ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 10-1073 (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 *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule ("Tailoring Rule")*, 75 Fed. Reg. 31,514 (June 3, 2010) and *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs ("Timing Rule")*, 75 Fed. Reg. 17,004 (Apr. 2, 2010)

AMICUS BRIEF OF THE COMMONWEALTH OF KENTUCKY AND THE AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

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

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

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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)
Light Duty Vehicle Rule	*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
PSD	Prevention of Significant Deterioration, Clean Air Act Title I, Part C: §§ 160-169b, 42 U.S.C. §§ 7470-7492
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).
tpy	tons per year

INTEREST OF AMICI

Pursuant to Circuit Rule 29(b), the Commonwealth of Kentucky ("Kentucky"), through its executive branch, has chosen to participate in this action as an amicus curiae because two rules promulgated by the United States Environmental Protection Agency ("EPA")—*Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs* ("Timing Rule"), 75 Fed. Reg. 17,004 (Apr. 2, 2010), and *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* ("Tailoring Rule") 75 Fed. Reg. 31,514 (June 3, 2010)—unlawfully circumvent the statutory requirements of the Clean Air Act ("CAA") (42 USC §§ 7401 to 7671q). Kentucky respectfully submits its amicus curiae brief in support of the Petitioners' and Supporting Intervenors' briefs filed June 20, 2011 challenging EPA's final Timing Rule and Tailoring Rule. *See* Br. of State Petitioners and Supporting Intervenor; J. Opening Br. of Non-State Pets. and Supporting Intervenors.

Kentucky is joined in this brief by the American Chemistry Council ("ACC"), also as an amicus curiae. 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.

Kentucky and ACC object to EPA's decision to impose greenhouse gas ("GHG") preconstruction permitting requirements on stationary sources through the Prevention of Significant Deterioration ("PSD") program. These PSD requirements will, for the first time, regulate GHG emissions of factories, manufacturers, and utilities from virtually every industrial sector. EPA has stated that these requirements are imposed through the combined effect of the Tailoring Rule, the Timing Rule, and two other rulemakings, the "Endangerment Rule"[1] and the "Light-Duty Vehicle Rule."[2] "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."[3]

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[1] *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).

[3] *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).

These new requirements will have a dramatic impact on the manufacturers, like ACC's members, that will be newly subject to the PSD program, and the States, like Kentucky, that must administer the program. EPA has stated that on July 1, 2011 it will more than double the number of sources subject to the PSD program, 75 Fed. Reg. at 31,540, and then will expand it to cover "as many GHG sources in the permitting programs . . . as possible, and as quickly as possible," *id.* at 31,548. Even before this increase, the permitting authorities who must guide permittees through the PSD process and rule on their applications have struggled to act on these permits in a timely fashion. *See Avenal Power Center v. EPA*, Order on No. 10-cv-383 (D.D.C. May 26, 2011) (ordering EPA to take final action on a permit application completed more than three years before). This increase will further swamp the state and local permitting authorities that administer the PSD permitting program, especially because they come at a time of staggering permit backlogs and significant reductions in funding of state and federal environmental agencies.[4] The resulting delay will hold up investment in the manufacturing sector, harming ACC's members.

Amici were granted leave to file by this Court on March 21, 2011. Per Curiam Order (ECF No. 1299257). No party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than

[4] 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.

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 participated in authoring this *amicus* brief for ACC and, separately, contributed to drafting the non-state petitioners' and intervenors' 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

In the challenged rules, EPA asserts the authority to alter the Clean Air Act's explicit statutory thresholds, arguing that the unaltered thresholds, when combined with its interpretation of other portions of the Act, would cause a drastic expansion of the PSD permitting program, halting nationwide construction for decades. This approach to statutory interpretation is fundamentally flawed. If EPA's *interpretations* of one part of the statute make the *literal text* of another part of the statute absurd, then EPA must alter its interpretations, not the statute. EPA has closed its eyes to several interpretations of the Clean Air Act that would have made the literal text of the statute sensible by narrowing the applicability of PSD requirements. EPA should not be allowed to rewrite the statute's text if a less drastic remedy is available.

If this Court does not insist on this course, Executive Branch agencies will be presented with a clear roadmap to freeing themselves from statutory constraints. *First*, they will reject narrowing constructions of their statutory authority, eventually resulting in an impossibly ambitious regulatory program. *Second*, they will rely on the resulting absurdities to alter the text of the statutes that they are bound to administer, allowing them to adopt rules pursuant to a free-form consideration of the costs-and-benefits of regulation, rather than under the text enacted by Congress.

The interpretations of the Clean Air Act in the Tailoring Rule and Timing Rule are also unlawful because they violate the Clean Air Act's signature structure of cooperative federalism, abrogating statutory procedures for incorporating new

pollutants into the PSD permitting programs. Congress and the Agency have provided an ordered process, measured in years, for States to incorporate new pollutants into state programs. EPA's expansive interpretations of its authority required the Agency to abandon this statutory process, forcing States to revise their laws under the pressure of unprecedented and unlawful three-week deadlines and threatened construction moratoria. The Court should uphold the cooperative federalism principles of the Clean Air Act by vacating the Tailoring Rule and the Timing Rule.

I. By Adopting Expansive Interpretations of the PSD Program, and Then Adopting Limits on That Program That Contradict the Statute, EPA Has Removed All Statutory Constraints on Its Actions

Under the Clean Air Act, the PSD program applies to sources that are located 1) in certain geographic "attainment" areas and 2) either have the potential to emit "two hundred and fifty tons per year or more of any air pollutant," or are in one of several defined industrial source categories and have the potential to emit "one hundred tons per year or more of any air pollutant." 42 U.S.C. §§ 7475, 7479(1). In the Timing Rule and Tailoring Rule, EPA adopted regulations that change the statutory applicability threshold from 100/250 tons per year ("tpy") to 100,000 tpy for greenhouse gases. 75 Fed. Reg. at 31,606.[5] EPA asserts that it could not follow a

[5] In the Timing Rule, EPA defined the term "any air pollutant" to mean a pollutant "subject to regulation," 75 Fed. Reg. 17,004, and then, in the Tailoring Rule, adopted a definition of "subject to regulation" that excludes emissions of greenhouse gases

"literal interpretation of the applicability provisions" as applied to GHGs, because to do so would be absurd. According to EPA, "the program that would result would be unduly costly to sources and impossible for permitting authorities to implement, and therefore would frustrate the purposes that Congress intended to achieve with the program that it did design." *Id.* at 31,563.

An Executive Branch agency, such as EPA, should be not be permitted to adopt a regulation that rewrites the text of a statute enacted by the Congress. *First*, EPA created the absurdity on which it bases the Tailoring and Timing Rules. The Act, however, can easily be read to avoid the absurdities. An agency-created absurdity should not be allowed to justify unilaterally changing a statute's text when reasonable alternative readings of the text would avoid the absurdity. *Second*, if this Court approves EPA's "two-step" maneuver—(1) rejecting reasonable, alternative statutory readings, and (2) using the resulting absurdities to justify rules that rewrite the Act—it will set a precedent for other Executive Branch agencies to circumvent the statutory text that they are supposed to implement. *Third*, allowing Executive Branch agencies to create regulations directly contrary to the explicit statutory text enacted by the Legislative Branch creates serious separation of power concerns.

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from facilities with a potential to emit less than 100,000 tpy of greenhouse gases, or with an increase in potential emissions of less than 75,000 tpy. 75 Fed. Reg. at 31,606.

A. EPA Rejected Several Alternative Readings of the Clean Air Act's Text That Would Have Avoided the Absurdities That EPA's Interpretation Created

The entire Tailoring Rule is premised on an EPA interpretation of the PSD provisions of the Act that EPA acknowledges would "subject an extraordinarily large number of sources, more than 81,000, to PSD each year, an increase of almost 300-fold," *id.* at 31,554. The result would be "absurd" as it would bring permitting, and associated commerce, to a halt. But, as demonstrated by Petitioners, EPA has rejected at least three reasonable, alternative interpretations of the Act that would have avoided these absurdities. *See* J. Opening Br. of Non-State Pets. and Supporting Intervs. 22-26.

1. The PSD program can only be triggered by pollutants for which an area is designated attainment, and there are currently no attainment areas for GHGs, because there are no air quality standards for GHGs. As such, EPA could have easily avoided the absurdity by simply finding greenhouse gas emissions do not now trigger PSD. The Clean Air Act requires a PSD permit before construction starts on any new or major modification to any "major emitting facility … *in any area to which this part applies*." 42 U.S.C. § 7475(a) (emphasis added). "This part" is the PSD program, and it "applies" to an area in attainment with a national ambient air quality standard (NAAQS) for a pollutant. 42 U.S.C § 7471. Thus, PSD only applies to a facility that is located in an area attaining the NAAQS for a given pollutant that it will emit in "major" amounts—*i.e.*, 100/250 tpy. 42 U.S.C § 7479(1). As this Court has explained, the "[t]he plain meaning [of 42 U.S.C. § 7475] is

that Congress intended location to be the key determinant of the applicability of the PSD review requirements." *Alabama Power Co. v. Costle*, 636 F.2d 323, 365 (D.C. Cir. 1979) (holding that EPA may only apply PSD in attainment areas).

Notwithstanding the location-limiting language of 42 U.S.C. § 7475(a) and the "key determinant" holding of *Alabama Power*, EPA chose to create the absurdity by applying its PSD program without reference to whether a location was in attainment for greenhouse gases, requiring PSD permits in every area of the country.[6] This interpretation ignores the statutory PSD applicability provisions and this Court's precedents that require location to be a determining factor for which sources trigger PSD permitting requirements. Under a faithful reading of the Act, by contrast, no source should have to apply for a PSD permit solely on the basis of its GHG emissions, because there are no attainment areas for GHGs—EPA has not promulgated a NAAQS for GHGs for sources to attain. *See* J. Opening Br. of Non-

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6 Technically, EPA accomplished this 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). This EPA interpretation means that the PSD program applies everywhere because *every* area of the country has always been in attainment with at least one NAAQS. *See* 75 Fed. Reg. at 31,561. Several parties, including ACC, have challenged this interpretation in another case before this court, Petitioners' Br. (ECF No. 1307254), *American Chemistry Council v. EPA*, No. 1011-67 (May 10, 2011), and EPA also reopened that issue in the Tailoring Rule, *see id.* at 24-28.

State Pets. and Supporting Intervs. 22-25; J. Opening Br. of Industry Pets., *American Chemistry Council v. EPA*, No. 10-1167 (filed May 10, 2011) 29-46.

2. *EPA has previously recognized that Congress intended the phrase "any air pollutant" under the PSD program to be read within the framework of that program. EPA could have avoided an absurdity by simply following the same statutory interpretation.* Although 42 U.S.C. § 7479(1) defines a major emitting facility in terms of its emissions of "any air pollutant," EPA has long recognized that Congress intended that "any air pollutant" necessarily has a narrower, and context-dependent meaning under the PSD program. For example, in the PSD program's visibility regulations, a "major stationary source" is defined in terms of emissions of "any pollutant," 42 U.S.C. § 7491(g)(7), yet EPA has defined that term to encompass only visibility-impairing pollutants. *See* 40 C.F.R. pt. 51, App. Y, § III.A.2. Congress enacted the PSD program to prevent "a decline of air quality to the minimum level permitted by NAAQS," *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 904 (7th Cir. 1990), so, for similar reasons, EPA should not have interpreted 42 U.S.C. § 7479(1) to encompass GHGs, since there is no NAAQS for GHGs and these gases have no local effects on air quality. This, again, would entirely avoid the absurdity of EPA's interpretation. *See* J. Opening Br. of Non-State Pets. and Supporting Intervs. 27-41.

3. *There are procedures in the Act for incorporating new pollutants into the PSD program. EPA could have avoided the absurdity by reading the Act to require EPA to follow this statutory process to incorporate greenhouse gases into the PSD program.* The Clean Air Act

dictates the procedure for incorporating new pollutants into the PSD program: "In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards." 42 U.S.C. § 7476. Thus, the statute may easily be read as requiring a NAAQS to be in place before EPA would regulate a pollutant under the PSD program. There is no NAAQS for GHGs, so this too would have avoided any absurdity. *See* J. Opening Br. of Non-State Pets. and Supporting Intervs. 41-46.

B. Having Rejected Narrowing Constructions of the PSD Program, EPA Cannot Then Rely on the Absurd Results It Has Created to Ignore the Statutory Text

After rejecting these reasonable, alternative interpretations of the Act, EPA argues that the resulting absurdities allow it to rewrite the statute's applicability threshold. 75 Fed. Reg. at 31,563. This Court should not countenance this "two-step" maneuver—instead EPA should be required to show that the text of the Clean Air Act *unavoidably* requires treating greenhouse gases no differently than the traditional criteria pollutants regulated under the PSD permitting program. It is particularly crucial that the Court reject EPA's interpretation, because this maneuver—an expansive interpretation of authority, creating absurd results, used to rewrite the statute—could be employed by any Executive Branch agency that desired to be free of statutory restraints imposed by the Congress. Left unchecked, EPA's two-step maneuver could become "the daily bread of convenience" for agencies

seeking to implement their own policy preferences. *NRDC v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974).

This Court has already rejected a similar attempt by EPA to rework the Clean Air Act through an expansive assertion of authority followed by regulatory exemptions—again in the seminal PSD decision *Alabama Power Co. v. Costle*, 636 F.2d 323. That case also examined EPA's two-step decision regarding which facilities it could regulate under the PSD program. First, the Agency interpreted the phrase "potential to emit" in Section 169(1)'s definition of "major emitting facility" as requiring the Agency to ignore a source's air pollution control equipment when measuring the source's emissions. *See* 636 F.2d at 353. Recognizing "that its definition placed an intolerable burden on both the agency and minor sources of pollution," EPA then "sought to cope with it by creating a broad exemption for smaller sources." *Id.* at 354. EPA conceded that its exemption violated Section 165(b), but, as it also does here three decades later, EPA blamed Congress for enacting irreconcilable provisions. *Id.* at 356.

The Court disagreed, refusing to countenance EPA's two steps, and noting that it was EPA's misinterpretation of the underlying statute that actually caused the absurdity. EPA's interpretation of the "potential to emit" "swept in too many facilities," including those Congress believed were too small to need PSD permits. *Id.* at 356. Thus, the problem of too many PSD permits, far from justifying EPA's text-

defying exemption for small sources, revealed that EPA's underlying interpretation of the term "potential to emit" was invalid. *Id.* at 354-55.

In the Tailoring Rule, EPA is attempting to expand the scope of its regulatory powers by obviating the express statutory limitations provided by Congress. Should this Court allow EPA to engage in these actions, it will be a signal to other agencies that they can similarly adjust the scope of their regulatory powers. Instead, this Court should signal Executive Branch agencies to heed the lesson of *Alabama Power*—that, if an agency's interpretation of its authorizing statute would establish regulatory power so broad that it leads to an absurd outcome, the agency cannot simply rewrite the statute to avoid the absurdity unless that outcome is entirely unavoidable. Instead, the correct result is to revisit and correct the agency's over-broad interpretation of the underlying statute.

C. EPA's Tailoring Rule and Timing Rule Unlawfully Exert Legislative Power that is Reserved to Congress

An administrative agency such as EPA cannot change a clear and unambiguous statutory emission limit by promulgating a regulation. This scenario of an Executive Branch agency unilaterally changing a statute enacted by the Legislative Branch is an enemy to the separation of powers between the executive and legislative branches of government. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-43

(1984). "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." (internal quotations omitted) *Ernst* & *Ernst v. Hochfelder,* 425 U. S. 185, 213-14 (1976).

The Clean Air Act does not afford EPA *any* discretion to change emission level thresholds and therefore EPA is due no deference under *Chevron* analysis. Under the PSD and Title V programs in the Act, Congress expressly eliminated certain aspects of the agency's discretion by statutorily prescribing specific emission rate thresholds in these programs. 42 U.S.C. 7479(1), 7602(j). Where "Congress has directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, as is the case here, the Tailoring Rule promulgated by EPA contravenes "the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 843.

Congress could not have been clearer when it specified precise numerical thresholds of 100/250 tpy. The Supreme Court observed in *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457 (2001), a case that addressed the degree of EPA's discretion under the CAA regarding the setting of NAAQS, that EPA cannot nullify applicable provisions of the CAA meant to limit is discretion. *Id.* at 485.

Kentucky's Governor, along with 19 other governors, wrote a letter dated March 10, 2010 to Congressional leaders concerning EPA's efforts to impose greenhouse gas regulations, urging Congress to decide the issue that involves

important energy and environmental policy for the nation – not a single federal agency. EPA, not content to wait for Congressional action, chose to address greenhouse gases but not within the bounds of the statute. EPA's solution—to read the Act to manufacture absurd results, and then alter the statute—is unlawful. A clear and unambiguous act of Congress—such as the emissions thresholds in the CAA-cannot be overridden by a regulatory process created for the convenience of an agency. An agency derives its power from Congress' statutory enactments and if a regulation conflicts with a statutory mandate, it must yield to Congress' will. *See Ernst* & *Ernst,* 425 U.S. at 213-14; *Fed. Maritime Comm'n v. Seatrain Lines, Inc.,* 411 U.S. 726, 745 (1973); *see also Southland Royalty Co. v. Fed. Energy Admin.,* 512 F. Supp. 436, 446 (N.D. Tex. 1980).

In short, the Tailoring Rule is unlawful and must not be allowed to stand. EPA's position is that the text of the CAA has no bearing on the appropriate thresholds for regulation, leaving it free to impose its own regulatory regime. If a federal agency can simply change clear and unambiguous Congressional language via a regulatory change then no one, States or individual citizens, is safe from having the Executive Branch of government unilaterally change what the elected representatives in Congress have done.

II. EPA's Regulatory Scheme Violates States' Rights as Co-equal Sovereigns by Disregarding the Statutory Procedures for Asking a State to Revise Its State Implementation Plan

EPA's actions also ignore the cooperative federalism embodied in the Clean Air Act's PSD program. As explained in the Supreme Court's most recent Clean Air Act decision, "[t]he Act envisions extensive cooperation between federal and state authorities." *See American Electric Power v. Connecticut*, 564 U.S. ___, ___ (June 20, 2011), Slip. Op. 14. Under the Act, EPA sets the minimum requirements of the program, and then those requirements are implemented through state implementation plans (SIPs). To ensure the smooth working of this process, when EPA brings a new pollutant into the PSD program by promulgating a NAAQS, the Clean Air Act generally allows States three years to submit a revised SIP to EPA. 42 U.S.C. § 7410(a)(1) ("Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a [NAAQS] … a plan which provides for implementation, maintenance, and enforcement of [the NAAQS].").

This three-year period is necessary due to the diverse state procedures required to revise state laws and regulations in order to adopt a revised state implementation plan. It also allows regulated parties time to adjust and plan for changes in applicable rules. Consequently, EPA has further cemented the importance of this statutory three-year period by incorporating it into its regulations: "[a]ny State required to revise its implementation plan by reason of an amendment to this section [addressing

minimum requirements for PSD implementation plans] … shall adopt and submit such plan revision to the Administrator for approval no later than three years after such amendment is published in the Federal Register." 40 C.F.R. § 51.166(a)(6)(i),(iii).

If a State refuses to comply with EPA's minimum standards, and ignores this deadline, the Clean Air Act provides EPA with certain sanctions to coerce compliance. 42 U.S.C. § 7509(a). EPA may penalize states by withdrawing federal highway funds or by requiring more stringent emissions offsets in nonattainment areas. 42 U.S.C. § 7509(b). EPA may not, however, halt permitting in a recalcitrant state. *See Citizens To Save Spencer Cnty. v. EPA*, 600 F.2d 844, 890 (D.C. Cir. 1979); *see also* J. Opening Br. of Non-State Pets. and Supporting Intervs. 51-53.

EPA's Tailoring Rule, however, did not follow this well established process. Instead, EPA demanded on June 3, 2010 that each State indicate within *60 days* how it would incorporate the Tailoring Rule into its state law by January 2, 2011. 75 Fed. Reg. at 31,582-83. If any State failed to meet these deadlines, *id.*, EPA would "move quickly to impose a Federal Implementation Plan (FIP)" on that State. 75 Fed. Reg. at 31,526. EPA soon made good on that threat, proposing a "SIP call"[7] which stated that, under the Tailoring Rule, States would have to submit a revised SIP before

[7] *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) (the "SIP call").

January 2, 2011 or face a total ban on construction of greenhouse gas emissions sources.[8] EPA did not finalize this SIP call until December 13, 2010.[9]

Thus, rather than giving States the three years contemplated by the Clean Air Act and EPA's own regulations, the agency gave states *only three weeks* to modify their laws and issue a revised SIP. Furthermore, EPA's threatened construction ban is entirely inconsistent both with the sanctions provided by the statute, and with Congress's decision not to provide EPA authority to use a construction ban as a sanction. 42 U.S.C. § 7509(b). As a result of these unprecedented threats, eight States had no choice but to turn their PSD permitting programs over to the federal government through the imposition of a federal implementation plan (FIP).[10]

The Tailoring Rule's accelerated timeline for state compliance was unprecedented. The proposed SIP and FIP were made final in record time[11] and the

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[8] *Id.* at 53,904.

[9] *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).

[10] *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).

[11] The "SIP call" as noted *supra* was proposed on September 2, 2010 and was published as final in 75 Fed. Reg. 77,698 (Dec. 13, 2010); the FIP Rule as noted *supra* was proposed on September 2, 2010 and was published as final in 75 Fed. Reg. 81,874 (Dec. 29, 2010).

States had only 20 days to come into compliance with the SIP call when federal law normally allows up to three years for compliance with new PSD requirements (40 CFR 51.166(a)(6)). The practical effect of the "SIP call" was to threaten a construction ban on States the instant the greenhouse gas rules became effective if a State did not bow to EPA's pressures and adopt the Tailoring Rule immediately.[12] This threat is inconsistent with the reasonable time period provided in the Act for States to modify their SIPs and the specified penalties for failure to modify a SIP. EPA may argue that this threat was imposed by its interpretation of the Act's permitting requirements, rather than by EPA's choice, but the distinction is artificial. EPA's interpretation would make the statutory sanctions, and Congress's decision to withhold the authority to ban construction, superfluous, and such an interpretation is unreasonable. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant").

Realistically speaking, EPA knew that penalties called for under the CAA for failure to implement a "SIP call" would not achieve the desired result of regulating

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12 EPA stated the following in the "SIP call" Final Rule "What EPA did say in the proposed SIP call is that GHG-emitting sources in states without authority to issue permits to those sources will face *de facto* obstacles to construction or modification. For example, EPA said that in such states, 'absent further action, GHG sources that will be required to obtain a PSD permit for construction or modification on and after January 2, 2011, will be unable to obtain that permit and therefore may be unable to proceed with planned construction * * *' 75 FR at 53894/3. This statement remains valid." 75 Fed. Reg. 77,709 (Dec. 13, 2010).

GHGs by January 2, 2011 and thus unlawfully threatened the construction ban. EPA's position that it may impose a construction ban on States that do not instantly adopt its changes to the federal PSD program destroys the cooperative federalism approach mandated by the CAA and instead treats the States as mere administrative cantons, to be ordered about at will.

EPA took unprecedented steps in imposing GHG rules on the States –coercing record fast SIP submittals and then making extraordinarily fast SIP and/or FIP approvals. After ignoring the normal three year period given a State to make a SIP submittal, EPA showed an astonishing ability to rush to approve the GHG SIP submittals once they were received. Excluding the GHG "SIP call", over the past five years EPA has taken an average of almost **20 months** to approve SIP submittals from Kentucky. In contrast EPA took only **21 days** to approve Kentucky's GHG SIP submittal.[13] The following illustrates Kentucky's SIP submittals since September 2006 for maintenance plans, re-designation requests, other SIP submittals and regulation updates:

Maintenance Plans	Date KY Submitted	Date Proposed Approval Published	Date Final Approval Published	Effective Date	Total Days From Submission to Final Action
Greenup Ozone MP	5/27/2008	3/25/2009	4/14/2011	5/16/2011	1084
Edmonson Ozone MP	5/27/2008	3/25/2009	4/14/2011	5/16/2011	1084

[13] *Approval and Promulgation of Implementation Plans; Kentucky: Prevention of Significant Deterioration; Greenhouse Gas Permitting Authority and Tailoring Rule Revision*, 75 Fed. Reg. 81,868 (Dec. 29, 2010).

Lexington Ozone MP	5/27/2008	3/25/2009	4/14/2011	5/16/2011	1084
Paducah Ozone MP	5/27/2008	1/4/2010	8/26/2010	9/27/2010	853
Owensboro Ozone MP	5/27/2008	1/20/2010	4/14/2011	5/16/2011	1084
Redesignation Requests					
Louisville Ozone	9/29/2006	4/27/2007	7/5/2007	8/6/2007	311
Ashland Ozone	9/29/2006	5/11/2007	8/3/2007	9/4/2007	340
NKY Ozone	1/28/2010	5/12/2010	8/5/2010	8/5/2010	189
NKY PM 2.5	1/27/2011	Waiting	Waiting	Waiting	151+
Other SIP Submittals					
Ozone Attainment Demo	12/7/2007	Waiting	Waiting	Waiting	1298+
Regional Haze	6/25/2008	Waiting	Waiting	Waiting	1097+
PM 2.5 Attainment Demo	12/3/2008	Waiting	Waiting	Waiting	936+
Infrastructure SIP	9/8/2009				
REGULATIONS ADDED THE SIP					
401 KAR 51:150	3/24/2006	10/23/2009		11/23/2009	1340
401 KAR 51:160	3/24/2006	10/23/2009		11/23/2009	1340
401 KAR 59:001	12/14/2006	9/13/2007		11/13/2007	334
401 KAR 61:001	12/14/2006	9/13/2007		11/13/2007	334
401 KAR 65:001	12/14/2006	9/13/2007		11/13/2007	334
401 KAR 63:001	12/14/2006	9/13/2007		11/13/2007	334
401 KAR 51:210	7/19/2007	10/4/2007		12/3/2007	137
401 KAR 51:220	7/19/2007	10/4/2007		12/3/2007	137
401 KAR 51:230	7/19/2007	10/4/2007		12/3/2007	137
401 KAR 50:066	12/1/2008	4/21/2010		5/21/2010	536
401 KAR 51:001	2/4/2010	9/15/2010		10/15/2010	253
401 KAR 51:017	2/4/2010	9/15/2010		10/15/2010	253
401 KAR 51:052	2/4/2010	9/15/2010		10/15/2010	253
401 KAR 59:015	11/22/2010	Waiting		Waiting	217+
401 KAR 52:001	12/13/2010	12/29/2010		1/3/2011	21
401 KAR 51:001	12/13/2010	12/29/2010		1/3/2011	21

As illustrated above, for regulations added to Kentucky's SIP before the Tailoring Rule, EPA has never taken less than at least three months to publish a final approval and never less than five months to make them effective, with the average being 13 months to publish and almost 14 months for final approval for the ones approved so far. However, for the GHG SIP EPA published final approval just 16

days after submittal and made it effective only 21 days after submittal. Meanwhile, EPA has yet to act on three other SIP submittals from Kentucky dating back to 2007 along with a regulation SIP submittal from 2010.

EPA has compounded its attack on the cooperative federalism contemplated in the CAA by its initial steps to implement the Tailoring Rule. While EPA was coercing States to promulgate the new rule and putting the rule into full force and effect with unprecedented speed, the Agency had not yet completed the guidance to the state agencies who are left to implement the new rules. For example, EPA's guidance for permitting of GHG emissions, including guidance on how to conduct the critical best available control technology (BACT) determinations under the PSD permit program was proposed in November 2010 and updated in March 2011, however EPA acknowledges this guidance is still a work in progress today.[14] In the meantime, EPA is putting regulations into full force and effect, threatening construction bans if a State does not comply within days of a final "SIP call" and implementing new regulatory standards before guidance is even complete. This clearly is not how Congress

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[14] The "PSD and Title V Permitting Guidance for Greenhouse Gases" was published for public comment November 17, 2010 (75 Fed. Reg. 70,254). EPA notes on its web site the availability of a March 2011 update. EPA states on its web site "This updated March 2011 version of the guidance reflects the technical corrections that were identified during our review of those comments. We also received substantive comments on several broader policy issues. We will respond to those substantive comments as appropriate as we continue to implement the PSD program for GHG through issuing permits and responding to inquiries from stakeholders." www.epa.gov/nsr/ghgpermitting.html.

intended cooperative federalism to work, and serves to illustrate how the alternative interpretations offered in Section I better comport with Congress's intent because they allow for an ordered process in which a pollutant is incorporated into the PSD program through adoption of a NAAQS, which is then incorporated into SIPs by the States in accordance with the statutory schedule rather than in a breakneck race to avoid a construction ban.

Allowing this "SIP call" and FIP rule to stand unabated by EPA confirms what Justice Kennedy spoke to and warned about in his dissent in *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004). The case, a 5-4 decision, involved EPA's actions to set aside the State of Alaska's application of the BACT determination for a permit issued under the CAA. Justice Kennedy noted in his dissent that by ignoring the States' discretion: "The majority, in my respectful view, rests its holding on mistaken premises, for its reasoning conflicts with the express language of the Clean Air Act … , with sound rules of administrative law, and with principles that preserve the integrity of States in our federal system." *Id.* at 502. Justice Kennedy's words then about the CAA ring even truer today. EPA's actions in implementing the Tailoring Rule conflict with the express language of the CAA and sound rules of administrative law, and usurp the integrity and sovereignty of the States by violating the core principles of state primacy and cooperative federalism embodied in the CAA. The CAA requires a reasonable amount of time to update a SIP; it envisions a

federal/state partnership. EPA's actions in this case flout this cooperative partnership.

CONCLUSION

For these reasons, the Court should vacate the Timing Rule and the Tailoring Rule.

Respectfully submitted,

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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 5,955 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 27, 2011

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 27th 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
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