ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL. Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Respondent.	No. 10-1073 (consolidated with Nos. 10-1083, 10-1099, 10-1109, 10-1110, 10-1114, 10-1115, 10-1118, 10-1119, 10-1120, 10-1122, 10-1123, 10-1124, 10-1125, 10-1126, 10-1127, 10-1128, 10-1129)

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL. Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Respondent.	No. 10-1092 (consolidated with Nos. 10-1094, 10-1134, 10-1143, 10-1144, 10- 1152, 10-1156, 10-1158, 10-1159, 10-1160, 10-1161, 10- 1162, 10-1163, 10- 1164, 10-1166, 10-1172, 10-1182)

SOUTHEASTERN LEGAL FOUNDATION, INC., ET AL. Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Respondent.	No. 10-1131 (consolidated with Nos. 10-1132, 10-1145, 10-1147, 10-1148, 10-1199, 10-1200, 10-1201, 10-1202, 10-1203, 10-1205, 10-1206, 10-1207, 10-1208, 10-1209, 10-1210, 10-1211, 10-1212, 10-1213, 10-1215, 10-1216, 10-1218, 10-1219, 10-1220, 10-1221, 10-1222)

PETITIONERS' REPLY IN SUPPORT OF MOTION FOR PARTIAL STAY OF EPA'S GREENHOUSE GAS REGULATIONS

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NAM Movants' (NAM) partial stay request is fundamentally narrower than the government's characterization of it and appreciably different from the stays sought by Texas and Coalition for Responsible Regulation. NAM's stay will neither intrude on EPA's tailpipe greenhouse gas (GHG) standards under the Clean Air Act (CAA) nor EPA's endangerment finding. Thus, most harms which Respondents and Intervenors (collectively, "Respondents") allege a stay would cause are not germane to NAM's narrow request. NAM seeks to stay only the consequences of the car standards *on stationary sources*, which flow from the Tailpipe Rule as interpreted in the PSD Interpretive Rule and implemented through the Tailoring Rule. As NAM has shown, those consequences will irreparably harm the nation's economic recovery.

Virtually ignoring the critical distinction among the stay requests, Respondents primarily focus on staying *the car standards*. They offer no rebuttal to the significant harms NAM identified regarding stationary sources and identify no harm resulting from NAM's narrow request. Indeed, auto makers—who vigorously support EPA's car regulations—recognize NAM's partial stay actually "avoids harm" to both the auto industry and the environment by enabling the car standards to be implemented.

I. THIS COURT HAS POWER TO ISSUE A PARTIAL STAY

EPA dismisses NAM's tailored approach, arguing that the Court cannot craft such a remedy. U.S. Opp. 92. The power to issue remedies is not so constrained, but broadly encompasses the authority to "postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review." 5 U.S.C. § 705.

First, the Court clearly can *preserve the status quo*—it can preclude EPA from requiring GHG triggered permits—by staying elements of EPA's rules that impact stationary sources. *See* Proposed Order A (Att. 1A). Second, given that the Tailoring Rule alters the statutory thresholds to exclude GHGs from the definition of pollutants "subject to regulation," only to phase GHGs back in separately, the Court could stay the phase-in provision and leave the exclusion of GHGs in place. *See* Proposed Order B (Att. 1B). Third, if the Court concludes that NAM is likely to prevail only in challenging EPA's PSD permitting requirements (but not Title V permitting), the Court can stay just the rules' PSD ramifications. *See* Proposed Order C (Att. 1C).

II. NAM IS LIKELY TO SUCCEED ON THE MERITS

A. Only Criteria Pollutants Can Trigger PSD Permitting

The text of the CAA dictates that a stationary source must obtain a PSD permit only if it is in an area in attainment with the NAAQS for a criteria pollutant and only if it will have major emissions of that particular pollutant. That interpretation is compelled by the location limitations in Sections 161, 165(a), and 107 and thus is required under *Chevron* step one. NAM Mot. 14-24.

EPA acknowledges that its interpretation obliterates those statutory limitations and triggers PSD for sources that emit major amounts of only non-criteria pollutants (like GHGs), for which no NAAQS have been issued and for which no attainment designations have been made. U.S. Opp. 51. EPA claims its interpretation is nonetheless compelled because applying the location limitations would nullify the phrase

"any air pollutant" in the definitions of "major emitting facility" and "modification." *Id.* 52. But holding that a definition cannot "alter the meaning" of an operative provision does not render the definition "superfluous." *Allison Engine Co. v. U.S. ex rel. Sanders*, 128 S. Ct. 2123, 2129 & n.1 (2008). Because "'any' can and does mean different things depending upon the setting[,] … [t]o get at Congress's understanding, what is needed is a broader frame of reference." *Nixon v. Missouri Mun. League*, 541 U.S. 125, 132-33 (2004). However expansive the statutory definitions may seem *when read in isolation*, the location limitations in Sections 161 and 165(a) are "restrictive language" that constrain the defined terms *when used in context*. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). Using "any air pollutant" enabled Congress to draft simple definitions that adapt and accommodate the location limitations at the heart of the PSD program. NAM's interpretation *harmonizes* the statutory provisions between which EPA thinks it must choose.

EPA's own regulations implementing the definitions of "major emitting facility" and "modification" fatally undermine EPA's contention that the phrase "any air pollutant" is unambiguous and compels EPA's interpretation under *Chevron* step one. EPA recognizes that "any air pollutant" needs interpretation. *See* 40 C.F.R. § 60.2 (1975); 75 Fed. Reg. at 17,004-05; *see also* 40 Fed. Reg. at 58,416, 58,418. Given that ambiguity, EPA cannot maintain Congress used "any air pollutant" as unambiguous and not limited by the location limitation provisions.

Alabama Power did not resolve the interpretive battle in EPA's favor. In reach-

ing its holding on how to measure potential to emit, the Court opined in *dictum* that the phrase "any air pollutant" in Section 169 is broad enough to encompass non-NAAQS pollutants.[1] 636 F.2d 323, 352-55 (D.C. Cir. 1979). That may be right, but it is beside the point. *Alabama Power* did not reconcile the definition in Section 169 with the location limitations in Sections 161, 165(a), and 107. Rather, its holdings require that the location limitations must be given force. *Id.* at 364-65; NAM Mot. 20-22.

EPA's argument that the definition of "modification" compels its interpretation, U.S. Opp. 49-50, is also fatal to EPA's interpretation of the PSD permitting triggers. Though used in the PSD part of the Act, "modification" is defined in the part that creates the New Source Performance Standard (NSPS) program. EPA has always interpreted "any air pollutant" in the NSPS program to mean "any air pollutant (to which a standard applies)." 40 C.F.R. § 60.2 (1975); 40 Fed. Reg. at 58,416, 58,418. EPA also has always ruled that a facility triggers the NSPS program only if it increases emissions of the particular pollutants whose standards apply to the facility. *See* 40 C.F.R. § 60.14(a) (1975). This longstanding NSPS approach is essentially what NAM contends is the statutorily required approach for PSD permitting.

B. EPA's Interpretation Is Manifestly Unreasonable

Relying on congressional intent for the CAA to encompass new pollutants,

[1] In the same sentence, the *Alabama Power* Court opined that the definition's phrase is broad enough to encompass pollutants not subject to regulation under the CAA. Because EPA has never considered unregulated pollutants to trigger PSD permitting, EPA cannot credibly contend that the sentence is anything but *dictum*.

U.S. Opp. 57, EPA argues that its reading of the PSD permitting triggers is at least reasonable under *Chevron* step two. No matter Congress' *general* intent, Congress *specifically* did not want the PSD program to encompass new pollutants *that would destroy the fundamental parameters of the program.* Congress did not "intend[] to define … obviously minor sources as 'major' for the purposes of the PSD provision" but rather intended to require PSD permits only for sources "financially able to bear the substantial regulatory costs imposed by the PSD provisions," the number of which is supposed to be "reasonably in line with EPA's administrative capability." *Alabama Power*, 636 F.2d at 353, 354. EPA concedes that its interpretation counters those goals by imposing "costs to sources and administrative burdens to permitting authorities" that "are so severe" as to "be considered 'absurd results.'" 75 Fed. Reg. at 31,517. That irrational outcome proves EPA's interpretation is unreasonable. *See Int'l Alliance of Theatrical & Stage Employees v. N.L.R.B.*, 334 F.3d 27, 35 (D.C. Cir. 2003).

EPA tries to deflect that conclusion by urging the Court to find NAM's interpretation *more absurd* on the grounds that excluding GHGs from PSD is a "greater deviation from congressional intent." U.S. Opp. 63-64. But courts applying *Chevron* step two do not grade the reasonableness of competing interpretations; they decide whether the agency's interpretation is, or is not, reasonable. *Coosemans Specialties, Inc. v. Dep't of Agric.*, 482 F.3d 560, 565 (D.C. Cir. 2007). Even if EPA were right that Con-

gress wanted GHGs to be covered by the PSD program (it is not[2]) the pertinent question is whether GHG emissions *trigger* PSD permitting. And NAM's interpretation of the PSD triggers is consistent with Congress's supposed intent to have the CAA "cover *any* pollutant that potentially endangers public health and welfare." U.S. Opp. 64. Under NAM's interpretation, EPA can regulate GHGs under the CAA (as through CAA Section 202) and also can realize Congress' intent to focus on truly major sources and build the PSD program on top of the geographically limited NAAQS program.

C. The Tailoring Rule Is Unlawful, Arbitrary, and Capricious

EPA hardly bothers to respond to NAM's argument that the Tailoring Rule is not justified by the doctrines EPA invokes. U.S. Opp. 64-66. As for administrative necessity, EPA ignores that its unreasonable interpretation of the PSD triggers creates the necessity that the agency wants to avoid. *Id.* 64. As for the "one-step-at-time" doctrine, EPA argues that *Massachusetts v. EPA* invented the doctrine when the Court observed that "[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop." *Id.* 65. But the Court's observation about how agencies *ordinarily* act is no justification for EPA's *extraordinary* decision to rewrite Congress' unambiguous emissions thresholds and implement them one step at a time.

[2] NAM's argument on this score, NAM Mot. 24-26, has nothing to do with "local" versus "interstate" pollution, *see* U.S. Opp. 52-53, but rather with the type of pollution that Part C addresses: pollution that deteriorates the air that people breathe in PSD areas designated under CAA § 107. 42 U.S.C. § 7407.

D. NAM's Arguments Are Not Time-Barred

EPA argues that it is too late to challenge its interpretation. Even if NAM could have brought its challenge years ago, EPA actually and constructively reopened its interpretation in recent rulemakings and so restarted the clock for judicial review. Here, EPA held "out the unchanged section as a proposed regulation, offer[ed] an explanation for its language, solicit[ed] comments on its substance, and respond[ed] to the comments in promulgating the regulation in its final form." *Sierra Club v. EPA*, 551 F.3d 1019, 1024 (D.C. Cir. 2008). In proposing the Tailoring Rule, EPA solicited comments on its interpretation of the PSD permitting triggers.[3] In proposing the Interpretive Rule, EPA noted that comments "regarding interpretation of the PSD applicability definition[ ]" had been submitted in response to other rulemakings and instructed commenters to submit those comments to the Interpretive Rule docket instead, 74 Fed. Reg. at 51,546. In the final notices to these rules, EPA responded to the comments it received. 75 Fed. Reg. at 17,006-09; *id.* at 31,560-62.

Further, an "agency's decision to adhere to the *status quo ante* under changed circumstances can constructively reopen a rule by the change in the regulatory context." *Sierra Club*, 551 F.3d at 1025 (citation omitted). "A constructive reopening oc-

[3] When proposing that NAM's interpretation of the PSD triggers should be the first phase of the Tailoring Rule, EPA "solicit[ed] comment on this approach, and on other potential variations on our proposal that commenters believe could address the administrative concerns in more effective ways." 74 Fed. Reg. at 55,327; s*ee also id.* at 55,317 (soliciting comment on methods to achieve the statutory purpose); *id.* at 55,320 (requesting comment on other "tools or options" to reduce permitting burdens).

curs if the revision of accompanying regulations significantly alters the stakes of judicial review, as the result of a change that could have not been reasonably anticipated." *Id.* (citations omitted). EPA's determinations to regulate a unique class of pollutants like GHGs and to require major emitters of GHGs to obtain PSD permits "significantly altered the stakes of judicial review" by, as EPA acknowledged in the Tailoring Rule, exposing thousands of additional sources annually to onerous PSD permitting for the first time.[4]

E. EPA Has Not Justified Its Failure To Perform Mandated Analyses

EPA does not seriously dispute it neglected required analyses regarding stationary sources; rather, it says the Court cannot do anything about it. U.S. Opp. 47 n.33. But uninformed agency action is arbitrary and capricious and must be remedied.[5]

First, EPA's attempt to distinguish direct and indirect impacts is inconsistent with its own prior view that the stationary source impacts flow *directly* from the challenged rules *and* its position the CAA *compels* stationary source permitting. As EPA

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[4] Out of an abundance of caution, a separate coalition of associations has filed a petition for review of 1978, 1980, and 2002 regulations in which EPA announced and adhered to its interpretation of the PSD permitting triggers. This coalition fully rebutted EPA's objections regarding timeliness. *See Petitioners' Opposition to Respondents' Motion to Dismiss* (Case No. 10-1167, Dkt. 1269170) (Att. 2).

[5] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (rule arbitrary and capricious when agency fails to "examine the relevant data"); *Bowman Transp. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974) (agency action invalid if not "based on a consideration of the relevant factors"); 42 U.S.C. § 7607(d)(9)(A),(D) (rule invalid if adopted "without observance of procedure required by law").

said recently (in contrast to its position now), it "has taken four related actions that, taken together, *trigger [permitting requirements] for GHG sources* on and after January 2, 2011, but limit the scope of PSD." SIP Call, 75 Fed. Reg. at 53,895 (emphasis added); *see also* 75 Fed. Reg. at 31,554 (the rules will "trigger the applicability of PSD for GHG sources at the 100/250 tpy threshold levels as of January 2, 2011"). That triggering is no mere accident, for EPA has stated that it aims to "include as many GHG sources in the permitting programs at as close to the statutory thresholds as possible, and as quickly as possible." *Id.* at 31,548. Indeed, EPA says in the Tailoring Rule that the "most important reason" justifying its interpretation of "congressional intent" is the practical consequence of regulating more or fewer stationary sources. *Id.* at 31,563.

Second, EPA's back-up argument is that it "did, in fact, consider such costs," U.S. Opp. 45-46, but its analysis is totally incomplete. EPA did not estimate the *substantive* burden imposed by its rules or perform the mandatory analyses identified by NAM. Worse, EPA directed the public *not* to comment on the costs on stationary sources, and ignored such comments that were submitted. NAM Mot. 38-39. EPA's see-no-evil approach is particularly egregious given the stakes for stationary sources, which even EPA's incomplete analysis puts at $78 billion, NAM Mot. Exh. 2 at 18, nearly five times the costs to car makers – $15.6 billion, 75 Fed. Reg. at 25,535.

III. MOVANTS WILL SUFFER IRREPARABLE HARM ABSENT A STAY

A. NAM Has Demonstrated Concrete Irreparable Harm

Respondents mischaracterize most of NAM's evidence showing irreparable

harm. NAM Mot. 40-53. Far from "hypothetical," U.S. Opp. 68, solely economic, *id.*, or "unsubstantiated," Int. Opp. 32-34, the unrebutted evidence shows lost jobs which will result from delayed and cancelled projects, permitting costs, BACT compliance, and investment stifled by the uncertainty of EPA's regime; limits on energy supply and reduced energy investments, leading to increased energy prices for U.S. consumers and burdens on vulnerable, low-income, minority, and elderly populations; construction freezes causing considerable reductions in residential investment, jobs, and tax and fee revenue; and retroactive risks, including litigation risk and potential civil or criminal liability[6] from CAA enforcement or citizens' suits. NAM Mot. 42-53.

Nor has EPA refuted that the economic harms that NAM and their members will suffer are *irreparable*,[7] which is the standard for economic or other harms. NAM's harm is quintessentially irreparable because, as numerous courts have held,[8] recom-

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[6] EPA wholly ignores that its Tailoring Rule cannot eliminate criminal liability. NAM Mot 51-53. Law-abiding companies misled by EPA should not be forced to assert an "entrapment-by-estoppel" affirmative defense to subsequent criminal enforcement. *See U.S. v. Penn. Indus. Chem. Corp.*, 411 U.S. 655 (1973) (corporate defendant must be allowed to present evidence that it was affirmatively misled by the responsible agency into believing that the law did not apply to specified conduct).

[7] Respondents' critique of references to cap and trade economic studies is misplaced. Margo Thorning explained that the "command-and-control" nature of that bill and EPA's rules make them sufficiently similar for her limited use of the studies – which did not include use in formulating her estimates of economic harm and reduced investment. Thorning Dec. ¶ 36; Thorning Supp. Dec. ¶¶ 2-6 (Att. 3).

[8] *Cal. Pharms. v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009); *Kan. Health Care Ass'n v. Kan. Dep't of Soc.,* 31 F.3d 1536, 1543 (10th Cir. 1994); *Baker Elec. Coop., Inc., v. Chaske*, 28 F.3d 1466, 1472-73 (8th Cir. 1994); *Rum Creek Coal Sales, Inc. v. Caperton*, (cont.)

pense from the federal government is impossible.

Respondents also ignore the evidence provided by Movants—who represent collectively virtually every manufacturing sector in the United States and countless businesses large and small—when they fancifully contend that the GHG regime will actually help, not harm, American industry. Int. Opp. 38; U.S. Opp. 69-70. Among other flaws, this assumes: (1) that industry is better off with unspecified, uncertain, and yet-to-be decided BACT controls versus a stay that would bring certainty to industry at this critical time; (2) all 50 states will timely and fully implement the Tailoring approach, which, as discussed below, is implausible; and (3) the unworkable permitting delays EPA itself has predicted will not materialize. NAM Mot. 41-48.[9]

It is Respondents' rebuttal that is speculative and unsubstantiated. Regarding the present and future uncertainty, cost, and delay of implementing BACT for GHGs, EPA speculates that such harm will not materialize but offers no concrete rebuttal to

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926 F.2d 353, 360-62 (4th Cir. 1991), *abrogated on other grounds by Winter v. Nat. Res. Defense Council*, 129 S.Ct. 365 (2008); *Brendsel v. Office of Fed. Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66-67 (D.D.C. 2004). This conclusion is not changed by EPA's citation of three district court cases, U.S. Opp. 68, involving disputes over lost market share between brand name and generic drug makers, where nonrecovery of economic harms was "peripheral" or unaddressed. *Biovail Corp. v. FDA*, 519 F. Supp. 2d 39, 48-49 (D.D.C. 2007); *Astellas Pharma US, Inc. v. FDA*, 642 F. Supp. 2d 10, 22-23 (D.D.C. 2009); *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 42-44 (D.D.C. 2000).

[9] Intervenors' assertion that a stay denial will bring closure to these issues and remove retroactive litigation risks, including permit challenges and citizens' suits, *see* Int. Opp. 51-53, is particularly brazen given at least two Intervenors themselves are challenging the Tailoring Rule, *see Ctr. for Biological Diversity v. EPA* (No. 10-1115); *Sierra Club v. EPA* (No. 10-1215).

NAM's numerous industry experts. In the alternative, Respondents speculate that other causes are to blame. U.S. Opp. 71-72; Int. Opp. 37-38. That incredible assertion is belied by EPA's own admission that, if stationary sources are subject to permitting at the statutory thresholds (as will happen in states that do not implement the Tailoring Rule in time or if the Tailoring Rule is invalidated), the result would be "absurd" and would "adversely affect national economic development," 75 Fed. Reg. at 31,557, with administrative costs of $78 billion annually, NAM Mot. Exh. 2 at 18.

B. Many States Will Not Avoid A Construction Freeze

EPA's assertion that only Texas will have problems as of January 2, 2011, U.S. Opp. 78, is incorrect. On the available evidence, *21* jurisdictions will likely face a construction ban or *de facto* freeze on January 2. Higgins Supp. Dec. Tbl. I (Att. 4). Although each state is different, the most problematic jurisdictions fall into two categories: (1) 36 with a SIP that includes GHGs; and (2) 16 with a SIP that does not include GHGs. EPA's overly complex and inevitably futile efforts to avoid permitting gridlock across the country only reinforce the urgency for this Court to grant a stay.

EPA concedes that the first category of jurisdictions—those whose SIPs provide for GHG permitting—will face a wide spread construction freeze, because on January 2 they will be "obligated to enforce PSD for greenhouse gases at the *statutory* levels"—*i.e.,* 100 or 250 tons. U.S. Opp. 80-81. EPA admits this will create a *de facto* construction freeze because local permitting authorities will be overwhelmed with permit applications for new construction. 75 Fed. Reg. at 31,557; NAM Mot. 48-51.

This freeze will affect not just industrial facilities, but also apartment buildings and large single-family homes that emit quantities of GHGs over the statutory thresholds.

The only appropriate way to avoid this result would be for each of the 36 separate jurisdictions to revise their SIP thresholds and submit revisions to EPA, which EPA *must review and approve* before they can be effective. This is an impossible feat for three reasons. *First*, as EPA admits, many jurisdictions have already indicated they *will not* make the deadline. 75 Fed. Reg. at 31,580. On the best available evidence, 13 jurisdictions will likely not have new state regulations in place by January 2. Higgins Supp. Dec. ¶ 47 (Att. 4). Even Assistant Administrator McCarthy concedes that at least ten jurisdictions will be unable to make the required changes to their laws on time. McCarthy Dec. ¶ 97. That admission, impacting 20 percent of the nation, by itself establishes irreparable harm. But McCarthy's account understates the available evidence. For example, she counts Oklahoma as a state that will meet the January 2 deadline, McCarthy Dec. Tbl. 3, while the only official response of Oklahoma that EPA has released says that it will *not* be able to revise its regulations until sometime between July 2011 and July 2012.[10] Similarly, EPA indicated Maryland and Wisconsin

[10] Letter, Oklahoma (Jul. 15, 2010) (Att. 5). EPA has possession of all the state responses and has striven to keep them secret. EPA received the responses on August 2, yet withheld them until September 23–a week *after* Movants stay motion was due–despite pleas from NAM and Congress to release them sooner. *See* Letter from Keith McCoy to Gina McCarthy (July 30, 2010)(Att. 6); Letter from James M. Inhofe to Lisa P. Jackson (Aug. 18, 2010)(Att. 7). When Peabody summarized the letters for the Court in a Response, EPA tried to have it stricken. *EPA Mot.* (Oct. 7, 2010).

would meet the deadline, which is unlikely, given that neither has even proposed a rule change. Higgins Supp. Dec. Tbl. I. And EPA, of course, cannot guarantee that *any* states will be able to modify their regulations on time.[11] This is why the CAA gives states three years to alter their rules. 42 U.S.C. § 7410(a)(1).

Second, even if states change their laws before January, EPA *will not be able to approve* those revisions by January 2 using notice-and-comment rulemaking, as required by CAA § 110(k)(5). *Id.* § 7410(k)(5). SIP revisions are not effective until EPA approves them, which requires a 30-day comment period and other procedures. *General Motors v. U.S.*, 496 U.S. 530 (1990). In EPA's proposed Tailoring Rule, it suggested that it would retroactively modify previously-approved SIPs to incorporate the statutory threshold. 75 Fed. Reg. at 31,580. In response to complaints that EPA does not have the authority to re-write SIPs, much less retroactively re-write them, EPA abandoned this approach in the final Tailoring Rule, proposing "another mechanism": states would simply "interpret" their rules to include the thresholds EPA issued in the Tailoring Rule to avoid the process requirements of the CAA. *Id.* But this approach did not work either, as 28 out of 36 states have determined that they must follow their own laws and use a public rulemaking or legislative process. Higgins Supp. Dec. ¶ 39.

[11] Louisiana plans to finish its rulemaking by year's end, but states that "public comments could delay its effective date." North Carolina states that its fix could be delayed "[i]f letters of objection are received." Mississippi's projected January 2 completion date is subject to "public interest and the potential controversy related to the EPA's PSD and Title V GHG Tailoring Rule." (Att. 5).

Blurring the line between litigation and regulation, and embodying its increasingly *ad hoc* approach to rulemaking, EPA's *brief* unexpectedly announces that EPA is reversing course yet again, returning to the approach of retroactive modification, without any legal justification. U.S. Opp. 81. Such steps are not sound administrative decision making, but acts of desperation in the face of an insurmountable deadline. *Third*, even *if* EPA could retroactively change PSD SIPs, EPA's rules trigger minor source permitting requirements under the SIPs that will bring construction to a halt.

The second category of jurisdictions fare no better. EPA concedes that on January 2, 2011, its approach *will* impose a construction ban in those jurisdictions and proposes two equally unattractive choices: accepting a FIP (which EPA *hopes* to have in place by December 1) or revising their SIPs before January 2. *Id.* 79. *First*, speculation about potential future action cannot preclude granting the partial stay request of manufacturers who are facing a construction freeze they cannot control. *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1291 (D.C. Cir. 2000). In any event, forcing states to accept a FIP to avoid a screeching halt to all economic growth flies in the face of core cooperative federalism principles underlying the CAA.[12] Although EPA

[12] For example, EPA told an Arizona county it would face a "construction ban" if it did not ask for its own "PSD program to be FIP'ed." E-mail (Oct. 4, 2010)(Att. 5). The County replied "To the extent a prompt FIP will enable the avoidance of a construction ban, Pinal County Air Quality sees no choice but to ask for such a FIP." *Id.* Similarly, Arizona said EPA's "threat of a construction ban" and the "practical impossibility" of revising a SIP in the brief time frame meant it had "no choice but to accept the imposition of a FIP." Letter, Arizona (Oct. 4, 2010) (Att. 5).

says "most of the States and other jurisdictions have adopted this FIP approach," Texas has explicitly not acquiesced, and seven other jurisdictions will not meet the demands for months. Higgins Supp. Dec. ¶ 27. *Second*, as described above, most states cannot revise their laws in just two (holiday-filled) months, owing to procedural requirements, and EPA cannot approve SIP revisions in time. The only solution to this chaos is through this Court's intervention with a stay.

IV. A PARTIAL STAY WILL NOT HARM EPA OR OTHER PARTIES AND IS IN THE PUBLIC INTEREST

For the first time *in its response brief*, EPA purports to identify benefits from reducing stationary source GHG emissions, U.S. Opp. 95-97, but those *ex post* justifications are generic and no substitute for proof. *Nowhere* in its four GHG rules did EPA attempt to measure the benefit of controlling such emissions. Nor can EPA abstractly call upon the "public welfare" orientation of environmental regulation, as if a stay of any environmental regulation was presumptively harmful. *See* U.S. Opp. 94-95. Notwithstanding that "there is a strong public interest in meticulous compliance with the law by public officials" that favors NAM's request, *Fund for Animals v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993), NAM has shown why regulation of stationary source GHG emissions will harm public welfare (by, for instance, hurting vulnerable, minority, and elderly populations, NAM Mot. 45, 49). Similarly, EPA's blind assurance that its regulations will not worsen global climate change through carbon leakage, U.S. Opp. 98-99, does not refute the expert testimony NAM offered on this point.

Finally, Intervenors' overstated scenario in which the stationary sources constructed during a stay escape GHG controls forever, Int. Opp. 41-45, ignores reality. A temporary stay of PSD controls will not forever immunize all facilities from GHG controls. Rather, EPA itself has preferred new legislation capping GHG emissions from new *and existing* facilities as the better approach for addressing GHG emissions. NAM Mot. 59-60. EPA is also likely to explore GHG controls under other CAA provisions, such as Section 111's New Source Performance Standards, which, unlike PSD, would be promulgated only after a full notice and comment opportunity and a full impacts analysis by EPA on stationary sources.

CONCLUSION

For the reasons stated above and in NAM's Motion, this Court should grant a partial stay as described alternatively in Proposed Orders A, B, and C.

Dated: November 8, 2010

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Petitioners' Reply in Support of Motion For Partial Stay Of EPA's Greenhouse Gas Regulations" was on this 8th day of November, 2010, served electronically through the Court's CM/ECF system on all registered counsel and by first-class mail on those counsel not registered as listed below:

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