ORAL ARGUMENT NOT YET SCHEDULED

No. 10-1167 (and consolidated cases)

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

AMERICAN CHEMISTRY COUNCIL, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Review of Final Action of the
United States Environmental Protection Agency

BRIEF OF *AMICUS CURIAE* CENTER FOR BIOLOGICAL DIVERSITY IN SUPPORT OF RESPONDENTS

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July 7, 2011

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the Center for Biological Diversity submits this certificate as to parties, rulings, and related cases.

A. Parties, Intervenors, and Amici before the District Court

All parties, intervenors, and amici appearing in this Court are listed in Petitioners' Joint Opening Briefs.

B. Rulings under review

References to the rulings at issue, the four EPA rules challenged in these consolidated partitions for review, are listed in Petitioners' Joint Opening Brief.

C. Related Cases

Each of these consolidated petitions for review is related. These petitions are also related to and will be heard by the same panel as: *Coalition for Responsible Regulation, et al., v. EPA*, No. 09-1322, and consolidated cases; *Coalition for Responsible Regulation, et al., v. EPA*, No. 10-1073, and consolidated cases; and *Coalition for Responsible Regulation, et al., v. EPA*, No. 10-1092, and consolidated cases. Order, Doc. #1299003, Mar. 18, 2011.

D. Statutes and Regulations

All pertinent statutes and regulations are set forth in the addenda to the Petitioners' and Respondents' briefs.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae Center for Biological Diversity (the "Center") states that it does not belong to any parent corporation and that no publicly-held company owns an interest of 10 percent or more in it.

Dated: July 7, 2011

Respectfully submitted,

/s/ Vera P. Pardee
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GLOSSARY

CAA	Clean Air Act
EPA	Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
PSD	Prevention of Significant Deterioration

Amicus Center for Biological Diversity respectfully submits this brief in support of respondent Environmental Protection Agency's (EPA's) rulemakings.

INTEREST OF AMICUS

The Center is a non-profit organization whose mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health. The Center's Climate Law Institute focuses on climate change science, law, and policy, with the primary mission of curbing global warming and other air pollution and sharply limiting their damaging effects on the environment and public health and welfare. One of the Center's central goals is to reduce U.S. greenhouse gas emissions and other air pollution by ensuring compliance with applicable laws.

A top priority of the Climate Law Institute is the full and immediate implementation of the Clean Air Act ("CAA" or the "Act") to rein in greenhouse gases. Petitioners' attempt to undo EPA's decades-old rulemakings that correctly interpret the Act's Prevention of Significant Deterioration ("PSD") permitting program to apply to all regulated pollutants (including greenhouse gases), rather than only to criteria pollutants in areas in attainment with the national ambient air quality

standards ("NAAQS) for those pollutants, would drastically decrease the Act's efficacy in curbing the nation's most urgent air pollution problems. This Court granted the Center permission to participate in this matter as amicus curiae in its Order dated September 15, 2010, Document #1266050.

BACKGROUND

EPA has successfully used the Clean Air Act's PSD program to protect public health and welfare from air pollutants for more than thirty years. *See* 42 U.S.C. § 7470(1). The program, created by the 1977 Amendments to the CAA, recognizes that the public secures critical environmental and health benefits where air quality exceeds the Act's baseline national ambient air quality standards. To safeguard regions with such air quality, the Act imposes rigorous permitting requirements on stationary sources, such as factories and power plants that emit "any air pollutant" in those areas in major amounts. *See* sections 165(a), 169(1), 42 U.S.C. §§ 7475(a), 7479(1); *Alabama Power Co. v. Costle,* 636 F.2d 323, 344-52 (D.C. Cir. 1980) (describing the history of the program). In keeping with the Act's nature as a "technology-forcing" statute, *see Union Elec. Co. v. EPA*, 427 U.S. 246, 256-57 (1976), the program requires these sources to install "the best available control technology for each pollutant subject to

regulation under this chapter emitted from, or which results from, such facility." Section 165(a)(4), 42 U.S.C. § 7475(a)(4).

EPA has determined that these requirements apply to new and modified sources of greenhouse gases, and has finalized rules under which it has begun a phase-in of permitting for these pollutants in January of this year. *See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010) ("Tailoring Rule"). Petitioners have challenged EPA's authority to regulate greenhouse gases in a host of petitions in this Court and before the agency. But the instant consolidated cases go further still. Petitioners now seek to overturn a number of rules promulgated by EPA as early as 1978 (the "1978-2002 Rules"), claiming that the PSD program was never intended to apply to traditional pollutants even though they have been so regulated for decades, and instead is applicable only to the six pollutants for which national ambient air quality standards have so far been established ("criteria pollutants"), and then only in areas in attainment with the NAAQS for the criteria pollutant a facility emits. In other words, in their zeal to avoid greenhouse gas regulations, Petitioners here seek to overturn core elements of the PSD program itself. If Petitioners were to succeed, the PSD program, and thus the country's air

quality and the health and welfare of its inhabitants, would be seriously damaged.

SUMMARY OF ARGUMENT

This Court should not reach the merits of Petitioners' attempt to overturn the 1978-2002 Rules because this matter is not properly before the Court. *See, e.g.*, section 307(b), 42 U.S.C. § 7607(b). Should this Court decide otherwise, the Center fully supports EPA's plain language reading of the relevant sections of Part C of the Clean Air Act in the 1978-2002 Rules and in its brief in this case. Initial Brief for Respondents, Doc. #1314747, June 6, 20011 ("EPA Br.") at 13-33. That reading demonstrates without question that all major sources of "any air pollutant," including non-criteria pollutants and greenhouse gases, located in "any area to which [Part C] applies" are subject to PSD permitting requirements. Sections 169(1), 165(a), 42 U.S.C. §§ 7479(1), 7475(a). This amicus brief discusses additional reasons to uphold this interpretation that have not already been addressed or fully elaborated upon by others.

First, Petitioners claim that the 1978-2002 Rules must be reversed because EPA's regulation of greenhouse gases under the Vehicle Rule[1] and

[1] Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

its use of the "absurd results" doctrine in the Tailoring Rule allegedly demonstrate that applying PSD permitting to anything but criteria pollutants is absurd. But this argument completely misrepresents EPA's use of that doctrine and the relevant law. The "absurd results" doctrine is a tightly circumscribed doctrine of statutory construction that may be employed where agencies are faced with difficulties in implementing statutory language, but that *mandates* the protection of congressional intent; EPA's reliance on it in the Tailoring Rule to accommodate specific implementation difficulties it believes arise out of the physical characteristics of greenhouse gases in no way equates to a concession that PSD permitting for non- criteria pollutants *as such* is absurd. To the contrary, EPA correctly concluded that PSD permitting for non-criteria pollutants in general and greenhouse gases in particular is compelled by the statutory language, structure and intent of the Act.

Moreover, EPA justified its actions in the Tailoring Rule independently and separately based on the "administrative necessity" doctrine. Thus, even assuming there are flaws in EPA's reliance on the "absurd results" doctrine, this Court can judge the legality of the Tailoring Rule on that independent ground. *A fortiori*, the argument that the 1978-2002 Rules must be invalidated based on a rule of construction invoked in

another rule that may never be reached by the Court or may be deemed harmless error, simply cannot withstand scrutiny. In short, this Court can and should uphold the 1978-2002 Rules without ever reaching Petitioners' red-herring claim that a purported absurdity in the Tailoring Rule renders them absurd as well.

Second, Petitioners' own interpretation of the statute does not avoid the alleged absurdity of which Petitioners complain, and thus cannot supplant the Agency's regulatory action.

ARGUMENT

I. EPA'S CONCLUSION THAT PSD PERMITTING APPLIES TO ALL REGULATED POLLUTANTS IS NOT "ABSURD"

Petitioners mount a collateral attack on EPA's 1978-2002 Rules by claiming that applying PSD permitting to greenhouse gases through the Vehicle Rule and the Tailoring Rule demonstrates that PSD permitting for non-criteria pollutants is absurd, and that EPA concedes as much. EPA plainly has conceded no such thing. Petitioners vastly misinterpret and misrepresent EPA's discussion of the "absurd results" doctrine in the Tailoring Rule. EPA used this rule of statutory construction solely to overcome specific (but limited) implementation difficulties it perceived in applying statutory emission thresholds to a pollutant that is emitted in larger volumes than previously regulated air pollutants. EPA did not state or imply

that PSD permitting for greenhouse gases, or the statute or the congressional intent underlying it, are in any way absurd. Indeed, any such conclusion would exceed agency discretion. *See, e.g.*, *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (in using absurd results doctrine, agency must protect congressional intent).

There is no reason, however, for the Court to reach this issue, either in this case or even in its consideration of the merits of the Tailoring Rule. EPA justified its actions in the Tailoring Rule independently and separately based on the "administrative necessity" doctrine, and could (and should) have proceeded based only on that doctrine. For that reason, to the extent this Court concludes that the legality of the Tailoring Rule can affect the validity of the 1978-2002 Rules at all, this Court can dispose of that issue by evaluating the Tailoring Rule based of the "administrative necessity" doctrine alone. Thus, nothing supports Petitioners' claim that any "absurdity" in the Tailoring Rule renders the 1978-2002 Rules absurd as well.

In short, EPA had no need to invoke the "absurd results" doctrine; that it did so does not render regulation of greenhouse gases under the PSD program "absurd," and it has no impact on the validity of the 1978-2002 Rules that are here at issue.

A. Petitioners Mischaracterize EPA's Use of the "Absurd Results" Doctrine in the Tailoring Rule

In the Tailoring Rule, EPA declared that, because greenhouse gases are emitted in higher volumes than pollutants previously subject to regulation, applying the major source emission thresholds in section 169(1) literally would have required PSD permits for such a large number of sources that the program would have come to a temporary halt.[2] To address what it felt was an immediate administrative impossibility, EPA in the Tailoring Rule temporarily raised the major source thresholds and adopted a phased-in approach to greenhouse gas PSD permitting based on each of three canons of construction, separately and independently: the absurd results doctrine, the administrative necessity doctrine, and the one step at a time doctrine.[3]

The "absurd results" doctrine is a legal concept with clearly defined limits that, under certain circumstances, permits an agency to implement a statute without following its literal meaning as long as the agency tightly adheres to Congress's intent in drafting the statute. The use of the doctrine to

[2] According to EPA, the same result would have pertained to Title V permitting under 42 U.S.C. §§ 7661 et seq. For the sake of brevity, the PSD and Title V permitting programs are discussed here together as the "PSD permitting program."

[3] 75 Fed. Reg. at 31,516. Because the "one step at a time doctrine" is also based on the existence of administrative impossibility, it is not separately discussed.

overcome implementation difficulties arising out of a particular set of circumstances does not, and cannot, create any inference that the statute at issue, or the congressional intent it expresses, is absurd. The contrary is true: an agency relying on the doctrine may *not* deviate from the drafters' intent, and would clearly exceed its mandate if it did otherwise.

As stated by the Supreme Court, the doctrine applies "in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters' . . . [in which case] the intention of the drafters, rather than the strict language, controls." *United States v. Ron Pair Enterprises,* 489 U.S. 235, 242 (1989); *Mova Pharm. Corp. v. Shalala,* 140 F.3d 1060, 1068 (D.C. Cir. 1998) (same). An agency relying on the doctrine does not "obtain a license to rewrite the statute." *Mova Pharm. Corp.,* 140 F.3d at 1068. Instead, congressional intent is paramount, and controls where literal application of specific statutory language would cause a result that "was unmistakably *not* Congress' intention." *Public Citizen v. United States Dep't of Justice,* 491 U.S. 440, 453-54 (1989) (emphasis in original); *see also In re Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 643 (1978) (statute must be applied in a manner that does not thwart its obvious purpose).

In the Tailoring Rule, EPA identified "absurd results" based on the immediate administrative impossibility it believed arose from the fact that application of the PSD permitting program to greenhouse gas emissions at the major source thresholds would result in a temporary standstill of stationary source permitting. 75 Fed. Reg. at 31,563. However, instead of declaring that therefore, PSD permitting of greenhouse gases and its decades-old PSD permitting program rulemakings had to be scrapped, as Petitioners would have it do, EPA found *the opposite*: that such permitting was clearly Congress's intent. 75 Fed. Reg. at 31,517 ("the PSD and title V provisions and their legislative history do indicate a clear congressional intent . . . that the permitting programs do apply to GHG sources."). EPA also properly recognized that it may never do more than is necessary to render requirements administrable, 75 Fed. Reg. at 31,517; *see Chevron v. NRDC*, 467 U.S. 837, 842-44 (1984) (agency may deviate no further from statute than is needed to protect Congressional intent); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1341 (D.C. Cir. 2001) (same); and it declared that it must include greenhouse gas sources in the permitting program at "as closely to the statutory threshold as possible, and as quickly as possible." 75 Fed. Reg. at 31,548. The manner in which EPA described and applied this particular rule of construction demonstrates that EPA plainly did *not*

concede that greenhouse gas permitting is absurd; *a fortiori*, EPA did not concede or imply, by some further leap of logic, that the specific difficulties encountered in implementing PSD permitting for greenhouse gases invalidates the 1978-2002 Rules. When compared to EPA's actual statements in the Tailoring Rule, Petitioners' insistence that EPA's pronouncements rendered the 1978-2002 Rules absurd is, ironically, revealed as an absurd exaggeration.

But even *if* EPA had erred by improperly invoking the absurd results doctrine in the manner in which Petitioners attempt to mischaracterize its use, this still would not lead to Petitioners' desired result. Assuming that EPA did indicate a belief that it is absurd ever to impose PSD permitting on sources with greenhouse emissions at the statutory threshold because of perceived prospective administrative difficulties or excessive permitting costs to those sources, EPA would have overstepped its bounds. While it may be that Congress intended to require PSD permitting only for sources financially able to bear the costs, *see Alabama Power*, 636 F.2d at 353, EPA admits it has not yet developed greenhouse gas permitting expertise or permissible streamlining techniques, hired or trained sufficient staff, or developed other tools that will affect its own efficiency as well as permitting costs to emitting facilities. 75 Fed. Reg. at 31,547. In advance of the actual

development of such tools and resources, which may very well allow PSD permitting at statutory levels without creating administrative impossibilities or excessive costs to smaller sources, EPA could not declare future regulation at the major source thresholds absurd or impossible.[4] *See Alabama Power*, 636 F.2d at 359-360 (request for a prospective exemption based only on predicted difficulties bears particularly heavy burden). However, EPA did not reach that conclusion; instead, it expressly conditioned the Tailoring Rule on the implementation of successive steps designed to reach statutory emission thresholds as closely as possible and as soon as possible. 75 Fed. Reg. at 31,548.

Nevertheless, should this Court, in its review of the Tailoring Rule, find fault with the speed, timing or limitations of the measures EPA has taken to overcome the pollutant-specific difficulties that led it to invoke the "absurd results" doctrine, those issues can be resolved within the confines of

[4] EPA estimated that implementing the statutory thresholds would subject an additional 11% of U.S. stationary source emissions to regulation, as compared to implementing the Tailoring Rule thresholds. 75 Fed. Reg. 31,540. This is a large volume of emissions, on the order of 500 million metric tons of CO_2eq. *See, e.g.,* U.S. Environmental Protection Agency, *EPA No. 430-R-11-005, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2009* (2011), *available at* http://epa.gov/climatechange/emissions/usinventoryreport.html . This amount is on par with the annual emissions of the state of California, and larger than the emissions of most countries in the world. Clearly, proceeding to implement a program to reduce such a large volume of emissions is not "absurd."

that rulemaking. But the logical leap of attributing any such flaws in the Tailoring Rule to the 1978-2002 Rules simply proves too much: Congress plainly intended to apply PSD permitting to pollutants other than criteria pollutants in areas in attainment with the NAAQS for those pollutants. *See, e.g., Alabama Power Co v. Costle.*, 636 F.2d 323, 352; section 169(1), 42 U.S.C. § 7479(1). Technical implementation difficulties arising from the physical characteristics of one such pollutant cannot nullify this clear statutory intent. *See Massachusetts v. EPA,* 549 U.S. 497, 532 (2007) (greenhouse gases are "air pollutants" within the meaning of the Act); *American Elec. Power Co. v. Connecticut,* No. 10-174, slip op. at 2 (S.Ct. June 20, 2011) (reaffirming that greenhouse gases are "air pollution subject to regulation under the Act).

B. EPA Independently Supported the Tailoring Rule with the "Administrative Necessity" Doctrine

As stated above, EPA supported the phased-in approach to greenhouse gas PSD permitting in the Tailoring Rule not only on the "absurd results" doctrine, but also, separately and independently, on the administrative necessity doctrine. 75 Fed. Reg. at 31,516. Petitioners' claim that EPA was compelled to concede that PSD permitting for greenhouse gases is absurd completely overlooks this fact.

The administrative necessity doctrine, like the "absurd results" doctrine, has clearly-defined parameters. As this Court stated in *Alabama Power*, the doctrine does *not* cloak EPA with broad powers to create exemptions to statutory mandates; instead, whatever temporary exemption it affords must be "born of administrative necessity." *Alabama Power*, 636 F.2d at 657; s*ee also New York v. EPA*, 443 F.3d 880, 884, 888 (D.C. Cir. 2006) (acknowledging agency discretion to modify statute's provision in light of administrative necessity). This Court in *Alabama Power* recognized an agency's need to "cope with the administrative impossibility of applying the commands of the substantive statute," arising directly out of the specific nature of the task then before the agency, its current financial and personnel resources, the time available to it, and other practical impossibilities. *Id.*, 636 F.2d at 357-360; *see also NRDC v. Train*, 510 F.2d 692, 712-13 (D.C. Cir. 1974) (courts "cannot responsibly mandate" enforcement of statutory deadlines when the Administrator "demonstrates that additional time is necessary.").

Here, EPA presented evidence to support its conclusion that it was faced with a current administrative impossibility because implementing the statute literally in January 2011 would have overwhelmed its resources and created a general air permitting logjam. 75 Fed. Reg. at 31,535-36, 31,547.

This evidence includes an estimated increase of PSD permits from hundreds to tens of thousands, and an asserted present lack of sufficient personnel, financial resources and time to process this increased volume. *Id.* When it reviews the Tailoring Rule, this Court will determine whether EPA has met its evidentiary burden of establishing administrative necessity in the Tailoring Rule's initial phase, and whether it has complied with the permitting program's clear intent as closely as is currently possible. Further, EPA concedes that it must move toward full implementation of the statute as quickly as administratively possible in the future, *e.g.*, 75 Fed. Reg. at 31,548, and to that end, it has so far scheduled two additional rulemakings in 2013 and 2016. 75 Fed. Reg. at 31,516. These rulemakings also will be subject to court review.[5] But none of these inquiries relating to the proper use of the "administrative necessity" doctrine requires a separate

[5] *Alabama Power* cautioned that EPA bears "a heavy burden to demonstrate the existence of an impossibility," particularly when it seeks exemptions based on anticipated rather than actual difficulties. *Alabama Power*, 636 F.2d at 359; *see also EDF v. EPA*, 636 F.2d 1267 (D.C. Cir. 1980) (denying exemption where EPA failed to show certain pollution concentrations could not be achieved); *Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C. Cir. 1983) (denying reliance on the doctrine based on predictions of future enforcement problems rather than actual experience). Thus, in its future rulemakings, EPA must show that it will implement greenhouse gas permitting as close to the statutory thresholds as is possible, and can deviate from those thresholds only to the extent that it then presents convincing evidence of ongoing administrative impossibility. *Alabama Power*, 636 F.2d at 357-360.

determination of whether implementing PSD permitting for greenhouse gases is justified by the "absurd results" doctrine.

In sum, EPA's Tailoring Rule approach is independently reviewable in phases based on the continuing existence of administrative necessity. EPA's invocation of the "absurd results" doctrine does not affect this Court's determination of whether the Tailoring Rule is independently justified based on the administrative necessity doctrine. Thus, Petitioners' argument falls apart; *a fortiori,* the claim that the 1978-2002 Rules must be invalidated because of a rationale EPA invoked in another rule that might never be reached by the Court or that may be found harmless error, has no merit. *See, e.g., Bluewater Network v. EPA,* 372 F.3d 404, 412 n.3 (D.C. Cir. 2004) (challenge to one ground for setting emission standards immaterial because EPA gave other, independent and sufficient reasons); *Steel Manufacturers Ass'n v. EPA*, 27 F.3d 642, 649 (D.C. Cir. 1994) (where EPA had adequate and independent grounds for setting standards, error in one ground was harmless); *Carnegie Nat'l Gas Co. v. Federal Energy Regulatory Commission*, 968 F.2d 1291, 1294 (D.C. Cir. 1992) (court need not consider error in one of agency's rationales for its decision where an independent ground sustains it).

II. PETITIONERS' SUGGESTED INTERPRETATION OF THE PSD PERMITTING PROGRAM DOES NOT AVOID THE PURPORTED "ABSURD RESULTS" IN ANY EVENT

A fundamental assertion of Petitioners' brief is that limiting the PSD program to criteria pollutants would avoid the allegedly "absurd results" of EPA's regulatory approach. *See, e.g.*, Petitioners' Br. at 4 ("…because GHGs are not criteria pollutants and have no NAAQS, the proper interpretation of the PSD permitting triggers avoids the absurdities and is consistent with Congress's intent."). The assertion is specious.

There is no real dispute that, even though greenhouse gases are not currently criteria pollutants, the agency has the authority to designate them as such and establish a NAAQS for them in the future.[6] Under Section 108(a)(1), the Administrator is required to list as a criteria pollutant each air pollutant "(A) the emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and (C) for which air quality criteria had not been issued before December 31, 1970 . . . ." 42 U.S.C. § 4708(a)(1). Greenhouse gases clearly are "emitted by numerous

[6] Indeed, petitioners in Case No. 10-1073, in the Joint Opening Brief of Non-State Petitioners and Supporting Intervenors, Doc. #1314204 at p. 45, appear to concede as much.

and diverse mobile or stationary sources" and meet the other criteria as well. *See Massachusetts v. EPA*, 549 U.S. at 532 (greenhouse gases are "air pollutants" within the meaning of the Act); *American Elec. Power Co. v. Connecticut*, No. 10-174, slip op. at 2 (affirming the same); *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). Indeed, a petition seeking this determination is currently pending before the agency.[7]

Notably, if and when a NAAQS for greenhouse gases is promulgated, even under Petitioners' own interpretation, the PSD program would apply to greenhouse gases at the statutory thresholds, as is now the case for the six current criteria pollutants. *See* Petitioners' Br. at 4. Applying the PSD permit program at those thresholds, however, is the very result Petitioners claim would be absurd. Therefore, Petitioners' interpretation—which claims that PSD permitting at those thresholds makes sense only if it is limited to criteria pollutants—transparently would not avoid either the administrative burdens or the "absurdities" of which Petitioners complain.

[7] Center for Biological Diversity, Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act (2009), *available at* www.biologicaldiversity.org/.../clean_air_act/.../Petition_GHG_pollution_cap_12-2-2009.pdf.

Petitioners may object that a NAAQS for greenhouse gases is absurd as well, for precisely this reason. But Congress enacted a forward-looking statutory scheme that envisioned the designation of additional criteria pollutants in accordance with the latest scientific information. 42 U.S.C. § 4708(a)(1), (a)(2); *see also Massachussets v. EPA*, 549 U.S. at 532 (rejecting the claim that Congress did not intend to regulate substances that contribute to climate change and stressing the Act's intent to avoid obsolescence by reacting to changed circumstances and new scientific developments); *American Elec. Power Co. v. Connecticut*, No. 10-174, slip op. at 1 (regulation of greenhouse gases through the Clean Air Act preempts federal common law nuisance claims). Petitioners' interpretation, however, would gut the PSD program *even for criteria pollutants* if they happen to be emitted in large quantities and thus would require a concomitant increase in permits, regardless of the threats to health and welfare they may cause. Thus, far from demonstrating that promulgating NAAQS for greenhouse gases is absurd, Petitioners' argument proves its own speciousness.[8] Petitioners'

[8] Petitioners may respond that all areas in the U.S. would be in non-attainment with greenhouse gas NAAQS, thus rendering PSD permitting inapplicable. But even if the NAAQS were set below current carbon dioxide concentrations, PSD permitting would simply be replaced by the more stringent permitting under Part D of the Act, applicable to non-attainment areas. Under either scenario, the very statutory interpretation Petitioners propose would lead to the same results they declare absurd.

interpretation would frustrate the Act's statutory text, structure and intent by preventing the PSD program from functioning even as they say it should—to ensure compliance with national ambient air quality standards in attainment and unclassifiable areas.

Apparently aware of the error of this reasoning, a petitioners' brief in Case No. 10-1073, Docket # 1314204 at 45-46, proposes that, if a greenhouse gas NAAQS were set, EPA would suddenly possess a vast amount of discretion to adjust the PSD program for criteria pollutants under section 166 of the Act, 42 U.S.C. § 7476, to avoid the absurd results about which Petitioners here complain. These petitioners would grant EPA "the freedom to craft a PSD program appropriate to GHGs," suggesting that once greenhouse gases become criteria pollutants, EPA, under section 166, could do what Petitioners here assert EPA cannot. For example, they say, EPA could "set the emissions thresholds at a sensible level" under section 166(c), or could simply maintain that the emission thresholds in section 169(1) "apply only to the pollutants regulated as of 1977." *Id.*

This argument is apparently meant to be facetious. Petitioners no doubt will seek to prevent EPA from setting NAAQS for greenhouse gases. But even at face value, the point has no merit. First, section 166 does not address emission thresholds that trigger PSD permitting applicability but, as

Alabama Power made clear, focuses on allowable increments instead. *Alabama Power*, 636 F.2d at 406 (footnotes omitted) (section 166 focuses on "'the development of maximum allowable increments or equivalent limitations for those pollutants . . . for which NAAQSs . . . have been or will be established.'"). Nothing in section 166, or anything else in the Act, indicates a congressional intent to change the PSD emission thresholds set in section 169(1) for criteria pollutants. Second, the notion that EPA could declare that the section 169(1) emission thresholds "apply only to the pollutants regulated as of 1977" is directly contradicted by *Alabama Power* as well. *Alabama Power*, 636 F.2d at 404 ("The language of the Act does not limit the applicability of PSD only to one or several of the pollutants regulated under the Act . . . .").

In short, Petitioners cannot escape the fact that their supposedly "common sense" interpretation of PSD permitting is in fact utterly nonsensical.

CONCLUSION

American Chemistry Council's petitions for review should be dismissed.

Dated: July 7, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), I certify that the foregoing brief is printed in 14-point proportional font and, exclusive of the portions permitted to be excluded under Circuit Rule 32(a)(1), and according to the word-count program of Microsoft Word, contains 4,241 words.

/s/ Vera P. Pardee

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2011, I electronically filed the foregoing Brief of amicus curiae Center for Biological Diversity in Support of Respondents by using the CM/ECF system, and that, pursuant to Circuit Rule 31(b), five paper copies of the brief were delivered to the Court by hand. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. As to non-CM/ECF users, I have caused a copy of the foregoing document to be sent today to the following person via first class mail, postage prepaid:

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/s/ Vera P. Pardee