July 6, 2010

VIA FACSIMILE, Certified Mail, and Email

The Honorable Lisa P. Jackson
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U.S. Environmental Protection Agency
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The Honorable Gina McCarthy
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Re: Petition to Reconsider, Rescind, and/or Revise EPA's Prevention of Significant Deterioration Regulations

Dear Administrator Jackson and Assistant Administrator McCarthy:

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

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

Attachment

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

EXECUTIVE SUMMARY

Pursuant to Clean Air Act (CAA) Section 307(d)(7), the National Association of Manufacturers, American Frozen Food Institute, American Petroleum Institute, Brick Industry Association, Corn Refiners Association, Independent Petroleum Association of America, Michigan Manufacturers Association, Mississippi Manufacturers Association, National Association of Home Builders, National Oilseed Processors Association, Specialty Steel Industry of North America, Tennessee Chamber of Commerce & Industry, West Virginia Manufacturers Association, and Wisconsin Manufacturers & Commerce (hereafter "the Associations") petition the U.S. Environmental Protection Agency (EPA) to reconsider, rescind, and/or revise its regulations for the Prevention of Significant Deterioration (PSD) program to comport with the CAA, specifically to limit the statutory and regulatory scope of the PSD permitting program to ensure only those pollutants for which EPA has established a national ambient air quality standard (NAAQS) and for which the area is designated attainment or unclassifiable are able to trigger PSD permitting requirements or cause a source to be classified as a PSD major source. This approach is called No Automatic PSD Trigger (NAPT), and it is consistent with the approach that the Final PSD Tailoring Rule adopts for the first six months of 2011.[1] It is also consistent with the statutory language, the purposes of the PSD program and Title I, and congressional intent. The Associations also petition EPA to reconsider its determination that greenhouse gases (GHGs) are "subject to regulation" within the meaning of CAA Section 165(a)(4).

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

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

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

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

[*] Note that this petition does not support or endorse any particular proposed legislation.

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

The Associations are submitting this petition because EPA has stated that it is unable to interpret its PSD regulations to implement the NAPT interpretation[3] and has interpreted the statute to allow *any* pollutant to trigger PSD. EPA claims that its interpretation is statutorily compelled. That is simply not the case. Moreover, the Final PSD Tailoring Rule's crafted solution to the PSD problem inappropriately grants the Agency unfettered discretion to choose which sources will trigger PSD and which will not. This is even more problematic legally because it is EPA's improper interpretation of the CAA that has caused it to take extraordinary steps to rewrite statutory major source thresholds.

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

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

1. Reconsider its interpretation announced in the preamble to the Final PSD Tailoring Rule that the statute compels or can be reasonably interpreted to allow PSD to be triggered by pollutants for which an area has not been designated attainment or unclassifiable for a particular NAAQS and rescind this interpretation or otherwise revise its rules as needed to adopt an interpretation that PSD can only be triggered by a NAAQS pollutant for which the area is designated attainment or unclassifiable.
2. Reconsider its interpretation announced in the Reconsideration Decision that the PSD regulations[5] compel or can reasonably be interpreted to allow PSD to be triggered by pollutants for which an area has not been designated attainment or unclassifiable for a particular NAAQS and rescind this interpretation or otherwise revise its rules as needed to adopt an interpretation that PSD can only be triggered by a NAAQS pollutant for which the area is designated attainment or unclassifiable.

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

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

I. BACKGROUND

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

A. The EPA 2009 Proposals and Comments

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

- EPA proposed to reaffirm the 2008 Agency interpretation regarding when pollutants become "subject to regulation" within the meaning of CAA Section 165(a)(4).[8]

- EPA proposed standards for emissions of GHGs from new motor vehicles pursuant to CAA Section 202(a).[9] There, EPA acknowledged the "concerns" of industries that the action would lead to PSD permitting being triggered for stationary sources.[10]

- On the premise that PSD could be triggered solely by any pollutant subject to regulation and that GHG emissions being subject to regulation could cause thousands of new PSD permits per year, EPA proposed to "tailor" the PSD and Title V operating permit programs.[11] EPA indicated that its interpretations of the statute created an exigent situation and solicited comment how that exigency could be solved.

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

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

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

B. Final Actions on the Three 2009 Proposals

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. EPA Should Reconsider Its Conclusion that the 1980[53] and 2002 PSD Regulations Preclude the NAPT Interpretation.

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

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

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

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

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

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

EPA claims in the response to comments on the Reconsideration Decision that commenters should have raised concerns regarding EPA's interpretation of its regulations in 1980 and 2002.[55] Under CAA Section 307(b), a party may petition for review of a rule based on grounds arising after the close of the public comment period.[56] In addition, while Section 307(d)(7)(B) provides that only an objection to a rule which was raised during the public comment period may be raised during judicial review, it requires EPA to convene a reconsideration proceeding if an administrative petition is filed citing an objection that arose after the close of the comment period or if it was impractical to raise such an objection during comment period.[57] The decision to regulate GHGs under the act constitutes new grounds warranting convening a reconsideration proceeding.

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

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

Similarly, it was not practical to expect the Associations to raise the issue during the comment period on the 2002 regulations because we could not have anticipated that EPA would determine that GHGs would become subject to PSD during the comment period on the 2002 New Source Review regulatory revisions. The public comment period for these regulations occurred in 1996. EPA issued a supplemental notice of availability on July 24, 1998.[59] Moreover, EPA suggests in the Response to Comments on the Reconsideration Decision that the Associations should have noted during the comment period the definition of "regulated NSR pollutant" and objected to its breadth during the comment period on the NSR Reform Regulations. That position ignores, however, that EPA never proposed the definition of "regulated NSR pollutant." That definition appeared for the *first time* in the 2002 Final NSR Reform Regulations.[60]

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

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

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

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

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

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

RELIEF REQUESTED

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

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

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

Respectfully submitted,

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

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

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

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

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

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

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

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

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

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

[10] *Id.* at 49,629.

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

[12] 74 Fed. Reg. at 17,016.

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

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

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

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

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

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

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

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

[21] *Id.* at 128-31.

[22] *Id.* at 136.

[23] *Id.*

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

[25] In the House Report, Rep. Stockman states that "Section 108(a), with some modification, is in essence the same approach taken by EPA in its regulations." H.R. Rep. No. 95-294, at 382 (Additional Views of Representative Dave Stockman). Rep. Stockman goes on to state that any gain from Section 108 is nearly cancelled out by the extension of the plan requirement to all of the regulated pollutants. EPA's regulations only apply to sulfur dioxide and particulates. Although the classification scheme set up in section 108(a) is mandatory only for these pollutants, the States must impose something at least as effective for the other pollutants. This requirement will, of course, leave them little choice but to adopt the classification system for all regulated pollutants. *Id.* Clearly, Representative Stockman believed that PSD could only be triggered after a NAAQS was established, and states had adopted a classification system for the pollutant at issue.
[26] S. Rep. No. 95-127, *as reprinted in* Arnold & Porter Legislative History at 8, 11-12, 29-30 (1977).
[27] *Id.* at 11.
[28] STAFF OF S. SUBCOMM. ON ENVIRONMENTAL POLLUTION OF THE S. COMM. ON ENVIRONMENT & PUBLIC WORKS, 95TH CONG., A SECTION-BY-SECTION ANALYSIS OF S. 252 AND S. 253 CLEAN AIR ACT AMENDMENTS AND S. 253 *as reprinted in* Arnold & Porter Legislative History at 5 (Comm. Print 1977).
[29] The inclusion of the reference to "any air pollutant" in Section 169(1) has to be read in light of the restricting language in Sections 161 and 165(a), indicating that Congress felt the limitation of the definition of major emitting facility in Section 169(1) to NAAQS pollutants was unnecessary since it was already reflected in the statute.
[30] 636 F.2d 323 (D.C. Cir. 1980).
[31] *Id*. at 364.
[32] *Id*. at 364–68.
[33] *Id*. at 365 (emphasis added).
[34] 40 C.F.R. § 52.21(i)(2) (emphasis added).
[35] 45 Fed. Reg. 52,676 (Aug. 7, 1980).
[36] *Id.* at 52,677.
[37] 549 U.S. at 528-29.
[38] Nor does it resolve whether they are intended to be covered under Section 165(a)(4).
[39] 75 Fed. Reg. at 31, 560.
[40] *Id.*
[41] *Id.*
[42] EPA's citation to *Alabama Power v. Costle*, 636 F.2d 323, 361, n.90 (D.C.Cir. 1980) for the proposition that PSD applicability is based on non-NAAQS pollutants is misleading and incorrect. EPA states that the D.C. Circuit found that "PSD applies to HAPs" based on the statute at that time. 75 Fed. Reg. at 31,561. The footnote cited by EPA actually stated that mercury was "subject to regulation" even though it was a Section 112 pollutant. Industry had argued that air toxics could not be "subject to regulation" but that does not answer the question, and the court clearly was not addressing, whether a non-NAAQS pollutant could be the basis for triggering the requirement to obtain a PSD permit in the first instance. This dictum certainly does not override a primary holding of the case that location is the key determinant for PSD permitting applicability. That mercury was "subject to regulation" merely meant that if PSD was triggered by a NAAQS pollutant, and a significant increase of mercury was also caused by such modification, BACT for mercury would be required under Section 165(a)(4). Moreover, contrary to EPA's inference in note 45 of the Final PSD Tailoring Rule, the exclusion from PSD for hazardous air pollutants in Section 112(b)(6) is also consistent with NAPT. *Id.* at 31,561, n.45. Congress was ensuring that pollutants subject to maximum achievable control technology (MACT) as enacted in 1990 would not be subject to duplicative or potentially conflicting control requirements under the PSD program and thus excluded these pollutants from the BACT and any other requirements of PSD.
[43] 42 U.S.C. § 7410(j) (emphasis added).
[44] 75 Fed. Reg. at 31,561.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 31,561-31,562.
[48] *Id.* at 31,561.
[49] *Id.*
[50] *Id.* at 31,562.
[51] *Id.*
[52] *See* EPA, *Draft NSR Workshop Manual: Prevention of Significant Deterioration (PSD) and Nonattainment Area Permitting* at A.26 and F.9 (Oct. 1990). For example, a new kraft pulp mill major for SO2, in an SO2 attainment

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

[53] To the extent EPA considers its interpretation that any pollutant subject to regulation can trigger the requirement to obtain a PSD permit to have originated in the regulations issued in 1978, *Part 51—Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Prevention of Significant Air Quality Deterioration*. 43 Fed. Reg. 26,380-26,388 (Jun. 19, 1978) and *Part 52—Approval and Promulgation of State Implementation Plans, 1977 Clean Air Act Amendments to Prevent Significant Deterioration; Final Rule*, 43 Fed. Reg. 26,388-26.410 (Jun. 19, 1978), references in this petition to reconsidering its interpretation of the PSD rules include these 1978 actions as well.

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

> To further clarify major NSR applicability in one location, we have moved Sec. 51.166(i)(1) through (3) and Sec. 52.21(i)(1) through (3) into the new applicability sections at Sec. 51.166(a)(7) and Sec. 52.21(a)(2). These provisions clarify that you must obtain a permit before you begin construction (including for major modifications), that the provisions apply for each regulated NSR pollutant that your source emits, and that the provisions apply to any source located in the area designated as attainment or unclassifiable (for Sec. Sec. 51.166 and 52.21).
>
> 67 Fed. Reg. 80,185, 80,190 (Dec. 31, 2002) (emphasis added).

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

[56] 42 U.S.C. § 7607(b).

[57] 42 U.S.C. § 7607(d)(7)(B).

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

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

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

[61] 42 U.S.C. § 7401(b)(1).

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

[63] 74 *Fed. Reg.* at 55,295.

White Paper for EPA Climate Change Workgroup:
Scope of the PSD Problem to Be Addressed[1]: Why There Is No Automatic PSD Trigger or "NAPT" Simply Because GHGs Become Regulated Under the Clean Air Act

January 8, 2010 (rev. 2/8/2010)

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

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

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

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

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

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

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

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

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

Similarly, Section 165(a) limits PSD applicability:

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

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

[2] 42 U.S.C. § 7471 (emphasis added).

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

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

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

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

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

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

[5] 636 F.2d 323 (D.C. Cir. 1980).

[6] *Id*. at 364.

[7] *Id*. at 364–68.

[8] *Id*. at 365 (emphasis added).

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

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

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

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

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

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

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

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

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

[12] *Id.* at § 7407(a).
[13] *Id.* at § 7473(b)(4).
[14] 42 U.S.C. § 7465(e)(1) (emphasis added).
[15] *See, e.g.*, 123 Cong. Rec. S9162-86 (daily ed., June 8, 1977) (stage-setting remarks of Senator Muskie, the lead floor manager); *id.* at H8662-65 (daily ed., Aug. 4, 1977) (stage-setting remarks of Congressman Rogers, the lead floor manager).

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

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

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

Attachment 1: Why EPA Should Adopt the NAPT Approach to Address the Immediate PSD Problem
Attachment 2: Examples of Implementing the NAPT Approach for PSD Applicability

[16] Under this approach EPA's "major for one major for all policy" would have to be modified. That policy results from EPA's reading of Section 165(a) as applying PSD if a source is located in an area that is attainment for *any attainment pollutant.* As discussed in the text, that reading of the statute nullifies the language in Section 165(a) that limits applicability to areas designated as attainment under Section 107. Theoretically, there could be a slight reduction in the number of PSD permits triggered for criteria pollutants. For example, consider a source is major for NOx but minor for all other pollutants and has a significant increase of SO_2 but no significant increase in NOx. Assuming the area is designated attainment for both NO2 and SO_2, under the 1980 preamble reading of Section 165(a), the source would trigger PSD for SO_2 because it is "major for SO_2" since it is "major for NOx" whereas under NAPT, the source would not trigger PSD for SO_2 since it is not a triggering PSD for SO_2 directly. In practice, however, it is unlikely that a source like an electric utility would not trigger PSD directly for an attainment criteria pollutant and once it does, BACT applies to all pollutants subject to regulation that increase significantly under the NAPT approach. Therefore, we believe that this theoretical difference is unlikely to result in an actual change in the number of plants triggering PSD and applying BACT for criteria pollutants. Even if it did result in a few less PSD permits, though, state minor new source review programs would at least require state BACT under their SIPs and thus control requirements would still apply, just not under the PSD program.

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

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

Why Should EPA Adopt the NAPT Approach?

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

What Would EPA Have to Do in Addition to NAPT?

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

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

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

What Are Responses to Potential Arguments Against NAPT?

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

Attachment 2
Examples of Implementing the NAPT Approach for PSD Applicability

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

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

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

Facts	**NAPT Result**	**Non-NAPT Result[1]**
Example 4: Existing major criteria pollutant source with project only increasing GHGs above significance levels. Existing source major for SO_2 in an SO_2 attainment area. Minor for all other criteria pollutants. Source undertakes a project that increases GHG emissions by more than the significance level but all criteria pollutant emissions either decrease or increase by less than significance levels.	PSD does not apply and does not require BACT for GHGs because, although the facility is a major emitting facility, it has not increased emissions above significance levels for any NAAQS pollutant for which the area is designated attainment or unclassifiable. Therefore, it is not triggering PSD permitting requirements for a criteria pollutant. Since PSD is not applicable, the question of GHG BACT would not be reached, even if GHG emissions would increase above the GHG significance level.	PSD would be triggered based solely on the increase in GHG emissions and would require BACT.
Example 5: Existing major criteria pollutant source with project increasing attainment criteria pollutant and GHG emissions above significance levels. Existing plant located in an attainment area for all criteria pollutants. The plant has potential NOx emissions above 250 tpy. It undertakes a project increasing NOx and SO_2 emissions above 40 tpy and GHG emissions above significance level. Other criteria pollutants, like $PM_{2.5}$ and $PM_{10,}$ will not increase above applicable significance levels.	PSD is triggered by NOx and $SO_{2.}$ BACT is required for NOx and SO_2 and GHGs.	Same result as NAPT.

CERTIFICATE OF SERVICE

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

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