

ORAL ARGUMENT NOT YET SCHEDULED

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

COALITION FOR RESPONSIBLE
REGULATION, INC., ET AL.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

Respondent.

No. 09-1322 (consolidated with
Nos. 10-1024, 10-1025, 10-1026,
10-1030, 10-1035, 10-1036, 10-
1037, 10-1038, 10-1039, 10-1040,
10-1041, 10-1042, 10-1044, 10-
1045, 10-1046, 10-1234, 10-1235,
10-1239, 10-1245, 10-1281, 10-
1310, 10-1318, 10-1319, 10-1320,
and 10-1321)

COMPLEX

COALITION FOR RESPONSIBLE
REGULATION, INC., ET AL.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

Respondent.

No. 10-1073 (consolidated with
Nos. 10-1083, 10-1099, 10-1109,
10-1110, 10-1114, 10-1118, 10-
1119, 10-1120, 10-1122, 10-1123,
10-1124, 10-1125, 10-1126, 10-
1127, 10-1128, 10-1129, 10-1131,
10-1132, 10-1145, 10-1147, 10-
1148, 10-1199, 10-1200, 10-1201,
10-1202, 10-1203, 10-1205, 10-
1206, 10-1207, 10-1208, 10-1209,
10-1210, 10-1211, 10-1212, 10-
1213, 10-1216, 10-1218, 10-1219,
10-1220, 10-1221, and 10-1222)

COMPLEX

COALITION FOR RESPONSIBLE
REGULATION, INC., ET AL.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

Respondent.

No. 10-1092 (consolidated with
Nos. 10-1094, 10-1134, 10-1143,
10-1144, 10-1152, 10-1156, 10-
1158, 10-1159, 10-1160, 10-1161,
10-1162, 10-1163, 10-1164, 10-
1166, 10-1172, and 10-1182)

COMPLEX

**NON-STATE PETITIONERS’
JOINT BRIEFING PROPOSAL**

Pursuant to the Court’s December 10, 2010 order, the parties and *amici curiae* listed in the Attachment (collectively “Movants”) respectfully submit the following proposed format and schedule for briefing in these cases. Consistent with the Court’s directive in favor of joint submissions, this proposal encompasses all Non-State Petitioners challenging EPA’s final rules, as well as their supporting intervenors and *amici curiae*. State Petitioners have filed their own proposal describing the briefing they believe is necessary.

INTRODUCTION AND SUMMARY

These **85 cases** embody interrelated challenges to **five** final rules that together comprise what is almost certainly the most costly, complex, and far-reaching environmental regulatory program in all American history. In the EPA Administrator’s own view, these coordinated cases concern “historic” and “ambitious” regulatory decisions. U.S. Environmental Protection Agency, Press Release, *DOT, EPA Set Aggressive National Standards for Fuel Economy and First Ever Greenhouse Gas Emission Levels For Passenger Cars and Light Trucks*, available at <http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceeac8525735900400c27/562b44f2588b871a852576f800544e01!OpenDocument> (Apr. 1, 2010). Acknowledging the importance of the five interrelated rulemakings, EPA has characterized just the automobile standards component of its program as “the first national standards ever to address” what it believes to be our “single

greatest long-term global environmental challenge.” *Id.*

All told, the five rules occupy a total of **610 pages** in the Federal Register’s dense, tri-columnar format. Confirming the breadth and importance of the 85 cases, they involve 98 unique petitioners, joined by 20 intervenors (not including those intervenors who are petitioners in other cases) and 6 *amici curiae*, representing 17 States, a joint action agency, business trade associations, public policy groups, and thousands of companies drawn from virtually every sector of our economy — all of which represent interests impacted by EPA’s new rules. To our knowledge, never before has this Court been asked to review such a significant and unprecedented assertion of regulatory authority. And rarely, if ever, has the Court been called upon to address as many interrelated final rules, with such array of petitioners and other interested parties, in cases affecting as many industries and having such widespread consequences for the Nation’s economy.

Not surprisingly, on November 16, 2010, the Court designated this multi-rule amalgam “complex.” Further binding the interrelated cases together, on December 10, 2010, the Court granted a request that these cases be scheduled for oral argument on the same day before the same panel. The cases have been grouped by the Court as follows:

1. Twenty-six cases consolidated under lead case **No. 09-1322**: sixteen petitions challenging EPA’s “Endangerment Rule,” 74 Fed. Reg. 66,496 (Dec. 15, 2009), and ten petitions challenging EPA’s denial of petitions to reconsider that rule, 75 Fed. Reg. 49,556 (Aug. 13, 2010).

2. Forty-two cases consolidated under lead case **No. 10-1073**: seventeen petitions challenging EPA's "Timing" (or "Triggering") Rule," 75 Fed. Reg. 17,004 (Apr. 2, 2001), and twenty-five petitions challenging EPA's "Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010).
3. Seventeen cases consolidated under lead case **No. 10-1092**, all challenging EPA's and NHTSA's "Tailpipe Rule," 75 Fed. Reg. 25,324 (May 7, 2010).

Whichever way they are viewed, it is apparent that the challenges posed by these 85 cases are unusually serious. In EPA's own-confessed view, applying the Clean Air Act's requirements "to sources of GHG emissions" in the manner EPA has chosen in these interrelated rulemakings "literally results" in a "program that is so contrary to what Congress had in mind . . . that it should be avoided under the 'absurd results' doctrine." 74 Fed. Reg. 55,292, 55,310 (Oct. 27, 2009). EPA nonetheless deliberately chose to produce such avowedly "absurd results" and all their attendant effects on the national economy.

In light of the breadth, complexity, importance, and seriousness of the topics to be briefed, Movants, as well as EPA and the Court, are entitled to an efficient and fully adequate presentation of the issues. Movants therefore propose a briefing format that responds to the Court's express invitation for submission of "common briefing across cases." Specifically, we propose a common-issue brief and an additional "Unified Statement of the Cases" that will reduce repetition and facilitate the efficient presentation of the issues. Consistent with the Court's December 10 order, Movants advance this proposal to avoid duplication, while

simultaneously posturing the wide range of issues involved in the way that makes greatest sense for comprehensive judicial consideration.

ARGUMENT

Respectful of this Court's order and its admonition to seek consensus and submit joint briefing proposals where possible, Movants attempted to reach broad agreement among the parties and *amici curiae* on both sides of the case in support of a briefing proposal that would allow presentation of the issues effectively and efficiently, without burdening the Court with repetitive submissions. All Non-State Petitioners, Intervenors, and supporting *amici* have reached a consensus in support of this proposal, which meets these criteria.

Unfortunately, an agreement could not be reached with the Respondents or with their intervenors and *amici*. Respondents proposed unrealistic word limits and significant departures from the practice (reflected in the Federal Rules of Appellate Procedure) of providing for balanced briefing on both sides of a case. If accepted, the proposal that Respondents shared with Movants would have deprived the Court of a fair opportunity to properly consider the issues and stripped the Non-State Petitioners and Intervenors, who bear the burden of proof, of their ability to present their cases in a briefing structure of their own design — not EPA's. Accordingly, this proposal is now respectfully being submitted.

I. OVERVIEW OF APPROACH TO PROPOSED BRIEFING FORMAT AND SCHEDULE.

For reasons described below, Movants respectfully propose that the Court adopt a briefing format and schedule that permits the Non-State Petitioners and Non-State Intervenors supporting petitioners to file 7 principal briefs and a unified factual treatment across all cases totaling no more than 89,000 words (the equivalent of just over 6.25 normal-length briefs). The reason for 7 briefs, rather than 5 briefs corresponding to the same number of rulemakings under review, is to organize the issues in a way that will provide for the most effective consideration and resolution of these cases by the Court, while avoiding duplication and constant cross-referencing between briefs on different cases or common issues.

As discussed below, Movants believe that three briefs are necessary to address the complex science and legal issues behind EPA's threshold Endangerment Rule and the Agency's denial of reconsideration petitions that were premised on the voluminous "Climategate" revelations that became available after the comment period on the Endangerment Rule had closed. In addition, a "common issues" brief is needed to address EPA's failure to consider the effect of its own concession that its regulatory program creates absurd results not simply in the Tailoring Rule, but across *all* of the five rulemakings — as well as closely related issues concerning EPA's failure to engage in a proper cost-benefit analysis and its misconstruction of *Massachusetts v. EPA*. In addition, two briefs are

required to consider implementation issues if EPA is correct that its mobile source regulations triggered stationary source regulation — one standard brief addressing the Tailpipe Rule and one longer brief addressing the Tailoring and PSD Timing Rules. In addition, to avoid duplication, Petitioners propose a common and comprehensive factual statement for all cases — reserving the ability to file short, supplemental factual statements as needed to frame individual briefs.

Because the five interrelated rules being challenged in these cases are individually and collectively of such far-reaching legal and economic significance, there is no ready analogue in the Court’s annals to inform the briefing structure here. This set of rulemakings is *sui generis*. Nonetheless, one somewhat analogous case is *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), a case Judge Leventhal described as “extraordinarily complex.” *Id.* at 344. To cope with that complexity and ensure a proper airing of the issues, the Court in *Alabama Power* permitted 18 separate opening issues briefs and a total of 50 briefs in all.

These cases are far more significant and complex than *Alabama Power*, which involved only two EPA rulemakings establishing the Prevention of Significant Deterioration (“PSD”) program to govern only traditional stationary source pollutants from large industrial sources. In contrast, these 85 cases involve the first-ever regulations under the Clean Air Act seeking to control ubiquitous greenhouse gas (“GHG”) emissions, which are the unavoidable product of nearly

every human activity and which impact virtually all individuals, families, businesses, and governmental entities in the Nation, and do not issue merely from only a relatively small roster of large-scale industrial sources. Moreover, these cases implicate not only the application of the singular PSD program to those emissions, but also (i) a threshold Endangerment Rule passing upon important scientific, policy, and statutory questions, (ii) a joint rule with the Department of Transportation regulating GHG emissions from the mobile-source sector, and (iii) a Tailoring Rule designed to revise the statutory triggers for applying the PSD program to stationary source GHG emissions. Nonetheless, this proposal seeks less than the briefing pages that the *Alabama Power* Court allowed.

More recent D.C. Circuit cases confirm that the approach taken in *Alabama Power* is consistent with the briefing limits imposed in other complex cases. For example, in *Michigan v. EPA*, 213 F.3d 633 (D.C. Cir. 2000), a case that involved only a single rule mandating that 22 States revise their state implementation plans (“SIPs”) to reduce nitrogen oxide emissions, the Court permitted petitioners and parties in support of petitioners to file 11 briefs totaling 42,250 words. And in *Transmission Access Policy Study Group v FERC*, 225 F.3d 667 (D.C. Cir. 2000), a case addressing two orders issued on the same day by the Federal Energy Regulatory Commission deregulating wholesale energy markets, the Court permitted the parties to file 13 opening briefs (including a statement of the case),

totaling 127,500 words. *See* Order, 1998 WL 633827 (Aug. 13, 1998).

These coordinated cases, which involve five final rules, are substantially and quite obviously more complex and important than any of those prior cases. Accordingly, this briefing proposal reasonably seeks 7 opening briefs totaling no more than 89,000 words (which is the equivalent of just over 6.25 normal-length briefs) to be filed by the Non-State Petitioners and Intervenors addressing the large number of substantial legal issues set out in more than 80 pages of underlying issue statements filed by Petitioners. Given the complexity and unmatched significance of these cases, we submit that the extent of the proposed briefing is quite modest.

Our understanding is that the State Petitioners have asked the Court to authorize them to file a 14,000-word brief in the Endangerment Reconsideration case, a 14,000-word brief in the consolidated Tailoring Rule/PSD Timing Rule cases, a 10,000-word brief in the Endangerment Rule case, and an 8,000-word brief in the Tailpipe Rule case. Non-State Petitioners, Intervenors, and *amici* will each strive to avoid duplication of the briefs filed by the States. The Non-State Petitioners' proposal calls for an appropriate amount of briefing, given that Movants here include many more separate parties ranging across vastly different types of business sectors and industrial interests, as well as public interest groups.

As noted above, Respondents and those aligned with them declined to support any proposal that would provide for briefing commensurate with the

number, complexity, and importance of the issues presented in these cases. Remarkably, these parties opposed all attempts to reduce duplication via “common briefing” across the three sets of consolidated cases, as suggested by this Court. They have taken this hardened position even though (i) the five rules are interrelated and flow from each other in a direct causal chain that begins with EPA’s 2009 Endangerment Rule; (ii) the Court has ordered that the cases be heard by the same panel for argument on the same day; and (iii) the Court specifically directed the parties to “address ... common briefing across cases.” Without common briefing, descriptions of statutory, regulatory, and factual materials would need to be replicated three to five times from one set of consolidated cases to the next. Given that the cases will be heard by the same panel, such duplication would frustrate, rather than promote, judicial economy. Such an approach serves neither the Court’s nor the parties’ interests.

II. PROPOSED BRIEFING FORMAT AND SCHEDULE

A. SUMMARY OF PROPOSED BRIEFING FORMAT

Movants propose that the Court adopt the following format for briefing, which both is streamlined and will ensure that the numerous legal and factual issues in these coordinated, complex cases are efficiently and appropriately addressed. Movants stress that this proposal is the result of a hard look by the Non-State Petitioners at the word allocations required in these cases. More than

four-fifths of the proposed briefing is specific to the five underlying rules, while less than one-fifth of the proposed briefing involves common-issues briefing.

Non-State Petitioners and Intervenors Opening Briefs		<u>Word Limit</u>
<u>Lead Case #</u>	<u>Common Briefing</u>	
All	Unified Statement of the Cases	7,000 words
All	Common Issues Brief (addressing EPA's selective consideration of the absurdity canon, costs/benefit analysis, and misconstruction of <i>Massachusetts v. EPA</i>)	8,000 words
Non-State <u>Common</u> Briefing Subtotal		<u>15,000 words</u>
<u>Lead Case #</u>	<u>Case-Specific Briefing</u>	
09-1322	Endangerment Rule Science/Record Issues Brief	14,000 words
09-1322	Endangerment Rule Legal Issues Brief	9,000 words
09-1322	Endangerment Reconsideration Brief	13,000 words
10-1092	Tailpipe Rule Impacts Brief (addressing failure to consider triggering of Title I and Title V and impacts, failure to consider timing of regulatory decision, and biomass issues)	14,000 words
10-1073	Timing / Tailoring Rules Issues Brief (addressing no <i>Chevron</i> Step 1 mandate as a result of Tailpipe Rule; no GHG under PSD; no PSD triggering by non-criteria pollutants; CAA § 166 issue; PSD implementation issues; stationary source biomass issues)	24,000 words
Non-State <u>Case-Specific</u> Briefing Subtotal		<u>74,000 words</u>
Non-State Briefing <u>Overall</u> Subtotal		89,000 words

State Petitioners/Intervenors Opening Brief(s) (included for convenience of the Court)		
	Total of 46,000 words for four briefs	46,000 words
State And Non-State Opening Brief Subtotal		135,000 words
<i>Amici Curiae</i> in Support of Petitioners		
	Three 7,000 word briefs (one in each consolidated case)	total 21,000 words
STATE AND NON-STATE OPENING/ <i>AMICUS</i> BRIEFS GRAND TOTAL		156,000 words
EPA Respondents Brief(s)		
	Unified Statement of the Cases	7,000 words
	Endangerment Rule Science/Record Issues Brief	14,000 words
	Endangerment Rule Legal Issues Brief	9,000 words
	Endangerment Reconsideration Brief	13,000 words
	One or more rule-specific or common issue brief(s)	total 46,000 words
State Intervenors and Private Intervenors Response Brief(s)		
	Total of 46,000 words for four briefs	46,000 words
<i>Amici Curiae</i> in Support of Respondents		
	Three 7,000 word briefs (one in each consolidated case)	21,000 words
RESPONDENTS OPPOSITION/ <i>AMICUS</i> BRIEFS GRAND TOTAL		156,000 words
All Petitioners / Intervenors Reply Briefs		
	1/2 the length of each opening brief described above (not including the Unified Statement of the Cases)	total 64,000 words

B. SUMMARY OF PROPOSED BRIEFING SCHEDULE

Movants propose that briefing for all three sets of consolidated cases should be both prompt and synchronized, with all briefs for all cases due in accordance with the following schedule. Oral argument should be held no later than early Fall.

<u>Briefing Events</u>	<u>Deadline</u>
All opening briefs by all State and Non-State Petitioners and Intervenors supporting Petitioners	60 days after entry of a briefing order by the Court
Briefs of <i>Amici Curiae</i> supporting State and Non-State Petitioners	7 days after the filing of opening briefs by the Petitioners and Intervenors
All responsive briefs by Respondents and Intervenors supporting Respondents	120 days after entry of a briefing order by the Court
Briefs of <i>Amici Curiae</i> supporting Respondents	7 days after the filing of responsive briefs by the Respondents and Intervenors
All reply briefs by all State and Non-State Petitioners and Intervenors supporting Petitioners	150 days after entry of a briefing order by the Court

C. DETAILED JUSTIFICATION FOR PROPOSED BRIEFING FORMAT AND SCHEDULE

Given the importance and complexity of the legal and record issues before the Court, the number of parties with differing perspectives who are participating in these coordinated cases, and the magnitude and consequences of EPA's regulatory program, it would not be beyond reason for the parties to propose briefing that far exceeds the ordinary word limits. Here, however, the Non-State

Petitioners and Intervenors have worked diligently to propose a coordinated briefing schedule that is fair and manifestly reasonable, and would minimize duplicative briefing. In particular, the Non-State Petitioners and Intervenors seek the equivalent of less than 6 ordinary briefs of argument (split one-fifth for common briefing across all cases and four-fifths for case-specific briefing), plus one Unified Statement of the Cases. This amounts to slightly more than one ordinary length brief per lengthy and complex EPA rulemaking. Such a treatment is fair and appropriate.

Justification for Common Briefing: Several Non-State Petitioners filed the Coordination Motion on August 26, 2010. That motion requested three key elements of relief — that these cases “[1] be designated ‘complex,’ [2] be assigned to a single three-judge panel, and [3] be briefed, argued, and decided in coordinated fashion.” Coordination Motion at 1. In response, the EPA and Department of Transportation Respondents contested the Coordination Motion, filing a total of 60 pages of opposition briefing. EPA took the view that the five rules had “little or no overlap” and shared only one common issue at the highest level of abstraction. EPA Endangerment Rule Coordination Opp. at 3; *see also* EPA Stationary Source Rules Opp. & Cross Mot. to Consol. at 8 (overlap is only that each rule addresses “*some* aspect of EPA’s efforts to address greenhouse gas emissions under the CAA”) (emphasis in original).

Declining to embrace EPA’s perspective, the Court has granted virtually all of the relief requested in the Coordination Motion. Specifically, the Court has designated the cases as “complex” and directed that they will be argued on the same day before the same panel. *See* Order, No. 09-1322, at 2 (Dec. 10, 2010). In addition, the Court’s December 10, 2010 Order calling for briefing proposals mandated that “[t]he parties and *amici* should ***specifically address*** any issues related to phased briefing and ***common briefing across cases.***” Order at 2 (Dec. 10, 2010) (emphasis added). The Court’s orders recognize that EPA’s five rules are closely intertwined and that common briefing could potentially eliminate repetitious submissions and streamline the adjudication of these coordinated cases.

As the parties who bear the burden of proof, the Non-State Petitioners should be permitted to demonstrate (i) that EPA has acted unlawfully and unreasonably and (ii) to present their arguments in the form and structure they deem most effective — as opposed to being unduly restricted to the alternative mold into which EPA would pour the cases. This is especially true where EPA’s approach would impose improper burdens on both Non-State Petitioners and the Court, by affording the Agency the improper tactical advantage of dictating Petitioners’ briefing structure and requiring duplication in briefing.

To this end, Non-State Petitioners are requesting a modest 15,000 words of common issues briefing, representing less than one-fifth of the total briefing

allocation they request. This common filing would comprise a Unified Statement of the Cases, operating across all three of the consolidated sets of cases, designed to efficiently explain the interrelationships between the five rules. (The Unified Statement may be augmented by short, non-duplicative supplements in the legal issues briefs, as needed.) In addition, one common issue brief is proposed. That brief would be no more than 8,000 words (about the size of an ordinary *amicus* brief), and would address EPA's absurdity analysis, by which EPA confirmed its own critical concession that its regulations lead to absurd results as a purported justification for its Tailoring Rule, but refused to consider the legal ramifications of that concession for any of the other four rules now before the Court. This brief would also address the related issue of how EPA improperly failed to consider the full costs and benefits of its rules (especially as to stationary sources), together with its misinterpretation of *Massachusetts v. EPA*. These arguments were presented efficiently to the Agency at this length, so there is no basis for an argument that this briefing allocation is not suitable.

Justification for the Word Limits Sought for Case-Specific Briefing:

Four-fifths of the briefing that Non-State Petitioners propose falls into a traditional, case-specific approach. Specifically, Non-State Petitioners propose three briefs concerning the two rules embodying endangerment issues, and one brief each on the Tailpipe Rule and the Tailoring / PSD Timing Rules consolidated

by the Court. Justification for the word allocations requested for each of those briefs follows:

1. Endangerment Rule — Science Findings / Record Brief: We propose one brief of 14,000 words to address EPA’s science findings that underpin the Endangerment Rule. Based on a detailed review of the extraordinarily extensive record, this brief will argue, among other things, that the Administrator (i) failed to meet applicable legal standards for the exercise of her judgment under Clean Air Act Section 202(a); (ii) failed to adequately account for science that does not support EPA’s conclusions; (iii) failed to properly treat the issue of scientific uncertainty, acting on a *de facto* “precautionary principle”; (iv) improperly delegated her judgment required under Section 202(a) to third parties; (v) misrepresented and misinterpreted the scientific record; and (vi) otherwise acted arbitrarily and capriciously and contrary to law. Given the technical complexity of the relevant assignments of error, 14,000 words are needed.¹

2. Endangerment Rule – Non-Science Legal Issues Brief: We also propose to submit a brief of 9,000 words to address a series of legal issues that do not arise from science-based deficiencies in the Endangerment Rule or its reconsideration. A separate brief is required because certain of the Non-State Petitioners believe it

¹ By way of comparison, the response to comments that EPA compiled to defend the Endangerment Rule spans 11 volumes and 701 pages, and the technical support document for this rule extends another 210 pages.

unnecessary to address the scientific issues, but nonetheless contend that EPA's Endangerment Rule is unlawful for other, independent reasons. These include, among other things, (i) EPA's improper amalgamation of six separate GHGs, including some pollutants not emitted by motor vehicles at all, into a single pollutant for purposes of making its "cause or contribute finding"; (ii) EPA's failure to consider GHG reductions mandated by the Energy Independence and Security Act; (iii) EPA's improper decision to ignore adaptation and mitigation considerations; (iv) EPA's failure to explain why it departed from its statements and analysis in its Advance Notice of Proposed Rulemaking for GHG regulation; (v) EPA's improper treatment of welfare effects as health effects; (vi) EPA's prejudgment of the endangerment finding, as reflected in statements of the Administrator and other officials and otherwise; (vii) EPA's formulation of the endangerment finding in contravention of the presumption against extraterritorial regulation; and (viii) EPA's improper reliance on a misinterpretation of its statutory discretion in concluding that it lacked authority to consider the effects of GHG regulation. In this brief, Non-State Petitioners propose to cover, in the modest requested word allotment, arguments that spanned many scores of pages in rulemaking comments and in EPA's responses to those comments.

3. Endangerment Rule Reconsideration Brief: This brief of 13,000 words would address EPA's 500-plus pages of rulemaking materials denying several

lengthy and well-documented petitions for reconsideration. These petitions were substantially, but not exclusively, based on scientific material that became available after the comment period closed. This material includes the voluminous e-mail and other information released from the Climatic Research Unit of the University of East Anglia (the material has become known as “Climategate”), as well as subsequent post-Endangerment Rule revelations of flaws in the technical reports of the Intergovernmental Panel on Climate Change on which the original Endangerment Rule was based. This brief will review EPA’s multiple and lengthy decisions denying the reconsideration petitions and argue, contrary to EPA’s conclusions, that (i) the “Climategate” material is “centrally relevant” to the Endangerment Rule within the meaning of the Clean Air Act; (ii) EPA applied the wrong legal standard in denying the reconsideration petitions; (iii) EPA’s denial improperly relied on selective extra-record information; (iv) the Climategate material confirms the impropriety of EPA’s having delegated its exercise of discretion to third parties; and (v) EPA failed to address issues raised in the reconsideration petitions and otherwise pre-judged the outcome. In addition, apart from Climategate, the brief will argue that EPA’s refusal and failure to make its Endangerment Rule available for review by its Science Advisory Board constitutes reversible error.²

² This proposed 13,000-word brief is much more concise than the

4. Tailpipe Rule Brief: This brief would be no more than 14,000 words and would challenge the legal foundation for EPA's program of regulation of stationary source GHG emissions under Titles I and V of the Clean Air Act. This brief would also set out the reasons why EPA's conclusion that Title II regulation triggers Title I and Title V regulation of GHG emissions is flawed and challenge EPA's failure to address the impacts of such triggering in the Tailpipe Rule with respect to the substance and/or timing of that rule. In addition, the brief would address issues concerning EPA's treatment of biomass and argue that the GHG tailpipe standards are contrary to Section 202(a) of the Clean Air Act to the extent they limit emissions of CO₂ from biomass-based fuels, because those standards do not mitigate the risks to health and welfare EPA identified.

5. Timing / Tailoring Rules Issues Brief: This 24,000-word brief, which must address *two separate* and intricate EPA rules (thus should presumptively warranting a total of 28,000 words), would focus on several complex issues, including the questions regarding: (i) whether there is or is not a *Chevron* Step 1 mandate as a result of the Tailpipe Rule; (ii) whether GHGs may be regulated under PSD; (iii) whether non-criteria pollutants can trigger PSD permitting requirements; (iv) whether EPA's determinations (and its procedure for making determinations) as to the timing of and transition to PSD and Title V requirements

voluminous agency docket for the original Endangerment Rule and its reconsideration, spanning 12,686 separate documents and thousands of pages.

for GHGs are arbitrary, capricious, or otherwise contrary to law; (v) whether EPA's treatment of stationary source biomass issues was arbitrary, capricious, or otherwise contrary to law; (vi) whether resolution of certain other PSD implementation issues was arbitrary, capricious, or otherwise contrary to law; and (vii) whether EPA inappropriately attempted to avoid the absurdity it concedes its PSD and Title V regulations of GHGs would create. Finally, this brief would explain how EPA's Tailoring and Timing regulations ran afoul of Clean Air Act Section 166.

Justification for Proposed Schedule: Given the importance of a prompt and coordinated decision in these intertwined cases, the Non-State Petitioners' proposed schedule is appropriate in terms of speed and synchronization. The schedule for simultaneous filing of common-issues and case-specific briefing ensures that the litigation can move forward to resolution at a reasonably expeditious pace.³ Briefing the three sets of cases in a staggered fashion would introduce needless complexity and, more importantly, unwarranted delay.

CONCLUSION

For the reasons set forth above, Movants respectfully request that the Court adopt the foregoing Proposed Briefing Format and Schedule.

³ Movants filed well-supported motions seeking stays of EPA's rulemakings and, although those motions were not successful, they demonstrated at a minimum the urgency of the issues presented and the need to resolve them as soon as possible.

Respectfully submitted,

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ATTACHMENT: Parties Joining in this Briefing Proposal

1. Chamber of Commerce of the United States of America, *Petitioner in Case Nos. 10-1030, 10-1235, 10-1123, 10-1199, 10-1160*
2. Coalition for Responsible Regulation, Inc., Industrial Minerals Association — North America, National Cattlemen’s Beef Association, Great Northern Project Development, L.P., Rosebud Mining Co., and Alpha Natural Resources, Inc. *Petitioners in Nos. 09-1322, 10-1073, 10-1092, 10-1132, and 10-1234*, and Massey Energy Co., *Petitioner in No. 09-1322*
3. Southeastern Legal Foundation, John Linder (U.S. Representative) (GA-7th); Dana Rohrabacher (U.S. Representative) (CA-46th); John Shimkus (U.S. Representative) (IL-19th); Phil Gingrey (U.S. Representative) (GA-11th); Lynn Westmoreland (U.S. Representative) (GA-3rd); Tom Price (U.S. Representative) (GA-6th); Paul Broun (U.S. Representative) (GA-10th); Steve King (U.S. Representative) (IA-5th); Jack Kingston (U.S. Representative) (GA-1st); Michele Bachmann (U.S. Representative) (MN-6th); Kevin Brady (U.S. Representative) (TX-8th); The Langdale Company; Langdale Forest Products Company; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc., *Petitioners in Nos. 10-1035, 10-1083, 10-1094, 10-1131, and 10-1239*; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc.— MDF; Langboard, Inc.— OSB, *Petitioners in Nos. 10-1035, 10-1083, 10-1131, and 10-1239*; Nathan Deal (U.S. Representative) (GA-5th) (petitioner in Nos. 10-1035, 10-1083, and 10-1094); John Shadegg (U.S. Representative) (AZ-3rd) and Dan Burton (U.S. Representative) (IN-5th), *Petitioners in Nos. 10-1083, 10-1094, 10-1131, and 10-1239*
4. National Mining Association, *Petitioner in Nos. 10-1024, 10-1120, 10-1162, and 10-1201*
5. Peabody Energy Company, *Petitioner in Nos. 10-1025, 10-1118, 10-1163, 10-1203, and 10-1245*
6. American Farm Bureau Federation, *Petitioner in Nos. 10-1026, 10-1119, 10-1164, and 10-1202*
7. Gerdau Ameristeel Corp., *Petitioner in Nos. 10-1037, 10-1110, 10-1156, and 10-1148*

8. American Iron and Steel Institute, *Petitioner in Nos. 10-1038, 10-1109, 10-1134, and 10-1147*
9. Ohio Coal Association, *Petitioner in Nos. 10-1040, 10-1126, 10-1144, 10-1145, and 10-1321*
10. Utility Air Resource Group, *Petitioner in Nos. 10-1042, 10-1122, 10-1161, 10-1212, and 10-1320*
11. National Association of Manufacturers, American Petroleum Institute, Brick Industry Association, Corn Refiners Association, National Association of Home Builders, National Oilseed Processors Association, National Petrochemical and Refiners Association, *Petitioners in Nos. 10-1044, 10-1127, 10-1166, and 10-1218*; Glass Packaging Institute, Michigan Manufacturers Association, Mississippi Manufacturers Association, Nebraska Chamber of Commerce & Industry, Tennessee Chamber of Commerce & Industry, West Virginia Manufacturers Association, Wisconsin Manufacturers & Commerce, *Petitioners in Nos. 10-1127, 10-1166, and 10-1218, and Petitioner-Intervenors in No. 09-1322 and consolidated cases*; American Frozen Food Institute, *Petitioner in Nos. 10-1127, 10-1166, and 10-1218*; Western States Petroleum Association, *Petitioner in Nos. 10-1044, 10-1127, and 10-1218*; Specialty Steel Industry of North America, *Petitioner in Nos. 10-1127 and 10-1166*; Independent Petroleum Association of America, Indiana Cast Metals Association, North American Die Casting Association, *Petitioners in No. 10-1127 and Petitioner-Intervenors in No. 09-1322 and consolidated cases*; and Glass Association of North America, *Petitioner in No. 10-1218*
12. Competitive Enterprise Institute, Freedom Works, and Science and Environmental Policy Project, *Petitioners in Nos. 10-1045 and 10-1143*
13. Portland Cement Association, *Petitioner in Nos. 10-1046, 10-1129, 10-1159, and 10-1220*
14. Pacific Legal Foundation, *Petitioner in No. 10-1310*
15. Counsel for the Clean Air Implementation Project, *Petitioner in Nos. 10-1099 and 10-1216*
16. Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation, *Petitioner in Nos. 10-1114, 10-1158, and 10-1206*
17. Missouri Joint Municipal Electric Utility Commission, *Petitioner in Nos. 10-*

1124 and 10-1213

18. National Environmental Development Association's Clean Air Project, *Petitioner in Nos. 10-1125, 10-1210*

19. Mark R. Levin, *Petitioner in Nos. 10-1152 and 10-1208*, and Landmark Legal Foundation, *Petitioner in Nos. 10-1152 and 10-1208 and Amicus Curiae in Support of Petitioners in No. 09-1322 and consolidated cases*

20. National Alliance of Forest Owners, *Petitioner in No. 10-1209*, and the American Forest & Paper Association, *Petitioner in Nos. 10-1172 and 10-1209*

21. Georgia Coalition for Sound Environmental Policy, *Petitioner in No. 10-1200*

22. South Carolina Public Service Authority, *Petitioner in No. 10-1207*

23. National Federation of Independent Business, *Petitioner in Nos. 10-1219, 10-1127, and 10-1166, and Amicus Curiae in support of Petitioners in No. 09-1322 and consolidated cases*

24. Arkansas State Chamber of Commerce, Associated Industries of Arkansas, Colorado Association of Commerce & Industry, Idaho Association of Commerce & Industry, the Kansas Chamber of Commerce & Industry, Louisiana Oil & Gas Association, National Electrical Manufacturers Association, the Ohio Manufacturers Association, Pennsylvania Manufacturers Association, Steel Manufacturers Association, and Virginia Manufacturers Association, *Intervenors in Support of Petitioners in No. 09-1322 and consolidated cases*

25. Atlantic Legal Foundation, *Amicus Curiae in Support of Petitioners in No. 09-1322 and consolidated cases*

26. American Chemistry Council, *Amicus Curiae in Support of Petitioners in Nos. 10-1073, 10-1092, 10-1131, and consolidated cases*

27. Mountain States Legal Foundation, *Amicus Curiae in Support of Petitioners in No. 09-1322 and consolidated cases*

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2011, I electronically filed the foregoing with the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. As to non-CM/ECF users, I have caused a copy of the foregoing document to be sent to the following non-CM/ECF users via First-Class Mail, postage-prepaid:

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