ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 10-1092 (Lead) and Consolidated Cases (Complex)

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 AND LISA P. JACKSON, ADMINISTRATOR,

Respondents.

On Petitions for Review of *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010)

AMICUS BRIEF OF THE AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONERS

For American Chemistry Council
Samuel B. Boxerman
R. Juge Gregg
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
sboxerman@sidley.com

Of Counsel
Leslie A. Hulse
Assistant General Counsel
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Blvd.
Arlington, VA 22209

DATED: June 10, 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) All parties, intervenors, and amici appearing in this Court are listed in the Joint Brief for the Non-State Petitioners and Supporting Intervenors and the Brief of Texas for State Petitioners and Supporting Intervenor.

(B) References to the rulings at issue appear in the Joint Brief for the Non-State Petitioners and Supporting Intervenors and the Brief of Texas for State Petitioners and Supporting Intervenor.

(C) Related cases are identified in Joint Brief for the Non-State Petitioners and Supporting Intervenors and the Brief of Texas for State Petitioners and Supporting Intervenor.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the American Chemistry Council ("ACC") states that it 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. EPA's Application of The LDVR as a Trigger for Stationary Source Regulation Will Impose Significant Additional Burdens on America's Industrial Economy Far Beyond the Auto Industry 5

A. EPA's Rules Will Delay Construction and Investment Nationwide by Newly Subjecting Sources Across the Economy to an Already-Stressed Permitting System, Exacerbating Existing Delays 7

B. Expanding the PSD Program to Greenhouse Gases Will Exacerbate Permitting Delays 9

C. Greenhouse Gas Permitting Will Be Subject to Unprecedented Uncertainty 13

D. Greenhouse Gas Permitting Threatens to Stifle Domestic Investment, Sending Trade-Exposed Industry Overseas, With No Corresponding Environmental Benefits 16

E. Greenhouse Gas Permitting Will Cause Fuel Switching That Will Cause Disruptive Spikes in Energy Prices 18

F. Greenhouse Gas Permitting Will Have a Disproportionate Impact on Small Businesses, and Discourage Upgrading Facilities to New, More Efficient Designs 20

II. EPA Unlawfully Failed to Consider the Negative Impacts of Greenhouse Gas Permitting for Stationary Sources 21

III. A Proper Interpretation of the Clean Air Act Would Avoid the Harm to the Economy Caused by GHG Permitting Requirements 24

IV. The Court Can Avoid These Costs Without Endangering The LDVR 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Alabama Power Co. v. Costle,
636 F.2d 323 (D.C. Cir. 1979) 25

Alaska v. EPA,
540 U.S. 461 (2004) 8

In re Prairie State Generating Co.,
13 E.A.D. 1 (EAB 2006) 11

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 21, 24

Small Refiner Lead Phase-Down Task Force v. EPA,
705 F.2d 506 (D.C. Cir. 1983) 21

Tesoro Alaska Petroleum Co. v. FERC,
234 F.3d 1286 (D.C. Cir. 2000) 28

United Steelworkers of Am., AFL-CIO-CLC v. Marshall,
647 F.2d 1189 (D.C. Cir. 1980) 27

STATUTES

42 U.S.C. § 7413(c)(1) 14

42 U.S.C § 7471 24

42 U.S.C. § 7475 25

42 U.S.C. § 7475(a) 24, 25

42 U.S.C. § 7475(a)(3), (e)(1) 12

42 U.S.C. § 7475(c) 9

42 U.S.C. § 7479(1) 24

42 U.S.C. § 7479(3) 9

42 U.S.C. § 7604 14

42 U.S.C. § 7604(d) 14

OTHER AUTHORITIES

Executive Order No. 13563 26

40 C.F.R. § 51.166(a)(6)(i), (iii) 15

40 C.F.R. §§ 51.166(b)(48)(iv)-(v) 28

40 C.F.R. §§ 52.21(b)(49)(iv)-(v) 28

Fed. R. App. P. 29(c)(5) 3

Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans,
45 Fed. Reg. 52,676 (Aug. 7, 1980) 25

Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards,
74 Fed. Reg. 49,454 (Sept. 28, 2009) 22

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule,
74 Fed. Reg. 55,292 (Oct. 27, 2009) 2, 14, 22

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act,
74 Fed. Reg. 66,496 (Dec. 15, 2009) 2

Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards,
75 Fed. Reg. 25,324 (May 7, 2010) ..... passim

Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs,
75 Fed. Reg. 17,004 (Apr. 2, 2010) 2

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule,
75 Fed. Reg. 31,514 (June 3, 2010) ..... passim

Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program,
75 Fed. Reg. 82,430 (Dec. 30, 2010) 15, 16

Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans, 75 Fed. Reg. 82,536 (Dec. 30, 2010) 15

Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 53,892 (Sept. 2, 2010) 2, 28

Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 77,698 (Dec. 13, 2010) 15, 16

Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan, 75 Fed. Reg. 82,246 (Dec. 30, 2010) 15

Allen, G. F., & Lewis, M., *Finding the Proper Forum for Regulation of U.S. Greenhouse Gas Emissions: The Legal and Economic Implications of Massachusetts V. EPA.* 44 U. Rich. L. Rev. 919, 923 (2010) 2, 8, 21

EPA, *New Source Review: Report to the President* (2002) 8

Carrie Wheeler, U.S. Envtl. Prot. Agency, Operating Permits Grp., Air Quality Policy Div., *Information Collection Request for Prevention of Significant Deterioration and Nonattainment New Source Review (40 C.F.R. Parts 51 and 52)* 8, 10

Dina Fine Maron, *State GHG Program Funds Hit Hard Under Budget Deal, N.Y. Times* (April 13, 2011) 10

PSD and Title V Permitting Guidance for Greenhouse Gases (Nov. 2010) 11, 12, 18

Congressional Research Service, *"'Carbon Leakage' and Trade: Issues and Approaches"* (Dec. 19, 2008) 18

Pauline McCallion, *US: New shale gas options bring market changes and challenges* (Apr. 4, 2011) 19

Impact of Rising Natural Gas Prices on U.S. Ammonia Supply, Economic Research Service, United States Dep't of Agric. (August 2007) 19

Comments of Interstate Natural Gas Association of America Regarding the Proposed Rule, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (Dec. 23, 2009) 20

Comments on EPA's Advance Notice of Proposed Rulemaking, Regulating Greenhouse Gas Emissions under the Clean Air Act (Nov. 28, 2008).....20

GLOSSARY OF TERMS

ACC	American Chemistry Council
BACT	Best Available Control Technology
CAA	Clean Air Act
CO_2	Carbon Dioxide
Endangerment Rule	*Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009).
EPA	Environmental Protection Agency
FIP(s)	Federal Implementation Plan(s)
GHG(s)	greenhouse gas(es)
LDVR	*Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010).
NAAQS	National Ambient Air Quality Standards
NAM	National Association of Manufacturers
NHTSA	National Highway Traffic Safety Administration
PSD	Prevention of Significant Deterioration, Clean Air Act Title I, Part C: §§ 160-169b, 42 U.S.C. §§ 7470-7492
RTC	EPA, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards: EPA Response to Comments Document for Joint Rulemaking, Doc. No. EPA-HQ-OAR-2009-472-11581
SIP(s)	State Implementation Plan(s)
Tailoring Rule	*Proposed Rule, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292 (Oct. 27, 2009). *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010).
Title V	Clean Air Act §§ 501-507, 42 U.S.C. §§ 7661-7661f
Timing Rule	*Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010).

INTEREST OF AMICUS

ACC is a not-for-profit trade association representing the companies that make the products that make modern life possible, while working to protect the environment, public health, and security of our nation. ACC represents the leading companies engaged in the business of chemistry. The business of chemistry is a $720 billion a year enterprise and a key element of the nation's economy. It is the nation's top exporting sector, accounting for 10 cents out of every dollar in U.S. exports. ACC members are committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing.

This *amicus* brief concerns the "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards" ("LDVR"), 75 Fed. Reg. 25324 (May 7, 2010), a rule issued by the U.S. Environmental Protection Agency ("EPA" or "Agency").[1] ACC does not seek to disrupt the ability of the LDVR to control greenhouse gas ("GHG") emissions from cars and light duty trucks. Instead, ACC objects to EPA's conclusion that the LDVR triggers wide-ranging Prevention of Significant Deterioration (PSD) preconstruction permitting requirements on stationary sources. *See*, *e.g.*, *Prevention of Significant Deterioration and Title V Greenhouse*

[1] At the same time, the National Highway Traffic Safety Administration ("NHTSA") finalized a companion rule, *id.*, but ACC does not challenge that rule.

Gas Tailoring Rule, 74 Fed. Reg. 55,292, 55,294 (Oct. 27, 2009). EPA has stated that the LDVR imposes these PSD requirements in concert with three other rulemakings, the "Endangerment Rule,"[2] the "Timing Rule,"[3] and the "Tailoring Rule."[4] "Taken together, these actions established regulatory requirements for GHGs emitted from new motor vehicles and new motor vehicle engines, determined that such regulations, [as of] January 2, 2011 . . . subject GHGs emitted from stationary sources to PSD requirements, and limited the applicability of PSD requirements . . . to GHG sources on a phased-in basis."[5]

This "regulatory chain reaction"[6] creates a single expansive regulatory regime under which EPA, for the first time, regulates GHG emissions of factories, manufacturers, and utilities from virtually every industrial sector. This regime will dramatically impact not only the nation's energy use and the manufacturing sector generally, but the core operations of the chemical industry specifically. ACC's

---

[2] *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

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

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

[5] *Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call*, 75 Fed. Reg. 53,892, 53,895 (Sept. 2, 2010).

[6] Allen, G. F., & Lewis, M., *Finding the Proper Forum for Regulation of U.S. Greenhouse Gas Emissions: The Legal and Economic Implications of Massachusetts V. EPA*. 44 U. Rich. L. Rev. 919, 923 (2010) ("Allen & Lewis").

members operate numerous facilities that are currently regulated under the Clean Air Act and are subject to this regulatory regime. Thus, ACC members and their thousands of employees are affected directly by the LDVR, both alone, and in combination with the other rules.

This Court granted ACC leave to participate as an *amicus* in an order dated September 28, 2011. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than ACC—contributed money that was intended to fund preparing or submitting the brief. Sidley Austin LLP, along with other counsel, also represents the National Association of Manufacturers, et al. ("NAM") petitioners in all three challenges to EPA's related greenhouse gas rulemakings (*see* Nos. 10-1044, 10-1127, and 10-1166). The lead Sidley Austin LLP counsel for the ACC and NAM representations are different. Sidley Austin LLP authored this *amicus* brief for ACC and, separately, contributed to drafting the industry petitioners' brief on behalf of NAM. NAM did not fund in whole or part the drafting of the ACC *amicus* brief. *See* Fed. R. App. P. 29(c)(5).

SUMMARY OF ARGUMENT

Although ostensibly aimed at *mobile* sources, left unchecked, EPA would have the LDVR impose damaging economy-wide greenhouse gas permitting requirements for *stationary* sources. These requirements will paralyze investment in domestic manufacturing by holding up new construction with a costly and lengthy permitting process. This will be exacerbated by deep uncertainty regarding what greenhouse gas controls this process will ultimately require, and by uncertainty regarding the validity of the permits under state and federal law. Facing these uncertainties, investment capital will flow overseas, sending manufacturing jobs, and their associated greenhouse gas emissions, to other countries, and damaging the American economy without improving its environment. These impacts will be particularly severe for small businesses and businesses that are sensitive to spikes in energy prices.

EPA recognizes that the LDVR could have disastrous consequences—indeed, as demonstrated in the Tailoring Rule, EPA believes these consequences are so severe that they require it to rewrite the text of the Clean Air Act through regulation. Yet the LDVR contains no analysis of these impacts. Furthermore, these impacts are not an inevitable result of the Clean Air Act—the plain language and the only reasonable interpretation of the Clean Air Act's text confirms that greenhouse gas emissions do not trigger PSD permitting requirements. This Court should remand the LDVR to avoid these far reaching consequences to stationary sources, without vacating the rule as it applies to mobile sources.

ARGUMENT

EPA has stated that the goal of the LDVR is "to establish a National Program consisting of new standards for light-duty vehicles that will reduce greenhouse gas emissions and improve fuel economy." 75 Fed. Reg. at 25,324. ACC has no quarrel with this goal. ACC's objection is to EPA's decision to use a *mobile source* rule to trigger permitting requirements for *stationary sources*. This decision, which hijacks the otherwise uncontroversial regulation of vehicles as the trigger of regulation of the manufacturing sector and beyond is unlawful, as Petitioners have explained,[7] and as ACC has explained in briefing in parallel cases challenging EPA's older PSD regulations before this Court.[8] These preconstruction permitting requirements would also impose significant additional burdens on the American economy directly and indirectly. Without upsetting EPA's regulation of mobile sources, the Court can and should remand the LDVR rule and direct EPA to avoid triggering stationary source regulation.

I. EPA's Application of The LDVR as a Trigger for Stationary Source Regulation Will Impose Significant Additional Burdens on America's Industrial Economy Far Beyond the Auto Industry

EPA's view of the effects of issuing the LDVR for stationary sources represents the single largest expansion of Clean Air Act preconstruction permitting

---

[7] J. Opening Br. of Non-State Pets. and Supporting Intervenors.

[8] Petitioners' Br. (ECF No. 1307254), *American Chemistry Council v. EPA*, No. 1011-67 (May 10, 2011) ("Grounds Arising After Br.").

requirements in the history of the Clean Air Act. At the regulatory thresholds set by the text of the Clean Air Act, the LDVR would "subject an extraordinarily large number of sources, more than 81,000, to PSD each year, an increase of almost 300-fold." 75 Fed. Reg. at 31,554. EPA's Tailoring Rule asserts authority to limit this expansion by raising the Clean Air Act's thresholds; but even if EPA's Tailoring Rule is upheld, EPA is still *more than doubling* the number of sources subject to PSD's preconstruction permit requirement; EPA estimates that the number of sources requiring a PSD permit would increase from 668 to 1,605 each year. 75 Fed. Reg. at 31,540. And those are just the initial numbers—EPA's rules commit it "to include as many GHG sources in the permitting programs at as close to the statutory thresholds as possible, and as quickly as possible." 75 Fed. Reg. at 31,523; *see also id.* at 31,607 (adopting enforceable commitments to accomplish this). That is, under these rules, the LDVR irrevocably commits EPA to an eventual 300-fold expansion of its PSD permitting program.

Thus, EPA is dramatically increasing the number of projects that will have to receive an agency permit—and complete all the attendant agency procedures, public comment, and administrative review—before even beginning construction. As explained below, before this drastic increase, this preconstruction permitting program imposes serious delays, and onerous costs on industry. Plainly, these costs and delays pose a significant barrier to companies considering building a new facility, or upgrading an old one. Making matters worse, increasingly complex regulations, and

increasingly unrealistic standards for the level of permit review that is practicable, have led to permitting backlogs, so that applicants now may wait years for final action on their permit applications. Applying the vehicle rule to stationary sources would dramatically expand this system by applying it to regulate consumption of energy across the national economy. That expansion would lead to even longer permitting delays, investment-paralyzing uncertainty, and unique strains on the nation's energy infrastructure.

Finally, faced with these costs, investment in new manufacturing is likely to move to other countries with fewer greenhouse gas controls. This will harm the nation's economy, without providing any environmental benefits. Greenhouse gases have global rather than local effects, so when industry moves overseas to less energy-efficient countries, the result is higher greenhouse gas concentrations everywhere, including in this country.

A. EPA's Rules Will Delay Construction and Investment Nationwide by Newly Subjecting Sources Across the Economy to an Already-Stressed Permitting System, Exacerbating Existing Delays

EPA has acknowledged that, if it follows its own interpretation of the Clean Air Act's text, and implements the resulting 300-fold expansion of its permitting program, it would freeze nearly all construction nationwide for "a decade or longer." *Id.* at 31,557. This is because every time another source is subjected to the permitting program, that delays the process for all sources, given the limited resources available

to state permitting agencies. *Id.* Thus, EPA will only "include as many GHG sources . . . as possible . . . as quickly as possible." *Id.* at 31,523.

There is, however, no bright line separating the "possible" from the "impossible." EPA can only mean that while it is not willing to tolerate the nationwide construction freeze that would result from a 300-fold increase in permits required, it would be willing to tolerate the substantial increases in delay and cost that would result from more than doubling the scope of its PSD program. 75 Fed. Reg. at 31,540.

Obtaining a preconstruction permit under EPA's Prevention of Significant Deterioration program is presently a lengthy, costly process. EPA has reported that the permitting process already takes seven to twenty-two months to complete.[9] Indeed, the permit process for larger and more complex projects can cost hundreds of thousands of dollars and take several years to complete.[10] Plus, a facility is required to spend whatever is necessary to meet the actual substantive requirements of a PSD

---

[9] EPA, *New Source Review: Report to the President* at 20 (2002), *available at* http://www.epa.gov/NSR/documents/nsr_report_to_president.pdf. EPA has also estimated that obtaining these permits costs sources $125,120 on average. Allen & Lewis, *supra* at 924 (citing Carrie Wheeler, U.S. Envtl. Prot. Agency, Operating Permits Grp., Air Quality Policy Div., Information Collection Request for Prevention of Significant Deterioration and Nonattainment New Source Review (40 C.F.R. Parts 51 and 52))("Wheeler"), *available at* No. EPA-HQ-OAR-2009-0517-19184 (also estimating that each permit requires an average of 866 hours).

[10] *Alaska v. EPA,* 540 U.S. 461, 516-17 (2004) (Kennedy, J., dissenting) ("We are advised that an applicant sometimes must spend up to $500,000 on the permit process and that, for a complex project, the time for approval can take from five to seven years.").

permit, such as adopting the "Best Available Control Technology" ("BACT") for each pollutant it emits in significant amounts. 42 U.S.C. § 7479(3).

Furthermore, the PSD program is actually implemented by state permitting authorities, who must guide permittees through the PSD process and rule on their applications, and these local authorities are currently being hit with a one-two punch of unprecedented permitting backlogs and reduced staffing due to state budget cuts. Yet, this LDVR would drastically expand the responsibilities of these authorities, more than doubling the number of sources subject to this already-constrained permitting program.

B. Expanding the PSD Program to Greenhouse Gases Will Exacerbate Permitting Delays

The PSD permitting process already faces backlogs and delays that violate EPA's statutory responsibilities. Congress placed great importance on the expeditious handling of permit applications; the Clean Air Act dictates that "[a]ny completed permit application . . . shall be granted or denied not later than one year after the date of filing of such completed application." 42 U.S.C. § 7475(c). Yet, EPA estimates that the *average time* to obtain initial approval of a permit has already lengthened to one year, 75 Fed. Reg. at 31,534, and recent permits have taken far longer. And this does not include the months or years it takes a source to prepare a permit application, or the months or years it can take the agency to review a permit once it receives initial approval. Just last month, in *Avenal Power Center v. EPA*, Order on No. 10-cv-383

(D.D.C. May 26, 2011), the United States District Court for the District of Columbia rebuked EPA for failing to grant or deny a complete application for over three years, *id.* at 7. In that case, EPA, already more than two years late, could not even offer a timetable for granting a final permit that would allow construction, instead suggesting that it would soon send the permit to its Environmental Appeals Board which would delay "the process for yet another six to eighteen months," *id.* at 7.

If the LDVR were to expand the PSD program to cover greenhouse gases, these permitting backlogs will become much worse. Even assuming that the counter-textual Tailoring Rule is upheld by the courts, EPA projects that the number of permits that permitting authorities will have to process will initially increase 133% from 668 to 1,605 PSD applications per year, 75 Fed. Reg. at 31,540, with further increases to come, imposing substantial additional costs and burdens.[11] This increase comes at a time of not only staggering permit backlogs, but also significant reductions in funding of state and federal environmental agencies.[12]

Making matters worse, each permitting application will be much more complex, given the ongoing uncertainty regarding the legal status of greenhouse gas permitting

---

[11] According to one EPA estimate, currently, each PSD permit application imposes a processing burden of 301 hours and $23,280 for EPA or a state environmental agency. Wheeler, *supra* n.9.

[12] Dina Fine Maron, *State GHG Program Funds Hit Hard Under Budget Deal*, N.Y. Times (April 13, 2011), *available at* http://www.nytimes.com/cwire/2011/04/13/13climatewire-state-ghg-program-funds-hit-hard-under-budge-49231.html.

and what controls will be required as BACT. *See* Section I.B. *infra.* Determining BACT will be particularly difficult for greenhouse gases because carbon dioxide is unavoidably emitted by combustion of any of the fossil fuels that power manufacturing processes, but there is no standard technology that can remove carbon dioxide from a plant's air emissions. Consequently, EPA has said that, unlike with traditional pollutants, it will require new plants seeking a BACT determination to consider a wide-range of changes to their plant-wide infrastructure – measures not just for their emitting units, but for the wider facility. *See* PSD and Title V Permitting Guidance for Greenhouse Gases at 32 (Nov. 2010) (describing how examining energy efficiency for GHGs involves a far broader BACT analysis than previously conducted for criteria pollutants).

EPA has also suggested that, as part of BACT review, a permitting authority may require a source to adopt an entirely different type of fuel, *id.*,[13] and has stated that as-yet undemonstrated technologies such as carbon capture and storage should be considered "'available' for large CO_2-emitting facilities," *id.* at 33, and demanded, in numerous permitting reviews, "comprehensive" consideration of this theoretical

[13] ACC strongly disagrees with EPA's position that such a requirement is consistent with the Clean Air Act. Requiring a source to change its primary fuel plainly redefines the proposed facility—a coal-fired power plant is not the equivalent of a natural-gas-fired power plant. Redefining the source in this manner is inappropriate given the Clean Air Act's simple requirement to adopt the "best available control technology" for the proposed facility at issue. *See In re Prairie State Generating Co.*, 13 E.A.D. 1, 23 (EAB 2006). But EPA's stated view, however incorrect, means this type of controversy is likely to arise in BACT determinations nationwide.

option, *id.* at 37. Furthermore, although EPA has stated that local air quality modeling, which is generally required as part of the PSD process, 42 U.S.C. § 7475(a)(3), (e)(1), will not be required for greenhouse gases because of the "nature of GHG emissions and their global impacts,"[14] this may be an issue that is contested in state PSD permit reviews. These complex determinations will place further stress on timely processing of permit applications, and will discourage investors from even undertaking many projects.[15]

Finally, this dramatic increase in the number of PSD permits will accomplish no demonstrated environmental benefit. For instance, rather than limiting greenhouse gas controls to sources that would require a permit anyway due to their emissions of criteria or other conventional pollutants, *see* J. Opening Br. of Non-State Pets. and Supporting Intervenors at 31-32, as of July 1, EPA is expanding its program to cover sources that only trigger PSD permitting based on their greenhouse gas emissions. *Id.* at 31,523. This will more than double the number of sources requiring a PSD permit, adding untold delay for all sources, but it only expands regulatory coverage of greenhouse gas emissions by 2%. *Id.* at 31,540. Indeed, EPA has not attempted to establish that regulating greenhouse gases from stationary sources under

---

[14] Guidance for Greenhouse Gases at 49.

[15] In fact, in practice, this has already resulted in EPA demanding very expansive BACT analyses evaluating GHG emissions. Region 6 GHG BACT Comment Letter to LDEQ on the Nucor Steel Louisiana PSD Permit (Jan. 7, 2011), *available at* http://www.epa.gov/region07/air/nsr/nsrmemos/nucor.pdf.

PSD will provide a material environmental benefit; in fact, it has never analyzed whether regulating greenhouse gases from stationary sources under PSD will have any benefit at all.[16]

C. Greenhouse Gas Permitting Will Be Subject to Unprecedented Uncertainty

Greenhouse gas permitting presents numerous unique complexities that will necessarily create uncertainty in permitting and thereby impede investments in new and modified equipment. Thus, if left as is, a rule designed to address vehicle emissions could impair the recovery of the manufacturing economy.

The first and most basic uncertainty concerns what will constitute the Best Available Control Technology for greenhouse gases from stationary sources. As noted above, with no off-the-shelf technology (such as scrubbers) EPA has acknowledged that determining BACT for greenhouse gases will involve unprecedented complexity.

Second, industry faces debilitating uncertainty because the counter-textual Tailoring Rule and the state laws that have implemented that rule are likely to be held unlawful, at the very least in some states, because they contradict the plain text of the

---

[16] No analysis of stationary source GHG emissions is provided in the Endangerment Finding, LDVR, or the Timing Rule. In the Tailoring Rule, EPA estimated the percentage of *total* GHG emissions by stationary sources under the Tailoring Rule thresholds and CAA statutory thresholds, but never attempted to estimate the relative *reductions* in emissions in those sources resulting from application of PSD BACT to any sources. *See* 75 Fed. Reg. at 31,599-600.

CAA and existing state air pollution control laws. If the Tailoring Rule or a state analog is invalidated, because of the chain of regulation started by EPA in this LDVR, projects without a PSD permit may then be in violation of the CAA. These risks are particularly acute because the CAA is a criminal statute. *See* 42 U.S.C. § 7413(c)(1) (felony for failure to obtain a PSD permit). Furthermore, the CAA Section 304, 42 U.S.C. § 7604, authorizes citizen suits against "any person who proposes to construct or constructs any new or modified major emitting facility without a permit required" under the statute. Such suits could be motivated by broader environmental concerns, attorney fees, *see id.* § 7604(d), or any "NIMBY" opposition to a project.

Third, permits issued under the Tailoring Rule may be invalid under state law. The requirements of the Clean Air Act's PSD permitting program are largely implemented by individual states under their own laws, which have been approved as State Implementation Plans (SIPs). Thus, the thresholds prescribed by EPA's Tailoring Rule do not automatically apply to sources governed by a SIP; generally the states apply a 250 ton threshold for regulation, rather than the 100,000 ton threshold prescribed by the Tailoring Rule. EPA initially proposed to change these SIPs unilaterally,[17] but declined to finalize this proposal, noting that it could not change state law, and could only change the SIP "for federal purposes." 75 Fed. Reg. at 31,518. Instead, EPA hoped that all states would adopt the higher thresholds before

---

[17] *Proposed Rule, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292, 55,341-43 (Oct. 27, 2009).

January 2, 2011, but that hope proved unfounded. Consequently, on the eve of GHG permitting, EPA promulgated a final rule retroactively modifying the federally-approved SIPs of 24 states.[18] In these 24 states, sources that begin construction may be in violation of their state laws.

Finally, EPA has created further complexity by disapproving the previously approved SIPs for eight states, and imposing Federal Implementation Plans (FIPs), without following the statutory process for such approvals.[19] EPA's regulations provides states up to three years to revise their SIPs following EPA's addition of a new pollutant to be regulated under the PSD program. *See* 40 C.F.R. § 51.166(a)(6)(i), (iii). Nevertheless, EPA demanded that these states alter their SIPs within one month of its final issuance of a finding that their SIPs were inadequate for failure to regulate greenhouse gases.[20] With respect to one state, Texas, EPA imposed a FIP even though the deadline EPA itself had identified as reasonable under the Clean Air Act

---

[18] *Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans*, 75 Fed. Reg. 82,536 (Dec. 30, 2010).

[19] *See Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan*, 75 Fed. Reg. 82,246 (Dec. 30, 2010); *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program*, 75 Fed. Reg. 82,430 (Dec. 30, 2010).

[20] *Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call*, 75 Fed. Reg. 77,698 (Dec. 13, 2010).

for Texas's response to the inadequacy finding had not yet run.[21] 75 Fed. Reg. 82,430. EPA's failure to abide by the Clean Air Act's procedures for imposing a FIP creates further uncertainty regarding the validity of the current structure of greenhouse gas permitting.

D. Greenhouse Gas Permitting Threatens to Stifle Domestic Investment, Sending Trade-Exposed Industry Overseas, With No Corresponding Environmental Benefits

The cost increases attributable to EPA's GHG regulations will also harm the nation's competitiveness, resulting in the loss of United States jobs, investment, and production to overseas industry, particularly in developing countries. Normally, EPA itself would provide an estimate of these effects, but as described in Section II below, EPA has refused to assess the economic impacts of GHG permitting for stationary sources. ACC is only aware of one significant study attempting to estimate the full scale of these impacts, which was conducted by Margo Thorning, PhD, the Chief Economist at the American Council for Capital Formation. Thorning Declaration, The Economic Impact of Regulating U.S. Greenhouse Gas Emissions Under the Clean Air Act (Sept. 14, 2011), *filed as* Pets. Mot. for Partial Stay of EPA's Greenhouse Gas Regulations (Stay Motion), Coalition for Responsible Regulation, Inc. *et al.* v. EPA, Nos. 10-1073 *et al.*, Doc. No. 1266110 (Attachment 19). This study concludes

[21] *See* 75 Fed. Reg. at 77,705 (setting a deadline of December 1, *2011*); *see also id.* at 77,704 (acknowledging that even this 12-month deadline is "expedited").

that the GHG permitting rules will stifle the new investment that is crucial to a continuing economic recovery.

The Thorning Study estimates that the regulatory burdens and uncertainty created by GHG permitting will increase the required rate of return on investments and thus the cost of capital for investments. *Id.* at ¶¶ 19-22. Consequently, as a conservative approximation, the uncertainty surrounding EPA's regulatory regime, excluding the impact on energy-intensive industries, could increase the cost of capital 6.0% to 8.5%. *Id.* at ¶ 22. Under conservative assumptions about elasticity of investment, this would decrease U.S. investment between 5% and 15%—equivalent to losses of $97 to $290 billion dollars in 2011 and $100 to $301 billion dollars in 2014. *Id.*

As the GHG regulations stifle domestic investment in industrial capacity, manufacturing and emissions may shift overseas.[22] Furthermore, these harms to American industry may not have any compensating global environmental benefits—in fact, they could result in "carbon leakage"—the relocation of industrial production to energy-intensive developing countries where GHG emissions are not regulated. Manufacturing may shift to developing nations, including China, India, and Brazil, where industry is significantly more energy intensive than U.S. industry, leading to greater greenhouse gas emissions. Moreover, such nations lack the strict

[22] Thorning Study ¶ 37.

environmental controls applied to other pollutants in the United States, thereby exacerbating other environmental problems. And shifting greenhouse gas emissions to other countries will not even provide a local benefit for the United States, because GHG emissions are globally distributed, so the location of emissions is irrelevant, as EPA itself acknowledged in its recent guidance concerning the PSD program's application to GHGs. Guidance for Greenhouse Gases at 49. This is why international trade considerations, which are not addressed by EPA's stationary source permitting requirements, are a key component of legislative climate change controls.[23]

E. Greenhouse Gas Permitting Will Cause Fuel Switching That Will Cause Disruptive Spikes in Energy Prices

Greenhouse gas permitting, in combination with other regulatory initiatives, may provide a strong incentive for facilities to switch fuels from coal to natural gas, particularly given EPA's incorrect but, of course, extremely influential, suggestion that state permitting authorities can require PSD applicants to switch their primary fuel.[24] PSD and Title V Permitting Guidance for Greenhouse Gases at 32.[25] But a

---

[23] *See* Congressional Research Service, *"'Carbon Leakage' and Trade: Issues and Approaches"* (Dec. 19, 2008), *available at* http://www.fas.org/sgp/crs/misc/R40100.pdf.

[24] This interpretation of the Clean Air Act is unlawful. *See supra* n.13.

[25] EPA has returned for further consideration BACT analyses that do not fully consider fuel switches. *In the Matter of Am. Elec. Power Serv. Corp., Sw. Elec. Power Co., John W. Turk Plant*, Petition No. VI-2008-01 (Order on Petition) (Dec. 15, 2009); *In the*

widespread switch to natural gas will cause disruptive spikes in sensitive energy markets, exacerbating the detrimental impact of GHG permitting.

Rising, volatile natural gas prices have already been implicated in the decline of American manufacturing. For instance, the United States Department of Agriculture has concluded that as a result of "the volatile and upward trend in U.S. natural gas prices from 2000-06 . . . U.S. ammonia production declined 44 percent, while U.S. ammonia imports increased 115 percent." Impact of Rising Natural Gas Prices on U.S. Ammonia Supply, Economic Research Service, United States Dep't of Agric. (August 2007), *available at* http://www.ers.usda.gov/publications/wrs0702/wrs0702.pdf. This not only destroys manufacturing jobs—it also raises prices for the farmers who depend on ammonia. *Id.*

Fuel switching to natural gas will have a particularly large effect on natural gas price volatility because inadequate infrastructure constrains the ability of natural gas providers to bring their product to market. Particularly in the Northeast, consumers are regularly subject to price spikes due to inadequate infrastructure.[26] And greenhouse gas permitting will make this problem worse as well by discouraging new

---

Matter of Cash Creek Generation, LLC, Petition Nos. IV-2008-1 & IV-2008-2 (Order on Petition) (Dec. 15, 2009).

[26] Pauline McCallion, US: New shale gas options bring market changes and challenges (Apr. 4, 2011), *available at* http://www.risk.net/energy-risk/feature/2034392/-shale-gas-options-bring-market-changes-challenges.

infrastructure: under the Tailoring Rule proposed pipeline compressor stations may now have to wait through the lengthy permitting process as well. *See* Comments of Interstate Natural Gas Association of America Regarding the Proposed Rule, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, EPA-HQ-OAR-2009-0517-4691.1, at 1-2 (Dec. 23, 2009).

F. Greenhouse Gas Permitting Will Have a Disproportionate Impact on Small Businesses, and Discourage Upgrading Facilities to New, More Efficient Designs

The United States Small Business Administration has repeatedly emphasized that "regulating GHGs under the CAA will have a disproportionate impact on small entities," because "the smallest businesses generally have to bear a 45 percent greater burden of regulatory compliance costs than their larger competitors do."[27] Furthermore, small businesses are uniquely vulnerable to the increased energy costs that are all but certain to result from greenhouse gas permitting. As noted, carbon dioxide is the unavoidable byproduct of fossil fuel combustion, so the impact of these regulations will fall hardest on the energy sector's ability to expand and overhaul facilities in order

[27] *Comments on EPA's Advance Notice of Proposed Rulemaking, "Regulating Greenhouse Gas Emissions under the Clean Air Act,"* (Nov. 28, 2008), *available at* http://archive.sba.gov/advo/laws/comments/epa08_1128.html (citing W. Mark Crain, The Impact of Federal Regulations on Small Firms, funded by the U.S. Small Business Administration, Office of Advocacy (2005)).

to keep pace with the economy's demand for energy. As a result, energy prices will increase, harming small businesses, their customers, and consumers.[28]

In addition, new manufacturing and processing investment typically involves more energy-efficient technology. By stifling this investment, businesses will forgo achievable environmental and efficiency benefits. Further, because PSD permitting targets new sources and new investment, sectors growing more rapidly or in their infancy, such as renewable energy—the very sectors that the nation is counting on for economic growth and new energy sources—will be most harmed.

II. EPA Unlawfully Failed to Consider the Negative Impacts of Greenhouse Gas Permitting for Stationary Sources

Under the Administrative Procedure Act, an agency rule cannot be upheld unless the agency can show that it has "examine[d] the relevant data," and examined each "important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The requirement that an agency consider all important aspects of its regulations is heightened under the Clean Air Act. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 518-19 (D.C. Cir. 1983) (agency must set forth, inter alia, "the major legal interpretations and policy considerations underlying the proposed rule").

---

[28] Allen & Lewis at 924 ("Few small businesses could operate under the PSD administrative burden and those enterprises that did obtain a permit would likely impose some of the additional cost on American consumers with higher prices.").

Here, the Agency has plainly marked the most "important aspect of the problem" of adopting light-duty vehicle standards under the Clean Air Act: those standards will "trigger PSD and title V applicability requirements for GHG emissions," 74 Fed. Reg. at 55,294. These requirements are, by far, the single most consequential effect of the LDVR under EPA's statutory interpretation, because they "will subject an extraordinarily large number of sources, more than 81,000, to PSD each year, an increase of almost 300-fold," 75 Fed. Reg. at 31,554. Calling this increase "an important aspect of the problem" would be an understatement: according to EPA, this level of permitting would immediately delay construction nationwide by "at least a decade or longer, and that would only grow worse over time as each year, the number of new permit applications would exceed permitting authority resources for that year." 75 Fed. Reg. at 31,557.

Yet, as aptly described in Petitioners' Brief, EPA adamantly refused to consider or quantify these burdens before adopting the LDVR. J. Opening Br. of Non-State Pets. and Supporting Intervs. 15-25. EPA has offered two excuses for this refusal, neither of which bears any scrutiny. First, EPA has suggested that its Tailoring Rule, if valid, would reduce some of these burdens,[29] but that is irrelevant to the question whether EPA properly considered the burdens in the first place. Furthermore, EPA

[29] 74 Fed. Reg. 49,454, 49,629 (Sept. 28, 2009)("direct any comments relating to potential adverse economic impacts on small entities from PSD requirements for GHG emissions to the docket for the PSD tailoring rule").

has adopted and defended the LDVR and Tailoring Rule separately, and therefore each must stand on its own merit. Finally, EPA has made plain that, *even if* the Tailoring Rule is effective, the consequences of the LDVR will be dramatic: "EPA seeks to include as many GHG sources in the permitting programs at as close to the statutory thresholds as possible, and as quickly as possible." 75 Fed. Reg. at 31,548.

Second, EPA has argued that it need not consider the cost of the permitting requirements imposed by the LDVR because "analysis of such impacts would not aid EPA in determining what GHG standards to adopt in this rulemaking," LDVR Response to Comments ("RTC") 5-456—suggesting that no matter how high the costs of imposing new GHG permitting requirements on stationary sources, it would not affect EPA's interpretation of whether the LDVR, as proposed, was appropriate under the CAA. But this argument is flatly contradicted by EPA's own Tailoring Rule. The premise of that rule is that, given the consequences of stationary source permitting for GHGs, "Congress did not intend for [EPA] to follow [a] literal reading" of the Clean Air Act's provisions. 75 Fed. Reg. at 31,541.

Thus, EPA has stated that the same costs that Petitioners ask EPA to consider are indispensable to interpreting the scope of EPA's duty under the Clean Air Act. Indeed, EPA says in the Tailoring Rule that the "most important reason" justifying its counter-textual interpretation of "congressional intent" is the practical consequence of regulating stationary sources. *Id.* at 31,563. Consequently, EPA's failure to consider the most important consequences of the LDVR was arbitrary and capricious

in light of EPA's reliance on those consequences, and their attendant absurdities, to justify the Tailoring Rule. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

III. A Proper Interpretation of the Clean Air Act Would Avoid the Harm to the Economy Caused by GHG Permitting Requirements

The burdens imposed by GHG permitting requirements are not required by the Clean Air Act; a proper interpretation of the Clean Air Act would avoid them. As explained in petitioners' brief challenging EPA's PSD regulations, the text of the Clean Air Act makes plain that PSD permitting requirements are only triggered by pollutants for which a national ambient air quality standard (NAAQS) has been set, and no NAAQS has been set for greenhouse gases. *See* Grounds Arising After Br. 2-16, 28-47.

In short, the Clean Air 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 a NAAQS for a pollutant. 42 U.S.C § 7471. Thus, PSD applies to a facility that is located in an area attaining the NAAQS for a given pollutant and if it will have "major" emissions of *that* pollutant—*i.e.* will emit more than 100 or 250 tons per year, 42 U.S.C. § 7479(1). Thus, the Clean Air Act does not apply to a facility on the basis of its greenhouse gas emissions because no NAAQS has been set for greenhouse gases—even if a facility will emit "major" amounts of greenhouse gases, no area of the country is attaining a NAAQS for greenhouse gases.

EPA, in contrast, has asserted that PSD applies to any source, in any area of the country, that "will have "major emissions" of *any regulated air pollutant*. EPA has attempted to brush aside the statutory text, which limits the PSD program to areas "to which this part applies," 42 U.S.C. § 7475(a), by stating that it will require permits for sources in areas that are in attainment *for any* NAAQS pollutant, regardless of whether the source emits that pollutant. *Requirements for Preparation Adoption and Submittal of Implementation Plans Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52,676, 52,710-11 (Aug. 7, 1980). But this interpretation makes the "to which this part applies" limitation meaningless because ever since EPA's first PSD regulations, *every* area of the country has always been in attainment with *at least one* NAAQS. *See* 75 Fed. Reg. at 31,561.

EPA's interpretation also makes a mockery of the D.C. Circuit's seminal decision on the PSD program, *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). In that case, as in this, EPA defended regulations that applied PSD to facilities in every area of the country. The *Alabama Power* court vacated that area-unspecific requirement, stating that "[t]he plain meaning of the inclusion in [42 U.S.C. § 7475] of the words 'any area to which this part applies' is that Congress intended location to be the key determinant of the applicability of the PSD review requirements." 636 F.2d at 365. The Court should uphold its *Alabama Power* ruling in this case as well.

If any confirmation were needed that EPA's statutory interpretation is unreasonable, the dilemma of GHG permitting would provide it. EPA has repeatedly

acknowledged that the consequences of its interpretation of the Clean Air Act are absurd, 75 Fed. Reg. at 31,517; an interpretation cannot be both absurd and reasonable.

Furthermore, as Petitioners have amply demonstrated, there is no question that, in considering the LDVR, EPA had several available options that would have avoided the absurd permitting costs it ultimately imposed, while doing less violence to the statutory text than the Tailoring Rule. J. Opening Br. of Non-State Pets. and Supporting Intervenors at 11-32. For example, EPA could have delayed the LDVR, allowing NHTSA to go forward with its companion rule, reaping many of the same benefits, without imposing any burdens on stationary sources. *See* 75 Fed. Reg. at 25,327 (acknowledging that the rules largely duplicate each other). Although EPA argued that delay would be outweighed by the LDVR's "important GHG reductions as well as benefits to the automakers and to consumers," LDVR RTC 7-68, it was not possible for EPA to rationally consider such a calculus without considering the burden on stationary sources. Indeed, the President has recently reemphasized the importance of these burdens, mandating retroactive consideration of how EPA can make its regulations "less burdensome in achieving the regulatory objectives" at which they are aimed.[30]

---

[30] Exec. Order No. 13563, *Improving Regulation and Regulatory Review* (Jan. 18, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.

IV. The Court Can Avoid These Costs Without Endangering The LDVR

The Court has the power to vacate in part and remand the LDVR to eliminate the stationary source impacts, without vacating the LDVR as it applies to mobile sources. Thus, the Court can ensure that EPA achieves the goal of the LDVR, which is "to establish a National Program consisting of new standards for light-duty vehicles that will reduce greenhouse gas emissions and improve fuel economy," 75 Fed. Reg. at 25,324, while protecting the regulated public from unconsidered and debilitating stationary source regulation.

In particular, the Court should vacate the unlawful trigger of the LDVR on stationary sources. This Court has regularly exercised its power to vacate a rule as to a subset of regulated parties. *See United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1311 (D.C. Cir. 1980) (vacating OSHA rule as to industries where OSHA had not offered sufficient reasoning, while leaving it in place as to industries where the agency had offered sufficient reasoning). EPA could not object to this course—EPA has said that relief for stationary sources from the effects of the LDVR "is necessary," *see* 75 Fed. Reg. at 31,516-17, and its own Tailoring Rule asserts the Agency's authority to avoid what it claims are the statutory consequences of its mobile source rule. *See, e.g.,* 75 Fed. Reg. at 31,596-98. If EPA has that authority, surely this Court does as well.

As noted, EPA has persisted in strategic ambiguity regarding the appropriate rule in which to challenge its imposition of greenhouse gas stationary source

permitting requirements, stating that these rules "*taken together*, trigger PSD applicability for GHG sources on and after January 2, 2011." 75 Fed. Reg. at 53,895 (emphasis added). For this reason, Petitions for Review of these rules have been coordinated. If this Court ultimately concludes that the Tailoring Rule is the appropriate forum in which to challenge these stationary source permitting requirements, the Court should, in that rulemaking, provide a remedy vacating provisions of the Tailoring Rule that phase-in stationary source permitting of greenhouse gases: 40 C.F.R. §§ 51.166(b)(48)(iv)-(v) and 40 C.F.R. §§ 2.21(b)(49)(iv)-(v). *See Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1293-94 (D.C. Cir. 2000) (agency may not "use shell games to elude review"). Finally, the Court may wish to entertain further briefing on the appropriate remedy.

CONCLUSION

For these reasons, the Court should vacate the LDVR's trigger as it applies to stationary sources without vacating the rule as it applies to mobile sources.

Respectfully submitted,

Samuel B. Boxerman
Samuel B. Boxerman
R. Juge Gregg
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
sboxerman@sidley.com
For American Chemistry Council

Of Counsel
Leslie A. Hulse
Assistant General Counsel
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Blvd.
Arlington, VA 22209

June 10, 2011

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), as it contains 6,882 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and D.C. Circuit Rule 32(a)(1), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), as it has been prepared in a proportionally-spaced typeface using a Microsoft Word word-processing program in 14-point font size and plain, roman type style.

/s/ Samuel B. Boxerman

Dated: June 10, 2011

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 10th day of June 2011, served a copy of the foregoing documents electronically through the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Samuel B. Boxerman
Samuel B. Boxerman