ORAL ARGUMENT NOT YET SCHEDULED

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

No. 10-1073 (Lead) and Consolidated Cases (Complex)

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

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

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

BRIEF FOR RESPONDENTS

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DATE: September 16, 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Respondents acknowledges that Petitioners' Briefs sets out the parties, rulings and related cases. In addition, Respondents note *Utility Air Regulatory Group v. EPA*, D.C. Circuit Case No. 11-1037, and the cases consolidated therewith (the "SIP/FIP Challenge"), as a related case (*see* description at p. 34 of Respondents' Brief).

CORPORATE DISCLOSURE STATEMENT

Respondents are a government agency and the Administrator of said agency for which a corporate disclosure statement is not required.

So certified this 16th day of September, 2011, by

/s/ Perry M. Rosen
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GLOSSARY

PARTIES

Petitioner-States: All parties appearing through "Brief of State Petitioners and Supporting Intervenor," Dkt. 1314199

Petitioner-Industry: All parties appearing through "Joint Opening Brief of Non-State Petitioners and Supporting Intervenors," Dkt. 1314204

THE CHALLENGED EPA RULE AND ACTION

Tailoring Rule: "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010)

Timing Decision: "Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs," 75 Fed. Reg. 17,004 (April 2, 2010)

RELATED EPA RULES AND ACTIONS

Endangerment Finding: "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule," 74 Fed. Reg. 66,496 (December 15, 2009)

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)

FIP Rule: "Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan," 75 Fed. Reg. 82,246 (Dec. 30, 2010)

SIP Call: "Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule," 75 Fed. Reg. 77,698 (Dec. 13, 2010)

1978 Rule: "Requirements for Preparation, Adoption, and Submittal of Implementation Plans, Prevention of Significant Air Quality Deterioration," 43 Fed. Reg. 26,380, and "Part 52 – Approval and Promulgation of State Implementation Plans," 43 Fed. Reg. 26,388 (June 19, 1978)

1980 Rule: "Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans," 45 Fed. Reg. 52,676 (Aug. 7, 1980)

2002 Rule: "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects," 67 Fed. Reg. 80,186 (Dec. 31, 2002)

RELATED CASES BEFORE THIS COURT

Endangerment Case: D.C. Circuit Case No. 09-1322, challenging the Endangerment Finding

Historic Regulation Challenge: D.C. Circuit Case No. 10-1167, challenging the 1978, 1980 and 2002 Rules

SIP/FIP Challenge: D.C. Circuit Case No. 11-1037, challenging the SIP Call and FIP Rule

Vehicle Case: D.C. Circuit Case No. 10-1092, challenging the Vehicle Rule

TERMS

Act: Clean Air Act, 42 U.S.C. §§ 7401-7671q

BACT: Best Available Control Technology

CAA: Clean Air Act, 42 U.S.C. §§ 7401-7671q

CO_2e: Carbon dioxide equivalent

EPA: Environmental Protection Agency

FIP: Federal Implementation Plan

GHGs: Greenhouse gases

GWP: Global Warming Potential

HAPs: Hazardous air pollutants

NAAQS: National Ambient Air Quality Standards

NNSR: Nonattainment New Source Review

NSPS: New Source Performance Standards

PSD (PSD Program): Prevention of Significant Deterioration, 42 U.S.C. §§7470-7492

RTC: Response to Comments

SIP: State Implementation Plan

TPY: Tons per year

TITLE V: 42 U.S.C. §§ 7661-7661f

JURISDICTIONAL STATEMENT

The Petitions for Review in this case challenge an agency interpretation, "Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs," 75 Fed. Reg. 17,004 (April 2, 2010) (the "Timing Decision"), and a regulation, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010) (the "Tailoring Rule"), each issued in 2010 by Respondent Environmental Protection Agency ("EPA"). These challenged administrative actions significantly ameliorate the burdens imposed on stationary sources that emit greenhouse gases, predominantly by phasing-in the statutory requirements of two permitting programs established under the Clean Air Act, 42 U.S.C. §§7401-7671q ("CAA" or "Act"): Prevention of Significant Deterioration, 42 U.S.C. §7470-7492 ("PSD program"), which requires pre-construction permits for new and modified stationary sources emitting air pollutants at or above a designated threshold; and Title V of the Act, 42 U.S.C. §7661-7661f ("Title V"), which requires operating permits for stationary sources emitting pollutants at similar levels.

While Petitioners ostensibly challenge the validity of the two above-described regulatory pronouncements, their core claim is that the underlying statutory programs, PSD and Title V, do not in fact apply to the emission of

greenhouse gases by stationary sources (the "applicability" issue). The Court, however, lacks jurisdiction to address Petitioners' argument that PSD is inapplicable to newly-regulated pollutants such as greenhouse gases, because that very issue was decided by EPA in regulations issued in 1978, 1980 and again in 2002 – and, in fact, was confirmed by this Court in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). Under the express terms of 42 U.S.C. §7607(b)(1), which demands that petitions for review be filed within sixty days of a challenged regulatory determination, Petitioners' principal claim is untimely and may not be reconsidered by the Court, regardless of the fact that the earlier determinations of the Agency (and this Court) may now affect a new set of regulated entities.

What the Court *would* have jurisdiction to address under §7607(b)(1) is the effect of the *regulatory* actions actually being challenged: EPA's determination in the Timing Decision that greenhouse gases did not become regulated pollutants under the Act until January 2, 2011 (as opposed to earlier suggested dates); and EPA's decision in the Tailoring Rule to phase-in the statutory thresholds at which stationary sources become subject to PSD and Title V, by raising those thresholds significantly during the initial steps of the implementation process. But on these issues Petitioners patently lack standing. Because both of the challenged regulatory actions relieve or delay burdens that would otherwise fall on Petitioners, they are not injured by these agency actions. Indeed, vacating these actions (the

relief sought by Petitioners) would not only fail to redress Petitioners' purported injury, it would increase their injury by, in their own words, orders of magnitude. It is for that reason that a number of Petitioners in this case have simultaneously intervened *in support of* both the Timing Decision and the Tailoring Rule.

The Court also lacks jurisdiction to address Petitioners' claim that States must be given three years to implement PSD requirements for greenhouse gases. Actions taken by EPA to ensure that State Implementation Plans are revised, as necessary, to ensure their compliance with the CAA's requirement to cover greenhouse gases, were taken through later-promulgated rules that are not before the Court in this case. Finally, the Court lacks jurisdiction to address a number of Petitioners' claims that the Tailoring Rule is procedurally defective.

The jurisdictional and standing defects in Petitioners' claims are fatal and the Court thus need not reach the merits of their claims. Ordinarily, EPA would present such jurisdictional issues as its first argument. However, because EPA believes that an understanding of Petitioners' specific merits arguments will aid the Court's evaluation of these dispositive jurisdictional issues, and because recitation and discussion of those arguments in a preliminary jurisdictional section would lead to needless duplication of argument, EPA's discussion of these jurisdictional

flaws is presented in conjunction with the Agency's response to each of Petitioners' specific substantive claims.[1]

STATEMENT OF THE ISSUES

In the event the Court determines it has jurisdiction over Petitioners' claims and that Petitioners have standing to raise those claims, the substantive issues presented are the following:

1. The PSD program and Title V both *expressly* require permits for all stationary sources with the potential to emit at or above the established thresholds of "any air pollutant" within the ambit of the CAA, and the PSD program further requires emission controls for "each pollutant subject to regulation under this chapter [the CAA]." Given these express statutory requirements, the fact that the Supreme Court has expressly declared that greenhouse gases are an "air pollutant" covered by the CAA, and the fact that emissions of greenhouse gases are now regulated under Title II of the Act governing mobile sources and are thus a pollutant regulated under the CAA, may greenhouse gas emissions nevertheless escape regulation under PSD and Title V?

[1] Although the challenged Agency actions in this case apply equally to the PSD program and to Title V, Petitioners' arguments for circumventing statutory requirements focus almost exclusively on PSD. Accordingly, EPA focuses its responsive brief on the application of the PSD program. However, as noted throughout this brief, many of the legal doctrines and agency findings supporting EPA's actions under the PSD program apply equally to Title V.

2. In phasing in the statutory emission thresholds at which a stationary source would become subject to the permitting requirements of PSD and Title V for the emission of greenhouse gases – thereby relieving millions of sources from the burdens of these permitting requirements for the present time – did EPA properly invoke the well-established doctrines of administrative necessity, one-step-at-a-time regulatory application, and/or absurd results?

3. Is the *Tailoring Rule* invalid because, in a separate set of regulatory actions promulgated six months *after* the Tailoring Rule, EPA called upon a limited number of States to amend their State Implementation Plans to reflect the application of the PSD program to greenhouse gases, giving them up to one year to complete those amendments if they so chose?

4. Is the Tailoring Rule invalid because EPA did not grandfather sources not already regulated under PSD, when it was not required to do so under the CAA or any current regulations and, in any event, when it afforded such sources thirteen months to commence construction without obtaining permits addressing their greenhouse gas emissions?

5. Is the definition of "greenhouse gases" used in the Tailoring Rule, which includes six constituent heat-trapping gases, invalid even though it includes the identical six gases that EPA found in its Endangerment Finding to cause or

contribute to endangerment of public health or welfare and the identical six gases that EPA regulated under Title II of the CAA governing mobile sources?

6. Is the Tailoring Rule invalid for failure to include adequate analyses of the Rule's economic impacts, even though the CAA provides EPA no discretion to decline to apply PSD to major stationary sources based on the economic impacts of such application *and* where EPA nevertheless did an extensive study of the economic impacts of the application of PSD and Title V to greenhouse gases, both with and without the Tailoring Rule?

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in Petitioners' briefs, the Addendums thereto, and in EPA's Addendum.

STATEMENT OF THE CASE

The Supreme Court has made it abundantly clear in two recent decisions that greenhouse gases fit squarely within the definition of "air pollutant" and thus are covered by the operative provisions of the CAA, including specifically those governing *stationary* sources. The Court has further explained that once EPA determines that greenhouse gases cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare – a finding that EPA has now made – EPA is required to regulate greenhouse gases under the express terms of the Act. Accordingly, on May 7, 2010, EPA issued its "Vehicle Rule,"

which regulates the emission of greenhouse gases from certain types of vehicles, which are governed under Title II of the CAA. 75 Fed. Reg. 25,324 (May 7, 2010).[2]

Stationary sources of air pollutants are, in turn, governed by various programs under the CAA. Two of these programs, PSD and Title V, require stationary sources to obtain construction and operating permits, respectively, if they have the potential to emit "any air pollutant " over an established threshold, 42 U.S.C. §§7475(a), 7479(1), 7661a, 7602(j), a requirement that EPA has long applied to any air pollutant actually subject to regulation under the Act. In order to obtain a PSD construction permit a source must, among other things, install the best available control technology ("BACT") to control "each pollutant subject to regulation under this chapter [the CAA]." 42 U.S.C. §7475(a)(4). Accordingly, once greenhouse gases became subject to regulation through the Vehicle Rule, stationary sources of this newly regulated pollutant became subject to PSD and Title V *by operation of statute*.

Under the express terms of the CAA, sources emitting greenhouse gases became subject to PSD and Title V in two significant respects. First, any stationary source that already is subject to PSD permitting requirements by virtue

[2] The Vehicle Rule is being challenged in Case No. 10-1092 ("Vehicle Case") and EPA's "Endangerment Finding" is being challenged in Case No. 09-1322 ("Endangerment Case"), both of which have been coordinated with the present action.

of its emissions of *non*-greenhouse gas pollutants must implement BACT to limit its greenhouse gas emissions (the "BACT requirement"). Second, a source not already subject to PSD (or Title V) may require a permit under that program if its proposed construction or modification project (or its operations under Title V) will emit greenhouse gases at or above the statutory thresholds.

Admittedly, the specific statutory thresholds Congress established – 100 or 250 tons per year ("tpy") – pose significant implementation difficulties when applied to greenhouse gases. Combustion processes at stationary sources result in emissions of greenhouse gases that are vastly greater than such sources' emissions of other pollutants regulated under the CAA. As a consequence, applying the requirements to obtain PSD and Title V permits for sources emitting greenhouse gases over the statutory thresholds of just 100/250 tpy would result in coverage of millions of additional sources, thereby presenting overwhelming regulatory burdens. At least until streamlined permitting programs are developed, these burdens would inundate not only EPA but also State permitting authorities and regulated sources, resulting in billions of dollars in implementation costs and years of delay in sources being able to obtain the required permits. These unmanageable burdens do not, however, exist with regard to the application of BACT to sources already subject to PSD permitting by virtue of their non-greenhouse gas emissions.

Accordingly, relying both on its express statutory authority to promulgate regulations to administer these programs, and on this Court's well-recognized precedents that permit an agency to phase-in regulatory programs in a manner that is administratively achievable, EPA promulgated the Tailoring Rule. With regard to sources already covered by PSD, Step 1 of the Tailoring Rule ensures that the BACT requirement is applied on the date PSD first becomes applicable to greenhouse gases, January 2, 2011. As to the application of PSD and Title V to newly regulated sources, Step 2 of the Tailoring Rule ensures that these sources require a permit on July 1, 2011, at an initial significantly elevated threshold, thereby relieving the overwhelming regulatory burdens on both permitting authorities and literally millions of stationary sources. Even, however, as the Tailoring Rule provides such significant regulatory relief to States and sources, the Rule captures approximately 86% of the emissions of greenhouse gases that would be captured by immediate, full application of the statutory 100/250 tpy threshold.

Notwithstanding the express statutory requirements of PSD and Title V, Petitioners assert that these programs simply do not cover greenhouse gas emissions – either to determine if a permit is required or even for applying BACT to sources *already* subject to PSD by virtue of their non-greenhouse gas emissions. Petitioners contend that PSD is limited to only the six pollutants for which EPA has promulgated a national ambient air quality standard ("NAAQS"), which does

not include greenhouse gases. But EPA made it clear decades ago that the unambiguous language of the CAA requires the automatic application of the PSD program to *any* pollutant that is regulated under *any* provision of the Act, not merely to those few pollutants for which EPA has established NAAQS.

In the face of these historical pronouncements, Petitioners contend that the clear mandate of PSD and Title V to cover any air pollutant regulated under the CAA must be somehow modified because EPA determined in the Tailoring Rule that the immediate application of the literal statutory 100/250 tpy threshold would lead to "absurd results" in the administration of the statutory permitting requirements. But this finding of absurd results concerned only the overall *administration* of the PSD and Title V programs, not the *application* of those programs to stationary sources of greenhouse gases. A finding that there are significant hurdles in administering the large potential volume of permit applications that need to be addressed does not allow EPA to ignore Congress's directive to, in the first instance, apply PSD and Title V to sources that emit "any air pollutant" regulated under the Act.

Petitioners offer a number of alternative "interpretations" of the Act's PSD provisions which they claim would allow EPA to avoid the significant administrative burdens associated with requiring additional sources to obtain permits based on their greenhouse gas emissions. Petitioners accomplish this feat,

however, by "interpreting away" Congress' express requirement that PSD apply to sources based on emissions of "any air pollutant" regulated under the Act and that covered sources satisfy substantive criteria applicable to "each pollutant subject to regulation under [the Act]." Indeed, by focusing on NAAQS pollutants, Petitioners' "solution" to the identified administrative burdens would relieve even sources already required to obtain PSD permits from having to limit greenhouse gas emissions. Moreover, Petitioners' "solution" would ensure that virtually no new pollutants regulated under the CAA – not just greenhouse gases – would become subject to PSD, *regardless* of whether their regulation would result in significant administrative burdens. Petitioners' "solution" would, in fact, require EPA to revoke regulations that have long applied PSD to a number of non-NAAQS pollutants. And Petitioners' "solution" does not even purport to apply to the permitting requirements under Title V.

EPA is not permitted to ignore a statutory command of Congress simply because the application of that directive causes EPA and the States administrative difficulty in processing additional permit applications. Instead, as this Court has explained through the adoption of three separate doctrines that affirmatively allow an agency to divert from the literal language of a statute, there is a permissible path forward when administrative difficulties prevent full compliance with the statute's literal terms: an agency may phase-in its application of new regulatory

requirements to ensure they are implemented in a manner consistent with congressional intent. Applying these well-recognized doctrines here, EPA phased-in the permitting requirements of PSD and Title V for greenhouse gas emissions so that Congress' directive to cover all air pollutants, which the Supreme Court has unmistakably declared includes greenhouse gases, can be manageably administered.

STATEMENT OF FACTS

I. The Emission of Greenhouse Gases From Stationary Sources

The air pollutant described as "greenhouse gases" is comprised of six gases that are emitted by human activities: carbon dioxide; methane; hydrofluorocarbons; perfluorocarbons; nitrous oxide; and sulfur hexafluoride. 75 Fed. Reg. at 31,518-19. Because these gases have different heat-trapping capacities and atmospheric lifetimes, they are often measured in tons of carbon dioxide equivalents ("CO_2e"), a metric based on each gas's comparative global warming potential ("GWP"). *Id.* Thus, for example, while one ton of carbon dioxide equals one ton of CO_2e, one ton of methane equals 21 tons of CO_2e. *Id.*

Stationary sources produce the majority of greenhouse gas emissions in the United States. 75 Fed. Reg. at 31,519/1. Because the predominant contributor to greenhouse gas emissions is the burning of fossil fuels (accounting for 80% of

greenhouse gas emissions), the majority of stationary source greenhouse gases are emitted by power plants and other fuel-intensive industries. *Id.*

The impacts on our climate resulting from the emission of greenhouse gases were detailed in EPA's separate Endangerment Finding. 74 Fed. Reg. 66,496 (Dec. 15, 2009). These impacts include: "increases in heat-related deaths; coastal inundation and erosion caused by melting icecaps and rising sea levels; more frequent and intense hurricanes, floods, and other 'extreme weather events' that cause death and destroy infrastructure; drought due to reduction in mountain snowpack and shifting precipitation patterns; destruction of ecosystems supporting animals and plants; and potentially 'significant disruptions' of food production." *Am. Elec. Power Co. v. Connecticut ("AEP v. Connecticut")*, 131 S.Ct. 2527, 2533 (citing 74 Fed . Reg. at 66,524-35).

II. Statutory Background

Congress enacted the CAA, 42 U.S.C. §§7401-7671q, in 1970 to "respond[] to the growing perception of air pollution as a serious national problem," *Alabama Power*, 636 F.2d at 346, by establishing a comprehensive program for controlling and improving the Nation's air quality. *NRDC v. Gorsuch*, 685 F.2d 718, 720-21 (D.C. Cir. 1982). The CAA itself explains that it was enacted to address "the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles

[which] has resulted in mounting dangers to the public health and welfare...." 42 U.S.C. §7401(a)(2). Thus, the Act is designed "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. §7401(b)(1).

A. The PSD Program

As part of the 1977 amendments to the CAA, Congress codified the PSD program under "Part C" of Title I of the Act, 42 U.S.C. §§7470-7479, which requires pre-construction permitting of stationary sources of air pollutants. A significant portion of the PSD program is directed to the maintenance of NAAQS. EPA has written NAAQS for six specific pollutants (referred to as "criteria pollutants" or "NAAQS pollutants"). 42 U.S.C. §§7407-7410. The PSD program, among other things, requires EPA to develop regulations that impose requirements for the control of NAAQS pollutants emitted by new or modified sources located in NAAQS "attainment" or unclassified areas. 42 U.S.C. §§7475(a)(1),(3).

In addition to these NAAQS-derived requirements, the PSD program requires preconstruction permits for sources emitting specific amounts of "any air pollutant" regulated under the CAA. More specifically, a "major emitting facility" may not initiate construction or make major modifications to an existing facility in any area covered by the PSD program, i.e., in any area that is in attainment or unclassified for *any* NAAQS (*see* discussion, *infra*), without first obtaining a PSD

permit. 42 U.S.C. §7475(a)(1). The PSD provisions define the "major emitting facility" subject to this permitting requirement as any stationary source that emits or has the potential to emit more than 100 or 250 tpy (depending on the type of source) of "*any* air pollutant," 42 U.S.C. §7479(1) (emphasis added), and apply to any "modification" of a facility, which is defined as a change "which increases the amount of *any* air pollutant." 42 U.S.C. §§7479(2)(C), 7411(a)(4) (emphasis added).

To obtain a PSD permit the applicant must, among other things, apply the "best available control technology ['BACT'] for *each pollutant subject to regulation under this chapter [the CAA]*." 42 U.S.C. §7475(a)(4) (emphasis added). *See also* 42 U.S.C. §7479(3) (emphasis added) (defining BACT as "an emission limitation based on the maximum degree of reduction of *each pollutant subject to regulation under this chapter [the CAA]*...."). The same substantive provision of PSD also requires an analysis of the effects of a source's emissions "for each pollutant *subject to regulation under this chapter [the CAA]* emitted from such facility." 42 U.S.C. §7475(e)(1) (emphasis added). This direction by Congress that the substantive criteria that must be met to obtain a PSD permit shall apply to *each pollutant* once it is actually *subject to regulation* under the Act, has been adopted by EPA in its regulations defining when a source must obtain a PSD permit under §7475(a). 40 C.F.R. §52.21(b)(50)(iv) (defining regulated NSR

pollutant to include "[a]ny pollutant that otherwise is subject to regulation under the Act."); §51.166(b)(49)(iv) (same); §52.21(b)(1) (definition of "major stationary source"); §52.21(b)(2) (definition of "major modification").

B. The Title V Program

Title V of the CAA, enacted in 1990, establishes an operating permit program covering stationary sources of air pollutants. 42 U.S.C. §§7661-7661f. Similar to PSD, the Title V operating permit requirement applies to, among others, any "major source" within the meaning of 42 U.S.C. §7661(2), including stationary sources that have the potential to emit 100 tpy of "any air pollutant." 42 U.S.C. §7602(j). Like PSD, EPA has long interpreted this requirement to apply to any air pollutant that is actually subject to regulation under the Act. 75 Fed. Reg. at 31,553-54.

Title V does not impose substantive pollution control requirements of its own. Instead, Title V requires that each source have a comprehensive operating permit to ensure compliance with all emissions limits and requirements applicable through other provisions of the CAA. 42 U.S.C. §7661c(a). Each State's Title V program must contain procedures for expeditiously processing permit applications. 42 U.S.C. §§7661a(b)(6), 7661b(c).

C. Implementation of CAA Requirements for Stationary Sources

Although Congress and EPA establish the air quality standards and emission control requirements to which sources must adhere, the CAA requires the States to implement many of these requirements, including PSD requirements, through state implementation plans ("SIPs"). 42 U.S.C. §7410(a)(2)(J); 40 C.F.R. §51.166. While States are afforded flexibility in how to meet some of the requirements of the CAA, the standards set by States may never be less stringent than the CAA and EPA's implementing regulations, and all SIP provisions must be approved by EPA. 42 U.S.C. §7410(k)(1)(A).

EPA can instruct a State to revise its SIP where it is inadequate to meet the requirements of the CAA, through what is commonly referred to as a "SIP Call." 42 U.S.C. §7410(k)(5). If a State fails to submit a SIP that conforms to the requirements of the PSD provisions, EPA must issue a Federal Implementation Plan ("FIP") that applies within that State until a SIP that complies with CAA requirements is approved. 42 U.S.C. §7410(c); 40 C.F.R. §52.21(a)(1). Title V generally is not implemented through SIPs. Instead, each State has its own approved Title V program, listed at 40 C.F.R. part 70, App. A, which must meet minimum CAA requirements. 42 U.S.C. §7661a.

III. Application of the Clean Air Act to Greenhouse Gases Emitted by Stationary Sources

As outlined above, the key (and disputed) provisions of Part C of Title I expressly state that the PSD program applies to the emissions of "any air pollutant," 42 U.S.C. §7479(1), and that BACT applies to "each pollutant regulated under this chapter [the CAA]." 42 U.S.C. §7475(a)(4). Based on this language, from the very outset of the PSD program – and consistently over the last thirty-three years – EPA has stated that the provisions of the PSD program cover *any* pollutant, once that pollutant is regulated under *some* provision of the Act.

Following the enactment of PSD in 1977, EPA promulgated regulations to implement the provisions of the PSD program. 43 Fed. Reg. 26,380 and 26,388 (June 19, 1978) ("1978 Rule"). These rules provided that all "major stationary sources" were subject to the PSD program, and defined "major stationary sources" as those that emit "any air pollutant regulated under the Clean Air Act" in amounts above the statutory thresholds. 43 Fed. Reg. at 26,382; 26,403. That rulemaking further explained that a pollutant would be deemed to be regulated under the Act, and therefore a source would be required to implement BACT for that pollutant, once any regulation was issued governing

> criteria pollutants subject to NAAQS review, pollutants regulated under the Standards of Performance for new Stationary Sources (NSPS), pollutants regulated under the National Emissions Standards for Hazardous Air Pollutants (NESHAP) *and all pollutants regulated*

> *under Title II of the Act regarding emissions standards for mobile sources.*

Id. at 26,397 (emphasis added). Thus, the 1978 Rule expressly contemplated the very application of PSD that Petitioners challenge here and assert is a novel "game-changer" – application of PSD to non-NAAQS pollutants by virtue of the regulation of greenhouse gas emissions from vehicles under Title II.

One year later, in 1979, this Court overturned certain of the provisions contained in EPA's comprehensive PSD regulations. The Court nevertheless read the PSD provisions at issue in this case to apply to *any* air pollutant. *Alabama Power*, 636 F.2d at 352 (noting that section 7479, which defines the sources required to obtain a permit under section 7475, "is *not pollutant-specific*, but rather identifies sources that emit more than a threshold quantity of *any air pollutant*."); *id.* at 406 ("Section [7475], in a litany of repetition, provides *without qualification* that each of its major substantive provisions shall be effective after 7 August 1977 with regard to *each pollutant subject to regulation under the Act.*") (emphasis added).

Partially in response to this Court's ruling in *Alabama Power*, EPA issued new regulations in 1980. 45 Fed. Reg. 52,676 (Aug. 7, 1980) ("1980 Rule"). There, EPA confirmed once again that "PSD review will apply to any source that emits *any* pollutant in major amounts" that is subject to regulation under another provision of the Act, so long as the project is to be constructed in an area that is in

attainment with the NAAQS "for *any* criteria pollutant." 45 Fed. Reg. at 52,710-11 (emphasis added).

Then, in 2002, EPA issued another rulemaking confirming its previous declarations about the breadth of pollutants covered by PSD, revising its regulatory terminology, and affirming that additional regulatory action is not necessary to make a pollutant subject to PSD, since "[t]he PSD program applies *automatically* to newly regulated NSR pollutants." 67 Fed. Reg. 80,186, 80,240/1, (Dec. 31, 2002) ("2002 Rule") (emphasis added). Under the revised terminology, PSD applies to a regulated NSR [New Source Review] pollutant, which is defined to include a NAAQS pollutant, any pollutant regulated under NSPS under 42 U.S.C. §7411, an ozone-depleting pollutant regulated under Title VI of the CAA, *or* "any other pollutant that is subject to regulation under the Act." *Id.* at 80,264; 40 C.F.R. §52.21(b)(50). Thus, the 1978-2002 Rules made clear that PSD applies *automatically* to all pollutants regulated under some provision of the Act *and* that PSD is *not* limited to NAAQS pollutants or to sources in an attainment area for the pollutant being regulated.[3]

[3] Recognizing that these regulatory pronouncements bar Petitioners from making their claims that PSD may only be triggered by emissions of a NAAQS pollutant in an area in attainment for that pollutant, a subset of Petitioners have belatedly – very belatedly – filed a separate challenge to EPA's 1978-2002 regulations. *See* D.C. Circuit case No. 10-1167 (the "Historic Regulation Challenge"). That challenge will be heard by the same panel assigned to this case.

While greenhouse gases and their impacts have been a matter of concern for years, these gases were not definitively determined to be an air pollutant covered by the CAA until the Supreme Court resolved that issue affirmatively in 2007. In addressing this issue, the Court looked to the definition of "air pollutant," which is defined as "any air pollution agent or combination of such agents ... which is emitted into or otherwise enters the ambient air." *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007) ("*Massachusetts")*. The Court found that the "statutory text" of the CAA forecloses any reading that might exclude greenhouse gases from its regulatory sphere, focusing specifically on the fact that Congress expressly declared that the Act covers "*any* air pollution agent." *Id.* at 528-29 (emphasis in original and noting the repeated use of the word "any" by Congress).

This view was recently reiterated by the Supreme Court in a case dealing specifically with *stationary* sources. Explaining that "the Clean Air Act, 42 U.S.C. §7401 *et seq*., authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases," the Court found it "equally plain that the Act 'speaks directly' to emissions of carbon dioxide from the defendants' [power] plants." *AEP v. Connecticut*, 131 S.Ct. at 2532, 2537.

The Supreme Court's determination that greenhouse gases are a pollutant covered by the CAA, did not, in and of itself, subject greenhouse gases to regulation under the Act. Under the terms of Title II, before it was obligated to

regulate emissions of greenhouse gases from vehicles, EPA had to determine that such emissions cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare. *Massachusetts*, 549 U.S. at 533. On December 15, 2009, EPA made its Endangerment Finding, concluding that atmospheric concentrations of the six heat-trapping gases that together form "greenhouse gases" are reasonably anticipated to endanger public health and welfare of current and future generations. 74 Fed. Reg. at 66,496.

As Petitioners readily admit, once EPA made its Endangerment Finding, "the Clean Air Act *requires* the Agency to regulate emissions of the deleterious pollutant from new motor vehicles." State Br. 12, quoting *Massachusetts*, 549 U.S. at 533 (emphasis in original).[4] *See also* 42 U.S.C. §7521(a)(1). Accordingly, on May 7, 2010, EPA issued the "Vehicle Rule," which establishes controls on the emission of greenhouse gases from new light-duty vehicles. 75 Fed. Reg. 25,324.

As outlined *supra*, the regulation of greenhouse gases from vehicles under Title II of the CAA meant these gases became a pollutant regulated under the Act, thereby making the provisions of PSD and Title V *automatically* applicable to stationary sources of that pollutant. No further action was required – *nor was any*

[4] The brief filed by the State Petitioners (Dkt. 1314199) is referred to herein as "State Br." The brief filed by the Non-State Petitioners (Dkt. 1314204) is referred to as "Industry Br."

action taken – by EPA to make the PSD and Title V provisions of the CAA applicable to the greenhouse gas emissions of stationary sources.

IV. The Challenged Regulatory Actions

EPA issued the two actions being challenged in this case, the Timing Decision and the Tailoring Rule, in order to clarify and address the application of the PSD and Title V programs to stationary sources that emit greenhouse gases. As noted, neither the Timing Decision nor the Tailoring Rule is the causative factor of the regulation of greenhouse gases under PSD and Title V. To the contrary, both of these regulatory measures ameliorate – or at least partially postpone – the application of PSD and Title V permitting requirements to greenhouse gas emissions generated by stationary sources.

A. The Timing Decision

EPA issued the Timing Decision after reconsideration of an interpretation of EPA regulations issued by EPA Administrator Johnson in 2008. JA XXX (the "Johnson Memo"). The Johnson Memo explained that as a matter of practice EPA has not historically applied the PSD program to pollutants that are only subject to monitoring and reporting requirements. *Id.* at 1. Accordingly, the Johnson Memo clarified that a pollutant becomes "subject to regulation" under the PSD program only when EPA promulgates a regulation that actually requires control or limitation of emissions of that pollutant, not merely monitoring or reporting of the

amount emitted. *Id.* Greenhouse gases were not covered by any regulation of this nature at the time the Johnson Memo was issued, and thus greenhouse gases were not subject to PSD in 2008.

In the Timing Decision EPA reaffirmed the Johnson Memo's finding that a pollutant is not "subject to regulation," and thus not subject to PSD requirements, until a statutory or regulatory provision requires "actual control" of emissions of that pollutant. 75 Fed. Reg. at 17,004-06, citing 40 C.F.R. §52.21(b)(50). EPA also partially revised one aspect of its earlier pronouncement, concluding that a regulation actually controls emissions when the control requirement becomes applicable to the regulated activity, as opposed to the date the regulation is promulgated. *Id.* at 17,015-16. Applying this finding to greenhouse gases, EPA noted that greenhouse gas control requirements in the Vehicle Rule did not take effect until January 2, 2011, so it is on that date that greenhouse gases would become "subject to regulation" and thereby covered by PSD and Title V requirements. *Id.* at 17,019/3, 17,023/3.

EPA explained that the question of precisely *when* a pollutant became "subject to regulation" was an issue on which Congress had not precisely spoken and thus was a question to which EPA had to apply its discretion. *Id.* at 17,006-07. This was not true, however, with regard to *whether* any pollutant that is subject to regulation under the CAA, including greenhouse gases, is automatically covered

by PSD. As EPA explained: "While EPA may have discretion as to the manner and time for regulating GHG emissions under the CAA, once EPA has determined to regulate a pollutant in some form under the Act and such regulation is operative on the regulated activity, the terms of the Act make clear that the PSD program is automatically applicable." *Id.* at 17,020/2-3. This conclusion was based on EPA's longstanding regulations (outlined above) describing such automatic application. *See e.g., id.* at 17,021-22 ("It has been EPA's consistent position since 1978 that regulation of a pollutant under Title II triggers PSD requirements for such a pollutant."). Similarly, with respect to Title V, EPA stated that "its [prior] interpretation of the applicability of Title V" to newly regulated pollutants "remains sound" in the context of greenhouse gas regulation. *Id.* at 17,023. Thus, the Timing Decision did not establish – or even consider – whether greenhouse gases could be regulated under PSD or Title V; that had already been determined by the plain language in the Act and confirmed by EPA's 1978-2002 regulatory actions.

B. The Tailoring Rule

The application of BACT for greenhouse gas emissions to sources that would be already subject to PSD by virtue of that source's *non*-greenhouse gas emissions as of January 2, 2011, the date greenhouse gas became a regulated air pollutant, did not pose significant administrative problems. 75 Fed. Reg. at

31,568. Simply put, these sources (termed "anyway sources" in the Tailoring Rule) were *already* required to obtain permits; thus, no new permits would be added to the system on account of such sources. However, as explained in the Timing Decision, the immediate and full application of PSD and Title V permitting requirements for stationary sources emitting greenhouse gases above the statutory thresholds on January 2, 2011, likely would cause "significant administrative and programmatic considerations." 75 Fed. Reg. at 17,023/3.

EPA studied and considered the breadth and depth of the projected administrative burdens in the Tailoring Rule. There, EPA explained that immediately applying the literal PSD statutory threshold of 100/250 tpy to greenhouse gas emissions, when coupled with the "any increase" trigger for modifications under 42 U.S.C. §§7479, 7411(a)(4), would result in annual PSD permit applications submitted to State and local permitting agencies to increase nationwide from 280 to over 81,000 per year, a 300-fold increase. 75 Fed. Reg. at 31,535-40, 31,554. Following a comprehensive analysis, EPA estimated that these additional PSD permit applications would require State permitting authorities to add 10,000 full-time employees and incur additional costs of $1.5 billion per year just to process these applications, a 130-fold increase in the costs to States of administering the PSD program. *Id.* at 31,539/3. Sources needing operating permits would jump from 14,700 to 6.1 million as a result of application of Title V

to greenhouse gases, a 400-fold increase. When EPA assumed a mere 40-fold increase in applications – one-tenth of the actual increase – and no increase in employees to process them, the processing time for Title V permits would jump from 6-10 months to ten years. Hiring the 230,000 full-time employees necessary to produce the 1.4 billion work hours required to address the actual increase in permitting functions would result in an increase in Title V administration costs of $21 billion per year. *Id.* at 31,535-40, 31,577.

Based on this analysis, EPA found that applying the literal statutory thresholds (100/250 tpy) on January 2, 2011, would "overwhelm[] the resources of permitting authorities and severely impair[] the functioning of the programs...." 75 Fed. Reg. at 31,514. After considerable study and receipt of public comment, EPA determined that by phasing in the statutory thresholds, it could almost immediately achieve most of the emission benefits that would result from strict adherence to the literal 100/250 tpy threshold while avoiding the permit gridlock that unquestionably would result from the immediate application of that threshold. This phase-in process would also allow EPA time to develop streamlining measures that could eventually ease administration at the statutory thresholds. *Id.* at 31,517/1. Thus, EPA promulgated the Tailoring Rule to "phase[] in the applicability of these programs to GHG sources, starting with the largest GHG

emitters." *Id.* at 31,514. This phased-in permitting process occurs pursuant to a series of steps that transpire on a designated schedule.

During Step 1, which began on January 2, 2011, no source is required to obtain a PSD permit because of its greenhouse gas emissions. Instead, only a source that already requires a PSD permit by virtue of its emissions of non-greenhouse gases already covered by the PSD program (a so-called "anyway" source) must address its greenhouse gas emissions. Even then, it need do so only if its new construction project will have the potential to emit 75,000 tpy of greenhouse gases on a carbon dioxide equivalent (CO_2e) basis or it modifies its facility resulting in a net increase of 75,000 tpy CO_2e (and any increase on a mass basis). 75 Fed. Reg. at 31,523-24. Such "anyway" sources generally meet their PSD requirements by implementing BACT, and EPA determined that application of the BACT requirement to anyway sources "can be implemented efficiently and with an administrative burden that is manageable." 75 Fed. Reg. at 31,568. Because it found no immediate impediment to implementing PSD applicability for "anyway" sources, EPA was able to implement Step 1 on the effective date of the application of PSD to greenhouse gases, January 2, 2011.[5]

[5] Although applying BACT to anyway sources does not present the unmanageable burdens associated with the permitting of new sources, EPA set a BACT threshold of 75,000 tpy CO_2e, largely to ensure consistency with sources that would be regulated under Step 2. 75 Fed. Reg. at 31,568.

During Step 2, which began on July 1, 2011, a source is subject to PSD permitting requirements for greenhouse gases if: (a) it meets the standards established in Step 1 as an "anyway" source; or (b) it emits over the statutory thresholds of greenhouse gases (100/250 tpy) on a mass basis[6] and also has the potential to emit over 100,000 tpy CO_2e (or 75,000 net tpy CO_2e for a modification project). *Id.* at 31,523/3. The steps are generally similar for Title V, with sources not already subject to Title V becoming subject at Step 2 if they have the potential to emit over the mass basis threshold and over 100,000 tpy CO_2e. *Id.*

These measures will greatly reduce both the overwhelming administrative burden on State permitting authorities and the costs to both permitting authorities *and* sources of preparing and reviewing additional permit applications, while causing comparatively little reduction in the volume of greenhouse gas emissions subjected to emissions controls. For example, at Step 2, only about 15,550 sources are projected to require PSD or Title V permits (an increase of only 550 above the 15,000 sources already required to obtain such permits based on *non*-greenhouse gas emissions), as compared to 6.1 million sources under the statutory thresholds. This would result in increased permitting costs to all State authorities of about $105 million per year, as compared to increased permitting costs of $22.5 billion

[6] Although not likely to often occur, it is possible for a project in Step 1 or 2 to exceed the CO_2e threshold (100,000/75,000 tpy) without exceeding the statutory (mass) threshold (100/250 tpy), because of the GWP multiplier. 75 Fed. Reg. at 31,522/2.

per year applying the statutory threshold. *See* chart at 75 Fed. Reg. at 31,540. The Step 2 measures also relieve permit applicants (stationary sources) of nearly $50 billion per year in Title V compliance permitting costs under the tailored thresholds and another $5.5 billion under the PSD program. *Id.* at 31,597-99. Notwithstanding the massive reduction in the number of sources covered under the tailored thresholds, those thresholds still cover the vast majority of greenhouse gases emitted from stationary sources, because they cover the largest emitters, who are responsible for the vast bulk of domestic greenhouse gas emissions. Thus, at Step 2, where we are presently, 86% of the greenhouse gas emissions that would be covered using the 100/250 tpy statutory thresholds are projected to be covered under the 75,000/100,000 tailored thresholds. *Id.* at 31,571.

The 75,000/100,000 tpy thresholds established for Steps 1 and 2 are not permanent. In the Tailoring Rule EPA committed to additional rulemakings which could result in those thresholds being reduced to as low as 50,000 tpy CO_2e through April 2016 and even further after that date. 75 Fed. Reg. at 31,579, 31,523/1. In Step 3 of the phase-in process, EPA will use the experience gained in administering the program to issue a new regulation by July 1, 2012 (to be effective July 1, 2013). In that regulation, EPA will address and potentially implement various streamlining options designed to reduce the administrative

burdens associated with application of PSD and Title V at the statutory thresholds. *Id.* at 31,526, 31,586-88.[7]

Finally, EPA will conduct a five-year study of the administration of the PSD and Title V programs to greenhouse gases which will lead to a Step 4 rulemaking by April 30, 2016. In that rulemaking EPA will address what action can be taken with regard to sources that have the potential to emit greenhouse gases in amounts above the statutory threshold but below the then-existing tailored threshold. *Id.* at 31,525. Thus, the Tailoring Rule is calculated to move toward eventual full compliance with the statutory threshold, unless, notwithstanding EPA's significant efforts at further reducing the administrative burdens through streamlining and other actions, impossibility of full administrative implementation persists at that time. 75 Fed. Reg. at 31,517-18, 31,522/1.

V. Implementation of the Tailoring Rule at the State Level

As noted, application of PSD and Title V to greenhouse gases occurs by operation of the provisions of the CAA, but PSD is administered through SIPs and/or FIPs. EPA recognized that the provisions of a limited number of States' SIPs might not, without amendment, allow those States to issue complete PSD

[7] Streamlining may include, e.g., general permits and/or presumptive BACT for certain categories of sources and electronic and truncated permitting requirements. EPA will also assess whether Title V "empty permits" (operating permits that are not tied to a substantive CAA requirement) need to be obtained. 75 Fed. Reg. 31,517/3, 31,526/2.

permits addressing greenhouse gases necessary for a source to commence construction or to apply the tailored thresholds. *Id.* at 31,526. Accordingly, six months after issuing the Tailoring Rule, EPA finalized separate rules to specifically address this issue.

The first such rule was EPA's "SIP Call" related to greenhouse gases, 75 Fed. Reg. 77,698 (Dec. 13, 2010) ("SIP Call"), which contained a determination that the existing SIPs of thirteen States were insufficient as presently worded to cover greenhouse gases in their PSD permitting. As a result, greenhouse-gas emitting sources in those States would remain subject to PSD, but neither the State nor EPA would have sufficient authority to issue complete PSD permits to those sources. The SIP Call thus "called" on those States to revise their SIPs to come into compliance with the statutory requirements of PSD and the tailored thresholds in EPA's revised regulations.

EPA proposed that the thirteen States subject to the SIP Call should submit corrective revisions of their SIPs within one year. 75 Fed. Reg. 53,892 (Sept. 2, 2010). In order, however, to guard against a gap in the availability of a permitting authority while the State prepared its SIP revision, EPA explained that covered States could, if they so chose, request a much shorter deadline, as early as December 22, 2010. *Id.* If a State chose December 22, 2010 as its deadline and did not submit the required SIP revision by that date, EPA would, as authorized by

42 U.S.C. §7410(c), immediately issue a FIP for the State. The FIP would take effect by January 2, 2011 and thereby "fill the gap" to prevent a lapse in PSD permitting for greenhouse gas permitting in the State in question. *Id.* at 53,901, 53,904-05.

Five of the thirteen States that were the subject of the SIP Call generally indicated that they would be able to amend their SIPs in time to avoid any significant permitting gap. Seven of the remaining States (all except Texas) chose not to object to December 22, 2010 as their SIP revision date, and, as expected, did not submit a SIP revision by that date. 75 Fed. Reg. 81,874 (Dec. 29, 2010). So there would be a FIP in place by January 2, 2011 for these seven States as promised, EPA issued its FIP for greenhouse gases just prior to that date. 75 Fed. Reg. 82,246 (Dec. 30, 2010) ("FIP Rule").[8]

Asserting that the SIP Call and the FIP Rule interfere with what they claim is the statutory right of States to take up to three years to amend their SIPs – and for sources and States to ignore statutory PSD greenhouse gas requirements in the

[8] Texas was given a full year to amend its SIP. Through a separate rulemaking particular to that State, a FIP now provides a Federal permitting authority in Texas until Texas amends its SIP. *See* 75 Fed. Reg. 82,430 (Dec. 30, 2010), which Texas is challenging in a separate action before this Court. Case No. 10-1425.

interim – a subset of Petitioners have challenged the SIP Call and FIP Rule in separate cases pending before this Court.[9]

SUMMARY OF ARGUMENT

The Supreme Court has held unequivocally that greenhouse gases constitute an air pollutant covered by the CAA, including by provisions applicable to stationary sources. Giving only grudging acknowledgement to this holding, Petitioners assert that what is true for the CAA as a whole, is not true for the two permitting programs applicable to stationary sources, PSD and Title V. However, the express wording of the PSD and Title V provisions, EPA's long-standing regulations, and this Court's precedent belie Petitioners' attempts to carve out exemptions for greenhouse gases that do not exist.

Congress made it overwhelmingly clear that the determination of whether a source requires a PSD or Title V permit shall be based on emissions of "any air pollutant." From the outset of the PSD program EPA made it clear, through express regulations, that an air pollutant in this context needed to at least be regulated under *some* provision of the CAA in order to be covered by PSD. This prerequisite, which is fully supported by Petitioners, ensures consistency between criteria defining sources that require permits and the substantive criteria that must be met to obtain a PSD permit. *See e.g.*, 42 U.S.C. §7475(a)(4) (the BACT

[9] *See* Case No. 11-1037, which consolidates various SIP Call and FIP challenges ("SIP/FIP Challenge").

provision, which requires control technologies to be applied for "each pollutant subject to regulation under this chapter [the CAA]"); 7475(e)(1) (requiring the permit applicant to analyze air quality "for each pollutant subject to regulation under this chapter….).

Consistent with the relevant PSD provisions, EPA expressly confirmed the applicability of PSD to *any* pollutant regulated under the Act, including specifically all non-NAAQS pollutants, in regulations issued in 1978, 1980 and 2002. Because a party is required to challenge such a determination within sixty days of its publication in the Federal Register, 42 U.S.C. §7607(b), the Court lacks jurisdiction to address Petitioners' claim that PSD is inapplicable to the particular pollutant with which they are concerned, greenhouse gases.

Petitioners seek to circumvent the earlier pronouncements of EPA – and this Court – by creating a fiction: that the Timing Decision affirmatively applied PSD and Title V to greenhouse-gas emitting sources, and that the Tailoring Rule somehow reopened the issue of the *applicability* of PSD to non-NAAQS pollutants, such as greenhouse gases. But the Timing Decision simply identified the date on which PSD and Title V first applies to greenhouse gas emissions by operation of statute and the Tailoring Rule did nothing more than establish a staged process for *administering* the permitting requirements for PSD and Title V for greenhouse gases. Neither the Timing Decision nor the Tailoring Rule revisited

the applicability issue decided by EPA decades ago and confirmed consistently in subsequent regulations. Petitioners may not now reopen this issue because a new set of sources is affected or because EPA found it necessary to deal with administrative difficulties by phasing-in the programs' requirements.

Even if Petitioners *could* revisit the applicability issue, their claims must be rejected based on the same reasoning already applied by EPA and this Court. Under a *Chevron* step one analysis, PSD and Title V each require permits based on a source's emissions of "any air pollutant" subject to regulation under the CAA. Similarly, the PSD provisions expressly state that BACT shall be applied to "each pollutant subject to regulation under this chapter" and greenhouse gases are now undeniably a "pollutant subject to regulation under [Title II of] this chapter."

Petitioners argue that notwithstanding this clear language, all prior agency and court determinations – and even the facial application of these statutory provisions – must be ignored because of EPA's finding that application of the literal statutory thresholds would lead to "absurd results" in the *administration* of PSD and Title V by greatly expanding the number of sources subject to the permitting requirements. Petitioners champion this finding to assert that the determination of the applicability of PSD to specific pollutants must be considered under a *Chevron* step two analysis, rather than under the *Chevron* step one analysis that has controlled for 30 years. Petitioners' attempt, however, to use EPA's

finding regarding administrative issues as a basis to force EPA to reject the mandate of Congress to cover any pollutant subject to regulation, is wholly unsupportable under *Chevron* step one *or* step two.

First, Petitioners never explain how EPA's determination that absurd results may occur with regard to requiring permits for *new* PSD and Title V sources, would prohibit EPA from requiring BACT for the emission of greenhouse gases from "anyway" sources, which are *already subject to PSD* by virtue of their emissions of non-greenhouse gas pollutants. Indeed, there are no "absurd results" in applying BACT to these 15,000 sources, and EPA has never concluded such. Thus, any argument that EPA's application of PSD is irrational because it would lead to absurd results, has no application whatsoever to the 15,000 anyway sources already subject to PSD's BACT requirement, which expressly applies to "each pollutant subject to regulation under this chapter."

As to the application of the statutory thresholds for which EPA did conclude that immediate application of the literal thresholds would lead to absurd results, Petitioners offer several alternative interpretations of the provisions of PSD (but not Title V) which they claim are more reasonable than EPA's phase-in of the statutory thresholds under the Tailoring Rule. They explain that their interpretations completely avoid the overwhelming administrative burdens (and the absurd results) that follow from strict application of the statutory thresholds to

greenhouse gases. But these "interpretations" avoid those administrative burdens only by applying the statutes in a manner that ensures that greenhouse gases are wholly exempt from regulation under PSD; an interpretation that is in direct contravention to EPA's longstanding regulations implementing PSD and this Court's precedent regarding the scope of that program. Indeed, under Petitioners' "interpretations," PSD would henceforth apply to *no air pollutant*, except for the six NAAQS pollutants already regulated, a result remarkably inconsistent with a program expressly designed to cover all air pollutants subject to regulation.

The problem EPA addressed in the Tailoring Rule is one of administration of a regulatory program; Congress already decided what pollutants are covered by the program. As this Court has explained, when faced with overwhelming burdens in the administration of statutory requirements, or where application of the literal language of a statute would actually subvert congressional intent, the agency does not get to blow-up the statute. Instead, the agency must still apply the statute, and it must do so in a manner that adheres as closely as possible to Congress' intent while assuring that implementation proceeds in a feasible manner. An agency may not use administrative burdens as a license to ignore its regulatory obligations, which is precisely what Petitioners' alternative "interpretations" are designed to do.

Devoid of any alternative "interpretations" that would actually effectuate Congress' expressly stated intent to apply PSD and Title V to sources of any regulated pollutant and require BACT for "each pollutant subject to regulation," Petitioner-States make an astonishing argument. They assert that EPA may not, under *any circumstances*, divert from the literal 100/250 tpy threshold set forth in the PSD and Title V provisions. In Petitioner-States' world, the doctrines of administrative necessity, one-step-at-a-time regulatory enforcement, and absurd results, simply do not exist as solutions to the impossibility of carrying out the literal requirements of a statute. Instead, Petitioner-States create a wholly new remedy, boldly declaring that the application of all elements of the PSD and Title V programs to greenhouse gases is suspended until Congress steps in to establish workable thresholds.

Contrary to Petitioner-States' breathtakingly unsupportable assumption, if the literal statutory thresholds cannot be tailored under the various doctrines relied upon by EPA, EPA may not simply *ignore* its statutory obligation to enforce those thresholds until Congress acts – if it ever does – to change the thresholds or otherwise alleviate the administrative burdens faced by the Agency. Application of the statutory thresholds that Petitioners assert *must* be applied would increase Petitioners' purported injury by orders of magnitude and Petitioners may not craft

a remedy for their purported injury – and thus conjure up their own standing – by engineering a "congressional rescue" remedy that this Court has no power to order.

In addition to the applicability issue, Petitioners launch a collateral attack on EPA's use of the various doctrines upon which it relied in the Tailoring Rule, asserting that EPA has misapplied them. Accordingly, Petitioners seek to vacate both the Tailoring Rule and the Timing Decision. Each of Petitioners' arguments is without merit but in any event they are arguments for which Petitioners lack standing. Like Petitioner-States' "literal thresholds-only" argument, if EPA's reliance on well-recognized doctrines to phase-in the statutory thresholds is deemed improper, the Agency is not free to ignore the mandate of the statute; it must apply the statute as literally written. Since neither the Timing Decision nor the Tailoring Rule caused PSD and Title V to become applicable to greenhouse gases, neither action caused the injury of which Petitioners complain. Indeed, as evidenced by the intervention of various Petitioners in support of the two challenged EPA actions, vacating these actions would only *cause* Petitioners greater injury, not redress their purported injury.

Notwithstanding Petitioners' arguments asserting that EPA has misinterpreted various provisions governing the PSD program, they virtually ignore Title V's application to greenhouse gases. Petitioners simply assert that EPA may not grant an exemption for major sources under Title V and that the

Tailoring Rule creates an exemption in violation of this prohibition. But the Tailoring Rule did not create exemptions for any type of source. Instead, it adopted a process for phasing-in Title V's requirements. Even if it had promulgated an exemption, striking down such a purported "exemption" under Title V would lead right back to application of the statutory thresholds, which under Title V would be immediately applied to over six million sources, thus causing injury to precisely the interests that Petitioners purport to be defending. So once again, Petitioners lack standing to pursue their assault on EPA's regulatory actions.

Using a scattershot approach, Petitioners further allege various procedural flaws that they contend require EPA to go back and fix portions of the Tailoring Rule. These arguments are entirely without merit since in each case EPA's determinations were made in strict adherence with statutory requirements and are based on a full administrative record. Additionally, the Court again lacks jurisdiction to entertain these claims because: (a) there is no private right of action related to failure to perform the economic and other analyses Petitioners claim are lacking; (b) Petitioners lack standing where they make no showing that even a single Petitioner would escape regulation if greenhouse gases included only the four gases emitted by vehicles; and (c) there is no jurisdiction to address procedural flaws where there is no showing of a "substantial likelihood that the

rule would have been significantly changed if such errors would not have been made." 42 U.S.C. §7607(d)(8).

Finally, Petitioners contend that the few States that needed to revise their SIPs to cover greenhouse gases and failed to do so must be given three years to adopt those revisions and, in the interim, may ignore the statutory requirements of the CAA. Once again, this issue is beyond the jurisdiction of this Court in this case, since the actions Petitioners challenge occurred through separate later-enacted regulations (the SIP Call and FIP) that are being challenged in a separate case before this Court. Beyond that, Petitioners' claims have no basis in fact (the SIP Call and FIP *prevent* a construction moratorium, they do not create one) or law (EPA acted well within statutory directives in requiring a SIP amendment within one year).

ARGUMENT

I. STANDARD OF REVIEW

The Timing Decision and the Tailoring Rule can be set aside only if the Court finds that EPA's issuance of these regulatory actions was arbitrary, capricious, an abuse of discretion, beyond its authority or not in accordance with law. 42 U.S.C. §7607(d)(9). In assessing whether EPA correctly applied its statutory obligations in promulgating these actions, the Court first inquires whether Congress "has directly spoken to the precise question at issue," in which case the

Court "must give effect to the unambiguously expressed intent of Congress." *Chevron Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). If the statute is "silent or ambiguous with respect to the specific issue," the Court moves to *Chevron's* second step and must defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." *Id*.

In interpreting a statute's reach and application under *Chevron* step two, considerable deference must be accorded to the interpretation of the agency assigned to administer that statute. In applying that deference, the issue is not whether *petitioners'* interpretations are reasonable. Instead, the *agency's* interpretation must be upheld "if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc*., 129 S.Ct. 1498, 1505 (2009) (emphasis in original).

Petitioner-States assert that *Chevron* deference can only be accorded to an agency's determination where the statute in question affirmatively vests the agency with interpretative discretion over the disputed provision. State Br. 59. This assertion is nonsensical, given that *Chevron* deference applies when a provision is ambiguous. Under Petitioners' reasoning, Congress would purposefully have to create ambiguous statutory provisions and then expressly assign an agency specific authority to interpret those provisions.

Moreover, the two cases relied upon by Petitioner-States for this drastic limitation on the *Chevron* doctrine completely undermine Petitioners' assertion. Relying on *United States v. Mead*, 533 U.S. 218 (2001) and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), Petitioners assert that "the Supreme Court no longer presumes, as it did in *Chevron*, that statutory ambiguity alone presents an implied delegation of interpretive authority to an agency." State Br. 59. Yet, *Brown and Williamson* states: "Deference under *Chevron* to an agency's construction of a statute it administers is premised on the theory that a statute's ambiguity constitutes an *implicit delegation from Congress* to the agency to fill the statutory gaps. [citing *Chevron*]." 529 U.S. at 159 (emphasis added).

In *Mead*, the Court again recognized that *Chevron* deference is to be accorded not only under an explicit delegation of authority but also may be implied based on a number of factors, including ambiguity of a statute the agency is charged with enforcing. 533 U.S. at 229. *Mead* merely explains that there are different types of agency actions and that full *Chevron* deference may not be accorded to agency actions that involve no administrative formality, such as a tariff ruling letter – one that was not subjected to notice and comment, responded to a specific transaction, was not required to be published, and could be modified without notice or comment. In contrast, the Court explained that *Chevron* deference is most appropriate in considering an agency rulemaking that generates a

regulation applicable to all persons, particularly where that rulemaking is subject to notice and comment. 533 U.S. at 229-31. The Tailoring Rule, which generated over 400,000 comments, involved precisely such a proceeding. And, as noted, that Rule was issued under the *express* authority of Congress. *See* 75 Fed. Reg. at 31,516/1, citing EPA's authority under 42 U.S.C. §7601(a)(1).

Moreover, Petitioners' argument that under *Mead* EPA is not entitled to deference is based on EPA's purported interpretation of the phrase "subject to regulation." State Br. 59-61. But EPA interpreted that phrase in the Timing Decision, which, as noted above, only assessed *when* greenhouse gases would be subject to PSD and Title V, not *whether* they are subject to these statutory provisions, which EPA explained had been decided years earlier and was not open to reinterpretation by EPA. Neither the Timing Decision nor the Tailoring Rule relied upon or interpreted the phrase "subject to regulation" with respect to the initial *applicability* of PSD and Title V to greenhouse gases, thus there is no basis to limit EPA's deference with regard to that issue.[10]

In fact, in this case the level of deference to be accorded EPA's interpretation of the various provisions of the PSD program and Title V (assuming

[10] The Tailoring Rule did reflect the higher thresholds in EPA's regulatory definition of "subject to regulation," codified the timing clarifications of the Timing Rule, and, for Title V, codified the long-applied requirement that a pollutant must actually be subject to regulation to be covered. 75 Fed. Reg. at 31,606-08. As noted, for PSD that requirement had been codified years earlier. *See* p. 15, *supra*.

one ever reaches *Chevron* step two) is heightened. While all agencies are entitled to deference when interpreting a statute they administer, particular deference is to be given to an agency's interpretation of a statute that is complex and within the agency's expertise. *Mead*, 533 U.S. at 227-31. The CAA is precisely this type of statute. *NRDC v. EPA*, 571 F.3d 1245, 1251 (D.C. Cir. 2009). *See also AEP v. Connecticut*, 131 S.Ct. at 2533, n.2 (describing the "complicated issues related to carbon dioxide emissions and climate change"). And, when an agency's action involves technical issues or a complex regulatory program, a court applies "an extreme degree of deference." *Huls Am. Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996). *See also St. Luke's Hosp. v. Sebelius*, 611 F.3d 900, 904-05 (D.C. Cir. 2010) ("Our 'broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical regulatory program."'") (citation omitted); *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009).

Moreover, if EPA's prior interpretations of the applicability of PSD as set forth in its 1978-2002 regulations do not absolutely foreclose Petitioners' arguments under 42 U.S.C. §7607(b), they must at the very least be accorded substantial deference. *EDF v. Duke Energy Corp.*, 549 U.S. 561, 575 (2007); *Alaska Dep't of Environmental Conservation v. EPA*, 540 U.S. 461, 487 (2004) ("We 'normally accord particular deference to an agency interpretation of

longstanding' duration.") (citations omitted). And, particular deference should be accorded to an agency interpretation that is generally contemporaneous with the statute being interpreted. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993) ("Of particular relevance is the agency's contemporaneous construction which 'we have allowed ... to carry the day against doubts that might exist from a reading of the bare words of the statute.'" [citations omitted]). The 1978 and 1980 Rules were generally contemporaneous to the enactment of the PSD program in 1977. *See* Industry Br. 34.

II. THE CLEAN AIR ACT REQUIRES THE APPLICATION OF PSD AND TITLE V TO ALL AIR POLLUTANTS SUBJECT TO REGULATION, INCLUDING GREENHOUSE GASES

The Supreme Court has unequivocally determined that greenhouse gases are "air pollutants" covered by the CAA. This conclusion is based in large part on the Act's definition of "air pollutant" set forth at 42 U.S.C. §7602(g), a provision that applies across all provisions of the Act, including PSD and Title V: "The Clean Air Act's sweeping definition of 'air pollutant' includes '*any* air pollution agent or combination of such agents, including *any* physical, chemical … substance." *Massachusetts*, 549 U.S. at 529 (emphasis in original). Making it clear that this expansive definition covers the emission of greenhouse gases, the Court explained that, to the extent one might argue "that Congress did not intend it to regulate substances that contribute to climate change ... [t]he statutory text forecloses [such

a] reading." 549 U.S. at 528. And while *Massachusetts* concerned the application of Title II of the CAA governing vehicles to greenhouse gases, the Court subsequently concluded that the same broad language of the Act governing "any pollutant" meant that greenhouse gas emissions also were covered under provisions of the Act governing stationary sources. *AEP v. Connecticut*, 131 S.Ct. at 2537.

That the PSD and Title V provisions apply to all air pollutants subject to regulation, including greenhouse gases, is evident from the face of the provisions governing these two programs, as they have long been interpreted by EPA and, in the case of PSD, by this Court. As outlined *supra*, the PSD permitting process applies to any "major emitting facility," which Congress specifically defined as a stationary source that emits or has the potential to emit "any air pollutant" over the applicable thresholds. 42 U.S.C. §7479(1). EPA interprets the PSD provisions to mean "[a]ny pollutant … subject to regulation under the Act," 40 C.F.R. §52.21(b)(50)(iv), an interpretation that EPA adopted in 1978, almost immediately after Congress adopted the PSD provisions, and reiterated in rulemakings in 1980 and 2002. *See supra* at18-20. Furthermore, the major substantive provisions of the PSD program, such as the BACT requirement, apply to "each pollutant subject to regulation under this chapter" without qualification. 42 U.S.C. § 7475(a)(4); 42 U.S.C. § 7475(e)(1); *Alabama Power*, 636 F.2d at 406.

Similarly, Title V's permit requirements apply to any "major source," which includes stationary sources that emit or have the potential to emit 100 tpy of "*any air pollutant*." 42 U.S.C. §7661(2); 42 U.S.C. §7602(j) (emphasis added). EPA has adopted the same interpretation for Title V, that its reference to "any air pollutant" means any air pollutant subject to regulation. *See* 75 Fed. Reg. at 31,553. Because both the PSD and Title V applicability provisions are jurisdictional, *Alabama Power*, 636 F.2d at 352, they delineate what sources are subject to PSD and Title V permitting requirements: those that emit over the applicable thresholds of *any* air pollutant that, as per EPA's regulations, are actually regulated under at least some provision of the Act.

Notwithstanding the clear pronouncements of the relevant statutes and the Supreme Court, Petitioner-States assert that the "phrase 'air pollution agent' leaves wiggle room." State Br. 70. They argue that while the definition of "air pollution" can include greenhouse gases under Title II of the CAA governing vehicles, it should not include greenhouse gases under Title I of the Act governing stationary sources. *Id.* First, the "wiggle room" to which Petitioners refer was suggested by Justice Scalia in his dissent in *Massachusetts*. State Br. 70, citing 549 U.S. at 555-60 (Scalia, J, dissenting). That view, however, was soundly rejected by the majority, which held that the "statutory text forecloses" an interpretation of "[t]he Clean Air Act's sweeping definition of 'air pollutant'" that excludes CO_2 and other

greenhouse gases. 549 U.S. at 528-29. Moreover, to the extent there might have been any lingering doubt about whether "any air pollutant" includes greenhouse gases emitted from stationary sources, it was put to rest to by the Court in its 2011 decision in *AEP v. Connecticut*.

In *AEP v. Connecticut*, several of the Petitioners' most prominent constituent members (four utilities that, together with fellow defendant Tennessee Valley Authority, emit 10% of all greenhouse gas emissions in the United States and 2.5% of all anthropogenic emissions worldwide, 131 S.Ct. at 2534), argued to the Supreme Court the exact opposite of what they argue now: that EPA in fact *has* authority to regulate greenhouse gases because it is required to do so under the CAA, and *specifically under PSD*. Defending a nuisance action for damages from global warming allegedly caused in part by their greenhouse gas emissions, these utilities told the Supreme Court that a nuisance cause of action is unavailable because it affects "a subject – carbon dioxide regulation – that is separately addressed by the comprehensive legislative scheme of the Clean Air Act." *AEP v. Connecticut*, Petitioners' Br. 20 (JA XXX). As the utilities explained, it is the Act's provisions governing stationary sources, not EPA's application of those provisions, that requires the regulation of greenhouse gases:

> Through the Clean Air Act, Congress has established a legislative scheme that "speaks directly" to the alleged problem identified in the complaint [emission of greenhouse gases from the defendant utilities] rendering resort to federal common law not only unnecessary but

> improper. * * * [T]he Clean Air Act delegates regulatory authority over carbon dioxide emissions to EPA and thus displaces federal common law claims addressing those emissions without regard to whether or how the agency has exercised its authority.

Id. at 21-23. Moreover, the defendants cited the very regulations being challenged in *this* case as confirmation that Congress had directed EPA to address greenhouse gas emissions from stationary sources through the PSD and Title V regulations, i.e., that it is not something EPA took upon itself through improper or overbroad interpretation of those statutes. *Id.* at 23 (explaining that under Congress' auspices, EPA "has established a permitting program for construction or modification of 'stationary sources' of greenhouse gas emissions, including facilities in categories that encompass those owned or operated by defendants. 75 Fed. Reg. 31,514 [the Tailoring Rule].").

The Supreme Court agreed with the position presented by the utilities and found that Congress had preempted common law nuisance claims through its express coverage of stationary source greenhouse gas emissions through the CAA. While Petitioners may assert that the Court was more focused on NSPS, in support of its ruling the Court specifically cited one of the PSD provisions that Petitioners now assert Congress never intended to apply to greenhouse gases, as well as the Tailoring Rule. *AEP v. Connecticut*, 131 S.Ct. at 2533 ("EPA also began phasing in requirements that new or modified '[m]ajor [greenhouse gas] emitting facilities' use the 'best available control technology [BACT].' §7475(a)(4); 75 Fed Reg.

31,520-21 [the Tailoring Rule.]"). Petitioners and their constituent members cannot have it both ways: arguing (successfully) to the Supreme Court that the CAA and EPA's regulatory actions under various provisions including PSD preempt common law nuisance claims based on greenhouse gas emissions, and then telling this Court that the identical provisions have no application whatsoever to greenhouse gases.

Petitioners nevertheless assert that hidden in the margins of the PSD and Title V provisions there exists an exception to the coverage of greenhouse gases as one of the "any air pollutant[s]" the Supreme Court found are clearly regulated under the Act. Petitioner-States first assert that in enacting the PSD program, Congress could not have contemplated that it would cover greenhouse gases, and this therefore provides a basis to exclude greenhouse gases from the coverage of PSD. State Br. 42. But the Supreme Court made it clear that under the CAA it is irrelevant that Congress had no specific intent with respect to greenhouse gases:

> While the Congress that drafted [§7521(a)(1)] might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific development would soon render the Clean Air Act obsolete. The broad language of [§7521(a)(1)] reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.

Massachusetts, 549 U.S. at 532. *See also Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1988) ("The fact that a statute can be applied in

situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth"). Thus, as Petitioner-States themselves explain, the Supreme Court "held that greenhouse gases 'without a doubt' qualify as air pollutants under the Act." State Br. 12, quoting *Massachusetts* at 528-29.

Petitioner-States next assert that the application of PSD to greenhouse gases "is foreclosed by the Supreme Court's ruling in *FDA v. Brown & Williamson*, 529 U.S. 120 (2000)." State Br. 64-67. Yet, in *Massachusetts* the Court specifically rejected an attempt to apply *Brown & Williamson* to preclude the regulation of greenhouse gases under the CAA, finding two critical considerations that formed the basis of the ruling in *Brown & Williamson* to be absent with regard to greenhouse gases. First, in *Brown & Williamson*, the assertion of FDA jurisdiction over tobacco products would have mandated that the FDA ban them outright. The Court found such an extreme measure to be counterintuitive, given clear statements by Congress to regulate and even promote the use of such products. In contrast, the Court found that "there is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter." *Massachusetts*, 549 U.S. at 531.

The Court further explained that "in *Brown & Williamson* we pointed to an unbroken series of congressional enactments that made sense only if adopted against the backdrop of the FDA's consistent and repeated statements that it lacked

authority under the FDCA to regulate tobacco." *Id.* The Court explained that while Congress had taken a number of actions implicitly premised on the FDA's "consistent and repeated" assertions that it lacked authority to regulate tobacco, Congress has taken no such action in regard to greenhouse gases and EPA had "never disavowed the authority to regulate" greenhouse gases, but rather "affirmed that it *had* such authority" in a 1998 memorandum. *Id.* at 531. This is even truer with regard to the application of PSD to greenhouse gases, given the thirty-year history of EPA statements that PSD applies to any pollutant regulated under the Act, including non-NAAQS pollutants.

Petitioner-States attempt to distinguish only one of the two bases relied upon by the Supreme Court in *Massachusetts* for rejecting application of *Brown and Williamson.* They assert that application of PSD at the statutory thresholds is an extreme measure akin to the banning of cigarettes. State Br. 65-66. In *Massachusetts* the Court concluded that regulating greenhouse gases "would lead to no ... extreme measures" because "EPA would only *regulate* emissions," rather than *ban* them as would have been required pursuant to the FDA's decision in *Brown & Williamson.* 549 U.S. at 531 (emphasis in original). Even under the statutory thresholds of PSD, the construction or modification of stationary sources is not banned; it simply would take longer (albeit, considerably longer) to obtain the permits required to initiate operations.

Petitioner-States next assert that because in the years following enactment of the PSD program Congress may have considered enacting legislation controlling emissions specifically of greenhouse gases, but instead chose to enact additional provisions requiring the study of this pollutant, it proves that no provision of the Act covers greenhouse gases. State Br. 42-43. But again, this take on the legislative history proves nothing and was specifically rejected by the Supreme Court. *Massachusetts v. EPA*, 549 U.S. at 529-30 ("That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant when it amended §202(a)(1) in 1970 and 1977."). *See also Alexander v. Sandoval*, 532 U.S. 275, 292 (2001).

Finally, Petitioner-States assert that PSD may not be applied to greenhouse gases because in issuing the Timing Decision, EPA exceeded its discretion when it interpreted the term "subject to regulation," which appears in the BACT provision of PSD and EPA's regulations, to conclude that PSD covers greenhouse gases. State Br. 60-62. But, as detailed above, although EPA stated that the question of *when* a pollutant becomes subject to regulation under the CAA was somewhat ambiguous and in need of clarification in the Timing Decision, the question of *whether* the statute covers any pollutant once regulated is clear from the statute, was never in doubt, and has been applied in that manner for over thirty years. *See* pp. 24-25, *supra*. Indeed, EPA explained that because the issue of *whether* PSD

applied to emissions of greenhouse gases was not a part of any lingering ambiguity in the term "subject to regulation," it did not even address that issue in the Timing Decision, explaining that any such discussion of the issue of whether PSD and Title V are, in the first instance, applicable to greenhouse gases, would occur in the Tailoring Rule. 75 Fed. Reg. at 17,019/1-2.[11] Regardless, then, of how EPA *administers* the PSD and Title V permitting programs, it is abundantly clear that the provisions of these programs expressly apply to *any* pollutant subject to regulation which, after *Massachusetts* and the Vehicle Rule, unquestionably includes greenhouse gases.

III. EPA ACTED PERMISSIBLY UNDER ITS STATUTORY AUTHORITY AND IN ACCORDANCE WITH CONGRESSIONAL INTENT WHEN IT TAILORED THE STATUTORY THRESHOLDS TO ADDRESS UNMANAGEABLE ADMINISTRATIVE BURDENS

As EPA explained, "the PSD and Title V provisions and their legislative history do indicate a clear congressional intent, under *Chevron* Step 1, as to *whether* the two permitting programs applied to GHG sources, and that [] intent was in the affirmative, that the permitting programs do apply to GHG sources. Our previous regulatory action defining the applicability provisions made this clear...." 75 Fed. Reg. at 31,517/2 (emphasis in original). Yet, as outlined above, immediate

[11] While the Tailoring Rule discussed the applicability issue because it was raised by commenters, it neither addressed any ambiguities in the phrase "subject to regulation" nor made any determination regarding applicability of PSD to greenhouse gases, other than to repeat what EPA has said over the last thirty years. *See* pp. 91, *infra*.

application of PSD and Title V to greenhouse gases at the statutory 100/250 tpy threshold set forth in those provisions presented EPA and State permitting authorities with insurmountable administrative difficulties. These problems, however, are not incurable. In fact, this Court and others have developed a number of doctrines that directly address the situation where an agency finds it impossible to administer a statute precisely as Congress specified.

A. In the Tailoring Rule EPA Properly Invoked Doctrines Designed to Aid in the Administration of Statutory Requirements

Each of the doctrines upon which EPA relies to phase-in the statutory PSD and Title V thresholds stands on its own as a separate and independent basis to affirm the Tailoring Rule. 75 Fed. Reg. at 31,517/2. Indeed, Petitioners themselves assert that the administrative necessity and one-step-at-a-time doctrines are "mutually exclusive" from the absurd results doctrine and must be applied separately. Industry Br. 40.[12] Each of these doctrines is, in fact, remarkably well-suited to allow EPA to implement its statutory obligations in a manner that hews as closely as possible to congressional intent, which, as this Court has noted, allows

[12] Although Petitioners correctly point out that each doctrine stands on its own, their assertion that each doctrine is mutually exclusive is an overstatement. Where the absurd result that occurs with application of the literal statutory thresholds *is* the overwhelming administrative burden that necessitates application of the administrative necessity doctrine, and the administrative response to that burden under the Tailoring Rule *is* to apply the statute one-step-at-a-time, the doctrines operate interdependently as well as independently, 75 Fed. Reg. at 31,533/3; 31,541/2, and arguably require a lower burden for their interdependent application than if only a single doctrine is relied upon.

them to be applied under *Chevron* step one. *See, e.g., Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). *See also* 75 Fed. Reg. at 31,546-47 (Tailoring Rule discussion of the consistency of the doctrines with the *Chevron* framework). Even, however, if the Court addresses this issue under a *Chevron* step two analysis, EPA's application of these doctrines must nevertheless be upheld.

1. EPA Properly Applied the Administrative Necessity Doctrine

Petitioner-States explain that they are unaware of any authority that "allows agencies to depart from unambiguous statutory language in the name of the 'administrative necessity' doctrine." State Br. 52. Yet, that is precisely what the doctrine calls for. Under the doctrine known as "administrative necessity," "an agency may depart from the requirements of a regulatory statute ... to cope with the administrative impossibility of applying the commands of the substantive statute." *EDF v. EPA*, 636 F.2d 1267, 1283 (D.C. Cir. 1980). *See also Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C. Cir. 1983); *Public Citizen, Inc. v. Shalala*, 932 F. Supp. 13, 17 (D.D.C. 1996). Even where the agency is *not* authorized to create a *de minimis* or other type of exemption, "administrative necessity may be a basis for finding implied authority for an administrative approach not explicitly provided in the statute [where 'applying the commands of the substantive statute'] would, as a practical matter, prevent the agency from carrying out the mission assigned to it by

Congress." *Alabama Power*, 636 F.2d at 358. *See also*, *New York v. EPA*, 443 F.3d 880, 888 (D.C. Cir. 2006).[13]

The factors to consider in assessing whether administrative necessity warrants deviation from strict application of a statute's literal requirements include inadequate funds, the need to apply the regulatory requirements in a timely manner, and the lack of technical expertise of the personnel needed to administer the program. *Id.* *See also*, *EDF v. EPA*, 636 F.2d at 1283 ("Considerations such as the availability of enforcement resources are relevant to the administrative necessity exemption.").

To utilize the administrative necessity doctrine, the Agency must establish that administering a program in accordance with the literal terms of the statute and in a timely manner is virtually impossible. Here, EPA performed a comprehensive study of the processes, costs, manpower, expertise, and resources available at State permitting authorities to provide full and timely compliance with the statutory requirements necessary to process over 81,000 PSD permits, which include case-by-case analysis of BACT, and 6.1 million Title V permits. 75 Fed. Reg. at 31,538, 31,562; JA XXX (Regulatory Impact Analysis; Technical Support

[13] The administrative necessity doctrine is distinct from a *de minimis* exemption that an agency may use to exempt certain small levels of emissions from statutory requirements. *Alabama Power*, 636 F.2d at 358-360; *New York v. EPA*, 443 F.3d at 888-89. In this case, EPA relied on the administrative necessity and absurd results doctrines, not a *de minimis* exemption. 75 Fed. Reg. at 31,560.

Document). It is not surprising then that Petitioners do not even assert that EPA failed to meet its burden of establishing the type of administrative impossibility necessary to invoke the doctrine. Quite to the contrary, Petitioners themselves make the case that application of PSD and Title V at the statutory thresholds is, indeed, administratively impossible. Industry Br. 18 ("[P]ermitting authorities could not possibly manage the permitting load.").[14]

Lacking any factual or legal support to challenge EPA's application of the administrative necessity doctrine, Petitioners try some misdirection. Petitioner-States assert that the administrative necessity doctrine requires the agency to head towards application of the literal statutory language and then baldly assert that EPA has no plans to reach small sources. State Br. 53. First, this prediction is directly contradicted by the statements – and arguments – of the States' fellow

[14] Some cases applying this doctrine have required the agency to first attempt literal application before it can rely upon administrative necessity as a basis for diverting from that literal application. *See e.g. Sierra Club v. EPA*, 719 F.2d at 463. These cases, however, generally involved brand new regulatory programs where the agency made unsupported projections about the administrative burdens. Here, EPA has decades of experience in administering the PSD and Title V programs, it conducted a rigorous analysis of the administrative burdens associated with extending the programs to greenhouse gases, and it surely makes no sense to overwhelm the system with 6 million permit applications in order to conclude that they will bring the system to a screeching halt. In any event, this is an argument the Court need not address because, to the extent it was raised at all by Petitioners, it was done in a partial sentence in a footnote. Industry Br. 20, n.3. As this Court has stated many times, it will not entertain an argument raised in a footnote. *Meijer, Inc. v. Biovail Corp.,* 533 F.3d 857, 864 (D.C. Cir. 2008); *Michigan Gambling Opposition v. Kempthorne,* 525 F.3d 23, 29 (D.C. Cir. 2008).

Petitioners. *See* Industry Br. 27; Dkt. 1266109 at 10 (Industry Motion for a Stay) (explaining that EPA will conduct future rulemakings in Steps 3 and 4 to expand coverage "potentially all the way down to the statutory thresholds of 100 or 250 tpy of CO_2e."); *Id.* at Ex. 25, p.6 ("As contemplated by the Tailoring Rule, EPA will, over time, impose the above requirements on sources at lower and lower thresholds, eventually down to the statutory thresholds required in the Clean Air Act.").

While EPA acknowledges that come 2016, the administrative burdens may still be so great that compliance at the 100/250 tpy level may still be absurd or impossible to administer at that time, that does not mean that the Agency is not moving toward the statutory thresholds. To the contrary, through this regulatory process "EPA intends to require full compliance with the CAA applicability provisions of the PSD and Title V programs...." 75 Fed. Reg. at 31,579. *See also id*. at 31,523/1 (explaining that EPA will implement the tailored approach "by applying PSD and Title V at threshold levels that are as close to the statutory levels as possible, and do so as quickly as possible....").

Petitioner-Industry separately asserts that the administrative necessity doctrine would never "warrant departures from unambiguous statutory text because of 'absurd results *stemming from regulatory provisions*.' [citations omitted]." Industry Br. 17 (emphasis in original). Petitioners' assertion is wholly inapplicable

here. As detailed above, neither the Tailoring Rule nor the Timing Decision caused PSD to become applicable to greenhouse gases: that was a consequence of the automatic operation of the statute. Thus, the absurd results necessitating promulgation of the Tailoring Rule stems from application of *statutory* provisions. The only regulations at issue in this case relieve, rather than create, absurd results.

2. EPA Properly Applied the One-Step-at-a-Time Doctrine

As the Supreme Court explained in *Massachusetts*, agencies are often required to regulate in steps in order to achieve Congressional directives such as controlling the emissions of greenhouse gases:

> Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) ("[A] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"). They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed. *Cf. SEC v. Chenery Corp.* 332 U.S. 194 (1947) ("Some principles must await their own development while others must be adjusted to meet particular, unforeseeable situations.").

549 U.S. at 524.

In particular, when a lack of resources or existing technical expertise makes it difficult for an agency to achieve its full regulatory mandate in accordance with statutory time requirements, it may accomplish that task in a stepped process, particularly if the process focuses initially on the most acute problems. *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 478 (D.C. Cir. 1998); *City of Las*

Vegas v. Lujan, 891 F.2d 927, 935 (D.C. Cir. 1989) ("'[A]gencies have great discretion to treat a problem partially ...' [and a] court will not strike down agency action 'if it were a first step toward a complete solution.'"); *Gen'l Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1059 (D.C. Cir. 1989); *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1209-14 (D.C. Cir. 1984).

Indeed, administering a large regulatory program in steps, rather than all at once on the program's effective date, is fairly typical for agencies. It is only the fact that the PSD program expressly prohibits sources from constructing their facilities until States or EPA can process their permits that necessitated tailoring of the thresholds as part of the four-step process of feasibly administering those programs with respect to greenhouse gases. Petitioners do not question the dates of each step, the level of emissions triggering permitting requirements at each step, or even the use of a stepped process. *See* Industry Br. 40-41 (claiming only that the doctrine is irrelevant because of their view that PSD does not apply to greenhouse gases); State Br. 52-53 (claiming only that, as debunked above, EPA supposedly has no plans to proceed toward the statutory thresholds). Accordingly, there is no legal or factual basis to reject the Tailoring Rule's reliance on this stepped implementation process.

3. EPA Properly Applied the Absurd Results Doctrine

It is true that it is easy to assess the literal reading of the numbers 100/250 tpy. Yet, as this Court explained, "where a literal reading of a statutory term would lead to absurd results, the term simply has no meaning ... and is the proper subject of construction by EPA and the courts." *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994). This situation is not at all unusual, as the "case law is replete with examples of statutes the ordinary meaning of which is not necessarily what the Congress intended." *Id. See also Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal meaning of a statutory term would "compel an odd result," [citation omitted], we must search for other evidence of congressional intent to lend the term its proper scope. [citations omitted]."); *Lynch v. Overhosler*, 369 U.S. 705, 710 (1962) ("The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute [citations omitted] for 'literalness may strangle meaning.'"); *Buffalo Crushed Stone, Inc. v. Surface Transp. Bd.*, 194 F.3d 125, 129 (D.C. Cir. 1999) ("Courts are not helpless captives when a literal application of statutory language would subvert a regulatory scheme").

The decisions of the Supreme Court as well as this Court illustrate that the "absurd results" doctrine is a somewhat misleading label. Although termed

"absurd results," the doctrine allows an agency to divert from the literal meaning of a statute where "'acceptance of that meaning would lead to absurd results ... *or* would thwart the obvious purpose of the statute.'" *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 633 (1978) (emphasis added) (quoting *Commissioner v. Brown*, 380 U.S. 563, 571 (1965)). *See also Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) ("It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute."); *United States v. Bryan*, 339 U.S. 323, 338 (1950) (refusing to apply the literal language where "congressional purpose would be frustrated"); *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940) ("When that [plain] meaning has led to absurd or futile result, however, this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."); *Arkansas Dairy Coop. Ass'n v. U.S. Dep't of Agriculture*, 573 F.3d 815, 829 (D.C. Cir. 2009) *cert. denied*, 130 S.Ct. 1066 (2010); *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996); *Mova Pharmaceutical*, 140 F.3d at 1067-68. Indeed, in a case that addressed the application of the then newly-enacted PSD program, this Court made it clear that the literal terms of the PSD

provisions might have to yield in order to fulfill Congress' intent in enacting PSD: "The policy as well as the letter of the law is a guide to decision ... to ameliorate ... (the law's) seeming harshness or to qualify its absolutes...." *Citizens to Save Spencer Cnty. v. EPA*, 600 F.2d 844, 871, n.123 (D.C. Cir. 1979) (citation omitted).

Petitioners do not contest that applying the literal statutory thresholds of PSD and Title V would lead to absurd results. *See e.g.* State Br. 50 ("It would indeed be absurd to apply CAA's numerical thresholds to greenhouse gas emissions...."). Thus, Petitioners are left to make a series of arguments attempting to limit the use of the doctrine or just outright deny its existence, none of which has any support in the law.

Petitioner-States first assert that the absurd results doctrine may only be applied when literal application of the statute would violate the Constitution. State Br. 46-48. Petitioners, however, cite to no case stating that a violation of the Constitution is a requirement for application of the absurd results doctrine. Instead, a plethora of cases explain that the absurd results doctrine may be applied when application of the statute would lead to an absurd result or a result that Congress would not have intended, without any showing that application of the literal language might violate the Constitution. *See, e.g. Bob Jones Univ.*, 461 U.S. at 586; *Arkansas Dairy*, 573 F.3d at 829; *American Water Works*, 40 F.3d at 1271;

Mova Pharmaceutical, 140 F.3d at 1067-68; *Buffalo Crushed Stone*,194 F.3d at 129.

Petitioner-States next assert that the absurd results doctrine no longer exists or never actually existed, contending that the doctrine either appears "only in dictum, or else pre-date[s] the modern Supreme Court's repudiation of *Church of the Holy Trinity's* intentionalism." State Br. 49. As outlined above, a multitude of cases hold – not merely state in dicta – that the absurd results doctrine applies whenever the literal language of a statute would lead to absurd results or undermine Congressional intent. Moreover, there exists no Supreme Court case repudiating the absurd results doctrine, and Petitioners cite none. Petitioners' description of a theory of "intentionalism" from a 19th century case has no bearing on the modern application of the absurd results doctrine.

Finally, Petitioner-States, using the fact that this doctrine is so well-recognized that the Supreme Court has not had to address it as much recently, baldly declare that therefore the doctrine no longer exists. State Br. 50. The assertion that the Supreme Court has not addressed this doctrine in many decades simply is wrong. *See e.g. Logan v. United States*, 552 U.S. 23, 36-37 (2007) and numerous other recent Supreme Court cases cited at 75 Fed. Reg. at 31,542-43. In any case, the age of the Supreme Court's pronouncements hardly matters, at least

to this Court. *See e.g. Arkansas Dairy*, 573 F.3d at 829 (citing several Supreme Court cases).

B. EPA Properly Utilized These Doctrines in the Tailoring Rule to Effectuate Congress' Mandate to Apply PSD and Title V to Any Air Pollutant, Including Non-NAAQS Pollutants

There is little doubt that Congress delegated to EPA both the authority and discretion to determine the steps necessary to carry out the requirements of the PSD program and Title V and to do so by issuing regulations addressing the *administration* of these programs. The CAA declares that "[t]he Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter [the CAA] ... as he may deem necessary and appropriate." 42 U.S.C. §7601(a)(1). That authority has been specifically recognized in implementation of the PSD program. *Spencer Cnty.*, 600 F.2d at 873. Indeed, "Congress clearly prescribed a somewhat larger role for the federal government in the formulation of PSD requirements than in some other aspects of the Act...." *Id.* at 868. *See also Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. at 490 ("Congress ... vested EPA with explicit and sweeping authority to enforce CAA requirements relating to the construction and modification of sources under the PSD program....").

The methodologies that EPA determines are necessary to administer Congress' mandates under PSD are to be afforded broad discretion.

Massachusetts, 549 U.S. at 527 ("As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibility."). *See also Negusie v. Holder*, 555 U.S. 511, 129 S.Ct. 1159, 1171 (2009) (Stevens, J., concurring and dissenting) ("The *Chevron* framework accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation. That the distinction can be subtle does not lessen its importance.").

Contrary to Petitioner-States' contention that when faced with unanticipated application of a statute the agency must wholly abandon implementation of that statute, the discretion accorded EPA to determine how to achieve Congress' intended objective is particularly acute when a situation arises that may not have been contemplated by the specific terms of the statute. In such situations, the agency must "use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms." *United States v. Haggar Apparel Co.*, 526 U.S. 380, 393 (1999). *See also American Trucking Ass'ns v. United States*, 344 U.S. 298, 309-10 (1953); *Indep. Bankers Ass'n v. Marine Midland Bank*, 757 F.2d 453, 461 (2d Cir. 1985), ("Fashioning policies in response to events that were unforeseeable when the legislation was written is one of the primary functions of executive agencies."). So long as the agency exercises its

delegated authority with common sense and fidelity to the intent of Congress, its decision must be upheld:

> When Congress delegates a function to an agency, we believe that an important element of congressional purpose is that the function be carried out sensibly and efficiently. Congress recognizes that it can only legislate, not administer, so it necessarily relies on agency action to make "common sense" responses to problems that arise during implementation, so long as those responses are not inconsistent with congressional intent.

Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., 836 F. 2d 599, 612 (D.C. Cir. 1988). In the Tailoring Rule, EPA did just this: it employed its statutorily-granted authority to establish a common sense process for implementing the intent of Congress as expressed under the PSD and Title V provisions.

First, as noted, even with phasing, the Tailoring Rule already captures 86% of the greenhouse gas emissions that would be captured if the literal 100/250 tpy threshold were applied. Thus, the Tailoring Rule stays true to the central purpose of the PSD and Title V provisions: to control emissions of pollutants that have the potential to harm public health and welfare. 42 U.S.C. §7470(1). And it does so by focusing initially, before EPA can implement streamlining techniques in Step 3, on the largest emitters – those emitters that are, as Congress suggested, more "financially able to bear the substantial regulatory costs imposed by the PSD provisions." *Alabama Power*, 636 F.2d at 352.

Although Congress' overriding purpose in enacting PSD and Title V was to control and reduce emissions of pollutants from stationary sources, that purpose was tempered by its intent to ensure that these two permitting programs were administered in a manner that did not result in administrative gridlock. *See* 42 U.S.C. §7475(c) (requiring a PSD permit to be acted upon within one year of its submission to the permitting authority); and for Title V, *see* 42 U.S.C. §7661a(b)(6) (mandating procedures "for expeditious review of permit actions"); 42 U.S.C. §7661a(b)(8) (mandating procedures "consistent with the need for expeditious action by the permitting authority on permit applications...."); 42 U.S.C. §7661a(b)(9) (mandating that permit revisions occur "as expeditiously as practicable...."). These provisions reflect the affirmatively stated position of Congress "to avoid a logjam of permit applications...." 136 Cong. Rec. 3389 (1990).

Petitioners recognize that focusing on larger sources and ensuring a workable permit process that does not result in an administrative logjam were among Congress' concerns when it enacted the PSD program. Industry Br. 6. But Petitioners seek to use these concerns as a talisman for no regulation whatsoever, completely ignoring the central and primary purpose of the PSD program: to prevent the deterioration of air quality by ensuring that newly constructed (or modified) facilities obtain a permit and install best available technologies to

control *any* pollutant regulated under the CAA. *See* Industry Br. 19 ("[T]he Act's Part C PSD provisions compel EPA to exclude GHGs from all aspects of the PSD program."); *id.* at 13-14, 28, 29, 39. Indeed, Petitioners even boast that unlike the Tailoring Rule, which is designed to move toward application of the statutory thresholds, their "solution" would allow – and even require – EPA to avoid applying those thresholds on a *permanent* basis. *Id.* at 25, n.5.

EPA may not, as Petitioners argue, simply interpret its way around Congress' clear intent under PSD to regulate any pollutant subject to regulation under the Act. *Massachusetts*, 549 U.S. at 533. ("To the extent that this [statutory language] constrains agency discretion ... this is the congressional design."). As the Supreme Court made clear, the CAA must be read to include "regulatory flexibility without which changing circumstances and scientific developments would soon render the Clean Air Act obsolete." *Id.* at 532. The PSD program and Title V are no exception. Having been assigned this flexibility, authority and responsibility to carry out the mandate of the CAA to control the emissions of pollutants that have the potential to harm public health and welfare, EPA lacks authority to interpret the Act in a manner that wholly ignores that mandate.

Contrary to Petitioners' argument, a finding of "absurd results" in the administration of a regulatory permitting program is not a magic elixir that causes a statutory mandate to disappear. None of the absurd results cases cited above

remotely suggest that if there is some alternative interpretation that does away with the absurdity, it must be adopted regardless of Congressional intent. Under this reasoning, there would be no absurd results doctrine because a party could always do precisely what Petitioners propose: just interpret the statute in a manner that calls for no regulation whatsoever, and the absurdity disappears. An Agency is not permitted to contort Congress' mandate beyond all recognition simply to make the absurd result evaporate.

The fallacy of Petitioners' argument – that the recognition of absurd results in the administration of PSD's permitting requirements with regard to greenhouse gases provides EPA license to interpret its way around the mandate of PSD to cover any pollutant subject to regulation – is illuminated by its overbreadth. Under *any* of Petitioners' alternative interpretations (which all fail on their own accord, *see* discussion *infra*), no non-NAAQS pollutant would ever be covered by any part of PSD *regardless* of whether the application of those PSD requirements to those pollutants causes absurd results or administrative impossibility. For instance, if a pollutant becomes regulated under NSPS or any other provision of the Act, and EPA faces no difficulties in processing the volume of permit applications or otherwise administering PSD to such pollutants at the statutory thresholds, Petitioners' theory would *still* prohibit EPA from regulating that pollutant under PSD. Thus, Petitioners' alternative interpretations subvert Congressional intent by

ensuring that a statute that expressly calls for coverage of "any" and "each pollutant regulated under [the Act]," in fact allows not only greenhouse gases but virtually *all* pollutants (except the six for which there exists a NAAQS) to fully escape regulation, and to do so regardless of whether administrative difficulties or "absurd results" occur.

To be sure, adopting Petitioners' alternative interpretations would cause the absurd results that follow from immediate application of PSD permitting requirements to greenhouse gases at the statutory thresholds to vanish. Industry Br. 19, 24. But so would taking a scissors and removing the PSD provisions from the U.S. Code. Clearly, if EPA ignores the mandate of Congress to enforce PSD with regard to the emissions of "any" and "each" pollutant subject to regulation, then no absurd results – and no regulation of any new pollutants – will occur. This, however, is not something within EPA's authority. Instead, EPA promulgated the Tailoring Rule which, while deviating from the numeric thresholds of the statutory provisions by phasing them in, is precisely the type of "deviat[ion from the statute tha[t] is needed to protect congressional intent." *Mova*, 140 F.3d at 1067-68.

Separately, Petitioner-States assert that the Tailoring Rule is unconstitutional because an agency may not exercise discretion absent Congress providing an "intelligible principle" by which to guide agency discretion, and that neither the

PSD program nor Title V contains such a principle. State Br. 54-56. In fact, EPA followed the clear Congressional principles detailed at length above that appear on the face of these provisions: that any pollutant regulated under the Act must be regulated under PSD and Title V; that emphasis should be directed first toward the largest sources; and that the permitting program should not become gridlocked. Petitioners agree with the latter two principles but simply choose to ignore the first and central principle announced by Congress in coming to their own "interpretation" of the statute: that PSD was enacted to prevent deterioration of air quality from "any air pollutant" regulated under the Act.

In the case relied upon by Petitioners for their "intelligible principle" argument, the Court made clear that the one thing an agency may *not* do is "adopt []in its discretion a limiting construction of the statute." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001). *See also New York v. EPA*, 443 F.3d at 886 (rejecting a restrictive "interpretation [of a CAA provision that] would produce a 'strange,' if not an 'indeterminate result:' a law intended to limit increases in air pollution would allow sources operating below applicable emission limits to increase significantly the pollution they emit without government review."). As outlined above, the express purpose of PSD is to limit air pollution and an interpretation of that program that allows most pollutants to escape coverage clearly is a limiting construction that does not reflect congressional intent.

Because the Tailoring Rule implements congressional intent, and does so utilizing well-recognized doctrines created specifically to deal with difficulties associated with the administration of a statute, the Tailoring Rule is, *at the very least*, a rational application of the PSD and Title V provisions and must, therefore, be upheld. *See* standard of review cases at pp. 42-47, *supra*.

IV. THE COURT LACKS JURISDICTION TO ADDRESS PETITIONERS' CHALLENGES TO THE TAILORING RULE AND TIMING DECISION

Petitioners launch three central attacks on the Tailoring Rule (and the Timing Decision) and, more specifically, on EPA's utilization of the three doctrines it relied upon in that Rule.[15] First, as outlined above, Petitioners assert that the doctrines upon which EPA relied either do not actually exist or have been misapplied and therefore the Tailoring Rule must be struck down. Second, Petitioner-States assert that EPA simply has no choice but to apply the literal statutory thresholds. According to the States, "there is no middle ground between a 'literal' reading of numerical permitting thresholds and defiance." State Br. 26. Finally, Petitioner-Industry sets forth several alternative interpretations of the key

[15] Petitioners do not actually challenge any facet of the Timing Decision. Petitioner-Industry does not directly address the Timing Decision in its arguments but merely references it alongside the Tailoring Rule in headings (*see, e.g.*, Industry Br. 29). Petitioner-States purport to raise limited arguments addressing the Timing Decision but each is actually part of their challenge to the underlying applicability of PSD and Title V to greenhouse gases. State Br. 58-72. In fact, the Timing Decision does not invoke the three doctrines challenged or make any finding of absurd results.

PSD provisions which they assert must be applied because, in their view, they are more reasonable than EPA's phasing-in of the statutory thresholds through the Tailoring Rule. As discussed *supra* (for the first argument) and *infra* (for the last two arguments), each of these attacks on EPA's rulemaking is entirely without merit. The Court, however, should not reach the merits because it lacks jurisdiction to address Petitioners' principal arguments.

As the Supreme Court has explained, "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006) (*quoting Raines v. Byrd*, 521 U.S. 811, 181 (1997)). Particularly with regard to the application of a statute or regulation, "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." 547 U.S. at 341. This jurisdictional bar is based not only on the requirement that the Court have statutory jurisdiction over a matter. In order for a court to exercise jurisdiction over a claim, the petitioner also must have standing. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). Here, the Court lacks jurisdiction over Petitioners' arguments on multiple bases.

A. Petitioners Lack Standing to Challenge the Tailoring Rule and Timing Decision

To establish standing, a petitioner must have suffered an "injury in fact" that: (a) is personal, distinct, palpable, actual, concrete, and imminent, not conjectural, speculative or hypothetical; (b) was caused by the conduct complained of; and (c) is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, Petitioners have the burden of establishing that the two actions they challenge, the Timing Decision and the Tailoring Rule, result in a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and are likely to be redressed by the requested relief." *DaimlerChrysler*, 547 U.S. at 342.

Petitioners make only conclusory statements to support standing, asserting that the challenged agency actions "mandate preconstruction review and permitting of greenhouse-gas emissions from stationary sources," State Br. 22. *See also* Industry Br. 14 (merely stating that the two challenged actions cause them "concrete particularized injury"). Indeed, Industry's claim of standing is so general, they appear to merely rely on the assertion that they do not need to establish standing "because State petitioners have standing." *Id.* It is true that if one party has standing a court need not address the standing of other parties advancing the same claims. *Laroque v. Holder*, No. 10-5433, __ F.3d __, 2011 WL 2652441 at *12 (D.C. Cir. July 8, 2011). Standing, however, is issue-specific,

In Re: Vitamins Antitrust Class Actions, 215 F.3d 26, 29 (D.C. Cir. 2000); *DaimlerChrysler* 547 U.S. at 352, and thus some Petitioner must establish standing for *each* of Petitioners' claims. Petitioners' claims of standing are so weakly asserted because it is evident that they, in fact, lack standing.

Asserting that the challenged agency actions caused them to become subject to PSD and Title V for greenhouse gas emissions, Petitioners seek to vacate the Timing Decision and Tailoring Rule. State Br. 18, 26, 56, 58; Industry Br. 20, 25, 57. Yet, as detailed above, neither the Timing Decision nor the Tailoring Rule caused the injury Petitioners allege: having to comply with PSD and Title V for emission of greenhouse gases. Indeed, as noted, vacating these two regulatory actions will increase Petitioners' purported harm immensely. Without the Timing Decision, both State and Industry Petitioners would have been subject to PSD and Title V for greenhouse gases at significantly earlier times than January 2, 2011. Without the Tailoring Rule, Industry will face PSD and Title V applicability for millions of additional sources and States will be required to permit all of these sources. That is why a number of Petitioners have intervened *in support* of both the Timing Decision and the Tailoring Rule. *See* Case 10-1115, Dkt. 1251928, 1251980, 1251985 (Petitioners intervening in the Timing Decision Case to defend against claims that sources become subject to PSD upon issuance of a regulation calling only for monitoring); Case No. 10-1205, Dkt. 1263308 (Petitioners

intervening in the Tailoring Rule Case to defend against claims that thresholds lower than 75,000/100,000 tpy should be applied or that the Steps be accelerated).[16]

As this Court recently summarized, to establish standing "the petitioners must show that, 'absent the [government's allegedly unlawful actions], there is a substantial probability that they would [not be injured] and that, if the court affords the relief requested, the [injury] will be removed.' *Warth v. Seldin*, 422 U.S. 490, 504 (1975)." *Chamber of Commerce v. EPA*, 642 F.3d 192, 201 (D.C. Cir. 2011). Petitioners' briefs, the Declarations submitted in support thereof, and their actions to intervene in support of the challenged actions, communicate unequivocally that absent the two challenged actions, their injuries will increase, not be redressed, and thus Petitioners lack standing.

EPA understands that Petitioners' central challenge in this case is to the underlying predicate of EPA's regulatory actions – that the *statutory* provisions of PSD and Title V are applicable in the first instance to greenhouse gases – not to the challenged regulations themselves. However, as discussed *infra*, the Court lacks jurisdiction to address Petitioners' challenge to the applicability of PSD to greenhouse gases because that challenge is time-barred. Petitioners may not

[16] Case No. 10-1115 has been severed, consolidated with Case No. 09-1018, and is held in abeyance. Order at Dkt. 1277729. Case No. 10-1215 was voluntarily dismissed on June 20, 2011. Dkt. 1314059.

circumvent that jurisdictional deficiency by challenging agency regulatory actions for which they clearly lack standing. Any challenge by Petitioners to the application of the substantive provisions of Tailoring Rule and Timing Decision is clearly beyond the purview of the Court.

B. Petitioners Cannot Create a Fictional Remedy to Establish Redress and Thereby Establish Standing

Petitioner-States argue at great length that the statutory 100/250 tpy thresholds for PSD and Title V may not be avoided, modified or strayed from in any way or for any period of time, regardless of what they concede is the administrative impossibility or absurd results of immediately applying those thresholds. State Br. 17-43. Following this thesis, Petitioners then assert that "EPA cannot invoke 'administrative necessity' when Congress would be certain to enact corrective legislation if EPA were to apply the statutory thresholds to greenhouse-gas emissions." State Br. 52-53. *See also* p. 51 (making the same argument regarding application of the absurd results doctrine).

As a substantive matter, Petitioners' argument ignores the need for, or even the existence of, the administrative necessity, one-step-at-a-time, or absurd results doctrines. Not a single case adopting these doctrines states that they may not be applied because Congress may come to the rescue and cure the absurd result or relieve the administrative burdens. Petitioners cannot make these doctrines disappear by persistently citing to the equally important (but inapplicable, here)

doctrine that an agency must adhere to a statute's express language rather than apply what the agency believes is a superior view of how to accomplish the purposes of a statute. *See, e.g.*, *Spencer Cnty.*, 600 F.2d at 892 (interpreting the key provision in this case, 42 U.S.C. §7475, emphasis added):

> It is a very useful rule in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, *unless* that is at variance with the intentions of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.

Moreover, even *if* one were to accept Petitioner-States' argument for strict application of the literal language of the statute, the obvious question is, what then? In a feat of rhetorical acrobatics, Petitioners contend that although EPA is absolutely required to apply PSD and Title V at the statutory thresholds, EPA has no choice but to completely *ignore* that statutory requirement. In other words, EPA is required to *not* apply the statutory thresholds that Petitioners assert *must* be applied. According to Petitioners, if an agency has difficulty applying the literal language of a statute, it must refrain from applying the statute at all and wait until Congress fixes the problem. State Br. 19-20, 40, 43, 52, 55.

Not surprisingly, Petitioners fail to cite a single case supporting the premise that an agency may apply the literal language of a statute by ignoring its obligation to administer and implement that very language. In fact, in virtually all of the cases cited by Petitioner-States for the proposition that the literal language must be

applied, that is exactly what happened: the court found that the agency was required to enforce the statute as literally written – not to ignore the statute until Congress did something about it. *See, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227-28 (2008); *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004); *MCI Telecommunications Corp. v. ATT*, 512 U.S. 218, 231-32 (1994); *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). *See also Sierra Club v. EPA*, 479 F.3d 875, 884 (D.C. Cir. 2007) ("If the Environmental Protection Agency disagrees with the Clean Air Act's requirements for setting emissions standards, it should take its concerns to Congress…. In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court).

The States' predictions regarding if, when, and in what form Congress might enact legislation is, of course, pure speculation. Additionally, even if specific curative legislation were imminent, it still could not provide an agency with an excuse to refrain from applying a statutory mandate. The logical extension of the rule proffered by Petitioner-States is both obvious and far-reaching. Any time an agency decided that it might prove difficult to enforce a statute, it would be free to ignore the statute until Congress amended it. Thus, an agency could effectively veto any burdensome obligation Congress places upon it and could force Congress to alter the statute to the agency's liking if Congress wants its prior enactments to

be enforced as intended. Not surprisingly, no court has ever remotely suggested a doctrine that would give agencies such unbridled power.

In addition to being an argument bankrupt of any substantive support, the remedy that Petitioner-States suggest if the challenged actions are vacated – Congressional rescue – simply does not exist and certainly is not within the Court's power to grant. Petitioners may not rest their standing on a non-existent (or at best, wildly hypothetical) remedy. If Petitioner-States are correct that EPA must apply the statutory thresholds as written and that EPA exceeded its authority in relying on the three doctrines cited, there is but one result: full application of the statutory thresholds. That is a remedy that most assuredly will not redress Petitioners' purported injury.

C. The Court Lacks Jurisdiction Over Petitioners' Arguments That Seek to Limit the Application of PSD to NAAQS or "Local" Pollutants

Petitioner-Industry, offering up alternative "interpretations" of the PSD provisions, assert that although Congress created the PSD program *expressly* to cover "any" and "each" pollutant subject to regulation, its intent was actually to have EPA regulate only a very small subset of pollutants regulated under the Act. That subset is so small that it would not even include many pollutants determined by EPA after careful study to imminently endanger public health. Specifically, Petitioners contend that EPA is prohibited from applying PSD to any pollutant

unless: (a) the source emits over the threshold emissions levels of a NAAQS pollutant and the source is located in an area in attainment for that NAAQS pollutant; (b) EPA follows procedures applicable only to NAAQS pollutants and gives States five years to implement those procedures; and (c) the pollutant has localized impacts, where Petitioners define "local" impacts by the air quality control region for which NAAQS attainment is determined. *See* Industry Br. 38-40.

As discussed *supra*, each of these alternatives (which are based solely on provisions of PSD and thus do not even purport to argue for non-applicability of Title V to greenhouse gases) must be rejected because each undermines, rather than applies, Congressional intent. As discussed *infra*, each alternative interpretation proposed by Petitioners fails on its own accord because each already has been rejected by EPA and the courts and/or is wholly unsupported by the statutory provisions it purports to interpret. But again, the Court should not reach these issues because it is without jurisdiction to address Petitioner-Industry's alternative interpretations.

Relying predominantly on the language in 42 U.S.C. §7475(a) that PSD's permitting requirements apply to any major source "constructed in any area to which this part [Title I, Article C] applies," Petitioners contend that "PSD permits are required only if (1) a source has major emissions of a NAAQS pollutant and (2)

the source is located in an area attaining *that pollutant's* NAAQS." Industry Br. 23 (emphasis in original). Because there is no NAAQS for greenhouse gases, a source cannot possibly satisfy either prong of what Petitioners term the "NAAQS-situs" requirement of PSD.

This Court explicitly rejected this very argument years ago in its *Alabama Power* decision. Considering the identical language of §7475(a) upon which Petitioners now rely, the Court explained that a source will be subject to PSD by reason of its emission of *any* air pollutant, *regardless* of whether the pollutant is a NAAQS pollutant, so long as the source is constructed in an area that is in attainment for *any* NAAQS:

> At the heart of the PSD provisions lies a definition that is jurisdictional in nature. We refer to the section 169(1) definition of "major emitting facility," which identifies sources of air pollution that are subject to the preconstruction review and permit requirements of section 165. The definition is *not pollutant-specific*, but rather identifies sources that emit more than a threshold quantity of *any air pollutant.* Once a source has been so identified, it may become subject to section 165's substantial administrative burdens and stringent technological control requirements for *each pollutant regulated under the Act, even though the air pollutant, emissions of which caused the source to be classified as a "major emitting facility," may not be a pollutant for which NAAQS have been promulgated....*

Alabama Power, 636 F.2d at 352 (emphasis added).

Following the *Alabama Power* decision, EPA expressly declared in its 1980 Rule that

> PSD review will apply to any source that emits any pollutant in major amounts, if the source would locate in an area designated attainment ... for *any* [NAAQS] criteria pollutant.... It should be noted that in 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...; the source need only emit *any* pollutant in major amounts (i.e., the amounts specified in section 169(1) of the Act) and be located in an area designated attainment ... for that *or any other pollutant*.

45 Fed. Reg. at 52,710-11 (emphasis in original and added). *See also id.* at 52,711 ("Read literally, section 165(a) applies PSD preconstruction review to *all* sources that are major for any pollutant subject to regulation under the Act and locate[d] in an area designated attainment or unclassified for any pollutant *** [N]either section 165 nor 169(1) links the pollutant for which the source is major and the pollutant for which an area is designated attainment or unclassifiable.").

The reading of the statute set forth in the 1980 regulations was again confirmed in EPA's 2002 Rule, where EPA explained that, *in addition to* pollutants for which a NAAQS has been established, "[t]he PSD program applies *automatically*" to any "newly regulated" pollutants. 67 Fed. Reg. at 80,240, 80,264.

Quite clearly, these agency pronouncements reject the argument being made by Petitioners that PSD applies only to a source that emits a NAAQS pollutant in an area designated as being in attainment for that specific pollutant. They also reject Petitioners' other alternative "interpretations," since each relies on application of PSD only to pollutants for which EPA purports to establish local emission standards defined by the NAAQS attainment area or follows procedures

for establishing a NAAQS pollutant, and each wholly rejects the application of PSD to, as the 1978-2002 regulations expressly state, "any pollutant" regulated under the Act.

Pursuant to 42 U.S.C. §7607(b), a party has sixty days to challenge the type of regulatory pronouncements set forth in the 1978, 1980 and 2002 rules and, failing such a challenge, is barred from later challenging it. This time limit "'is jurisdictional in nature, and may not be enlarged or altered by the courts.'" *NRDC v. EPA*, 571 F.3d at 1265 (citation omitted). The Court is, therefore, without jurisdiction to consider Petitioners' NAAQS-only situs argument or their related alternative interpretations.

Petitioners readily acknowledge the jurisdictional bar to their NAAQS-only situs argument resulting from 42 U.S.C. §7607(b) and, accordingly, seek to apply an exception, asserting that the Tailoring Rule reopened the issue, thereby allowing them to circumvent the statutory 60-day filing requirement. Industry Br. 26. But the fact that PSD has now been applied to another of the "any pollutants" to which it has always applied, consistent with its express terms and EPA's express warnings in earlier regulations, does not provide a basis for reopening the issue, no

matter how monumental Petitioners believe the impacts of such application may be.[17]

An agency determination or conclusion reached in a prior rulemaking will be deemed reopened if the agency expressly reopens it or otherwise consciously acts to "reexamin[e] … the policy at issue in the petition." *Nat'l Mining Ass'n v. Dep't of Interior*, 70 F.3d 1345, 1351 (D.C. Cir. 1995) (finding that an agency's statement of "renewed adherence" to the former determination does not reopen the issue). If the agency does not affirmatively seek comment on the *specific* established policy being challenged, or otherwise affirmatively reconsider *that* policy, challenges to the policy announced in the earlier regulation are barred. *Am. Road & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1115 (D.C. Cir. 2009), *cert. denied*, 131 S.Ct. 388 (2010); *NRDC v. EPA*, 571 F.3d at 1255-56; *Envtl. Def. v. EPA*, 467 F.3d 1329, 1333 (D.C. Cir. 2006).

Discussion in a rule's preamble of the issue decided in the earlier regulation does not constitute reopening. *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 398

[17] In their brief in the Historic Regulation Challenge, Petitioners assert that they can circumvent the 60-day filing requirement in challenging the 1978-2002 regulations because 42 U.S.C. §7607(b) provides an exception for claims based solely on grounds arising after the sixtieth day. That exception would apply only to a direct challenge to those earlier regulations, which Petitioners do not make here. In any event, as explained in EPA's brief in the Historic Regulation Challenge (Dkt.1322352), the mere application of PSD to yet another pollutant regulated under the CAA is not "grounds arising after" the Historic Regulations that warrants a renewed challenge under §7607(b).

(D.C. Cir. 1989). Instead, the Court can only find a reopening to have occurred where it is clear that the agency consciously undertook to reevaluate its prior policy determination:

> The [reopener] doctrine only applies, however, where "the entire context [of the new regulation]" [citation omitted] demonstrates that the agency "has undertaken a serious, substantive reconsideration of the [existing] rule." *Nat'l Mining Ass'n v. Dep't of Interior*, 70 F.3d [at 1352].

P & V Enters. v. U.S. Army Corps of En'rs, 516 F.3d 1021, 1024 (D.C. Cir. 2008) (finding no reopener because, *inter alia*, the agency did not "consider []the substance of the [earlier] rule to be in doubt.").

Nowhere did the preamble to the proposed Tailoring Rule affirmatively reconsider or ask for comments on the NAAQS-only situs issue or any issue relating to the applicability of PSD to greenhouse gases. While the preamble asked for comments on a number of issues, they all related to examining how best to deal with the administrative burdens faced by State agencies in issuing PSD permits for greenhouse gases – applicability of PSD to greenhouse gases was assumed.[18] Nor may Petitioners rely on a general call for comments, including one for all ideas to streamline the implementation of regulatory requirements, as evidence that EPA

[18] *See* 74 Fed. Reg. 55,292, 55,302, 55,332 (Oct. 27, 2009) (appropriate thresholds); 55,296, 55,332-55,335-37 (timing of steps); 55,315/3, 55,321/3, 55,323, 55,525/2 (streamlining); 55,318/1, 55,331/3 (permitting burdens); 55,319 (step-at-a-time doctrine); 55,328/2-55,3230 (greenhouse gas metric); 55,330 (application of mass requirement); 55,348/3 (technical guidance); and 55,350 (application to tribal authorities).

consciously undertook to reconsider the pollutant applicability issue. *See e.g.*, *National Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 143 (D.C. Cir. 1998) (a statement by the agency "welcome[ing] public comments on these proposals, and on any other areas where changes might be made, to streamline our abandonment regulations," does not reopen previously decided issues).

Indeed, EPA made it quite clear in the preamble to the Tailoring Rule that both PSD and Title V apply to any pollutant, including greenhouse gases, by *operation of statute*, expressly declaring that it was *not* reopening the pollutant "applicability" issue:

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

75 Fed. Reg. at 31,517/2 (emphasis in original and added). *See also id.* at 31,558/3; 31,548/2.

In their reply brief in the Historic Regulation Challenge, Petitioners deride these statements as self-serving admonitions contained only in the Final Rule. Dkt. 1320046 at 10-11. Yet, this is precisely the type of statement relied upon by this Court in finding that there has been no reopener. *Sierra Club v. EPA*, 551 F.3d

1019, 1024-25 (D.C. Cir. 2008) (relying on EPA's recognition in the *Final* Rule that the issue had been decided in earlier regulations), *cert. denied*, 130 S.Ct. 1735 (2010). In any event, Petitioners are unable to point to any contrary statement in the Proposed Rule evidencing that EPA consciously undertook to reopen the pollutant applicability issue.

Alternatively, Petitioners argue that regardless of whether EPA solicited comments on this issue, it nevertheless responded to comments on whether the applicability of the PSD permitting program should be based on non-NAAQS pollutants. They contend that this mere act reopens the issue. Industry Br. 26. As EPA explained in the Tailoring Rule, it responded to comments on this issue only to be responsive to interested parties:

> In this preamble and the response to comments document we fully address arguments that commenters and others have presented about congressional intent and coverage of GHGs. We do so to be fully responsive, even though we believe that this is a settled matter for which the time for judicial review has passed.

75 Fed. Reg. at 31,517, n.4. *See also* 75 Fed. Reg. at 31,548, n.32 (repeating the identical statement). Such action does not reopen an issue:

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

Kennecott Utah Copper Corp. v. Dep't of Interior, 88 F.3d 1191, 1213 (D.C. Cir. 1996). *See also Nat'l Ass'n of Reversionary Prop. Owners*, 158 F.3d at 145; *Medical Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011); *Am. Road & Transp.*, 588 F.3d at 1114.

Finally, Petitioners assert that EPA *constructively* reopened the applicability issue because it "adhered to the status quo ante despite dramatically changed circumstances." Industry Br. 26. As this Court has explained, "[a] constructive reopening occurs if the revision of accompanying regulations 'significantly alters the stakes of judicial review' ... as the result of a change that 'could have not been reasonably anticipated,'" such that it affects a "sea change" in the manner in which the regulatory scheme works. *NRDC v. EPA*, 571 F.3d at 1266 (quoting *Sierra Club v. EPA*, 551 F.3d at 1025-26 and *Kennecott*, 88 F.3d at 1214). In applying this rule, "Petitioners have ... [the] burden of proving that EPA either changed the regulatory context in such a way that could not have been reasonably anticipated ... or officially reinterpreted the regulation...." *Envtl. Def. v. EPA*, 467 F.3d at 1334.

There simply is no authority for the notion that, as Petitioners assert, an agency constructively reopens a determination it has made numerous times in the past because it *adhered* to that earlier determination despite changed circumstances, dramatic or otherwise. If this were a basis for reopener, a new set of Petitioners would get to challenge the identical determination that PSD applies

to any pollutant regardless of whether there exists a NAAQS for that pollutant, every time PSD was applied to a new pollutant, since sources of those pollutants would certainly consider the new application to be a "dramatic" change.

As detailed above, in 1978, 1980, and 2002, EPA made it very clear that PSD applied to all regulated pollutants, specifically declaring that the coverage of PSD was not limited to NAAQS pollutants or to areas in attainment for the pollutant being regulated. The application of PSD to an additional regulated pollutant does not alter the regulatory scheme in any manner. Indeed, only if EPA had made the determination in the Timing Decision or the Tailoring Rule that PSD did *not* apply to greenhouse gases, could one conclude that EPA had altered its prior regulatory scheme. Thus, the application of PSD to non-NAAQS pollutants (in this case, to greenhouse gases) "did not work such a sea change. The basic regulatory scheme remains unchanged." *NRDC v. EPA*, 571 F.3d at 1266 (Petitioners could not challenge as expressly *or* constructively "reopened" EPA's determination made in a regulation years earlier that pre-application offset credits could, in the first instance, be used under the statute). *See also EDF v. EPA*, 467 F.3d at (D.C. Cir. 2006) (holding no constructive reopening, finding: "We require evidence that an interpretation adopted by EPA prior to the 2004 rulemaking differed with its own current interpretation."); *Medical Waste Inst.*, 645 F.3d at 427 (holding that a new regulation which would base emission standards on a universe

of sources 94% smaller than when the challenged determination was made years earlier, was not a sea change that warranted reopening of the previously decided issue of which pollutants were addressed by the regulation).

Even if the application of PSD to another pollutant can be considered to affect a "sea change," it clearly could have been reasonably anticipated at the time the prior rules were issued. As outlined at pp. 18-19 *supra*, EPA specifically forewarned in the 1978 Rule that the PSD BACT requirement would apply whenever EPA regulated a NAAQS pollutant *or* a pollutant regulated under Title II governing vehicles, *exactly* the action Petitioners now challenge. Then, in 1980, EPA expressly stated that "in 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 ...; the source need only emit *any pollutant* in major amounts (i.e., the amounts specified in section 169(1) of the Act) and be located in an area designated attainment ... for that *or any other pollutant*." 45 Fed. Reg. at 52,710-11 (emphasis added). One can hardly say, then, that it could not have been reasonably anticipated that PSD would be applied to "any pollutant" emitted in an area designated attainment for the newly regulated pollutant *or "any other pollutant,"* i.e., for *any* NAAQS pollutant, or for any pollutant regulated under Title II.

Petitioners endeavor to backwards-engineer their reopener argument, once again seizing upon EPA's finding in the Tailoring Rule that absurd results occur in

the *administration* of PSD to greenhouse gases, this time as a magic wand that purports to allow them to reopen the underlying determination made years ago that applies to the *applicability* of PSD to any non-NAAQS pollutant, such as greenhouse gases. Industry Br. 26. But, as the cases cited above indicate, addressing a new issue, such as administration of the thresholds, does not open up other issues previously determined, in this case the applicability issue.

For more than thirty years PSD has applied to any regulated pollutant, which now includes greenhouse gases. As of January 2, 2011, PSD applied to greenhouse gases *regardless* of whether EPA ever issued the Tailoring Rule or made any determination about absurd results in the administration of PSD with respect to such gases. The fact that EPA employed the absurd results doctrine as one of three bases to relieve regulatory burdens on all of the Petitioners, does not affect a sea change as to the issue Petitioners challenge: the applicability of PSD to greenhouse gases. Nor does it affect a sea change as to the regulatory scheme. Any attempt to use EPA's phasing-in of the statutory thresholds – to the extreme benefit of Petitioners – as a basis for asserting that there was some great sea change in the regulatory scheme affecting Petitioners, is baseless, if not disingenuous. The few cases recognizing constructive reopening (cited above), which require an unanticipated sea change in the regulatory scheme, surely were never meant to be

applied based on a phasing-in of the statutory requirements, particularly one that *benefits* the challenging party.

V. PETITIONERS' ALTERNATIVE INTERPRETATIONS ARE UNREASONABLE, HAVE ALREADY BEEN REJECTED BY EPA AND THE COURTS, AND CANNOT DISPLACE EPA'S RATIONAL INTERPRETATION THAT PSD AND TITLE V APPLY TO GREENHOUSE GASES

Even if the Court had jurisdiction to address Petitioners' alternative "interpretations," each is without merit.

A. There is No Basis for a NAAQS-Only Situs Exception to the Congressional Mandate to Apply PSD to Any Pollutant Subject to Regulation

Petitioners contend that their novel "NAAQS-only situs" reading is mandated, under *Chevron* step one, by the plain language of the statute. That argument is untenable in light of the interpretative contortions in which Petitioners must engage to even explain their argument. To the contrary, as explained by this Court in *Alabama Power* and restated in EPA's brief in the Historic Regulation Challenge, it is clear under *Chevron* step one that the application of PSD to any air pollutant regulated under the CAA, including non-NAAQS pollutants, results from a straightforward application of the PSD provisions. Rather than repeat those arguments here, we respectfully invite the Court's attention to EPA's brief in the Historic Regulation Challenge, which is before the same panel of this Court. *See* Dkt. 1322352.

Alternatively, Petitioners assert that EPA has applied the wrong interpretation to ambiguous language of the statute and that their own alternative interpretations are both reasonable and preferable and should be adopted under a *Chevron* step 2 analysis. Industry Br. 12-13. To reach *Chevron* step 2, Petitioners assert that EPA already has interpreted PSD to limit the application of the term "any air pollutant" by issuing regulations limiting PSD's coverage to any air pollutant actually regulated under the Act and by limiting PSD's visibility regulations to any visibility-impairing pollutant, citing 42 U.S.C. §7491(g)(7). Industry Br. 32-34.

EPA's position that pollutants covered by PSD should actually be subject to regulation under some provision of the CAA merely mirrors the wording of the provisions setting forth the substantive criteria contained in the PSD program. *See* 42 U.S.C. §7475(a)(4) (requiring BACT for "each pollutant subject to regulation under this chapter [the CAA]"); 42 U.S.C. §7475(e)(1) (requiring a source to analyze the ambient air quality at the site "for each pollutant subject to regulation under this chapter [the CAA] which will be emitted from such facility"). Indeed, Petitioners themselves assert that under the *statute* "it is not enough for EPA to conclude that greenhouse gases qualify as 'air pollutants,' because the statute requires facilities to install 'best available control technology' only for a *subset* of air pollutants – those 'subject to regulation under this chapter,'" State Br. 14, and

that reflecting this requirement in EPA's regulations was "a proper application" of EPA's authority. Industry Br. 32.[19] EPA's clarification that the applicability of the PSD requirements reflects the actual statutory language of the substantive PSD requirements, does not move the inquiry as to whether PSD is restricted to only a very few air pollutants (i.e., NAAQS pollutants), from *Chevron* step one to *Chevron* step two. Nevertheless, the conclusion reached both by this Court in *Alabama Power* and by EPA under *Chevron* step one that PSD covers non-NAAQS pollutants, does not change when analyzed under *Chevron* step two.[20]

As detailed *supra*, the provisions upon which Petitioners rely, 42 U.S.C. §§7479 and 7475(a), expressly apply PSD to "any air pollutant" and "each pollutant subject to regulation under this chapter" without any suggestion that the regulated pollutant be one for which a NAAQS has been established. Petitioners' only support for limiting this language to NAAQS pollutants is language explaining that the source be located in any area that is in attainment (or unclassifiable) for a NAAQS. 42 U.S.C. §7475(a). Congress gave no indication in the PSD provisions that its general description that the source be located in an area

[19] Petitioners' other reference, §7491(g)(7), is titled "Visibility protection for Federal Class I Areas," so it naturally follows that EPA's regulations under that section should address "visibility-impairing pollutants."

[20] In the Tailoring Rule EPA explained that although it had previously decided the applicability issue, and had done so under *Chevron* step one, its interpretation of the relevant statutory provisions is reasonable and accordingly is entitled to deference under a *Chevron* step two analysis. 75 Fed. Reg. at 31,517/2, 31,558/3.

covered generally by the PSD program (in an "area to which this part applies," §7475(a)) should be used to severely limit its clear statement that the PSD program covers "any air pollutant" and that BACT applies to "each pollutant subject to regulation under this chapter." Indeed, the phrase "subject to regulation under this chapter" clearly is expansive, describing the entire Clean Air Act rather than limiting the reach of PSD to just NAAQS pollutants regulated under sections 7408 and 7409 of the Act, as Petitioners advocate. Petitioners reading would, in fact, render the "under this chapter" language of the provision they rely upon, section 7475(a), superfluous, which would violate "a cardinal principle of statutory construction." *New York v. EPA*, 443 F.3d at 847 (quoting *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

Moreover, the underlying premise of Petitioners' NAAQS-only situs requirement is that the pollutant being subjected to PSD permitting requirements must be one for which there exists a NAAQS, but that clearly is not a requirement under the statute. The substantive criterion most directly applicable to NAAQS pollutants requires a permit applicant to establish that its project will not

> cause or contribute to air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard [NAAQS] in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter [the CAA].

42 U.S.C. §7475(a)(3). If the purpose of the PSD program were solely to ensure that a construction project did not result in any increase in emissions of a NAAQS pollutant, then subsection (C), which follows the reference in subsection (B) to NAAQS and prohibits increases of emissions in excess of *any other* emission standard established anywhere in the CAA, would be nonsensical, or at the very least superfluous. Instead, what this provision establishes is that while the PSD program was certainly directed toward NAAQS-criteria pollutants, it also was directed at maintaining air quality for other pollutants regulated under other provisions of the CAA.

Similarly, in the first sentence of the PSD provisions Congress declared:

> The purposes of this part [PSD] are as follows: (1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipated to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air, *notwithstanding attainment and maintenance of all national ambient air quality standards* [NAAQS]....

42 U.S.C. §7470(1) (emphasis added). *See also EDF v. Duke Energy Corp.*, 549 U.S. at 567-68 ("the PSD provisions … aim[] at giving added protection to air quality in certain parts of the country 'notwithstanding attainment and maintenance of' the NAAQS. 42 U.S.C. §7401(1)."); S. Rep. No. 95-127 at 32 (1977)[21] (emphasis added) ("The chief tool to be used in implementing the no significant

[21] Reprinted in 3 Legislative History of the CAA Amendments of 1977 ("Leg. History") at 1406.

deterioration requirements is the permit that must be issued by the State for *any* major emitting facility to be located in *any* clean-air area."). The Administrator's mandate to protect the public from adverse effects of pollutants *notwithstanding* attainment and maintenance of NAAQS and in *any* clean-air area, would be unduly constrained if PSD were interpreted to apply only to pollutants for which an area has attained the NAAQS for the offending pollutant. Because a court "must reject [an] interpretation if it is 'inconsistent with the statutory mandate or [would] frustrate the policy that Congress sought to implement,'" *Kerr-McGee Chem. Corp. v. U.S. Nuclear Regulatory Comm'n*, 903 F.2d 1, 6 (D.C. Cir. 1990) (quoting *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 137, 143 (1984)), Petitioners' NAAQS-only situs requirement must be rejected.

Not only has EPA stated in regulations spanning 1978 to the present that PSD applies to any pollutant regardless of whether that specific pollutant is in attainment for NAAQS, the Agency has issued regulations under the PSD program governing a number of non-NAAQS pollutants. For instance, EPA has established significance levels (necessary to determine when a modification project is subject to PSD or when BACT is required) for fluorides, sulfuric acid mist, hydrogen sulfide, total reduced sulfur, municipal waste combustor organics, metals and acid gases, and solid waste landfill emissions – none of which are NAAQS pollutants. 40 C.F.R. §51.166(b)(23)(i) (setting significance levels for pollutants subject to

PSD). This longstanding regulation evidences not only that the application of PSD to non-NAAQS pollutants should have been no surprise to Petitioners, but also the reasonableness of EPA's application of PSD to non-NAAQS pollutants. *Entergy Corp.*, 129 S.Ct. at 1509 (historic practice in applying a statute "tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion"). Under Petitioners' interpretation, all of these provisions must be deemed invalid because they do not apply to NAAQS pollutants.

Furthermore, as noted, PSD requires permits for new construction and modifications of a stationary source. 42 U.S.C. §7475(a). The type of "modification" that may require a PSD permit under §7475(a) is defined in §7479(1)(C) to include any "modification" described in §7411(a), which is located in a section of the Act describing the NSPS program. That section, in turn, defines a "modification" as a change "which increases the amount of *any air pollutant.*" §7411(a)(4) (emphasis added). Air pollutants regulated under the modification provisions of §7411(a)(4) clearly include non-NAAQS pollutants. This is evident because §7411(d), which regulates air pollutants from existing (as opposed to new or modified) sources, applies by its terms to *only* certain non-NAAQS pollutants, and only after those pollutants are regulated from "new source[s]," §7411(d)(1), which §7411(a)(2) defines to include sources that undertake modifications. Thus, in determining the applicability of the PSD program to sources, the Act requires

EPA to look beyond the statutory provisions establishing PSD, to provisions (in this case, to NSPS) that clearly are not limited to NAAQS pollutants. This provision is particularly pertinent because modifications account for the vast majority of instances in which PSD permits are required and where BACT is required for an anyway source. 75 Fed. Reg. at 31,571/1.

Turning to a particularly telling provision, the 1990 CAA amendments expressly exempted from the PSD program the 188 hazardous air pollutants ("HAPs") governed by 42 U.S.C. §7412. 42 U.S.C. §7412(b)(6) ("The provisions of part C of this subchapter (prevention of significant deterioration [PSD]) shall not apply to pollutants listed under this section."). This provision makes clear that Congress itself recognized that there were, under the terms of the PSD provisions as enacted in 1977, potentially hundreds of additional pollutants subject to PSD permitting requirements, since there would be no need to statutorily exempt these pollutants from PSD coverage if PSD only applied to the six NAAQS pollutants. This provision further evidences that Congress knows how to exempt certain pollutants from coverage of PSD; by stating it expressly as opposed to using convoluted machinations based on language merely stating that a source must be in an "area to which this part applies." 42 U.S.C. §7475(a). While Congress expressly exempted hundreds of pollutants from the coverage of PSD through enactment of 42 U.S.C. §7412(b)(6), greenhouse gases are not so exempted.

Circling back to the language upon which Petitioners rely, the question is whether the source intends to construct its facility in "*any* area to which this part [the PSD program] applies." 42 U.S.C. §7475(a) (emphasis added). The term "any" is broadly construed under the CAA. *See New York v. EPA*, 443 F.3d at 885 (explaining that the word "any" has an expansive meaning; noting that "the [Supreme] Court has read the word 'any' to signal expansive reach when construing the Clean Air Act"); *Massachusetts*, 549 U.S. at 528-29 (explaining that "any" really does mean "any" when it comes to coverage of greenhouse gases under the CAA); *New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008). It is undeniable that Texas, or Virginia, or any other area of the Nation presently is "any area to which [some aspect of the PSD program] applies." *See* Industry Br. 22. Based on all of the provisions set forth above, there simply is no basis to rewrite this provision to apply PSD only to a source that intends to construct its facility in "any area to which this part [the PSD program] applies *but only for the specific NAAQS-criteria pollutant for which the area has been designated attainment.*"

As outlined above, under the considerable deference accorded to EPA, the Court need only find "that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." *Chem. Mfrs. Ass'n v. NRDC, Inc.*, 470 U.S. 116, 125 (1985). At the

very least, EPA's choice to apply 42 U.S.C. §7475(a) as actually written, without the added proviso set forth in italics above – particularly in light of this Court's acknowledgment of Congress' clear intent that PSD applies "even though the air pollutant, emissions of which caused the source to be classified as a 'major emitting facility,' may not be a pollutant for which NAAQS have been promulgated," *Alabama Power* 636 F.2d at 352 – cannot be deemed to be an irrational interpretation of the language at issue.[22]

B. EPA is Not Required to Follow the Procedures for Promulgating Regulations for NAAQS Set Forth in 42 U.S.C. §7476

In a derivative of its NAAQS-only situs argument, Petitioner-Industry asserts that 42 U.S.C. §7476 establishes that PSD was specifically designed to apply only to "then extant-criteria pollutants" that were identified in 1977 and that application of PSD can only be extended to additional pollutants for which a NAAQS is generated under the rulemaking process set forth in §7476. According to Petitioners, "Section [7476](a) limits PSD to new [NAAQS] criteria pollutants" and it requires EPA to go through a rulemaking to create a new PSD-covered pollutant. Even then, Petitioners assert that States have five years to accommodate such new pollutants with an actual PSD permitting program. Industry Br. 43-46.

[22] Any additional assertions made by Petitioners on their NAAQS-only situs argument are addressed in EPA's brief in the Historic Regulation Challenge.

The subsection upon which Petitioners rely, §7476(a), actually refers to four specific pollutants: hydrocarbons, carbon monoxide, petrochemical oxidants, and nitrogen oxides. The provision calls on the Administrator to issue regulations "to prevent the significant deterioration of air quality which would result from the emissions of such pollutants." Finally, the provision states: "In the case of pollutants for which [NAAQS] are promulgated after August 7, 1977, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards." This section says nothing about non-NAAQS pollutants and contains no requirements that EPA issue any regulations before applying PSD to non-NAAQS pollutants. To the contrary, on its face the entire provision applies only to the four identified pollutants and any other NAAQS pollutant subsequently identified. It is not surprising then that the identical argument Petitioners make here was rejected by this Court in *Alabama Power*.

In that case, Petitioners argued that PSD was limited to the two then-extant criteria pollutants and that "any PSD review not premised on the studies and standards required under section 166 [§7476] thus must be arbitrary and invalid." 636 F.2d at 406. The Court, however, relying on the language of the provisions at issue in this case, 42 U.S.C. §§7475 and 7479, soundly rejected this argument:

> These arguments, however, are contradicted by the plain language of section 165. Section 165, in a litany of repetition, provides without qualification that each of its major substantive provisions shall be effective after 7 August 1977 with regard to each pollutant subject to

> regulation under the Act, or with regard to any "applicable emission standard or standard of performance under" the Act. As if to make the point even more clear, the definition of BACT itself in section 169 applies to each such pollutant.... We find no implied or apparent conflict between sections 165 and 166; nor, as Industry Groups contend, must the requirements of section 165 be "subsumed" with those of section 166. As we have noted in our earlier *per curiam* opinion, section 166 has a different focus from section 165: the development of maximum allowable increments or equivalent limitations for those pollutants (other than sulfur dioxide and particulate matter) for which NAAQS (national ambient air quality standards) have been or will be established.

636 F.2d at 406. Although Petitioner-Industry cites *Alabama Power* four times in its brief, there is no mention of this conclusion.

C. There is No Ambient Air or Local Impacts Exception to PSD

Petitioner-Industry asserts that Congress limited the PSD program to pollutants whose emissions resulted only in "localized" problems due to their concentration in the "ambient air," which Petitioners choose to define as the "air people breathe." Industry Br. 17. Petitioners further assert that regulating greenhouse gases would frustrate Congress' intent because greenhouse gas emissions "have no deleterious effects on ambient air." *Id.* at 18. Petitioners' argument misconstrues the facts, the provisions of the CAA, and the meaning of "ambient air."

There is no exception in PSD that allows EPA to exclude from its coverage pollutants determined to endanger public health and welfare but which may not have as immediate and direct an impact on local communities as other pollutants.

Petitioners cite references to "air quality" and "ambient air" as indicators that the reach of PSD is limited to some radius surrounding the source emitting the pollutant in question. Industry Br. 38-39. But there is nothing about the terms "air quality" or "ambient air" that limits the geographical reach of the statute.

First, "ambient air" refers simply to outdoor air, *Train v. NRDC*, 421 U.S.60, 65 (1975), which quite naturally exists anywhere in the atmosphere. *See also* 40 C.F.R. §50.1(e) (defining "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access."). When Congress wanted to refer to *local* ambient air quality within the key provision of PSD, it specifically referenced "the ambient air *at the proposed site* ...." 42 U.S.C. §7475(e)(1) (emphasis added). *See also* 42 U.S.C. §7470(4) (referring to regional air quality).

Moreover, the Supreme Court already has rejected any attempt to exclude greenhouse gases from coverage of provisions of the CAA by trying to limit the meaning of "ambient air." EPA had at one point asserted that in calling for the Agency to address impacts to "ambient air," the CAA concerns itself with impurities "at ground level or near the surface of the earth." *Massachusetts*, 549 U.S. at 560 (Scalia, J., dissenting). As the majority in *Massachusetts* explained, the position that greenhouse gases can be excluded from coverage of the provisions of the Act addressed to impacts on ambient air "finds no support in the text of the statute, which uses the phrase 'the ambient air' without distinguishing between

atmospheric layers. Moreover it is a plainly unreasonable reading of a sweeping statutory provision designed to capture '*any* physical, [or] chemical ... substance or matter which is emitted into or otherwise enters the ambient air.' 42 U.S.C. §7602(g)." *Massachusetts*, 549 U.S. at 529, n.26 (emphasis in original).

Petitioners state that "all CAA-regulated pollutants in 1977 were regulated because they could cause elevated ground-level concentrations in ambient air people breathe.... All of these pollutants were ones EPA found posed health or welfare risks due to exposure in the ambient air." Industry Br. 36. Under Petitioners' view of the term "ambient air," PSD only covers pollutants that present immediate health risks in the immediate area surrounding a source. *Id.* at 35-39. First, greenhouse gases do, in fact, impact people's health, 74 Fed. Reg. at 66,524-30, and that obviously occurs as a result of emissions to the ambient air. Additionally, as Petitioners themselves explain, PSD contains provisions which deal with visibility and impacts to parkland that occur sometimes hundreds of kilometers away from a source and have nothing to do with health risks, local impacts, or Petitioners' characterization of the "ambient air people breath." *See, e.g.*, 42 U.S.C. §§7491-92. *See also* 42 U.S.C. §7475(d); 40 C.F.R. part 51, Appendix W, §6.2.3; §52.21(a)(1). In addition, the legislative history clearly indicates that Congress intended PSD to apply more broadly than to local air quality issues. *See* H.R. Rep. No. 95-294 at 105, 4 Leg. History at 2572 ("The

committee recognized the strong need for a policy of preventing significant deterioration of air quality. The bases of such a policy include … avoidance of unnecessary stratospheric and atmospheric modifications due to air pollution."); *id.* at 138 [2605] ("A policy of preventing significant deterioration of clear air resources which minimizes the impact of emissions of new industrial sources will help reduce possible major weather modifications such as increased acidity of rainfall, changes in amounts of rainfall and temperature changes.").

Finally, a stated 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." 42 U.S.C. §7470(1) (emphasis added). Public welfare, in contrast to public health, refers generally to impacts to the environment. *See, e.g.*, 42 U.S.C. §7602(h) (where the Act uses "language referring to effects on welfare," that "includes, but is not limited to, effects on ... climate"). As outlined in the Endangerment Finding, impacts from greenhouse gases to the public welfare may be more widespread, long-lasting, and serious than those of perhaps any other pollutant regulated under the CAA. Thus, even if one assumes that the emission of greenhouse gases may not result in the type of localized respiratory injuries that Petitioners purport to be concerned about, they nevertheless fall squarely in the range of pollutants that the PSD program was designed to address.

D. None of Petitioners' Alternative Interpretations Even Applies to Title V

As with PSD, EPA is not free to ignore either the statutory provisions that require expeditious processing of Title V permits or the provisions that require permits for any stationary source that has the potential to emit at least 100 tpy of "any air pollutant," which EPA applies to any pollutant subject to regulation.[23] EPA reasonably reflected the Congressional intent embodied in these statutory provisions by phasing-in permitting requirements for sources that are newly subject to Title V as a result of greenhouse gas emissions. Unlike PSD, however, Petitioners fail to identify any provisions of Title V that even purport to restrict its mandate to cover any pollutant regulated under the Act. Indeed, each of the alternative interpretations offered by Petitioner-Industry addressed above is based on specific provisions of the PSD program and thus none supports *any* type of alternative interpretation of Title V.

Instead, Petitioners cite 42 U.S.C. §7661a(a), which allows EPA to "exempt one or more source categories" from the permitting requirements of Title V, except that EPA "may not exempt any major source from such requirements." In yet another upside-down argument, Petitioners contend that because this section

[23] Contrary to the suggestion in Petitioner's brief at p. 47, the definition of "regulated air pollutant" in EPA's Title V regulations is relevant to certain requirements (e.g., fees) but it is not used for determining whether a source is subject to Title V permitting as a major source. *See* 40 C.F.R. §70.3 (states must permit major sources); §70.2 (defining major source).

prohibits EPA from exempting "major sources" from Title V requirements, EPA must exclude greenhouse gases from regulation under Title V. Industry Br. 46-47. In other words, to address EPA's purported improper "exemption" through the Tailoring Rule of millions of sources that would be deemed "major" utilizing the statutory thresholds, EPA must exempt *all* sources of greenhouse gases, in direct violation of the provision Petitioners claim EPA is already violating.

Petitioners' counterintuitive argument is academic because EPA has not exempted major source categories that emit greenhouse gases from Title V permitting requirements. In the Tailoring Rule, EPA concluded only that it "may apply Title V to GHG sources in a phased-in manner," noting that "congressional intent is clear that Title V applies to GHG sources in general." 75 Fed. Reg. at 31,562. *See also id.* ("[T]his rule" "describe[s]" the application of the major source definition "to GHG sources on a phased-in basis, with the largest sources first"); *id.* at 31,565-67 ("We expect to apply Title V to more sources, in a step-by-step fashion, over time."). Phasing in the requirements of Title V simply does not equate to the type of express exemption prohibited by the statute.

To be sure, the phasing-in process through tailored thresholds established what might be termed effective temporary exemptions for sources emitting under the tailored thresholds. *See, e.g.* 75 Fed. Reg. at 31,590 ("We are finalizing Steps 1 and 2 using the threshold-based approach, which applies the various legal

doctrines, in the context of the *Chevron* framework, in a way that effectively exempts all small sources during this part of the phase-in....”). But §7661a(a), upon which Petitioners rely, speaks to the “exempt[ion] of one or more *source categories*” from the permitting requirements of Title V and does so as to *permanent* exemptions.

In the Tailoring Rule EPA “did not propose any permanent exemptions of any kind,” 75 Fed. Reg. at 31,590/1, and, after considering commenters’ requests for exemptions of certain source categories from the Title V (and PSD) permitting requirements, EPA rejected them all. *See* 75 Fed. Reg. at 31,589-95 (“[W]e do not believe special exemptions for GHG requirements are likely to be justified”); *id.* at 31,526 (“EPA has decided not to provide exemptions from applicability determinations (major source and major modification) under Title V and PSD for certain GHG emission sources, emission activities, or types of emissions at this time.”). Thus, EPA did not “exempt” major source categories from Title V permitting requirements in the Tailoring Rule. Instead, it is *Petitioners’* suggestion that EPA categorically “exclude GHGs from the pollutants regulated under Title V” (Industry Br. 47), and do so on a permanent basis (*id.* at 25, n.5), that stands in

tension with the statutory prohibition on exempting major source categories from Title V.[24]

In any event, if the Tailoring Rule cannot be used to phase-in the statutory thresholds for "major sources" under Title V, then those statutory thresholds must be applied, unless future streamlining or other analysis suggests that permits are not required for certain categories or types of sources. Until such time as this may occur in Step 3 or otherwise, Petitioners would not get to escape the requirements of Title V because EPA lacks a tool to ameliorate the burdens of that regulation. Thus, as with all of Petitioners' arguments that seek either application of the statutory thresholds or non-application of the Tailoring Rule, Petitioners lack standing to mount such a challenge because such "relief" will only exacerbate their alleged harm.

VI. SEVEN STATES MAY NOT RELY ON AN OUTDATED SIP TO DELAY THE APPLICATION OF PSD TO GREENHOUSE GASES FOR THREE YEARS

Accepting (presumably only for argument's sake) that PSD fully applies to emission of greenhouse gases, Petitioners assert that EPA may not presently enforce PSD requirements against sources of such emissions in seven States.

[24] In a separate rulemaking issued more than a year after the Tailoring Rule, EPA deferred for a three-year study period the application of PSD and Title V to carbon dioxide emissions from biomass because of uncertainty as to the net impact on the environment after absorption of carbon dioxide by biological processes. 76 Fed. Reg. 43,490 (July 20, 2011).

Petitioners first contend that the CAA allows a State to take up to three years to amend its SIP to reflect the fact that PSD now covers greenhouse gases. Petitioners next insist that States whose SIPs do not currently cover greenhouse gases may grant permits to sources in those States emitting greenhouse gases above statutory *or* tailored thresholds without requiring BACT or otherwise enforcing the PSD provisions. Industry Br. 51-53. In support of this argument, Petitioners contend that EPA may not unilaterally impose a construction moratorium. Industry Br. 51. Every facet of Petitioners' argument (which applies only to PSD, not Title V) is meritless but, more importantly, the Court lacks jurisdiction to even address Petitioners' claim.

A. The Court Lacks Jurisdiction to Decide SIP Issues in This Case

As outlined above, no major stationary source in any attainment area may commence construction without obtaining a permit that meets all of the requirements of 42 U.S.C. §7475(a). This prohibition, and any "construction moratorium" that may result because a source must obtain a PSD permit that is compliant with the PSD provisions, applies by operation of statute, *not* by application of the Tailoring Rule.

Nowhere do Petitioners point to any regulatory language promulgated as part of the Tailoring Rule that imposes any type of construction *or* permitting moratorium, even for States that refuse to amend their SIP to comply with the

current requirements of the PSD program. Instead, Petitioners merely disagree with EPA's explanation in the preamble to the Tailoring Rule of what would occur under the plain terms of the PSD provisions themselves if SIPs that do not already cover greenhouse gases were not amended by January 2, 2011, the date the PSD provisions were to be first applied to greenhouse gases. *See* Industry Br. 51, 53 (emphasis added), titling their argument: "EPA's Construction Moratorium *Interpretation* is Unlawful," and asking that "EPA's Tailoring Rule *interpretation* of its regulatory actions ... be set aside."

The Tailoring Rule contains nothing that requires States to amend their SIPs to recognize greenhouse gases as a covered pollutant in the first instance or place a moratorium on construction in a State until its SIP is amended. EPA simply explained that some States would likely need to amend their SIP prior to January 2, 2011 or they would not be in a position to grant PSD permits meeting all requirements of the CAA because their SIP did not cover greenhouse gases. 75 Fed. Reg. at 31,525. Petitioners cannot transform EPA's warning that a *de facto* moratorium on construction could occur by operation of statute if the *States* did not act, into the imposition of a moratorium through some phantom act of EPA.

EPA's actual finding that the SIPs of a number of States were inadequate because they did not cover greenhouse gases as required under the terms of the PSD provisions, and the call to amend those SIPs within one year, did not even

occur until six months *after* the final Tailoring Rule was published on June 3, 2010. *See* the SIP Call and FIP Rule (described *supra*), both proposed in September 2010 and finalized in December, 2010. It is those actions with which Petitioners have a complaint. *See* Amicus-Kentucky Br. 19 (asserting that "the practical effect of the 'SIP Call' was to threaten a construction ban on the States....") and 23 (asking the Court not to allow the "SIP Call and FIP rule to stand...."). Thus, Petitioners' alleged injury was not caused by the actions being challenged here. This Court has no jurisdiction to issue an advisory opinion on the validity of the SIP Call and FIP – which are being separately challenged before this Court (*see* n.9, *supra*) – by addressing the issue in a challenge to the Tailoring Rule. *Massachusetts*, 549 U.S. at 516 (no advisory opinions).

B. Petitioners Substantive SIP Claims are Without Merit

Petitioners-Industry's SIP claims will fare no better on the merits whenever they are properly presented. Under the express terms of the PSD program "[n]o major emitting facility ... may be constructed [or modified] in any area" subject to the PSD provisions unless it is the subject of a PSD permit "setting forth emission limitations for such facility which conform to the requirements of this part [the PSD provisions]" and "the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility...." 42 U.S.C. §7475(a)(1), (4). *See also* 42

U.S.C. §7661a(a), making it unlawful to operate a facility that is not in compliance with Title I, Part C (the PSD program). It's simple: construct without a permit that "conform[s] to the requirements of [the PSD program]," and you violate the statute.

Looking to at least buy time, Petitioner-Industry contends that pending a SIP revision, "States may continue to issue valid PSD permits under the terms of their previously approved SIPs." Industry Br. 52 (citing *United States v. Cinergy Corp.* 623 F.3d 455 (7th Cir. 2010)). But *Cinergy* dealt with the nonattainment new source review ("NNSR") program under Part D of Title I, which unlike the PSD program is not self-enforcing but instead expressly relies on SIP provisions for enforcement of its permitting requirements.[25] In contrast, in *Sierra Club v. Jackson*, No. 10-5280, 2011 WL 2600841 (D.C. Cir. July 1, 2011), this Court explained that under the PSD program, a permit applicant could not rely on a SIP that has not yet been amended to conform with statutory PSD requirements because 42 U.S.C. §7475(a) expressly "forbids the construction of such facilities

[25] The Seventh Circuit mistakenly cited the Act's PSD provisions in its decision but the case concerned *only* the NNSR requirements under part D of Title I, 42 U.S.C. §§7501-15, which can only be enforced through a SIP. Indeed, the court never cited the permitting provision (§7475) or the enforcement provision (§7477) of PSD. *See* Def.-Appellants' Br. in *United States v. Cinergy*, 2010 WL 3950590 at *5-*6, *14-*15 (explaining that while "§7475(a) ... prohibits construction without a PSD permit, [t]he NNSR program, in contrast, does not directly impose obligations on utilities and subjects a utility to federal liability *only for* violating the terms of the EPA-approved SIP.") (emphasis in original). JA XXX.

absent a PSD permit meeting the requirements of the Clean Air Act." *Id.* at *2. *See also* 42 U.S.C. §7477 (directing EPA or a State to "take measures . . . to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part [the PSD program] ….").[26]

Regardless of whether a SIP not in compliance with PSD can continue to be used to issue PSD permits, Petitioners' contention that States are entitled to three years to amend their SIPs is erroneous. Petitioner-Industry asserts that 42 U.S.C. §7410(a) and (c) "establish the only procedure available to revise approved SIPs." Industry Br. 53. This assertion is facially incorrect. EPA is specifically authorized to issue a SIP Call whenever it finds a SIP to be substantially inadequate to "comply with any requirement of this chapter [the CAA]." 42 U.S.C. §7410(k)(5). Under the express terms of §7410(k)(5), "[t]he 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). Thus, not only is EPA specifically authorized to set *any reasonable deadline* for a submission from States for a SIP revision to cover greenhouse gases, that deadline may not in any case

[26] Amicus-Kentucky incorrectly cites enforcement procedures under 42 U.S.C. §7509, which expressly apply only to the NNSR program and do not apply to PSD. Amicus-Kentucky Br. 17-18.

exceed 18 months, i.e., States have no statutory right to three years to submit such a SIP revision.

Furthermore, 42 U.S.C. §7410(a)(1), upon which Petitioner-Industry expressly relies, is inapplicable here because it applies only in conjunction with promulgation of a NAAQS, which EPA has not issued for greenhouse gases. Even if it were applicable, this provision specifically declares that SIP amendments may be required "within 3 years (*or such shorter period as the Administrator may prescribe*)." *Id.* (emphasis added). In this case the Administrator prescribed a period of one year for amendment of the SIP, which did not require a comprehensive revision but rather a simple language change of several sentences that would allow for coverage of greenhouse gases at the tailored thresholds. Moreover, the one-year deadline is consistent with deadlines in other SIP calls, the Agency's experience regarding the time necessary to accomplish SIP revisions, and the comments of most States subject to the SIP Call. *See* 75 Fed. Reg. at 77,710-11.

Petitioner-Industry also relies on 42 U.S.C. §7410(i), which states that "*except for* ... a plan promulgation under *subsection (c) of this section*, or a plan revision under subsection (a)(3) of this section, no ... action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the [EPA] Administrator." 42 U.S.C. §7410(i)

(emphasis added). Petitioners assert that pursuant to this language, neither EPA nor the States can change the language of any SIP to cover greenhouse gases. Industry Br. 53. Yet, the very subsection *excepted* from this provision, "subsection (c) of this section [42 U.S.C. §7410(c)]," is the provision under which EPA is acting – and typically acts – to ensure that SIPs are updated to reflect changes in federal requirements. This subsection requires EPA to promulgate a FIP when it "finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section." 42 U.S.C. §7410(c)(1)(A). Under the SIP Call that EPA issued pursuant to §7410(k) and the FIP Rule, that is exactly what EPA is doing here. The SIP Call calls on States to amend their SIP provisions to cover greenhouse gases and the FIP Rule applies PSD requirements where a State "failed to make the required submission" or otherwise does not satisfy the minimum criteria under subsection (k)(1)(A). 75 Fed. Reg. 82,246. Under the clear wording of 42 U.S.C. §7410(c), in the event of either of these failures, EPA *shall* promulgate a FIP and may do so at *any time* within two years after either of these events.

Finally, Petitioners cite "the three year SIP-revision deadline in 40 C.F.R. §51.166(a)(6)." Industry Br. 52. This provision provides that "[a]ny State required to revise its [SIP] *by reason of an amendment to this section [51.166]* …

shall adopt and submit such plan revision to [EPA] … no later than three years after such amendment." (Emphasis added). While the Tailoring Rule added a definition to amend section 51.166 that effectively altered the definition of "major source" to incorporate the tailored thresholds, as outlined above it is the statute, not any amendment of §51.166, that leads to the necessity for certain States that lacked greenhouse gas PSD permitting authority to amend their SIPs.

VII. STEP 2 OF THE TAILORING RULE IS NEITHER ARBITRARY NOR UNLAWFUL

As outlined above, the PSD program expressly forbids a major source to *commence construction* unless it has a permit that is in compliance with PSD requirements. 42 U.S.C. §7475(a). Petitioners nevertheless assert that Step 2 of the Tailoring Rule is arbitrary and capricious because it does not contain a grandfather clause that allows a source that obtained a construction permit that does not meet the requirements of the PSD program (a "minor source" permit) before July 1, 2011, the operative date of Step 2, to nevertheless avoid PSD requirements by commencing construction anytime within 18 months of receiving its minor source permit. Industry Br. 53-55.

"[T]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *See*

also, FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810 (2009). The agency need merely articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

The Tailoring Rule was issued on June 3, 2010 and thus parties that might be subject to Step 2 had nearly 13 months under existing regulations to obtain a minor source permit and begin construction so as to avoid the requirement that they obtain a PSD permit that addressed their greenhouse gas emissions. 75 Fed. Reg. at 31,594/3. As EPA explained, it saw no reasonable basis to amend its regulations to enable sources that become major sources on July 1, 2011 to begin construction after that date without obtaining a PSD permit under the terms applicable on that date. *Id.* at 31,592-95. *See also* the Timing Decision, where EPA explained that "under the particular circumstances presented by the forthcoming application of PSD requirements to GHGs, EPA does not see a justification for adopting an explicit grandfathering provision...." *Id.* at 17,021-22.

Petitioners fail to cite any statute or regulation that requires EPA to provide minor sources 18 months to commence construction from the date they obtain a minor source construction permit. There is no such provision in the Clean Air Act, and the only provision in EPA regulations that arguably could (but does not

actually) support Petitioners' argument applies to PSD permits issued to major sources, not to minor source permits. 40 C.F.R. §52.21(r)(2).

Instead, Petitioner-Industry merely asserts that EPA has allowed grandfathering in other circumstances and that it did not apply the same requirements to begin construction to avoid greenhouse gas requirements to Step 1 sources that obtained PSD permits before January 2, 2011. Industry Br. 53-54. The fact that differently-situated sources might be subject to different time periods in which to comply with regulatory requirements does not make a rule arbitrary or capricious. *Ace Motor Freight, Inc. v. ICC*, 557 F.2d 859, 862 (D.C. Cir. 1977). *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994). The agency need merely provide an explanation for its different treatment, *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 968 (D.C. Cir. 1999), *Chadmoore Commc'ns, Inc. v. FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997), and a party carries a heavy burden in establishing that an agency acted irrationally because it treats one set of regulated entities differently from another with regard to inclusion under a federal program or statute. *City of Las Vegas v. Lujan*, 891 F.2d at 935. As EPA explained, the difference in treatment for Step 1 "anyway" sources and Step 2 sources "is because such a Step 2 source that begins actual construction after Step 2 would likely be doing so without having any permit meeting the requirements of

paragraphs (j) through (r)(5) of 40 C.F.R. 52.21 or 51.166 or a state equivalent," which is prohibited under paragraph (a)(2)(iii). *75* Fed. Reg. at 31,594/2.[27]

Petitioner-Industry alternatively asserts that EPA failed to address this grandfathering issue in the proposed rule and therefore EPA made its decision not to adopt their preferred grandfathering clause "without notice and comment opportunity...." Industry Br. 50. This argument misses the mark for several reasons.

In a rulemaking proceeding EPA "'must provide notice sufficient to fairly apprise interested persons of the subjects and issues before the Agency.'" *NRDC v. EPA*, 279 F.3d 1180, 1186 (D.C. Cir. 2002) (citation omitted). An agency may satisfy this requirement, "and need not conduct a further round of public comment, as long as its final rule is a 'logical outgrowth' of the rule it originally proposed." *Northeast Maryland Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951-52 (D.C. Cir. 2004); *CSX Transp. Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009).

The proposed Tailoring Rule set out procedures to tailor the statutory thresholds and the Timing Decision clarified the date on which PSD would become

[27] EPA's regulations specify that a major emitting facility subject to PSD may not begin actual construction without a PSD permit. 40 C.F.R. §51.166(a)(6)(iii); 40 C.F.R. §52.21(a)(2)(iii). A Step 2 source holding only a minor source permit that did not address greenhouse gas emissions would not have obtained a permit meeting the requirements of the PSD regulations. 75 Fed. Reg. at 31,594/2.

applicable to greenhouse gas emissions. EPA was not required to provide notice that it was *not* proposing to delay application of its regulation through grandfathering or that it was *not* otherwise going to follow existing regulations as written. To be sure, desired grandfathering by an affected party is the logical outgrowth of every rule that has a date upon which it becomes effective, and an agency does not have to list every conceivable grandfathering scenario that it will *not* be considering in the Final Rule in order to provide adequate notice.

In fact, numerous comments were submitted on the Proposed Timing Decision and Tailoring Rule suggesting how various types of sources, or sources at various stages of application or construction, might be grandfathered. *See* 75 Fed. Reg. at 31,592-93. Indeed, a number of parties submitted comments addressing the regulations that allow 18 months to commence construction before a PSD permit expires. JA XXX (Response to Comments at 184). Because the issue on which Petitioners contend they had no opportunity to comment was raised in response to both the proposed Timing Decision and Tailoring Rule (evidencing that it was a logical outgrowth of these proposed actions), and was specifically addressed by EPA in its final actions and its Response to Comments, there is no basis for the Court to remand the Rule back to EPA for comments on this issue.

Finally, the alleged failure to provide notice and opportunity for comment is, at best, a procedural rulemaking error. Under §7607(d)(8), "[i]n reviewing alleged

procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." Since EPA already considered comments regarding grandfathering and rendered its view on that issue, there is no likelihood that EPA's decision on this issue would be significantly changed if Petitioners submit additional comments, and thus the Court must reject this claim.[28]

VIII. EPA PROPERLY IDENTIFIED THE POLLUTANT NOW SUBJECT TO PSD REQUIREMENTS AS THE GROUP OF SIX GASES KNOWN COLLECTIVELY AS "GREENHOUSE GASES"

Petitioner-Industry argues that EPA's "determination" in the Tailoring Rule that all six gases collectively designated as greenhouse gases are subject to PSD requirements, rather than only the four component gases for which the Vehicle Rule sets individual standards, was arbitrary and capricious. Industry Br. 55-56. Eliminating the two gases that are not directly emitted by vehicles would, in fact,

[28] In a single sentence, Petitioners complain, without any argument or authority, that EPA failed to provide notice and comment opportunity regarding the January 2, 2011 date for application of Step 1. Industry Br. 50. First, this Court will not address challenges made in a single sentence without argument or citation to authority. *See* p. 135 *infra*. Second, the applicability of PSD requirements on January 2, 2011 was discussed at length in the Timing Decision, which asked for comments on when a pollutant becomes subject to regulation under PSD. *See* 75 Fed. Reg. at 17,006/1. Moreover, Petitioners failed to satisfy the requirements of §7607(d)(8), as discussed above. Finally, in the Tailoring Rule EPA asked for comments on all manner of *administering* the PSD requirements for sources of greenhouse gases, including appropriate thresholds, 74 Fed. Reg. at 55,302, 55,332 and timing of the steps, *id*. at 55,296, 55,332-55,335-37.

have little, if any, effect on the number of stationary sources covered by PSD. As noted above, Petitioners have the burden of establishing standing and they must support their claims of injury with affidavits. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). Here, Petitioners have offered no affidavits – or even alleged – that a single Petitioner would escape regulation if the definition of greenhouse gases included only the four component gases for which the Vehicle Rule sets individual standards. Petitioners' failure to address their standing burden cannot be cured on reply brief. *Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 675 (7th Cir. 2008). *See also* Circuit Rule 28(a)(7) and Dkt. No. 1299257 at 3. Thus, this claim should not be considered by the Court.

If the Court does reach this issue, as a factual matter there are significant policy reasons supporting the six-gas definition for stationary sources. *See, e.g.* 75 Fed. Reg. at 31,529-32 (using the six-gas definition is likely to *reduce* sources' burdens by providing maximum flexibility in designing control responses, opportunity for multi-gas mitigation strategies, and a broader platform for potential future offsets). Petitioners do not even address these findings. Thus, the six-gas definition should be upheld on these grounds alone as neither arbitrary nor capricious.

Moreover, the Tailoring Rule applies the identical definition of greenhouse gases applied in the Vehicle Rule and EPA had no discretion to limit that definition

with regard to stationary sources. In the Endangerment Finding EPA identified the "air pollution" reasonably anticipated to endanger public health and welfare as a mix of the six gases. 74 Fed. Reg. at 66,516-22. Accordingly, EPA defined the specific "air pollutant" causing or contributing to that pollution under 42 U.S.C. §7521 as "the aggregate group of the same six ... greenhouse gases." *Id.* at 66,536. As pointed out in the Tailoring Rule, "it is not uncommon for EPA to recognize 'collective air' pollutants comprised of many individual compounds based upon shared threats to health and welfare." 75 Fed. Reg. at 31,528.

Having made its Endangerment Finding under the auspices of Title II of the CAA governing mobile sources, EPA issued the Vehicle Rule regulating the emissions of the six-gas pollutant denominated as greenhouse gases. 40 C.F.R. §86.1818-12(a). As detailed above, the provisions of PSD and Title V require EPA to apply the requirements of those programs to any pollutant regulated under the CAA. In this case, the air pollutant for which EPA set emission standards is greenhouse gases, which is expressly defined in the Vehicle Rule as the group of all six constituent gases. *Id.*; 75 Fed. Reg. at 31,530. As EPA explained in the Tailoring Rule, the applicable CAA provisions give EPA no leeway to redefine the pollutant in administering the PSD and Title V program:

> The phrase "subject to regulation under the Act," by its terms, identifies the air pollutant that is subject to PSD and Title V as the same air pollutant that is identified in the regulatory action under another provision of the Act. The term is a simple cross-reference....

> Whatever the pollutant is that is regulated elsewhere, it is that pollutant to which PSD and title V apply.... The applicability provision in the LDVR [Vehicle Rule] provides a clear reference to the definition of the single pollutant comprised of the aggregate group of the six well-mixed GHGs, which makes clear PSD and Title V applicability depends on the same sum-of-six GHG construct. We must follow this construct of the aggregate group of the six gases and do not have discretion to interpret the GHG "air pollutant" differently for the purposes of PSD or Title V.

75 Fed. Reg. at 31,528/3.

Petitioner-Industry does not quarrel with EPA's lack of discretion to redefine greenhouse gases for the purpose of applying PSD and Title V. Instead, Petitioners argue as a factual matter that the Vehicle Rule "regulates only four" of the six gases found to endanger health and welfare. Industry Br. 55. That assertion is incorrect. While the Vehicle Rule sets standards applicable to the emissions of greenhouse gases by setting individual emissions limits for some, but not all, of the constituent gases, *see, e.g.*, 75 Fed. Reg. at 25,421-24, that does not change the fact that the "air pollutant" regulated in the Rule is the group-pollutant known as greenhouse gases, not its component gases. Thus, in administering the PSD program through the Tailoring Rule, EPA was correct to identify the pollutant now subject to regulation under the Vehicle Rule (and thus also to PSD and Title V requirements) as all six of the component gases collectively identified as "greenhouse gases."

IX. EPA COMPLIED WITH ANY OBLIGATION TO ADDRESS THE IMPACTS OF ITS REGULATIONS ON STATIONARY SOURCES

Petitioner-Industry asserts that EPA should have analyzed the economic impacts of incorporating greenhouse gases into the PSD program before applying that program to stationary sources. Industry Br. 56-57. This argument lacks merit on several levels.

First, EPA *did* analyze the "costs to the sources and administrative burdens to the permitting authorities from PSD and Title V applicability for GHG emissions" using "labor and cost information" gained from Information Collection Requests sent to the regulated community, as well as "information on numbers and types of affected sources." 75 Fed. Reg. at 31,533-34. EPA concluded that it would cost an industrial source an average of $84,500 to apply for and receive a PSD permit, while a commercial or residential source would incur an average of $59,000 in costs to obtain a PSD permit. 75 Fed. Reg. at 31,534. EPA then extensively analyzed the corresponding burdens on permitting authorities – the States – in terms of both time and money. *Id.* at 31,535-40. EPA also assessed the impacts and benefits of phasing-in the application of PSD in steps. *Id.* at 31,540-41; 31,596-99. This multi-faceted analysis belies the assertion (Industry Br. 56) that EPA "refused" to "analyze the economic effects" of the application of the PSD and Title V programs to stationary-source greenhouse gas emissions.

Petitioners claim that EPA "refused" to address impacts "on the grounds that the Tailoring Rule provided only 'relief.'" Industry Br. 56 (citing 75 Fed. Reg. at 31,597). In the cited passage, however, EPA was responding to comments that its *Regulatory Impacts Analysis* – which assessed the *relief* provided by the Tailoring Rule – should have been "more comprehensive" by including an assessment of the costs of applying PSD to large sources. EPA did, in fact, assess the costs of applying PSD to all sources emitting greenhouse gases at or above the statutory thresholds in a separate part of the Rule preamble. 75 Fed. Reg. at 31,533-34.

Petitioner-Industry further accuses EPA of playing a "shell game" – of promising an impact analysis that it failed to deliver. But, as described above, EPA did what it said it would do. *Compare* 75 Fed. Reg. 25,401 (identifying, in the Vehicle Rule, "impacts on stationary sources, due to the CAA's provisions for permitting requirements" and the "number of stationary sources that may be subject to GHG permitting requirements" as issues that EPA planned to address in the Tailoring Rule) *with* 75 Fed. Reg. at 31,533-41 (assessing, in the Tailoring Rule, the costs and burdens of applying PSD to greenhouse gas emissions, based on EPA's estimate of the number of sources affected). Thus, EPA did not mislead the public or "switch[] course" (Industry Br. 56).

Second, the adequacy of EPA's economic impact analysis is irrelevant because, once again, application of PSD to sources of greenhouse gases occurred

by operation of statute, i.e., it would occur regardless of the outcome of *any* economic analysis. Unlike certain other parts of the CAA, the PSD applicability provisions do not provide for any consideration of costs, burdens, or benefits. *Compare* 42 U.S.C. §§7475(a), 7479(1) (PSD applies to all sources emitting more than a certain amount of any pollutant) *with* 42 U.S.C. §§7411(a)(1), (b)(1)(B) (in setting NSPS EPA must "tak[e] into account the cost of achieving such reduction"). While statutory silence can, in some instances, be interpreted as allowing the agency to consider such factors, *Entergy Corp.*, 129 S.Ct. at 1508, it does not require the agency to do so. *See American Textile Mfrs. Inst., Inc. v. Donavan*, 452 U.S. 490, 510 (1981) ("[W]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute."). In the context of the CAA, this was not even an option for EPA. *Whitman*, 531 U.S. at 467 ("We have ... refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted").

Moreover, in the PSD program itself Congress described precisely when economic impacts should be considered by EPA or the permitting agency. For example, BACT is to be determined on a case-by-case basis, taking into consideration not only the available technology to control emissions but also the "economic impacts and other costs" of installing such controls. 42 U.S.C.

§7479(3). In contrast, the permitting requirements of PSD apply to a source emitting any air pollutant subject to regulation without any mention of the cost or impacts of those permitting requirements. "Where Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (citations omitted).

Taking an alternative approach, Petitioner-Industry lists, in a single sentence with no explanation, argument, or even citation, a string of provisions under which EPA supposedly "failed to conduct required analyses." Industry Br. 57. This Court has made clear that it declines to resolve issues raised in only a cursory fashion. *Anna Jaques Hosp. v. Sebelius*, 583 F.3d 1, 7 (D.C. Cir. 2009) ("We will not 'consider asserted' but unanalyzed arguments"); *Washington Legal Clinic for the Homeless v. Barry*, 197 F.3d 32, 39 (D.C. Cir. 1997); *Railway Labor Executives' Ass'n v. U.S. R.R. Bd.*, 749 F.2d 856, 859, n.6 (D.C. Cir. 1984) (declining to resolve issue "on the basis of briefing which consisted of only three sentences ... and no discussion of the relevant statutory text, legislative history, or relevant case law."). Neither can Petitioners be saved because an *Amicus* provided some very limited argument on a few of the listed provisions.

Nevertheless, addressing the argument "raised," *Amicus*-MGCM asserts that EPA failed to conduct economic analyses required under 42 U.S.C. §7617 (economic impacts) and Executive Orders 12,898 (environmental justice and low income impacts) and 13,211 (energy supply impacts). MGCM Br. 6-7. The issue of whether or not EPA's analysis adequately complies with these provisions and orders is not subject to judicial review. *See* 42 U.S.C. § 7617(e); 59 Fed. Reg. 7629 (Executive Order 12898) (Feb. 11, 1994); 66 Fed. Reg. 28,355 (Executive Order 13211) (May 18, 2001). Thus, the Court lacks jurisdiction to address these arguments.

In any event, EPA did conduct an analysis under each of the provisions cited by Amicus-MGCM and in Petitioners' single-sentence list. For example, Petitioners' list includes the Regulatory Flexibility Act ("RFA"), which addresses impacts on small entities. Industry Br. 57 (which does not even cite the RFA statute). EPA properly certified that the Tailoring Rule would not have a significant economic impact on a substantial number of small businesses given that it would *relieve* the regulatory burden that would otherwise be imposed on small businesses. 75 Fed. Reg. at 31,602. This fulfilled EPA's requirements under the RFA, 5 U.S.C. §605(b).[29] Indeed, EPA addressed each and every provision cited

[29] Nevertheless, EPA recognized the concerns of small entities regarding the potential impacts of the statutory imposition of PSD requirements for greenhouse gas emissions. Thus, EPA conducted outreach to small entities, in consultation

in Petitioners' single-sentence list. *See* 75 Fed. Reg. at 31,601-05. Thus, EPA fulfilled all its statutory review requirements.

CONCLUSION

For the foregoing reasons, the Petitions for Review should be dismissed for lack of jurisdiction or otherwise be denied on the merits.

Respectfully submitted,

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DATE: September 16, 2011

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with the Small Business Administration, to address these issues and receive their recommendations. 75 Fed. Reg. at 31,602.

CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 37(A)(7)(b)

This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) and the orders of the Court in this case because this brief contains 32,960 words, excluding the parts of the brief exempt under Fed. R. App. P. 32 (a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in proportionally spaced typeface using Microsoft Word 14 point Times New Roman type.

So certified this 16th day of September, 2011, by

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF OF RESPONDENTS was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record for Petitioners and all other parties who have registered with the Court's CM/ECF system.

Date: September 16, 2011

/s/ Perry M. Rosen
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STATUTORY ADDENDUM TO BRIEF OF RESPONDENTS

STATUTORY ADDENDUM

Effective:[See Notes]

United States Code Annotated Currentness
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 6. The Analysis of Regulatory Functions (Refs & Annos)
§ 605. Avoidance of duplicative or unnecessary analyses

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

CREDIT(S)

(Added Pub.L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1167, and amended Pub.L. 104-121, Title II, § 243(a), Mar. 29, 1996, 110 Stat. 866.)

1996 Acts. Amendment by Pub.L. 104-121 effective on expiration of 90 days after Mar. 29, 1996, except as otherwise provided, see section 245 of Pub.L. 104-121, set out as a note under section 601 of this title.

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END OF DOCUMENT

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)
§ 7401. Congressional findings and declaration of purpose

(a) Findings

The Congress finds--

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration

The purposes of this subchapter are--

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and con-

trol of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 101, formerly § 1, as added Dec. 17, 1963, Pub.L. 88-206, § 1, 77 Stat. 392, and renumbered § 101 and amended Oct. 20, 1965, Pub.L. 89-272, Title I, § 101(2), (3), 79 Stat. 992; Nov. 21, 1967, Pub.L. 90-148, § 2, 81 Stat. 485; Nov. 15, 1990, Pub.L. 101-549, Title I, § 108(k), 104 Stat. 2468.)

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END OF DOCUMENT

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)
§ 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means--

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C.A. § 792(a)] or any amendment thereto, or any subsequent enactment which supersedes such Act [15 U.S.C.A. § 791 et seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii) of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

(c) State implementation and enforcement of standards of performance

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority--

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

(e) Prohibited acts

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

(f) New source standards of performance

(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) of this section before November 15, 1990, and for which regulations had not been proposed by the Administrator by November 15, 1990, the Administrator shall--

(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after November 15, 1990;

(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after November 15, 1990; and

(C) propose regulations for the remaining categories of sources within 6 years after November 15, 1990.

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider--

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit;

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.

(g) Revision of regulations

(1) Upon application by the Governor of a State showing that the Administrator has failed to specify in regulations under subsection (f)(1) of this section any category of major stationary sources required to be specified under such regulations, the Administrator shall revise such regulations to specify any such category.

(2) Upon application of the Governor of a State, showing that any category of stationary sources which is not included in the list under subsection (b)(1)(A) of this section contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources), the Administrator shall revise such regulations to specify such category of stationary sources.

(3) Upon application of the Governor of a State showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2) of this section, the Administrator shall revise the list under subsection (b)(1)(A) of this section to apply properly such criteria.

(4) Upon application of the Governor of a State showing that--

(A) a new, innovative, or improved technology or process which achieves greater continuous emission reduction has been adequately demonstrated for any category of stationary sources, and

(B) as a result of such technology or process, the new source standard of performance in effect under this section for such category no longer reflects the greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) has been adequately demonstrated,

the Administrator shall revise such standard of performance for such category accordingly.

(5) Unless later deadlines for action of the Administrator are otherwise prescribed under this section, the Administrator shall, not later than three months following the date of receipt of any application by a Governor of a State, either--

(A) find that such application does not contain the requisite showing and deny such application, or

(B) grant such application and take the action required under this subsection.

(6) Before taking any action required by subsection (f) of this section or by this subsection, the Administrator shall provide notice and opportunity for public hearing.

(h) Design, equipment, work practice, or operational standard; alternative emission limitation

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce a standard of performance" means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the provisions of this chapter (other than the provisions of subsection (a) of this section and this subsection).

(i) Country elevators

Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.

(j) Innovative technological systems of continuous emission reduction

(1)(A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this paragraph, if the Administrator determines after notice and opportunity for public hearing,

that--

(i) the proposed system or systems have not been adequately demonstrated,

(ii) the proposed system or systems will operate effectively and there is a substantial likelihood that such system or systems will achieve greater continuous emission reduction than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact,

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C).

In making any determination under clause (ii), the Administrator shall take into account any previous failure of such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technological systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amounts without use of such system.

(B) A waiver under this paragraph shall be granted on such terms and conditions as the Administrator determines to be necessary to assure--

(i) emissions from the source will not prevent attainment and maintenance of any national ambient air quality standards, and

(ii) proper functioning of the technological system or systems authorized.

Any such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and section 7413 of this title.

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of con-

tinuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified in clauses (ii) and (iii) of subparagraph (A).

(D) A waiver under this paragraph shall extend to the sooner of--

(i) the date determined by the Administrator, after consultation with the owner or operator of the source, taking into consideration the design, installation, and capital cost of the technological system or systems being used, or

(ii) the date on which the Administrator determines that such system has failed to--

(I) achieve at least an equivalent continuous emission reduction to that required to be achieved under the standards of performance which would otherwise apply, or

(II) comply with the condition specified in paragraph (1)(A)(iii),

and that such failure cannot be corrected.

(E) In carrying out subparagraph (D)(i), the Administrator shall not permit any waiver for a source or portion thereof to extend beyond the date--

(i) seven years after the date on which any waiver is granted to such source or portion thereof, or

(ii) four years after the date on which such source or portion thereof commences operation,

whichever is earlier.

(F) No waiver under this subsection shall apply to any portion of a source other than the portion on which the innovative technological system or systems of continuous emission reduction is used.

(2)(A) If a waiver under paragraph (1) is terminated under clause (ii) of paragraph (1)(D), the Administrator shall grant an extension of the requirements of this section for such source for such minimum period as may be necessary to comply with the applicable standard of performance under this section. Such period shall not extend beyond the date three years from the time such waiver is terminated.

(B) An extension granted under this paragraph shall set forth emission limits and a compliance schedule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize

emissions. Such schedule shall be treated as a standard of performance for purposes of subsection (e) of this section and section 7413 of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 111, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1683, and amended Nov. 18, 1971, Pub.L. 92-157, Title III, § 302(f), 85 Stat. 464; Aug. 7, 1977, Pub.L. 95-95, Title I, § 109(a)-(d)(1), (e), (f), Title IV, § 401(b), 91 Stat. 697 to 703, 791; Nov. 16, 1977, Pub.L. 95-190, § 14(a)(7) to (9), 91 Stat. 1399; Nov. 9, 1978, Pub.L. 95-623, § 13(a), 92 Stat. 3457; Nov. 15, 1990, Pub.L. 101-549, Title I, § 108(e) to (g), Title III, § 302(a), (b), Title IV, § 403(a), 104 Stat. 2467, 2574, 2631.)

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END OF DOCUMENT

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United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)
§ 7412. Hazardous air pollutants

(a) Definitions

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

(1) Major source

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

(2) Area source

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

(3) Stationary source

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

(4) New source

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

(5) Modification

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

(6) Hazardous air pollutant

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

(7) Adverse environmental effect

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

(8) Electric utility steam generating unit

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

(9) Owner or operator

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

(10) Existing source

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

(11) Carcinogenic effect

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

(b) List of pollutants

(1) Initial list

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

CAS number	Chemical name
75070	Acetaldehyde
60355	Acetamide
75058	Acetonitrile
98862	Acetophenone
53963	2-Acetylaminofluorene
107028	Acrolein

79061 Acrylamide
79107 Acrylic acid
107131 Acrylonitrile
107051 Allyl chloride
92671 4-Aminobiphenyl
62533 Aniline
90040 o-Anisidine
1332214 Asbestos
71432 Benzene (including benzene from gasoline)
92875 Benzidine
98077 Benzotrichloride
100447 Benzyl chloride
92524 Biphenyl
117817 Bis(2-ethylhexyl)phthalate (DEHP)
542881 Bis(chloromethyl)ether
75252 Bromoform
106990 1,3-Butadiene
156627 Calcium cyanamide
105602 Caprolactam
133062 Captan
63252 Carbaryl
75150 Carbon disulfide
56235 Carbon tetrachloride
463581 Carbonyl sulfide
120809 Catechol
133904 Chloramben
57749 Chlordane
7782505 Chlorine
79118 Chloroacetic acid
532274 2-Chloroacetophenone
108907 Chlorobenzene
510156 Chlorobenzilate
67663 Chloroform
107302 Chloromethyl methyl ether
126998 Chloroprene
1319773 Cresols/Cresylic acid (isomers and mixture)
95487 o-Cresol

108394 m-Cresol
106445 p-Cresol
98828 Cumene
94757 2,4-D, salts and esters
3547044 DDE
334883 Diazomethane
132649 Dibenzofurans
96128 1,2-Dibromo-3-chloropropane
84742 Dibutylphthalate
106467 1,4-Dichlorobenzene(p)
91941 3,3-Dichlorobenzidene
111444 Dichloroethyl ether (Bis(2-chloroethyl)ether)
542756 1,3-Dichloropropene
62737 Dichlorvos
111422 Diethanolamine
121697 N,N-Diethyl aniline (N,N-Dimethylaniline)
64675 Diethyl sulfate
119904 3,3-Dimethoxybenzidine
60117 Dimethyl aminoazobenzene
119937 3,3'-Dimethyl benzidine
79447 Dimethyl carbamoyl chloride
68122 Dimethyl formamide
57147 1,1-Dimethyl hydrazine
131113 Dimethyl phthalate
77781 Dimethyl sulfate
534521 4,6-Dinitro-o-cresol, and salts
51285 2,4-Dinitrophenol
121142 2,4-Dinitrotoluene
123911 1,4-Dioxane (1,4-Diethyleneoxide)
122667 1,2-Diphenylhydrazine
106898 Epichlorohydrin (1-Chloro-2,3-epoxypropane)
106887 1,2-Epoxybutane
140885 Ethyl acrylate
100414 Ethyl benzene
51796 Ethyl carbamate (Urethane)
75003 Ethyl chloride (Chloroethane)
106934 Ethylene dibromide (Dibromoethane)

107062 Ethylene dichloride (1,2-Dichloroethane)
107211 Ethylene glycol
151564 Ethylene imine (Aziridine)
75218 Ethylene oxide
96457 Ethylene thiourea
75343 Ethylidene dichloride (1,1-Dichloroethane)
50000 Formaldehyde
76448 Heptachlor
118741 Hexachlorobenzene
87683 Hexachlorobutadiene
77474 Hexachlorocyclopentadiene
67721 Hexachloroethane
822060 Hexamethylene-1,6-diisocyanate
680319 Hexamethylphosphoramide
110543 Hexane
302012 Hydrazine
7647010 Hydrochloric acid
7664393 Hydrogen fluoride (Hydrofluoric acid)
123319 Hydroquinone
78591 Isophorone
58899 Lindane (all isomers)
108316 Maleic anhydride
67561 Methanol
72435 Methoxychlor
74839 Methyl bromide (Bromomethane)
74873 Methyl chloride (Chloromethane)
71556 Methyl chloroform (1,1,1-Trichloroethane)
78933 Methyl ethyl ketone (2-Butanone)
60344 Methyl hydrazine
74884 Methyl iodide (Iodomethane)
108101 Methyl isobutyl ketone (Hexone)
624839 Methyl isocyanate
80626 Methyl methacrylate
1634044 Methyl tert butyl ether
101144 4,4-Methylene bis(2-chloroaniline)
75092 Methylene chloride (Dichloromethane)
101688 Methylene diphenyl diisocyanate (MDI)

101779 4,4'-Methylenedianiline
91203 Naphthalene
98953 Nitrobenzene
92933 4-Nitrobiphenyl
100027 4-Nitrophenol
79469 2-Nitropropane
684935 N-Nitroso-N-methylurea
62759 N-Nitrosodimethylamine
59892 N-Nitrosomorpholine
56382 Parathion
82688 Pentachloronitrobenzene (Quintobenzene)
87865 Pentachlorophenol
108952 Phenol
106503 p-Phenylenediamine
75445 Phosgene
7803512 Phosphine
7723140 Phosphorus
85449 Phthalic anhydride
1336363 Polychlorinated biphenyls (Aroclors)
1120714 1,3-Propane sultone
57578 beta-Propiolactone
123386 Propionaldehyde
114261 Propoxur (Baygon)
78875 Propylene dichloride (1,2-Dichloropropane)
75569 Propylene oxide
75558 1,2-Propylenimine (2-Methyl aziridine)
91225 Quinoline
106514 Quinone
100425 Styrene
96093 Styrene oxide
1746016 2,3,7,8-Tetrachlorodibenzo-p-dioxin
79345 1,1,2,2-Tetrachloroethane
127184 Tetrachloroethylene (Perchloroethylene)
7550450 Titanium tetrachloride
108883 Toluene
95807 2,4-Toluene diamine
584849 2,4-Toluene diisocyanate

95534 o-Toluidine
8001352 Toxaphene (chlorinated camphene)
120821 1,2,4-Trichlorobenzene
79005 1,1,2-Trichloroethane
79016 Trichloroethylene
95954 2,4,5-Trichlorophenol
88062 2,4,6-Trichlorophenol
121448 Triethylamine
1582098 Trifluralin
540841 2,2,4-Trimethylpentane
108054 Vinyl acetate
593602 Vinyl bromide
75014 Vinyl chloride
75354 Vinylidene chloride (1,1-Dichloroethylene)
1330207 Xylenes (isomers and mixture)
95476 o-Xylenes
108383 m-Xylenes
106423 p-Xylenes
0 Antimony Compounds
0 Arsenic Compounds (inorganic including arsine)
0 Beryllium Compounds
0 Cadmium Compounds
0 Chromium Compounds
0 Cobalt Compounds
0 Coke Oven Emissions
0 Cyanide Compounds [FN1]
0 Glycol ethers [FN2]
0 Lead Compounds
0 Manganese Compounds
0 Mercury Compounds
0 Fine mineral fibers [FN3]
0 Nickel Compounds
0 Polycylic Organic Matter [FN4]
0 Radionuclides (including radon) [FN5]
0 Selenium Compounds

NOTE: For all listings above which contain the word “compounds” and for glycol ethers, the following applies: Unless otherwise specified, these listings are defined as including any unique chemical substance that contains the named chem-

ical (i.e., antimony, arsenic, etc.) as part of that chemical's infrastructure.

[FN1] X'CN where X = H' or any other group where a formal dissociation may occur. For example KCN or $Ca(CN)_2$

[FN2] Includes mono- and di- ethers of ethylene glycol, diethylene glycol, and triethylene glycol $R-(OCH_2CH_2)_n-OR'$ where

n = 1, 2, or 3

R = alkyl or aryl groups

R' = R, H, or groups which, when removed, yield glycol ethers with the structure: $R-(OCH_2CH)_n-OH$. Polymers are excluded from the glycol category.

[FN3] Includes mineral fiber emissions from facilities manufacturing or processing glass, rock, or slag fibers (or other mineral derived fibers) of average diameter 1 micrometer or less.

[FN4] Includes organic compounds with more than one benzene ring, and which have a boiling point greater than or equal to 100°C.

[FN5] A type of atom which spontaneously undergoes radioactive decay.

(2) Revision of the list

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

(3) Petitions to modify the list

(A) Beginning at any time after 6 months after November 15, 1990, any person may petition the Administrator to modify the list of hazardous air pollutants under this subsection by adding or deleting a substance or, in case of listed pollutants without CAS numbers (other than coke oven emissions, mineral fibers, or polycyclic organic matter) removing certain unique substances. Within 18 months after receipt of a petition, the Administrator shall either grant or deny the petition by publishing a written explanation of the reasons for the Administrator's decision. Any such petition shall include a showing by the petitioner that there is adequate data on the health or environmental defects [FN1] of the pollutant or other evidence adequate to support the petition. The Administrator may not deny a petition solely on the basis of inadequate resources or time for review.

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

or adverse environmental effects.

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

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

(4) Further information

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

(5) Test methods

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

(6) Prevention of significant deterioration

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

(7) Lead

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

(c) List of source categories

(1) In general

Not later than 12 months after November 15, 1990, the Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories and subcategories of major sources and area sources (listed under paragraph (3)) of the air pollutants listed pur-

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part C. Prevention of Significant Deterioration of Air Quality
Subpart I. Clean Air (Refs & Annos)

§ 7470. Congressional declaration of purpose

The purposes of this part are as follows:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate [FN1] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air) [FN2], notwithstanding attainment and maintenance of all national ambient air quality standards;

(2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 160, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 127(a), 91 Stat. 731.)

[FN1] So in original. Probably should be “anticipated”.

[FN2] So in original. Section was enacted without an opening parenthesis.

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END OF DOCUMENT

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part C. Prevention of Significant Deterioration of Air Quality
Subpart I. Clean Air (Refs & Annos)
§ 7477. Enforcement

The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 167, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 127(a), 91 Stat. 740, and amended Nov. 15, 1990, Pub.L. 101-549, Title I, § 110(3), Title VII, § 708, 104 Stat. 2470, 2684.)

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United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part D. Plan Requirements for Nonattainment Areas
Subpart 1. Nonattainment Areas in General (Refs & Annos)
§ 7509. Sanctions and consequences of failure to attain

(a) State failure

For any implementation plan or plan revision required under this part (or required in response to a finding of substantial inadequacy as described in section 7410(k)(5) of this title), if the Administrator--

(1) finds that a State has failed, for an area designated nonattainment under section 7407(d) of this title, to submit a plan, or to submit 1 or more of the elements (as determined by the Administrator) required by the provisions of this chapter applicable to such an area, or has failed to make a submission for such an area that satisfies the minimum criteria established in relation to any such element under section 7410(k) of this title,

(2) disapproves a submission under section 7410(k) of this title, for an area designated nonattainment under section 7407 of this title, based on the submission's failure to meet one or more of the elements required by the provisions of this chapter applicable to such an area,

(3)(A) determines that a State has failed to make any submission as may be required under this chapter, other than one described under paragraph (1) or (2), including an adequate maintenance plan, or has failed to make any submission, as may be required under this chapter, other than one described under paragraph (1) or (2), that satisfies the minimum criteria established in relation to such submission under section 7410(k)(1)(A) of this title, or

(B) disapproves in whole or in part a submission described under subparagraph (A), or

(4) finds that any requirement of an approved plan (or approved part of a plan) is not being implemented,

unless such deficiency has been corrected within 18 months after the finding, disapproval, or determination referred to in paragraphs (1), (2), (3), and (4), one of the sanctions referred to in subsection (b) of this section shall apply, as selected by the Administrator, until the Administrator determines that the State has come into compli-

ance, except that if the Administrator finds a lack of good faith, sanctions under both paragraph (1) and paragraph (2) of subsection (b) of this section shall apply until the Administrator determines that the State has come into compliance. If the Administrator has selected one of such sanctions and the deficiency has not been corrected within 6 months thereafter, sanctions under both paragraph (1) and paragraph (2) of subsection (b) of this section shall apply until the Administrator determines that the State has come into compliance. In addition to any other sanction applicable as provided in this section, the Administrator may withhold all or part of the grants for support of air pollution planning and control programs that the Administrator may award under section 7405 of this title.

(b) Sanctions

The sanctions available to the Administrator as provided in subsection (a) of this section are as follows:

(1) Highway sanctions

(A) The Administrator may impose a prohibition, applicable to a nonattainment area, on the approval by the Secretary of Transportation of any projects or the awarding by the Secretary of any grants, under Title 23 other than projects or grants for safety where the Secretary determines, based on accident or other appropriate data submitted by the State, that the principal purpose of the project is an improvement in safety to resolve a demonstrated safety problem and likely will result in a significant reduction in, or avoidance of, accidents. Such prohibition shall become effective upon the selection by the Administrator of this sanction.

(B) In addition to safety, projects or grants that may be approved by the Secretary, notwithstanding the prohibition in subparagraph (A), are the following--

(i) capital programs for public transit;

(ii) construction or restriction of certain roads or lanes solely for the use of passenger buses or high occupancy vehicles;

(iii) planning for requirements for employers to reduce employee work-trip-related vehicle emissions;

(iv) highway ramp metering, traffic signalization, and related programs that improve traffic flow and achieve a net emission reduction;

(v) fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit operations;

(vi) programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use, through road use charges, tolls, parking surcharges, or other pricing mechanisms, vehicle restricted zones or periods, or vehicle registration programs;

(vii) programs for breakdown and accident scene management, nonrecurring congestion, and vehicle information systems, to reduce congestion and emissions; and

(viii) such other transportation-related programs as the Administrator, in consultation with the Secretary of Transportation, finds would improve air quality and would not encourage single occupancy vehicle capacity.

In considering such measures, the State should seek to ensure adequate access to downtown, other commercial, and residential areas, and avoid increasing or relocating emissions and congestion rather than reducing them.

(2) Offsets

In applying the emissions offset requirements of section 7503 of this title to new or modified sources or emissions units for which a permit is required under this part, the ratio of emission reductions to increased emissions shall be at least 2 to 1.

(c) Notice of failure to attain

(1) As expeditiously as practicable after the applicable attainment date for any nonattainment area, but not later than 6 months after such date, the Administrator shall determine, based on the area's air quality as of the attainment date, whether the area attained the standard by that date.

(2) Upon making the determination under paragraph (1), the Administrator shall publish a notice in the Federal Register containing such determination and identifying each area that the Administrator has determined to have failed to attain. The Administrator may revise or supplement such determination at any time based on more complete information or analysis concerning the area's air quality as of the attainment date.

(d) Consequences for failure to attain

(1) Within 1 year after the Administrator publishes the notice under subsection (c)(2) of this section (relating to notice of failure to attain), each State containing a nonattainment area shall submit a revision to the applicable implementation plan meeting the requirements of paragraph (2) of this subsection.

(2) The revision required under paragraph (1) shall meet the requirements of section 7410 of this title and section 7502 of this title. In addition, the revision shall include such additional measures as the Administrator may reasonably prescribe, including all measures that can be feasibly implemented in the area in light of technological achievability, costs, and any nonair quality and other air quality-related health and environmental impacts.

(3) The attainment date applicable to the revision required under paragraph (1) shall be the same as provided in the provisions of section 7502(a)(2) of this title, except that in applying such provisions the phrase “from the date of the notice under section 7509(c)(2) of this title” shall be substituted for the phrase “from the date such

area was designated nonattainment under section 7407(d) of this title" and for the phrase "from the date of designation as nonattainment".

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 179, as added Nov. 15, 1990, Pub.L. 101-549, Title I, § 102(g), 104 Stat. 2420.)

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United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions
§ 7601. Administration

(a) Regulations; delegation of powers and duties; regional officers and employees

(1) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations subject to section 7607(d) of this title, as he may deem necessary or expedient.

(2) Not later than one year after August 7, 1977, the Administrator shall promulgate regulations establishing general applicable procedures and policies for regional officers and employees (including the Regional Administrator) to follow in carrying out a delegation under paragraph (1), if any. Such regulations shall be designed--

(A) to assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the chapter;

(B) to assure at least an adequate quality audit of each State's performance and adherence to the requirements of this chapter in implementing and enforcing the chapter, particularly in the review of new sources and in enforcement of the chapter; and

(C) to provide a mechanism for identifying and standardizing inconsistent or varying criteria, procedures, and policies being employed by such officers and employees in implementing and enforcing the chapter.

(b) Detail of Environmental Protection Agency personnel to air pollution control agencies

Upon the request of an air pollution control agency, personnel of the Environmental Protection Agency may be detailed to such agency for the purpose of carrying out the provisions of this chapter.

(c) Payments under grants; installments; advances or reimbursements

Payments under grants made under this chapter may be made in installments, and in advance or by way of reimbursement, as may be determined by the Administrator.

(d) Tribal authority

(1) Subject to the provisions of paragraph (2), the Administrator--

(A) is authorized to treat Indian tribes as States under this chapter, except for purposes of the requirement that makes available for application by each State no less than one-half of 1 percent of annual appropriations under section 7405 of this title; and

(B) may provide any such Indian tribe grant and contract assistance to carry out functions provided by this chapter.

(2) The Administrator shall promulgate regulations within 18 months after November 15, 1990, specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States. Such treatment shall be authorized only if--

(A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 7405 of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title III, § 301, formerly § 8, as added Dec. 17, 1963, Pub.L. 88-206, § 1, 77 Stat. 400, renumbered Oct. 20, 1965, Pub.L. 89-272, Title I, § 101(4), 79 Stat. 992, and amended Nov. 21, 1967, Pub.L. 90-148, § 2, 81 Stat. 504; Dec. 31, 1970, Pub.L. 91-604, §§ 3(b)(2), 15(c)(2), 84 Stat. 1677, 1713; Aug. 7, 1977, Pub.L. 95-95, Title III, § 305(e), 91 Stat. 776; Nov. 15, 1990, Pub.L. 101-549, Title I, §§ 107(d), 108(i), 104

Stat. 2464, 2467.)

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Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter V. Permits (Refs & Annos)
§ 7661c. Permit requirements and conditions

(a) Conditions

Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.

(b) Monitoring and analysis

The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this chapter, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance. Nothing in this subsection shall be construed to affect any continuous emissions monitoring requirement of subchapter IV-A of this chapter, or where required elsewhere in this chapter.

(c) Inspection, entry, monitoring, certification, and reporting

Each permit issued under this subchapter shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to any applicable regulation under subsection (b) of this section. Any report required to be submitted by a permit issued to a corporation under this subchapter shall be signed by a responsible corporate official, who shall certify its accuracy.

(d) General permits

The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to permits under this subchapter. No source covered by a general permit shall thereby be relieved from the obligation to file an application under section 7661b of this title.

(e) Temporary sources

The permitting authority may issue a single permit authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of this chapter at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under part C of subchapter I of this chapter. Any such permit shall in addition require the owner or operator to notify the permitting authority in advance of each change in location. The permitting authority may require a separate permit fee for operations at each location.

(f) Permit shield

Compliance with a permit issued in accordance with this subchapter shall be deemed compliance with section 7661a of this title. Except as otherwise provided by the Administrator by rule, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this chapter that relate to the permittee if--

(1) the permit includes the applicable requirements of such provisions, or

(2) the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.

Nothing in the preceding sentence shall alter or affect the provisions of section 7603 of this title, including the authority of the Administrator under that section.

CREDIT(S)

(July 14, 1955, c. 360, Title V, § 504, as added Nov. 15, 1990, Pub.L. 101-549, Title V, § 501, 104 Stat. 2642.)

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this ratio. However, a spatially averaged alternative default annual NO_2/NO_X ratio may be determined from an existing air quality monitoring network and used in lieu of the 0.75 value if it is determined to be representative of prevailing ratios in the urban area by the reviewing agency. To ensure use of appropriate locally derived annual average NO_2/NO_X ratios, monitoring data under consideration should be limited to those collected at monitors meeting siting criteria defined in 40 CFR Part 58, Appendix D as representative of "neighborhood", "urban", or "regional" scales. Furthermore, the highest annual spatially averaged NO_2/NO_X ratio from the most recent 3 years of complete data should be used to foster conservatism in estimated impacts.

f. To demonstrate compliance with NO_2 PSD increments in urban areas, emissions from major and minor sources should be included in the modeling analysis. Point and area source emissions should be modeled as discussed above. If mobile source emissions do not contribute to localized areas of high ambient NO_2 concentrations, they should be modeled as area sources. When modeled as area sources, mobile source emissions should be assumed uniform over the entire highway link and allocated to each area source grid square based on the portion of highway link within each grid square. If localized areas of high concentrations are likely, then mobile sources should be modeled as line sources using an appropriate steady-state plume dispersion model (e.g., CAL3QHCR; subsection 5.2.3).

g. More refined techniques to handle special circumstances may be considered on a case-by-case basis and agreement with the appropriate reviewing authority (paragraph 3.0(b)) should be obtained. Such techniques should consider individual quantities of NO and NO_2 emissions, atmospheric transport and dispersion, and atmospheric transformation of NO to NO_2. Where they are available, site specific data on the conversion of NO to NO_2 may be used. Photochemical dispersion models, if used for other pollutants in the area, may also be applied to the NO_X problem.

5.2.5 Models for Lead

a. For major lead point sources, such as smelters, which contribute fugitive emissions and for which deposition is important, professional judgement should be used, and there should be coordination with the appropriate reviewing authority (paragraph 3.0(b)). To model an entire major urban area or to model areas without significant sources of lead emissions, as a minimum a proportional (rollback) model may be used for air quality analysis. The rollback philosophy assumes that measured pollutant concentrations are proportional to emissions. However, urban or other dispersion models are encouraged in these circumstances where the use of such models is feasible.

b. In modeling the effect of traditional line sources (such as a specific roadway or highway) on lead air quality, dispersion models applied for other pollutants can be used. Dispersion models such as CALINE3 and CAL3QHCR have been used for modeling carbon monoxide emissions from highways and intersections (subsection 5.2.3). Where there is a point source in the middle of a substantial road network, the lead concentrations that result from the road network should be treated as background (subsection 8.2); the point source and any nearby major roadways should be modeled separately using the appropriate recommended steady-state plume dispersion model (subsection 4.2.2).

6.0 Other Model Requirements

6.1 Discussion

a. This section covers those cases where specific techniques have been developed for special regulatory programs. Most of the programs have, or will have when fully developed, separate guidance documents that cover the program and a discussion of the tools that are needed. The following paragraphs reference those guidance documents, when they are available. No attempt has been made to provide a comprehensive discussion of each topic since the reference documents were designed to do that. This section will undergo periodic revision as new programs are added and new techniques are developed.

b. Other Federal agencies have also developed specific

modeling approaches for their own regulatory or other requirements. [FN58] Although such regulatory requirements and manuals may have come about because of EPA rules or standards, the implementation of such regulations and the use of the modeling techniques is under the jurisdiction of the agency issuing the manual or directive.

c. The need to estimate impacts at distances greater than 50km (the nominal distance to which EPA considers most steady-state Gaussian plume models are applicable) is an important one especially when considering the effects from secondary pollutants. Unfortunately, models originally available to EPA had not undergone sufficient field evaluation to be recommended for general use. Data bases from field studies at mesoscale and long range transport distances were limited in detail. This limitation was a result of the expense to perform the field studies required to verify and improve mesoscale and long range transport models. Meteorological data adequate for generating three-dimensional wind fields were particularly sparse. Application of models to complicated terrain compounds the difficulty of making good assessments of long range transport impacts. EPA completed limited evaluation of several long range transport (LRT) models against two sets of field data and evaluated results. [FN59] Based on the results, EPA concluded that long range and mesoscale transport models were limited for regulatory use to a case-by-case basis. However a more recent series of comparisons has been completed for a new model, CALPUFF (Section A.3). Several of these field studies involved three-to-four hour releases of tracer gas sampled along arcs of receptors at distances greater than 50km downwind. In some cases, short-term concentration sampling was available, such that the transport of the tracer puff as it passed the arc could be monitored. Differences on the order of 10 to 20 degrees were found between the location of the simulated and observed center of mass of the tracer puff. Most of the simulated centerline concentration maxima along each arc were within a factor of two of those observed. It was concluded from these case studies that the CALPUFF dispersion model had performed in a reasonable manner, and had no apparent bias toward over or under prediction, so long as the transport distance was limited to less than 300km. [FN60]

6.2 Recommendations

6.2.1 Visibility

a. Visibility in important natural areas (e.g., Federal Class I areas) is protected under a number of provisions of the Clean Air Act, including Sections 169A and 169B (addressing impacts primarily from existing sources) and Section 165 (new source review). Visibility impairment is caused by light scattering and light absorption associated with particles and gases in the atmosphere. In most areas of the country, light scattering by PM–2.5 is the most significant component of visibility impairment. The key components of PM–2.5 contributing to visibility impairment include sulfates, nitrates, organic carbon, elemental carbon, and crustal material.

b. The visibility regulations as promulgated in December 1980 (40 CFR 51.300–307) require States to mitigate visibility impairment, in any of the 156 mandatory Federal Class I areas, that is found to be “reasonably attributable” to a single source or a small group of sources. In 1985, EPA promulgated Federal Implementation Plans (FIPs) for several States without approved visibility provisions in their SIPs. The IMPROVE (Interagency Monitoring for Protected Visual Environments) monitoring network, a cooperative effort between EPA, the States, and Federal land management agencies, was established to implement the monitoring requirements in these FIPs. Data has been collected by the IMPROVE network since 1988.

c. In 1999, EPA issued revisions to the 1980 regulations to address visibility impairment in the form of regional haze, which is caused by numerous, diverse sources (e.g., stationary, mobile, and area sources) located across a broad region (40 CFR 51.308–309). The state of relevant scientific knowledge has expanded significantly since the Clean Air Act Amendments of 1977. A number of studies and reports [FN61] [FN62] have concluded that long range transport (e.g., up to hundreds of kilometers) of fine particulate matter plays a significant role in visibility impairment across the country. Section 169A of the Act requires states to develop SIPs contain-

ing long-term strategies for remedying existing and preventing future visibility impairment in 156 mandatory Class I federal areas. In order to develop long-term strategies to address regional haze, many States will need to conduct regional-scale modeling of fine particulate concentrations and associated visibility impairment (e.g., light extinction and deciview metrics).

d. To calculate the potential impact of a plume of specified emissions for specific transport and dispersion conditions ("plume blight"), a screening model, VISCREEN, and guidance are available. [FN63] If a more comprehensive analysis is required, a refined model should be selected. The model selection (VISCREEN vs. PLUVUE II or some other refined model), procedures, and analyses should be determined in consultation with the appropriate reviewing authority (paragraph 3.0(b)) and the affected Federal Land Manager (FLM). FLMs are responsible for determining whether there is an adverse effect by a plume on a Class I area.

e. CALPUFF (Section A.3) may be applied when assessment is needed of reasonably attributable haze impairment or atmospheric deposition due to one or a small group of sources. This situation may involve more sources and larger modeling domains than that to which VISCREEN ideally may be applied. The procedures and analyses should be determined in consultation with the appropriate reviewing authority (paragraph 3.0(b)) and the affected FLM(s).

f. Regional scale models are used by EPA to develop and evaluate national policy and assist State and local control agencies. Two such models which can be used to assess visibility impacts from source emissions are Models–3/CMAQ [FN38] and REMSAD. [FN41] Model users should consult with the appropriate reviewing authority (paragraph 3.0(b)), which in this instance would include FLMs.

6.2.2 Good Engineering Practice Stack Height

a. The use of stack height credit in excess of Good Engineering Practice (GEP) stack height or credit resulting from any other dispersion technique is prohibited in the development of emission limitations by 40 CFR 51.118 and 40 CFR 51.164. The definitions of GEP stack height and dispersion technique are contained in 40 CFR 51.100. Methods and procedures for making the appropriate stack height calculations, determining stack height credits and an example of applying those techniques are found in several references [FN64] [FN65] [FN66] [FN67], which provide a great deal of additional information for evaluating and describing building cavity and wake effects.

b. If stacks for new or existing major sources are found to be less than the height defined by EPA's refined formula for determining GEP height, then air quality impacts associated with cavity or wake effects due to the nearby building structures should be determined. The EPA refined formula height is defined as H + 1.5L (see reference 66). Detailed downwash screening procedures [FN24] for both the cavity and wake regions should be followed. If more refined concentration estimates are required, the recommended steady-state plume dispersion model in subsection 4.2.2 contains algorithms for building wake calculations and should be used.

6.2.3 Long Range Transport (LRT) (i.e., Beyond 50km)

a. Section 165(d) of the Clean Air Act requires that suspected adverse impacts on PSD Class I areas be determined. However, 50km is the useful distance to which most steady-state Gaussian plume models are considered accurate for setting emission limits. Since in many cases PSD analyses show that Class I areas may be threatened at distances greater than 50km from new sources, some procedure is needed to (1) determine if an adverse impact will occur, and (2) identify the model to be used in setting an emission limit if the Class I increments are threatened. In addition to the situations just described, there are certain applications containing a mixture of both long range and short range source-receptor relationships in a large modeled domain (e.g., several industrialized areas located along a river or valley). Historically, these applications have presented considerable difficulty to an analyst if impacts from sources having transport distances greater than 50km significantly contributed to the design concentrations. To properly analyze applications of this type, a modeling approach is needed which has the capability of com-

bining, in a consistent manner, impacts involving both short and long range transport. The CALPUFF modeling system, listed in Appendix A, has been designed to accommodate both the Class I area LRT situation and the large modeling domain situation. Given the judgement and refinement involved, conducting a LRT modeling assessment will require significant consultation with the appropriate reviewing authority (paragraph 3.0(b)) and the affected FLM(s). The FLM has an affirmative responsibility to protect air quality related values (AQRVs) that may be affected, and to provide the appropriate procedures and analysis techniques. Where there is no increment violation, the ultimate decision on whether a Class I area is adversely affected is the responsibility of the appropriate reviewing authority (Section 165(d)(2)(C)(ii) of the Clean Air Act), taking into consideration any information on the impacts on AQRVs provided by the FLM. According to Section 165(d)(2)(C)(iii) of the Clean Air Act, if there is a Class I increment violation, the source must demonstrate to the satisfaction of the FLM that the emissions from the source will have no adverse impact on the AQRVs.

b. If LRT is determined to be important, then refined estimates utilizing the CALPUFF modeling system should be obtained. A screening approach [FN60] [FN68] is also available for use on a case-by-case basis that generally provides concentrations that are higher than those obtained using refined characterizations of the meteorological conditions. The meteorological input data requirements for developing the time and space varying three-dimensional winds and dispersion meteorology for refined analyses are discussed in paragraph 8.3.1.2(d). Additional information on applying this model is contained in Appendix A. To facilitate use of complex air quality and meteorological modeling systems, a written protocol approved by the appropriate reviewing authority (paragraph 3.0(b)) and the affected FLM(s) may be considered for developing consensus in the methods and procedures to be followed.

6.2.4 Modeling Guidance for Other Governmental Programs

a. When using the models recommended or discussed in the Guideline in support of programmatic requirements not specifically covered by EPA regulations, the model user should consult the appropriate Federal or State agency to ensure the proper application and use of the models. For modeling associated with PSD permit applications that involve a Class I area, the appropriate Federal Land Manager should be consulted on all modeling questions.

b. The Offshore and Coastal Dispersion (OCD) model, described in Appendix A, was developed by the Minerals Management Service and is recommended for estimating air quality impact from offshore sources on onshore, flat terrain areas. The OCD model is not recommended for use in air quality impact assessments for onshore sources. Sources located on or just inland of a shoreline where fumigation is expected should be treated in accordance with subsection 7.2.8.

c. The latest version of the Emissions and Dispersion Modeling System (EDMS), was developed and is supported by the Federal Aviation Administration (FAA), and is appropriate for air quality assessment of primary pollutant impacts at airports or air bases. EDMS has adopted AERMOD for treating dispersion. Application of EDMS is intended for estimating the collective impact of changes in aircraft operations, point source, and mobile source emissions on pollutant concentrations. It is not intended for PSD, SIP, or other regulatory air quality analyses of point or mobile sources at or peripheral to airport property that are unrelated to airport operations. If changes in other than aircraft operations are associated with analyses, a model recommended in Chapter 4 or 5 should be used. The latest version of EDMS may be obtained from FAA at its Web site: http://www.aee.faa.gov/emissions/edms/edmshome.htm.

7.0 General Modeling Considerations

7.1 Discussion

a. This section contains recommendations concerning a number of different issues not explicitly covered in other sections of this guide. The topics covered here are not specific to any one program or modeling area but are common to nearly all modeling analyses for criteria pollutants.

Effective: December 19, 2005

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 70. State Operating Permit Programs (Refs & Annos)

§ 70.3 Applicability.

(a) Part 70 sources. A State program with whole or partial approval under this part must provide for permitting of the following sources:

(1) Any major source;

(2) Any source, including an area source, subject to a standard, limitation, or other requirement under section 111 of the Act;

(3) Any source, including an area source, subject to a standard or other requirement under section 112 of the Act, except that a source is not required to obtain a permit solely because it is subject to regulations or requirements under section 112(r) of this Act;

(4) Any affected source; and

(5) Any source in a source category designated by the Administrator pursuant to this section.

(b) Source category exemptions.

(1) All sources listed in paragraph (a) of this section that are not major sources, affected sources, or solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act, may be exempted by the State from the obligation to obtain a part 70 permit until such time as the Administrator completes a rulemaking to determine how the program should be structured for nonmajor sources and the appropriateness of any permanent exemptions in addition to those provided for in paragraph (b)(4) of this section.

(2) In the case of nonmajor sources subject to a standard or other requirement under either section 111 or section 112 of the Act after July 21, 1992 publication, the Administrator will determine whether to exempt any or all such applicable sources from the requirement to obtain a part 70 permit at the time that the new standard is promulgated.

(3) [Reserved]

(4) The following source categories are exempted from the obligation to obtain a part 70 permit:

(i) All sources and source categories that would be required to obtain a permit solely because they are subject to part 60, subpart AAA--Standards of Performance for New Residential Wood Heaters; and

(ii) All sources and source categories that would be required to obtain a permit solely because they are subject to part 61, subpart M--National Emission Standard for Hazardous Air Pollutants for Asbestos, § 61.145, Standard for Demolition and Renovation.

(c) Emissions units and part 70 sources.

(1) For major sources, the permitting authority shall include in the permit all applicable requirements for all relevant emissions units in the major source.

(2) For any nonmajor source subject to the part 70 program under paragraph (a) or (b) of this section, the permitting authority shall include in the permit all applicable requirements applicable to emissions units that cause the source to be subject to the part 70 program.

(d) Fugitive emissions. Fugitive emissions from a part 70 source shall be included in the permit application and the part 70 permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.

[70 FR 75346, Dec. 19, 2005]

SOURCE: 57 FR 32295, July 21, 1992, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

40 C. F. R. § 70.3, 40 CFR § 70.3

Current through September 8, 2011; 76 FR 55777.

Effective: March 25, 2011

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 70. State Operating Permit Programs (Refs & Annos)

APPENDIX A TO PART 70--APPROVAL STATUS OF STATE AND LOCAL OPERATING PERMITS PROGRAMS

This appendix provides information on the approval status of State and Local operating Permit Programs. An approved State part 70 program applies to all part 70 sources, as defined in that approved program, within such State, except for any source of air pollution over which a federally recognized Indian Tribe has jurisdiction.

Alabama

(a) Alabama Department of Environmental Management:

(1) Submitted on December 15, 1993, and supplemented on March 3, 1994; March 18, 1994; June 5, 1995; July 14, 1995; and August 28, 1995; interim approval effective on December 15, 1995; interim approval expires on December 1, 2001.

(2) Revisions submitted on July 19, 1996; April 9, 1997; August 4, 1999; January 10, 2000; and May 11, 2001. The rule revisions contained in the July 19, 1996; January 10, 2000; and May 11, 2001 submittals adequately addressed the conditions of the interim approval which expires on December 1, 2001. The State is hereby granted final full approval effective on November 28, 2001.

(b) City of Huntsville Division of Natural Resources:

(1) Submitted on November 15, 1993, and supplemented on July 20, 1995; interim approval effective on December 15, 1995; interim approval expires on December 1, 2001.

(2) Revisions submitted on March 21, 1997; July 21, 1999; December 4, 2000; February 22, 2001; April 9, 2001; and September 18, 2001. The rule revisions contained in the March 21, 1997; April 9, 2001; and September 18, 2001 submittals adequately addressed the conditions of the interim approval which expires on December 1, 2001. The City is hereby granted final full approval effective on November 28, 2001.

(c) Jefferson County Department of Health:

(1) Submitted on December 14, 1993, and supplemented on July 14, 1995; interim approval effective on December 15, 1995; interim approval expires on December 1, 2001.

(2) Revisions submitted on February 5, 1998; September 20, 1999; August 8, 2000; March 30, 2001; May 18, 2001; and September 11, 2001. The rule revisions contained in the August 8, 2000; May 18, 2001; and September 11, 2001 submittals adequately addressed the conditions of the interim approval which expires on December 1, 2001. The County is hereby granted final full approval effective on November 28, 2001.

(d) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Alaska

(a) Alaska Department of Environmental Conservation: submitted on May 31, 1995, as supplemented by submittals on August 16, 1995, February 6, 1996, February 27, 1996, July 5, 1996, August 2, 1996, and October 17, 1996; interim approval effective on December 5, 1996; revisions submitted on June 5, 1996, October 3, 1996, August 25, 1998, and May 24, 1999; full approval effective on November 30, 2001.

(b) [Reserved]

Arizona

(a) Arizona Department of Environmental Quality:

(1) Submitted on November 15, 1993 and amended on March 14, 1994; May 17, 1994; March 20, 1995; May 4, 1995; July 22, 1996; and August 12, 1996; interim approval effective on November 29, 1996; interim approval expires December 1, 2001.

(2) Revisions submitted on August 11, 1998, May 9, 2001 and September 7, 2001. Full approval is effective on November 30, 2001.

(b) Maricopa County Environmental Services Department:

(1) Submitted on November 15, 1993 and amended on December 15, 1993; January 13, 1994; March 9, 1994; and March 21, 1995; July 22, 1996; and August 12, 1996; interim approval effective on November 29, 1996; interim approval expires December 1, 2001.

(2) Revisions submitted on September 7, 2001. Full approval is effective on November 30, 2001.

(c) Pima County Department of Environmental Quality:

(1) Submitted on November 15, 1993 and amended on December 15, 1993; January 27, 1994; April 6, 1994; April 8, 1994; August 14, 1995; July 22, 1996; August 12, 1996; interim approval effective on November 29, 1996; interim approval expires December 1, 2001.

(2) Revisions submitted on January 14, 1997; February 26, 1997; July 17, 1997; July 25, 1997; November 7, 1997; approval effective October 23, 1998; interim approval expires December 1, 2001.

(3) Revisions submitted on May 30, 1998 and November 9, 2001. Full approval is effective on November 30, 2001.

(d) Pinal County Air Quality Control District:

(1) submitted on November 15, 1993 and amended on August 16, 1994; August 15, 1995; July 22, 1996; and August 12, 1996; interim approval effective on November 29, 1996; interim approval expires December 1, 2001.

(2) revisions submitted on August 15, 1995; interim approval effective on December 30, 1996; interim approval expires December 1, 2001.

(3) revisions submitted on September 18, 2001. Full approval is effective on November 30, 2001.

Arkansas

(a) The ADPCE submitted its Operating Permits program on November 9, 1993, for approval. Interim approval is effective on October 10, 1995. Interim approval will expire December 1, 2001.

(b) The Arkansas Department of Environmental Quality submitted program revisions on August 4, 2000. The rule revisions adequately addressed the conditions of the interim approval effective on October 10, 1995, and which would expire on December 1, 2001. The State is hereby granted final full approval effective on December 10, 2001.

(c) The Arkansas Department of Environmental Quality; submitted its operating permits program revisions on October 24, 2002: the Arkansas Operating Permit Program Regulation 26, effective November 8, 2004.

California

The following district programs were submitted by the California Air Resources Board on behalf of:

(a) Amador County Air Pollution Control District (APCD):

(1) Complete submittal received on September 30, 1994; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on April 10, 2001. Amador County Air Pollution Control District was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(b) Bay Area Air Quality Management District (AQMD):

(1) Submitted on November 16, 1993, amended on October 27, 1994, and effective as an interim program on July 24, 1995. Revisions to interim program submitted on March 23, 1995, and effective on August 22, 1995, unless adverse or critical comments are received by July 24, 1995. Approval of interim program, including March 23, 1995, revisions, expires December 1, 2001.

(2) Revisions were submitted on May 30, 2001. Bay Area Air Quality Management District was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(c) Butte County APCD:

(1) Complete submittal received on December 16, 1993; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on May 17, 2001. Butte County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(d) Calaveras County APCD:

(1) Complete submittal received on October 31, 1994; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on July 27, 2001. Calaveras County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revisions submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(e) Colusa County APCD:

(1) Complete submittal received on February 24, 1994; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on August 22, 2001 and October 10, 2001. Colusa County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(f) El Dorado County APCD:

(1) Complete submittal received on November 16, 1993; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on August 16, 2001. El Dorado County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(g) Feather River AQMD:

(1) Complete submittal received on December 27, 1993; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on May 22, 2001. Feather River AQMD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(h) Glenn County APCD:

(1) Complete submittal received on December 27, 1993; interim approval effective on August 14, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on September 13, 2001. Glenn County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(i) Great Basin Unified APCD:

(1) Complete submittal received on January 12, 1994; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on May 18, 2001. Great Basin Unified APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(j) Imperial County APCD:

(1) Complete submittal received on March 24, 1994; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on August 2, 2001. Imperial County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agri-

cultural sources, effective on January 1, 2004.

(k) Kern County APCD:

(1) Complete submittal received on November 16, 1993; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on May 24, 2001. Kern County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(l) Lake County AQMD:

(1) Complete submittal received on March 15, 1994; interim approval effective on August 14, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on June 1, 2001. Lake County AQMD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(m) Lassen County APCD:

(1) Complete submittal received on January 12, 1994; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on August 2, 2001. Lassen County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(n) Mariposa County APCD:

(1) Submitted on March 8, 1995; approval effective on February 5, 1996 unless adverse or critical comments are received by January 8, 1996. Interim approval expires on December 1, 2001.

(2) Revisions were submitted on September 20, 2001. Mariposa County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(o) Mendocino County APCD:

(1) Complete submittal received on December 27, 1993; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on April 13, 2001. Mendocino County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(p) Modoc County APCD:

(1) Complete submittal received on December 27,

1993; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on September 12, 2001. Modoc County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(q) Mojave Desert AQMD:

(1) Complete submittal received on March 10, 1995; interim approval effective on March 6, 1996; interim approval expires December 1, 2001.

(2) Revisions were submitted on June 4, 2001 and July 11, 2001. Mojave Desert AQMD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(r) Monterey Bay Unified Air Pollution Control District:

(1) Submitted on December 6, 1993, supplemented on February 2, 1994 and April 7, 1994, and revised by the submittal made on October 13, 1994; interim approval effective on November 6, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on May 9, 2001. Monterey Bay Unified Air Pollution Control District was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(s) North Coast Unified AQMD:

(1) Complete submittal received on February 24, 1994; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on May 24, 2001. North Coast Unified AQMD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(t) Northern Sierra AQMD:

(1) Complete submittal received on June 6, 1994; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on May 24, 2001. Northern Sierra AQMD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(u) Northern Sonoma County APCD:

(1) Complete submittal received on January 12, 1994; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on May 21, 2001. Northern Sonoma APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(v) Placer County APCD:

(1) Complete submittal received on December 27, 1993; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on May 4, 2001. Placer County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(w) The Sacramento Metropolitan Air Quality Management District:

(1) Complete submittal received on August 1, 1994; interim approval effective on September 5, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on June 1, 2001. The Sacramento Metropolitan Air Quality Management District was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(x) San Diego County Air Pollution Control District:

(1) Submitted on April 22, 1994 and amended on April 4, 1995 and October 10, 1995; approval effective on February 5, 1996, unless adverse or critical comments are received by January 8, 1996. Interim approval expires on December 1, 2001.

(2) Revisions were submitted on June 4, 2001. The San Diego County Air Pollution Control District was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(5) Revisions were submitted on August 19, 2003, effective February 27, 2004.

(y) San Joaquin Valley Unified APCD:

(1) Complete submittal received on July 5 and August 18, 1995; interim approval effective on May 24, 1996; interim approval expires May 25, 1998. Interim approval expires on December 1, 2001.

(2) Revisions were submitted on June 29, 2001. San Joaquin Valley Unified APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(z) San Luis Obispo County APCD:

(1) Complete submittal received on November 16, 1995; interim approval effective on December 1, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on May 18, 2001. San Luis Obispo County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(aa) Santa Barbara County APCD:

(1) Submitted on November 15, 1993, as amended March 2, 1994, August 8, 1994, December 8, 1994, June 15, 1995, and September 18, 1997; interim approval effective on December 1, 1995; interim approval expires on December 1, 2001.

(2) Revisions were submitted on April 5, 2001. Santa Barbara County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(bb) Shasta County AQMD:

(1) Complete submittal received on November 16, 1993; interim approval effective on August 14, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on May 18, 2001. Shasta County AQMD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(cc) Siskiyou County APCD:

(1) Complete submittal received on December 6, 1993; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on September 28, 2001. Siskiyou County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(dd) South Coast Air Quality Management District:

(1) Submitted on December 27, 1993 and amended on March 6, 1995, April 11, 1995, September 26, 1995, April 24, 1996, May 6, 1996, May 23, 1996, June 5, 1996 and July 29, 1996; approval effective on March 31, 1997. Interim approval expires on December 1, 2001.

(2) Revisions were submitted on August 2, 2001 and October 2, 2001. South Coast AQMD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(ee) Tehama County APCD:

(1) Complete submittal received on December 6, 1993; interim approval effective on August 14, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on June 4, 2001. Tehama County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(ff) Tuolumne County APCD:

(1) Complete submittal received on November 16, 1993; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on July 18, 2001. Tuolumne County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(gg) Ventura County APCD:

(1) Submitted on November 16, 1993, as amended December 6, 1993; interim approval effective on December 1, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on May 21, 2001. Ventura County APCD was granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(hh) Yolo-Solano AQMD:

(1) Complete submittal received on October 14, 1994; interim approval effective on June 2, 1995; interim approval expires December 1, 2001.

(2) Revisions were submitted on May 9, 2001. Yolo-Solano AQMD is hereby granted final full approval effective on November 30, 2001.

(3) Approval is withdrawn for state-exempt major stationary agricultural sources, effective on November 14, 2002.

(4) Revision submitted on November 7, 2003 containing approved program for major stationary agricultural sources, effective on January 1, 2004.

(ii) Antelope Valley APCD:

(1) Complete submittal received on January 26, 1999; interim approval effective January 18, 2001; interim approval expires January 21, 2003.

(2) Revisions were submitted on October 22, 2001 and June 17, 2002. Due to unresolved deficiency of state-exempt major stationary agricultural sources, interim approval expired for all major stationary sources, effective January 21, 2003.

(3) Revision submitted on November 7, 2003 containing program for major stationary agricultural sources, effective on January 1, 2004.

(jj) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Colorado

(a) Colorado Department Health-Air Pollution Control Division: submitted on November 5, 1993; effective on February 23, 1995; interim approval expires December 1, 2001.

(b) The Colorado Department of Public Health and Environment--Air Pollution Control Division submitted an operating permits program on November 5, 1993; interim approval effective on February 23, 1995; revised June 24, 1997; full approval effective on October 16, 2000.

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Connecticut

(a) Department of Environmental Protection: submitted on September 28, 1995; interim approval effective on April 23, 1997; revised program submitted on January 11, 2002; full approval effective May 31, 2002.

(b) [Reserved]

Delaware

(a) Department of Natural Resources and Environmental Control: submitted on November 15, 1993 and amended on November 22, 1993, February 9, 1994, May 15, 1995 and September 5, 1995; interim approval effective on January 3, 1996; interim approval expires December 1, 2001.

(b) The Delaware Department of Natural Resources and Environmental Control submitted program amendments on November 14, 2000 and November 20, 2000. The rule amendments contained in the November 14, 2000 and November 20, 2000 submittals adequately addressed the conditions of the interim approval effective on January 3, 1996. The State is hereby granted final full approval effective on November 19, 2001.

(c) The Delaware Department of Natural Resources and Environmental Control submitted program amendment on May 18, 2004. This rule amendment contained in the May 18, 2004 submittal is necessary to make the current definition as stringent as the corresponding provision of 40 CFR part 70, which went into effect on November 27, 2001. The State is hereby granted approval effective on February 5, 2007.

District of Columbia

(a) Environmental Regulation Administration: submitted on January 13, 1994 and March 11, 1994; interim approval effective on September 6, 1995; interim approval expires December 1, 2001.

(b) The District of Columbia Department of Health submitted operating permit program amendments on May 21, 2001, August 30, 2001, and September 26, 2001. The rule amendments contained in the May 21, 2001, August 30, 2001, and September 26, 2001 submittals adequately addressed the conditions of the interim approval effective on September 6, 1995. The District of Columbia is hereby granted final full approval effective on November 30, 2001.

(c) The District of Columbia Department of Health submitted program amendments on April 4, 2003. The rule amendments contained in the April 4, 2003 submittal adequately addressed the deficiency identified in the Notice of Deficiency effective on December 13, 2001. The District of Columbia hereby maintains final full approval effective on June 2, 2003.

(d) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as

major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Florida

(a) Florida Department of Environmental Protection: submitted on November 16, 1993, and supplemented on July 8, 1994, November 28, 1994, December 21, 1994, December 22, 1994, and January 11, 1995; interim approval effective on October 25, 1995; interim approval expires December 1, 2001.

(b) The Florida Department of Environmental Protection submitted program revisions on April 29, 1996, February 11, 1998, June 11, 1998, April 9, 1999 (two submittals), July 1, 1999, and October 1, 1999. The rule revisions contained in the April 29, 1996, February 11, 1998, June 11, 1998, April 9, 1999, July 1,1999, and October 1, 1999 submittals adequately addressed the conditions of the interim approval effective on October 25, 1995, and which would expire on December 1, 2001. The State's operating permits program is hereby granted final full approval effective on October 31, 2001.

Georgia

(a) The Georgia Department of Natural Resources submitted on November 12, 1993, and supplemented on June 24, 1994; November 14, 1994; and June 5, 1995; interim approval effective on December 22, 1995; interim approval expires December 1, 2001.

(b) The Georgia Department of Natural Resources submitted program revisions on March 10, 1997, February 11, 1998, September 30, 1999, November 15, 1999, and January 11, 2000. The rule revisions contained in the February 11, 1998 submittal adequately addressed the conditions of the interim approval effective on December 22, 1995, and which would expire on June 1, 2000. The State is hereby granted final full approval effective on August 7, 2000.

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Hawaii

(a) Department of Health; submitted on December 20, 1993; effective on December 1, 1994; interim approval expires December 1, 2001.

(b) Revisions were submitted on September 21, 2001. The rule amendments contained in the September 21, 2001 submittal adequately addressed the conditions of the interim approval effective on December 1, 1994. The Department of Health, State of Hawaii, is hereby granted final full approval effective on November 30, 2001.

(c) Department of Health: Program revisions submitted on November 14, 2003; submittal corrects the deficiency outlined in an April 1, 2002 Notice of Deficiency. These revisions are hereby granted full approval effective June 19, 2007.

(d) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Idaho

(a) Idaho Division of Environmental Quality: sub-

mitted on January 20, 1995, and supplemented on July 14, 1995, September 15, 1995, and January 12, 1996; interim approval effective on January 6, 1997; revisions submitted on July 9, 1998, May 25, 1999, and March 15, 2001; full approval effective on November 5, 2001.

(b) [Reserved]

Illinois

(a) The Illinois Environmental Protection Agency: submitted on November 15, 1993; interim approval effective on March 7, 1995; interim approval expires December 1, 2001.

(b) The Illinois Environmental Protection Agency: program revisions submitted on May 31, 2001; submittal adequately addressed the conditions of the interim approval which expires on December 1, 2001. Illinois is hereby granted final full approval effective November 30, 2001.

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Indiana

(a) The Indiana Department of Environmental Management: submitted on August 10, 1994; interim approval effective on December 14, 1995; interim approval expires December 1, 2001.

(b) The Indiana Department of Environmental Management: Program revisions submitted on May 22, 1996; submittal adequately addressed the conditions of the interim approval which expires on December 1, 2001. Indiana is hereby granted final full approval effective November 30, 2001.

(c) The Indiana Department of Environmental Management: program revisions submitted on February 7, 2002. These revisions are hereby granted final approval effective June 17, 2002.

Iowa

(a) The Iowa Department of Natural Resources submitted on November 15, 1993, and supplemented by correspondence dated March 15, 1994; August 8, 1994; October 5, 1994; December 6, 1994; December 15, 1994; February 6, 1995; March 1, 1995; March 23, 1995; and May 26, 1995. Interim approval effective on October 2, 1995; interim approval expires October 1, 1998.

(b) The Iowa Department of Natural Resources submitted a revised workload analysis dated April 3, 1997. This fulfills the final condition of the interim approval effective on October 2, 1995, and which would expire on October 1, 1997. The state is hereby granted final full approval effective September 12, 1997.

(c) The Iowa Department of Natural Resources submitted for program approval rules 567-22.100 through 567-22.116 and 567-22.300 on August 7, 2000, rules 567-22.201, 567-22.203, and 567-22.300 (except 22.300(7)(“c”)) on January 29, 2001, and 567-22.100 and 567-22.106 on July 18, 2001. These revisions to the Iowa program are approved effective May 3, 2002.

(d) The Iowa Department of Natural Resources (IDNR) submitted amendments to Iowa Rule, 567 Iowa Administrative Code (IAC) 22.108(3), as a revision to the Iowa Title V operating permits program on August 31, 2001, effective August 15, 2001. The amendments incorporate existing periodic monitoring guidance and adopt by reference compliance assurance monitoring requirements. The IDNR submitted a supplement regarding these amendments on November 7, 2001, clarifying IDNR's authority to establish periodic monitoring on a case-by-case basis. This revision to the Iowa program is effective April 15, 2002.

(e) The Iowa Department of Natural Resources submitted for program approval rules "567-22.100," "567-22.101," "567-22.201," and "567-22.300" on April 25, 2002. The state effective date of these rules is April 24, 2002. These revisions to the Iowa program are approved effective May 6, 2003.

(f) The Iowa Department of Natural Resources submitted for program approval rules 567-22.100, 567-22.103 on July 17, 2002, and rules 567-22.105, 567-22.113, on March 11, 2002. These revisions to the Iowa program are approved effective November 17, 2003.

(g) The Iowa Department of Natural Resources submitted for program approval rule 567-22.100(455B) on April 20, 2004. The state effective date is January 15, 2003. We are approving this program revision effective September 27, 2004.

(h) The Iowa Department of Natural Resources submitted for program approval rules 567-22.100, 567-22.101(2), 567-22.102, 567-22.105(1), 567-22.108(17)"a"(2), 567-22.209 and 567-22.300(12) on July 18, 2005. The state effective date was July 13, 2005. These revisions to the Iowa program are approved effective February 21, 2006.

(i) The Iowa Department of Natural Resources submitted for program approval rules 567-22.105(2), 567-22.106(6), 567-22.201(2), 567-22.300(3) on April 19, 2007. The state effective date was April 4, 2007. These revisions to the Iowa program are approved effective December 17, 2007.

(j) The Iowa Department of Natural Resources submitted for program approval rule 567-22.100(455B) on April 8, 2008. The state effective date was March 19, 2008. These revisions to the Iowa program are approved effective October 24, 2008.

(k) The Iowa Department of Natural Resources submitted for program approval rules 567-22.100, 567-22.105(1)"a", except subparagraph (9); new subrules 567-22.105(5) and 567-22.106(8); 567-22.110, and 567-22.116 on November 18, 2008. The state effective dates were October 15, 2008. These revisions to the Iowa program are approved effective March 1, 2010.

(l) The Iowa Department of Natural Resources submitted for program approval a revision to rule 567-22.106(1) on February 20, 2009. The State effective date was February 4, 2009. This revision to the Iowa program is approved effective April 30, 2010.

(m) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Kansas

(a) The Kansas Department of Health and Environment program submitted on December 12, 1994; April 7 and 17, 1995; November 14, 1995; and December 13, 1995. Full approval effective on February 29, 1996.

(b) The Kansas Department of Health and the Environment approved revisions to the Kansas Administrative Record (K.A.R.), 28-19-202 and 28-19-517, which became effective on March 23, 2001, and February 28, 1998, respectively. These revisions were submitted on June 25, 2001. We are approving these program revisions effective October 6, 2003.

(c) The Kansas Department of Health and Environment approved this revision to the Kansas Administrative Regulations, 28-19-202, as a revision to the Kansas Title V Operating Permits Program, which became effective on January 30, 2004. This revision was submitted on April 22, 2004. We are approving this program revision effective September

27, 2004.

(d) The Kansas Department of Health and Environment submitted for program approval rule K.A.R. 28-19-517 on January 27, 2006. The state effective date was September 23, 2005. This revision to the Kansas program is approved effective April 8, 2008.

(e) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Kentucky

(a)(1) Kentucky Natural Resources and Environmental Protection Cabinet: Submitted on December 27, 1993, and supplemented on November 15, 1994, April 14, 1995, May 3, 1995, and May 22, 1995; interim approval expires on December 1, 2001.

(2) Revision submitted on February 13, 2001. Rule revisions contained in the February 13, 2001 submittal adequately addressed the conditions of the interim approval which expires on December 1, 2001. The Commonwealth is hereby granted final full approval effective on November 30, 2001.

(b)(1) Air Pollution Control District of Jefferson County: submitted on January 31, 1994, and supplemented on March 9, 1994, June 15, 1994, July 15, 1994, July 14, 1995, August 9, 1995, August 10, 1995, and February 16, 1996; full approval effective on April 22, 1996.

(2) Revisions submitted on February 20, 1998, January 11, 1999, September 30, 1999, March 17, 2000, March 21, 2001, and October 23, 2001; full approval of revisions effective on April 22, 2002.

Louisiana

(a) The Louisiana Department of Environmental Quality, Air Quality Division submitted an Operating Permits program on November 15, 1993, which was revised November 10, 1994, and became effective on October 12, 1995.

(b) [Reserved]

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Maine

(a) Department of Environmental Protection: submitted on October 23, 1995; source-category limited interim approval effective on March 24, 1997; full approval effective December 17, 2001.

(b) [Reserved]

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Maryland

(a) Maryland Department of the Environment: submitted on May 9, 1995; interim approval effective on August 2, 1996; interim approval expires December 1, 2001.

(b) The Maryland Department of Environmental

Quality submitted operating permit program amendments on July 15, 2002. The program amendments contained in the July 15, 2002 submittal adequately addressed the conditions of the interim approval effective on August 2, 1996. The State is hereby granted final full approval effective on February 14, 2003.

(c) The Maryland Department of the Environment submitted an operating permit program amendment on February 13, 2007. The program amendment contained in the February 13, 2007 submittal will update Maryland's existing incorporation by reference citations to the Federal Acid Rain Program. The state is hereby granted approval effective on June 25, 2007.

(d) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Massachusetts

(a) Department of Environmental Protection: submitted on April 28, 1995; interim approval effective on May 15, 1996; interim approval expires December 1, 2001.

(b) The Massachusetts Department of Environmental Services submitted program revisions on November, 19, 1996 and May 11, 2001. EPA is hereby granting Massachusetts full approval effective on November 27, 2001.

Michigan

(a)(1) Department of Environmental Quality: received on May 16, 1995, July 20, 1995, October 6, 1995, November 7, 1995, and January 8, 1996; interim approval effective on February 10, 1997; interim approval expires December 1, 2001.

(2) Interim approval revised to provide for a 4 year initial permit issuance schedule under source category limited (SCL) interim approval, pursuant to the Department of Environmental Quality's request received on April 18, 1997. SCL interim approval effective on July 18, 1997.

(3) Department of Environmental Quality: interim approval corrections submitted on June 1, 2001 and September 20, 2001; submittals adequately address the conditions of the interim approval which expires on December 1, 2001. Based on these corrections, Michigan is hereby granted final full approval effective on November 30, 2001.

(4) Department of Environmental Quality: Program revisions submitted on May 7, 2003, May 21, 2003, and August 18, 2003, including Michigan Administrative Rule 336.1216; submittals satisfactorily address EPA's Notice of Program Deficiency, published on December 11, 2001 (66 FR 64038). Final full approval of these revisions is effective December 10, 2003.

(b) [Reserved]

Minnesota

(a) The Minnesota Pollution Control Agency: submitted on November 15, 1993; interim approval effective on July 16, 1995; interim approval expires December 1, 2001.

(b) The Minnesota Pollution Control Agency: Program revisions submitted on June 9, 2000, July 21, 2000, June 12, 2001; Rule revisions contained in the submittals adequately addressed the conditions of the interim approval which expires on December 1, 2001. Minnesota is hereby granted final full approval effective November 30, 2001.

(c) [Reserved]

(d) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA ap-

proves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Mississippi

(a) Department of Environmental Quality: submitted on November 15, 1993; full approval effective on January 27, 1995.

(b) [Reserved]

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Missouri

(a) The Missouri Department of Natural Resources program submitted on January 13, 1995; August 14, 1995; September 19, 1995; and October 16, 1995. Interim approval effective on May 13, 1996. Interim approval expires on September 13, 1998.

(b) The Missouri Department of Natural Resources program submitted on January 13, 1995; August 14, 1995; September 19, 1995; October 16, 1995; and August 6, 1996.

Full approval effective June 13, 1997.

(c) The Missouri Department of Natural Resources submitted Missouri rule 10 CSR 10-6.110, "Submission of Emission Data, Emission Fees, and Process Information," on February 1, 1996, approval effective September 25, 1997.

(d) The Missouri Department of Natural Resources submitted on May 28, 1998, revisions to Missouri Rules 10 CSR 10-6.020, "Definitions and Common Reference Tables," and 10 CSR 10-6.065, "Operating Permits." Effective date was April 30, 1998.

(e) The Missouri Department of Natural Resources submitted on July 8, 1999, revisions to Missouri rules 10 CSR 10-6.110, "Submission of Emission Data, Emission Fees, and Process Information," effective on December 30, 1998.

(f) The Missouri Department of Natural Resources submitted Missouri rule 10 CSR 10-6.020, "Definitions and Common Reference Tables," on September 30, 1999, approval effective May 30, 1999.

(g) The Missouri Department of Natural Resources submitted Missouri rule 10 CSR 10-6.110, Submission of Emission Data, Emission Fees, and Process Information on May 22, 2000, approval effective December 26, 2000.

(h) The Missouri Department of Natural Resources submitted Missouri rule 10 CSR 10-6.065, "Operating Permits," on June 8, 2000, approval effective May 22, 2001.

(i) The Missouri Department of Natural Resources submitted Missouri rule 10 CSR 10-6.020, "Definitions and Common Reference Tables," on July 31, 2000, approval effective May 22, 2001.

(j) The Missouri Department of Natural Resources submitted Missouri rule 10 CSR 10-6.110, "Submission of Emission Data, Emission Fees, and Process Information" on November 27, 2000, approval effective October 5, 2001.

(k) The Missouri Department of Natural Resources submitted Missouri rule 10 CSR 10-6.110, "Submission of Emission Data, Emission Fees, and Process Information" on December 27, 2001, approval effective April 22, 2002.

(l) The Missouri Department of Natural Resources submitted Missouri rule 10 CSR 10-6.065,

"Operating Permits" on May 30, 2002, approval effective October 28, 2002.

(m) The Missouri Department of Natural Resources submitted Missouri rule 10 CSR 10-6.110, "Submission of Emission Data, Emission Fees, and Process Information" on September 9, 2002, approval effective January 21, 2003.

(n) The Missouri Department of Natural Resources submitted Missouri rule 10 CSR 10-6.065, "Operating Permits," on May 6, 2003, approval effective November 17, 2003.

(o) The Missouri Department of Natural Resources submitted revisions to Missouri rule 10 CSR 10-6.110, "Submission of Emission Data, Emission Fees, and Process Information" on December 16, 2003, approval of section (3)(D) effective February 15, 2005.

(p) The Missouri Department of Natural Resources submitted revisions to Missouri rule 10 CSR 10-6.110, "Submission of Emission Data, Emission Fees, and Process Information" on December 8, 2004, approval of section (3)(D) effective July 1, 2005.

(q) The Missouri Department of Natural Resources submitted revisions to Missouri rule 10 CSR 10-6.110, "Submission of Emission Data, Emission Fees, and Process Information" on January 5, 2006, approval of section (3)(D) effective July 11, 2006.

(r) The Missouri Department of Natural Resources submitted revisions to Missouri rule 10 CSR 10-6.020, "Definitions and Common Reference Tables," on June 30, 2004, approval effective August 10, 2006.

(s) The Missouri Department of Natural Resources submitted revisions to Missouri rule 10 CSR 10-6.020, "Definitions and Common Reference Tables," on March 13, 2006, approval effective January 4, 2007.

(t) The Missouri Department of Natural Resources submitted revisions to Missouri rule 10 CSR 10-6.065, "Operating Permits" on January 3, 2006. We are approving this rule except for Section (4) which relates to the State Basic Operating Permits. This approval is effective April 23, 2007.

(u) The Missouri Department of Natural Resources submitted revisions to Missouri rule 10 CSR 10-6.110, "Submission of Emission Data, Emission Fees, and Process Information" on December 11, 2006; approval of sections (3)(D)1., (3)(D)2.E., and (3)(D)2.F. effective May 8, 2007.

(v) The Missouri Department of Natural Resources submitted revisions to Missouri rule 10 CSR 10-6.110, "Submission of Emission Data, Emission Fees, and Process Information" on December 21, 2007; approval of section (3)(D) effective November 14, 2008.

(w) The Missouri Department of Natural Resources submitted revisions to Missouri rule 10 CSR 10-6.020, "Definitions and Common Reference Tables," on September 5, 2008, approval effective May 14, 2009.

(x) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

(y) The Missouri Department of Natural Resources submitted revisions to Missouri rule 10 CSR 10-6.110, "Submission of Emission Data, Emission Fees, and Process Information" on December 30, 2008; approval of section (3)(D) effective March 25, 2011.

Montana

(a) Montana Department of Health and Environmental Sciences--Air Quality Division: submitted

on March 29, 1994; effective on June 12, 1995; interim approval expires December 1, 2001.

(b) The Montana Department of Environmental Quality submitted an operating permits program on March 29, 1994; effective on June 12, 1995; revised January 15, 1998, and March 17, 2000; full approval effective on January 22, 2001.

Nebraska; City of Omaha; Lincoln-Lancaster County Health Department

(a) The Nebraska Department of Environmental Quality submitted on November 15, 1993, supplemented by correspondence dated November 2, 1994, and August 29, 1995, and amended Title V rules submitted June 14, 1995.

(b) Omaha Public Works Department submitted on November 15, 1993, supplemented by correspondence dated April 18, 1994; April 19, 1994; May 13, 1994; August 12, 1994; and April 13, 1995. A delegation contract between the state and the city of Omaha became effective on June 6, 1995.

(c) Lincoln-Lancaster County Health Department submitted on November 12, 1993, supplemented by correspondence dated June 23, 1994. Full approval effective on November 17, 1995.

(d) The Nebraska Department of Environmental Quality submitted the following program revisions on August 20, 1999; NDEQ Title 129, Chapters 1, 2, 5, 6, 7, 8, 10, 29, and 41; City of Omaha Ordinance No. 34492, amended section 41-2, and LLCHD Articles 2-1, 2-2, 2-5, 2-6, 2-7, 2-8, and 2-15, effective February 22, 2000.

(e) The Nebraska Department of Environmental Quality submitted the following program revisions on June 29, 2001; NDEQ Title 129, Chapters 1 and 41, effective December 15, 1998; and NDEQ Title 129, Chapters 1, 7, 8, and 31, effective on August 22, 2000.

(f) The Nebraska Department of Environmental Quality submitted the following program revisions on May 10, 2002, NDEQ Title 129, Chapters 1, 5, 6, and 29; and on November 5, 2002, NDEQ Title 129, Chapters 1, 2, 5, 6, and 31, approval effective September 8, 2003.

(g) The Nebraska Department of Environmental Quality approved revisions to NDEQ Title 129, chapters 1, 5, 6, and appendix III (which codifies its prior Federally approved Insignificant Activities List) on September 5, 2002, which became effective on November 20, 2002. These revisions were submitted on May 1, 2003. We are approving these program revisions effective November 4, 2003.

(h) The Nebraska Department of Environmental Quality approved a revision to NDEQ Title 129, appendix III, on November 19, 2003, which became effective November 24, 2003. This revision was submitted on June 4, 2004. We are approving this program revision effective May 31, 2005.

(i) The Nebraska Department of Environmental Quality approved a revision to NDEQ Title 129, Appendix III on May 2, 2005, which became effective May 7, 2005. This revision was submitted on October 20, 2005. We are approving this program revision effective September 8, 2006.

(j) The Nebraska Department of Environmental Quality approved a revision to NDEQ Title 129, Chapter 1 on June 2, 2005, which became effective September 25, 2005. This revision was submitted on May 27, 2009. We are approving this program revision effective October 12, 2010.

(k) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Nevada

The following state district program was submitted by the Nevada Division of Environmental Protection on behalf of:

(a) Nevada Division of Environmental Protection:

(1) Submitted on February 8, 1995; interim approval effective on January 11, 1996; interim approval expires December 1, 2001.

(2) Revisions submitted on May 30, 2001. Full approval is effective on November 30, 2001.

(b) Washoe County District Health Department:

(1) Submitted on November 18, 1993; interim approval effective on March 6, 1995; interim approval expires December 1, 2001.

(2) Revisions submitted on May 8, 2001. Full approval is effective on November 30, 2001.

(c) Clark County Department of Air Quality Management:

(1) Submitted on January 12, 1994 and amended on July 18 and September 21, 1994; interim approval effective on August 14, 1995; interim approval expires on December 1, 2001.

(2) Revisions submitted on June 1, 2001. Full approval is effective on November 30, 2001.

(3) Revisions were submitted on February 23, 2004, effective October 1, 2004.

(d) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

New Hampshire

(a) Department of Environmental Services: submitted on October 26, 1995; interim approval effective on December 1, 2001.

(b) The New Hampshire Department of Environmental Services submitted program revisions on May 14, 2001. EPA is hereby granting New Hampshire full approval effective on November 23, 2001.

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

New Jersey

(a) The New Jersey Department of Environmental Protection submitted an operating permit program on November 15, 1993, revised on August 10, 1995, with supplements on August 28, 1995, November 15, 1995, December 4, 1995, and December 6, 1995; interim approval effective on June 17, 1996; interim approval expires December 1, 2001.

(b) The New Jersey State Department of Environmental Protection submitted an operating permits program revision request on June 11, 1998; interim program revision approval effective on July 6, 1999.

(c) The New Jersey Department of Environmental Protection submitted program revisions on September 17, 1999 and May 31, 2001. The rule revisions contained in the September 17, 1999 and May 31, 2001 submittals adequately addressed the conditions of the interim approval effective on June 17, 1996, and which would expire on December 1, 2001. The State is hereby granted final full approval effective on November 30, 2001.

(d) The New Jersey Department of Environmental

Protection submitted program revisions on October 4, 2006; approval effective August 27, 2007.

New Mexico

(a) Environment Department; submitted on November 15, 1993; Effective Date on December 19, 1994; Interim Approval Expires on October 19, 1997.

(b) City of Albuquerque Environmental Health Department, Air Pollution Control Division: submitted on April 4, 1994; effective on March 13, 1995; interim approval expires June 10, 1997.

(c) The New Mexico Environment Department, Air Pollution Control Bureau submitted an operating permits program on November 15, 1993, which was revised July 31, 1996, and became effective on December 26, 1996.

(d) The City of Albuquerque, Environmental Health Department, submitted an operating permits program on April 4, 1994, which was revised July 31, 1996, and became effective on December 26, 1996.

(e) The Environmental Department; submitted the following program revisions on November 5, 2002: NMAC 20.2.70, effective November 8, 2004.

(f) Albuquerque/Bernalillo County Air Quality Control Board; submitted the following program revisions on May 2, 2003: NMAC 20.11.42.7, effective November 8, 2004.

New York

(a) The New York State Department of Environmental Conservation submitted an operating permits program on November 12, 1993, supplemented on June 17, 1996 and June 27, 1996; interim program approval effective on December 9, 1996; interim program approval expires December 1, 2001.

(b) [Reserved]

(c) The New York State Department of Environmental Conservation submitted program revisions on June 8, 1998 and October 5, 2001. The rule revisions contained in the June 8, 1998 and October 5, 2001 submittals adequately addressed the conditions of the interim approval effective on December 9, 1996, and which would expire on December 1, 2001. The October 5, 2001 submission consists of rules adopted pursuant to New York's emergency rulemaking procedures. The State is hereby granted final full approval effective on November 30, 2001.

(d) The New York State Department of Environmental Conservation submitted program revisions on June 8, 1998 and January 2, 2002. The rule revisions contained in the June 8, 1998 and January 2, 2002 submittals adequately addressed the conditions of the interim approval effective on December 9, 1996. The State is hereby granted final full approval effective on January 31, 2002.

(e) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

North Carolina

(a)(1) Department of Environment and Natural Resources: submitted on November 12, 1993, and supplemented on December 17, 1993, May 31, 1994, and August 3, 1994, March 23, 1995, and August 9, 1995; interim approval effective on December 15, 1995; interim approval expires June 1, 2000.

(2) North Carolina Department of Environment and Natural Resources submitted program revisions on March 23, 1995, August 16, 1996, March 19, 1997, July 29, 1998, November 15, 1999, January 21, 2000, June 14, 2000, and August 28, 2000. The rule revisions contained in the March 23, 1995, March 19, 1997, January 21, 2000, and August 28, 2000 submittals adequately addressed the conditions of

the interim approval which would expire on December 1, 2001. The State is hereby granted final full approval effective on October 1, 2001.

(b)(1) Forsyth County Environmental Affairs Department: submitted on November 12, 1993, and supplemented on May 31, 1994 and November 28, 1994; interim approval effective on December 15, 1995; interim approval expires June 1, 2000.

(2) Forsyth County submitted program revisions on September 25, 1995, January 16, 1997, August 1, 1997, April 22, 1998, October 2, 1998, February 18, 1999, September 29, 1999, October 26, 1999, and February 24, 2000. The rule revisions contained in the September 25, 1995, August 1, 1997, and October 26, 1999 submittals adequately addressed the conditions of the interim approval which would expire on June 1, 2000. The County is hereby granted final full approval effective on August 21, 2000.

(3) [Reserved]

(c)(1) Mecklenburg County Department of Environmental Protection: submitted on November 12, 1993, and supplemented on June 5, 1995; interim approval effective on December 15, 1995; interim approval expires June 1, 2000.

(2) Mecklenburg County Department of Environmental Protection submitted program revisions on October 11, 1999, November 2, 1999, December 8, 1999, December 28, 1999, and July 26, 2000. The rule revisions contained in the October 11, 1999, December 8, 1999, December 28, 1999, and July 26, 2000 submittals adequately addressed the conditions of the interim approval which would expire on December 1, 2001. Mecklenburg County is hereby granted final full approval effective on October 1, 2001.

(d)(1) Western North Carolina Regional Air Pollution Control Agency: submitted on November 12, 1993, and supplemented on January 12, 1994, September 16, 1994, October 11, 1994, and May 17, 1995; interim approval effective on December 15, 1995; interim approval expires June 1, 2000.

(2) Western North Carolina Regional Air Quality Agency submitted program revisions on January 23, 1997, September 29, 1999, November 10, 1999, January 5, 2000, and August 17, 2000. The rule revisions contained in the January 23, 1997, January 5, 2000, and August 17, 2000 submittals adequately addressed the conditions of the interim approval which would expire on December 1, 2001. Western North Carolina is hereby granted final full approval effective on October 1, 2001.

North Dakota

(a) North Dakota State Department of Health and Consolidated Laboratories--Environmental Health Section: submitted on May 11, 1994; effective on August 7, 1995; interim approval expires June 1, 2000.

(b) The North Dakota Department of Health, Environmental Health Section, submitted an operating permits program on May 11, 1994; interim approval effective on August 7, 1995; revised January 1, 1996, September 1, 1997, September 1, 1998, and August 1, 1999; full approval effective on August 16, 1999.

(c) The North Dakota Department of Health, Environmental Health Section submitted the following program revisions on May 1, 2003: NDAC 33-15-14-06.1(o)(2)(aa), effective November 17, 2003.

Ohio

(a) Ohio Environmental Protection Agency (OEPA): Submitted on November 1, 1993; interim approval effective on December 9, 1994; revisions submitted on June 5, 1996, October 3, 1996, August 25, 1998, and May 24, 1999; full approval effective on September 12, 2001; revision submitted on September 16, 2003; revision approved December 22, 2003.

(b) [Reserved]

(c) The Ohio Environmental Protection Agency submitted an operating permits program amendment on March 23, 2007. The program amendment contained in the March 23, 2007 submittal will update Ohio's existing Acid Rain program. The state is hereby granted approval effective on March 25, 2008.

(d) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Oklahoma

(a) The Oklahoma Department of Environmental Quality submitted its operating permits program on January 12, 1994, for approval. Source category-limited interim approval is effective on March 6, 1996. Interim approval will expire December 1, 2001.

(b) The Oklahoma Department of Environmental Quality submitted program revisions on July 27, 1998. The rule revisions adequately addressed the conditions of the interim approval effective on March 6, 1996, and which will expire on December 1, 2001. The State is hereby granted final full approval effective on November 30, 2001.

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Oregon

(a) Oregon Department of Environmental Quality: submitted on November 15, 1993, as amended on November 15, 1994 and June 30 1995; full approval effective on November 27, 1995; revisions submitted on March 15, 2000; approval of revisions effective on August 9, 2002.

(b) Lane Regional Air Pollution Authority: submitted on November 15, 1993, as amended on November 15, 1994, and June 30, 1995; full approval effective on November 27, 1995.

Pennsylvania

(a) Pennsylvania Department of Environmental Resources [now known as the Pennsylvania Department of Environmental Protection]: submitted on May 18, 1995; full approval effective on August 29, 1996.

(b) The Pennsylvania Department of Environmental Protection submitted a request on behalf of the Allegheny County Health Department pertaining to operating permit programs in the Commonwealth of Pennsylvania. The submission, dated November 9, 1998 and amended March 1, 2001, includes a request for approval of a partial operating program pursuant to 40 CFR part 70 for Allegheny County. The Allegheny County Health Department's partial operating permit program is hereby granted full approval effective on December 17, 2001.

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Puerto Rico

(a) The Puerto Rico Environmental Quality Board submitted an operating permits program on November 15, 1993 with supplements on March 22, 1994

and April 11, 1994 and revised on September 29, 1995; full approval effective on March 27, 1996.

(b) [Reserved]

Rhode Island

(a) Department of Environmental Management: submitted on June 20, 1995; interim approval effective on July 5, 1996; interim approval expires December 1, 2001.

(b) The Rhode Island Department of Environmental Management submitted program revisions on October 1, 1996, January 21, 1999 and October 26, 2000. EPA is hereby granting Rhode Island full approval effective on November 30, 2001.

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

South Carolina

(a) Department of Health and Environmental Control: submitted on November 12, 1993; full approval effective on July 26, 1995.

(b) [Reserved]

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

South Dakota

(a) South Dakota Department of Environment and Natural Resources--Division of Environmental Regulations: submitted on November 12, 1993; effective on February 28, 1996.

(b) [Reserved]

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Tennessee

(a)(1) Tennessee Department of Environment and Conservation: submitted on November 10, 1994, and supplemented on December 5, 1994, August 8, 1995, January 17, 1996, January 30, 1996, February 13, 1996, April 9, 1996, June 4, 1996, June 12, 1996, July 3, 1996, and July 15, 1996; interim approval effective on August 28, 1996; interim approval expires on December 1, 2001.

(2) Revisions submitted on July 15, 1997, June 16, 1998, February 5, 1999, February 24, 1999, March 5, 1999, June 16, 1999, July 2, 1999, November 30, 1999, December 30, 1999, August 21, 2000, and October 16, 2001. The rule revisions contained in the February 5, 1999, February 24, 1999, March 5, 1999, June 16, 1999, and December 30, 1999, submittals adequately addressed the conditions of the interim approval effective on August 28, 1996, and which would expire on December 1, 2001. The State's operating permit program is hereby granted final full approval effective on November 30, 2001.

(b)(1) Chattanooga-Hamilton County Air Pollution Control Bureau: submitted on November 22, 1993, and supplemented on January 23, 1995, February 24, 1995, October 13, 1995, and March 14, 1996; full approval effective on April 25, 1996.

(2) [Reserved]

(c)(1) Knox County Department of Air Quality Management: submitted on November 12, 1993, and supplemented on August 24, 1994, January 6, 1995, January 19, 1995, February 6, 1995, May 23, 1995, September 18, 1995, September 25, 1995, and March 6, 1996; full approval effective on May 30, 1996.

(2) [Reserved]

(d)(1) Memphis-Shelby County Health Department: submitted on June 26, 1995, and supplemented on August 22, 1995, August 23, 1995, August 24, 1995, January 29, 1996, February 7, 1996, February 14, 1996, March 5, 1996, and April 10, 1996; interim approval effective on August 28, 1996; interim approval expires December 1, 2001.

(2) Revisions submitted on October 11, 1999 and May 2, 2000. The rule revisions contained in the May 2, 2000, submittal adequately addressed the conditions of the interim approval effective on August 28, 1996, and which would expire on December 1, 2001. The County's operating permit program is hereby granted final full approval effective on November 30, 2001.

(e)(1) Metropolitan Health Department of Nashville-Davidson County: submitted on November 13, 1993, and supplemented on April 19, 1994, September 27, 1994, December 28, 1994, and December 28, 1995; full approval effective on March 15, 1996.

(2) Revisions submitted on December 10, 1996, August 27, 1999, and December 6, 1999.

Revised approval effective on August 7, 2000.

(f) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Texas

(a) The TNRCC submitted its Operating Permits program on September 17, 1993, and supplemental submittals on October 28, 1993, and November 12, 1993, for approval. Source category-limited interim approval is effective on July 25, 1996. Interim approval will expire December 1, 2001. The scope of the approval of the Texas part 70 program excludes all sources of air pollution over which an Indian Tribe has jurisdiction.

(b) The Texas Natural Resource Conservation Commission submitted program revisions on June 12, 1998, and June 1, 2001, and supplementary information on August 22, 2001; August 23, 2001; September 20, 2001; and November 5, 2001. The rule revisions adequately addressed the conditions of the IA effective on July 25, 1996, and which will expire on December 1, 2001. The State is hereby granted final full approval effective on November 30, 2001.

(c) The Texas Commission on Environmental Quality: program revisions submitted on December 9, 2002, and supplementary information submitted on December 10, 2003, effective on April 29, 2005. The rule amendments contained in the submissions adequately addressed the deficiencies identified in the notice of deficiency published on January 7, 2002.

Utah

(a) Utah Department of Environmental Quality--Division of Air Quality: submitted on April 14, 1994; effective on July 10, 1995.

(b) [Reserved]

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as

major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Vermont

(a) Department of Environmental Conservation: submitted on April 28, 1995; interim approval effective on November 1, 1996; revised program submitted on November 15, 2001; full approval effective November 30, 2001.

(b) [Reserved]

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Virgin Islands

(a) The Virgin Islands Department of Natural Resources submitted an operating permits program on November 18, 1993 with supplements through August 25, 2000; full approval effective on January 16, 2001.

(b) [Reserved]

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Virginia

(a) The Commonwealth of Virginia's Title V operating permit and fee program regulations submitted on September 10, 1996, the acid rain operating permit regulations submitted on September 12, 1996, and the non-regulatory operating permit program provisions submitted on November 12, 1993, January 14, 1994, January 9, 1995, May 17, 1995, February 6, 1997, and February 27, 1997; interim approval effective on March 12, 1998; interim approval expires on December 1, 2001.

(b) The Virginia Department of Environmental Quality submitted operating permit program amendments on November 20, 2000. The rule revisions contained in the November 20, 2000 submittal adequately addressed the conditions of the interim approval effective on March 12, 1998. The Commonwealth is hereby granted final full approval effective on November 30, 2001.

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Washington

(a) Department of Ecology (Ecology): Submitted on November 1, 1993; interim approval effective on December 9, 1994; revisions submitted on June 5, 1996, October 3, 1996, August 25, 1998, and May 24, 1999; full approval effective on September 12, 2001; revision submitted on September 26, 2002; revision approved January 2, 2003.

(b) Energy Facility Site Evaluation Council (EFSEC): Submitted on November 1, 1993; interim approval effective on December 9, 1994; revisions submitted on June 5, 1996, October 3, 1996, August

25, 1998, and May 24, 1999; full approval effective on September 12, 2001; revision submitted on September 26, 2002; revision approved January 2, 2003.

(c) Benton Clean Air Authority (BCAA): Submitted on November 1, 1993; interim approval effective on December 9, 1994; revisions submitted on June 5, 1996, October 3, 1996, August 25, 1998, and May 24, 1999; full approval effective on September 12, 2001; revision submitted on September 26, 2002; revision approved January 2, 2003.

(d) Northwest Air Pollution Authority (NWAPA): Submitted on November 1, 1993; interim approval effective on December 9, 1994; revisions submitted on June 5, 1996, October 3, 1996, August 25, 1998, and May 24, 1999; full approval effective on September 12, 2001; revision submitted on September 26, 2002; revision approved January 2, 2003.

(e) Olympic Regional Clean Air Authority (ORCAA): Submitted on November 1, 1993; interim approval effective on December 9, 1994; revisions submitted on June 5, 1996, October 3, 1996, August 25, 1998, and May 24, 1999; full approval effective on September 12, 2001; revision submitted on September 26, 2002; revision approved January 2, 2003.

(f) Puget Sound Clean Air Agency (PSCAA): Submitted on November 1, 1993; interim approval effective on December 9, 1994; revisions submitted on June 5, 1996, October 3, 1996, August 25, 1998, and May 24, 1999; full approval effective on September 12, 2001; revision submitted on September 26, 2002; revision approved January 2, 2003.

(g) Spokane County Air Pollution Control Authority (SCAPCA): Submitted on November 1, 1993; interim approval effective on December 9, 1994; revisions submitted on June 5, 1996, October 3, 1996, August 25, 1998, and May 24, 1999; full approval effective on September 12, 2001; revision submitted on September 26, 2002; revision approved January 2, 2003.

(h) Southwest Clean Air Agency (SWCAA): Submitted on November 1, 1993; interim approval effective on December 9, 1994; revisions submitted on June 5, 1996, October 3, 1996, August 25, 1998, and May 24, 1999; full approval effective on September 12, 2001; revision submitted on September 26, 2002; revision approved January 2, 2003.

(i) Yakima Regional Clean Air Authority (YRCAA): Submitted on November 1, 1993; interim approval effective on December 9, 1994; revisions submitted on June 5, 1996, October 3, 1996, August 25, 1998, and May 24, 1999; full approval effective on September 12, 2001; revision submitted on September 26, 2002; revision approved January 2, 2003.

(j) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

West Virginia

(a) Department of Commerce, Labor and Environmental Resources: submitted on November 12, 1993, and supplemented by the Division of Environmental Protection on August 26 and September 29, 1994; interim approval effective on December 15, 1995; interim approval expires December 1, 2001.

(b) The West Virginia Department of Environmental Protection submitted nonsubstantial program revisions to its program on February 11, 1997. The revisions involved additions to West Virginia's “insignificant activity” list. The revisions were approved on October 6, 1997 by letter from W. Michael McCabe, Regional Administrator, EPA Region III.

(c) The West Virginia Department of Environmental Protection submitted program amendments on June 1, 2001. The rule revisions contained in the June 1, 2001 submittal adequately addressed the conditions of the interim approval effective on December 15, 1995. The State is hereby granted final full approval effective on November 19, 2001.

(d) The West Virginia Department of Environmental Protection submitted program revisions on June 1, 2001. The rule revisions contained in the June 1, 2001 submittal revise West Virginia's existing approved program. The State is hereby granted revised approval effective on November 23, 2001.

(e) The West Virginia Department of Natural Resources and Environmental Control submitted program amendment on September 10, 2003. This rule amendment contained in the September 10, 2003 submittal is necessary to make the current definitions of a “major source” and “volatile organic compound” consistent with the corresponding provisions of 40 CFR part 70, which went into effect on November 27, 2001. The State is hereby granted approval effective on April 27, 2007.

(f) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Wisconsin

(a)(1) Department of Natural Resources: Submitted on January 27, 1994; interim approval effective on April 5, 1995; interim approval expires December 1, 2001.

(2) Department of Natural Resources: Interim approval corrections submitted on March 28, 2001, September 5, 2001, and September 17, 2001; submittals adequately address the conditions of the interim approval which expires on December 1, 2001. Based on these corrections, Wisconsin is hereby granted final full approval effective on November 30, 2001.

(b) [Reserved]

(c) For any permitting program located in the State, insofar as the permitting threshold provisions concern the treatment of sources of GHG emissions as major sources for purposes of title V, EPA approves such provisions only to the extent they require permits for such sources where the source emits or has the potential to emit at least 100,000 tpy CO_2e, as well as 100 tpy on a mass basis, as of July 1, 2011.

Wyoming

(a) Department of Environmental Quality: submitted on November 19, 1993; effective on February 21, 1995; interim approval expires June 1, 2000.

(b) The Wyoming Department of Environmental Quality submitted an operating permits program on November 19, 1993; interim approval effective on February 21, 1995; revised August 19, 1997; full approval effective on April 23, 1999.

[59 FR 55820, Nov. 9, 1994; 59 FR 59660, Nov. 18, 1994; 59 FR 61552, Dec. 1, 1994; 59 FR 61827, Dec. 2, 1994; 59 FR 62327, Dec. 5, 1994; 59 FR 66740, Dec. 28, 1994; 60 FR 1744, Jan. 5, 1995; 60 FR 2534, Jan. 10, 1995; 60 FR 3770, Jan. 19, 1995; 60 FR 4568, Jan. 24, 1995; 60 FR 8772, Feb. 15, 1995; 60 FR 12137, March 6, 1995; 60 FR 12483, March 7, 1995; 60 FR 15069, March 22, 1995; 60 FR 21723, May 3, 1995; 60 FR 25146, May 11, 1995; 60 FR 30195, June 8, 1995; 60 FR 31641, June 16, 1995; 60 FR 32606, 32611, June 23, 1995; 60 FR 32916, June 26, 1995; 60 FR 35338, July 7, 1995; 60 FR 36069, 36072, July 13, 1995; 60 FR 39864, Aug. 4, 1995; 60 FR 40104, Aug. 7, 1995; 60 FR 42046, Aug. 15, 1995; 60 FR 45673, Sept. 1, 1995; 60 FR 46774, Sept. 8, 1995; 60 FR 47297,

Sept. 12, 1995; 60 FR 49347, Sept. 25, 1995; 60 FR 50108, Sept. 28, 1995; 60 FR 52336, Oct. 6, 1995; 60 FR 55466, Nov. 1, 1995; 60 FR 53875, Oct. 18, 1995; 60 FR 57191, Nov. 14, 1995; 60 FR 57352, 57357, 57361, Nov.15, 1995; 60 FR 57837, Nov. 22, 1995; 60 FR 62034, Nov. 4, 1995; 60 FR 62753, 62762, Dec. 7, 1995; 60 FR 62998, Dec. 8, 1995; 60 FR 63634, Dec. 12, 1995; 61 FR 2722, Jan. 29, 1996; 61 FR 2939, Jan. 30, 1996; 61 FR 3832, Feb. 2, 1996; 61 FR 4220, 4224, Feb. 5, 1996; 61 FR 5707, Feb. 14, 1996; 61 FR 7073, 7076, Feb. 26, 1996; 61 FR 8876, March 6, 1996; 61 FR 11739, March 22, 1996; 61 FR 13103, March 26, 1996; 61 FR 16065, April 11, 1996; 61 FR 18088, April 24, 1996; 61 FR 18968, April 30, 1996; 61 FR 20155, May 6, 1996; 61 FR 24461, May 15, 1996; 61 FR 24720, May 16, 1996; 61 FR 31443, June 20, 1996; 61 FR 32699, June 25, 1996; 61 FR 34739, July 3, 1996; 61 FR 39343, July 29, 1996; 61 FR 39601, July 30, 1996; 61 FR 39883, July 31, 1996; 61 FR 45336, Aug. 29, 1996; 61 FR 51370, 51372, Oct. 2, 1996; 61 FR 55923, Oct. 30, 1996; 61 FR 56370, Oct. 31, 1996; 61 FR 56631, Nov. 4, 1996; 61 FR 57594, Nov. 7, 1996; 61 FR 60034, Nov. 26, 1996; 61 FR 63928, Dec. 2, 1996; 61 FR 64475, Dec. 5, 1996; 61 FR 64635, Dec. 6, 1996; 62 FR 1399, Jan. 10, 1997; 62 FR 7941, Feb. 21, 1997; 62 FR 8883, Feb. 27, 1997; 62 FR 13832, March 24, 1997; 62 FR 26407, May 14, 1997; 62 FR 31519, June 10, 1997; 62 FR 33011, June 18, 1997; 62 FR 37516, July 14, 1997; 62 FR 45167, Aug. 26, 1997; 62 FR 45734, Aug. 29, 1997; 62 FR 62951, Nov. 26, 1997; 63 FR 6494, Feb. 9, 1998; 63 FR 13346, March 19, 1998; 63 FR 40057, July 27, 1998; 63 FR 50773, Sept. 23, 1998; 64 FR 8526 , Feb. 22, 1999; 64 FR 23779, May 4, 1999; 64 FR 32436, June 17, 1999; 64 FR 71041, Dec. 20, 1999; 64 FR 72035, Dec. 23, 1999; 65 FR 1790, Jan. 12, 2000; 65 FR 3136, Jan. 20, 2000; 65 FR 7294, Feb. 14, 2000; 65 FR 16523, March 29, 2000; 65 FR 32040, May 22, 2000; 65 FR 36362, 36364, June 8, 2000; 65 FR 37052, June 13, 2000; 65 FR 38748, June 22, 2000; 65 FR 48391, Aug. 8, 2000; 65 FR 49922, Aug. 16, 2000; 65 FR 64161, Oct. 26, 2000; 65 FR 78104, Dec. 14, 2000; 65 FR 79317, Dec. 19, 2000; 65 FR 80790, Dec. 22, 2000; 66 FR 21, Jan. 2, 2001; 66 FR 15639, March 20, 2001; 66 FR 16139, March 23, 2001; 66 FR 17512, April 2, 2001; 66 FR 24061, May 11, 2001; 66 FR 38946, July 26, 2001; 66 FR 40903, Aug. 6, 2001; 66 FR 42441, Aug. 13, 2001; 66 FR 45943, Aug. 31, 2001; 66 FR 48357, Sept. 20, 2001; 66 FR 48808, Sept. 24, 2001; 66 FR 49544, Sept. 28, 2001; 66 FR 49839, 49841, Oct. 1, 2001; 66 FR 50325, 50329, Oct. 3, 2001; 66 FR 50575, Oct. 4, 2001; 66 FR 51317, 51320, Oct. 9, 2001; 66 FR 51585, Oct. 10, 2001; 66 FR 52544, Oct. 16, 2001; 66 FR 52876, Oct. 18, 2001; 66 FR 54446, Oct. 29, 2001; 66 FR 54955, Oct. 31, 2001; 66 FR 55115, Nov. 1, 2001; 66 FR 57000, Nov. 14, 2001; 66 FR 58400, Nov. 21, 2001; 66 FR 58952, Nov. 26, 2001; 66 FR 59537, Nov. 29, 2001; 66 FR 62946, 62949, 62951, 62954, 62960, 62967, 62969, 62972, Dec. 4, 2001; 66 FR 63168, 63170, 63175, 63180, 63184, 63188, 63192, Dec. 5, 2001; 66 FR 63331, Dec. 6, 2001;66 FR 63510, Dec. 7, 2001; 67 FR 5217, Feb. 5, 2002; 67 FR 7965, 7976, Feb. 21, 2002; 67 FR 9596, March 4, 2002; 67 FR 11581, March 15, 2002; 67 FR 31974, May 13, 2002; 67 FR 34848, May 16, 2002; 67 FR 37328, May 29, 2002; 67 FR 39632, June 10, 2002; 67 FR 55131, Aug. 28, 2002; 67 FR 63563, Oct. 15, 2002; 67 FR 70322, Nov. 22, 2002; 67 FR 71481, Dec. 2, 2002; 68 FR 1985, Jan. 15, 2003; 68 FR 10972, March 7, 2003; 68 FR 18550, April 16, 2003; 68 FR 40531, July 8, 2003; 68 FR 46491, Aug. 6, 2003; 68 FR 52695, Sept. 5, 2003; 68 FR 54172, Sept. 16, 2003; 68 FR 54369, 54377, Sept. 17, 2003; 68 FR 63737, Nov. 10, 2003; 68 FR 65403, Nov. 20, 2003; 68 FR 65639, Nov. 21, 2003; 68 FR 74873, Dec. 29, 2003; 69 FR 2513, Jan. 16, 2004; 69 FR 45277, 45278, July 29, 2004; 69 FR 46108, Aug. 2, 2004; 69 FR 54247, Sept. 8, 2004; 69 FR 75481, Dec. 17, 2004; 70 FR 16141, March 30, 2005; 70 FR 16430, March 31, 2005; 70 FR 22603, 22606, May 2, 2005; 70 FR 75403, Dec. 20, 2005; 71 FR 27631, May 12, 2006; 71 FR 38780, July 10, 2006; 71 FR 39001, July 11, 2006; 71 FR 70471, Dec. 5, 2006; 71 FR 70667, Dec. 6, 2006; 72 FR 7832, Feb. 21, 2007; 72 FR 8283, Feb. 26, 2007; 72 FR 10616, March 9, 2007; 72 FR

19806, April 20, 2007; 72 FR 20429, April 25, 2007; 72 FR 41026, July 26, 2007; 72 FR 58538, Oct. 16, 2007; 73 FR 4475, Jan. 25, 2008; 73 FR 7472, Feb. 8, 2008; 73 FR 49955, Aug. 25, 2008; 73 FR 53140, Sept. 15, 2008; 74 FR 17089, April 14, 2009; 74 FR 68696, Dec. 29, 2009; 75 FR 9107, March 1, 2010; 75 FR 48585, Aug. 11, 2010; 75 FR 82267, Dec. 30, 2010; 76 FR 4078, Jan. 24, 2011]

SOURCE: 57 FR 32295, July 21, 1992, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401, et seq.

40 C. F. R. Pt. 70, App. A, 40 CFR Pt. 70, App. A

Current through September 8, 2011; 76 FR 55777.

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Effective: September 6, 2011

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 86. Control of Emissions from New and In–Use Highway Vehicles and Engines (Refs & Annos)
Subpart S. General Compliance Provisions for Control of Air Pollution from New and In–Use Light–Duty Vehicles, Light–Duty Trucks, and Complete Otto–Cycle Heavy–Duty Vehicles (Refs & Annos)

§ 86.1818–12 Greenhouse gas emission standards for light-duty vehicles, light-duty trucks, and medium-duty passenger vehicles.

(a) Applicability. This section contains standards and other regulations applicable to the emission of the air pollutant defined as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. This section applies to 2012 and later model year LDVs, LDTs and MDPVs, including multi-fuel vehicles, vehicles fueled with alternative fuels, hybrid electric vehicles, plug-in hybrid electric vehicles, electric vehicles, and fuel cell vehicles. Unless otherwise specified, multi-fuel vehicles must comply with all requirements established for each consumed fuel. The provisions of this section, except paragraph (c), also apply to clean alternative fuel conversions as defined in 40 CFR 85.502, of all model year light-duty vehicles, light-duty trucks, and medium-duty passenger vehicles. Manufacturers that qualify as a small business according to the requirements of § 86.1801–12(j) are exempt from the emission standards in this section. Manufacturers that have submitted a declaration for a model year according to the requirements of § 86.1801–12(k) for which approval has been granted by the Administrator are conditionally exempt from the emission standards in paragraphs (c) through (e) of this section for the approved model year.

(b) Definitions. For the purposes of this section, the following definitions shall apply:

(1) Passenger automobile means a motor vehicle that is a passenger automobile as that term is defined in 49 CFR 523.4.

(2) Light truck means a motor vehicle that is a non-passenger automobile as that term is defined in 49 CFR 523.5.

(3) Manufacturer has the meaning given by the Department of Transportation at 49 CFR 531.4.

(c) Fleet average CO_2 standards for passenger automobiles and light trucks.

(1) For a given individual model year's production of passenger automobiles and light trucks, manufacturers must comply with a full useful life fleet average CO_2 standard calculated according to the provisions of this paragraph (c). Manufacturers must calculate separate full useful life fleet average CO_2 standards for their passenger automobile and light truck fleets, as those terms are defined in this section. Each manufacturer's fleet average CO_2 standards determined in this paragraph (c) shall be expressed in whole grams per mile, in the model year specified as applicable. Manufacturers eligible for and choosing to participate in the Temporary Leadtime Allowance Alternative Standards for qualifying manufacturers specified in paragraph (e) of this section shall not include vehicles subject to the Temporary Leadtime Allowance Alternative Standards in the calculations of their primary passenger automobile or light truck standards determined in this paragraph (c). Manufacturers shall demonstrate compliance with the applicable stand-

ards according to the provisions of § 86.1865.

(2) Passenger automobiles--

(i) Calculation of CO_2 target values for passenger automobiles. A CO_2 target value shall be determined for each passenger automobile as follows:

(A) For passenger automobiles with a footprint of less than or equal to 41 square feet, the gram/mile CO_2 target value shall be selected for the appropriate model year from the following table:

Model year	CO_2 target value (grams/mile)
2012	244.0
2013	237.0
2014	228.0
2015	217.0
2016 and later	206.0

(B) For passenger automobiles with a footprint of greater than 56 square feet, the gram/mile CO_2 target value shall be selected for the appropriate model year from the following table:

Model year	CO_2 target value (grams/mile)
2012	315.0
2013	307.0
2014	299.0
2015	288.0
2016 and later	277.0

(C) For passenger automobiles with a footprint that is greater than 41 square feet and less than or equal to 56 square feet, the gram/mile CO_2 target value shall be calculated using the following equation and rounded to the nearest 0.1 grams/mile:

Target CO_2 = [4.72 x f] + b

Where:

f is the vehicle footprint, as defined in § 86.1803; and

b is selected from the following table for the appropriate model year:

Model year	b

2012	50.5
2013	43.3
2014	34.8
2015	23.4
2016 and later	12.7

(ii) Calculation of the fleet average CO_2 standard for passenger automobiles. In each model year manufacturers must comply with the CO_2 exhaust emission standard for their passenger automobile fleet, calculated for that model year as follows:

(A) A CO_2 target value shall be determined according to paragraph (c)(2)(i) of this section for each unique combination of model type and footprint value.

(B) Each CO_2 target value, determined for each unique combination of model type and footprint value, shall be multiplied by the total production of that model type/footprint combination for the appropriate model year.

(C) The resulting products shall be summed, and that sum shall be divided by the total production of passenger automobiles in that model year. The result shall be rounded to the nearest whole gram per mile. This result shall be the applicable fleet average CO_2 standard for the manufacturer's passenger automobile fleet.

(3) Light trucks--

(i) Calculation of CO_2 target values for light trucks. A CO_2 target value shall be determined for each light truck as follows:

(A) For light trucks with a footprint of less than or equal to 41 square feet, the gram/mile CO_2 target value shall be selected for the appropriate model year from the following table:

Model year	CO_2 target value (grams/mile)
2012	294.0
2013	284.0
2014	275.0
2015	261.0
2016 and later	247.0

(B) For light trucks with a footprint of greater than 66 square feet, the gram/mile CO_2 target value shall be selected for the appropriate model year from the following table:

Model year	CO_2 target value (grams/mile)

2012	395.0
2013	385.0
2014	376.0
2015	362.0
2016 and later	348.0

(C) For light trucks with a footprint that is greater than 41 square feet and less than or equal to 66 square feet, the gram/mile CO_2 target value shall be calculated using the following equation and rounded to the nearest 0.1 grams/mile:

Target CO_2 = (4.04 x f) + b

Where:

f is the footprint, as defined in § 86.1803; and

b is selected from the following table for the appropriate model year:

Model year	b
2012	128.6
2013	118.7
2014	109.4
2015	95.1
2016 and later	81.1

(ii) Calculation of fleet average CO_2 standards for light trucks. In each model year manufacturers must comply with the CO_2 exhaust emission standard for their light truck fleet, calculated for that model year as follows:

(A) A CO_2 target value shall be determined according to paragraph (c)(3)(i) of this section for each unique combination of model type and footprint value.

(B) Each CO_2 target value, which represents a unique combination of model type and footprint value, shall be multiplied by the total production of that model type/footprint combination for the appropriate model year.

(C) The resulting products shall be summed, and that sum shall be divided by the total production of light trucks in that model year. The result shall be rounded to the nearest whole gram per mile. This result shall be the applicable fleet average CO_2 standard for the manufacturer's light truck fleet.

(d) In-use CO_2 exhaust emission standards. The in-use CO_2 exhaust emission standard shall be the combined city/highway carbon-related exhaust emission value calculated for the appropriate vehicle carline/subconfiguration according to the provisions of § 600.113–12(g)(4) of this chapter multiplied by 1.1 and rounded to the nearest whole gram per mile. For in-use vehicle carlines/subconfigurations for which a combined city/highway carbon-related exhaust emission value was not determined under § 600.113–12(g)(4) of this chapter, the in-use CO_2 exhaust emission standard shall be the combined city/highway carbon-related ex-

haust emission value calculated according to the provisions of § 600.208 of this chapter for the vehicle model type (except that total model year production data shall be used instead of sales projections) multiplied by 1.1 and rounded to the nearest whole gram per mile. For vehicles that are capable of operating on multiple fuels, including but not limited to alcohol dual fuel, natural gas dual fuel and plug-in hybrid electric vehicles, a separate in-use standard shall be determined for each fuel that the vehicle is capable of operating on. These standards apply to in-use testing performed by the manufacturer pursuant to regulations at §§ 86.1845 and 86.1846 and to in-use testing performed by EPA.

(e) Temporary Lead Time Allowance Alternative Standards.

(1) The interim fleet average CO_2 standards in this paragraph (e) are optionally applicable to each qualifying manufacturer, where the terms "sales" or "sold" as used in this paragraph (e) means vehicles produced and delivered for sale (or sold) in the states and territories of the United States.

(i) A qualifying manufacturer is a manufacturer with sales of 2009 model year combined passenger automobiles and light trucks of greater than zero and less than 400,000 vehicles.

(A) If a manufacturer sold less than 400,000 but more than zero 2009 model year combined passenger automobiles and light trucks while under the control of another manufacturer, where those 2009 model year passenger automobiles and light trucks bore the brand of the producing manufacturer, and where the producing manufacturer became independent no later than December 31, 2010, the producing manufacturer is a qualifying manufacturer.

(B) In the case where two or more qualifying manufacturers combine as the result of merger or the purchase of 50 percent or more of one or more companies by another company, and if the combined 2009 model year sales of the merged or combined companies is less than 400,000 but more than zero (combined passenger automobiles and light trucks), the corporate entity formed by the combination of two or more qualifying manufacturers shall continue to be a qualifying manufacturer. The total number of vehicles that the corporate entity is allowed to include under the Temporary Leadtime Allowance Alternative Standards shall be determined by paragraph (e)(2) or (e)(3) of this section where sales is the total combined 2009 model year sales of all of the merged or combined companies. Vehicles sold by the companies that combined by merger/acquisition to form the corporate entity that were subject to the Temporary Leadtime Allowance Alternative Standards in paragraph (e)(4) of this section prior to the merger/acquisition shall be combined to determine the remaining number of vehicles that the corporate entity may include under the Temporary Leadtime Allowance Alternative Standards in this paragraph (e).

(C) In the case where two or more manufacturers combine as the result of merger or the purchase of 50 percent or more of one or more companies by another company, and if the combined 2009 model year sales of the merged or combined companies is equal to or greater than 400,000 (combined passenger automobiles and light trucks), the new corporate entity formed by the combination of two or more manufacturers is not a qualifying manufacturer. Such a manufacturer shall meet the emission standards in paragraph (c) of this section beginning with the model year that is numerically two years greater than the calendar year in which the merger/acquisition(s) took place.

(ii) For the purposes of making the determination in paragraph (e)(1)(i) of this section, "manufacturer"

shall mean that term as defined at 49 CFR 531.4 and as that definition was applied to the 2009 model year for the purpose of determining compliance with the 2009 corporate average fuel economy standards at 49 CFR parts 531 and 533.

(iii) A qualifying manufacturer may not use these Temporary Leadtime Allowance Alternative Standards until they have used all available banked credits and/or credits available for transfer accrued under § 86.1865–12(k). A qualifying manufacturer with a net positive credit balance calculated under § 86.1865–12(k) in any model year after considering all available credits either generated, carried forward from a prior model year, transferred from other averaging sets, or obtained from other manufacturers, may not use these Temporary Leadtime Allowance Alternative Standards in such model year.

(2) Qualifying manufacturers may select any combination of 2012 through 2015 model year passenger automobiles and/or light trucks to include under the Temporary Leadtime Allowance Alternative Standards determined in this paragraph (e) up to a cumulative total of 100,000 vehicles. Vehicles selected to comply with these standards shall not be included in the calculations of the manufacturer's fleet average standards under paragraph (c) of this section.

(3) Qualifying manufacturers with sales of 2009 model year combined passenger automobiles and light trucks in the United States of greater than zero and less than 50,000 vehicles may select any combination of 2012 through 2015 model year passenger automobiles and/or light trucks to include under the Temporary Leadtime Allowance Alternative Standards determined in this paragraph (e) up to a cumulative total of 200,000 vehicles, and additionally may select up to 50,000 2016 model year vehicles to include under the Temporary Leadtime Allowance Alternative Standards determined in this paragraph (e). To be eligible for the provisions of this paragraph (e)(3) qualifying manufacturers must provide annual documentation of good-faith efforts made by the manufacturer to purchase credits from other manufacturers. Without such documentation, the manufacturer may use the Temporary Leadtime Allowance Alternative Standards according to the provisions of paragraph (e)(2) of this section, and the provisions of this paragraph (e)(3) shall not apply. Vehicles selected to comply with these standards shall not be included in the calculations of the manufacturer's fleet average standards under paragraph (c) of this section.

(4) To calculate the applicable Temporary Leadtime Allowance Alternative Standards, qualifying manufacturers shall determine the fleet average standard separately for the passenger automobiles and light trucks selected by the manufacturer to be subject to the Temporary Leadtime Allowance Alternative Standards, subject to the limitations expressed in paragraphs (e)(1) through (3) of this section.

(i) The Temporary Leadtime Allowance Alternative Standard applicable to qualified passenger automobiles as defined in § 600.002–08 of this chapter shall be the standard calculated using the provisions of paragraph (c)(2)(ii) of this section for the appropriate model year multiplied by 1.25 and rounded to the nearest whole gram per mile. For the purposes of applying paragraph (c)(2)(ii) of this section to determine the standard, the passenger automobile fleet shall be limited to those passenger automobiles subject to the Temporary Leadtime Allowance Alternative Standard.

(ii) The Temporary Leadtime Allowance Alternative Standard applicable to qualified light trucks (i.e. non-passenger automobiles as defined in § 600.002–08 of this chapter) shall be the standard calculated using the provisions of paragraph (c)(3)(ii) of this section for the appropriate model year multiplied by 1.25 and rounded to the nearest whole gram per mile. For the purposes of applying

paragraph (c)(3)(ii) of this section to determine the standard, the light truck fleet shall be limited to those light trucks subject to the Temporary Lead-time Allowance Alternative Standard.

(5) Manufacturers choosing to optionally apply these standards are subject to the restrictions on credit banking and trading specified in § 86.1865–12.

(f) Nitrous oxide (N_2O) and methane (CH_4) exhaust emission standards for passenger automobiles and light trucks. Each manufacturer's fleet of combined passenger automobile and light trucks must comply with N_2O and CH_4 standards using either the provisions of paragraph (f)(1) of this section or the provisions of paragraph (f)(2) of this section. The manufacturer may not use the provisions of both paragraphs (f)(1) and (f)(2) of this section in a model year. For example, a manufacturer may not use the provisions of paragraph (f)(1) of this section for their passenger automobile fleet and the provisions of paragraph (f)(2) for their light truck fleet in the same model year.

(1) Standards applicable to each test group.

(i) Exhaust emissions of nitrous oxide (N_2O) shall not exceed 0.010 grams per mile at full useful life, as measured according to the Federal Test Procedure (FTP) described in subpart B of this part.

(ii) Exhaust emissions of methane (CH_4) shall not exceed 0.030 grams per mile at full useful life, as measured according to the Federal Test Procedure (FTP) described in subpart B of this part.

(2) Including N_2O and CH_4 in fleet averaging program. Manufacturers may elect to not meet the emission standards in paragraph (f)(1) of this section. Manufacturers making this election shall include N_2O and CH_4 emissions in the determination of their fleet average carbon-related exhaust emissions, as calculated in subpart F of part 600 of this chapter. Manufacturers using this option must include both N_2O and CH_4 full useful life values in the fleet average calculations for passenger automobiles and light trucks. Use of this option will account for N_2O and CH_4 emissions within the carbon-related exhaust emission value determined for each model type according to the provisions part 600 of this chapter. This option requires the determination of full useful life emission values for both the Federal Test Procedure and the Highway Fuel Economy Test.

[75 FR 25686, May 7, 2010; 76 FR 19874, April 8, 2011; 76 FR 39521, July 6, 2011]

SOURCE: 50 FR 35386, Aug. 30, 1985; 53 FR 19134, May 26, 1988; 53 FR 43875, Oct. 31, 1988; 54 FR 14455, April 11, 1989; 56 FR 64711, Dec. 12, 1991; 57 FR 30055, July 7, 1992; 58 FR 4002, Jan. 12, 1993; 58 FR 16019, March 24, 1993; 62 FR 31232, June 6, 1997; 62 FR 44875, Aug. 22, 1997; 62 FR 47119, Sept. 5, 1997; 63 FR 7719, Feb. 17, 1998; 64 FR 23925, May 4, 1999; 65 FR 59963, Oct. 6, 2000; 66 FR 17273, March 29, 2001; 67 FR 72825, Dec. 6, 2002, unless otherwise noted.

AUTHORITY: 42 U.S.C. 7401–7671q.

40 C. F. R. § 86.1818–12, 40 CFR § 86.1818–12

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strengthening of current law. It will help the United States regain its rightful position as a world leader in environmental matters and will help pave the way for restoration of Earth's fragile ozone layer.

One area that was not agreed upon are changes in the permitting and enforcement titles of S. 1630. The proposed changes in the substitute will assure prompt and continuous compliance with the requirements of the Clean Air Act.

I think it important to point out the permitting and enforcement titles of S. 1630 were virtually identical to those in the President's bill. Those provisions received much criticism and we have been working with the administration and affected groups to come up with an alternative approach.

Let me begin by addressing the permit system.

First, the permit system will assist everyone—from plant managers to government regulators to concerned citizens—in understanding exactly what is required of each permitted plant in order to satisfy the requirements of the Clean Air Act.

Second, the permit system will provide a convenient means for establishing and keeping track of emissions inventories—and this will prove invaluable to plants as they begin to operate under the acid rain restrictions imposed in the bill.

Third, the permit system will allow the States and EPA to tailor emission limitations to specific sources and to take into account special conditions that may affect any particular source.

Fourth, the permit system will ensure uniform Federal enforcement of the requirements of the Clean Air Act.

Mr. President, as I have said, there is very broad agreement among a wide range of affected groups that these goals are important. However, there remains some disagreement. The changes we have made in the substitute represent our best effort at resolving as many of the concerns of the various groups as we can, consistent with the goals I just mentioned.

Now let me turn to a brief summary of the permitting program established in S. 1630, and then to a summary of the pending substitute.

As we know, the current Clean Air Act has no provision of any kind requiring operators of plants that emit air pollutants to obtain operating permits under a uniform program administered by the Federal Government. Such permits are routinely required under the Clean Water Act, and they have proved of enormous assistance in the battle to clean up our Nation's waters.

Instead of a straightforward system under which these operators can apply for and be issued such permits under a uniform federally administered system, the current Clean Air Act relies upon a combination of requirements and controls imposed upon plants by State implementation plans, various State permit programs, and the like. Indeed, I understand that approximately 35 States have developed some sort of operating permit program, and that the requirements of these programs vary enormously from State to State and have resulted in confusion and inefficiency.

To remedy these problems we designed a permitting system that will resolve significant problems that currently exist under the Clean Air Act.

The substitute makes several changes in S. 1630.

First of all, it preserves the existing timetable for the implementation of the permit program, and I must say that this timetable is quite generous in allowing time for EPA, the States, and industry to put the program in place. Let me just walk through the timetable as it would apply for a specific source that is considered a significant contributor to air pollution.

EPA is granted 12 months from the date this act is passed to develop regulations implementing the permit program.

Next, the States are then given 2 years after EPA publishes those regulations within which to prepare and submit their own programs to implement the permit process.

Then, after the States submit their proposed programs to EPA, EPA is allowed another year to review those proposals. And if EPA asks a State to revise its proposal, we allow yet another 6 months for revisions.

Just in case you weren't counting all these periods of time as I went along, let me just note that they total a full 4½ years. Now remember, this is 4½ years just to get to the point where EPA-approved, federally enforceable, State-administered operating permit programs are in place and ready to process the first permit application.

Mr. President, we both know that sources subject to the permit requirements of the act will not spend those 4½ years with their heads in the sand. To the contrary, they will use that time to monitor the development of the EPA regulations and the State proposals, and they will be ready to submit applications when the time finally arrives.

In order to avoid a logjam of permit applications, we have added to S. 1630 a provision that would allow the permitting agencies to establish a phased priority system for the submission of permits over a period of 2½ years. This process would begin at the point roughly 4½ years after we enact this legislation.

And so, Mr. President, this amendment neatly resolves the concern that the permit process will result in regulatory gridlock. Agreeing to this amendment would ensure that gridlock can be avoided, and that the permitting process will work with a minimum of disruption and delay.

I would like now to proceed with discussion of the other major provisions contained in the permitting amendment.

In recent days we have heard a concern that S. 1630 as currently phrased would require the States to collect $10,000 per day in fines from sources that violate these new permit requirements. Let me just say that we certainly did not—and do not—intend that such a requirement be imposed.

Therefore, we have revised the language in S. 1630 in order to make clear that States are not going to be required to impose minimum fines of $10,000 per day for permit violations. Instead, the bill as amended makes clear that States shall ensure that they have authority to impose fines in that amount.

We have also heard concerns from industry that S. 1630 would burden sources unduly by requiring them to submit—along with their permit applications—plans explaining how they intend to comply with all requirements of the Clean Air Act that apply to them.

But, Mr. President, we emphatically do not intend to burden industry with preparation and submission of unnecessary compliance plans. The substitute clarifies that any compliance plans would address only those matters by which the sources would comply with new requirements imposed by this act as it is finally signed into law. These plans would not need to address compliance with any existing Clean Air Act requirements, unless the source is in violation of those requirements.

So, Mr. President, the amendment should calm the concerns of industry that S. 1630 will impose unnecessary filing burdens with respect to compliance plans.

The amendment resolves yet another concern. As initially drafted, S. 1630 would require that each State located next to a State, in which an air operating permit is sought, be given notice of that permit application. Concerns were raised that this contiguous State notification requirement, if it applied to each permit application, harbored the potential for delays in the program.

Thus, the amendment includes new wording in this section of S. 1630 to limit the requirement to notify States to those instances where the source of the emissions lies within 50 miles of the State affected by those emissions.

Mr. President, I would now like to touch on the process by which EPA would review permit applications approved by States. S. 1630 provides that EPA shall have 90 days to review the

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CLEAN AIR ACT AMENDMENTS OF 1977

REPORT

BY THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

[To accompany H.R. 6161]

together with

ADDITIONAL, SEPARATE, AND SUPPLEMENTAL VIEWS

And Including Cost Estimate of the Congressional Budget Office

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amendments and their legislative history all required a policy of prevention of significant deterioration of clean air quality. *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D.C.D.C. 1972. That ruling was subsequently upheld by the Circuit Court of Appeals and affirmed by an equally divided Supreme Court on June 11, 1973.

More than 2½ years later, after outlining four alternative approaches to prevention of significant deterioration, holding extensive public hearings, reissuing proposed regulations, and receiving hundreds of written comments, the Administrator promulgated final regulations on December 5, 1974. These regulations were immediately challenged by both industry and environmental groups These suits are still pending and will likely take several more years to resolve.

The need for a national policy of and State policy for preventing significant deteriorations

The committee recognized the strong need for a policy of preventing significant deterioration of air quality. The bases of such a policy include: health and welfare protection, economic and employment considerations, protection of States' rights and avoidance of interstate conflicts relating to air pollution, protection of air quality within unique national lands such as national parks, and avoidance of unnecessary stratospheric and atmospheric modifications due to air pollution.

Health basis for preventing significant deterioration

In its "Forward Plan for Health, 1977–1981," the Department of Health, Education, and Welfare has stressed the fact that preventive methods of dealing with disease represent the best hope of substantially improving the Nation's health in the coming years.

> In recent years, it has become clear that only by preventing disease from occurring, rather than treating it late, can we hope to achieve any major improvement in the Nation's health. . . . The problem of disease prevention itself has changed radically since 1900 when pneumonia, influenza, and tuberculosis were the leading killers. . . . [T]oday, heart disease, cancer, and stroke, claim our attention. A distinctive feature of these conditions is that most of them are caused by factors (for example, the environment an dindividual behavior) that are not susceptible to direct medical solution.
>
> It is therefore a basic premise of the prevention strategy that much greater attention and resources must be directed to preventing the underlying causes of disease itself—at controlling [among other things] exposures to toxic chemicals in the environment.[1]

It is with this goal of disease prevention in mind that the committee approached the 1977 Clean Air Act Amendments in general and the issue of prevention of significant deterioration in particular. Some people have attempted to characterize the policy of prevention of significant deterioration as one of protecting trees and wilderness areas

[1] D.H.E.W., *Forward Plan for Health, 1977–81* (June 1975), pp. 12–17.

Clearly, then, allowing air quality in national parks and national wilderness areas to deteriorate to the level of the secondary standards (as proposed by the energy industries and the National Chamber of Commerce), will irreparably damage the very purposes for which these special areas are established.

It should be noted that many parts of America, including the Northeast, the Atlantic and Gulf Coast, the Rockies, the Southwest and the Far West, enjoy substantial economic benefits resulting from tourist travel to enjoy the beauty of the unique national lands in those regions. Drastically reduced visibility can be expected to undermine the attractiveness of these areas to tourists, thereby cutting tourist travel to those regions. Accordingly, the economic life blood of many areas may be seriously threatened by any policy of allowing our national parks and other lands to become as polluted as our major industrial cities.

Worldwide weather modification

Fine particulates and aerosols emitted from polluting sources threaten to bring about major modifications in weather and climate.

A National Oceanic and Atmospheric Administration study (Weikmann and Peuschel, "Atmospheric Aerosols: Residence Times, Retainment Factor and Climatic Effects," January, 1973 p. 113) warns:

> If we consider that the energy demand has increased with time drastically in the past with no limit in sight, then there can be little doubt that inadvertent weather modification on a scale large enough to affect man's well-being might soon become a reality.

Similarly, a National Academy of Sciences Report, (NAS, "Understanding Climate Change: A Program for Action," September, 1974) states:

> It is not primarily the advance of a major ice sheet over our farms and cities that we must fear. Rather, it is persistent changes of the temperature and rainfall in areas committed to agriculture use which are of more immediate concern. We know from experience that the world's food production is highly dependent on the occurrence of favorable weather conditions in the breadbasket areas during growing seasons. (pp. 1–2)

This report also expressed concern about increased CO levels and aerosol levels as possible contributing factors to potential inadvertent weather changes. (pp. 59–63)

A policy of preventing significant deterioration of clear air resources which minimizes the impact of emissions of new industrial sources will help reduce possible major weather modifications such as increased acidity of rainfall, changes in amounts of rainfall and temperature changes.

ALTERNATIVES

The Committee faced four alternatives on the issue of prevention of significant deterioration of clean air.

The first option was to do nothing. This would leave standing the

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REPORT

OF THE

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TOGETHER WITH

ADDITIONAL VIEWS

TO ACCOMPANY

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The chief tool to be used in implementing the no-significant deterioration requirements is the permit that must be issued by the State for any major emitting facility to be located in any clean-air area, including Federal lands. The permit must include an emission limitation based on best available technology. It must insure that total emissions from the facility are such that the increments will never be exceeded. The application for a permit must include careful analyses of climate and meteorology, the soils, the vegetation, the visibility, and other environmental factors at the proposed site and in the area that might be affected by the emissions.

In studying the permit application, the State must examine the growth associated with any proposed facility in terms of other industries that might be attracted to the area and associated with the facility, and its effect on support services, and the residential, commercial, and transportation needs accompanying the facility.

Inherent in any review-and-permit process is the opportunity for delay. The committee does not intend that the permit process to prevent significant deterioration should become a vehicle for inaction and delay. To the contrary, the States and Federal agencies must do all that is feasible to move quickly and responsibly on permit applications and those studies necessary to judge the impact of an application. Nothing could be more detrimental to the intent of this section and the integrity of this act than to have the process encumbered by bureaucratic delay.

Major emitting facilities which commence construction after June 1, 1975, are required to receive a permit under this provision.

The amendments provide a definition of when a major emitting facility can be said to have "commenced construction." This definition was adopted to allow a determination as to whether any particular facility is subject to the review and other requirements of the provisions for the prevention of significant deterioration. The date at which construction is said to have commenced is the time at which the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State or local laws and has committed itself to a program of construction. The test of commitment is whether physical on-site construction has begun or whether the owner or operator has entered into contractual obligations which cannot be canceled or modified without substantial loss. The committee does not expect that this test will necessarily be met by penalty clauses in contracts. Rather, the committee intends a factual determination as to whether a source has so committed itself, financially and otherwise, to the use of a particular site for a particular facility that relocation is not an option and delay or substantial modification would be severely disruptive.

This definition represents a change from the policy which the Environmental Protection Agency followed during 1975. The definition of "commenced construction" used at that time excluded from coverage under the regulations those sources which had entered into binding obligations before June 1, 1975, whether or not construction had actually begun or whether there would be any substantial loss if the contract was canceled or modified. Some sources, in fact, received assurances from the Environmental Protection Agency that their