Oral Argument Not Yet Scheduled

NO. 10-1167

Consolidated with Case Nos. 10-1168, 10-1169, 10-1170, 10-1173, 10-1174, 10-1175, 10-1176, 10-1177, 10-1178, 10-1179, and 10-1180

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CHEMISTRY COUNCIL,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator, U.S. Environmental Protection Agency,
Respondents.

ON PETITION FOR REVIEW FROM THE ENVIRONMENTAL PROTECTION AGENCY

PETITIONERS' JOINT OPENING BRIEF

For American Chemistry Council
Timothy K. Webster
Roger R. Martella, Jr.
James W. Coleman
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005

For Clean Air Implementation Project
William H. Lewis, Jr.
Ronald J. Tenpas
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

For National Ass'n of Manufacturers, et al.
Charles H. Knauss
Shannon S. Broome
KATTEN MUCHIN ROSENMAN LLP
2900 K Street, NW, North Tower, Suite 200
Washington, DC 20007
(202) 625-3525

Bryan M. Killian
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006

Roger R. Martella, Jr.
Timothy K. Webster
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005

Matthew G. Paulson
BAKER BOTTS LLP
98 San Jacinto Boulevard
1500 San Jacinto Center
Austin, TX 78701

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(A)(1)

The following certificate as to parties, rulings, and related cases is provided pursuant to D.C. Circuit Rule 28(a)(1).

A. Parties and Amici

Petitioners

Petitioner in consolidated case Nos. 10-1167, 10-1168, 10-1169, and 10-1170 is the American Chemistry Council;

Petitioners in consolidated case Nos. 10-1176, 10-1178, 10-1179, and 10-1180 are the National Association of Manufacturers, American Frozen Food Institute, American Petroleum Institute, Brick Industry Association, Corn Refiners Association, Glass Packaging Institute, Independent Petroleum Association of America, Michigan Manufacturers Association, Mississippi Manufacturers Association, National Association of Home Builders, National Oilseed Processors Association, National Petrochemical and Refiners Association, Specialty Steel Industry of North America, Tennessee Chamber of Commerce and Industry, Western States Petroleum Association, West Virginia Manufacturers Association, and Wisconsin Manufacturers & Commerce;

Petitioner in consolidated case Nos. 10-1173, 10-1174, 10-1175, and 10-1177 is the Clean Air Implementation Project.

Respondents

U.S. Environmental Protection Agency (EPA) and Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency.

Intervenor for Petitioners

Chamber of Commerce of the United States of America.

Intervenors for Respondents

Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club.

Amicus Curiae for Respondents

Center for Biological Diversity.

B. Rulings Under Review

These consolidated cases challenge four EPA rules:

Prevention of Significant Deterioration and Nonattainment New Source Review; Final Rule and Proposed Rule, 67 Fed. Reg. 80,186 –80,289 (Dec. 31, 2002);

Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676 – 52,748 (Aug. 7, 1980);

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);

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).

C. Related Cases

Each of the consolidated cases is related.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioners make the following Disclosures:

Case Nos. 10-1176, 10-1178, 10-1179, and 10-1180

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

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

The American Petroleum Institute ("API") states that it is a national trade association representing all aspects of America's oil and natural gas industry. API has approximately 400 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of industry. API has no parent company, and no publicly held company has a 10% or greater ownership interest in API.

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

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

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

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

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

The Mississippi Manufacturer's Association states that it is Mississippi's largest industrial trade association, representing small and large manufacturers in every industrial sector within the state. The mission of the Mississippi Manufacturer's Association is to provide unrelenting advocacy in support of measures benefiting manufacturers while also working to eliminate unfair, unnecessary or costly burden on the operation of Mississippi's manufacturing community. The Mississippi Manufacturer's

Association has no parent company, and no publicly held company has a 10% or greater ownership interest in the Mississippi Manufacturer's Association.

The National Association of Home Builders ("NAHB") states that it is a not-for-profit trade association organized for the purposes of promoting the general commercial, professional, and legislative interests of its approximately 160,000 builder and associate members throughout the United States. NAHB's membership includes entities that construct and supply single family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB has no parent company, and no publicly held company has a 10% or greater ownership interest in NAHB.

The National Oilseed Processors Association ("NOPA") states that it is a national trade association that represents 15 companies engaged in the production of vegetable meals and oils from oilseeds, including soybeans. NOPA's member companies process more than 1.7 billion bushels of oilseeds annually at 64 plants located throughout the country, including 59 plants that process soybeans. NOPA has no parent company, and no publicly held company has a 10% or greater ownership interest in NOPA.

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

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

The Tennessee Chamber of Commerce and Industry states that it is Tennessee's largest statewide, broad-based business and industry trade association, representing small and large businesses and organizations in every economic sector across the

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

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

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

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

Case Nos. 10-1167, 10-1168, 10-1169, and 10-1170

The American Chemistry Council ("ACC") is a not-for-profit trade association. ACC has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a ten percent (10%) or greater ownership interest in ACC.

Case Nos. 10-1173, 10-1174, 10-1175, and 10-1177

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

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

FEDERAL STATUTES

TABLE OF AUTHORITIES
(continued)

Page

ADMINISTRATIVE MATERIALS

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

LEGISLATIVE HISTORY

AUTHORITIES CHIEFLY RELIED UPON ARE INDICATED BY AN ASTERISK (*)

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

EPA	Environmental Protection Agency
GHGs	Greenhouse gases
NAAQS	National ambient air quality standard(s)
NNSR	Nonattainment new source review
PSD	Prevention of Significant Deterioration

JURISDICTIONAL STATEMENT

In these consolidated cases, Petitioners seek review of four related final actions by EPA: (1) *Part 51—Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Prevention of Significant Air Quality Deterioration*, 43 Fed. Reg. 26,380 (June 19, 1978) (J.A.2); (2) *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 (June 19, 1978) (J.A.10); (3) *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52,676 (Aug. 7, 1980) ("1980 PSD Rules") (J.A.71); and (4) *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR); Final Rule and Proposed Rule*, 67 Fed. Reg. 80,186 (Dec. 31, 2002) (J.A.145). Because the petitions for review are based on grounds arising within the 60 days before Petitioners filed on July 6, 2010, the Court has jurisdiction pursuant to Clean Air Act Section 307(b)(1), 42 U.S.C. § 7607(b)(1). Pages 17–30 below explain timeliness in greater detail.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in an addendum to this brief.

STATEMENT OF ISSUES

1) Does the Clean Air Act require a source to get a preconstruction permit only if it emits major amounts of a pollutant whose air quality standard is being attained in the area where the source is located, thus foreclosing EPA's broader interpretation that a source emitting major amounts of any regulated pollutant needs a permit?

2) Is EPA's broader interpretation unreasonable because, after EPA regulated greenhouse gases, it required about 81,000 preconstruction permits annually, a massive increase even EPA calls absurd?

3) Even though EPA's broader interpretation is 30 years old, are petitions for review challenging it timely because they are based upon EPA's recent regulation of greenhouse gases, which precipitated unexpected difficulties and ripened thousands of new claims?

4) Did EPA reopen its broader interpretation in recent rulemakings?

INTRODUCTION

The Clean Air Act's Prevention of Significant Deterioration (PSD) program requires some sources of air emissions to get permits before beginning construction or undertaking a modification. 42 U.S.C. § 7475. Knowing that obtaining PSD permits would be hard and implementing them costly, Congress required them only for "facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for" air pollution. *Alabama Power Co. v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1980). "The numbers of sources that meet these criteria," moreover, "are reasonably in line with EPA's administrative capability." *Id.* at 354.

Recently, EPA counted a few hundred PSD permits issuing each year—a total consistent with congressional intent to limit the PSD program to a manageable num-

ber of large industrial sources. *See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule*, 75 Fed. Reg. 31,514, 31,537 (June 3, 2010) ("Final Tailoring Rule") (J.A.1179). Yet because of the Tailpipe Rule, a recently promulgated regulation controlling automobile emissions of greenhouse gases (GHGs), EPA estimated the annual number of PSD permits would explode to *over 81,000* and include many small and nonindustrial sources. *Id.* at 31,538 (J.A.1180). Exceeding EPA's administrative capability, each permit would take "a decade or longer" to obtain. *Id.* at 31,557 (J.A.1199).

Despite admitting that such an explosion of PSD permits is "inconsistent with Congress's expressed intent," EPA contends that the "literal application" of the Act compels it. *See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule*, 74 Fed. Reg. 55,292, 55,308 (Oct. 27, 2009) ("Proposed Tailoring Rule") (J.A.618). EPA is wrong. The fault lies not in the Clean Air Act, but in the Agency's strained interpretation of it.

The Act requires a PSD permit before construction starts on any "major emitting facility … in any area to which this part applies." 42 U.S.C. § 7475(a). "This part" is the PSD program, and it "applies" to an area in attainment with the national ambient air quality standard (NAAQS) for a criteria pollutant (ozone, sulfur dioxide, particulate matter, nitrogen oxides, carbon monoxide, or lead, *but not GHGs*). 42 U.S.C § 7471. As EPA interprets the PSD provisions, a stationary source must get a PSD permit before construction if it will have "major emissions"—more than 100 or 250

tons per year, 42 U.S.C. § 7479(1)—of *any regulated air pollutant*. *See 1980 PSD Rules*, 45 Fed. Reg. at 52,711 (J.A.106). Owing to its interpretation, EPA concludes that the Tailpipe Rule, its first-ever regulation of GHGs, automatically requires stationary sources emitting major amounts of GHGs to get PSD permits. Yet the text, structure, and purposes of the Act, as reinforced by the foundational *Alabama Power* decision, require a narrower interpretation: a stationary source must get a PSD permit if it is located in an area attaining the NAAQS for a criteria pollutant and if it will have major emissions of *that criteria pollutant*.

EPA's broader interpretation fails both *Chevron* steps. It fails *Chevron* step one because it severs the statutory link between the PSD program and the attainment of NAAQS. And it fails *Chevron* step two because, contrary to Congress's intent, it absurdly subjects tens of thousands of stationary sources to the PSD program solely because of their GHG emissions. By contrast, because GHGs are not criteria pollutants and have no NAAQS, the proper interpretation of the PSD permitting triggers avoids the absurdities and is consistent with Congress's intent.

The mere fact that EPA first announced its interpretation three decades ago does not prevent the Court from reviewing it now. Section 307(b)(1) of the Clean Air Act allows petitions for review based on "grounds arising after" the close of the initial period for reviewing an Agency interpretation. *See* 42 U.S.C. § 7607(b)(1). Petitioners satisfy Section 307(b)(1) because the Tailpipe Rule created new grounds when it inflated the number of stationary sources exposed to PSD permitting. That exposed

EPA's interpretation of the PSD permitting triggers as absurd: before the Tailpipe Rule, EPA's unlawful interpretation at least required a manageable number of PSD permits, as Congress intended; but now it requires too many. And by potentially requiring thousands of new PSD permits, the Tailpipe Rule injured thousands of sources and thus ripened thousands of challenges. Even EPA has recognized that its interpretation of the PSD permitting triggers should be re-examined now. In recent rulemakings, EPA acknowledged the interpretation's unintended consequences, solicited comment on how to solve them, yet ultimately retained the interpretation. That reopening of the interpretation independently allows judicial review at this time.

The Court, accordingly, should grant the petitions for review and vacate EPA's unlawful interpretation of the PSD permitting triggers.

STATEMENT OF THE CASE AND FACTS

The present petitions for review challenge EPA's interpretation of the PSD permitting triggers, as announced in rulemakings since 1978. *See* p. 1, *supra*. The interpretation was explicitly reaffirmed, and its impact dramatically expanded, in recent rulemakings initiating regulation of GHGs under the Act. An examination of the statutory and regulatory background is essential to addressing the present petitions.

I. STATUTORY AND REGULATORY BACKGROUND.

A. The Clean Air Act: NAAQS And The PSD Program.

Part A of Title I of the Clean Air Act sets forth the National Ambient Air Quality Standards program for regulating criteria pollutants. 42 U.S.C. §§ 7401–7431. Criteria pollutants—ozone, sulfur dioxide, particulate matter, nitrogen oxides, carbon monoxide, and lead—constitute a subset of air pollutants whose presence in the ambient air poses special risks for public health and welfare. 42 U.S.C. § 7408(a). Under Section 109 of the Act, EPA must promulgate a NAAQS that sets safe levels for each criteria pollutant, 42 U.S.C. § 7409; under Section 107, EPA must designate areas of the country as either in attainment or in nonattainment with each NAAQS, 42 U.S.C. § 7407(d).[1] Area designations are NAAQS-specific and, therefore, "pollutant-specific" as well. *Alabama Power*, 636 F.2d at 350. A single geographic area may be in attainment with one NAAQS while in nonattainment with another.

Congress wanted each area to be in attainment with each NAAQS. Among its means for achieving that end are two complementary permitting programs run principally by States through implementation plans. *See* 42 U.S.C. § 7410(a)(2)(C). One is the nonattainment new source review (NNSR) program in Part D of Title I of the Act. To improve air quality in areas not in attainment with a NAAQS, Congress re-

[1] For lack of data, an area may be designated unclassifiable for a NAAQS. *See Alabama Power*, 636 F.2d at 343 n.2. Because unclassifiable and attainment areas are the same for purposes of the PSD program, this brief refers only to attainment areas.

quired certain stationary sources in those areas to obtain NNSR permits that impose the "lowest achievable emissions rate" to control emissions of the criteria pollutant whose NAAQS the area is not attaining. *See* 42 U.S.C. §§ 7501(3), 7502.

The other permitting program is the one at issue here—the PSD program in Part C of Title I—which was enacted to prevent air quality in areas in attainment with a NAAQS from worsening to the point that they are no longer in attainment. *See Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 904 (7th Cir. 1990); *Alabama Power*, 636 F.2d at 349; *see also* 42 U.S.C. § 7470. The first substantive PSD provision, Section 161, tethers the PSD program to attainment areas. It requires implementation plans to "contain emission limitations and such other measures as may be necessary … to prevent significant deterioration of air quality in each region (or portion thereof) designated … as attainment" pursuant to Section 107. 42 U.S.C. § 7471.

Preconstruction or premodification permitting is the central PSD requirement.[2] Section 165(a) commands that "[n]o major emitting facility … may be constructed in any area to which this part applies" unless the facility has a PSD permit. 42 U.S.C. § 7475(a)(1). Securing and satisfying a PSD permit are demanding obligations. To get one, a facility must show, among other things, that its emissions will not cause air quality to exceed any NAAQS, 42 U.S.C. § 7475(a)(3)—which is to say, a facility must

[2] Because the PSD provisions define the term "construction" to encompass modifications of existing facilities, 42 U.S.C. § 7479(2)(C), this brief's references to "construction" encompass modifications as well.

show that its emissions will not cause an attainment area to become a nonattainment area. And after a PSD permit is issued, a facility must install "best available control technology for each pollutant subject to regulation under" the Act. 42 U.S.C. § 7475(a)(4); *see* 42 U.S.C. § 7479(3) (defining "best available control technology").

Given the burdens of applying for, then implementing, PSD permits, the threshold question is which sources need them. A "major emitting facility" potentially subject to PSD permitting is one with "major" emissions—more than 100 or 250 tons per year—of "any air pollutant." 42 U.S.C. § 7479(1). Not all major emitting facilities need PSD permits. Only those "in any area to which this part applies" do. 42 U.S.C. § 7475(a). As discussed at length below, the phrase "in any area to which this part applies" in Section 165(a) must be read together with the term preceding it ("major emitting facility") as establishing a *pollutant-specific situs requirement* or, viewed another way, a location-specific emissions requirement: PSD permits are necessary only if a source has major emissions of a pollutant and only if the source is located in an area attaining that pollutant's NAAQS. *See* pp. 31–35, *infra*.

In short, the Clean Air Act sets up the following complementary permitting triggers: Given the attainment and nonattainment designations of a particular location, construction of a source in the location is subject to NNSR permitting if it emits major amounts of a local nonattainment pollutant, to PSD permitting if it emits major amounts of a local attainment pollutant, and to both programs if it emits major

amounts of local attainment and nonattainment pollutants. The statute allows no other permitting option.

B. EPA's Interpretation Of The PSD Permitting Triggers.

Once, EPA interpreted the PSD permitting triggers the same way. In proposing regulations on September 5, 1979, EPA stated its plan "to apply PSD review to a source if the source locates in an area designated attainment … for a pollutant which the source emits in major amounts." *1980 PSD Rules*, 45 Fed. Reg. at 52,710 (J.A.105). Specifically, EPA proposed requiring PSD permits for

> any major stationary source or major modification that … would be constructed in an area which is designated under section 107 as attainment … for a pollutant for which the source or modification would be major … .

Requirements for Preparation, Adoption, and Submittal of State Implementation Plans; Approval and Promulgation of State Implementation Plans; Proposed Rule, 44 Fed. Reg. 51,924, 51,949 (Sept. 5, 1979) ("1979 Proposed PSD Rules") (J.A.59).

Between the proposed and final rules, however, EPA changed its mind. In the preamble to the final 1980 PSD rules, EPA stated its decision "to modify the September 5 proposal somewhat." *1980 PSD Rules*, 45 Fed. Reg. at 52,710 (J.A.105). In fact, EPA modified the proposal *completely*, concluding that

> except with respect to nonattainment pollutants, PSD review will apply to any source that emits any pollutant in major amounts, if the source would locate in an area designated attainment … for *any* criteria pollutant. … It should be noted that in order for PSD review to apply to a source, the source need not be major for a pollutant for which an

> area is designated attainment …; the source need only emit any pollutant in major amounts (i.e., the amounts specified in section 169(1) of the Act) and be located in an area designated attainment … for that *or any other pollutant*.

Id. at 52,710–711 (emphasis added) (J.A.105-J.A.106). EPA essentially switched its interpretation of Section 165(a) from a pollutant-specific situs requirement to a pollutant-indifferent one. Under the revised interpretation, PSD permitting is trigged whenever a source emits major amounts of *any* regulated pollutant, so long as the source is located in an area in attainment with *any* NAAQS—even a NAAQS for other pollutants. According to EPA, the "literal" requirements of the Act compelled the switch. *Id.* at 52,711 (J.A.106).

Announced in the 1980 preamble, EPA's view of the PSD permitting triggers is an interpretation of its 1980 PSD rules. Petitioners, accordingly, seek review of the 1980 rulemaking. And insofar as EPA contends that its 1978 PSD rulemakings (in which it promulgated similar rules) and its 2002 PSD rulemaking (which reorganized, renumbered, and reworded the rules) form the basis for or restate its interpretation, particularly as applied to GHGs, Petitioners seek review of those rulemakings as well.

C. EPA's Regulation Of GHGs.

Until only recently, GHGs were not regulated under the Clean Air Act. EPA claimed authority to regulate GHGs in the late 1990s but did not then regulate them. *See* Mem. from Jonathan Z. Cannon, General Counsel, EPA to Carol M. Browner, Administrator, EPA re: "EPA's Authority to Regulate Pollutants Emitted by Electric

Power Generation" (Apr. 10, 1998) (J.A.1427). Over the next decade, EPA contended that GHGs were not even "air pollutants" under the Act, but the Supreme Court rejected that contention and directed EPA to respond to a petition for rulemaking requesting EPA to regulate GHG emissions from new cars under Title II of the Act. *See Massachusetts v. EPA*, 549 U.S. 497, 528–35 (2007). At the end of 2009, EPA issued an Endangerment Rule, concluding that GHGs emitted from cars "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" and should be regulated under Section 202 of the Act. *Endangerment and Cause or Contribute Findings for GHGs under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (J.A.677); *see* 42 U.S.C. § 7521. Then on May 7, 2010, EPA promulgated the Tailpipe Rule under Section 202, which for the first time regulated GHGs under the Act. *See Light-Duty Vehicle Greenhouse Gas Emissions Standard and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010) (J.A.750); *see also Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Action on Reconsideration of Interpretation*, 75 Fed. Reg. 17,004, 17,019–020 (Apr. 2, 2010) (J.A.744-J.A.745).

While the Endangerment and Tailpipe Rules were gestating, EPA foresaw that they would have serious PSD-permitting consequences in light of its longstanding interpretation of the PSD permitting triggers. Thousands of small and nonindustrial sources would for the first time have to get PSD permits. *See Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel*

Economy Standards; Proposed Rule, 74 Fed. Reg. 49,454, 49,629 (Sept. 28, 2009) (J.A.425); *Proposed Tailoring Rule*, 74 Fed. Reg. at 55,294 (J.A.604); *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, EPA Response to Comments Document for Joint Rulemaking*, EPA-420-R-10-012 (April 2010), at 5-454 (J.A.1376). Rightly, EPA also foresaw that those consequences would be absurd and impossible to implement. *Proposed Tailoring Rule*, 74 Fed. Reg. at 55,295, 55,303–305 (J.A.605, J.A.613-J.A.615). So to avoid issuing 81,000 new PSD permits each year, EPA invoked the administrative necessity doctrine and proposed to reduce the number of PSD permits the Tailpipe Rule would require by "tailoring" (the Agency's word) the emissions thresholds for stationary sources of GHGs, raising them far, far above the statutory major emissions thresholds. *See id.* at 55,305 (J.A.615). EPA solicited comments on all aspects of its Tailoring Rule proposal to rewrite the Clean Air Act, making clear that all alternatives were on the table. *See id.* at 55,317, 55,320, 55,327 (J.A.627, J.A.630, J.A.637); *see also 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, 51,546–547 (Oct. 7, 2009) (J.A.597-J.A.598).

In response, Petitioners and others proposed that the Agency revert to the narrower interpretation of the PSD permitting triggers, which avoids the absurdities entirely. Because GHGs have no NAAQS, no area is designated as in attainment with such a NAAQS. Thus, under the narrower interpretation, no newly constructed

source with major emissions of only GHGs would have to get a PSD permit, and no existing major source undertaking a modification would have to get a PSD permit solely because of its increased GHG emissions. EPA rejected those comments, reaffirmed its interpretation of the PSD permitting triggers, and instead settled on 100,000 and 75,000 tons per year as new, GHG-specific emissions thresholds. *See Final Tailoring Rule*, 75 Fed. Reg. at 31,560–562 (J.A.1202-J.A.1204). Even under those super-elevated thresholds, EPA still expects the new number of annual PSD permit applications to surpass the old. *See Regulatory Impact Analysis for the Final PSD and Title V Greenhouse Gas Tailoring Rule, Final Report*, EPA 452/R-10-003 (May 2010) at Attach. C, p. 23 (J.A.1425); *Final Tailoring Rule*, 75 Fed. Reg. at 31,536–541 (J.A.1178-J.A.1183).

The Tailoring Rule currently has two phases. The first phase effectively adopts the narrower interpretation of the PSD permitting triggers: before July 2011, no construction of a major source requires a PSD permit solely because of GHG emissions. *See id.* at 31,516 (J.A.1158). In that six-month span, the PSD program regulates GHGs insofar as sources otherwise required to get a PSD permit must adopt the best available control technology for GHGs. In the second phase of the Tailoring Rule, starting July 2011, the new GHG-specific thresholds take effect. EPA has stated it will propose additional phases for the Tailoring Rule in order to expand PSD permitting to more sources. *Id.* at 31,566 (J.A.1208).

II. PETITIONERS AND THEIR CASES.

Several of Petitioners' members are among those who were unaffected and uninjured by EPA's interpretation of the PSD permitting triggers until the Tailpipe Rule. After July 2011, the Tailoring Rule will not help many of these members, either. *See* Addendum pp. 29–44 (six declarations from Petitioners and members describing how members will have to get PSD permits solely because of their GHG emissions).

In light of those consequences, Petitioners have advocated on their members' behalf regarding PSD permitting. For instance, Petitioners recommended that EPA correct its overbroad interpretation of the PSD permitting triggers. *See, e.g.*, Comments of Nat'l Ass'n of Manufacturers, *et al.*, on Proposed Tailoring Rule (Dec. 28, 2009) (J.A.1381); Comments of Am. Chemistry Council on Proposed Tailoring Rule (Dec. 28, 2009) (J.A.1378).

EPA rejected those recommendations, and Petitioners filed the present petitions for review on July 6, 2010, within 60 days of the promulgation of the Tailpipe Rule (and within 60 days of the promulgation of the Tailoring Rule). On the same day, Petitioners filed administrative petitions with EPA to reconsider, rescind, or revise its interpretation. *See* Nat'l Ass'n of Manufacturers *et al.*, Petition to Reconsider, Rescind, and/or Revise EPA's Prevention of Significant Deterioration Regulation (July 6, 2010) (J.A.1473); Am. Chemistry Council, Petition to Reconsider, Rescind, and/or Revise EPA's Prevention of Significant Deterioration Regulations: 40 C.F.R. Sections 51.166 and 52.21 (July 6, 2010) (J.A.1504). EPA has not acted upon those filings.

Last September, EPA filed a motion to dismiss the petitions for review as untimely. After briefing on the motion, the Court deferred ruling on it until the merits.

SUMMARY OF ARGUMENT

Section 165(a) of the Clean Air Act requires PSD permits before constructing a "major emitting facility … in any area to which this Part [*i.e.*, Part C, the PSD program] applies." 42 U.S.C. § 7475(a). EPA has long interpreted Section 165(a) to require a source emitting major amounts of *any* regulated pollutant to get a PSD permit if it is located in an area attaining at least one NAAQS, even one for a pollutant the source does not emit. When the Tailpipe Rule regulated GHGs, EPA's interpretation of the PSD permitting triggers fundamentally changed the PSD program. The formerly manageable program for large industrial sources ballooned to include almost everyone. Even EPA acknowledges that much.

An agency cannot wield longstanding interpretations in unforeseen ways, achieving unforeseen results, yet expect that federal courts will lack jurisdiction to review the interpretation merely because of its vintage. Quite the contrary. The absurdities recently created by EPA's never-reviewed interpretation warrant immediate judicial review, both because the absurdities were unexpected and because thousands of challenges ripened when thousands of sources were exposed to PSD permitting for the first time. In any event, EPA opened a new review window on its own by reopening its interpretation while trying to avoid the absurdities. Because all those events

occurred in rulemakings finalized within the 60 days before the present petitions were filed, the petitions are timely. *See* 42 U.S.C. § 7607(b)(1).

On the merits, EPA's interpretation is unlawful, arbitrary, and capricious because it cannot be reconciled with the language, the structure, or the purposes of the Act. EPA proposes a pollutant-indifferent interpretation of Section 165(a), but the PSD provisions in Part C do not "apply" to an area generally; they "apply" only with respect to the pollutant whose NAAQS an area is attaining. Correctly parsed, Section 165(a) requires PSD permits for sources only when they emit major amounts of a pollutant and are located in an area designated attainment for that pollutant's NAAQS. The Act compels a pollutant-specific situs requirement for PSD permitting, as confirmed by *Alabama Power*'s holding that location is the key determinant of PSD permitting. If, however, the Court doubted that either interpretation was compelled, the validity of EPA's interpretation would turn on its reasonableness, and the absurdities that have recently arisen reveal its unreasonableness.

STANDING

Petitioners bring this case on their members' behalf. Associations have standing if (1) at least one member has standing, (2) the interests at stake are germane to the associations' purpose, and (3) individual members need not participate. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). Petitioners easily meet that standard. (1) EPA's interpretation of the PSD permitting triggers injures Petitioners'

members. Several will need PSD permits solely because of their GHG emissions. *See* p. 14, *supra*. As the "object of the action (or forgone action) at issue," their standing is assured. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992). (2) Petitioners routinely advocate for their members' interests on environmental issues, as evidenced by their participation in the GHG rulemakings. *See* p. 14, *supra*. (3) And because the questions presented are purely legal, individual member participation is unnecessary. *See Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287–88 (1986).

ARGUMENT

I. THE PETITIONS ARE TIMELY.

EPA's regulations are not chiseled in stone. In the right circumstances, a court may review agency action long overdue for judicial review. Under Section 307(b)(1), a party may petition for review of regulations based upon grounds arising after the initial review period closes. With Section 307(b)(1), Congress "struck a careful balance between the need for administrative finality and the need to provide for subsequent review in the event of unexpected difficulties." *Nat'l Mining Ass'n v. Dept. of Interior*, 70 F.3d 1345, 1350 & n.2 (D.C. Cir. 1995) (hereinafter, *NMA*).

This is a classic case for a grounds-arising-after petition. Because thousands upon thousands of small or nonindustrial sources emit GHGs in major amounts, EPA's regulation of GHGs exposes the irrationality of EPA's interpretation that ma-

jor emissions of noncriteria pollutants trigger PSD permitting. *See NMA*, 70 F.3d at 1350. Concomitantly, the need for thousands of new PSD permits ripened thousands of challenges to EPA's never-reviewed interpretation. *See La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996) (hereinafter, *LEAN*); *see also Am. Road & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1113–14 (D.C. Cir. 2009) (hereinafter, *ARTBA*). In searching for a solution to the permitting onslaught, EPA actually reopened its interpretation, responded to comments, and ultimately reaffirmed its original position. *See NMA*, 70 F.3d at 1352. And across all the recent GHG rulemakings, EPA constructively reopened its interpretation by "adher[ing] to the *status quo ante* under changed circumstances." *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1214 (D.C. Cir. 1996).

Because the petitions for review are timely in every possible way, EPA's motion to dismiss should be denied.

A. The Petitions Are Based On Unexpected Difficulties.

Congress did not penalize challengers for failing to predict that agency action will lead to "unexpected difficulties," *NMA*, 70 F.3d at 1350, particularly because those difficulties may reveal the action's substantive invalidity. Section 307(b)(1) thus allows petitions for review that "raise[] points" that could not have been raised beforehand. *ARTBA*, 588 F.3d at 1113; *see, e.g.*, *NMA*, 70 F.3d at 1352–53. New facts, laws, and regulations can "essentially create a challenge that did not previously exist." *Eagle-Picher Industries Inc. v. EPA*, 759 F.2d 905, 913 (D.C. Cir. 1985).

Here, "events occurred after the statutory period that gave rise to an essentially new claim" disputing EPA's interpretation of the PSD permitting triggers. *Id.* at 914. On May 7, 2010, EPA promulgated the Tailpipe Rule, unleashing a tidal wave of PSD permits that will wash the PSD program away. The consequences are absurd, a rejection of Congress's manifest intent to limit PSD permitting to large industrial sources with the greatest emissions. *See* pp. 42–45, *infra*. Those absurdities did not exist in 1980 or at any time before the Tailpipe Rule actually opened the floodgate.

EPA did not contest these points in defending its motion to dismiss. Instead, it argued that the Court has no power to vacate its interpretation on account of absurdities because, according to EPA, the interpretation is compelled by the Clean Air Act and *Alabama Power*. *See* EPA Reply on Mot. to Dismiss, Case No. 10-1167 *et al.*, at 4–6 (D.C. Cir. Oct. 12, 2010) (hereinafter, "Mot. Reply"). In essence, EPA's argument is that, when unexpected difficulties arise, the Court can hear grounds-arising-after petitions complaining about the absurd results of *discretionary* interpretations, but not *compelled* interpretations. That argument lacks merit.

EPA improperly mixes jurisdictional and merits issues. Petitioners' absurdity argument might fail on the merits if EPA's interpretation is indeed compelled. *But see* pp. 31–42, *infra*. But "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Under Section 307(b)(1), jurisdiction turns entirely on the timing of the new grounds, like unexpected difficulties, on which a grounds-arising-after

petition is based. *See, e.g.*, *NMA*, 70 F.3d at 1352–53 (exercising jurisdiction over a nonmeritorious grounds-arising-after petition under Section 307(b)(1)).[3] To be sure, the Court has declined to decide a grounds-arising-after petition challenging a rule as "*ultra vires*" when "*all the arguments* [petitioners made] in support of that proposition were available to them at the time the rule was adopted." *NMA*, 70 F.3d at 1350 (emphasis added); *see Sierra Club v. EPA*, 551 F.3d 1019, 1029 (D.C. Cir. 2008) (Randolph, J., dissenting). But not all the arguments Petitioners make were available in 1980. The argument based on the recent absurdities precipitated by the Tailpipe Rule was not.

Reading Section 307(b)(1) to preclude the Court from now deciding whether EPA's never-reviewed interpretation is compelled or discretionary would vitiate Congress's decision to allow petitions raising unexpected difficulties. Only EPA's say-so supports its assertion that its interpretation is compelled. If such *ipse dixit* could block judicial review when a petition identifies unexpected difficulties, such petitions would be allowed only if the Court has previously held that an interpretation is not compelled. No precedent so restricts Section 307(b)(1). Because the Court has jurisdiction to decide whether EPA's current interpretation of the PSD permitting triggers is

---

[3] *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), does not support EPA. *See* Mot. 14–16 & n.14; Mot. Reply 6–7. It holds that a court considering a grounds-arising-after petition may not consider "new" grounds that the Act would have forbidden EPA to consider when promulgating a challenged regulation. *See* 427 U.S. at 255–56. That holding is no hindrance here because EPA may consider absurd results when interpreting the Act. *See Alabama Power*, 636 F.2d at 360 & n.89.

invalid and absurd in light of recent, unexpected difficulties, the court also has jurisdiction to decide the antecedent question whether that interpretation is compelled or discretionary.

B. Petitioners' Claims Ripened When The Tailpipe Rule Injured Petitioners' Members.

The time bar in Section 307 runs only against ripe claims. *See ARTBA*, 588 F.3d at 1113–14; *LEAN*, 87 F.3d at 1385. Not every claim ripens when a regulation is promulgated because not every injury is concrete and imminent at that time. *See Reno v. Catholic Social Servs. Inc.*, 509 U.S. 43, 57–58 (1993); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967). For instance, in *LEAN,* petitioners immediately challenged EPA regulations for approving State-run programs, claiming that their members would be injured when EPA approved programs in the future. The challenge was unripe: when parties will not be injured until a challenged regulation interacts with subsequent agency action, judicial review must wait. *See LEAN*, 87 F.3d at 1385.

This case is the flipside of *LEAN*. EPA's interpretation that PSD permitting is required for sources with major emissions of any regulated pollutant is not the sort of agency action that immediately causes injury. Injury occurs when EPA actually regulates pollutants. Because many members' new constructions or modifications will trigger PSD permitting only for GHG emissions, Petitioners filed their challenges soon after the Tailpipe Rule regulated GHGs. At no time before did EPA's interpre-

tation injure Petitioners' members or the thousands of other sources whose GHG emissions trigger PSD permitting.

EPA urges the Court to hold that Petitioners' members' claims ripened long before it regulated GHGs. EPA offers several alternative dates when the claims might have ripened: 1998 (when, according to EPA, its "official position was that it had regulatory authority over greenhouse gases under the Clean Air Act"); 2002 (when EPA reorganized its 1980 PSD regulations); 2007 (when the Supreme Court decided *Massachusetts v. EPA*); and 2008 (when EPA purportedly "addressed the question of when EPA regulations make a specific pollutant 'subject to regulation' for purposes of the PSD program"). *See* EPA Mot. to Dismiss, Case No. 10-1167 *et al.*, at 19–20 (D.C. Cir. Sept. 10, 2010) (hereinafter, "Mot."); Mot. Reply 8–10. But while each of those stages brought EPA closer to the Tailpipe Rule, at no time before the Tailpipe Rule did EPA actually regulate GHGs. A person is simply not injured, and his or her claim is simply not ripe, while regulation is only being contemplated. The mere prospect of regulation causes "no hardship at present or in the near future." *Pfizer Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999); *see Hinton v. Udall*, 364 F.2d 676, 680 (D.C. Cir. 1966) ("The doctrine of ripeness often precludes immediate judicial consideration even in cases when judicial consideration seems well nigh inevitable."). Courts do not "adjudicat[e] matters that in fact make no difference." *Am. Trucking Ass'ns v. ICC*, 747 F.2d 787, 789–90 (D.C. Cir. 1984) (Scalia, J.).

George E. Warren Corp. v. EPA, 159 F.3d 616 (D.C. Cir. 1998), cited by EPA in defending its motion to dismiss, is not to the contrary. *See* Mot. Reply 10 n.8. There, the Court held that Section 307(b)(1) alters the analysis for *prudential* ripeness by relieving the Court of having to consider the hardship of withholding immediate review in cases filed within the initial review period. *See* 159 F.3d at 621–22. Here, by contrast, the issue is *constitutional* ripeness. *See generally LEAN*, 87 F.3d at 1384 (discussing the constitutional and prudential dimensions of ripeness). Sources whose only major emissions are of GHGs were not injured during the initial review period or at any time before the Tailpipe Rule. Congress can only hasten judicial review so much. It cannot override constitutional requirements and authorize suits by uninjured persons. *See Zivotofsky v. Sec. of State*, 444 F.3d 614, 618 (D.C. Cir. 2006) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) and *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

Contending that the Court disfavors determining ripeness retrospectively and that precautionary petitions should be filed whenever there is "*any* doubt about the ripeness of a claim," *Eagle-Picher*, 759 F.2d at 914, EPA argues that Petitioners should have had the Court resolve ripeness sometime before the Tailpipe Rule, *see* Mot. Reply 9. But there was no doubt that Petitioners' members' claims were unripe before the Tailpipe Rule, and there can be no doubt that those claims just ripened. If anything is doubtful, it is *Eagle-Picher*'s application to this case; unlike the review provision in *Eagle-Picher*, Section 307(b)(1) allows petitions based on newly ripened claims. *See, e.g.*, *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 460–61 (D.C. Cir. 1998) (ana-

lyzing ripeness retrospectively under Section 307(b)(1)). In any event, *Eagle-Picher* states that the Court will "engage in a retrospective determination of" ripeness whenever "events occur or information becomes available after the statutory review period expires that essentially create a challenge that did not previously exist." 759 F.2d at 913–14. Petitioners easily show that. *See* pp. 18–20, *supra*.

Suggesting that someone else could have challenged its interpretation's overbreadth in the past, EPA implies that Section 307(b)(1) opens new judicial review windows only for the first potential challenger whose claim ripens. *See* Mot. 17–19; Mot. Reply 7. Section 307(b)(1) allows petitions for review "based solely on grounds arising after" the initial review period, and the ripening of an individual claim counts. *See LEAN*, 87 F.3d at 1385. One party's failure to litigate as soon as its claim ripens does not control later ripening claims of other, unrelated parties or somehow make those claims unripe.

C. EPA Reopened Its Interpretation.

Reacting itself to the very grounds Petitioners rely upon (unexpected difficulties and the ripening of thousands of claims), EPA reopened its interpretation of the PSD permitting triggers. The reopening independently makes the petitions for review timely. "[J]udicial review of a long-standing regulation is not barred when an agency reopens" it. *Kennecott*, 88 F.3d at 1213. "The reopener doctrine allows judicial review where an agency has—*either explicitly or implicitly*—undertaken to reexamine its former

choice." *NMA*, 70 F.3d at 1351 (emphasis added) (internal quotation marks omitted); *see Public Citizen v. NRC*, 901 F.2d 147, 150–51 (D.C. Cir. 1990). Here, EPA did both.

1. EPA Substantively Reconsidered Its Interpretation.

An agency reopens an interpretation when undertaking "a serious, substantive reconsideration," even if the agency ultimately decides to "stand by" it. *NMA*, 70 F.3d at 1352. Several circumstances may indicate reopening. The agency can "explicitly … request[] comment" on its interpretation, *id.*, or may otherwise "suggest[s] that the search for harmony might lead to a rethinking of old positions," *Ass'n of Am. R.Rs. v. EPA*, 846 F.2d 1465, 1473 (D.C. Cir. 1988); *see Edison Elec. Inst. v. EPA*, 996 F.2d 326, 332 (D.C. Cir. 1993). Substantive responses to comments also imply the agency's "willingness to reconsider" an older interpretation. *Kennecott*, 88 F.3d at 1214; *see ARTBA*, 588 F.3d at 1114; *Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 142 (D.C. Cir. 1998). *See generally Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 397 (D.C. Cir. 1989).

EPA reopened its broad interpretation of the PSD permitting triggers in the Tailoring Rule rulemaking. The Tailoring Rule's avowed premise is that "EPA's current interpretation of PSD … applicability requirements" creates absurd results—regulation of sources beyond Congress's contemplation and administrative gridlock. *Proposed Tailoring Rule*, 74 Fed. Reg. at 55,295 (J.A.605). In search of a solution, EPA stated its intent "to mitigate administrative problems through techniques consistent with the statutory requirements." *Id.* EPA solicited comments on its proposal for

alleviating the burden (elevating the major-source emissions thresholds for GHGs) "and any others that may occur to stakeholders or the public." *Id.* at 55,317 (J.A.627); *see id.* at 55,320 (J.A.630). EPA expressly sought comment on approaches like the pollutant-specific interpretation of the PSD permitting triggers. *See id.* at 55,327 (J.A.637). In the Final Rule, EPA responded at length to comments (including Petitioners') recommending that it change its broad interpretation of the PSD permitting triggers to apply only to sources emitting major amounts of a criteria pollutant in an area attaining the pollutant's NAAQS. EPA attempted to justify its interpretation and stood by it. *See Final Tailoring Rule*, 75 Fed. Reg. at 31,560–562 (J.A.1202-J.A.1204). That EPA ultimately rejected the recommendation while asserting that it had not meant to "reopen this issue," *id.* at 31,548 (J.A.1190), 31,558 (J.A.1200), cannot change the fact that EPA actively solicited the comments it received and assessed its interpretation in light of them. Indeed, EPA has lately acknowledged as much. *See* EPA Mot. to Consolidate and Hold in Abeyance, Case No. 11-1037 *et al.*, at 19 (D.C. Cir. Apr. 25, 2011) ("Among the central issues that the petitioners in the Timing Decision and Tailoring Rule cases have indicated they intend to raise is whether the CAA's PSD provisions automatically applied to GHG-emitting stationary sources once the Vehicle Rule took effect on January 2, 2011.… *This is procedurally proper, since EPA did explain its construction of the PSD provisions in the Tailoring Rule.*") (emphasis added).

2. EPA Constructively Reopened Its Interpretation By Completely Changing The Regulatory Context.

An agency constructively reopens a settled interpretation when it "*completely* change[s] the regulatory context." *Sierra Club*, 551 F.3d at 1025; *see NRDC v. EPA*, 571 F.3d 1245, 1266 (D.C. Cir 2009). Alterations of related regulations may give unaltered regulations "new significance." *Sierra Club*, 551 F.3d at 1029 (Randolph, J., dissenting). At such times, the "agency's decision to adhere to the *status quo ante* under changed circumstances" allows renewed challenges. *Kennecott*, 88 F.3d at 1214.

Across its GHG actions—"a change that could have not been reasonably anticipated" in 1980—EPA constructively reopened its interpretation of the PSD permitting triggers by "significantly alter[ing] the stakes of judicial review." *Sierra Club*, 551 F.3d at 1025 (internal quotation marks omitted). EPA adopted a totally new PSD program for sources of GHGs. The new PSD program applies to thousands of small or nonindustrial sources that are qualitatively different from the few large industrial sources used to PSD permitting. *See Final Tailoring Rule*, 75 Fed. Reg. at 31,534 (recognizing "that virtually all commercial and residential sources will have no experience with the PSD permitting process, and therefore will face a significant learning curve that will entail more time to complete the application, develop control recommendations, and take the other required steps") (J.A.1176). For all PSD permit holders, best available control technology review and implementation have become more "complicate[d]." *Id.* at 31,531 (J.A.1173). EPA has set unique emissions thresholds for rela-

tively large sources of GHGs and has proposed to revolutionize the permitting process for smaller sources of GHGs "through general permits and presumptive BACT." *Id.* at 31,559 (J.A.1201). To implement its new PSD program, EPA has revised (and even rescinded) longstanding State implementation plans. *See Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program; Final Rule*; 75 Fed. Reg. 82,430 (Dec. 30, 2010) (J.A.1252); *Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule*, 75 Fed. Reg. 82,536 (Dec. 30, 2010) (J.A.1285). Solely because of its never-reviewed interpretation of the PSD permitting triggers, EPA has completely changed the regulatory context while leaving that interpretation unchanged. Given the consequences for all stakeholders, judicial review of that interpretation is in order.

II. THE COURT SHOULD NOT WAIT FOR EPA TO ACT ON PETITIONERS' RECONSIDERATION PETITIONS.

On the same day they filed petitions for review, Petitioners sent EPA administrative petitions to reconsider its interpretation of the PSD permitting triggers. *See* p. 14, *supra*. Twice since, the Court has questioned whether it should hold this case until EPA disposes of them. *See* Show Cause Order, Case Nos. 10-1167 *et al.* (D.C. Cir. Dec. 14, 2010); Briefing Order, Case Nos. 10-1167 *et al.* (D.C. Cir. Mar. 18, 2011). The Court should proceed.

In the past, the Court has advised parties with new grounds for challenging an old regulation to file administrative petitions before filing petitions for review. *See Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 666 (D.C. Cir. 1975). Recently, the Court clarified that the prudential justification for that approach—the "interest in informed decision-making," *id.*—is not implicated when the new ground is the ripening of a claim, *see ARTBA*, 588 F.3d at 1114. Here, the petitions for review are based on the ripening of claims, *see* pp. 21–24, *supra*, "hardly the sort of novelty that seems to require special agency reaction," *ARTBA*, 588 F.3d at 1114.

Administrative petitions also are unnecessary when an agency reopens its interpretation. *See ARTBA*, 588 F.3d at 1114–15; *Kennecott*, 88 F.3d at 1214. Here, EPA reopened and reaffirmed its interpretation of the PSD permitting triggers. *See* pp. 24–28, *supra*. "To have the agency say yet again that it adheres to the regulation it only recently reaffirmed would be pointless." *Kennecott*, 88 F.3d at 1214.

In all events, Petitioners filed administrative petitions almost a year ago. EPA has not acted on them, and it is not clear when (or if) it ever will. Meanwhile, EPA's interpretation is causing Petitioners' members harm. Nothing more can be said about the interpretations' legality; in the original record and in the records of the recent GHG rulemakings, EPA has tried to explain why its interpretation is not inconsistent with the Clean Air Act and why the absurdities do not require a different interpretation. Because the questions posed by the present petitions are pure questions of law

the Court can resolve without a more developed record, the Court should hold that Petitioners substantially complied with any duty to file administrative petitions.

III. EPA'S INTERPRETATION OF THE PSD PERMITTING TRIGGERS VIOLATES THE CLEAN AIR ACT AND CREATES ABSURD RESULTS.

The familiar two-step *Chevron* framework for evaluating the lawfulness of agency action provides the standard of review. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–45 (1984). EPA must show either that the statute compels its interpretation or that the interpretation, though discretionary, is reasonably consistent with statutory text, structure, and purposes.

EPA's view that PSD permits are needed for construction of sources emitting major amounts of any regulated pollutant falters at both *Chevron* steps. It obliterates statutory provisions tying the PSD program to emissions of pollutants whose NAAQS are being attained. And as recent rulemakings bring to light, it creates absurd permitting burdens greater than Congress intended. Congress designed the PSD program to maintain attainment areas, yet EPA has made it an all-purpose permitting program.

The text, structure, and purposes of the Clean Air Act, confirmed by *Alabama Power*, support a different interpretation of the PSD permitting triggers: emissions of only a subset of criteria pollutants—those whose NAAQS an area is attaining—trigger PSD permitting. Because that pollutant-specific interpretation harmonizes text, structure, and purpose, it is compelled; because it creates no absurdities, it is reasonable.

A. There Are No Gaps For EPA To Fill; The Act Requires One Interpretation And It Is Not EPA's (*Chevron* Step One).

1. Text, Structure, And Purpose Tie PSD Permitting To Location-Specific Criteria Pollutants.

The PSD permitting provision, Section 165(a), limits permitting to "major emitting facilit[ies] … in any area to which this part applies." 42 U.S.C. § 7475(a). A "major emitting facility" is one with major emissions of "any pollutant," 42 U.S.C. § 7479(1), and an "area to which this part applies" is an attainment area, 42 U.S.C. § 7471. EPA reads those limitations expansively, requiring PSD permits for sources with major emissions of *any* regulated pollutant so long as they are located in an area attaining *any* NAAQS. "Traditional tools of statutory construction," however, validate a narrower interpretation. *Chevron*, 467 U.S. at 843 n.9. PSD permits are required only for sources with major emissions of the pollutant(s) whose NAAQS the area is attaining. The situs requirement in Section 165(a) is pollutant-specific, not pollutant-indifferent.

Besides Section 165(a), Congress used the phrase "in any area to which this part applies" only three other times throughout the Clean Air Act, all in PSD provisions: Section 163(b)(4), Section 165(a)(3)(A), and Section 165(c). *See* 42 U.S.C. §§ 7473(b)(4), 7475(a)(3)(A), 7475(c). Each use supports the pollutant-specific reading of Section 165(a). Each time, the phrase is preceded by the term "any air pollutant" or its derivative, "major emitting facility." Such repetition indicates that the phrase has a uniform meaning, for the principle that like words should be interpreted

alike is strong when "the subject matter to which the words refer" is "the same in the several places where they are used." *Atlantic Cleaners & Dyers, Inc. v. U.S.*, 286 U.S. 427, 433 (1932).

The other provisions make sense only when the phrase and its preceding term are read together as setting a pollutant-specific situs requirement. Section 163(b)(4) provides that

> The maximum allowable concentration of *any air pollutant in any area to which this part applies* shall not exceed a concentration for such pollutant for each period of exposure equal to
>
> > (A) the concentration permitted under *the national secondary ambient air quality standard*, or
> >
> > (B) the concentration permitted under *the national primary ambient air quality standard*,
>
> whichever concentration is lowest for such pollutant for such period of exposure.

42 U.S.C. § 7473(b)(4) (emphases added). If the phrase "in any area to which this part applies" established a pollutant-indifferent situs requirement, Section 163(b)(4) would apply to noncriteria pollutants, but EPA could not actually set a "maximum allowable concentration" because noncriteria pollutants have no primary or secondary NAAQS. In Section 163(b)(4) (and Section 165(a)(3)(A), which implements it), then, the entire phrase "any air pollutant in any area to which this part applies" must be read as a symbiotic, pollutant-specific whole.

The textual conclusion is straightforward. Congress used the phrase "in any area to which this part applies" *only* in Part C of the Act and *only* after the term "any

air pollutant" or its derivative, "major emitting facility." Each time, the term and the phrase *together* mean "any air pollutant whose NAAQS an area is attaining" or "a major source of any air pollutant whose NAAQS an area is attaining."

The pollutant-specific interpretation follows from the structure of the Act. Part C, which contains the PSD provisions, applies only to areas designated pursuant to Section 107 as attaining a pollutant's NAAQS. *See* 42 U.S.C. § 7471; *see also* 42 U.S.C. § 7410(a)(2)(C) ("Each implementation plan … 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 national ambient air quality standards are achieved, including a permit program as required in parts C and D."). Because Section 107 area designations are pollutant-specific, a single area may be in attainment with one NAAQS while in nonattainment with another. A single stationary source may be located in an area designated as attainment for one pollutant and as nonattainment for another, *i.e.*, in an area "to which this part applies" and "to which this part" does not apply. Congress's word choice in Section 165(a) and the other PSD provisions—modifying expansive terms like "any air pollutant" and its derivative, "major emitting facility," with the phrase "in any area to which this part applies"—is in keeping with that variability. A pollutant-specific situs requirement allows the PSD program to fit uniquely designated areas across the country.

A pollutant-specific situs requirement thus fulfills Congress's purpose of maintaining attainment areas. Congress designed the PSD program to do what its unab-

breviated name implies—"*prevent significant deterioration* of air quality in each region ... designated pursuant to [Section 107] as attainment," 42 U.S.C. § 7471—and to complement and reinforce the location-specific and pollutant-specific NAAQS program, *see Wisconsin Elec.*, 893 F.2d at 904; *Alabama Power*, 636 F.2d at 349. Congress intended that the operative PSD provisions apply to sources whose emissions might cause an area to cease attaining a NAAQS. *Cf.* 42 U.S.C. § 7475(a)(3) (requiring a facility, before construction or modification, to show that its emissions will not cause an attainment area to become a nonattainment area).[4]

A pollutant-indifferent situs requirement, by contrast, vitiates the purpose of the PSD program and the key characteristic of Section 107's area designation scheme. No NAAQS is maintained by requiring a PSD permit for a source with major emissions of a pollutant whose NAAQS an area is not attaining. And no NAAQS is maintained by requiring a PSD permit for a source with major emissions of a pollutant without a NAAQS.

---

[4] Legislative history is fully in accord. *See* H.R. Rep. No. 95-294, at 128-45 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077 (the PSD program is limited "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.") (J.A.1324-J.A.1338); 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.2533, *as reprinted in* Arnold & Porter Legislative History at 5 (Comm. Print 1977) (the PSD program "affects only those areas where air quality is cleaner than the present primary or secondary standards.") (J.A.1321-J.A.1322); *see also* S 95-127 (95th Cong., 1st Sess.), at 27 (J.A.1341).

Accordingly, the phrase "major emitting facility in any area to which this part applies" must mean a source with major emissions of any pollutant whose NAAQS the source's area is attaining. Section 165(a)'s situs requirement is pollutant-specific. Emissions of noncriteria pollutants thus cannot trigger PSD permitting.

2. *Alabama Power* Confirms A Location-Specific And Pollutant-Specific PSD Permitting Trigger.

In the PSD program's youth, EPA understood that Congress required PSD permits only for sources whose major emissions threaten an area's attainment of a NAAQS. *See 1980 PSD Rules*, 45 Fed. Reg. at 52,710 (J.A.105). Yet, disregarding the statutory location limitations, EPA did not distinguish between a source's local area and neighboring areas; EPA required PSD permits for any source whose major emissions threatened *any area's* attainment designation. *See Alabama Power*, 636 F.2d at 364; *see also 1979 Proposed PSD Rules*, 44 Fed. Reg. at 51,949 (J.A.59).

Alabama Power vacated that area-unspecific requirement. "The plain meaning of the inclusion in [Section 165] 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." 636 F.2d at 365. Section 165 "does not, by its own terms, apply to sources located outside of" attainment areas; no other provisions of the Act "justify the application of the permit requirements of [Section 165] to sources not located in, but impacting upon," other areas. *Id.* at 367, 368.

If, as EPA maintains, Section 165(a)'s situs requirement is pollutant-indifferent, location cannot now be—or ever have been—the "key determinant" of PSD permitting. From before *Alabama Power* until today, *every area of the country* has been in attainment with at least one NAAQS. *See Final Tailoring Rule*, 75 Fed. Reg. at 31,561 (J.A.1203). If EPA's broad interpretation of the PSD permitting triggers were the only permissible one, EPA never needed to require major sources to get PSD permits because of the threats they posed to neighboring areas, and the Court never needed to pass upon the validity of that requirement. The logical consequence of EPA's broad interpretation is that *Alabama Power* was an inconsequential academic exercise.

A pollutant-indifferent situs requirement not only nullifies *Alabama Power*; it also nullifies itself. Because every area of the country has always been in attainment with at least one NAAQS, every "major emitting facility" has always satisfied a pollutant-indifferent situs requirement. If EPA's interpretation were right, Congress simply could have left out the phrase "in any area to which this part applies." *But see Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004) (Congress does not enact "stillborn" laws); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

The premise of *Alabama Power* and the PSD provisions is that to be "in" an area to which the PSD program applies means to be emitting major amounts of local attainment pollutants. Indeed, that was EPA's interpretation until the Agency lost *Alabama Power*. *See 1980 PSD Rules*, 45 Fed. Reg. at 52,710–711 (J.A.105-J.A.106). EPA has several powers to regulate sources whose emissions do not threaten their immedi-

ate areas' attainment designations, but it cannot simply reinterpret Section 165(a)'s PSD permitting triggers to encompass major emissions of noncriteria and nonattainment pollutants. *See Alabama Power*, 636 F.2d at 366–68.

3. EPA's Explanations For Why It Thinks Its Interpretation Is Compelled Lack Merit.

By requiring PSD permits for sources with major emissions of only noncriteria pollutants, EPA has expanded the PSD program to do much more than prevent significant deterioration. EPA reaches that paradoxical result by interpreting Section 165(a) as establishing a pollutant-indifferent situs requirement, and the cornerstone of EPA's illogic is Section 169(1). *See 1980 PSD Rules*, 45 Fed. Reg. at 52,711 (J.A.106); *Final Tailoring Rule*, 75 Fed. Reg. at 31,547, 31,560 (J.A.1189, J.A.1202). But Section 169(1)'s definition of the bare term "major emitting facility" as a source with major emissions of "any air pollutant" cannot elucidate what Congress meant in Section 165(a) when modifying that term with the phrase "in any area to which this part applies."

EPA contends that interpreting Section 165(a) to establish a pollutant-specific situs requirement renders Section 169(1)'s breadth superfluous. *See* EPA Opp'n to Stay Mot., Case Nos. 10-1073 *et al.*, at 52 (D.C. Cir. Oct. 28, 2010). But a limitation in an operative provision does not render a broad definitional provision superfluous. *See Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662, 670 & n.1 (2008). Moreover, Congress's use of the word "any" in Section 169(1) is not an inexorable command.

The word "'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); *see, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008); *U.S. v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994); *U.S. v. Palmer*, 16 U.S. 610, 631 (1818) ("[G]eneral words," such as the word "any," must "be limited … to those objects to which the legislature intended to apply them").[5] The term "any air pollutant" may be "a catchall … but to say this is not to define what it catches." *Flora v. U.S.*, 362 U.S. 145, 149 (1960). Indeed, despite Section 169(1)'s literal breadth, even EPA has "long interpreted" it narrowly to include only *regulated* pollutants. *Final Tailoring Rule*, 75 Fed. Reg. at 31,560 (J.A.1202).

Capacious and flexible by itself, the term "any air pollutant" is a chameleon term when modified by the phrase "in any area to which this part applies," a simple, adaptive solution to the complex reality that each area of the country has idiosyncratic attainment and nonattainment designations. EPA suggests that Congress could have made that point with a longer phrase in Section 169(1), like "any pollutant for which an area is designated attainment." *Final Tailoring Rule*, 75 Fed. Reg. at 31,561

[5] For example, in *O'Connor v. U.S.*, 479 U.S. 27 (1986), the Supreme Court held that, in a treaty, the phrase "payment in the Republic of Panama of all taxes" and the term "any taxes" meant just "Panamanian taxes." *Id.* at 30. "Purely textual evidence, albeit subtle," revealed the drafters' assumption that the term "any taxes" meant "any Panamanian taxes." *Id.* at 30–31. "More persuasive than the textual evidence," though, was "the contextual case for limiting Article XV to Panamanian taxes;" while linguistically possible, reading "any taxes" to include federal taxes was "utterly implausible" and without "foundation in the negotiations leading to the Agreement." *Id.*

(J.A.1203). Congress's choice to use two provisions to accomplish what it might have accomplished with one is immaterial; "[w]hen the words of a statute are unambiguous, … 'judicial inquiry is complete.'" *Conn. Nat'l Bk. v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. U.S.*, 449 U.S. 424, 430 (1981)). Yet, even EPA's alternative does not work. It misses a step; under Section 107, areas are designated attainment for NAAQS, not pollutants. The expert Agency's inability to draft a more compact alternative reveals the difficulty of the task.

Glosses on Sections 165(a) and 169(1) in *Alabama Power* do not compel EPA's interpretation, either. *See 1980 PSD Rules*, 45 Fed. Reg. at 52,711 (J.A.106); Mot. 5 n.6, 14. In a brief discussion of the literal breadth of the PSD provisions, *Alabama Power* observed that the term "any air pollutant" in Section 169(1) could include pollutants not regulated under the Act and that, under Section 165(a), a source could have to adopt best available control technologies "even though the air pollutant, emissions of which caused the source to be classified as a 'major emitting facility,' may not be a pollutant for which NAAQS have been promulgated or even one that is otherwise regulated under the Act." 636 F.2d at 352–53 & n.60. Because the Court was deciding only whether the term "potential to emit" in Section 169(1) included uncontrolled emissions, both glosses are dicta. *Alabama Power* did not reconcile Section 169(1) with Sections 107, 161, and 165(a). EPA cannot now claim to be bound by what it has always recognized as nonbinding, having consistently "interpreted the statutory PSD applicability provisions to apply more narrowly—to any air pollutant

subject to regulation—than their literal meaning." *Final Tailoring Rule*, 75 Fed. Reg. at 31,550 (J.A.1192).

Aside from Section 169(1), EPA points to three statutory provisions that it says incorporate noncriteria pollutants into the PSD program: Section 165(a)(4), requiring PSD permit holders to adopt best available control technology for "each pollutant subject to regulation;" Section 165(a)(3)(C), requiring PSD permit applicants to show that they will not violate any "applicable emissions standard or standard of performance;" and Section 110(j), substantially echoing Section 165(a)(3)(C). *See* 42 U.S.C. §§ 7410(j), 7475. Of these, EPA places the most weight on Section 165(a)(4). *See Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule*, 75 Fed. Reg. 17,004, 17,010 (Apr. 2, 2010) ("The controlling language in the PSD provisions is the 'subject to regulation' language in sections 165(a)(4) and 169(3)") (J.A.735); *see also Final Tailoring Rule*, 75 Fed. Reg. at 31,561 (J.A.1203); *see also id.* at 31,562 (listing noncriteria pollutants for which best available control technologies have been adopted) (J.A.1204); Mot. 14–15 (citing *Alabama Power*, 636 F.2d at 353–54 n.60, 361 n.90, & 405–07, for the proposition that best available control technologies may be adopted for noncriteria pollutants). In EPA's view, because those provisions encompass noncriteria pollutants, the PSD permitting triggers encompass noncriteria pollutants, too.

EPA puts the cart before the horse. There is no logical reason why the PSD permitting triggers must be coextensive with the substantive PSD requirements, like

Section 165(a)(4). On the contrary, *when* PSD permitting is triggered is a separate issue from *what* an applicant must show to obtain a PSD permit, which in turn is separate from *what* a permit holder must do once it has one. Even if GHGs or other non-criteria pollutants fit into some aspects of the PSD program, they need not fit into all. *See* pp. 44–45 & n.6, *infra*. But EPA inappropriately embraces subparagraphs, like Section 165(a)(4), as controlling the main paragraph in Section 165(a); that is, EPA inappropriately embraces post-triggering substantive requirements as controlling the PSD permitting triggers.

A final reason to doubt EPA's pollutant-indifferent situs requirement is that it would require a source emitting only local nonattainment pollutants to get a PSD permit so long as the source is in an area attaining one NAAQS. Yet, applying essentially the pollutant-specific situs requirement, EPA has always exempted such sources from PSD permitting and subjected them to NNSR permitting instead. *See 1980 PSD Rules*, 45 Fed. Reg. at 52,711–712 (J.A.106-J.A.107). EPA's pollutant-indifferent interpretation of the PSD permitting triggers cannot be literally compelled when EPA does not even follow it faithfully. Moreover, if it is "implicit in *Alabama Power* and the structure of the Act" that NNSR permitting is triggered only by major emissions of local nonattainment pollutants, *id.*, then PSD permitting can be triggered only by major emissions of local attainment pollutants. The PSD and NNSR programs in Parts C and D of the Act are siblings, after all.

B. EPA's Interpretation Of The PSD Permitting Triggers Is Unreasonable Because It Creates Absurd Results The Narrower Interpretation Avoids (*Chevron* Step Two).

Text, structure, and purpose make this clear: PSD permitting is required only for sources that are in an attainment area for a criteria pollutant and that emit major amounts of that pollutant. But even if EPA could fight Petitioners to a draw over text, structure, and purpose, it would show only that the Act is unclear about whether the situs requirement in Section 165(a) is pollutant-specific or pollutant-indifferent. The fight would move from *Chevron* step one to step two, where EPA would still lose. Regulation of GHGs has revealed EPA's interpretation to be unreasonable and absurd. Because Petitioners' interpretation does not generate absurd results, EPA must reject its pollutant-indifferent situs requirement.

1. EPA's Interpretation Repudiates Congress's Vision For A Limited PSD Program.

Agency discretion to fill statutory gaps is not unlimited. Courts "must reject administrative constructions of [a] statute … that frustrate the policy that Congress sought to implement." *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1453 (D.C. Cir. 1988) (quoting *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)). An interpretation goes too far when it "leads to irrational results in practice." *Int'l Alliance of Theatrical & Stage Employees v. N.L.R.B.*, 334 F.3d 27, 35 (D.C. Cir. 2003).

This Court already has "clearly discern[ed]" Congress's vision for PSD permitting. *Alabama Power*, 636 F.2d at 353. "Congress was concerned with large industrial

enterprises." *Id.* at 354. "[O]bviously minor sources," like "the heating plant operating in a large high school or in a small community college," were never supposed to trigger PSD permitting. *Id.* at 354. Accordingly, PSD permits are only for "facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for" air pollution. *Id.* at 353. And by constraining PSD permits to only a few hundred large industrial sources each year, the workload for processing PSD permits is "reasonably in line with EPA's administrative capability." *Id.* at 354.

In light of Congress's vision, it is absurd for EPA to require PSD permits for every source that emits major amounts of GHGs—81,000 per year—merely because they are located in an area that is attaining a NAAQS, which every area of the country is. As EPA convincingly showed, Congress did not intend for so many sources to obtain PSD permits. *See Proposed Tailoring Rule*, 74 Fed. Reg. at 55,308–310 (J.A.618-J.A.620). Not only will permitting agencies be frozen, incapable of processing so many applications, but because PSD permits are prerequisites for construction, national growth will be frozen as well, *see Final Tailoring Rule*, 75 Fed. Reg. at 31,557 (J.A.1199), in derogation of Congress's goal that the PSD program "insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources," 42 U.S.C. § 7470(3). Halting development does not "promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1).

2. A Pollutant-Specific Situs Requirement Does Not Repudiate Congress's Vision.

EPA has always characterized its interpretation as compelled by the Clean Air Act read "literally," as a "necessary literal interpretation." *1980 PSD Rules*, 45 Fed. Reg. at 52,711 (J.A.106). Even if there were a kernel of truth to that characterization, *but see* pp. 31–42, *supra*, EPA must "look beyond the words to the purpose of the act where its literal terms lead to absurd or futile results." *Alabama Power*, 636 F.2d at 360 n.89; *see Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940). EPA must ask whether "alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

When interpreting the phrase "in any area to which this part applies," EPA could "easily have placed an alternative construction on the key phrase … that would not have scuttled critical congressional objectives." *Kerr-McGee Chem. Corp v. NRC*, 903 F.2d 1, 7 (D.C. Cir. 1990). EPA could have chosen a pollutant-specific interpretation (as it originally proposed in 1979), by which emissions of GHGs, other noncriteria pollutants, and local nonattainment pollutants do not trigger PSD permitting. For all the reasons that interpretation is compelled, *see* pp. 31–42, *supra*, it is at least a permissible alternative construction.

The pollutant-specific interpretation of Section 165(a) adheres to Congress's vision for the PSD program. It requires no new PSD permits. The Tailpipe Rule only made GHGs regulated pollutants; EPA has not set NAAQS for GHGs, nor has it

designated any areas of the country as attainment for such a (hypothetical) NAAQS. EPA admits that there is "particular appeal" in holding that sources need not get PSD permits solely because of their GHG emissions. *Final Tailoring Rule*, 75 Fed. Reg. at 31,568 (J.A.1210). So much appeal, in fact, that EPA crafted the first phase of the Tailoring Rule to effectively reach that result, *id.*, thereby confessing the pollutant-specific interpretation's reasonableness and consistency with the Act's text, structure, and purpose. Notably, under the first phase of the Tailoring Rule, though PSD permitting is not triggered by a source's GHG emissions, the PSD program still applies to GHGs insofar as sources getting PSD permits must adopt best available control technology for their GHG emissions. *Id.* The pollutant-specific situs requirement does not foreclose a similar result.

It is important to emphasize that the question whether emissions of noncriteria pollutants trigger PSD permitting is independent of the question whether GHGs can be included as pollutants in any part of the PSD program. *Even if* the other parts of PSD program include GHGs and *even if* sources with PSD permits must adopt best available control technologies for GHGs, the pollutant-specific situs requirement permanently achieves the same or better result as the Tailoring Rule without rewriting the statute.[6]

---

[6] The question whether GHGs can be included as pollutants in any part of the PSD program, including the requirement to adopt best available control technology, is not before the Court now but will be addressed in the Tailoring Rule merits brief.

C. The Tailoring Rule Cannot Save EPA's Interpretation.

EPA might argue that, by taking a red pen to the Clean Air Act, the Tailoring Rule cures the failings of its interpretation of the PSD permitting triggers and that the Court, accordingly, need not vacate the interpretation as unlawful. That defense did not work in *Alabama Power*, and it does not work here.

Before *Alabama Power*, EPA interpreted the phrase "potential to emit" in Section 169(1)'s definition of "major emitting facility" as requiring the Agency to ignore a source's air pollution control equipment when measuring the source's emissions. *See* 636 F.2d at 353. That interpretation "swept in too many facilities," including those Congress believed were too small to need PSD permits. *Id.* at 356. Recognizing "that its definition placed an intolerable burden on both the agency and minor sources of pollution," EPA "sought to cope with it by creating a broad exemption for smaller sources." *Id.* at 354. EPA conceded that its exemption violated Section 165(b), but argued that Congress was to blame for enacting irreconcilable provisions. *Id.* at 356.

The Court disagreed. The absurdity of too many PSD permits, far from justifying EPA's text-defying exemption for small sources, revealed that EPA's underlying interpretation of the term "potential to emit" was invalid. *Id.* at 354–55. *Alabama Power* teaches that an agency's stopgap effort to contain a regulation's absurd consequences does not keep the Court from scrutinizing the regulation at the source of the absurd consequences, and it does not keep the Court from vacating the underlying regulation because of the absurd consequences. "[A]n absurd result in applying a

statute caused by regulations, rather than calling into question the statutory provisions, calls into question the regulatory provisions." *Bower v. Federal Express Corp.*, 96 F.3d 200, 207–08 (6th Cir. 1996).

The only difference between the two-step approach EPA took here and the two-step approach in *Alabama Power* is the length of time that passed between each step. That difference is immaterial. Time goes to jurisdiction, not the merits. *Cf.* p. 19–20, *supra*. Thus, as in *Alabama Power*, the Court can scrutinize the interpretation whose absurd results EPA has tried to contain through other regulation. That is, notwithstanding the Tailoring Rule, the Court can scrutinize EPA's interpretation of the PSD permitting triggers and can hold it unlawful because of the absurdities it would otherwise create.

CONCLUSION

Because the Tailpipe Rule's absurd consequences and EPA's effort to contain them prove that the consolidated petitions for review are timely and meritorious, the Court should deny EPA's motion to dismiss. On the merits, the Court should vacate EPA's interpretation of the PSD permitting triggers in the four rulemakings at issue here. EPA should interpret the Clean Air Act so that construction of a stationary source requires a PSD permit only if it has major emissions of a criteria pollutant and only if the source is located in an area in attainment with that pollutant's NAAQS.

August 5, 2011

Respectfully submitted,

For the National Association of Manufacturers, et al.:

/s/ Charles H. Knauss

Charles H. Knauss
Shannon S. Broome
Bryan M. Killian
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000

Roger R. Martella, Jr.
Timothy K. Webster
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Matthew G. Paulson
BAKER BOTTS LLP
98 San Jacinto Boulevard
1500 San Jacinto Center
Austin, TX 78701
(512) 322-2500

For the American Chemistry Council:

/s/ Timothy K. Webster

Timothy K. Webster
Roger R. Martella, Jr.
James W. Coleman
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

For the Clean Air Implementation Project:

/s/ William H. Lewis, Jr.

William H. Lewis, Jr.
Ronald J. Tenpas
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-5145

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2011, I caused to be electronically filed the foregoing Petitioners' Joint Opening Brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system.

The following participants in the case are registered CM/ECF users and will be served by the Court's CM/ECF system:

Paul D. Clement	pclement@bancroftpllc.com
John D. Walke	jwalke@nrdc.org, dfaulkner@nrdc.org, mavalos@nrdc.org
Brendan R. Cummings	bcummings@biologicaldiversity.org
Ann B. Weeks	aweeks@catf.us, hdsilver@catf.us
Joanne M. Spalding	joanne.spalding@sierraclub.org, violet.lehrer@sierraclub.org, alison.vicks@sierraclub.org
David S. Baron	dbaron@earthjustice.org, jyowell@earthjustice.org, seisenberg@earthjustice.org
Ashley C. Parrish	aparrish@kslaw.com
Jon M. Lipshultz	jon.lipshultz@usdoj.gov, efile_eds.enrd@usdoj.gov
Vickie L. Patton	vpatton@edf.org
David D. Doniger	ddoniger@nrdc.org

Colin C. O'Brien	cobrien@earthjustice.org, dfaulkner@nrdc.org, edavis@nrdc.org, mgeertsma@nrdc.org, jdrapalski@nrdc.org, akar@nrdc.org
Craig H. Segall	Craig.Segall@SierraClub.org
Cynthia Anne May Stroman	cstroman@kslaw.com, slawson@kslaw.com
Pamela A. Campos	pcampos@edf.org
Vera P. Pardee	vpardee@biologicaldiversity.org, aweber@biologicaldiversity.org
Kevin P. Bundy	kbundy@biologicaldiversity.org
Amanda S. Berman	amanda.berman@usdoj.gov

The following participant in the case is not registered CM/ECF users and will be served via first-class mail, postage prepaid:

Elliott Zenick
U.S. Environmental Protection Agency
(EPA) Office of General Counsel
Mail Code 2344A
1200 Pennsylvania Avenue, NW
Ariel Rios Building
Washington, DC 20460-0000

/s/ Charles H. Knauss
Charles H. Knauss

CERTIFICATION PURSUANT TO RULE 32(a)(7)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), the undersigned hereby certifies that the Petitioners' Joint Opening Brief is 11,942 words in compliance with this Court's order dated March 18, 2011, establishing a briefing schedule and stating that the Joint Brief for Petitioners not exceed 14,000 words.

/s/ Charles H. Knauss
Charles H. Knauss

ADDENDUM

INDEX TO ADDENDUM

C

Effective: January 23, 2004

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)
§ 7407. Air quality control regions

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

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) Designated regions

For purposes of developing and carrying out implementation plans under section 7410 of this title--

(1) an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

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

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

(d) Designations

(1) Designations generally

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

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

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

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

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

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

(B) Promulgation by EPA of designations

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

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

(iii) If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or portions thereof) in the State designated as nonattainment, attainment, or unclassifiable, the Administrator shall act on such designations in accordance with the procedures under paragraph (3) (relating to redesignation).

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

(C) Designations by operation of law

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

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

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

(2) Publication of designations and redesignations

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

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

(3) Redesignation

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

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

(C) No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in

accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

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

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

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

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

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

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

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

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

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

(A) Ozone and carbon monoxide

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

the national ambient air quality standards for ozone and carbon monoxide.

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

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

(iv) Notwithstanding paragraph (1)(C)(ii) of this subsection, if an ozone or carbon monoxide nonattainment area located within a metropolitan statistical area or consolidated metropolitan statistical area (as established by the Bureau of the Census) is classified under part D of this subchapter as a Serious, Severe, or Extreme Area, the boundaries of such area are hereby revised (on the date 45 days after such classification) by operation of law to include the entire metropolitan statistical area or consolidated metropolitan statistical area, as the case may be, unless within such 45-day period the Governor (in consultation with State and local air pollution control agencies) notifies the Administrator that additional time is necessary to evaluate the application of clause (v). Whenever a Governor has submitted such a notice to the Administrator, such boundary revision shall occur on the later of the date 8 months after such classification or 14 months after November 15, 1990, unless the Governor makes the finding referred to in clause (v), and the Administrator concurs in such finding, within such period. Except as otherwise provided in this paragraph, a boundary revision under this clause or clause (v) shall apply for purposes of any State implementation plan revision required to be submitted after November 15, 1990.

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

(B) PM-10 designations

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

(i) each area identified in 52 Federal Register 29383 (Aug. 7, 1987) as a Group I area (except to the extent

that such identification was modified by the Administrator before November 15, 1990) is designated nonattainment for PM-10;

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

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

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

(5) Designations for lead

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

(6) Designations

(A) Submission

Notwithstanding any other provision of law, not later than February 15, 2004, the Governor of each State shall submit designations referred to in paragraph (1) for the July 1997 $PM_{2.5}$ national ambient air quality standards for each area within the State, based on air quality monitoring data collected in accordance with any applicable Federal reference methods for the relevant areas.

(B) Promulgation

Notwithstanding any other provision of law, not later than December 31, 2004, the Administrator shall, consistent with paragraph (1), promulgate the designations referred to in subparagraph (A) for each area of each State for the July 1997 $PM_{2.5}$ national ambient air quality standards.

(7) Implementation plan for regional haze

(A) In general

Notwithstanding any other provision of law, not later than 3 years after the date on which the Administrator promulgates the designations referred to in paragraph (6)(B) for a State, the State shall submit, for the entire State, the State implementation plan revisions to meet the requirements promulgated by the Administrator under section 7492(e)(1) of this title (referred to in this paragraph as "regional haze requirements").

(B) No preclusion of other provisions

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

(e) Redesignation of air quality control regions

(1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be modified accordingly.

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

(3) No compliance date extension granted under section 7413(d)(5) of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5) of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 107, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1678, and amended Aug. 7, 1977, Pub.L. 95-95, Title I, § 103, 91 Stat. 687; Nov. 15, 1990, Pub.L. 101-549, Title I, § 101(a), 104 Stat. 2399; Jan. 23, 2004, Pub.L. 108-199, Div. G, Title IV, § 425(a), 118 Stat. 417.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1970 Acts. House Report No. 91-1146 and Conference Report No. 91-1783, see 1970 U.S. Code Cong. and

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part C. Prevention of Significant Deterioration of Air Quality
Subpart I. Clean Air (Refs & Annos)
§ 7470. Congressional declaration of purpose

The purposes of this part are as follows:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate [FN1] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air) [FN2], notwithstanding attainment and maintenance of all national ambient air quality standards;

(2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 160, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 127(a), 91 Stat. 731.)

[FN1] So in original. Probably should be “anticipated”.

[FN2] So in original. Section was enacted without an opening parenthesis.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1977 Acts. House Report No. 95-294 andHouse Conference Report No. 95-564, see 1977 U.S. Code Cong. and Adm. News, p. 1077.

Effective and Applicability Provisions

1977 Acts. Section effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub.L. 95-95, set out as a note under section 7401 of this title.

Guidance Document

Section 127(c) of Pub.L. 95-95 provided that not later than 1 year after Aug. 7, 1977, the Administrator publish a guidance document to assist the States in carrying out their functions under part C of Title I of the Clean Air Act [this part] with respect to pollutants for which national ambient air quality standards are promulgated.

Study and Report on Progress Made in Program Relating to Significant Deterioration of Air Quality

Section 127(d) of Pub.L. 95-95 provided that not later than 2 years after Aug. 7, 1977, the Administrator shall complete a study and report to the Congress on the progress made in carrying out part C of Title I of the Clean Air Act [this part] and the problems associated with carrying out such section.

CODE OF FEDERAL REGULATIONS

Emission standards for hazardous pollutants, see 40 CFR § 61.01 et seq.

Implementation plans, requirements, see 40 CFR § 51.40 et seq.

LAW REVIEW COMMENTARIES

Commanding respect: Criminal sanctions for environmental crimes. Eva M. Fromm, 21 St.Mary's L.J. 821 (1990).

Federal environmental citizen provisions: Obstacles and incentives on the road to environmental justice. Eileen Gauna, 22 Ecology L.Q. 1 (1995).

Protecting national park system buffer zones: Existing, proposed, and suggested authority. John W. Hiscock, 7 J.Energy L. & Pol'y 35 (1986).

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part C. Prevention of Significant Deterioration of Air Quality
Subpart I. Clean Air (Refs & Annos)
§ 7471. Plan requirements

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 161, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 127(a), 91 Stat. 731, and amended Nov. 15, 1990, Pub.L. 101-549, Title I, § 110(1), 104 Stat. 2470.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1977 Acts. House Report No. 95-294 andHouse Conference Report No. 95-564, see 1977 U.S. Code Cong. and Adm. News, p. 1077.

1990 Acts. Senate Report No. 101-228, House Conference Report No. 101-952, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 3385.

Amendments

1990 Amendments. Pub.L. 101-549, § 110(1), substituted “designated pursuant to section 7407 of this title as attainment or unclassifiable” for “identified pursuant to section 7407(d)(1)(D) or (E) of this title”.

Effective and Applicability Provisions

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part C. Prevention of Significant Deterioration of Air Quality
Subpart I. Clean Air (Refs & Annos)
§ 7473. Increments and ceilings

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

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

(b) Maximum allowable increases in concentrations over baseline concentrations

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

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

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

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

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

Pollutant	Maximum allowable in- crease (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	37
Twenty-four-hour maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
Twenty-four-hour maximum	182
Three-hour maximum	7002

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

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

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

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

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

(1) In the case of any State which has a plan approved by the Administrator for purposes of carrying out this part, the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for purposes of determining compliance with the maximum allowable increases in ambient concentrations of an air

pollutant, the following concentrations of such pollutant shall not be taken into account:

(A) concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, or natural gas, or both, by reason of an order which is in effect under the provisions of sections 792(a) and (b) of Title 15 (or any subsequent legislation which supersedes such provisions) over the emissions from such sources before the effective date of such order. [FN1]

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

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

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

(2) No action taken with respect to a source under paragraph (1)(A) or (1)(B) shall apply more than five years after the effective date of the order referred to in paragraph (1)(A) or the plan referred to in paragraph (1)(B), whichever is applicable. If both such order and plan are applicable, no such action shall apply more than five years after the later of such effective dates.

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

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 163, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 127(a), 91 Stat. 732, and amended Nov. 16, 1977, Pub.L. 95-190, § 14(a)(41), 91 Stat. 1401.)

[FN1] So in original. The period probably should be a comma.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1977 Acts. House Report No. 95-294 andHouse Conference Report No. 95-564, see 1977 U.S. Code Cong. and Adm.

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part C. Prevention of Significant Deterioration of Air Quality
Subpart I. Clean Air (Refs & Annos)
§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless--

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions

from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception

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

(c) Permit applications

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

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

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

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

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

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

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

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

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

	Maximum allowable in crease (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	32

5

(D)(i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

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

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

MAXIMUM ALLOWABLE INCREASE		
[In micrograms per cubic meter]		
	Low terrain	High terrain
Period of exposure	areas	areas
24-hr maximum	36	62
3-hr maximum	13	221
	0	

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

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

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

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

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

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

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and vis-

ibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

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

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

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

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 165, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 127(a), 91 Stat. 735, and amended Nov. 16, 1977, Pub.L. 95-190, § 14(a)(44)-(51), 91 Stat. 1402.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1977 Acts. House Report No. 95-294 andHouse Conference Report No. 95-564, see 1977 U.S. Code Cong. and Adm. News, p. 1077.

House Report No. 95-338, see 1977 U.S. Code Cong. and Adm. News, p. 3648.

Amendments

1977 Amendments. Subsec. (a)(1). Pub.L. 95-190, § 14(a)(44), substituted “part;” for “part:”.

Subsec. (a)(3). Pub.L. 95-190, § 14(a)(45), added provision making applicable requirement of section 7410(j) of this title.

Subsec. (b). Pub.L. 95-190, § 14(a)(46), struck out “actual” preceding “allowable emissions” and added “cause or” preceding “contribute”.

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part C. Prevention of Significant Deterioration of Air Quality
Subpart I. Clean Air (Refs & Annos)
§ 7479. Definitions

For purposes of this part--

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

(2)(A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 169, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 127(a), 91 Stat. 740, and amended Nov. 16, 1977, Pub.L. 95-190, § 14(a)(54), 91 Stat. 1402; Nov. 15, 1990, Pub.L. 101-549, Title III, § 305(b), Title IV, § 403(d), 104 Stat. 2583, 2631.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1977 Acts. House Report No. 95-294 andHouse Conference Report No. 95-564, see 1977 U.S. Code Cong. and Adm. News, p. 1077.

House Report No. 95-338, see 1977 U.S. Code Cong. and Adm. News, p. 3648.

1990 Acts. Senate Report No. 101-228, House Conference Report No. 101-952, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 3385.

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions
§ 7607. Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4) or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the [FN1] chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),, [FN2] the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other na-

tionally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,, [FN2] under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

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

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to [FN3] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

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

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

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

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

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

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

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

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

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

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

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

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

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

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

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

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

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

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

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

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

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

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of Title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section [FN4] 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title III, § 307, as added Dec. 31, 1970, Pub.L. 91-604, § 12(a), 84 Stat. 1707, and amended Nov. 18, 1971, Pub.L. 92-157, Title III, § 302(a), 85 Stat. 464; June 22, 1974, Pub.L. 93-319, § 6(c), 88 Stat. 259; Aug. 7, 1977, Pub.L. 95-95, Title III, §§ 303(d), 305(a), (c), (f)-(h), 91 Stat. 772, 776, 777; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(79), (80), 91 Stat. 1404; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 108(p), 110(5), Title III, § 302(g), (h), Title VII, §§ 702(c), 703, 706, 707(h), 710(b), 104 Stat. 2469, 2470, 2574,

2681-2684.)

[FN1] So in original. Probably should be “this”.

[FN2] So in original.

[FN3] So in original. The word “to” probably should not appear.

[FN4] So in original. Probably should be “sections”.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1970 Acts. House Report No. 91-1146 and Conference Report No. 91-1783, see 1970 U.S. Code Cong. and Adm. News, p. 5356.

1971 Acts. House Report No. 92-258 andHouse Conference Report No. 92-578, see 1971 U.S. Code Cong. and Adm. News, p. 1610.

1974 Acts. House Report No. 93-1013 and Conference Report No. 93-1085, see 1974 U.S. Code Cong. and Adm. News, p. 3281.

1977 Acts. House Report No. 95-294 andHouse Conference Report No. 95-564, see 1977 U.S. Code Cong. and Adm. News, p. 1077.

House Report No. 95-338, see 1977 U.S. Code Cong. and Adm. News, p. 3648.

1990 Acts. Senate Report No. 101-228, House Conference Report No. 101-952, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 3385.

References in Text

Section 7521(b)(5) of this title, referred to in subsec. (b)(1), was repealed by Pub.L. 101-549, Title II, § 203(3), Nov. 15, 1990, 104 Stat. 2529.

Section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977), referred to in subsec. (b)(1), was in the original “section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977)”, meaning section 119 of Act July 14, 1955, c. 360, Title I, as added June 22, 1974, Pub.L. 93-319, § 3, 88 Stat. 248, (which was classified to section 1857c-10 of this title) as in effect prior to the enactment of Pub.L. 95-95, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CHEMISTRY COUNCIL,	)	
Petitioner,	)	Case No. 10-1167
	)	(Consolidated with
v.	)	Case Nos. 10-1168,
	)	10-1169, 10-1170,
U.S. ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator, U.S. Environmental Protection Agency,	)	10-1173, 10-1174, 10-1175, 10-1176, 10-1177, 10-1178, 10-1179, 10-1180)
Respondents.	)	

DECLARATION OF MICHELLE R. MCCRACKEN

I, Michelle R. McCracken, declare under penalty of perjury under the laws of the United States of America that the following is true and correct to the best of my knowledge, information, and belief, and is based on my own personal knowledge.

1. I am a Manager, EH&S for The Williams Companies, Inc. ("Williams") Midstream Business Unit and have held that position since January, 2010. In my position, I am responsible for managing multi-media environmental, health, and safety compliance activities for Williams gathering and processing assets. Williams is an integrated natural gas company, which engages in, among other things, midstream gas and liquids processing. Williams is a member of the American Petroleum Institute, a trade association petitioner in this case.
2. My responsibilities include managing staff assessing the Clean Air Act permitting requirements for construction projects that Williams undertakes.

3. As explained below, the U.S. Environmental Protection Agency's (EPA) position (as a result of the Tailoring Rule) that greenhouse gases (GHGs) can trigger Prevention of Significant Deterioration (PSD) permitting for a facility that is not classified as a major source, major stationary source, or major emitting facility for criteria pollutants will impose new requirements on numerous facilities that Williams currently operates and on projects that are planned at Williams facilities. For example;
4. ***The Markham Gas Processing Plant :*** Williams operates a facility in Markham, Texas that is classified as a minor New Source Review (NSR) source for all criteria pollutants (pollutants for which there is a National Ambient Air Quality Standard (NAAQS)) under Title I of the Clean Air Act.
    a. The Markham facility has the potential to emit more than 100,000 tons per year of GHGs and thus would be classified as a "major" source under EPA's New Source Review/Prevention of Significant Deterioration (NSR/PSD) regulations.
    b. Williams is currently in the planning stages to expand its Markham facility. This will involve installation of combustion turbines and an amine treating unit.
    c. While the facility will remain a minor NSR source for criteria pollutants, the GHG emissions associated with the installation of the planned equipment will exceed the significance level of 75,000 tons per year of GHGs that EPA has established.
    d. Under EPA's interpretation of the statute, this installation will require PSD permitting for the newly proposed equipment for GHGs.
    e. Under the interpretation of the statute advocated by petitioners in this case, this installation would not require a PSD permit.
    f. Obtaining a PSD permit will delay the installation of the proposed project, will require expenditures of funds to prepare the permit application and complete the permitting process, will require a determination of best available control technology and compliance with such requirements.

5. ***The Frewen Lake Compressor Station:*** Williams operates a facility near Wamsutter, Wyoming that is classified as a minor NSR source for all criteria pollutants (pollutants for which there is a NAAQS) under Title I of the Clean Air Act.

a. The Frewen Lake facility currently has the potential to emit less than 100,000 tons per year of GHGs and thus would be classified as a "minor" source under EPA's NSR/PSD regulations.
b. Williams is currently in the planning stages to expand its Frewen Lake facility. This will involve installation of combustion turbines and an amine treating unit.
c. While the facility will remain a minor NSR source for criteria pollutants, the GHG emissions associated with the installation of the planned equipment will exceed the significance level of 1000,000 tons per year of GHGs that EPA has established.
d. Under EPA's interpretation of the statute, this installation will require PSD permitting for the newly proposed equipment for GHGs.
e. Under the interpretation of the statute advocated by petitioners in this case, this installation would not require a PSD permit.
f. Obtaining a PSD permit will delay the installation of the proposed project, will require expenditures of funds to prepare the permit application and complete the permitting process, will require a determination of best available control technology and compliance with such requirements.

Executed this 6th day of May, 2011.

Michelle R. McCracken

Michelle R. McCracken
Manager, EH&S
Williams Midstream

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CHEMISTRY COUNCIL,	)	
Petitioner,	)	Case No. 10-1167
v.	)	(Consolidated with Case Nos. 10-1168, 10-1169, 10-1170, 10-1173, 10-1174, 10-1175, 10-1176, 10-1177, 10-1178, 10-1179, 10-1180)
U.S. ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator, U.S. Environmental Protection Agency,	)	
Respondents.	)	

DECLARATION OF STACY S. PUTMAN

I, Stacy S. Putman, declare under penalty of perjury under the laws of the United States of America that the following is true and correct:

1. I have been with INEOS Olefins & Polymers USA, LLC ("INEOS") for nine years and currently hold the position of Safety, Health, Environmental & Quality Manager with regulatory and compliance responsibilities for four facilities in Texas and California. INEOS is a member of the National Petrochemical and Refiners Association, a petitioner in this case. We are the fourth largest marketer of olefins in North America. Our high purity olefins are valued for use as chemical intermediates in processes that produce a variety of consumer products. Our high density polyethylene and polypropylene are used to make a wide variety of plastic products that consumers value for convenience, safety, hygiene, ease of use, light-weighting, durability and recyclability. I make this declaration in support of the petitioners' opening brief.

2. The U.S. Environmental Protection Agency ("EPA") has interpreted the Clean Air Act to mean that emissions of greenhouse gases ("GHGs") alone can trigger the Prevention of Significant Deterioration ("PSD") permitting program for the construction of new sources or major modifications to existing sources. As a result of this interpretation, together with EPA's promulgation of the so-called Tailpipe Rule (which regulates GHG emissions from cars and light-duty trucks), INEOS is now subject to and harmed by EPA's PSD regulations.

3. For example, INEOS operates an ethylene manufacturing facility near Alvin, Texas. The plant is currently a major source for emission of certain pollutants for which EPA has established National Ambient Air Quality Standards ("NAAQS"). The geographic area in which the plant is located is in "attainment" for these pollutants (CO, NO2, and PM). Therefore, a PSD permit would be required for any major modification to that plant that would cause a net

increase in those pollutants above the de minimis thresholds that EPA has set. Prior to promulgation of the Tailpipe Rule, however, no PSD permit would have been required for a project that caused only GHG emissions to increase significantly.

4. INEOS is currently planning to install a process heater at the Alvin, Texas plant for, among other reasons, the purpose of increasing capacity and product yields. Based on preliminary design information, the project is not expected to trigger PSD permitting due to emissions of any NAAQS-pollutant. However, the project will trigger PSD permitting for emissions of GHGs under EPA's interpretation of its regulations and the Clean Air Act.

5. INEOS is harmed by the application of EPA's interpretation of the Clean Air Act here (specifically, the requirement to obtain a PSD permit due to emissions of GHGs) due to: the costs of the PSD permitting process; project delay related to the PSD permitting process (and associated costs), which is estimated to take 12 months and potentially more; and the substantive terms and conditions of the PSD permit that will be imposed upon INEOS, which represent a potential competitive disadvantage.

6. Finally, INEOS owns or operates many sources that are not major emitting facilities for NAAQS-pollutants. Many of these source, however, would be major emitting facilities, and would trigger applicability of the PSD regulations, if the statutory thresholds (100 or 250 tons per year) for emissions of GHGs were utilized according to the Clean Air Act.

Executed this 9 day of May, 2011.

Stacy S. Putman

Stacy S. Putman

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CHEMISTRY COUNCIL, Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator, U.S. Environmental Protection Agency, Respondents.	)	Case No. 10-1167 (Consolidated with Case Nos. 10-1168, 10-1169, 10-1170, 10-1173, 10-1174, 10-1175, 10-1176, 10-1177, 10-1178, 10-1179, 10-1180)

DECLARATION OF JAMES P. MANNING MARATHON PETROLEUM COMPANY LP

I, James P. Manning, declare under penalty of perjury under the laws of the United States of America that the following is true and correct:

1. I am the Environmental, Safety and Security Manager, Refining Environmental, Safety and Security Analysis and Technology for Marathon Petroleum Company LP ("Marathon"). Marathon is the fifth largest petroleum refiner in the United States and has a downstream business which includes refineries, pipelines, bulk storage terminals and marketing facilities. In my capacity as Environmental, Safety and Security Manager, I am familiar with construction projects our six refineries are planning to conduct and the environmental permits that will be needed for such projects. I also have general familiarity with the air permitting requirements of Marathon's other downstream operations. Marathon is a member of the National Association of Manufacturers, the American Petroleum Institute, the National Petrochemical & Refiners Association, and the American Chemistry Council, petitioners in this case. I make this declaration in support of the petitioners' opening brief.

2. The U.S. Environmental Protection Agency ("EPA") has interpreted the Clean Air Act ("CAA") to mean that emissions of pollutants for which there are no National Ambient Air Quality Standards ("NAAQS") can trigger applicability of the Prevention of Significant Deterioration ("PSD") permitting program for the construction of new sources or major modifications to existing sources. On May 7, 2010, EPA issued the Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) ("Tailpipe Rule"), which regulates Greenhouse Gas ("GHG") emissions from cars and light duty trucks under the CAA. EPA asserts that its interpretation,

together with its promulgation of the Tailpipe Rule, triggers applicability of the PSD program to GHG emissions from stationary sources. As a result, Marathon is harmed.

3. Specifically, Marathon has approved funding a hydrocracker expansion at one of its facilities that will require the installation of a large new process heater. The geographic area in which the facility is located is in "attainment" for certain "criteria" pollutants for which a NAAQS has been established (e.g., nitrogen oxides, lead, and sulfur dioxide). This project would not trigger PSD permitting based on its criteria pollutant emissions because any increases will be below the de minimis thresholds that EPA has set. However, based on Marathon's analysis, the project will trigger PSD permitting for emissions of GHGs under EPA's interpretation of its regulations and the CAA.

4. Marathon is harmed by application of EPA's interpretation of the CAA to this project in a variety of ways. For example, those harms include the costs of the PSD permitting process; delays associated with obtaining a PSD permit that could impact the planned timing of the project; and the impact of any substantive terms and conditions of the PSD permit that will be imposed upon Marathon.

5. In addition to the project described above, Marathon is also harmed by EPA's interpretation that GHGs can trigger PSD permitting because it is now subject to that interpretation for GHG emissions and must maintain records for at least five years of every project that increases GHG emissions that has a reasonable possibility of triggering PSD permitting (even if no PSD permit is ultimately required) under 40 C.F.R. § 52.21(r)(6).

6. Finally, Marathon or its wholly-owned subsidiaries own or operate sources that are not major emitting facilities for NAAQS-pollutants. A number of these sources, however, would potentially be major emitting facilities, and would trigger applicability of the PSD regulations, under EPA's interpretation of the CAA if the statutory thresholds (100 or 250 tons per year) for emissions of GHGs were applicable according to the CAA.

Executed this 10th day of May, 2011.

James P. Manning

DECLARATION OF
THOMAS J. WARD,
NATIONAL ASSOCIATION OF HOME BUILDERS

1. I am Thomas J. Ward, and I make this Declaration in support of the opening brief filed by the National Association of Manufacturers and others to the motion to dismiss filed by the U.S. Environmental Protection Agency ("EPA") in *National Association of Manufacturers, et al., v. EPA*, Nos. 10-1176, 10-1178, 10-1179, 10-1180 (consolidated into lead case *American Chemistry Council v. EPA*, No. 10-1167).

2. I am currently Vice President of Legal Affairs for the National Association of Home Builders ("NAHB"), where my responsibilities include oversight of NAHB's litigation and legal services programs. As such, I am well-versed with the federal, state, and local permitting obligations of NAHB members.

3. NAHB is a trade association, headquartered in Washington, D.C., whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all consumers to have safe, decent and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 160,000 members are single-family or multifamily home builders, residential land developers, remodelers, or some combination of these. As such, NAHB and its members are strongly affected by laws governing the building industry and regulatory restrictions on residential development.

4. The economic effects of EPA's regulation of greenhouse gas ("GHG") emissions from a large number of new and modified residential facilities are of concern to NAHB. NAHB acts to implement organizational policy adopted by its Board of Directors on the scope of the EPA's use of the Clean Air Act to regulate GHG emissions. NAHB's current organizational policy, adopted February 2007, urges:

> action to prevent federal agencies from using existing federal environmental laws (e.g., the Clean Air Act or Endangered Species Act) or their underlying regulatory regimes to curtail or direct future land-use activities as a means to reduce GHG emissions.

Further, this policy established NAHB's intent to:

> support green building programs that are based on the NAHB Model Green Home Building Guidelines [such at the National Green Building Standard] or voluntary energy efficiency programs that are consistent

with NAHB's criteria including, but not limited to, the Energy Star Program® for residential homes.

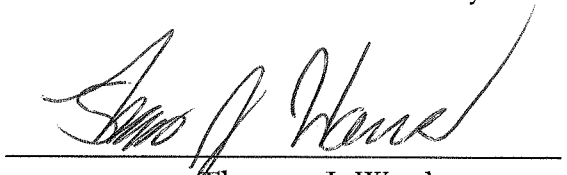
5. On May 7, 2010, EPA issued the *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010) ("Tailpipe Rule"), which regulated for the first time GHG under the Clean Air Act ("CAA").

6. Prior to issuance of the Tailpipe Rule, the members of NAHB were never considered major emitting facilities under Clean Air Act Section 169 or major stationary sources under the prevention of significant deterioration ("PSD") regulations issued by EPA or in any approved State implementation plan under 40 C.F.R. part 51 or 52. These members' facilities had therefore never been subject to the requirement to obtain a PSD permit. Our home builder members' facilities were not affected by EPA's longstanding interpretation of the CAA that emissions of a pollutant for which no national ambient air quality standard ("NAAQS") had been issued can trigger PSD permitting requirements.

7. Various NAHB members engage in construction projects that do, however, emit more than 100 or 250 tons per year of GHGs. EPA itself has expressly stated that, because of the Tailpipe Rule, approximately 6,400 multifamily buildings and 515 single family homes constructed annually will be considered major sources under EPA's longstanding interpretation of the CAA, even though there is no GHG NAAQS, assuming those statutory PSD triggers are applied to GHGs. EPA, Regulatory Impact Analysis for the Proposed Greenhouse Gas Tailoring Rule, at Table 70 (Sept. 2009). If EPA had interpreted the CAA correctly, however, new major stationary sources or modifications of existing major stationary sources that result in a significant increase of GHG emissions would *not* trigger PSD permitting requirements.

8. EPA's long-standing interpretation that PSD permitting may be required for non-NAAQS pollutants did not harm NAHB members until the issuance of the Tailpipe Rule. Because of EPA's interpretation, the Tailpipe Rule triggers the applicability of the PSD program to thousands of single and multifamily construction projects due solely to emissions of GHGs above the statutory threshold.

I, Thomas J. Ward, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 10th day of May, 2011.



Thomas J. Ward

DECLARATION OF DAVID C. AILOR, P.E., EXECUTIVE VICE PRESIDENT-REGULATORY AFFAIRS OF THE NATIONAL OILSEED PROCESSORS ASSOCIATION IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS

1. I am David C. Ailor, and I make this Declaration in support of the opening brief filed by the National Association of Manufacturers and others to the motion to dismiss filed by the U.S. Environmental Protection Agency (EPA) in *National Association of Manufacturers, et al., v. EPA*, Nos. 10-1176, 10-1178, 10-1179, 10-1180 (consolidated into lead case *American Chemistry Council v. EPA*, No. 10-1167).

2. I am currently Executive Vice President-Regulatory Affairs of the National Oilseed Processors Association (NOPA). NOPA is a national trade association headquartered in Washington, D.C. that represents companies engaged in the production of food, feed and renewable fuels from oilseeds, including soybeans. At NOPA, my responsibilities include formulating policy positions; developing regulatory responses; analyzing regulations and legislation; providing "early warning" on pending legislation and regulatory issues; directing lobbyists and outside counsel in support of same; and, working with relevant regulatory agencies to ensure the reasonableness of regulations being developed. As NOPA's lead technical staff member, I also provide technical support and guidance to NOPA members and NOPA's various committees and respond to various technical inquiries and requests for information.

3. I have extensive education and experience in both the environmental area and the food processing side of the agriculture industry. I have spent my entire 35-year career in the environmental field. Most of that period - 25 years - has been focused on addressing environmental issues related to the food processing side of agriculture.

4. For the last 21 years (from 1989-2010) I have been directing the regulatory and legislative efforts of NOPA (Washington, D.C.) on issues related to the Clean Air Act (CAA); Clean Water Act (CWA); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); Superfund Amendments and Reauthorization Act (SARA); Oil Pollution Act of 1990 (OPA'90); Resource Conservation and Recovery Act (RCRA); Toxic Substances Control Act (TSCA); Occupational Safety and Health Act; and, the Federal Food, Drug and Cosmetic Act (FFDCA).

5. My previous professional experience also includes project engineering and environmental engineering positions with Frito Lay (1985-1989); the American Coke and Coal Chemicals Institute (1989-2005); The Standard Oil Company of Ohio (1981-1985); TRW, Inc. (1978-1981); and, the California Air Resources Board (1977-1978). I am a registered Professional Engineer (Ohio), and hold an M.S.C.E. degree from Purdue University (1977) and a B.S.C.E. degree from North Carolina State University (1975).

6. The analysis presented in this declaration was prepared by me based on my knowledge and experience of the industry that I represent and my direct inquiry of NOPA member companies.

7. On May 7, 2010, EPA issued the *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (Tailpipe Rule), which regulated for the first time Greenhouse Gases (GHGs) under the Clean Air Act (CAA).

8. Prior to issuance of the Tailpipe Rule, many NOPA member companies operated facilities that were major stationary sources under the prevention of significant deterioration (PSD) regulations by virtue of their potential emissions of pollutants for which EPA had issued a national ambient air quality standard (NAAQS). Those facilities, however, had never triggered PSD permitting requirements because of an increase in a non-NAAQS pollutant. Thus, these facilities were not harmed by EPA's interpretation that non-NAAQS pollutants could trigger PSD permitting requirements.

9. With the issuance of the Tailpipe Rule, the Environmental Protection Agency asserts that GHG emissions can by themselves trigger PSD permitting requirements. Thus, NOPA member company facilities will for the first time trigger PSD review because a project increases emissions of a non-NAAQS pollutant. Even with EPA's issuance of its *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010), based on my knowledge of the industry, there will be projects at NOPA member facilities that exceed the significance threshold EPA has promulgated and thus trigger PSD permitting requirements based solely on GHG emissions. This will result in facilities triggering the requirement to obtain a PSD permit when they otherwise would not have had to obtain such a permit.

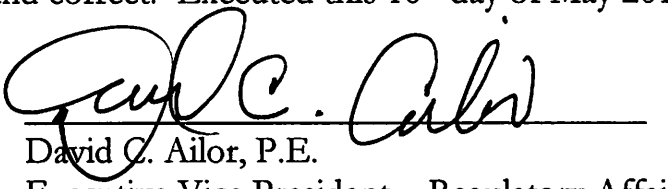
10. Finally, NOPA members would be subject to the PSD program due to increases of emissions of GHGs above the statutory thresholds in the Clean Air Act, should those thresholds be held to apply.

11. Like other sectors of the food industry of which it is a part, the U.S. oilseed processing industry is a high volume, low margin business that operates in a very competitive international marketplace. The industry is also very energy-intensive in terms of power produced onsite and power purchased off the grid. As a consequence, costs commensurate with any carbon reduction program, including the GHG regulatory programs which EPA is pursuing and to which NOPA members are now subject, harms NOPA's members and will threaten the viability of not only the oilseed processing industry and the oilseed growers which supply it with oilseeds, but other sectors of manufacturing in the U.S., resulting in companies moving more and more operations out of the country.

12. The harm to NOPA's members caused by EPA's interpretation of the CAA and promulgation of the Tailpipe Rule would be redressed were the Court to grant the petitions for review in this case.

* * *

I, David C. Ailor, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 10th day of May 2011.



David C. Ailor, P.E.
Executive Vice President – Regulatory Affairs
National Oilseed Processors Association

DECLARATION OF DAVID N. FRIEDMAN

I. Introduction

1. My name is David N. Friedman. I am the Senior Director of Regulatory Affairs at NPRA, the National Petrochemical and Refiners Association, in Washington, D.C. I am the Secretary for NPRA's Environmental Committee and I am responsible for the development and communication of NPRA positions on environmental public policy issues and regulatory initiatives.

2. A significant portion of my professional responsibilities at NPRA includes working with senior executives of NPRA member companies on compliance with new federal and state regulatory requirements under the Clean Air Act (CAA), including the recently finalized greenhouse gas (GHG) prevention of significant deterioration (PSD) rules. I have been employed by NPRA for 6 years. Prior to my employment at NPRA, I performed similar duties for private corporations in the refining industry and for other national trade associations. I have a total of 20 years of experience with the stationary source permitting requirements of the CAA.

3. NPRA is a national trade association that represents corporations that own and operate over 98 percent of the United States' domestic petroleum refining capacity and over 90 percent of our nation's petrochemical production capacity. NPRA member companies manufacture and supply to consumers, both individual and corporate, a wide variety of essential products and services that are the backbone of the nation's transportation economy and are used daily, if not hourly, by families, farmers and industries across the nation. These products include gasoline, diesel fuel, home heating oil, jet fuel, asphalt products, and the petrochemicals that serve as "building blocks" in thousands of products used every day by consumers and businesses, including plastics, clothing, medicine and computers.

4. Petrochemical plants use oil and natural gas liquids as feedstocks to manufacture many products that are in turn used as raw materials by other businesses to manufacture finished goods used by consumers every day. There are 88 petrochemical plants in the United States[1] that employ approximately 214,000 individuals directly. It is estimated that the domestic petrochemical industry directly and indirectly supports over 1.4 million jobs in the United States.[2] Worldwide, the petrochemical industry is highly competitive, with extensive new capacity being constructed in the Middle East, South America and the Far East over the past decade. Domestic petrochemical manufacturers must compete internationally with foreign companies that enjoy significant competitive advantages ranging from direct and indirect government subsidies, cheap and abundant raw materials, lower wages and less stringent environmental protections. It is therefore imperative that U.S. facilities be able to maximize production from their current operations.

5. After EPA promulgates a National Ambient Air Quality Standard (NAAQS) for a criteria pollutant, preconstruction review and permitting requirements applied to new and

---

[1] Stated in EPA GHG reporting rule (74 FR 16536; 4/10/09).

[2] Petrochemicals in Goods Critical to the United States Economy, Presentation by CMAI, July 8, 2010.

modified sources of criteria pollutants in all states, but the contours of those requirements differ depending on whether the sources are located in an attainment or nonattainment area. For areas that are in attainment with a particular NAAQS, the PSD program contained in Title I, Part C of the CAA, applies. EPA, however, has interpreted the CAA such that PSD permitting can be triggered solely on the basis of emissions of non-criteria pollutants, i.e., pollutants for which no NAAQS has been set. In 2010, EPA promulgated the so-called Tailpipe Rule, 75 Fed. Reg. 25,324 (May 7, 2010), which for the first time regulated GHG emissions from cars and light duty vehicles. This development, in conjunction with EPA's prior interpretation that the PSD program can be applied to stationary sources due solely to emissions of non-criteria pollutants, have caused EPA to assert that GHG emissions alone can trigger the need for PSD permitting.

6. In general, the PSD program applies to both new and modified refineries and petrochemical plants. The primary impact of the PSD program on refineries and petrochemical plants is the result of modifications to a facility to comply with environmental mandates, to increase production or efficiency, or to expand a facility's manufacturing capacity. A refinery emits approximately 10 metric tons CO2e per year per barrel/day of crude oil capacity. As a result, an average-size (118,000 b/d) domestic refinery would emit approximately 1 million metric tons CO2e per year. EPA also has estimated that the average domestic petrochemical facility emits about 625,000 metric tons CO2e each year.[3] Applying the GHG PSD rule to these average CO2e emissions levels, almost all refinery and petrochemical plants in the nation would have the potential to emit over 100,000 TPY of CO2e. NPRA's members are therefore harmed by EPA's interpretation of the CAA at issue in this case in several concrete ways.

a. As a result, every time one of these manufacturing facilities undertakes a physical change or change in method of operation, such as a modification or expansion, it will, under the rule, be forced to include a GHG PSD analysis in its permit application if the project will result in a CO2e increase of 75,000 TPY or more. The analysis in its own right is complex and will require significant time and resources. EPA has estimated that the average PSD permit costs $125,000 and requires 866 hours to complete. The inclusion of such an analysis, in and of itself, will have a significant negative impact on the operations of these manufacturing

[3] EPA has defined the petrochemicals industry as follows. "For this proposed GHG reporting rule, the reporting of process related emissions in the petrochemical industry is limited to the production of acrylonitrile, carbon black, ethylene, ethylene dichloride, ethylene oxide, and methanol. The petrochemicals source category includes production of all forms of carbon black (e.g., furnace black, thermal black, acetylene black, and lamp black) because these processes use petrochemical feedstocks; bone black is not considered to be a form of carbon black because it is not produced from petrochemical feedstocks. ... There are 88 facilities operating petrochemical processes in the U.S., and 9 of these operate either two or three types of petrochemical processes (e.g., ethylene and ethylene oxide). We estimate petrochemical production accounts for approximately 55 million metric tons CO2e." (74 FR 16536; 4/10/09). Dividing the 55 million metric tons by the 88 facilities means that the average petrochemical facility emits about 625,000 metric tons CO2-equivalent each year.

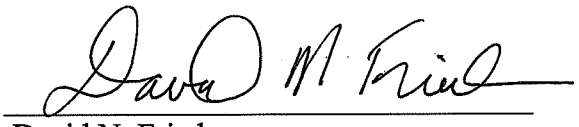
plants and on the ability of these plants to perform upgrades or expansions to assure safe and efficient operation or to respond to increases in consumer and customer demands for transportation fuels and petrochemical products.

b. Facilities that determine the increase from a project is less than the significance level, and therefore does not trigger PSD permitting, will still face significant burdens. The federal PSD rules require sources to track emissions for 5 to 10 years following a project if the projected increase would be greater than 37,500 tpy CO2e but less than 75,000 tpy CO2e. Moreover, some states require facilities to analyze PSD applicability based on the potential increases in emissions, not the maximum projected actual emissions.

c. Furthermore, NPRA is aware of several specific instances where members are planning projects now that would not trigger application of the PSD program for emissions of any criteria pollutants but will trigger PSD permitting due solely to emissions of GHG. For example, two companies plan to expand existing facilities by undertaking projects that will require the installation of new process heaters. The projects will not cause a significant net increases of emissions of criteria pollutants above the EPA de minimis thresholds for criteria pollutants, but calculations indicate they will cause increases that will require PSD permitting solely for GHGs. These projects are located in attainment areas for criteria pollutants. These companies are harmed because they now have to go through the PSD permit process, with the attendant permit cost, delay, and implementation and compliance costs that they would not otherwise have endured. Another oil and gas company plans to install combustion turbines that will have emissions of criteria pollutants below major source levels but will have more than 100,000 tons per year of GHGs. Thus, the source would not require a PSD permit under Petitioners' interpretation but requires a PSD permit under EPA's interpretation. That company is preparing the PSD application now.

d. Finally, NPRA members own or operate numerous smaller sources that are minor not major emitting facilities for NAAQS-pollutants, such as petroleum fuel terminals, chemical terminals, and small petrochemical facilities. Many of these source, however, would be major emitting facilities, and would trigger applicability of the PSD regulations, if the statutory thresholds (100 or 250 tons per year) for emissions of GHGs were utilized according to the Clean Air Act. In fact, one company tells us that if the significance level for GHGs for modifications were aligned with the statutory major source thresholds, under EPA's interpretation, each of its refineries in several states would trigger PSD for GHGs even though the company would not otherwise trigger PSD for any other pollutant at any refinery during the year.

I, David N. Friedman, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this tenth day of May, 2011.



David N. Friedman