ORAL ARGUMENT NOT YET SCHEDULED

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

Respondent.

No. 09-1322 and consolidated cases

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

No. 10-1073 and consolidated cases

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL.

Petitioners,

v. **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY** **Respondent.**	No. 10-1092 and consolidated cases
SOUTHEASTERN LEGAL FOUNDATION, ET AL. **Petitioners,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY** **Respondent.**	No. 10-1131 and consolidated cases

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

SOUTHEASTERN LEGAL FOUNDATION, ET AL.,

COMPETITIVE ENTERPRISE INSTITUTE, ET AL.,

LANDMARK LEGAL FOUNDATION, ET AL.,

AND

OHIO COAL ASSOCIATION

REPLY IN SUPPORT OF MOTION FOR STAY

TABLE OF CONTENTS

Page

INDEX OF ABBREVIATIONS

BACT	Best Available Control Technology
CAA	Clean Air Act
CAFE	Corporate Average Fuel Economy
CRR	Collectively, Coalition for Responsible Regulation, Inc., Southeastern Legal Foundation, Competitive Enterprise Institute, Landmark Legal Foundation, and Ohio Coal Association, et al.
CRR Br.	Coalition for Responsible Regulation, Inc., Southeastern Legal Foundation, Competitive Enterprise Institute, Landmark Legal Foundation, and Ohio Coal Association, et al. Motion for Stay filed Sept. 15, 2010 (Doc. No. 1266030)
CRU	Climate Research Unit
EPA	U.S. Environmental Protection Agency
EPA Br.	EPA's Response to Stay Motions filed Oct. 28, 2010 (Doc. No. 1274377)
FIP	Federal Implementation Plan
GHG	Greenhouse Gas
GNPD	Great Northern Project Development
Int. Br.	State and Environmental Intervenors' Joint Response to Motions to Stay filed Nov. 1, 2010 (Doc. No. 1274847)
IPCC	Intergovernmental Panel on Climate Change
NAAQS	National Ambient Air Quality Standard
NHTSA	National Highway Traffic Safety Administration
NRC	National Research Council
PSD	Prevention of Significant Deterioration
RTC	EPA's Response to Comments on Endangerment Finding. All record excerpts referenced in this Reply are excerpted either in its Exhibit 3 or in Exhibit 11 of CRR's Motion for Stay.
SIP	State Implementation Plan
USGCRP	United States Global Climate Research Program

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

REPLY

EPA begins its defense with the remarkable assertion that its greenhouse gas control rules simply implement clear directives in the Clean Air Act and the mandate in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Remarkable, because the Act says nothing relevant about GHGs at all.[1] Remarkable, because the Supreme Court did not direct the conclusion that the CAA regulates GHG emissions in *any* respect, much less *every* respect.[2] And remarkable because, in pursuit of what it describes as Congress' "express direction" to regulate GHGs under the Act, EPA Br. 4, EPA ignores a great many of the Act's express directions. EPA's claim that it must disregard numerous specific directives to regulate a substance that the Act barely mentions "raises serious legal questions going to the merits, so serious, substantial, difficult as to make them a fair ground of litigation and thus for more deliberative investigation," *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986), and EPA identifies no meaningful consequence of staying the rules while these questions are adjudicated: EPA itself projects that the Rules will forestall 0.01°C in temperature

[1] Exhibit 1 presents a full listing of all CAA provisions that have anything to say about regulating "greenhouse gases" for the purpose of ameliorating global climate change. One can hardly conclude from these tea leaves that Congress intended EPA to regulate GHGs just like any other "air pollutant," but one can conclude the opposite.

[2] The Court did not direct EPA to find endangerment, but to answer "yes," "no," or "I don't know" to the pending petition for GHG controls on new cars. 549 U.S. at 533. EPA does not dispute CRR's observation, CRR Br. 17-18, that both the majority and dissent believed that even a "yes" answer—assuming one were appropriate—would have no effect beyond cars.

rise over the next century, so a year's delay should not be missed.

I. THE LIKELIHOOD OF SUCCESSFUL CHALLENGE TO EACH OF EPA'S LINKED RULES SUFFICES TO STAY ALL OF THEM.

Even if the Court were to find unequal likelihoods of successful challenge among the rules, still all should be stayed because each falls without the others.[3] *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000). In fact, EPA's Response offers little reason to uphold *any* of its Rules.

A. EPA Mischaracterizes and So Fails to Address the Defects Identified in its Endangerment Finding.

1. EPA Admits It Did Nothing to Define Endangerment Before Finding It to Exist.

EPA misreads both *Massachusetts* and *Ethyl Corp. v. EPA,* 541 F.2d 1 (D.C. Cir. 1976). EPA cites *Massachusetts* for the proposition that the endangerment determination has "nothing to do" with policy issues. EPA Br. n.13. But the Court held only that EPA cannot, as a matter of policy, refuse altogether to address endangerment. 549 U.S. at 534. Once initiated, the endangerment determination necessarily involves innumerable policy choices, *Ethyl*, 541 F.2d at 27, 29, many of which were identified in CRR's Motion, CRR Br. 30-31, 33.[4] None of those policy

[3] Although EPA's Response continues the "four unique rules" refrain, EPA Br. at 5, its recent "SIP call" proposal accepts the obvious: "In recent months, EPA has taken four related actions that, taken together, trigger PSD applicability for GHG sources." 75 Fed. Reg. 53,892, 53,895 (Sept. 2, 2010).

[4] All references to "CRR" include Joint Movants Southeastern Legal Foundation, Competitive Enterprise Institute, Landmark Legal Foundation, and Ohio Coal Asso-

choices finds explanation in the Endangerment Finding, even though the Administrator's assessment under § 202[5] is "confined to reasonable limits," *Ethyl*, 541 F.2d at 18 n.32, and so must be explained at least well enough to allow meaningful judicial review.

EPA gives lip service to this obligation: "[T]he statute [§ 202] directs EPA to set emission standards at a level that is reasonable *overall* in light of applicable environmental, cost, and technology considerations." EPA Br. 29. But to determine whether an emission standard is "reasonable" in light of these considerations, one must know the extent and severity of the risk, its likelihood, the extent of any net harm after consideration of benefits, and the costs and environmental tradeoffs involved. That is exactly the information EPA provided in *Ethyl* but refuses to provide here, CRR Br. 31-32, effectively rendering judicial review of EPA's Endangerment Finding impossible.

As but one example, EPA refused to explain how it concluded that warmer temperatures, on balance, "endanger," in light of the conceded benefits of warmer temperatures. *See* 74 Fed. Reg. 66,496, 66,529, 66,531-32 & 66,535 (Dec. 15, 2009) (acknowledging research establishing benefits of warming, yet asserting without meaningful discussion, proof, or quantification that asserted harms outweigh

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ciation, et al. "Movants" refers to all those who have filed motions to stay one or more of the challenged rules.

[5] All statutory references are by CAA section. Parallel U.S. Code cites are given in the Table of Authorities.

benefits). On the basis of this "reasoning," EPA could have just as easily said the opposite. The exercise of a judgment delegated by statute requires more than a coin toss.

EPA conceded in *Ethyl* that the lead emissions at issue "must make more than a minimal contribution to total exposure in order to justify regulation," 541 F.2d at 31 n.62, a proposition it now abandons for GHGs. EPA now believes that it need not find that emissions *from new cars* endanger public health and welfare; rather, it need only find that a particular "air pollutant" presents a danger, and then—if cars happen to emit that pollutant—they must be regulated. EPA Br. 27-28. But this interpretation ascribes to Congress the irrational intent to demand regulations that do nothing to address the problem that triggered regulation. This Court in *Ethyl* avoided such an irrational interpretation by requiring EPA to show that any action under § 202(a) would "fruitfully…attack" the perceived danger. 541 F.2d at 31 n.62.

And so EPA interprets *Ethyl* to provide that any unquantified risk of any unquantified harm, regardless of unquantified but substantial scientific uncertainties, justifies any regulation EPA wants to impose, regardless of cost or demonstrable benefit. EPA thus assumes the same sweeping delegation of power the Supreme Court forbade in *Industrial Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607 (1980).

2. EPA's "Vast Body of Evidence" Establishes Only that Greenhouse Gases Cause a Greenhouse Effect.

EPA says it is "very likely" (90-99%) that "the observed increase in global average

temperatures since the mid-20th century is…due to the observed increase in anthropogenic greenhouse gas concentrations." 74 Fed. Reg. at 66,518. This claim of scientific certainty is patently unreasonable, as the IPCC and EPA both acknowledge a very poor understanding of the influence of two of the three principal drivers of the climate system (the sun and albedo effects from clouds).

Intervenors, too, suffer from selective certainty:

> CRR [asserts] that EPA ignored that some "unknown" quality of the sun and clouds may actually be causing global warming … EPA explained that the well-respected climate models, and data on which it relies, *take these influences into account*…. According to EPA, natural factors, like clouds which actually reflect heat back into space – and the sun *would on their own "likely have produced cooling, not warming."*

Int. Br. 10-11 (emphasis added, citations omitted). But in the conceded absence of scientific understanding of the effects of clouds and sun, EPA cannot rationally "take these influences into account" or by computer models conclude they "would on their own 'likely have produced cooling'."

This is not "nibbling at the edges," EPA Br. 22, but crumbling the whole cookie. EPA (really the IPCC) treated the "greenhouse effect" as the sole driver of climate change, CRR Br. 40-42, and so of course its models predict overwhelming effects from greenhouse gases. From these tautological models, EPA made all manner of dire predictions about the influence of insignificant changes in atmospheric GHG concentrations on temperature, and from those temperature changes came the parade of horribles that EPA used to justify its finding.

As it cannot reasonably account for its "90-99% certain" attribution to GHGs, EPA informs the Court of a huge body of third-party assessments to which EPA can cite. EPA Br. 35-36. But as this Court knows from countless briefs, the amount of paper devoted to an argument is no measure of its merit.

Closer examination of this "vast body of evidence," EPA Br. 22, reveals much result-oriented analysis. For example, EPA admits essentially no change in temperatures for the last decade, despite increasing GHG concentrations. RTC 2-41. EPA attributes this to a "natural variability" it does not identify or explain, *id.*, which is precisely the point: Warming trends are attributed to increases in GHGs, while cooling trends are attributed to unexplained natural forcings. EPA also dismisses this data with the assertion that "examining trends over five to ten years" may be misleading. EPA Br. 37. But EPA is perfectly willing to rely on five- to ten-year trends when they *support* its desired conclusion. *See, e.g.*, RTC-1-43 (citing a 2009 Report from the Academies of Science to assert that declines in arctic ice cover since 2000 evidence causation by GHG emissions).

Similarly, EPA cites USGCRP for the assertion that "[t]he global warming of the past 50 years is due primarily to human-induced increases in heat-trapping gases." RTC-3-3. But EPA then cites to the IPCC for the observation that "difficulties remain in attributing temperature changes on … time scales of less than 50 years," and that with limited exceptions "attribution [of warming to human emissions] at these scales has not yet been established." RTC-3-4. Which is it?

This last observation is particularly telling, because temperatures generally fell from 1940 to 1975, and then rose until 1995-2000, after which they've leveled off. RTC 2-41; AR4 The Physical Science Basis, 3.2.2.1. EPA thus finds 95% certainty from a 20-year warming trend that is preceded by a 30-year cooling trend, and followed by more than 10 years of stable temperatures, even though GHG emissions steadily rose the whole time, and even though "attribution to humans at time scales of less than 50 years has not been established." This hardly supports 95% certainty; indeed, the IPCC estimates that the forcing (warming) caused by humans may range from 0.6 to 2.4 watts/meter squared, an error bar of 400%.[6]

3. EPA's Response Confirms that It Delegated the Assessment of Endangerment to Other Agencies.

EPA's Response confirms that the Administrator "relied primarily" on *assessments* of climate change science prepared by the IPCC, USGCRP and NRC. EPA Br. 21. In defense of this approach, EPA says it may use "work performed by outside parties as the factual basis for its decision making." *Id.* at 31. But EPA is relying not on third-party generated *facts*; but on third-party generated *assessments*. The law permits the former, but not the latter: The Act charges the *Administrator* with the endangerment judgment, not the IPCC, USGCCRP, or NRC. The Administrator's admitted failure to undertake "a new and independent assessment" of the scientific evidence, 74 Fed. Reg. at 66,511, is inconsistent with her obligation to "confront

[6] *See* http://www.ipcc.ch/publications_and_data/ar4/wg1/en/faq-2-1.html

personally the essential evidence" supporting the rule. *United Steelworkers v. Marshall*, 647 F.2d 1189, 1217 (D.C. Cir. 1980).

EPA chides CRR for citing only "a single email from Dr. Phil Jones" to evidence why the law prohibits off-shoring of judgment. EPA Br. 34. Given the space, CRR would be pleased to expound on the *thousands* of Climategate emails, many of which evidence efforts to suppress contrary science, manipulate peer review, and hide or destroy data.[7] Although EPA cites an inquiry purporting to absolve IPCC assessment authors, *id.* at 34 n.25, this inquiry has been criticized as a whitewash, and new inquiries are underway.[8] After reviewing the disclosures, a prominent American physicist described global warming alarmism as "the greatest and most successful pseudoscientific fraud."[9] The point, for present purposes, is not to ask the Court to adjudicate the IPCC's integrity, but to show EPA's error in placing the Court in the position of having to do so.

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[7] As EPA complains that CRR cites only one example, we attach pages 7-21 of CRR's Petition for Reconsideration of the Endangerment Determination, which more fully documents the serious nature of the conduct disclosed. *See* Ex. 2 Two more examples from Dr. Jones, CRU email 1091798809.txt (August 2004):

- "We have 25 years or so invested in this work. Why should I make the data available to you, when your aim is to try and find something wrong with it?"
- "[Michael] Mann refuses to talk to these people and I can understand why. They are just trying to find if we have done anything wrong."

[8] *See* http://wattsupwiththat.com/2010/09/15/mckitrick-understanding-the-climategate-inquiries/.

[9] *See* http://thegwpf.org/ipcc-news/1670-hal-lewis-my-resignation-from-the-american-physical-society.html

B. The Tailpipe Rule Does Nothing but Collateral Damage.

CRR challenges the Tailpipe Rule as duplicative of the NHTSA CAFE standards, accomplishing nothing in its own right. CRR Br. 45-46. EPA responds that the Tailpipe Rule will command greater emissions reductions than the CAFE standards alone. EPA Br. 44. But EPA arrives at this conclusion by deception: When attributing reductions to the CAFE standards, EPA fails to count substantial reductions in upstream emissions (*i.e.,* from the oil wells and refineries that produce fuels for vehicles), yet EPA credits those same emission reductions to the Tailpipe Rule. *Compare* 75 Fed. Reg. 25,324, 25,489 (May 7, 2010) *with id.* at 25,635-36. Second, EPA claims that "manufacturers may opt to pay a fine in lieu of meeting CAFE standards, an option not available under EPA's program," but EPA relaxed the Tailpipe Rule until 2015 to compensate for this. 75 Fed. Reg. at 25,414. Third, EPA contends that the Tailpipe Rule cuts GHG emissions from air conditioning systems, but manufacturers may comply with the Tailpipe Rule *without* making such cuts. *Id.* at 25,396. Finally, CAA § 608 independently compels the control of vehicle air conditioner refrigerants.

Even if EPA were right to attribute 47% greater reduction to the Tailpipe Rule, 47% of nothing is nothing: Taking EPA's contentions at face value, the maximum "benefit" of the Tailpipe Rule would be an imperceptible 0.01°C reduction in global mean temperature and 1 millimeter in avoided sea level rise *over the next 100 years*. CRR Br. 43-44. But the targeted emissions "must make more than a minimal

contribution to total exposure in order to justify regulation"; in fact, that contribution "must be 'significant'" before regulation is proper. *Ethyl*, 541 F.2d at 31 n.62.[10]

According to EPA, CAA permitting of stationary sources ineluctably follows its decision to regulate cars under § 202(a), while NHTSA's imposition of effectively the same GHG controls has no CAA consequences. Especially given the timing of the Finding in the midst of Senate debate on a cap-and-trade bill, the Tailpipe Rule's proposal on the eve of the Copenhagen Conference in December 2009, and the Administrator's pronouncements that the threat of CAA regulation would be a useful spur to action,[11] it is reasonable to conclude that EPA adopted the Finding for the very purpose of creating a beachhead into stationary source permitting.

C. To Justify its Stationary Source Permitting Scheme, EPA Reads the Clean Air Act Like a Chinese Menu.

To construe the CAA so that its stationary source provisions cover GHGs, EPA must contort the Act and treat several clear commands as nullities. The audacity of EPA's position is well illustrated by one passage from its Response:

> The PSD program applies, by the express terms of the Act, to the construction or modification of each stationary source that "emit[s], or has the potential to emit, [a specified quantity] per year or more of *any air pollutant*." §§ 7475, 7479(1) (emphasis added). Movants would give a narrow

[10] As EPA observes, EPA Br. 43-44, it does have a statutory duty, independent of NHTSA, to protect public and welfare; however, that duty does not extend to duplicative regulation of mobile sources based on illusory benefits, and then bootstrapping that action into economy-wide regulation of stationary sources.

[11] *See* http://www.guardian.co.uk/environment/2009/dec/07/us-climate-carbon-emissions-danger

> reading to this broad language, arguing that a source is subject to PSD only if it emits "a particular NAAQS pollutant [in] a sufficient amount."

EPA Br. 48-49 (alterations in original). Of course the Act, at § 169(1) [42 U.S.C. § 7479(1)], does not say "a specified quantity," but "one hundred tons," and so the problem is not that "Movants would give a narrow reading to this broad language," but that EPA would give a broad reading to this narrow language: Surely the meaning of "one hundred tons" is no more ambiguous than "any air pollutant." Indeed, were EPA correct that the latter phrase admits no ambiguity, then it better start demanding permits to emit water vapor or even air: After all, *Massachusetts* declares that the phrase "air pollutant" includes any substance emitted into the air, 549 U.S. at 528 ("On its face, the definition embraces all airborne compounds of whatever stripe….").

EPA contends that one sub-sub-section buried within Subpart C of the Act—its PSD provisions—compels it to require BACT reviews for stationary sources of GHG emissions on the day it imposes GHG limits on cars. In purported obeisance to that one section of the Act—§ 165(a)(4)—EPA insults a great many more, including §§ 169(1) and 302(j) (applying the Titles I and V permitting programs to any source that emits "any air pollutant" above the 100/250 ton thresholds); § 502(a) (forbidding EPA from exempting any "major source" from Title V);[12] § 110(a)(2)(C) (compelling State permitting programs to address only NAAQS pollutants); § 166 (explicitly

[12] EPA asserts that Movants have nothing to say about Title V, EPA Br. 59-60, but it evidently overlooked CRR's argument that this provision of the Act expressly forbids any "tailoring" of at least the Title V program. CRR Br. 47-48.

instructing EPA how to add new pollutants to the PSD program and also limiting it to NAAQS pollutants); § 110(k) (allowing States time to change their programs in response to new federal requirements); and § 307(d)(1)(J) (requiring EPA to provide notice of rules before adopting them).[13] The CAA does not compel its own repudiation. *See, e.g., U.S. v. Morton*, 467 U.S. 822, 828 (1984) ("We do not…construe statutory phrases in isolation; we read statutes as a whole.").

EPA treats its decision to regulate a new pollutant as effecting a self-executing change in the permitting programs of each State. EPA Br. 4 & 84. But § 165(a)(4) is not self-executing: Section § 166 of the Act—the PSD program section actually titled "Other Pollutants"—expressly describes what EPA must do to add other pollutants to the PSD program, and EPA did none of it. CRR Br. 51-52. EPA responds that it didn't have to satisfy § 166, not because of any argument on the face of the statute but because it believes this Court already has relieved it of that obligation. EPA Br. 54-55, citing *Alabama Power Co. v. Costle*, 636 F.2d 363, 405-06 (D.C. Cir 1980). But, in the cited portion of that opinion, the Court was deciding a claim quite different from CRR's: Petitioners in that case argued that § 165(a)(4) required BACT reviews only for particulate matter and sulfur dioxide, 636 F.2d at 405-06, and not even for the

[13] EPA never even proposed critical elements of its strategy for circumventing the SIP process, including its multi-page "definition" of what it now means by "subject to regulation." CRR Br. 59-90. EPA's sole response is that these rules were "logical outgrowths" of a proposal, EPA Br. 87 n.55, but a multi-column rule prescribing such details as emission thresholds, time frames, and phase-in schedules cannot be the "logical outgrowth" of a "proposal" that included no rule at all.

four other air pollutants already then "subject to regulation" by NAAQS. The Court's rejection of that argument perfectly squares with CRR's argument that § 165(a)(4) applies only to NAAQS pollutants at the time of enactment, with any added later to be governed as may be directed in rules adopted under § 166. CRR Br. at 49-52

Section 166(a) says that, "[i]n the case of pollutants for which [NAAQS] are promulgated after August 7, 1977, [EPA] shall promulgate [appropriate PSD] regulations not more than 2 years after the date of promulgation of such standards." Section 166(c) says that those rules must include not just increments (acceptable degrees of ambient air quality deterioration), but also "a framework for stimulating improved control technology," clearly referring to the development of BACT or BACT-like requirements as may be appropriate for whatever new pollutants EPA may one day regulate. It is through those rules, not § 165(a)(4), that new pollutants may become subject to technology-based emission standards. Most tellingly, those rules also could set applicability thresholds appropriate to each new pollutant, avoiding the need to "tailor" the thresholds that Congress found appropriate for the six NAAQS pollutants of the day. [14]

Consider how adherence to § 166 not only would avoid all of the legal problems

[14] EPA suggests that the § 166 obligation applies only to NAAQS pollutants, leaving "other pollutants 'subject to regulation,' like greenhouse gases" under § 165(a)(4)'s BACT requirements. EPA Br. 88. But this reading is perverse: EPA attributes to Congress an intent to require *more* time and customization to develop a PSD program for NAAQS pollutants than for any other "air pollutant" that might randomly become "subject to regulation."

associated with EPA's attempt to make § 165(a)(4) an independent, self-executing obligation, but also how well—to quote § 166 itself—the § 166 process "fulfill[s] the goals and purposes set forth in section 101 and section 160." Section 101(a)(3), of course, announces Congress' intent "that air pollution prevention … and air pollution control at its source is the primary responsibility of States and local governments" and § 160 expresses Congress' intent that the Nation not deteriorate to bare compliance with the NAAQS. *Alaska Dep't of Envtl. Conserv. v. EPA,* 540 U.S. 461, 470-71 (2004). Rules that steamroll the States to address a NAAQS-less "air pollutant" do nothing to further those intentions.

II. THE "BALANCE OF HARMS" WEIGHS HEAVILY IN FAVOR OF A STAY.

With one exception, CRR leaves to others the requisite reply to EPA's and Intervenors' denial of harm to Movants, and focuses instead on Movants' denial of harm to EPA and Intervenors. That exception is to address Intervenors' efforts to dismiss the harm CRR member Great Northern Project Development has shown it will suffer. Contrary to the argument of EPA's supporters, Int. Br. 34-35, GNPD's shift to a coal gasification design in 2008 does not change the fact its decision was driven by the prospect of the very GHG regulation that now has come to pass. CRR Br. Ex. 21, ¶¶ 6-8. Nor does GNPD's application for other regulatory approvals diminish the direct impact on the project from EPA's GHG regulatory regime.[15]

[15] Similarly, EPA's supporters' reliance on general economic conditions in the market for steam coal, Int. Br. 35-36, does not undermine CRR's demonstration that its coal-

CRR does appreciate Intervenors' effort to inform CRR's members of their own interests. Int. Br. 38 (advising that a stay would injure businesses preparing for implementation). To return the favor, we note that a stay of GHG reduction rules would promote Intervenors' interests in biological diversity, Int. Br. 40, because, for example, the Cambrian explosion occurred at a time of atmospheric carbon dioxide levels far higher even than predicted by Intervenors' professional Cassandras. RTC-3-54. Unfortunate, then, for Intervenors that a stay would not increase emissions.

In any event, although they did so, Movants need not show much harm, because Respondents show none, and so the balance of equities favors a stay. *See, e.g., Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). EPA and its allies cite large tonnages of GHGs reduced by the Tailpipe Rule, EPA Br. 13; Int. Br. 41, but of course those emissions get reduced by the NHTSA rules anyway, and EPA itself finds that the environmental consequences of these emissions is beneath trivial: *Over a period of 100 years*, the Tailpipe Rule would prevent sea level rise of about the diameter of the period at the end of this sentence**.** 75 Fed. Reg. at 25,495. This hardly seems relevant to the parade of horribles that EPA's Endangerment Finding associates with climate change. *See* EPA Br. 95.[16]

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producing members have experienced decreased revenues from declining coal sales attributable to GHG regulation. CRR Br., Exs. 22 & 24.

[16] "The Endangerment Finding…provides a veritable roadmap of the many ways in which a stay of EPA's actions—or of the statutory permitting programs for stationary sources—would harm the public interest[, including] direct temperature effects, air

AAM contends that a stay "could" subject car manufacturers to multiple state standards and point to California regulations that "can be read" in that way. AAM Br. 17, 19. AAM's concern that a stay *could* create a multiplicity of standards can be solved by complying with the strictest one. In any event, these admittedly speculative harms must yield to the concrete injuries facing Movants.

Recent pronouncements from President Obama reinforce the wisdom of CRR's suggestion that "a stay would allow for the possibility that Congress finally will state its intentions to regulate GHGs under the [CAA], or not, so that his Court will not have to speak for it." CRR Br. 69. On November 3, the President said "I think the EPA wants help from the legislature on this. I don't think that the desire is to somehow be protective of their powers here. I think what they want to do is make sure that the issue is being dealt with."[17] A stay would allow time for the 112th Congress to grant EPA its wish.

Respectfully submitted this 8th day of November, 2010.

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quality effects, the potential for changes in vector-borne diseases, and the potential for changes in the severity and frequency of extreme weather events."

Intervenors' claims are even more histrionic: EPA's regulations should be upheld and any stay denied because it is necessary to keep "global warming below 1 degree C (1.8F) above the year 2000 temperature" to avoid an imminent "tipping point." Int. Br., Ex. 27 ¶ 32. Evidently it is only tons from tailpipes that cause tipping, and not the tons lost to tailoring the PSD program.

[17] As reported in the *New York Times*, available on-line at http://www.nytimes.com/2010/11/04/business/energy-environment/04enviro.html?src=busln

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INDEX OF EXHIBITS