recently promulgated GHG mandatory emission reporting rule). Similarly, imposing PSD permitting requirements, even only for larger GHG sources, would have precious little environmental benefit: there are no ambient standards or PSD increments to apply, and there are no demonstrated CO₂ emission control technologies per se to apply

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through the BACT requirement (and even if there were, there likely are much less costly ways to achieve the same reductions in CO₂ emissions). Moreover, greatly expanding the number of sources requiring PSD or Title V permits will congest the permitting process and delay or preempt countless projects, especially when permit writers have virtually no guidance or precedent to help them with GHG permitting. These circumstances all constitute the kind of absurd results and administrative infeasibility that EPA claims justify departing from the strict language of the statute through the Tailoring Rule.

Importantly, in many States there are independent provisions of State law or regulations that could still require PSD or Title V permitting of 10 times as many sources as currently, as a matter of State law, if GHGs become a “regulated NSR pollutant,” until the State is able to go through the lengthy procedures required to modify a law or regulation. During that time, the capability to review and issue permits in those States would be overwhelmed, and the purposes of the Tailoring Rule would be thwarted. Moreover, EPA says, in VII.B. of the Preamble to the proposed Tailoring Rule, that developing and implementing various potential techniques to “streamline” and reduce the burden of PSD and Title V permitting, some of which are discussed below, would take three to four years. The time needed for States to act and for EPA to consider and adopt mechanisms for reducing the cost and delay associated with expansion of the PSD and Title V permitting programs to encompass GHG emissions provides additional strong justification for deferral of PSD and Title V application to GHG emissions altogether.

PCA urges EPA to defer application of PSD and Title V permitting requirements to GHG emissions for at least 4-5 years. At that time, EPA may revise its permitting regulations to address GHG emissions, providing States the time to make necessary adjustments in State laws and regulations and permit processing capabilities. Or the matter may have become moot due to congressional action.

If EPA insists on applying PSD and Title V programs to GHGs, it should increase the proposed applicability thresholds.

At the very least, even if EPA does not defer application of PSD and Title V to GHGs altogether, EPA should substantially increase the applicability thresholds. Based on the analysis presented above, it would make sense to set a PSD threshold for GHGs of at least 100,000 tpy. This would still pull in many fossil-fuel combustion sources that would not be considered major for any other pollutant. We do not necessarily agree that assessing what portion of aggregate national stationary source GHG emissions would be “covered” at various threshold levels is an appropriate way to consider whether a threshold will avoid the unintended and unworkable consequences of an overbroad applicability provision. But since EPA has considered that factor, we note that the information EPA provided in the preamble to the proposed Tailoring Rule shows that a relatively small reduction in the percentage of national stationary source emissions covered would produce a substantial reduction in the number of additional sources that would have to obtain PSD and Title V permits.

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For example, according to Table VIII-1 at 74 Fed. Reg. 55,332, increasing the major source threshold from 25,000 to 100,000 would reduce the number of permits that would have to be issued per year by sixty percent. Yet increasing the threshold from 25,000 to 100,000 reduces the percentage coverage of nationwide stationary source GHG emissions by only four (4) percentage points, or by less than six percent. See Table VIII-2 at 74 Fed. Reg. 55,333. The number of Title V permits that would have to be issued (i.e., the number of existing facilities above the size cutoff) would decrease by about two-thirds. *Id.* These large reductions in permitting burden, with only a very small difference in the portion of stationary source GHG emissions covered, present a strong case for increasing the major source and major modification thresholds from the 25,000 tpy EPA has proposed (and certainly from the 10,000 tpy significance level EPA says it is considering). (PCA assumes that the comparisons would be similar—but the relief provided by higher thresholds, in terms of lower numbers of facilities and projects requiring permits, would be much more dramatic—if a more reasonable, higher estimate of the number of sources affected at the proposed Tailoring Rule applicability thresholds, as discussed above, were used in the analysis.)³

Increasing the number of new facilities and modifications of existing facilities that will have to obtain PSD permits by a factor of 2, 4, 10 or more would wreak havoc with the permitting programs, resulting in unreasonable delays, excessive costs for both industry and permitting authorities, and ultimately a reduction in environmental protection by decreasing the attention that could be paid to each permit, and by greatly delaying or effectively precluding many projects that would have net environmental benefits (including a net improvement in GHG loadings). While we believe the right thing for EPA to do is to defer application of the PSD and Title V programs to GHGs altogether, if EPA refuses to do that EPA should at a minimum increase the applicability thresholds to 100,000 tpy CO₂e for major new source status and for major modifications.⁴

³ On a related note, PCA was concerned by EPA statements in the preamble to the proposed Tailoring Rule that discuss “strategies for obtaining GHG reductions from sources under the proposed GHG permit thresholds,” i.e. “through means other than PSD and Title V during the first phase” of the Tailoring Rule. See 74 Fed. Reg. at 55,325. The Title V program is, by congressional directive, not to be a program for imposing new reductions in or “mitigating” emissions of pollutants. Thus, exempting sources of GHGs below a certain size cutoff from Title V permitting in no way creates a rationale for EPA to impose other regulatory requirements that would reduce GHG emissions from such sources. Similarly, the PSD program is designed to avoid “backsliding” that would interfere with continued attainment of air quality standards in clean-air areas. Congress did not intend the PSD provisions of the CAA to be used for purposes of reducing emissions (overall or in attainment areas) from existing sources, nor is reducing emissions even from new and modified sources a broad goal of the PSD program, other than ensuring that the best available control technology is used. See, e.g., CAA §§ 160, 161. To the extent EPA is suggesting that there is some legal or policy reason to develop ways to reduce GHG emissions from sources falling below the applicability thresholds in the Tailoring Rule, simply because they will not be subject to PSD and Title V permitting, there is no legal or logical reason for that assertion.

⁴ There is precedent in the current PSD regulations for setting the significance level for modifications the same as the major source threshold: under 40 C.F.R. § 52.21(b)(23)(i), only those emissions increases for carbon monoxide that equal or exceed 100 tpy are considered significant, even though

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EPA should include clarifications to the PSD program if it subjects GHG emissions to PSD permitting.

If EPA, rather than deferring application of PSD to GHGs altogether for the time-being, nevertheless publishes something like the Tailoring Rule, establishing applicability thresholds for GHGs, EPA should at the same time clarify existing regulations or adopt changes to those regulations to address issues that will become even more important once the PSD rules are applied to many more sources due to their GHGs emissions. EPA has been involved in a years-long project to improve and clarify the workings of the PSD regulations, and it is not good policy for EPA to implement a huge expansion of the number of sources covered by the PSD regulations before EPA has completed work on improving those regulations.

In particular, if EPA persists in applying PSD to GHG emissions, it would be especially important for EPA to clarify application of the exclusion from PSD, under existing regulations, for changes at a facility that merely result in the increased utilization of a unit or increased fuel burning or burning of an alternative fuel, provided the unit was capable of accommodating that change. See 40 C.F.R. § 52.21(b)(2)(iii)(e) - (f). Since EPA has identified combustion sources like boilers as the primary units that will be affected by or will trigger PSD permitting for GHGs, see 74 Fed. Reg. at 55,334 col.1, there will be an increased number of questions about whether increases of fuel consumption or fuel-switching at those units is exempted from being a PSD major modification.

Similarly, EPA needs to clarify how debottlenecking projects will be treated and how projects must be aggregated for PSD applicability purposes. EPA should clearly indicate in the regulations as well how “contemporaneous” increases and decreases of GHGs will be addressed with respect to changes in GHG emissions that took place before they became regulated under the PSD rules. PCA also believes that, in light of the lack of current limitations on GHG emissions, and the practical inability for a source to secure such limitations once the permitting authorities are overwhelmed by the doubling or tripling or more of their permitting load under the Tailoring Rule, EPA needs to make every effort to modify or clarify its regulations and policy concerning the determination of a source’s “potential to emit” GHGs. We suggest that (a) EPA has asserted in the past that it has substantial discretion in determining such details of the PSD program and (b) there is a clear need to base applicability for GHG emissions on a measure more reflective of reality than the source’s theoretical ability to emit CO₂ at the maximum fuel-burning rate every hour of the year. Additionally, while we think it is clear from existing regulations, EPA also should reinforce explicitly that the GHG emissions to be assessed are those from the source itself, and not those from things like transportation or off-site electricity generation that has some connection with the source.

for designated source categories a potential to emit 100 tpy of carbon monoxide or other regulated pollutants makes the source “major” and subject to PSD.

EPA indicates that it has efforts underway separately to consider how BACT requirements might apply in the context of GHG emissions, and whether EPA may be able to issue guidance that would reduce somewhat the burden of BACT analyses for GHGs. PCA supports those efforts as a general matter, and we look forward to participating in what we hope and presume will be a transparent process, with public input, as EPA develops BACT guidance specifically intended for GHGs. While PCA believes that issues of BACT for GHG are for the most part beyond the scope of the proposed Tailoring Rule and these comments on that proposal, we already have some concerns about some of the remarks EPA has made in the preamble to the proposed Tailoring Rule and in other settings. For example, statements about “presumptive BACT” in the preamble seem inconsistent with the fact that BACT is by statute supposed to be a case-by-case analysis, rather than the imposition of national emission standards. See CAA §§ 165(a)(4) and 169(3). PCA also is concerned that EPA seems to be suggesting that it could be appropriate, under the rubric of determining BACT, to tell a source what type of combustion unit it must build, or what type of fuel it may use, or how it must engineer its operations to reduce demand for the thermal energy or electricity that the combustion unit will generate. Such expansion of the statutory requirement to assure that the best available control technology is used for a particular project, into an inquiry by the permitting authority into whether a plant can be designed or operated more efficiently, or whether it might be environmentally preferable for the plant to be proposing a different kind of project, would be inconsistent with EPA’s statutory authority, long-standing EPA interpretations and policy, and judicial and Environmental Appeals Board decisions.

In the ways described above, among others, the preamble to the Tailoring Rule reads like a description of a wide-ranging and on-going policy discussion, a work-in-progress rather than a proposal for a huge new regulatory program set to go into effect next year. This further supports PCA’s recommendation, as set out above, that EPA should defer entirely application of the PSD and Title V programs to GHG emissions at this time.

PSD and Title V should only apply once emissions of a GHG are actually limited by federal regulations.

While it is not entirely clear to us, it appears that the proposed Tailoring Rule is written so that GHG emissions above the thresholds would trigger PSD and Title V applicability as soon as the Tailoring Rule goes into effect. See, e.g., proposed 40 C.F.R. 52.21(b)(1)(i)(d)). That would be inconsistent with EPA’s claim of statutory authority to apply these permitting programs to GHGs. In particular, EPA has asserted, in the preamble to the proposed Tailoring Rule and also in EPA’s proposal to reaffirm the “Johnson Memo” interpreting when PSD and Title V apply to GHGs, 74 Fed. Reg. 51,535, that stationary source permitting requirements apply to GHGs once there is a limitation on emissions of the GHG imposed under federal law. Thus, until GHGs are subject to emission limitations under Title II of the CAA (for motor vehicles) or some other CAA authority, EPA cannot apply PSD and Title V permit requirements based on a source’s GHG emissions. See, e.g., 74 Fed. Reg. at 51,547.

EPA needs to make the Tailoring Rule very clear that GHGs are not counted for purposes of determining whether a new source or modification will exceed PSD applicability thresholds, and whether a source needs a Title V permit, until the GHG is actually subject to an emission limitation issued under the CAA.⁵ If GHG tailpipe emissions standards are the first such limitation, then PSD and Title V would begin to apply to the pollutant(s) regulated by such standards at the time motor vehicle manufacturers are required to demonstrate compliance with them. For similar reasons, EPA lacks authority to impose PSD and Title V requirements on emissions of a pollutant that is considered a greenhouse gas but is not yet subject to any promulgated emission limitation under the CAA.

EPA should disapprove State programs that expand PSD or Title V applicability beyond the extent of the final Tailoring Rule.

The Tailoring Rule, as proposed, has a huge gap that could totally frustrate the purposes for which EPA says it is proposing to adopt the Tailoring Rule. EPA is proposing to modify its approval of existing state PSD programs so that the States will not be *required* to apply PSD to sources that would be “major” only because they have GHG emissions greater than 100/250 tpy but less than 25,000 tpy. Under the approach to State Implementation Plan approval/disapproval EPA proposed in the Tailoring Rule, however, States would be free to include in their State PSD programs such smaller GHG sources. In fact, it appears that States would have to affirmatively amend their regulations to exempt such smaller sources, unless the regulations incorporate EPA’s PSD regulations by reference (and the State rules on incorporation by reference allow updating to include the latest version of those EPA regulations).

It appears to us that the result of this approach will inevitably be mass confusion and, at least in the first months and years, requirements to apply for and obtain a PSD permit in many States for sources whose GHG emissions are over 100/250 tpy. That will produce exactly the kind of overload of permitting authorities and permitting gridlock that the Tailoring Rule is supposed to avoid. Applying the same principles of administrative necessity and avoiding absurd results on which EPA based the proposed Tailoring Rule, EPA could modify the Tailoring Rule to assure that State programs do not apply to the smaller sources of GHGs.

EPA explained in the preamble to the proposed Tailoring Rule how provisions of the CAA related to EPA review and approval of State Implementation Plans form a requirement

⁵ Note that EPA states in the preamble to the proposed Tailoring Rule that PSD permitting requirements for GHGs would be triggered “when a rule controlling those pollutants is promulgated (and even before that rule takes effect).” 74 Fed. Reg. at 55,300 col. 2. EPA has proposed to change that interpretation in its reconsideration of the Johnson Memo, see 74 Fed. Reg. at 51,546. We agree it should be changed and indeed see no basis for that interpretation, since it is inconsistent with EPA’s analysis (with which we agree) that a pollutant is not subject to regulation under the CAA until its emission is actually limited—which does not occur upon a rule’s promulgation date, or even on the rule’s effective date if compliance is not required until some later time.

that “EPA may approve the SIP PSD provisions only if EPA is satisfied that the State will have adequate personnel and funding to administer the PSD program, including conducting the appropriate analyses for new and existing sources, issuing the permits, conducting enforcement, and taking other necessary administrative action.” 74 Fed. Reg. at 55,341 col. 1. EPA has enough information to conclude that states would not have adequate resources to implement their State PSD programs if the threshold for GHGs is 100/250 tpy, or anything near that level. Thus, EPA can disapprove state SIPs to the extent they require PSD permits for sources/modifications below the thresholds established in the Tailoring Rule. Failure to disapprove such SIPs will create great confusion for potentially regulated sources and will generate the kind of permitting gridlock (and “absurd results”) that EPA is trying to avoid. Among other things, potentially regulated sources, especially those operating in numerous jurisdictions, will be unable to rely on compliance with the federal regulations and will face potential State or citizen suit enforcement actions if they fail to sort accurately through the myriad inconsistent permitting requirements.

EPA should exempt CO₂ emissions of biomass origin from PSD applicability thresholds.

EPA has in that past used its discretion to define the pollutants subject to PSD, with particular regard to their potential adverse impacts on environmental quality. For example, EPA has distinguished between total particulate matter and fine particulate matter. In a case even more analogous to GHGs, EPA has by regulation excluded certain compounds, which are in fact “volatile” and “organic,” from the definition of VOCs that are subject to PSD applicability thresholds, based on those particular compounds’ low potential for photochemical oxidation and generation of smog. See 40 C.F.R. §§ 51.100(s), 52.21(b)(2)(ii), and 52.21(b)(30).

For similar reasons, EPA should exclude from PSD applicability determinations that portion of a facility’s CO₂ emissions that come from oxidation of carbon of biomass origin. Because of the natural carbon cycle (carbon in biomass having been extracted from the atmosphere through the plant’s uptake of CO₂), CO₂ emissions generated by burning biomass do not add to atmospheric CO₂ loadings. The principle of neutrality of emissions from biomass combustion has been widely accepted by scientists and regulators in both the United States⁶ and Europe.⁷ Exempting those emissions from inclusion in calculations for

⁶ For example, in determining the treatment of CO₂ emitted from combustion of biomass-based fuels during the processing of feedstock into transportation biofuels, in its proposed rule to implement the Energy Independence and Security Act of 2007 through a new Renewable Fuel Standard, EPA made clear that: “The emissions from combustion of biomass fuel source are not assumed to increase net atmospheric CO₂ levels. The CO₂ emitted from biomass-based fuels combustion does not increase the atmospheric CO₂ concentrations, assuming the biogenic carbon emitted is offset by the uptake of CO₂ resulting from the growth of new biomass. Therefore, the CO₂ emissions from biomass combustion as a process fuel source are not included in the lifecycle GHG inventory of the ethanol (and other biofuels) plant.” 74 Fed. Reg. 24,904, 25,039 (May 26, 2009).

determining whether a new or modified source requires a PSD permit would be consistent with their environmental impact (lack thereof). It also would create an important incentive for companies to try to use biomass-based fuels where possible, with the dual benefits of reducing atmospheric GHG loadings as compared to fossil-fuel combustion and increasing the use of renewable energy.

EPA should conduct a comprehensive analysis of the regulatory impact of expanding PSD and Title V permitting to major sources of GHGs.

In the preamble to the Tailoring Rule, EPA describes its assessment of the economic impact of the Tailoring Rule in terms of the regulatory burden that would be reduced as a result of the higher applicability thresholds proposed in the Tailoring Rule. On the other hand, the preamble to the proposed GHG tailpipe emission standards, the promulgation of which EPA says will trigger application of PSD and Title V permitting, addresses the economic impact of the tailpipe emission standards on motor vehicle manufacturers and others, while ignoring the huge impact on businesses, permitting authorities, and the public that would arise from the vast increase in sources and projects that would become subject to PSD and Title V permitting requirements, under the current permitting regulations, as a result of promulgation of those tailpipe standards.

EPA does not appear to have conducted a comprehensive analysis of the impacts resulting from the significant expansion of the PSD and Title V programs which the Tailoring Rule would allow, nor of the even much greater burden if PSD and Title V applicability for GHGs is determined using existing thresholds. PCA suggests, and has suggested in its comments on the proposed GHG tailpipe standards, that such an analysis is a legal prerequisite before EPA triggers PSD and Title V permitting for GHGs through its adoption of the tailpipe standards. To the extent that EPA ignores our comments above and issues a Tailoring Rule that makes GHGs subject to PSD and Title V independent of promulgation of GHG tailpipe emission standards, that kind of thorough review of the economic and social impact would be a legal prerequisite for the Tailoring Rule itself.

EPA also has failed to comply with its obligations under the Paperwork Reduction Act. Although EPA asserts that the Paperwork Reduction Act's requirement for creation and OMB review and approval of an Information Collection Request (ICR) does not apply because of prior approval of an ICR for the PSD program, this ignores the fact that there would be a huge increase in the paperwork burden as a result of applying PSD and Title V permitting requirements to sources that are "major" only because of their GHG emissions. Certainly if the Tailoring Rule is worded to take effect independently of promulgation of GHG tailpipe standards or other GHG emission limitations, then there is no question that a new ICR would be required, because promulgation of the Tailoring Rule would expand the PSD and Title V programs dramatically. But even if the Tailoring Rule were legitimately

⁷ The European Commission 2004 regulation on the European Union Emissions Trading Scheme, for example, states in section 4.2.2.1.6, Emission Factors: "Biomass is considered as CO₂-neutral. An emission factor of 0 [t CO₂/TJ or t or m³] shall be applied to biomass."

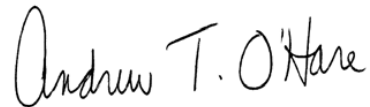
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seen only as reducing the burden imposed as a result of current PSD and Title V applicability regulations and the promulgation of emission limitations for GHGs, there is still a tremendous paperwork burden that would remain after the Tailoring Rule went into effect, and it is EPA's consideration (or lack thereof) of ways to further reduce that huge burden, in the Tailoring Rule, that should be evaluated in the context of the Paperwork Reduction Act.

Conclusion

PCA appreciates the opportunity to comment on the proposed greenhouse gas Tailoring Rule. We would be happy to meet with EPA or communicate further, if additional explanation of our views would be helpful. If you have any questions about these comments, please contact me or Deidra Ciriello at (202) 408-9494, or aohare@cement.org or dciriello@cement.org.

Sincerely,

A handwritten signature in black ink that reads "Andrew T. O'Hare". The signature is written in a cursive, slightly slanted style.

Andrew T. O'Hare
Vice President, Regulatory Affairs

cc: Desk Officer for EPA, OMB-OIRA

ATTACHMENT 3

Associations' Petition to Reconsider, Rescind, and/or Revise the Tailoring Rule

July 6, 2010

VIA FACSIMILE, Certified Mail, and Email

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
jackson.lisa@epa.gov
Fax No: 202-501-1450

The Honorable Gina McCarthy
Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
mccarthy.gina@epa.gov
Fax No: (202) 501-0986

Re: Petition to Reconsider, Rescind, and/or Revise EPA's Prevention of
Significant Deterioration Regulations

Dear Administrator Jackson and Assistant Administrator McCarthy:

The National Association of Manufacturers, American Frozen Food Institute, American Petroleum Institute, Brick Industry Association, Corn Refiners Association, Indiana Cast Metals Association, Michigan Manufacturers Association, Mississippi Manufacturers Association, National Association of Home Builders, National Federation of Independent Business, National Oilseed Processors Association, Specialty Steel Industry of North America, Tennessee Chamber of Commerce & Industry, West Virginia Manufacturers Association, and Wisconsin Manufacturers & Commerce (hereafter "the Associations") hereby submit the attached for the Environmental Protection Agency (EPA or "Agency") to reconsider, rescind, and/or revise its regulations for the Prevention of Significant Deterioration (PSD) program to comport with the Clean Air Act (CAA). We also request that EPA stay implementation of the PSD program for greenhouse gases (GHGs) while it considers this petition, specifically to stay Sections 52.21(b)(49)(v) and 51.166(b)(48)(v) of its newly revised regulations.¹ *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule*, 75 Fed. Reg. 31,514, 31,607 (June 3, 2010) (hereinafter referred to as "Final PSD Tailoring Rule").

¹ Our petition is submitted pursuant to CAA Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B). This petition is in addition to and also endorses a similar petition submitted by the American Chemistry Council.

EPA concludes in its Final PSD Tailoring Rule that (1) the CAA *compels* the Agency to interpret the CAA such that GHGs trigger PSD permitting and (2) the Agency must take *emergency steps* to ratchet up the major source levels for the PSD program. Otherwise, EPA finds that there will be over 80,000 new PSD permits annually compared to about 300 now, thereby creating a crushing load for state permitting authorities, stalling plant modernization projects, and creating a severely negative impact on the economy. These consequences are to be avoided to be sure. As EPA has explained, Congress could not possibly have contemplated this PSD burden when it enacted the PSD program. EPA has therefore proceeded to invoke judicial “exception” doctrines it believes allow it to rewrite the statutory major source thresholds the Agency posits will open these PSD floodgates. EPA acknowledges that the judicial precedents only allow these doctrines to be used when the *literal meaning of the statute creates an exigency*.

Here, however, the statute does not create the exigency; rather, it is *EPA’s own interpretation of the Act* that creates the exigency. Indeed, EPA has been offered in public comments a solution – a statutory interpretation grounded in the plain language of the PSD provisions themselves that would lead to not one additional PSD permit if GHGs were considered “subject to regulation” under the PSD program. Moreover, this interpretation, unlike EPA’s “floodgates” interpretation, gives meaning to Congress’ explicit statement that PSD permitting only applies in areas designated attainment/unclassifiable for a national ambient air quality standard (NAAQS). Under the interpretation offered by commenters, only a NAAQS pollutant can actually trigger PSD permitting, but once triggered control requirements apply to all pollutants “subject to regulation.”

EPA rejected the commenters’ “solution” interpretation of the statute and of the regulations in the Final PSD Tailoring Rule and the *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule*, 75 *Fed. Reg.* 17,004 (Apr. 2, 2010) (“Reconsideration Decision”), respectively. Instead, EPA maintains that its “floodgates” interpretation of the Act and regulations – that all pollutants subject to regulation can and must trigger PSD permitting – is *compelled*. However, it is EPA’s floodgates interpretation of the Act that is causing the exigency (*i.e.*, 80,000 PSD permits not envisioned by Congress), which now EPA must *solve* by invoking the doctrines of “absurd results,” “administrative necessity” and “step-by-step approach” to rewrite the statute, rather than simply revising its regulations to comport with the statute as would be the case under the interpretation outlined by commenters.

It is a fundamental judicial principle that EPA cannot create its own exigent circumstances and then change statutory terms to “solve” the problem. Just as police officers (*i.e.* the government) cannot manufacture exigent circumstances to justify a warrantless search under the Fourth Amendment,² EPA cannot choose to interpret a statute to create an emergency so as to justify a massive new regulatory program of PSD for GHGs – particularly

² See, *e.g.*, *United States v. Webster*, 750 F.2d 307, 327 (5th Cir. 1984), *cert. denied*, 471 U.S. 1106, 105 S. Ct. 2340, 85 L.Ed.2d 855 (1985).

when there is a more reasonable interpretation that avoids the emergency in the first place. EPA agrees with us that *Congress could not have contemplated* these permitting burdens, so this *must* mean that the language of the CAA itself must be construed to avoid these burdens in the first place.

As explained in the attached petition, we request that the Agency take the following immediate steps:

1. Reconsider its interpretation announced in the preamble to the Final PSD Tailoring Rule that the statute compels or can be reasonably interpreted to allow PSD to be triggered by pollutants for which an area has not been designated attainment or unclassifiable for a particular NAAQS and rescind this interpretation or otherwise revise its rules as needed to adopt an interpretation that PSD can only be triggered by a NAAQS pollutant for which the area is designated attainment or unclassifiable.
2. Reconsider its interpretation announced in the Reconsideration Decision that the PSD regulations³ compel or can reasonably be interpreted to allow PSD to be triggered by pollutants for which an area has not been designated attainment or unclassifiable for a particular NAAQS and rescind this interpretation or otherwise revise its rules as needed to adopt an interpretation that PSD can only be triggered by a NAAQS pollutant for which the area is designated attainment or unclassifiable.
3. Reconsider its interpretation of CAA Section 165(a)(4) expressed in the Reconsideration Decision and the Final PSD Tailoring Rule that GHGs can be interpreted to be “subject to regulation” as a result of being regulated under Title II of the Act and rescind or otherwise revise its interpretation to exclude GHGs.

Finally, it is critical that EPA act quickly. Sections 52.21(b)(49)(v) and 51.166(b)(48)(v) of the Final PSD Tailoring Rule provide that PSD will begin being triggered based solely on GHG emissions on July 1, 2011. Until NAPT is formally adopted, EPA should also immediately stay the effectiveness of these provisions (either through an administrative stay under Clean Air Act Section 307 or through rulemaking) and direct states to implement the “subject to regulation” definition consistent with such a stay.

³ This request encompasses the PSD regulations issued in 2002, 1980, and 1978 to the extent that EPA considers them to allow pollutants that are not subject to a NAAQS for which the area is designated attainment or unclassifiable to trigger PSD permitting or classify a source as major.

The Honorable Lisa. P. Jackson and The Honorable Gina McCarthy

July 6, 2010

Page 4 of 4

Please contact our counsel, Chuck Knauss, at 202-373-6000 with any questions regarding this petition.

Sincerely,

National Association of Manufacturers
American Frozen Food Institute
American Petroleum Institute
Brick Industry Association
Corn Refiners Association
Michigan Manufacturers Association
Mississippi Manufacturers Association
National Association of Home Builders
National Oilseed Processors Association
Specialty Steel Industry of North America
Tennessee Chamber of Commerce & Industry
West Virginia Manufacturers Association
Wisconsin Manufacturers & Commerce

Attachment

**Petition to Reconsider, Rescind, and/or Revise
EPA's Prevention of Significant Deterioration Regulations:
40 C.F.R. Sections 51.166 and 52.21**

EXECUTIVE SUMMARY

Pursuant to Clean Air Act (CAA) Section 307(d)(7), the National Association of Manufacturers, American Frozen Food Institute, American Petroleum Institute, Brick Industry Association, Corn Refiners Association, Independent Petroleum Association of America, Michigan Manufacturers Association, Mississippi Manufacturers Association, National Association of Home Builders, National Oilseed Processors Association, Specialty Steel Industry of North America, Tennessee Chamber of Commerce & Industry, West Virginia Manufacturers Association, and Wisconsin Manufacturers & Commerce (hereafter “the Associations”) petition the U.S. Environmental Protection Agency (EPA) to reconsider, rescind, and/or revise its regulations for the Prevention of Significant Deterioration (PSD) program to comport with the CAA, specifically to limit the statutory and regulatory scope of the PSD permitting program to ensure only those pollutants for which EPA has established a national ambient air quality standard (NAAQS) and for which the area is designated attainment or unclassifiable are able to trigger PSD permitting requirements or cause a source to be classified as a PSD major source. This approach is called No Automatic PSD Trigger (NAPT), and it is consistent with the approach that the Final PSD Tailoring Rule adopts for the first six months of 2011.¹ It is also consistent with the statutory language, the purposes of the PSD program and Title I, and congressional intent. The Associations also petition EPA to reconsider its determination that greenhouse gases (GHGs) are “subject to regulation” within the meaning of CAA Section 165(a)(4).

As EPA has acknowledged, *Congress could not have contemplated* the scope of the PSD program that would be created by the treatment of GHGs as pollutants that could trigger PSD review or cause a source to be a major source when that program was enacted. We agree. That is why in comments on EPA's GHG rulemakings,² the Associations here petitioning have advocated:

(1) that the inefficient case-by-case and command-and-control programs in the CAA designed to address conventional pollutants should *not* be used to inefficiently regulate global GHGs.

(2) that comprehensive and appropriate federal GHG legislation^{*} would be a more efficient and effective means to address the risks of climate change, and

Nothing in this petition should be taken as support for the notion that EPA should use the CAA to regulate GHGs nor does this petition support a NAAQS for GHGs. In fact, the Associations strongly agree with the several EPA statements that the NAAQS is an inappropriate tool for regulating GHGs, and we urge EPA to maintain that position. Nonetheless, since EPA has decided to proceed with regulating GHGs under the CAA, this petition requests that if EPA continues on this ill-advised path, the Agency proceed with such inappropriate regulation in the manner least damaging to the American economy.

^{*} Note that this petition does not support or endorse any particular proposed legislation.

If EPA grants this petition to adopt the NAPT interpretation, it would *eliminate* the need for EPA to unlawfully “raise” the PSD major source thresholds as the Agency has done in the Final PSD Tailoring Rule and that a pollutant merely becoming “subject to regulation” under the Act would not create an automatic PSD trigger for that pollutant. This NAPT interpretation of the Act can be easily implemented and would alleviate many of the problems EPA and the States face. In the Final PSD Tailoring Rule, EPA adopted an approach that effectively achieves the NAPT result for the first six months of 2011; it should, however, adopt the NAPT approach permanently if it proceeds to regulate GHGs under the CAA.

The Associations are submitting this petition because EPA has stated that it is unable to interpret its PSD regulations to implement the NAPT interpretation³ and has interpreted the statute to allow *any* pollutant to trigger PSD. EPA claims that its interpretation is statutorily compelled. That is simply not the case. Moreover, the Final PSD Tailoring Rule’s crafted solution to the PSD problem inappropriately grants the Agency unfettered discretion to choose which sources will trigger PSD and which will not. This is even more problematic legally because it is EPA’s improper interpretation of the CAA that has caused it to take extraordinary steps to rewrite statutory major source thresholds.

In short, because EPA concludes that it must interpret the CAA and regulations such that *any* pollutant subject to regulation, in this case GHGs, can *trigger* PSD permitting, it has created an “exigency” – that there would be thousands of PSD permit applications per year and then EPA uses that exigency to justify invoking disfavored legal exception doctrines (*i.e.*, the “absurd results,” “administrative necessity” and need for a “step-by-step” approach). Just as police officers (the government) cannot manufacture exigent circumstances to justify a warrantless search under the Fourth Amendment,⁴ EPA cannot use its rejection of a statutory interpretation, particularly one compelled by the Act’s plain language, to justify a massive new regulatory program such as that created by applying PSD to GHGs. EPA has justified its actions in the Final PSD Tailoring Rule because it says that *Congress could not have contemplated* this scope for the PSD program when it was enacted. Yet, if Congress could not have contemplated these results, this *must* mean that the language of the CAA itself should be construed to avoid them in the first place. This is particularly true in this case when the statute is more naturally read to avoid EPA’s manufactured absurd results.

Based on this and as explained below, we petition EPA to:

1. Reconsider its interpretation announced in the preamble to the Final PSD Tailoring Rule that the statute compels or can be reasonably interpreted to allow PSD to be triggered by pollutants for which an area has not been designated attainment or unclassifiable for a particular NAAQS and rescind this interpretation or otherwise revise its rules as needed to adopt an interpretation that PSD can only be triggered by a NAAQS pollutant for which the area is designated attainment or unclassifiable.
2. Reconsider its interpretation announced in the Reconsideration Decision that the PSD regulations⁵ compel or can reasonably be interpreted to allow PSD to be triggered by pollutants for which an area has not been designated attainment or unclassifiable for a particular NAAQS and rescind this interpretation or otherwise revise its rules as needed to adopt an interpretation that PSD can only be triggered by a NAAQS pollutant for which the area is designated attainment or unclassifiable.

3. Reconsider its interpretation of CAA Section 165(a)(4) expressed in the Reconsideration Decision and the Final PSD Tailoring Rule that GHGs can be interpreted to be “subject to regulation” as a result of being regulated under Title II of the Act and rescind or otherwise revise its interpretation to exclude GHGs.

Finally, it is critical that EPA act quickly. Sections 52.21(b)(49)(v) and 51.166(b)(48)(v)⁶ of the Final PSD Tailoring Rule provide that PSD will begin being triggered based solely on GHG emissions on July 1, 2011. Until NAPT is formally adopted, EPA should also immediately stay the effectiveness of these provisions (either through an administrative stay under Section 307 of the Act or through rulemaking) and direct states to implement the “subject to regulation” definition consistent with such a stay.

I. BACKGROUND

In 2007, the Supreme Court held that GHGs fall within the definition of “air pollutant” in CAA Section 302, but did not take the additional step of defining GHGs as pollutants “subject to regulation” under the Act.⁷ Prior to and since that decision, EPA has received several petitions for rulemaking to regulate GHGs under the Act while Congress has considered legislation to provide a comprehensive program that is designed for GHGs because the CAA is plainly not structured for the magnitude and nature of GHG emissions. For its part, EPA has struggled to manage the unintended consequences that could flow from regulating GHGs for one type of source under one part of the Act on other types of sources under other Act provisions. Since 2009, three EPA actions to regulate GHG emissions have prompted this petition.

A. The EPA 2009 Proposals and Comments

In three proposed Federal Register notices in 2009, EPA spoke to the potential for the PSD program to apply to GHGs:

- EPA proposed to reaffirm the 2008 Agency interpretation regarding when pollutants become “subject to regulation” within the meaning of CAA Section 165(a)(4).⁸
- EPA proposed standards for emissions of GHGs from new motor vehicles pursuant to CAA Section 202(a).⁹ There, EPA acknowledged the “concerns” of industries that the action would lead to PSD permitting being triggered for stationary sources.¹⁰
- On the premise that PSD could be triggered solely by any pollutant subject to regulation and that GHG emissions being subject to regulation could cause thousands of new PSD permits per year, EPA proposed to “tailor” the PSD and Title V operating permit programs.¹¹ EPA indicated that its interpretations of the statute created an exigent situation and solicited comment how that exigency could be solved.

For each of these actions, the public commented that to the extent EPA moves forward with GHG regulations, it should adopt an interpretation of the CAA and the PSD regulations that allows PSD to be triggered only by an increase in a criteria pollutant, *i.e.*, those for which a NAAQS has been issued (while concurring with EPA’s conclusion that a NAAQS is not appropriate for GHGs). As detailed below, the commenters explained that the text of the CAA

and judicial precedents prohibit EPA from allowing GHGs to trigger PSD or cause a source to be classified as a major source. Commenters also explained that the regulations themselves can be interpreted to limit PSD-triggering to criteria pollutants, consistent with the statutory terms.

Finally, commenters provided extensive support for the proposition that Congress never contemplated GHGs as being within the meaning of the term “subject to regulation” under the Act and urged EPA to find that GHGs do not fall within the meaning of that phrase in Section 165(a)(4).

B. Final Actions on the Three 2009 Proposals

EPA has now finalized the above-listed actions. Notwithstanding numerous comments regarding stationary source implications of the Motor Vehicle Rules, the Agency did not respond to those comments in that rulemaking but deferred them to the other two actions. The final Reconsideration Decision determined that for purposes of Section 165(a)(4), the date that a pollutant becomes “subject to regulation” is the date that a regulation “takes effect.”¹² In responding to the comments regarding PSD applicability, EPA stated that (1) the comments were outside the scope of the action and (2) the existing regulations will not be interpreted by the Agency to limit PSD triggering to criteria pollutants.¹³ EPA went on to explain its reasoning as to why, in EPA’s view, the 1980 and 2002 regulations cannot be interpreted to impose PSD only on those sources that trigger review for criteria pollutants.

On June 3, 2010, EPA issued the Final PSD Tailoring Rule. There, EPA promulgated a new definition of the term “subject to regulation” to include a 100,000 ton per year CO₂e major source threshold and 75,000 ton per year CO₂e significance level along with codifying the “take effect” language from the Reconsideration Decision and establishing a phase-in program. Beginning January 2, 2011, the Final PSD Tailoring Rule provides that only a source that is triggering PSD “anyway” will have to apply GHGs until July 1, 2011. In this way, EPA effectively and temporarily adopted the result that commenters stated was compelled by the statute, the NAPT result, to limit the ability to trigger PSD permitting to those pollutants for which an area is designated attainment or unclassifiable.

II. THE ASSOCIATIONS PETITION EPA TO RECONSIDER, RESCIND, AND/OR REVISE AS NECESSARY ITS REGULATIONS SO AS TO LIMIT THE POLLUTANTS THAT CAN TRIGGER PSD TO CRITERIA POLLUTANTS FOR WHICH AN AREA IS DESIGNATED ATTAINMENT OR UNCLASSIFIABLE.

EPA has announced its determination that the issuance of the Motor Vehicle Rules automatically triggers PSD for GHGs because they (1) make GHGs “subject to regulation” and (2) the statute and existing regulations mandate that any pollutant subject to regulation can cause a source to be classified as a major source and can trigger the requirement to obtain a PSD permit. In so doing, EPA rejected comments indicating that the existing regulations and the statute contain No Automatic PSD Trigger based on a pollutant being subject to regulation and that GHGs in particular should not be considered “subject to regulation” for PSD purposes.

As a result of EPA’s rejection of these comments and its conclusions cited above, the Associations hereby petition EPA to reconsider and rescind its interpretation of the statute and

regulations and to conduct a rulemaking to explicitly incorporate the NAPT approach in its PSD regulations to comport with the statute (although we continue to believe that the existing and prior regulations can be interpreted to incorporate the NAPT approach as discussed below).

EPA should propose and finalize revisions to the regulations to clarify that only a criteria pollutant for which an area is designated as attainment or unclassifiable can be used to identify a PSD major source or a major modification that would trigger PSD permitting requirements.

A. The Statutory Provisions Limit PSD Applicability Based on the Location of the Source, Thus Requiring that Only Criteria Pollutants Can Trigger PSD and Providing No Automatic PSD Trigger Simply Because a Pollutant Is Subject to Regulation.

In the recent actions, EPA incorrectly determined that PSD applicability is based solely on Section 165(a)(4), i.e., whether a source emits or modifies to increase emissions of pollutant “subject to regulation” under CAA Section 165(a)(4). While this language is relevant because it determines the scope of the BACT requirement, skipping directly to this phrase bypassed important statutory provisions that constrain *at the outset* the applicability of the PSD program.

Sections 161 and 165(a) plainly limit application of PSD permit requirements to certain areas – those designated as attainment or unclassifiable *pursuant to Section 107 of the Act*. Section 107 is applicable only to criteria pollutants. Thus, Sections 161 and 165(a) limit applicability by location and this “location-limiting language” must be given meaning in the Agency’s application of the statute. EPA’s analysis inappropriately creates an “automatic PSD trigger” once a pollutant is subject to regulation by skipping directly to subparagraph (4) of Section 165(a), which defines the pollutants that are subject to Best Available Control Technology (BACT) *provided PSD permitting is already required*. Subparagraph (4) uses the phrase “each pollutant subject to regulation,” language that differs from the pollutants designated in Section 165(a) – those subject to a NAAQS for which the area is designated attainment or unclassifiable.¹⁴ Yet, EPA incorrectly assumes that it is *this* subparagraph (a)(4) that dictates when PSD permitting is actually required.

In fact, there is no automatic PSD trigger in the statute. By “skipping ahead” to subparagraph (4) in this manner, EPA failed to effectuate the applicability limitation in Sections 161 and 165(a). In so doing, EPA treated the location-limiting language as mere surplusage. Under EPA’s interpretation of the current regulations, the location-limiting language of the Act would simply require that a source be located in an area that is attainment for *any* pollutant. But that is no limitation at all since every area of the country is and always has been in attainment with at least one criteria pollutant. Congress must be presumed to have been aware of this fact when it enacted Part C (the PSD provisions), making EPA’s construction inconsistent with canons of statutory construction requiring all words in the statute to be given meaning.¹⁵

As detailed in comments on the proposed Tailoring Rule, other provisions in Title I provide further support for limiting PSD permit applicability to new major sources of criteria pollutants for which an area is designated attainment or unclassifiable and to existing major sources of criteria pollutants undertaking a major modification for a criteria pollutant in such an area.¹⁶ Moreover, there is additional statutory evidence for concluding that PSD permitting can

only be triggered by a criteria pollutant. For example, the 28 source categories that Congress listed in Section 169(1) in 1977 are the very ones EPA regarded at the time as posing the greatest potential for air quality degradation due to conventional pollutants. The only way to explain the selection of those particular categories is to posit a concern only with criteria pollutants. Thus, Part C on its face, and read in conjunction with other provisions of Title I, gives a clear indication that the NAPT interpretation is the proper reading of the Act and should be adopted.¹⁷

B. The Legislative History Also Reflects Congressional Intent to Trigger PSD Only for Criteria Pollutants.

At the time Congress was considering the Clean Air Act Amendments of 1977, the origin of Sections 165(a) and 169(1), EPA had already promulgated a PSD rule in response to a court decision.¹⁸ In the rule, the definition of “modification” was limited to NAAQS pollutants.¹⁹ Although the 95th Congress intended to modify EPA’s existing regulations, the legislative history shows that Congress intended PSD to continue to be triggered only by NAAQS pollutants. In the House Committee Report, the Committee discussed its decision not to simply endorse the agency’s existing regulations at length.²⁰ The Committee lists the shortcomings of the existing regulations, and their limitation of “modification” to NAAQS pollutants was not among those shortcomings.²¹ The Committee’s description of its proposal states that the proposed PSD provision “[a]ssures adequate consideration and protection of public health and welfare from potential harm at levels of air pollution lower than minimum Federal standards and from harm due to as yet unregulated derivative pollutants.”²² The Committee makes clear, however, that the proposed PSD provision “[l]imits application of this section only to those areas of the country with air quality superior to the national air quality standards for any pollutant and to new sources of pollution.”²³ Moreover, the PSD program in the House bill was limited to “major stationary sources,” which in turn were defined to include only sources of NAAQS pollutants.²⁴ This indicates that Congress did not intend to trigger PSD for non-NAAQS pollutants.²⁵

The Senate Committee Report also discusses the existing EPA regulations and the Committee’s regulations.²⁶ The Committee states that, “[p]resented with arguments ranging from a do-nothing approach to repeal, the committee determined that the implications of that policy and procedures are too vast to be left to the administrative or judicial process.”²⁷ At no point in the Committee’s discussion of its changes to the existing agency regulations does the Committee suggest that it intended non-NAAQS pollutants to trigger PSD applicability. The Senate Subcommittee’s Section-by-Section analysis further states the program “affects only those areas where air quality is cleaner than the present primary or secondary standards.”²⁸

Taken together this history indicates that the Congress had in mind limiting PSD applicability to criteria pollutants for which the area is designated attainment or unclassifiable, as evidenced in the explicit restriction included in Sections 161 and 165(a) that remains in the Act today.²⁹

C. Case Law Supports NAPT as the Proper Statutory Interpretation.

*Alabama Power Co. v. Costle*³⁰ indicates that NAPT is the correct interpretation of the statute. In that case, the court of appeals rejected EPA’s contention that PSD should apply in all

areas of the country, regardless of attainment status, and found instead that *location* is the key determinant for PSD applicability. In *Alabama Power*, EPA had argued that PSD permitting requirements should apply not only to attainment areas for a given pollutant, but to anywhere that a new emitting facility would “adversely affect the air quality of an area to which” PSD requirements apply.³¹ The court held that this interpretation violated the CAA’s plain language.³² The court stated: “The plain meaning of the inclusion in [42 U.S.C. § 7475] of the words ‘any area to which this part applies’ is that Congress intended *location* to be the key determinant of the applicability of the PSD review requirements.”³³ In its regulatory response to the *Alabama Power* decision, EPA gave this ruling only grudging effect. Specifically, EPA provided an exemption from PSD for nonattainment pollutants in Section 52.21(i)(2), stating that PSD “shall not apply to a major stationary source or major modification *with respect to a particular pollutant* if ... the source or modification is located in an area designated as nonattainment under section 107.”³⁴ But, in the preamble to regulations, EPA otherwise maintained its position.³⁵ The 1980 Preamble stated that PSD requirements still apply to any area that is “designated ... as ‘attainment’ or ‘unclassifiable’ for *any* pollutant for which a national ambient air quality standard exists.”³⁶ This was inconsistent with the Act in 1980 and it is inconsistent with the Act today. EPA must correct this interpretation and, to the extent it believes it cannot interpret its rules without revision, should revise them to reflect the proper reading of the Act that only a criteria pollutant for which an area is designated attainment or unclassifiable can cause a source to trigger PSD review (or be classified as a major PSD source).

Massachusetts v. EPA affect our request for relief. In *Massachusetts v. EPA*, the U.S. Supreme Court decided that GHGs fit within the CAA’s definition of “air pollutant” for the purposes of Section 202(a)(1), which authorizes EPA to make endangerment findings as a predicate to setting tailpipe emission standards.³⁷ Whether GHGs are within what can be considered “air pollutants” under the Act and can be candidates for regulation under Section 202(a)(1), however, are completely different questions from whether GHGs can trigger PSD in the first instance. The Supreme Court held that EPA must determine whether sufficient information exists to make an endangerment finding for GHGs. Fundamentally, determining that GHGs are air pollutants and that EPA must analyze whether endangerment exists does not resolve whether GHGs can serve as a PSD trigger.³⁸ This issue has not been fully evaluated by EPA and we request that EPA undertake rulemaking to confirm that non-criteria pollutants, like GHGs, do not in fact serve as a PSD trigger.

D. EPA’s Rejection of NAPT in the Final PSD Tailoring Rule Is Based on an Improper Analysis of the Statutory Provisions.

EPA responded to comments on the Proposed Tailoring Rule by arguing that the statute *must* be interpreted to apply PSD to any and all pollutants that are “subject to regulation” as EPA chooses to define that term. The Associations request that EPA reconsider this response because it is incorrect. In addition to ignoring the plain statutory language, this approach appears designed to give EPA complete discretion to determine which pollutants are regulated under PSD and, given the embedding of the major source levels in the “subject to regulation” definition in the Final PSD Tailoring Rule, at what emission levels. We explain below why EPA’s reliance on certain statutory provisions to support its decision to ignore the location-limiting language in the Act is misplaced:

1. EPA stated in the Final PSD Tailoring Rule that “the key PSD applicability provisions are found in Sections 165(a) and 169(1). EPA went on to assert that “[a]lthough section 165(a) makes clear that the PSD requirements apply only to sources located in areas designated attainment or unclassifiable, it does not, by its terms, state that the PSD requirements apply only to pollutants for which the area is designated attainment or unclassifiable.”³⁹ EPA went on to cite provisions of the statute *that follow the initial applicability provisions of Sections 161 and 165(a)* that apply PSD to pollutants “subject to regulation” in support of its view. However, nowhere did EPA answer the point that its interpretation makes the introductory language in Section 165(a) – limiting the program to areas designated attainment or unclassifiable with a NAAQS – completely superfluous. This language is wholly unnecessary if the interpretation EPA offered in the Final PSD Tailoring Rule is correct. EPA’s reliance on the term “any air pollutant” in the major emitting facility definition as an indication that Congress intended broad applicability is misplaced.⁴⁰ But that cannot be true when that language is not in the applicability provision but is rather in the definitions section of the rule – the definitions cannot be read to create broader permitting requirements than Congress established in the applicability section of the statute. Moreover, EPA has already conceded that the term “any air pollutant” cannot have been intended to be read literally (“EPA has long interpreted the term ‘any air pollutant’ to refer to ‘any air pollutant subject to regulation under the CAA,’ and for present purposes, will continue to read ‘subject to regulation’ phrase into that term.”⁴¹). Thus, EPA cannot reasonably claim that Section 169(1) drives it to reject NAPT.

2. EPA also cited Section 165(a)(3) as supporting its position that PSD applicability is to be driven by any pollutant “subject to regulation” under Act. This provision merely provides that a PSD permit cannot be *issued* absent a demonstration that there will (1) not be emissions in excess of increments or ceilings for NAAQS, (2) be no NAAQS violation, and (3) not be a violation of any other applicable emission standard or standard of performance under the Act. The provision actually bolsters the NAPT interpretation because it explicitly refers to NAAQS and increments for NAAQS. The last clause is simply a prohibition on issuing a PSD permit to a source that is in violation of other applicable standards under the Act. This provision does not create applicability but rather indicates that Congress wanted EPA to ensure that a source did not have a track record of noncompliance with CAA requirements before it issued a PSD permit that authorizes significant increases in emissions of a NAAQS pollutant. Structurally, Section 165(a)(3) follows the limiting applicability language of Section 165(a) and establishes the terms under which a permit *that is otherwise required* may be issued.

3. EPA also cited Section 165(a)(4) which imposes the BACT requirement on “each pollutant subject to regulation” – and which EPA views as driving all applicability. The use of this language in Section 165(a)(4) indicates merely that BACT may be imposed on a broader range of pollutants than those that trigger PSD permitting in the first instance. Had Congress intended for PSD to be triggered by each pollutant subject to regulation, it would have drafted Section 165(a) to so state. Instead, it limited applicability to areas designated attainment or unclassifiable with a NAAQS.⁴²

4. EPA made passing reference to Section 110(j) as supporting its interpretation of the Act. Section 110(j) states that as “a condition for issuance of *any permit required under this*

subchapter, the owner or operator of each new or modified stationary source ... must show ... that the technological system of continuous emission reduction ... will enable such source to comply with the standards of performance which are to apply” and that the source will comply with other applicable requirements.⁴³ Nothing in this provision indicates that *PSD permitting requirements* can be triggered by non-NAAQS pollutants. As EPA knows, “this subchapter” refers to Title I. Title I imposes permitting requirements for minor sources and major sources, both in attainment and nonattainment areas, under the state implementation plans. This provision simply creates a generalized requirement for sources that obtain a Title I permit to establish that their technology will work. It does not in any way define the scope of pollutants that can trigger PSD permitting requirements.

5. EPA’s further suggestion that Congress would have been more clear if it had intended to limit the PSD program to pollutants for which an area is designated attainment or unclassifiable is similarly unavailing. Congress was explicit. Section 161 identifies the areas to which Part C applies. Section 165(a) states that PSD permitting is triggered for areas to which this part applies. Nothing could be more explicit. It is possible that Congress could have accomplished this in a single section of the statute, but that it chose to do so in two sections does not make the statute unclear. And it is certainly not “indirect” or “silently implied” as EPA suggests.⁴⁴

6. EPA’s reliance on Sections 111(d) and 112(a)(1) to support its view that Congress was “silent” in Part C on applicability is misplaced because these provisions also support the NAPT interpretation.⁴⁵ EPA stated that Section 111(d) shows that Congress knew how to limit a provision because the provision explicitly excludes NAAQS and Section 112 pollutants from state plan NSPS rules for existing sources.⁴⁶ But, Congress explicitly defined the scope of pollutants that could trigger the permitting requirement in Part C. It did so affirmatively by stating that Part C PSD permitting can be triggered by an attainment or unclassifiable pollutant. It did not need to exclude other pollutants explicitly because it had stated plainly which pollutants could trigger a PSD permitting requirement. Section 112(a)(1) does not support EPA’s position either. Congress established a list of hazardous air pollutants for regulation in the 1990 Amendments. In Part C, Congress referred to the list of pollutants that EPA creates under Sections 107-109. Thus, Section 112(a)(1) shows that Congress followed the same procedure in Part C that it did in Section 112, by referring to the specific pollutants for which an area is designated attainment or unclassifiable.

7. The final statutory argument EPA offered is that its interpretation of the statute, *even if not compelled*, must be reasonable because people have not challenged its establishment of significance levels for non-NAAQS pollutants in the past.⁴⁷ Leaving aside the absurdity of the suggestion that an action contrary to the plain language of the statute can be made reasonable if done for a long enough period of time, establishing significance levels for other pollutants is not inconsistent with NAPT. A pollutant “subject to regulation” can clearly become subject to the BACT requirement even applying the NAPT interpretation. NAPT simply states that the requirement to obtain a PSD permit must first be triggered by a pollutant for which the area is designated attainment or unclassifiable. Sources would have had no reason to challenge the significance levels for fluorides, sulfuric acid mist, and the other non-NAAQS pollutants for which significance levels have been issued. Industrial sources’ emissions of these pollutants would not typically be expected to reach a level that would trigger PSD. Normally, a source

would trigger PSD permitting for a pollutant like SO₂ or NO_x – for which the area was designated attainment or unclassifiable – and then all other pollutants subject to regulation for which there was a significant increase would require a BACT analysis. Unless a source triggered PSD permitting based solely on the non-NAAQS pollutants, that source would have had no injury or reason to challenge EPA’s overly expansive reading of the Act. Thus, the “lack of objection” does not indicate that EPA’s reading is correct. It merely shows that it did not matter before the advent of GHG regulation.

EPA stated that all of these provisions lend credence to its view that Congress intended the PSD applicability provisions to include GHG sources.⁴⁸ If anything, EPA’s exercise in bouncing around the statute – and staying as far away from the applicability language in Sections 161 and 165(a) as possible – is more like grasping at straws. That EPA relied on provisions that do not speak to PSD applicability to support its “capacious”⁴⁹ interpretation of plainly limited applicability language shows that the Agency was incorrect, and we request that the Agency correct its analysis immediately.

E. EPA’s Citation to “Policy Reasons” for Rejecting NAPT in the Final PSD Tailoring Rule Are Also Misplaced.

From a policy perspective, EPA stated that NAPT would create “inequitable results,” citing the hypothetical case in which two sources are constructed in the same area, each of which emits the same amount of GHGs, with the first but not the second also emitting NAAQS pollutants large enough to trigger PSD applicability.⁵⁰ Under NAPT, EPA stated that only the first one would be subject to GHG BACT, not the second. These results may be different, but they are not inequitable. The statute defines applicability and Congress made a decision that sources that increase NAAQS pollutants are subject to extra scrutiny and the requirement to install BACT for pollutants subject to regulation under the Act. That is not inequitable – it reflects a choice about the type of facility and investment that warrants imposition of expensive and time-consuming permitting requirements, a choice that Congress made and did not vest with the Agency. The second source is deserving of minor source status because it has limited its emissions.

EPA posited another hypothetical that the first source constructs in an attainment area for the NAAQS pollutant it emits in major amounts and the second constructs in an area that is in nonattainment for that NAAQS pollutant.⁵¹ EPA stated that if GHG sources are excluded from PSD applicability, then the first but not the second would trigger PSD permitting. Again, the result is different, but it is not “inequitable.” Indeed, this type of result can occur under EPA’s current PSD program today with respect to nonattainment and attainment pollutants. Consider a source being constructed in an attainment area for SO_x with potential emissions above the major source level for SO_x and significant but minor levels of emissions for ozone (VOC as precursor), a nonattainment pollutant for that area. The source would be subject to PSD for SO_x but no control requirements would apply to the significant VOC increase because the source is not a major nonattainment pollutant source. If this same source located in an area that was attainment for ozone and SO_x, the source would be subject to PSD for *both* SO_x and ozone.⁵² Rather than creating inequitable results, the NAPT interpretation *rationalizes the* program so that there is more uniform and equitable treatment of sources and areas.

III. THE ASSOCIATIONS PETITION EPA TO RECONSIDER AND RESCIND OR REVISE THE 1980 AND 2002 PSD REGULATIONS (OR INTERPRETATIONS THEREOF) TO THE EXTENT EPA BELIEVES THEY REQUIRE GHGS TO TRIGGER PSD OR CLASSIFY A SOURCE AS MAJOR.

As discussed above, the statute and its legislative history demonstrate clearly that Congress intended PSD permitting to be triggered only by criteria pollutants. EPA has stated that it reads the 1980 and 2002 PSD regulations to require GHGs to be the sole reason a source is classified as major or a major source triggers the requirement to obtain a PSD permit. The Associations believe the existing and prior versions of the PSD regulations can all be interpreted consistent with NAPT based on their plain language and urge EPA to do so.

A. EPA Should Reconsider Its Conclusion that the 1980⁵³ and 2002 PSD Regulations Preclude the NAPT Interpretation.

In addressing the Reconsideration Decision, members of the public commented that the original 1978, the revised 1980, and the current 2002 PSD regulations could all be interpreted consistent with NAPT. EPA rejected these comments in its final action but failed to address plainly the comments that were submitted. Commenters explained that the current version of Section 52.21(a)(1) as issued in 2002 states that Section 52.21 applies to “any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards.” This provision can only be understood with respect to particular NAAQS. This is followed by Section 52.21(a)(2)(i) which further clarifies that the requirements of 52.21 “apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.” This language, they explained, shows that the applicability of the section is tied to Section 107(d) – the NAAQS pollutants. Anything that follows is subject to these caveats. The definitions cannot be read separate and distinct from the applicability provisions. Thus, this language clearly can be read consistent with the statute’s location-limiting language. Commenters also addressed Section 51.166, which governs the SIP provisions for the PSD program and in Section 51.166(a)(7) contains the same applicability provision that 52.21(a)(2) contains. And, Section 52.01(d) defines the term modification or modified source to mean “any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under part 50 of this chapter or which results in the emission of any such pollutant not previously emitted.” This provision limits modification generally to NAAQS pollutants.

The 1980 regulations contained the same provisions as the 2002 regulations but 52.21(a)(2) is contained in 52.21(i). Section 52.01(d) defined the term modification or modified source to mean “any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under part 50 of this chapter or which results in the emission of any such pollutant

not previously emitted.” This provision limited modification generally to NAAQS pollutants. Section 52.21(a) just like the current rule provided that Section 52.21 applies to “any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards,” again a provision that can only be understood with respect to particular NAAQS. This was followed by Section 52.21(i)(2) and (3) which further clarified that the requirements only apply in attainment areas:

- (2) The requirements of paragraphs (j) through (r) of this section apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the Act that it would emit, except as this section otherwise provides.
- (3) The requirements of paragraphs (j) through (r) of this section **apply only** to any major stationary source or major modification that would be constructed in any area designated as attainment or unclassifiable under section 107(d)(1)(D) or (E) of the Act.

This language shows that the applicability of the section has been tied to Section 107(d) – the NAAQS pollutants and that anything that follows is subject to these caveats. Section 52.21(i) is entitled -- *Review of major stationary sources and major modifications—Source applicability and exemptions*. The definitions cannot be read separate and distinct from the applicability provisions.⁵⁴

B. EPA’s Claim That Parties Should Have Raised Concerns Earlier Is Incorrect.

EPA claims in the response to comments on the Reconsideration Decision that commenters should have raised concerns regarding EPA’s interpretation of its regulations in 1980 and 2002.⁵⁵ Under CAA Section 307(b), a party may petition for review of a rule based on grounds arising after the close of the public comment period.⁵⁶ In addition, while Section 307(d)(7)(B) provides that only an objection to a rule which was raised during the public comment period may be raised during judicial review, it requires EPA to convene a reconsideration proceeding if an administrative petition is filed citing an objection that arose after the close of the comment period or if it was impractical to raise such an objection during comment period.⁵⁷ The decision to regulate GHGs under the act constitutes new grounds warranting convening a reconsideration proceeding.

According to EPA, issuance of the Motor Vehicle Rules on May 7th means that GHGs (1) will be subject to PSD and starting on January 2, 2011 and (2) can be the sole basis for triggering PSD starting on July 1, 2011. Thus, the grounds for challenge and reconsideration of the EPA’s “automatic PSD trigger” approach arose after the close of the comment period on both the 1980 and 2002 regulations. It was also impractical to raise an objection in this regard during the public comment period on the 1980 or 2002 regulations.⁵⁸ Moreover, there was no ripe claim in 1980. This interpretation had no import at the time because it was unlikely that a source would trigger PSD for a pollutant for which no NAAQS had been issued without also triggering

it for a criteria pollutant. Indeed, at that time, there were very few pollutants regulated that were not criteria pollutants, and, thus, no ripe claim existed.

Similarly, it was not practical to expect the Associations to raise the issue during the comment period on the 2002 regulations because we could not have anticipated that EPA would determine that GHGs would become subject to PSD during the comment period on the 2002 New Source Review regulatory revisions. The public comment period for these regulations occurred in 1996. EPA issued a supplemental notice of availability on July 24, 1998.⁵⁹ Moreover, EPA suggests in the Response to Comments on the Reconsideration Decision that the Associations should have noted during the comment period the definition of “regulated NSR pollutant” and objected to its breadth during the comment period on the NSR Reform Regulations. That position ignores, however, that EPA never proposed the definition of “regulated NSR pollutant.” That definition appeared for the *first time* in the 2002 Final NSR Reform Regulations.⁶⁰

Further, EPA’s position at that time was that regulating GHGs under the CAA was inappropriate as evidenced in EPA’s 2003 denial of a 1999 petition for rulemaking on this very subject, well after the close of the comment period on the 2002 regulations. Even if the petition had been filed before the close of the comment period, the mere existence of a rulemaking petition filed by a private party with the Agency would not rise to the level of making the issue of regulating GHGs under the PSD program an issue a member of the public would be expected to raise in comments on the NSR Reform regulations.

Thus, Petitioners here could not have contemplated that EPA would use its NSR Reform regulations, *which were intended to narrow the impact of NSR and PSD*, to expand the scope of the program exponentially.

Accordingly, we request that EPA reconsider its interpretation of the PSD regulations and if it fails to interpret them consistent with NAPT, to make revisions as necessary to implement the NAPT interpretation of the statute.

IV. EPA SHOULD RECONSIDER AND RESCIND ITS DETERMINATION THAT THE PHRASE “POLLUTANT SUBJECT TO REGULATION” INCLUDES GHGS AND SHOULD INSTEAD INTERPRET IT TO EXCLUDE GHGS.

The “absurd results doctrine” dictates that, to avoid absurd results, an agency may only depart from the literal meaning of the statute in as limited a manner as possible to effectuate underlying congressional intent. Congress created the CAA to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”⁶¹ With the PSD program, Congress struck a delicate balance between environmental protection and economic growth.⁶² EPA’s interpretation – that the designation of an area as attainment or unclassifiable for any pollutant means PSD applies to all pollutants – is fundamentally inconsistent with the purpose of the Act. The repercussions created by applying PSD to GHGs are perhaps the best evidence that such an interpretation runs contrary to congressional intent. Given this, EPA can and should interpret the term “subject to regulation” to exclude GHGs.

This is supported by the clear indications that Congress did not intend for the PSD program to effectively authorize a national permitting system for newly classified air pollutants. If PSD applies to GHG emissions, the Agency estimates that without the proposed tailoring approach 90,000 new PSD permits will be required annually,⁶³ including permits for small entities not previously subject to PSD, such as hospitals, churches, schools, and small businesses. This vast expansion in permitting will do little to “protect and enhance the quality of the Nation’s air resources,” yet will significantly weaken the “productive capacity of the population.” In addition, it will certainly stifle if not completely halt the nation’s economic growth. Currently, PSD permitting requires 12-18 months *after* a complete application is filed. With this new burden, EPA and state permitting agencies will face such severe backlogs of PSD permit applications that companies will be forced to wait decades for a permit. Faced with such delays and uncertainty, many companies may forgo new projects and expansions altogether. Congress never intended to create a program of such magnitude, particularly where the expansion in permitting will do little, if anything, to improve *local* air quality. EPA should therefore reconsider its interpretation that GHGs are within the scope of the phrase “subject to regulation.”

RELIEF REQUESTED

For the foregoing reasons, the Associations respectfully request that EPA reconsider and revise its interpretations of the CAA and the PSD regulations regarding the NAPT interpretation and to determine that GHGs are not subject to regulation for purposes of the PSD program. Specifically, and as expeditiously as practicable, we petition EPA to:

1. Reconsider its interpretation announced in the preamble to the Final PSD Tailoring Rule that the statute compels or can be reasonably interpreted to allow PSD to be triggered by pollutants for which an area has not been designated attainment or unclassifiable for a particular NAAQS and rescind this interpretation or otherwise revise its rules as needed to adopt an interpretation that PSD can only be triggered by a NAAQS pollutant for which the area is designated attainment or unclassifiable.
2. Reconsider its interpretation announced in the Reconsideration Decision that the PSD regulations compel or can reasonably be interpreted to allow PSD to be triggered by pollutants for which an area has not been designated attainment or unclassifiable for a particular NAAQS and rescind this interpretation or otherwise revise its rules as needed to adopt an interpretation that PSD can only be triggered by a NAAQS pollutant for which the area is designated attainment or unclassifiable.
3. Reconsider its interpretation of CAA Section 165(a)(4) expressed in the Reconsideration Decision and the Final PSD Tailoring Rule that GHGs can be interpreted to be “subject to regulation” as a result of being regulated under Title II of the Act and rescind or otherwise revise its interpretation to exclude GHGs.

Until NAPT is formally adopted, EPA should also immediately stay the effectiveness of these provisions (either through an administrative stay under Section 307 of the Act or through rulemaking) and direct states to implement the “subject to regulation” definition consistent with such a stay.

Respectfully submitted,

National Association of Manufacturers
American Frozen Food Institute
American Petroleum Institute
Brick Industry Association
Corn Refiners Association
Michigan Manufacturers Association
Mississippi Manufacturers Association
National Association of Home Builders
National Oilseed Processors Association
Specialty Steel Industry of North America
Tennessee Chamber of Commerce & Industry
West Virginia Manufacturers Association
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Attachment: White Paper for EPA Climate Change Workgroup: *Scope of the PSD Problem to Be Addressed1: Why There Is No Automatic PSD Trigger or “NAPT” Simply Because GHGs Become Regulated Under the Clean Air Act*

¹ *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule*, 75 Fed. Reg. 31,514 (June 3, 2010) (“Final PSD Tailoring Rule”).

² See, e.g., *Comments of the Air Permitting Forum, American Chemistry Council, American Coke & Coal Chemicals Institute, American Iron And Steel Institute, Corn Refiners Association, Institute Of Shortening And Edible Oils, National Association Of Manufacturers, National Oilseed Processors Association, and Renewable Fuels Association* at 13-15, EPA-HQ-OAR-2009-0517-5181.1 (Dec. 28, 2009) (“Industry Comments”). These comments are incorporated by reference in this petition as are the comments on the Reconsideration Decision filed by the coalition of associations, EPA-HQ-OAR-2009-0597-0086.1.

³ *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule*, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (“Reconsideration Decision”).

⁴ See, e.g., *United States v. Webster*, 750 F.2d 307, 327 (5th Cir.1984), *cert. denied*, 471 U.S. 1106, 105 S.Ct. 2340, 85 L.Ed.2d 855 (1985).

⁵ This request encompasses the PSD regulations issued in 2002, 1980, and 1978 to the extent that EPA considers them to allow pollutants that are not subject to a NAAQS for which the area is designated attainment or unclassifiable to trigger PSD permitting or classify a source as major.

⁶ References to Section 52.21 should generally be read in this document as also including the corresponding references to Section 51.166.

⁷ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁸ *Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program; Proposed rule; reconsideration*, 74 Fed. Reg. 51,535 (Oct. 7, 2009) (hereafter “Proposed Reconsideration Decision”).

⁹ *Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Proposed rule*, 74 Fed. Reg. 49,454 (Sept. 28, 2009) (hereafter, the “Motor Vehicle Rule”).

¹⁰ *Id.* at 49,629.

¹¹ *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed rule*, 74 Fed. Reg. 55,292 (Oct. 27, 2009).

¹² 74 Fed. Reg. at 17,016.

¹³ EPA, *Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs: EPA’s Response to Public Comments* at 151-52, EPA-HQ-OAR-2009-0597-0128 (Mar. 29, 2010) (“Final Reconsideration Decision Response to Comment”).

¹⁴ 42 U.S.C. § 7475(a)(1). We note further that EPA’s assumed applicability approach also bypasses subparagraph (1), which requires that a PSD permit be issued and required, before a BACT requirement is imposed. *Id.*

¹⁵ *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); see also *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995); *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (“‘[C]ardinal principle of statutory construction’ [instructs that a court has a duty] ‘to give effect, if possible, to every clause and word of a statute... .’”) (citations omitted).

¹⁶ See, e.g., *Industry Comments* at 6.

¹⁷ *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (agency must give effect to the unambiguously expressed intent of Congress).

¹⁸ 39 Fed. Reg. 42,510 (Dec. 5, 1974).

¹⁹ *Id.* at 42,514 (“The phrases ‘modification’ or ‘modified source’ mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted”)

²⁰ See H.R. Rep. No. 95-294, at 128-45 (1977), as reprinted in 1977 U.S.C.C.A.N. 1077.

²¹ *Id.* at 128-31.

²² *Id.* at 136.

²³ *Id.*

²⁴ See H.R. 6161, 95th Cong. § 103 (as introduced in the House, Apr. 6, 1977) (adding a new Section 302, which would define “Major stationary source” as “any stationary facility or source of air pollutants which directly emits, or has the design capacity to emit, one hundred tons per year or more of any air pollutant for which a national ambient air quality standard is promulgated under this Act.”).

²⁵ In the House Report, Rep. Stockman states that “Section 108(a), with some modification, is in essence the same approach taken by EPA in its regulations.” H.R. Rep. No. 95-294, at 382 (Additional Views of Representative Dave Stockman). Rep. Stockman goes on to state that any gain from Section 108 is nearly cancelled out by the extension of the plan requirement to all of the regulated pollutants. EPA’s regulations only apply to sulfur dioxide and particulates. Although the classification scheme set up in section 108(a) is mandatory only for these pollutants, the States must impose something at least as effective for the other pollutants. This requirement will, of course, leave them little choice but to adopt the classification system for all regulated pollutants. *Id.* Clearly, Representative Stockman believed that PSD could only be triggered after a NAAQS was established, and states had adopted a classification system for the pollutant at issue.

²⁶ S. Rep. No. 95-127, *as reprinted in* Arnold & Porter Legislative History at 8, 11-12, 29-30 (1977).

²⁷ *Id.* at 11.

²⁸ STAFF OF S. SUBCOMM. ON ENVIRONMENTAL POLLUTION OF THE S. COMM. ON ENVIRONMENT & PUBLIC WORKS, 95TH CONG., A SECTION-BY-SECTION ANALYSIS OF S. 252 AND S. 253 CLEAN AIR ACT AMENDMENTS AND S. 253 *as reprinted in* Arnold & Porter Legislative History at 5 (Comm. Print 1977).

²⁹ The inclusion of the reference to “any air pollutant” in Section 169(1) has to be read in light of the restricting language in Sections 161 and 165(a), indicating that Congress felt the limitation of the definition of major emitting facility in Section 169(1) to NAAQS pollutants was unnecessary since it was already reflected in the statute.

³⁰ 636 F.2d 323 (D.C. Cir. 1980).

³¹ *Id.* at 364.

³² *Id.* at 364–68.

³³ *Id.* at 365 (emphasis added).

³⁴ 40 C.F.R. § 52.21(i)(2) (emphasis added).

³⁵ 45 Fed. Reg. 52,676 (Aug. 7, 1980).

³⁶ *Id.* at 52,677.

³⁷ 549 U.S. at 528-29.

³⁸ Nor does it resolve whether they are intended to be covered under Section 165(a)(4).

³⁹ 75 Fed. Reg. at 31, 560.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² EPA’s citation to *Alabama Power v. Costle*, 636 F.2d 323, 361, n.90 (D.C.Cir. 1980) for the proposition that PSD applicability is based on non-NAAQS pollutants is misleading and incorrect. EPA states that the D.C. Circuit found that “PSD applies to HAPs” based on the statute at that time. 75 Fed. Reg. at 31,561. The footnote cited by EPA actually stated that mercury was “subject to regulation” even though it was a Section 112 pollutant. Industry had argued that air toxics could not be “subject to regulation” but that does not answer the question, and the court clearly was not addressing, whether a non-NAAQS pollutant could be the basis for triggering the requirement to obtain a PSD permit in the first instance. This dictum certainly does not override a primary holding of the case that location is the key determinant for PSD permitting applicability. That mercury was “subject to regulation” merely meant that if PSD was triggered by a NAAQS pollutant, and a significant increase of mercury was also caused by such modification, BACT for mercury would be required under Section 165(a)(4). Moreover, contrary to EPA’s inference in note 45 of the Final PSD Tailoring Rule, the exclusion from PSD for hazardous air pollutants in Section 112(b)(6) is also consistent with NAPT. *Id.* at 31,561, n.45. Congress was ensuring that pollutants subject to maximum achievable control technology (MACT) as enacted in 1990 would not be subject to duplicative or potentially conflicting control requirements under the PSD program and thus excluded these pollutants from the BACT and any other requirements of PSD.

⁴³ 42 U.S.C. § 7410(j) (emphasis added).

⁴⁴ 75 Fed. Reg. at 31,561.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 31,561-31,562.

⁴⁸ *Id.* at 31,561.

⁴⁹ *Id.*

⁵⁰ *Id.* at 31,562.

⁵¹ *Id.*

⁵² See EPA, *Draft NSR Workshop Manual: Prevention of Significant Deterioration (PSD) and Nonattainment Area Permitting* at A.26 and F.9 (Oct. 1990). For example, a new kraft pulp mill major for SO₂, in an SO₂ attainment

area and having VOC emissions of 45 tons per year and PM/PM-10 emissions of 30/5 tpy in an ozone and PM nonattainment area would not trigger nonattainment NSR for VOC or PM/PM10 because the source is not a major source for the nonattainment pollutant.

⁵³ To the extent EPA considers its interpretation that any pollutant subject to regulation can trigger the requirement to obtain a PSD permit to have originated in the regulations issued in 1978, *Part 51—Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Prevention of Significant Air Quality Deterioration*, 43 Fed. Reg. 26,380-26,388 (Jun. 19, 1978) and *Part 52—Approval and Promulgation of State Implementation Plans, 1977 Clean Air Act Amendments to Prevent Significant Deterioration; Final Rule*, 43 Fed. Reg. 26,388-26,410 (Jun. 19, 1978), references in this petition to reconsidering its interpretation of the PSD rules include these 1978 actions as well.

⁵⁴ It is also worth noting that when EPA created 52.21(a)(2)(i) (and Section 51.166(i)(1)) it stated that it was simply rearranging the provisions on applicability to clarify their scope:

To further clarify major NSR applicability in one location, we have moved Sec. 51.166(i)(1) through (3) and Sec. 52.21(i)(1) through (3) into the new applicability sections at Sec. 51.166(a)(7) and Sec. 52.21(a)(2). These provisions clarify that you must obtain a permit before you begin construction (including for major modifications), that the provisions apply for each regulated NSR pollutant that your source emits, and that the provisions apply to any source located in the area designated as attainment or unclassifiable (for Sec. Sec. 51.166 and 52.21).

67 Fed. Reg. 80,185, 80,190 (Dec. 31, 2002) (emphasis added).

⁵⁵ Final Reconsideration Decision Response to Comment at 151-153.

⁵⁶ 42 U.S.C. § 7607(b).

⁵⁷ 42 U.S.C. § 7607(d)(7)(B).

⁵⁸ Indeed, in the final Reconsideration Decision, EPA acknowledges that commenters could not have contemplated that GHGs would become subject to regulation in 1980 when the preamble to that final rule interpreted Section 165(a) as meaning that if an area is subject to PSD for *any* pollutant, it is subject to PSD for all pollutants except nonattainment pollutants. *Final Reconsideration Decision Response to Comment* at 153 (March 29, 2010) (The “potential for regulation of GHGs, and the implications of such regulation, may have been outside of the commenters’ contemplation in 1980....”).

⁵⁹ *Notice of Availability; Alternatives for New Source Review (NSR) Applicability for Major Modifications; Solicitation of Comment*, 63 Fed. Reg. 39,857 (July 24, 1998).

⁶⁰ *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR); Final Rule and Proposed Rule*, 67 Fed. Reg. 80,186, 80,240 (Dec. 31, 2002).

⁶¹ 42 U.S.C. § 7401(b)(1).

⁶² One purpose of the PSD program is “to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.” 42 U.S.C. § 7470(3).

⁶³ 74 Fed. Reg. at 55,295.

**White Paper for EPA Climate Change Workgroup:
Scope of the PSD Problem to Be Addressed¹: Why There Is
No Automatic PSD Trigger or “NAPT”
Simply Because GHGs Become Regulated Under the Clean Air Act
January 8, 2010 (rev. 2/8/2010)**

Once GHGs become “subject to regulation” under any Clean Air Act authority, it has been argued that any new or modified major source of greenhouse gases automatically becomes subject to “New Source Review” and must apply best available control technology (BACT) under a statutory program referred to as “PSD.” The thresholds in the Clean Air Act for a major source are 100 or 250 tons per year and for a major modification are typically in the range of 40 to 100 tons per year, a significant amount of emissions for conventional air pollutants, but an exceedingly low level if applied to GHGs. In its Proposed Tailoring Rule, EPA attempted to fix this problem by raising the threshold levels, which may make sense in terms of policy, but it not only creates disagreements about the “right level,” it is also subject to legal challenge. This paper proposes an alternative, more legally defensible approach to limiting the applicability of PSD to GHGs. Simply put, we argue that GHG emissions by themselves do not trigger PSD review. Rather, PSD review is triggered only by a major new source or modification for a criteria pollutant. Once such a review is triggered, if GHGs become subject to regulation, the source subject to PSD review for the criteria pollutant(s) must also apply BACT for significant GHG emission increases. *This approach would mean that subjecting GHGs to regulation under one part of the Clean Air Act would not trigger any additional sources to get PSD permits; rather, it would only affect those sources who have to get permits anyway for criteria pollutants to also apply BACT for GHGs.* Thus, only a few hundred permits a year would require BACT for GHGs, and these requirements would only affect truly large sources.

The BACT Work Group formed by the Clean Air Act Advisory Committee (CAAAC) has undertaken extensive discussions to develop recommendations to streamline the determination of BACT for GHGs. If successful, this effort would help EPA develop uniform guidelines for states if GHGs become subject to regulation under the Clean Air Act. As a result, CAAAC has focused on the definition of BACT in the Act. An issue that the Work Group is taking up in Phase II of its work is the scope of PSD applicability because the scope of the program dictates how many BACT determinations are likely to be required and the degree of streamlining that is needed to the existing BACT process. In completing its charge to identify the major issues related to implementing the PSD Program under the Clean Air Act for GHGs, the Work Group should address whether GHGs are meant to be a sole basis for triggering the PSD permitting requirement in the first instance under the statutory and regulatory language or whether GHG BACT is only required by statute/regulation when a source is already required to obtain a PSD permit based emissions of a criteria pollutant.

This White Paper addresses this important question and contends that there is *no automatic PSD triggering* or *NAPT* based solely on emissions of GHGs but rather that BACT may apply to significant GHG increases only when PSD is being triggered for a criteria pollutant. For shorthand purposes, we refer to this as the *NAPT* (no automatic PSD trigger) *approach*. It does not address the question of which

¹ This white paper has been prepared by Chuck Knauss (Clean Air Act Advisory Committee and EPA Climate Change Workgroup Member) as a draft document to support discussion among members of the EPA Climate Change Workgroup. While the NAPT approach would not solve the PSD problem completely, it should be a key element of addressing the stationary source implications of subjecting GHGs to regulation, which would also need to address the Title V issue, significance levels, definition of “subject to regulation”, and the comments raised by state agencies regarding their need for a delay in the triggering of PSD and Title V to adopt regulations.

or when pollutants are “subject to regulation” within the meaning of Section 165(a)(4) of the Act that is raised in EPA’s Reconsideration of the Johnson Memorandum, or other applicability issues such as the appropriate significance levels and measurement methods that have been raised in recent Federal Register notices. ***This paper is accompanied by two attachments. One explains why EPA should adopt the NAPT approach and the second provides a series of examples showing how NAPT works as compared with the “non-NAPT” interpretation.***

As explained in detail below, the statutory and regulatory provisions governing the PSD program state that PSD only applies in those areas designated attainment or unclassifiable for a particular pollutant. Specifically, PSD is triggered by: (1) a new major source of a pollutant for which the area where the source is located is classified as attainment or unclassifiable; or (2) a major modification of an existing source for a pollutant for which the area where the source is located is classified as attainment or unclassifiable.

A. Sections 161 and 165(a) Limit Triggering of PSD to Criteria Pollutants, While Section 165(a)(4) Applies BACT to Pollutants “Subject to Regulation” if a PSD Permit Is Required for a Criteria Pollutant.

The statutory language indicates that the initial applicability of the PSD program is determined based only on criteria pollutants for which an area is designated attainment or unclassifiable and is not triggered based on emissions of non-criteria pollutants. In particular, Section 161 states with regard to the PSD program that:

In accordance with the policy of section 101(b)(1), each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) *designated pursuant to section 107 as attainment or unclassifiable*.²

Similarly, Section 165(a) limits PSD applicability:

No major emitting facility on which construction is commenced after the date of the enactment of this part, may be constructed *in any area to which this part applies* unless — (1) a [PSD] permit has been issued...; (2) [notice, comment, and hearing opportunity given]; (3) [air quality requirements demonstrated to be met]; (4) the proposed facility is subject to [BACT] for each pollutant subject to regulation under this chapter...; (5) [class I area requirements are met as applicable]; (6) [air quality impacts of growth analyzed]; (7) [certain area monitoring requirements met]; and (8) [certain applicable class II and III area requirements met].³

The above text plainly limits application of PSD to certain areas — those designated as attainment or unclassifiable *pursuant to Section 107 of the Act*. Section 107 applies *only* to criteria pollutants. Thus, Sections 161 and 165(a) serve to limit applicability by location and this “location-limiting language” must be given meaning in the Agency’s application of the statute. EPA’s discussion of BACT to date,

² 42 U.S.C. § 7471 (emphasis added).

³ 42 U.S.C. § 7475(a) (emphasis added). Section 52.21(a)(2) of EPA’s regulations, captioned “applicability procedures,” also reflects the limitation of PSD applicability to situations where the pollutant triggering review is one for which the area has been designated attainment or unclassifiable. Section 52.21(a)(2) states that PSD applies to new major stationary sources or projects at existing major stationary sources “*in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.*” 40 C.F.R. § 52.21(a)(2) (emphasis added).

however, skips directly to subparagraph (4) of Section 165(a), which defines the pollutants that are subject to BACT *once PSD permitting is already required*. The scope of the BACT determination is important, but it is not the initial question.

Giving meaning to the language in these statutory provisions is important for several reasons. First, it assures that all provisions of the statute are given meaning. If Section 165(a)(4) alone governs the scope of PSD program applicability, then the location-limiting language of Sections 161 and 165(a) would be rendered mere surplusage. According to basic canons of statutory construction, all provisions of the Act must be given meaning.⁴

Second, this interpretation comports with the holding in *Alabama Power Co. v. Costle*,⁵ where the court found that *location* is the key determinant for PSD applicability and rejected EPA's contention at that time that PSD should apply in all areas of the country, regardless of attainment status. EPA had argued that PSD permitting requirements should apply not only to attainment areas for a given pollutant, but to anywhere that a new emitting facility would "adversely affect the air quality of an area to which" PSD requirements apply.⁶ The court held that EPA's regulations violated the CAA's plain language.⁷ The court stated: "The plain meaning of the inclusion in [42 U.S.C. § 7475] of the words 'any area to which this part applies' is that Congress intended *location* to be the key determinant of the applicability of the PSD review requirements."⁸ In its regulatory response to the *Alabama Power* decision, EPA acknowledged the Court's holding by specifically providing an exemption from PSD for nonattainment pollutants in Section 52.21(i)(2).⁹ But, in the preamble to those regulations, EPA otherwise maintained the concept that other pollutants (such as NSPS-only pollutants) could trigger PSD.¹⁰ EPA's approach remained contrary to the Act, but it had little effect because there were very few non-criteria pollutants at the time.

Third, other provisions in Title I provide further support for limiting PSD program applicability to new major sources of NAAQS pollutants for which an area is designated attainment or unclassifiable and to existing major sources of NAAQS pollutants undertaking a major modification for a NAAQS pollutant in such an area. Section 110(a)(2)(C) sets forth the requirements for SIPs, stating that the plans shall "include a program to provide for ... regulation of the modification and construction of any stationary source within the areas covered by the plan *as necessary to assure that [NAAQS] are achieved, including a permit program as required in parts C [PSD] and D [nonattainment New Source Review]*."¹¹ This language again explicitly indicates that the purpose of the PSD program is to assure the NAAQS continue

⁴ *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); see also *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995); *Bennett v. Spear*, 520 U.S. 154, 173 (1997) ("'[C]ardinal principle of statutory construction' [instructs that a court has a duty] 'to give effect, if possible, to every clause and word of a statute....'" (internal citations omitted)).

⁵ 636 F.2d 323 (D.C. Cir. 1980).

⁶ *Id.* at 364.

⁷ *Id.* at 364-68.

⁸ *Id.* at 365 (emphasis added).

⁹ EPA stated that PSD "shall not apply to a major stationary source or major modification *with respect to a particular pollutant* if ... the source or modification is located in an area designated as nonattainment under section 107." 40 C.F.R. § 52.21(i)(2) (emphasis added).

¹⁰ 45 Fed. Reg. 52,675, 52,676 (Aug. 7, 1980). The 1980 Preamble stated that PSD requirements still apply to any area that is "designated ... as 'attainment' or 'unclassifiable' for *any* pollutant for which a national ambient air quality standard exists." *Id.* at 52,677. This interpretation is wrong because it renders Section 165(a)'s language a nullity since every area in the country is designated attainment for at least one pollutant, and that has always been the case. Moreover, the 1980 interpretation is inconsistent with EPA's approach for nonattainment NSR, in that EPA applies a pollutant-by-pollutant approach to trigger nonattainment NSR but does not do so for PSD.

¹¹ 42 U.S.C. § 7410(a)(2)(C) (emphasis added).

to be achieved. It is therefore inconsistent with this language to apply PSD in situations when there is no significant increase of a NAAQS pollutant for which an area is designated attainment or unclassifiable. Moreover, Section 107 provides insight into the meaning of the term “air quality” in Section 161 because it requires SIPs to “specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.”¹² Finally, Section 163(b)(4) specifies that the maximum allowable concentration of “any air pollutant” in “any area” to which Part C applies shall not exceed the NAAQS, further indicating that the PSD program is focused on attaining the NAAQS.¹³

Fourth, the 28 source categories that Congress listed in Section 169(1) in 1977 are the very ones EPA regarded at the time as posing the greatest potential for air quality degradation due to conventional pollutants. The only way to explain the selection of those particular categories is to posit a concern only with criteria pollutants. Indeed, the only way to understand the 100/250 tpy cutoffs is also in terms of criteria pollutants. Similarly, the provisions of Sections 165(a) and (e) that require air quality monitoring and air quality impact analysis in connection with PSD permitting are oriented on their face to local or regional impacts. A prime example is Section 165(e)(1), which calls for an analysis of “the ambient air quality at the proposed site *and in areas which may be affected by emissions from [the proposed] facility for each pollutant subject to regulation under the [CAA] which will be emitted from such facility.*”¹⁴

Fifth, the entire system for area designations in Section 107(d) and the underlying system for establishing air quality control regions in Section 107(b) make sense only from the standpoint of managing emissions of criteria pollutants, not GHGs. Indeed, Section 161 is the provision in Part C that dictates that each SIP must contain a PSD program and that the program be designed to prevent significant deterioration of air quality in areas designated as attainment or unclassifiable under Section 107(d). That objective makes sense only from the standpoint of emissions having a local or regional impact, not emissions of GHGs.

Sixth, the legislative history of the Clean Air Act Amendments of 1977, the origin of Sections 165(a) and 169(1), reveals without doubt that Congress, in creating those provisions, had in mind only criteria pollutants. Both the Senate and the House saw themselves as engaged primarily in continuing the work that a prior Congress had begun, through the 1970 Clean Air Act, to rid the Nation, especially urban areas, of unhealthy levels of smog, particulates, sulfur dioxide, and other criteria pollutants. The air quality problems of concern to the 95th Congress in 1977 did not remotely include global warming.¹⁵ It is simply not possible, in light of this legislative history, to make a credible argument that the 95th Congress intended that GHG emissions could be a basis for applicability of the PSD permitting program as defined by Sections 165(a) and 169(1).

B. While Limiting the Scope of the PSD Program Consistent with the Statute Will Limit the Number of PSD Permits for GHGs, a Significance Level Would Still Need to Be Established.

EPA must still establish a significance level for GHGs because sources that are obtaining a PSD permit and increasing GHG emissions would need to determine the level of increase that triggers the BACT requirement under Section 165(a)(4). Unlike the major source threshold for PSD applicability of 100 or 250 tpy, the statute does not specify the significance levels for determining whether BACT is required for

¹² *Id.* at § 7407(a).

¹³ *Id.* at § 7473(b)(4).

¹⁴ 42 U.S.C. § 7465(e)(1) (emphasis added).

¹⁵ *See, e.g.*, 123 Cong. Rec. S9162-86 (daily ed., June 8, 1977) (stage-setting remarks of Senator Muskie, the lead floor manager); *id.* at H8662-65 (daily ed., Aug. 4, 1977) (stage-setting remarks of Congressman Rogers, the lead floor manager).

a pollutant. Thus, EPA can set a significance level without reference to the major source thresholds, as they are not relevant. The sources for which a GHG BACT analysis would be conducted would, by definition, be major emitting facilities by virtue of their emissions of a NAAQS pollutant for which an area is designated attainment or unclassifiable. The only question for EPA to answer at that point is what level of GHG emissions increase is significant enough to warrant imposition of BACT. This approach would leave EPA with significantly greater flexibility under the statute to set an appropriate significance level for GHGs to determine the level of emissions increase above which BACT analysis is appropriate. EPA would not be departing from a specified numerical value in the statute – *i.e.*, because the statute does not specify significance levels.

The result of this approach is illustrated by a couple of examples. First, consider an existing plant located in an attainment area for all criteria pollutants and subject to the 250 tpy major source threshold. If this plant's potential emissions of all criteria pollutants are less than the major source threshold, the mere fact that its GHG emissions are above the major source threshold that Congress established for criteria pollutants would not make the source a "major emitting facility" under the PSD program. Similarly, consider an existing source that is major for particulate matter and located in a particulate matter attainment area. If that source undertakes a project that reduces particulate emissions but causes a significant GHG emissions increase, under the proper statutory interpretation, PSD would not be triggered for GHGs because GHGs are not a criteria pollutant. However, if that same plant increased particulate emissions by more than the significance level, under the NAPT approach, BACT would have to be applied for GHGs (if deemed "subject to regulation"). **Additional examples are provided in Attachment 2.**¹⁶

* * * * *

To date, our discussions about the potential triggers of PSD have not directly addressed this initial applicability question and the Work Group should discuss it, not only because of its overall importance to the program, but also because a narrower scope to the potential GHG burden may allow for a more focused discussion of solutions for BACT itself.

Attachment 1: Why EPA Should Adopt the NAPT Approach to Address the Immediate PSD Problem

Attachment 2: Examples of Implementing the NAPT Approach for PSD Applicability

¹⁶ Under this approach EPA's "major for one major for all policy" would have to be modified. That policy results from EPA's reading of Section 165(a) as applying PSD if a source is located in an area that is attainment for *any* attainment pollutant. As discussed in the text, that reading of the statute nullifies the language in Section 165(a) that limits applicability to areas designated as attainment under Section 107. Theoretically, there could be a slight reduction in the number of PSD permits triggered for criteria pollutants. For example, consider a source is major for NO_x but minor for all other pollutants and has a significant increase of SO₂ but no significant increase in NO_x. Assuming the area is designated attainment for both NO₂ and SO₂, under the 1980 preamble reading of Section 165(a), the source would trigger PSD for SO₂ because it is "major for SO₂" since it is "major for NO_x" whereas under NAPT, the source would not trigger PSD for SO₂ since it is not a triggering PSD for SO₂ directly. In practice, however, it is unlikely that a source like an electric utility would not trigger PSD directly for an attainment criteria pollutant and once it does, BACT applies to all pollutants subject to regulation that increase significantly under the NAPT approach. Therefore, we believe that this theoretical difference is unlikely to result in an actual change in the number of plants triggering PSD and applying BACT for criteria pollutants. Even if it did result in a few less PSD permits, though, state minor new source review programs would at least require state BACT under their SIPs and thus control requirements would still apply, just not under the PSD program.

Attachment 1

Why EPA Should Adopt the NAPT Approach to Address the PSD Problem

Background: *NAPT (No Automatic PSD Trigger) is a consistent application of the Clean Air Act and existing PSD program regulations that requires a PSD permit only if a physical or operational change causes a significant increase in a criteria pollutant. Once that occurs, all pollutants subject to regulation must apply BACT. Under NAPT, GHGs could not be the sole reason a PSD permit is required but if a source requires a PSD permit due to criteria pollutant increases (e.g., NOx or VOC), then BACT would be required for significant increases of GHGs.*

Why Should EPA Adopt the NAPT Approach?

1. It limits the requirement for GHG BACT to the existing number of PSD permits being triggered today, about 300 PSD permits each year. These permits would have to include GHG BACT if the projects cause a significant increase in GHG emissions.
2. It prevents EPA from having to create new ~~has been prepared by Chuck Knauss (Clean Air Act Advisory Committee and EPA Climate~~ major source thresholds for GHGs since the major source level would not be relevant for GHGs; only the significance level would be relevant.
3. EPA could issue a significance level at any appropriate level since (unlike the major source threshold), the Act does not specify a particular significance level.
4. It ensures that those sources that are otherwise minor and permits in the permitting queue are not prevented from bringing more efficient processes on line.
5. It is consistent with the language of the Clean Air Act and faithfully implements the decision in *Alabama Power v. Costle*.

What Would EPA Have to Do in Addition to NAPT?

1. EPA would need to adopt a Title V major source threshold because the NAPT interpretation does not apply to Title V.
2. EPA would need to issue a GHG significance level to ensure that minor increases in GHGs do not trigger.
3. EPA would need to delay applicability of the “subject to regulation” provision for GHGs to allow states time to conform any conflicting state and federal rules.

Why Is Simply Adopting the Tailoring Rule or Using the Federal Implementation Plan Approach Insufficient?

1. The Tailoring Rule does not alter state laws and sources still remain subject to these requirements. Simply changing federal law does not solve the problem.
2. Issuing a FIP does not address the state law issue nor does it undo state implementation plan approvals. Moreover, many believe it is not legally defensible and if vacated, would place numerous construction projects in jeopardy.

What Are Responses to Potential Arguments Against NAPT?

1. While some might argue that it creates an uneven playing field because sources located in attainment areas for a criteria pollutant could be forced to apply GHG BACT whereas a source that triggers only nonattainment NSR would not be triggering PSD and therefore not trigger GHG BACT, this argument ignores that the current PSD system takes this approach. PSD does not apply to nonattainment pollutants under the *Alabama Power* case. Moreover, this situation is unlikely to arise very often and the benefits of limiting PSD for GHGs to the larger sources that are already undertaking a project significant enough to trigger PSD for criteria pollutants makes policy sense.
2. While some might argue that pollutants like formaldehyde have historically triggered PSD review, the fact is that these pollutants are generally hazardous air pollutants that have not been subject to PSD since 1990. Prior to 1990, PSD was the only way to control certain pollutants but with regulation under Section 112, these concerns have been addressed.
3. While some might argue that NAPT does not implement fully EPA’s historical “major for one, major for all” approach, NAPT merely modifies it slightly so that it is “major for one criteria pollutant and trigger PSD for it, apply BACT to the broader group of pollutants subject to regulation.”

Attachment 2

Examples of Implementing the NAPT Approach for PSD Applicability

The following examples illustrate how the statute and regulations can be applied to implement the NAPT approach (assuming GHGs are subject to regulation within the meaning of CAA Section 165(a)(4)) and the significant streamlining that would result:

Facts	NAPT Result	Non-NAPT Result ¹
Example 1: New Minor Criteria Pollutant Source with Major Levels of GHG Emissions: A new plant is being built in an attainment area for all criteria pollutants with potential emissions of criteria pollutants less than major source thresholds but with VOC emissions at 50 tons per year. GHG emissions will be greater than the major source threshold.	PSD does not apply because the source is not major for any criteria pollutant for which the area is designated attainment.	PSD would apply because the source is “major” for GHGs and the significance level would apply for all criteria pollutant emissions. This means that both GHGs and VOC would be subject to BACT whereas today, neither is subject to BACT.
Example 2: New Major Criteria Pollutant Source: A new plant is being built in an ozone attainment area with potential emissions of VOC greater than 250 tons per year. GHG emissions are greater than the GHG significance level.	PSD applies because the source is major for a criteria pollutant for which the area is designated attainment and BACT is required for VOCs and GHGs. The source is a new major emitting facility of an attainment pollutant (VOC) and there is a significant increase in GHGs emissions.	Same result as NAPT.
Example 3: Existing minor criteria pollutant source with GHG emissions greater than major source threshold. An existing plant is located in an attainment area for all criteria pollutants. PTE of all criteria pollutants is less than the major source threshold. PTE of GHGs exceeds the GHG major source threshold. The facility undertakes a project that increases GHG emissions above the GHG significance levels but otherwise remains a minor source for criteria pollutants. Emissions of VOC will increase by more than 40 tpy to 85 tons.	PSD does not apply because the source is not a major source for a criteria pollutant for which the area is designated attainment or unclassifiable. GHGs would not be subject to BACT.	PSD would apply because the source is “major” for GHGs and the significance level would apply for all criteria pollutant emissions. This means that both GHGs and VOC would be subject to BACT due to the 45 tpy increase even though the source remains minor for VOC. Today, neither VOC nor GHGs would be subject to BACT.

¹ This is the result that would apply under EPA’s 1980 NSR Rule preamble assumption that PSD can be triggered by non-criteria pollutants.

Facts	NAPT Result	Non-NAPT Result ¹
<p>Example 4: Existing major criteria pollutant source with project only increasing GHGs above significance levels. Existing source major for SO₂ in an SO₂ attainment area. Minor for all other criteria pollutants. Source undertakes a project that increases GHG emissions by more than the significance level but all criteria pollutant emissions either decrease or increase by less than significance levels.</p>	<p>PSD does not apply and does not require BACT for GHGs because, although the facility is a major emitting facility, it has not increased emissions above significance levels for any NAAQS pollutant for which the area is designated attainment or unclassifiable. Therefore, it is not triggering PSD permitting requirements for a criteria pollutant. Since PSD is not applicable, the question of GHG BACT would not be reached, even if GHG emissions would increase above the GHG significance level.</p>	<p>PSD would be triggered based solely on the increase in GHG emissions and would require BACT.</p>
<p>Example 5: Existing major criteria pollutant source with project increasing attainment criteria pollutant and GHG emissions above significance levels. Existing plant located in an attainment area for all criteria pollutants. The plant has potential NO_x emissions above 250 tpy. It undertakes a project increasing NO_x and SO₂ emissions above 40 tpy and GHG emissions above significance level. Other criteria pollutants, like PM_{2.5} and PM₁₀, will not increase above applicable significance levels.</p>	<p>PSD is triggered by NO_x and SO₂. BACT is required for NO_x and SO₂ and GHGs.</p>	<p>Same result as NAPT.</p>

CERTIFICATE OF SERVICE

A copy of the preceding was sent on July 6, 2010 to the following via facsimile, email, and certified mail:

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_____/s/
Charles H. Knauss

ATTACHMENT 4

American Chemistry Council's Petition to Reconsider, Rescind, and/or Revise PSD Regulations

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

American Chemistry Council's Petition
to Reconsider, Rescind, and/or Revise
EPA's Prevention of Significant
Deterioration Regulations:
40 C.F.R. Sections 51.166 and 52.21

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**AMERICAN CHEMISTRY COUNCIL'S PETITION TO RECONSIDER, RESCIND,
AND/OR REVISE EPA'S PREVENTION OF SIGNIFICANT DETERIORATION
REGULATIONS: 40 C.F.R. SECTIONS 51.166 AND 52.21**

The American Chemistry Council (ACC) petitions the Environmental Protection Agency to reconsider, revise, and/or rescind two EPA final actions promulgated under the Prevention of Significant Deterioration (PSD) program: *Prevention of Significant Deterioration and Nonattainment New Source Review (NSR); Final Rule and Proposed Rule*, 67 Fed. Reg. 80,186 (Dec. 31, 2002); and *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52,676 (Aug. 7, 1980). ACC is a not-for-profit trade association representing the companies that make the products that make modern life possible, while working to protect the environment, public health, and security of our nation. ACC's members operate numerous facilities regulated under the Clean Air Act (CAA) and have an overriding interest in the proper implementation of the Clean Air Act and accompanying regulations, as well as offering solutions on realizing the goals ACC shares with EPA on improving the efficiency and effectiveness of the Clean Air Act as described below.

The regulations subject to this petition must be reconsidered, revised and/or rescinded to comport with the letter and the spirit of the Clean Air Act. EPA has implemented its regulations in a manner flatly inconsistent with both the language and the history surrounding the Act. While this gap between what EPA's approach requires from what the Clean Air Act authorizes may have been of little consequence until now, it is necessary at this time for EPA to more explicitly reconcile and conform its regulations and interpretation to Congress' statutory direction at the outset of the Agency's greenhouse gas (GHG) regulatory regime. As described below, EPA can narrowly revise its regulations and/or its interpretation thereof to achieve this required result without any ramifications on existing Clean Air Act programs.¹

¹ As described below, EPA has interpreted and applied the 1980 and 2002 regulations in a fundamentally flawed manner that allows non criteria pollutants to trigger Prevention of Significant Deterioration (PSD) permits, and ACC thus focuses this petition on those regulations. To the extent EPA considers its interpretation that any pollutant subject to regulation can trigger the requirement to obtain a PSD permit to have originated in the regulations issued in 1978, *Part 51—Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Prevention of Significant Air Quality Deterioration*. 43 Fed. Reg. 26,380-26,388 (Jun. 19, 1978) and *Part 52—Approval and Promulgation of State Implementation Plans, 1977 Clean Air Act Amendments to Prevent Significant Deterioration; Final Rule*, 43 Fed. Reg. 26,388-26,410 (Jun. 19, 1978), references in this petition to the 1980 rules include these 1978 actions as well.

The fundamental flaw with EPA's existing approach to PSD in its regulations and interpretation thereof is that EPA has disregarded the Clean Air Act's distinction between regulated pollutants and criteria pollutants, which are pollutants subject to a National Ambient Air Quality Standard (NAAQS). EPA has wrongfully interpreted the Clean Air Act to mandate PSD permits for facilities that emit threshold amounts of *any* pollutant regulated under the Clean Air Act, rather than limiting this mandate to facilities that emit threshold amounts of *criteria* pollutants, as the Clean Air Act requires. Under EPA's expansive and erroneous interpretation, a facility may be required to obtain a PSD permit based solely on the emissions of a pollutant that is not subject to a NAAQS.

Such an outcome violates the Clean Air Act. Congress clearly established the PSD program to require PSD permits in nonattainment or unclassifiable areas *only when a NAAQS controlled pollutant* is being emitted above certain specified thresholds for such specific pollutants. This approach is clear not only in the language and legislative history of the Clean Air Act, but also is a reasonable and logical approach to addressing air pollution. It makes abundant sense to conclude that a permit for *prevention of significant deterioration* of air quality should be required only when an area has been designated attainment or is unclassifiable for a certain pollutant, and the goal is to prevent the *deterioration* of air quality in that area for that pollutant. In contrast, it makes no sense to invoke this permitting system intended to prevent deterioration in air quality where there is no associated classification status for such a pollutant. PSD permits cannot be triggered based on emissions from non-criteria pollutants.

Unfortunately, EPA has interpreted its existing regulations to require what Congress did not intend: the triggering of PSD permitting requirements based solely on the emissions of non-criteria pollutants and for which there has been no determination of attainment status for such pollutant. Until now, this gap between the Clean Air Act and EPA's approach has been of little consequence. However, as EPA approaches its GHG regulatory regime in early 2011, this issue becomes critically important. The gap between the statute and EPA's approach has led EPA to develop legally suspect and pragmatically complicated ad hoc approaches to avoid triggering PSD for GHGs that will result only in years of uncertainty, confusion, and litigation risk for the government, states, and the regulated community. Instead, EPA should reconcile, conform, and reconsider its regulatory approach consistent with the Clean Air Act prior to January 2, 2011, the date by which EPA has concluded GHGs will become "air pollutants subject to regulation," and thus an unlawful trigger for PSD permits.

Fortunately, the solution before the Agency is a straightforward one. EPA should revise, rescind, and/or reconsider its existing approach to limit the PSD program in the first instance to those pollutants for which EPA has promulgated a NAAQS, *i.e.*, criteria pollutants. This approach is consistent with the Clean Air Act and would *eliminate* the need for EPA to unlawfully “raise” the statutory PSD “major source” thresholds as the Agency has done in its GHG Tailoring Rule.² It also would mean that a pollutant merely becoming “subject to regulation” under the Act would not create an automatic PSD trigger for that pollutant. This interpretation of the Act can be easily implemented and would alleviate many of the problems EPA and the States face in applying the Clean Air Act to GHGs. Moreover, it is an approach that allows EPA to realize its GHG objectives, and is consistent with (if not compelled by) the statutory language and Congressional intent. EPA has already committed to adopting this approach for the first six months of 2011; it should, however, make this approach permanent. ACC accordingly respectfully requests that EPA engage in a rulemaking to revise or rescind its PSD regulatory approach as described below.

Analysis

In the context of recent GHG rulemakings, EPA has announced its interpretation that the *existing PSD regulations* contain an automatic PSD trigger. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs (GHG Reconsideration Rule), 75 Fed. Reg. 17,004 (April 2, 2010). Under EPA's approach, emissions of *any* pollutant subject to regulation under Section 165(a)(4) can classify a source as major for PSD and thus trigger PSD permitting requirements. In pursuing this approach, EPA disregarded extensive comments asserting that the mere fact of a pollutant becoming “subject to regulation” should not automatically trigger PSD permitting requirements based on emissions of that pollutant.

As a result, ACC hereby petitions EPA to conduct a rulemaking to revise, rescind, and/or reconsider its PSD regulations to comport with the statute, which hinges the determination of whether a PSD permit is required solely on criteria pollutants. Thus, EPA should propose and finalize revisions to the regulations to ensure that only a criteria pollutant for which an area is designated as attainment or unclassifiable can be used to identify a PSD major source or a major modification that would trigger PSD permitting requirements. As described below, granting this petition would not only avoid the “absurd results” EPA has identified with implementing the PSD program for GHGs, but would entirely preserve the existing PSD program while enabling EPA to control GHGs from major sources already subject to PSD.

- I. The Relevant Statutory Applicability Provisions Make it Clear that PSD Permitting Requirements Are Triggered Only by the Emissions of Criteria Pollutants in Areas Designated Attainment or Unclassifiable for those Pollutants.

In recent actions where EPA concluded that any air pollutant, including non-criteria pollutants, can trigger PSD permitting requirements, EPA incorrectly focused its analysis

² See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (GHG Tailoring Rule), 75 Fed. Reg. 31514, 31525 (Jun. 3, 2010).

exclusively on whether a given pollutant is “subject to regulation,” a phrase found in Section 165(a)(4) of the Act, as the basis for the PSD trigger. This “subject to regulation” language is certainly germane to implementation of the PSD program. However, its relevance applies to a separate and distinct context: *the scope* of the Best Available Control Technology (BACT) requirements imposed *after* PSD is triggered. Under the Clean Air Act, not all pollutants “subject to regulation” *trigger* PSD permitting in the first instance. In other words, EPA’s regulatory approach, by hinging PSD applicability on *any* pollutant subject to regulation, ignores the criteria that Congress specifically set forth for deciding when PSD permitting requirements are applicable.

A. Section 107’s Designation of Areas as Attainment or Unclassifiable As the Prerequisite for PSD Applicability.

A proper analysis of PSD applicability begins not with Section 165(a)(4), but with Section 107. As numerous courts have recognized, the PSD program was enacted for the purpose of avoiding “a decline of air quality to the minimum level permitted by NAAQS.” *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990). In harmony with this scheme, Clean Air Act Section 107(d) at the outset governs the process of designating an area as “attainment,” “nonattainment,” or “unclassifiable” for each pollutant for which “a new or revised national ambient air quality standard” has been issued.³ When EPA promulgates a new NAAQS for a pollutant, EPA must give each State four months to a year to submit an initial designation of areas as attainment or nonattainment.⁴ EPA, in turn, must promulgate final designations within two to three years of the NAAQS promulgation or revision.⁵

Thus, an area is designated “attainment,” “nonattainment,” or “unclassifiable” separately for each pollutant for which a NAAQS has been set. The same region may be attainment for one criteria pollutant, nonattainment for another, and unclassifiable for another. Consequently, one cannot say whether an area is an “attainment” area in general; the determination of attainment status is entirely dependent on the criteria pollutant at issue.

Section 107’s designation determinations are the critical prerequisite to implementation of the PSD program. Without a determination that a region is in attainment or unclassifiable for a given criteria pollutant, there is no basis to prevent the deterioration of air quality for that pollutant. Accordingly, as described below, other provisions of the Clean Air Act hinge PSD applicability *at the outset* on a determination of attainment or unclassifiable status for any given criteria pollutant. Without such a determination, PSD simply does not apply.

Finally, Section 107 provides insight into the meaning of the term “air quality” in Section 161 because it requires state implementation plans (SIPs) to “specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.”⁶

³ 42 U.S.C. § 7407(d)(1)(A).

⁴ *Id.*

⁵ 42 U.S.C. § 7407(d)(1)(B)(i).

⁶ *Id.* at § 7407(a).

B. The PSD Program's Reliance on Section 107's Designations.

As demonstrated above, Section 107 provides in the first instance for the Administrator to designate areas as attainment, nonattainment, and unclassifiable for each NAAQS pollutant at the outset of implementing PSD for any given pollutant. The Clean Air Act provisions that implement the PSD program in turn hinge on the Section 107 determinations.

First, CAA Section 161 provides the overriding foundation for the PSD program and is entitled "Plan Requirements." This Section is the lead statutory provision under Part C of Clean Air Act Title I—the Part of the CAA specifically dedicated to the PSD program. Section 161 states:

In accordance with the policy of section 101(b)(1), each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to *prevent significant deterioration* of air quality in each region (or portion thereof) *designated pursuant to section 107 as attainment or unclassifiable*.⁷

Thus, the applicability of Section 161 at the outset is qualified and limited to areas designated pursuant to Section 107 as attainment or unclassifiable for individual NAAQS pollutants. The entirety of the PSD program is qualified by Section 161, and the entirety of the PSD program must be implemented in consideration of Section 161's express limitations, which in turn incorporate Section 107's attainment designations.

Second, CAA Section 165, entitled "Preconstruction Requirements," determines both: (1) *when* a PSD permit is required based on *criteria pollutants*; and (2) *what requirements* must be imposed for regulated pollutants *once* PSD is triggered. Regarding applicability, the provision makes clear that PSD permits are limited only to areas designated pursuant to Section 107 as attainment or unclassifiable. Specifically, 165(a) states:

No major emitting facility on which construction is commenced after the date of the enactment of this part, may be constructed *in any area to which this part applies* unless—

- (1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;
- (2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the

⁷ 42 U.S.C. § 7471 (emphasis added).

Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

- (3) the owner or operator of such facility demonstrates, as required pursuant to section 7410 (j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any
 - (A) maximum allowable increase or maximum allowable concentration for *any pollutant in any area to which this part applies* more than one time per year,
 - (B) *national ambient air quality standard in any air quality control region*, or
 - (C) any other applicable emission standard or standard of performance under this chapter;
- (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;
- (5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;
- (6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;
- (7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and
- (8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.⁸

Thus, Section 165 contains a number of subsections that further reinforce that Congress intended PSD requirements to be triggered only when a criteria pollutant subject to a NAAQS is being emitted in an area designated as attainment or unclassifiable. First, the initial paragraph of

⁸ 42 U.S.C. § 7475(a) (emphasis added).

Section 165(a) limits PSD applicability to “any area to which this part applies.” That, in turn, is a reference to Part C of the Clean Air Act, which Section 161 limits to areas “designated pursuant to section 107 as attainment or unclassifiable.” Second, Section 165(a)(3) continues to incorporate the limitations and qualifications of Section 161 and Section 107 by referencing thresholds for: (A) “any pollutant in any area to which this part applies”; or (B) “any national ambient air quality standard in any air quality control region.” These provisions further reinforce that PSD applicability hinges solely on the emissions of criteria pollutants in attainment or unclassifiable areas.⁹

Taken together, Sections 161 and 165 demonstrate that Congress intended the PSD permitting requirements to be triggered only when a criteria pollutant subject to a NAAQS is being emitted in an area designated as attainment or unclassifiable. Section 161 clearly prefaces the entirety of the PSD analysis on a Section 107 determination of attainment or unclassifiable for a given criteria pollutant. Section 165, which dictates when PSD permits are required, further incorporates Section 107's qualifying factors by making the provision applicable only in the same circumstances as Section 161, limiting its reach to areas “to which this part applies”—i.e. areas that are in attainment for the relevant pollutant.¹⁰ Further, beyond the actual statutory language, Section 52.21(a)(2) of EPA's regulations properly incorporates the very same limitation that Section 165(a) includes – that PSD apply only in areas designated pursuant to Section 107 for a NAAQS.

C. The Clean Air Act Explicitly Distinguishes Between Criteria Pollutants as a PSD Trigger and Regulated NSR Pollutants for BACT Controls.

The CAA uses different terms to define: (1) the kind of pollutant that triggers a permitting requirement; and (2) the kind of pollutant for which BACT must be demonstrated in the permit once PSD is triggered. As described above, Sections 107, 161, and 165(a) limit the PSD *trigger and applicability* to criteria pollutants in areas which are designated attainment or unclassifiable for such pollutant. By contrast, the statutory term for the pollutants that a PSD permit must *control* is the broader “pollutant subject to regulation” under the Act.¹¹

EPA has elided this difference by interpreting the triggering requirement to also mean any pollutant “subject to regulation under the Act.” EPA has no authority to arbitrarily substitute language from one provision of the Clean Air Act for the plain language that limits applicability only to criteria pollutants. Undoubtedly, the “pollutant subject to regulation” under the Act language remains highly relevant to the PSD program, but in an entirely different context. That language determines what pollutants are actually controlled *after* PSD is triggered. EPA cannot,

⁹ Section 165(a)(3)(C) is a simple prohibition on issuing a PSD permit to a source that is in violation of other applicable standards under the Act. As the text indicates, it does not impose any new standards, only mentioning standards that are already “applicable.” Thus, this provision does not expand the PSD trigger beyond the limitations in Sections 107, 161, and 166(a), but rather indicates that Congress wanted EPA to ensure a source did not have a track record of noncompliance with Clean Air Act requirements before it issued a PSD permit that authorizes significant increases in emissions of a NAAQS pollutant.

¹⁰ 42 U.S.C. § 7471.

¹¹ CAA Sections 165(a)(4), 169(3), 42 U.S.C. 7475(4), 7479(3).

by regulation or otherwise, substitute this language for the clear language established by Congress for determining PSD applicability in the first instance.

Thus, only a limited class of pollutants should trigger PSD permitting. But EPA has chosen the wrong definition of the kind of pollutant that triggers PSD permitting requirements. It should not be pollutants "subject to regulation under the Act," it should be pollutants for which a NAAQS has been set.

D. Other Clean Air Act Provisions Support the Conclusion that PSD is Triggered Only by Criteria Pollutants.

Other provisions in Title I provide further support for limiting PSD permit applicability to new major sources of criteria pollutants for which an area is designated attainment or unclassifiable and to existing major sources of criteria pollutants undertaking a major modification for a criteria pollutant in such an area.

Section 110(a)(2)(C) sets forth the requirements for state implementation plans, stating that the plans shall "include a program to provide for ... regulation of the modification and construction of any stationary source within the areas covered by the plan *as necessary to assure that [NAAQS] are achieved, including a permit program as required in parts C [PSD] and D [nonattainment New Source Review].*"¹² This language again explicitly indicates that the purpose of the PSD program is to assure the NAAQS continue to be achieved. It is therefore inconsistent with this language to apply PSD in situations when there is no significant increase of a criteria pollutant for which an area is designated attainment or unclassifiable.

Further, Section 163(b)(4) specifies that the maximum allowable concentration of "any air pollutant" in "any area" to which Part C applies shall not exceed the NAAQS, further indicating that the PSD program is focused on maintaining the NAAQS.¹³

There is additional strong statutory evidence for concluding that PSD permitting can only be triggered by a criteria pollutant. For example, the only rational way to understand the 100/250 tpy emission thresholds that Congress established to define a "major emitting facility" is in terms of emissions of criteria pollutants. Further, the twenty-eight source categories that Congress listed in Section 169(1) in 1977 are the very ones EPA regarded at the time as posing the greatest potential for air quality degradation due to their emissions of conventional pollutants. The only way to explain the selection of those particular categories is to conclude that Congress was concerned only with criteria pollutants.

Thus, Part C on its face, and read in conjunction with other provisions of Title I, gives a clear indication and support a logical interpretation that the proper reading of the Act is that only

¹² 42 U.S.C. § 7410(a)(2)(C) (emphasis added).

¹³ *Id.* at § 7473(b)(4).

NAAQS pollutants trigger applicability of the PSD program and this interpretation should be adopted by EPA.¹⁴

E. The Legislative History Also Reflects Congressional Intent to Limit the PSD Trigger to Criteria Pollutants.

At the time Congress was considering the Clean Air Act Amendments of 1977, the origin of Sections 165(a) and 169(1), EPA had already promulgated a PSD rule in response to a court decision.¹⁵ In that rule, EPA explicitly limited the definition of “modification” to NAAQS pollutants.¹⁶ Although the 95th Congress sought to modify certain aspects of EPA's existing regulations, the legislative history shows that Congress intended PSD to continue to be triggered only by NAAQS pollutants.

In the House Committee Report, the Committee discussed at length its decision not to merely endorse the agency's existing regulations.¹⁷ The Committee identified numerous specific shortcomings of the existing regulations, but did not critique the limitation of “modification” to NAAQS pollutants as the sole trigger.¹⁸ The Committee's description of its proposal goes on to state that the proposed PSD provision “[a]ssures adequate consideration and protection of public health and welfare from potential harm at levels of air pollution *lower than minimum Federal standards* and from harm due to as yet unregulated derivative pollutants.”¹⁹ The Committee further makes clear that the proposed PSD provision “[l]imits application of this section *only to those areas of the country with air quality superior to the national air quality standards* for any pollutant and to new sources of pollution.”²⁰ Moreover, the PSD program in the House bill was limited to “major stationary sources,” which in turn were defined to include only sources of NAAQS pollutants.²¹ This legislative history further reinforces that Congress in the Clean Air Act did not intend PSD to be triggered by non-NAAQS pollutants.

The Senate Committee Report also discusses the existing EPA regulations and the Committee's provisions.²² The Committee states that, “[p]resented with arguments ranging from a do-nothing approach to repeal, the committee determined that the implications of that policy

¹⁴ *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (agency must give effect to the unambiguously expressed intent of Congress).

¹⁵ 39 Fed. Reg. 42,510 (Dec. 5, 1974).

¹⁶ *Id.* at 42,514 (“The phrases ‘modification’ or ‘modified source’ mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted”)

¹⁷ See H.R. Rep. No. 95-294, at 138-155 (1977).

¹⁸ *Id.* at 139-140.

¹⁹ *Id.* at 147 (emphasis added).

²⁰ *Id.*

²¹ See H.R. 6161, 95th Cong. § 103 (1977) (adding a new Section 302, which would define “Major stationary source” as “any stationary facility or source of air pollutants which directly emits, or has the design capacity to emit, one hundred tons per year or more of any air pollutant for which a national ambient air quality standard is promulgated under this Act.”).

²² S. Rep. No. 95-127, at 8, 11-12, 29-30 (1977).

and procedures are too vast to be left to the administrative or judicial process.”²³ At no point in the Committee's discussion of its changes to the existing agency regulations does the Committee suggest that it intended non-NAAQS pollutants to trigger PSD applicability. The Senate Subcommittee's Section-by-Section analysis further clarifies that the PSD permitting program “affects only those areas where air quality is *cleaner than the present primary or secondary standards*.”²⁴

The legislative history of the Clean Air Act Amendments of 1977 reveals without doubt what the language of the Clean Air Act makes plain: that Congress in legislating the PSD program intended only criteria pollutants as triggering PSD permitting requirements in attainment and unclassifiable areas. Both the Senate and the House saw themselves as engaged primarily in continuing the work that a prior Congress had begun, through the 1970 Clean Air Act, to rid the Nation, especially urban areas, of unhealthy levels of smog, particulates, sulfur dioxide, and other criteria pollutants for which EPA was required to set national standards, while utilizing the PSD program to protect air quality in areas that were better than the standards for these criteria pollutants.²⁵ It is simply not possible, in light of this legislative history and the legislative history EPA references, to make a credible argument that the 95th Congress intended that GHG emissions could be a basis for applicability of the PSD permitting program as defined by Sections 165(a) and 169(1).

F. Relevant Case Law Also Supports the Plain Reading of the Clean Air Act Limiting the PSD Trigger to Criteria Pollutants in Attainment and Unclassifiable Areas.

The interpretation that the Clean Air Act is properly read to trigger PSD based on NAAQS criteria pollutants alone is reinforced by relevant caselaw. In *Alabama Power Co. v. Costle*,²⁶ the court found that *location* is the key determinant for PSD applicability and rejected EPA's contention that PSD should apply in all areas of the country, regardless of attainment status. In *Alabama Power*, EPA had argued that PSD permitting requirements should apply not only to attainment areas for a given pollutant, but to anywhere that a new emitting facility would “adversely affect the air quality of an area to which” PSD requirements apply.²⁷ The court held that this interpretation violated the CAA's plain language.²⁸ The court stated: “The plain meaning of the inclusion in [42 U.S.C. § 7475] of the words ‘any area to which this part applies’ is that Congress intended *location* to be the key determinant of the applicability of the PSD

²³ *Id.* at 11.

²⁴ STAFF OF S. SUBCOMM. ON ENVIRONMENTAL POLLUTION OF THE S. COMM. ON ENVIRONMENT & PUBLIC WORKS, 95TH CONG., A SECTION-BY-SECTION ANALYSIS OF S. 252 AND S. 253 CLEAN AIR ACT AMENDMENTS AND S. 253 6 (Comm. Print 1977) (emphasis added).

²⁵ See, e.g., 123 Cong. Rec. S9162-86 (daily ed., June 8, 1977) (stage-setting remarks of Senator Muskie, the lead floor manager); *id.* at H8662-65 (daily ed., Aug. 4, 1977) (stage-setting remarks of Congressman Rogers, the lead floor manager).

²⁶ 636 F.2d 323 (D.C. Cir. 1980).

²⁷ *Id.* at 364.

²⁸ *Id.* at 364-68.

review requirements.”²⁹ Thus, the *Alabama Power* decision reinforces the notion that PSD is triggered only by criteria pollutants for facilities located in attainment or unclassifiable areas.

In its regulatory response to the *Alabama Power* decision, EPA gave this ruling only grudging effect. Specifically, EPA provided an exemption from PSD for nonattainment pollutants in Section 52.21(i)(2), stating that PSD “shall not apply to a major stationary source or major modification *with respect to a particular pollutant* if ... the source or modification is located in an area designated as nonattainment under section 107.”³⁰ But, in the preamble to regulations, EPA otherwise maintained its position.³¹

II. EPA Should Revise, Rescind, and/or Reconsider its Regulations to Conform to the Clean Air Act's Limitation on the PSD Trigger to Criteria Pollutants.

As the agency charged with implementing the Clean Air Act, EPA is required to give full effect and meaning to the plain language and the legislative history regarding the PSD program. Specifically, it must promulgate and implement regulations that dovetail with the limitations of the reach of the PSD program as established by Sections 107, 161, and 165(a). The Supreme Court has made it clear that Executive Branch agencies cannot render meaningless key statutory provisions.³²

A. EPA's Approach to the PSD Program Ignores the Statutory Limits on the PSD Trigger to Criteria Pollutants in Attainment or Unclassifiable Areas.

At direct odds with the Clean Air Act is EPA's approach to triggering PSD for new and modified sources as expressed in two regulations and its interpretation thereof. 40 CFR 52.21(b)(1), and its parallel for states, 40 CFR 51.166(b)(1) define major stationary source as follows:³³

“(1)(i) Major stationary source means:

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant: . . .

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant; or”

²⁹ *Id.* at 365 (emphasis added).

³⁰ 40 C.F.R. § 52.21(i)(2) (emphasis added).

³¹ 45 Fed. Reg. 52,675, 52,676 (Aug. 7, 1980).

³² *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 697–98 (1995).

³³ As noted on the cover to this petition, the petition also addresses Section 51.166 which provides the state plan provisions for the PSD program. Throughout the petition, we reference Section 52.21 for convenience. These references include the corresponding provisions of Section 51.166.

In promulgating these regulations in 1980, EPA in the preamble stated that PSD requirements apply to any area that is “designated . . . as ‘attainment’ or ‘unclassifiable’ for *any* pollutant for which a national ambient air quality standard exists.”³⁴ This interpretation effectively flouted the *Alabama Power* holding that location was key, because applying PSD regulations to any area deemed attainment or unclassifiable for *any* pollutant means that PSD applies to every region in the United States. This is because every area is designated attainment for *some* pollutant. In fact, this new interpretation actually exacerbated the overreaching rejected by the D.C. Circuit in *Alabama Power*. In that case, EPA had only asked to apply PSD regulation to all facilities that affected the air quality of PSD regions; EPA’s 1980 interpretation applies PSD regulation to all facilities *everywhere*.

EPA’s approach to its PSD program is thus fundamentally flawed under the Clean Air Act. In addition to the flawed interpretation in the preamble above, EPA relies on a phrase in its regulations that is not found in the PSD provisions of the Clean Air Act in assessing PSD applicability, which in turn greatly expands the scope of sources subject to PSD. Specifically, EPA’s approach, unlike the Clean Air Act, triggers PSD based on the emissions of *any* “regulated NSR pollutant” regardless of whether there has been a designation of attainment or unclassifiable status for that pollutant. EPA never accepted comment on this definition, which appeared for the *first time* in the 2002 Final NSR Reform Regulations. Final Rule on Prevention of Significant Deterioration and Nonattainment New Source Review (NSR Reform Regulations), 67 Fed. Reg. 80,186, 80,240 (Dec. 31, 2002). EPA also ignores the geographic nexus between the emissions of an air pollutant and whether the region where they are emitted is designated attainment or unclassifiable for that given pollutant. Thus, in the final GHG Tailoring Rule, EPA stated “the PSD applicability provision—the definition of “major emitting facility” in CAA section 169(1)—applies by its terms (as we have interpreted them narrowly through regulation) to sources emitting any air pollutant subject to regulation, and is not limited to any NAAQS air pollutant.”³⁵

Accordingly, EPA’s approach obliterates the distinction Congress made with: (1) criteria pollutants serving as the *trigger* for PSD; and (2) BACT requirements for regulated NSR pollutants *after* PSD is triggered. This approach entirely eradicates the limitations specified in Sections 107, 161, and 165(a) of the PSD program to attainment and unclassifiable areas, and leads to the perverse result of requiring permits intended to prevent the deterioration of air quality anywhere in the country, even for pollutants for which no national standards have been set. In essence, EPA’s regulations have the impact of bringing the entire nation into the PSD program for *any* non criteria pollutant, an impact that Congress clearly did not intend.

EPA’s interpretation also errs by ignoring Section 161 and 165(a)(1), which limit the applicability of the PSD program at the outset, and skipping directly to subparagraph (4) of Section 165(a). As described above, Section 165(a)(4) is not germane to the applicability of PSD. Instead, Section 165(a)(4) merely defines the pollutants that are subject to BACT *provided*

³⁴ 45 Fed. Reg. 52675, 52676 (Aug. 7, 1980).

³⁵ 75 Fed. Reg. at 31,562.

PSD permitting is already required. In other words, Sections 161 and 165(a) determine *when* PSD is triggered based solely on criteria pollutants, and Section 165(a)(4) subjects a broader range of air pollutants to the BACT analysis *once* PSD is triggered. Consistent with this approach, Subparagraph (4) uses the phrase “each pollutant subject to regulation,” language that differs from the pollutants designated in Section 165(a) – those subject to a NAAQS for which the area is designated attainment or unclassifiable.³⁶ Yet, EPA incorrectly assumes that it is *this* subparagraph that dictates when PSD permitting is actually required in the first instance.

EPA clearly lacks authority to take one phrase (subject to regulation) intended for one purpose (controls on PSD facilities) and apply it in an entirely different context (PSD applicability) where Congress already has spoken to applicability. As the Supreme Court has noted, when “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”³⁷ EPA’s regulatory approach must conform to the clear statutory structure that at the outset hinges PSD applicability (and thus the PSD trigger) on a determination of attainment or unclassifiable status. Once PSD is triggered, EPA clearly then may require BACT controls for all pollutants “subject to regulation,” including non-criteria pollutants. However, by no means may EPA expand the applicability of the PSD program beyond what Congress clearly intended.³⁸

B. EPA’s Justification of its Overly Broad Approach is Inconsistent with the Clean Air Act.

In responses to comments submitted in connection with recent EPA rulemakings, EPA attempted to defend its approach in its interpretation and the regulations at issue but neglected the plain statutory language discussed above. For the reasons described below, the arguments EPA has offered do not survive scrutiny.

EPA states in the GHG Tailoring Rule that “the key PSD applicability provisions are found in sections 165(a) and 169(1).”³⁹ EPA goes on to assert that “although section 165(a) makes clear that the PSD requirements apply only to sources located in areas designated attainment or unclassifiable, it does not, by its terms, state that the PSD requirements apply only to pollutants for which the area is designated attainment or unclassifiable.”⁴⁰ EPA goes on to cite provisions of the statute *that follow the initial applicability provisions of Sections 161 and 165(a)* that apply PSD to pollutants “subject to regulation” in support of its view. However, nowhere does EPA answer the point that its interpretation makes the introductory language in Section 165(a) – limiting the program to areas designated attainment or unclassifiable with a

³⁶ 42 U.S.C. § 7475(a)(1). We note further that EPA’s assumed applicability approach also bypasses subparagraph (1), which requires that a PSD permit be issued and required, before a BACT requirement is imposed. *Id.*

³⁷ *Russello v. United States*, 464 U.S. 16, 23 (1983).

³⁸ ACC in this petition expresses no views on whether GHGs are or will be pollutants subject to regulation under the Clean Air Act by operation of various EPA regulations.

³⁹ GHG Tailoring Rule, 75 Fed. Reg. at 31,560

⁴⁰ *Id.*

NAAQS – completely superfluous. This language is wholly unnecessary if the interpretation EPA offers in the GHG Tailoring Rule is correct.

EPA also relies on the term “any air pollutant” in the “major emitting facility” definition at CAA Section 169(1) as an indication in its view that Congress intended broader applicability for triggering PSD.⁴¹ But such a conclusion cannot be true when that language is not in the statutory applicability provision but rather is in the definitions section of the CAA – the definitions cannot be read to create broader permitting requirements than Congress established in the applicability section of the statute. Moreover, EPA has already conceded that the term “any air pollutant” cannot have been intended to be read literally (“EPA has long interpreted the term ‘any air pollutant’ to refer to ‘any air pollutant subject to regulation under the CAA,’ and for present purposes, will continue to read ‘subject to regulation’ into that term.”⁴²). Thus, EPA cannot reasonably claim that Section 169(1) drives it to reject the plain language of the Act regarding applicability.

EPA also cites to Section 165(a)(3) as supporting its position that PSD applicability is to be driven by any pollutant “subject to regulation” under Act. This provision merely provides that a PSD permit cannot be *issued* absent a demonstration that there will not be emissions in excess of increments or ceilings for NAAQS, there will be no NAAQS violation, and that there will not be a violation of any other applicable emission standard or standard of performance under the Act. As described above in Part I.B, the provision actually bolsters the interpretation that PSD is triggered only by criteria pollutants because it explicitly refers to NAAQS and increments for NAAQS. Structurally, Section 165(a)(3) follows the limiting applicability language of Section 165(a) and establishes the terms under which a permit that is otherwise required may be issued.

EPA also cites Section 165(a)(4) which imposes the BACT requirement on “each pollutant subject to regulation”—the language that EPA views as driving all applicability. As described above in Part I.C, the use of this language in Section 165(a)(4) indicates merely that BACT may be imposed on a broader range of pollutants than those that trigger PSD permitting in the first instance. Had Congress intended for PSD to be triggered by each pollutant subject to regulation, it would have drafted Section 165(a) to so state.⁴³ Instead, it limited applicability to areas designated attainment or unclassifiable with a NAAQS.⁴⁴

⁴¹ *Id.* at 31,561.

⁴² *Id.* at 31, 560.

⁴³ *Russello*, 464 U.S. at 23.

⁴⁴ EPA's citation to *Alabama Power v. Costle*, 636 F.2d 323, 361, n.90 (D.C.Cir. 1980) for the proposition that PSD applicability is based on non-NAAQS pollutants is misleading and incorrect. EPA states that the D.C. Circuit Court found that “PSD applies to HAPs” based on the statute at that time. GHG Tailoring Rule, 75 Fed. Reg. at 31,561. The footnote cited by EPA actually stated that mercury was “subject to regulation” even though it was a Section 112 pollutant. Industry had argued that air toxics could not be “subject to regulation” but that does not answer the question, and the court clearly was not addressing, whether a non-NAAQS pollutant could be the basis for triggering the requirement to obtain a PSD permit in the first instance. This dictum certainly does not override a primary holding of the case that location is the key determinant for PSD permitting applicability. That mercury was “subject to regulation” merely meant that if PSD was triggered by a NAAQS pollutant, and a significant increase of mercury was also caused by such modification, BACT for mercury would be required under

EPA makes passing reference to Section 110(j) as also justifying the expansive regulations at issue. Section 110(j) states that as “a condition for issuance of *any permit under this subchapter*, the owner or operator of each new modified stationary sources ... must show that the technological system of continuous emission reduction ... will enable it to comply with the standards of performance which are to apply” and that the source will comply with other applicable requirements.⁴⁵ Nothing in this provision indicates that *PSD permitting requirements* can be triggered by non-NAAQS pollutants. Further, “this subchapter” refers to Title I of the CAA. Title I imposes permitting requirements for minor sources and major sources, both in attainment and nonattainment areas, under the state implementation plans, and Section 129 imposes permitting requirements related to solid waste combustion facilities. This provision simply creates a generalized requirement for sources that obtain a Title I permit to establish that their technology will work. It does not in any way define the scope of pollutants that can trigger PSD permitting requirements.

EPA's further suggestion that Congress would have been more clear if it had intended to limit the PSD program to pollutants for which an area is designated attainment or unclassifiable is similarly unavailing. Congress could hardly be more explicit on this point. Section 161 identifies the areas to which Part C applies and references areas designated attainment or unclassifiable for criteria pollutants. Section 165(a) states that PSD permitting is triggered for areas to which this Part applies. It is possible that Congress could have accomplished this in a single section of the statute but that it chose to do so in two sections does not make the statute unclear. And it is certainly not “indirect” or “silently implied” as EPA suggests.⁴⁶

EPA's reliance on Sections 111(d) and 112(a)(1) in fact supports the proper Clean Air Act interpretation that PSD applicability applies solely to criteria pollutants.⁴⁷ EPA states that Section 111(d) shows that Congress knew how to limit a provision because the provision explicitly excludes NAAQS and Section 112 pollutants from state plan NSPS rules for existing sources.⁴⁸ But, the fact is that Congress did explicitly state in Part C the scope of pollutants that could trigger the permitting requirement. It did so affirmatively by stating that Part C PSD permitting can be triggered by an attainment/unclassifiable pollutant. It did not need to exclude other pollutants explicitly because it had stated plainly which pollutants could trigger a PSD permitting requirement. Section 112(a)(1) is not supportive of EPA's position either. Congress established a list of hazardous air pollutants for regulation in the 1990 Amendments. In Part C, Congress referred to the list of pollutants that EPA creates under Section 107-109. Thus, Section 112(a)(1) shows that Congress followed the same procedure in Part C that it did in Section 112,

Section 165(a)(4). Moreover, contrary to EPA's inference in note 45 of the GHG Tailoring Rule, the exclusion from PSD for hazardous air pollutants in Section 112(b)(6) is also consistent with the proper interpretation explained here. GHG Tailoring Rule, 75 Fed. Reg. at 31,561 n.45. Congress was ensuring that pollutants subject to maximum achievable control technology or MACT as enacted in 1990 would not be subject to duplicative or potentially conflicting control requirements under the PSD program and thus excluded these pollutants from the BACT and any other requirements of PSD.

⁴⁵ 42 U.S.C. § 7410(j).

⁴⁶ GHG Tailoring Rule, 75 Fed. Reg. at 31,561

⁴⁷ *Id.*

⁴⁸ *Id.*

by referring to the specific pollutants for which an area is designated attainment or unclassifiable.

III. EPA's Efforts to Regulate Greenhouse Gases Create Urgent Grounds to Revise, Rescind, or Reconsider its PSD Regulations.

Although the gap between what the Clean Air Act provides and what EPA has required has existed since 1980, it has been of little to no import until now. As EPA implements a GHG regulatory agenda in 2011, this distinction never has been more important. To escape the absurd results EPA concedes will arise under its existing regulations regarding GHGs and PSD, it has manufactured an ad hoc system to attempt to avoid the most onerous PSD ramifications that is legally vulnerable and pragmatically challenging for EPA, the states, and industry to implement. A much clearer path lies with EPA simply conforming its approach to the Clean Air Act in a manner that limits the PSD trigger to criteria pollutants. Such an action would avoid the absurd results EPA has identified in a manner fully consistent with the Clean Air Act, would preserve entirely the integrity of the existing PSD program, and would enable EPA to address GHGs from sources triggering PSD based on emissions of NAAQS pollutants.

A. EPA's Greenhouse Gas Regulations Compel Revisions at this Time.

In 2007, the Supreme Court held that GHGs fall within the definition of "air pollutant" in CAA Section 302, but did not define GHGs as pollutants "subject to regulation" under the Act. *Massachusetts v. EPA*, 549 U.S. 497 (2007). Prior to and since that decision, EPA has received several petitions for rulemaking to regulate GHGs under the Act. At the same time, Congress has considered legislation to provide a comprehensive program that is designed for GHGs, because the CAA is plainly not structured for the magnitude and nature of GHG emissions. Given the widespread acknowledgment that using the CAA to regulate GHGs is problematic, the Agency has struggled to manage the unintended consequences that could flow from regulating GHGs for one type of source under one part of the Act on other types of sources under other parts of the Act.

The most significant concern to date has been the potential for huge numbers of sources – small businesses, hospitals, office buildings, farms, and the like – to become subject to stationary source permitting requirements under Titles I and V of the Act. Under Title I, case-by-case permitting procedures threaten to overwhelm the resources of state and federal agencies and bring permitting (and plant expansions and modernizations) essentially to a halt. Under Title V, some 6 million sources could potentially become subject to operating permit requirements, creating a permit issuance and modification logjam. And, all of this, because of EPA's regulatory approach, would be triggered for sources that Congress never envisioned as being covered by these programs. For larger businesses there would be consequences as well. Small changes that have historically not required permitting under the Act would now require permits. EPA has not yet estimated these impacts. Moreover, the permit processing times for the permits that were expected under the Act will now be significantly delayed, hampering business' ability to respond to market demands and recover from the current economic crisis.

In 2009 and 2010, EPA undertook three formal actions to address GHG emissions and the potential impacts on stationary sources. These actions create new grounds arising after the enactment of the 1990 and 2002 regulations for EPA to revise or rescind those regulations to conform them to the Clean Air Act at this time.

1. The EPA 2009 Proposals Misinterpret the PSD Program to Provide for a GHG Trigger.

In three proposed Federal Register notices in 2009, EPA spoke to the potential for the PSD program to apply to GHGs:

- First, EPA proposed standards for emissions of GHGs from new motor vehicles pursuant to Clean Air Act Section 202(a).⁴⁹ In that proposed action, EPA acknowledged the “concerns” of industries that the action would lead to PSD permitting being triggered for stationary sources and the effects that would have on the ability of state permitting agencies to process permits.⁵⁰
- Second, EPA proposed to reaffirm the 2008 Agency interpretation regarding when pollutants become “subject to regulation” within the meaning of CAA Section 165(a)(4).⁵¹ In that notice, EPA stated that the “issue of how and when PSD permitting requirements would apply to GHG pollutants would be addressed during [that] reconsideration action” and “direct[ed] all parties that might have submitted comments regarding interpretation of the PSD applicability definitions” in other rulemakings to submit new comments to the docket for the reconsideration action.⁵²
- Third, EPA proposed to “tailor” the PSD and Title V operating permit programs.⁵³ In that proposal, EPA proposed thresholds higher than those specified in the Act for major sources. EPA’s proposal recognized the broad implications of triggering PSD for GHGs and relied on the doctrines of administrative necessity and absurd results to change the statutory thresholds for major sources. Therefore, EPA specifically solicited comment on an approach that would require BACT for GHGs only if PSD was already being required at the source for a criteria pollutant.⁵⁴ EPA requested comment on that approach and “on other potential variations” of the approach “commenters believe could address the administrative concerns in more effective ways.”⁵⁵ EPA further sought comment on “any other tools or options that could address or reduce the administrative burden of

⁴⁹ Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards (proposed Motor Vehicle Rule), 74 Fed. Reg. 49,454 (Sept. 28, 2009).

⁵⁰ *Id.* at 49,629.

⁵¹ *Notice Regarding Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program*, 74 Fed. Reg. 51,535 (Oct. 7, 2009) (hereafter the “Subject to Regulation Notice”).

⁵² 74 Fed. Reg. at 51,546 (emphasis added).

⁵³ *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Proposed Rule*, 74 Fed. Reg. 55,292 (Oct. 27, 2009).

⁵⁴ *Id.* at 55,327.

⁵⁵ *Id.*

implementing PSD and title V for major GHG sources and reduce the burdens on the sources.”⁵⁶

2. Comments on the EPA 2009 Proposals and EPA's Interpretation of the PSD Requirements Made Clear GHGs Should not Trigger PSD Permits.

For each of the three proposed actions, interested stakeholders (including ACC) filed comments explaining that to the extent EPA moves forward with GHG regulations, it should adopt an interpretation of the CAA and the PSD regulations that allows PSD to be triggered only by an increase in a criteria pollutant (*i.e.*, those for which a NAAQS has been issued).⁵⁷ Consistent with the discussion above, the commenters explained that the text of CAA Sections 161 and 165(a) plainly limits application of PSD to certain areas – those designated as attainment or unclassifiable *pursuant to Section 107 of the Act*. The commenters also explained that the regulations themselves can be interpreted to limit the PSD trigger consistent with the statutory terms to criteria pollutants. Specifically, they noted that Section 52.21(a)(2) expressly limits applicability to “*an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act*,”⁵⁸ thereby faithfully including the *location limitation* of the statutory provisions. Therefore, the comments argued that EPA could address the adverse consequences of triggering PSD based on GHGs merely by announcing its interpretation in one of the final actions—preferably the first of those actions. EPA solicited comment on PSD applicability, including the possibility of limiting PSD to criteria pollutants for a transition rule and on variations of that approach.⁵⁹ It would have been a logical outgrowth for EPA to announce that in response to comments, it would be adopting the proper scope of applicability for the PSD program.

3. Final Actions on the Three 2009 Proposals

EPA has finalized the three above-listed actions. Notwithstanding the numerous comments filed regarding the stationary source implications of issuing the Motor Vehicle Rule, the Agency did not respond to those comments but deferred them to the other two proposed actions. EPA continued to acknowledge the “concerns” of the industry regarding the assumption that issuance of the Motor Vehicle Rule could lead to PSD and Title V permitting requirements for stationary sources.

The GHG Reconsideration Rule determined that for purposes of Section 165(a)(4), the date that a pollutant becomes “subject to regulation” is the date that a regulation “takes effect.”⁶⁰ In responding to the comments regarding PSD applicability, EPA stated that: (1) the comments

⁵⁶ *Id.* at 55,320.

⁵⁷ The industry comments also supported EPA's view that a NAAQS should not be issued for GHGs.

⁵⁸ 40 C.F.R. § 52.21(a)(2) (emphasis added).

⁵⁹ Proposed Tailoring Rule, 74 Fed. Reg. at 55,294, 55,327; Reconsideration Decision, 74 Fed. Reg. 51,535, 51,547.

⁶⁰ *Final Decision on Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (April 2, 2010) (hereafter “Final Reconsideration Decision”).

were outside the scope of the action; and (2) it would not interpret the existing regulations to limit PSD triggering to criteria pollutants.⁶¹ EPA stated:

EPA is not persuaded that it can limit the scope of PSD to NAAQS pollutants through an interpretation of 52.21(a)(2) on the ground that this provision limits the scope of PSD to areas that have been designated "attainment or unclassifiable." As some of these commenters acknowledge, adopting this approach would require that the Agency reverse a long standing interpretation of 52.21(a)(2) that PSD applies if the source is locating in an area that is designated as attainment for any pollutant. Thus, commenters' request that EPA adopt this interpretation of 52.21(a)(2) is beyond the scope of this immediate action as we did not seek comment on this provision, or this long standing interpretation. However, as noted above, we do intend to address the underlying substantive claim in the tailoring rule.⁶²

EPA went on to explain its reasoning as to why the existing regulations (those issued in 1980 and as amended in 2002) cannot be interpreted in its view to impose PSD only on those sources that trigger review for criteria pollutants.

On May 13, 2010, EPA released its *Final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*.⁶³ In this rule, EPA promulgated a new definition of the term "subject to regulation." Unlike the proposed GHG Tailoring Rule, which would have revised directly the definition of "major stationary source" and established significance levels, EPA decided to embed a 100,000 ton per year CO₂e major source threshold and 75,000 ton per year CO₂e significance level in the "subject to regulation" definition along with codifying the "take effect" language from the GHG Reconsideration Rule and establishing a phase-in program.

Beginning on January 2, 2011, the GHG Tailoring Rule provides that only a source that is triggering PSD "anyway" will have to apply GHGs until July 1, 2011. As a practical matter, "anyway" sources, as EPA calls them, are generally those that would otherwise trigger PSD for a NAAQS pollutant for which the area is designated attainment or unclassifiable. Thus, EPA has effectively adopted the result that commenters stated was compelled by the statute and which ACC petitions here to limit the ability to trigger PSD permitting to those pollutants for which an area is designated attainment or unclassifiable. Unfortunately, EPA adopts this approach only for 6 months and justifies this decision on the grounds of "administrative necessity," "absurd results," and the "step by step" doctrines that it believes authorize it to ignore otherwise plain statutory language. Moreover, to justify invoking these doctrines which can only be used to override the "literal" meaning of a statute, EPA tries to make the case, that the statute *compels* that PSD must be triggered by any pollutant, not just those specified in Sections 161 and 165 of the Act. Thus, while EPA de facto adopts the proper Clean Air Act approach temporarily as a

⁶¹ *Response to Comments on Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs* at 151-152, EPA-HQ-OAR-2009-0597-0122 (March 29, 2010).

⁶² *Id.* at 152-153.

⁶³ Available at <http://www.epa.gov/nsr/actions.html#may10>.

matter of practice, it ultimately rejects the interpretation of the statute because, to accept it, would mean that the approach for the first six months of the program would be permanent.

B. Conforming EPA's Approach to the Clean Air Act Will Enable EPA to Fully Realize both PSD and Greenhouse Gas Goals.

1. Revising, Rescinding, or Reconsidering Will Avoid The Need To Implement Legal Fictions to Limit GHG Impacts.

Limiting the triggering of PSD to NAAQS pollutants alleviates the need for EPA to invoke risky legal theories to justify raising major source thresholds for PSD permitting, will reduce much of the concerns over EPA's Motor Vehicle Rule, and has been supported by state agencies.

EPA's reliance on the administrative necessity doctrine to justify the GHG Tailoring Rule's broad departure from the plain language of the CAA is highly questionable. First, the administrative necessity doctrine is more theory than reality—while courts have occasionally cited the doctrine, EPA does not cite a single instance in which a court upheld use of the doctrine. Second, *Alabama Power* and other cases interpreting the doctrine do not support the proposal's massive "tailoring" of the PSD program. EPA need not rely on administrative necessity if it simply adopts the approach as intended by Congress. Notably, *Alabama Power* involved a *de minimis* exemption. While the D.C. Circuit stated that "[c]onsiderations of administrative necessity may be a basis for finding implied authority for an administrative approach not explicitly provided in the [CAA],"⁶⁴ the Court also explained that "there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of cost and benefits."⁶⁵ Furthermore, where an agency seeks a "prospective exemption ... from a statutory command based upon the agency's prediction of the difficulties of undertaking regulation," rather than a relief after good faith effort, the agency's burden is "especially heavy."⁶⁶ The case law following the *Alabama Power* decision similarly reflects the very limited nature of the administrative necessity doctrine.⁶⁷

EPA did not cite and ACC has been unable to find a *single case* to support such a broad and prospective application of the administrative necessity doctrine such as that proposed and finalized by EPA in for PSD tailoring.⁶⁸ The D.C. Circuit "has stated that the administrative necessity doctrine is particularly difficult to assert when the agency ha[s] not yet tried to enforce the statutory requirements."⁶⁹ Furthermore, the Court does not favor "[c]ategorical exemptions

⁶⁴ 636 F.2d at 358.

⁶⁵ *Id.* at 357.

⁶⁶ *Id.* at 359-360.

⁶⁷ In every case relied on by the Agency, the court rejected attempts by administrative agencies to invoke the doctrine. EPA concluded the discussion of each successive case with a statement such as the following: "[t]he court went on to find, however, that in this case, EPA's justification for 'administrative necessity' was not sufficient." See e.g., *Env'tl. Def. Fund, Inc. v. EPA*, 636 F.2d 1267, 1283 (D.C. Cir. 1980) ("EDF"); *Public Citizen v. FTC*, 869 F.2d 1541, 1556-57 (D.C. Cir. 1989).

⁶⁸ 74 Fed. Reg. at 55,313.

⁶⁹ *Id.* at 55,318 (citing *Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C. Cir.1983)).

from the clear commands of a regulatory statute.”⁷⁰ EPA takes extraordinary risks with the American economy by attempting to avert the train wreck of PSD applicability to millions of small GHG sources by invoking administrative necessity to rewrite the major source thresholds. In contrast, limiting PSD applicability to NAAQS pollutants as Congress intended provides a better, and permanent, approach to PSD tailoring that is fully consistent with the statute and with respect to which the Agency's view would receive significant deference if a judicial challenge is filed.

EPA could have avoided invoking the “absurd results” doctrine for PSD by instead conforming the regulatory approach to the Clean Air Act, which is entirely consistent with the plain language of the Act. This is important because the doctrine of “absurd results” is to be applied to guide EPA's interpretation of the statute in the first instance, not to support the need for rules designed to avoid a result based on an interpretation of the statute that creates the absurd result. This means that the absurd results caused by EPA's interpreting the Act to allow *any* pollutant to trigger PSD indicate that an alternative interpretation of the statute should be adopted as the correct reading of the Act. Moreover, to use the absurd results doctrine, EPA must recognize that when “the ‘absurd results’ doctrine of statutory construction authorizes an agency to depart from the literal meaning of the statute, the agency must do so in as limited a manner as possible to effectuate underlying congressional intent.”⁷¹ Here, conforming the regulations to the Clean Air Act would limit the use of the absurd results doctrine to Title V – substantially narrowing the Agency's need to invoke the doctrine. *See Mova Pharm. Corp. v. Shahala*,⁷² where the court applied this principle to an FDA regulatory requirement. Like the court recommended to the FDA, EPA should “adopt[] a more narrow solution to the problem.”

2. Revising Or Rescinding The Regulations Will Enable EPA To Realize GHG Goals.

An approach limiting PSD applicability to NAAQS pollutants would still allow for pollutants subject to regulation to meet BACT if PSD is triggered by criteria pollutant emissions.⁷³ Thus, this approach would still provide for control of non-criteria pollutants from the sources that are likely the largest emitters of such pollutants. In other words, if PSD is triggered by a criteria pollutant, all pollutants subject to regulation would be required to apply BACT if they experience a significant increase.⁷⁴

⁷⁰ *Id.* (quoting *Alabama Power*, 636 F.2d at 358) (alteration in original).

⁷¹ *Id.* at 55,307.

⁷² *See Mova Pharm. Corp. v. Shahala*, 140 F.3d 1060, 1069 (D.C. Cir. 1998) (“FDA has embarked upon an adventurous transplant operation in response to blemishes in the statute that could have been alleviated with more modest corrective surgery”).

⁷³ As described below, nothing in this petition should be taken as support by ACC for the notion that EPA should use the CAA to regulate GHGs. Equally strongly, nothing in this petition should be taken as support for the position that EPA should promulgate a NAAQS for GHGs. Nonetheless, since EPA has decided to proceed with regulating GHGs under the Clean Air Act, the Agency should pursue a path that is least damaging to the American economy.

⁷⁴ The petitioners do not concede that GHGs are contemplated to be covered as “pollutants subject to regulation.”

Such an approach is also likely to be supported by a wide range of stakeholders because it permits the Motor Vehicle Rule to be implemented without wreaking havoc on stationary source permitting. Thus, many state agencies also support adoption of an approaching limiting PSD to criteria pollutants. States filed comments on the proposed 2009 actions indicating that triggering PSD should be limited to pollutants for which a NAAQS has been issued, thus explicitly endorsing this result. States also unanimously supported a delay in implementation of the PSD program for GHGs because they simply do not have the resources to undertake the program EPA has proposed – even with the increased thresholds EPA offered in the proposed GHG Tailoring Rule.

C. There are Adequate Grounds Arising After to Justify Revision, Rescission, and/or Reconsideration at this Time.

As discussed above, the statute and its legislative history demonstrate clearly that Congress intended PSD permitting to be triggered only by criteria pollutants. CAA Section 307(b) allows a party to file a petition for review in the D.C. Circuit based on grounds arising after the close of the public comment period on a rule.⁷⁵ Section 307(d)(7)(B) provides that only an objection to a rule which was raised during the public comment period may be raised during judicial review but provides also that if grounds for objection arose after the close of the comment period or it was impractical to raise such an objection during comment period, the Administrator shall convene a reconsideration proceeding.⁷⁶

According to EPA, the issuance of the Motor Vehicle Rule, means that GHGs will become subject to regulation on January 2, 2011:

Under the current interpretation of the PSD applicability provision, EPA's recent promulgation of the LDVR will trigger the applicability of PSD for GHG sources at the 100/250 tpy threshold levels as of January 2, 2011.⁷⁷

The final Motor Vehicle Rule was published on May 7, 2010.⁷⁸ Thus, the grounds for challenge and reconsideration of the “automatic PSD trigger” approach EPA is promoting clearly arose after the close of the comment period on both the 1980 and 2002 regulations. Instead, it first arose, at earliest, on May 7, 2010.

Alternatively, it was impractical to raise the objection during the public comment period on the 1980 or 2002 regulations.⁷⁹ In the GHG Reconsideration Rule, EPA acknowledges that

⁷⁵ 42 U.S.C. § 7607(b).

⁷⁶ 42 U.S.C. § 7607(d)(7)(B).

⁷⁷ GHG Tailoring Rule, 75 Fed. Reg. at 31,554.

⁷⁸ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010).

⁷⁹ As explained in footnote 1, this argument applies as well to the 1978 regulations to the extent EPA considers its interpretation that any pollutant subject to regulation can trigger the requirement to obtain a PSD permit to have originated in the regulations issued in 1978.

commenters could not have contemplated that GHGs would become subject to regulation in 1980⁸⁰ when the preamble to that final rule interpreted Section 165(a) as meaning that if an area is subject to PSD for *any* pollutant, it is subject to PSD for all pollutants except nonattainment pollutants.⁸¹ As explained above, this interpretation had no import at the time because it was unlikely that a source would trigger PSD for a pollutant for which no NAAQS had been issued without also triggering it for a criteria pollutant. Indeed, at that time, there were very few pollutants regulated that were not criteria pollutants.

Similarly, it was not practical to expect ACC to raise the issue during the comment period on the 2002 regulations because ACC could not have anticipated that EPA would determine that GHGs would become subject to PSD during the comment period on the 2002 New Source Review (NSR) regulatory revisions. The public comment period for these regulations commenced on July 23, 1996. EPA issued a supplemental notice on July 24, 1998.⁸² Moreover, EPA suggests in the Response to Comments on the GHG Reconsideration Rule that commenters should have noted during the comment period the definition of “regulated NSR pollutant” and objected to its breadth during the comment period on the NSR Reform Regulations. That position ignores, however, that EPA never proposed the definition of “regulated NSR pollutant.” That definition appeared for the *first time* in the final 2002 NSR Reform Regulations.⁸³

Moreover, EPA's position at that time was that it did not believe it was appropriate to regulate GHGs under the CAA. This was evidenced in EPA's denial of a 1999 petition⁸⁴ for rulemaking on this very subject on August 28, 2003, well after the close of the comment period on the 2002 regulations. Thus, ACC here could not have contemplated that EPA would use its NSR Reform regulations *which were intended to narrow the impact of NSR and PSD* to expand the scope of the program exponentially.

Accordingly, ACC hereby requests that EPA reconsider its PSD regulations (and interpretations thereof) and make rescissions and revisions as necessary to implement the proper interpretation of the statute.

⁸⁰ *Response to Comments on Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs* at 153, EPA-HQ-OAR-2009-0597-0122 (March 29, 2010) (The “potential for regulation of GHGs, and the implications of such regulation, may have been outside of the commenters’ contemplation in 1980....”).

⁸¹ EPA's overly broad interpretation of PSD applicability in the preamble to the 1980 regulations has attracted little scrutiny because, to date, it has had negligible practical import. Until now, sources rarely, if ever, triggered PSD based solely on emissions of a non-NAAQS pollutant. However, now this incorrect interpretation does have the potential to substantially and negatively impact U.S. industry and the economy thereby undermining the very balance between maintaining clean air and allowing for economic growth that Congress strived to achieve in enacting the PSD program.

⁸² *Notice of Availability; Alternatives for New Source Review Applicability for Major Modifications; Solicitation of Comment*, 63 *Fed. Reg.* 39,857 (July 24, 1998).

⁸³ NSR Reform Regulations, 67 *Fed. Reg.* at 80,240.

⁸⁴ This date was before the 1999 petition to regulate greenhouse gases under Section 202 but even if the petition had been filed first, that would not rise to the level of making the issue of regulating GHGs under the PSD program a possibility that should have been raised in comments on the NSR Reform regulations.

RELIEF REQUESTED

For the foregoing reasons, ACC respectfully requests that EPA reconsider its interpretations of the Clean Air Act in its PSD regulations and initiate proceedings to implement the proper Clean Air Act approach limiting PSD applicability to the emissions of NAAQS pollutants in attainment or unclassifiable areas as expeditiously as practicable by:

1. Rulemaking to revise its current PSD regulations and/or the interpretation thereof to be consistent with the Clean Air Act's requirement that only criteria pollutants in an area designated attainment or unclassifiable for that pollutant can trigger PSD permitting requirements, while providing that pollutants "subject to regulation" can be subject to BACT.
2. Reconsidering and rescinding those aspects of the rulemakings subject to this petition to the extent they are interpreted to require a PSD permit to be obtained on the basis of emissions of any pollutant (i.e., those for which an area is not designated attainment or unclassifiable) based on grounds arising after promulgation of such regulations and promulgating revised rules to implement the proper Clean Air Act interpretation.
3. We also petition EPA to rescind its decision that any pollutant subject to regulation can trigger PSD permitting requirements and to implement a revised program under the existing regulations or under new regulations as expeditiously as practicable.

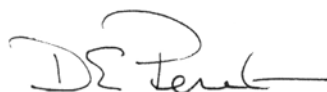
We further petition EPA to stay Sections 52.21(b)(49)(v) and 51.166(b)(48)(v) until action on this petition has been completed.

ACC has advocated (1) that comprehensive federal greenhouse gas legislation is the most efficient and effective means to address the risks of climate change, and (2) that Congress should ensure that the inefficient case-by-case and command-and-control programs in the CAA designed to address conventional pollutants are *not* used to inefficiently regulate global GHGs. Nothing in this petition should be taken as support by ACC for the notion that EPA should use the CAA to regulate GHGs. Equally strongly, nothing in this petition should be taken as support for the position that EPA should promulgate a NAAQS for GHGs. In fact, ACC strongly agrees with the several EPA statements that the NAAQS is an inappropriate tool for regulating GHGs, and we urge EPA to maintain that sound position. Even though ACC continues to believe that appropriate federal climate legislation is the only efficient and effective approach to addressing GHG emissions and that the CAA is not well-suited to addressing GHGs, EPA has made it clear that it intends to proceed with GHG regulation under the CAA. Accordingly, this petition is being submitted to request that if EPA continues to insist on regulating GHGs under the CAA, EPA proceed with such regulation, inappropriate as it may be, in the manner least damaging to the American economy, and through a means consistent with both the text of the CAA and congressional intent.

Attachment: Comments Submitted (as part of Coalition and separate comments) by ACC on proposed Motor Vehicle Rule, GHG Reconsideration Rule, and GHG Tailoring Rule Relevant to This Petition.

July 6, 2010

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ATTACHMENT 5

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