ORAL ARGUMENT NOT YET SCHEDULED

10-1073(L) & 10-1131(L) – Complex

United States Court of Appeals
for the District of Columbia Circuit

COALITION FOR RESPONSIBLE REGULATION, INC., et al.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

SOUTHEASTERN LEGAL FOUNDATION, INC., et al
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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

BRIEF FOR STATE AND ENVIRONMENTAL INTERVENORS IN SUPPORT OF RESPONDENTS

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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 and amici to these consolidated actions are set forth in the Rule 28(a)(1) certificates filed with the briefs of Petitioners and Respondents, except that certain parties—Massachusetts, Pennsylvania Department of Environmental Protection, California, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, North Carolina, Oregon, Rhode Island, Center for Biological Diversity, Conservation Law Foundation, Natural Resources Council of Maine, Inc, Georgia Forest Watch and Wild Virginia—appear to be mistakenly listed on the docket as respondent-intervenors in No. 10-1073, *et al.* (the "Timing Decision" petitions). Those parties did not move to intervene in that petition or the other petitions challenging the Timing Decision. *See* Order, No. 10-1073 (Sept. 3, 2010) (doc. 1264200). They were, however, granted respondent-intervenor status in No. 10-1131, *et al.*, the Tailoring Rule petitions. Order, No. 10-1131 (doc. 1265460) (as EPA's certificate notes, the Pennsylvania Department of Environmental Protection has since withdrawn).

The petitions filed in the Timing Decision and Tailoring Rule cases were subsequently consolidated. Order at 4 (Nov. 16, 2010) (doc. 1277729)). But because those two sets of petitions challenge separate agency actions,

consolidation would not appear to have the effect of conferring intervenor status in the Timing Decision case on parties that had been granted intervenor status in the Tailoring Rule case. *Cf.* Circuit Rule 15(b) (providing that intervention in one challenge to agency action presumptively treated as motion to intervene in other challenges to "the same agency action or order"). None of the above-listed parties sought or seeks intervenor status in the Timing Decision case.

As explained below (pp. xx), six of the parties to this brief—Environmental Defense Fund, Indiana Wildlife Federation, Michigan Environmental Council, Natural Resources Defense Council, Ohio Environmental Council, and the Sierra Club—moved to intervene in support of EPA in the Timing Decision case, No. 10-1073, *see* Motion for Leave to Intervene (May 3, 2010) (doc. 1243015), and the Court deferred their motion to the merits panel, See Order, No. 10-1073 (Sept. 3, 2010) (doc. 1264200).

Rulings under review: This case is a set of consolidated petitions for review of two final actions of the Environmental Protection Agency: Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) ("Timing Decision") and (2) Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) ("Tailoring Rule").

(C) **Related cases**: Each of the petitions for review consolidated under No. 10-1073 is related. In addition, pursuant to this Court's prior orders, No. 10-1073 will be argued before the same panel as the consolidated actions in Nos. 10-1167, 09-1322, and 10-1092.

DATED: October 17, 2011

/s/ Monica Wagner
Monica Wagner

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GLOSSARY

Act	Clean Air Act
BACT	Best Available Control Technology
EDF	Movant-Intervenor Environmental Defense Fund
EPA Br.	Brief for Respondents
Endangerment Finding	*Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009)
FIP	Federal Implementation Plan
Industry Br.	Joint Opening Brief of Non-State Petitioners and Supporting Intervenors
NAAQS	National Ambient Air Quality Standard
NESHAP	National Emission Standards for Hazardous Air Pollutants
NRDC	Movant-Intervenor Natural Resources Defense Council
NSPS	New Source Performance Standards
PSD	Prevention of Significant Deterioration
State Br.	Brief of State Petitioners and Supporting Intervenors
SIP	State Implementation Plan
Tailoring Rule	*Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010)
Timing Decision	*Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010)

tpy	Tons Per Year
Vehicle Rule	*Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010)

PRELIMINARY STATEMENT

The Environmental Protection Agency has taken a series of regulatory actions in response to the Supreme Court's ruling in *Massachusetts v. EPA,* 549 U.S. 497 (2007), that greenhouse gases are an air pollutant under the Clean Air Act. Two of those actions, the Timing Decision and the Tailoring Rule, are under review in this proceeding. These two actions address the application of two Clean Air Act programs—Prevention of Significant Deterioration ("PSD") and Title V permitting—to sources of greenhouse gas emissions. Intervenors, twelve States and several environmental organizations, support EPA's actions to maintain workable air pollution permitting programs that focus first on the largest sources of greenhouse gases.

Petitioners lack standing to challenge either action, both of which addressed the implementation of compliance obligations that existed by operation of the Act. The Timing Decision simply determined that preconstruction and operating permit requirements in the PSD and Title V provisions would not apply to greenhouse gas emissions until vehicle manufacturers were first required to comply with vehicle emission standards. The Tailoring Rule adopted a phased approach to implementing those requirements, and Petitioners do not contest that, without that phased approach, implementation would create an overwhelming administrative logjam.

Instead, Petitioners argue that the PSD provisions do not apply to greenhouse gases. But the unambiguous language of those provisions, as interpreted by EPA and this Court for over thirty years, makes it clear that they cover every air pollutant subject to regulation under the Act. Because greenhouse gases are such a pollutant, the PSD program applies to sources of greenhouse gases.

Petitioners also argue that the Court should invalidate the Tailoring Rule on the ground that EPA had no authority to use a phased approach—under which the PSD and Title V permitting requirements are applied to the largest emitters of greenhouse gases first—by establishing emission thresholds that are higher than the statutory thresholds. They are mistaken. Faced with a statutory mandate to apply those requirements to greenhouse gases, and recognizing the demonstrated administrative impossibility of fully implementing those requirements immediately, EPA properly invoked the administrative necessity doctrine to phase in the requirements as quickly and closely as possible to what Congress intended.

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction over the petitions, which challenge two EPA actions: (1) *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004

(Apr. 2, 2010) ("Timing Decision") and (2) *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010) ("Tailoring Rule"). As shown below (pp. 24-29), Petitioners Coalition for Responsible Regulation, *et al.* ("Industry Petitioners") and Texas, *et al*. ("State Petitioners") (collectively, "Petitioners") lack Article III standing to challenge these decisions, both of which *ameliorate* Petitioners' asserted injuries rather than inflicting any injury on Petitioners.

Instead of directly challenging those ameliorative actions, Petitioners ask the Court to hold that EPA's decades-old understanding of the Act's PSD requirements is incorrect. As also shown below (pp. 28-31), that challenge is time-barred under section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1).

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set out in the addenda to the briefs submitted by Industry Petitioners and EPA.

STATEMENT OF THE CASE

A. The Clean Air Act's PSD and Title V Programs

1. The PSD Program

The Act's Prevention of Significant Deterioration program requires new and modified major stationary sources of air pollution to obtain preconstruction permits. 42 U.S.C. § 7475. Major stationary sources include specified sources such as power plants, petroleum refineries, and cement kilns that emit or have the potential to emit one hundred tons per year ("tpy") or more of any air pollutant. 42 U.S.C. § 7479(1). They also include any other source that has the potential to emit two-hundred-fifty or more tpy of any air pollutant. *Id*.

Congress enacted the PSD provisions in 1977 when it concluded that the Act's then-existing requirements were insufficient to limit pollution from stationary sources. *See Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 567-68 (2007). At that time, EPA had already implemented a PSD program by regulation, in response to *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), *aff'd*, 4 E.R.C. 1815 (D.C. Cir. 1972) (per curiam), *aff'd by an equally divided Court sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973) (per curiam). The statutory PSD program maintained, with modifications, the basic structure of the regulatory program. *See Ala. Power Co. v. Costle*, 636 F.2d 323, 350-51 (D.C. Cir. 1979).

The PSD program applies to new and modified major stationary sources located in areas that are designated as "attainment" areas because they are in compliance with at least one National Ambient Air Quality Standard ("NAAQS").[1] 42 U.S.C. §§ 7407(d)(1)(A)(ii), 7471, 7475(a).[2] NAAQS have been established for six pollutants. *See* 40 C.F.R. Pt. 50.

Congress enacted the PSD program to address the concern that "the inadequacies of the [NAAQS] are substantial both with regard to the pollutants which are regulated and with respect to their failure to regulate others." H.R. Rep. No. 95-294, at 1184 (1977). To this end, the Act provides that a primary purpose of the PSD program is "to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution . . . notwithstanding attainment and maintenance of all national ambient air quality standards." 42 U.S.C. § 7470(1).

To further these purposes, the PSD program prohibits the construction or modification of major stationary sources in any attainment area unless the owner obtains a preconstruction permit that includes an emission limitation reflecting the

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[1] The PSD program also applies in "unclassifiable" areas, *i.e.*, areas where available information does not allow a determination of whether the area meets a NAAQS. 42 U.S.C. § 7407(d)(1)(A)(iii).

[2] A separate "nonattainment new source review" program limits emissions of a pollutant for which an area is in nonattainment. *See* 42 U.S.C. §§ 7501-7503.

best available control technology ("BACT") for "each pollutant subject to regulation under the [Act]." 42 U.S.C. § 7475(a)(1), (a)(4). For three decades, EPA has construed the PSD requirements as meaning that (1) in an area that is in attainment with a NAAQS, any new or modified major stationary source must obtain a PSD preconstruction permit if it emits any regulated air pollutant above the statutory emission thresholds, whether or not that particular pollutant is subject to a NAAQS, and (2) a pollutant is "subject to regulation" for the purposes of requiring a BACT limit in a PSD permit if the pollutant is regulated by the Act itself or by a regulation issued under any provision of the Act.[3] 43 Fed. Reg. 26,388 (June 19, 1978); 43 Fed. Reg. 26,380 (June 19, 1978); 45 Fed. Reg. 52,676, 52,710-11 (Aug. 7, 1980); 67 Fed. Reg. 80,186 (Dec. 31, 2002).

PSD permits are issued by States pursuant to EPA-approved state implementation plans ("SIPs"), or by EPA when a state program is not fully approved. 42 U.S.C. § 7410(a)(2)(C), (c)(1).

[3] EPA regulations require facilities undergoing a modification to meet BACT emission limits for each regulated pollutant for which emissions increases from the modification exceed specified significance thresholds. 40 C.F.R. 51.166(b)(23)(i); *see Ala. Power*, 636 F.2d at 360-61.

2. The Title V Program

The Title V operating permit program requires operating permits for "major sources." 42 U.S.C § 7661a(a). Major sources are defined as any source that emits or has the potential to emit one hundred tpy of any air pollutant. *Id.* §§ 7661(2), 7602(j). The purpose of Title V is to assist in enforcement of the Act by collecting all requirements applicable to a source in one permit. 57 Fed. Reg. 32,250, 32,251 (July 21, 1992). Like PSD permits, States issue Title V permits pursuant to their approved Title V programs, and EPA issues Title V permits when there is no fully-approved state program. 42 U.S.C. § 7661a(d).

B. Regulation of Greenhouse Gas Emissions

1. The Endangerment Finding and the Vehicle Rule

The *Massachusetts* Court ruled that greenhouse gases are an "air pollutant" as defined by the Act, 42 U.S.C. § 7602(g), and that EPA must regulate those emissions under the Act's motor-vehicle provisions, 42 U.S.C. § 7521, if the agency finds that they endanger public health or welfare. 549 U.S. at 533. On December 15, 2009, EPA determined that greenhouse gases endanger public health and welfare and that greenhouse gas emissions from new motor vehicles contribute to that air pollution. 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Finding").

Subsequently, EPA promulgated standards requiring new light-duty motor vehicles from model years 2012 to 2016 to reduce their greenhouse gas emissions. *See* 75 Fed. Reg. 25,324 (May 7, 2010) (the "Vehicle Rule"). Those standards, which are expected to result in the reduction of the equivalent of 960 million metric tons of carbon dioxide over the life of those vehicles, took effect in January 2011, which is the beginning of the 2012 model year. *Id.* at 25,404, 25,445.

2. Stationary Sources

a. Greenhouse gas emissions from stationary sources

Stationary sources, such as power plants, petroleum refineries, and cement kilns, account for the majority of greenhouse gas emissions in the country. 75 Fed. Reg. at 31,519. Power plants alone account for more than one-third of domestic emissions of greenhouse gases. *See* 74 Fed. Reg. at 66,540. Given that these large sources are often operated for fifty years or more, even one plant can emit hundreds of millions of tons of greenhouse gases over the course of its operating life. 74 Fed. Reg. at 66,519. Those emissions will persist in the atmosphere for decades to centuries, causing climate effects well beyond the time of the emissions. 75 Fed. Reg. at 31,519.

b. The Timing Decision

In the Timing Decision, EPA determined that a pollutant is "subject to regulation" and thus covered by the PSD and Title V requirements, on the date when compliance is first required with emission limitations on that pollutant issued under any provision of the Act. 75 Fed. Reg. at 17,004-06. In the case of greenhouse gases, EPA determined that the PSD and Title V requirements would first apply on January 2, 2011, the date on which 2012 model year vehicles subject to greenhouse gas emission standards under the Vehicle Rule could be "introduced into commerce." *Id*. at 17,019.

c. The Tailoring Rule

i. The administrative impossibility of implementing the statutory thresholds immediately

In the rulemaking for the Tailoring Rule, EPA extensively analyzed the impacts on States of issuing PSD and Title V permits beginning in January 2011 to all sources whose greenhouse gas emissions meet the Act's thresholds: (1) 100 or 250 tpy, depending on the source, for the PSD program, and (2) 100 tpy for the Title V program. The agency concluded that immediately implementing the PSD and Title V requirements for all sources above those thresholds would create overwhelming administrative burdens for permitting agencies as a result of the dramatic increase in the number of permit applications. *See, e.g.*, 75 Fed. Reg. at

31,540 (PSD permits would jump from the current average of approximately 700 permits per year nationally to more than 81,000 per year, and Title V permits would increase from 14,700 sources to approximately 6.1 *million*). EPA also concluded that streamlining techniques or other options could not be developed or implemented in time to reduce the administrative logjam to manageable proportions. *Id.* at 31,577.

States on both sides of the present petitions for review commented on the severe burdens that would fall on state permitting authorities if PSD and Title V permitting requirements took immediate effect for all covered sources. *See, e.g.*, Comments of South Carolina Department of Health and Environmental Control 5-6 (Dec. 23, 2009) ("permitting at the 100/250 tpy thresholds" would "equate to a 950% increase in our current PSD workload and a 185% increase in our Title V source workload," making it "virtually impossible to issue any air permits in a timely manner"); Comments of California Air Resources Board 2 (Dec. 22, 2009) (anticipated 400-fold increase in permitting at the 100/250 tpy levels "would effectively bring the PSD and Title V programs to a standstill").

ii. EPA's phased-in approach

Based on its analysis of the administrative impossibilities for permitting agencies, EPA determined that it should phase in PSD and Title V requirements for greenhouse gas emissions in four steps over five years. In the first phase, which

began on January 2, 2011, a source that is required to obtain a PSD permit anyway because its emissions of pollutants other than greenhouse gases exceed the statutory emission thresholds is also required to meet BACT emission limitations for greenhouse gases if the construction or modification would increase greenhouse gas emissions by more than 75,000 tpy. 75 Fed. Reg. at 31,523-24.

In the second phase, which began on July 1, 2011, a new major source not already subject to PSD permitting must obtain a preconstruction permit if it has the potential to emit more than 100,000 tpy of greenhouse gases. *Id.* at 31,523. A permit is also required if an existing major source undertakes a modification that would increase those emissions by at least 75,000 tpy. *Id.*.

In the third phase, to be completed by July 1, 2012, EPA committed to proposing or soliciting comment on implementing lower greenhouse gas emission thresholds based on techniques to streamline or otherwise ease the permitting process. 40 C.F.R. §§ 52.22(b)(1), 70.12(b)(1); 75 Fed. Reg. at 31,572, 31,586-88. In the fourth phase, EPA committed to (1) completing a study projecting the administrative burdens of issuing permits based on lower thresholds; (2) based on the results of that study, "propos[ing] a rule addressing the permitting obligations of [smaller] stationary sources" no later than April 30, 2015; and (3) "tak[ing] final action on such a rule no later than April 30, 2016." 40 C.F.R. §§ 52.22(b)(2)(ii), 70.12(b)(2)(ii).

iii. Implementation of the Tailoring Rule

EPA promulgated two additional rules that are not under review in this proceeding: a "SIP Call," 75 Fed. Reg. 77,698 (Dec. 13, 2010), and a Federal Implementation Plan ("FIP"), 75 Fed. Reg. 82,246 (Dec. 30, 2010) ("FIP Rule"). The goal of these rules is to assure that, for every new and modified source required to obtain a PSD permit, there is a permitting agency—either the State or, as a backup, EPA—with legal authority to make timely permitting decisions. In the SIP Call, EPA called for thirteen States whose SIPs did not provide that authority to revise them within one year. 75 Fed. Reg. at 77,705-06. Pursuant to the FIP Rule, EPA is able to issue PSD permits for greenhouse gases in any States that were unable to revise their SIPs by January 2, 2011. *Id.* at 82,250-51.

In opposing motions from various Petitioners to stay the Timing Decision and Tailoring Rule, Intervenors submitted affidavits from several permitting agencies explaining how the States were working cooperatively with EPA to ensure that permitting authorities would be able to issue PSD and Title V permits for greenhouse gas emissions under the Tailoring Rule in a timely fashion. *See* State & Envtl. Intervenors' Joint Response in Opp'n to Stay, Exs. 2-19

(Timing/Tailoring:1274851[4]). This Court denied the stay motions, and permitting under the Tailoring Rule has proceeded.

INTERVENTION MOTIONS

A. Granted Motions

In the Tailoring Rule case, the Court has granted the motions to intervene submitted by the twelve States who are parties to this brief, as well as four of the environmental groups that join the brief, Conservation Law Foundation, Georgia ForestWatch, Natural Resources Council of Maine, and Wild Virginia.

B. Pending Motions

Pending before the Court are timely motions to intervene in the Tailoring Rule case filed by NRDC, EDF, and Sierra Club. NRDC, EDF, Sierra Club, Michigan Environmental Council, Ohio Environmental Council, and Indiana Wildlife Federation have also moved to intervene in the Timing Decision case, for the purpose of responding to Petitioners' argument in that case that the Act's PSD requirements do not apply to greenhouse gases. The Court referred all these

[4] References to [case description]:[#] refer to docket entries in these four cases: Timing Decision (Timing), No. 10-1073; Tailoring Rule (Tailoring), No. 10-1131; Endangerment Finding (Endangerment), No. 09-1322; and Vehicle Rule (Vehicle), No. 10-1092; or in the separate action, *American Chemistry Counsel v. EPA* (*Am.Chem.Council*), No. 10-1167.

motions to the merits panel, directing Movants and the other parties to address intervention in their merits brief.[5] For the reasons stated below, the Court should grant those pending motions.

1. Movants Have Met the Requirements of Rule 15(d) of the Federal Rules of Appellate Procedure.

Federal Rule of Appellate Procedure 15(d) requires a motion for intervention in a review of an agency action to provide "a concise statement of the interest of the moving party and the grounds for intervention." Movants have satisfied that requirement.

Movants' interest and grounds for intervention are twofold. First, Movants are organizations whose mission encompasses protection of health and welfare from air pollution. They represent members who are and will be harmed by climate change resulting from greenhouse gas emissions and thus have an interest in opposing efforts to weaken safeguards against such pollution. *See* Movants' Mot. to Intervene at 12-13, Ex. A (Timing: 1243015); Movants' Reply, Ex. A (Timing: 1244969); Movant's Corrected Mot. to Intervene, Ex. A (Tailoring: 1253229). The Act's PSD and Title V programs cover the largest emission sources in the nation and yet Petitioners seek to render these programs *entirely*

[5] *See* Order (Sept. 3, 2010) (Timing:1264200); Order (Sept. 13, 2010) (Tailoring:1265283).

inapplicable to greenhouse gases. That result would cause significant environmental harm. For example, electric power plants are the United States' largest source of greenhouse gas emissions. 74 Fed. Reg. at 66,540. Permits issued to a power plant or another stationary source under the PSD preconstruction program can determine emissions levels for decades. 75 Fed. Reg. at 31,519. Moreover, Petitioners' arguments, if accepted, would require EPA to "unregulate" numerous other pollutants that have long been covered by the PSD program. These challenges directly affect Movants and their members.

Second, following a decade-long effort by Movants, several of the state and environmental intervenors, and others, EPA has taken several actions that will limit greenhouse gases from motor vehicles and stationary sources. That effort included the *Massachusetts* litigation that succeeded in overturning EPA's initial decision not to regulate greenhouse gases, *see* 549 U.S. at 535, and submission of comments in the resulting EPA proceedings, including those under review here. Having achieved this success, Movants have an interest in protecting those gains against Petitioners' efforts to overturn the application of the Clean Air Act to sources of greenhouse gases. *See, e.g.*, *UAW, Local 283 v. Scofield*, 382 U.S. 205, 216, 222 (1965).

2. Rule 24(a) of the Federal Rules of Civil Procedure Does Not Govern.

Petitioners oppose Movants' intervention based on the requirements for intervention of right under Federal Rule of Civil Procedure 24(a), *see* Pets.' Response in Opp'n at 2 (Timing: 1243684); Pets.' Response in Opp'n at 2 (Tailoring: 1255288), but this case is governed by Rule 15(d), which simply requires "a concise statement of the interest of the moving party and the grounds for intervention." *See also Synovus Fin. Corp. v. Bd. of Governors*, 952 F.2d 426, 433 (D.C. Cir. 1991).[6]

`Even if the Court were to look to Rule 24 here, Petitioners overlook subsection (b) of the Rule, which allows for permissive intervention regardless of whether the requirements of subsection (a) are met. *See UAW, Local 283*, 382 U.S. at 216 n.10 (intervention would be appropriate "[u]nder Rule 24(a)(2) or Rule 24(b)(2)"). The requirements for permissive intervention fit 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, *see* Movants' Mot. to Intervene at 9-10 (citing cases) (Timing:

[6] The drafters of the appellate rules were fully capable of borrowing from the civil rules when they so chose, but signaled no such intention in adopting Rule 15(d). *Compare*, *e.g.,* Fed. R. App. P. 3 advisory comm. notes to subdivs. a & b (1967), *with* Fed. R. App. P. 15 advisory comm. notes to subdiv. d (1967).

1243015). Unlike subsection (a), subsection (b) does not require a showing of impairment of interest or inadequate representation, but requires instead that the movant have "a claim or defense that shares with the main action a common question of law or fact." Movants seek to intervene to support the EPA actions challenged by Petitioners, and thus easily meet that requirement.

3. Respondent-Intervenors Need Not Demonstrate Standing, But Movants Have Standing If It Were Required.

The oppositions to the pending intervention motions appear to raise standing objections, Pets.' Response in Opp'n at 4-6 (Timing: 1243684); Pets.' Response in Opp'n at 4-6 (Tailoring: 1255288), but Movants need not demonstrate standing to intervene.

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. *Bond v. United States*, 131 S. Ct. 2355, 2361-62 (2011).[7] Here it is Petitioners, not Movants, who seek to invoke the Court's Article III jurisdiction. Moreover, because EPA has standing, the

[7] Even before *Bond*, precedent requiring such a demonstration in some circumstances, *see*, *e.g.*, *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533 (D.C. Cir. 1999), had been questioned by this Court. *See Jones v. Prince George's County*, 348 F.3d 1014, 1018 (D.C. Cir. 2003); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003).

Court need not reach Movants' standing. *See McConnell v. FEC*, 540 U.S. 93, 233 (2003), *overruled on other grounds*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Comcast Corp. v. FCC*, 579 F.3d 1, 5-6 (D.C. Cir. 2009).

In any event, Movants' declarations satisfy both constitutional and prudential requirements. The use and enjoyment of specific natural areas and private property owned by Movants' members has already been harmed by climate change, and that harm will increase if climate change worsens. Movant's Corrected Mot. to Intervene, Ex. A (Tailoring: 1253229). Climate change is caused by anthropogenic emissions of greenhouse gases, and preserving the greenhouse gas emission limitations against Petitioners' arguments for statutory exemptions will redress the injuries to Movants' members by decreasing or slowing the growth of those emissions. *See Massachusetts*, 549 U.S. at 523-26.

Although Petitioners consented to Movants' intervention in the proceedings regarding the Endangerment Finding and Vehicle Rule, they argue that Movants have no interest in defending either the Timing Decision or the Tailoring Rule, because, they contend, these rules merely delay the implementation of the regulatory scheme Movants seek. Pets.' Response in Opp'n at 3 (Timing: 1243684); Pets.' Response in Opp'n at 3 (Tailoring: 1255288). Petitioners claimed as the "most important[]" reason for denying Movants' intervention in the Timing Decision case, that "this rulemaking does not ultimately decide whether

greenhouse gases will be regulated, or even by how much, but only when any permitting requirements may take effect." Pets.' Response in Opp'n at 6 (Timing: 1243684).

Petitioners are incorrect for two reasons. First, Movants have an interest in seeing the statute implemented in a manner that avoids gridlock, and the Tailoring Rule accomplishes that. Second, as discussed below (pp. 34-44), Petitioners challenge both the Timing Decision and the Tailoring Rule on the ground that greenhouse gases are not properly subject to PSD regulation at all. Movants have a major, well-demonstrated interest in the resolution of *that* question. Indeed, Movants NRDC, EDF, Sierra Club, and CLF were granted intervention to address precisely that question—whether PSD provisions apply to greenhouse gases—in another case pending before this Court, *American Chemistry Council v. EPA*, No. 10-1167.

Accordingly, the motions for leave to intervene should be granted.

STANDARD OF REVIEW

The Court may set aside the Timing Decision and Tailoring Rule only if it finds that they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9); *see also* EPA Br. 42-47 (Tailoring/Timing:1330078).

SUMMARY OF ARGUMENT

Once stationary sources of greenhouse gases became subject to the PSD and Title V programs by operation of the Act, EPA confronted administrative problems that no one disputes were real, exceptional, and compelling. EPA confronted those problems in a serious, considered way that adhered to its responsibilities under the Act. Petitioners have seized on those problems as reason to completely exempt greenhouse gases from the Act, but the Supreme Court rejected such an exemption in *Massachusetts* and this Court should reject it here.

1. Petitioners lack standing to challenge either the Timing Decision or the Tailoring Rule because those actions did not injure them. The Timing Decision simply determined that the Act's PSD and Title V requirements would not apply to greenhouse gas emissions until the Vehicle Rule went into effect in January 2011. In the absence of that determination, those requirements would have applied to Industry Petitioners earlier, and State Petitioners would have had to implement the requirements earlier.

The Tailoring Rule adopted a phased approach to implementing the PSD and Title V requirements. That approach does not injure Petitioners but instead helps Industry Petitioners by delaying implementation of the requirements with respect to smaller emitters, and helps both Industry Petitioners and State Petitioners by

preventing administrative gridlock. Unless Petitioners are injured by an implementation process that avoids a permitting logjam—which they do not contend—they have no standing to contest the Rule.

2. Petitioners seek to invalidate the Timing Decision and Tailoring Rule on the ground that the Act's PSD requirements do not apply to greenhouse gases at all. EPA, however, has long held that the PSD provisions apply to all pollutants subject to regulation under the Act, and the sixty-day period to challenge that interpretation ran decades ago. To the extent that Petitioners assert new factual grounds for attacking those long-standing regulatory interpretations, the statute and Circuit precedent require that such claims first be exhausted by petition to EPA.

Even if Petitioners' argument were not time-barred, it would fail because EPA's interpretation of the statutory PSD requirements is based on their unambiguous language. That statute says that, if a new or modified stationary source is located in "any area" that is in "attainment" and emits "any air pollutant" above the statutory thresholds, the source is required to obtain a PSD preconstruction permit that establishes emission limitations for "each pollutant subject to regulation under" the Act. Because *Massachusetts* held that greenhouse gases are an air pollutant under the Act and, as a result, EPA now regulates greenhouse gases under the Vehicle Rule, new and modified stationary emitters of

greenhouse gases above the statutory thresholds are required to obtain preconstruction permits establishing emission limitations for greenhouse gases.

3. Petitioners also argue that the Court should invalidate the Tailoring Rule because the Rule's phased approach relies on doctrines they contend are not available to the Agency. The Tailoring Rule is an appropriate application of the administrative necessity doctrine, which permits an agency to depart from the requirements of a statute when it is administratively impossible to implement the requirements, so long as the agency departs only to the extent necessary and only for as long as necessary.

4. Assuming any Petitioner has standing to challenge EPA's use in the Tailoring Rule of the same six-compound definition of "greenhouse gases" employed in the Vehicle Rule, that use was entirely lawful.

5. Industry Petitioners lack standing to assert their claims that (1) EPA is required to give States three years to change their SIPs before the start of PSD permitting; and (2) the Tailoring Rule illegally bars construction of unpermitted sources before then. By preventing any gap in permitting authority, EPA's separate SIP Call and FIP Rule—which are not subject to review in this proceeding—ensure that Industry Petitioners will not be injured. Industry Petitioners are also not injured by the one-year deadline that the SIP Call imposed on States and, in any event, the SIP Call is at issue in another proceeding before

the Court. Further, any construction moratorium would have been imposed by the Act, which expressly bars construction without PSD permits, not the Tailoring Rule.

6. Industry Petitioners argue that, in addition to the extensive analysis conducted by EPA, the agency was required to do a broad analysis of the PSD and Title V programs' costs and burdens before issuing the Tailoring Rule, but the Act provides for case-by-case consideration of costs in each individual permit proceeding and neither requires nor authorizes the program-wide preliminary analysis Petitioners seek.

ARGUMENT

I. PETITIONERS LACK STANDING TO CHALLENGE THE TIMING DECISION AND THE TAILORING RULE, AND THEIR OTHER CLAIMS ARE TIME-BARRED.

This Court lacks jurisdiction to hear Petitioners' claims. Petitioners do not have standing to challenge EPA's Timing Decision and Tailoring Rule because both actions *reduce* the regulatory obligations that Petitioners claim injure them. The Court lacks jurisdiction to hear Petitioners' remaining challenge—that PSD permitting should not apply to greenhouse gases *at all*—because the sixty-day filing period specified by section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1), expired long ago.

A. Petitioners Have Not Demonstrated Standing to Challenge the Timing Decision or the Tailoring Rule.

A petitioner invoking federal court jurisdiction must demonstrate standing by showing an "actual or imminent" injury that is "traceable" to the complained-of conduct and that is "likely" to be redressed by a favorable judicial ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). There is no standing when the remedy a court may grant would not relieve the claimed injury. *McConnell*, 540 U.S. at 229 (plaintiffs lacked standing because order invalidating challenged statutory provisions "would not redress [plaintiffs'] alleged injury"). Moreover, a petitioner "must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 733-34 (2008) (quotation marks omitted).

Petitioners have not shown that the Timing Decision or Tailoring Rule injures them or that the invalidation of either of those actions would benefit them.

1. The Timing Decision Does Not Injure Petitioners, and Invalidating the Decision Would Not Benefit Them.

The Timing Decision addressed the narrow question of when a pollutant becomes "subject to regulation" for purposes of section 165(a)(4), 42 U.S.C. § 7475(a)(4), thus triggering PSD and Title V permitting requirements. For more than three decades EPA has interpreted "subject to regulation" under section 165(a)(4) to mean pollutants regulated either directly by the Act or by regulations

adopted under any provision of the Act. The Timing Decision did not modify the interpretation of *what* is subject to regulation, but rather addressed *when* such pollutants become subject to regulation.

The Timing Decision confirmed an interpretation issued in 2008, *see* EPA Br. 23-24, that the PSD permitting requirements are triggered only by regulations imposing requirements for actual control of emissions and not by monitoring and reporting requirements. None of the Petitioners here challenges this interpretation. The Timing Decision altered that interpretation only by determining that a pollutant is subject to regulation when emissions-control requirements for that pollutant take effect (*i.e.*, when compliance is required), rather than when they are promulgated. 75 Fed. Reg. at 17,004, 17,009. Based on these conclusions, the Timing Decision found that greenhouse gases would be subject to regulation on January 2, 2011, when the Vehicle Rule required vehicle manufacturers to comply with greenhouse gas emission standards. *Id.* at 17,004, 17,015-19.

The Timing Decision does not increase regulatory burdens for any Petitioner. Instead, it reduced industry's regulatory obligations by delaying the onset of greenhouse gas permitting requirements for stationary sources until the emission standards in the Vehicle Rule took effect, rather than when they were promulgated (*see* p. 9). Invalidating the Timing Decision would only result in applying PSD and Title V to greenhouse gases at a date earlier than January 2,

2011. Thus, far from providing the redress that State and Industry Petitioners seek—elimination or reduction of greenhouse gas regulations—reversal of the Timing Decision would not benefit them.

2. The Tailoring Rule Does Not Injure Petitioners, and Invalidating the Rule Would Not Benefit Them.

Similarly, the Tailoring Rule reduces Petitioners' regulatory obligations under the PSD and Title V permitting programs. The rule implements those requirements in phases, starting with the largest greenhouse gas emission sources. 75 Fed. Reg. at 31,514. If the Tailoring Rule had not been issued—and if it were invalidated—PSD and Title V permitting would apply immediately to thousands more lower-emitting stationary sources. Industry Petitioners who own or operate such lower-emitting sources, and State Petitioners who would have had to process permit applications for those sources, avoided these obligations due to the Tailoring Rule, and the interests they assert would be harmed by its invalidation. Indeed, many Industry Petitioners explicitly acknowledge they would suffer greater injury without the Tailoring Rule. Industry Br., App. C, Ex. 4 ¶ 14 (National Mining Association members have 153 underground coal mines that will avoid regulation due to Tailoring Rule), Ex. 5 ¶¶ 4, 13, 15 (as many as forty-four members of the Industrial Mineral Association will avoid regulation due to Tailoring Rule) (Timing/Tailoring:1314204).

Moreover, because the PSD and Title V requirements implemented by the Rule were imposed by the Act, not the Rule, neither Industry Petitioners who own or operate larger sources covered by the Rule nor State Petitioners who are required to process permits for such sources are injured by the Rule. Although Petitioners claim that they have standing based on the assertion that the Timing Decision and Tailoring Rule are the source of their regulatory obligations under the PSD and Title V programs, they fail to explain how these ameliorative rules, rather than the statute, create the obligations that they claim cause them injury. *See* State Br. 22-23; Industry Br. 14-15.

State Petitioners suggest that, in the absence of the Tailoring Rule, "neither [EPA] nor Congress would abide" the application of the PSD requirements to greenhouse gases and, that "[w]ithout the Tailoring Rule, there can be no Timing Rule; and without the Timing Rule, State Petitioners are relieved of the administrative and pecuniary burdens" of issuing PSD and Title V permits under the Tailoring Rule. State Br. 23. They also assert that invalidating the Tailoring Rule would prompt Congress to repeal or amend PSD and Title V requirements for greenhouse gases. *Id.* at 52-53.

To establish redressability, however, Petitioners must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (citing *Defenders of*

Wildlife, 504 U.S. at 560-61). It is mere speculation that, if the Tailoring Rule were invalidated, EPA would abandon its settled understanding of the Act's PSD and Title V permitting requirements. Nor can redressability hinge on speculation that Congress will repeal a longstanding environmental statute. *See Chamber of Commerce v. EPA*, 642 F.3d 192, 208 (D.C. Cir. 2011) (speculation about future action by EPA or Congress is inadequate to confer standing).

Accordingly, Petitioners have not shown that the Tailoring Rule injures them or that vacating the Rule would help them.

B. Petitioners' Argument that Permitting Requirements Do Not Apply to Greenhouse Gases Is Jurisdictionally Time-Barred.

For three decades, EPA has consistently construed the PSD requirements in Part C of the Act, in particular sections 165 and 169, 42 U.S.C. §§ 7475, 7479, as meaning that (1) any major new or modified stationary source located in any area in attainment with a NAAQS is required to obtain a PSD preconstruction permit, regardless of whether the source exceeds the statutory emission thresholds for the pollutant subject to that NAAQS, and (2) a pollutant is "subject to regulation" under the Act—requiring BACT in the permit—if it is regulated by either the Act itself or by EPA regulations adopted under any provision of the Act. EPA adopted a series of rules that codified those interpretations between 1978 and 2002. 43 Fed. Reg. at 26,397; 43 Fed. Reg. at 26,380; 45 Fed. Reg. at 52,710-11; 67 Fed.

Reg. at 80,240, 80,264. In those rulemakings, EPA explicitly rejected the interpretations that Petitioners advance here.

For example, in 1978, EPA issued a regulation providing that BACT meant an emission standard "based on the maximum degree of reduction for each pollutant subject to regulation under the act." 43 Fed. Reg. at 26,404. It explained when it promulgated that regulation that:

> As mentioned in the proposal, "subject to regulation under the Act" means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type. This then includes all criteria pollutants subject to NAAQS review, pollutants regulated under the Standards of Performance for new Stationary Sources (NSPS), pollutants regulated under the National Emission Standards for Hazardous Air Pollutants (NESHAP), and all pollutants regulated under Title II of the Act regarding emission standards for mobile sources.

Id. at 26,397.

In 1980, EPA issued a regulation providing that "PSD review will apply to any source that emits any pollutant in major amounts" to be constructed in an area that is in attainment with the NAAQS "for any criteria pollutant." 45 Fed. Reg. at 52,710-11. It noted when it issued the regulation that:

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

Id. at 52,711. EPA also affirmed in 2002 that "[t]he PSD program applies automatically to newly regulated NSR pollutants," which it defined to include both pollutants for which a NAAQS has been set and pollutants subject to other standards. 67 Fed. Reg. at 80,240, 80,264 (codified at 40 C.F.R. § 51.166(b)(49)).

The statutory interpretation claims that Petitioners make here—that only emissions of pollutants for which an area is in attainment with a NAAQS can trigger the PSD permit obligation and that PSD permits are required to impose BACT only for NAAQS pollutants—go to the fundamental mechanics of the PSD program. These claims either were made or could have been made decades ago when EPA adopted PSD regulations shortly after Congress added the PSD provisions to the Clean Air Act in 1977. *See* Envtl. Intervenors Resp. Br. 7-8 (*Am.Chem.Council*:1317374). Those claims are jurisdictionally barred because they come long after expiration of the sixty-day filing period prescribed by section 307(b) of the Act, 42 U.S.C. § 7607(b). *See Motor & Equip. Mfrs. Ass'n v. Nichols,* 142 F.3d 449, 460 (D.C. Cir. 1998) (noting that section 307(b) "is jurisdictional in nature"). In the separate proceeding in which some of the Petitioners attempt to reopen judicial review of these decades-old regulations, *American Chemistry Council,* No. 10-1167, EPA has shown that it did not reopen or reconsider these interpretations in either the Timing Decision or the Tailoring

Rule. *See* EPA 33-51 (*Am.Chem.Council*:1314737); *see also* Envtl. Intervenors Resp. Br. 5-14 (*Am.Chem.Council*:1317374).

To the extent Petitioners are asking the Court to reconsider EPA's longstanding interpretations on the ground that the application of the PSD requirements to greenhouse gases creates new factual circumstances that undermine the basis for those interpretations, those claims are also not properly before the Court because Petitioners have not exhausted their administrative remedies. *See* 42 U.S.C. § 7607(d)(7)(B); *Oljato Chapter of Navajo Tribe v. Train,* 515 F.2d 654, 665-67 (D.C. Cir. 1975); *see also* EPA Br. 54-55 (noting pending petitions for reconsideration filed by Petitioners) (*Am.Chem.Council*:1314737). This exhaustion requirement, too, is jurisdictional. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1065 (D.C. Cir. 2001).

For these reasons, all of Petitioners' claims should be dismissed.

II. THE CLEAN AIR ACT'S PSD AND TITLE V REQUIREMENTS APPLY TO GREENHOUSE GASES.

If the Court reaches the merits of EPA's determination that the Act requires it to apply PSD requirements to greenhouse gases, it should uphold EPA's interpretation because it conforms to Congress' intent as "unambiguously expressed" in the Act, *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 843 (1984), and to this Court's interpretation of the relevant statutory provisions in *Alabama*

Power, 636 F.2d at 350-51. If there were any ambiguity in the relevant statutory provisions, EPA's interpretation is manifestly reasonable, and hence entitled to deference. *Chevron*, 467 U.S. at 842-43.[8]

A. The Act's PSD Provisions Require Major Emitters of Any Pollutant in Any Attainment Area to Obtain a PSD Permit Establishing BACT for Greenhouse Gases.

The Act's PSD provisions unambiguously provide that a new or modified source that is (1) located in "any area" that is in attainment with at least one NAAQS, and (2) exceeds the statutory thresholds for "any air pollutant"—including greenhouse gases—is (3) required to obtain a PSD permit that, among other things, establishes BACT emission limitations for "each pollutant subject to regulation under" the Act—including greenhouse gases. The key provisions setting forth those requirements are the following:

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[8] Petitioners rely on EPA's use of the "absurd results" doctrine to challenge its conclusion that the PSD requirements apply to greenhouse gases. Industry Br. 16-19, 27-28; State Br. 19, 50-51. EPA did not conclude that applying the PSD program to greenhouse gases is absurd. Instead, it found that Congress plainly intended PSD to apply to non-NAAQS pollutants, including greenhouse gases. 75 Fed. Reg. at 31,517. EPA invoked the absurd results doctrine—as well as the administrative necessity doctrine—to address the current administrative impossibility of implementing the PSD and Title V permitting programs for greenhouse gases at the statutory thresholds, not because it believed such permitting to be absurd. *See id.* at 31,554.

- The PSD requirements apply to any "major emitting facility," which is defined as a facility that emits more than specified amounts of "any air pollutant." 42 U.S.C. §§ 7475(a), 7479(1).

- "Air pollutant" for purposes of the entire Act "means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." *Id*. § 7602(g).

- A new or modified major emitting facility that is located "in any area to which this part [*i.e.*, Part C containing the PSD requirements] applies" is required to obtain a PSD preconstruction permit. *Id* § 7475(a). The PSD requirements apply in each area that has been designated as "attainment" because its air quality complies with at least one NAAQS or as unclassifiable. *Id*. §§ 7407(d)(1)(A)(ii)-(iii), 7471.

- A PSD permit must include BACT for "each pollutant subject to regulation under this chapter," referring to 42 U.S.C. chapter 85, *i.e.*, the Clean Air Act.[9] *Id*. § 7475(a)(4). BACT is "an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter." *Id*. § 7479(3).

These provisions unambiguously command the application of PSD permitting, and its central requirement that new and modified sources meet BACT limits, to greenhouse gases. First, a source must obtain a PSD permit if it emits an "air pollutant" above the statutory thresholds and is located in any attainment area.

[9] As discussed above (p. 5n.3), facilities undergoing a modification are required to meet BACT limitations for pollutants that exceed specified significance thresholds.

"Air pollutant" in the PSD requirements has the same Act-wide meaning, *id.* § 7602(g), that *Massachusetts* construed to cover greenhouse gases.

Second, "any area to which this part applies" means any attainment area. *Id*. § 7475(a). "[T]his part" means the PSD requirements in Part C of Title I of the Act. The areas to which Part C applies are areas classified as attainment or unclassifiable for at least one NAAQS pollutant. *Id*. §§ 7407(d)(1)(A)(ii)-(iii), 7471.

Lastly, the Vehicle Rule plainly made greenhouse gases a pollutant "subject to regulation." *Id.* § 7475(a)(4). As this Court recognized in *Alabama Power*, the statute requires BACT in a PSD permit for any pollutant subject to regulation without regard to the provision of the Act under which the pollutant is regulated. 636 F.2d at 352.

B. Petitioners' Arguments Are Inconsistent with the Statutory Text and Controlling Precedent.

Petitioners argue that greenhouse gases cannot be subject to the PSD program because (1) "any air pollutant" in section 169(1), 42 U.S.C. § 7479(1), means only pollutants subject to a NAAQS; (2) "any area" in section 165(a), *id.* U.S.C. § 7475(a), means only those attainment areas in which the new or modified source will emit sufficient amounts of the same NAAQS pollutant for which the area is designated in attainment; and (3) "pollutant subject to regulation" in section

165(a)(4), *id.* § 7475(a)(4), means only a NAAQS pollutant. Those arguments are contrary to the Act's plain language.[10]

1. Petitioners fail to show that "any air pollutant" excludes greenhouse gases.

Petitioners argue that greenhouse gases cannot be an "air pollutant" for purposes of the PSD program because they are emitted in much greater volumes than other pollutants and, as a result, application of the statutory emission thresholds to greenhouse gases makes much smaller sources subject to the PSD requirements than do other pollutants. State Br. 62-63; Industry Br. 33. But Petitioners fail to reconcile their argument with *Massachusetts*, which held that greenhouse gases are an "air pollutant" under the same "sweeping" statutory definition, *see* 549 U.S. at 528, that applies across the Act, 42 U.S.C. § 7602(g).

Indeed, the Supreme Court unanimously ruled in *American Electric Power Co. v. Connecticut*, that the Act authorizes EPA to regulate greenhouse gas emissions from stationary sources. 131 S. Ct. 2527, 2537 (2011) ("*AEP*"). "*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the [Act]. And it is equally plain that the Act

[10] Because Petitioners' arguments focus on PSD permitting, we respond to those arguments. Petitioners advance no serious theory upon which sources of greenhouse gases can be exempted from Title V.

'speaks directly' to emissions of carbon dioxide from the defendants' plants." *Id*. (citation omitted). In *AEP*, several major utilities, supported by amici including many of the Petitioners here, won dismissal of a federal-common-law challenge to their greenhouse gas emissions based on their argument that the Act—including the PSD program—had created a "comprehensive regulatory scheme" authorizing EPA to regulate greenhouse gas emissions from stationary sources. *See* Br. for Pets. at 41, *AEP*, No. 10-174 (citing 42 U.S.C. § 7475(a)). The Supreme Court specifically noted that the Act's PSD provisions had begun to apply to greenhouse gases. *AEP*, 131 S. Ct. at 2533 (EPA has begun "phasing in requirements that new or modified '[m]ajor [greenhouse gas] emitting facilities' use the 'best available control technology.'").

Even if *Massachusetts* and *AEP* had not already confirmed that "air pollutant" means the same thing for stationary sources that it means for mobile sources, Petitioners' argument that that term, which is governed by a single, statute-wide definition, 42 U.S.C. § 7602(g), means different things for different sources is contrary to basic principles of statutory construction. *See United States v. Santos*, 553 U.S. 507, 522 (2008) (plurality op.) (noting that Court has "forcefully rejected" "interpretive contortions" that would give "the same word, in the same statutory provision, different meanings in different factual contexts") (*citing Clark v. Martinez,* 543 U.S. 371, 378, 382, 386 (2005)).

Industry Petitioners nonetheless argue that greenhouse gases are not PSD pollutants because the purpose of the PSD program is to regulate air pollutants that have only a local effect. Industry Br. 17-18. *Massachusetts* rejected a similar argument, 549 U.S. at 512, and nothing in the statute supports that limitation. *See Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996) (burden is on party contesting natural meaning of statute to show that Congress did not mean what it said). EPA has for many years regulated pollutants under the PSD program that have global effects, such as chemicals that deplete the stratospheric ozone layer. *See* 40 C.F.R. § 52.21(b)(50)(iii). Moreover, the PSD program is expressly dedicated to the purpose, among others, of safeguarding "public welfare," from "any actual or potential adverse effect," a phrasing defined in the Act to include effects on "climate." 42 U.S.C. §§ 7470(1), 7602(h); *see also* Envtl. Intervenors Br. at 28 & n.11 (*Am.Chem.Council*:1317374).

Industry Petitioners also note that EPA interpreted "any air pollutant"—as used to define a major emitting facility in section 169(1), 42 U.S.C. § 7479(1)—to cover only "regulated" pollutants, making the scope of the requirement to obtain a permit congruent with the requirement to impose BACT permit limitations only on pollutants that are "subject to regulation." *See* Industry Br. 28, 32-33; *see also* EPA Br. 7; 43 Fed. Reg. 26,388, 26,403 (June 19, 1978); 40 C.F.R. § 52.21(b)(1) (1978). Petitioners argue that EPA has equal authority, and, indeed, an obligation

to further narrow the definition of "any air pollutant" to exclude greenhouse gases. But EPA's decision to limit the air pollutants that trigger PSD permitting to those pollutants subject to the BACT requirement does not give EPA the wide latitude that Industry Petitioners wish. Assuming that EPA's interpretation is permissible—it was never challenged—it does not follow that EPA has the authority to further limit "any air pollutant" to mean just the handful of NAAQS pollutants. That limitation would have the anomalous effect of making the class of pollutants that trigger the PSD permitting requirements narrower than the class of pollutants controlled in a PSD permit. In *Alabama Power*, however, this Court found that the opposite is true: "any air pollutant," 42 U.S.C. § 7479(1) is broader than "each pollutant subject to regulation," *id*. § 7475(a)(4)). 636 F.2d at 353 n.60.

Nor is there any merit to Industry Petitioners' argument that EPA has limited "any pollutant" in section 169A(g)(7), 42 U.S.C. § 7491(g)(7)—which requires EPA to regulate pollutants that impair visibility—to "'any' visibility-impairing pollutant." *See* Industry Br. 34. The regulation to which they refer does not construe the unqualified term "any pollutant." Instead, it implements section 169A(b)(2)(A), which directs States to determine whether a source "emits any air pollutant which may reasonably be anticipated to cause or contribute to any

impairment of visibility," 42 U.S.C. § 7491(b)(2)(A). *See* 40 C.F.R. pt. 51, App. Y, § III.A.2. These provisions have no relevance to the issue here.

2. Petitioners fail to show that "any area" means something different from "any attainment area."

As explained above (pp. 32-34), the Act requires PSD preconstruction permits for sources that will be "constructed in any area to which this part applies," 42 U.S.C. § 7475(a), meaning any area classified as in attainment or unclassifiable for at least one NAAQS pollutant. *Id*. §§ 7407(d)(1)(A)(ii)-(iii), 7471. Rejecting that reading of the statute, Industry Petitioners argue for a "pollutant-specific situs requirement," under which "any area" does not mean any attainment area, but instead means an area in attainment with the particular NAAQS pollutant for which the source in question exceeds the Act's emission thresholds. Industry Br. 23-25.

Although Congress could have enacted the limitations that Petitioners advocate, it did not do so. *See* EPA Br. 99-100; *Ala. Power*, 636 F.2d at 365 (noting that Congress used "precise language" in the PSD provisions "where its concern was more source (rather than area) specific"). Petitioners ultimately provide no plausible basis for reading "area" other than the straightforward way—as referring to an area that is in attainment with a NAAQS. *See* 42 U.S.C. § 7475(a). They seek to base the determination of whether a source will be

"constructed in any area to which this part applies" on the pollutants that the source will emit, but it is well outside the bounds of ordinary usage to decide whether a facility is constructed "in" a certain kind of "area" based on the characteristics of the facility, rather than the characteristics of the area. *See Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (interpretation of undefined statutory terms starts with their "ordinary meaning"). Petitioners provide no reason to conclude that "any area" "does not mean what it says." *New York v. EPA*, 443 F.3d 880, 889 (D.C. Cir. 2006).

Alabama Power rejected the first prong of Industry Petitioners' definition over thirty years ago, ruling that "air pollutant" does not mean only "a pollutant for which NAAQS have been promulgated." 636 F.2d at 352. The Court rejected an industry petition for rehearing on that ruling. *See id.* at 370 n.134; *Ala. Power Co. v Costle*, 606 F.2d 1068, 1080 n.20 (D.C. Cir. 1979) (per curiam), *superseded by* 636 F.2d 323; Envtl. Intervenors Br. 30-31 (*Am.Chem.Council*:1317374). If, as the Court ruled, the pollutant that triggers the permit requirements may be a *non*-NAAQS pollutant, then the second prong of the definition advocated by Industry

Petitioners—that the area must be in attainment for the same NAAQS pollutant that the source emits—necessarily also fails.[11]

Moreover, the language of the Act does not limit "major emitting facilit[ies]" to those located in an area in attainment with a NAAQS pollutant emitted at the facility in excess of the thresholds. The PSD requirements apply to emitters of "any air pollutant" in "any [attainment] area," emphasizing the broad applicability of the requirements. *See New York*, 443 F.3d at 885-86 ("any" has an "expansive reach" in context of the Clean Air Act); *Massachusetts*, 549 U.S. at 528-29 (citing *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002)).

Industry Petitioners argue that EPA's interpretation makes no sense because every area in the country is now an attainment area and so PSD applies everywhere. Industry Br. 22-23. There is nothing strange in that fact, because Congress plainly foresaw that, as the Act's provisions for cleaning up polluted areas brought them into attainment, every area of the country would eventually meet all of the NAAQS. *See* Pub. L. No. 95-95, § 129(b), 91 Stat. 685, 746-47 (1977) (imposing deadlines of 1982 and 1987 for achieving attainment of all

[11] *Alabama Power*'s holding that PSD requirements could not be imposed on emitters in *nonattainment* areas that impact attainment areas, 636 F.2d at 365-68, provides no support for Petitioners' very different submission here, which seeks to exempt sources in attainment areas.

NAAQS) (codified as amended in 42 U.S.C. § 7502(a)). Given that the PSD program's broad purpose is "to protect public health and welfare from any actual or potential adverse effect" from air pollution "notwithstanding" attainment of the NAAQS, *see*, *e.g.*, 42 U.S.C. § 7470(1), Congress's decision to apply the program broadly is neither surprising nor a basis to dispense with the plain meaning of the statutory terms.

The surrounding provisions further demonstrate the broad reach of the core PSD permit obligation. The PSD program allows for classification of three different categories of attainment areas—for example, national parks over a certain size are in Class I—and establishes different requirements for the different classes. *See* 42 U.S.C. §§ 7472-7476. But the basic PSD permit requirement is applicable in "any area to which this part applies," *id.* § 7475(a), meaning all three classes of attainment areas as well as areas that have not been classified.

Congress also drew distinctions concerning which pollutants are covered by specific elements of the PSD program, further demonstrating that, when Congress used the encompassing terms "any area" and "any air pollutant," it did so deliberately. For example, while section 163 applies only to specific pollutants (particulate matter and sulfur dioxide), sections 165(a)(4) and 165(e)(1) apply to "each pollutant subject to regulation" under the Act. 42 U.S.C. §§ 7473, 7475(a)(4), (e)(1). Likewise, section 165(e)(1) requires an air quality analysis "for

each pollutant subject to regulation under this chapter which will be emitted from such facility," but the next provision, section 165(e)(2), requires air quality monitoring only to gauge impacts on maximum allowable increases or maximum allowable concentrations, which are established only for certain pollutants. 42 U.S.C. § 7475(e)(1), (2). This Court, in *Alabama Power*, commented upon these and other precise distinctions drawn by Congress throughout the PSD provisions. *See, e.g.*, 636 F.2d at 403-06 (contrasting breadth of BACT requirement with relative narrowness of other PSD provisions).

3. Petitioners fail to show that "each pollutant subject to regulation" does not include greenhouse gases.

Finally, the Vehicle Rule plainly made greenhouse gases a pollutant "subject to regulation," thus requiring BACT in a PSD permit. *See* 42 U.S.C. §§ 7475(a)(4), 7479(3). State Petitioners argue that PSD permits may regulate only air pollutants for which a NAAQS has been promulgated, State Br. 63, but, if that had been Congress's intent, it would have required PSD permits to impose BACT for "each air pollutant subject to a NAAQS." As noted above (pp. 39-43), Congress frequently limited the scope of various PSD provisions, and its failure to include the limitation that Petitioners advocate cannot be ascribed to mistake or inadvertence.

Moreover, *Alabama Power* made it clear that PSD permits are not limited to NAAQS pollutants. It ruled that a PSD permit is required to establish BACT for "any pollutant regulated under the act." 636 F.2d at 353 n.60.[12] It also gave a specific example of a non-NAAQS pollutant—"excluded particulates"—to which BACT would apply in a PSD permit if EPA established an emission standard for that pollutant under a separate program of the Act governing new stationary sources. *Id*. at 370 n.134.

C. Even if the Statute Were Ambiguous, EPA's Interpretation Is Reasonable and Therefore Entitled to Deference.

As demonstrated above, EPA's construction of the Act is consistent with, and indeed compelled by, the statute's plain language. But even if there were any room for ambiguity on that score, EPA's construction of the Act is at least

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[12] As discussed above (pp. 35-39), Industry Petitioners argue that greenhouse gases are not an air pollutant for purposes of the PSD program. But, in *American Chemistry Council*, many of the Industry Petitioners here argued to this Court that, although a source's emissions of greenhouse gases do not trigger PSD permitting, "a source that otherwise triggers PSD permitting" would be required to adopt BACT for greenhouse gas emissions. Joint Industry Pets.' Reply Brief at 10 (*Am.Chem.Council*:1320046). That argument is inconsistent with the position that Industry Petitioners take here. Regardless, the interpretation that "each pollutant subject to regulation," 42 U.S.C. § 7475(a)(4), could encompass greenhouse gases for the purposes of requiring BACT, while the broader phrase "any air pollutant," 42 U.S.C. § 7479(1), could not encompass them for the purposes of requiring a PSD permit, is untenable. *See Ala. Power*, 636 F.2d at 353 n.60 (noting greater breadth of the latter provision).

reasonable and therefore entitled to deference under *Chevron*. First, as demonstrated, that construction is firmly based in the plain statutory language. *See PDK Labs. Inc. v. DEA*, 438 F.3d 1184, 1190 (D.C. Cir. 2006) ("Even at *Chevron*'s second step, we begin with the statute's language."); *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 299 (D.C. Cir. 2003) ("[T]he language of [the statute] plainly admits of the [FCC]'s interpretation, and it therefore is a permissible construction of the statute.").

Second, EPA's interpretation is consistent with, and was crafted in light of, this Court's comprehensive *Alabama Power* decision, issued shortly after the Act was amended to include the PSD program. As discussed above (pp. 38-44), *Alabama Power* construed the Act to mandate its application to emitters of non-NAAQS pollutants and to require BACT for non-NAAQS pollutants that are subject to regulation under the Act. It was at least reasonable for EPA to follow *Alabama Power*'s construction of the Act.

Third, EPA's approach is also consistent with the statute's purposes. Congress did not limit the PSD program to NAAQS pollutants, but enacted a program broadly applicable to air pollutants "notwithstanding" attainment of NAAQS, *see* 42 U.S.C. § 7470(1), and included among the broad purposes of this program avoidance of actual or potential adverse effects on "welfare," which, as

noted, are defined under the Act to include "climate" impacts. *Id.* §§ 7470(1), 7602(h).

The soundness of EPA's longstanding interpretation of the Act is underscored by the facts that the interpretation is codified in regulations adopted contemporaneously with the enactment of the relevant statutory provisions and, in relevant respects, has remained in place consistently for more than thirty years. *See Alaska Dep't of Envtl. Conserv. v. EPA*, 540 U.S. 461, 487 (2004) ("[w]e normally accord particular deference to an agency interpretation of longstanding duration") (quotation marks omitted). Indeed, Petitioners' interpretation would significantly restrict the categories of pollutants covered by the PSD requirements, and would exclude pollutants that have long been covered by the program. *See* EPA Br. 102.

Moreover, EPA's interpretation of "subject to regulation" earned an implicit ratification in the 1990 amendments to the Act, when Congress exempted "hazardous air pollutants" from the PSD program and created alternative permitting requirements for them. 42 U.S.C. § 7412(b)(6). There would have been no reason for Congress to exclude hazardous air pollutants from the PSD program if that program had covered only NAAQS pollutants because hazardous air pollutants cannot be covered by a NAAQS, *see id*. §§ 7412(b)(6), 7473(a), 7476(a). Congress's legislation in light of EPA's "longstanding admin-

istrative construction" "enhance[s]" the deference due to that interpretation. *See Chemehuevi Tribe of Indians v. Fed. Power Comm'n*, 420 U.S. 395, 409-10 (1975).

In addition, for decades the primary implementers of the PSD program, the States, including all State Petitioners here, have relied upon EPA's longstanding interpretation requiring emitters in any attainment area to comply with BACT for any pollutant subject to regulation, regardless of whether the pollutant is subject to a NAAQS. *See*, *e.g.*, Ala. Admin. Code § 335-3-14-.04(2)(ww) (SIP defining "regulated NSR pollutant" to include non-NAAQS pollutants, such as a pollutant subject to a standard promulgated under 42 U.S.C. § 7411); Neb. Admin. Code, tit. 129, ch. 1, § 131 (SIP defining "regulated NSR pollutant" to include non-NAAQS pollutants). That consistent interpretation is important to Intervenor States, who are responsible for administering the complex and critically important air pollution control programs established by the Act.

In sum, even if there were any ambiguity in the statute, EPA's interpretation is plainly reasonable and entitled to deference.

III. EPA PROPERLY DECIDED TO PHASE IN IMPLEMENTATION OF PSD AND TITLE V REQUIREMENTS FOR GREENHOUSE GASES TO AVOID ADMINISTRATIVE IMPOSSIBILITIES.

The Tailoring Rule applies PSD and Title V permitting requirements to greenhouse gases starting with the largest emitters. To avoid administrative gridlock for EPA and state permitting agencies, EPA deferred the application of the permitting requirements to more numerous, smaller sources and set enforceable deadlines to complete analysis of whether potential streamlining or other strategies can make issuing permits to those sources administratively possible. Under this phased approach, EPA has applied the PSD and Title V permitting requirements to eighty-six percent of the greenhouse gas emissions from new and modified stationary sources, while preventing administrative paralysis. *See* 75 Fed. Reg. at 31,571.

Petitioners do not contest the impossibility of the administrative tasks identified by EPA. Nor do they contest that the Tailoring Rule effectively addresses those challenges. Instead of attacking the Tailoring Rule itself, Petitioners' fundamental argument is that EPA should have reinterpreted the PSD and Title V provisions to exclude greenhouse gases altogether. State Br. 49-51; Industry Br. 40-41. But, as also shown above (pp. 31-47), EPA correctly determined that those provisions cover greenhouse gases.

The Tailoring Rule enables EPA and the States to implement the PSD and Title V programs for a high-volume pollutant without the administratively impossible task of managing a permit load that would have increased by three orders of magnitude with six months' notice. 75 Fed. Reg. at 31,577-78. Intervenors are States and environmental groups that strongly support full implementation and vigorous enforcement of critical environmental and public health laws like the Clean Air Act. They do not lightly support agency action that departs from full implementation of statutory requirements. *See, e.g.*, *New York*, 443 F.3d at 880; *Sierra Club v. EPA*, 719 F.2d 436 (D.C. Cir. 1983); *Ala. Power*, 636 F.2d at 356. But Intervenors support EPA's administrative necessity rationale in this unusual and specific instance because (1) the problems to which EPA is responding are real and well-documented; (2) the agency has structured the Tailoring Rule to quickly require permitting from the large new and modified sources that emit the vast bulk of the total greenhouse gas emissions potentially subject to permitting, thereby hewing to the statutory mandate as closely as currently possible; and (3) an attempt by EPA to cover smaller sources at the outset would create a presently insurmountable implementation challenge for EPA and the States. *See NRDC v. Costle*, 568 F.2d 1369, 1379 (D.C. Cir. 1977). The public's interest in minimizing the risk of enormous harm from greenhouse gases is best served by a functional permitting system that immediately ensures that the

largest sources act to reduce their emissions while EPA works to identify methods to proceed toward full implementation as quickly as possible.

A. The Administrative Necessity Doctrine Provides Sufficient Authority for EPA to Phase In Implementation of PSD and Title V Requirements as Applied to Greenhouse Gas Emissions.

While EPA has justified the Tailoring Rule on three separate grounds, EPA's action is fully justified on the basis of administrative necessity, and can be upheld on that ground alone.[13] *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 658 (D.C. Cir. 1989); *see also* EPA Br. 57-76 (discussion of all three grounds). EPA has made clear that the administrative necessity doctrine is sufficient to support the Tailoring Rule. *See* 75 Fed. Reg. at 31,541 ("each of these doctrines provides independent support for our action"); *id.* at 31,576; EPA Br. 57.

Invoking the administrative necessity doctrine under the unique circumstances of this case is consistent with this Court's recognition that EPA has a responsibility to implement the Clean Air Act in a workable manner. *Alabama Power*, discussing the PSD program, recognized the agency's potential need to "cope with the administrative impossibility of applying the commands of the substantive statute." 636 F.2d at 357-60. The Court recognized that "certain

[13] EPA also relied on the absurd results and one-step-at-a-time doctrines. 75 Fed. Reg. at 31,516.

limited grounds for the creation of exemptions are inherent in the administrative process, and their unavailability under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent to foreclose them." *Id.* at 358.

If the alternative is a wholesale failure to implement provisions of the statute, the impossibility of administrative demands may in certain rare circumstances compel departure from statutory language while the administrative impossibility continues. Those rare circumstances may exist when, for instance, the administrative requirements of implementing statutory duties far exceed an agency's capacity, *see Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968), or agency funds are too constrained to cover all persons eligible for a statutory entitlement, *Morton v. Ruiz*, 415 U.S. 199, 230-31 (1974).

The bar for invoking the administrative necessity doctrine is properly high, and requires that four criteria be met. First, the doctrine is available only when compliance with the statute is actually impossible. *Sierra Club*, 719 F.2d at 463; *see also Ala. Power*, 636 F.2d at 359-60. The burden of making this showing is especially heavy when the agency is predicting implementation challenges rather than seeking relief after a good-faith implementation effort. *Ala. Power*, 636 F.2d at 359; *Sierra Club*, 719 F.2d at 463. Second, the agency must demonstrate the factual basis for its determination of administrative impossibility. *See EDF v.*

EPA, 636 F.2d 1267, 1283 (D.C. Cir. 1980) (criticizing failure to quantify the amount of PCBs "left unregulated" by EPA exemption); *see also Sierra Club*, 719 F.2d at 462. Third, an agency may depart from a statute only to the "minimum extent necessary to realize the general objectives of the Act." *NRDC*, 568 F.2d at 1379; *see also Sierra Club*, 719 F.2d at 464 (suggesting methods not considered by agency to reduce administrative burdens and emphasizing agency's responsibility to seek out new methods as it "gains experience in the field"). Finally, an agency may depart from a statute only so long as the administrative necessity continues, and the agency retains an ongoing obligation to take action to eliminate the barriers to implementation. *See NRDC v. Train*, 510 F.2d 692, 712, 714 (D.C. Cir. 1974).

Each of those criteria is met here. EPA has demonstrated on the record that the Tailoring Rule responds to an actual administrative impossibility. EPA estimates that in 2011, the demand for PSD permits would have increased from 688 per year to over 81,000, 75 Fed. Reg. at 31,540, requiring an increase in work hours to process permits from 151,000 to nearly twenty million annually. *Id.* Similarly, the annual demand for Title V permits would have swelled from 14,700 facilities to approximately six million facilities, a 400-fold increase, requiring an increase of over 340 million work hours per year. *Id.* at 31,536. Such increases are unmanageable for EPA and state permitting agencies. *See id*. at 31,516 (impossible to implement at statutory levels before 2016), 31,576 (applying at

statutory thresholds renders PSD program impossible for permitting authorities to administer). The Supreme Court has recognized that this scale of challenge presents an impossibility. *See Dupont v. Train*, 430 U.S. 112, 132-33 (1977) (suddenly-triggered case-by-case review of effluent limits of tens of thousands of permit applications is an "impossible burden").

EPA has also provided evidence showing that its phased approach to resolving the administrative burden adheres as closely as currently possible to Congress's intent to protect public health and welfare while covering the lion's share of greenhouse gas emissions from new and modified stationary sources and securing immediate emissions reductions from the largest sources of pollution. *See* 75 Fed. Reg. at 31,534-36. Finally, EPA recognized that it may depart from statutory requirements "no more than necessary to render the requirements administrable," *id*. at 31,517, and created an enforceable commitment to thoroughly search for options to reduce the administrative impossibilities and to determine, at a specific and reasonable time, whether the administrative necessity continues. 40 C.F.R. §§ 52.22(b)(1), 70.12(b)(1); 75 Fed. Reg. at 31,586-88.

B. Contrary to Petitioners' Objections, the Administrative Necessity Doctrine Is Available to EPA Under These Circumstances.

Petitioners portray the administrative logjam EPA faces as a problem of its own making. Industry Br. 15-21; State Br. 19, 43-53. But, as discussed above (pp. 31-44), the statute requires EPA to apply PSD permitting to greenhouse gases once they are regulated. It is the statutory threshold levels as applied to a pollutant emitted in exceptionally high volumes that create the administrative challenges. Industry Petitioners attempt to analogize this case to *Alabama Power*, where the Court remanded EPA's permanent exemption of small sources from certain PSD requirements. Industry Br. 16. But the Court did so because the exemption had been the result of EPA's erroneous interpretation of the term "potential to emit," 42 U.S.C. § 7479(1), to refer to a source's projected emissions without air pollution controls. The Court reversed that interpretation, ruling that EPA had erred by "hypothesizing the absence of air pollution control equipment designed into the source." *Ala. Power*, 636 F.2d at 353. And, because EPA had exempted smaller sources to cope with the large number of sources covered by that erroneous interpretation, the Court found that its reversal of the interpretation rendered the dispute over the exemption "academic." *Id.* at 355, 357.

Nevertheless, recognizing that administrative challenges might still arise under a correct interpretation of the statute, the Court provided guidance regarding

the narrow extent of EPA's powers to depart from full implementation of a statute when absolutely required for reasons of administrative impossibility. *Id*. at 357.[14] Thus, the Court anticipated that there could be circumstances where, as here, the statutory provisions, correctly interpreted, give rise to administrative impossibility, at least for an initial period. Contrary to Petitioners' argument, the administrative necessity challenge here does not spring from an erroneous interpretation of the statute. As anticipated in *Alabama Power*, this is a case where the administrative impossibility flows directly from correct application of the Act's plain language.

Petitioners argue that, because EPA assumes that Congress did not anticipate that the PSD program would apply to sources as small as those now covered by the statutory thresholds, EPA may not invoke the administrative necessity doctrine here. Industry Br. 41; State Br. 56-58. But the touchstone is the statutory text, and as described above (pp. 31-44), both EPA and this Court in *Alabama Power* concluded more than thirty years ago that the statute requires PSD permits for all regulated pollutants, which now includes greenhouse gases. As a result, EPA has the responsibility to implement those requirements for greenhouse gases without allowing the program to fall into administrative gridlock.

[14] The Court also warned that EPA is not empowered to make the type of cost/benefit analysis that Petitioners, throughout the briefing of these three related cases, have suggested EPA should have undertaken. *Ala. Power*, 636 F.2d at 361; *see also* Industry Br. 56-57; Joint Industry Pets. Br. at 19-20 (Vehicle: 1311526).

State Petitioners suggest that EPA "has no plans" to fully implement the statutory thresholds. State Br. 53. Even if that were true, State Petitioners would not be injured. And, even if there were a petitioner with standing to make that challenge, it would be premature because EPA has not yet made any such decision. Petitioners overlook the fact that EPA has established enforceable dates for completing its assessment of potential solutions to administrative impossibility. 40 C.F.R. §§ 52.22(b)(1), 70.12(b)(1) (July 1, 2012 for third phase); 52.22(b)(2)(ii), 70.12(b)(2)(ii) (April 30, 2016 for fourth phase). Those analyses have not yet been undertaken and any dispute over the results has not yet arisen. *See* 75 Fed. Reg. at 31,578 (discussing possibility, in the future, that EPA may not be able to fully resolve administrative challenges.)

Industry Petitioners also argue that the administrative necessity doctrine does not permit EPA to adopt exemptions prospectively or to "fundamentally transform" the PSD program. Industry Br. 20-21 & n.3. But as discussed above (pp. 51-52), *Alabama Power* recognizes that agencies sometimes need to invoke the administrative necessity doctrine prospectively. In this case, where EPA and States face the impossibility of managing a dramatic increase in the number of permits to be issued, invoking the doctrine prospectively is appropriate.

Nor does the Tailoring Rule fundamentally transform the PSD program. EPA merely adopts an approach that allows implementation of the statutory

permitting requirements without creating permitting gridlock. Sources subject to regulation are required to follow the same elements of the PSD program that have been in place for decades. The program itself is not transformed but preserved. Indeed, it is Petitioners, not EPA, that seek to reverse the long-standing statutory interpretation that has governed the program for decades.

Industry Petitioners admit that the administrative necessity doctrine would be available if EPA concluded that Congress intended the PSD program to apply to greenhouse gases but found that implementation at statutory thresholds is impossible. Industry Br. 41. This is, in fact, precisely the situation here. As discussed above (pp. 31-44), Congress intended the PSD program to cover all pollutants subject to regulation under the Act. And, as Petitioners do not contest, the administrative challenges that result from greenhouse gases' high emissions volume are impossible to meet at this time. Faced with a statutory mandate to implement the PSD program, EPA had the choice of ignoring an impossible situation for both itself and for State permitting agencies, or invoking the administrative necessity doctrine to phase in regulation as quickly as possible while hewing as close as possible to the plain language. EPA followed the path permitted by law.

IV. EPA PROPERLY USED ITS SIX-COMPOUND DEFINITION OF GREENHOUSE GASES IN THE PSD AND TITLE V PROGRAMS.

In the Endangerment Finding and the Vehicle Rule, EPA defined "greenhouse gases" as a single "air pollutant" consisting of six compounds, because those compounds share physical characteristics, including long atmospheric lives and tendency to trap heat, among other similarities. 75 Fed. Reg. at 31,519, 31,528; 74 Fed. Reg. at 66,517-18. Industry Petitioners contend that EPA acted unlawfully by "includ[ing] all six [greenhouse gases] in the PSD program," since two of the compounds—perfluorocarbons and sulfur hexafluoride—are not emitted by the motor vehicles targeted in the Vehicle Rule. Industry Br. 56. As an initial matter, Industry Petitioners fail to allege that anyone they represent is injured by the inclusion of those two compounds and, as discussed above (p. 24), "a plaintiff must demonstrate standing for each claim he seeks to press," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

In any event, as EPA explains, the PSD provisions apply to the "*pollutant* subject to regulation," and the pollutant regulated by the Vehicle Rule is greenhouse gases, as defined by EPA. EPA Br. 128-31. Petitioners' argument confuses the regulated "air pollutant" with its constituent agents. *See* Industry Br. 56.

Nor is there any question that EPA's definition of greenhouse gases is reasonable. Under the definition of "air pollutant" that applies throughout the Act, a pollutant may include a "combination" of air pollution agents, 42 U.S.C. § 7602(g), and is not based on specific pollution sources.[15] It was reasonable for EPA to define greenhouse gases to reflect the shared environmentally significant characteristics of six compounds, rather than adopting a shifting variety of definitions geared to the particular source categories.

V. THE TAILORING RULE COMPLIES WITH THE PROCEDURES MANDATED BY THE ACT.

A. Industry Petitioners' State Implementation-Related Claims Are Not Properly Before the Court.

Industry Petitioners—but not State Petitioners—argue that the Tailoring Rule is unlawful because it called on States to start issuing PSD preconstruction permits covering greenhouse gases as of January 2011 even though, at the time the Rule was promulgated, not all the States' SIPs authorized them to do so and the Act gives those States three years to revise their SIPs. Industry Br. 48-49.

[15] Some of the most familiar pollutants regulated under the Act, such as particulate matter and volatile organic compounds, are combined pollutants consisting of many distinct compounds with common characteristics, not all of them emitted by every category of sources regulated for the air pollutant. *See*, *e.g.*, Br. of State, City, & Envtl. Intervenors at 51 (Endangerment:1330161).

Industry Petitioners also argue that EPA improperly imposed a "construction moratorium" pending such SIP revisions. *Id*. at 51-53. Those claims should not be heard here because they involve separate administrative actions—the SIP Call and FIP Rule—that are the focus of separate cases pending before the Court, nor do Industry Petitioners have standing to raise them.

The Tailoring Rule took no action regarding SIPs, but merely requested that States notify EPA how they intended to implement the PSD requirements with respect to greenhouse gases and recognized that a handful of States would need to amend their SIPs. 75 Fed. Reg. at 31,582-83. The SIP Call imposed the requirement that States desiring to be the permitting authorities for greenhouse gases amend their SIPs, and any challenge to that requirement should be heard in the cases challenging the SIP Call, consolidated under No. 11-1037, not here.

Even if this case properly involved the SIP regulations, Industry Petitioners lack standing to raise any claim regarding the deadlines imposed on States because, as discussed above (p. 12), the SIP Call and FIP Rule benefit Industry Petitioners by preventing any gap in PSD permitting authority. And Industry Petitioners cannot rely for standing on State Petitioners because State Petitioners do not raise that claim here. *See Warth v. Seldin,* 422 U.S. 490, 499 (1975).

Industry Petitioners also do not have standing to raise their claim regarding a "construction moratorium" because they have not alleged that any moratorium has

in fact occurred or even is likely to occur, or that they have been unable to obtain a PSD permit in any State because its SIP is inadequate. Nor would there be basis for such allegations, because EPA and the States have ensured that there is no gap in legally compliant permit programs. *See* State & Envtl. Intervenors' Joint Response in Opp'n to Stay at 24-26 & Exs. 1-19 (Timing/Tailoring:1274851); EPA Resp. in Opp'n to Stay, Ex. 13 (Timing/Tailoring: 1274569); *see also* 75 Fed. Reg. 82,430 (Dec. 30, 2010) (finalizing FIP to provide federal permitting authority in Texas).

B. Industry Petitioners' State Implementation-Related Claims Fail on the Merits.

Even if Industry Petitioners' claims were properly before the Court, they fail on their merits. Industry Petitioners claim that section 110(a)(1) of the Act, 42 U.S.C. § 7410(a)(1), mandates that States have three years to revise their SIPs, but that three-year period, which the Administrator has the discretion to vary, applies only when EPA promulgates a NAAQS. By contrast, when a SIP must be revised "to otherwise comply with any requirements" of the Act, the following provision applies:

> The Administrator shall notify the State of the inadequacies [through a SIP Call] and may establish reasonable deadlines (*not to exceed 18 months* after the date of such notice) for the submission of such plan revisions.

42 U.S.C. § 7410(k)(5) (emphasis added). The one-year deadline in the SIP Call is clearly within the range contemplated by that provision.

Industry Petitioners also argue that the Tailoring Rule improperly "amends existing EPA-approved PSD SIPs to impose a moratorium." Industry Br. 52. As discussed above (pp. 9-12), the Tailoring Rule does not impose any new PSD permit requirements. Instead, it phases in the new greenhouse gas requirements imposed by the operation of the Act itself, which prohibits construction or modification of a major stationary source absent a PSD permit. 42 U.S.C. § 7475(a)(1). Thus, even if there had actually been a construction moratorium, it would have occurred as a result of the Act, not the Tailoring Rule.

Industry Petitioners also argue that section 168(b) of the Act, 42 U.S.C. § 7478(d), requires EPA to impose new PSD requirements "so as to avoid any interruption in preconstruction permitting." Industry Br. 51. That section expressly addresses permits only for facilities "on which construction was commenced" between June 1, 1975 and August 7, 1977, 42 U.S.C. § 7478(b), so it does not apply here.

Industry Petitioners' reliance upon *Citizens to Save Spencer County v. EPA*, 600 F.2d 844 (D.C. Cir. 1979), is also misplaced. The issue there was whether EPA had properly resolved through regulation a conflict between sections 165 and 168, 42 U.S.C. §§ 7475 and 7478, that appeared to establish inconsistent effective

dates for implementation of the 1977 PSD requirements. Because section 168 is inapplicable here, no similar conflict exists and section 165 governs. Indeed, the Court found in *Citizens* that section 165 "by its terms explicitly and without qualification prohibits the construction of any major pollution-emitting facility after 7 August 1977 unless the substantive requirements of that section have been met with regard to that facility." *Id.* at 853.

C. Cost-Benefit Considerations Play No Part In Determining Whether PSD Permitting Applies.

Industry Petitioners maintain that EPA may not apply PSD requirements to greenhouse gas emissions unless it has weighed the costs and burdens the program might impose. Industry Br. 56-57. But, as shown above (pp. 31-44), EPA has no authority to consider such factors before PSD permitting requirements are triggered: Congress determined that PSD permitting applies to major stationary sources emitting regulated air pollutants over the statutory thresholds, 42 U.S.C. §§ 7475(a), 7479(1), and EPA has no leeway to deviate from its duty to implement Congress's policy choice. EPA Br. 133-34.

Moreover, the Act places the responsibility on permitting authorities (whether States or EPA) to weigh costs and other statutory factors on a case-by-case basis in each permit proceeding when determining BACT. 42 U.S.C. §§ 7479(3) (permitting authority establishes BACT taking into account "energy,

environmental, and economic impacts and other costs"), 7475(a)(4). It is there that Congress intended the costs of the permit to be weighed and determined, and not at a national level before PSD permitting commences. Whether PSD permitting applies in the first place is not a choice Congress left in the agency's hands.

CONCLUSION

For the reasons stated above, the petitions for review should be dismissed for lack of jurisdiction or, if the Court reaches the merits, denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 13,981 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

/s/ Oren L. Zeve
Oren L. Zeve