Oral Argument Not Yet Scheduled

NO. 10-1167

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

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

AMERICAN CHEMISTRY COUNCIL,
***Petitioner*,**

v.

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

ON PETITION FOR REVIEW FROM THE ENVIRONMENTAL PROTECTION AGENCY

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

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

Attainment area	An area designated attainment or unclassifiable for a particular NAAQS pursuant to 42 U.S.C. § 7407(d)
EPA	Environmental Protection Agency
GHGs	Greenhouse gases
"Major" emissions	Per 42 U.S.C. § 7479(1), emissions of a pollutant that exceed either 100 tons per year for specified classes of sources or 250 tons per year for other sources
NAAQS	National ambient air quality standard(s)
NNSR	Nonattainment new source review
PSD	Prevention of Significant Deterioration
Situs requirement	The phrase "in any area to which this part applies" in 42 U.S.C. § 7475(a)

INTRODUCTION

Under Clean Air Act Section 165(a), a "major emitting facility," a source emitting major amounts of "any air pollutant," must get a PSD permit before construction "in any area to which this part [*i.e.*, Part C of Title I of the Act] applies." 42 U.S.C. §§ 7475(a), 7479(1). According to EPA, Section 165(a) would produce absurd results if read literally. Given the capacious definition of "air pollutant," 42 U.S.C. § 7602(g), sources emitting major amounts of *anything*—from industrial substances like sulfur oxide to common substances like GHGs and water vapor—would be "major emitting facilities." All, in EPA's view, would be in an "area to which this part applies" because every area of the country always has been attaining at least one NAAQS. All, therefore, would need preconstruction PSD permits, even small commercial and residential sources Congress did *not* want exposed to PSD permitting. Sources and permitting authorities would be overwhelmed, halting development nationwide for years.

EPA has never embraced that reading. While claiming to read Section 165(a)'s situs requirement literally, EPA has read the term "major emitting facility" nonliterally to include only sources with major emissions of "any *regulated* air pollutant." EPA Resp. 16–17. That construction avoided absurd results, but only until EPA regulated a common substance, as happened when EPA regulated GHGs last year.

To avoid absurd results again, EPA promulgated the Tailoring Rule, rewriting the unambiguous emissions thresholds that qualify sources as "major emitting facili-

ties." Such statutory revision, if ever permissible, is nevertheless unnecessary now because a more natural interpretation of Section 165(a)'s situs requirement avoids absurd results. Because the PSD program "applies" to an area only insofar as the area is attaining the NAAQS of a specific pollutant, the phrase "major emitting facility … in any area to which this part applies" reaches only facilities emitting major amounts of a pollutant in an area attaining *that pollutant's NAAQS*. Pet'rs Br. 30–34. Far from interpretive "alchem[y]," EPA Resp. 16, this pollutant-specific interpretation of the situs requirement reconciles text, structure, and purpose while avoiding absurd results.

EPA does not defend its interpretation as reasonable but defends it only as "compelled." *See* EPA Resp. 13, 51–55. It cannot be upheld, therefore, unless it is the only possible interpretation. *See Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002); *Prill v. NLRB*, 755 F.2d 941, 948 (D.C. Cir. 1985); *see also SEC v. Chenery Corp.*, 318 U.S. 80 (1943). It is not. At bottom, EPA's *Chevron*-step-one defense "confuses 'plain meaning' with literalism." *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1045 (D.C. Cir. 1997). Even if EPA's interpretation were literal (it isn't), at *Chevron* step one EPA cannot disregard statutory context, *see id.* at 1047, or absurd results, *see Alabama Power Co. v. Costle*, 636 F.2d 323, 360 n.89 (D.C. Cir. 1980), both of which show that EPA's interpretation is incompatible with the Act.

EPA errs in contending that Petitioners' challenges are untimely. The consolidated petitions were brought pursuant to Clean Air Act Section 307(b)(1), 42 U.S.C. § 7607(b), which allows petitions based on "grounds arising after" an initial review

period. Petitioners' claims are based on new grounds—the absurd results of expanding the PSD program to thousands of never-regulated sources, contrary to congressional intent. As confirmed by EPA's reworking of the PSD program in light of those absurd results, an unprecedented sea change has occurred, and judicial review of EPA's interpretation of Section 165(a) is not just appropriate, but essential.

ARGUMENT

I. THE PETITIONS FOR REVIEW ARE TIMELY.

No longstanding agency interpretation has created as much havoc as EPA's interpretation of Section 165(a). Situations like this one are why courts have authority to exercise judicial review after the initial review period. Unsurprisingly, this case satisfies every basis for belated judicial review. *See* Pet'rs Br. 24–28. Petitioners could not seek review earlier because, before the Tailpipe Rule, there were no absurd results and Petitioners' members were uninjured. *See* 42 U.S.C. § 7607(b)(1); *see also* Pet'rs Br. 18–24. Moreover, EPA reopened judicial review in recent rulemakings by overhauling the PSD program to deal with its interpretation's absurd results.

Petitioners are not barred from raising objections that could have been (or even were) raised during the original 1980 rulemaking. *See* EPA Resp. 34–39. So long as a petition for review is timely—particularly when it is timely because of ripeness or reopener—this Court has recognized that the parties may raise all relevant arguments, including those that may have been available in prior rulemaking proceedings. *See Si-*

erra Club v. EPA, 551 F.3d 1019, 1027 (D.C. Cir. 2008) (considering an argument "under *Chevron* step one" even though it could have been raised in original rulemaking); *see also* Pet'rs Br. 19–20 (explaining why the lawfulness of EPA's interpretation may be considered if the Court exercises jurisdiction on account of absurd results).

A. EPA Constructively Reopened Its Interpretation.

EPA argues that it has not constructively reopened its interpretation of Section 165(a) because it has not "altered, in any way, the basic regulatory framework governing which pollutants are subject to PSD." EPA Resp. 51. Yet, by acknowledging that an agency constructively reopens an interpretation when "revision of accompanying regulations 'significantly alters the stakes of judicial review' as the result of a change that 'could not have been reasonably anticipated,'" *id.* at 49 (quoting *NRDC v. EPA*, 571 F.3d 1245, 1266 (D.C. Cir. 2009)), EPA disproves its own argument. Constructive reopener turns on new circumstances and altered regulations. Taken together, EPA's recent actions radically expanded and reshaped the PSD program: after promulgating the Tailpipe Rule and exposing thousands of sources to PSD permitting, EPA revised "major" emissions thresholds, revoked state implementation plans, and took (and promised to consider) other actions to compensate for the absurd results of its interpretation of Section 165(a). *See* Pet'rs Br. 27. By leaving its absurdity-creating interpretation unaltered, EPA "adhere[d] to the *status quo ante* under changed circumstances" and thus reopened the interpretation. *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1214 (D.C. Cir. 1996).

EPA complains that, if this case presents a regulatory "sea change" that re-opens its interpretation, there is a sea change "every time EPA applies PSD to another pollutant." EPA Resp. 50 (citing *NRDC*, 571 F.3d at 1266). On the contrary, few (if any) other pollutants could expand the scope of a regulatory program the way GHGs expand the PSD program, which is precisely why EPA took unprecedented steps to revise the program for GHG-emitting sources. If this case does not present a sea change, none does. By any measure, the full complement of EPA's GHG rulemakings reopened EPA's interpretation to judicial review.

B. The Petitions Are Based On New Grounds—Absurd Results.

In arguing that the consolidated petitions are based on stale grounds, EPA mischaracterizes Petitioners' case. EPA asserts that it "is based on purely legal arguments that were equally available … during the normal judicial review periods of the 1978, 1980 and 2002 rules." EPA Resp. 37; *see id.* at 40 (similar). While Petitioners do argue that EPA's interpretation is unlawful because it contradicts the plain meaning of the Act, Petitioners also argue that EPA's interpretation is unlawful at both *Chevron* steps because of the absurd results it produced after the Tailpipe Rule.

EPA contends that "applying PSD to greenhouse gases" cannot be absurd, EPA Resp. 52 & n.26, but Petitioners' challenge is not "predicated on the regulation of a newly-designated pollutant," *id.* at 37. It is based on EPA's accurate characterization of the absurd results. *See* Pet'rs Br. 2–3, 42–43. Namely, requiring 81,000 PSD permits annually, including for small residential and commercial sources, would crip-

ple permitting authorities and impose "undue costs" on sources. *Final Tailoring Rule*, 75 Fed. Reg. 31,514, 31,547 (June 3, 2010) (J.A.__).

Accounting for absurd results is not "fundamentally inconsistent" with EPA's task. EPA Resp. 39. Even when an agency believes an interpretation is literal and is, therefore, compelled at *Chevron* step one (as EPA believes here), it cannot ignore absurd results. *See Alabama Power*, 636 F.2d at 360 & n.89; *see also Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994) ("[W]here a literal reading of a statutory term would lead to absurd results, the term simply has no plain meaning … and is the proper subject of construction by the EPA and the courts.") (internal quotation marks omitted). The absurd results revealed by EPA's recent actions are relevant to both *Chevron* steps and thus support the consolidated petitions.

C. Petitioners' Members' Claims Just Ripened.

EPA argues that Petitioners' claims ripened before members were even "subject to the PSD program" because "purely legal" claims like Petitioners' "are usually ripe when the regulations presenting them are promulgated." EPA Resp. 42, 43. Intervenors amplify that argument, contending that one commenter in the 1980 rulemaking raised similar objections. Intervenors Br. 8–9. That misses the point. "Ripeness, while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that an injury in fact be certainly impending." *Nat'l Treasury Employees Union v. U.S.*, 101 F.3d 1423, 1427 (D.C. Cir. 1996). During an initial review period, although purely legal claims may be justiciable

and thus *prudentially* ripe, a party without immediate or threatened injury lacks a *constitutionally* ripe claim. *See* Pet'rs Br. 21–22. Petitioners' evidence, *undisputed by EPA*, shows that Petitioners' members' injury just occurred. *See* Addendum pp. 29–44. Their claims, therefore, just ripened, and their arguments regarding the proper interpretation of Section 165(a) may now be raised, whether or not some version of those arguments could have been (or even were) raised previously in another context.[1]

EPA tries to shift the focus off Petitioners' members, arguing that Petitioners cannot proceed because the "regulated community" had, but never litigated, a ripe challenge to EPA's interpretation of Section 165(a) in 1980. EPA Resp. 43–44. Section 307(b)(1) bears no indication that Congress intended to bar newly ripened claims simply because someone in the "regulated community" *failed* to litigate as soon as its claim ripened. Contrary to this Court's precedents, Section 307(b)(1) never would be available for newly ripened claims if a petitioner had to prove that none of the "regulated community" had a ripe claim in the past. Ranging far beyond the immediate case or controversy to prove a negative, such a burden of proof is impossible for a private petitioner to carry.

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[1] Intervenors claim that a petition seeking rehearing of the June 1979 per curiam *Alabama Power* decision "argued against EPA's reading of the Act's PSD trigger." Intervenors Br. 9. Intervenors misread that petition. EPA did not adopt its pollutant-indifferent interpretation until *after* the December 1979 final *Alabama Power* decision. The rehearing petition addressed two issues actually decided in *Alabama Power*: what "subject to regulation" means in Section 165(a)(4), and whether Section 166 prevents EPA from including some pollutants in the PSD program without rulemaking.

EPA fears that following this Court's precedents and allowing judicial review of newly ripened claims "would have far-reaching implications for the finality of any agency action pursuant to the Clean Air Act." EPA Resp. 44. *Accord* Intervenors Br. 10 n.1. The fear is overwrought. After one party litigates a claim, other doctrines limit future challenges. *See Pub. Citizen v. NRC*, 901 F.2d 147, 153 n.3 (D.C. Cir. 1990) (noting that, when new judicial review windows open, there may be "some other bar to the challenge, such as *res judicata*, collateral estoppel, or failure to exhaust administrative remedies, and *stare decisis* may make such a challenge unlikely to succeed").

This case is extraordinary. For years, EPA disclaimed authority to regulate GHGs. Like thousands of sources newly subject to PSD permitting because they emit GHGs, a commonly emitted pollutant, Petitioners' members could not have sought judicial review sooner. They should not be penalized because members of "the regulated community"—sources with major emissions of rarely emitted noncriteria pollutants—theoretically could have brought a similar case in the past.

Unsurprisingly, EPA has not shown that there was a ripe challenge earlier. Not every source to trigger PSD permitting has had standing to argue that EPA's interpretation of the situs requirement is overbroad. The argument can be raised only by a source that triggers PSD permitting under EPA's pollutant-indifferent interpretation *but not under Petitioners' pollutant-specific interpretation*. In its only attempt to prove a prior petitioner's standing, EPA notes that sources in *Alabama Power* argued that, *after getting PSD permits*, they should not have to adopt the best available control technology for

mercury, a noncriteria pollutant. *See* EPA Resp. 43. Because those sources emitted mercury in only "trace" amounts, however, 636 F.2d at 361 n.90, they plainly were not triggering PSD permitting solely because of mercury emissions and thus plainly had no standing to argue for the pollutant-specific interpretation.

Intervenors quote a commenter in the 1980 PSD rulemaking who cited the example of a source triggering PSD permitting solely because of emissions of a noncriteria pollutant (hydrogen sulfide). *See* Intervenors Br. 8. The commenter was clearly discussing a hypothetical, as revealed by language Intervenors omit. *See* Comments of Chem. Mfrs. Ass'n, EPA Docket No. A-79-35, III-B-317, at 18 (filed Feb. 29, 1980) (J.A.__). A comment criticizing "EPA's hypothetical situation," *id.*, does not establish that any source actually had a ripe challenge to EPA's interpretation and thus does not substantiate EPA's and Intervenors' argument that an unlitigated claim in 1980 can somehow bar Petitioners from litigating their newly ripened claims.

D. EPA Expressly Reopened Its Interpretation.

Ignoring its concession that it reopened its pollutant-indifferent interpretation of Section 165(a) in the Tailoring Rule rulemaking, *see* EPA Mot. to Consolidate and Hold in Abeyance, Case No. 11-1037 *et al.*, at 19 (D.C. Cir. Apr. 25, 2011), EPA argues that Petitioners simply filed nonresponsive comments that goaded the Agency into defending its interpretation on the merits. *See* EPA Resp. 48–49. As this Court recently reaffirmed, unsolicited comments do not, by themselves, reopen an interpretation to judicial review. *See* EPA Rule 28(j) Letter (July 19, 2011) (citing *Medical Waste*

Inst., et al. v. EPA, 2011 WL 2507842 (D.C. Cir. June 24, 2011)). But that rule does not fit this case.

Contrary to EPA's characterization, Petitioners' comments responsively answered EPA's solicitation for comments addressing "*how* to phase-in the application of the PSD program to greenhouse gases." EPA Resp. 47. Under the pollutant-specific interpretation that Petitioners' proposed, although a stationary source does not trigger PSD permitting because of GHG emissions, a source that otherwise triggers PSD permitting has to comply with the PSD program's control requirement and adopt the best available control technology for GHG emissions. *See* 42 U.S.C. § 7475(a)(4). In this respect, the pollutant-specific interpretation achieves almost exactly the same results as the first phase of the Tailoring Rule, but achieves them *indefinitely* (because of its statutory underpinnings) whereas the Tailoring Rule implements them *temporarily* (because it is an exercise of administrative discretion). *See* Pet'rs Br. 44–45. Petitioners' comments offered EPA a legally sound basis for achieving its goals and thus were responsive. *See Proposed Tailoring Rule*, 74 Fed. Reg. 55,292, 55,327 (Oct. 27, 2009) (soliciting comments on the first phase of the Tailoring Rule and "on other potential variations on our proposal that commenters believe could address the administrative concerns in more effective ways.") (J.A.__).

After deciding to reject comments the *proposed* Tailoring Rule sought, EPA inserted disclaimers into the preamble of the *final* Tailoring Rule, stating that the Agency was not reopening its interpretation of Section 165(a). *See* EPA Resp. 48; Intervenors

Br. 11. EPA cannot un-ask for responsive comments. EPA's original solicitations speak for themselves. *See, e.g.*, *Proposed Tailoring Rule*, 74 Fed. Reg. at 55,320 ("We solicit comment on the permit streamlining approaches discussed in section VII.A of this preamble and *also request information and comment on any other tools or options that could address or reduce the administrative burden of implementing PSD and title V for major GHG sources and reduce the burdens on the sources.*") (emphasis added) (J.A.__).

II. EPA'S INTERPRETATION OF SECTION 165(a) VIOLATES THE CLEAN AIR ACT AND CREATES AVOIDABLE ABSURD RESULTS.

The pollutant-indifferent interpretation of the situs requirement in Section 165(a), far from being "compelled," EPA Resp. 53, is foreclosed. The Act's text, structure, and purpose, plus the recent absurd results, support a pollutant-specific interpretation, linking the pollutants a source emits in major amounts with the pollutants whose NAAQS are being attained locally.

A. EPA Does Not And Cannot Interpret Section 165(a) Literally.

As incorporated in implementation plans, Section 165(a) requires PSD permits before construction of "major emitting facilities" located "in any area to which this part applies." 42 U.S.C. § 7475(a). EPA claims that its pollutant-indifferent interpretation is the "plain" or "literal" result of "putting the two core components" of Section 165(a) "together," whereas Petitioners' pollutant-specific interpretation is nonliteral "alchem[y]." EPA Resp. at 7 (quoting *1980 PSD Rules*, 45 Fed. Reg. 52,676, 52,711 (Aug. 7. 1980)); *id.* at 14–16. But because the "literal language of a provision

taken out of context cannot provide conclusive proof of congressional intent" at *Chevron* step one, *Bell Atlantic*, 131 F.3d at 1047, EPA also claims that *Alabama Power* requires its interpretation and forbids Petitioners', *see* EPA Resp. 18–20. In one sentence, the *Alabama Power* Court opined that a source may need a PSD permit "even though the air pollutant, emissions of which caused the source to be classified as a 'major emitting facility,' may not be a pollutant for which NAAQS have been promulgated or even one that is otherwise regulated under the Act," 636 F.2d at 352.

The *Alabama Power* sentence is dictum. *See* Pet'rs Br. 39. EPA does not disagree, but contends that focusing on the sentence's nonbinding effect "miss[es] the point" that it reflects the *Alabama Power* Court's understanding of the Act's literal meaning. EPA Resp. 20. It is EPA who misses the point: judicial dictum never binds agencies. "Before a judicial construction of a statute … may trump an agency's, the court must hold that the statute unambiguously requires the court's construction." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005).

EPA cannot credibly argue that *Alabama Power*'s dictum requires any interpretation—literal or not—because EPA admits it has never fully implemented the dictum. *See* EPA Resp. 16–17, 19 n.8, 32–33. EPA has never required PSD permits for major sources of unregulated pollutants, as the dictum might suggest is required, because EPA has never treated such sources as "major emitting facilities." Although Section 169(1) defines "major emitting facility" as a source with major emissions of "any air pollutant," 42 U.S.C. § 7479(1), EPA includes only sources with major emissions of

"any *regulated* air pollutant." EPA Resp. 16–17. EPA's nonliteral interpretation of Section 169(1), which deviates from *Alabama Power*'s dictum, belies EPA's contention that the Agency must adhere to its supposedly literal interpretation of the phrase "in any area to which this part applies" or else impermissibly deviate from the dictum.

In fact, fully implementing *Alabama Power*'s dictum with EPA's pollutant-indifferent interpretation would have produced absurd results thirty years ago. Sources emitting major amounts of common, then-unregulated pollutants (like GHGs) would have been "major emitting facilities." All would have been in areas attaining a NAAQS, since every area was attaining at least one. All, therefore, would have needed preconstruction PSD permits from the outset; permitting authorities would have been immediately overwhelmed processing needless applications; the economy would have ground to a halt. *See* pp. 1, 5–6, *supra*; Pet'rs Br. 42–43.

EPA chose to avoid those absurd results by adopting a nonliteral interpretation of the term "major emitting facility" and rejecting *Alabama Power*'s dictum.[2] Now that those absurd results have surfaced, EPA cannot cling to its interpretation of the phrase "in any area to which this part applies" on the ground that it is literal and compelled by *Alabama Power*'s dictum. EPA cannot have it both ways.

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[2] EPA claims that it revised the term to avoid the hassle of issuing "empty" PSD permits to sources emitting no regulated pollutants. EPA Resp. 32–33. That explanation rings hollow because EPA's revision sweeps more broadly. By excluding *all* sources with major emissions of only unregulated pollutants, EPA excludes sources emitting lesser amounts of regulated pollutants, to which PSD control requirements could apply.

B. A Pollutant-Specific Interpretation Is More Natural.

Without adding words or changing the statute's plain meaning, the absurd results of EPA's reading of Section 165(a) can be avoided. *See* Pet'rs Br. 30–36, 43–45. Traditional tools of statutory construction show that the phrase "major emitting facility … in any area to which this part applies" necessarily and reasonably means any facility emitting major amounts of a pollutant whose NAAQS is being attained locally.

1. Congress Used The Phrase "In Any Area To Which This Part Applies" To Refer To Pollutant-Specific Areas.

Other Clean Air Act provisions use the phrase "in any area to which this part applies" to refer to pollutant-specific areas. *See* Pet'rs Br. 31–32. Section 163(b)(4), for instance, instructs EPA to set the "maximum allowable concentration of any air pollutant in any area to which this part applies" for the primary or secondary NAAQS "for such pollutant." 42 U.S.C. § 7473(b)(4). Since only criteria pollutants have NAAQS, Section 163(b)(4) makes sense only if the entire phrase "any air pollutant in any area to which this part applies" is limited to criteria pollutants.

EPA tries to distinguish Section 163(b)(4), noting that it uses the phrase "in any area to which this part applies" to modify the term "any air pollutant," rather than "major emitting facility," and that it later refers to "such pollutant[s]" for which NAAQS have been issued. *See* EPA Resp. 30–31. But a "basic canon of statutory construction [is] that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992); *see Atl. Cleaners & Dyers, Inc. v.*

U.S., 286 U.S. 427, 433 (1932). Because Congress used the phrase "in any area to which this part applies" as a pollutant-specific limitation in Section 163(b)(4), Congress presumably meant the same in Section 165(a), particularly because the phrase modifies related terms in both sections ("major emitting facility" and "any air pollutant"). Moreover, Section 165(a)(3)(A) shows that the term "such pollutant" is irrelevant; that section lacks the term but makes sense only if the entire phrase "any air pollutant in any area to which this part applies" is limited to location-specific criteria pollutants. *See* 42 U.S.C. § 7475(a)(3)(A).

2. The NNSR And PSD Permitting Triggers Are Equally Pollutant-Specific.

EPA's pollutant-specific interpretation of the NNSR permitting trigger confirms that Congress intended for the PSD permitting trigger to be pollutant-specific as well. Both permitting triggers are similar. Section 165(a) requires a PSD permit for a "major emitting facility … in any area to which this part applies," 42 U.S.C. § 7675(a); Section 172(c)(5) requires an NNSR permit for "major stationary sources anywhere in the nonattainment area," *id.* § 7502(c)(5). Both provisions apply to "major" sources. Both have a situs requirement.

Yet, EPA has adopted a pollutant-specific interpretation for the NNSR permitting trigger but not for the PSD permitting trigger. EPA's explanation is that Section 171(2) of Part D defines the term "nonattainment area" as "for any air pollutant, an area which is designated 'nonattainment' with respect to that pollutant within the

meaning of section 7407(d) [*i.e.*, Section 107(d) of the Act]." 42 U.S.C. § 7501(2). Contending that the PSD program lacks a similar definition of the phrase "in any area to which this part applies," EPA argues that it must adopt a pollutant-specific situs requirement for NNSR permitting but not for PSD permitting. *See* EPA Resp. 25–28

The Act defines the two situs requirements in the same way, however—in fact, by reference to the same statutory provision, Section 107(d). The NNSR permitting situs requirement depends on Section 171(2), which (as quoted above) expressly incorporates Section 107(d). Likewise, the PSD permitting situs requirement depends on Section 161, *see* EPA Resp. 15, which also expressly incorporates Section 107(d). *See* 42 U.S.C. § 7471 (providing that the PSD program applies "in each region (or portion thereof) designated pursuant to [Section 107(d)] as attainment"). Section 107(d)'s definitions of "attainment" and "nonattainment" areas are *inherently* pollutant-specific: an "attainment" area is one "that meets the national primary or secondary ambient air quality standard *for the pollutant*," and a "nonattainment" area is one "that does not meet … the national primary or secondary ambient air quality standard *for the pollutant*." 42 U.S.C. § 7407 (emphases added); *see Alabama Power*, 636 F.2d at 350 (under Section 107, "classification of areas is pollutant-specific"). Far from treating the NNSR and PSD permitting triggers *differently*, the Act treats them *identically*. Because Section 107(d) drives EPA's pollutant-specific interpretation of the NNSR permitting trigger, it should drive interpretation of the PSD permitting trigger as well.

3. Purpose, Structure, And Context Support Petitioners.

EPA argues that the pollutant-specific interpretation, by requiring PSD permits only for major sources of local criteria pollutants, is incompatible with the PSD program's "broader purpose" of protecting the public. EPA Resp. 27. EPA ignores other purposes, like promoting economic growth, 42 U.S.C. § 7470(3), that clearly support limiting—not expanding—the PSD program. Congress designed the PSD program to complement and reinforce the location-specific NAAQS program. *See* Pet'rs Br. 30–34. To require PSD permits for sources that emit no criteria pollutants and thus impact no NAAQS would not advance that purpose.

Nor is it "illogical" to limit PSD permitting to major sources of criteria pollutants while requiring them to adopt best available control technology for more pollutants—those subject to regulation. EPA Resp. 20–23. Congress reasonably determined that any facility whose major emissions of criteria pollutants trigger PSD permitting (by threatening to make an attainment area a nonattainment area) ought to address all of its emissions before construction when it is making substantial economic investments and can make adjustments more cost-efficiently *Cf. Alabama Power*, 636 F.2d at 353 (the point of the PSD permitting trigger is to identify "facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for" air pollution).

4. A Pollutant-Specific Interpretation Avoids Absurd Results.

EPA does not dispute that the pollutant-specific interpretation (like the first phase of the Tailoring Rule) requires no new PSD permits and thus avoids absurd results. EPA's Amicus contends otherwise, however. *See* Amicus Br. 17–21. The Amicus argues that, after regulating GHG emissions from automobiles, EPA *should* list GHGs on its air pollutant list (42 U.S.C. § 7408(a)(1)), then *should* issue air quality criteria for GHGs (*id.* § 7408(a)(2)), then *should* adopt NAAQS for GHGs (*id.* § 7409(a), (b)), then *should* designate each area of the country as in attainment with those NAAQS (*id.* § 7407)—at which point, all major sources of GHGs will need pre-construction PSD permits under the pollutant-specific interpretation.

Suffice it to say, the Amicus (like EPA and Petitioners) cannot see into the future. Given the paucity of *regulated* pollutants that are *criteria* pollutants, the Amicus's highly conditional vision is hardly certain, as the Amicus practically concedes. *See* Amicus Br. 19 n.8 (acknowledging that it cannot predict the level EPA would set for a hypothetical GHG NAAQS and thus cannot predict which areas will be designated attainment). Even if the Amicus's vision were inevitable, it would take many years for the entire process to play out and for every area of the country to be designated in attainment with a GHG NAAQS. In the meantime, the pollutant-specific interpretation of Section 165(a) avoids the absurd results of EPA's pollutant-indifferent interpretation—much as EPA's nonliteral interpretation of the term "major emitting facility" in Section 169(1) avoided the absurd results for three decades.

C. EPA's Interpretation Is Inconsistent With The Act.

1. EPA's Reliance On Regulatory Interpretations Is Misplaced.

EPA argues that its regulatory construction of Section 169(1)'s definition of "major emitting facility" as a source emitting major amounts of any *regulated* air pollutant compels its pollutant-indifferent interpretation of Section 165(a)'s situs requirement. The pollutant-specific interpretation, EPA objects, would have the effect of limiting that definition further, including only sources with major emissions of any *local attainment* pollutant. *See* EPA Resp. 17. But at *Chevron* step one, EPA's atextual interpretation of Section 169(1) is unavailing because it is not a reason for concluding that "*Congress* has directly spoken to" the meaning of the situs requirement. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984) (emphasis added).

2. EPA's Interpretation Fails The Anti-Superfluity Canon.

It is a basic principle of statutory construction that all words must be given meaning and effect. Yet, because every area of the country has always been in attainment with at least one NAAQS, EPA's interpretation of Section 165(a) reads the situs requirement out of the statute. *See* Pet'rs Resp. 35–36. EPA does not dispute that, under its interpretation, Congress could have dropped the phrase "in any area to which this part applies" with no real-world effect. *See* EPA Resp. 17–18.[3]

[3] Citing a 1974 report showing some areas in nonattainment for all then-current NAAQS, Intervenors claim that Congress must have believed the same in 1977 when it enacted Section 165(a). Intervenors Br. 23. That claim is contradicted by legislative

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EPA's only response is that the phrase "serves to clarify that the PSD program does not apply to the extent that the NNSR program applies." *See* EPA Resp. 18. But that response is inconsistent with how EPA actually applies the two programs' permitting triggers. Indeed, Section 165(a)'s situs requirement could distinguish the PSD and NNSR permitting triggers only if EPA read it pollutant-specifically. Consider a source that emits several pollutants but that is deemed "major" only for emissions of local nonattainment pollutants. According to the pollutant-specific interpretation, that source triggers only NNSR permitting because it has no major emissions of local attainment pollutants. According to EPA's pollutant-indifferent interpretation, however, that source triggers *both* PSD *and* NNSR permitting. *See 1980 PSD Rules*, 45 Fed. Reg. at 52,711–712 (example #2) (J.A.__).[4]

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reports, however, which show that Congress was aware in 1977 that all areas of the country were then in attainment with at least one NAAQS. *See* Staff of S. Subcomm. on Environmental Pollution of the S. Comm. on Environment & Public Works, 95th Cong., A Section-by-Section Analysis of S. 252 and S. 253 Clean Air Act Amendments And S.2533, *as reprinted in* Arnold & Porter Legislative History at 1 (Comm. Print 1977) (observing that "sufficient information already exists to implement" the Act's area designation requirement and that "[i]n the absence of information to the contrary, a region would be assumed 'clean' and placed automatically in the category which subjects the region to provisions preventing significant deterioration of air quality").

[4] For a source that triggers both PSD and NNSR permitting, EPA holds that the PSD program's control requirements apply to all regulated pollutants the source emits *except local nonattainment pollutants*, to which the NNSR program's more stringent control requirements apply (if emitted in major amounts—local nonattainment pollutants emitted in less-than-major amounts are uncontrolled). *See 1980 PSD Rules*, 45 Fed. Reg. at 52,711–712 (J.A.__). In 1980, EPA stated that that exception was "implicit in *Alabama Power* and the structure of the Act." *Id.* at 52,711 (J.A.__). EPA did not cite

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Intervenors argue that the phrase "in any area to which this part applies" clarifies that PSD permitting is required, not just in "some" areas, but in "all" areas. Intervenors Br. 23–24. There is, however, no ambiguity or uncertainty the phrase helps to clarify; in fact, without the phrase's reference to "area[s]," Section 165(a) would doubtlessly require preconstruction permits for all major emitting facilities *regardless of their location*. Nor is there any reason to hold that the phrase serves only to clarify, with no substantive effect, when there exists an alternative interpretation—the pollutant-specific interpretation—that is both reasonable and non-superfluous.

3. EPA's Interpretation Is Contrary To *Alabama Power*.

Construing Section 165(a), *Alabama Power* held that a facility emitting a pollutant in an area that is not attaining that pollutant's NAAQS was not "in an[ ] area to which this part applies" and thus could not be subject to PSD permitting simply because its emissions impact a neighboring area attaining that pollutant's NAAQS. 636 F.2d at 364–65. "Congress intended location to be the key determinant of the applicability of the PSD review requirements." *Id.* at 365. EPA's pollutant-indifferent interpretation of Section 165(a) nullifies that holding: EPA's view that a source can trigger PSD permitting even if it does not impact a local NAAQS would have rendered irrelevant the very question decided in *Alabama Power*—whether a source trig-

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Section 165(a)'s situs requirement, nor could it have. The situs requirement is a limitation on *which sources* trigger PSD permitting (Section 165(a)), not a limitation on *which pollutants* are subject to the PSD program's control requirements (Section 165(a)(4)).

gers PSD permitting because its emissions impact a NAAQS being attained in another area. *See* Pet'rs Br. 34–36. EPA tries to twist *Alabama Power* to support its interpretation, claiming that *Alabama Power* read the Act to "unambiguously require[] application of PSD to *all* major emitting facilities constructed in attainment areas." EPA Resp. 20 n.9 (citing 636 F.2d at 368). Yet, EPA fails to acknowledge that the holding of *Alabama Power* was necessarily premised on an understanding of Section 165(a)'s situs requirement as pollutant-specific.

4. EPA's Interpretation Produces Absurd Results.

EPA's interpretation cannot be accepted because it produces absurd results. *See* Pet'rs Br. 41–46. EPA does not argue otherwise or attempt to justify its reading as "reasonable" despite its effects. This simply confirms that, if the pollutant-indifferent interpretation is not "compelled" by the statute, it must be rejected.

EPA's Amicus claims that EPA never actually concluded that its interpretation of the PSD permitting trigger produces absurd results. *See* Amicus Br. 8–13. EPA's own words belie that contention. *See, e.g.*, *Final Tailoring Rule*, 75 Fed. Reg. at 31,547 ("Those insurmountable administrative burdens—along with the undue costs to sources—must be considered 'absurd results' that would undermine congressional purpose for the PSD and title V programs.") (J.A.__); *id.* at 31,554 (EPA's "current interpretation of the PSD applicability provision" produces results "contrary to congressional intent for the PSD program") (J.A.__); *Proposed Tailoring Rule*, 74 Fed. Reg. at 55,310 (J.A.__).

Had EPA not drawn the conclusion itself, *Alabama Power* makes clear that an interpretation of the PSD permitting trigger that annually requires 81,000 PSD permit applications—including from small residential and commercial sources—absurdly distorts the PSD program. *See* 636 F.2d at 353–56; *see also* Pet'rs Br. 42–43. The Amicus's "alternative" contention that the Court can pretend the absurdities do not exist because the Court can uphold the Tailoring Rule under the administrative necessity doctrine (and thus never address whether the Tailoring Rule is justified under the absurd-results doctrine) is convoluted and utterly irrelevant. *See* Amicus Br. 13–16. The Tailoring Rule's validity has no bearing on this case, which directly challenges only EPA's absurdity-creating interpretation of Section 165(a). *See* Pet'rs Br. 45–47.

III. THE COURT SHOULD PROCEED IN THIS CASE, NOT WAIT FOR THE CASE CHALLENGING THE TAILORING RULE OR FOR EPA TO ACT ON PETITIONERS' YEAR-OLD ADMINISTRATIVE PETITION.

As a fallback, EPA urges the Court not to exercise jurisdiction, asking it either to consider the merits of Petitioners' challenge in the case challenging the Tailoring Rule (if the Court agrees that EPA reopened its interpretation) or to await EPA's decision on Petitioners' pending administrative petitions for reconsideration (if the Court agrees that the petitions are based on new grounds—absurd results or newly ripened claims). *See* EPA Resp. 51–55. The Court should decline both requests.

A. A Grounds-Arising-After Petition Is Appropriate When An Agency Reopens An Old Interpretation.

Because Petitioners argue that the Tailoring Rule is the rulemaking in which EPA explicitly reopened its interpretation of Section 165(a) and which is one of several rulemakings that constructively reopened the interpretation, EPA argues that Petitioners *must* bring their challenge to EPA's interpretation in the case challenging the Tailoring Rule. *See* EPA Resp. 51–52. Nothing in law or logic requires that result. Never has a petitioner with a grounds-arising-after petition been forbidden to argue reopening. *Cf. Nat'l Mining Ass'n v. Dept. of Interior*, 70 F.3d 1345, 1350–52 (D.C. Cir. 1995) (considering reopener and grounds-arising-after arguments as potential bases for exercising jurisdiction).

EPA contends that, in general, the record of a recent rulemaking may contain relevant findings and arguments. *See* EPA Resp. 52–53. But there can be no guarantee it will, particularly in constructive reopener cases. The old record, however, always will be sufficient for judicial review because it always will be focused on a rule's original justifications. Moreover, where, as here, an agency reopens an old interpretation across multiple rulemakings, EPA's approach yields indeterminate and inefficient results. Out of caution, petitioners will file petitions to review each one.

The better approach is to hold that a reopener allows judicial review of an old interpretation both in the context of a new rulemaking and, where a statute allows it,

in a grounds-arising-after petition directly challenging the old interpretation.[5] Thus, under Section 307(b)(1), reopeners are "grounds arising after" an initial review period on which a petition for review can be based. 42 U.S.C. § 7607(b)(1).

B. The Court Should Not Wait For EPA To Act On Petitioners' Administrative Petitions For Reconsideration.

EPA asks the Court not to reach the merits of the petitions for review, in order to give the Agency a chance to act on administrative reconsideration petitions Petitioners filed *over one year ago*. *See* EPA Resp. 53–55. EPA does not address the many reasons why that would be inappropriate. *See* Pet'rs Br. 28–29. If EPA were serious about considering those petitions, it would have done so well before now.

Intervenors argue that Section 307(d)(7)(B) requires that EPA *must* act on Petitioners' reconsideration petitions before the Court may exercise jurisdiction in light of "new grounds" under Section 307(b). *See* Intervenors Resp. 15–17. Section 307(d)(7)(B) requires that "an objection to a rule" be raised "during the period for public comment" before the same objection can be "raised during judicial review"; the section also provides a mechanism for some objections, those "of central relevance to the outcome of the rule," to be raised "after the period of public comment (but within the time specific for judicial review)." 42 U.S.C. § 7607(d)(7)(B). Interve-

[5] Not all statutes authorize grounds-arising-after petitions. *See, e.g.*, *Kennecott*, 88 F.3d at 1213 (considering reopener arguments in a challenge to a recent rule when CERCLA's judicial review provision, 42 U.S.C. § 9613(a), does not authorize grounds-arising-after petitions).

nors ignore Congress's careful word choice. "New grounds" and "objections" are different things. Indeed, if they were identical, there would be no need for Section 307(b)(1) to authorize filing of petitions for review *in court* within sixty days after new grounds arise.

In any event, Intervenors themselves argue that Petitioners' *objection*—the lawfulness of EPA's interpretation of Section 165(a)'s situs requirement—was raised in comments on the 1980 PSD Rules. *See* Intervenors Br. 8. And EPA exhaustively considered Petitioners' *new grounds*—absurd results—in the Tailoring Rule rulemaking. *See* p. 22, *supra*. No more rulemakings are needed.

IV. REMAND IS UNWARRANTED.

EPA argues that, if its interpretation of the PSD permitting trigger is not "compelled," the case should be remanded for the Agency to "use its judgment to interpret the statute." EPA Resp. 53–55. Yet, as EPA admits, in the Tailoring Rule rulemaking it *already* decided that its interpretation is reasonable. *See* EPA Resp. 52 ("even if [its] long-established regulatory position were not justifiable based on Chevron Step 1 … then we believe this position, that the statutory provisions apply PSD to GHG sources in general, was justified under Chevron Step 2") (quoting *Final Tailoring Rule*, 75 Fed. Reg. at 31,558); *see also Final Tailoring Rule*, 75 Fed. Reg. at 31,559 (finding EPA's overall approach to be reasonable) (J.A.__). The Court should not reward EPA's strategic decision to mount only a partial defense here.

Moreover, after the Court holds that EPA's interpretation is not compelled, a remand allowing EPA to readopt its interpretation is needless, as EPA cannot lawfully adopt an interpretation that that creates absurd results, let alone one that is foreclosed by the Clean Air Act, when a reasonable alternative interpretation—the pollutant-specific interpretation—avoids the absurd results. *See, e.g.*, *NRDC v. EPA*, Case No. 10-1056 (D.C. Cir. July 1, 2011), at slip op. 18 (declining to remand for agency to re-consider an interpretation "[b]ecause it violates the statute's plain language and our precedent"). The principal case on which EPA relies, *Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 494 F.3d 1066 (D.C. Cir. 2007), is inapposite. There, the petitioners *but not the agency* contended that the agency's reading produced absurd results. *See id.* at 1075–77. Here, by contrast, EPA has not only developed a record substantiating its interpretation's absurd results, it has adopted a rule to ameliorate them—the Tailoring Rule. Nothing would be gained by allowing EPA a further opportunity to justify an invalid interpretation.

CONCLUSION

The Court should deny EPA's motion to dismiss and should vacate EPA's interpretation of the PSD permitting trigger in the four rulemakings at issue in this case. EPA must interpret the Act to implement the situs requirement in Section 165(a) consistent with statutory text, structure, and purpose and with *Alabama Power*. Accordingly, PSD permitting must be linked to the impact of construction or modification on a NAAQS for which the area is designated attainment.

July 21, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2011, I caused to be electronically filed the foregoing Petitioners' Joint Reply Brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system.

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CERTIFICATION PURSUANT TO RULE 32(a)(7)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), the undersigned hereby certifies that the Petitioners' Joint Reply Brief is 6,949 words in compliance with this Court's order dated March 18, 2011, establishing a briefing schedule and stating that the Joint Reply Brief for Petitioners not exceed 7,000 words.

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