COMMENTS OF THE UTILITY AIR REGULATORY GROUP 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 (Mar. 8, 2012); Docket ID No. EPA-HQ-OAR-2009-0517

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On March 8, 2012, the United States Environmental Protection Agency ("EPA" or "Agency") issued its proposed rule entitled "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3, GHG Plantwide Applicability Limitations and GHG Synthetic Minor Limitations" (the "Proposed Step 3 Tailoring Rule"). 77 Fed. Reg. 14,226 (Mar. 8, 2012). The Utility Air Regulatory Group ("UARG") submits the following comments on the Proposed Step 3 Tailoring Rule.

UARG is a voluntary, not-for-profit group of electric utilities, other electric generating companies, and national trade associations. UARG's purpose is to participate collectively on behalf of its members in EPA's rulemakings under the Clean Air Act ("CAA" or "Act") and other proceedings that affect the interests of electric generators and in related litigation. UARG has participated extensively in proceedings regarding EPA's regulation of greenhouse gases ("GHGs") under the CAA, including submitting comments on EPA's proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (the "Tailoring Rule"). Comments of the Utility Air Regulatory Group on the Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, Docket ID No. EPA-HQ-OAR-2009-0517-5317 (incorporated herein by reference) ("UARG Tailoring Rule Comments"). EPA finalized the Tailoring Rule on June 3, 2010. 75 Fed. Reg. 31,514 (June 3, 2010). The Proposed

Step 3 Tailoring Rule is "the third step … in the EPA's Tailoring Rule." 77 Fed. Reg. at 14,226/1. UARG has a strong interest in EPA's GHG rules because UARG members own and operate fossil fuel-fired electric generating facilities that emit GHGs, including carbon dioxide.

EPA's regulation of GHG emissions from stationary sources under the prevention of significant deterioration ("PSD") and Title V programs is the subject of considerable controversy, and every major EPA rule related to GHG regulation under these programs is, in one respect or another, the subject of petitions for review pending in the U.S. Court of Appeals for the District of Columbia Circuit by numerous parties, including UARG. *See, e.g.*, *Coal. for Responsible Regulation v. EPA*, No. 09-1322 (and consolidated cases) (D.C. Cir.) (petitions for review of EPA's GHG "endangerment" and "cause or contribute" findings for motor vehicles under CAA § 202(a), 74 Fed. Reg. 66,496 (Dec. 15, 2009)); *Coal. for Responsible Regulation v. EPA*, No. 10-1073 (and consolidated cases) (D.C. Cir.) (petitions for review of EPA's Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) ("Timing Rule")); *Coal. for Responsible Regulation v. EPA*, No. 10-1092 (and consolidated cases) (D.C. Cir.) (petitions for review challenging EPA's Light-Duty Vehicle Greenhouse Gas Emission Standards, 75 Fed. Reg. 25,324 (May 7, 2010) ("Light-Duty Vehicle Rule")); *Se. Legal Found., Inc. v. EPA*, No. 10-1131 (and consolidated cases) (D.C. Cir.) (petitions for review of the Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010)). Depending on the outcome of these pending cases, it is possible that one or more of the current PSD and Title V permitting rules that apply to stationary sources' GHG emissions and related rules may be vacated in whole or in part or otherwise changed significantly as a result of judicial review. If that occurs, such an outcome could well affect the Proposed Step 3 Tailoring Rule.

First, the comments presented below address the fundamental issue that exists with regard to the Tailoring Rule (and thus also exists with regard to the Proposed Step 3 Tailoring Rule), which is that EPA begins from the faulty premise that "GHGs are required to be addressed under the major source permitting requirements of the Act's PSD and title V programs." 77 Fed. Reg. at 14,227/3. As UARG explained in its comments on the Tailoring Rule and argued in the pending litigation in which UARG and others challenge that rule, GHGs are not an "air pollutant" under the PSD provisions of the CAA, and the Tailoring Rule (and by extension the Proposed Step 3 Tailoring Rule) cannot be justified by the "absurd results" doctrine on the one hand and the "administrative necessity" and "one-step-at-a-time" doctrines on the other. UARG recognizes that the D.C. Circuit may resolve these issues when it decides the pending GHG cases, but UARG in any event reiterates its position here to preserve it and to have the Agency consider it.

Second, the comments address UARG's position in the event that the D.C. Circuit upholds the Tailoring Rule. In that context, as an initial matter, UARG supports EPA's proposal not to lower the GHG PSD and Title V permitting applicability thresholds from the levels specified in the Tailoring Rule. UARG also generally supports measures that can have the potential to ease the burden associated with obtaining a PSD permit and add flexibility to that process. For that reason, UARG supports EPA's proposal that would amend the PSD regulations to allow permitting authorities to issue plantwide applicability limitations ("PALs") to major and potentially-major GHG stationary sources on either a mass-basis or a carbon dioxide equivalent ("CO_2e") basis and to allow PALs to be used as an alternative approach for determining whether a project is a major modification and subject to regulation for GHGs. Likewise, UARG supports

EPA's proposal that would allow EPA to issue GHG synthetic minor permits in those areas for which it is the permitting authority.

I. GHGs Are Not an "Air Pollutant" Under the CAA's PSD Provisions.

The Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), addressed EPA's regulatory authority under CAA § 202(a)(1) and held that the "sweeping definition of 'air pollutant'" set forth in CAA § 302(g) is "unambiguous" and "embraces all airborne compounds of whatever stripe," including carbon dioxide and other GHGs. 549 U.S. at 528-29. No party in *Massachusetts* argued that the definition of "air pollutant" in CAA § 302(g) did not govern the meaning of the term as it is used in CAA § 202(a)(1), and so the Court rejected EPA's position to the extent that the Agency had "maintain[ed] that carbon dioxide is not an 'air pollutant' within the meaning of the provision" (i.e., CAA § 202(a)(1)). *Id.* at 528.

Given this, and "[b]ecause greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,'" the Court held that "EPA has the statutory authority to regulate the emission of such gases *from new motor vehicles*." *Id*. at 532 (emphasis added). Following the *Massachusetts* decision, EPA made an "endangerment" finding pursuant CAA § 202(a)(1), identifying the "endangering" pollutant as GHGs, which the Agency defined as a pollutant consisting of six different substances, including carbon dioxide. 74 Fed. Reg. at 66,497/2. In the Timing Rule, EPA stated that PSD is triggered for an air pollutant when regulations requiring actual reductions of emissions of that pollutant take effect. For GHGs, EPA said that date would be January 2, 2011, which was when EPA said the emission control requirements of the Light-Duty Vehicle Rule would take effect. 75 Fed. Reg. at 17,007/1.

For the reasons discussed below, EPA erred in finding GHGs to be an "air pollutant" that Congress intended to be regulated under the CAA Title I, Part C PSD program ("PSD program"

or "Part C"). CAA §§ 160-169, 42 U.S.C. §§ 7470-7479. EPA was required to exclude GHGs from regulation under the PSD program because their inclusion would be contrary to express congressional intent. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

A. The Tailoring Rule Is Unlawful Because the Term "Pollutant," as Used in the CAA PSD Provisions, Cannot Be Construed Under *Chevron* Step One To Include GHGs.

The Tailoring Rule is the product of EPA's attempting to reconcile two aspects of what the Agency considers to be "congressional intent" regarding the scope of the PSD program. On the one hand, EPA believes that Congress intended that GHGs be regulated as an "air pollutant" under that program. "[A]s a matter of *Chevron* Step 1," EPA said in promulgating the Tailoring Rule, "PSD … generally appl[ies] to GHG sources." 75 Fed. Reg. at 31,548/2;[1] *see also* 77 Fed. Reg. at 14,227/3 ("GHGs are required to be addressed under the major source permitting requirements of the Act's PSD and title V programs.").

On the other hand, EPA recognizes that one inescapable consequence of its conclusion that Congress intended that PSD apply to GHG sources is to "subject an extraordinarily large number of sources, more than 81,000, to PSD each year, an increase of almost 300-fold." 75 Fed. Reg. at 31,554/3. This result, EPA concedes, would be "contrary to congressional intent for the PSD program, and in fact would severely undermine what Congress sought to accomplish with the program." *Id.* "It is not too much to say," EPA continued, "that applying PSD

[1] *See also* 75 Fed. Reg. at 31,548/1 ("[W]e believe that congressional intent is clear, and that is to apply PSD … to GHG sources generally."); *id.* at 31,548/1 n.31 ("We do not believe that th[e] term ['any air pollutant'] is ambiguous with respect to the need to cover GHG sources under … the PSD … program, only with respect to what sources of GHG should be covered under the circumstances presented here."); *id.* at 31,558/2-3 ("[W]e find nothing in the PSD provisions or legislative history that would indicate congressional intent to exclude GHG sources.").

requirements literally to GHG sources … would result in a program that would have been unrecognizable to the Congress that designed PSD." *Id.* at 31,555/3.

EPA's legal rationale for the Tailoring Rule therefore presents a conundrum: how could Congress have intended, as a *Chevron* step one matter, to extend PSD coverage in a manner that would "severely undermine" what it sought to accomplish through the PSD program? The short answer is that the statute need not and should not be read to create this conflict.

The "problem" that the Tailoring Rule seeks to address is of EPA's own making insofar as the Agency has chosen to interpret the term "air pollutant" – as used under the provisions of the PSD program – to include GHGs. In promulgating the Tailoring Rule, EPA assumed that, under the PSD program, it *had* to construe "air pollutant" to include GHGs. As a matter of *Chevron* step one, the Agency had neither an obligation nor authority to do so.

1. The Plain Language of the CAA Provides that Any Stationary Source That Emits an "Air Pollutant" in Amounts of 250 Tons Per Year ("TPY") or More Is To Be Regulated Under the PSD Program.

On the face of the CAA, Congress's intent as to what sources are subject to the review and permitting requirements of the PSD program could not be clearer. Under CAA § 165(a), those requirements apply to each "major emitting facility on which construction [was] commenced after August 7, 1977." CAA § 165(a). Congress defined "major emitting facility," first, by identifying 28 types of industrial sources that anyone would recognize as major industrial facilities – e.g., power plants, refineries, cement kilns. Congress then limited which of these types of facilities would be subject to the PSD program by providing that such facilities would be deemed to constitute a "major emitting facility" for PSD only if they "emit, or have the potential to emit one hundred tons per year or more of any air pollutant." *Id.* § 169(1).

Second, as to other types of facilities not specifically listed, Congress provided that they would be considered "major emitting facilit[ies]" only if they met an even higher threshold, to ensure that only truly large "unlisted" sources would be captured under the program. For such facilities, the term "major emitting facility" is defined generally to mean "any … [stationary] source with the potential to emit two hundred and fifty tons per year or more of any air pollutant." *Id*.

In promulgating the Tailoring Rule, EPA acknowledged that the 100 tpy and 250 tpy "threshold limitations" set forth in CAA § 169(1) serve as "Congress's mechanism for limiting PSD." 75 Fed. Reg. at 31,555/2. These numerical limitations restrict the PSD program to relatively few "large industrial sources," *id.*, while excluding numerous "small[er] commercial and residential sources," *id.* at 31,556/1.

The language in CAA § 169(1) that limits the emitting sources subject to PSD is clear: i.e., "any" source with the "potential to emit" at least 250 tpy of "any air pollutant" *is* a "major" source to which Congress directed that the PSD requirements apply. As for sources within the 28 industrial categories carved out by the first sentence of CAA § 169(1), those sources are "major" if they emit at least 100 tpy of "any air pollutant."

In other words, what the unambiguous language of the CAA establishes is that Congress considered a "source" to be an appropriate target of regulation under the PSD program on the basis of the tonnage amount of that source's emissions of "any air pollutant." The distinction that Congress drew between the 28 categories of industrial sources specifically identified in the first sentence of CAA § 169(1) and "any other source" referenced in the second sentence of that provision underscores this point; the only difference between the two is that a source falling within one or the other category is subject to a different tonnage threshold.

This reading of CAA § 169(1) was confirmed in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). There, certain industry petitioners objected to EPA's PSD implementing regulations that defined the term "'major stationary source' to include any 'source' with actual or potential emissions of 250 tons per year, regardless of physical size or production capacity of the source." *Id.* at 398. The issue arose because four of the 28 source categories listed in CAA § 169(1) are defined as "major emitting facilit[ies]" under the *first* sentence of that provision only if they meet what the court characterized as "additional operating capacity, or size, qualifications."[2] *Id.* The industry petitioners in *Alabama Power* argued that "each generic type of industrial entity specified in the first sentence [of CAA § 169(1)], regardless of size, was considered exclusively by Congress in the first sentence and [therefore could] not be included by EPA within the second" sentence. *Id.*

The U.S. Court of Appeals for the D.C. Circuit rejected petitioners' reading of CAA § 169(1). In so doing, the court noted that:

> While it may be uneconomical and impractical to apply PSD to small sources that emit a *low level of pollutants*, such as those sources, withdrawn from PSD by the first sentence of section 169(1); it [is] less impractical to apply PSD to small sources that emit *relatively higher levels of pollutants*, such as those sources reached by the second sentence.

Id. (emphases added). The "critical factor in pollution control," the court continued, "is not the industrial output of a particular source but its *pollution output*." *Id.* (emphasis added). The court

[2] The four are (1) "fossil-fuel fired steam electric plants *of more than two hundred and fifty million British thermal units per hour heat input*"; (2) "municipal incinerators capable of charging *more than fifty tons of refuse per day*"; (3) "fossil-fuel boilers *of more than two hundred and fifty million British thermal units per hour heat input*"; (4) and "petroleum storage and transfer facilities *with a capacity exceeding three hundred thousand barrels*." CAA § 169(1) (emphasis added).

therefore upheld "EPA's extension of PSD to *all* sources with potential emissions of 250 tons or more per year."[3] *Id.* at 399 (emphasis added).

In short, on the face of the CAA, the sole criterion that makes "any" source "major," and thus subject to the PSD review and permitting requirements, is the *amount* of its emissions of "any air pollutant." As the D.C. Circuit has found, Congress made clear on the face of CAA § 169(1) that any source with "pollution output" of 250 tpy or more was to be regulated under the PSD program. *If* GHGs constitute an "air pollutant" for purposes of the PSD program, therefore, there is no escaping the fact that any source that emits 250 tpy or more of GHGs *is* a source that Congress intended to be subject to that program.

At the same time, as EPA correctly perceived when it promulgated the Tailoring Rule, subjecting to PSD review and permitting every source that emits as little as 250 tpy of GHGs would not only be unmanageable as an administrative matter, it would transform the program into something that Congress never enacted. 75 Fed. Reg. at 31,569/3. In light of this, EPA was compelled to adopt a definition of "pollutant" under Part C that excluded GHGs. That is, in lieu of adopting the unlawful Tailoring Rule, EPA should have acknowledged that it has no authority to regulate GHGs under the PSD provisions of the CAA.

2. For Purposes of PSD, the Term "Air Pollutant" Cannot Be Defined to Include GHGs.

EPA's position that it *must* regulate GHGs as an "air pollutant" under the PSD program is based on its view that the term "subject to regulation," as used in CAA § 165(a)(4), is a "simple cross-reference [that] … carries no implication that EPA, in identifying the pollutant to which

[3] For its part, when EPA promulgated revised PSD rules in the aftermath of *Alabama Power*, the Agency reiterated that, given the plain terms of CAA § 169(1), the "primary criterion in determining PSD applicability is whether the proposed project is sufficiently large *(in terms of its emissions)* to be a major stationary source." 45 Fed. Reg. 52,676, 52,677/2 (Aug. 7, 1980) (emphasis added).

PSD … appl[ies], may redefine the pollutant that is regulated elsewhere in the Act." 75 Fed. Reg. at 31,528/3. Rather, says the Agency, "[w]hatever the pollutant is that is regulated elsewhere, it is that pollutant to which PSD … appl[ies]." *Id.* Because EPA defined the "air pollutant subject to control" in the Light-Duty Vehicle Rule "as the aggregate group of the six GHGs, including [carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, and perfluorocarbons]," the Agency says that it is "this pollutant" to which PSD must apply. *Id.* According to EPA, it "*must follow* this construct of the aggregate group of the six gases, and [it] do[es] *not have discretion*" to do otherwise. *Id.* (emphases added).

EPA both misconstrues the CAA and the scope of its own authority in interpreting the Act. As discussed above, the CAA contains a spectrum of statutory programs addressing different pollutants, and different sources of pollution, using different regulatory mechanisms of different geographical focus, with the ultimate purpose of addressing distinct pollution problems. Because the CAA is not self-implementing,[4] rulemaking is required under each of these separate programs to spell out the specific elements of each, *including the "air pollutants" that each program is to address*.

Accordingly, while the Supreme Court in *Massachusetts* found that the definition of "air pollutant" in CAA § 302(g) is "capacious" enough to encompass GHGs, so as to authorize EPA to "regulate the emission of such gases from new motor vehicles," 549 U.S. at 532, that finding does not resolve the question of whether EPA has authority to regulate GHG emissions from

[4] *See*, *e.g.*, CAA § 161 ("[E]ach 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....") (PSD program) (emphasis added); CAA § 202(a)(1) (EPA "shall *by regulation prescribe* … standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles ….") (CAA, Title II, Part A, Motor Vehicle Emission and Fuel Standards, CAA §§ 202-219, 42 U.S.C. §§ 7521-7554 ("Title II")) (emphasis added).

stationary sources under the PSD program. The same term appearing in different statutory programs can (indeed, must) be given different meanings if the congressional intent underlying those programs is different.

In this regard, it has long been understood that, in matters of statutory construction, "[m]ost words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). While there may be a

> natural presumption that identical words used in different parts of the same act are intended to have the same meaning, … [such a] presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law.

Id. (internal citation omitted).

What is required, therefore, is a "consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed." *Id.* As the Supreme Court more recently put it, "[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). Indeed, this is *precisely* what EPA did in past actions under Part C, which contradicts EPA's assertion of a *Chevron* step one mandate to include GHGs in the PSD program. In 1977, Congress enacted the PSD program against the backdrop of CAA regulation of a known set of pollutants, all of which had been found to pose risks in the ambient air and potentially contribute to degradation of air

quality. Contemporaneously with the 1977 Amendments that added the statutory Part C PSD program, EPA limited PSD pollutant coverage of "any pollutant" by interpreting that term to refer to "any" pollutant "regulated" under the Act. 40 C.F.R. § 52.21(b)(1)(i); *see generally Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993) (contemporaneous and consistently maintained position "[o]f particular relevance" in construing statute).

EPA similarly limited the reference to "any pollutant" for purposes of visibility regulation in CAA § 169A(g)(7) to "any" visibility-impairing pollutant. *See* 40 C.F.R. pt. 51, App. Y, § III.A.2. Given its interpretation of the Act that including GHGs under the PSD program would contradict congressional intent, EPA should similarly have limited the PSD program to exclude GHGs. Whether "pollutant" as used in the PSD program is modified by the capacious "any" under CAA § 169(1) or the more limited "subject to regulation" under CAA § 165(a)(4), GHGs should not have been added to the list of pollutants that EPA's regulations make subject to PSD.

The Supreme Court's view of statutory construction in *United States v. American Trucking Ass'ns*, 310 U.S. 534 (1940) – a decision relied upon by EPA in finding that inclusion of GHGs in the "pollutants" regulated under Part C would be contrary to congressional intent, 75 Fed. Reg. at 31,543/1 n.26 – is particularly instructive. The American Trucking Associations had petitioned the Interstate Commerce Commission ("ICC") to issue rules addressing all "employees" within the trucking industry. The Fair Labor Standards Act contained a provision exempting from its minimum wage and overtime requirements those "employees" regulated under the earlier-enacted Motor Carrier Act. The ICC declined to issue the requested rules, finding that it had no authority to issue those rules under the Motor Carrier Act. The ICC

construed the Motor Carrier Act as affording it jurisdiction over only those "employees" whose jobs were safety-related.

The Supreme Court agreed. "In the interpretation of statutes," the Court began, "the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *Am. Trucking Ass'ns*, 310 U.S. at 542. The Court continued, however, that in so doing, "[t]o take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute." *Id.*

Rather, the Court continued, "[e]mphasis should be laid … upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts." *Id.* at 544. In the case at hand, the statutory language at issue, "if construed as appellees contend," would have extended to the ICC "a power of regulation as to qualifications and hours of employees quite distinct from the settled practice of Congress." *Id.* The Court reached that conclusion after taking into account how the term "employee" was used in other federal statutes – such as the Hours of Service Act, the Seamen's Act – that, the Court determined, involved the "regulation of transportation employees," statutes that addressed "matters of movement and safety only." *Id.* at 544-45.

Given that the "policy" of Congress had been thus "consistent in legislating" as to this matter, the Court concluded that it "cannot be said that the word 'employee' as used in [the Motor Vehicle Act was] so clear as to the workmen it embraces that we would accept its broadest meaning." *Id*. The word "takes color from its surroundings." *Id.* at 545.

The foregoing principles should have informed EPA's interpretation of the term "air pollutant" as used in the PSD provisions of the CAA.[5] Rather than conclude that the definition EPA adopted under the Light-Duty Vehicle Rule was the "construct" that the Agency "must follow" for purposes of PSD, the Agency should have determined that defining "air pollutant" under Part C to include GHGs would not comport with – indeed, would frustrate – congressional intent. This is especially the case given the Agency's recognition that, under the plain language of the CAA – specifically, the language defining "major emitting facility" in CAA § 169(1) – regulating GHGs would lead to "absurd results" by subjecting to regulation under the PSD program far more, and far different, sources than Congress could have ever intended. *See*, *e.g.*, 75 Fed. Reg. at 31,533/2 ("To apply the statutory PSD … applicability threshold[] literally to sources of GHG emissions would bring tens of thousands of small sources and modifications into the PSD program each year," an "extraordinary increase[] in the scope of the permitting

[5] These principles also should have informed EPA's interpretation of the term "air pollutant" in Title V of the CAA. CAA §§ 501-507, 42 U.S.C. §§ 7661-7661f. In the Title V program, Congress expressly *forbade* EPA to depart from the major source thresholds set out in the statute. Section 502(a) of the CAA provides that EPA "may … promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of [Title V] if … [EPA] finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, *except that the Administrator may not exempt any major source from such requirements*" (emphasis added). Congress quite clearly never intended that Title V extend to millions of small sources – as EPA recognizes. 75 Fed. Reg. at 31,562/3 (permitting of millions of small sources "is contrary to congressional intent for the title V program, and in fact would severely undermine what Congress sought to accomplish with the program"). Furthermore, as with the PSD definition of "major emitting facility," EPA must define the "pollutants" that trigger Title V in reference to the pollutants Congress intended to be covered; and much as with its earlier PSD and visibility rules, EPA, in its Title V rules, interpreted "any pollutant" to refer to "regulated" pollutants. 40 C.F.R. § 70.2 (defining "regulated air pollutant"). Because EPA is expressly forbidden to "exempt any major source" from Title V requirements by revising statutory emission thresholds and is required to avoid what EPA recognizes as absurd in order to preserve congressional intent, EPA must exclude GHGs from the pollutants regulated under the Title V program.

program[]" that would entail the program "becom[ing] several hundred-fold larger than what Congress appeared to contemplate.").

In *Chevron*, the Supreme Court explained that if, by "employing *traditional tools of statutory construction*," it is possible to "ascertain[] that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9 (emphasis added). Construing a statute so as to avoid "absurd results" is itself one of those "traditional tools of statutory construction." Accordingly, consistent with *Chevron* step one, given that EPA recognized that regulating GHGs under Part C would lead to such an "absurd" outcome, it was incumbent on EPA to reject the importation into the PSD program of the definition of "air pollutant" the Agency had adopted under the Light-Duty Vehicle Rule. As discussed below, on the face of the CAA, applying traditional tools of statutory construction, EPA is not authorized, much less compelled, to define "air pollutant" to include GHGs for purposes of the PSD program.

a. GHGs Are Nothing Like the Conventional "Air Pollutants" Regulated Under the CAA.

When EPA in 2008 issued its Advance Notice of Proposed Rulemaking on potential CAA regulation of GHGs, soliciting preliminary input on the various ways that GHG emissions might be regulated under the CAA, the Agency acknowledged that "[t]he global nature of climate change, the unique characteristics of GHGs, and the ubiquity of GHG emission sources [would] present special challenges for regulatory design." 73 Fed. Reg. 44,354, 44,400/3 (July 30, 2008). In particular, EPA said, "[a] significant difference between the major GHGs and most air pollutants regulated under the CAA is that GHGs have much longer atmospheric lifetimes. [And,] [o]nce emitted[,] GHG[s] can remain in the atmosphere for decades to centuries." *Id.* at 44,400/3-01/1. In contrast, "traditional air pollutants typically remain airborne for days to

weeks." *Id.* at 44,401/1. This, EPA went on to explain, had important ramifications – ramifications that the Agency unfortunately failed to take into account when it eventually promulgated the Tailoring Rule.

First, in contrast to "most traditional air pollutants," EPA said, GHG emissions "become well mixed throughout the global atmosphere so that the long-term distribution of GHG concentrations is not dependent on local emission sources." *Id*. Rather, "GHG concentrations tend to be relatively uniform around the world." *Id*. Second, "[a]s a result of this global mixing, GHGs emitted anywhere in the world affect climate everywhere in the world." *Id.* Third, "GHGs build up in the atmosphere so that past, present and future emissions ultimately contribute to total atmospheric concentrations." *Id.* As a consequence, GHG concentrations cannot be affected by near-term emission control strategies, as is the case with conventional "air pollutants" regulated under the CAA.

It was for these reasons that EPA went on to note that the "global nature and effect of GHG emissions raise questions regarding the suitability of CAA provisions that are designed to protect local and regional air quality by controlling local and regional emission sources." *Id.* at 44,408/3. Among other things, "the geographic location of emission sources and reductions are generally not important to mitigating global climate change." *Id.*

At the same time, the Agency pointed out, the "[c]urrent and projected levels of ambient concentrations of the six" GHG pollutants, including carbon dioxide, were "not expected to cause any direct adverse health effects, such as respiratory or toxic effects, which would occur as a result of the elevated GHG concentrations themselves rather than through the effects of climate change." *Id.* at 44,427/3. EPA returned to this theme when it proposed its CAA Title II "endangerment" finding, stating that "ambient concentrations of carbon dioxide and the other

greenhouse gases, whether at current levels or at projected ambient levels under scenarios of high emissions growth over time, do not cause direct adverse health effects." 74 Fed. Reg. 18,886, 18,901 (Apr. 24, 2009). Instead, the concern with GHG emissions stems from what EPA characterized as indirect effects – i.e., the "additional heating effect caused by the buildup of anthropogenic GHGs in the [global] atmosphere" and the associated potential effects on climate. 73 Fed. Reg. at 44,423/3.

In short, the regulation of GHG emissions as an "air pollutant" under the CAA is in no respect driven by any health or environmental concern with local emissions causing elevated ground-level exposures to GHGs in the air that people breathe in the air quality control regions to which the PSD program applies. *See* CAA § 107. Rather, that regulation is ostensibly directed at the projected effects of undifferentiated GHG emissions from sources throughout the world that mix homogeneously in the global atmosphere and are thought thereby to exacerbate the planetary "greenhouse effect." With respect to the principal greenhouse gas, carbon dioxide – a substance that is itself necessary to sustain plant life and ecosystems of all types – current and projected ground-level concentrations of that GHG pose no health risk from exposure in the ambient air anywhere in the country. But it is only threats from ground-level pollution in air quality control regions designated "attainment" or "unclassifiable" that EPA is authorized to address through regulation under the PSD program.

b. GHGs Cannot Be Regulated Under the PSD Program Insofar as GHG Emissions Do Not Deteriorate "Air Quality" in CAA § 107 Areas.

Under Title II of the CAA, regulation of GHG emissions from motor vehicles may be required where, in the Administrator's judgment, such emissions cause or contribute to air pollution that "may reasonably be anticipated to endanger public health or welfare." *Id.* §

202(a)(1). Even assuming that the concentrations of GHGs in the global atmosphere from anthropogenic emissions may properly be viewed as presenting an endangerment to public health or welfare within the meaning of CAA § 202(a)(1), it does not follow that EPA is authorized, much less compelled, to regulate GHGs under the PSD program, when the endangerment is from the presence of a pollutant in the "global" atmosphere and not the atmosphere in a geographically-defined CAA § 107 area.

In contrast to CAA § 202(a)(1), the Part C PSD program is explicitly focused *not* on emissions whose presence in the atmosphere may endanger public health and welfare, but on protection by states of localized ambient "air quality" – i.e., the air that people breathe in certain geographically defined CAA § 107 areas within a state. Reflecting Congress's intent in this regard, the CAA provides that:

> [E]ach applicable [state] implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under [Part C], to prevent significant deterioration of *air quality* in each [air quality control] region (or portion thereof) designated pursuant to section 107 of [the Act] as attainment or unclassifiable.[6]

CAA § 161 (emphasis added).

Thus, CAA § 161 makes clear that the Part C PSD program is not directed to the regulation of emissions of "any pollutant" that may be anticipated to endanger health or welfare due to the pollutant's presence throughout the atmospheric column planet-wide. Rather, states are required to adopt and implement measures under the PSD program as "necessary" to address

[6] In turn, CAA § 107(b), (c), and (e) describe "air quality control regions" as intrastate or, in some cases, localized interstate regions, with CAA § 107(a) making clear that the focus of control efforts is on pollution that exists at the state level.

local "air quality" problems that are created by emissions that, if left unaddressed, would degrade the quality of the ambient air (i.e., the outdoor air that people breathe).[7]

Given the well-mixed nature of GHGs in the atmosphere, GHG concentrations do not differ from one location to another. Consequently, local or even state-level measures to limit or control GHG emissions would be wholly ineffective in addressing local or state GHG concentrations, much less any adverse climate effects that might be attributed to those concentrations. Such regulation would, therefore, be wholly at odds with the objective of the PSD program, which is to prevent deterioration of local air quality.

For these reasons, any regulation of GHG emissions – where that regulation is directed to the effects GHGs may have on global climate – cannot constitute a "measure[]" that is "necessary" to "prevent significant deterioration" of CAA § 107 "air quality" within the meaning of CAA § 161. EPA therefore has no authority to regulate GHGs as an "air pollutant" under the PSD program.

3. EPA's Conclusion that the Meaning of "Air Pollutant" for Purposes of the PSD Program Is Resolved by Rulemaking To Define That Term Under Title II Is Contrary to Law.

EPA finds "authority" for regulating GHG emissions under the PSD program in its assumption that the promulgation of regulations for the control of GHG emissions from new motor vehicles would thereafter require control of GHG emissions from stationary sources under the PSD program. Under the CAA, the only possible basis the Agency could have for this assumption is certain language from CAA § 165(a)(4), which states that "[n]o major emitting facility … may be constructed in any area to which this part applies unless … the proposed

[7] *See* 40 C.F.R. § 50.1(e) (defining "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access"); *Train v. NRDC*, 421 U.S. 60, 65 (1975) ("'ambient air' … is the statute's term for the outdoor air used by the general public").

facility is subject to the best available control technology for *each pollutant subject to regulation under this [Act]* emitted from, or which results from, such facility." CAA § 165(a)(4) (emphasis added). But this language must itself be read in the context provided by the structure and terms of Part C generally and CAA § 161 specifically.

As discussed above, (i) inclusion of GHGs among the "air pollutants" subject to regulation at the 100 tpy and 250 tpy thresholds established by CAA § 169(1) would be contrary to congressional intent, and (ii) PSD requirements cannot apply to pollutants that have no adverse impact on local "air quality." Accordingly, although GHG emissions may be "subject to regulation" as a pollutant under CAA Title II, it does not necessarily follow that EPA can regulate GHGs as a pollutant under Part C. Only a "pollutant" that (i) is "subject to regulation" under the CAA, (ii) has an adverse impact on local "air quality" within the meaning of CAA § 161, and (iii) is emitted by a "major emitting facility" as Congress defined that term under CAA § 169(1), is the sort of pollutant to which the PSD program applies.

Only with respect to emissions of those pollutants that meet *all* of these tests can it be said that any measures are necessary to prevent significant deterioration of air quality from major emitting facilities in individual CAA § 107 air quality control regions. Although GHGs may meet the first of these tests (due to their being regulated as an "air pollutant" under Title II), they do not and cannot meet the second and third tests, as explained above. Accordingly, EPA is not authorized to regulate GHGs as an "air pollutant" under the PSD program.

B. The Tailoring Rule Cannot Be Justified Under the "Administrative Necessity" or "One-Step-at-a-Time" Doctrines.

When it promulgated the Tailoring Rule, EPA asserted that the "situation presented here is exactly the kind that the 'absurd results,' 'administrative necessity,' and "one-step-at-a-time' doctrines have been developed to address." 75 Fed. Reg. at 31,533/3. Those doctrines, the

Agency claimed, "[s]eparately and interdependently … authorize EPA and the permitting authorities to tailor the PSD and title V applicability provisions through a phased program as set forth in this rule."[8] *Id.*

In so arguing, EPA failed to appreciate that the "absurd results" doctrine on the one hand, and its "administrative necessity" and so-called "one-step-at-time" doctrines on the other, are grounded in *mutually exclusive* rationales regarding an agency's obligations in responding to expressions of congressional intent. The various "absurd results" cases that EPA cited in the Tailoring Rule preamble establish that an agency must construe statutory language to avoid any literal interpretation that would be inconsistent with congressional intent. In contrast, the "administrative necessity" and "one-step-at-a-time" doctrines apply only where it is otherwise clear that Congress intended coverage but where measures to reach that end are, for all practical purposes, impossible to implement or impossible to implement except in a stepwise fashion. EPA is trying to have it both ways, which it cannot do. In the Proposed Step 3 Rule, EPA says it will continue to try to implement measures to bring smaller sources into the PSD program in the future but "may also consider additional permanent exclusions based on the 'absurd results' doctrine, where applicable." 77 Fed. Reg. at 14,233/2. EPA cannot switch between these doctrines at will. Either Congress intended PSD to apply to GHGs or it did not. If it did not intend that, then EPA should interpret the Act to exclude GHGs. If Congress did intend that GHGs be covered by the PSD program, then EPA needs to take steps to implement the program fully.

[8] Elsewhere, EPA alleged that, although "each of these doctrines provides independent support" for the Tailoring Rule, the "three doctrines are directly intertwined and can be considered in a comprehensive and interconnected manner." 75 Fed. Reg. at 31,541/2.

In *Alabama Power*, the case in which, as EPA acknowledged, the "doctrine of 'administrative necessity'" is "most prominently" set out, 75 Fed. Reg. at 31,543/3, the D.C. Circuit recognized that, in certain limited circumstances, an agency may be empowered to "take appropriate action to cope with the administrative impossibility of *applying the commands* of the substantive statute." 636 F.2d at 359 (citing *Morton v. Ruiz*, 415 U.S. 199, 230-31 (1973)) (emphasis added). That is, the "administrative necessity" doctrine applies in those situations where it is clear that Congress intended a certain result but where measures that would give effect to that result are, for all practical purposes, impossible to implement.

If EPA believed – as its resort to the "absurd results" doctrine establishes – that Congress's intention was never to subject sources to regulation under the Act's PSD provisions with respect to their GHG emissions, then the Agency was obliged to construe the CAA to avoid that result. Conversely, the "administrative necessity" and "one-step-at-a-time" doctrines would have application here only if EPA had accepted that Congress *did* intend regulation of GHGs from all sources under the PSD and Title V provisions, but that implementing that congressional intent was effectively impossible. With EPA's having made out its case under the "absurd results" doctrine, the Agency cannot resort to the "administrative necessity" doctrine as providing an alternative (much less an "interdependent") justification for the Tailoring Rule.

II. In the Event the Tailoring Rule Remains in Place, UARG Generally Supports the Proposed Revisions to the PSD Regulations that Would Add Flexibility to the PSD Permitting Program.

First, UARG supports EPA's proposal not to lower the GHG permitting applicability thresholds for PSD and Title V permits. UARG agrees that the resources are not yet in place for permitting authorities to be able to process the additional GHG permit applications that would result from lowering the thresholds. UARG notes, however, that EPA failed in the Proposed

Step 3 Tailoring Rule to examine *all* of the factors that the Agency outlined in the Tailoring Rule as the criteria for determining whether to lower the thresholds. *See* 75 Fed. Reg. at 31,559/2 (setting forth criteria EPA is to examine). In the Tailoring Rule, EPA committed to examining, among other things, "information … as to the sources' abilities to meet the requirements of the PSD program and the permitting authorities' ability to process permits in a timely fashion." *Id.* Although EPA in the Proposed Step 3 Tailoring Rule does examine the ability of permitting authorities to process permits, *see* 77 Fed. Reg. at 14,236/3, it failed entirely to examine the ability of sources to meet the requirements of the PSD program. Examination of the ability of permitting authorities to process permits in a timely fashion does not shed any light on the ability of sources to meet the actual requirements of the PSD program – contrary to the assertion of EPA in footnote 30 of the Proposed Step 3 Tailoring Rule. *See id.* at n.30. Had EPA examined the issue of sources' ability to meet the requirements of the PSD program, this would have provided additional support for its determination that the thresholds should not be lowered. When EPA examines this issue in the future, it should not neglect this important criterion.

Second, as a general matter, UARG supports measures that add flexibility to the PSD permitting program and streamline the permitting process. To that end, UARG generally supports the specific revisions to the PSD regulations proposed in the Proposed Step 3 Tailoring Rule and has some specific comments below on these revisions. Although some smaller fossil fuel-fired electric generating units may emit GHGs at levels close to the Tailoring Rule's permitting thresholds and might benefit from PALs or synthetic minor permits to address their GHG emissions, the majority of fossil fuel-fired electric generating units emit GHGs at levels well in excess of those thresholds. As a result, the Proposed Step 3 Tailoring Rule would provide minimal practical benefit to most UARG members. UARG nevertheless supports the

proposed revisions because EPA should be encouraged to develop measures that add flexibility to PSD permitting and help streamline that burdensome process.

In the Proposed Step 3 Rule, EPA proposes two changes to its PSD regulations: (1) modifications to the regulations governing PALs to allow permitting authorities to issue PALs to major and potentially-major GHG stationary sources on either a mass basis or a CO_2e basis and to allow PALs to be used as an alternative approach for determining whether a project is a major modification and subject to regulation for GHGs; and (2) addition of new regulations that would allow EPA to issue GHG synthetic minor permits in areas where it is the permitting authority. With regard to PALs, UARG suggests that EPA make clear in any final rule that any emission limits accepted as part of a PAL will be guaranteed for the 10-year period of the PAL. Because EPA may periodically be addressing the question whether to lower the applicability thresholds for GHGs under the PSD program, sources will be reluctant to enter into PALs without some assurance that if EPA changes its rules, the source would not thereby lose the flexibility afforded by the PAL.

With regard to EPA's proposal on synthetic minor permits, EPA makes clear that it will not be issuing these permits for any pollutant other than GHGs and that "[i]f a source wishes to obtain a synthetic minor limit for any other pollutant, it should seek that limit under the applicable minor source program." *Id*. at 14,244/3. UARG notes that this would require the source to submit two applications – one to EPA for GHGs and one to the state for any other pollutants. This approach increases rather than reduces permitting burden, and EPA should examine whether there are alternatives available that could correct this problem.

EPA's proposed regulatory language for synthetic minor permits states, in proposed 40 C.F.R. § 52.21(dd)(5)(ii)(a), that "the permit must include an emissions limitation that is legally

enforceable and enforceable as a practical matter, and is expressed *over the shortest practicable time period, generally not to exceed a 12-month rolling total*." *Id.* at 14,261/1. UARG believes this proposed regulatory language should be amended so that the emissions limitation would need to be "expressed over a 12-month rolling total time period." The proposed language requiring the limitation to be expressed "over the shortest practicable time period" has no basis in the Act and will lead to confusion over the time period. Synthetic minor permits are intended to restrict *annual* emissions at the source. Thus, a rolling time period of 12 months is sufficient and appropriate to determine whether the source has complied with its annual limit. Historically, rolling 12-month limits have been used in synthetic minor permits. That practice should not be changed here.

Finally, EPA requests comments on the possibility of excluding "empty" permits from Title V permitting. *Id.* at 14,255/1-2. UARG has expressed support for such an exclusion, *see* UARG Tailoring Rule Comments at 53-54, and continues to support it. Congress intended a Title V permit to be the repository of all CAA emission limitations or other substantive CAA requirements that in fact apply to the source in question. With respect to any source that is not subject to any such requirements (and therefore would have an empty permit), EPA can and should interpret the Title V permit application requirement to be inapplicable. When it addresses empty permits, EPA should make clear that any source that is subject to Title V permit requirements due to its emissions of non-GHG pollutants would not have to apply for an amended permit to address GHGs if it is not subject to any emission limitation or standard for GHGs under the CAA.

III. Conclusion

For the reasons discussed above, the Proposed Step 3 Tailoring Rule rests on the incorrect premises that EPA must, and may properly, regulate GHGs under the CAA's PSD and Title V permitting programs. In fact, GHGs are not an "air pollutant" under the PSD provisions of the CAA as a matter of law.

To the extent that EPA's PSD regulation of GHGs pursuant to the Tailoring Rule is upheld and remains in place, UARG supports EPA's proposal not to lower the GHG PSD and Title V permitting applicability thresholds. UARG generally supports the proposed revisions to the PSD rules that would amend the PAL regulations to allow PALs to be issued to major and potentially-major GHG stationary sources on either a mass basis or a CO_2e basis and that would allow PALs to be used as an alternative approach for determining whether a project is a major modification and subject to regulation for GHGs. UARG also generally supports EPA's proposed revisions to the PSD regulations that would allow EPA to issue GHG synthetic minor permits to GHG sources where EPA is the permitting authority.