**ORAL ARGUMENT NOT YET SCHEDULED**

No. 10-1425 (and consolidated cases)

---

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

---

STATE OF TEXAS, *ET AL.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

---

On Petitions for Review of Final Actions of the
United States Environmental Protection Agency

---

# BRIEF FOR INTERVENORS CONSERVATION LAW FOUNDATION, ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB IN SUPPORT OF RESPONDENT

Vickie L. Patton
Pamela Campos
Peter Zalzal
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302
(303) 447-7215

Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St. NW Suite 808
Washington DC 20036
(202) 277-7085
sean@donahuegoldberg.com

*Attorneys for Environmental Defense Fund*

Joanne Spalding
Nathan Matthews
Sierra Club
85 2nd Street
San Francisco, CA 94105
(415) 977-5725

*Attorneys for Sierra Club*

(additional counsel listed on following page)

David Doniger
Natural Resources Defense Council
1152 15th St., Suite 300
Washington, DC 20005
(202) 289-6868

*Attorneys for NRDC*

Ann Brewster Weeks
Lisa J. Zak
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
(617) 624-0234

*Attorneys for Conservation Law Foundation*

October 12, 2012
(Final Brief)

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

Pursuant to D.C. Cir. R. 28(a)(1), Intervenors submit this certificate as to parties, rulings and related cases.

*Parties and amici*: The parties to these consolidated actions are set forth in the Rule 28(a)(1) certificate filed by Petitioners. There are no amici.

*Rulings under review*: This is a set of consolidated petitions for review of two final actions of the Environmental Protection Agency, entitled the *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program*, 75 Fed. Reg. 82,430 (Dec. 30, 2010), and the *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program*, 76 Fed. Reg. 25,178 (May 3, 2011).

*Related cases*: The related cases are set forth in the brief of Petitioners.

DATED: October 12, 2012

*/s/ Sean H. Donahue*
Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St. NW, Suite 808
Washington, DC 30036
(202) 777-7085
sean@donahuegoldberg.com

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases



## Statutes



## Regulations

*Authorities chiefly relied upon are marked with asterisks.

# GLOSSARY

| | |
|---|---|
| Act: | Clean Air Act, 42 U.S.C. §§ 7401-7671q |
| Br. | Brief of State of Texas and Industry Petitioners |
| CAA: | Clean Air Act, 42 U.S.C. §§ 7401-7671q |
| CRR: | *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) |
| EPA: | Environmental Protection Agency |
| EPA Br.: | Brief of Respondents |
| Error Correction Rule: | Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program; Final Rule, 76 Fed. Reg. 25,178 (May 3, 2011) |
| FIP: | Federal Implementation Plan |
| GHG: | Greenhouse gas |
| GHG SIP Call: | Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule, 75 Fed. Reg. 77,698 (Dec. 13, 2010) |

| | |
|---|---|
| Interim-Final Rule: | Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program; Final Rule, 75 Fed. Reg. 82,430 (Dec. 30, 2010) |
| NAAQS: | National Ambient Air Quality Standard |
| PM: | Fine particle pollution of particulate matter. |
| PSD: | Prevention of Significant Deterioration, 42 U.S.C. §§ 7470-7492 |
| SIP: | State Implementation Plan |
| Tailoring Rule: | Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed. Reg. 31,514 (June 3, 2010) |
| Texas GHG Letter: | Letter from Bryan Shaw, Chairman, Texas Commission on Environmental Quality to Lisa Jackson, Administrator, Environmental Protection Agency, Doc. No. EPA-HQ-OAR-2010-0107-0121 |
| Timing Decision: | Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule, 75 Fed. Reg. 17,004 (Apr. 2, 2010) |
| TCEQ: | Texas Commission on Environmental Quality |

Environmental Defense Fund, the Natural Resources Defense Council, Sierra Club, and Conservation Law Foundation (collectively, "Respondent-Intervenors") respectfully submit this brief in support of Respondents Environmental Protection Agency, *et al*. ("EPA").

## STATEMENT OF JURISDICTION

Petitioners challenge two EPA actions concerning implementation in the state of Texas of permitting for sources of greenhouse gases under the Prevention of Significant Deterioration ("PSD") program, Title I, Part C of the Clean Air Act ("Act"), 42 U.S.C. §§ 7470-7492. 75 Fed. Reg. 82,430 (Dec. 30, 2010) ("Interim-Final Rule"); 76 Fed. Reg. 25,178 (May 3, 2011) ("Error Correction Rule").

As we explain below, Petitioners have failed to demonstrate Article III standing as to any of their claims, and as a result, this Court lacks jurisdiction to hear Petitioners' challenges. *See* pp. 9-12, *infra*.

## STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the addenda to the Brief of Respondents.

## BACKGROUND

EPA's brief (pp. 2-20) describes the statutory and regulatory background of this case in detail, and we provide only this brief further statement.

Under the Prevention of Significant Deterioration ("PSD") program, 42 U.S.C. §§ 7470-7479, construction or modification of major sources of air pollution requires a PSD permit mandating, among other things, that the facility use the "best available control technology" to control emissions of all pollutants subject to regulation under the Act. *Id.* §§ 7475(a), 7479(3). A major new facility cannot commence construction without such a permit. *Id.* § 7475(a). The universe of pollutants "subject to regulation" is not static. Notably, this Court recently upheld EPA's determination that greenhouse gases automatically became pollutants "subject to regulation" by operation of law on January 2, 2011. *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 144 (D.C. Cir. 2012) ("*CRR*") (petitions for rehearing en banc pending, No. 09-1322).

While implementation of PSD permitting was initially EPA's responsibility, the Act authorizes states to implement the permitting program if they adopt State Implementation Plans ("SIPs") consistent with the Act's requirements. *See* 42 U.S.C. §§ 7410(a)(2)(C), (J); *id.* § 7471. State SIPs must at a minimum be consistent with the Federal Act, but states are not required to otherwise design their programs to Federal specifications. SIPs must however demonstrate authority to implement the Federal requirements. Starting January 2, 2011, those states with SIPs that provided the necessary authority to address greenhouse gases began permitting major new emission sources. But in states lacking the necessary

authority, permits could not be issued to such sources, and they could not legally construct.

Most states' SIPs provided such authority; however, some did not. SIPs in 13 states, including Texas, did not provide authority to issue PSD permits for major sources of greenhouse gas emissions. *See* 75 Fed. Reg. 77,698, 77,700 (Dec. 13, 2010) ("GHG SIP Call"). EPA determined these states' SIPs were "substantially inadequate" and called for the states to make SIP revisions pursuant to Section 110(k)(5) of the Act. 75 Fed. Reg. 53,892, 53,892 (Sept. 2, 2010).[1] In order to avoid a permitting gap – a period of time in which no governmental authority was available to issue permits to greenhouse gas emitting sources – EPA provided states with the option to accept an accelerated schedule for the revision and approval of state plans. As a last resort, EPA provided for issuing federal implementation plans ("FIPs") as a gap-filling measure, under which EPA would re-assume the permitting role for greenhouse gas emissions only, and only for as long as it took states to amend their SIPs to provide the needed authority. *Id.* at 53,896.

[1] The GHG SIP Call provided for these states to submit SIP revisions within 12 months, although states had the option of accepting a more immediate deadline to ensure that a FIP would be in place and therefore avoid any permitting disruptions for greenhouse gas sources while the States amended their SIPs. The GHG SIP Call is the subject of another challenge before this Court. *See Utility Air Regulatory Group v. EPA*, No. 10-1137.

Except for Texas, all states facing a greenhouse gas permitting gap accepted the accelerated EPA procedure and, where needed, the gap-filling EPA FIP, to ensure some greenhouse gas permitting authority was in place after January 2, 2011.[2] 75 Fed. Reg. at 77,713 (Dec. 13, 2010).

Texas informed EPA that "it had neither the authority nor the intention" of regulating GHGs. Letter from Bryan Shaw, Chairman, Texas Commission on Environmental Quality to Lisa Jackson, Administrator, Environmental Protection Agency, Doc No. EPA-HQ-OAR-2010-0107-0121 at 1 ("Texas GHG Letter") (JA 67).

Texas's refusal either to update its own SIP or to cooperate with EPA to ensure a federal permitting backstop meant that large new or modified greenhouse gas emitters in Texas would not be able to obtain compliant PSD permits after January 2, 2011.[3] Texas estimated a lack of authority could impact as many as 167 projects. Texas Stay Motion 41, No. 10-1041 (D.C. Cir.) (Doc. 1266093).[4]

---

[2] Some states assured the agency that the state-selected deadline would not result in any permitting disruptions. 75 Fed. Reg. at 77,713 (Dec. 13, 2010).

[3] The CAA's PSD provisions apply directly to sources: a source cannot commence construction without a permit that encompasses emissions of all regulated pollutants, regardless of whether the applicable SIP or FIP provides the permitting agency with authority to issue such a permit. EPA Br. in 11-1037 at 42-62 (Doc. 1379360); Env. Resp. Br. in 11-1037 at 19-22 (Doc. 1377155).

[4] Texas is a large industrial state – those 167 projects represent almost 25% of all the projects needing PSD permits in the entire United States during a typical year.

Texas's actions revealed a fundamental defect that had existed in the state's SIP as approved in past years: the SIP does not provide means by which Texas will bring newly-regulated pollutants into its PSD permitting process.[5] Texas submitted various SIP updates between 1985 and 1988, none of which addressed this problem. Notwithstanding the failure, EPA approved Texas's SIP in 1992 without specifically addressing Texas's failure to commit to incorporating newly-regulated pollutants into its SIP. *Id.*

EPA followed a cooperative process with all other states to avoid a permitting authority gap for sources of greenhouse gas emissions. Texas alone rebuffed this process, persisting in the mistaken view, rejected by this Court in *CRR*, that PSD permitting for greenhouse gases would not take effect by operation of statute on January 2, 2011. In order to avoid the economic disruption that would flow from Texas's erroneous legal interpretation, EPA took action to avoid a PSD permitting gap in the state by determining under Section 110(k)(6) that its 1992 approval of Texas's SIP was in error. EPA revised its previous approval to a partial disapproval pursuant to its authority under Section 110(k)(6). 75 Fed. Reg.

---

75 Fed. Reg. 31,514, 31,540 (June 3, 2010) (Tailoring Rule) (EPA estimates there are 668 PSD permits on an annual basis in the United States).

[5] Although Texas's PSD program applies to "any air pollutant regulated under the Clean Air Act" and incorporates many of the requirements at 40 C.F.R. Part 52, including the PSD applicability provisions, other provisions of Texas law limit this incorporation by reference to pollutants that were regulated on the date the SIP was approved in 1992. *See* 75 Fed. Reg. at 82,432.

at 82,431. EPA then promulgated a FIP for Texas providing federal authority to issue PSD permits for greenhouse gases. The SIP disapproval and the FIP left Texas's permitting authority for all other pollutants entirely intact. 42 U.S.C. § 7410(c)(1)(B).[6] The Error Correction Rule avoided the gap in permitting authority described above, ensuring a continuous program enabling sources to apply for and obtain needed permits from EPA.

Texas could have revised its SIP to avoid this problem, or to cure it at any time since the beginning of 2011. In the past, Texas has incorporated newly-regulated pollutants into its PSD permitting rules simply by updating the incorporation-by-reference date in its SIP.[7] Yet in the roughly two years since Texas was notified of its SIP's failure to apply to greenhouse gases, the state has made no effort to incorporate these pollutants into its program – and indeed, has repeatedly stated that it has no intention of doing so. Texas adopted eight SIP revisions amending other portions of its SIP during that time,[8] but the State's

[6] To ensure that permitting authority would be in place in time for January 2, 2011, EPA initially promulgated an interim FIP ("Interim Final Rule"), and then replaced it with a FIP following notice and comment." *See* EPA Br. 14-16.

[7] For example, in 1987 EPA promulgated a National Ambient Air Quality Standard ("NAAQS") for particulate matter ("PM") which subjected sources of PM to the PSD program. In response, Texas simply changed the incorporation by reference date and submitted this newly updated SIP to EPA for approval. 76 Fed. Reg. at 25,184.

[8] *See* "Texas SIP Revisions," TCEQ, *available at* http://www.tceq.texas.gov/airquality/sip/texas-sip/sipplans.html (last updated Aug. 20, 2012).

regulatory agenda indicates no future plan to incorporate greenhouse gases into the SIP.[9] Even after this Court's decision in *CRR*, the Texas Commission on Environmental Quality ("TCEQ") has stated that the Act does not require SIPs to provide for permitting of greenhouse gas emissions: "Greenhouse gases are not criteria pollutants, with a NAAQS that must be met, and therefore a lack of permitting requirements in Texas rules for greenhouse gas emissions does not constitute a lack in the required infrastructure elements of §110(a)(2)."[10]

This case therefore does not involve a situation in which a state disagrees with EPA concerning the method of implementing a Clean Air Act requirement; rather, Texas fundamentally disputes whether there *is* a requirement. But that question was definitively resolved against the State in *CRR*, which found EPA's reading of the law "unambiguously correct." 684 F.3d at 113.

## STANDARD OF REVIEW

EPA's brief sets forth the standard of review. EPA Br. 22-23.

---

[9] *See* "Executive Director Approved SIP Projects: Anticipated Dates and Activities for 2012 -2014," TCEQ, July 2012, *available at* http://www.tceq.texas.gov/assets/public/implementation/air/sip/miscdocs/SIP_Timeline_July_2012.pdf .

[10] TCEQ, REVISIONS TO THE STATE OF TEXAS AIR QUALITY IMPLEMENTATION PLAN FEDERAL CLEAN AIR ACT, SECTIONS 110(a)(1) AND (2) INFRASTRUCTURE AND TRANSPORT x n.1 (Aug. 3, 2012), *available at* http://www.tceq.texas.gov/assets/public/implementation/air/sip/ozone/infrastructure/12004SIP_Complete.pdf (statements in a SIP amendment made for an entirely different purpose than regulating GHGs).

## SUMMARY OF ARGUMENT

Neither the Interim Final Rule nor the Error Correction Rule injures Petitioners, and as a result, this Court lacks jurisdiction to hear their challenges. Both rules provided for greenhouse gas permitting authority where none would otherwise exist, and, as such, actually helped rather than harmed Petitioners. *See CRR*, 684 F.3d at 106 (petitioners lacked standing because alleged harm was attributable to operation of the Act, not the challenged EPA rules).

Even if Petitioners had standing to bring any of their claims, their challenges lack merit. The plain language of Section 110(k)(6) applies to any EPA SIP approval that "was in error," and the statutory language does not include any of the procedural or substantive limitations that Petitioners attempt to read into the statute. Nor does the statutory structure mandate Petitioners' preferred reading of the Act. Since EPA is correcting *its own* error in approving a deficient SIP, and is not reaching out to change the Texas SIP itself, that action is consistent with the balance of federal and state interests provided in the Clean Air Act.

Moreover, EPA's determination that it made such an error in approving Texas's SIP in 1992 was eminently reasonable. The Act provides that all states' PSD SIPs, including Texas's, must apply to all pollutants "subject to regulation" under the Act, including newly-regulated pollutants like greenhouse gases. Texas's SIP did not apply to such newly-regulated pollutants, nor did it provide

any assurance that Texas would take timely action to incorporate additional pollutants when they became subject to the permitting requirement in Section 165. EPA's action to approve Texas's SIP in 1992 despite this deficiency was "in error" – an error that occurred at the time of the SIP approval but became more apparent when Texas refused to update its SIP to include greenhouse gases.

Ultimately, Texas and Industry Petitioners cloak their fundamental disagreement – which is with regulation of greenhouse gases *at all* – in procedural challenges and appeals to the Act's cooperative structure. But Texas has indicated that it will not implement greenhouse gas requirements, and this Court should decline Petitioners' invitation to adopt an interpretation of the Act's procedural provisions that would condone Texas's effort to frustrate federal implementation of federal law.

## ARGUMENT

### I. PETITIONERS HAVE NOT DEMONSTRATED ARTICLE III STANDING

This Court's jurisdiction extends only to cases where petitioners can meet their burden to demonstrate each of the elements of Article III standing – injury in fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As EPA demonstrates, Petitioners failed to establish their Article III standing. EPA Br. 24-27.

Texas claims that EPA's actions injured its "quasi-sovereign interest in regulating air quality within its borders." Br. 17. But the Error Correction Rule did not affect Texas's existing permitting authority; instead, it provided federal authority to issue PSD permits to major greenhouse gas emitting sources only where the State refused to act. *See* 75 Fed. Reg. at 82,449. Texas cannot claim that federal implementation of Clean Air Act permitting requirements applicable to private parties – in the undisputed absence of any current state implementation authority to do so – constitutes a cognizable "sovereign interest" supporting standing.

Texas's "interest in regulating air quality" cannot support standing here because Texas has affirmatively disclaimed any intention of implementing the Clean Air Act with respect to greenhouse gas emissions. *See Lujan*, 504 U.S. at 560 (injuries must be "actual or imminent, not 'conjectural' or 'hypothetical'").[11] Even if Texas has articulated a concrete injury, the Error Correction Rule has not displaced Texas's ability to submit a compliant SIP revision and exercise authority over its greenhouse gas permitting program, though the State has taken no steps to do so. Texas's real grievance is that PSD permitting applies to greenhouse gas sources *at all*, but this Court has already resolved that issue, *CRR*, 684 F.3d at 146.

[11] Texas cites *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), in support of its standing, but, in that case, Massachusetts's injury arose from its interest in protecting its natural resources from pollution that could be reduced by federal regulation. Texas claims nothing like that there. *See CRR*, 684 F.3d at 113.

Nor have Industry Petitioners demonstrated their standing. Though they claim that the Error Correction Rule injures them, Br. 17, this Court confirmed in *CRR* that it is *the statute itself* that imposes the requirement for a construction permit for a major new or modified source emitting greenhouse gases. 684 F.3d at 146. That statutory requirement would have applied directly to sources in Texas even had EPA not taken any action to ensure permitting could continue after January 2, 2011. In fact, without EPA's actions, no such source in Texas would have been able to obtain a permit at that time.

Industry Petitioners have also failed to demonstrate that a decision vacating the Rule would redress their alleged injuries. *See CRR*, 684 F.3d at 146 (petitioners lacked standing because the relief they seek would exacerbate their asserted injuries). Indeed, at least two industrial interests in Texas, Lower Colorado River Authority and Energy Transfer Company, would not have been able to embark on plant expansions in the absence of EPA's FIP.[12] Both State and Industry Petitioners would be worse off if the Error Correction Rule were, as they request, "vacate[d]," *see* Pet. Br. 57, as large greenhouse gas emitting sources in

[12] EPA approved two GHG PSD permits for Texas sources: Jackson County Gas Plant, Energy Transfer Company, PSD-TX-1264-GHG (May 24, 2012) (enabling plant expansion); Thomas C. Ferguson Power Plant, Lower Colorado River Authority, PSD-TX-1244-GHG (Nov. 10, 2011)(enabling plant expansion).

Texas would no longer be able to obtain permits compliant with the Act.[13] Petitioners therefore lack Article III standing.

## II. SECTION 110(K)(6) AUTHORIZES EPA'S ERROR CORRECTION ACTION

Petitioners claim that Section 110(k)(6) unambiguously limits EPA's error correction authority to "technical" or "clerical" errors. Pet. Br. 30. But neither that limitation – nor the additional restrictions on EPA's authority that Petitioners advocate – has any basis in the statute.

Petitioners are simply wrong to argue that Section 110(k)(6) is limited only to correction of "technical" or "clerical" errors. *See* EPA Br. 31-35, 33 n.6. Petitioners' argument that the phrase "in the same manner" requires EPA to respond to an acknowledged error by reaching the same *result*, even if erroneous, is similarly unavailing. *Id.* at 39. Instead, "in the same manner" is an instruction to follow the same procedures as in EPA's original action. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583-84 (2012) (statutory directive that a penalty be "assessed and collected in the same manner" as taxes directs "the Secretary of the Treasury to use the same methodology and procedures to collect the penalty that he uses to collect taxes").

---

[13] There is another fatal jurisdictional obstacle, besides lack of standing, to Petitioners' challenge to the Interim Final Rule. That challenge is moot because the rule expired on April 30, 2011, and therefore no longer has any continuing effect. *See* EPA Br. 27-28.

A. EPA's Implementation of Its Error Correction Responsibilities Under Section 110(k)(6) is Consistent with the Act's Structure of Cooperative Federalism

Petitioners attempt to avoid the plain language of Section 110(k)(6) by arguing that, under EPA's interpretation, the provision lacks limiting principles, renders other provisions of the Act a nullity, and upsets the careful balance between federal and state powers under the Act. As EPA demonstrates, however, the agency's authority under Section 110(k)(6) is limited and fits with the larger statutory framework in the Clean Air Act.[14]

As EPA demonstrates, interpreting Section 110(k)(6) in accord with its plain meaning does not render Section 110(k)(5) superfluous. EPA Br. 43-45. The respective provisions authorize EPA action in distinct circumstances. The agency could not use the error correction provision in Section 110(k)(6) to correct a SIP that becomes deficient only due to a new requirement in the Act – EPA must have

[14] In *EME Homer City Generation, L.P. v. E.P.A.*, this Court ruled that EPA acted unlawfully by promulgating FIPs requiring interstate air pollution reductions under the Act's "good neighbor" provision, Section 110(a)(2)(D)(i)(I), 42 U.S.C. 7410(a)(2)(D)(i)(I), without providing the upwind states a "first opportunity to implement the reductions required." No. 11-1302, Slip Op. at 41, 2012 WL 3570721, *15 (D.C. Cir. Aug. 21, 2012). *See also id.* at *18. Nothing in *EME Homer City* casts doubt upon the propriety of EPA's actions here. Leaving aside the large differences between the PSD program, which imposes direct permitting obligations on private parties, *see* Section 165(a), and the "good neighbor" provision – which instead addresses the requirements for SIPs, *see* Section 110(a)(2)(D) – the "first opportunity" concern is inapplicable here: Texas had the opportunity to revise its PSD SIP to include a greenhouse gas permitting mechanism, but refused to do so – and, in fact, still refuses to do so. *See* EPA Br. 11-17; *supra*, p. 4.

made an error in order to invoke Section 110(k)(6).[15] *See* EPA Br. 44. It may be that, in some circumstances, both Sections apply: for example, a SIP might contain a deficiency that existed when it was approved that is both severe enough to render the SIP "substantially inadequate" today and that also renders EPA's prior approval thereof "in error." That Sections 110(k)(5) and 110(k)(6) may both apply in some circumstances, however, falls far short of rendering either provision superfluous, and is no reason to depart from the plain language regarding Section 110(k)(6)'s scope. *See CRR*, 684 F.3d at 143 (distinguishing a phrase "currently without practical import" from a phrase that "means nothing" and noting "under different circumstances, the phrase would have a significant effect").

Petitioners wrongly argue that EPA's actions under Section 110(k)(6) generally "circumvent the CAA's procedural requirements and protections for states" and "defeat Congress' intent in crafting a SIP revision process that respects state's roles in implementing air quality policy," Br. 32, are similarly wrong. All EPA is doing under Section 110(k)(6) is correcting its own error (approving a SIP that did not meet requirements). Disapproval under this provision does not reach into and change the SIP itself, nor does it even command the state to do so. Petitioners fail to recognize that the Act provides for a more limited state role

[15] Conversely, minor errors may warrant correction under Section 110(k)(6) but not rise to the level of rendering a SIP substantially inadequate.

when the agency is correcting its own error in reviewing an action a state has already completed.[16]

Under the Clean Air Act, the respective roles and responsibilities of the states and EPA are defined in the terms of specific statutory provisions. These provisions balance federal and state interests differently in different circumstances. *Compare, e.g.*, 42 U.S.C. § 7410(a)(1) (providing states up to three years to develop a compliant SIP in response to a new or revised NAAQS) *with id.* § 7410(k)(5) (providing a maximum of 18 months for states to submit SIP revisions when SIP is "substantially inadequate") *and id.* § 7410(k)(6) (providing for no additional state submission when EPA's action in approving or disapproving a SIP, or promulgating a FIP, was in error). As explained previously, Section 110(k)(6) is inapplicable in many circumstances, and in those situations, states enjoy the involvement and procedural protections afforded by Section 110(a)(1), Section 110(k)(5), and similar provisions. Here, where EPA acted within the scope of Section 110(k)(6) and adhered to the procedures required by that provision, EPA cannot be said to have "circumvent[ed]" the Act's provisions at all.

[16] In *EME Homer City*, petitioning states challenged EPA's reliance upon Section 110(k)(6) to correct SIP approvals that indicated, contrary to a D.C. Circuit opinion handed down after the approvals, that conformity with EPA's Clean Air Interstate Rule satisfied a specific statutory requirement. The Court in *EME Homer City* did not reach the petitioners' argument that this was not a proper use of Section 110(k)(6) error correction authority. 2012 WL 3570721 at *18 n.29. An error correction action predicated upon an intervening judicial decision is not presented here. EPA Br. 53-55.

EPA has exercised its authority under Section 110(k)(6) in a carefully limited fashion here. The agency proceeded with the Error Correction Rule with respect to only one state – Texas – and did so only after it determined that because of the state's unique position regarding greenhouse gases, action under Section 110(k)(5) would not ensure that Texas's SIP would timely contain permitting requirements needed to meet requirements of federal law, leaving Texas's industries with nowhere to turn for needed permits. In other circumstances, the agency has utilized Section 110(k)(6) at the request of a state.[17] These actions further undermine Petitioners' characterizations of the agency's supposed over-aggressive application of that provision.

There is irony in Petitioners' appeal to the Act's cooperative structure in this case, where Texas has refused to cooperate in any way with EPA's efforts to implement federal law. *See supra* pp. 6-7 (describing Texas's refusal to implement PSD permitting for greenhouse gases and assertions that it would not do so in the future). Moreover, this Court in *CRR* confirmed that the Clean Air Act and long-standing agency interpretations *require* that greenhouse gases are included within the PSD program. Whatever the limits of cooperative federalism, that concept

[17] *E.g.*, 64 Fed. Reg. 7790 (Feb. 17, 1999) (noting EPA was acting on an error correction request submitted by Michigan Department of Environmental Quality with respect to certain air quality rules); 61 Fed. Reg. 47,058 (Sept. 6, 1996) (noting similar action in response to Wyoming's request).

certainly does not entitle a state to block a federal agency from implementing federal statutory requirements that the state refused to implement.

B. EPA's Interpretation is Consistent with Legislative History and Precedent

Petitioners point to a single, post-enactment legislator's statement, Br. 30, and a Third Circuit decision pre-dating adoption of Section 110(k)(6), Br. 27, to support their reading of Section 110(k)(6), but neither are persuasive. If anything, the legislative history behind Section 110(k)(6) and the timing of that provision's enactment confirm that it was adopted to codify a broader error correction authority than the Third Circuit recognized in *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777 (3d Cir. 1987).

EPA demonstrates why its partial disapproval of Texas's SIP is distinguishable from the wholesale revision of Pennsylvania's SIP in *Bridesburg*, and why the passage of the 1990 Amendments – which post-dated *Bridesburg* – indicated that Congress was consciously codifying a broader error correction authority in Section 110(k)(6). *See* EPA Br. 46-49; *see also* 75 Fed. Reg. 82,435. It bears repeating that the *Bridesburg* court was interpreting an *older* version of the Clean Air Act – one that lacked *any* explicit error correction provision. In that context, the Third Circuit found that "the statute also does not provide any authority for modifying an existing SIP other than through the revision provisions," rejecting EPA's arguments concerning its inherent authority. 836 F.2d at 785. In

adopting this language and adding a separate error correction provision to the Act, Congress granted EPA ample authority to correct errors in response to the Third Circuit's decision that the Act previously lacked such authority. And as noted, EPA is not modifying Texas's SIP, but rather, correcting its own error in approving that SIP.

## III. EPA'S DETERMINATION THAT IT ERRED IN APPROVING TEXAS'S SIP WAS NEITHER ARBITRARY NOR CAPRICIOUS

The plain language of Section 165 automatically encompasses all pollutants, including those newly subject to regulation, and applies directly to sources. *See CRR*, 684 F.3d at 136, 144. Thus, it has always been the case that, when any air pollutant becomes subject to regulation, a state will need to promptly update its SIP to encompass the newly regulated pollutant, lest sources be unable to obtain the required permits. Accordingly, the Texas SIP's "fail[u]re to address or to include assurances of adequate legal authority (required under CAA section 110(a)(2)(E)(i)) for the application of PSD to each newly regulated pollutant, including non-NAAQS pollutants, regulated under the CAA" rendered that SIP deficient at the time it was adopted. 75 Fed. Reg. at 82,448. EPA should never have approved Texas's SIP. In light of the discretion afforded to EPA by the text of Section 110(k)(6), *see* EPA Br. 36, EPA's determination that its approval was in error was neither arbitrary nor capricious.

As recently confirmed by this Court, the plain language of Section 165 requires sources subject to PSD permitting requirements to receive permits encompassing each pollutant subject to regulation under the Act; these permitting requirements are not limited to pollutants for which a NAAQS has been adopted. *CRR*, 684 F.3d at 134-37. This requirement arises from the plain language of the Act, *id.* at 134, and it was therefore in place in 1992 when EPA approved Texas's SIP.

Similarly, the language of Section 165 plainly states that it applies to sources directly, as this Court has repeatedly ruled. *See* EPA Br. in No. 11-1037 at 42-62; Env. Resp. Br. in No. 11-1037 at 19-22. Section 165 provides that "[n]o major emitting facility . . . may be constructed [or modified] in any area" subject to the PSD provisions unless it is the subject of a PSD permit "setting forth emission limitations for such facility which conform to the requirements of this part [the PSD provisions]" including, among other things, that "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. . . " 42 U.S.C. § 7475(a)(1), (4). In two cases decided well before the 1992 approval of Texas's SIP, this Court determined that Section 165 applies directly to sources. *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 853 (D.C. Cir. 1979), *Alabama Power Co. v. Costle*, 636 F.2d 323, 404 (D.C. Cir. 1979).

Thus, the danger of a "gap" in permitting authority like the one EPA identified with regard to greenhouse gases has been real and present since the enactment of Section 165 – and certainly since EPA's erroneous approval of Texas's SIP in 1992. The need for SIPs to avert or minimize this danger arises from the statute itself. EPA should have ensured that Texas's SIP addressed the treatment of newly regulated pollutants prior to approving that SIP in 1992. As explained above, Texas could have addressed the matter by automatically incorporating newly regulated pollutants or by providing assurances that Texas would update its SIP once new pollutants became subject to regulation. But Texas did not do so.

Perhaps the only aspect of EPA's Section 110(k)(6) correction that Petitioners do not dispute is the Texas SIP's failure to ensure that newly regulated pollutants would be incorporated. Petitioners acknowledge that Texas's SIP explicitly disclaims any "automatic updating" in response to regulation of new pollutants. Petitioners argue that Texas had an existing practice of engaging SIP revisions to bring newly regulated pollutants within its SIP, Br. 43-44, but they do not identify any assurances in the SIP that Texas could or would be able to promptly respond to newly regulated pollutants going forward. The absence of any such plan has been made glaringly apparent by Texas's refusal over the past two

years to take any action to update its SIP to reflect the greenhouse gases' new status as regulated pollutants.

## CONCLUSION

The petitions for review should be dismissed or, if the Court concludes that it has jurisdiction, denied.

Respectfully submitted,

*/s/ Sean H. Donahue*
Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St. NW Suite 808
Washington DC 20036
(202) 277-7085
sean@donahuegoldberg.com

*/s/ Peter Zalzal*
Vickie L. Patton
Pamela Campos
Peter Zalzal
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302
(303) 447-7215

*Attorneys for Environment Defense Fund*

*/s/ David Doniger*
David Doniger
Natural Resources Defense Council
1152 15th St., Suite 300
Washington, DC 20005
(202) 289-6868

*Attorneys for NRDC*

*/s/ Nathan Mathews*
Joanne Spalding
Nathan Matthews
Sierra Club
85 2nd Street
San Francisco, CA 94105
(415) 977-5725

*Attorneys for Sierra Club*

*/s/ Ann Brewster Weeks*
Ann Brewster Weeks
Lisa J. Zak
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
(617) 624-0234

*Attorneys for Conservation Law Foundation*

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Intervenors Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club in Support of Respondent was served, this 12th day of October, 2012, on all registered counsel, through the Court's CM/ECF system.

*/s/ Sean H. Donahue*
Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St. NW, Suite 808
Washington, DC 20036
(202) 777-7085
sean@donahuegoldberg.com

Dated: October 12, 2012

**CERTIFICATE OF COMPLIANCE WITH WORD COUNT**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7(C), I hereby certify that the foregoing Brief of Intervenors in Support of Respondent EPA contains 4892 words as counted by the Microsoft Office Word 2007 word processing system, and thus complies with the applicable word limitation.

/s/ Sean H. Donahue
Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St. NW, Suite 808
Washington, DC 30036
(202) 777-7085
sean@donahuegoldberg.com

Dated: October 12, 2012

**ORAL ARGUMENT NOT YET SCHEDULED**

No. 11-1037 (and consolidated cases)

---

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

---

UTILITY AIR REGULATORY GROUP, *ET AL*.
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

---

On Petitions for Review of Final Actions of the
United States Environmental Protection Agency

---

# BRIEF FOR INTERVENORS STATE OF CONNECTICUT, CONSERVATION LAW FOUNDATION, ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB IN SUPPORT OF RESPONDENT

Vickie L. Patton
Pamela Campos
Peter Zalzal
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302
(303) 447-7215

Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St., NW Suite 808
Washington DC 30036
(202) 277-7085
sean@donahuegoldberg.com

*Attorneys for Environmental Defense Fund*

George Jepsen
Attorney General

Kimberly P. Massicotte
Scott N. Koschwitz
Assistant Attorneys General
55 Elm Street
P.O. Box 120
Hartford, CT 06106
(860) 808-5250
Scott.Koschwitz@ct.gov

*Attorneys for State of Connecticut*

(additional counsel listed on following page)

David Doniger
Meleah Geertsma
Natural Resources Defense Council
1152 15th St., Suite 300
Washington, DC 20005
(202) 289-6868

*Attorneys for NRDC*

Ann Brewster Weeks
Lisa J. Zak
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
(617) 624-0234

*Attorneys for Conservation Law Foundation*

Joanne Spalding
Nathan Matthews
Sierra Club
85 2nd Street
San Franscico, CA 94105
(415) 977-5725

*Attorneys for Sierra Club*

June 5, 2012
(Final Brief)

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

Pursuant to D.C. Cir. R. 28(a)(1), Intervenors submit this certificate as to parties, rulings and related cases.

*Parties and amici*: The parties to these consolidated actions are set forth in the Rule 28(a)(1) certificates filed by Petitioners. There are no amici.

*Rulings under review*: This is a set of consolidated petitions for review of three final actions of the Environmental Protection Agency, *Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call* ("SIP Call"), 75 Fed. Reg. 77,698 (Dec. 13, 2010); *Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure to Submit State Implementation Plan Revisions Required for Greenhouse Gases*, ("Failure Finding") 75 Fed. Reg. 81,874 (Dec. 29, 2010); and, *Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan*, ("FIP Rule") 75 Fed. Reg. 82,246 (Dec. 30, 2010).

*Related cases*: The related cases are set forth in the briefs of Petitioners.

DATED: June 5, 2012

*/s/ Sean H. Donahue*
Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St. NW, Suite 808
Washington, DC 30036
(202) 777-7085
sean@donahuegoldberg.com

## TABLE OF CONTENTS

**ADDENDA**

# TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**

**Rules**



**Regulations**



**Constitutional Provisions**



*Authorities chiefly relied upon are marked with asterisks.

## GLOSSARY

| | |
|---|---|
| Act: | Clean Air Act, 42 U.S.C. §§ 7401-7671q |
| APA: | Administrative Procedure Act, 5 U.S.C. §§ 551- 706 |
| BACT: | Best Available Control Technology |
| CAA: | Clean Air Act, 42 U.S.C. §§ 7401-7671q |
| EDF: | Environmental Defense Fund |
| EPA: | Environmental Protection Agency |
| EPA Br.: | Brief of Respondents |
| FIP: | Federal Implementation Plan |
| GHG: | Greenhouse gas |
| Industry Br.: | Opening Brief of Non-State Petitioners |
| NAAQS: | National Ambient Air Quality Standard |
| NNSR: | Non-attainment New Source Review |
| NSR: | New Source Review |
| PM2.5: | Fine particle pollution of particulate matter that is 2.5 micrometers in diameter and smaller. |
| PSD: | Prevention of Significant Deterioration, 42 U.S.C. §§ 7470-7492 |
| SIP: | State Implementation Plan |
| State Br.: | Brief of Petitioners State of Wyoming, State of Texas, *et al.* |
| Wyoming DEQ: | Wyoming Department of Environmental Quality |

The State of Connecticut, Conservation Law Foundation, Environmental Defense Fund, the Natural Resources Defense Council, and Sierra Club (collectively, "Respondent-Intervenors") respectfully submit this brief in support of Respondents Environmental Protection Agency, *et al*. ("EPA").

## STATEMENT OF JURISDICTION

Petitioners challenge three related EPA actions concerning the implementation of permitting for sources of greenhouse gases under the Prevention of Significant Deterioration ("PSD") program, Title I, Part C of the Clean Air Act ("Act"), 42 U.S.C. §§ 7470-7492. 75 Fed. Reg. 77,698 (Dec. 13, 2010) ("SIP Call"); 75 Fed. Reg. 81,874 (Dec. 29, 2010) ("Failure Finding"); 75 Fed. Reg. 82,246 (Dec. 30, 2010) ("FIP Rule").

This Court has jurisdiction to review such final actions of the EPA Administrator under Section 307(b) of the Act, 42 U.S.C. § 7607(b), and the petitions were timely. As noted below, however, Petitioners' challenges to two longstanding EPA interpretations of the PSD provisions contravene the restriction against challenging EPA actions beyond the 60-day period allowed by Section 307(b) of the Act. *See* pp. 14-17, *infra*.

## STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the addenda to the Petitioners' briefs.

## BACKGROUND

EPA's brief (pp. 4-20) describes the statutory and regulatory background of this case in detail, and we provide only this brief discussion.

This is another set of challenges to EPA's response to *Massachusetts v. EPA*, which held that greenhouse gases are "pollutants" within the coverage of the Clean Air Act. 549 U.S. 497, 528-29 (2007). Following that decision, the Administrator found, pursuant to Section 202(a) of the Act, 42 U.S.C. § 7521(a), that greenhouse gases cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare, 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Finding"), and promulgated regulations to control greenhouse gas emissions from light duty motor vehicles, 75 Fed. Reg. 25,324 (May 7, 2010) ("Vehicle Rule"). Petitioners and others have challenged those decisions, which were argued before this Court in February, 2012 (Nos. 09-1322 and 10-1092).

Title I, Part C of the Act prohibits construction of a new or modified facility that emits specified amounts of any air pollutant subject to regulation under the Act unless the facility obtains a PSD permit prior to commencing

construction. *See* 42 U.S.C. §§ 7475(a); 7479(1); *Alabama Power Co. v. Costle*, 636 F.2d 323, 349-51, 403-06 (D.C. Cir. 1979); *see also* 75 Fed. Reg. at 77,700. A PSD permit must require such facilities to install the "best available control technology" ("BACT") for "each air pollutant subject to regulation" under the Act. 42 U.S.C. §§ 7475(a)(4); 7479(3).

The agency has addressed the consequences of greenhouse gases becoming regulated pollutants in a series of actions after *Massachusetts*. EPA recognized that under the plain language of the statute and longstanding EPA regulations, the PSD program would clearly apply to greenhouse gases once that pollutant became "subject to regulation" with the adoption, on remand from the *Massachusetts* decision, of Section 202(a) vehicle emissions standards. The vast number of major industry stakeholders and some States agreed, including those that argued against setting *any* greenhouse gas standards for this very reason. After taking notice and comment, EPA decided that the precise point in time when greenhouse gases were "subject to regulation" was the point when the motor vehicle standards "took effect," *i.e.*, when vehicle manufacturers first had to comply with them, January 2, 2011. *See* 75 Fed. Reg. 17,004, 17,015 (Apr. 2, 2010) ("Timing Decision"). In order to avoid administratively unworkable burdens on state permitting authorities, EPA later promulgated

regulations to phase in the application of the PSD program to greenhouse gas sources, restricting it initially to sources that otherwise required PSD permits and then to other sources with high levels of emissions. *See* 75 Fed. Reg. 31,514 (June 3, 2010) ("Tailoring Rule").

The EPA actions challenged here were taken to avoid the permitting disruption that would occur in States that could not legally issue permits for major new or modified greenhouse gas emission sources when Section 165's prohibition on construction of those sources without a permit took effect on January 2, 2011. EPA responded to this situation with steps to ensure that a permitting authority would be available for major new or modified greenhouse gas sources in every State. *See* 75 Fed. Reg. at 77,700; EPA Br. 14-16. On September 2, 2010, EPA proposed to find that the State Implementation Plans ("SIPs") of 13 States were "substantially inadequate" under Section 110(k)(5) because they did not provide regulatory authority to issue PSD greenhouse gas permits when such permits became required on January 2, 2011. 75 Fed. Reg. 53,892 (Sept. 2, 2010). EPA said that it would promulgate the finding of substantial inadequacy on or about December 1, 2010, and issue a "SIP Call" for those States, if they had not by then adopted the requisite permitting authority. *Id*. at 53,896.

EPA called on these 13 States to submit SIP revisions within 12 months.[1] The agency informed covered States, however, that they could elect a SIP revision deadline as early as December 22, 2010, to prevent any permitting disruption for greenhouse gas sources while States amended their SIPs. If any one of the covered States did not revise their SIPs within 12 months or by the State's earlier-selected deadline, EPA would issue for it a finding of failure to submit a required SIP revision and a Federal Implementation Plan ("FIP") under Section 110(c). Thus, EPA could issue greenhouse gas permits for sources in those States from the trigger date of January 2, 2011 (and only until the State was able to adequately amend its SIP). *See* 75 Fed. Reg. 53,892, 53,901, 53,904-05.

Seven of the 13 States chose to amend their SIPs so that they could issue permits for greenhouse gases on or near January 2, 2011. EPA issued a SIP Call and established FIPs for the other six States (plus Wyoming, which acknowledged in comments that its state law forbade issuing greenhouse gas permits). 75 Fed. Reg. 77,698 (Dec. 13, 2010); 75 Fed. Reg. 81,874 (Dec. 29, 2010); 75 Fed. Reg. 82,246 (Dec. 30, 2010). As EPA explained,

[1] Section 110(k)(5) authorizes EPA to establish a "reasonable deadline[] (not to exceed 18 months * * *)" for submission of SIP revisions. *See* 42 U.S.C. § 7410(k)(5).

> This SIP call is important because without it, large GHG-emitting sources in these States may be unable to obtain a PSD permit for their GHG emissions and therefore may face delays in undertaking construction or modification projects. This is because without the further action by the States or EPA that the SIP call is designed to lead to, sources that emit or plan to emit large amounts of GHGs will, starting January 2, 2011, be required to obtain PSD permits before undertaking new construction or modification projects, but neither the States nor EPA would be authorized to issue the permits. The SIP call and, in the States in which it is necessary, the FIP will assure that in each of the 13 States—with the exception of Texas—either the State or EPA will have the authority to issue PSD permits by January 2, 2011, or sufficiently soon thereafter so that sources in the State will not be adversely affected by the short-term lack of a permitting authority.

75 Fed. Reg. at 77,700.

These actions ensured that major new and modified sources located anywhere in the country would have a state or federal agency from which they could obtain valid PSD permits covering greenhouse gases after January 2, 2011. 75 Fed. Reg. at 77,703; *see also* 75 Fed. Reg. at 82,246.

## PENDING INTERVENTION MOTIONS

Respondent-Intervenors have been granted leave to intervene as to each of the three EPA actions at issue here.[2] However, two motions to intervene from the four environmental organizations that join in this brief remain pending and subject to this Court's order to address intervention in our merits brief. Order of July 6, 2011 (Doc. No. 1316738).

[2] The consolidated petitions include challenges transferred from the Fifth and Tenth Circuits, as well as petitions originally filed here. In the proceedings originally filed in this Court, the motion of Sierra Club, Natural Resources Defense Council, Environmental Defense Fund, and Conservation Law Foundation ("Environmental Organizations") to intervene in support of EPA in the Failure Finding challenges was granted in No. 11-1059 (order of April 15, 2011 Doc. No. 1300872), but their motions to intervene in the other two EPA actions were referred to the merits panel in No. 11-1060 and No. 11-1063. Another set of petitions solely over the SIP Call, No. 11-1063, 11-1075, 11-1076, 11-1077, and 11-1078, were transferred from the Fifth Circuit, *see Texas v. E.P.A.*, No. 10-60961, 2011 WL 710598 (5th Cir. Feb. 24, 2011). In the Fifth Circuit, the Environmental Organizations filed an opposed motion to intervene, and Connecticut filed an unopposed motion to intervene. After transfer, this Court granted Connecticut's motion, on March 18, 2011, Order, No. 11-1063 (Doc. No. 1299059), and referred the Environmental Organizations' motions to the merits panel, Nos. 11-1060 and 1063 (order of July 6, 2011) (Doc. No. 1316738), and directed movants and the parties to address intervention in their merits briefs. Later, another set of petitions challenging the same EPA actions, D.C. Cir. Nos. 11-1287 to -1193, was transferred from the Tenth Circuit, and docketed in this Court on August 17, 2011. Before that transfer, the Tenth Circuit had granted the Environmental Organizations' motion to intervene in those six related petitions for review. Order, Tenth Cir. Nos. 11-9505, *et al*. (April 20, 2011) (Doc. No. 9859753). The Tenth Circuit cases included the first-filed petitions for review of the Failure Finding and FIP.

Because, with the transfer of the Tenth Circuit petitions, each of the Movant-Intervenors has now been granted intervenor status as to each agency action challenged here, *cf.* D.C. Circuit Rule 15(b), the basis of the referrals of the intervention motions to the motions panel may now be vitiated.[3] Nonetheless, in light of the Court's order, we briefly address why the Environmental Organizations' intervention is proper.

Fed. R. App. P. 15(d) requires a motion for intervention in a proceeding for review of an agency action to provide "a concise statement of the interest of the moving party and the grounds for intervention." Movants' timely motions in this Court and the Fifth Circuit satisfied that requirement. *See*, *e.g.*, Motion in No. 11-1060 at 13-16 (filed Mar. 30, 2011) (Doc. No. 1300873) ("Motion in No. 11-1060"); Motion in 5th Cir. No. 10-60961 (filed Dec. 22, 2010) (Doc. No. 6696801).[4]

---

[3] No Petitioner has asked the Court to revisit the Tenth Circuit's grant of the Environmental Organizations' motion to intervene. *See Magnetic Eng'g & Mfg. v. Dings Mfg.*, 178 F.2d 866, 868 (2d Cir.1950) (L. Hand, J.) (transfer "leav[es] untouched whatever has been already done").

[4] Based upon their organizational interests in control of greenhouse gas emissions, and their extensive involvement in the administrative proceedings, Movant-Intervenors have been granted intervention in No. 09-1322, and many of the other related proceedings in this Court. *See* No. 10-1425, Order (Jan. 12, 2011) (Doc. No. 1287610) (granting them intervention in Texas FIP challenge). Further, this Court has regularly granted intervention to such organizations in their previous efforts to support EPA's

Petitioners seek to prevent or delay the implementation of greenhouse gas controls for stationary sources in numerous States – actions that would directly impair Movants' interests. *See*, *e.g.*, Motion in No. 11-1060 at 13-16. Movants' declarations detail their stake in these proceedings. *See*, *e.g.*, Motion in No. 11-1060, Exhibits 4-11.[5]

The only opposition to the Environmental Organizations' motions came from Texas, which argued in the Fifth Circuit, solely with respect to the SIP Call, that the motions failed to satisfy Fed. R. Civ. P. 24(a) and Fifth Circuit precedent construing that rule. *See* Opp. to Mot. to Intervene at 2, 7 in No. 10-60961 (filed Jan. 3, 2011) (Doc. No. 6707246). However, this case is governed by Fed. R. App. P. 15(d), which simply requires "a concise statement of the interest of the moving party and the grounds for

---

actions under the Act, *see, e.g.*, *North Carolina v. EPA*, 531 F.3d 896, *modified on rehearing*, 550 F.3d 1176 (D.C. Cir. 2008) (EDF intervened in support of EPA).

[5] The Supreme Court recently confirmed that Article III standing requirements apply to those "who seek[] to initiate or continue proceedings in federal court," not to those who *defend* against such proceedings, and here it is Petitioners, not Movant-Intervenors, who invoke the Court's jurisdiction. *Bond v. U.S.*, 131 S. Ct. 2355, 2361-62 (2011). In any case, Movant-Intervenors' standing has not been challenged by any party, and because EPA has standing, the Court need not reach their standing. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 233 (2003); *Comcast Corp. v. FCC*, 579 F.3d 1, 5-6 (D.C. Cir. 2009). Regardless, Movants' declarations satisfy both constitutional and prudential standing requirements.

intervention." *See also Synovus Fin. Corp. v. Board of Governors of Federal Reserve System*, 952 F.2d 426, 433 (D.C. Cir. 1991).[6]

Even if the Court were to look to Fed. R. Civ. P. 24 here, Texas's objection ignores subsection (b) of the Rule, which allows for permissive intervention regardless of whether the requirements of subsection (a) are met. *See Int'l Union v. Scofield*, 382 U.S. 205, 216 n.10 (1965) (intervention would be appropriate "[u]nder Rule 24(a)(2) or Rule 24(b)(2)"). Allowing intervention here accords with this Court's well-established practice of granting intervention motions from a wide variety of interested entities, including environmental advocacy groups and industry trade associations. The Environmental Organizations have satisfied the requirements for intervention.

## STANDARD OF REVIEW

Review of the SIP Call and Failure Finding is governed by the Administrative Procedure Act ("APA"), which instructs the court to hold unlawful and set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review of the FIP is governed by 42 U.S.C. § 7607(d), which

[6] The drafters of the appellate rules were capable of borrowing from the civil rules when they so chose. *Compare, e.g.*, 1967 Advisory Committee Notes (notes to Fed. R. App. P. 3(a) and 3(b)) *with id.* (note to Fed. R. App. P. 15(d)).

incorporates the APA review standard. The agency's interpretation of the Clean Air Act must be upheld unless it is contrary to unambiguous congressional intent or an unreasonable reading of statutory language, *Chevron USA Inc. v. NRDC*, 467 U.S. 837 (1984), and the agency's interpretation of its own regulations is entitled to substantial deference "unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation.'" *Petit v. U.S. Dept. of Educ.*, 2012 WL 1232572, *8 (D.C. Cir. Apr. 13, 2012) (citation omitted).

## SUMMARY OF ARGUMENT

Petitioners' challenges to EPA's longstanding interpretation that Section 165(a), by its own force, prohibits construction of a source without a PSD permit that complies with statutory requirements, appear to be time-barred under Section 307(b) of the Act. If those arguments are barred, Petitioners lack Article III standing to press any of their other arguments, insofar as EPA's actions merely facilitated permitting that would otherwise have been prohibited by operation of statute.

EPA's position that the Act by its own force prohibits construction of a new or modified major emitting facility absent a permit satisfying the requirements of CAA Part C tracks express statutory requirements. Section

165(a) provides that "[n]o major emitting facility * * * may be constructed in any area to which [the PSD program] applies" unless "a permit has been issued for such proposed facility * * * setting forth emission limitations for such facility which conform to the requirements of this part." 42 U.S.C. § 7475(a)(1). The "requirements" of Part C include the requirement that "the proposed facility is subject to the best available control technology *for each pollutant subject to regulation under this chapter* [i.e., the Clean Air Act] emitted from * * * such facility." *Id.* § 7475(a)(1), (4) (emphasis added). Reinforcing this point, Section 167 provides that the Administrator "shall" take enforcement action "as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part." 42 U.S.C. § 7477.

Plain statutory language also refutes Petitioners' challenge to EPA's authority to make a SIP call under Section 110(k)(5), which provides that EPA must require a State to revise its SIP "[w]henever the Administrator finds that the applicable implementation plan for any area is substantially inadequate" to "comply with any requirement of this chapter." 42 U.S.C. § 7410(k)(5). The absence of authority in some SIPs to issue permits for new and modified major sources of greenhouse gases made those plans "substantially inadequate." Petitioners' strained reading of Section

110(k)(5) fails to comport with the statutory text, and the experiences of other States that initially lacked authority under their SIPs to permit sources of greenhouse gases belie Petitioners' claims that EPA's position is unduly restrictive.

EPA also properly rejected Petitioners' claim that States were entitled to three years to amend their SIPs, during which time major new and modified sources of greenhouse gases could continue to be built without permits. Petitioners rely on two statutory provisions – Sections 110(a)(1) and 166 – that are expressly limited to pollutants for which there are National Ambient Air Quality Standards ("NAAQS"); they are inapplicable here. Nor does Petitioners' argument find support in an EPA regulation providing a three-year response time for SIP reviews required "by reason of an amendment" to EPA's PSD regulations, 40 C.F.R. § 51.166(a)(6). As EPA explained, the necessity for revision was the SIPs' failure to include greenhouse gases, which created a permitting gap that stemmed from greenhouse gases becoming "subject to regulation" pursuant to the Vehicle Rule, not from revisions to EPA's PSD regulations.

Wyoming's claim of inadequate notice is groundless. EPA's September 2, 2010, proposal prominently explained that any State lacking authority to issue greenhouse gas permits would be included within the SIP

Call. Wyoming's comments, acknowledging just such a lack of authority, show that the State had due notice.

Finally, Petitioners' Tenth Amendment claims lack merit. EPA's actions were entirely consistent with the cooperative federalism model blessed in numerous Supreme Court opinions. After giving States the opportunity to comply with the permitting requirements for greenhouse gases set forth in applicable federal law, and determining that certain States had not done so, EPA stepped in to perform those permitting responsibilities itself, through FIPs. EPA pointedly did not commandeer any State into performing these permitting duties. The Constitution does not empower – indeed it forbids, *see* U.S. CONST. ART. VI, Cl. 2. – States to block federal implementation and enforcement of a valid federal statute like the Clean Air Act.

## ARGUMENT

### I. PETITIONERS MAY NOT RELITIGATE IN THIS CASE ARGUMENTS THAT GREENHOUSE GAS SOURCES ARE NOT SUBJECT TO PSD PERMIT OBLIGATIONS, OR THAT SUCH OBLIGATIONS DO NOT ATTACH UNTIL THE SIP IS REVISED.

Petitioners seek to challenge the proposition that Section 165(a) of the Clean Air Act, by its own force, prohibits construction of major new or modified sources that emit a regulated pollutant unless such sources have

Section 165(a) permits. Petitioners attack this proposition on two levels: First, State Petitioners appear to deny that Section 165(a)'s prohibition on constructing without such a permit is ever triggered by greenhouse gas emissions sources. State Br. 31-32. Second, Industry Petitioners contend that even if the prohibition can ever apply to a greenhouse gas source, it applies only after that prohibition has been adopted into a State's SIP. *See* Industry Br. 25-30. Both of these arguments fail on the merits. More importantly, we believe both are barred in this case.

Under Section 307(b) of the Act, challenges to final actions of the Administrator must be filed within sixty days of publication in the Federal Register. *See* 42 U.S.C. § 7607(b). This Court has stated that the requirement is "'jurisdictional in nature.'" *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 460 (D.C. Cir. 1998) (quoting *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 331 (D.C. Cir.1993)); *NRDC v. NRC*, 666 F.2d 595, 602 (D.C. Cir.1981).

Neither proposition that Petitioners attack – that Section 165(a) prohibits construction without a PSD permit covering all regulated pollutants, and that this prohibition operates directly without need of being included in the State's SIP – originated in the proceedings at issue here. Both are previously established agency interpretations that were announced

and reaffirmed in prior proceedings. *See* EPA Br. 9-10; EPA Br. in No. 10-1073, at 84-88 (Doc. No. 1347529). State and Industry Petitioners have challenged the first proposition in Nos. 10-1073 and 10-1131, which were argued before this Court on February 29, 2012. The Court will either decide the issue on the merits, or rule that it is, as EPA argues in that proceeding, time-barred there. In any event, the issue cannot be re-litigated here. The challenge to the second proposition is at least arguably also subject to the Section 307(b) bar, because it targets a longstanding EPA interpretation that was aired (and rejected by EPA on the basis of its being settled and longstanding) in the Timing Decision proceedings.[7] If so, it too cannot be re-litigated here.

---

[7] There, commenters American Chemistry Council, *et al.* ("ACC") argued (1) that Section 110's SIP revision provisions precluded application of greenhouse gas permitting requirements where existing SIPs did not provide for greenhouse gas permitting, and (2) that under Section 110and 40 C.F.R. § 51.166(a)(6)(i), EPA had to allow states a three-year period for such SIP revisions. *See* ACC Comments at 21-23, EPA-HQ-OAR-2009-0597-0086 (Addendum A). EPA responded:

> The Agency interprets the provisions of Section 165 to apply to any pollutant that becomes "subject to regulation" under the Act. The D.C Circuit Court upheld this position. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 403-406 (C.A.D.C., 1979) (rejecting arguments that Section 165 should not automatically apply to all pollutants subject to regulation under the Act.). We have continued to assert this position since this time. *See, e.g.*, 67 FR 80,240 (stating that the PSD program applies automatically to newly regulated NSR pollutants); 61 FR 38,307 (stating that the PSD regulations apply to all pollutants regulated under the Act), and Memo From John S. Seitz, Director, Office of Air Quality

If Section 307(b) bars Petitioners' challenge of these propositions in this case, Petitioners lack Article III standing for any other contentions they raise. The purpose and effect of all the EPA actions at issue was to assure the existence of a permitting agency with legal authority to grant permits to sources that cannot construct without them. If the Act itself prohibits construction of such sources in States with SIPs that do not provide for greenhouse gas permitting, then Petitioners have failed to show how they have been harmed by EPA's actions, or how overturning these actions would redress any injuries. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *McConnell*, 540 U.S. at 229 (no standing when the remedy a court may grant would not relieve the claimed injury).

---

> Planning and Standards, to Regional Air Directors, "Interim Implementation of New Source Review Requirements for PM2.5," April 5, 2005 (stating that Section 165(a)(1) of the Act provides that no new or modified major source may be constructed without a PSD permit.). We are not changing our regulations, and did not open this interpretation for reconsideration in this action.

Timing Response to Comments at 155 (Addendum B). *See also* Timing Decision, 75 Fed. Reg. at 17,022 ("[P]ermitting authorities in SIP-approved States do not have the discretion to apply State laws in a manner that does not meet the minimum Federal standards in 40 CFR 51.166, as interpreted and applied by EPA. Thus, if a State is not applying the PSD requirements to GHGs for the required sources after January 2, 2011, or lacks the legal authority to do so, EPA will exercise its oversight authority as appropriate to call for revisions to SIPs and to otherwise ensure sources do not commence construction without permits that satisfy the minimum requirements of the Federal PSD program.").

## II. EPA PROPERLY CALLED FOR SIP REVISIONS AND ISSUED FIPS WHERE STATES LACKED THE AUTHORITY TO ISSUE PERMITS TO MAJOR SOURCES OF GREENHOUSE GASES

Assuming the Court has jurisdiction to hear Petitioners' claims, they fail on the merits. Petitioners argue that EPA's SIP Call, Failure Finding, and FIP are premised "on an impermissible construction of the CAA Prevention of Significant Deterioration ("PSD") program provisions" and violate the Act's "orderly process" for SIP revisions, which, they claim, grants States three years to submit compliant plans. Industry Br. 2; *see also* State Br. 5. Petitioners' reading of these provisions, however, lacks any basis in the statutory text, structure, or purposes of the Act. In fact, the Act directly bars construction of sources in violation of Section 165(a), and EPA reasonably utilized Section 110(k)(5) to require revisions of State SIPs that failed to include greenhouse gases in their PSD programs.

EPA determined that the PSD SIPs of most States provided the requisite coverage of greenhouse gases and thus required no action.[8] EPA's actions covering the 13 States with SIPs lacking this permitting authority merely implemented EPA's obligations under Section 110(k)(5).

[8] Doc. No. EPA-HQ-OAR-2010-0107-0119 (Declaration of Regina McCarthy) at Attachment 1, Table III (hereinafter "State Status Attachment") (JA 620-24).

### A. The PSD Provisions Directly Prohibit Construction in Violation of Section 165 of the Act

Petitioners argue that the Act's PSD provisions are applicable to sources only through EPA-approved State SIPs, and as a result, they argue that sources in States that do not include greenhouse gases in their PSD programs are exempt from the prohibition on construction without a permit covering those pollutants. This argument entirely fails to account for Section 165 – the central basis for EPA's SIP Call – or for this Court's precedent.

Section 165 of the Act expressly provides that "[n]o major emitting facility * * * may be constructed in any area to which [the PSD program] applies" unless "a permit has been issued for such proposed facility * * * setting forth emission limitations for such facility which conform to the requirements of this part," including that "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." 42 U.S.C. § 7475(a)(1), (4) (emphasis added). The applicability of these requirements is not predicated on their inclusion in a State SIP – the statute directly prohibits construction that is not in accord with a permit meeting the specified requirements. *See Sierra Club v. Jackson*, 648 F.3d 848, 851-52

(D.C. Cir. 2011) (observing that Section 165(a) "*forbids the construction of such facilities absent a PSD permit meeting the requirements of the Clear Air Act*") (emphasis added).

This conclusion is powerfully reinforced by the enforcement provision, Section 167, which provides that "[t]he Administrator shall, and a State may, take such measures * * * necessary to prevent the construction or modification of a major emitting facility *which does not conform to the requirements of this part*." 42 U.S.C. § 7477 (emphasis added). "This part" plainly refers to Part C of Title I – *i.e.*, the statutory PSD requirements. Furthermore, Section 167 distinguished between construction that itself violates "this part" and construction that is unlawful because it occurred in an area that lacks a statutorily compliant SIP – and Congress commanded EPA to take enforcement action in *both* situations. *See id*. (EPA "shall" take enforcement action to block a facility "proposed to be constructed in any area designated * * * as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part").

Where Congress intended air quality programs to apply solely through State-approved SIPs, Congress used explicit language that sharply contrasts with the language of Section 165. *See* 42 U.S.C. §§ 7502; 7503(a)(1) (Non-attainment New Source Review, "NNSR," permits "may be issued if 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 * * *"). Unlike NNSR, PSD permitting requirements, including the requirement to apply BACT to "each pollutant subject to regulation under this chapter," are not operative only through EPA-approved State SIPs, but instead apply clearly and directly to "major emitting facilities." *See Rusello v. United States*, 464 U.S. 16, 24 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

This Court's precedent reinforces the conclusion that Section 165(a) creates direct obligations upon sources. *See Citizens to Save Spencer County v. EPA*, 600 F.2d. 844, 853 (D.C. Cir. 1979) (resolving conflict between Sections 165 and 168, both of which the Court identified as "clear," and rejecting Petitioners' interpretation that requirements in Section 165 took effect only after approval of SIPs); *Alabama Power Co. v. Costle*, 636 F.2d 323, 404 (D.C. Cir. 1979) (rejecting claims that the requirements in Section 165 must be delayed until performance of the studies and enactment

of the regulations required by Section 166); *see also* EPA Br. 49-54 (discussing *Spencer County*).

Petitioners provide thin justification for their argument that the PSD provisions are not self-executing, failing entirely to account for Section 165 or to meaningfully address this Court's decisions in *Spencer County* and *Alabama Power*. Industry Petitioners point to Section 161, 42 U.S.C. § 7471, but that provision simply allows EPA to adopt regulations "for such other measures as may be necessary" to prevent significant deterioration of air quality, without stating that those are the exclusive requirements that States must include in SIPs or providing that the PSD program is effective only after SIP approval. Similarly, Petitioners' reliance on Section 168(b) fails entirely to account for *Spencer County*, which expressly rejected the position that the PSD provisions are only effective after approval in a State SIP. *See supra* Part II.A. These claims lack merit.

### B. EPA Properly Relied Upon Section 110(k)(5) to Call for SIP Revisions Where State Plans Did Not Allow for Permitting of Major Sources of Greenhouse Gases

Petitioners argue that EPA may not use Section 110(k)(5) to call for a SIP revision because greenhouse gases were not regulated pollutants when EPA earlier approved Texas's and Wyoming's SIPs. Specifically, Petitioners contend that paragraph (5) allows EPA to find substantial

inadequacies only with respect to legal requirements in effect when EPA earlier approved the underlying SIP. They further contend that both States' SIPs satisfied the pre-existing requirements and thus are immune from Section 110(k)(5). State Br. 28-29. This argument is meritless.

Section 110(k)(5) applies to *all* deficiencies that render SIPs "substantially inadequate," not just the temporal subset that Petitioners favor. The Section provides that the Administrator "shall" require a plan revision "[w]henever the Administrator finds that the applicable implementation plan for any area is substantially inadequate * * * to comply with any requirement of this chapter." 42 U.S.C. § 7410(k)(5). The State must submit a SIP revision "as necessary to correct such inadequacies" within a reasonable deadline to be selected by EPA, not to exceed 18 months. *Id.* Congress crafted Section 110(k)(5) expansively, requiring revision of inadequate plans "[w]henever" those inadequacies are identified. Congress directed EPA to determine a SIP's inadequacy in the present, not the past – the question is whether the plan "*is* substantially inadequate." 42 U.S.C. § 7410(k)(5) (emphasis added). *See U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 493 (D.C. Cir. 2004) (rejecting reading that disregarded present-tense wording of statute and noting that "'Congress' use of a verb tense is significant in construing statutes'") (*quoting United*

*States v. Wilson*, 503 U.S. 329, 333 (1992)); *see also Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past * * *, but it did not choose this readily available option."). And Congress targeted *all* SIP inadequacies, using broad language like "*any requirement* of this chapter." (emphasis added). *See Massachusetts v. EPA*, 549 U.S. 497, 529 (2007) ("any" intended to encompass "all airborne compounds of whatever stripe"); *New York v. EPA*, 443 F.3d 880, 889 (D.C. Cir. 2006).

Petitioners nonetheless argue that Section 110(k)(5) restricts EPA to calling for SIP revisions only when a plan fails to meet requirements that were in place *at the time of the SIP's original approval*. State Br. 28. Petitioners base this argument on the fourth sentence of Section 110(k)(5), which provides that "[a]ny finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made * * * ." 42 U.S.C. § 7410(k)(5). But this language limits a SIP Call to those past requirements only "to the extent the Administrator deems appropriate." In other circumstances, including those here, EPA is authorized to require States to conform their

SIPs to all current requirements, including those that took effect after the original SIP approval.

The Texas and Wyoming SIPs were substantially inadequate because they did not allow the States to issue permits requiring "the best available control technology for" greenhouse gases, a pollutant "subject to regulation" under the Clean Air Act, as required by Section 165(a)(4). The SIPs of many other States met this requirement because their regulations automatically update to track changes to pertinent EPA regulations.[9] In other States without automatically updating SIPs, the States were able to keep their SIPs current by swiftly updating the list of covered pollutants when additional pollutants become subject to regulation under the Clean Air Act.[10] Texas and Wyoming did not take either of these approaches,[11] and as

[9] *See, e.g.*, State Status Attachment, *supra*, note 8 at Table III (listing Delaware, Montana, North Dakota, and Pennsylvania as states with PSD SIPs that allowed Jan. 2, 2011 regulation of GHGs and interpreted their SIP provisions to incorporate Tailoring Rule thresholds without requiring further action) (JA 621-23).

[10] *See, e.g.*, 75 Fed Reg. 77,713 (SIP covering Clark County in Nevada identifies specific pollutants but does not included GHGs); State Status Attachment, *supra* note 8 at Table II (stating that approved SIP for Clark County will be in place by July 1, 2011 and that no permit applications were expected between January 2, 2011 and July 1, 2011) (JA 619).

[11] Texas's SIP does not automatically update to include newly-regulated pollutants. 75 Fed. Reg. 77,702. Texas further explicitly stated that it would not update its SIP to include GHGs. *See* EPA Doc. No. EPA-HQ-OAR-2010-0107, August 2, 2010 Letter to Administrator Jackson, *et al*. (stating

a result, their SIPs became "substantially inadequate." In these circumstances, EPA properly applied Section 110(k)(5).[12]

**C. EPA's SIP Call is Consistent with Cooperative Federalism**

Finally, Petitioners allege that EPA's "attempt" to use its SIP Call "to coerce immediate state plan revisions out of Texas and Wyoming by threatening a construction moratorium contradicts Congress's plan for cooperative federalism under the Clean Air Act." State Br. 23. This claim is entirely based on the premise that the Clean Air Act does not of itself prohibit construction of major new or modified greenhouse gas sources without a Section 165 permit. But that premise is wrong.

---

that it had "neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emission") (JA 625). This inadequacy is not limited to greenhouse gases and Texas's refusal to update its SIP to encompass newly regulated pollutants violated § 165 even prior to the onset of GHG regulation. The Wyoming SIP does automatically update, but Wyoming law specifically prevents the state from regulating greenhouse gases. *See* 75 Fed. Reg. at 77,713.

[12] Other states used the SIP Call in the updating process for greenhouse gases by accepting a FIP. *See, e.g.*, State Status Attachment, *supra*, note 8 at Table II (stating Pinal County in Arizona intends to seek delegation of FIP) (JA 617). Several states determined that no immediate action was needed because they did not anticipate construction of any new or modified sources of greenhouse gases during the time they needed to update their regulations. *See, e.g.*, *infra*, pp. 25-26 (discussing Connecticut); *see also* State Status Attachment at Table II (discussing California's Sacramento Metropolitan AQMD) (JA 617).

EPA's actions were calculated to help the States, not to coerce them. EPA took these actions to ensure that no major new or modified source was blocked from constructing in those States for want of a pathway to obtain necessary permits.

Given that Texas has been completely *uncooperative* in the matter of greenhouse gases, the State's invocation of the principle of cooperative federalism is ironic. The State made it abundantly clear that it had no intention of complying with federal law pertaining to greenhouse gases. *See* August 2, 2010 Letter to Administrator Jackson and Dr. Armendariz Docket ID No. EPA-HQ-OAR-2010-0107-0121 (JA 625-30). A losing party in *Massachusetts* itself, Texas has subsequently challenged EPA's greenhouse gas regulations at every turn, filing lawsuits seeking to overturn EPA's Endangerment Finding, the Vehicle Rule, the Timing Decision, Tailoring Rule, and this SIP Call and the Texas-specific interim and final FIP. In numerous cases, Texas has unsuccessfully sought to stay the challenged actions. *Alone* among the thirteen States subject to the SIP Call, Texas did not respond to EPA's request that it identify a SIP submittal deadline. 75 Fed. Reg. at 77,711. Under these circumstances, Texas's claim that it is simply trying, in good faith, to follow the Clean Air Act rings particularly

hollow. Nothing in the cooperative federalism principle provides an excuse to block federal statutory requirements with which a State disagrees.

Every other State with an inadequate SIP, including Respondent-Intervenor Connecticut, worked within the Act's structure and with EPA both to ensure continuity of permitting authority and to maximize State participation in the decision making process.[13] The actions of States that actually chose to utilize the Act's cooperative structure underscore two points: the SIP Call provided flexibility to States in choosing how best to effectuate the Act's provisions; and the degree to which federal authority substituted for state authority was, if at all, limited in both duration and scope. From a practical standpoint, these actions also reveal that the regulatory revisions could be completed in short order, in contrast to the Petitioners' claims.

## III. PETITIONERS' OTHER ARGUMENTS FOR YEARS MORE TIME TO APPLY THE ACT TO GREENHOUSE GASES ARE MERITLESS

Petitioners attempt to avoid the requirements of Section 110(k)(5) by pointing to separate statutory and regulatory provisions that they claim provide States with a minimum of three years to incorporate newly-regulated

[13] *See supra*, notes 9, 10, and 12.

pollutants into their SIPs. *See* Industry Br. 35-38; State Br. 20-28. These claims are meritless.

### A. Section 110(a) and Section 166 Do Not Impose a 3-Year Waiting Period on SIP Revisions

Petitioners suggest that Sections 110(a) and 166 establish an "orderly process" for SIP revisions, requiring EPA to provide States with a minimum of three years to revise SIPs to incorporate newly-regulated pollutants. The pertinent portions of these statutory provisions, however, apply by their terms only to pollutants for which there are National Ambient Air Quality Standards ("NAAQS").[14] EPA has set no primary or secondary NAAQS for greenhouse gases, and as such, these provisions are by their terms simply

[14] 42 U.S.C. § 7410(a)(1) ("Each State shall * * * adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) *after the promulgation of a national primary ambient air quality standard* (or any revision thereof) under section 7409 of this title for any air pollutant, *a plan which provides for implementation, maintenance, and enforcement of such primary standard*") (emphases added); 42 U.S.C. § 7476 ("*In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977*, [the Administrator] shall promulgate [regulations to prevent the significant deterioration of air quality which would result from emissions of such pollutant] not more than 2 years after the date of promulgation of such standards.") (emphasis added). For purposes of this case, it is dispositive that neither provision applies to non-NAAQS pollutants such as greenhouse gases. We do not imply, however, that Petitioners have correctly described the effect of the two provisions even in instances where a new NAAQS has been promulgated.

inapplicable. *See Chevron*, 467 U.S. at 842 ("If the intent of Congress is clear, that is the end of the matter.").

Industry Petitioners selectively quote from these provisions (Br. 23, 27-29, 33-35), omitting the language in both provisions that limits them to NAAQS. State Petitioners do acknowledge that these provisions apply to promulgations or revisions of NAAQS but suggest – with little elaboration – that it would be an "absurd result" (Br. 32) to not apply the same provisions to the broader PSD program. They do not, however, demonstrate why it would be the slightest bit "absurd" to read the statute as it is written. Congress's distinction is certainly rational: revising a SIP to address a new NAAQS pollutant is a more far-reaching and complex endeavor than addressing newly regulated pollutants in individual PSD permitting proceedings. The former requires careful modeling of the sources in the State to inform many state-specific factors, none of which are required to impose BACT on the latter.[15]

**B. 40 C.F.R. 51.166(a)(6) is Inapplicable**

Finally, Petitioners suggest that 40 C.F.R. 51.166(a)(6) requires the agency to provide States with three years to revise their SIPs to include

[15] Petitioners relatedly argue that Section 110(i) required EPA to use Sections 110(a) and (c) to effect changes in SIPs, precluding EPA's use of Section 110(k)(5). Section 110(i) does not apply here, because the SIP Call was not a "modification" of any SIP. *See* EPA Br. 37.

greenhouse gases. In the final SIP Call, EPA responded to this argument and properly interpreted the regulation not to apply here.

Section 51.166(a)(6) provides that "[a]ny State required to revise its implementation plan by reason of an amendment to this section * * * shall adopt and submit such plan revision to the Administrator for approval no later than three years after such amendment is published in the Federal Register." Here, the States' requirement to revise their SIPs is not "by reason of" EPA's amendments to Section 51.166 in the Tailoring rule. As EPA explained, the PSD program's application to greenhouse gases, and thus States' obligation to review their SIPs, arises from the interaction of the Vehicle Rule and the Act's provision that PSD applies to any pollutant "subject to regulation." 75 Fed. Reg. at 77,707-08. The Tailoring Rule's amendments to Section 51.166 were purely deregulatory, and States would have been required to review their SIPs even if the Tailoring Rule had not been adopted. *Id.* Accordingly, it cannot be said that the SIPs became deficient "by reason of" the Tailoring Rule.

EPA's rejection of this argument is correct on its face. Moreover, because EPA's interpretation of its own regulatory "by reason of" language was made in a decision published after notice and comment, EPA's interpretation is entitled to strong deference unless "plainly erroneous or

inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Am. Fed'n of Gov't Employees, AFL-CIO v. Gates*, 486 F.3d 1316, 1330 (D.C. Cir. 2007) (regulatory textual interpretation published in Federal Register necessarily "fair and considered" and therefore entitled to *Auer* deference) (citation omitted). Accordingly, the regulatory language Petitioners rely on has no application here.

## IV. WYOMING HAD ADEQUATE NOTICE THAT STATES WITHOUT MEANS TO GRANT PSD PERMITS FOR GREENHOUSE GASES WOULD BE SUBJECT TO FIPS.

In response to EPA's request for information on the adequacy of state plans, Wyoming commented that state law prohibited it from applying its PSD program to greenhouse gas and specifically requested that EPA reclassify its SIP as substantially inadequate. *See* Wyoming DEQ Comments at 2 (Oct. 4, 2010) (Doc. No. EPA-HQ-OAR-2010-0107-0079) (JA 587-88). Wyoming now claims that it was "surprise[d]" (State Br. 35) by EPA's decision to do precisely what the State asked for, arguing that EPA's "bait and switch" in the final SIP Call was not a "logical outgrowth" of EPA's proposal and therefore violated the Administrative Procedure Act's notice requirements. Wyoming's notice claims misapply the "logical

outgrowth" doctrine and are contradicted by the State's own comments on EPA's proposal.[16]

An agency may issue a final rule that differs from the proposal if such final rule is a "logical outgrowth" of the proposal. *City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007); *see CSX Transp. Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2004) ("A final rule qualifies as a logical outgrowth 'if interested parties "should have anticipated" that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.'") (citations omitted).

EPA repeatedly and explicitly requested comments on potential barriers to regulations of greenhouse gases in States, like Wyoming, with SIPs the agency had determined to be presumptively adequate. *E.g.*, 75 Fed. Reg. at 53,901 ("[W]e request that each of these States inform us if it has another State law provision or legal interpretation that may have the effect of limiting PSD applicability to air pollutants covered by EPA's PSD program as of a certain date, and therefore does not include GHGs."). The agency explained that if it received such information, it would "take final action to

[16] Given that Wyoming interprets state law to forbid it from issuing permits to sources of greenhouse gases, Wyoming does not explain what it would have done differently had it received the notice it claims was lacking. *See* 5 U.S.C. § 706 ("prejudicial error" rule for APA review); *see also* 42 U.S.C. § 7607(d)(8).

issue a finding of substantial inadequacy and a SIP Call for that State, on the same schedule as that for the [other] 13 States." *Id.* at 53,895-96.

In light of EPA's clear statements and Wyoming's equally clear comments, the State must have anticipated EPA would do as it had said it would, and finalize a SIP Call covering Wyoming. Indeed, Wyoming's own comments suggest this very course of action,[17] and as such, Wyoming's attempt to disown its prior position through its current notice claim must fail.

## V. EPA'S ACTIONS DO NOT VIOLATE THE TENTH AMENDMENT

Finally, State Petitioners assert a Tenth Amendment claim (Br. 37-41) that is, at best, insubstantial. Petitioners invoke *New York v. United States*, which teaches that the federal government may not "commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." 505 U.S. 144, 161 (1992); *see also Printz v. United States*, 521 U.S. 898, 935 (1997) (federal government may not "command the States' officers, or those of their political subdivisions, to

[17] Wyoming's comments explained that, based upon its interpretation of a state statute to prohibit any regulation of greenhouse gases, Wyoming "needs to be moved to * * * Table IV-1 in the SIP call rule," referring to the proposed SIP Call Rule's table showing states without existing authority to issue permits for greenhouse gases and that would be subject to a SIP Call on that basis. Wyoming DEQ Comments at 2 (JA 588); *see* 75 Fed. Reg. at 53,899 (Table IV-1).

administer or enforce a federal regulatory program"). This anti-commandeering principle has no application here.

EPA has not required the petitioning States, or any other States, to legislate or to regulate. To the contrary – consistent with the standard approach under the Clean Air Act's cooperative federalism regime – EPA offered the States the choice to implement federal permitting requirements for sources of greenhouse gas emissions, and promulgated the FIP only as to States that had made clear that they were unable or unwilling to provide regulatory authority adequate to enforce federal law. *See* 75 Fed. Reg. at 53,904 (Proposed SIP Call); 75 Fed. Reg. at 77,700 (Final SIP Call); EPA Br. 88.

This approach – undertaking direct federal regulation of private conduct when the State is unwilling or unable to enforce federal standards – is the classic cooperative federalism mechanism that has been in place for decades under numerous major federal statutes; it manifestly does not infringe State sovereignty. As the Court explained in *New York*:

> [W]e have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, [452 U.S. 264, 288 (1981). See also *FERC v. Mississippi, [*456 U.S., 742, 764-765 (1982)]. This arrangement, which has been termed "a program of cooperative federalism," *Hodel*, 452 U.S., at 289, is replicated in numerous federal statutory schemes.

505 U.S. at 167; *see also id*. at 145 ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, it may, as part of a program of 'cooperative federalism,' offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.") (citing *Hodel*, 452 U.S., at 288, 289); *Nebraska v. E.P.A.*, 331 F.3d 995, 998-99 (D.C. Cir. 2003) (rejecting Tenth Amendment challenge to Safe Drinking Water Act because "[t]he Act does not compel the states to pass legislation or to enforce the federal standards for arsenic").

Attempting to force this case into the *New York* anti-commandeering mold, the States claim that EPA subjected them to a cruel trilemma among promptly amending their regulations; "abandoning their rights under the Clean Air Act"; or "suffer[ing] a moratorium on construction of sources emitting greenhouse gases." Br. 39. But recharacterization of Petitioners' baseless statutory arguments does not make out a cognizable Tenth Amendment claim. As explained above, the Clean Air Act did not give the two States any "right" to delay application of the Act to greenhouse gases for three years. Direct federal regulation of private actors by means such as an EPA-administered FIP simply does not present a Tenth Amendment issue. Petitioners' effort to impute an air of menace to EPA by accusing it of threatening a "construction ban" is, for reasons set out above, entirely

baseless – the Clean Air Act itself requires a PSD permit prior to the commencement of construction, and among the statutory requirements for such a permit is controls for each air pollutant "subject to regulation" under the Act. *See supra*,Part II.A.

Moreover, in promulgating a FIP providing for direct federal permitting of greenhouse gas sources in States unable or unwilling to provide for such permitting, EPA is acting squarely within powers lawfully delegated to it by Congress under its Commerce Clause authority. Indeed, even petitioners concede – or at least do not challenge (State Br. 37) – that Congress has the power to regulate stationary sources of air pollution. *See Hodel*, 452 U.S. at 282 ("agree[ing] with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State"); *Allied Local & Reg'l Mfrs. Caucus v. U.S. E.P.A.*, 215 F.3d 61, 83 (D.C. Cir. 2000) (stating that "nothing contained in the Court's recent Commerce Clause jurisprudence casts doubt on the validity of" the *Hodel* Court's analysis, and rejecting Commerce Clause challenge to Section 183(e) of the Clean Air Act, concerning control of volatile organic compounds). There can be no serious constitutional objection to the federal

government assuming responsibility for regulating air pollution where a State has refused to do so consistently with the terms of a federal statute. *New York*, 505 U.S. at 156 ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."). The Tenth Amendment does not give any State the right to nullify valid federal laws, or to block *federal enforcement* of such laws.

## CONCLUSION

For the foregoing reasons, the petitions for review should be dismissed or denied.

Respectfully submitted,

George Jepsen
Attorney General

*/s/ Scott N. Koschwitz*
Kimberly P. Massicotte
Scott N. Koschwitz
Assistant Attorneys General
55 Elm Street
P.O. Box 120
Hartford, CT 06106
(860) 808-5250
Scott.Koschwitz@ct.gov

*Attorneys for Intervenor State of Connecticut*

*/s/ Sean H. Donahue*
Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St., NW Suite 808
Washington, DC 20036
(202) 277-7085
sean@donahuegoldberg.com

*/s/ Peter Zalzal*
Vickie L. Patton
Pamela Campos
Peter Zalzal
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302
(303) 447-7215

*Attorneys for Environment Defense*

*/s/ David Doniger*
David Doniger
Meleah Geertsma
Natural Resources Defense Council
1152 15th St., Suite 300
Washington, DC 20005
(202) 289-6868

*Attorneys for NRDC*

*/s/ Nathan Mathews*
Joanne Spalding
Nathan Matthews
Sierra Club
85 2nd Street
San Franscico, CA 94105
(415) 977-5725

*Attorneys for Sierra Club*

*/s/ Ann Brewster Weeks*
Ann Brewster Weeks
Lisa J. Zak
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
(617) 624-0234

*Attorneys for Conservation Law Foundation*

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing final Brief for Intervenors State of Connecticut, Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club in Support of Respondent was served, this 5th day of June, 2012, on all registered counsel, through the Court's CM/ECF system.

*/s/ Sean H. Donahue*
Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St. NW, Suite 808
Washington, DC 30036
(202) 777-7085
sean@donahuegoldberg.com

**CERTIFICATE OF COMPLIANCE WITH WORD COUNT**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7(C), I hereby certify that the foregoing final Brief of Intervenors in Support of Respondent EPA contains 8,667 words as counted by the Microsoft Office Word 2007 word processing system, and thus complies with the applicable word limitation.

*/s/ Sean H. Donahue*
Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St. NW, Suite 808
Washington, DC 30036
(202) 777-7085
sean@donahuegoldberg.com

June 5, 2012 (final brief)

# ADDENDA

# ADDENDUM A

## American Chemistry Council, *et al.* Comments on EPA's Timing Decision (Selected Portions)

## EPA-HQ-OAR-2009-0597-0086

December 7, 2009

EPA Docket Center (EPA/DC)
Air and Radiation Docket and Information Center
Attention Docket ID No. EPA-HQ-OAR-2009-0597
Mail Code 6102T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

**Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program**
**Docket: EPA-HQ-OAR-2009-0597**

Administrator Jackson:

The following organizations ("the Associations") jointly submit these comments on the Proposed Prevention of Significant Deterioration ("PSD"): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program ("PSD Interpretive Memorandum") ("Proposed Reconsideration"), 74 Fed. Reg. 51535 (October 7, 2009):

**American Chemistry Council**

**American Iron and Steel Institute**

**Brick Industry Association**

**Corn Refiners Association**

**Institute of Shortening and Edible Oils**

**National Association of Manufacturers**

**National Oilseed Processors Association**

**National Petrochemical and Refiners Association**

The Associations and their members represent a sizeable and diverse collection of commercial interests.[1] The issues addressed by the PSD Interpretive Memorandum and EPA's proposed reconsideration have substantial and direct implications for the Associations' members. In a parallel proceeding, EPA has proposed motor vehicle emission standards for greenhouse gases (GHGs) under Section 202 of the Clean Air Act (the "Motor Vehicle Rule").[2] EPA has stated that it plans to treat a finalized Motor Vehicle Rule as rendering GHGs "subject to regulation" under the Clean Air Act for purposes of the PSD permitting program.[3] As a result,

[1] An addendum to these comments contains a description of each of the Associations.
[2] Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49454 (Sept. 28, 2009).
[3] *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule ("GHG Tailoring Rule"), 74 Fed. Reg. 55292, 55294 (October 27, 2009) ("When the light-duty vehicle rule is finalized, the GHGs subject to regulation under that rule would become immediately subject to regulation under the PSD program.").

"substitut[ing] [its] judgment for that of the State." *Id.*

Nothing in the legislative history of the 1977 Act indicates that Congress expected that California's freedom under Section 209(b) could create obligations for other States, and especially not obligations under the PSD program. Indeed, that result is wholly implausible in light of Congress's desire to give States substantial autonomy to administer the PSD program and Congress's withdrawal of federal supervision over California's mobile source standards. The contrary position incredibly suggests that Congress intended to allow standards adopted by California for its own particular problems and never substantively reviewed by federal officials to impose PSD permitting obligations on all other States.[46]

## V. Timing of PSD Applicability After EPA Issues a Regulation Requiring Actual Control of GHGs

### A. The Overlooked Necessity of a SIP Revision Process First

The PSD Interpretative Memorandum and the Proposed Reconsideration focus intensely on whether the phrase "regulated NSR pollutant" as it exists in EPA's PSD permitting program at 40 CFR § 52.21 refers to any pollutant whose emissions are subject to actual CAA control or instead to broader sets of pollutants. They conclude that the phrase refers to the former set and, consequently, that Title II restrictions on tailpipe emissions of GHGs would turn GHGs into a "regulated NSR pollutant," thereby automatically triggering applicability of 40 CFR § 52.21 for new and modified stationary sources of GHGs emissions in certain States and other jurisdictions. Further, they imply that, because that phrase or similar phrases (*e.g.*, "any pollutant subject to regulation under the Act") appear generally in PSD permitting programs adopted by States and other jurisdictions and approved by EPA into the relevant SIPs, such tailpipe restrictions likewise might trigger those programs automatically for such sources. Similarly, they imply that the phrase "regulated NSR pollutant" as it exists in EPA's PSD template regulations at 40 CFR § 51.166 has parallel potential—*i.e.,* that such tailpipe restrictions would trigger automatically an ongoing requirement that each SIP must contain a GHG-based PSD permitting program.

Having thus concluded that EPA's PSD regulations and at least some state and tribal PSD regulations already contain language that was meant originally to trigger PSD permitting for GHG emissions whenever EPA establishes GHG emission control requirements, EPA asks in the Proposed Reconsideration merely a secondary question about the precise timing of the triggering event—in particular, whether the triggering event is promulgation or effectiveness of the control requirements.

However, that query, and indeed the entire PSD Interpretative Memorandum and the Reconsideration Proposal, beg a vastly more important question—whether those federal and state/tribal regulations actually do contain such language. This is not merely a technical legal question, but one that implicates the principles of cooperative federalism that form the bedrock of the Clean Air Act.

The answer is that they do not. While EPA's two PSD regulations do contain the phrase "regulated NSR pollutant" and that phrase is indeed broad on its face, EPA *never* made the

[46] *Cf. Ford Motor*, 606 F.2d at 1301–1302 (holding that automakers had to comply with federal standards in States that had not adopted California standards because Congress could not have intended California standards to displace federal standards).

alleged meaning a visible part of any of the several rulemaking processes that formed the present regulations. The idea that the phrase "regulated NSR pollutant" or it ancestors could trigger PSD review for extraordinarily massive numbers of construction projects, a vision that EPA's so-called "Tailoring" proposal now makes explicit, was *never* present in those rulemakings. It was not noticed in any preamble, nor in the analyses of regulatory and paperwork impacts required by statute and Executive Order. To the contrary, the focus of all of those rulemakings—in line indeed with the focus of Section 165 of the CAA—was on pollutants having local or regional impacts, not global impacts. Thus, either EPA had no specific intent to make the PSD regulations trigger potential GHG applicability, or it failed to conduct an adequate rulemaking to establish that intent. Either way, the PSD Interpretive Memorandum is a new rule, injecting new substance and direction to the PSD program.

The same can be said with respect to the state/tribe-adopted, SIP-approved PSD regulations. First, none of EPA's rulemakings to approve state/tribe-adopted PSD regulations focus attention on the alleged GHG significance of the rules. Second, while the present commenters have not examined the relevant rulemaking records at the state or tribal level, they can assert with confidence that at least some of those States or tribes did *not* build the necessary specific intent into their regulations. Indeed, it would be surprising if any State or tribe has built into its PSD program already the potential for triggering the massive increase in permitting activity that the "Tailoring" proposal rightly characterizes as absurd.

The reality is that the PSD Interpretive Memorandum is in effect a new rule and this has important implications for timing and the CAA's cooperative federalism. For example, assume that EPA were to uphold the PSD Interpretive Memorandum and promulgate the GHG tailpipe standards and the PSD Tailoring Rule at roughly the same time. In that case, once the rules become effective, EPA will have amended at least the PSD template regulations at 40 CFR § 51.166, establishing a new SIP requirement for a GHG-based PSD system. EPA, however, will have no authority for likewise amending 40 CFR § 52.21. There are two reasons. First, in line with the usual pattern of state-action and EPA-response under CAA Section 110, 40 CFR § 51.166 explicitly gives each state three years to adopt and submit the necessary revisions. *See id.* § 51.166(a)(6)(i) ("Any State required to revise its implementation plan by reason of an amendment to this section … shall adopt and submit such plan revision … no later than three years after such amendment is [promulgated]."). Second, EPA may promulgate federal implementation plan provisions only if a State has first failed to submit the necessary revisions or, after submission, EPA disapproves them. *See* CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1).[47] Thus, assuming also that EPA made no attempt to construe the existing SIP-approved PSD regulations to apply to GHG emissions, the normal pattern under Section 110 would unfold: (1) three years for adoption and submission of the necessary SIP revisions; (2) one-two years for EPA action on the submission; and (3) possible FIP rulemakings.

While the Associations believe that the CAA requires EPA to follow that pattern with respect to GHG emissions, it is beyond doubt that the CAA at least affords EPA discretion to

[47] While EPA's pattern since 1977 has been to place new amendments directly into 40 CFR 52.21 without waiting for a cycle of SIP revision and EPA action, that pattern arguably was a continuation of EPA's resolution in 1978-80 of the conflict between Sections 165(a) and 168, a resolution upheld by the D.C. Circuit in *Citizens to Save Spencer County v. EPA*, 600 F.2d 844 (D.C. Cir. 1979). Here, that pattern is neither appropriate nor authorized for the massive shift in policy involved in establishing a GHG-based PSD system.

follow it. The alternative would be for EPA to trigger a GHG-based PSD system initially in some States, *i.e.,* those with 40 CFR § 52.21, but not others. That would create huge adverse differences between the States, at least for several years, an outcome Congress strongly disfavored in establishing the PSD program in its present form in 1977. Since the usual Section 110 pattern would be the only lawful one and more orderly in any event, the commenters urge EPA to adopt it.

B. Timing of "Actual Control" Interpretation's Effect

EPA invited comment on whether a pollutant becomes "subject to regulation" at the moment a rule controlling it is promulgated, or whether instead, it becomes subject to regulation at a later date. EPA should clarify that the key point is when a rule first actually controls current emissions of the pollutant.

This point is particularly important to clarify because EPA states that its proposed Section 202 motor vehicle emission standard will render GHGs "subject to regulation." Section 202 regulations do not take effect immediately upon promulgation. Rather, recognizing the obvious need for lead time, vehicle standards only "take effect after such period as [EPA] finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." 42 U.S.C. § 7521(a)(2). In light of that constrained, EPA has proposed vehicle GHG emission standards that do not take effect until model year 2012. *See* 74 Fed. Reg. 49454.

The best view is that a pollutant is not subject to regulation until a rule controlling that pollutant actually requires compliance mandates controlling current emissions of that pollutant. As the PSD Interpretive Memorandum explains, the plain meaning of "regulation" in the phrase "subject to regulation" requires that a pollutant be under "control." PSD Interpretive Memorandum. 7–8. And, plainly enough, if regulation of a pollutant has not yet taken effect, that pollutant is not yet under control. As EPA later explained in its proposed reconsideration: "No party is required to comply with a regulation until it has become final *and effective*. Prior to that date, an activity covered by a rule is not in the ordinary sense 'subject to' any regulation." 74 Fed. Reg. 51545 (emphasis added). EPA's language—"final *and effective*"—dovetails with the lead time requirement in Section 202(a)(2), that tailpipe regulations do not "take effect" until the model year to which the standards apply.

Despite that reasoning, the PSD Interpretive Memorandum suggested that a pollutant becomes a "regulated NSR pollutant" at an earlier point—"upon *promulgation* of a regulation that requires actual control of emissions." PSD Interpretive Memorandum. 14 (emphasis added). Likewise, EPA's proposed Tailoring Rule for the PSD program states that the PSD program would be triggered "when a rule controlling those pollutants is promulgated (and even before that rule takes effect)." *See* Proposed PSD Tailoring Rule, 74 Fed. Reg. at 55300. Yet, "promulgation" of a rule is not a sensible triggering point because a promulgated, but not yet effective, regulation no more "controls" a pollutant than does a proposed regulation.

EPA's proposed reconsideration of the PSD Interpretive Memorandum endorses the more sensible view. EPA recognizes that "the term 'subject to regulation' in the statute and regulation is most naturally interpreted to mean that PSD requirements apply when the regulations addressing a particular pollutant become final *and effective*." 74 Fed. Reg. at 51545–46 (emphasis added). EPA noted that "subject to regulation" in the "ordinary sense" means that a

control has taken effect, and current emissions are subject to controls. It also recognized that requiring PSD controls of GHGs immediately upon promulgation of the Section 202 rule would frustrate the purposes of the Congressional Review Act, 5 U.S.C. 801 *et seq*, which provides a 60 day period before a new major rule goes into effect, so that Congress may review the rule and reject it if necessary. Surely, EPA is correct—it is difficult to imagine that any rule could be more "major" than newly applying carbon controls to over a million sources. An interpretation of "subject to regulation" that was triggered by promulgation would directly conflict with the Congressional Review Act.

The proposed reconsideration also further clarifies that the PSD Interpretive Memorandum was mistaken in reading two other prongs of the "regulated NSR pollutant" regulation as turning upon promulgation, when they should have been read to turn upon the effective date of the statute. 74 Fed. Reg. 51546. Thus, both the CAA and the "regulated NSR pollutant" regulation dictate that a pollutant only becomes "subject to regulation" when a final rule controlling it takes effect. In the case of EPA's proposed Section 202 vehicle emission standards, that point would not occur until the model year 2012 standards take effect.

This interpretation is also dictated by policy considerations. As noted, EPA has pressed forward with an endangerment finding for GHGs under CAA Section 202 and related vehicle emission regulations. But EPA has recognized the current administrative impossibility of instituting PSD requirements for all the sources that would qualify as "major stationary" sources if carbon dioxide was treated like a typical regulated NSR pollutant. *See* Proposed PSD Tailoring Rule, Section VI (explaining that the number of permit applications would grow by "150-fold, an unprecedented increase that would far exceed administrative resources"). Consequently, it has proposed "tailoring" PSD requirements for greenhouse gases, so that they only apply to sources that emit over 25,000 tons of carbon dioxide per year, instead of using the 100 or 250 ton thresholds dictated by the statute. *Id*. at VIII(a). EPA has justified this rule solely on administrative necessity—*i.e.*, it would be "impossible" and "absurd" to implement the express statutory quantitative thresholds, so another higher threshold is necessary. *Id*. at Section VI.

Moreover, there is agency precedent for delaying implementation of PSD requirements to account for administrative difficulties. As noted above in Part IV.A.2, EPA has long withheld enforcement of BACT requirements for $PM_{2.5}$ because of the lack of adequate modeling techniques for $PM_{2.5}$.[48] As evidenced by the Proposed PSD Tailoring Rule, the administrative and technical problems posed by requiring PSD permits and BACT for GHGs dwarfs the problems posed by $PM_{2.5}$.

Given that agency precedent and the fact that EPA has confirmed that it would be administratively impossible to implement a PSD rule in the near future, it would be arbitrary and capricious for EPA to interpret the words "subject to regulation" to apply to a pollutant for which there was a promulgated control that had not yet taken effect. EPA could not justify twisting this term to reject what it has recognized as its "ordinary meaning," 74 Fed. Reg. at 51545, in order to produce a result, which it has recognized is "absurd" and "impossible to implement." *See* Proposed PSD Tailoring Rule, Section VI. Nor can EPA simultaneously tie its hands in the PSD

[48] *See* Final Rule, Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$), 28321, 28324 (May 16, 2008) (explaining that a NAAQS for $PM_{2.5}$ was issued in 1997 but that PSD requirements for $PM_{10}$ have served as surrogate for $PM_{2.5}$ requirements).

Interpretive Memorandum reconsideration, and insist on the need for interpretive latitude in the Proposed PSD Tailoring Rule.

* * *

The undersigned Associations appreciate the opportunity to comment on the proposed reconsideration of the PSD Interpretative Memorandum, as well as the consideration given to our respective industries.

**Addendum – Description of Associations Jointly Submitting These Comments**

**American Chemistry Council** is a nonprofit trade association whose member companies represent the majority of the productive capacity of basic industrial chemicals within the United States. The business of chemistry is a $689 billion enterprise and a key element of the nation's economy.

**American Iron and Steel Institute** represents approximately 28 member iron and steel companies, and 138 associate and affiliate members who are suppliers to or customers of the steel industry. These members operate and hold ownership interests in various steel manufacturing and related operations across the United States and its producer, associate and/or affiliate members supply various customers and projects in the United States.

The **Brick Industry Association** is the national trade association representing distributors and manufacturers of clay brick and suppliers of related products and services.

**Corn Refiners Association** is the national trade association representing the corn refining (wet milling) industry of the United States. Corn refiners manufacture sweeteners, ethanol, starch, bioproducts, corn oil, and feed products from corn components such as starch, oil, protein, and fiber.

The **Institute of Shortening and Edible Oils, Inc.** is a trade association representing the refiners of edible fats and oils in the U.S. Its member companies process approximately 90% of the edible fats and oils produced in the U.S., which are used in baking and frying fats, salad and cooking oils, margarines and spreads, confectionary fats and as ingredients in a wide variety of foods.

**National Association of Manufacturers** is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states.

**National Oilseed Processors Association** is a national trade association comprised of 15 companies engaged in the production of vegetable meals and oils from oilseeds, including soybeans. NOPA's member companies process more than 1.7 billion bushels of oilseeds annually at 65 plants located throughout the country, including 60 plants which process soybeans.

**National Petrochemical and Refiners Association** is a national trade association whose members comprise more than 450 companies, including virtually all United States refiners and petrochemical manufacturers. NPRA's members supply consumers with a wide variety of products and services that are used daily in homes and businesses.

# ADDENDUM B

## EPA's Response to Comments – Timing Decision (Selected Portions)

## EPA-HQ-OAR-2009-0597-0128

EPA United States Environmental Protection Agency

# Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs

# EPA's Response to Public Comments

**U.S. Environmental Protection Agency**
**Office of Air Quality Planning and Standards**
**Air Quality Policy Division**
**Research Triangle Park, NC**

**March 29, 2010**

# FOREWORD

This document provides responses to public comments on the U.S. Environmental Protection Agency's (EPA's) Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs." EPA received comments on this Reconsideration proposal via mail, e-mail, and facsimile. Copies of all comment letters submitted are available at the EPA Docket Center Public Reading Room, or electronically through http://www.regulations.gov by searching Docket ID EPA-HQ-OAR-2009-0597.

This document provides a single response to each significant argument, assertion, and question contained within the totality of comments. Within each comment summary, EPA provides in parentheses, one or more lists of Docket ID numbers for commenters who raised particular issues; however, these lists are not meant to be exhaustive and EPA does not individually identify each and every commenter who made a certain point in all instances, particularly in cases where multiple commenters expressed essentially identical arguments.

# Table of Contents

One state agency commenter (0102) states that the CAA is not an appropriate vehicle for the regulation of GHGs and that such regulation will result in significant impacts on the economy without measurable environmental benefits. The commenter (0102) notes that the endangerment finding and subsequent proposals of the PSD Interpretation, the GHG mobile sources regulations, and the Tailoring Rule interconnected, and asserted that the piecemeal GHG proposals prevent adequate opportunity to evaluate and effectively comment on the proposals. The commenter (0102) states that EPA should withdraw all the GHG proposals.

Commenters (0092, 0098) representing several groups of companies state that, with regard to all of EPA's recent GHG rulemakings under the CAA, the Agency should proceed with caution going forward by allowing both the international community and Congress time to develop a comprehensive and sensible approach to the global problem of climate change.

**Response:**

Regardless of whether the CAA is the preferred mechanism for GHG regulation, the U.S. Supreme Court determined that GHGs fit within the definition of air pollutant in the Act and directed EPA to take actions in accordance with that determination. EPA is responding to the Court's decision by following the statutory requirements of the CAA. Accordingly, EPA finalized its endangerment and cause and contribute findings for GHGs under section 202(a) of the CAA and proposed corresponding GHG controls for light duty vehicles. As explained in various responses above, a final vehicle rule will trigger PSD requirements for GHGs. Thus, EPA is taking appropriate action in this reconsideration and the proposed Tailoring Rule to ensure a common sense and efficient approach to GHG regulation. This reconsideration action is not the appropriate forum for addressing whether the CAA is suited to GHG regulation or opining on potential Congressional action with regard to GHG regulation.

## *9.8. Arguments That PSD Cannot Apply to Pollutants Regulated Only Under Title II of Clean Air Act*

**Comment:**

Twenty-six industry and commerce commenters (0051, 0053, 0056, 0060, 0061, 0066, 0067, 0068, 0069, 0071, 0072, 0073, 0074/0075, 0076, 0085, 0086, 0088, 0092, 0093, 0096, 0098, 100, 0104, 0106/0107, 0111, 0118) opine that a GHG NAAQS is a prerequisite for PSD to be triggered based solely on emissions of GHGs and EPA must interpret the CAA and PSD regulations consistent with this requirement.

One commenter (0086), representing several groups of companies, believes that the PSD Interpretive Memorandum and the Reconsideration Proposal reflect a major oversight on EPA's part in that EPA has been focused on whether the phrase "subject to regulation" in section 165(a) refers only to actual control, concluding in the end that it does and then merely assuming, without analysis, that the "any pollutant" component of the total phrase "any pollutant subject to regulation" has no bounds and therefore potentially includes GHGs. However, the commenter

believes that the 100/250 TPY thresholds in the statute must have some meaning, as EPA has recognized, because they are an integral part of the statutory fabric, and they cannot be reconciled programmatically with an unbounded reading of "any pollutant subject to regulation." The commenter states that, while EPA has chosen to try to weave new thresholds into that fabric specifically for GHGs, it has ignored the possibility that the 100/250 TPY thresholds actually signal that the 95th Congress intended applicability of the section 165(a) PSD program to be based on conventional pollutants, and that the 95th Congress did not mean to authorize EPA to base section 165(a) PSD applicability on GHG emissions. The commenter urges EPA, at a minimum, to address that probability through a detailed and thoughtful legal analysis, because without such an analysis, any final decision to base PSD on GHG emissions can have no legitimacy. The commenter states that if EPA fails to adopt the interpretation that PSD intended only to apply to conventional pollutants, its PSD Interpretive Memorandum, along with the LDV rule, will be arbitrary and capricious for failure to adequately consider their consequences. The commenter (0086) adds that failure to account for the PSD and title V implications of EPA's actions also violates the Regulatory Flexibility Act (RFA), the Unfunded Mandates Act (UMA), and the Paperwork Reduction Act (PRA).

According to one commenter (0094) representing an industry trade association, EPA's reconsideration proposal does not reflect the robust legal analysis required to support an interpretation with such far-reaching legal, policy, technical and economic consequences. The commenter notes that the proposal begins with the starting premise that the phrase in section 165(a)(4) -- "subject to regulation under this Act" -- operates as an independent and powerful PSD permitting trigger. According to the commenter, the proposal rests on the proposition that treating this phrase as a permitting trigger accords with longstanding Agency practice, but the *Deseret* case found otherwise, and besides, longstanding Agency practice alone cannot provide sufficient legal basis for the interpretation. This commenter contends that the reconsideration proposal offers no evidence to indicate that U.S. EPA, in arriving at the interpretation, evaluated any of the following:

(1) The entire statutory provision at issue in the context of the CAA and with reference to its legislative and regulatory history;

(2) A potentially more appropriate triggering phrase -- "in any area to which this part applies" -- at the beginning of section 165(a); and

(3) Other potential meanings of the "subject to regulation under this Act" phrase in section 165(a)(4), including based upon comparison to other provisions with similar scope and status to section 165(a)(4) -- i.e., sections 165(a) (1), (2), (3), (5), (6), (7) and (8). The commenter claims that the absence of such evaluation is material, and concludes that the Reconsideration Proposal, therefore, does not satisfy the Agency's obligation for rational, fully reasoned and explained analysis.

One industry commenter (0100) claims that adherence to the statute will save everyone a lot of trouble. The commenter, referring to the Tailoring Rule proposal, states that EPA leans most heavily on *Alabama Power* to support its claim of authority to adjust the statute out of "impossibility" or "administrative necessity," but asserts that this case instructs EPA not to do exactly what it proposes to do with the regulation of GHGs. According to the commenter, what *Alabama Power* tells us is that EPA cannot create its own "administrative necessity" by ignoring one provision of the CAA, and then solve that manufactured necessity by ignoring another.

Commenter cites resolution of the "potential to emit" issue in *Alabama Power*, and EPA's attempt (then) to exempt from PSD review any source with actual (controlled) emissions below 50 tons over year. Commenter claims that this attempt at a tailoring rule ignored the very same specific 100/250 ton-per-year thresholds set by statute and was an 'expansion' of the limited exemption provided in section 165(b) of the Act. Further, commenter argues that EPA tried to defend its tailoring of the PSD thresholds in 1979 the same way it now tries 30 years later, claiming that EPA's present plans with respect to CAA regulation of GHG are little different from those found defective and remanded in *Alabama Power* in that EPA intends to (1) manufacture CAA overbreadth in direct violation of CAA language, structure, and legislative history, in this case by declaring GHGs to be an air pollutant that endangers public health and welfare, (2) adopt rules to limit such emissions from mobile sources, and (3) in this Docket, conclude that these limits on mobile source emissions instantly trigger air permitting requirements for stationary sources.

This industry commenter (0100) argues that EPA should decide to leave GHGs out of the PSD program (at least before completing the process required by section 166) and states that such a decision would not only comport with the law, but with good policy in that the currently proposed decisions do not reflect a policy that a rational legislature would have intended (e.g., it makes no sense to have a pollutant regulated for one purpose, from one category of sources, under one section of the statute, based on one set of findings, to cause that pollutant automatically to become regulated for an entirely different purpose, from a wholly separate category of sources, under a totally different regulatory scheme.

This industry commenter (0100) states that proper "tailoring" could be undertaken in the design of a future PSD program for GHGs. In support, this commenter states that Congress left EPA relatively free to fashion — by rule — a sensible PSD program for those unknown future pollutants and, consequently, EPA — in the event EPA could justify and promulgate a NAAQS for GHGs — has the freedom to craft a PSD program appropriate to GHGs. Section 166(c) tells EPA that it may choose some other means of technology-forcing appropriate to GHGs. Further, commenter points out that section 166(e) also would be handy in that unlikely future, as it leaves EPA without the obligation to undertake any geographical classifications that are rather pointless for GHGs and that EPA arguably even could set the permitting thresholds at a sensible level, as section 166(c) allows. The commenter claims that EPA proceeds at odds with the statute with any rule that declares GHGs "subject to regulation" under Part C by any means other than the one prescribed in section 166.

The commenter (0100) argues that the proper interpretation of Part C (if followed by EPA as commenter claims it must) allows for orderly administration respectful of the State Implementation Planning process, and that another major advantage of complying with the statute is that it allows for orderly implementation.

The commenter (0100) asserts that EPA's request for comments posits only a very limited range of possibilities, asking narrowly and only about the meaning of the section 165(a)(4) phrase, "subject to regulation," and then suggesting a range of nuances in that phrase having to do with whether the pollutant is regulated by monitoring, by constituent, or by numeric limit, and whether by the date of adoption of the limit or its effective date. This commenter

points out that section 165(a)(4) is but one sub-subsection of an entire part of the CAA, "Prevention of Significant Deterioration of Air Quality, " states that the entirety of the statute should be examined to find a sensible interpretation that gives full effect to the purpose of the Act, to each of its provisions, and avoids "absurd results."

The commenter (0100) asserts that the "absurd results" documented in the proposed Tailoring Rule establish that Congress did not intent for GHG to be regulated under Part C. The commenter notes that EPA makes quite clear its intent to ignore clear statutory thresholds and state prerogatives in the implementation of the PSD program, all out of a claimed need to avoid the "absurd results" and impossible burdens befalling the PSD program as a result of EPA's choice to invite GHGs into it, overnight. The commenter suggests that EPA's view is incorrect, and that the statute — at section 166 — prescribes a very different, longer and more thoughtful path to possible regulation of GHGs under the PSD program. Further, the commenter contends that the statute does not compel the "absurd results" that cause EPA to propose rules that violate the statute. The commenter notes that the phrase "subject to regulation" appears in the subsection of section 165 that enumerates the criteria for review and issuance of PSD permits, notes that section appears in a Part of the Act enacted in 1977 to prevent significant deterioration of air quality, and so claims that the meaning of that one subsection should be understood in the context in which it was adopted. The commenter states that the PSD provisions were enacted to address a limited number of criteria pollutants – those "subject to regulation" to regulation in 1977 – certainly not including "greenhouse gases."

The commenter (0100), based on their review of the PSD program (Part C of Title I) statute and legislative history, contends that everything about Part C was drafted with the intention of governing emissions of the criteria pollutants regulated at the time of enactment (in 1977) and that nothing about Part C suggests an intent to apply PSD to anything other than criteria pollutants, or to pollutants that might be regulated in the future, after enactment. Commenter notes that the PSD program was established in 1977 as reaction to concerns about the possibility that areas cleaner than the national ambient air quality standards might be allowed to degrade to bare compliance with those standards. The PSD provisions of the CAA establish in detail the requirements for EPA to establish the maximum amount of degradation allowed from "baseline" air quality relative to the existing NAAQS, at least for two out of the six criteria pollutants, sulfur dioxide and particulate matter. Commenter also observes that Part C is extremely prescriptive, not only in its quantification of allowable deterioration of the two covered pollutants (the "increments"), but also in its designation of geographic areas of applicability, and its special concern for national parks and visibility, and notes one criteria for issuance of a required permit is the imposition of BACT for "each pollutant subject to regulation." The commenter also points out that throughout Part C, it completely relies on state implementation. To this commenter it is no surprise that none of the Part C provisions make any sense as applied to emissions of GHG, especially for the purpose of regulating those emissions so as to minimize a trace, natural, uniformly distributed constituent of clean air presumed to be associated with modulating global temperatures. The commenter provides a review of sections 161 through 172 to support the contention that everything about Part C was drafted with the intention of governing emissions of the criteria pollutants regulated at the time of enactment, with detailed instructions on $SO_2$ and PM, and generalized instructions to adapt a PSD program for the others of the time (hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen

oxides) and that nothing about Part C suggests an intent to apply PSD to anything other than criteria pollutants, or to pollutants that might be regulated in the future, after enactment. Further, the commenter (0100) claims that before EPA can add a new pollutant subject to review under Part C, it must undertake a rulemaking to create a PSD program appropriate to that pollutant.

The commenter (0100) further contends that EPA's pending proposals to sweep GHGs into the PSD program on the day of its regulation under section 202(a) of the CAA could not more clearly violate Congress' instructions on how to handle "other pollutants" under Part C: Section 166(a) limits PSD to new criteria pollutants, and, as to those, it requires rules specific to that new pollutant to be developed within two years after adopting its NAAQS.

One commenter (0104) representing industry states that they support EPA's "actual control alternative," but that, in addition, the PSD Interpretive Memo should be amended to clarify that the process for PSD regulation under the "actual control" interpretation must include a determination that a pollutant is a criteria pollutant and the establishment of corresponding NAAQS. The commenter further states that that only criteria pollutants with an established NAAQS are subject to PSD, and in cases where there is no NAAQS for a pollutant, PSD is not triggered because there is no "attainment" or "unclassifiable" determination to be made. The commenter believes that regulation of any pollutant under the PSD program without first determining that the pollutant is a criteria pollutant and establishing a corresponding NAAQS would be a violation of the rule of law as outlined in the CAA. In the alternative, the commenter urges EPA to revise the memo to make it clear that GHGs are not pollutants "subject to regulation" under the PSD permitting program.

One commenter (0111) states that the CAA limits PSD applicability for GHGs to (1) areas designated as attainment or unclassifiable under a GHG NAAQS or (2) sources that require a PSD permit based on emissions of a criteria pollutant that also will experience a significant increase in GHG emissions. According to the commenter, a NAAQS for GHGs is necessary for PSD to be triggered solely on the basis of a source's GHG emissions (i.e., for GHGs emitted from otherwise minor sources, or for significant increases of GHGs from major sources that are not otherwise experiencing a significant increase of a NAAQS pollutant for which the area is designated attainment or unclassifiable). Importantly, CAA sections 161 and 165 precondition applicability of the PSD program to those areas designated as attainment or unclassifiable under section 107. Section 161 provides that EPA is to promulgate regulations "to prevent significant deterioration of air quality in each region . . . designated pursuant to section 107 [NAAQS designations] as attainment or unclassifiable." Section 165(a) prohibits construction of a major emitting facility "in any area to which this part applies" unless the PSD permit requirements are met. National Ambient Air Quality Standard designations are made on a pollutant-by-pollutant basis. The applicability of the PSD program in a given area must be based on the attainment status of the area for the pollutant in question. If there is no NAAQS, there can be no attainment status and therefore the fact that a source has major emissions of a non-NAAQS pollutant does not make it a PSD major source.

The commenter (0111) argues that the existence of section 166 supports the conclusion that the applicability of PSD under the CAA is based on the existence of a NAAQS for the

pollutant in question. This section requires EPA to develop PSD regulations within two years of establishing a new NAAQS. Under section 166, EPA is also required to approve plan revisions for the new regulations within 25 months after EPA promulgates applicable rules. Thus, under Section 166, PSD is triggered by adoption of a NAAQS, not by a pollutant becoming subject to regulation. Through this section, Congress recognized the need for a mechanism for incorporating new pollutants into the PSD program. This more reasonable approach to regulation can be compared to EPA's interpretation that BACT for GHGs would be determined under section 165(a)(4) without reference to any standard for calculating the impact of GHGs on local air quality. The existence of both sections 166 and 165 of the CAA strongly suggests that PSD applicability is not "triggered" by a new pollutant becoming "subject to regulation" under the CAA. Rather, the more reasonable interpretation of both these provisions suggests that PSD is only applicable after the establishment of a new NAAQS pursuant to sections 108 and 109 of the CAA and the designation of new areas for that NAAQS under section 107.

The commenter (0111) continues that the only part of the PSD statutory scheme that imposes requirements broadly on pollutants "subject to regulation" is the requirement for BACT. Thus, if a source makes a modification that increases emissions significantly of a NAAQS pollutant, all pollutants "subject to regulation" must be controlled. Those facilities that trigger PSD for a non-GHG NAAQS pollutant would also have to consider BACT for GHGs if a significant increase in GHG emissions occurs. However, if a major source does not have a significant increase of a NAAQS pollutant in an area designated attainment or unclassifiable, nothing in the statute requires the source to be subject to the significance levels for non-NAAQS pollutants.

One industry commenter (0085) states that EPA is incorrect in assuming that that the section 202 rule will automatically trigger PSD permitting for sources solely based on their emissions of GHGs. The commenter believes that the text of the statute is more naturally read to limit PSD applicability to sources that are major for a NAAQS pollutant only and, then, within that group, to those projects that result in a significant net emissions increase of a NAAQS pollutant – only when PSD is triggered by a major NAAQS pollutant source for a NAAQS pollutant would the statute impose BACT on pollutants "subject to regulation." The commenter indicates that EPA's approach is inconsistent with the statutory and regulatory language because it completely bypasses the core applicability provisions and renders their inclusion in the statute superfluous. The commenter argues that sections 161 and 165(a) of the CAA limit PSD applicability based on the location of the source and case law confirms this limitation, as follows:

- The text of sections 161 and 165(a) plainly limits application of PSD to certain areas – those designated attainment or unclassifiable pursuant to section 107 of the CAA, which applies only to NAAQS pollutants. It is only section 165(a)(4) – defining the pollutants subject to BACT once PSD permitting is already required – that uses the phrase "pollutants subject to regulation."
- This plain language reading is also consistent with the holding in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), where the court found that location is the key determinant for PSD applicability and rejected EPA's contention that PSD should apply in all areas of the country, regardless of attainment status.

- The EPA gave this ruling only grudging effect by an interpretation of PSD requirements in the preamble to the 1980 PSD regulations. 45 FR 52675, 52,676 (Aug. 7, 1980). The 1980 preamble stated that PSD requirements still apply to any area that is "designated . . . as 'attainment' or 'unclassifiable' for any pollutant for which a national ambient air quality standard exists."
- This interpretation of the "location-limiting language" of the statute results in no limitation at all since every area of the country is and always has been in attainment with at least one criteria pollutant. Congress must be presumed to have been aware of this fact when it enacted the PSD provisions, making EPA's construction inconsistent with canons of statutory construction requiring all words in the statute to be given meaning.
- While this reading was inconsistent with the CAA, industry had no reason at the time to challenge it. There were very few regulated pollutants that were not subject to NAAQS at that time and even for those, it was unlikely that those pollutants would be the sole reason that a PSD permit would be required.
- Now, with EPA's decision to regulate GHGs, this interpretation could trigger a host of results that contravene congressional intent. The EPA has itself recognized that the practical result of the 1980 interpretation is not desirable, specifically soliciting comment on an approach in which BACT would be applied to GHGs only in those cases where PSD permits are otherwise required for a source. *See* Proposed Tailoring Rule, 74 FR 55327.
- The EPA can only rely on the "administrative necessity" rationale in its proposed PSD Tailoring Rule so long as it is strictly necessary to avoid absurd consequences that result from "the literal application of a statute." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989). Here the "absurd results" are not driven by the statute, but rather by an EPA interpretation that is not consonant with the statutory language. Where a statute can be interpreted to avoid "absurd results," it must be so interpreted rather than relying on judicially created exceptions. (Numerous citations given.)
- Accordingly, to give effect to unambiguous terms of the statute (and regulations), EPA cannot require a source to undergo PSD permitting solely on the basis of emissions of a pollutant for which there is no NAAQS. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984) (agency must give effect to the unambiguously expressed intent of Congress).

The industry commenter (0085) adds that EPA can implement the interpretation advocated above without changing its regulations because 40 CFR 52.21(a)(2) includes the location limitation of the statutory provisions and EPA's historic interpretation is contained only the preamble to the 1980 PSD rules. The commenter (0085) believes that all that is necessary is for EPA to announce its new interpretation in the *Federal Register*, which is sufficient because it is a logical outgrowth of the request for comments on this issue (in this action and in the companion GHG proposals) and the comments received.

One industry commenter (0118) states that the PSD program only applies to those pollutants for which EPA has promulgated a NAAQS, not to all pollutants "subject to regulation" under the CAA. Citing the language of sections 161 and 165 of the Act, the commenter argues that the Act limits applicability of the PSD program to new and existing major sources that trigger PSD for NAAQS pollutants in areas designated as "attainment" or "unclassifiable." Thus, the commenter believes that a change resulting in a significant increase

of a non-NAAQS pollutant (such as GHGs) that does not trigger PSD for a NAAQS pollutant is not subject to PSD preconstruction requirements.

The industry commenter (0118) notes that, in its 1979 PSD regulations, EPA initially interpreted part C of title I of the Act to require PSD permitting for nonattainment pollutants, but the Court rejected this interpretation in *Alabama Power*. The commenter further explained that, in the 1980 PSD regulations, EPA excluded nonattainment pollutants from PSD but took the position that PSD applies to any regulated pollutant (other than a nonattainment pollutant) as long as an area is attainment or unclassifiable for any pollutant. The commenter (0118) urges EPA to reinterpret the PSD regulations to be consistent with the Court's decision and rule that PSD applies only to major new or existing sources that trigger PSD for a NAAQS pollutant in an attainment or unclassifiable area.

The industry commenter (0118) concedes that under section 164(a)(4) of the CAA, if a major source or major modification is subject to PSD for a NAAQS pollutant, BACT is to be installed to control emissions of all pollutants "subject to regulation" under the Act. Thus, the commenter states that even though the full range of PSD requirements do not apply to a non-NAAQS pollutant "subject to regulation" under the Act, BACT is required for such a pollutant when the construction is otherwise subject to the PSD preconstruction requirements. The commenter notes that by so interpreting the CAA, the regulation of non-NAAQS pollutants will not increase the number of PSD permits that will be required, which alleviates greatly one of the "absurd results" that the proposed Tailoring Rule is intends to address. However, the commenter believes that the BACT requirement for those sources that do require PSD permits would still be an enormous burden. Also, the commenter (0118) notes that this changed interpretation of PSD applicability would not affect the applicability of title V permitting to the approximately 6.1 million sources of GHGs estimated by EPA.

Three industry commenters (0069, 0096, 0106/0107) contend that, based on the language of sections 161 and 165(a), the CAA only applies PSD review for pollutants that have the potential to result in deterioration of air quality in an area that meets a NAAQS or is undesignated. One commenter (0107) adds that if applicable at all, the only possible interpretation of the applicability of PSD would be limited to situations when criteria pollutants or their precursors might cause significant deterioration of air quality and BACT would apply to other pollutants "subject to regulation" if a significant increase would be projected to result from the project. On this basis, one commenter (0107) asserts that EPA's intent to regulate GHGs under the PSD program by requiring PSD review and permitting of new "major" GHG emitting facilities and "major modifications" of major GHG emitting facilities based on GHG emission increases alone violates Title I of the CAA. Commenter (0096) also states that PSD rules apply only to pollutants for which a NAAQS exist and certainly not to a Title II motor vehicle standard for which there is no NAAQS.

Commenters (0092, 0098) representing several groups of companies (industry) contend that the plain language of the CAA and EPA's corresponding regulations condition PSD applicability in the first instance on emissions of a pollutant for which there is a NAAQS. The commenters state that EPA should correct this error and state that whether a pollutant is "subject to regulation" is relevant only to whether a source that is subject to PSD requirements for a

NAAQS-pollutant must install BACT for other pollutants. Alternatively, the commenters recommend that EPA exercise its discretion by interpreting "subject to regulation" to exclude CAA section 202 regulation of GHG emissions from motor vehicles. The commenters contend that *Alabama v. Costle* supports the NAAQS prerequisite interpretation of the CAA, and that EPA's response to this decision misinterpreted the Court's opinion. The commenters further claim that even if the statutory language were ambiguous, EPA could not apply PSD to GHGs, because such an interpretation does not represent a reasonable balancing of the goals Congress established for the PSD program, and the "absurd results" of EPA's proffered interpretation show that the language must be interpreted to require a GHG NAAQS before GHGs can be the sole trigger for PSD. The commenters add that to the extent EPA applies the "absurd results" doctrine to support the PSD Tailoring Rule, the Agency's approach is inconsistent with the law because it applies PSD to GHGs notwithstanding the absurdity of doing so.

One commerce commenter (0074) states that revising the PSD Interpretive Memo to state that PSD is not triggered without a NAAQS would be consistent with the plain meaning of sections 161 and 165 of the CAA, section 52.52 of the regulations, and the holding in *Alabama Power Co. v. Costle* (where the court found that location is the key determinant for PSD applicability and rejected EPA's contention that PSD should apply in all areas of the country, regardless of attainment status). CAA sections 161 and 165 precondition applicability of the PSD program to those areas designated as attainment or unclassifiable under section 107 for a NAAQS. This and other commenters opine that PSD permitting requirements can only be triggered in the first instance by pollutants for which there is a NAAQS. Section 52.21(a)(2) of the regulations provides "applicability procedures" for PSD, stating that PSD applies to "the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act." It is only in defining and requiring BACT that the statute imposes requirements on pollutants "subject to regulation." The commenter opines that nothing in the statute or regulations requires a source that is major to be subject to the significance levels for non-NAAQS pollutants if there is no significant increase of a NAAQS pollutant for which the source is designated attainment or unclassifiable.

One industry group commenter (0066) requests that EPA revise the interpretive memo to clarify that PSD is limited to criteria pollutants for which a NAAQS has been set.

Two commenters (0051, 0053) request that EPA interpret PSD applicability provisions of the statute and regulations to avoid triggering PSD for the vast majority of sources rather than relying on the "absurd results" and "administrative necessity" doctrines to rewrite statutory thresholds. This commenter states that the GHG-PSD problem is created by interpreting the statute and regulations to require that PSD applicability as being dictated solely through the phrase "subject to regulation." Prior to resorting to the "administrative necessity" and "absurd results" doctrines to rewrite statutory thresholds, they opine that EPA is obliged to consider statutory interpretations that eliminate the GHG-PSD problem. The statute does not state that PSD applies to all pollutants subject to regulation; the statute only requires BACT apply to all pollutants subject to regulation fro sources that trigger PSD. Under the suggested interpretation, sources and modifications will not be classified as major requiring a PSD permit based on GHG emissions unless: (1) EPA issues a NAAQS for GHGs; or (2) a facility is already major for

traditional pollutants triggers PSD for a non-GHG pollutant (e.g., for ozone ($O_3$, $SO_2$)(and the facility experiences a significant GHG emissions increase). Under this approach, GHG emissions would still be regulated. Any new or existing source that triggers PSD for a non-GHG pollutant will also be subject to BACT, if the source also experiences a significant GHG emission increase. This would limit the number of PSD permits and BACT determinations for GHGs to larger sources that trigger PSD for other pollutants. Nothing in the statute requires a source that is major to be subject to significance levels for non-NAAQS pollutants if there is no significant increase of a NAAQS pollutant for which the area is designated attaining in the statute requires a source that is major to be subject to significance levels for non-NAAQS pollutants if there is no significant increase of a NAAQS pollutant for which the area is designated attainment or unclassifiable. The commenter asserts that there are no "absurd results" under their suggested NAAQS prerequisite approach, and it is consistent with *Alabama Power v. Costle*.

One industry commenter (0068) states that based on the requirements outlined in the statute regarding the applicability of PSD and the decision in *Alabama Power*, PSD would not be triggered solely on the basis of GHG emissions. The commenter opines that such an approach would prevent the EPA from having to rely on the "administrative necessity" and "absurd results" legal doctrines which are exceptions to a statutory mandate as fewer sources would be subject to permit requirements and states would not be forced to handle massive increases in the number of PSD permits and could still require BACT in PSD permits that are triggered for attainment pollutants.

One industry commenter (0056) believes that PSD review is only triggered by the emissions/emissions increases of pollutants for which a NAAQS has been established. They state that the CAA prohibits applying PSD to a GHG unless PSD review is triggered by a significant increase in a NAAQS pollutant that could contribute to a violation of a NAAQS or a NAAQS increment. Since there is no NAAQS for a GHG, PSD applicability to a proposed project cannot be triggered by GHG emissions alone. If a BACT review is allowed for a GHG, it is only if a criteria pollutant triggers PSD review and the projected actual emissions of GHGs exceeded the major source threshold or the definition of a "significant emissions increase." This commenter asserts that their statutory construction is consistent with the purposes of the Act and provides a technology-forcing function for regulated pollutants for which EPA has not established a NAAQS or an increment.

One industry commenter (0060) believes that section 161 and 165 of the CAA clearly limit the applicability of the PSD program in such a way to reflect the most basic aspect of applicability of the PSD program: Prevention of Significant Deterioration review is triggered only for pollutants for which a NAAQS has been established. As an example, they state that if EPA were to establish an emission control requirement for a previously unregulated substance pursuant to an NSPS standard, then the substance would be "subject to regulation under the Act." But because the substance is not a criteria pollutant for which a NAAQS has been established, the level of the substance's emissions is not a factor in determining whether a source is a major source or whether a project is a major modification under the PSD program. Only the pollutants for which there are NAAQS may be used to make that determination. They opine that if a project is not major for any NAAQS pollutant, and it has emissions of a previously unregulated

substance, it should not be subject to PSD, regardless of the amount of the substance emitted by the project.

One industry group commenter (0061) states that section 161 of the CAA and section 52.21(a)(2) of the CFR limit applicability of the PSD program to those areas "designated" as attainment or unclassifiable pursuant to section 107 of the CAA. *See also,* section 165(a) (requiring demonstration that air quality requirements are met). Section 107 applies only to sources that are major for a NAAQS pollutant and those major sources that have modifications that result in a significant net emissions increase of a NAAQS pollutant. Stated differently, this commenter (0061) asserts that emissions of a non-NAAQS pollutant cannot trigger PSD applicability.

One industry commenter (0072) urges EPA to adopt an "alternative interpretation" of the existing stationary and regulatory provisions, so PSD is not triggered for a source by its emissions of a regulated NSR pollutant for which no NAAQS has been promulgated. They assert that, because section 161 and 165 of the CAA make clear that the PSD program only applies to construction projects in an area designated as attainment or unclassifiable for a NAAQS, PSD applicability should not be triggered by emissions of a pollutant for which no NAAQS has been promulgated. Once a source becomes subject to PSD due to emissions of any NAAQS pollutant in excess of the statutory major source thresholds of 100 or 250 TPY, the source must achieve BACT for every pollutant "subject to regulation" under the CAA that will be emitted in significant amounts, which, for GHGs, would be any amount (absent promulgation of a higher *de minimis* threshold, as proposed by the GHG Tailoring Rule). As other commenters opine, this commenter believes that EPA could completely avoid the "absurd results: and "administrative necessity" it claims as the basis for establishing a higher PSD applicability threshold in the GHG Tailoring Rule. By modifying this interpretation, so that a source does not trigger PSD based on its emissions of non-criteria pollutants, the commenter states that EPA could begin requiring BACT for GHGs under existing PSD rules, without any resulting negative impacts. The commenter asserts that this interpretation is consistent with *Alabama Power v. Costle*, 636 F.2d 232 (D.C. Cir. 1979).

An industry commenter (0093) urges EPA to clarify that the applicability of PSD to pollutants "subject to regulation" properly triggers a BACT analysis for sources that otherwise trigger requirements of the existing PSD program, but does not trigger PSD applicability, in and of itself, for pollutants which do not have, nor are precursors to, a NAAQS.

One state agency commenter (0102) believes that the PSD applies only to pollutants or precursors for which a NAAQS exists, and not to non-NAAQS emissions regulated by a Title II motor vehicle standard. The state agency commenter indicates that EPA's policy should state that PSD is not triggered automatically or otherwise upon GHGs becoming controlled under title II of the CAA because PSD applies only to pollutants for which a NAAQS has been established. The PSD program and the NAAQS assume that some areas of a state or the country have higher concentrations of a criteria pollutant than another (hence attainment and nonattainment areas), but GHG concentrations are generally uniform throughout the world. Thus, the commenter believes that preventing deterioration of an area's GHG concentrations below a certain ambient air quality standard through permitting controls is virtually impossible where the standard to

achieve is a global one. The commenter concludes that EPA's interpretation that PSD is applicable to GHGs at any time is not legally supportable and no amount of tampering with the Tailoring Rule or ordering of federal actions will change this.

Nine industry and commerce commenters (0051, 0053, 0066, 0072, 0074, 0076, 0079, 0085, 0086) suggest that EPA clarify in the PSD Interpretive Memo that the term "Pollutants Subject to Regulation" exclude GHGs. They assert that Congress did not intend such pollutants to trigger PSD. In order to secure passage in 1977, supporters of the PSD program stressed that it would not impact smaller sources, such as residential, commercial, or agricultural facilities.

One commenter (0111) noted that EPA should construe the phrases "any pollutant" in section 169(1) and "any pollutant subject to regulation" in section 165(a) to refer only to conventional pollutants whose emissions have regional or local impact, rather than any pollutant subject to regulation under the CAA. Such an interpretation would automatically exclude GHGs, which are "global in nature because the GHG emissions emitted from the United States . . . become globally well-mixed." In the PSD Tailoring Rule, EPA's own analysis—which demonstrates that Congress could not have intended those CAA sections to require PSD applicability for GHGs, because, if they did, the number of sources requiring PSD permits would rise to absurd and unanticipated levels— supports this interpretation. EPA proposes only one solution to avoid the absurdity of triggering PSD for GHGs: rewriting the statutory PSD and title V applicability thresholds and significance levels.

The commenter (0111) states that strong evidence supports an interpretation of the CAA that excludes GHGs from PSD. First, the original 28 source categories listed by Congress constitute the sources EPA regarded as posing the greatest potential for air quality degradation due to conventional pollutants. The 100 TPY threshold for these source categories makes sense only in terms of conventional pollutants. Second, the air quality monitoring and impact analysis provisions of CAA sections 165(a) and (e) focus on local and regional impacts. For example, Section 165(e)(1) requires an analysis of "the ambient air quality at the proposed site and in areas which may be affected by emissions from [the proposed] facility for each pollutant subject to regulation under the [CAA] which will be emitted from such facility." The focus on the "proposed site" and affected areas implies that Congress was focused on regional and local concerns.

In addition, according to the commenter (0111), the legislative history of sections 165(a) and 169(l) under the 1977 CAA amendments makes clear that Congress had only conventional pollutants in mind when creating those provisions. Both the Senate and the House were engaged primarily in continuing the work that a prior Congress had begun, through the 1970 CAA, to rid the Nation, especially urban areas, of unhealthy levels of smog, particulates, sulfur dioxide, and other conventional pollutants. The air quality problems of concern to the 95$^{th}$ Congress in 1977 simply did not include global warming. It is simply not possible, in light of this legislative history and the legislative history EPA references, to make a credible argument that the 95$^{th}$ Congress intended that GHG emissions could be a basis for applicability of the PSD permitting program as defined by sections 165(a) and 169(1). Additional evidence of Congress' intent for the CAA not to apply to GHGs is Section 166, which provides EPA with a separate mechanism for adding pollutants for PSD applicability. The commenter (0111) notes that the consequences

of applying PSD to GHGs are perhaps the best evidence that such an interpretation runs contrary to congressional intent. If PSD applies to GHG emissions, EPA estimates that 40,000 new PSD permits will be required annually, including permits for small entities not previously subject to PSD, such as hospitals, churches, schools, and small businesses. This vast and unprecedented expansion in permitting will halt the nation's economic growth with little if any improvement in local air quality.

One industry commenter (0085) argues that the endangerment finding under title II is distinctly different from the air quality purposes of the PSD program – the former is triggered where, in the Administrator's judgment, such emissions "may reasonably be anticipated to endanger public health or welfare" (CAA section 202(a)(1)), while the latter is specifically directed towards the protection of "air quality" (CAA section 161), i.e., the air that people breathe. Consequently, the commenter asserts that the regulation of $CO_2$ emissions – where it is intended to address the effects that $CO_2$ has on global climate change, rather than its effect on local "air quality" – does not constitute a measure to control $CO_2$ emissions which is "necessary" to "prevent significant deterioration" of local "air quality" (CAA section 161); therefore, it does not follow from an endangerment finding under title II that EPA is thereby authorized, much less compelled, to regulate $CO_2$ emissions from stationary sources under the PSD program.

Rather than seeking to justify rewriting the CAA's 100/250 TPY thresholds for PSD applicability, the industry commenter (0085) believes that EPA could rely on the fact that Congress never intended the PSD program to apply to emissions of a substance such as $CO_2$ that, while it may constitute an "air pollutant" under the broad definition of CAA section 302(g), does not pose any threat to "air quality." To that end, the commenter (0085) asserts that EPA should recognize that the CAA's PSD provisions, including the Best Available Control Technology (BACT) requirement "for each pollutant subject to regulation" under the Act, must be understood in the context of the fundamental purpose and scope of the PSD program, as is made clear on the face of CAA section 161; that is, the BACT requirement should be read as applying only to regulated pollutants that have an adverse impact on "air quality" – i.e., air that people breathe.

The industry commenter (0085) observes that the preamble to the proposed Tailoring Rule is replete with statements by the EPA that point out how inconsistent with Congressional intent would be the regulation of thousands of small stationary sources of $CO_2$, and opines that EPA has drawn the wrong conclusion as to how it should proceed in the face of this anomalous situation. The commenter asserts that, rather than attempting to rewrite the PSD threshold limits, which are set forth in the Act in unambiguous terms, EPA should instead conclude that Congress never intended the regulation of $CO_2$ under the PSD program because emissions of $CO_2$ do not degrade air quality.

Another commenter (0086), representing several groups of companies, asserts that (in absence of the alternative to applying PSD only to pollutants for which there is a national ambient air quality standard [NAAQS]) EPA should interpret the phrases "any pollutant" in section 169(1) and "any pollutant subject to regulation" in section 165(a) to refer only to pollutants whose emissions have local or regional impacts, and hence not GHGs. The commenter believes that EPA should find that Congress intended applicability to be based only

on "conventional" pollutants, i.e., pollutants whose emissions have predominantly local or regional impact such as pollutants subject now to NAAQS and new source performance standards (NSPS) for the following reasons:

- The 28 source categories that Congress listed in section 169(1) in 1977 are the ones EPA regarded at the time as posing the greatest potential for air quality degradation due to conventional pollutants. The only way to explain the selection of those particular categories is to posit a concern only with conventional pollutants. Indeed, the only way to understand the 100/250 TPY cutoffs is also in terms of conventional pollutants.
- The provisions of sections 165(a) and (e) that call for air quality monitoring and air quality impact analysis in connection with PSD permitting are oriented on their face to local or regional impacts.
- Other relevant provisions of the CAA demonstrate the same mindset. An example is the system for area designations in section 107(d) and the underlying system for establishing air quality control regions in section 107(b), which make sense only from the standpoint of managing emissions of conventional pollutants, in particular NAAQS pollutants. The objective of the PSD program, to prevent significant deterioration of air quality in areas designated as attainment or unclassifiable under section 107(d), makes sense only from the standpoint of emissions having a local or regional impact, not emissions of GHGs.
- Congress kept the door open for a PSD program geared to other pollutants, such as GHGs, through section 166. That section requires EPA, in the event it creates a NAAQS for a "new" pollutant (i.e., a pollutant not subject to a NAAQS in 1977), to create a PSD system that is tailored to that pollutant's unique profile, but that need not necessarily conform to the blueprint of sections 165(a) and 169(1). Thus, EPA potentially could create for GHGs a PSD permitting system with a 25,000 TPY $CO_2$ equivalent cutoff, but it would first have to establish a NAAQS for GHGs.
- The legislative history of the CAA Amendments of 1977, the origin of sections 165(a) and 169(1), reveals that Congress had in mind only conventional pollutants. Both the Senate and the House saw themselves as engaged primarily in continuing the work that a prior Congress had begun, through the 1970 CAA, to rid the Nation, especially urban areas, of unhealthy levels of smog, particulates, sulfur dioxide, and other conventional pollutants. The air quality problems of concern to the 95th Congress in 1977 did not remotely include global warming.

One industry commenter (0079), and others, express that section 163, as enacted by the 1977 Amendments, addresses baseline concentrations and increments for sulfur dioxide ($SO_2$) and particulate matter (PM), *see* §163(b), and to any other pollutant for which a national primary or secondary NAAQS exists, *see* §163(c). This emphasis, the commenter opines, is carried on in CAA section 169, which provides:

> Not later than one year after the date of enactment of this Act, the Administrator shall publish a guidance document to assist the States in carrying out their functions under part C of title I of the Clean Air Act (relating to prevention of significant deterioration of air quality) with respect to pollutants, other than sulfur oxides and particulates, for which national ambient air quality standards are promulgated. Such guidance document shall

> include recommended strategies for controlling petrochemical oxidants on a regional or multistate basis for the purpose of implementing part C and section 110 of such Act.

§169(c). This subsection omits consideration of additional pollutants beyond the NAAQS. The commenter asserts that section 166 of the CAA also provides further limiting of "pollutants subject to regulation under the Act" to those pollutants subject to NAAQS. *See* §166(a) & (e). This commenter asserts that the only condition that suggests a broader reading is in §165(a)(3):

> The owner or operator of such facility demonstrates 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 region, or (C) any other applicable emission standard or standard of performance under this Act;

The commenter asserts that (A) and (B) apply to NAAQS pollutants, consistent with the argument outlined above. (C) applies to "any other applicable emission standard or standard of performance under the Act." This language is susceptible to a broader reading, though §169(a)(3) clarifies that the "applicable emission standards" are those issued pursuant to subsection 111 or 112 of the CAA. This commenter adds that in the 1990 CAA Amendments, Congress provided evidence of its intent not to broaden the NAAQS and NSPS focus of the PSD program by specifically mandating that HAPs are not "subject to regulation" under the CAA for purposes of the PSD program. *See* 42 U.S.C. §7412(b)(6).

This commenter (0079) further states that the legislative history of the PSD program also supports "pollutants subject to regulation under the Act" as being limited to NAAQS pollutants and NSPS pollutants (cites discussion by The House Committee on Interstate and Foreign Commerce, in its discussion of a bill that ultimately became part of the CAA Amendments of 1977.

In addition to statute and legislative support for limiting "pollutants subject to regulation under the Act," this commenter (0079) asserts that there are practical economic and burden considerations to limiting the PSD program to NAAQS and NSPS pollutants.

Another state agency commenter (0103) agrees with the "actual control" interpretation to the extent that it excludes pollutants subject only to monitoring or reporting requirements, but does not believe that the interpretation goes far enough. The commenter advocates an interpretation that requires EPA to establish an NSPS or NAAQS for the pollutant (if the pollutant is not considered a HAP subject to section 112 of the CAA) and also requires the ability to control the pollutant by means of an add-on control device.

One commenter (0088), while generally agreeing with the December 18, 2008 EPA Memorandum, states that interpretation must be further clarified to state that the PSD permitting program should only apply to air pollutants with NAAQS.

**Response:**

We agree with these commenters that the appropriate scope of the PSD program is an important issue in evaluating the level of administrative necessity and the need to tailor the PSD program with respect to GHG emissions, but comments on this topic are beyond the scope of this action. This reconsideration action sought comment on EPA's interpretation of the phrase "subject to regulation under the Act" used the fourth part of an existing regulatory definition of "Regulated NSR Pollutant" at 40 CFR 52.21(b)(50). EPA requested comment on whether this part of the regulation (and similar provisions in the CAA) should apply to any pollutant that may be subject to a monitoring and reporting requirement, SIP provision, endangerment finding, or a waiver under section 209 of the Act. While this raised issues of how EPA's definition should be interpreted in light of a variety of statutory provisions, EPA did not propose to amend or remove from this definition the description of the categories of pollutants listed in the first three parts. *See* 40 CFR 52.21(b)(50)(ii)-(vi). Nor did EPA propose to reconsider its interpretive statement in 1978 that a pollutant subject to regulation includes "all pollutants regulated under Title II of the Act." *See* 43 FR at 26397. EPA requested comment only on whether it should amend the text of the definition to expressly incorporate EPA's interpretation that pollutants subject to regulation are those subject to an actual control requirement, like those described in the first three parts of the definition. As discussed elsewhere in this document, EPA is not changing the regulatory definition in this action at this time. Because, for the reasons described below, we believe that the interpretations of the CAA advocated by these commenters are inconsistent with the plain language of the portions of the regulation that EPA did not propose to reconsider, we are therefore not addressing them as part of this action. We note, however, that to the extent that these comments are directed at the need to tailor the PSD program with respect to GHGs, we believe these interpretive issues are more appropriately addressed in the context of the tailoring rule, where we received similar comments.

These commenters urged a variety of interpretations by focusing on the statute itself but largely ignore the applicable rules in the CFR, which govern PSD applicability until such time as they are changed pursuant to a rulemaking under Section 307 of the CAA. Moreover, those comments that do acknowledge that there are applicable regulations that govern which pollutants are subject to the PSD program only focus on the original EPA rules adopted in 1980 and ignore the comprehensive definition of "regulated NSR pollutant" adopted in 2002.The phrase "pollutants otherwise subject to regulation" is just one part of that definition. That definition provides that Regulated NSR pollutant includes:

> (i) Any pollutant for which a national ambient air quality standard has been promulgated and any pollutant identified under this paragraph (b)(50)(i) as a constituent or precursor for such pollutant. Precursors identified by the Administrator for purposes of NSR are the following:
>
> (ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act;
>
> (iii) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act;

> (iv) Any pollutant that otherwise is subject to regulation under the Act; except that any or all hazardous air pollutants either listed in section 112 of the Act or added to the list pursuant to section 112(b)(2) of the Act, which have not been delisted pursuant to section 112(b)(3) of the Act, are not regulated NSR pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Act.

Based on the plain language of the first three parts of this provision (and other regulations that incorporate this definition), we are unable within the scope of this action to adopt the interpretations advocated by commenters.

EPA's regulations are not susceptible the interpretation that "pollutants subject to regulation" are limited to NAAQS pollutants. As NAAQS pollutants and precursors are spelled out as a specific line item in the definition of "Regulated NSR Pollutant," this interpretation would render the remainder of the definition meaningless. Furthermore, this interpretation would be inconsistent with the plain language in parts (ii) and (iii) of the definition, which presently incorporate pollutants regulated in an NSPS and under Title VI of the Act that are not covered by a NAAQS. Accordingly, we decline to adopt this interpretation in this action.

While some commenters present as a separate argument, based on section 166 of the Act, that the Agency should interpret "subject to regulation" as requiring that EPA undertake a PSD implementation rulemaking prior to regulating a pollutant under PSD, we do not view this as a distinct argument. As the commenters acknowledge, Section 166 requires certain actions be taken with respect to a new NAAQS, and thus this interpretation would act to ensure that "any future application of Part C is limited to criteria pollutants." (commenter 100 page 8-9). In addition, the argument that pollutants are not subject to regulation for PSD purposes until EPA promulgates regulations for each pollutant under section 166 was previously rejected by the D.C. Circuit. *Alabama Power Co. v. Costle,* 636 F. 2d 323, 406 (D.C. Cir. 1979).

Furthermore, the definition of regulated NSR pollutant affects more than just the applicability of the BACT requirements under the PSD regulations. The term "regulated NSR pollutant" is also incorporated in the definitions of "major stationary source" and "major modification." 40 CFR 52.21(b)(1)-(2). Because of the references to "regulated NSR pollutant," both of those provisions contemplate that PSD may be triggered based upon non-NAAQS pollutants (e.g. a modification occurs if there is a significant increase in any "regulated NSR pollutant" not "any pollutant for which an area has been designated attainment."). Accordingly, the interpretation urged by these commenters is inconsistent with the language and structure of the existing PSD regulations.

EPA is not persuaded that it can limit the scope of PSD to NAAQS pollutants through an interpretation of 52.21(a)(2) on the ground that this provision limits the scope of PSD to areas that have been designated "attainment or unclassifiable." As some of these commenters acknowledge, adopting this approach would require that the Agency reverse a long standing interpretation of 52.21(a)(2) that PSD applies if the source is locating in an area that is designated as attainment for any pollutant. Thus, commenters' request that EPA adopt this interpretation of 52.21(a)(2) is beyond the scope of this immediate action as we did not seek

comment on this provision, or this long standing interpretation. However, as noted above, we do intend to address the underlying substantive claim in the tailoring rule. We do not agree with one commenter's (0086) argument that 52.21(a)(2) unambiguously limits applicability of all PSD requirements to only those pollutants for which the area has been designated attainment or unclassifiable. The language of that provision in the regulation, that the "requirements of this section apply to the construction of any new major stationary source … or any project at an existing major stationary source in an area designated as attainment or unclassifiable," does not contain the express limitation "for that pollutant," which commenters are reading into it.

As with other commenters, the commenters that cite 52.21(a)(2) failed to address the adoption of the definition of "regulated NSR pollutant" in 2002 and instead chose to focus on provision enacted as part of the original 1980 PSD rulemaking. Accordingly, these commenters have made no attempt to show how the urged interpretation of 52.21(a) is consistent with the broader definitions of "major stationary source" and "major modification" which incorporate the definition of "regulated NSR pollutant," and which we have explained above cannot be so narrowly construed as to be limited to NAAQS pollutants.

The claims of some commenters that these are new issues upon which they had no reason to comment in 1980 also ignores the existence of the 2002 rulemaking and the revisions to various parts of section 52.21 made therein. While the potential for regulation of GHGs, and the implications of such regulation, may have been outside of the commenters' contemplation in 1980, the potential for GHG regulation and the implication of the language that the agency was adopting was evident by 2002. Thus, commenters could have challenged the adoption of the definition at that time.

EPA is also unable to interpret the existing PSD provisions as being limited to pollutants whose effects are primarily local or that only affect "air quality" (defined by one commenter as the "air that people breathe"). Such a limitation does not appear in the definition of "regulated NSR pollutant." Furthermore, the language of that definition in the current regulation demonstrates that EPA has already taken a position on this issue that is contrary to one commenters recommend. Specifically the inclusion of ozone depleting substances (ODS), which are regulated because of their global, not local, impacts, as a specific category of pollutants that are regulated NSR pollutants demonstrates EPA has previously rejected the local effects view. Thus, we believe that reading such a limitation into the fourth part of the definition would be inconsistent with the definition as a whole. The notice of reconsideration did not raise the issue of whether EPA should amend section 52.21(b)(50) to exclude ozone depleting substances.

EPA is also unable in this action to adopt the interpretation that the phrase "subject to regulation" requires control only for sources that are regulated under a MACT or NESHAP (or similar regulation) covering the pollutant. This interpretation is inconsistent with portions of the existing definition of "regulated NSR pollutant" that EPA did not address in the reconsideration notice. First, MACT standards and NSPS are covered by specific provisions of the definition of "regulated NSR pollutant." NSPS pollutants are covered in section 52.21(b)(50)(ii), while MACT pollutants are exempt under the last sentence in section 52.21(b)(50) due to a statutory exemption of MACT pollutants from PSD (42 U.S.C. §7412(b)(6)). Second, the NSPS provision in the definition of "regulated NSR pollutant" provides that the definition includes "any pollutant

that is subject to any standard promulgated under section 111." *See* 40 CFR 52.21(b)(50)(ii). Since it applies to any pollutant regulated in any NSPS, this provision is not susceptible to an interpretation that it means "any pollutant for which an NSPS has been promulgated for the source category of the source obtaining a PSD permit."

**Comments:**

A state agency commenter (0091) supports EPA's preferred option of "actual control" or a regulated NSR pollutant as being "subject to regulation under the Act," and also supports EPA in their interpretation that the remaining four options are not viable. However, this commenter believes that the actual control should be the control of a stationary source, and not a mobile source tailpipe emissions limitation. The commenter understands that EPA is considering development of an NSPS for GHG emissions from several industry sectors, and states that promulgation of an NSPS for stationary sources would be the most appropriate trigger for PSD applicability.

Ten industry commenters (0089 and others incorporating this submission (0065, 0067, 0081, 0083, 0090, 0096, 0106/0107, 0108, 0109)) said that the "actual control" interpretation safeguards the Administrator's authority to require such controls on individual pollutants under other portions of the Act before triggering PSD requirements. This is important because it properly recognizes that promulgation of emission control requirements with respect to a pollutant (such as $CO_2$) under another provision of the CAA (e.g., a provision in Title II of the Act) does not automatically trigger PSD.

One commenter (0088), while generally agreeing with the December 18, 2008 EPA Memorandum, states that clearly the interpretation must be further clarified, and strongly suggests EPA's interpretation must clarify that the PSD permitting program actions should be activated upon stationary source regulations and the actual control of stationary sources of missions – not a mobile source control rule such as the LDVR

Commenters (0092, 0098) representing several groups of companies (industry) argue that the proposed reconsideration implicitly promotes EPA's erroneous belief that the LDVR would automatically trigger PSD permitting requirements for stationary sources, and this is by no means the correct or the preferable interpretation of the CAA. According to these commenters, under a more logical interpretation of the CAA, the LDVR would not trigger PSD, eliminating the need for millions of new sources to obtain PSD permits and for much of the PSD Tailoring Rule.

**Response:**

EPA has already established an interpretation that a pollutant "subject to regulation" includes "all pollutants regulated under Title II of the Act regarding emission standards for mobile sources." 43 FR at 26397. Thus, EPA has not previously considered PSD to be limited only to pollutants regulated in stationary source standards. Nor has EPA previously taken the position that Title II standards do not automatically trigger PSD. Since EPA's reconsideration

notice did not address this precedent, EPA is unable to modify this interpretation through this final action.

The Agency interprets the provisions of Section 165 to apply to any pollutant that becomes "subject to regulation" under the Act. The D.C Circuit Court upheld this position. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 403-406 (C.A.D.C., 1979) (rejecting arguments that Section 165 should not automatically apply to all pollutants subject to regulation under the Act.). We have continued to assert this position since this time. *See, e.g.,* 67 FR 80240 (stating that The PSD program applies automatically to newly regulated NSR pollutants); 61 FR 38307 (stating that the PSD regulations apply to all pollutants regulated under the Act), and Memo. From John S. Seitz, Director Office of Air Quality Planning and Standards to Regional Air Directors, "Interim Implementation of New Source Review Requirements for PM2.5," April 5, 2005 (stating that Section 165(a)(1) of the Act provides that no new or modified major source may be constructed without a PSD permit.). We are not changing our regulations, and did not open this interpretation for reconsideration in this action.

## *9.9. Need for Additional Process and Analysis Before Regulating Stationary Source GHG Emissions*

### 9.9.1. Requests for More Orderly Process and Judgment Before EPA Regulates GHGs Emissions from Stationary Sources

**Comment:**

Eight industry commenters (0067, 0083, 0089, 0090, 0096, 0106/0107, 0108, 0109) state that the orderly regulatory process contemplated by the CAA starts with information-gathering concerning the pollutant's emissions, continues with determinations (under the CAA's non-PSD provisions) regarding the effect of the pollutant on public health and welfare and with development and issuance of proposed control regulations, and ultimately culminates in final regulatory controls on emissions of the pollutant, if justified and necessary. The commenters express concern that EPA's recent proposals to regulate GHG emissions from major stationary sources through PSD would undermine the orderly approach contemplated by the CAA. The commenters believe that establishing GHG emission control requirements for stationary sources through the back door of GHG rules for motor vehicles promulgated under Title II simply does not allow the time necessary to assess emissions and available controls and to prepare for compliance with any new regulatory requirements. Two of the commenters (0081, 0083) add that if EPA wants to establish GHG emission controls on stationary sources, it should do so through the orderly regulatory process set forth in the CAA, which would allow sufficient time to assess emissions and controls and provide sources the ability to work with the Agency in shaping the regulations and time to meet any new requirements.

One industry commenter (0109) state that the concerns expressed by EPA, that it have adequate time to assess emissions of a pollutant and determine appropriate controls before PSD and BACT requirements are required for a pollutant, would seem to be at odds with EPA's