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

INITIAL BRIEF FOR RESPONDENTS

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June 22, 2011

Respondents' Certificate as to Parties, Rulings, and Related Cases

A. Parties and Amici.

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

B. Rulings Under Review.

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

C. Related Cases.

Each of these consolidated petitions for review is related. Moreover, these petitions are 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. *See* Order, Doc. #1299003 (March 18, 2011).

/s/ Amanda Shafer Berman
Counsel for Respondents

Dated: June 22, 2011

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Glossary of Abbreviations

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

JA	Joint Appendix
PSD	Prevention of Significant Deterioration
NNSR	Nonattainment New Source Review
NAAQS	National Ambient Air Quality Standards

Jurisdictional Statement

Petitioners seek review of four rules promulgated by EPA under the Clean Air Act between 1978 and 2002. Br. 1. As explained in section III below, the time to challenge those rules has long passed, 42 U.S.C. § 7607(b), and the regulation of greenhouse gases neither provides new grounds to challenge those rules nor reopens issues addressed therein. Therefore, the Court lacks jurisdiction.

Statement of Issues

1. Part C of the Clean Air Act provides that the Prevention of Significant Deterioration ("PSD") program applies to all "major emitting facilities" – defined as facilities emitting a certain amount of "any air pollutant" – constructed "in any area to which this part applies." Does that language limit application of the PSD program only to facilities emitting the requisite amount of one of the six pollutants for which national ambient air quality standards have been set, rather than any of the other air pollutants regulated under the Act?

2. Does the Court have jurisdiction over these petitions for review given that they challenge rules promulgated in 1978, 1980, and 2002, and the arguments made by Petitioners now are purely legal arguments that were equally available when those rules were promulgated?

3. Did EPA reopen the issue of the scope of the PSD program when it promulgated regulations addressing greenhouse gases even though, in

promulgating those regulations, EPA did not reconsider that issue or change the way the regulatory scheme operates? If it did, should that issue be addressed in Petitioners' pending challenges to the greenhouse gas regulations, rather than here?

4. If the Court determines that it has jurisdiction over Petitioners' challenge to EPA's 1978, 1980, and 2002 rules based on other grounds and decides that the relevant statutory provisions are ambiguous, should EPA have the chance to interpret those provisions in the administrative context before the Court determines whether EPA's reading of the statute is reasonable?

Statutes and Regulations

All pertinent statutes and regulations are contained in the addendum to Petitioners' brief, except for 42 U.S.C. §§ 7412(a)-(b), 7501-03. Those provisions are set forth in the addendum attached to this brief. 42 U.S.C. §§ 7475(a)-(c), 7479 are reproduced in the addendum to this brief as well for the Court's convenience.

Statement of the Case

Petitioners challenge EPA's longstanding reading of the portions of the Clean Air Act addressing the scope of the "Prevention of Significant Deterioration," or "PSD," program. EPA reads those provisions to require application of that program not only to sources emitting certain amounts of a pollutant for which a national ambient air quality standard, or "NAAQS," has been set, but also to sources emitting such amounts of any other air pollutant regulated

under the Act. EPA's reading is based on the text of the relevant provisions of the Act, which provide that "major emitting facilities" in attainment areas are subject to the PSD program and defines that term as facilities emitting certain amounts of "any air pollutant." 42 U.S.C. §§ 7475(a), 7479(1). It has been set forth in rules dating back to 1978, and the time to challenge those rules has long passed. Petitioners nevertheless seek to reach back and strike down those rules to avoid their application to a newly-regulated group of pollutants: greenhouse gases.

Statutory and Regulatory Background

I. The Clean Air Act

In 1970, Congress passed the Clean Air Act Amendments to "respond[] to the growing perception of air pollution as a serious national problem." *Alabama Power Co. v. Costle*, 636 F.2d 323, 346 (D.C. Cir. 1979). Because "only varying degrees of success in controlling pollution in different parts of the country" resulted, "Congress enacted the Clean Air Act Amendments of 1977." *Wisconsin Elec. Power Co. v. Reilly ("WepCo")*, 893 F.2d 901, 904 (7th Cir. 1990). Those amendments were "a lengthy, detailed, technical, complex, and comprehensive response to a major social issue," *Chevron U.S.A., Inc. v. NRDC*, Inc. 467 U.S. 837, 848 (1984), intended to "strengthen the safeguards that protect the nation's air quality." *New York v. EPA*, 413 F.3d 3, 10 (D.C. Cir. 2005).

II. The PSD and NNSR Programs

Congress added the PSD program, contained in Part C of Title I of the Act, when it amended the Act in 1977. *See* 42 U.S.C. §§ 7470 *et seq*. Through this program, Congress required new stationary sources of pollution undertaking construction and existing sources undergoing modifications in areas that are in attainment[1] (or are "unclassifiable" with regard to attainment status) with a NAAQS to obtain preconstruction review and permits. *New York*, 413 F.2d at 10. The scope of the PSD permitting program is described in sections 165(a) and 169 of the Act, 42 U.S.C. §§ 7475(a), 7479. Section 165(a) provides that:

> No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless -- [certain substantive requirements are met]

42 U.S.C. § 7475(a). Section 169 defines several of those terms. "Major emitting facility" is defined as any stationary source that "emits" or has "the potential to emit" either one hundred or two hundred fifty tons per year (depending on the type of source) or more of "any air pollutant." 42 U.S.C. § 7479(1).[2] "Construction" is defined to include "the modification . . . of any source or facility," 42 U.S.C. § 7479(2)(C), which is then defined by cross-reference to 42 U.S.C. § 7411(a)(4) to

[1] The Act defines "attainment" as meeting the NAAQS for a pollutant for which a NAAQS has been designated, and "nonattainment" as not meeting the NAAQS for such a pollutant. *See* 42 U.S.C. § 7407(d)(1)(A).

[2] The phrase "major amounts" will be used herein to reference emissions at or above the statutory thresholds.

include "any physical change in, or change in the method of operation" that "increases the amount of any air pollutant emitted by such source."

The requirements of PSD, to be set forth in permits issued to sources covered by the program, are set out in sections 165(a)(1)-(8), 42 U.S.C. § 7475(a)(1)-(8). Some address the maintenance of NAAQS, which establish maximum permissible concentrations for certain air pollutants. *See, e.g.*, 42 U.S.C. § 7475(a)(3)(B) (emissions from the facility may not cause or contribute to pollution in excess of NAAQS). Other requirements address other standards and a broader range of pollutants. *See id.* §§ 7475(a)(3)(C) (facility emissions may not cause or contribute to pollution in excess of "any other applicable emissions standard or standard of performance"); 7475(a)(4) (facility must use the "best available control technology for each pollutant subject to regulation under [the Act]").

Congress set forth the requirements for nonattainment areas in Part D of Title I of the Act, 42 U.S.C. §§ 7501-7515. Those requirements include preconstruction review and permitting, *see* 42 U.S.C. §§ 7502(c)(5), 7503, referred to as "Nonattainment New Source Review" or "NNSR." "Sources seeking NNSR permits must meet stricter requirements than sources seeking PSD permits," such as achieving the "lowest achievable emission rate" rather than just using the "less demanding 'best available control technology.'" *New York*, 413 F.3d at 13.

III. EPA's Implementation of the PSD Program

A. The 1978 Rules

EPA issued two rules implementing the PSD program in 1978. While they were substantively similar, one concerned the federal regulatory requirements (43 Fed. Reg. 26,388 (June 19, 1978) [JA XX]), while the other (43 Fed. Reg. 26,380 (June 19, 1978) [JA XX]) addressed the requirements for state implementation plans. EPA provided in both that "major stationary sources" were subject to the PSD program, and defined "major stationary sources" as those that emit "any air pollutant regulated under the Clean Air Act" in amounts beyond the statutory thresholds. 43 Fed. Reg. at 26,382 [JA XX]; 43 Fed. Reg. at 26,403 [JA XX]. EPA did not discuss that language at that time.

The 1978 rules were challenged in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). In that case, discussed in section II(A) below, this Court stated that the PSD program applies to sources emitting major amounts of any pollutant, not just to sources emitting major amounts of pollutants for which NAAQS have been set.[3] *See id.* at 352. The Court went on to hold that the Act mandates that the substantive PSD requirements apply to any regulated pollutant emitted by a source subject to PSD review. *Id.* at 403-06.

[3] This brief will refer to pollutants for which NAAQS have been promulgated as "NAAQS pollutants" for purposes of clarity and brevity.

B. The 1980 Rule

Largely in response to the *Alabama Power* ruling, EPA promulgated a rule in 1980 that confirmed that "PSD review will apply to any source that emits any pollutant in major amounts" to be constructed in an area that is in attainment with the NAAQS "for *any* criteria pollutant." 45 Fed. Reg. 52,676, 52,710-11 (Aug. 7, 1980) [JA XX]. EPA noted:

> [I]n order for PSD review to apply to a source, the source need not be major for a pollutant for which an area is designated attainment or unclassifiable; the source need only emit *any pollutant* in major amounts . . . and be located in any area designated attainment or unclassifiable for that *or any other* pollutant.

45 Fed. Reg. at 52,711 (second emphasis added) [JA XX]. EPA explained that the text of the statute and this Court's decision in *Alabama Power* compel that application of the PSD program:

> EPA believes that this approach is required by *Alabama Power* and sections 165(a) and 169(1) of the Act. . . . *Alabama Power* held that this provision must be interpreted literally . . . Read literally, section 165(a) applies PSD preconstruction review to all sources that are major for any pollutant subject to regulation under the Act and locate in an area designated attainment or unclassifiable for any pollutant . . . [R]ead literally, section 165(a) applies PSD review to *all* pollutants subject to regulation under the Act emitted by the source provided that the source is major for *some* pollutant and is located in a clean air area for some pollutant.

Id. EPA also noted that "neither section 165 nor 169(1) links the pollutant for which the source is major and the pollutant for which an area is designated attainment or unclassifiable." *Id.*

C. The 2002 Rule

EPA revised its PSD regulations again in 2002. 67 Fed. Reg. 80,186 (Dec. 31, 2002) [JA XX]. Among other things, EPA revised its terminology by providing that PSD applies to any "regulated NSR pollutant," defining that term to include both pollutants for which NAAQS have been set and pollutants subject to other standards. *Id*. at 80,240, 80,264 [JA XX, XX]. EPA then stated that "[t]he PSD program applies automatically to newly regulated NSR pollutants." *Id*. Indeed, the 2002 Rule itself specifically identified a class of non-NAAQS pollutants, ozone depleting substances, as "currently regulated under the Act" and accordingly subject to "Federal PSD review and permitting requirements." *Id.* at 80,240 [JA XX]. EPA also noted: "[p]ollutants regulated under the Act and not on the list of [hazardous air pollutants] . . . continue to be regulated under PSD. Public commenters generally agree that our proposal reflects the statutory requirements." *Id.* at 80,239-40 [JA XX-XX]. Thus, like the 1978 and 1980 Rules, the 2002 Rule provided that the PSD program applies to sources on the basis of their emissions of non-NAAQS pollutants as well as NAAQS pollutants.

Until now, no one challenged that aspect of the 1978-2002 rules.

IV. EPA's Regulation of Greenhouse Gases

In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court held that greenhouse gases are "air pollutants" under the Act. Pursuant to that decision,

EPA concluded in late 2009 that emissions of greenhouse gases from motor vehicles cause or contribute to air pollution reasonably anticipated to endanger public health and welfare. 74 Fed. Reg. 66,496 (Dec. 15, 2009) [JA XX]. EPA was therefore required to issue standards for motor vehicle greenhouse gas emissions under section 202 of the Act, 42 U.S.C. § 7521, and did so in the "Vehicle Rule." *See* 75 Fed. Reg. 25,324 (May 7, 2010) [JA XX].

Around the same time, EPA determined that greenhouse gases would become "subject to regulation" under the Act, and thus trigger application of the PSD program to facilities emitting major amounts of those pollutants, as of January 2, 2011, when the first vehicles subject to the Vehicle Rule would be eligible to enter the market. 75 Fed. Reg. 17,004 (Apr. 2, 2010) ("Timing Decision") [JA XX]. However, EPA recognized that immediately implementing PSD (as well as Title V) permit requirements for all sources emitting major amounts of greenhouse gases would be administratively impracticable. EPA therefore promulgated the "Tailoring Rule" to establish an effective process by which permit requirements for greenhouse gases can be phased in. 75 Fed. Reg. 31,514 (June 3, 2010) [JA XX].

All of those regulatory actions concerning greenhouse gases have been challenged, and those challenges have been consolidated and will be heard by the same panel that hears this case. *See Coalition for Responsible Regulation v. EPA*, Nos. 09-1322 *et al.*, 10-1073, *et al.*, & 10-1092, *et al.* (D.C. Cir.). Several of those

petitions raise, among other issues, the same question regarding the scope of the PSD program presented here. Industry petitioners challenging the Timing Decision and Tailoring Rule argue that, contrary to EPA's "30 years old" reading of the Act, PSD review applies "only if (1) a source has major emissions of a NAAQS pollutant and (2) the source is located in an area attaining that pollutant's NAAQS." No. 10-1073, Doc. #1314204 (Joint Opening Brief of Non-State Petitioners and Supporting Intervenors) at 23, 25. And industry petitioners challenging the Vehicle Rule show little concern about the regulation of greenhouse gas emissions from vehicles, focusing largely on the rule's impacts on stationary sources. *See* No. 10-1092, Doc. #31311526 (Joint Opening Brief of Non-State Petitioners) at 15-33.

Summary of Argument

Congress expressed its intent that the PSD program be applied to sources in attainment areas emitting major amounts of a wide range of pollutants – not just pollutants for which NAAQS have been set and the area is in attainment – when it provided that any "major emitting facility" constructed in an attainment area is subject to PSD review and permitting, and then defined that term as a facility emitting major amounts of "any air pollutant." 42 U.S.C. §§ 7475(a), 7479(1). The statutory text is clear on this point, this Court so stated in *Alabama Power*, 636 F.2d at 352, and other parts of the PSD program and the Act reinforce that reading.

Petitioners' suggested interpretation, in contrast, is blatantly at odds with the text of the relevant provisions and finds no support in the broader context of the Act. Thus, EPA's longstanding reading of the Act as applying PSD review to sources emitting major amounts of non-NAAQS pollutants, reflected in four rules issued between 1978 and 2002, must be upheld and Petitioners' challenge rejected.

The Court should not reach the merits, however, because Petitioners' challenge is untimely, *see* 42 U.S.C. § 7607(b), and so the court lacks jurisdiction. EPA's reading of the statute was set forth multiple times between 1978 and 2002 and the arguments Petitioners raise here are purely legal arguments that could have been raised then.[4] Thus, EPA's recent regulation of greenhouse gases is not "new grounds" for a late challenge to the 1978-2002 rules, and Petitioners' claims were ripe when the rules challenged here were promulgated. Furthermore, EPA did not expressly or constructively reopen issues addressed in those rules.

Finally, if the Court determines that it has jurisdiction because EPA reopened the PSD applicability issue, the merits of that issue should be reached in the litigation challenging the Tailoring Rule, not here. If the Court has jurisdiction for any of the other reasons advanced by Petitioners and EPA's longstanding reading

[4] EPA strongly believes that the Court lacks jurisdiction to entertain this late challenge to the 1978-2002 Rules. While the Court must decide jurisdiction before addressing the merits, and accordingly EPA would normally present jurisdictional arguments ahead of merits arguments, here we believe that a full presentation of the statutory context will be helpful in understanding the jurisdictional issues.

of the PSD applicability provisions is not required by the statute, then EPA must be given the opportunity to interpret those provisions in the administrative context: specifically, in deciding the petitions for reconsideration of the PSD regulations currently pending before the Agency.

Argument

I. Standard of Review

The standard of review governing the merits of Petitioners' challenge is the two-step approach of *Chevron*, 467 U.S. at 837. If it is clear that Congress intended the PSD program to apply not just to sources in attainment areas that emit major amounts of a NAAQS pollutant for which the area is in attainment, but also to sources emitting major amounts of other non-NAAQS pollutants, then "'that is the end of the matter.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 481 (2001) (quoting *Chevron*, 467 U.S. at 842-43). In that case, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43; *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 891 (D.C. Cir. 2006) (quoting same). In this first step, the court must "exhaust the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue." *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). If the search "yields a clear result," Congress has expressed its intent and deference does not come into play. *Id*.

Only if the statute is "silent or ambiguous" does the *Chevron* analysis proceed to step two, and then the question is whether EPA has filled the gap left by Congress in a "reasonable" manner. *See Chevron*, 467 U.S. at 844. However, "ambiguities should not be found where statutes are clear on their face." *Citizens to Save Spencer Cnty. v. EPA*, 600 F.2d 844, 870 (D.C. Cir. 1979). Moreover, where EPA has promulgated a rule with terms it believes are compelled by the statute under step one of the *Chevron* analysis – as is the case here – the reasonableness of that rule cannot yet be resolved under step two; rather, if the Court determines that the statute is ambiguous, EPA must then be given the opportunity to interpret the statute using its discretion. *See Sec'y of Labor v. Nat'l Cement Co.*, 494 F.3d 1066, 1075 (D.C. Cir. 2007).

II. Petitioners' Challenge to the 1978-2002 Rules Fails As Contrary to Congress' Unambiguous Intent Regarding the Applicability of PSD.

EPA has long read the text of the Act to require it to apply the PSD program to sources in attainment areas that emit "major" amounts of any regulated pollutant, not just NAAQS pollutants. That longstanding reading, set forth in EPA's 1978, 1980, and 2002 Rules (*see* 43 Fed. Reg. at 26,382 [JA XX], 43 Fed. Reg. at 26,403 [JA XX]; 45 Fed. Reg. at 52,711 [JA XX]; 67 Fed. Reg. at 80,240, 80,264 [JA XX, XX]) must be upheld, and Petitioners' contrary interpretation rejected, under step one of the *Chevron* analysis. EPA's reading is consistent with both the statutory text and context, while Petitioners' suggestion that PSD review only applies to

sources that emit major amounts of pollutants *for which a NAAQS has been designated and the area is in attainment* is inconsistent with both text and context.

A. The Statutory Text Mandates EPA's Longstanding Reading of the Act.

Sections 169(1) and 165(a) of the Act, 42 U.S.C. §§ 7479(1) & 7475(a), provide by their terms that the PSD program applies to facilities in attainment areas emitting major amounts of "any air pollutant," not just pollutants for which a NAAQS has been set, with which the area is in attainment. Indeed, this Court said as much in *Alabama Power*, 636 F.3d at 352. Therefore, EPA's longstanding application of the PSD program to sources emitting major amounts of not just NAAQS pollutants, but other regulated pollutants as well, must be upheld under step one of the *Chevron* analysis.

1. *The text of sections 169(1) and 165(a) of the Act plainly provides that application of the PSD program is not limited to facilities emitting major amounts of NAAQS pollutants.*

The text of the Act plainly establishes that application of the PSD program is not limited to facilities emitting major amounts of pollutants for which a NAAQS has been set and the area is in attainment. Section 165(a) of the Act establishes the scope, or applicability, of the PSD program, providing that "[n]o major emitting facility" can be constructed in "any area to which this part applies" unless it meets the substantive requirements of the PSD program. 42 U.S.C. § 7475(a). The first core component of that provision is the term "major emitting facility," which is

defined in section 169(1) as a facility that emits, or has the potential to emit, certain threshold amounts (100 tons per year for certain listed categories of sources listed and 250 for all others) or more of "any air pollutant." 42 U.S.C. § 7479(1). This definition is "jurisdictional in nature." *Alabama Power*, 636 F.2d at 352.

The second core component of section 165(a), 42 U.S.C. § 7475(a), is the phrase "in any area to which this part applies." "This part" is Part C of Title I of the Act – the PSD program. *See* 42 U.S.C. §§ 7470-7492. By its terms, Part C applies to areas designated as in "attainment" with one or more NAAQS, or as "unclassifiable."[5] *Id*. § 7471. Thus, "in any area to which this part applies" means in an area that is in attainment with any NAAQS, not in attainment for a specific NAAQS pollutant. Putting the two core components of the PSD applicability provision together, then, a "major emitting facility" constructed "in any area to which this part applies" is a facility emitting "any air pollutant" in major amounts that is constructed in an attainment area. 42 U.S.C. §§ 7475(a), 7479(1).[6]

Petitioners do not dispute that a "major emitting facility" is one that emits more than the threshold amounts of "any" air pollutant. Br. 8 ("A 'major emitting

[5] As in Petitioners' brief (Br. 6 n.1), this brief will henceforth refer solely to attainment areas, with the understanding that the scope of PSD review is the same for both "attainment" and "unclassifiable" areas.

[6] The legislative history is in accord. *See* S. Rep. No. 95-127, 1157 (1977) ("The chief tool to be used in implementing the no significant deterioration requirements is the permit that must be issued by the State for *any* major emitting facility to be located in *any* clean-air area.") (emphasis added).

facility' . . . is one with 'major emissions'. . . of 'any air pollutant.'"). They also agree that "an area to which this part applies is an attainment area." Br. 31. Yet they disagree that the PSD program therefore applies to all major emitting facilities in attainment areas, arguing instead that it applies to only a subset – those emitting major amounts of pollutants *for which NAAQS have been set and the area is in attainment*. Br. 16 ("Correctly parsed, Section 165(a) requires PSD permits for sources only when they emit major amounts of a pollutant and are located in an area designated attainment for that pollutant's NAAQS.") Thus, Petitioners claim, in alchemic fashion, that the two key phrases collectively impart significant limitations not present in their textual components. But there is simply no basis for such a narrow reading of the PSD applicability provisions in the text of sections 169(1) and 165(a) of the Act, 42 U.S.C. §§ 7479(1) & 7475(a).

Petitioners correctly note that EPA itself has always limited the application of PSD somewhat insofar as it has applied the program based on emissions of "regulated" pollutants – *i.e.*, pollutants that have actually been subjected to regulation under the Clean Air Act – whereas "any air pollutant" (42 U.S.C. § 7479(1)) could theoretically be read as an even broader category. *See* Br. 38. This

implicit limitation was reflected in each iteration of EPA's regulations,[7] and has never been challenged. More importantly, this limitation is simply not at issue here. No party in this case is contending that "any air pollutant," 42 U.S.C. § 7479(1), covers pollutants not subject to regulation; rather, the issue presented is whether that phrase necessarily implicates a broader range of pollutants than *only* pollutants for which NAAQS have been set with which the area is in attainment. Thus, even if EPA's reading of "any air pollutant" as limited to *regulated* pollutants were not required by the Act, that does not mean that the Act is ambiguous in regard to whether the PSD program applies based on emissions of NAAQS pollutants only, as opposed to other regulated pollutants as well. *See Am. Trucking*, 531 U.S. at 481 (an interpretation that goes "beyond the limits of what is ambiguous and contradicts what . . . is quite clear" must fail).

Petitioners also argue that EPA's reading of sections 165(a) and 169(1), 42 U.S.C. §§ 7475(a) & 7479(1), renders the phrase "in any area to which this part applies" (*i.e.*, in an attainment area) surplusage because every area of the country has long been in attainment for at least one NAAQS pollutant. Br. 36. While

[7] *See* 43 Fed. Reg. at 26,382 (defining, in the 1978 rules, "major stationary source" as a source that emits more than 100 or 250 tons per year of "any air pollutant regulated under the Clean Air Act") [JA XX]; 45 Fed. Reg. at 52,711 (stating, in the 1980 rule preamble, that "section 165(a) applies PSD review to [major emissions of] all pollutants subject to regulation under the Act") [JA XX]; 67 Fed. Reg. at 80,240 & 80,264 (providing in the 2002 rule that PSD applies to "regulated" pollutants) [JA XX, XX].

Petitioners are correct as to attainment status, they fail to recognize that the phrase is meaningful because it serves to distinguish application of the PSD program from application of the NNSR program. *See Alabama Power*, 636 F.2d at 364 (discussing whether PSD applied only to sources in "clean air" areas, as opposed to "in the so-called 'non-attainment' areas"). As discussed further below, unlike the PSD program requirements, the substantive requirements of the NNSR program only apply to the source's emissions of the specific pollutant for which the area is nonattainment. *See* 42 U.S.C. § 7503(a). As both programs can apply to the same source simultaneously (in an area that is attainment for one pollutant and nonattainment for another), the "in any area to which this part applies" language serves to clarify that the PSD program does not apply to the extent that the NNSR program applies – *i.e.*, it operates to distinguish "this part" (the PSD program) from the NNSR program. It certainly does not insert a "pollution specific situs requirement" (Br. 8) through oblique references.

2. This Court confirmed EPA's reading of the PSD applicability provisions in Alabama Power.

This Court expressly and clearly confirmed in *Alabama Power* that emissions of non-NAAQS pollutants can trigger PSD:

> At the heart of the PSD provisions lies a definition that is jurisdictional in nature. We refer to the section 169(1) definition of "major emitting facility," which identifies sources of air pollution that are subject to the preconstruction review and permit requirements of section 165. *The definition is not pollutant-specific, but rather*

> *identifies sources that emit more than a threshold quantity of any air pollutant*. Once a source has been so identified, it may become subject to section 165's substantial administrative burdens and stringent technological control requirements for each pollutant regulated under the Act, *even though the air pollutant, emissions of which caused the source to be classified as a "major emitting facility," may not be a pollutant for which NAAQS have been promulgated* or even one that is otherwise regulated under the Act.[8]

636 F.2d at 352 (emphasis added, footnotes omitted). Nothing could more plainly speak to the issue presented here. Construing the PSD program only two years after it was enacted, the Court unequivocally stated that PSD review applies to a major source even if the emissions that make it "major" are *not* "a pollutant for which NAAQS have been promulgated." *Id.*

Importantly, the Court did not make this pronouncement in the context of reviewing EPA's regulations. It was not merely analyzing whether this was a reasonable interpretation of the statute by EPA to which the Court should defer. Rather, the Court was stating what it viewed as the plain requirements of the Act. Moreover, later in its opinion, the Court characterized the phrase "constructed in any area to which this part applies" as "plain language," noting that "neither this

[8] As noted at p. 16 *supra*, EPA has in fact always limited PSD review to sources emitting major quantities of *regulated* pollutants, and whether that limitation is required or permitted by the Act is irrelevant to the question of whether the Act at least plainly requires PSD review to be applied not only to sources emitting major amounts of NAAQS pollutants, but also to those emitting such amounts of other regulated pollutants. In *Alabama Power*, this Court clearly answered that question in the affirmative, 636 F.3d at 352.

court nor the agency is free to ignore the plain meaning of the statute and to substitute its policy judgment for that of Congress." *Id*. at 365.[9]

Petitioners dismiss the Court's discussion of the applicability of the PSD program as a "gloss" and dicta. Br. 39. They are missing the point. The Court made this statement while comprehensively describing and analyzing the PSD provisions, characterizing the non-pollutant-specific definition of "major emitting facility" as "jurisdictional in nature" and "at the heart of the PSD provisions." 636 F.2d at 352. Moreover, later in the opinion, the Court upheld (over industry petitioners' arguments) a regulation that "applies PSD and [best available control technology] immediately to each type of pollutant regulated for any purpose under the provisions of the Act," while striking down a regulation that exempted "from PSD and [its requirements] each pollutant not emitted in sufficient amounts to qualify a source as a major emitting facility." 636 F.2d at 403. The Court explained: "[A]ny source that qualifies with regard to any applicable pollutant as a 'major emitting facility' under the statute's definition of such source is subject to [the requirements of PSD]" and "[t]he language of the Act does not limit the applicability of PSD only to one or several of the pollutants regulated under the

[9] While the Court made this observation in the context of vacating a regulation that would have extended PSD to sources merely because they contributed pollution to a nearby attainment area, *see* Br. 34-35, this is a distinction without a difference here. The key point for this case is that the Court stated that the Act unambiguously required application of PSD to *all* major emitting facilities constructed in attainment areas. *See Alabama Power*, 636 F.2d at 368.

Act . . . or set high thresholds for potential emissions of each pollutant before a major emitting facility because subject to PSD for that pollutant." *Id*. at 404. Thus, while the primary issue addressed in this part of the opinion was whether the requirements of the PSD program, such as the use of "best available control technology," applied to all pollutants regulated under the Act, *see id*. at 406, the Court reiterated in reaching that conclusion that the program is not limited to emissions of only certain regulated pollutants. This further indicates that the Court viewed *both* the scope of application *and* requirements of PSD as non-NAAQS-pollutant-specific, consistent with its earlier statements in the opinion.

B. The Statutory Context Confirms EPA's Longstanding Reading of the Act.

In addition to the text of sections 165(a) and 169(1), 42 U.S.C. §§ 7475(a) & 7479(1), the statutory context of those provisions can also appropriately be considered in step one of the *Chevron* analysis. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (the *Chevron* step one is not "confine[d] to examining a particular statutory provision in isolation"); *Bell Atl.*, 131 F.3d at 1047 ("textual analysis is a language game played on a field known as 'context'"). Here, other aspects of the PSD program and other parts of the Act confirm EPA's longstanding reading of the PSD applicability provisions as not limiting the application of the PSD program to sources emitting major amounts of NAAQS pollutants, but extending it to sources emitting major amounts of other pollutants.

1. Other aspects of the PSD program reinforce EPA's reading of sections 169(1) and 165(a) of the Act.

Other parts of, as well as exemptions from, Part C of the Act – the PSD program – support EPA's reading of sections 165(a) and 169(1), 42 U.S.C. §§ 7475(a) & 7479(1), as applying the PSD program more broadly than just to sources emitting major amounts of pollutants for which NAAQS have been set with which the area is in attainment.

First, EPA's reading of the *scope of application* of the PSD program is consistent with the regulatory *requirements* of that program. Several of those regulatory requirements, set forth immediately after the applicability provision, apply to the emission of pollutants other than NAAQS pollutants. *See* 42 U.S.C. § 7475(a)(1)-(8). One key requirement is that the facility be subject to best available control technology for "each pollutant subject to regulation under [the Act]" that it emits. *Id.* § 7475(a)(4). Another is that the owner or operator demonstrate that emissions from that facility will not cause or contribute to an exceedance of not only the NAAQS, but also "any other applicable emission standard or standard of performance." *Id*. § 7475(a)(3). Such "other" standards would include, for example, standards of performance for new stationary sources under section 111 of the Act, 42 U.S.C. § 7411, which may limit the rate of emission of any of a wide range of pollutants other than NAAQS pollutants, *see* 40 C.F.R. Pt. 60. The fact that the PSD requirements indisputably apply to the emission of non-NAAQS

pollutants strongly supports EPA's reading of the PSD applicability provisions as applying the program to sources emitting "major" amounts of any regulated pollutant, not just NAAQS pollutants. It would be illogical for Congress to apply the requirements of PSD broadly to the emission of all regulated pollutants, but simultaneously limit the program's application to sources emitting major amounts of a subset of pollutants.

Second, PSD review applies to the "modification" as well as the "construction" of a facility, 42 U.S.C. §§ 7475(a), 7479(2)(C), and Congress defined the term "modification" for purposes of the PSD program to include changes resulting in increased emissions of "any air pollutant," including non-NAAQS pollutants.[10] Thus, an increase in emissions of non-NAAQS pollutants resulting from a change at a facility can trigger PSD review. This is yet another indication that PSD review does not apply only to sources emitting NAAQS pollutants in major amounts.

Third, Congress declared that the purpose of the PSD program is to protect the public from the adverse effects of "air pollution . . . notwithstanding attainment and maintenance of all national ambient air quality standards." 42 U.S.C. § 7470(1). This is strong contextual evidence that, while the PSD program is

[10] The term "modification" is defined in section 111 to include a physical change or change in method of operation that increases the amount of "any air pollutant" emitted, 42 U.S.C. § 7411(a)(4), and other provisions of that section expressly distinguish "any air pollutant" from the smaller subset of NAAQS pollutants. *See* 42 U.S.C. § 7411(d) (states must establish performance standards for "any air pollutant" other than a NAAQS pollutant or hazardous air pollutant).

partially directed towards maintenance of the NAAQS, its purpose is considerably broader, and not specific to pollutants for which NAAQS have been set.[11] Moreover, each of the five stated purposes of the PSD program – "protect[ing] public health and welfare"; preserving and enhancing air quality in national parks and other areas; ensuring that economic growth occurs while "existing clean air resources" are preserved; ensuring that emissions from a source in one state do not interfere with "air quality" in other states; and ensuring that decisions to increase "air pollution" are made after "careful evaluation of all the consequences" (42 U.S.C. § 7470) – applies more broadly than just to pollutants for which NAAQS have been promulgated.

Finally, in the 1990 amendments to the Act, Congress confirmed that the PSD program applies to sources that emit non-NAAQS pollutants in major amounts when it explicitly exempted hazardous air pollutants – which are *not* pollutants for which NAAQS have been set – from "[t]he provisions of Part C." 42 U.S.C. § 7412(b)(6). That includes the applicability provisions, 42 U.S.C. §§ 7475(a) & 7479(1). This would have been unnecessary if those provisions, as enacted in 1977, applied to only NAAQS pollutants.

[11] Indeed, Senator Muskie, the sponsor of the 1977 Amendments, specifically rejected the assertion that "there are no air quality values other than those protected by national primary and secondary standards," explaining that "[t]he nondegredation provision is intended to provide protection against harmful environmental effects not anticipated by secondary standards" and address issues like "visibility." 123 Cong. Rec. 18461 (1977) [JA XX].

2. EPA's reading of the PSD applicability provisions is consistent with the NNSR program provisions.

EPA's reading of sections 165(a) and 169(1) is also consistent with Part D of the Act, the NNSR program. Petitioners suggest that the scope of the two programs must be symmetrical because they are "siblings." Br. 41. But while the two programs are complementary, they differ in that, unlike the PSD program, both the scope of application and the regulatory requirements of the NNSR program are pollutant-specific. This serves the different purposes of the two programs.

With respect to applicability, the NNSR program requires permits for "major stationary sources" constructed or modified "anywhere in [a] nonattainment area." 42 U.S.C. §§ 7502(c)(5), 7503(a). Similar to the term "major emitting facility" in section 165(a), 42 U.S.C. § 7475(a), the term "major stationary source" is defined as one that emits certain quantities of "any air pollutant." 42 U.S.C. § 7602(j). However, for purposes of Part D only, the definition of the term "nonattainment area" is narrowed to: "for any air pollutant, an area which is designated 'nonattainment' *with respect to that pollutant.*" 42 U.S.C. § 7501(2) (emphasis added). There is no such language in Part C, the corresponding portion of which reads "in any area to which this part applies," 42 U.S.C. § 7475(a), *not* "in any area to which this part applies with respect to that pollutant." Thus, unlike the applicability provisions of the PSD program, which apply based on emissions of "any air pollutant," 42 U.S.C. § 7479(1), the applicability provisions of the NNSR

program are explicitly pollutant-specific. *See* 45 Fed. Reg. at 52,711("These rules are different from the PSD pollutant applicability rules. Major sources are subject to review under . . . [the NNSR permit program] . . . only if they emit in major amounts the pollutant(s) for which the area is designated nonattainment. In addition, only those nonattainment pollutants which the source emits in major amounts are subject to review . . .") [JA XX].

With respect to the substantive requirements, a permit cannot be issued pursuant to the NNSR program unless the source obtains "offsetting emissions reductions" such that the total emissions in the area will be "sufficiently less than the total emissions from existing sources . . . so as to represent . . . reasonable further progress." 42 U.S.C. § 7503(a)(1)(A). "Reasonable further progress" means achieving "annual incremental reductions in emissions of the *relevant* air pollutant" so as to "ensur[e] attainment of *the applicable* [NAAQS]" by the date set forth in the state's plan. 42 U.S.C. § 7501(1) (emphasis added). Alternatively, if the source is in an economic development zone, then a permit can issue if, *inter alia*, emissions of "*such pollutant* . . . will not cause or contribute to emissions levels which exceed the allowance permitted for *such pollutant* for such area." 42 U.S.C. § 7503(a)(1)(B) (emphasis added). Thus, unlike the requirements of PSD, which address "each pollutant subject to regulation," 42 U.S.C. § 7475(a)(4), the requirements of NNSR review address only the pollutants for which an area is

designated non-attainment. *See* 45 Fed. Reg. at 52,711 ("there is no requirement similar to the one in section 165(a) that subjects a source to review for all regulated pollutants it emits once it is subject to review for one pollutant") [JA XX].

This statutory scheme makes sense as a matter of policy, given that the primary purpose of Part D (entitled "Plan Requirements for Nonattainment Areas") is to bring areas in non-attainment for a specific pollutant into attainment as quickly as possible. *See* 42 U.S.C. § 7502(b) & (c)(1) (identifying the first substantive requirement of Part D as the submission of state plans that "provide for attainment" of the NAAQS). This contrasts with the broader purpose of Part C (entitled "Prevention of Deterioration of Air Quality"), which includes "protect[ing] public health and welfare . . . notwithstanding attainment and maintenance of all [NAAQS]." 42 U.S.C. § 7470(1). "Deterioration of air quality" can result from emissions of any pollutant, notwithstanding attainment of all NAAQS.[12]

EPA's textual reading of the Act is consistent with these different purposes. A source in an area that is nonattainment for a NAAQS pollutant will be subject to the NNSR requirements *for that pollutant*, but not for any other pollutants, because the NNSR program requirements are specific to pollutants for which the area is

[12] Contrary to Petitioners' arguments, Br. 33, nothing in the term "prevent significant deterioration of air quality" limits the meaning of that term to "maintaining attainment" with the NAAQS. On the contrary, the inclusion of "air quality" suggests a broader focus given that non-NAAQS pollutants undeniably also affect air quality.

designated non-attainment. But so long as that area is in attainment for at least one NAAQS pollutant, the PSD program also applies to ensure that there is no deterioration due to emissions of any other pollutants, whether NAAQS or non-NAAQS. Once the Congressionally-mandated goal of bringing the area into attainment with all NAAQS is achieved, the NNSR requirements cease to apply to emissions of the pollutants for which the area was previously nonattainment. But the PSD program then continues to apply to all pollutants emitted in order to ensure not only that there is no exceedence of the NAAQS, but that there is no deterioration in air quality more broadly.[13]

C. Petitioners' Interpretation of the Act Cannot Be Reconciled With the Text.

Petitioners advance a different interpretation of the statutory provisions defining the scope of the PSD program: that only emissions of a "subset of criteria pollutants – those whose NAAQS an area is attaining – trigger PSD permitting." Br. 30. They go so far as to argue that this reading is "compelled" under step one of the *Chevron* framework because it "harmonizes text, structure and purpose." *Id.* But Petitioners' creative reading is blatantly at odds with the text of the Act, and

[13] Congress' policy of requiring PSD for all regulated pollutants (other than NAAQS for which the area is nonattainment) is sensible because PSD provides a ready vehicle to assure pollution control, the basic elements of which are the requirements for preconstruction review and permitting and the imposition of best available control technology.

therefore not only is it not "compelled," it also does not establish that there is any ambiguity in the statute.

The words of a statute "are assumed to bear their 'ordinary, contemporary, common meaning'" absent a contrary indication. *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 207 (1997) (citation omitted). Here, what Petitioners would characterize as a textual reading of the statute under *Chevron* step one "is anything but plain." *WepCo*, 893 F.2d at 908. Petitioners argue that "any pollutant," or its "derivative" term "major emitting facility" must be "read together" with "in any area to which this part applies" as setting a "pollutant-specific situs requirement." Br. 8, 31. This is the antithesis of a plain reading. If Petitioners' interpretation were plain, they would not need to contrive such verbiage.

Petitioners' plainest statement of their desired interpretation of section 165(a) is: "PSD permits are required only for sources with major emissions of the pollutant(s) whose NAAQS the area is attaining." Br. 31. But that is not the language Congress chose to use in the statute. Congress could have defined a "major emitting facility" for purposes of PSD as one that emits certain amounts of "a pollutant for which a NAAQS has been promulgated with which the area is in

attainment."[14] However, as discussed above, it included no such limitation. It would be inappropriate to assume that Congress did not have the tools to achieve the result it desired, rather than that it meant what it said. [15]

Petitioners point to the use of the phrase "any air pollutant in any area to which this part applies" in section 163(b)(4) of the Act, 42 U.S.C. § 7473(b)(4), as supporting their interpretation because that section addresses "maximum allowable concentration[s]," which only exist for NAAQS pollutants. Br. 32. But the text of that provision explicitly limits its application to a particular subset of "any air pollutant": "such pollutant[s]" for which a "maximum allowable concentration" is required to be established, 42 U.S.C. § 7473(b)(4), which includes the NAAQS pollutants. No such limiting language is found in the PSD applicability provisions, 42 U.S.C. §§ 7475(a) & 7479(1). And while some of the language in section 163(b)(4) is similar to some of the language in the PSD applicability provisions, there is a key difference in how it is used: in section 165(a), 42 U.S.C. § 7475(a),

[14] Petitioners argue that the "Agency's inability to draft a more compact alternative shows the difficulty of the task," which is why Congress relied on the simpler language it chose even though it meant something far more complex. Br. 38. But the potential for verbosity does not generally deter Congress from expressing what it intends. *See, e.g.*, 42 U.S.C. § 7410(n)(3) (describing, with much qualification, the areas in which a construction moratorium will be retained).

[15] Petitioners suggest that Congress sought to limit the application of the PSD program, with its associated burdens, to large sources. Br. 42. But Petitioners' interpretation of the statute is not needed to achieve that goal, as PSD applies only to sources emitting pollutants in "major" amounts, excluding even sources that emit NAAQS pollutants in amounts under the statutory threshold.

the subject of the phrase "in any area to which this part applies" is the *facility to be constructed* ("[n]o major emitting facility . . . constructed in any area to which this part applies"); in section 163(b)(4), 42 U.S.C. § 7473(b)(4), it is the *pollutant* ("any air pollutant in any area . . ."). [16]

Petitioners also argue that their definition is consistent with the statutory text because "any" is a "chameleon term." Br. 37-38. But the term "any" cannot be stretched to mean the exact opposite.[17] The cases Petitioners cite in support of their attempt to do so stand only for the unremarkable proposition that one must sometimes look to context to clarify what "any" refers to.[18] And "[i]n the context of the [Act], 'the word "any" has an expansive meaning.'" *New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008) (quoting *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006)). Indeed, in *Massachusetts v. EPA*, the Supreme Court specifically relied on the word "any" in the definition of "air pollutant" to conclude that the statute "foreclose[d]" EPA's decision not to regulate carbon dioxide

[16] The other provision referenced by Petitioners is section 165(c), 42 U.S.C. § 7475(c). Br. 31. But that provision only states that a permit application "for a major emitting facility in any area to which this part applies" shall be granted or denied within a certain time. 42 U.S.C. § 7475(c).

[17] *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("any" has "expansive meaning"; the court could not impose a limit where "Congress did not add any language limiting the breadth of that word"); *Ford v. Mabus*, 629 F.3d 198, 206 (D.C. Cir. 2010) ("'Any,' after all, means any.").

[18] *See, e.g.*, *O'Connor v. United States*, 469 U.S. 27, 30 (1986) (context made it evident that "any taxes" meant "Panamanian taxes").

because "the definition embraces *all* airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.'" 549 U.S. at 528-29 (citation omitted); *see also WepCo*, 893 F.2d at 908 ("courts considering the modification provisions of . . . PSD have assumed that 'any physical change' means precisely that"). Thus, Petitioners' interpretation of the PSD applicability provisions, which replaces the phrase "any air pollutant" with "a pollutant for which a NAAQS has been promulgated with which the area is in attainment," cannot be reconciled with the statutory text.

As noted above, *supra* p. 16-17, Petitioners argue that EPA only applies PSD to sources emitting major amounts of *regulated* pollutants, not "any" pollutant (regulated or not) literally. But that limitation is akin to the Supreme Court's conclusion in *O'Connor*, 469 U.S. at 30, that "any taxes," in the context of a treaty addressing taxes in Panama, meant any *Panamanian* taxes. Similarly, considered in the context of the PSD program, "any air pollutant" logically means any pollutant regulated under that Act. That is the broadest category of pollutants to which substantive requirements actually apply under the PSD program. *See*, *e.g.*, 42 U.S.C. § 7475(a)(4) (applying the "best available control technology" requirement, the principal PSD control provision, to "each pollutant subject to regulation"). Without that common-sense limitation, sources might be required to obtain PSD permits even if no requirements apply to them (because they emit only

unregulated pollutants), resulting in empty permits serving little purpose in the context of the PSD program. But that issue is not before the Court here and, regardless of whether the Act requires or allows EPA to apply PSD to regulated pollutants only, it plainly does not limit the application of PSD review to facilities emitting major amounts of NAAQS pollutants only.

Petitioners' proposed interpretation is inconsistent with the text of sections 169(1) and 165(a), 42 U.S.C. §§ 7475(1) & 7479(1), and would limit the scope of PSD review "far beyond the words enacted by Congress." *WepCo*, 893 F.2d at 908. As such, it is not only *not* compelled, but it must be rejected because the Act, as well as this Court's decision in *Alabama Power*, make clear that it is not consistent with the intent of Congress.

III. Petitioners' Challenge to the 1978-2002 Rules Is Untimely

The Court should not reach the merits of Petitioners' challenge to the 1978-2002 rules, however, because the time to challenge EPA's reading of the provisions defining the scope of application of the PSD program has long passed. The Act sets a time limit for challenging EPA rules: sixty days. 42 U.S.C. § 7607(b). This time limit "'is jurisdictional in nature, and may not be enlarged or altered by the courts.'" *NRDC v. EPA*, 571 F.3d 1245, 1265 (D.C. Cir. 2009) (citation omitted). Petitioners attempt to avoid this bar by suggesting that EPA's regulation of greenhouse gases is of such moment that it gives rise to several

exceptions to the time bar. However, the exceptions invoked – the "new grounds," ripeness, and reopener doctrines – are narrow and do not apply here.

A. The 1978-2002 Rules Set Forth EPA's Reading of the Act, and the Arguments Made Here Could Have Been Raised Then.

EPA's reading of the PSD applicability provisions was clearly and unambiguously set forth in its 1978, 1980, and 2002 rules, and the legal arguments advanced by Petitioners here could have been presented at that time.

EPA's interpretation was first reflected in the 1978 rules, which defined a "major stationary source" – the regulatory term that EPA employed to implement the statutory term "major emitting facility" – as a source that emits "any air pollutant regulated under the Clean Air Act" in amounts beyond the statutory thresholds and specified that state plans had to require such sources to meet the PSD requirements. 43 Fed. Reg. at 26,382-85 [JA XX-XX]. Briefs submitted by industry petitioners challenging the 1978 rules in *Alabama Power* demonstrate that they understood that EPA would therefore apply the PSD program to both NAAQS pollutants and other regulated pollutants. Those petitioners stated: "[t]he proposed regulations required PSD review of all new stationary sources and major modifications, which were defined in terms of their potential to emit 'any pollutant,'" and "EPA has indicated that it may require PSD review of not only [other NAAQS pollutants], but any other pollutant regulated under the Act." *See* Brief for Industry Petitioners on Regulation of Pollutants other than Sulfur Dioxide

and Particulates, Nos. 78-1006 (and consolidated cases) (Dec. 19, 1978) at 10, 12 [JA XX, XX]. They chose, however, to primarily challenge whether the PSD requirements should be applied to any pollutants, NAAQS or non-NAAQS, before certain studies were done and further regulations issued. *See Alabama Power*, 636 F.2d at 405-06.

After the Court rejected their initial arguments, industry petitioners in *Alabama Power* requested rehearing, arguing that "under EPA's approach, all industry stationary sources that emit 100/250 tons" of non-NAAQS pollutants such as hydrogen sulfide and mercury "would require a PSD permit," and that "the express language of Section 165 neither authorizes nor requires" such an approach. Industry Petitioners' Petition for Rehearing on the Application of PSD Requirements to Pollutants Other than Sulfur Dioxide and Particulates, Nos. 78-1006 (and consolidated cases) (July 19, 1979) at 15-16 [JA XX-XX]. Again, however, those petitioners strategically chose to focus on whether, "once a source qualifies as a major emitting facility with regard to *any pollutant*," the substantive requirements of the program actually apply to all regulated pollutants emitted. *See id.* at 17 (emphasis added) [JA XX]. This further shows that industry petitioners challenging the 1978 rules understood that, under EPA's reading of the statute, application of the PSD program was not limited to sources emitting NAAQS pollutants in major amounts.

The 1980 Rule not only reiterated, but specifically highlighted, EPA's interpretation of the PSD applicability provisions. This time around, EPA not only incorporated its interpretation in regulatory text,[19] but also expanded on that text in the preamble, explaining that "for PSD review to apply," a source "need not be major for a pollutant for which an area is designated attainment," but only "emit any pollutant in major amounts" in an "area designated attainment . . . for that or any other pollutant." 45 Fed. Reg. at 52,710–11 [JA XX-XX]. EPA noted that it considered its reading to be "required by *Alabama Power* and sections 165(a) and 169(1) of the Act," because "[r]ead literally, section 165(a) applies PSD preconstruction review to *all* sources that are major for any pollutant subject to regulation under the Act and located in an area designated attainment or unclassified for any pollutant." *Id.* at 52,711. Thus, there is no question that the reading of the PSD applicability provisions challenged here was plainly set forth in the 1980 Rule, and Petitioners acknowledge that. Br. 13 ("EPA's view of the PSD permitting triggers" was "announced in the 1980 preamble"). EPA's reading of the PSD applicability provisions was not challenged at that time.

Finally, while any challenge to EPA's reading of the PSD applicability provisions arguably should have been made when it was first set forth – *i.e.*, in

[19] Petitioners argue that the proposed version of this rule was more consistent with their desired interpretation of the relevant provisions. Br. 9. But even if EPA changed its views on the applicability issue between the proposed and final rules, that only confirms that the issue was plainly presented for challenge then.

1978, or at least in 1980 – the 2002 Rule also squarely reflected EPA's (by then) longstanding reading. EPA explained there that, *in addition to* pollutants for which a NAAQS has been established, "[t]he PSD program applies automatically" to any "newly regulated" pollutants. 67 Fed. Reg. at 80,240, 80,264 [JA XX, XX]. Yet again, no challenge was made to that aspect of the Rule. *See New York*, 413 F.3d at 3 (listing petitioners' challenges). Thus, the time to challenge EPA's reading of the PSD applicability provisions has long passed. 42 U.S.C. § 7607(b).

B. The Vehicle Rule Is Not New Grounds to Challenge the 1978-2002 Rules.

A petitioner may challenge a regulation promulgated under the Act more than sixty days after promulgation "if such petition is based solely on grounds arising after such sixtieth day." 42 U.S.C. § 7607(b). The "grounds arising after" or "new grounds" doctrine is narrow. Under this Court's precedent, it does *not* encompass any event that may occur after the normal judicial review period has closed. Here, Petitioners' new grounds argument – predicated on the regulation of a newly-designated pollutant, greenhouse gases – fails because Petitioners' challenge to EPA's reading of the PSD applicability provisions is based on purely legal arguments that were equally available, albeit equally unavailing, during the normal judicial review periods for the 1978, 1980 and 2002 rules.

This Court has explained that new grounds can only form the basis for a late challenge to final agency action where the challenge is based on substantive legal

arguments that were not available during the initial review period. *Nat'l Mining Ass'n v. DOI*, 70 F.3d 1345, 1350 (D.C. Cir. 1995). In *National Mining*, the review provision was substantively the same as here: it allowed petitions based "solely on grounds arising after" the initial sixty-day period. 70 F.3d at 1350 & n.2. The Court held that there was no jurisdiction over appellants' late challenge to a rule there because it was based on legal arguments that were "available . . . at the time the rule was adopted." 70 F.3d at 1350. The Court explained that to allow such challenges would "thwart Congress' well-laid plan" to balance the "need for administrative finality and . . . unexpected difficulties." *Id.*

Here, the "new ground[]" Petitioners rely on is a factual development – the regulation of greenhouse gases in the Vehicle Rule – but, as in *National Mining*, their substantive challenge to EPA's longstanding interpretation of the scope of PSD review is based on a purely legal argument. They argue that the Act "compels" a different interpretation of the scope of the PSD program than EPA's longstanding reading. Br. 30-40. That argument was fully available during the judicial review periods for the 1978, 1980 and 2002 rules.[20] The statutory

[20] Indeed, as noted above, industry petitioners who challenged the 1978 rules indicated that they understood how EPA read those provisions, but chose to make different, more limited arguments about the immediately application of PSD requirements to any pollutants (NAAQS or non-NAAQS) for which EPA had not yet completed certain studies. *See* p. 34-35 *infra*.

provisions have been in place since 1977, and EPA's reading of those provisions has been set forth in its regulations since 1978.

Moreover, in addition to being equally available when EPA promulgated the rules challenged, Petitioners' argument would have been equally unavailing then. This also bars that argument from being considered now under the "new grounds" doctrine. A factual development, such as the regulation of a new pollutant, cannot be "new grounds" for a challenge to agency action if the legal arguments raised are fundamentally inconsistent with the statute. *See Union Elec. v. EPA*, 427 U.S. 246, 255-66 (1976) (new information showing economic and technological infeasibility was not "new grounds" for review since the Act does not allow EPA to consider such infeasibility). Thus, EPA's longstanding interpretation of the PSD applicability provisions "cannot [be] set [] aside on" the grounds asserted by Petitioners "no matter when they are raised." *Id.* at 266.

Apparently recognizing that their challenge does not fit neatly into the "grounds arising after" exception to section 307(b), 42 U.S.C. § 7607(b), Petitioners seize on the phrase "unexpected difficulties" from *National Mining*, 70 F.3d at 1350. Br. 18. But the Court did not say that "unexpected difficulties" constitute "new grounds;" rather, it stated that Congress had balanced such "difficulties" with the "need for administrative finality" when it decided that new grounds can only be

invoked to challenge an old rule if the challenge is based on arguments that could not have been made at the time. 70 F.3d at 1350.

The other case law cited by Petitioners similarly reveals that their invocation of the "new grounds" doctrine is misplaced. Petitioners cite *Am. Road & Transp. Builders Ass'n v. EPA ("ARTBA")*, 588 F.3d 1109, 1113 (D.C. Cir. 2009), cert. denied, 131 S. Ct. 388 (2010) as allowing petitions that "raise points" that could not have been raised before, and *Eagle-Picher Industries Inc. v. EPA*, 759 F.2d 905, 913 (D.C. Cir. 1985), as stating that new regulations can "essentially create a challenge that did not previously exist." Br. 18. But the point Petitioners make here is neither one that they could not have raised before, nor a challenge that did not previously exist. Rather, they raise a fundamental legal question of statutory interpretation that was as equally available, evident, and meaningful when EPA addressed the scope of PSD in 1978, 1980, and 2002 as now.

Petitioners then fall back on their assertion that the "absurdities" created by the regulation of greenhouse gases are what is new here. Br. 19. But that is not the basis for their challenge, which is premised on whether a different reading of the Act than EPA's is compelled under step one of the *Chevron* analysis. Petitioners return to arguments based on the "absurdities" of regulating greenhouse gases in their *Chevron* step two argument, but their proffered reading cannot be both

simultaneously compelled by the text of the 1977 Amendments and only evident now that it has been applied to a particular pollutant.

Ultimately, Petitioners' admission that "the questions posed by the present petitioners are pure questions of law," Br. 29, "dooms [their] petition in this forum," *ARTBA*, 588 F.3d at 1112. A legal argument, equally evident when an agency's reading of a statute is laid out for the first time – or even for the second or third time – simply is not "grounds arising after." *Nat'l Mining*, 70 F.3d at 1350.

C. Petitioners' Challenge to the 1978-2002 Rules Did Not Just Ripen.

Petitioners also suggest that their challenges to EPA's reading of section 165(a) of the Act did not ripen until EPA promulgated the Vehicle Rule. Br. 21. At that point, they claim, "thousands upon thousands" of facilities became potentially subject to the PSD program for the first time. Br. 17, 21-22. To begin with, "ripeness" is not an alternative ground for allowing a new challenge to an old rule; it is simply a variant of the "grounds arising after" doctrine. *See ARTBA*, 588 F.3d at 1109 ("§ 307(b)(1)'s provision for judicial review after the initial filing period for suits based on newly arising grounds encompasses the occurrence of an event that ripens a claim"). But even if it did provide a separate potential ground for Petitioners to challenge EPA action dating back to 1978, Petitioners' ripeness argument fails on the law.

In the regulatory context, "purely legal" issues are usually ripe when the regulations presenting them are promulgated, even if they only directly affect regulated entities after future agency action. *See Eagle-Picher*, 759 F.2d at 917-18 ("because the issue presented for review is purely a legal one, it was suitable for review at the time the [regulation] was issued . . . the court has an interest in conserving its own resources by resolving challenges to agency action during the statutory period, rather than stretching them out over an indefinite period of time"). This is particularly true where Congress has specified a limited judicial review period for such action.

As this Court explained in *George E. Warren Corp. v. EPA*, 159 F.3d 616, 621-22 (D.C. Cir. 1998), *op. amended*, 164 F.3d 676 (D.C. Cir. 1999) where the question raised is "purely an issue of law" presented in a "concrete" setting, and "Congress has emphatically declared a preference for immediate review as it has under the Clean Air Act" (citation omitted), then the issue is ripe for review when the regulation is promulgated. And there, the Court found the challenge to be "as concrete now as it will ever be," without waiting for the regulation to be implemented in a specific factual context, "because the rule operates automatically" (*id.*) – just as the 1978-2002 rules automatically apply PSD to any

newly-regulated pollutants.[21] Thus, the fact that some sources may not have been subject to the PSD program until greenhouse gases were regulated does not mean their claims only ripened at that time.

Petitioners' ripeness argument also fails as a matter of logic. Petitioners dispute EPA's reading of the PSD applicability provisions because of the "triggering" effect of that reading: once something becomes a regulated pollutant, then a source that emits it in major amounts falls within the scope of the PSD program. But this is true for every new pollutant regulated after 1977. The prospect of new pollutants being regulated, and thus new sources being subject to PSD, has always been present. Indeed, Petitioners cannot even claim that this is the first newly regulated pollutant to cause this type of concern in the regulated community: industry petitioners unsuccessfully sought to exclude emissions of mercury – a non-NAAQS pollutant[22] – from the reach of PSD in *Alabama Power*. *See* 636 F.3d at 361 n.90. This demonstrates that the regulated community understood at that

[21] Petitioners cite *Louisiana Environmental Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996) to argue that their challenge would not have been ripe when the 1978-2002 rules were promulgated because their injury was not "concrete" then. Br. 21. But there, the Court held that a challenge was unripe because the injury alleged did not result from the regulations challenged, but rather only *might* result from *state-adopted regulations* subsequently approved by EPA. *Id.* Petitioners also cite this case for the proposition that the case law relied on by EPA addresses prudential ripeness, and the issue here is constitutional ripeness. Br. 23. But the cited passage addresses constitutional *standing*. *Id*. at 1384.

[22] As noted above, Congress thereafter specifically exempted hazardous air pollutants from PSD. 42 U.S.C. § 7412(b)(6).

time that the PSD program applied to newly regulated, non-NAAQS pollutants. Accordingly, any issue they had with that prospect was ripe for review then.

Finally, Petitioners' ripeness argument would have far-reaching implications for the finality of any agency action pursuant to the Clean Air Act, or any other statute that instructs the agency to determine what activities its provisions will apply to. If the addition of a new pollutant to the pantheon of pollutants regulated under the Act "ripened" the claims of any facility that emits that pollutant, the basic regulatory framework would be subject to challenge every time EPA did the very thing it is mandated to do by the Act – identify new pollutants threatening human health or welfare and regulate them as necessary.

D. EPA Did Not Reopen the PSD Applicability Issue.

Petitioners next contend that, when it recently promulgated regulations addressing greenhouse gases, EPA expressly or constructively *reopened* the PSD applicability issue, thereby making their challenge to EPA's longstanding reading of the applicability provisions timely. Br. 25. It clearly did not.

1. EPA did not expressly reopen the PSD applicability issue.

An agency determination reached in a prior rulemaking will be deemed to be reopened if the agency expressly reopens it or otherwise consciously acts to "reexamine[ ] the policy at issue in the petition." *Nat'l Mining*, 70 F.3d at 1351. If the agency does not seek comment on the *specific* policy being challenged, or

otherwise affirmatively reconsider that policy, challenges to the original regulation are barred. *ARTBA*, 588 F.3d at 1109, 1115; *NRDC v. EPA*, 571 F.3d at 1255-56. The Court can only find a reopening to have occurred where, based on the full context of the new regulation, it is clear that the agency "has undertaken a serious, substantive reconsideration of the [existing] rule." *Nat'l Mining*, 70 F.3d at 1352; *see also P & V Enters v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1024 (D.C. Cir. 2008) (finding no reopener because the agency did not "consider[] the substance of the rule to be in doubt"). Mere discussion of the old rule in the new rule does not constitute reopening. *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 398 (D.C. Cir. 1989).

The cases cited by Petitioners do not establish any contrary tenet. In *Association of American Railroads v. ICC*, 846 F.2d 1465, 1473 (D.C. Cir. 1988), the Court concluded that the agency had reopened a policy because it stated that it was supplementing the views it expressed in an earlier regulation. In *Edison Electric Institute v. EPA*, 996 F.2d 326, 332 (D.C. Cir. 1993), the Court found that EPA had reopened the issue because it "explicitly invited comments on the precise question for which petitioners now seek review . . . ." And, in *Public Citizen v. NRC*, 901 F.2d 147, 151 (D.C. Cir. 1990), the Court found an issue to be reopened where the very purpose of the new rulemaking was to reexamine the policy from the former rulemaking. Nowhere does the Tailoring Rule suggest that the 1978,

1980 or 2002 rules would be revisited; in fact, as noted below, EPA expressly stated that it was not reopening those regulations.

Failing to find any express statements that EPA was revisiting or reconsidering the 1978, 1980 and 2002 rules, Petitioners assert that by examining the ways in which to deal with the *administrative burdens* associated with PSD permitting for greenhouse gases, EPA effectively called for comments on the PSD applicability issue. Br. 12. To begin with, a general call for comments is not sufficient to find that an agency reopened all issues related to that regulation. *See Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 143 (D.C. Cir. 1998) (a statement by the agency "welcom[ing] public comments on these proposals, and on any other areas where changes might be made, to streamline our abandonment regulations," did not support a finding of reopening). More importantly, EPA did not, in fact, solicit comments on all aspects of its Tailoring Rule – and certainly not on the applicability of PSD to non-NAAQS pollutants. Contrary to Petitioners' assertion, *nowhere* does the preamble to the proposed Tailoring Rule ask for comments on this issue. The comments that the preamble

solicits all relate to examining how best to deal with the administrative burdens faced by state agencies in issuing PSD permits for greenhouse gases.[23]

Petitioners cite three instances where EPA purportedly reopened the PSD applicability issue, Br. 12, but none of those statements addresses whether PSD is triggered by emissions of non-NAAQS pollutants such as greenhouse gases. *See* 74 Fed. Reg. 55,317 (explaining that there are different ways of "narrowing the administrative burden through means consistent with the statutory requirements" and soliciting comments on "streamlining approaches") [JA XX], 55,320 ("We solicit comment on the permit streamlining approaches" or "on any other tools or options that could address or reduce the administrative burden.") [JA XX] & 55,327 (soliciting comment on how to "address the administrative concerns in more effective ways") [JA XX]. EPA was seeking comments on *how* to phase-in the application of the PSD program to greenhouse gases; it was not seeking comments on *whether* it applied.

Petitioners nevertheless assert that asking for comments on how to deal with the administrative burdens of applying a statutory provision is the same as asking for comments on *whether* the statute applies. Br. 25-26. Yet, EPA made it clear in the

[23] EPA solicited comments on, *inter alia*: the number of sources affected under the statutory thresholds and proposed tailored thresholds for applying PSD requirements to greenhouse gases (74 Fed. Reg. 55,292 at 55,302, 55,332 (Oct. 27, 2009) [JA XX, XX]); the appropriate time periods for various steps of implementation (*id.* at 55,337 [JA XX]); and the burdens faced by permitting authorities and applicants (*id.* at 55,318, 55,331 [JA XX, XX]).

Tailoring Rule preamble that the PSD program applies to any pollutant by *operation of statute,* and that it was *not* soliciting comments on that issue:

> [T]he PSD and title V provisions and their legislative history do indicate a clear Congressional intent, under *Chevron* Step 1, as to *whether* the two permitting programs applied to GHG sources, and that the intent was in the affirmative, that the permitting programs do apply to GHG sources. Our previous regulatory action defining the applicability provisions made this clear, and *we do not reopen this issue in this rulemaking*.

75 Fed. Reg. at 31,517 (emphasis added) [JA XX].[24] Petitioners therefore resort to arguing that, even if EPA did not solicit comments on the PSD applicability issue, it responded to comments about it, thus reopening it. Br. 25-26. But EPA explained it did so only "to be fully responsive, even though we believe that this is a settled matter for which the time for judicial review has passed." 75 Fed. Reg. at 31,517 n.4, 31,548 n.32 [JA XX, XX]. Such action does not reopen an issue:

> "[W]hen the agency merely responds to an unsolicited comment by reaffirming its prior position, that response does not create a new opportunity for review. [Citation omitted.] Nor does an agency reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter."

[24] *See also id.* at 31,558 ("Congress must be said to have intended an affirmative response for whether PSD applies to sources of GHGs as a general matter. Our previous regulatory action defining the PSD applicability provisions made this clear and we do not reopen this issue in this rulemaking.") [JA XX] & 31,548 ("[A]s a matter of *Chevron* Step 1, PSD and Title V apply to GHG sources. Our previous regulatory action defining the applicability provisions made this clear, and we do not reopen this issue in this rulemaking.") [JA XX].

Kennecott Utah Copper Corp. v. Dep't. of Interior, 88 F.3d 1191, 1213 (D.C. Cir. 1996). As this Court has noted, "if a party were allowed to 'goad an agency into a reply, and then sue on the ground that the agency . . . re-opened the issue,' the agency's thorough answer would put it at risk of 'reopening,' while a taciturn response would put it at risk of being faulted for acting without reasoned decision-making." *ARTBA*, 588 F.3d at 1114 (quoting *Am. Iron and Steel Inst.*, 886 F.2d at 398). Here, while EPA acted responsibly in responding to the concerns of stakeholders on the applicability of PSD to all pollutants, it merely "reaffirm[ed] its prior position." *Id.* Thus, it did not reopen the PSD applicability issue.

2. EPA did not constructively reopen the PSD applicability issue.

Petitioners alternatively argue that EPA *constructively* reopened the applicability issue "across its [greenhouse gases] actions." Br. 26. Under this Court's precedent, "[a] constructive reopening occurs if the revision of accompanying regulations 'significantly alters the stakes of judicial review' as the result of a change that 'could not have been reasonably anticipated.'" *NRDC v. EPA*, 571 F.3d at 1266 (internal citation omitted). For such a constructive reopener to be found, the new regulations must do more than affect new stakeholders; it must effect a "sea change" in the manner in which the regulatory scheme works that could not have been reasonably anticipated. *Id.*

Petitioners focus on the increased number of covered entities that result from the application of PSD to greenhouse gases as the "sea change" that significantly altered the stakes of judicial review. Br. 27. But under Petitioners' reasoning, every time EPA applies PSD to another pollutant because it becomes regulated under the Act, a new set of Petitioners get to challenge the same regulations issued in 1978, 1980, and 2002. This is not the type of "change" that can be deemed to constructively reopen a previously decided issue.

Moreover, Petitioners' argument is based on the false premise that a change actually occurred in the regulatory scheme. But as detailed above, there has been no change in the regulations; rather, the Tailoring Rule only confirms the regulatory scheme. Only if EPA had made the determination, in either the Tailoring Rule or one of the other greenhouse gas rules, that PSD did *not* apply to greenhouse gases could one conclude that EPA had altered its regulatory scheme in a fundamental way. Thus, EPA's application of PSD review to non-NAAQS pollutants (in this case, greenhouse gases) "did not work such a sea change. The basic regulatory scheme remains unchanged." *NRDC v. EPA*, 571 F.3d at 1266.

The few cases where a constructive reopening has been found confirm that EPA's regulation of greenhouse gases did not constructively reopen the PSD applicability issue. For example, in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), EPA adopted a new regulation that removed at least four safeguards that

previously existed and shifted from a regulatory scheme based on mandatory requirements subject to prior approval with public involvement to a non-mandatory plan with no approval requirement and no public involvement. Here, while the Tailoring Rule addressed the *pace* at which PSD would be applied to greenhouse gas emissions (to the great benefit of Petitioners), neither the Tailoring Rule nor any of the other actions addressing greenhouse gases altered, in any way, the basic regulatory framework governing which pollutants are subject to PSD – which is the only issue raised by Petitioners in this action. Increasing the number of covered entities by regulating a new pollutant does not alter the regulatory scheme. Thus, the regulatory scheme Petitioners challenge has been subject to no "sea change," but "remains unchanged." *NRDC*, 571 F.3d at 1266.

IV. If the Court Finds that EPA Reopened the PSD Applicability Issue, That Issue Must Be Addressed in the Challenges to the Tailoring Rule; If the Court Has Jurisdiction On Other Grounds and the Statute is Ambiguous, EPA Must Now Have the Chance to Interpret It.

If the Court agrees with Petitioners that the issue of PSD applicability was reopened by the Tailoring Rule, or even "across" EPA's greenhouse gas regulations, Br. 26, the appropriate place for that issue to be addressed is in the pending challenge to the Tailoring Rule.[25] Reopener allows a party to challenge a previously-decided issue in the context of a *new* regulation. *See Pub. Citizen v.*

[25] The Tailoring Rule is challenged in twenty-five separate petitions for review consolidated in No. 10-1131, which has been consolidated with the challenge to the "Timing Decision" in No. 10-1073, and will be heard by this panel.

NRC, 901 F.2d at 151-52 (finding that a challenge to an old regulation was time-barred, but the issue had been reopened in a new regulation and so could be challenged as part of the petition to review *that new regulation*). This is particularly appropriate here given that Petitioners' challenge is partially based on the assertion that EPA recently found that applying PSD to greenhouse gases is absurd, Br. 25-26,[26] a finding that did not exist in 1978, 1980, or 2002 and lies outside the record for those rules. That issue is addressed, however, in the record for the Tailoring Rule, where EPA also stated that "even if [its] long-established regulatory position were not justifiable based on Chevron Step 1 . . . then we believe that this position, that the statutory provisions apply PSD to GHG sources in general, was justified under Chevron Step 2." 75 Fed. Reg. at 31,558. Therefore, if the PSD applicability issue has been reopened, then the appropriate place for Petitioners and EPA to debate that issue is in the pending challenges to the Tailoring Rule – which is exactly what Petitioners are already doing.[27] Petitioners should not be permitted to reach back and rewrite four separate

[26] As EPA will detail in its defense of the Tailoring Rule, application of PSD to greenhouse gases is *not* absurd; rather, it is consistent with Congress' clear directive, which is not altered because it may lead to some "absurd results" in the administration.

[27] *See* No. 10-1073, Doc. #1314204 (Joint Opening Brief of Non-State Petitioners and Supporting Intervenors) at 25 (arguing that industry petitioners' "pollutant-specific interpretation" of the PSD applicability provisions is "compelled" by the Act, or at least a "permissible interpretation").

regulations, issued in three prior decades, because a *new* regulation purports to have revisited one issue addressed therein.

If, however, this Court allows Petitioners' challenge to the 1978-2002 rules to proceed based on the "new grounds" or ripeness doctrines, then EPA must have the opportunity to interpret the PSD applicability provisions in the administrative context before the Court determines whether EPA's reading of the statute is reasonable. EPA has consistently characterized its reading of the PSD applicability provisions as compelled. *See* Preamble to 1980 Rule, 45 Fed. Reg. at 52,711 ("EPA believes that this approach is required by *Alabama Power* and sections 165(a) and 169(1) of the Act.") [JA XX]; Preamble to Tailoring Rule, 75 Fed. Reg. at 31,558 ("[W]e believe that Congress must be said to have intended an affirmative response for whether PSD applies to sources of [greenhouse gases] as a general matter.") [JA XX]. Where an agency promulgates a regulation with terms it believes were compelled, as opposed to within its discretion, the reasonableness of its interpretation cannot be resolved under step two of the *Chevron* analysis; rather, the agency must first be afforded the opportunity to use its judgment to interpret the statute. *See Nat'l Cement Co.*, 494 F.3d at 1075; *Am. Trucking*, 531 U.S. at 486 (it must be "left to the EPA to develop a reasonable interpretation of" the statutory provisions). Thus, if EPA's belief that the Act requires it to apply PSD not just to facilities emitting major amounts of NAAQS pollutants, but also to

those emitting major amounts of other pollutants, is wrong, EPA must now be given the opportunity to interpret the Act.

The appropriate place for EPA to do so is in deciding the Petitions to Reconsider, Rescind, and/or Revise EPA Prevention of Significant Deterioration Regulation submitted to the Agency by these Petitioners on July 6, 2010. This Court's decision in *Oljato Chapter of Navajo Tribe v. EPA*, 515 F.2d 654, 666-67 (D.C. Cir. 1975), requires that a "new grounds" claim first be presented to EPA and judicial review reserved until after EPA renders a decision. As noted in EPA's motion to dismiss these petitions (Mot. at 20 n.18), EPA does not believe that *Oljato* applies here because there are no legitimate "new grounds" for Petitioners' challenge to the 1978-2002 Rules. And even if it does, EPA believes that the Court can still appropriately decide now whether EPA's reading of the Act reflects the clear intent of Congress under step one of the *Chevron* analysis, as there would be little point in reserving that issue until after EPA decides the petitions for reconsideration given its belief that its reading is mandated by the Act.

But if the Court finds that there are "new grounds" to challenge the 1978-2002 rules *and* it does not uphold EPA' reading under *Chevron* step one, EPA must have the opportunity to consider how best to interpret the PSD applicability provisions in light of those "new grounds" in the administrative context before this Court proceeds to step two of the *Chevron* analysis. *See Oljato*, 515 F.2d at 666-67. In

that event, the Court should stay this challenge to the 1978-2002 rules until EPA has acted on the petitions for reconsideration. To consider Petitioners' *Chevron* step two arguments without giving EPA that opportunity would rob it of its Congressionally-designated role.

Conclusion

For the foregoing reasons, the Court should dismiss or deny Petitioners' challenge to EPA's 1978, 1980 and 2002 rules.

Respectfully submitted,

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June 22, 2011

Certificate of Compliance with Type-Volume Limitation,
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Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that:

1. this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because, as counted by the word count feature of Microsoft Office Word, it contains exactly 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1); and

2. this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) because it was prepared using Microsoft Office Word 2007 in a proportionally spaced typeface, Times New Roman, in 14 pt. font.

/s/ Amanda Shafer Berman
Amanda Shafer Berman
Counsel for Respondents

Dated: June 22, 2011

Certificate of Service

I hereby certify that the foregoing Brief for Respondents EPA and Lisa P. Jackson was electronically filed today with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, and that, pursuant to Circuit Rule 31(b), five paper copies of the brief were delivered to the Court by hand.

I further certify that a copy of the foregoing Brief for Respondents EPA and Lisa P. Jackson was today served electronically through the court's CM/ECF system on all registered counsel for Petitioners and Intervenors.

/s/ Amanda Shafer Berman

DATED: June 22, 2011

STATUTORY ADDENDUM

TABLE OF CONTENTS FOR STATUTORY ADDENDUM

§ 7475. Preconstruction Requirements [CAA § 165]

(a) Major emitting facilities on which construction is commenced
No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless--

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from

any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception
The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications
Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

*** * ***

§ 7479. Definitions [CAA § 169]

For purposes of this part--

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

(2)(A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term “construction” when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term “best available control technology” means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of “best available control technology” result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term “baseline concentration” means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

§ 7412. Hazardous air pollutants [CAA § 112]

(a) Definitions
For purposes of this section, except subsection (r) of this section--

(1) Major source

The term “major source” means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. The Administrator may establish a lesser quantity, or in the case of radionuclides different criteria, for a major source than that specified in the previous sentence, on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors.

(2) Area source

The term “area source” means any stationary source of hazardous air pollutants that is not a major source. For purposes of this section, the term “area source” shall not include motor vehicles or nonroad vehicles subject to regulation under subchapter II of this chapter.

(3) Stationary source

The term “stationary source” shall have the same meaning as such term has under section 7411(a) of this title.

(4) New source

The term “new source” means a stationary source the construction or reconstruction of which is commenced after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source.

(5) Modification

The term “modification” means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.

(6) Hazardous air pollutant

The term “hazardous air pollutant” means any air pollutant listed pursuant to subsection (b) of this section.

(7) Adverse environmental effect

The term “adverse environmental effect” means any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

(8) Electric utility steam generating unit

The term “electric utility steam generating unit” means any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale shall be considered an electric utility steam generating unit.

(9) Owner or operator

The term “owner or operator” means any person who owns, leases, operates, controls, or supervises a stationary source.

(10) Existing source

The term “existing source” means any stationary source other than a new source.

(11) Carcinogenic effect

Unless revised, the term “carcinogenic effect” shall have the meaning provided by the Administrator under Guidelines for Carcinogenic Risk Assessment as of the date of enactment. Any revisions in the existing Guidelines shall be subject to notice and opportunity for comment.

(b) List of pollutants
(1) Initial list

The Congress establishes for purposes of this section a list of hazardous air pollutants as follows:

[LIST OF POLLUTANTS]

(2) Revision of the list

The Administrator shall periodically review the list established by this subsection and publish the results thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) of this section as a result of emissions to the air. No air pollutant which is listed under section 7408(a) of this title may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is listed under section 7408(a) of this title or to any pollutant which is in a class of pollutants listed under such section. No substance, practice, process or activity regulated under subchapter VI of this chapter shall be subject to regulation under this section solely due to its adverse effects on the environment.

(3) Petitions to modify the list

(A) Beginning at any time after 6 months after November 15, 1990, any person may petition the Administrator to modify the list of hazardous air pollutants under this subsection by adding or deleting a substance or, in case of listed pollutants without CAS numbers (other than coke oven emissions, mineral fibers, or polycyclic organic matter) removing certain unique substances. Within 18 months

after receipt of a petition, the Administrator shall either grant or deny the petition by publishing a written explanation of the reasons for the Administrator's decision. Any such petition shall include a showing by the petitioner that there is adequate data on the health or environmental defects [FN1] of the pollutant or other evidence adequate to support the petition. The Administrator may not deny a petition solely on the basis of inadequate resources or time for review.

(B) The Administrator shall add a substance to the list upon a showing by the petitioner or on the Administrator's own determination that the substance is an air pollutant and that emissions, ambient concentrations, bioaccumulation or deposition of the substance are known to cause or may reasonably be anticipated to cause adverse effects to human health or adverse environmental effects.

(C) The Administrator shall delete a substance from the list upon a showing by the petitioner or on the Administrator's own determination that there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects.

(D) The Administrator shall delete one or more unique chemical substances that contain a listed hazardous air pollutant not having a CAS number (other than coke oven emissions, mineral fibers, or polycyclic organic matter) upon a showing by the petitioner or on the Administrator's own determination that such unique chemical substances that contain the named chemical of such listed hazardous air pollutant meet the deletion requirements of subparagraph (C). The Administrator must grant or deny a deletion petition prior to promulgating any emission standards pursuant to subsection (d) of this section applicable to any source category or subcategory of a listed hazardous air pollutant without a CAS number listed under subsection (b) of this section for which a deletion petition has been filed within 12 months of November 15, 1990.

(4) Further information

If the Administrator determines that information on the health or environmental effects of a substance is not sufficient to make a determination required by this subsection, the Administrator may use any authority available to the Administrator to acquire such information.

(5) Test methods

The Administrator may establish, by rule, test measures and other analytic procedures for monitoring and measuring emissions, ambient concentrations, deposition, and bioaccumulation of hazardous air pollutants.

(6) Prevention of significant deterioration

The provisions of part C of this subchapter (prevention of significant deterioration) shall not apply to pollutants listed under this section.

(7) Lead

The Administrator may not list elemental lead as a hazardous air pollutant under this subsection.

* * *

§ 7501. Definitions [CAA § 171]

For the purpose of this part--

(1) Reasonable further progress

The term “reasonable further progress” means such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.

(2) Nonattainment area

The term “nonattainment area” means, for any air pollutant, an area which is designated “nonattainment” with respect to that pollutant within the meaning of section 7407(d) of this title.

(3) Lowest achievable emission rate

The term “lowest achievable emission rate” means for any source, that rate of emissions which reflects--

(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

(4) Modifications; modified

The terms “modifications” and “modified” mean the same as the term “modification” as used in section 7411(a)(4) of this title.

§ 7502. Nonattainment plan provisions in general [CAA §172]

(a) Classifications and attainment dates
(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of Title 5 (concerning notice and comment) and shall not be subject to judicial review until the Administrator takes final action under subsection (k) or (l) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the attainment date determined by the Administrator under subparagraph (A) or (B) if--

(i) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(ii) in accordance with guidance published by the Administrator, no more than a minimal number of exceedances of the relevant national ambient air quality standard has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this subparagraph for a single nonattainment area.

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part.

(b) Schedule for plan submissions
At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 7407(d) of this title, the Administrator shall establish a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title.

(c) Nonattainment plan provisions
The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

(1) In general

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.

(2) RFP

Such plan provisions shall require reasonable further progress.

(3) Inventory

Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as the Administrator may determine necessary to assure that the requirements of this part are met.

(4) Identification and quantification

Such plan provisions shall expressly identify and quantify the emissions, if any, of any such pollutant or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) of this title, from the construction and operation of major new or modified stationary sources in each such area. The plan shall demonstrate to the satisfaction of the Administrator that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient air quality standard by the applicable attainment date.

(5) Permits for new and modified major stationary sources

Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.

(6) Other measures

Such plan provisions shall include enforceable emission limitations, and such other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as schedules and

timetables for compliance, as may be necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified in this part.

(7) Compliance with section 7410(a)(2)

Such plan provisions shall also meet the applicable provisions of section 7410(a)(2) of this title.

(8) Equivalent techniques

Upon application by any State, the Administrator may allow the use of equivalent modeling, emission inventory, and planning procedures, unless the Administrator determines that the proposed techniques are, in the aggregate, less effective than the methods specified by the Administrator.

(9) Contingency measures

Such plan shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

(d) Plan revisions required in response to finding of plan inadequacy
Any plan revision for a nonattainment area which is required to be submitted in response to a finding by the Administrator pursuant to section 7410(k)(5) of this title (relating to calls for plan revisions) must correct the plan deficiency (or deficiencies) specified by the Administrator and meet all other applicable plan requirements of section 7410 of this title and this part. The Administrator may reasonably adjust the dates otherwise applicable under such requirements to such revision (except for attainment dates that have not yet elapsed), to the extent necessary to achieve a consistent application of such requirements. In order to facilitate submittal by the States of adequate and approvable plans consistent with the applicable requirements of this chapter, the Administrator shall, as appropriate and from time to time, issue written guidelines, interpretations, and information to the States which shall be available to the public, taking into consideration any such guidelines, interpretations, or information provided before November 15, 1990.

(e) Future modification of standard

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

§ 7503. Permit Requirements [CAA § 173]

(a) In general
The permit program required by section 7502(b)(6) of this title shall provide that permits to construct and operate may be issued if--

(1) in accordance with regulations issued by the Administrator for the determination of baseline emissions in a manner consistent with the assumptions underlying the applicable implementation plan approved under section 7410 of this title and this part, the permitting agency determines that--

(A) by the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained, such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources (as determined in accordance with the regulations under this paragraph) prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 7502 of this title) reasonable further progress (as defined in section 7501 of this title); or

(B) in the case of a new or modified major stationary source which is located in a zone (within the nonattainment area) identified by the Administrator, in consultation with the Secretary of Housing and Urban Development, as a zone to which economic development should be targeted, that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which exceed the allowance permitted for such pollutant for such area from new or modified major stationary sources under section 7502(c) of this title;

(2) the proposed source is required to comply with the lowest achievable emission rate;

(3) the owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under common control with such person) in such State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under this chapter; and

(4) the Administrator has not determined that the applicable implementation plan is not being adequately implemented for the nonattainment area in which the proposed source is to be constructed or modified in accordance with the requirements of this part; and

(5) an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.

Any emission reductions required as a precondition of the issuance of a permit under paragraph (1) shall be federally enforceable before such permit may be issued.

(b) Prohibition on use of old growth allowances
Any growth allowance included in an applicable implementation plan to meet the requirements of section 7502(b)(5) of this title (as in effect immediately before November 15, 1990) shall not be valid for use in any area that received or receives a notice under section 7410(a)(2)(H)(ii) of this title (as in effect immediately before November 15, 1990) or under section 7410(k)(1) of this title that its applicable implementation plan containing such allowance is substantially inadequate.

(c) Offsets
(1) The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant only by obtaining emission reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the State may allow the owner or operator of a source to obtain such emission reductions in another nonattainment area if (A) the other area has an equal or higher nonattainment classification than the area in which the source is located and (B) emissions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the source is located. Such emission reductions shall be, by the time a new or modified source commences operation, in effect and enforceable and shall assure that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant from the same or other sources in the area.

(2) Emission reductions otherwise required by this chapter shall not be creditable as emissions reductions for purposes of any such offset requirement. Incidental emission reductions which are not otherwise required by this chapter shall be creditable as emission reductions for such purposes if such emission reductions meet the requirements of paragraph (1).

(d) Control technology information
The State shall provide that control technology information from permits issued under this section will be promptly submitted to the Administrator for purposes of making such information available through the RACT/BACT/LAER clearinghouse to other States and to the general public.

(e) Rocket engines or motors
The permitting authority of a State shall allow a source to offset by alternative or innovative means emission increases from rocket engine and motor firing, and cleaning related to such firing, at an existing or modified major source that tests rocket engines or motors under the following conditions:
(1) Any modification proposed is solely for the purpose of expanding the testing of rocket engines or motors at an existing source that is permitted to test such engines on November 15, 1990.

(2) The source demonstrates to the satisfaction of the permitting authority of the State that it has used all reasonable means to obtain and utilize offsets, as determined on an annual basis, for the emissions increases beyond allowable levels, that all available offsets are being used, and that sufficient offsets are not available to the source.

(3) The source has obtained a written finding from the Department of Defense, Department of Transportation, National Aeronautics and Space Administration or other appropriate Federal agency, that the testing of rocket motors or engines at the facility is required for a program essential to the national security.

(4) The source will comply with an alternative measure, imposed by the permitting authority, designed to offset any emission increases beyond permitted levels not directly offset by the source. In lieu of imposing any alternative offset measures, the permitting authority may impose an emissions fee to be paid to such authority of a State which shall be an amount no greater than 1.5 times the average cost of stationary source control measures adopted in that area during the previous 3 years. The permitting authority shall utilize the fees in a manner that maximizes the emissions reductions in that area.