

**ORAL ARGUMENT NOT YET SCHEDULED**

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

COALITION FOR RESPONSIBLE	)	
REGULATION, INC., ET AL.,	)	<b>No. 10-1073</b> (consol. with
	)	Nos. 10-1083, 10-1099, 10-
Petitioners,	)	1109, 10-1110, 10-1114, 10-
	)	1118, 10-1119, 10-1120, 10-
	)	1122, 10-1123, 10-1124, 10-
	)	1125, 10-1126, 10-1127, 10-
v.	)	1128, 10-1129, 10-1131, 10-
	)	1032, 10-1145, 10-1147, 10-
	)	1148, 10-1199, 10-1200, 10-
UNITED STATES ENVIRONMENTAL	)	1201, 10-1202, 10-1203, 10-
PROTECTION AGENCY,	)	1205, 10-1206, 10-1207, 10-
	)	1208, 10-1209, 10-1210, 10-
Respondent.	)	1211, 10-1212, 10-1213, 10-
	)	1216, 10-1218, 10-1219, 10-
	)	1220, 10-1221, and 10-1222)
_____	)	

**BRIEF OF *AMICUS CURIAE*  
MUNICIPAL GAS COMMISSION OF MISSOURI**

Jonathan S. Massey  
MASSEY & GAIL LLP  
1325 G Street, N.W., Suite 500  
Washington, D.C. 20055  
Tel: (202) 652-4511  
Fax: (312) 379-0467  
jmassey@masseygail.com

**CERTIFICATE AS TO PARTIES, RULINGS,  
AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), *amicus curiae* Municipal Gas Commission of Missouri states as follows:

**(A) Parties and Amici**

All parties, intervenors, and amici appearing in this court are listed in the Joint Opening Brief Of Non-State Petitioners And Supporting Intervenors (Dkt. # 1314204).

**(B) Rulings Under Review**

References to the rulings at issue appear in the Joint Opening Brief Of Non-State Petitioners And Supporting Intervenors (Dkt. # 1314204).

**(C) Related Cases**

There are numerous cases related to these consolidated cases. The Court has placed these related cases into four separate groupings, as follows:

- (1) Twenty-six petitions for review consolidated under lead case **No. 09-1322**:
  - (a) petitions challenging EPA's final 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) ("Endangerment Rule"); and
  - (b) 10 petitions for review of EPA's denial of reconsideration of the Endangerment Rule, EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 Fed. Reg. 49,556 (Aug. 13, 2010)("Reconsideration Denial").

- (2) Seventeen petitions for review consolidated under lead case **No. 10-1092**, challenging EPA's final rule, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010).
- (3) Twelve petitions for review consolidated under lead case **No. 10-1167**: three petitions challenging each of the following four EPA Rules:
  - (a) *Part 51 – Requirements for Preparation, Adoption, and Submittal of Implementation Plans: Prevention of Significant Air Quality Deterioration*, 43 Fed. Reg. 26,380 (June 19, 1978);
  - (b) *Part 52 – Approval and Promulgation of State Implementation Plans: 1977 Clean Air Act Amendments to Prevent Significant Deterioration*, 43 Fed. Reg. 26,388 (June 19, 1978);
  - (c) *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52,676 (Aug. 7, 1980); and
  - (d) *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, 67 Fed. Reg. 80,186 (Dec. 31, 2002).
- (4) Five petitions for review consolidated under lead case **No. 09-1018**, challenging EPA's December 18, 2008 memorandum regarding "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program," 73 Fed. Reg. 80,300 (Dec. 31, 2008).

Case No. 10-1209, *National Alliance of Forest Owners and American Forest & Paper Association v. EPA*, challenging the Tailoring Rule, was severed by Order dated May 27, 2011, from these consolidated cases on motion of Petitioners American Forest & Paper Association and National Alliance of Forest Owners, and by that Order was held in abeyance pending a decision in Case No. 10-1073. *See*

Doc. No. 1307898 (motion to sever); Doc. No. 1310363 (Order placing case in abeyance).

Cases No. 10-1115, *Center for Biological Diversity v. EPA*, and No. 10-1215, *Sierra Club v. EPA*, challenging the Timing Rule and Tailoring Rule, respectively, were held in abeyance by Order dated November 16, 2010. *See* Doc. No. 1277729 (Order placing cases in abeyance). In addition, by that Order, certain issues in Case No. 10-1205, *Center for Biological Diversity v. EPA*, were severed and assigned a separate docket number, No. 10-1388, which the Court held in abeyance. *See id.* Center for Biological Diversity filed an unopposed motion (Doc. No. 1313541) on June 16, 2011, seeking to dismiss voluntarily its remaining Tailoring Rule claims in No. 10-1205, and the Court granted that motion on June 20, 2011 (Doc. No. 1314059).

*/Jonathan S. Massey/*

Jonathan S. Massey  
MASSEY & GAIL LLP  
1325 G Street, N.W., Suite 500  
Washington, D.C. 20055  
Tel: (202) 652-4511  
Fax: (312) 379-0467  
jmassey@masseygail.com

**CORPORATE DISCLOSURE STATEMENT PURSUANT TO FED. R. APP.  
26.1 AND CIRCUIT RULE 26.1**

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Amicus makes the following disclosure:

The Municipal Gas Commission of Missouri (“MGCM”) is a not-for-profit joint action agency organized under Missouri law. MGCM 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 MGCM.

Respectfully submitted,

*/Jonathan S. Massey/*

Jonathan S. Massey  
MASSEY & GAIL LLP  
1325 G Street, N.W., Suite 500  
Washington, D.C. 20055  
Tel: (202) 652-4511  
Fax: (312) 379-0467  
jmassey@masseygail.com

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Authorities upon which we chiefly rely are marked with an asterisk.

All applicable statutes are contained in the Joint Opening Brief of Non-State Petitioners and Supporting Intervenors (Dkt. #1314204).

## **GLOSSARY**

BACT	Best Available Control Technology
CAA	Clean Air Act
Decl.	Declaration
DOE	Department of Energy
EPA	Environmental Protection Agency
GHG	Greenhouse Gas
MGCM	Municipal Gas Commission of Missouri
MHI	Median Household Income
PSD	Prevention of Significant Deterioration



### **I. INTEREST OF *AMICUS CURIAE***

The Municipal Gas Commission of Missouri (“MGCM”) is a not-for-profit, joint action agency under Missouri law, with members in two states, Missouri and Illinois. MGCM is composed of 16 municipally-owned utilities that have aggregated their natural gas demand so they can bulk purchase natural gas for resale to their member municipalities. MGCM also manages the supply and storage contracts of natural gas for its members. MGCM's administration of the purchasing, transportation, and storage of natural gas on behalf of its membership reduces the total cost and increases the efficiency for all the members. The 16 MGCM members operate small community-owned natural gas distribution systems that provide natural gas through over 7,300 gas meters.

MGCM members provide natural gas primarily for home heating to the residents of the member communities. As the joint provider of natural gas to the consumers in the members’ systems, MGCM acts on behalf of its member communities and their customers to minimize the costs of natural gas use. Most MGCM member communities rely primarily on electricity from coal-fired power generation, and natural gas for heat. Any pressures on coal-fired power, such as costly new regulatory requirements, that lead to increased demand of natural gas as a substitute fuel, will have an impact on the price of natural gas and therefore will have an impact on MGCM member communities and their ratepayers directly,

through higher heating bills for the homes and businesses within those communities. Accordingly, MGCM has an interest in the proper evaluation of the economic impacts on its member communities caused by the regulation of “greenhouse gas” by the United States Environmental Protection Agency.

In representing natural gas consumers in small Midwestern communities, MGCM is uniquely positioned to provide the Court with a relevant perspective concerning EPA’s inadequate evaluation of economic impacts on Midwestern energy consumers resulting from their GHG regulations. MGCM supports the Petitioners’ position in the Joint Opening Brief Of Non-State Petitioners And Supporting Intervenors (Dkt. # 1314204) (“Non-State Petitioners’ Brief”). MGCM seeks only to elaborate on Argument Seven in the Non-State Petitioners’ Brief, concerning the failure of EPA to conduct required economic impact analyses of its actions.

Pursuant to Federal Rule of Appellate Procedure 29(c), MGCM states that this brief was authored in part by counsel for the Missouri Joint Municipal Electric Utility Commission, who is a Petitioner in Case Nos. 10-1213 (consolidated under Case No. 10-1131) and Case No. 10-1124 (consolidated under Case No. 10-1073). No party or person other than MGCM contributed funding for this brief.

## **II. ARGUMENT IN SUPPORT OF NON-STATE PETITIONERS**

### **EPA'S TAILORING RULE AND TIMING RULE ARE ARBITRARY AND CAPRICIOUS BECAUSE EPA DID NOT CONSIDER THE ECONOMIC IMPACTS OF GREENHOUSE GAS REGULATION ON LOW-INCOME POPULATIONS.**

#### **A. EPA Has Been Fully Aware of The Potential Impacts of GHG Regulation On Low-Income Populations.**

At the outset of EPA's effort to regulate stationary sources of greenhouse gases under the Clean Air Act, EPA sought input from a variety of federal agencies on proposed methods to regulate greenhouse gases under the Clean Air Act, including under the Prevention of Significant Deterioration ("PSD") program. *See* Advanced Notice of Proposed Rulemaking, "Regulating Greenhouse Gas Emissions Under the Clean Air Act," 73 Fed. Reg. 44,354, at 44,368-69 (July 30, 2008). EPA was made acutely aware of the serious impacts that could befall low-income populations as a result of imposition of new regulations on coal-fired energy production.

The United States Department of Energy warned that "[t]he effects of broad based, economy-wide regulation of GHGs under the CAA would have significant adverse effects on U.S. energy supplies, energy reliability, and energy security." *Id.* at 44,368. DOE specifically warned EPA that "the effect of regulating emissions of GHGs from stationary sources under the CAA could force a drastic shift in the U.S. power sector" toward reliance on natural gas for energy generation. *Id.* at 44,369. *See also* Declaration of Michael R. Peelish (Dkt. #

1314204, App. C, Ex. 10) at para. 12 (“[A] number of our utility customers are switching units to natural gas.... Electric utilities and independent power producers that are adding capacity are being pressured by EPA’s regulations, and by the uncertainty arising from those regulations, to design and construct electric generating units that do not use coal.”); Affidavit of Standing by Peabody Energy Company (Dkt. # 1314204, App. C, Ex. 7), at paras. 15-21 (describing the costs of potential GHG control technology and EPA efforts to mandate substitution of natural gas for coal as “best available control technology” (“BACT”) for coal-fired electric generating plants); Decl. of James R. Barker (Dkt. # 1314204, App. C, Ex.8) at para. 10 (“the uncertain regulatory climate is driving utility and industrial customers to switch from coal to natural gas”).

Increased demand for natural gas is likely to cause sharp increases in the price of natural gas. *See* 73 Fed. Reg. at 44,369, n.4 (citing studies showing increases in natural gas prices resulting from GHG control at coal-fired utility sources). Thus, DOE advised EPA:

...[T]he regulatory regime envisioned by [EPA in the ANPR] would result in emission controls, technology requirements, and compliance costs being imposed on entities that have never before been subject to direct regulation under the CAA. Before proceeding down that path, *EPA should be transparent about, and there should be a full and fair discussion about, the true burdens of this path--in terms of its monetary cost, in terms of its regulatory and permitting burden, and in*

*terms of exactly who will bear those costs and other burdens.*

Id. at 44,366 (emphasis added).

The rising costs of natural gas will be acutely felt by low-income and fixed income populations, who will bear the burden of resulting higher heating and energy bills. This point was recently illustrated on both a local and a national scale in declarations submitted with the Non-State Petitioners' Brief. See Declaration of Duncan Kincheloe (Dkt. # 1314204 at App. C, Ex. 11 ("Kincheloe Decl.") and Exhibit B thereto (Declaration of Dr. Roger H. Bezdek ("Bezdek Decl.")). The greatest burdens of increased energy costs resulting from EPA GHG regulations will fall on households of elderly Social Security recipients – more than 20 percent of all households nationally – who depend mainly on fixed incomes and who have limited opportunity to increase earnings from employment. (Bezdek Decl., at para. 6.) Dr. Bezdek further noted that "[o]ver the past decade, home heating costs have been increasing as a result of an overall rise in energy costs, and energy costs have increased more rapidly than the purchasing power of low-income consumers. As a result, winter heating costs present a special burden for seniors – especially low income seniors, and this burden will be exacerbated by the impending EPA GHG regulations." Bezdek Decl., at para. 8.

These effects are even more pronounced in the Midwest, and in particular rural and small-town populations, due to disproportionate numbers of elderly and

fixed-income consumers served predominantly by coal-fired electric power. Kincheloe Decl., para. 5.

Despite full forewarning of these impacts at the outset of its journey to regulate stationary sources, EPA proceeded without ever considering the burden on utility ratepayers, and especially those ratepayers who will shoulder disproportionate burdens of the costs of compliance.

**B. EPA is Required To Perform Economic Impacts Analyses.**

The President has specifically directed EPA, before taking final action, to assess all the impacts of its actions and to consider the benefits of alternative approaches. Executive Order 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994)<sup>1</sup> directs EPA to identify and address disproportionate effects of its actions on minority and low-income populations in the United States. In addition, Executive Order 13211, 66 Fed. Reg. 28,355 (May 22, 2001)<sup>2</sup> requires preparation of a Statement of Energy Effects to describe the effects of regulatory actions on energy supply, distribution, or use, including any price increases resulting from federal agency action, including rules promulgated by EPA.

The Clean Air Act also requires EPA to conduct an economic impact assessment of its actions. Under CAA § 317, 42 U.S.C. § 7617, EPA must provide an evaluation of a proposed rule's compliance costs, inflationary or recessionary

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<sup>1</sup> <http://www.epa.gov/fedreg/eo/eo12898.htm>

<sup>2</sup> [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001\\_register&docid=fr22my01-133.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=fr22my01-133.pdf)

effects, competitive effects, effect on consumers, and impact on energy use. This statute specifically applies to regulations adopted under the PSD program. 42 U.S.C. § 7617(a)(4). The law requires at a minimum an evaluation of “the effects of the standard or regulation on consumer costs” and “the effects of the standard or regulation on energy use.” 42 U.S.C. § 7617(c)(4) and (5).

EPA has failed to comply with these statutory requirements.

**C. At Every Turn, EPA Has Ignored Its Required Consideration Of The Impacts of GHG Stationary Source Regulation On Low-Income Populations.**

EPA’s development of its scheme to regulate GHGs from stationary sources under the Clean Air Act was hasty and rough, and with admitted disregard of clear statutory requirements. EPA states that it “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.” 74 Fed. Reg. 55,292 at 55,295 (Oct. 27, 2009). Yet as it embarked on this program, EPA ignored requirements to analyze the consequences of the rules on the sources and other populations they will affect.

Following its ANPR, EPA initiated four rulemakings to implement its regulation of GHGs at stationary sources. The first was the “Endangerment Finding.” 74 Fed. Reg. 66,496 (December 15, 2009). In the Endangerment Finding, EPA made no effort to address the impacts on low-income populations that might result from that finding, because EPA felt at that time that the

Endangerment Finding did not impose any standards or requirements on any entities. *See id.* at 66,546.

The second was the Light Duty Motor Vehicle Rule (“LDVR”), 75 Fed. Reg. 25,344 (May 10, 2010), in which EPA noted that its regulation of GHGs from vehicles would necessarily trigger the regulation of GHGs from stationary sources such as coal-fired power plants. EPA’s only consideration of economic impacts from this triggering was its summary certification that the LDVR will “not have a significant economic impact on a substantial number of small entities...” 75 Fed. Reg. at 25,541. EPA conducted no other economic impacts analysis relevant to low-income ratepayers, stating instead that it would directly address concerns about stationary source permitting in its later actions on stationary source permitting, *i.e.*, the Tailoring Rule and Timing Rule. *Id.* at 25,402.

But after pushing its consideration of these relevant issues until the Tailoring Rule and Timing Rule, EPA then wholly ignored its obligations to address or evaluate these impacts at all. Despite EPA’s awareness and recognition that its GHG requirements will place disproportionate burdens on low-income populations because of the regressive impact of increasing energy costs, see 73 Fed. Reg. 44,354 at 44,410 n.58 (July 30, 2008), EPA made no analysis in the Tailoring Rule of impacts on energy consumers, but focused only on the impacts of the rule on potential permittees and how that rule provides “regulatory relief” to permittees



and permitting agencies. 75 Fed. Reg. 31,514 at 31,604-05 (June 3, 2010). Similarly, in the Timing Rule EPA completely avoided its obligations to consider low-income population impacts or other analyses required by the Clean Air Act and Executive Orders. 75 Fed. Reg. 17,004 (April 2, 2010).

MGCM's customers are mainly located in rural or small towns with a disproportionate number of low income, minorities, and elderly. Most of MGCM's customers are located in Missouri, which has one of the largest numbers of small towns with populations under 1,000 people. Kincheloe Decl., at para. 5. MGCM customers rely on public utilities to provide them affordable electricity and natural gas in order to maintain basic hygiene and health standards.

Fourteen of the 16 MGCM member cities have a median household income (MHI) below the national average, and half of those fourteen cities have median household income more than 25% below the federal MHI. Most MGCM communities have poverty rates in excess of the national average, and in five (5) of those cities the rate is more than 40% above the national rate. Also, in 14 of the 16 MGCM communities, the average rate of residents age 65 and older is nearly 60% higher than the national average rate of 12.6%. In five (5) of those communities, the rate ranges from 80% to 100% higher than the national average.

The significant increase in energy costs will force many of MGCM's customers to choose between heat and other necessities such as clothing, medical

necessities, and food. EPA did not consider any of these impacts on low-income, elderly, or minority ratepayers, who will ultimately shoulder the burden of the increased costs of the Timing and Tailoring Rules. EPA's complete refusal to evaluate these impacts renders their actions arbitrary and capricious. Here, EPA "entirely failed to consider an important aspect of the problem," and therefore its actions must be reversed. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

### **III. CONCLUSION**

For the foregoing reasons, MGCM requests that this court award the relief sought by Non-State Petitioners.

*/Jonathan S. Massey/*

Jonathan S. Massey  
MASSEY & GAIL LLP  
1325 G Street, N.W., Suite 500  
Washington, D.C. 20055  
Tel: (202) 652-4511  
Fax: (312) 379-0467  
jmassey@masseygail.com

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Brief of *Amicus Curiae* contains 2,176 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limited set by the Court.

*/Jonathan S. Massey/*

Jonathan S. Massey  
MASSEY & GAIL LLP

Dated: June 27, 2011

**CERTIFICATE OF SERVICE**

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that I have this 27th day of June 2011, served a copy of the foregoing *Brief of Amicus Curiae* electronically through the Court's CM/ECF system.

*/Jonathan S. Massey/*

Jonathan S. Massey  
MASSEY & GAIL LLP