ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 10-1073 (Lead) and Consolidated Cases (Complex)

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

COALITION FOR RESPONSIBLE REGULATION, INC., *ET AL.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND LISA P. JACKSON, ADMINISTRATOR,

Respondents.

On Petitions for Review of Final Agency Actions of the U.S. Environmental Protection Agency

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JOINT OPENING BRIEF OF NON-STATE PETITIONERS AND SUPPORTING INTERVENORS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Non-State Petitioners and Petitioner-Intervenors state as follows:

The Court's Order of March 21, 2011 (Doc. No. 1299257), rejected Petitioners' briefing proposal and required these 74 parties, representing a variety of interests, to file joint briefing subject to a combined word limit, and does not otherwise provide for separate argument where those interests may diverge. Any given argument presented or incorporated in this brief should not be construed as necessarily representing the views of each of these parties.

(A) Parties and *Amici*

PETITIONERS:

***Petitions for Review Challenging the Timing Rule*, 75 Fed. Reg. 17,004 (Apr. 2, 2010):**

Case No. 10-1073: Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.

Case No. 10-1083: Southeastern Legal Foundation, Inc.; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. - MDF; Langboard, Inc. - OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; John Linder, U.S. Representative, Georgia 7th District; Dana Rohrabacher, U.S. Representative, California 46th District; John Shimkus, U.S. Representative, Illinois 19th District; Phil Gingrey, U.S. Representative, Georgia 11th District; Lynn

Westmoreland, U.S. Representative, Georgia 3rd District; Tom Price, U.S. Representative, Georgia 6th District; Paul Broun, U.S. Representative, 10th District; Steve King, U.S. Representative, Iowa 5th District; Nathan Deal, U.S. Representative, Georgia 9th District; Jack Kingston, U.S. Representative, Georgia 1st District; Michele Bachmann, U.S. Representative, Minnesota 6th District; Kevin Brady, U.S. Representative, Texas 8th District; John Shadegg, U.S. Representative, Arizona 3rd District; Marsha Blackburn, U.S. Representative, Tennessee 7th District; Dan Burton, U.S. Representative, Indiana 5th District

Case No. 10-1099: Clean Air Implementation Project

Case No. 10-1109: American Iron and Steel Institute

Case No. 10-1110: Gerdau Ameristeel US Inc.

Case No. 10-1114: Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation

Case No. 10-1118: Peabody Energy Company

Case No. 10-1119: American Farm Bureau Federation

Case No. 10-1120: National Mining Association

Case No. 10-1122: Utility Air Regulatory Group

Case No. 10-1123: Chamber of Commerce of the United States of America

Case No. 10-1124: Missouri Joint Municipal Electric Utility Commission

Case No. 10-1125: National Environmental Development Association's Clean Air Project

Case No. 10-1126: Ohio Coal Association

Case No. 10-1127: National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan

Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Federation of Independent Business; National Oilseed Processors Association; National Petrochemical & Refiners Association; North American Die Casting Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers and Commerce

Case No. 10-1128: State of Texas; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; Commonwealth of Virginia; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; Haley Barbour, Governor of the State of Mississippi

Case No. 10-1129: Portland Cement Association

RESPONDENTS: United States Environmental Protection Agency (Respondent in all consolidated cases) and Lisa Perez Jackson, Administrator, United States Environmental Protection Agency (Respondent in No. 10-1123)

PETITIONER-INTERVENORS (WITH RESPECT TO CERTAIN PETITIONS FOR REVIEW): American Frozen Food Institute; American Petroleum Institute; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Louisiana Department of Environmental Quality; Michigan Manufacturers Association; National Association of Home Builders; National Association of Manufacturers; National Mining Association; National Oilseed Processors Association; National Petrochemical & Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce

RESPONDENT-INTERVENORS (WITH RESPECT TO CERTAIN PETITIONS FOR REVIEW): Alpha Natural Resources, Inc.; American Farm Bureau Federation; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Center for Biological Diversity; Chamber of Commerce of the United States of America; Clean Air Implementation Project; Coalition for Responsible Regulation, Inc.; Commonwealth of Massachusetts; Commonwealth of Pennsylvania, Department of Environmental Protection; Conservation Law Foundation; Corn Refiners Association; Georgia ForestWatch;

Glass Packaging Institute; Great Northern Project Development, L.P.; Independent Petroleum Association of America; Michigan Manufacturers Association; Industrial Minerals Association - North America; Mississippi Manufacturers Association; National Association of Home Builders; National Association of Manufacturers; National Cattlemen's Beef Association; National Environmental Development Association's Clean Air Project; National Federation of Independent Business; National Mining Association; National Oilseed Processors Association; National Petrochemical and Refiners Association; Natural Resources Council of Maine; Ohio Coal Association; Peabody Energy Company; Rosebud Mining Company; South Coast Air Quality Management District; Specialty Steel Industry of North America; State of California; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; Tennessee Chamber of Commerce and Industry; Utility Air Regulatory Group; Western States Petroleum Association; West Virginia Manufacturers Association; Wild Virginia; Wisconsin Manufacturers and Commerce

MOVANT-INTERVENORS: Environmental Defense Fund; Indiana Wildlife Federation; Michigan Environmental Council; Natural Resources Defense Council; Ohio Environmental Council; Sierra Club

***AMICI CURIAE* FOR CERTAIN PETITIONERS:** American Chemistry Council; Commonwealth of Kentucky

***Petitions for Review Challenging the Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010)**

Case No. 10-1131: Southeastern Legal Foundation, Inc.; John Linder, U.S. Representative, Georgia 7th District; Dana Rohrabacher, U.S. Representative, California 46th District; John Shimkus, U.S. Representative, Illinois 19th District; Phil Gingrey, U.S. Representative, Georgia 11th District; Lynn Westmoreland, U.S. Representative, Georgia 3rd District; Tom Price, U.S. Representative, Georgia 6th District; Paul Broun, U.S. Representative, Georgia 10th District; Steve King, U.S. Representative, Iowa 5th District; Jack Kingston, U.S. Representative, Georgia 1st District; Michele Bachmann, U.S. Representative, Minnesota 6th District; Kevin Brady, U.S. Representative, Texas 8th District; John Shadegg, U.S. Representative, Arizona 3rd District; Marsha Blackburn, U.S. Representative, Tennessee 7th District; Dan Burton, U.S. Representative, Indiana 5th District; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. -

OSB; Langboard, Inc. - MDF; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.

Case No. 10-1132: Coalition for Responsible Regulation, Inc.; Industrial Minerals Association - North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Company; Alpha Natural Resources, Inc.

Case No. 10-1145: The Ohio Coal Association

Case No. 10-1147: American Iron and Steel Institute

Case No. 10-1148: Gerdau Ameristeel US Inc.

Case No. 10-1199: Chamber of Commerce of the United States of America

Case No. 10-1200: Georgia Coalition for Sound Environmental Policy, Inc.

Case No. 10-1201: National Mining Association

Case No. 10-1202: American Farm Bureau Federation

Case No. 10-1203: Peabody Energy Company

Case No. 10-1206: Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation

Case No. 10-1207: South Carolina Public Service Authority

Case No. 10-1208: Mark R. Levin; Landmark Legal Foundation

Case No. 10-1210: National Environmental Development Association's Clean Air Project

Case No. 10-1211: State of Alabama; State of North Dakota; State of South Dakota; Haley Barbour, Governor of Mississippi; State of South Carolina; State of Nebraska

Case No. 10-1212: Utility Air Regulatory Group

Case No. 10-1213: Missouri Joint Municipal Electric Utility Commission

Case No. 10-1216: Clean Air Implementation Project

Case No. 10-1218: National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Independent Petroleum Association of America; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Oilseed Processors Association; National Petrochemical & Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce; National Association of Home Builders

Case No. 10-1219: National Federation of Independent Business

Case No. 10-1220: Portland Cement Association

Case No. 10-1221: Louisiana Department of Environmental Quality

Case No. 10-1222: Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; State of Texas

RESPONDENTS: United States Environmental Protection Agency (Respondent in all consolidated cases) and Lisa Perez Jackson, Administrator, United States Environmental Protection Agency (Respondent in Nos. 10-1199, 10-1219)

PETITIONER-INTERVENORS (WITH RESPECT TO CERTAIN PETITIONS FOR REVIEW): American Frozen Food Institute; American Petroleum Institute; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; National Association of Home Builders; National Association of Manufacturers; National Oilseed Processors Association; National Petrochemical & Refiners Association; Tennessee Chamber of Commerce and Industry; West Virginia Manufacturers Association; Western States Petroleum Association; Wisconsin Manufacturers & Commerce

RESPONDENT-INTERVENORS (WITH RESPECT TO CERTAIN PETITIONS FOR REVIEW): American Farm Bureau Federation; Brick Industry Association; Center for Biological Diversity; Clean Air Implementation Project; Commonwealth of Massachusetts; Commonwealth of Pennsylvania, Department of Environmental Protection; Conservation Law Foundation; Georgia ForestWatch; National Environmental Development Association's Clean Air Project; National Mining Association; Natural Resources Council of Maine; Peabody Energy Company; South Coast Air Quality Management District; State of California; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; Utility Air Regulatory Group; Wild Virginia

MOVANT-INTERVENORS: Environmental Defense Fund; Natural Resources Defense Council; Sierra Club

***AMICI CURIAE* FOR CERTAIN PETITIONERS:** American Chemistry Council; Commonwealth of Kentucky

(B) Rulings Under Review

These petitions for review challenge **(1)** EPA's final rule entitled *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"); and **(2)** EPA's final rule entitled *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010) ("Tailoring Rule").

(C) Related Cases

There are numerous cases related to these consolidated cases. The Court has placed these related cases into four separate groupings, as follows:

(1) Twenty-six petitions for review consolidated under lead case **No. 09-1322**: (a) 16 petitions challenging EPA's final rule, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Rule"); and (b) 10 petitions for review of EPA's denial of reconsideration of the Endangerment Rule, *EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 75 Fed. Reg. 49,556 (Aug. 13, 2010) ("Reconsideration Denial").

(2) Seventeen petitions for review consolidated under lead case **No. 10-1092**, challenging EPA's final rule, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010).

(3) Twelve petitions for review consolidated under lead case **No. 10-1167**: three petitions challenging each of the following four EPA Rules: (a) *Part 51 – Requirements for Preparation, Adoption, and Submittal of Implementation Plans: Prevention of Significant Air Quality Deterioration*, 43 Fed. Reg. 26,380 (June 19, 1978); (b) *Part 52 – Approval and Promulgation of State Implementation Plans: 1977 Clean Air Act Amendments to Prevent Significant Deterioration*, 43 Fed. Reg. 26,388 (June 19, 1978); (c) *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52,676 (Aug. 7, 1980); and (d) *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, 67 Fed. Reg. 80,186 (Dec. 31, 2002).

(4) Five petitions for review consolidated under lead case **No. 09-1018**, challenging EPA's December 18, 2008 memorandum regarding "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program," 73 Fed. Reg. 80,300 (Dec. 31, 2008).

Case No. 10-1209, *National Alliance of Forest Owners and American Forest & Paper Association v. EPA*, challenging the Tailoring Rule, was severed by Order dated May 27, 2011, from these consolidated cases on motion of Petitioners American Forest & Paper Association and National Alliance of Forest Owners, and by that Order was held in abeyance pending a decision in Case No. 10-1073. *See* Doc. No. 1307898 (motion to sever); Doc. No. 1310363 (Order placing case in abeyance).

Cases No. 10-1115, *Center for Biological Diversity v. EPA*, and No. 10-1215, *Sierra Club v. EPA*, challenging the Timing Rule and Tailoring Rule, respectively, were held in abeyance by Order dated November 16, 2010. *See* Doc. No. 1277729 (Order placing cases in abeyance). In addition, by that Order, certain issues in Case No. 10-1205, *Center for Biological Diversity v. EPA*, were severed and assigned a separate docket number, No. 10-1388, which the Court held in abeyance. *See id.* Center for Biological Diversity filed an unopposed motion (Doc. No. 1313541) on June 16, 2011, seeking to dismiss voluntarily its remaining Tailoring Rule claims in No. 10-1205, and the Court granted that motion on June 20, 2011 (Doc. No. 1314059).

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the following Petitioners and Petitioner-Intervenors provide the following disclosures:

Alpha Natural Resources, Inc. is a Delaware corporation engaged in the business of coal mining and gas production. Alpha Natural Resources, Inc. has no parent companies. No publicly-held corporation has a 10% or greater ownership interest in Alpha Natural Resources, Inc.

American Farm Bureau Federation ("AFBF") is a non-profit voluntary general farm organization founded in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF represents more than 6 million member families through membership organizations in all fifty States and Puerto Rico. AFBF has no member companies, and no publicly-held companies have an ownership interest in AFBF.

The American Frozen Food Institute ("AFFI") is a trade association that serves the frozen food industry by advocating its interests in Washington, D.C., and communicating the value of frozen food products to the public. The AFFI is comprised of 500 members including manufacturers, growers, shippers and warehouses, and represents every segment of the $70 billion frozen food industry. As a member-driven association, AFFI exists to advance the frozen food industry's agenda in the 21st century. The AFFI has no parent company, and no publicly held company has a 10% or greater ownership interest in the AFFI.

American Iron & Steel Institute ("AISI") is a non-profit, national trade association headquartered in the District of Columbia. AISI has no parent corporation, and no publicly held company has a ten percent or greater ownership interest in AISI. AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI is comprised of 24 member companies, including integrated and electric furnace steelmakers, and 138 associate and affiliate members who are suppliers to or customers of the steel industry. AISI's member companies represent approximately 75 percent of both U.S. and North American steel capacity.

American Petroleum Institute ("API") is a national trade association that represents all aspects of America's oil and natural gas industry. API has over 470 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline

operators and marine transporters, as well as service and supply companies that support all segments of industry. API has no parent company, and no publicly held company has a 10% or greater ownership interest in API.

The Brick Industry Association ("BIA") is a national trade association representing small and large brick manufacturers and associated services. Founded in 1934, the BIA is the recognized national authority on clay brick construction, representing approximately 270 manufacturers, distributors, and suppliers that generate approximately $9 billion annually in revenue and provide employment for more than 200,000 Americans. BIA has no parent company, and no publicly held company has a 10% or greater ownership interest in BIA.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is a non-profit corporation organized under the laws of the District of Columbia. It has no parent company and does not issue stock. It is a trade association within the meaning of Circuit Rule 26.1(b). The U.S. Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than 3,000,000 businesses and professional organizations of every size and in every economic sector and geographic region of the country. A central function of the U.S. Chamber is to advocate for the interests of its members in important matters before courts, Congress, and the Executive Branch.

The Clean Air Implementation Project ("CAIP") is a nonprofit trade association whose members are major petroleum, chemical, pharmaceutical, glass and gas pipeline companies. CAIP has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Coalition for Responsible Regulation, Inc. is a non-profit membership corporation organized under the laws of the State of Texas for the purpose of promoting social welfare, particularly to ensure that the Clean Air Act is properly applied with respect to greenhouse gases, and its members include businesses and trade associations of businesses engaged in activities that would likely be subject to regulation under the Clean Air Act for greenhouse gas emissions. Coalition for Responsible Regulation, Inc. has no parent companies. No publicly-held corporation has a 10% or greater ownership interest in Coalition for Responsible Regulation, Inc.

Collins Industries, Inc. is a Georgia corporation in the business of transporting building products. Collins Industries, Inc. has no parent corporation.

No publicly-held corporation has 10% or greater ownership interest in Collins Industries, Inc.

Collins Trucking Company, Inc. is a Georgia corporation in the business of transporting pine and hardwood logs in the State of Georgia. Collins Trucking Company, Inc. is a subsidiary of Collins Industries, Inc. No publicly-held corporation has 10% or greater ownership interest in Collins Trucking Company, Inc.

The Corn Refiners Association ("CRA") is the national trade association representing the corn refining (wet milling) industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture starches, sweeteners, corn oil, bioproducts (including ethanol), and animal feed ingredients. CRA has no parent company, and no publicly held company has a 10% or greater ownership interest in CRA.

The Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation ("Energy-Intensive Manufacturers' Group") is a trade association formed for the purpose of promoting the general policy interests of its members. The Energy-Intensive Manufacturers' Group represents companies from a broad swath of United States manufacturing, including the ferrous and non-ferrous metal, cement, glass, ceramic, chemical, paper, and nitrogen fertilizer industries. The Energy-Intensive Manufacturers' Group has no parent company, and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public. As such, no publicly held company has a 10% or greater ownership interest in the Energy-Intensive Manufacturers' Group.

Georgia Agribusiness Council, Inc. is a Georgia corporation whose mission is to advance the business of agriculture and promote environmental stewardship to enhance the quality of life for all Georgians. The Georgia Agribusiness Council, Inc. has no parent company. No publicly-held company has a 10% or greater ownership in the Georgia Agribusiness Council, Inc.

Georgia Coalition for Sound Environmental Policy, Inc. ("GCSEP") is a nonprofit corporation under the Georgia Nonprofit Corporation Code. It was organized to assist in the development of technically and legally sound environmental policy, including Federal and State regulations designed to address, among other issues, air quality matters. Because GCSEP is an incorporated and continuing association of numerous companies and business organizations operated for the purpose of promoting the interests of its membership, no listing of its individual members that have issued shares or debt securities to the public is required under Circuit Rule 26.1(b).

Georgia Motor Trucking Association, Inc. is a Georgia corporation that serves as the "voice" of the trucking industry in Georgia, representing more than 400 for-hire carriers, 400 private carriers, and 300 associate members. The mission of the Georgia Motor Trucking Association is to promote: reasonable laws; even-handed, common-sense administration; equitable and competitive fees and taxes; a market, political and social environment favorable to the trucking industry; and good citizenship among the people and companies of Georgia's trucking industry. Georgia Motor Trucking Association, Inc. has no parent corporation. No publicly-held corporation has a 10% or greater ownership interest in the Georgia Motor Trucking Association.

Gerdau Ameristeel Corporation ("Gerdau Long Steel North America" or "GLN"), headquartered in Tampa, Florida, manufactures steel at facilities located throughout the United States and Canada. Gerdau S.A., which is approximately 47% owned by Metalurgica Gerdau S.A., has a 10% or greater indirect ownership interest in GLN.

The Glass Association of North America ("GANA") is the leading association serving flat glass manufacturers, fabricators and glazing contractors. GANA's mission is to provide industry leadership and guidance, education and knowledge; promote the use of value-added glass and glazing products; provide a forum for exchanging information and ideas through its divisions and membership; and provide a unified voice on matters affecting the glass and glazing industry.

The Glass Packaging Institute ("GPI") is a national trade association that represents the interests of the North American glass container industry to promote understanding of the industry and promote sound environmental and health regulatory policies. GPI's member companies bring a broad array of products to consumers, producing glass containers for food, beer, soft drinks, wine, liquor, cosmetics, toiletries, medicines and other products. GPI members are involved in a highly competitive market that includes both glass containers and potential substitute container products such as metals and plastics. GPI has no parent company, and no publicly held company holds more than a 10% ownership interest in GPI.

Great Northern Project Development, L.P. is a Delaware limited partnership engaged in the business of developing, constructing, and operating coal gasification projects. Great Northern Project Development, L.P. has no parent companies. No publicly-held corporation has a 10% or greater ownership interest in Great Northern Project Development, L.P.

Independent Petroleum Association of America ("IPAA") is the leading, national upstream trade association representing more than 5,000 independent oil and natural gas producers that drill 90 percent of the nation's oil and natural gas wells. These companies account for 68 percent of America's oil production and 82 percent of its natural gas production. Independent producers represent the exploration and production segment of the industry. IPAA has no parent company, and no publicly held company has a 10% or greater ownership interest in IPAA.

The Indiana Cast Metals Association ("INCMA") states that it is a not-for-profit trade association organized for the purposes of promoting the general commercial, professional, and legislative interests of its approximately 70 foundry and associate members throughout Indiana. INCMA's membership includes entities that manufacture metal castings that in general are found in more than 90 percent of all manufactured goods or other manufacturing processes such as automotive, defense, agriculture, energy and renewable energy, and many more. INCMA has no parent company, and no publicly held company has a 10% or greater ownership interest in INCMA.

Industrial Minerals Association – North America ("IMA-NA") is a trade association representing the interests of producer member companies that extract and process industrial minerals, and associate member companies that provide goods and services to the industrial minerals industry. IMA-NA has no parent companies. No publicly-held corporation has a 10% or greater ownership interest in IMA-NA.

J&M Tank Lines, Inc. is a Georgia corporation in the business of transporting industrial grade products, such as lime, calcium carbonate, cement, and sand, as well as food grade products such as flour, and agricultural grade products such as salt. J&M Tank Lines, Inc. operates a fleet of 265 tractors and 414 tanks, with 9 terminals located in Georgia, Alabama, and Texas. J&M Tank Lines, Inc. has no parent company. No publicly held corporation has a 10% or greater ownership in J&M Tank Lines, Inc.

Kennesaw Transportation, Inc. is a Georgia corporation in the business of truckload long-haul transportation of goods, serving an area from Georgia south to Florida, north to Illinois, and west to Washington, Oregon, California, Nevada and Arizona. Kennesaw Transportation, Inc. has no parent company. No publicly-held corporation has a 10% or greater ownership interest in Kennesaw Transportation, Inc.

Landmark Legal Foundation is a Missouri nonprofit corporation and national public interest law firm except from taxation under 26 U.S.C. § 501(c)(3).

Landmark Legal Foundation does not have a parent company and is not traded for profit.

Langboard, Inc.-MDF is a Georgia corporation in the business of producing Medium Density Fiberboard ("MDF"). MDF is used in various applications including molding, flooring and furniture. Langboard, Inc.-MDF is a wholly owned subsidiary of The Langdale Company. No publicly-held corporation has 10% or greater ownership in Langboard, Inc.-MDF.

Langboard, Inc.-OSB is a Georgia corporation in the business of producing Oriented Strand Board ("OSB"). OSB is used in the home construction industry as a panel in flooring, roofing and siding. Langboard, Inc.-OSB is a wholly owned subsidiary of The Langdale Company. No publicly-held corporation has 10% or greater ownership in Langboard, Inc.-OSB.

Langdale Chevrolet-Pontiac, Inc. is a Georgia corporation in the business of selling and servicing Chevrolet and Pontiac automobiles. Langdale Chevrolet - Pontiac, Inc. is a wholly owned subsidiary of The Langdale Company. No publicly-held corporation has 10% or greater ownership in Langdale Chevrolet - Pontiac, Inc.

The Langdale Company is a Georgia corporation and is the parent company for a diverse group of businesses, some of which are described elsewhere in this Certificate. The Langdale Company has no parent companies. No publicly held corporation has 10% or greater ownership in the Langdale Company.

Langdale Farms, LLC is a Georgia corporation in the business of producing soybeans, peanuts, cotton, pecans, tomatoes, hay, cattle, and fish. Langdale Farms, LLC is a wholly owned subsidiary of The Langdale Company. No publicly-held corporation has 10% or greater ownership in Langdale Farms, LLC.

Langdale Ford Company is a Georgia corporation in the business of selling and servicing Ford automobiles and trucks with one of the largest new car and truck dealerships in the area with sales, service, parts, body repair and commercial/fleet departments. Langdale Ford Company is a wholly owned subsidiary of The Langdale Company. No publicly-held corporation has 10% or greater ownership in Langdale Ford Company.

Langdale Forest Products Company is a Georgia corporation and is a leading producer of lumber, utility poles, marine piling and fence posts. Langdale Forest Products Company is a wholly owned subsidiary of the Langdale Company.

No publicly-held corporation has 10% or greater ownership in Langdale Forest Products Company.

Langdale Fuel Company is a Georgia corporation in the business of providing fuel for The Langdale Company's needs. It is comprised of two divisions which provide wholesale Fuel and Lubricants. Langdale Fuel Company is a wholly owned subsidiary of The Langdale Company. No publicly-held corporation has 10% or greater ownership in Langdale Fuel Company.

The Michigan Manufacturers Association ("Michigan MA") is a private nonprofit organization and is the State of Michigan's leading advocate exclusively devoted to promoting and maintaining a business climate favorable to industry. Michigan MA represents the interests and needs of over 2,500 members, ranging from small manufacturing companies to some of the world's largest corporations. Michigan MA's members operate in the full spectrum of manufacturing industries, which account for 90% of Michigan's industrial workforce and employ over 500,000 Michigan citizens. Michigan MA has no parent company, and no publicly held company has a 10% or greater ownership interest in Michigan MA.

Mississippi Manufacturers Association ("Mississippi MA") is Mississippi's largest industrial trade association, representing small and large manufacturers in every industrial sector within the State. The mission of the Mississippi MA is to provide unrelenting advocacy in support of measures benefiting manufacturers while also working to eliminate unfair, unnecessary or costly burden on the operation of Mississippi's manufacturing community. The Mississippi MA has no parent company, and no publicly held company has a 10% or greater ownership interest in the Mississippi MA.

Missouri Joint Municipal Electric Utility Commission ("MJMEUC") is a non-profit utility joint action agency, authorized by Missouri State law (MO. ANN. STAT. §§ 393.700-393.770). MJMEUC has no parent corporation or public shareholders. MJMEUC services rural communities. It is composed of 60 municipalities providing electric service to their customers. MJMEUC owns or has long-term power purchase agreements with four coal-fired power plants in four States in the Midwest and South.

National Association of Home Builders ("NAHB") is a not-for-profit trade association organized for the purposes of promoting the general commercial, professional, and legislative interests of its approximately 160,000 builder and associate members throughout the United States. NAHB's membership includes entities that construct and supply single family homes, as well as apartment,

condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB does not have any parent companies that have a 10% or greater ownership interest in NAHB, and no publicly held company has a 10% or greater ownership interest in NAHB.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM has no parent company, and no publicly held company has a 10% or greater ownership interest in the NAM.

National Cattlemen's Beef Association ("NCBA") is a trade association representing more than 230,000 cattle breeders, producers, and feeders in the United States. NCBA has no parent companies. No publicly-held corporation has a 10% or greater ownership interest in NCBA.

National Environmental Development Association's Clean Air Project ("NEDA/CAP") is a nonprofit trade association, as defined under Circuit Rule 26.1(b), whose member companies represent a broad cross-section of American industry. NEDA/CAP addresses issues of interest to its members relating to the development and implementation of requirements under Federal and State clean air programs. NEDA/CAP does not have any outstanding securities in the hands of the public, nor does NEDA/CAP have a publicly owned parent, subsidiary, or affiliate.

The National Federation of Independent Business ("NFIB") is the nation's leading association of small businesses and has a presence in all 50 States and the District of Columbia. NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. NFIB has no parent company, and no publicly held company has a 10% or greater interest in NFIB.

The National Mining Association ("NMA") is a non-profit, incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public, although NMA's individual members have done so.

The National Oilseed Processors Association ("NOPA") is a national trade association that represents 13 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 63 plants located in 19 states throughout the country, including 58 plants that process soybeans. NOPA has no parent company, and no publicly held company has a 10% or greater ownership interest in NOPA.

The National Petrochemical and Refiners Association ("NPRA") is a national trade association whose members comprise more than 450 companies, including virtually all United States refiners and petrochemical manufacturers. NPRA's members supply consumers with a wide variety of products and services that are used daily in homes and businesses. These products include gasoline, diesel fuel, home-heating oil, jet fuel, asphalt products, and the chemicals that serve as "building blocks" in making plastics, clothing, medicine, and computers. NPRA has no parent company, and no publicly held company has a 10% or greater ownership interest in NPRA.

The North American Die Casting Association ("NADCA") serves as the voice of the die casting industry. NADCA represents more than 3,000 individual and 300 corporate members in the U.S., Canada and Mexico. NADCA is committed to promoting industry awareness, domestic growth in the global marketplace and member exposure. NADCA has no parent company, and no publicly held company has a 10% or greater ownership interest in NADCA.

The Ohio Coal Association ("OCA") is an unincorporated trade association dedicated to representing Ohio's coal industry. As a united front, OCA is committed to advancing the development and utilization of Ohio coal as an abundant, economic, and environmentally sound energy source. OCA has not issued shares or debt securities to the public and has no parent companies, subsidiaries, or affiliates that have any outstanding shares or debt securities issued to the public.

Peabody Energy Company ("Peabody") is a publicly-traded company and, and to its knowledge, has no shareholder owning ten percent or more of its common stock with the exception of BlackRock, Inc., which reported that at December 31, 2009, it owned approximately 10.96% of Peabody's outstanding common stock. Peabody's principal business is the mining and sale of coal.

The Portland Cement Association is a not-for-profit trade association that represents more than thirty companies in the United States and Canada engaged in the

manufacture of portland cement. The Portland Cement Association conducts market development, engineering, research, education, technical assistance and public affairs programs on behalf of its member companies. Its mission focuses on improving and expanding the quality and uses of cement and concrete, raising the quality of construction, and contributing to a better environment. The Portland Cement Association is a "trade association" within the meaning of Circuit Rule 26.1(b). It has no parent corporation, and no publicly held company owns a 10 percent or greater interest in the Portland Cement Association.

Rosebud Mining Company is a Pennsylvania corporation engaged in the business of bituminous coal mining primarily in Ohio and Pennsylvania. Rosebud Mining Company has no parent companies. No publicly-held corporation has a 10% or greater ownership interest in Rosebud Mining Company.

Santee Cooper**,** as an agency of the State of South Carolina, is a governmental entity; therefore, a corporate disclosure statement is not required under Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1.

Southeastern Legal Foundation, Inc. ("SLF") is a non-profit Georgia corporation and constitutional public interest law firm and policy center that advocates limited government, individual economic freedom, and the free enterprise system in the courts of law and public opinion. SLF has no parent companies. No publicly-held corporation has 10% or greater ownership interest in SLF.

Southeast Trailer Mart, Inc. is a Georgia corporation in the business of selling new and used semi-trailers, along with providing related parts and services. Southeast Trailer Mart, Inc. has no parent company. No publicly-held company has a 10% or greater ownership interest in Southeast Trailer Mart, Inc.

The Specialty Steel Industry of North America ("SSINA") is a national trade association comprised of 17 producers of specialty steel products, including stainless, electric, tool, magnetic, and other alloy steels. SSINA members produce steel by melting scrap metal in electric arc furnaces and account for over 90 percent of the specialty steel manufactured in the United States. The SSINA has no parent company, and no publicly held company has a 10% or greater ownership interest in the SSINA.

The Tennessee Chamber of Commerce & Industry (the "Tennessee Chamber") is Tennessee's largest statewide, broad-based business and industry trade association representing small and large businesses and organizations in every economic sector across the State. The Tennessee Chamber exists to protect and

enhance the business climate in Tennessee, enabling Tennessee companies to be competitive and to grow and create jobs. The Tennessee Chamber has no parent company, and no publicly held company has a 10% or greater ownership interest in the Tennessee Chamber.

Utility Air Regulatory Group ("UARG") is a not-for-profit association of individual electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

The Western States Petroleum Association ("WSPA") is headquartered in California and is a non-profit trade association that represents companies that account for the bulk of petroleum exploration, production, refining, transportation, and marketing in the six western States of Arizona, California, Hawaii, Nevada, Oregon, and Washington. WSPA has no parent company, and no publicly held company has a 10% or greater ownership interest in WSPA.

West Virginia Manufacturers Association ("WVMA") is a non-profit, statewide organization that has been continuously representing the interests of the manufacturing industries in West Virginia since 1915. Its membership currently consists of one hundred fifty (150) member companies employing twenty-five thousand (25,000) men and women in West Virginia. The average wage of employees of WVMA's members in West Virginia is forty-four thousand two hundred dollars ($44,200). WVMA has no parent company, and no publicly held company has a 10% or greater ownership interest in WVMA.

The Wisconsin Manufacturers and Commerce ("WMC") is a business trade association with nearly 4,000 members, and is dedicated to making Wisconsin the most competitive State in the nation to do business through public policy that supports a healthy business climate. Its members are Wisconsin businesses that operate throughout the State in the manufacturing, energy, commercial, health care, insurance, banking, and service industry sectors of the economy. Roughly one-fourth of Wisconsin's workforce is employed by a WMC member company. WMC has no parent company, and no publicly held company has a 10% or greater ownership interest in WMC.

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Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

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GLOSSARY OF TERMS

1980 Rule Brief	Joint Opening Brief of Industry Petitioners, *American Chemistry Council v. EPA*, No. 10-1167 (filed May 10, 2011)
Act	Clean Air Act
Agency	U.S. Environmental Protection Agency
ANPR	Advance Notice of Proposed Rulemaking, *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354 (July 30, 2008)
BACT	Best Available Control Technology
CAA	Clean Air Act
CO	Carbon Monoxide
CO_2	Carbon Dioxide
Endangerment Rule	Proposed Rule, *Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 18,886 (Apr. 24, 2009) Final Rule, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009)
Endangerment Rule Brief	Joint Opening Brief of Non-State Petitioners and Supporting Intervenors, filed May 20, 2011 in *Coalition for Responsible Regulation v. EPA*, No. 09-1322 (filed May 20, 2011)
EPA	U.S. Environmental Protection Agency
FIP	Federal Implementation Plan
GHG(s)	Greenhouse gas(es)
HC	Hydrocarbons

NAAQS	National Ambient Air Quality Standards
NOx	Nitrogen Oxides
Paperwork Reduction Act	44 U.S.C. §§ 3501-3520
Part C	Clean Air Act §§ 160-169B, 42 U.S.C. §§ 7470-7492 (the CAA provisions containing the PSD and visibility programs)
PM	Particulate Matter
PSD	Prevention of Significant Deterioration, Clean Air Act Title I, Part C, §§ 160-169, 42 U.S.C. §§ 7470-7479
Regulatory Flexibility Act	5 U.S.C. §§ 601-612
SIP	State Implementation Plan
Small Business Regulatory Enforcement Fairness Act	Pub. L. No. 104-121 (1996), *as amended by* Pub. L. No. 110-28 (1997) (codified in scattered sections of 5 U.S.C., 15 U.S.C., and 28 U.S.C.)
SO_2	Sulfur Dioxide
Tailoring Rule	Proposed Rule, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292 (Oct. 27, 2009) Final Rule, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010)
Tailpipe Rule	*Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010)

Timing Rule	Final Rule, *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010)
Title V	Clean Air Act §§ 501-507, 42 U.S.C. §§ 7661-7661f
Tpy	Tons per year
Unfunded Mandates Reform Act	Pub. L. No. 104-4, 109 Stat. 48, Title II, codified at 2 U.S.C. §§ 1531-1538

JURISDICTIONAL STATEMENT

Petitioners seek review of two final rules of the U.S. Environmental Protection Agency ("EPA" or "Agency"): **(1)** *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"); and **(2)** *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010) ("Tailoring Rule"). Petitions for review of each rule were filed within the 60-day period under Clean Air Act ("CAA" or "Act") § 307(b)(1). This Court has jurisdiction under that provision.

STATEMENT OF ISSUES

1. Whether preconstruction permits under the CAA's Prevention of Significant Deterioration ("PSD") program are required only when a stationary source emits major amounts of a pollutant whose air quality standard is being attained locally.

2. Whether, given the nature of greenhouse gases ("GHGs") and the PSD program, GHGs are among the pollutants that may be regulated under that program.

3. Whether EPA must follow statutory procedures for GHGs to become part of the PSD program.

4. Whether EPA has authority to regulate GHG emissions under CAA Title V.

5. Whether the Tailoring Rule applicability dates are unlawful and cannot be interpreted to revise approved State implementation plans ("SIPs").

6. Whether EPA's decision to include six GHGs as "subject to regulation" was arbitrary and capricious.

7. Whether EPA failed to conduct required analyses and consider the Tailoring Rule's burdens.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are in the Addendum (Appendix A). Citations of the CAA herein are to the Act, not the U.S. Code. Appendix B provides cross-references.

STATEMENT OF THE CASE AND FACTS

This case involves EPA's regulation of GHGs under the CAA and, in particular, EPA's Timing and Tailoring Rules, which expand the CAA's PSD and Title V permitting programs to include stationary sources of GHGs.

I. THE CAA'S STRUCTURE

The CAA's six titles establish different programs to address distinct air pollution problems in different geographic areas from different types of sources. The Timing and Tailoring Rules involve the Title I, Part C PSD preconstruction permitting program for major stationary sources of air pollution and the Title V permitting program, which requires collection in one "operating permit" of all federally enforceable air pollution control requirements applicable to a source.

A. National Ambient Air Quality Standards

The starting point for regulating stationary sources under the CAA is the national ambient air quality standards ("NAAQS") program in section 109. NAAQS define the maximum allowed concentrations of pollutants in the "ambient" air, the air people breathe. *See Train v. NRDC*, 421 U.S. 60, 65 (1975). EPA sets NAAQS for "criteria pollutants"—ozone, sulfur dioxide ("SO_2"), particulate matter ("PM"),

nitrogen oxides ("NOx"), carbon monoxide ("CO"), and lead. CAA § 108(a). For each criteria pollutant, EPA must set NAAQS to protect "public health" with an "adequate margin of safety" and to protect "public welfare" from "known or anticipated adverse effects." *Id.* § 109(b).

Under sections 107 and 110, States have primary responsibility to implement the EPA-promulgated NAAQS within their borders by adopting emission limitations and other measures necessary to attain and maintain the NAAQS. For each State, these measures are collected in a SIP.

Section 107 assigns responsibility for achieving NAAQS on a geographic basis, and authorizes EPA to designate interstate air quality control regions. *Id.* § 107(a), (c). For each NAAQS, EPA must designate each area as "attainment" (air quality as good as or better than the NAAQS) or "nonattainment" (air quality worse than the NAAQS).[1] *Id.* § 107(d). Area designations are NAAQS-specific and, therefore, "pollutant-specific" as well. *Alabama Power*, 636 F.2d at 350. A single geographic area may be in attainment with one NAAQS but nonattainment with another.

B. The PSD Program

The PSD program originated from litigation following EPA's approval of the first SIPs in 1972. In *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), *aff'd per*

[1] For lack of data, an area may be designated unclassifiable for a NAAQS. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 343 n.2 (D.C. Cir. 1979). Because unclassifiable and attainment areas are treated the same for PSD purposes, this brief's references to "attainment" areas encompass unclassifiable areas.

curiam, 4 Env't Rep. Cas. (BNA) 1815 (D.C. Cir. 1972), *aff'd per curiam by an equally divided Court sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973), EPA was ordered to disapprove any SIP for an attainment area that allowed air quality to deteriorate to the level of a NAAQS. *Id.* at 257. In 1974, implementing the court's decision, EPA established the initial PSD program. EPA's regulations addressed potential degradation in "area-wide concentrations" of pollution that were "expected to result from localized … activity" regarding only two pollutants with NAAQS—SO_2 and PM. 39 Fed. Reg. 31,000, 31,006 (Aug. 27, 1974).

The regulations sought to "prevent significant deterioration" of attainment areas by requiring preconstruction review of major sources (and major modifications of sources) so the permitting authority could determine whether (1) the source would not cause ambient air quality impacts above specified numerical "increments" that quantified "significant deterioration" for SO_2 and PM; and (2) the source would employ "best available control technology" ("BACT") for SO_2 and PM emissions. EPA explained that this program would help manage public health and welfare risks. In the future, EPA said, "it may become desirable to control deterioration due to … additional pollutants for which national standards might be set." 39 Fed. Reg. at 31,006.

In 1977, Congress enacted a statutory PSD program, based on the 1974 regulatory program. Like the 1974 regulations, the statutory PSD program requires new sources and major modifications to obtain preconstruction permits. In the

statutory PSD program, Congress established detailed requirements for SO_2 and PM, CAA § 163; set applicability thresholds geared to capture the intended sources of those pollutants, *id.* § 169(1); required BACT for "each pollutant subject to regulation" under the Act, *id.* § 165(a)(4); and authorized EPA to develop a PSD program for other existing NAAQS and future NAAQS, *id.* § 166. Along with the PSD program, Congress in 1977 included in Title I, Part C a new program requiring protection of "visibility" in national parks. *Id.* § 169A.

Reflecting the PSD program's focus on ambient air quality, Congress provided:

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

Id. § 161 (emphasis added). These Part C regulations were to require, among other things, "an analysis of any air quality impacts" of the proposed facility and any associated growth. *Id.* § 165(a)(3), (6). Reflecting the PSD provisions' focus on local health-and-welfare effects, Congress directed EPA to promulgate regulations for "analysis … of *the ambient air quality* at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this [Act] which will be emitted from such facility." *Id.* § 165(e)(1) (emphasis added).

Concerned with the PSD program's potential economic impacts, Congress set precise, numerical tonnage amounts restricting the sources EPA could regulate. *See, e.g.*, S. REP. NO. 95-127, at 96-97 (1977), *reprinted in* 3 A LEGISLATIVE HISTORY OF THE

CLEAN AIR ACT AMENDMENTS OF 1977, at 1470-71 (1979). Congress also limited source coverage by location, requiring permits for "major emitting facilit[ies] … *in any area to which this part applies*." CAA § 165(a) (emphasis added). Congress defined "major emitting facility" as a large facility emitting (or with potential to emit) at least 250 tons per year ("tpy") of "any air pollutant," or 100-tpy of "any air pollutant" for statutorily enumerated industrial source categories. *Id.* § 169(1). It also required PSD permits to be issued within one year. *Id.* § 165(c). Congress similarly defined "major stationary source" under the Part C visibility program as a source emitting at least 250-tpy of "any pollutant." *Id.* § 169A(g)(7).

In rulemakings, EPA defined the pollutants to which the Part C (the PSD program and the new visibility protection program) emission thresholds apply. For PSD, EPA applied the statutory thresholds for emissions of "any air pollutant," not to *all* pollutants, but only to pollutants "subject to regulation" by borrowing that phrase from CAA § 165(a)(4). For the visibility program, consistent with that program's purpose, EPA similarly limited "any pollutant" to visibility-impairing pollutants. *Compare* 40 C.F.R. § 52.21(b)(10) (1978) (PSD) *with* 40 C.F.R. pt. 51, App. Y, § III.A.2 (visibility).

C. Title V

Like PSD, Title V covers "major stationary sources" but defines that term differently to include sources emitting or with potential to emit at least 100-tpy of "any air pollutant." CAA §§ 302(j), 501(2). EPA's Title V regulations limit its

coverage to those pollutants that Title V targets—the pollutants addressed in CAA regulatory requirements that are "applicable" to a source (*i.e.*, "regulated pollutants"). *See, e.g.*, 40 C.F.R. § 70.2 ("applicable requirement" and "major source" definitions).

II. EPA'S GHG REGULATIONS

A. Background

A 1999 rulemaking petition asked EPA to regulate GHG emissions from vehicles under CAA § 202(a)(1) in Title II of the Act. 66 Fed. Reg. 7486 (Jan. 23, 2001). EPA denied the petition, saying it lacked authority to regulate GHGs. 68 Fed. Reg. 52,922 (Sept. 8, 2003). On review, the Supreme Court held EPA had authority to consider regulation of vehicles' GHG emissions because GHGs fall within the Act's "capacious" definition of "air pollutant" (CAA § 302(g)), and "[t]he broad language of § 202(a)(1) reflects an intentional effort" by Congress to authorize regulation of motor vehicle emissions to the outer bounds of that definition. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). In directing EPA to reconsider the rulemaking petition, the Court carefully explained it was *not* directing EPA to regulate GHGs. *Id.* at 533-35.

Following *Massachusetts*, EPA issued an Advance Notice of Proposed Rulemaking ("ANPR") and announced its intent to consider carefully the consequences of Title II GHG regulation. 73 Fed. Reg. 44,354 (July 30, 2008). In 2009, however, EPA abandoned its ANPR approach and refused to consider the consequences of its contemplated regulations. Instead, deeming such consequences

irrelevant, EPA issued a final rule under CAA § 202(a)(1), determining that vehicle GHG emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 74 Fed. Reg. 66,496, 66,506 (Dec. 15, 2009) ("Endangerment Rule"). EPA did not find that GHGs in the ambient air endanger public health or welfare; rather, it purported to find that GHGs dispersed throughout the global atmosphere affect climate. *See id.* at 66,514-16; Joint Opening Brief of Non-State Petitioners and Supporting Intervenors, *Coalition for Responsible Regulation v. EPA*, No. 09-1322, at 25 (filed May 20, 2011) ("Endangerment Rule Brief"). Then, concluding that the Endangerment Rule required it to promulgate GHG emission standards for vehicles under section 202(a)(1), EPA published such regulations. 75 Fed. Reg. 25,324 (May 7, 2010) ("Tailpipe Rule").

B. The Timing Rule

In 2008, EPA concluded that pollutants "subject to regulation" under PSD included only those pollutants subject to actual emission-control requirements. Because no such requirements for GHGs existed then, EPA concluded that the PSD program did not apply to GHGs at that time. After environmental groups sought reconsideration, EPA adopted its Timing Rule, providing that a pollutant becomes "subject to regulation" for PSD purposes when an emission-control requirement for that pollutant "takes effect." 75 Fed. Reg. at 17,006. According to EPA, the Tailpipe Rule took effect on January 2, 2011, and that date would be the effective date for GHG requirements under the PSD program. *Id.* at 17,019.

C. The Tailoring Rule

As EPA interpreted the CAA, (i) the Endangerment Rule required EPA to issue the Tailpipe Rule under Title II, and (ii) the Tailpipe Rule required EPA to regulate GHG emissions from stationary sources under PSD and Title V. 75 Fed. Reg. at 31,517. According to EPA, adding GHGs to the PSD and Title V programs would extend the programs to tens of thousands (under PSD) or millions (under Title V) of sources never before subject to either. *See, e.g.*, *id.* at 31,533, 31,563, 31,576. As EPA explained, "[t]hese results are not consistent with other provisions of the PSD and title V requirements, and are inconsistent with—and, indeed, undermine—congressional purposes for the PSD and title V provisions." *Id.* at 31,547. EPA acknowledged that "applying PSD requirements literally to GHG sources at the present time … would result in a program that would have been unrecognizable to the Congress that designed PSD." *Id.* at 31,555.

To address this problem, EPA proposed rewriting several statutory emission thresholds set by Congress (*i.e.*, 100 or 250-tpy of a pollutant for PSD, or 100-tpy for Title V) in CAA §§ 169(1), 501, and 302(j). Specifically, EPA proposed that, "[n]otwithstanding" those thresholds, a stationary source would be subject to the PSD and Title V programs based on its GHG emissions only if those emissions exceed 25,000 tpy. 74 Fed. Reg. 55,292, 55,351, 55,352 (Oct. 27, 2009) (PSD); *id.* at 55,361, 55,365 (Title V).

During its Tailoring Rule rulemaking, EPA realized that rewriting the statutory emission thresholds would not solve its overbreadth problem because, among other things, those thresholds appear in independently enforceable SIPs. *See* 75 Fed. Reg. at 31,581. Accordingly, in the final Tailoring Rule, EPA adopted a new approach to circumvent the statutory thresholds and achieve indirectly what EPA recognized it could not achieve directly. The final Tailoring Rule amends 40 C.F.R. § 51.166, EPA's regulatory provision defining minimum requirements for PSD SIPs, and treats GHGs differently from all other pollutants "subject to regulation" under PSD.

First, the Tailoring Rule amends § 51.166 to include a new definition of the term "subject to regulation" that exempts GHG sources from the class of "major emitting facilities" potentially subject to PSD if they emit GHGs in amounts below a new GHG-specific emission threshold (100,000-tpy). This amount is orders of magnitude above the CAA's unambiguous 100/250-tpy thresholds. Under the rule, sources emitting GHGs below the Tailoring Rule's 100,000-tpy major source threshold are not "major emitting facilities," while sources emitting GHGs at or above that threshold are.

Second, the Tailoring Rule provides a special method for calculating quantities of GHG emissions. The method multiplies emission mass by "global warming potential," yielding a measure of "CO_2 equivalent emissions." 75 Fed. Reg. at 31,606-07 (promulgating 40 C.F.R. §§ 51.166(b)(48)(ii), 52.21(b)(49)(ii)).

Third, the Tailoring Rule sets January 2, 2011, as the "Step 1" date at which GHG requirements would apply to a source only if it needed a PSD permit for emissions of another pollutant. 75 Fed. Reg. at 31,566; *see also id.* at 31,606-07 (promulgating 40 C.F.R. §§ 51.166(b)(48)(iv), 52.21(b)(49)(iv)). In "Step 2," beginning on July 1, 2011, GHG emissions alone could trigger PSD permitting requirements. *Id.* at 31,566; *see also id.* at 31,606-07 (promulgating 40 C.F.R. §§ 51.166(b)(48)(v), 52.21(b)(49)(v)). In addition, based on its interpretation that it must regulate under PSD and Title V "any pollutant regulated under th[e] Act" and emitted in amounts at or above the 100/250-tpy thresholds, *see* 75 Fed. Reg. at 31,561 n.44, EPA committed in regulatory language to conduct future rulemaking to extend PSD requirements to smaller GHG sources. *Id.* at 31,607-08. A "Step 3[] that would apply PSD and title V to additional sources" will be finalized "no later than July 1, 2012," and "another round of [EPA] rulemaking addressing [even] smaller sources" will be completed "by April 30, 2016." *Id.* at 31,566.

In adopting these requirements, EPA rejected commenters' arguments that it either was required or had discretion to interpret the CAA to avoid any "absurd results" caused by its interpretation that Title II GHG regulation automatically triggered stationary source GHG regulation. *Id.* at 31,548. Commenters noted that EPA could interpret the term "air pollutant" to confine the PSD and Title V programs to their congressionally intended scopes. *See, e.g.*, Docket EPA-HQ-OAR-2009-0517-5317, at 15, 19-40. Notwithstanding EPA's prior actions limiting "any air

pollutant" under Titles I and V, EPA responded that, "[w]e do not believe that this term is ambiguous with respect to the need to cover GHG sources under either the PSD or title V program." 75 Fed. Reg. at 31,548 n.31. Commenters also argued that, under section 165(a), PSD permitting can be required only for new or modified sources emitting major amounts of pollutants with NAAQS that are being attained in the sources' local area. *See, e.g.*, Docket EPA-HQ-OAR-2009-0517-4862, at 4. EPA responded that, "[w]e find no support for th[is] proposition." 75 Fed. Reg. at 31,561 n.44. Commenters also noted that, if EPA wanted to add GHGs to the PSD program, it needed to comply with the provision of the Act—section 166—expressly designated for adding "Other Pollutants" to the PSD program. *See, e.g.*, Docket EPA-HQ-OAR-2009-0517-5715, at 27-35. The final rule contains no response to this comment.

SUMMARY OF ARGUMENT

These cases are among several challenging EPA's multi-rule undertaking to regulate GHG emissions from mobile and stationary sources. In their briefs in related cases, Petitioners explain that EPA's antecedent actions (the Endangerment Rule and the Tailpipe Rule) are unlawful, including due to EPA's failure to take account of the absurd results it recognized its actions would cause.

These cases address EPA's determination that absurdities that EPA concedes would be "contrary to congressional intent" but that are created by its interpretation of the CAA can be averted only by promulgating a rule that "tailors"—rewrites—

unambiguous statutory language, *i.e.*, that changes clear, congressionally established numerical thresholds. But this ignores the availability of *multiple* statutory interpretations that avoid the absurdities in the first place. The CAA's text, structure, and purposes compel alternative interpretations that effectuate congressional intent and avoid the absurdities altogether. ***First***, EPA is wrong that all major emitting facilities, no matter which pollutants they emit in major amounts, must obtain PSD permits; as a matter of law, PSD permits are required only for major emitting facilities emitting major amounts of certain pollutants—criteria pollutants whose NAAQS are being attained locally. ***Second***, EPA errs in asserting it lacks discretion to exclude GHGs from PSD entirely; as a matter of law, GHGs cannot be regulated under PSD because, as EPA concedes, their inclusion transforms that program into one Congress never intended. ***Third***, EPA is wrong that it may include GHGs in PSD (if at all) without following statutorily prescribed procedures to regulate pollutants that were not subject to regulation when Congress enacted Part C in 1977, as following those procedures would avoid any absurd results.

As demonstrated below, these three statutory interpretations are consistent with one another and compelled by the CAA under *Chevron* step one. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). But even if that were not the case, each is at least a permissible construction of the Act under *Chevron* step two. If even one is permissible, that is enough to show that EPA's absurdity-creating interpretation is not

compelled, that EPA's decision to rewrite the statute was not a permissible response, and that the Tailoring Rule is therefore unlawful and must be vacated.

The Timing and Tailoring Rules are unlawful for other reasons as well. Like the PSD program, the Title V program cannot be interpreted to require permits for GHG sources. In addition, in many respects, the rules override the States' primacy in implementing the CAA. The effective dates of the Tailoring Rule's phases—January 2 and July 1, 2011—and the consequences EPA attributes to them, are contrary to law and arbitrary. Also arbitrary is EPA's determination that six GHGs, rather than four, are "subject to regulation." And EPA failed to undertake required analyses.

For these reasons, EPA's rules must be vacated and remanded.

STANDARD OF REVIEW

The Court sets aside final EPA action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law," CAA § 307(d)(9); 5 U.S.C. § 706, or if it contradicts congressional intent, *Chevron,* 467 U.S. 837.

STANDING

Petitioners here include companies and associations representing members aggrieved by EPA's CAA interpretation in the Timing Rule and by the Tailoring Rule's regulation of GHG emissions, directly causing concrete, particularized injury. The relief requested will redress those harms. Therefore, petitioners have Article III standing. *See, e.g., Ctr. for Energy & Econ. Dev. v. EPA*, 398 F.3d 653, 656-58 (D.C. Cir.

2005); *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895-96 (D.C. Cir. 2006); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-63 (1992); Declarations, Appendix C, Exhibits 1-11. Association petitioners have standing to represent their members because (i) the members satisfy Article III requirements, (ii) their interests in EPA adopting rational regulatory policies as to their members are germane to their purposes, and (iii) the questions presented do not require individual members' participation. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002); *see also* Declarations, Appendix C, Exhibits 1-5.

Furthermore, because State petitioners have standing, the Court need not address other petitioners' standing. *See*, *e.g.*, *Nuclear Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998).

ARGUMENT

I. THE TAILORING RULE IS INCONSISTENT WITH BASIC PRINCIPLES OF STATUTORY INTERPRETATION.

Review of EPA's CAA regulatory actions, like the rules under review here, must begin with the Act's text, structure, and purpose and the canons that guide this Court in evaluating whether EPA's actions comport with Congress's intent. It is axiomatic that interpretations and regulations "contrary to clear congressional intent" must be rejected. *Chevron*, 467 U.S. at 843 n.9. Only Congress may write laws. "Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001).

EPA should not be quick to conclude that Congress enacted a statute that produces absurdities. The presence of absurd results under the CAA's complex regime typically signals that EPA, not Congress, has erred—either by adopting an interpretation foreclosed under *Chevron* step one or, when more than one construction is theoretically possible, by adopting an interpretation that deviates from congressional intent. In either case, EPA must fix its own mistake.

Alabama Power teaches that EPA cannot create an administrative necessity by incorrectly or unreasonably interpreting one provision of the CAA to produce absurd results and then solve that manufactured absurdity by ignoring another provision. There, EPA had unlawfully defined "major emitting facility" too broadly, inflating the number of sources subject to PSD. 636 F.2d at 353-55. To solve the problem, EPA added a "tailoring rule" exempting certain sources from PSD review, ignoring the specific statutorily-set 100/250-tpy thresholds. *Id.* at 355-56. The Court rejected that tailoring rule as beyond the Agency's limited exemption authority. EPA's only lawful choice was to avoid manufacturing overbreadth in the first place. *Id.* at 323, 353, 356-57.

EPA cannot rewrite the statute by adopting regulations that implement the absurd results step-by-step. It cannot invoke the absurdity-avoidance canon in support of rewriting the statute, as that canon only authorizes narrow constructions of

statutory terms to avoid the absurd results of broad constructions.[2] Nor can it invoke the administrative-necessity doctrine, which, if it even exists, would never warrant departures from unambiguous statutory text because of "absurd results *stemming from regulatory provisions*." *Bower v. Fed. Express Corp.*, 96 F.3d 200, 207-08 (6th Cir. 1996) (emphasis added); *see Alabama Power*, 636 F.2d at 357-61. EPA has only one option: It must adopt any reasonable construction of a statute that gives effect to congressional intent, or else the remedial doctrines of last resort become "the daily bread of convenience" for an agency seeking to implement its own policy preferences. *NRDC v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974).

With those principles in mind, three of Congress's fundamental goals for the PSD program are relevant here. First, Congress fashioned the PSD program to address emissions of pollutants that create *localized* problems due to their concentration *in the ambient air* (*i.e.*, air people breathe). 40 C.F.R. § 50.1(e). Second, Congress focused on industrial sources that are large in size but small in number. *See Alabama Power*, 636 F.2d at 353-54. Finally, to define the contours of the program,

[2] *See Pub. Citizen v. Dept. of Justice*, 491 U.S. 440, 455 (1989) ([I]t is "perfectly proper" to "[l]ook[] beyond" a statute's literal text "for guidance … when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention."); *Alabama Power*, 636 F.2d at 360 n.89; *see, e.g.*, *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 520-21 (1989) ("defendant" construed to mean criminal defendant); *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 23-24 (1976) ("pollutant" construed not to include certain radioactive materials); *United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 553 (1940) ("employee" construed to include only some employees).

Congress required EPA to develop NAAQS and to measure local ambient air quality against the NAAQS benchmarks. *Id.* at 347-50 (describing the relationship of the NAAQS to the PSD program). A regulatory approach that pulls the PSD program from any of those foundational moorings must be rejected as contrary to congressional intent.

EPA's effort to regulate stationary sources' GHG emissions under the PSD program plainly frustrates, rather than advances, Congress's goals. EPA's rules would, for the first time, cause the program to regulate pollutants that have no deleterious effects on ambient air. And that regulation would render the PSD program "unrecognizable" because it "would expand … from the current 280 sources per year to almost 82,000 sources, virtually all of which would be smaller than the sources currently in the PSD program and most of which would be small commercial and residential sources." 75 Fed. Reg. at 31,555-56. Furthermore, permitting authorities could not possibly manage the permitting load. *See* 74 Fed. Reg. at 55,308-10.

To mitigate those results, the Tailoring Rule rewrites the emission thresholds in CAA § 169(1), after EPA found 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." *See* 75 Fed. Reg. at 31,533. But because the results are absurd, they cannot be implemented one step at a time, and because the statutory emission thresholds are clear and unambiguous, the Tailoring Rule cannot be a "narrowing" interpretation allowed by the absurdity-avoidance canon. Nor is the

Tailoring Rule properly grounded in the administrative-necessity doctrine—a doctrine EPA cannot invoke if an available interpretation is consistent with congressional intent, and cannot invoke in order to implement a program in "steps" to achieve absurd results contrary to congressional intent, as EPA did here. EPA unlawfully rejected each of the three interpretations of the Act (set forth in Section II *infra* as Arguments One, Two, and Three) that, if adopted, would have kept the PSD program within the congressionally set boundaries, and chose instead to create an extra-statutory program.

Argument One explains that the absurd results EPA identified in expanding PSD permitting to include all sources emitting GHGs above the 100/250-tpy thresholds are not compelled by a reasonable interpretation of the Act but instead are based on an erroneous interpretation. The PSD program, properly construed, requires PSD permits only for sources emitting certain NAAQS pollutants, depending on the sources' locations. Limiting the permitting trigger, as the statute requires, causes EPA's absurd results to vanish.

Argument Two explains that, even with Argument One's interpretation, the Act's Part C PSD provisions compel EPA to exclude GHGs from all aspects of the PSD program. Given the nature of GHGs and the statute's unambiguous thresholds, inclusion of GHGs among the pollutants regulated under PSD is fundamentally incompatible with that program.

Argument Three explains that the only possible statutory mechanism for bringing GHGs into the PSD program would be adoption of GHG-specific rules under CAA § 166. In any such rulemaking, EPA would have to address the absurd results it identified and show that regulating GHGs would otherwise be consistent with PSD. Compliance with section 166's specific directives for adding "other pollutants" to the PSD program would have avoided the absurd results that EPA created.

Instead of embracing a statutory interpretation that avoids absurdities and adheres to the congressional intent underlying the PSD program, EPA invoked the last-resort doctrines to adopt a legislative rule that alters clear, numerical emission thresholds in the statutory text, all to advance the Agency's objective of regulating GHGs under the PSD and Title V programs. EPA's rejection of interpretations that satisfy congressional intent in favor of a rule that contradicts congressional intent warrants vacatur and remand. *Cf. Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1069 (D.C. Cir. 1998) ("In effect, the [agency] has embarked upon an adventurous transplant operation in response to blemishes in the statute that could have been alleviated with more modest corrective surgery.").[3]

[3] The Tailoring Rule fails the administrative-necessity doctrine and so-called one-step-at-a-time doctrine for other reasons. The administrative-necessity doctrine does not permit EPA to adopt exemptions prospectively or to fundamentally transform the PSD program. *See Alabama Power*, 636 F.2d at 359–60; *see also Public Citizen v. FTC*, 869 F.2d 1541, 1557(D.C. Cir. 1989). Likewise, the supposed one-

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II. EPA UNLAWFULLY REJECTED THREE INTERPRETATIONS THAT WOULD NOT HAVE FUNDAMENTALLY CHANGED THE PSD PROGRAM CONTRARY TO CONGRESSIONAL INTENT.

A. Argument One: The Tailoring Rule Is Unlawful Because the Absurd Results It Tries to Mitigate Are the Result of EPA's Misinterpretation of the PSD Permitting Situs Requirement.

In order for a doctrine of "last resort" to sustain the Tailoring Rule, EPA must show that the Rule is necessary to alleviate an absurd, administrative necessity imposed by the CAA itself. But contrary to EPA's assertions, the CAA does *not* literally require issuing 81,000 PSD permits annually. EPA arrives at that conclusion because it ignores Congress's command that PSD permits are needed only for stationary sources located in certain areas. Interpreted properly, the PSD permitting "situs requirement" requires no new PSD permits after the Tailpipe Rule. Because at the very least, (1) the CAA is reasonably read to require PSD permits only for sources located in attainment areas for a particular NAAQS, (2) that interpretation would avoid the absurdity and administrative necessity completely, and (3) the Act does not compel EPA's contrary interpretation, EPA lacked authority to promulgate the Tailoring Rule.

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step-at-a-time doctrine does not authorize fundamental transformations. *See Nat'l Ass'n of Broadcasters v. FCC,* 740 F.2d 1190, 1210 (D.C. Cir. 1984) (incremental rulemaking does not justify rulemaking action that restructures an "entire industry on a piecemeal basis through a rule that utterly fails to consider how the likely future resolution of crucial issues will affect the rule's rationale").

1. The CAA Requires Preconstruction PSD Permits Only for Sources in Certain Areas.

The PSD permitting provision is section 165(a). Under section 165(a), a new major emitting facility needs to obtain a preconstruction or "premodification" PSD permit if it is located "in an area to which this part [Part C] applies." Part C applies to areas that are designated as attaining a NAAQS. *See* CAA § 161. Because area designations are NAAQS-specific and, therefore, "pollutant-specific," *Alabama Power*, 636 F.2d at 350, a single geographic area may be in attainment with one NAAQS while in nonattainment with another. Accordingly, a single stationary source may be located in an area designated as attainment for one pollutant and as nonattainment for another, *i.e.*, in an area "to which this part applies" and "to which this part" does not apply.

EPA maintains that, read literally, the section 165(a) situs requirement requires a major emitting facility to obtain a PSD permit if it is located in an area attaining *any* NAAQS—including a NAAQS for a pollutant the facility does not even emit. *See* 75 Fed. Reg. at 31,560–62. Because every area of the country is in attainment with at least one NAAQS, *id.*, every major emitting facility satisfies EPA's interpretation of the situs requirement. In fact, because every area of the country *has always been* in attainment with at least one NAAQS, *id.* at 31,561, every major emitting facility *has always satisfied* EPA's interpretation of the situs requirement. As a practical matter, then, EPA's interpretation reads the situs requirement out of the statute. Now that

EPA has determined GHGs are subject to regulation under the Act, EPA's supposedly literal interpretation of section 165(a) requires a preconstruction PSD permit for *every* domestic stationary source with GHG emissions greater than 100 or 250-tpy, some 81,000 annually according to EPA. 75 Fed. Reg. at 31,554.

As explained at length in the brief filed in the challenge to the PSD Rules issued in 1978, 1980, and 2002, EPA's supposedly literal interpretation of the section 165(a) situs requirement has no foundation. None of the reasons EPA has given for its interpretation actually supports it. *See* Joint Opening Brief of Industry Petitioners, *American Chemistry Council v. EPA*, No. 10-1167, at 36-41 (filed May 10, 2011) ("1980 Rule Brief"). Indeed, in pointing only to different statutory provisions that use different words for different substantive ends, EPA conspicuously offers no analysis of the critical phrase "in any area to which this part applies" in section 165(a).

The text, structure, and purpose of the PSD provisions compel an interpretation narrower than EPA's. The phrase "in any area to which this part applies" in section 165(a) must be read together with the term preceding it ("major emitting facility") as establishing a *pollutant-specific* situs requirement: PSD permits are required only if (1) a source has major emissions of a NAAQS pollutant and (2) the source is located in an area attaining *that pollutant's* NAAQS.[4] Such a reading accords

[4] Besides section 165(a), Congress used the phrase "in any area to which this part applies" only three other times throughout the CAA, all in PSD provisions: Section 163(b)(4), section 165(a)(3)(A), and section 165(c). Each use supports the

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with Congress's purpose for the PSD program—preventing significant deterioration of the air quality of areas attaining a NAAQS. Such a reading also accords with this Court's holding in *Alabama Power* that "location" is "the key determinant of the applicability of the PSD review requirements." 636 F.2d at 365; *see id.* at 367, 368 (Section 165 "does not, by its own terms, apply to sources located outside of" attainment areas; no other provisions of the Act "justify the application of the permit requirements of section 165 to sources not located in, but impacting upon," other areas.).

The pollutant-specific interpretation of section 165(a)'s situs requirement *completely* avoids the absurdity of having to issue 81,000 PSD permits annually. Because EPA has regulated GHGs only under Title II and has not issued any NAAQS for GHGs, no major source of GHGs can be located in an area attaining the nonexistent NAAQS for GHGs. Thus, under the pollutant-specific interpretation, no source that is major on account of its GHG emissions would have to obtain a PSD permit before construction or modification. Going forward, only major sources of

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pollutant-specific reading of section 165(a). Each time, the phrase is preceded by the term "any air pollutant" or its derivative, "major emitting facility." Such repetition indicates that the phrase has a uniform meaning, for the principle that like words should be interpreted alike is strong when "the subject-matter to which the words refer" is "the same in the several places where they are used." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). The other provisions make sense only when the phrase and its preceding term are read together as setting a pollutant-specific situs requirement. *See* 1980 Rule Brief at 30-34.

criteria pollutants whose NAAQS are being attained in the sources' areas would have to obtain PSD permits, a figure that has historically been only a few hundred a year.[5] *See* 75 Fed. Reg. at 31,537.

Because the pollutant-specific interpretation of section 165(a) is compelled by the text and structure of the CAA, EPA's contrary interpretation cannot be compelled. The absurd results, therefore, cannot be compelled, either. The Tailoring Rule must therefore be vacated and remanded.

2. Even If the Pollutant-Specific Interpretation of Section 165(a) Were Not Compelled, It Is at Least a Reasonable Alternative to EPA's "Absurd" Reading.

Even if section 165(a) were unclear about what Congress meant by the phrase "in any area to which this Part applies," the pollutant-specific interpretation is plainly a permissible interpretation of that phrase. Because it (unlike EPA's interpretation) is at least consistent with statutory text, structure, and purpose and because it (unlike EPA's interpretation) avoids absurd results, it is an interpretation that EPA cannot reject in favor of the Tailoring Rule. That is, by adopting the pollutant-specific interpretation of the section 165(a) situs requirement, EPA could "easily have placed

[5] It is important to emphasize that the question whether emissions of noncriteria pollutants trigger PSD permitting is independent of the question addressed in Section II.B., *i.e.*, whether GHGs can be included as pollutants in any part of the PSD program. *Even if* the PSD program includes GHGs and *even if* sources with PSD permits must adopt BACT for GHGs, the pollutant-specific situs requirement *permanently* achieves the same or better result as Step 1 of the Tailoring Rule *without rewriting the statute*.

an alternative construction on the key phrase" that, unlike the Tailoring Rule, "would not have scuttled critical congressional objectives." *Kerr-McGee Chem. Corp v. NRC*, 903 F.2d 1, 7 (D.C. Cir. 1990).

EPA may claim that its interpretation of section 165(a) should be spared judicial review because it is longstanding—about 30 years old. *See 1980 PSD Rules*, 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980). But if an agency may ever take the radical step of revising unambiguous statutory commands to avoid absurd results or to alleviate administrative necessities, it is when the agency can prove that other, unambiguous statutory commands dictate those problems. If an administrative regulation is the source of the problem, the agency must revise the regulation no matter how old it may be and cannot cling to its prior interpretation once absurdities of that position are brought to its attention.

In any event, in searching for a solution to the absurdities in the Tailoring Rule rulemaking, EPA reopened its interpretation of section 165(a), responded to Petitioners' comments on it, and ultimately reaffirmed its original position. Moreover, because EPA not only sought comment on but also adhered to the *status quo ante* despite dramatically changed circumstances, EPA constructively reopened its interpretation. Accordingly, EPA cannot shield its interpretation of section 165(a) from judicial review merely on the ground that the interpretation is longstanding. *See* 1980 Rule Brief at 24-28 (addressing reopening).

B. Argument Two: GHGs Cannot Be Subject to the PSD Program.

According to EPA, regulating motor vehicle GHG emissions under Title II automatically triggers regulation of stationary source GHG emissions under the Title I, Part C PSD program. Because GHGs can be emitted by stationary sources in much larger quantities than conventional pollutants, however, regulating sources emitting GHGs in amounts exceeding 100/250-tpy—the minimum numerical threshold selected by Congress to identify "major" sources under Part C—would vastly expand the program coverage and transform it into something "unrecognizable to … Congress." 75 Fed. Reg. at 31,555. The Tailoring Rule defines the GHGs subject to regulation under PSD and Title V in terms that exclude GHGs emitted in amounts below 100,000-tpy—a level that exceeds the statutory thresholds by orders of magnitude. EPA chose that level to blunt temporarily the unambiguous statutory thresholds—and then committed to undertake future rulemakings to lower that regulatory level in a "step-by-step" fashion designed to bring in all the sources that, as EPA concedes, Congress never *intended* to cover.

Determining that a problem would be caused by bringing a particular pollutant—GHGs—into the PSD program does not authorize EPA to engage in legislative rulemaking to circumvent, or rewrite, numerical thresholds enacted by Congress to define which sources are regulated. Instead, it requires EPA to focus on the *cause* of the problem—*i.e.*, inclusion of GHGs in a regulatory scheme concededly

not designed to address them—and to interpret PSD not to include GHGs as one of the pollutants regulated under that program.

In prior rules to implement Title I, Part C, EPA read the term "any air pollutant" in section 169(1)'s definition of "major emitting facility" *not* to encompass all pollutants within section 302(g)'s "capacious" definition of "air pollutant," *Massachusetts*, 549 U.S. at 532, but only those that fall within that program. Thus, EPA limited the PSD rules' coverage to "regulated" pollutants. Commenters called for a similar inquiry focusing on whether GHGs should be included in the PSD program, but EPA summarily dismissed that request on asserted *Chevron* step-one grounds. 75 Fed. Reg. at 31,548.

Without evaluating congressional intent regarding Part C coverage of a pollutant like GHGs, EPA interpreted Part C as *mandating* coverage of GHGs under PSD, and then found that this (supposedly) congressionally mandated inclusion of GHGs as a PSD pollutant would be *contrary to congressional intent*. That was error. Had EPA applied traditional principles of statutory construction to determine congressional intent *and then* interpreted the statute consistent with that intent,[6] EPA

[6] It is axiomatic that, on issues of statutory construction, "administrative constructions which are contrary to clear congressional intent" must be rejected. *Chevron*, 467 U.S. at 843 n.9. To that end, when an agency seeks to discern "congressional intent," it must use "traditional tools of statutory construction." *Id.* The so-called "absurd results" cases analyzed by EPA in the Tailoring Rule represented one such tool: the canon that calls for statutes to be construed to avoid producing results demonstrably at odds with Congress's intent. In construing a

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would have found that, under *Chevron* step one, GHGs must be excluded from the PSD program.

1. The Tailoring and Timing Rules Are Unlawful Because the CAA PSD Provisions Cannot Be Construed Under *Chevron* Step One to Apply to GHGs.

a. Each CAA Program's Purpose Must Drive the *Chevron* Interpretation Inquiry.

The CAA enacts a spectrum of programs addressing different pollutants, and different sources of pollution, using different regulatory mechanisms of different geographic focus, with the purpose of addressing distinct pollution problems. "Of necessity, Congress selects different regulatory regimes to address different problems." *Am. Elec. Power Co., Inc. v. Connecticut*, ___ U.S. ___, ___, slip op. at 12 (June 20, 2011).[7] Because the CAA is not self-implementing,[8] rulemaking is required

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statute, it is "perfectly proper" to "[l]ook[] beyond the naked text for guidance … when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention." *Pub. Citizen*, 491 U.S. at 455; *Am. Trucking*, 310 U.S. at 543-44 ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'").

[7] This brief is being filed the same day the Supreme Court issued its decision in *Connecticut*. Non-State Petitioners and Petitioner-Intervenors have not had an opportunity to evaluate that decision fully given the multi-party coordination process involved in preparing this brief.

[8] *See*, *e.g.*, CAA § 161 (SIPs "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) (emphasis added); CAA § 165(e)(1) (EPA to promulgate regulations governing the required "analysis … [of] ambient air quality") (PSD); CAA § 202(a)(1) (EPA "shall *by regulation prescribe* . . .

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under each of these separate programs to spell out the specific elements of each, *including the pollutants to which a program will apply*. In giving content to the term "pollutant" as used in each of these programs, the Agency must begin, but not end, with section 302(g)'s "capacious" definition of air pollutant that was before the Supreme Court in *Massachusetts*. Section 302(g) was so framed to provide the Agency flexibility to mold any particular CAA program to accomplish its specific purposes. Where, as the Court found in *Massachusetts* with respect to motor vehicles under Title II, the program contemplates coverage of all substances that could fall within the CAA § 302(g) definition, that program must be given that pollutant coverage. But where the structure and purposes of a program signal less comprehensive coverage, the Agency must construe that program to embrace a narrower range of pollutants than fall within CAA § 302(g). EPA wholly failed to engage in this inquiry with respect to GHGs.

The same term appearing in different statutory programs can (indeed, must) be given different regulatory meanings *if* the congressional purposes underlying those programs differ. *Cf. Abbott Labs. v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990) ("[I]t is not impermissible under *Chevron* for an agency to interpret an imprecise term differently in two separate sections of a statute which have different purposes.").

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standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles.") (Title II) (emphasis added).

Indeed, 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).

American Trucking, 310 U.S. 534, is instructive. EPA relied on that decision in concluding that treating GHGs the same as all other Part C PSD "pollutants" would produce results contrary to congressional intent. 75 Fed. Reg. at 31,543 n.26. In examining the meaning of "employee" in the Motor Vehicle Act, the Court observed:

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress…. To 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.

Am. Trucking, 310 U.S. at 542. Given the context in which "employee" was used and the congressional policy being advanced, the Court concluded "it cannot be said that the word 'employee' as used" in the statute was "so clear … that we would accept its broadest meaning." *Id.* at 545. Rather, the word "takes color from its surroundings." *Id.*

These interpretive principles historically have guided EPA's understanding of which pollutants are covered by Part C and should have informed EPA's interpretation of the scope of the program with respect to including GHGs in PSD. Following the 1977 CAA Amendments' enactment, EPA was called on to interpret the terms "any air pollutant" and "any pollutant," describing, respectively, the

pollutants subject to the 100/250-tpy thresholds in CAA § 169(1) (for PSD) and the 250-tpy threshold in CAA § 169A(g)(7) (for visibility). In both instances, EPA interpreted those terms to be *no broader* than the type of pollutants covered by the programs EPA was implementing through its relevant legislative rules. This past practice, and a proper application of *Chevron,* should have focused EPA here on whether pollutants covered by the CAA's PSD provisions can include GHGs, rather than on methods to circumvent the unambiguous 100/250-tpy statutory thresholds.

Chevron teaches that if, by "employing *traditional tools of statutory construction*," an agency can "ascertain[] that Congress had an intention on the precise question at issue," that "intention is the law and must be given effect." 467 U.S. at 843 n.9 (emphasis added). Construing a statute in a way that avoids results that are contrary to congressional intent is itself one of those "traditional tools of statutory construction." *Supra* note 6. As discussed below, application of traditional tools of statutory construction confirms that EPA should not have interpreted the Act's PSD provisions to include GHGs, much less mandate their inclusion.

b. Applying Traditional Tools of Statutory Construction, EPA Was Required to Exclude GHGs from PSD.

Source Coverage of PSD. Congress's intent to use congressionally specified numerical criteria as to what sources are "major emitting facilities" that could be subject to PSD could not be clearer. For 28 categories of industrial facilities—*e.g.*, power plants, refineries, cement plants, CAA § 169(1)—Congress determined such

facilities would be "major" if they "emit, or have the potential to emit, one hundred [tpy] or more of any air pollutant." *Id.* Sources in other categories not specifically listed would be "major emitting facilities" only if they had "the potential to emit two hundred and fifty [tpy] or more of any air pollutant." *Id.*

In promulgating the Tailoring Rule, EPA acknowledged that section 169(1)'s 100/250-tpy "threshold limitations" serve as "Congress's mechanism" for "limiting PSD." 75 Fed. Reg. at 31,555. These numerical limitations, EPA recognized, restrict PSD's coverage to relatively few "large industrial sources," *id.*, while excluding numerous smaller "commercial and residential sources." *Id.* at 31,556. On the face of the CAA, therefore, the criterion for categorizing a source as "major," and thus potentially subject to PSD permitting, is congressionally defined as the *amount* of "any air pollutant" the source emits.

In view of the statutory thresholds, *if* GHGs were unavoidably a covered "air pollutant" for purposes of the CAA PSD program, there is no escaping the conclusion that sources emitting GHGs above 100/250-tpy would exceed the statutory thresholds for "major emitting facility" as defined in the Act's PSD provisions. As EPA explained in the Tailoring Rule preamble, however, "applying the definition[] of 'major emitting facility'" to GHGs not only would be unmanageable, but "would result in a program that would have been unrecognizable to the Congress that designed PSD." *Id.* at 31,555.

The problem EPA identified is *not* caused by a literal interpretation of the unambiguous statutory 100/250-tpy amounts, which are *not* subject to interpretation at all, but by EPA's claim that a *Chevron* step one mandate required that *all* pollutants, including GHGs, once regulated under Title II, be covered by PSD. The solution to EPA's problem, and EPA's task in interpreting the statute, was *not* to depart from and rewrite unambiguous statutory text but to limit the scope of air pollutant, *as used in the PSD provisions*, to conform to congressional intent. This is *precisely* what EPA did in past actions under Part C, which contradict EPA's assertion here of a *Chevron* step one mandate to include GHGs in the PSD program.

In 1977, Congress enacted its 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 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)(ii); *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 Part C 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.

Atmospheric and Geographic Coverage of PSD. When EPA published its ANPR, soliciting preliminary input on ways GHGs might be regulated under the CAA, it acknowledged that the "global nature of climate change, the unique characteristics of GHGs, and the ubiquity of GHG emission sources present special challenges for regulatory design." 73 Fed. Reg. at 44,400. For example, 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 … can remain in the atmosphere for decades to centuries." *Id.* at 44,400-01. In contrast, "traditional air pollutants typically remain airborne for days to weeks," *id.* at 44,401, and have mainly local effects. EPA concluded that these and corollary key distinctions—GHGs pollute globally and traditional pollutants pollute locally—had important ramifications for selecting GHG regulatory strategies, ramifications ignored by EPA in the Tailoring Rule, *see* 75 Fed. Reg. at 31,561 (rejecting the distinction between local and global impacts as a basis for selecting among GHG regulatory strategies).

In contrast to "most traditional air pollutants, GHGs become well mixed throughout the global atmosphere so that the long-term distribution of GHG

concentrations is not dependent on local emission sources. Instead, GHG concentrations tend to be relatively uniform around the world." *Id.* Thus, according to EPA, "GHGs emitted anywhere in the world affect climate everywhere in the world." *Id.* Accordingly, EPA recognized that the "global nature and effect of GHG emissions raise questions regarding the suitability of CAA provisions [like PSD] that are designed to protect local and regional air quality by controlling local and regional emission sources." *Id.* at 44,408. Among other things, the "geographic location of emission sources and reductions [is] generally not important to mitigating global climate change." *Id.* Moreover, "[c]urrent and projected levels of ambient concentrations" of GHG "pollutants," including carbon dioxide ("CO_2"), 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." *Id.* at 44,427.

In sum, regulating GHGs as an "air pollutant" under CAA § 202 was not driven by health or environmental concerns with local emissions. Those concerns, however, are the precise concerns that led Congress to enact PSD against the backdrop of a known universe of CAA-regulated pollutants. All CAA-regulated pollutants in 1977 were regulated because they could cause elevated ground-level concentrations in ambient air people breathe. For example, in 1977, EPA regulated SO_2, PM, NOx, and hydrocarbons ("HC") under the NAAQS program; acid mist, fluorides, and HC under the section 111 stationary-source performance standards

program; asbestos, benzene, beryllium, mercury, and vinyl chloride under the section 112 hazardous air pollutants program; and HC, NOx, and CO under the CAA's Title II program for motor vehicle emissions. All of those pollutants were ones EPA had found posed health or welfare risks due to exposure in the ambient air. *See, e.g.*, H.R. REP. NO. 95-294, at 2, 8, 105-06 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1079, 1085, 1183-85. EPA observed, for example, that fluoride, "even in low ambient concentrations," can "have adverse effects on plants and animals" exposed to that pollutant. 40 Fed. Reg. 33,152, 33,152 (Aug. 6, 1975). By contrast, with respect to the principal GHG, CO_2—a uniformly distributed constituent of the atmosphere that is needed for life on Earth—current and projected ground-level concentrations pose no possible health or welfare risk from inhalation of, or exposure to, the ambient air in any CAA § 107 area anywhere in the country.[9]

Under CAA Title II, regulation of vehicles' GHG emissions may be required where, in EPA's judgment, those emissions cause or contribute to air pollution that "may reasonably be anticipated to endanger public health or welfare." CAA

[9] EPA did not and could not find that CO_2 degrades ambient air in any section 107 area. EPA concluded, for example, that existing and anticipated future concentrations of CO_2 in the atmosphere present no direct health risk. 74 Fed. Reg. 18,886, 18,901 (Apr. 24, 2009). Although one or more of the other pollutants EPA aggregated with CO_2 as the purported collective pollutant "GHGs" might arguably, under some circumstances, be deemed to "deteriorate" "air quality" in some fashion (though *not* through any global climate effect), the same cannot be said as to CO_2.

§ 202(a)(1). Even assuming GHG concentrations in the global atmosphere from anthropogenic emissions may properly be viewed as "endanger[ing] 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 CAA's PSD program*, when the "endangerment" is from a pollutant's presence in the "global" atmosphere, not in the ambient air of geographically defined CAA § 107 areas.

In contrast to CAA § 202(a)(1), the PSD program is focused *not* on emissions whose presence in the atmosphere *generally* may "endanger public health or welfare," but on States' protection of *localized* ambient "air quality"—*i.e.*, the air people breathe in certain geographically defined CAA § 107 areas within a State. When Congress enacted the statutory PSD program in 1977, the only pollutants regulated under the CAA were NAAQS pollutants, and others that directly affected health and welfare due to their presence in the ambient air. In this regard, CAA § 161 provides that "each applicable [SIP] shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under" Part C of CAA Title I, "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" (emphasis added). Furthermore, reflecting Congress's understanding that emission of "regulated" pollutants involves pollution that degrades local air quality, CAA § 165 directs EPA to promulgate regulations governing analysis

of impacts on "ambient air quality" that might flow from "emissions from [the PSD] facility for each pollutant subject to regulation under this [Act]." *Id.* § 165(e)(1).

The CAA thus makes clear that PSD is not directed to regulation of emissions of "any air pollutant" (as defined in CAA § 302(g)) that may be anticipated to endanger health or welfare due to its presence throughout the global atmosphere. Rather, the CAA directs EPA to promulgate regulations, and States to adopt measures, under the PSD program as "necessary" to address "air quality" problems in specific geographic areas, problems created by emissions of any CAA-regulated pollutant that could degrade the quality of the ambient air—the air people breathe—in those areas. CAA § 161.

Accordingly, any Title II GHG emission regulation—where that regulation is directed to the effects GHGs may have on global climate—cannot constitute a "measure[]" "necessary" "to prevent significant deterioration" of CAA § 107 "air quality" within the plain meaning of CAA § 161 and cannot create a *Chevron* step one mandate to regulate GHGs under the Title I PSD program. Just as regulation of a pollutant under CAA § 169A that had no effect on visibility would contradict congressional intent underlying Part C's visibility protection program, regulation of GHGs as an "air pollutant" under Part C's PSD program contradicts congressional intent underlying that program.

2. The Timing and Tailoring Rules Cannot Be Justified by the "Administrative Necessity" or "One-Step-at-a-Time" Doctrines.

In the Tailoring Rule, EPA claimed 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. Those doctrines, it asserted, "[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." *Id.* The three doctrines cannot, however, be invoked "separately and interdependently," or be considered "in a comprehensive and interconnected manner." *Id.* at 31,541.

EPA's rationale disregards the difference between a canon of construction used to determine a statutory meaning that effectuates congressional intent and a doctrine of administrative convenience used to justify administrative action that falls short of achieving Congress's intent. The so-called absurdity canon of construction on the one hand, and the administrative necessity doctrine and the EPA-created one-step-at-a-time doctrine on the other, are *mutually exclusive* and address polar-opposite obligations faced by agencies. The "absurd results" cases EPA cites, *see id.* at 31,542-43, establish that agencies must construe statutory language to avoid any overly broad interpretation that would contradict congressional intent. In contrast, "administrative necessity" leading to EPA's "one-step-at-a-time" implementation program applies

only where it is *clear* Congress *intended* a result but Congress's intended objective cannot be reached except in a deferred, stepwise fashion.

Thus, "administrative necessity" could apply here only if EPA concluded (and had sound reason to conclude) that Congress *did* intend PSD regulation of GHGs at the statutory 100/250-tpy thresholds, but that, although Congress *intended* the vastly larger program coverage that would thereby result, implementing that congressional intent immediately was impossible. Because, as EPA concedes, Congress never intended PSD to apply to tens of thousands of small sources, the administrative necessity and one-step-at-a-time doctrines EPA invokes have no legal relevance here and fail to support EPA's PSD regulation of GHGs.

C. Argument Three: EPA Did Not Follow the CAA's Requirements for Adding New Pollutants to the PSD Constellation.

The PSD provisions were written to address pollutants subject to regulation at the time of enactment and specifically to prevent significant deterioration with respect to two air pollutants regulated under the Act in 1977 (SO_2 and PM). Thus, it is no surprise that none of Part C's provisions makes sense as applied to GHGs:

- Section 161 applies to "prevent significant deterioration of air quality in each region … designated pursuant to section [107] … as attainment or unclassifiable." There are no such regions for GHGs because there are no NAAQS for GHGs. And given GHGs' uniform distribution in the global

atmosphere, neither could there be any meaningful distinctions among "regions."

- Section 162 contemplates different PSD increments depending on geography (*e.g.*, special protections for national parks). It makes no sense as applied to a "pollutant" that exists uniformly distributed around the globe and is regulated, not for purposes of protecting visibility or health, but for its purported influence on global temperatures.
- Section 163 establishes increments for SO_2 and PM only, not GHGs.
- Section 164 allows for redesignation of Class I areas, a concept without relevance to GHGs.
- Section 165 is the permit program applicable to "major emitting facilities." In addition to demonstrating that the proposed source will not violate PSD increments, the permitting authority must find that "the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter ...." CAA § 165(a)(4). Because the purpose of the PSD program is to prevent deterioration of areas in compliance with the NAAQS, a permit requirement interpreted to apply to GHGs (which have no NAAQS) would do nothing to advance those purposes.
- Section 166 instructs EPA how to handle the criteria pollutants other than SO_2 and PM that existed at the time of enactment (HC, CO, photochemical

oxidants, and NOx), requiring pollutant-specific decisions on (1) applicability thresholds, (2) whether and at what level to set any increments of acceptable deterioration, and (3) consideration of appropriate means of "stimulating alternative control technologies," among others.

- Sections 169A and 169B relate to visibility protection, again an issue wholly unrelated to GHG emissions.

In short, everything about Part C was drafted to govern emissions of the criteria pollutants regulated at the time of the statute's enactment, with detailed instructions on SO_2 and PM, and generalized instructions in section 166 to adopt a PSD program for the other NAAQS then existing or contemplated (HC, CO, photochemical oxidants, and NOx). Nothing about Part C suggests an intent to apply PSD to anything other than criteria pollutants, and then only as directed in section 166:

> In the case of the pollutants [HC, CO,] photochemical oxidants, and [NOx], the Administrator shall conduct a study and not later than two years after August 7, 1977, promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions of such pollutants. *In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.*

CAA § 166(a) (emphasis added). And so section 166 affirms several understandings obvious from a proper read of the rest of Part C against the whole statute: First, Congress enacted the PSD program in 1977 to apply to then-extant criteria pollutants

only; second, any future application of Part C is limited to new criteria pollutants; and third, the addition of new pollutants to a regulatory scheme intended for a known few pollutants is not automatic, but may follow only a deliberate rulemaking process intended to ensure that the regulatory scheme makes sense as applied to any new "other pollutants."

EPA's rules sweeping GHGs into the Act's permitting programs simply because of their regulation under section 202(a) could not more clearly violate Congress's instructions on how to handle "other pollutants" under Part C: Section 166(a) limits PSD to new criteria pollutants, and, as to those, it requires rules specific to each new pollutant to be developed within two years after adopting its NAAQS. Rules developed pursuant to section 166(a) become effective a year after their promulgation. This one-year delay allows Congress an opportunity to review the rules before the States become required to implement them. 72 Fed. Reg. 54,112, 54,118 (Sept. 21, 2007) (citing H.R. CONF. REP. NO. 95-564, at 151 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1502, 1532). Each State then has 21 months to submit a revised SIP meeting those new requirements, and EPA must approve or disapprove the revised SIP four months later. CAA § 166(b). Under the statutorily prescribed process, States have up to five years to accommodate new pollutants within their

preconstruction permitting programs. Under EPA's rules, the States got as little as three weeks.[10]

Congress specifically considered the question of how to bring "other pollutants" into the PSD program and told EPA how to do that in a section captioned "Other Pollutants." Compliance with the obligations imposed by section 166 has not only the virtue of lawfulness, but also of avoiding the absurd results that cause EPA to engage in still further rebellion against the unambiguous applicability thresholds set elsewhere in the Act. The Act's permitting program, including area classifications and BACT reviews, made sense as applied to PM and SO_2, but not necessarily as to the other criteria pollutants (especially ozone, for which EPA still has not crafted any PSD program). And it might make no sense as applied to any unknown future pollutant, *i.e.*, GHGs.

Congress left EPA relatively free to fashion—by rule—a sensible PSD program for those unknown future pollutants. Consequently, EPA—in the unlikely event it could justify and promulgate a NAAQS for GHGs—would have the freedom to craft a PSD program appropriate to GHGs. Section 166(c) tells EPA that it may choose some other means of technology-forcing appropriate to GHGs, which at least as of today are not meaningfully susceptible to BACT. Section 166(e) also could be handy in that unlikely future, as it leaves EPA without the obligation to undertake any

[10] *See* Argument III.B, *infra*.

geographical classifications (pointless for globally uniform atmospheric gases such as GHGs). EPA arguably even could set the emissions thresholds at a sensible level, as section 166(c) allows EPA to set "specific numerical measures against which permit applications may be evaluated." Or, most logically of all, EPA could equally maintain that the emissions thresholds in the definition of "major emitting facility" apply only to the pollutants regulated as of 1977.

Compliance with the statute allows for orderly implementation. The section 166 process expressly allows time for EPA to announce its expectations by rule, for Congress to have a chance to consider EPA's plans, for the States to amend their rules to conform, and for the SIP process to work as intended. As explained in Argument III.B below, the interpretation chosen by EPA instead eviscerates CAA federalism.

III. THE TAILORING RULE IS UNLAWFUL FOR OTHER REASONS.

A. EPA Has No Authority to Regulate GHG Emissions Under Title V.

No rule can be upheld if it is inconsistent with the plain language of the law that purports to authorize it. *See Chevron*, 467 U.S. at 842-43. This principle applies with special force where, as with 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*." CAA § 502(a) (emphasis added); *see id.* § 302(j) (defining as "major" a source emitting 100-tpy or more of any air pollutant). Just as Congress never intended the PSD program to reach tens of thousands of small sources, Congress quite clearly never intended that Title V extend to millions of small sources. EPA concedes this, stating that "this result is contrary to congressional intent for the title V program, and in fact would severely undermine what Congress sought to accomplish with the program." 75 Fed. Reg. at 31,562. 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.

B. The Tailoring Rule Step 1 and Step 2 PSD Applicability Provisions Are Unlawful.

The CAA establishes a Federal-State partnership in which States have "primary responsibility" to develop emission control programs that implement, within their borders, standards and program elements contained in EPA rules. CAA §§ 107(a), 110(a); *Train*, 421 U.S. at 64. Congress has given States up to three years to adopt laws to implement new EPA rules, develop State regulations, hold public hearings, and propose SIP revisions for EPA approval. *See, e.g.*, CAA § 110(a)(1). Under the Part C PSD program, EPA's rules in 40 C.F.R. Part 51 provide that States have three years to develop SIP revisions that implement any new EPA Part 51 PSD requirements "prospectively." 40 C.F.R. § 51.166(a)(6)(i), (iii).[11]

EPA long ago established that Part C, including section 165(a), is simply a directive for legislative rules governing PSD implementation plans. With the exception of specific provisions expressly listed in CAA § 168(b), which was enacted in 1977 and directly amended SIPs to incorporate certain new statutory PSD changes,

[11] 40 C.F.R. § 51.166(a)(6)(i) provides that States "required to revise" SIPs "by reason of an amendment to this section [*i.e.*, § 51.166] … shall adopt and submit" to EPA the necessary SIP revisions within "three years after such amendment is published in the Federal Register." Such SIP revisions "may operate prospectively." 40 C.F.R. § 51.166(a)(6)(iii). The Tailoring Rule, published June 3, 2010, amended § 51.166 to impose EPA's new GHG PSD requirements on States, 75 Fed. Reg. at 31,606 (amending § 51.166), and did not amend § 51.166(a)(6). Thus, States properly should have until June 2013 to revise their SIPs to implement the Tailoring Rule's PSD regulation of GHGs.

new PSD requirements must be included in SIPs through the CAA-mandated SIP revision process. *Citizens To Save Spencer Cnty. v. EPA*, 600 F.2d 844, 856 n.28 (D.C. Cir. 1979). Throughout the Part C PSD program's history, EPA's Part 51 rules establishing minimum requirements for State PSD programs, and EPA's 40 C.F.R. Part 52 rules for federally-administered programs, have provided that any SIP revision incorporating new PSD requirements would not apply to previously permitted sources that "commence construction" within 12 to 18 months or more after the SIP revision. *See, e.g.*, 40 C.F.R. § 52.21(i), (j). And never in the past has EPA imposed a PSD construction permit moratorium due to a State's failure to submit a PSD SIP revision.

The Tailoring Rule ignores the statutory and regulatory requirements governing PSD SIP revisions. Instead of recognizing that States have a three-year period to adopt new GHG PSD requirements by revising SIPs, EPA in the Tailoring Rule demanded that States inform EPA within 60 days whether they could issue PSD permits for GHG-emitting sources *without* revising SIPs to incorporate the Tailoring Rule. Any State barred by State law from immediately implementing the Tailoring Rule without going through the SIP revision process would, according to EPA, become subject to an EPA "SIP Call" under CAA § 110(k)(5), requiring that the State change its SIP forthwith to incorporate the Tailoring Rule. If the State did not do so, EPA would impose a federal implementation plan ("FIP") on it by the end of December 2011. 75 Fed. Reg. at 31,526, 31,582-83.

EPA's premise was that section 165(a) is a "self-executing" command directly applicable to sources, not merely a statutory provision that governs Part 51 legislative rules defining PSD program content. Thus, according to EPA, because GHGs would become "subject to regulation" on January 2, 2011, States that did not yet have an EPA-approved SIP (and were not subject to a FIP) incorporating the Tailoring Rule by that date would be barred from issuing permits to sources emitting GHGs above the Tailoring Rule thresholds. *See* 75 Fed. Reg. at 31,516. Without permits, sources could not be built or modified; there would be a construction moratorium.

The Tailoring Rule calls, in Step 2, for new sources and source modifications not previously subject to PSD that had not "[begun] actual construction" before July 1, 2011, to obtain PSD permits based solely on their GHG emissions. *Id.* at 31,527. This requirement was absent from the proposed Tailoring Rule (which would have exempted sources from its requirements if they had received permits but had not yet begun construction) and was adopted without notice and comment opportunity and without any rational explanation. Likewise, EPA unlawfully failed to provide notice and comment opportunity for other critical transition provisions appearing for the first time in its final rule, including the January 2, 2011 Step 1 applicability date and EPA's refusal to "grandfather" sources that submitted complete PSD permit applications before that date. *See id.* at 31,592-93.

For these and other reasons, addressed in detail below, the Tailoring Rule's applicability dates as construed by EPA, as well as associated transition provisions, are unlawful and should be set aside.

1. EPA's Construction-Moratorium Interpretation Is Unlawful.

Imposition of a construction permit moratorium as a penalty for a State not revising its SIP to include new permit requirements is an uncommonly severe sanction—authorized by Congress only in Title I, Part D, of the Act addressing new source review ("NSR") for nonattainment areas, not in Title I, Part C, governing PSD for attainment areas. In 1977, Congress gave States two years to develop Part D SIP revisions for nonattainment-NSR preconstruction permit programs or else face the extraordinary sanction of a "construction [permit] moratorium" in nonattainment areas. Pub. L. No. 95-95, § 129(a), 91 Stat. 745 (1977). This "moratorium" in States that failed to submit Part D nonattainment-NSR SIPs had to be imposed by statute to override CAA § 110(a) and (c), which authorize only prospective SIP changes.

By contrast, no moratorium similar to the Part D moratorium was included in Part C PSD provisions. Congress, EPA, and courts all have recognized that the Part C PSD program must be implemented so as to avoid any interruption in preconstruction permitting. *See* CAA § 168(b); 45 Fed. Reg. at 52,683; *Spencer Cnty.*, 600 F.2d at 890. Thus, the Tailoring Rule could trigger a Part C PSD permit moratorium only if the statute imposed one. Because no provision in Part C triggers a PSD permit moratorium for failure to revise a SIP by a deadline, the Tailoring Rule

cannot lawfully be construed to establish such a moratorium. *See City of Idaho Falls v. FERC*, 629 F.3d 222, 230 (D.C. Cir. 2011) (citing *Stinson v. United States*, 508 U.S. 36, 45 (1993)) (courts must reject interpretation of regulations if those interpretations contradict the statute).

Moreover, EPA's construction that the Part 51 Tailoring Rule amends existing EPA-approved PSD SIPs to impose a moratorium is also fundamentally flawed because the PSD requirements of CAA § 165(a) are not self-executing. CAA § 110 implementation-plan revision procedures must be followed to incorporate new part 51 PSD requirements like the Tailoring Rule. *Spencer Cnty.*, 600 F.2d at 865-66.

For a new § 51.166 requirement to become part of a SIP, the State must develop a proposed SIP revision, provide "reasonable notice" to the public, hold a "public hearing," adopt a final revision rule, and obtain EPA's approval following notice-and-comment rulemaking by EPA. CAA § 110(a)(2), (k), (l). If, by the three-year SIP-revision deadline in 40 C.F.R. § 51.166(a)(6), a State fails to submit a SIP revision that meets the new requirements, EPA may make a finding to that effect and then, after notice-and-comment rulemaking, impose FIP requirements that will apply until the State corrects the deficiency. *See id.* §§ 110(c), 307(d)(1)(B), (d)(2)-(6). Pending revision of SIPs to incorporate new § 51.166 requirements, States may continue to issue valid PSD permits under the terms of their previously approved SIPs. *See, e.g., United States v. Cinergy Corp.*, 623 F.3d 455, 457-59 (7th Cir. 2010).

EPA's interpretation of the Tailoring Rule as overriding existing, EPA-approved Part C PSD SIPs to impose a construction moratorium beginning January 2, 2011, is contrary to CAA § 110(a), (c), and (i). CAA § 110(a) and (c) establish the only procedures available to revise approved SIPs. CAA § 110(i) states that "[e]xcept for … a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no … action modifying *any requirement* of an applicable implementation plan may be taken with respect to *any stationary source* by the State or by the [EPA] Administrator" (emphasis added). *See Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 787 n.12 (3d Cir. 1987) (CAA § 110(i) "appears to confirm … that the Act attempts to enumerate an exhaustive list of the EPA's powers regarding SIPs" and that, "[l]acking another statutory source of authority, the EPA must utilize the [SIP] revision provisions to accomplish its purpose.").

Accordingly, EPA's Tailoring Rule interpretation of its regulatory actions as imposing PSD requirements on States directly circumvents statutory requirements and therefore must be set aside.

2. EPA's Adoption of Step 2 Without Any Transition and Without Notice-and-Comment Rulemaking Was Unlawful.

Promulgation of the Step 2 PSD requirements without any transition provisions was arbitrary. At a minimum, EPA was required to provide notice and a comment opportunity on its approach. Historically, when EPA has expanded PSD coverage, it has exempted from the new requirements sources with all otherwise-

required preconstruction air permits as of the effective date if they "commenced construction" within 18 months. *See* 75 Fed. Reg. at 31,594-95 (discussing 40 C.F.R. § 52.21(i)(1)(i)-(v)). Indeed, here, EPA grandfathered from the Step 1 applicability date sources with PSD permits issued before January 2, 2011. Those sources are given at least 18 months to commence construction. *Id.* at 31,527; 40 C.F.R. § 52.21(r). EPA arbitrarily treated Step 2 sources very differently. Specifically, Step 2 sources with all applicable preconstruction permits that have entered into binding contracts and have thus "commence[d] construction" before the July 1, 2011 Step 2 applicability date are nonetheless subject to the onerous GHG PSD permitting obligations unless they "begin actual [*i.e.*, permanent on-site] construction"—a more stringent standard[12]—before July 1, 2011. EPA thus bars any transitional period for such sources.

EPA attempts to explain this disparate treatment by arguing it could not promulgate a Step 2 transition policy because it did not propose one. *Id.* at 31,595. EPA did not propose a Step 2 at all. Indeed, it provided no prior notice or explanation of its departure from its historic PSD transition policy, yet did not dispute

[12] *See* 75 Fed. Reg. 31,593-95 ("entering into binding contracts" satisfies "commence construction" but not "begin actual construction").

it *could* have opened these issues for comment with a supplemental proposed rule.[13] EPA further tried to justify its disparate treatment by noting sources had six months between the Step 1 and 2 dates, and about a year from the Tailoring Rule's publication, before Step 2 requirements began, to obtain PSD permits. *Id.* at 31,594. But EPA frequently takes more than the statutorily mandated one-year period, CAA § 165(c), to act on PSD permit applications. *See, e.g.*, *Avenal Power Ctr. v. EPA*, ___ F. Supp. 2d ___, 2010 WL 6743488 (D.D.C. May 26, 2011) (criticizing EPA's three-year delay in acting on PSD permit application). Indeed, EPA has acknowledged it typically requires 18-24 months for sources to obtain PSD permits. *See United States v. Xcel Energy*, 2010 U.S. Dist. LEXIS 139382, at *4 (D. Minn. Sept. 27, 2010).

EPA's actions and rationale violate requirements of reasoned decision-making and are arbitrary and capricious.

C. The Tailoring Rule Unlawfully Includes Six GHGs as "Subject to Regulation" When the Tailpipe Rule Regulated Only Four.

Although EPA's Endangerment Rule determined that six GHGs endanger health and welfare, EPA's Tailpipe Rule regulates only four—nitrous oxide, methane, CO_2, and hydrofluorocarbons, but not perfluorocarbons or sulfur hexafluoride. 75 Fed. Reg. at 31,520. Yet, in the Tailoring Rule, EPA determined all six are now

[13] EPA's Step 1 and 2 applicability dates were not in the proposed rule and appeared in the final rule without reopening of the rulemaking for comment. Consequently, these applicability dates should be set aside for this additional reason.

"subject to regulation" for stationary sources. This determination not only conflicts with the plain meaning of the term "subject to regulation" in CAA § 165(a)(4), but contradicts EPA's own determination in the Timing Rule that "subject to regulation" only includes "each pollutant subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of *that pollutant*." 75 Fed. Reg. at 17,004 (emphasis added). Accordingly, it was arbitrary and capricious for EPA to include all six GHGs in the PSD program.

D. EPA Failed to Conduct Required Analyses and Consider the Burdens Imposed.

EPA characterized the Tailoring Rule as a "relief rule," 75 Fed. Reg. at 31,595, but, as demonstrated above, it is EPA's interpretation of the PSD provisions in the Timing and Tailoring Rules that creates absurd results and accompanying burdens. Yet, EPA refused to analyze the economic effects of its interpretation. First, EPA refused to analyze stationary-source impacts of its decision to trigger PSD review in the Tailpipe Rule, asserting the Tailoring Rule would address those impacts. 75 Fed. Reg. at 25,401-02. Then, in the Tailoring Rule, EPA switched course and, claiming that it was the Tailpipe Rule that imposed the burdens, *refused* to address those impacts on grounds that the Tailoring Rule provided only "relief." *See* 75 Fed. Reg. at 31,597; *id.* at 31,554 (stating Tailpipe Rule "will trigger the applicability of PSD for GHG sources").

EPA failed to conduct required analyses under CAA § 317, the Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, Unfunded Mandates Reform Act, Paperwork Reduction Act, and Executive Orders 12898 and 13211. As explained in Petitioners' Tailpipe Rule Brief, Joint Opening Brief of Non-State Petitioners and Supporting Intervenors, *Coalition for Responsible Regulation v. EPA*, No. 10-1092, at 19-24 (filed June 3, 2011), EPA's regulatory "shell game" does not and cannot justify its failure to address the impacts of its actions, which was arbitrary and capricious and not in "observance of procedure required by law." CAA § 307(d)(9); 5 U.S.C. § 706.

CONCLUSION

For the foregoing reasons, the Court should vacate and remand the Timing and Tailoring Rules' regulation of stationary source GHG emissions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Joint Opening Brief of Non-State Petitioners and Supporting Intervenors contains 13,949 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limited set by the Court.

/s/ Allison D. Wood
Allison D. Wood

Dated: June 20, 2011

APPENDIX A:

ADDENDUM OF STATUTORY AND REGULATORY PROVISIONS

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APPENDIX A — STATUTORY ADDENDUM

Administrative Procedure Act Section 10(e), 5 U.S.C. § 706:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Clean Air Act Section 107, 42 U.S.C. § 7407:

§ 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will 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.

* * *

(c) Authority of Administrator to designate regions; notification of Governors of affected States

The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

(d) Designations

(1) Designations generally

(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as--

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not

meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

(B) Promulgation by EPA of designations

(i) Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

(ii) In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator intends to make a modification, the Administrator shall notify the State and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

(iii) If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or portions thereof) in the State designated as nonattainment, attainment, or unclassifiable, the Administrator shall act on such designations in

accordance with the procedures under paragraph (3) (relating to redesignation).

(iv) A designation for an area (or portion thereof) made pursuant to this subsection shall remain in effect until the area (or portion thereof) is redesignated pursuant to paragraph (3) or (4).

(C) Designations by operation of law

(i) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(A), (B), or (C) of this subsection (as in effect immediately before November 15, 1990) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

(ii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before November 15, 1990) is designated by operation of law, as an attainment area for such pollutant within the meaning of subparagraph (A)(ii).

(iii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(D) (as in effect immediately before November 15, 1990) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

(2) Publication of designations and redesignations

(A) The Administrator shall publish a notice in the Federal Register promulgating any designation under paragraph (1) or (5), or announcing any designation under paragraph (4), or promulgating any redesignation under paragraph (3).

(B) Promulgation or announcement of a designation under paragraph (1), (4) or (5) shall not be subject to the provisions of sections 553 through 557 of Title 5 (relating to notice and comment), except nothing herein shall be construed as precluding such public notice and comment whenever possible.

(3) Redesignation

(A) Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as

the Administrator may have available explaining the basis for the notice.

(B) No later than 120 days after receiving a notification under subparagraph (A), the Governor shall submit to the Administrator such redesignation, if any, of the appropriate area (or areas) or portion thereof within the State or interstate area, as the Governor considers appropriate.

(C) No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

(D) The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State. Within 18 months of receipt of a complete State redesignation submittal, the Administrator shall approve or deny such redesignation. The submission of a redesignation by a Governor shall not affect the effectiveness or enforceability of the applicable implementation plan for the State.

(E) The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless--

(i) the Administrator determines that the area has attained the national ambient air quality standard;

(ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;

(iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

(iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and

(v) the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

(F) The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable.

(4) Nonattainment designations for ozone, carbon monoxide and particulate matter (PM-10)

(A) Ozone and carbon monoxide

(i) Within 120 days after November 15, 1990, each Governor of each State shall submit to the Administrator a list that designates, affirms or reaffirms the designation of, or redesignates (as the case may be), all areas (or portions thereof) of the Governor's State as attainment, nonattainment, or unclassifiable with respect to the national ambient air quality standards for ozone and carbon monoxide.

(ii) No later than 120 days after the date the Governor is required to submit the list of areas (or portions thereof) required under clause (i) of this subparagraph, the Administrator shall promulgate such designations, making such modifications as the Administrator may deem necessary, in the same manner, and under the same procedure, as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with clause (i) of this subparagraph, a designation for an area (or portion thereof), the Administrator shall promulgate the designation that the Administrator deems appropriate.

(iii) No nonattainment area may be redesignated as an attainment area under this subparagraph.

(iv) Notwithstanding paragraph (1)(C)(ii) of this subsection, if an ozone or carbon monoxide nonattainment area located within a metropolitan statistical area or consolidated metropolitan statistical area (as established by the Bureau of the Census) is classified under part D of this subchapter as a Serious, Severe, or Extreme Area, the boundaries of such area are hereby revised (on the date 45 days after such classification) by operation of law to include the entire metropolitan statistical area or consolidated metropolitan statistical area, as the case may be, unless within

such 45-day period the Governor (in consultation with State and local air pollution control agencies) notifies the Administrator that additional time is necessary to evaluate the application of clause (v). Whenever a Governor has submitted such a notice to the Administrator, such boundary revision shall occur on the later of the date 8 months after such classification or 14 months after November 15, 1990, unless the Governor makes the finding referred to in clause (v), and the Administrator concurs in such finding, within such period. Except as otherwise provided in this paragraph, a boundary revision under this clause or clause (v) shall apply for purposes of any State implementation plan revision required to be submitted after November 15, 1990.

(v) Whenever the Governor of a State has submitted a notice under clause (iv), the Governor, in consultation with State and local air pollution control agencies, shall undertake a study to evaluate whether the entire metropolitan statistical area or consolidated metropolitan statistical area should be included within the nonattainment area. Whenever a Governor finds and demonstrates to the satisfaction of the Administrator, and the Administrator concurs in such finding, that with respect to a portion of a metropolitan statistical area or consolidated metropolitan statistical area, sources in the portion do not contribute significantly to violation of the national ambient air quality standard, the Administrator shall approve the Governor's request to exclude such portion from the nonattainment area. In making such finding, the Governor and the Administrator shall consider factors such as population density, traffic congestion, commercial development, industrial development, meteorological conditions, and pollution transport.

(B) PM-10 designations

By operation of law, until redesignation by the Administrator pursuant to paragraph (3)--

(i) each area identified in 52 Federal Register 29383 (Aug. 7, 1987) as a Group I area (except to the extent that such identification was modified by the Administrator before November 15, 1990) is designated nonattainment for PM-10;

(ii) any area containing a site for which air quality monitoring data show a violation of the national ambient air quality standard for PM-10 before January 1, 1989 (as determined under part 50, appendix K of title 40 of the Code of Federal Regulations) is hereby designated nonattainment for PM-10; and

(iii) each area not described in clause (i) or (ii) is hereby designated unclassifiable for PM-10.

Any designation for particulate matter (measured in terms of total suspended particulates) that the Administrator promulgated pursuant to this subsection (as in effect immediately before November 15, 1990) shall remain in effect for purposes of implementing the maximum allowable increases in concentrations of particulate matter (measured in terms of total suspended particulates) pursuant to section 7473(b) of this title, until the Administrator determines that such designation is no longer necessary for that purpose.

(5) Designations for lead

The Administrator may, in the Administrator's discretion at any time the Administrator deems appropriate, require a State to designate areas (or portions thereof) with respect to the national ambient air quality standard for lead in effect as of November 15, 1990, in accordance with the procedures under subparagraphs (A) and (B) of paragraph (1), except that in applying subparagraph (B)(i) of paragraph (1) the phrase "2 years from the date of promulgation of the new or revised national ambient air quality standard" shall be replaced by the phrase "1 year from the date the Administrator notifies the State of the requirement to designate areas with respect to the standard for lead".

(6) Designations

(A) Submission

Notwithstanding any other provision of law, not later than February 15, 2004, the Governor of each State shall submit designations referred to in paragraph (1) for the July 1997 PM2.5 national ambient air quality standards for each area within the State, based on air quality monitoring data collected in accordance with any applicable Federal reference methods for the relevant areas.

(B) Promulgation

Notwithstanding any other provision of law, not later than December 31, 2004, the Administrator shall, consistent with paragraph (1), promulgate the designations referred to in subparagraph (A) for each area of each State for the July 1997 PM2.5 national ambient air quality standards.

(7) Implementation plan for regional haze

(A) In general

Notwithstanding any other provision of law, not later than 3 years after the date on which the Administrator promulgates the designations referred to in paragraph (6)(B) for a State, the State shall

submit, for the entire State, the State implementation plan revisions to meet the requirements promulgated by the Administrator under section 7492(e)(1) of this title (referred to in this paragraph as "regional haze requirements").

(B) No preclusion of other provisions

Nothing in this paragraph precludes the implementation of the agreements and recommendations stemming from the Grand Canyon Visibility Transport Commission Report dated June 1996, including the submission of State implementation plan revisions by the States of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, or Wyoming by December 31, 2003, for implementation of regional haze requirements applicable to those States.

* * *

Clean Air Act Section 108(a), 42 U.S.C. § 7408(a):

§ 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in

varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

Clean Air Act Section 109(b), 42 U.S.C. § 7409(b):

§ 7409. National primary and secondary ambient air quality standards

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

Clean Air Act Section 110(a), (c), (i), (k), (l), 42 U.S.C. § 7410(a), (c), (i), (k), (l):

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the

areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide

(i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof),

(ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and

(iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)

(A) Repealed. Pub. L. 101–549, title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413 (d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413 (e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub. L. 101–549, title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409.

(5)

(A)

(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413 (d) of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

* * *

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)

(A) Repealed. Pub. L. 101–549, title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation

plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub. L. 101–549, title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub. L. 101–549, title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409.

(5)

(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which

application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

* * *

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413 (d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section; no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

* * *

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be

treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

(l) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision

would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

Clean Air Act Section 161, 42 U.S.C. § 7471:

§ 7471. Plan requirements

In accordance with the policy of section 7401(b)(1) of this title, 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 7407 of this title as attainment or unclassifiable.

Clean Air Act Section 162, 42 U.S.C. § 7472:

§ 7472. Initial classifications

(a) Areas designated as class I

Upon the enactment of this part, all—

(1) international parks,

(2) national wilderness areas which exceed 5,000 acres in size,

(3) national memorial parks which exceed 5,000 acres in size, and

(4) national parks which exceed six thousand acres in size,

and which are in existence on August 7, 1977, shall be class I areas and may not be redesignated. All areas which were redesignated as class I under regulations promulgated before August 7, 1977, shall be class I areas which may be redesignated as provided in this part. The extent of the areas designated as Class I under this section shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990.

(b) Areas designated as class II

All areas in such State designated pursuant to section 7407 (d) of this title as attainment or unclassifiable which are not established as class I under subsection (a) of this section shall be class II areas unless redesignated under section 7474 of this title.

Clean Air Act Section 163, 42 U.S.C. § 7473:

§ 7473. Increments and ceilings

(a) Sulfur oxide and particulate matter; requirement that maximum allowable increases and maximum allowable concentrations not be exceeded

In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under section 7475 (d)(2)(C)(iv) of this title) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

(b) Maximum allowable increases in concentrations over baseline concentrations

(1) For any class I area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant Maximum allowable increase (in micrograms per cubic meter) Particulate matter: 5 Annual geometric mean Twenty-four-hour maximum 10 Sulfur dioxide: 2 Annual arithmetic mean 5 Twenty-four-hour maximum Three-hour maximum 25

(2) For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant Maximum allowable increase (in micrograms per cubic meter) Particulate matter: 19 Annual geometric mean 37 Twenty-four-hour maximum Sulfur dioxide: 20 Annual arithmetic mean 91 Twenty-four-hour maximum Three-hour maximum 512

(3) For any class III area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant Maximum allowable increase (in micrograms per cubic meter) Particulate matter: 37 Annual geometric mean 75 Twenty-four-hour maximum Sulfur dioxide: 40 Annual arithmetic mean Twenty-four-hour maximum 182 Three-hour maximum 700

(4) The maximum allowable concentration of any air pollutant in any area to which this part applies shall not exceed a concentration for such pollutant for each period of exposure equal to—

(A) the concentration permitted under the national secondary ambient air quality standard, or

(B) the concentration permitted under the national primary ambient air quality standard,

whichever concentration is lowest for such pollutant for such period of exposure.

(c) Orders or rules for determining compliance with maximum allowable increases in ambient concentrations of air pollutants

(1) In the case of any State which has a plan approved by the Administrator for purposes of carrying out this part, the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for purposes of determining compliance with the maximum allowable increases in ambient concentrations of an air pollutant, the following concentrations of such pollutant shall not be taken into account:

(A) concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, or natural gas, or both, by reason of an order which is in effect under the provisions of sections 792 (a) and (b) of title 15 (or any subsequent legislation which supersedes such provisions) over the emissions from such sources before the effective date of such order.

(B) the concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from using natural gas by reason of a natural gas curtailment pursuant to a natural gas curtailment plan in effect pursuant to the Federal Power Act [16 U.S.C. 791a et seq.] over the emissions from such sources before the effective date of such plan,

(C) concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities, and

(D) the increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration determined in accordance with section 7479 (4) of this title.

(2) No action taken with respect to a source under paragraph (1)(A) or (1)(B) shall apply more than five years after the effective date of the order referred to in paragraph (1)(A) or the plan referred to in paragraph

(1)(B), whichever is applicable. If both such order and plan are applicable, no such action shall apply more than five years after the later of such effective dates.

(3) No action under this subsection shall take effect unless the Governor submits the order or rule providing for such exclusion to the Administrator and the Administrator determines that such order or rule is in compliance with the provisions of this subsection.

Clean Air Act Section 164, 42 U.S.C. § 7474:

§ 7474. Area redesignation

(a) Authority of States to redesignate areas

Except as otherwise provided under subsection (c) of this section, a State may redesignate such areas as it deems appropriate as class I areas. The following areas may be redesignated only as class I or II:

(1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore, and

(2) a national park or national wilderness area established after August 7, 1977, which exceeds ten thousand acres in size.

The extent of the areas referred to in paragraph (1) and (2) shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990. Any area (other than an area referred to in paragraph (1) or (2) or an area established as class I under the first sentence of section 7472 (a) of this title) may be redesignated by the State as class III if—

(A) such redesignation has been specifically approved by the Governor of the State, after consultation with the appropriate Committees of the legislature if it is in session or with the leadership of the legislature if it is not in session (unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area so redesignated enact legislation (including for such units of local government resolutions where appropriate) concurring in the State's redesignation;

(B) such redesignation will not cause, or contribute to, concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and

(C) such redesignation otherwise meets the requirements of this part.

Subparagraph (A) of this paragraph shall not apply to area redesignations by Indian tribes.

(b) Notice and hearing; notice to Federal land manager; written comments and recommendations; regulations; disapproval of redesignation

(1)

(A) Prior to redesignation of any area under this part, notice shall be afforded and public hearings shall be conducted in areas proposed to be redesignated and in areas which may be affected by the proposed redesignation. Prior to any such public hearing a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation shall be prepared and made available for public inspection and prior to any such redesignation, the description and analysis of such effects shall be reviewed and examined by the redesignating authorities.

(B) Prior to the issuance of notice under subparagraph (A) respecting the redesignation of any area under this subsection, if such area includes any Federal lands, the State shall provide written notice to the appropriate Federal land manager and afford adequate opportunity (but not in excess of 60 days) to confer with the State respecting the intended notice of redesignation and to submit written comments and recommendations with respect to such intended notice of redesignation. In redesignating any area under this section with respect to which any Federal land manager has submitted written comments and recommendations, the State shall publish a list of any inconsistency between such redesignation and such recommendations and an explanation of such inconsistency (together with the reasons for making such redesignation against the recommendation of the Federal land manager).

(C) The Administrator shall promulgate regulations not later than six months after August 7, 1977, to assure, insofar as practicable, that prior to any public hearing on redesignation of any area, there shall be available for public inspection any specific plans for any new or modified major emitting facility which may be permitted to be constructed and operated only if the area in question is designated or redesignated as class III.

(2) The Administrator may disapprove the redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section or is inconsistent with the requirements of section 7472 (a) of this title or of subsection (a) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(c) Indian reservations

Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respect to the provisions of subsection (e) of this section.

(d) Review of national monuments, primitive areas, and national preserves

The Federal Land Manager shall review all national monuments, primitive areas, and national preserves, and shall recommend any appropriate areas for redesignation as class I where air quality related values are important attributes of the area. The Federal Land Manager shall report such recommendations, within supporting analysis, to the Congress and the affected States within one year after August 7, 1977. The Federal Land Manager shall consult with the appropriate States before making such recommendations.

(e) Resolution of disputes between State and Indian tribes

If any State affected by the redesignation of an area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in any State which the Governor of an affected State or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

Clean Air Act Section 165, 42 U.S.C. § 7475:

§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, 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 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.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)

(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)

(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or

operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

(iv) In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such facility will not cause or contribute to concentrations of such pollutant which exceed the following maximum allowable increases over the baseline concentration for such pollutants:

Maximum allowable increase (in micrograms per cubic meter) Particulate matter: 19 Annual geometric mean 37 Twenty-four-hour maximum Sulfur dioxide: 20 Annual arithmetic mean 91 Twenty-four-hour maximum Three-hour maximum 325

(D)

(i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the

case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

(ii) In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

(iii) In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such facility will not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which exceed the following maximum allowable increases for such areas over the baseline concentration for such pollutant and to assure that such emissions will not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less on more than 18 days during any annual period:

(In micrograms per cubic meter)

MAXIMUM ALLOWABLE INCREASE **Period of exposure**	**Low terrain areas**	**High terrain areas**
24-hr maximum	36	62
3-hr maximum	130	221

(iv) For purposes of clause (iii), the term "high terrain area" means with respect to any facility, any area having an elevation of 900 feet or more above the base of the stack of such facility, and

the term "low terrain area" means any area other than a high terrain area.

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

(2) Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

(3) The Administrator shall within six months after August 7, 1977, promulgate regulations respecting the analysis required under this subsection which regulations—

(A) shall not require the use of any automatic or uniform buffer zone or zones,

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

(D) shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

Clean Air Act Section 166, 42 U.S.C. § 7476:

§ 7476. Other pollutants

(a) Hydrocarbons, carbon monoxide, petrochemical oxidants, and nitrogen oxides

In the case of the pollutants hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later than two years after August 7, 1977, promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions of such pollutants. In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.

(b) Effective date of regulations

Regulations referred to in subsection (a) of this section shall become effective one year after the date of promulgation. Within 21 months after such date of promulgation such plan revision shall be submitted to the Administrator who shall approve or disapprove the plan within 25 months after such date or promulgation in the same manner as required under section 7410 of this title.

(c) Contents of regulations

Such regulations shall provide specific numerical measures against which permit applications may be evaluated, a framework for stimulating improved control technology, protection of air quality values, and fulfill the goals and purposes set forth in section 7401 and section 7470 of this title.

(d) Specific measures to fulfill goals and purposes

The regulations of the Administrator under subsection (a) of this section shall provide specific measures at least as effective as the increments established in section 7473 of this title to fulfill such goals and purposes, and may contain air quality increments, emission density requirements, or other measures.

(e) Area classification plan not required

With respect to any air pollutant for which a national ambient air quality standard is established other than sulfur oxides or particulate matter, an area classification plan shall not be required under this section if the implementation plan adopted by the State and submitted for the Administrator's approval or promulgated by the Administrator under section 7410 (c) of this title contains other provisions which when considered as a whole, the Administrator finds will carry out the purposes in section 7470 of this title at least as effectively as an area classification plan for such pollutant. Such other provisions referred to in the preceding sentence need not require the establishment of maximum allowable increases with respect to such pollutant for any area to which this section applies.

(f) PM–10 increments

The Administrator is authorized to substitute, for the maximum allowable increases in particulate matter specified in section 7473 (b) of this title and section 7475 (d)(2)(C)(iv) of this title, maximum allowable increases in particulate matter with an aerodynamic diameter smaller than or equal to 10 micrometers. Such substituted maximum allowable increases shall be of equal stringency in effect as those specified in the provisions for which they are substituted. Until the Administrator promulgates regulations under the authority of this subsection, the current maximum allowable increases in concentrations of particulate matter shall remain in effect.

Clean Air Act Section 168(b), 42 U.S.C. § 7478(b):

§ 7478. Period before plan approval

(b) Regulations deemed amended; construction commenced after June 1, 1975

If any regulation in effect prior to August 7, 1977, to prevent significant deterioration of air quality would be inconsistent with the requirements of section 7472 (a), section 7473(b) or section 7474 (a) of this title, then such regulations shall be deemed amended so as to conform with such requirements. In the case of a facility on which construction was commenced (in accordance with the definition of "commenced" in section 7479 (2) of this title) after June 1, 1975, and prior to August 7, 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to August 7, 1977.

Clean Air Act Section 169(1), 42 U.S.C. § 7479(1):

§ 7479. Definitions

For purposes of this part--

> **(1)** The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

Clean Air Act Section 169A, 42 U.S.C. § 7491:

§ 7491. Visibility protection for Federal class I areas

(a) Impairment of visibility; list of areas; study and report

(1) Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution.

(2) Not later than six months after August 7, 1977, the Secretary of the Interior in consultation with other Federal land managers shall review all mandatory class I Federal areas and identify those where visibility is an important value of the area. From time to time the Secretary of the Interior may revise such identifications. Not later than one year after August 7, 1977, the Administrator shall, after consultation with the Secretary of the Interior, promulgate a list of mandatory class I Federal areas in which he determines visibility is an important value.

(3) Not later than eighteen months after August 7, 1977, the Administrator shall complete a study and report to Congress on available methods for implementing the national goal set forth in paragraph (1). Such report shall include recommendations for—

(A) methods for identifying, characterizing, determining, quantifying, and measuring visibility impairment in Federal areas referred to in paragraph (1), and

(B) modeling techniques (or other methods) for determining the extent to which manmade air pollution may reasonably be anticipated to cause or contribute to such impairment, and

(C) methods for preventing and remedying such manmade air pollution and resulting visibility impairment.

Such report shall also identify the classes or categories of sources and the types of air pollutants which, alone or in conjunction with other sources or pollutants, may reasonably be anticipated to cause or contribute significantly to impairment of visibility.

(4) Not later than twenty-four months after August 7, 1977, and after notice and public hearing, the Administrator shall promulgate regulations to assure (A) reasonable progress toward meeting the national goal specified in paragraph (1), and (B) compliance with the requirements of this section.

(b) Regulations

Regulations under subsection (a)(4) of this section shall—

(1) provide guidelines to the States, taking into account the recommendations under subsection (a)(3) of this section on appropriate techniques and methods for implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a)(3)), and

(2) require each applicable implementation plan for a State in which any area listed by the Administrator under subsection (a)(2) of this section is located (or for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area) to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal specified in subsection (a) of this section, including—

(A) except as otherwise provided pursuant to subsection (c) of this section, a requirement that each major stationary source which is in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date, and which, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410 (c) of this title) emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410 (c) of this title) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment, and

(B) a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal specified in subsection (a) of this section.

In the case of a fossil-fuel fired generating powerplant having a total generating capacity in excess of 750 megawatts, the emission limitations required under this paragraph shall be determined pursuant to guidelines, promulgated by the Administrator under paragraph (1).

(c) Exemptions

(1) The Administrator may, by rule, after notice and opportunity for public hearing, exempt any major stationary source from the requirement of subsection (b)(2)(A) of this section, upon his determination that such source does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to a significant impairment of visibility in any mandatory class I Federal area.

(2) Paragraph (1) of this subsection shall not be applicable to any fossil-fuel fired powerplant with total design capacity of 750 megawatts or more, unless the owner or operator of any such plant demonstrates to the satisfaction of the Administrator that such powerplant is located at such distance from all areas listed by the Administrator under subsection (a)(2) of this section that such powerplant does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such area.

(3) An exemption under this subsection shall be effective only upon concurrence by the appropriate Federal land manager or managers with the Administrator's determination under this subsection.

(d) Consultations with appropriate Federal land managers

Before holding the public hearing on the proposed revision of an applicable implementation plan to meet the requirements of this section, the State (or the Administrator, in the case of a plan promulgated under section 7410 (c) of this title) shall consult in person with the appropriate Federal land manager or managers and shall include a summary of the conclusions and recommendations of the Federal land managers in the notice to the public.

(e) Buffer zones

In promulgating regulations under this section, the Administrator shall not require the use of any automatic or uniform buffer zone or zones.

(f) Nondiscretionary duty

For purposes of section 7604 (a)(2) of this title, the meeting of the national goal specified in subsection (a)(1) of this section by any specific date or dates shall not be considered a "nondiscretionary duty" of the Administrator.

(g) Definitions

For the purpose of this section—

(1) in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements;

(2) in determining best available retrofit technology the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology;

(3) the term "manmade air pollution" means air pollution which results directly or indirectly from human activities;
(4) the term "as expeditiously as practicable" means as expeditiously as practicable but in no event later than five years after the date of approval of a plan revision under this section (or the date of promulgation of such a plan revision in the case of action by the Administrator under section 7410 (c) of this title for purposes of this section);
(5) the term "mandatory class I Federal areas" means Federal areas which may not be designated as other than class I under this part;
(6) the terms "visibility impairment" and "impairment of visibility" shall include reduction in visual range and atmospheric discoloration; and
(7) the term "major stationary source" means the following types of stationary sources with the potential to emit 250 tons or more of any pollutant: fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than 250 million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities.

Clean Air Act Section 169B, 42 U.S.C. § 7492

§ 7492. Visibility

(a) Studies

(1) The Administrator, in conjunction with the National Park Service and other appropriate Federal agencies, shall conduct research to identify and evaluate sources and source regions of both visibility impairment and regions that provide predominantly clean air in class I areas. A total of $8,000,000 per year for 5 years is authorized to be appropriated for the Environmental Protection Agency and the other Federal agencies to conduct this research. The research shall include—

(A) expansion of current visibility related monitoring in class I areas;

(B) assessment of current sources of visibility impairing pollution and clean air corridors;

(C) adaptation of regional air quality models for the assessment of visibility;

(D) studies of atmospheric chemistry and physics of visibility.

(2) Based on the findings available from the research required in subsection (a)(1) of this section as well as other available scientific and technical data, studies, and other available information pertaining to visibility source-receptor relationships, the Administrator shall conduct an assessment and evaluation that identifies, to the extent possible, sources and source regions of visibility impairment including natural sources as well as source regions of clear air for class I areas. The Administrator shall produce interim findings from this study within 3 years after November 15, 1990.

(b) Impacts of other provisions

Within 24 months after November 15, 1990, the Administrator shall conduct an assessment of the progress and improvements in visibility in class I areas that are likely to result from the implementation of the provisions of the Clean Air Act Amendments of 1990 other than the provisions of this section. Every 5 years thereafter the Administrator shall conduct an assessment of actual progress and improvement in visibility in class I areas. The Administrator shall prepare a written report on each assessment and transmit copies of these reports to the appropriate committees of Congress.

(c) Establishment of visibility transport regions and commissions

(1) Authority to establish visibility transport regions

Whenever, upon the Administrator's motion or by petition from the Governors of at least two affected States, the Administrator has reason

to believe that the current or projected interstate transport of air pollutants from one or more States contributes significantly to visibility impairment in class I areas located in the affected States, the Administrator may establish a transport region for such pollutants that includes such States. The Administrator, upon the Administrator's own motion or upon petition from the Governor of any affected State, or upon the recommendations of a transport commission established under subsection (b) of this section may—

(A) add any State or portion of a State to a visibility transport region when the Administrator determines that the interstate transport of air pollutants from such State significantly contributes to visibility impairment in a class I area located within the transport region, or

(B) remove any State or portion of a State from the region whenever the Administrator has reason to believe that the control of emissions in that State or portion of the State pursuant to this section will not significantly contribute to the protection or enhancement of visibility in any class I area in the region.

(2) Visibility transport commissions

Whenever the Administrator establishes a transport region under subsection (c)(1) of this section, the Administrator shall establish a transport commission comprised of (as a minimum) each of the following members:

(A) the Governor of each State in the Visibility Transport Region, or the Governor's designee;

(B) The Administrator or the Administrator's designee; and

(C) A representative of each Federal agency charged with the direct management of each class I area or areas within the Visibility Transport Region.

(3) Ex officio members

All representatives of the Federal Government shall be ex officio members.

(4) Federal Advisory Committee Act

The visibility transport commissions shall be exempt from the requirements of the Federal Advisory Committee Act [5 U.S.C. App.].

(d) Duties of visibility transport commissions

A Visibility Transport Commission—

(1) shall assess the scientific and technical data, studies, and other currently available information, including studies conducted pursuant to subsection (a)(1) of this section, pertaining to adverse impacts on visibility from potential or projected growth in emissions from sources located in the Visibility Transport Region; and

(2) shall, within 4 years of establishment, issue a report to the Administrator recommending what measures, if any, should be taken under this chapter to remedy such adverse impacts. The report required by this subsection shall address at least the following measures:

(A) the establishment of clean air corridors, in which additional restrictions on increases in emissions may be appropriate to protect visibility in affected class I areas;

(B) the imposition of the requirements of part D of this subchapter affecting the construction of new major stationary sources or major modifications to existing sources in such clean air corridors specifically including the alternative siting analysis provisions of section 7503 (a)(5) of this title; and

(C) the promulgation of regulations under section 7491 of this title to address long range strategies for addressing regional haze which impairs visibility in affected class I areas.

(e) Duties of Administrator

(1) The Administrator shall, taking into account the studies pursuant to subsection (a)(1) of this section and the reports pursuant to subsection (d)(2) of this section and any other relevant information, within eighteen months of receipt of the report referred to in subsection (d)(2) of this section, carry out the Administrator's regulatory responsibilities under section 7491 of this title, including criteria for measuring "reasonable progress" toward the national goal.

(2) Any regulations promulgated under section 7491 of this title pursuant to this subsection shall require affected States to revise within 12 months their implementation plans under section 7410 of this title to contain such emission limits, schedules of compliance, and other measures as may be necessary to carry out regulations promulgated pursuant to this subsection.

(f) Grand Canyon visibility transport commission

The Administrator pursuant to subsection (c)(1) of this section shall, within 12 months, establish a visibility transport commission for the region affecting the visibility of the Grand Canyon National Park.

Clean Air Act Section 202(a), 42 U.S.C. § 7521(a):

§ 7521. Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b) of this section—

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(3)

(A) In general.—

(i) Unless the standard is changed as provided in subparagraph (B), regulations under paragraph (1) of this subsection applicable to emissions of hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter from classes or categories of heavy-duty vehicles or engines manufactured during or after model year 1983 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.

(ii) In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, type of fuel used, or other appropriate factors.

(B) Revised standards for heavy duty trucks.—

(i) On the basis of information available to the Administrator concerning the effects of air pollutants emitted from heavy-duty vehicles or engines and from other sources of mobile source related pollutants on the public health and welfare, and taking costs into account, the Administrator may promulgate regulations under paragraph (1) of this subsection revising any standard promulgated under, or before the date of, the enactment of the Clean Air Act Amendments of 1990 (or previously revised under this subparagraph) and applicable to classes or categories of heavy-duty vehicles or engines.

(ii) Effective for the model year 1998 and thereafter, the regulations under paragraph (1) of this subsection applicable to emissions of oxides of nitrogen (NOx) from gasoline and diesel-fueled heavy duty trucks shall contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh).

(C) Lead time and stability.— Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning no earlier than the model year commencing 4 years after such revised standard is promulgated.

(D) Rebuilding practices.— The Administrator shall study the practice of rebuilding heavy-duty engines and the impact rebuilding has on engine emissions. On the basis of that study and other information available to the Administrator, the Administrator may prescribe requirements to control rebuilding practices, including standards applicable to emissions from any rebuilt heavy-duty engines (whether or not the engine is past its statutory useful life), which in the Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare taking costs into account. Any regulation shall take effect after a period the Administrator finds necessary to permit the development and application of the requisite control measures, giving appropriate consideration to the cost of compliance within the period and energy and safety factors.

(E) Motorcycles.— For purposes of this paragraph, motorcycles and motorcycle engines shall be treated in the same manner as heavy-duty vehicles and engines (except as otherwise permitted under section 7525 (f)(1) of this title) unless the Administrator promulgates a rule reclassifying motorcycles as light-duty vehicles within the

meaning of this section or unless the Administrator promulgates regulations under subsection (a) of this section applying standards applicable to the emission of air pollutants from motorcycles as a separate class or category. In any case in which such standards are promulgated for such emissions from motorcycles as a separate class or category, the Administrator, in promulgating such standards, shall consider the need to achieve equivalency of emission reductions between motorcycles and other motor vehicles to the maximum extent practicable.

(4)

(A) Effective with respect to vehicles and engines manufactured after model year 1978, no emission control device, system, or element of design shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with requirements prescribed under this subchapter if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

(B) In determining whether an unreasonable risk exists under subparagraph (A), the Administrator shall consider, among other factors,

(i) whether and to what extent the use of any device, system, or element of design causes, increases, reduces, or eliminates emissions of any unregulated pollutants;

(ii) available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such device, system, or element of design, and

(iii) the availability of other devices, systems, or elements of design which may be used to conform to requirements prescribed under this subchapter without causing or contributing to such unreasonable risk. The Administrator shall include in the consideration required by this paragraph all relevant information developed pursuant to section 7548 of this title.

(5)

(A) If the Administrator promulgates final regulations which define the degree of control required and the test procedures by which compliance could be determined for gasoline vapor recovery of uncontrolled emissions from the fueling of motor vehicles, the Administrator shall, after consultation with the Secretary of Transportation with respect to motor vehicle safety, prescribe, by regulation, fill pipe standards for new motor vehicles in order to insure effective connection between such fill pipe and any vapor

recovery system which the Administrator determines may be required to comply with such vapor recovery regulations. In promulgating such standards the Administrator shall take into consideration limits on fill pipe diameter, minimum design criteria for nozzle retainer lips, limits on the location of the unleaded fuel restrictors, a minimum access zone surrounding a fill pipe, a minimum pipe or nozzle insertion angle, and such other factors as he deems pertinent.

(B) Regulations prescribing standards under subparagraph (A) shall not become effective until the introduction of the model year for which it would be feasible to implement such standards, taking into consideration the restraints of an adequate leadtime for design and production.

(C) Nothing in subparagraph (A) shall

(i) prevent the Administrator from specifying different nozzle and fill neck sizes for gasoline with additives and gasoline without additives or

(ii) permit the Administrator to require a specific location, configuration, modeling, or styling of the motor vehicle body with respect to the fuel tank fill neck or fill nozzle clearance envelope.

(D) For the purpose of this paragraph, the term "fill pipe" shall include the fuel tank fill pipe, fill neck, fill inlet, and closure.

(6) Onboard vapor recovery.— Within 1 year after November 15, 1990, the Administrator shall, after consultation with the Secretary of Transportation regarding the safety of vehicle-based ("onboard") systems for the control of vehicle refueling emissions, promulgate standards under this section requiring that new light-duty vehicles manufactured beginning in the fourth model year after the model year in which the standards are promulgated and thereafter shall be equipped with such systems. The standards required under this paragraph shall apply to a percentage of each manufacturer's fleet of new light-duty vehicles beginning with the fourth model year after the model year in which the standards are promulgated. The percentage shall be as specified in the following table:

Implementation Schedule for Onboard Vapor Recovery Requirements

Model year commencing after standards promulgated	**Percentage***
Fourth	40
Fifth	80
After Fifth	100

*Percentages in the table refer to a percentage of the manufacturer's sales volume.

The standards shall require that such systems provide a minimum evaporative emission capture efficiency of 95 percent. The requirements of section 7511a (b)(3) of this title (relating to stage II gasoline vapor recovery) for areas classified under section 7511 of this title as moderate for ozone shall not apply after promulgation of such standards and the Administrator may, by rule, revise or waive the application of the requirements of such section 7511a (b)(3) of this title for areas classified under section 7511 of this title as Serious, Severe, or Extreme for ozone, as appropriate, after such time as the Administrator determines that onboard emissions control systems required under this paragraph are in widespread use throughout the motor vehicle fleet.

Clean Air Act Section 302(g) and (j), 42 U.S.C. § 7602(g) and (j):

§ 7602. Definitions

When used in this chapter--

* * *

(g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

* * *

(j) Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

Clean Air Act Section 307(b) and (d), 42 U.S.C. § 7607(b) and (d):

§ 7607. Administrative proceedings and judicial review

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521 (b)(1) of this title), any determination under section 7521 (b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411 (d) of this title, any order under section 7411 (j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c–10 (c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414 (a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this

subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

* * *

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412 (f) of this title, or any regulation under section 7412 (g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV–A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413 (d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV–A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b (f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second

(identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553 (b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409 (d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)

(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)

(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies

(i) the Administrator shall allow any person to submit written comments, data, or documentary information;

(ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions;

(iii) a transcript shall be kept of any oral presentation; and

(iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)

(A) The promulgated rule shall be accompanied by

(i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and

(ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)

(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b)

of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if

(i) such failure to observe such procedure is arbitrary or capricious,

(ii) the requirement of paragraph (7)(B) has been met, and

(iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

Clean Air Act Section 317, 42 U.S.C. § 7617:

§ 7617. Economic Impact Assessment

(a) Notice of proposed rulemaking; substantial revisions

This section applies to action of the Administrator in promulgating or revising--

(1) any new source standard of performance under section 7411 of this title,

(2) any regulation under section 7411(d) of this title,

(3) any regulation under part B of subchapter I of this chapter (relating to ozone and stratosphere protection),

(4) any regulation under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality),

(5) any regulation establishing emission standards under section 7521 of this title and any other regulation promulgated under that section,

(6) any regulation controlling or prohibiting any fuel or fuel additive under section 7545(c) of this title, and

(7) any aircraft emission standard under section 7571 of this title.

Nothing in this section shall apply to any standard or regulation described in paragraphs (1) through (7) of this subsection unless the notice of proposed rulemaking in connection with such standard or regulation is published in the Federal Register after the date ninety days after August 7, 1977. In the case of revisions of such standards or regulations, this section shall apply only to revisions which the Administrator determines to be substantial revisions.

(b) Preparation of assessment by Administrator

Before publication of notice of proposed rulemaking with respect to any standard or regulation to which this section applies, the Administrator shall prepare an economic impact assessment respecting such standard or regulation. Such assessment shall be included in the docket required under section 7607(d)(2) of this title and shall be available to the public as provided in section 7607(d)(4) of this title. Notice of proposed rulemaking shall include notice of such availability together with an explanation of the extent and manner in which the Administrator has considered the analysis contained in such economic impact assessment in proposing the action. The Administrator shall also provide such an

explanation in his notice of promulgation of any regulation or standard referred to in subsection (a) of this section. Each such explanation shall be part of the statements of basis and purpose required under sections 7607(d)(3) and 7607(d)(6) of this title.

(c) Analysis

Subject to subsection (d) of this section, the assessment required under this section with respect to any standard or regulation shall contain an analysis of--

(1) the costs of compliance with any such standard or regulation, including extent to which the costs of compliance will vary depending on (A) the effective date of the standard or regulation, and (B) the development of less expensive, more efficient means or methods of compliance with the standard or regulation;

(2) the potential inflationary or recessionary effects of the standard or regulation;

(3) the effects on competition of the standard or regulation with respect to small business;

(4) the effects of the standard or regulation on consumer costs; and

(5) the effects of the standard or regulation on energy use.

Nothing in this section shall be construed to provide that the analysis of the factors specified in this subsection affects or alters the factors which the Administrator is required to consider in taking any action referred to in subsection (a) of this section.

(d) Extensiveness of assessment

The assessment required under this section shall be as extensive as practicable, in the judgment of the Administrator taking into account the time and resources available to the Environmental Protection Agency and other duties and authorities which the Administrator is required to carry out under this chapter.

(e) Limitations on construction of section

Nothing in this section shall be construed--

(1) to alter the basis on which a standard or regulation is promulgated under this chapter;

(2) to preclude the Administrator from carrying out his responsibility under this chapter to protect public health and welfare; or

(3) to authorize or require any judicial review of any such standard or regulation, or any stay or injunction of the proposal, promulgation, or effectiveness of such standard or regulation on the basis of failure to comply with this section.

(f) Citizen suits

The requirements imposed on the Administrator under this section shall be treated as nondiscretionary duties for purposes of section 7604(a)(2) of this title, relating to citizen suits. The sole method for enforcement of the Administrator's duty under this section shall be by bringing a citizen suit under such section 7604(a)(2) for a court order to compel the Administrator to perform such duty. Violation of any such order shall subject the Administrator to penalties for contempt of court.

(g) Costs

In the case of any provision of this chapter in which costs are expressly required to be taken into account, the adequacy or inadequacy of any assessment required under this section may be taken into consideration, but shall not be treated for purposes of judicial review of any such provision as conclusive with respect to compliance or noncompliance with the requirement of such provision to take cost into account.

Clean Air Act Section 501, 42 U.S.C. § 7661:

§ 7661. Definitions

As used in this subchapter—

(1) Affected source

The term "affected source" shall have the meaning given such term in subchapter IV–A of this chapter.

(2) Major source

The term "major source" means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following:

(A) A major source as defined in section 7412 of this title.

(B) A major stationary source as defined in section 7602 of this title or part D of subchapter I of this chapter.

(3) Schedule of compliance

The term "schedule of compliance" means a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition.

(4) Permitting authority

The term "permitting authority" means the Administrator or the air pollution control agency authorized by the Administrator to carry out a permit program under this subchapter.

Clean Air Act Section 502(a), 42 U.S.C. § 7661a(a):

§ 7661a. Permit programs

(a) Violations

After the effective date of any permit program approved or promulgated under this subchapter, it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source (as provided in subchapter IV–A of this chapter), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts C or D of subchapter I of this chapter, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter. (Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.) The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this chapter, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator 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.

40 C.F.R. § 50.1(e)

§ 50.1 Definitions

(e) Ambient air means that portion of the atmosphere, external to buildings, to which the general public has access.

40 C.F.R. § 51.166(a)(6)

§ 51.166 Prevention of significant deterioration of air quality
(a)(6) *Amendments.*

(i) Any State required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph (a)(6)(i), shall adopt and submit such plan revision to the Administrator for approval no later than three years after such amendment is published in the FEDERAL REGISTER.
(ii) Any revision to an implementation plan that would amend the provisions for the prevention of significant air quality deterioration in the plan shall specify when and as to what sources and modifications the revision is to take effect.
(iii) Any revision to an implementation plan that an amendment to this section required shall take effect no later than the date of its approval and may operate prospectively.

40 C.F.R. pt. 51, App. Y, § III.A.2

APPENDIX Y TO PART 51—GUIDELINES FOR BART DETERMINATIONS UNDER THE REGIONAL HAZE RULE

* * *

III. HOW TO IDENTIFY SOURCES "SUBJECT TO BART"

* * *

A. *What Steps Do I Follow to Determine Whether a Source of Group of Sources Cause or Contribute to Visibility Impairment for Purposes of BART?*

* * *

2. What Pollutants Do I Need to Consider?

You must look at SO_2, NO_X, and direct particulate matter (PM) emissions in determining whether sources cause or contribute to visibility impairment, including both PM_{10} and $PM_{2.5}$. Consistent with the approach for identifying your BART-eligible sources, you do not need to consider less than de minimis emissions of these pollutants from a source.

As explained in section II, you must use your best judgement to determine whether VOC or ammonia emissions are likely to have an impact on visibility in an area. In addition, although as explained in Section II, you may use PM_{10} an indicator for particulate matter in determining whether a source is BART-eligible, in determining whether a source contributes to visibility impairment, you should distinguish between the fine and coarse particle components of direct particulate emissions. Although both fine and coarse particulate matter contribute to visibility impairment, the long-range transport of fine particles is of particular concern in the formation of regional haze. Air quality modeling results used in the BART determination will provide a more accurate prediction of a source's impact on visibility if the inputs into the model account for the relative particle size of any directly emitted particulate matter (i.e. PM_{10} vs. $PM_{2.5}$).

40 C.F.R. § 52.21(i), (j), (r)

§ 52.21 Prevention of significant deterioration of air quality.

* * *

(i) *Exemptions*.

(1) The requirements of paragraphs (j) through (r) of this section shall not apply to a particular major stationary source or major modification, if;

(i) Construction commenced on the source or modification before August 7, 1977. The regulations at 40 CFR 52.21 as in effect before August 7, 1977, shall govern the review and permitting of any such source or modification; or

(ii) The source or modification was subject to the review requirements of 40 CFR 52.21(d)(1) as in effect before March 1, 1978, and the owner or operator:

(a) Obtained under 40 CFR 52.21 a final approval effective before March 1, 1978;

(b) Commenced construction before March 19, 1979; and

(c) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time; or

(iii) The source or modification was subject to 40 CFR 52.21 as in effect before March 1, 1978, and the review of an application for approval for the stationary source or modification under 40 CFR 52.21 would have been completed by March 1, 1978, but for an extension of the public comment period pursuant to a request for such an extension. In such a case, the application shall continue to be processed, and granted or denied, under 40 CFR 52.21 as in effect prior to March 1, 1978; or

(iv) The source or modification was not subject to 40 CFR 52.21 as in effect before March 1, 1978, and the owner or operator:

(a) Obtained all final Federal, state and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before March 1, 1978;

(b) Commenced construction before March 19, 1979; and

(c) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time; or

(v) The source or modification was not subject to 40 CFR 52.21 as in effect on June 19, 1978 or under the partial stay of regulations published on February 5, 1980 (45 FR 7800), and the owner or operator:

(a) Obtained all final Federal, state and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before August 7, 1980;

(b) Commenced construction within 18 months from August 7, 1980, or any earlier time required under the applicable State Implementation Plan; and

(c) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time; or

(vi) The source or modification would be a nonprofit health or nonprofit educational institution, or a major modification would occur at such an institution, and the governor of the state in which the source or modification would be located requests that it be exempt from those requirements; or

(vii) [Reserved]

(viii) The source is a portable stationary source which has previously received a permit under this section, and

(a) The owner or operator proposes to relocate the source and emissions of the source at the new location would be temporary; and

(b) The emissions from the source would not exceed its allowable emissions; and

(c) The emissions from the source would impact no Class I area and no area where an applicable increment is known to be violated; and

(d) Reasonable notice is given to the Administrator prior to the relocation identifying the proposed new location and the probable duration of operation at the new location. Such notice shall be given to the Administrator not less than 10 days in advance of the proposed relocation unless a different time duration is previously approved by the Administrator.

(ix) The source or modification was not subject to § 52.21, with respect to particulate matter, as in effect before July 31, 1987, and the owner or operator:

(a) Obtained all final Federal, State, and local preconstruction approvals or permits necessary under the applicable State implementation plan before July 31, 1987;

(b) Commenced construction within 18 months after July 31, 1987, or any earlier time required under the State implementation plan; and

(c) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable period of time.

(x) The source or modification was subject to 40 CFR 52.21, with respect to particulate matter, as in effect before July 31, 1987 and the

owner or operator submitted an application for a permit under this section before that date, and the Administrator subsequently determines that the application as submitted was complete with respect to the particular matter requirements then in effect in the section. Instead, the requirements of paragraphs (j) through (r) of this section that were in effect before July 31, 1987 shall apply to such source or modification.

(xi) The source or modification was subject to 40 CFR 52.21, with respect to PM2.5, as in effect before July 15, 2008, and the owner or operator submitted an application for a permit under this section before that date consistent with EPA recommendations to use PM10 as a surrogate for PM2.5, and the Administrator subsequently determines that the application as submitted was complete with respect to the PM2.5 requirements then in effect, as interpreted in the EPA memorandum entitled "Interim Implementation of New Source Review Requirements for PM2.5" (October 23, 1997). Instead, the requirements of paragraphs (j) through (r) of this section, as interpreted in the aforementioned memorandum, that were in effect before July 15, 2008 shall apply to such source or modification.

(2) The requirements of paragraphs (j) through (r) of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment under section 107 of the Act.

(3) The requirements of paragraphs (k), (m) and (o) of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant, if the allowable emissions of that pollutant from the source, or the net emissions increase of that pollutant from the modification:

(i) Would impact no Class I area and no area where an applicable increment is known to be violated, and

(ii) Would be temporary.

(4) The requirements of paragraphs (k), (m) and (o) of this section as they relate to any maximum allowable increase for a Class II area shall not apply to a major modification at a stationary source that was in existence on March 1, 1978, if the net increase in allowable emissions of each regulated NSR pollutant from the modification after the application of best available control technology would be less than 50 tons per year.

(5) The Administrator may exempt a stationary source or modification from the requirements of paragraph (m) of this section, with respect to monitoring for a particular pollutant if:

(i) The emissions increase of the pollutant from the new source or the net emissions increase of the pollutant from the modification would cause, in any area, air quality impacts less than the following amounts:

Carbon monoxide—575 μg/m3, 8-hour average;
Nitrogen dioxide—14 μg/m3, annual average;
Particulate matter—10 μg/m3 of PM–10, 24- hour average;
Sulfur dioxide—13 μg/m3, 24-hour average;
Ozone;[14]
Lead—0.1 μg/m3, 3-month average;
Fluorides—0.25 μg/m3, 24-hour average;
Total reduced sulfur—10 μg/m3, 1-hour average;
Hydrogen sulfide—0.2 μg/m3, 1-hour average;
Reduced sulfur compounds—10 μg/m3, 1-hour average; or

(ii) The concentrations of the pollutant in the area that the source or modification would affect are less than the concentrations listed in paragraph (i)(5)(i) of this section; or

(iii) The pollutant is not listed in paragraph (i)(5)(i) of this section.

(6) The requirements for best available control technology in paragraph (j) of this section and the requirements for air quality analyses in paragraph (m)(1) of this section, shall not apply to a particular stationary source or modification that was subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submitted an application for a permit under those regulations before August 7, 1980, and the Administrator subsequently determines that the application as submitted before that date was complete. Instead, the requirements at 40 CFR 52.21(j) and (n) as in effect on June 19, 1978 apply to any such source or modification.

(7)

(i) The requirements for air quality monitoring in paragraphs (m)(1) (ii) through (iv) of this section shall not apply to a particular source or modification that was subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submits an application for a permit under this section on or before June 8, 1981, and the Administrator subsequently determines that the application as

[14] No *de minimis* air quality level is provided for ozone. However, any net emissions increase of 100 tons per year or more of volatile organic compounds or nitrogen oxides subject to PSD would be required to perform an ambient impact analysis, including the gathering of ambient air quality data.

submitted before that date was complete with respect to the requirements of this section other than those in paragraphs (m)(1) (ii) through (iv) of this section, and with respect to the requirements for such analyses at 40 CFR 52.21(m)(2) as in effect on June 19, 1978. Instead, the latter requirements shall apply to any such source or modification.

(ii) The requirements for air quality monitoring in paragraphs (m)(1) (ii) through (iv) of this section shall not apply to a particular source or modification that was not subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submits an application for a permit under this section on or before June 8, 1981, and the Administrator subsequently determines that the application as submitted before that date was complete, except with respect to the requirements in paragraphs (m)(1) (ii) through (iv).

(8)

(i) At the discretion of the Administrator, the requirements for air quality monitoring of PM10 in paragraphs (m)(1) (i)–(iv) of this section may not apply to a particular source or modification when the owner or operator of the source or modification submits an application for a permit under this section on or before June 1, 1988 and the Administrator subsequently determines that the application as submitted before that date was complete, except with respect to the requirements for monitoring particulate matter in paragraphs (m)(1) (i)–(iv).

(ii) The requirements for air quality monitoring pf PM10 in paragraphs (m)(1), (ii) and (iv) and (m)(3) of this section shall apply to a particular source or modification if the owner or operator of the source or modification submits an application for a permit under this section after June 1, 1988 and no later than December 1, 1988. The data shall have been gathered over at least the period from February 1, 1988 to the date the application becomes otherwise complete in accordance with the provisions set forth under paragraph (m)(1)(viii) of this section, except that if the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data over a shorter period (not to be less than 4 months), the data that paragraph (m)(1)(iii) requires shall have been gathered over a shorter period.

(9) The requirements of paragraph (k)(2) of this section shall not apply to a stationary source or modification with respect to any maximum allowable increase for nitrogen oxides if the owner or operator of the source or modification submitted an application for a permit under this section before the provisions embodying the maximum allowable increase took effect as part

of the applicable implementation plan and the Administrator subsequently determined that the application as submitted before that date was complete.

(10) The requirements in paragraph (k)(2) of this section shall not apply to a stationary source or modification with respect to any maximum allowable increase for PM–10 if (i) the owner or operator of the source or modification submitted an application for a permit under this section before the provisions embodying the maximum allowable increases for PM–10 took effect in an implementation plan to which this section applies, and (ii) the Administrator subsequently determined that the application as submitted before that date was otherwise complete. Instead, the requirements in paragraph (k)(2) shall apply with respect to the maximum allowable increases for TSP as in effect on the date the application was submitted.

(j) ***Control technology review.***

(1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emissions standard and standard of performance under 40 CFR parts 60 and 61.

(2) A new major stationary source shall apply best available control technology for each regulated NSR pollutant that it would have the potential to emit in significant amounts.

(3) A major modification shall apply best available control technology for each regulated NSR pollutant for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

(4) For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the latest reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

* * *

(r) ***Source obligation.***

(1) Any owner or operator who constructs or operates a source or modification not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct, or any owner or operator of a source or modification subject to this section who commences construction

after the effective date of these regulations without applying for and receiving approval hereunder, shall be subject to appropriate enforcement action.

(2) Approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The Administrator may extend the 18-month period upon a satisfactory showing that an extension is justified. This provision does not apply to the time period between construction of the approved phases of a phased construction project; each phase must commence construction within 18 months of the projected and approved commencement date.

(3) Approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the State implementation plan and any other requirements under local, State, or Federal law.

(4) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements or paragraphs (j) through (s) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

(5) [Reserved]

(6) The provisions of this paragraph (r)(6) apply to projects at an existing emissions unit at a major stationary source (other than projects at a Clean Unit or at a source with a PAL) in circumstances where there is a reasonable possibility that a project that is not a part of a major modification may result in a significant emissions increase and the owner or operator elects to use the method specified in paragraphs (b)(41)(ii)(a) through (c) of this section for calculating projected actual emissions.

(i) Before beginning actual construction of the project, the owner or operator shall document and maintain a record of the following information:

(a) A description of the project;

(b) Identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and

(c) A description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under

paragraph (b)(41)(ii)(c) of this section and an explanation for why such amount was excluded, and any netting calculations, if applicable.

(ii) If the emissions unit is an existing electric utility steam generating unit, before beginning actual construction, the owner or operator shall provide a copy of the information set out in paragraph (r)(6)(i) of this section to the Administrator. Nothing in this paragraph (r)(6)(ii) shall be construed to require the owner or operator of such a unit to obtain any determination from the Administrator before beginning actual construction.

(iii) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions unit identified in paragraph (r)(6)(i)(b) of this section; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity of or potential to emit that regulated NSR pollutant at such emissions unit.

(iv) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the Administrator within 60 days after the end of each year during which records must be generated under paragraph (r)(6)(iii) of this section setting out the unit's annual emissions during the calendar year that preceded submission of the report.

(v) If the unit is an existing unit other than an electric utility steam generating unit, the owner or operator shall submit a report to the Administrator if the annual emissions, in tons per year, from the project identified in paragraph (r)(6)(i) of this section, exceed the baseline actual emissions (as documented and maintained pursuant to paragraph (r)(6)(i)(c) of this section), by a significant amount (as defined in paragraph (b)(23) of this section) for that regulated NSR pollutant, and if such emissions differ from the preconstruction projection as documented and maintained pursuant to paragraph (r)(6)(i)(c) of this section. Such report shall be submitted to the Administrator within 60 days after the end of such year. The report shall contain the following:

(*a*) The name, address and telephone number of the major stationary source;

(*b*) The annual emissions as calculated pursuant to paragraph (r)(6)(iii) of this section; and

(*c*) Any other information that the owner or operator wishes to include in the report (e.g., an explanation as to why the emissions differ from the preconstruction projection).

(vi) A "reasonable possibility" under paragraph (r)(6) of this section occurs when the owner or operator calculates the project to result in either:

(*a*) A projected actual emissions increase of at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph (b)(40) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant; or

(*b*) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph (b)(41)(ii)(*c*) of this section, sums to at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph (b)(40) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of paragraph (r)(6)(vi)(*b*) of this section, and not also within the meaning of paragraph (r)(6)(vi)(*a*) of this section, then provisions (r)(6)(ii) through (v) do not apply to the project.

(7) The owner or operator of the source shall make the information required to be documented and maintained pursuant to paragraph (r)(6) of this section available for review upon a request for inspection by the Administrator or the general public pursuant to the requirements contained in 70.4(b)(3)(viii) of this chapter.

40 C.F.R. § 70.2

§ 70.2 Definitions.

The following definitions apply to part 70. Except as specifically provided in this section, terms used in this part retain the meaning accorded them under the applicable requirements of the Act.

Act means the Clean Air Act, as amended, 42 U.S.C. 7401, et seq.

Affected source shall have the meaning given to it in the regulations promulgated under title IV of the Act.

Affected States are all States:

(1) Whose air quality may be affected and that are contiguous to the State in which a part 70 permit, permit modification or permit renewal is being proposed; or

(2) That are within 50 miles of the permitted source.

Affected unit shall have the meaning given to it in the regulations promulgated under title IV of the Act.

Alternative operating scenario (AOS) means a scenario authorized in a part 70 permit that involves a change at the part 70 source for a particular emissions unit, and that either results in the unit being subject to one or more applicable requirements which differ from those applicable to the emissions unit prior to implementation of the change or renders inapplicable one or more requirements previously applicable to the emissions unit prior to implementation of the change.

Applicable requirement means all of the following as they apply to emissions units in a part 70 source (including requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates):

(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter;

(2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act;

(3) Any standard or other requirement under section 111 of the Act, including section 111(d);

(4) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act;

(5) Any standard or other requirement of the acid rain program under title IV of the Act or the regulations promulgated thereunder;

(6) Any requirements established pursuant to section 504(b) or section 114(a)(3) of the Act;

(7) Any standard or other requirement under section 126(a)(1) and (c) of the Act;

(8) Any standard or other requirement governing solid waste incineration, under section 129 of the Act;

(9) Any standard or other requirement for consumer and commercial products, under section 183(e) of the Act;

(10) Any standard or other requirement for tank vessels under section 183(f) of the Act;

(11) Any standard or other requirement of the program to control air pollution from outer continental shelf sources, under section 328 of the Act;

(12) Any standard or other requirement of the regulations promulgated to protect stratospheric ozone under title VI of the Act, unless the Administrator has determined that such requirements need not be contained in a title V permit; and

(13) Any national ambient air quality standard or increment or visibility requirement under part C of title I of the Act, but only as it would apply to temporary sources permitted pursuant to section 504(e) of the Act.

Approved replicable methodology (ARM) means part 70 permit terms that:

(1) Specify a protocol which is consistent with and implements an applicable requirement, or requirement of this part, such that the protocol is based on sound scientific and/or mathematical principles and provides reproducible results using the same inputs; and

(2) Require the results of that protocol to be recorded and used for assuring compliance with such applicable requirement, any other applicable requirement implicated by implementation of the ARM, or requirement of this part, including where an ARM is used for determining applicability of a specific requirement to a particular change.

Designated representative shall have the meaning given to it in section 402(26) of the Act and the regulations promulgated thereunder.

Draft permit means the version of a permit for which the permitting authority offers public participation under §70.7(h) or affected State review under §70.8 of this part.

Emissions allowable under the permit means a federally enforceable permit term or condition determined at issuance to be required by an applicable requirement that establishes an emissions limit (including a work practice standard) or a federally enforceable emissions cap that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject.

Emissions unit means any part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act. This term is not meant to alter or affect the definition of the term "unit" for purposes of title IV of the Act.

The EPA or the Administrator means the Administrator of the EPA or his designee.

Final permit means the version of a part 70 permit issued by the permitting authority that has completed all review procedures required by §§70.7 and 70.8 of this part.

Fugitive emissions are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.

General permit means a part 70 permit that meets the requirements of §70.6(d).

Major source means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping and that are described in paragraph (1), (2), or (3) of this definition. For the purposes of defining "major source," a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same Major Group (i.e., all have the same two-digit code) as described in the Standard Industrial Classification Manual, 1987.

(1) A major source under section 112 of the Act, which is defined as:

(i) For pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tons per year (tpy) or more of any hazardous air pollutant which has been listed pursuant to section 112(b) of the Act, 25 tpy or more of any combination of such hazardous air pollutants, or such lesser quantity as the Administrator may establish by rule. Notwithstanding the preceding sentence, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources; or

(ii) For radionuclides, "major source" shall have the meaning specified by the Administrator by rule.

(2) A major stationary source of air pollutants, as defined in section 302 of the Act, that directly emits, or has the potential to emit, 100 tpy or more of any air pollutant subject to regulation (including any major source of fugitive emissions of any such pollutant, as determined by rule by the Administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of section 302(j) of the Act, unless the source belongs to one of the following categories of stationary source:

(i) Coal cleaning plants (with thermal dryers);

(ii) Kraft pulp mills;

(iii) Portland cement plants;

(iv) Primary zinc smelters;

(v) Iron and steel mills;

(vi) Primary aluminum ore reduction plants;

(vii) Primary copper smelters;

(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) Hydrofluoric, sulfuric, or nitric acid plants;

(x) Petroleum refineries;

(xi) Lime plants;

(xii) Phosphate rock processing plants;

(xiii) Coke oven batteries;

(xiv) Sulfur recovery plants;

(xv) Carbon black plants (furnace process);

(xvi) Primary lead smelters;

(xvii) Fuel conversion plants;

(xviii) Sintering plants;

(xix) Secondary metal production plants;

(xx) Chemical process plants—The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;

(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) Taconite ore processing plants;

(xxiv) Glass fiber processing plants;

(xxv) Charcoal production plants;

(xxvi) Fossil-fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input; or

(xxvii) Any other stationary source category, which as of August 7, 1980 is being regulated under section 111 or 112 of the Act.

(3) A major stationary source as defined in part D of title I of the Act, including:

(i) For ozone nonattainment areas, sources with the potential to emit 100 tpy or more of volatile organic compounds or oxides of nitrogen in areas classified as "marginal" or "moderate," 50 tpy or more in areas classified

as "serious," 25 tpy or more in areas classified as "severe," and 10 tpy or more in areas classified as "extreme"; except that the references in this paragraph to 100, 50, 25 and 10 tpy of nitrogen oxides shall not apply with respect to any source for which the Administrator has made a finding, under section 182(f) (1) or (2) of the Act, that requirements under section 182(f) of the Act do not apply;

(ii) For ozone transport regions established pursuant to section 184 of the Act, sources with the potential to emit 50 tpy or more of volatile organic compounds;

(iii) For carbon monoxide nonattainment areas:

(A) That are classified as "serious," and

(B) in which stationary sources contribute significantly to carbon monoxide levels as determined under rules issued by the Administrator, sources with the potential to emit 50 tpy or more of carbon monoxide; and

(iv) For particulate matter (PM–10) nonattainment areas classified as "serious," sources with the potential to emit 70 tpy or more of PM–10.

Part 70 permit or *permit* (unless the context suggests otherwise) means any permit or group of permits covering a part 70 source that is issued, renewed, amended, or revised pursuant to this part.

Part 70 program or *State program* means a program approved by the Administrator under this part.

Part 70 source means any source subject to the permitting requirements of this part, as provided in §§70.3(a) and 70.3(b) of this part.

Permit modification means a revision to a part 70 permit that meets the requirements of §70.7(e) of this part.

Permit program costs means all reasonable (direct and indirect) costs required to develop and administer a permit program, as set forth in §70.9(b) of this part (whether such costs are incurred by the permitting authority or other State or local agencies that do not issue permits directly, but that support permit issuance or administration).

Permit revision means any permit modification or administrative permit amendment.

Permitting authority means either of the following:

(1) The Administrator, in the case of EPA-implemented programs; or

(2) The State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to carry out a permit program under this part.

Potential to emit means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the Administrator. This term does not alter or affect the use of this term for any other purposes under the Act, or the term "capacity factor" as used in title IV of the Act or the regulations promulgated thereunder.

Proposed permit means the version of a permit that the permitting authority proposes to issue and forwards to the Administrator for review in compliance with §70.8.

Regulated air pollutant means the following:

(1) Nitrogen oxides or any volatile organic compounds;

(2) Any pollutant for which a national ambient air quality standard has been promulgated;

(3) Any pollutant that is subject to any standard promulgated under section 111 of the Act;

(4) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or

(5) Any pollutant subject to a standard promulgated under section 112 or other requirements established under section 112 of the Act, including sections 112(g), (j), and (r) of the Act, including the following:

(i) Any pollutant subject to requirements under section 112(j) of the Act. If the Administrator fails to promulgate a standard by the date established pursuant to section 112(e) of the Act, any pollutant for which a subject source would be major shall be considered to be regulated on the date 18 months after the applicable date established pursuant to section 112(e) of the Act; and

(ii) Any pollutant for which the requirements of section 112(g)(2) of the Act have been met, but only with respect to the individual source subject to section 112(g)(2) requirement.

Regulated pollutant (for presumptive fee calculation), which is used only for purposes of §70.9(b)(2), means any "regulated air pollutant" except the following:

(1) Carbon monoxide;

(2) Any pollutant that is a regulated air pollutant solely because it is a Class I or II substance to a standard promulgated under or established by title VI of the Act; or

(3) Any pollutant that is a regulated air pollutant solely because it is subject to a standard or regulation under section 112(r) of the Act.

Renewal means the process by which a permit is reissued at the end of its term.

Responsible official means one of the following:

(1) For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(i) The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(ii) The delegation of authority to such representatives is approved in advance by the permitting authority;

(2) For a partnership or sole proprietorship: a general partner or the proprietor, respectively;

(3) For a municipality, State, Federal, or other public agency: Either a principal executive officer or ranking elected official. For the purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a Regional Administrator of EPA); or

(4) For affected sources:

(i) The designated representative in so far as actions, standards, requirements, or prohibitions under title IV of the Act or the regulations promulgated thereunder are concerned; and

(ii) The designated representative for any other purposes under part 70.

Section 502(b)(10) changes are changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

State means any non-Federal permitting authority, including any local agency, interstate association, or statewide program. The term "State" also includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Where such meaning is clear from the context, "State" shall have its conventional meaning. For purposes of the acid rain program, the term "State" shall be limited to authorities within the 48 contiguous States and the District of Columbia as provided in section 402(14) of the Act.

Stationary source means any building, structure, facility, or installation that emits or may emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act.

Subject to regulation means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the Administrator in subchapter C of this chapter, that requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:

(1) *Greenhouse gases (GHGs),* the air pollutant defined in §86.1818–12(a) of this chapter as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation unless, as of July 1, 2011, the GHG emissions are at a stationary source emitting or having the potential to emit 100,000 tpy CO_2equivalent emissions.

(2) The term *tpy CO_2 equivalent emissions (CO_2 e)* shall represent an amount of GHGs emitted, and shall be computed by multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials, and summing the resultant value for each to compute a tpy CO_2e.

Whole program means a part 70 permit program, or any combination of partial programs, that meet all the requirements of these regulations and cover all the part 70 sources in the entire State. For the purposes of this definition, the term "State" does

not include local permitting authorities, but refers only to the entire State, Commonwealth, or Territory.

APPENDIX B:

CLEAN AIR ACT CROSS-REFERENCES

APPENDIX B — CLEAN AIR ACT CROSS REFERENCES

Section		Title Of CAA
Clean Air Act	U.S. Code (42 U.S.C.)	
101-193	7401-7515	**Title I:** Air Pollution Prevention And Control
160-169b	7470-7492	**Title I, Part C:** Prevention Of Significant Deterioration
201-250	7521-7590	**Title II:** Emission Standards for Moving Sources
401-416	7651-7651o	**Title IV:** Acid Deposition Control
501-507	7661-7661f	**Title V:** [Stationary Source] Permits
601-618	7671-7671q	**Title VI:** Stratospheric Ozone Protection

Clean Air Act	U.S. Code (42 U.S.C.)	Name Of Specific Sections
107	7407	Air quality control regions
108	7408	Air quality criteria and control techniques
109	7409	National primary and secondary ambient air quality standards
110	7410	State implementation plans for national primary and secondary ambient air quality standards
161	7471	Plan requirements
162	7472	Initial classifications
163	7473	Increments and ceilings
164	7474	Area redesignation
165	7475	Preconstruction requirements
166	7476	Other pollutants
168	7478	Period before plan approval

Clean Air Act	U.S. Code (42 U.S.C.)	Name Of Specific Sections
169	7479	Definitions
169A	7491	Visibility protection for Federal class I areas
169B	7492	Visibility
202	7521	Emission standards for new motor vehicles or new motor vehicle engines
302	7602	Definitions
307	7607	Administrative proceedings and judicial review
317	7617	Economic impact assessment
501	7661	Definitions
502	7661a	Permit programs

APPENDIX C:

DECLARATIONS

APPENDIX C – TABLE OF CONTENTS

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that I have this 20th day of June 2011, served a copy of the foregoing Joint Opening Brief of Non-State Petitioners and Supporting Intervenors electronically through the Court's CM/ECF system.

/s/ Allison D. Wood
Allison D. Wood