ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL. Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Respondent.	No. 10-1073 (consolidated with Nos. 10-1083, 10-1099, 10-1109, 10-1110, 10-1114, 10-1115, 10-1118, 10-1119, 10-1120, 10-1122, 10-1123, 10-1124, 10-1125, 10-1126, 10-1127, 10-1128, 10-1129)

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL. Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Respondent.	No. 10-1092 (consolidated with Nos. 10-1094, 10-1134, 10-1143, 10-1144, 10- 1152, 10-1156, 10-1158, 10-1159, 10-1160, 10-1161, 10- 1162, 10-1163, 10- 1164, 10-1166, 10-1172, 10-1182)

SOUTHEASTERN LEGAL FOUNDATION, INC., ET AL. Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Respondent.	)	No. 10-1131 (consolidated with Nos. 10-1132, 10-1145, 10-1147, 10-1148, 10-1199, 10-1200, 10-1201, 10-1202, 10-1203, 10-1205, 10-1206, 10-1207, 10-1208, 10-1209, 10-1210, 10-1211, 10-1212, 10-1213, 10-1215, 10-1216, 10-1218, 10-1219, 10-1220, 10-1221, 10-1222)

PETITIONERS' MOTION FOR PARTIAL STAY OF EPA'S GREENHOUSE GAS REGULATIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

STATUTES

OTHER AUTHORITIES

EXHIBIT INDEX

Other Exhibits (in alphabetical order)

PETITIONERS' MOTION FOR PARTIAL STAY OF EPA'S GREENHOUSE GAS REGULATIONS

In less than four months, a patchwork of EPA actions related to the emissions of greenhouse gases (GHGs) will become effective. Together, those Clean Air Act (CAA) actions—the first GHG mandates in the United States—will irreparably harm Movants and damage all sectors of the economy. EPA *itself* has called the consequences of its actions "absurd," affecting 6.1 million sources, introducing $78 billion in annual costs, causing "at least a decade or longer" of permit delays, "slow[ing] construction nationwide for years," introducing burdens that are administratively "infeasible," "overwhelming," and will "adversely affect national economic development," while impacting sources "not appropriate at this point to even consider regulating."[1]

EPA's efforts to reduce these burdens will not prevent significant irreparable harm during this litigation. Given the harms and the arguments below, the National Association of Manufacturers and others listed in Exhibit 1 (Movants) respectfully request this Court issue a narrowly tailored partial stay to preserve the status quo and prevent these rules from taking effect on countless stationary sources that EPA has

[1] *Regulatory Impact Analysis for the Final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* (RIA) (Exh. 2) at 6, 19; *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* (Exh. 3), 75 Fed. Reg. 31,514, 31,557 (June 3, 2010); Robin Bravender, *EPA issues final 'tailoring' rule*, Greenwire, (May 13, 2010) (Exh. 4) (quoting Office of Air and Radiation's chief administrative officer, Gina McCarthy).

not assessed, while allowing EPA to proceed with its CAA efforts to control GHG emissions from cars and light duty trucks (hereinafter, cars).

At issue are four final EPA actions to be implemented on January 2, 2011, the latter three of which Movants seek to stay, collectively constituting the nation's first GHG regulatory scheme: the "Endangerment Rule;" the "Tailpipe Rule;" the "PSD Interpretive Rule;" and the "Tailoring Rule."[2] Together these actions simultaneously impose GHG controls on two distinct groups of GHG sources: (1) cars; and, critical to the stay request here, (2) stationary sources of all kinds. Movants do not seek to stay EPA's actions as applied to cars. Instead, Movants request the Court stay the effects of the Tailpipe Rule, the Tailoring Rule, and the PSD Interpretive Rule on stationary sources only. This is critical because EPA has not engaged in *any* required analysis of the impact these rules will have on stationary sources.

All four factors for granting preliminary relief strongly favor this request:

1. Movants are likely to succeed on the merits. As applied to stationary sources, EPA's GHG actions are substantively and procedurally invalid. The CAA unambiguously provides that a stationary source's emission of a pollutant triggers the

[2] *Endangerment and Cause or Contribute Findings for GHGs under Section 202(a) of the Clean Air Act,* 74 Fed. Reg. 66,496 (Dec. 15, 2009); *Light-Duty Vehicle GHG Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010) (Exh. 5); *Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (April 2, 2010) (Exh. 6); 75 Fed. Reg. 31,514.

Prevention of Significant Deterioration (PSD) permitting program if, and only if, the pollutant is subject to a National Ambient Air Quality Standard (NAAQS) and the source is located in an area designated "attainment" or "unclassifiable" for the pollutant. Because EPA has established no NAAQS for GHGs and because no region of the country is designated attainment or unclassifiable for GHGs, EPA's decision that GHG emissions alone trigger PSD permitting violates the plain terms of the CAA. Neither EPA's interpretation nor its efforts to mitigate the absurd results that are its own making withstand *Chevron* scrutiny. It is the epitome of arbitrary and capricious decisionmaking to assert, as EPA has, that its view is reasonable yet also absurd. EPA also failed to conduct required analyses of the impacts of its actions on stationary sources, using multiple rulemakings to hide the true impacts of its actions.

2. EPA's actions will cause concrete and irreparable harm across the economy. Even by EPA's own estimates, its actions *immediately* subject Movants and their members to hundreds of millions of dollars in administrative costs and delays plus unknown costs of implementing the GHG-control technologies EPA must select. The uncertainty surrounding EPA's regulations will discourage capital investment and, by EPA's own admission, threaten a regulatory construction freeze in some states. Jobs will be lost, and vulnerable, minority, and elderly populations will be harmed disproportionately.

3. Granting a limited stay will not harm EPA in any manner. This is an atypical case in that granting a partial stay will not hinder the policy goal driving EPA's actions in response to the Court's decision in *Massachusetts v. EPA*—controlling GHG emissions

from cars. Movants simply seek to preserve the status quo for stationary sources. EPA *never has estimated* any benefits of regulating GHGs from stationary sources, and thus cannot complain that a stay prevents any benefits.

4. Granting a stay benefits the public interest and the environment. In its zeal to control GHGs from stationary sources, EPA has ignored the impacts on the economy. The public interest favors preserving the status quo, which will further efforts to restore jobs. A stay here, moreover, will *further* global GHG reductions because it will keep facilities from relocating to nations where GHG emissions will be greater.

BACKGROUND

Movants do not contest EPA's goal of limiting the emissions of GHGs from cars; rather, they contest EPA's path for reaching that goal, which tremendously impacts stationary sources. EPA has unlawfully linked its car standards with the distinct PSD permitting program, creating an absurd, economy-wide permitting program that could bring economic development to a halt.

A. The Clean Air Act

Congress enacted the CAA, 42 U.S.C. §§ 7401-7671q, 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*." *Id.* § 7401(b)(1) (emphasis added). It separately regulates stationary sources (in Title I) and mobile sources (in Title II).

1. Car Emission Standards

Of core relevance, Section 202(a)(1) provides:

> The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any *air pollutant* from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably *be anticipated to endanger public health or welfare*.

42 U.S.C. § 7521(a) (emphasis added). Prior to the Endangerment Rule, EPA had not defined "air pollutant" to include GHGs, and thus has not regulated GHGs under the CAA. In 2007, the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), held that the broad definition of "air pollutant" encompassed GHGs. The Court then directed EPA to respond to a 1999 petition requesting EPA regulate GHG emissions from cars by assessing whether GHG emissions endanger public health or welfare. *Id.* at 532-35. The Court did not determine that EPA must regulate GHGs.

2. Stationary Source Permitting

The CAA stationary source programs relevant here are: (1) the PSD pre-construction permitting program; and (2) the Title V operating permits program. For the most part, the authority to issue both permits is delegated to state, local, or tribal agencies, operating under their own provisions, which have been approved by EPA.

a. PSD Permitting Program

The PSD program (Part C of Title I) is a pre-construction permitting program implementing the scheme Congress established for maintaining the National Ambient Air Quality Standards (NAAQS) program created in 1970 in Part A of Title I.

The NAAQS/PSD Relationship. The NAAQS program is the foundation for regulating specific air pollutants known as "criteria pollutants." EPA establishes geographic air quality districts and designates them as (a) in attainment, (b) in non-attainment, or (c) unclassifiable for each criteria pollutant. The CAA treats areas designated attainment and unclassifiable for a particular pollutant—hereinafter "attainment areas"—identically for PSD purposes. States apply NAAQS to individual stationary sources through a State Implementation Plan (SIP) "for each 'air quality control region' within the state," which ensures that the region meets the applicable NAAQS. *Alabama Power Co. v. Costle*, 636 F.2d 323, 346 (D.C. Cir. 1979); 42 U.S.C. § 7410.

PSD Permitting Statutory Thresholds. Congress enacted the PSD program to prevent "a decline of air quality to the minimum level permitted by NAAQS." *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 904 (7th Cir. 1990). It requires a facility in an attainment area for a specific criteria pollutant to obtain a pre-construction permit when it has the potential to emit more than the CAA threshold for that pollutant, either 100 or 250 tons per year (tpy), depending on the source. *See infra* § I.A. The CAA does not authorize EPA to raise the thresholds.

Two Key Ramifications of PSD Permitting. First, no construction may begin on a new or modified source until a final PSD permit is obtained. 42 U.S.C. § 7474(a). *Second*, sources subject to PSD must adopt Best Available Control Technology (BACT) for emissions of pollutants "subject to regulation" under the CAA. *See* 75

Fed. Reg. at 31,520.[3] BACT is not a specific pollution control device, but an emissions limit set case-by-case, premised on what is viewed as "achievable" through the application of available technology, production, fuel treatments, and other options, and taking into account energy, environmental, and economic considerations. *See* 42 U.S.C. § 7479(3). To date, EPA has offered no guidance on BACT for GHGs.

b. Title V Permitting Program

Added by Congress in the 1990 amendments, CAA Title V requires a source that emits or has the potential to emit more than 100 tpy of any air pollutant to obtain an operating permit that lists applicable regulatory requirements. *See*, *e.g.*, 42 U.S.C. §§ 7661a(b), 7661c. Unlike PSD permits, Title V permits are not triggered just by emissions of NAAQS criteria pollutants in attainment areas.[4]

[3] EPA estimates that currently 280 sources require a PSD permit annually, 75 Fed. Reg. at 31,540, that the administrative cost of doing the paperwork is $84,500 for each applicant, *id.* at 31,534, and that it takes one year to receive a permit, *id.* at 31,535. After GHG emissions trigger PSD permitting, EPA estimates that under the statutory thresholds, 82,173 new construction projects will require permits annually, *id.* at 31,540, and each will take "a decade or longer" to obtain, *id.* at 31,557.

[4] The Title V program currently encompasses 15,000 sources. 75 Fed. Reg. at 31,540. EPA estimates that the average Title V permit takes six months to obtain, *id.* at 31,536, at an average administrative cost of $46,350. RIA at 35. EPA has estimated that once GHGs apply to Title V, under the statutory thresholds, 6,118,252 sources will need Title V permits, 75 Fed. Reg. at 31,540, each of which will take 10 years to obtain, *id.* at 31,536, costing permit authorities more than $123 billion annually in administrative costs alone. RIA at 19.

B. EPA's Four-Step GHG Approach

Spurred on by *Massachusetts v. EPA*, EPA embarked on a path to control GHGs from cars under CAA Section 202(a). Along the way, EPA took a complex four-step approach that, according to EPA's interpretation, will simultaneously trigger PSD and Title V permitting requirements for stationary sources emitting GHGs.

1. Endangerment Finding: The Legal Prerequisite

First, EPA determined that car GHG emissions endanger public health and the environment. 74 Fed. Reg. 66,496 (Dec. 15, 2009).[5] This is the legal prerequisite to EPA's regulation of GHGs under CAA Section 202(a).

2. Tailpipe Rule: The Stationary Source Trigger

Second, EPA and the National Highway Transportation Safety Administration (NHTSA) undertook a joint rulemaking on car emissions consisting of two components: (1) an EPA Tailpipe Rule, promulgated under CAA § 202(a); and (2) a NHTSA Fuel Economy Rule, promulgated under the Energy Policy Conservation Act (EPCA). 75 Fed. Reg. at 25,677-728.

The stated purpose for the joint rulemaking is "to establish a National Program consisting of new standards for light-duty vehicles that will reduce greenhouse gas emissions and improve fuel economy" between model years 2012-2016. 75 Fed. Reg.

---

[5] The six GHGs are: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). *See, e.g.*, *id.* at 66,497.

at 25,324. Although each rule uses slightly different means, they are both directed to the same "harmonized" endpoint. *Id.* at 25,330.[6]

EPA's Tailpipe Rule has two ramifications for stationary sources. First, EPA has incorrectly concluded that regulating GHG emissions under Section 202(a) will trigger stationary-source PSD permitting. *See infra* § I.A-C. Second, despite the stationary-source impacts that, in EPA's view, the Rule triggers, EPA's regulatory impact analysis did not address stationary sources, only cars. *See infra* § I.D.

3. PSD Interpretive Rule: The Linkage to PSD

In the PSD Interpretive Rule, EPA coupled the Section 202(a) regulations with the PSD program. EPA incorrectly interpreted the CAA as requiring that GHG emissions trigger PSD permits when the Tailpipe Rule's regulation of *car* emissions takes effect on January 2, 2011. 75 Fed. Reg. at 17,019-20. By EPA's admission, 6,118,252 stationary sources emit GHGs above the statutory thresholds, so the PSD Interpretive Rule will dramatically increase the number of required permits.[7]

---

[6] EPA achieves this objective with per-mile, fleet average CO_2 emissions limits, while NHTSA employs national mile per gallon fuel economy standards. *See id.* at 25,396.

[7] EPA concluded that the combination of the Tailpipe Rule, PSD Interpretive Rule, and the CAA's statutory thresholds would require 82,173 new PSD permits annually and 6,118,252 new Title V permits. 75 Fed. Reg. at 31,540. This would result in more than a 100-fold increase in permit applications to state, tribal, and local permitting authorities and more than $190 billion in application, preparation, and processing costs alone from January 2011 to July 2013. RIA at 19. That would "overwhelm" permitting agencies and leave "the programs' abilities to manage air quality . . . severely impaired." EPA, *Tailoring Rule Fact Sheet* (Exh. 7) at 1. *See also infra* I.B.

4. Tailoring Rule: The Effort to Contain the Regulatory Cascade

Having reached the edge of the cliff in the PSD Interpretive Rule, EPA attempted to take one step back from the brink. In the Tailoring Rule, it recognized that the stationary-source consequences of the Tailpipe Rule and PSD Interpretive Rule were "absurd." 75 Fed. Reg. at 31,517. To mitigate some of those impacts:

- First, EPA codified the link between the car standards and the stationary-source ramifications. *Id.* at 31,606-08.
- Second, EPA excluded GHGs from the definition of pollutants "subject to regulation." *Id.*
- But then EPA phased GHGs back into the definition in several steps.
  - In "Step One," beginning January 2, 2011, the GHG emissions of sources already subject to PSD permitting for non-GHG emissions will be regulated if they emit above 75,000 tpy of CO2e. *Id.*
  - In "Step Two," beginning July 1, 2011, GHG emissions of any source emitting more than 100,000 tpy of CO2e will trigger PSD permitting. *Id.*
  - Future rulemakings will expand coverage to additional sources, potentially all the way down to the statutory thresholds of 100 or 250 tpy of CO2e. *Id.* at 31,524-26.

5. Additional Elements of EPA's Regulatory Program

EPA currently is developing *two additional steps* that it believes are necessary to avoid a construction freeze. The first, known as the "Proposed SIP Call," tentatively identifies 13 states that must revise their SIPs because, according to EPA, those states currently do not have authority to issue PSD permits for GHGs.[8] The second rule

[8] *Action to Ensure Auth. to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call*, 75 Fed. Reg. 53,892 (Sept. 2, 2010).

proposes a federal implementation plan (FIP) for taking over GHG permitting in states that cannot revise their SIPs before January 2, 2011.[9]

STANDARD OF REVIEW

"The usual role" of a stay "is to preserve the status quo pending the outcome of litigation." *Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006). Such interim relief is "not simply '[a]n historic procedure for preserving rights during the pendency of an appeal,' but also a means of ensuring that appellate courts can responsibly fulfill their role in the judicial process." *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009).

The Court considers four factors in determining whether to grant a stay or other preliminary relief: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 129 S. Ct. at 1761; *see also* D.C. Cir. Rule 18(a)(1). These factors must be balanced against one another, such that "[a] stay may be granted with either a high probability of success and some injury, or *vice versa." Cuomo v. US Nuclear Reg. Com'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). All four factors tip in favor of granting a partial stay here.

[9] *Action to Ensure Auth. to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Fed. Implementation Plan*, 75 Fed. Reg. 53,883 (Sept. 2, 2010).

RELIEF REQUESTED

Movants offer a distinct request for a partial stay that would enable EPA to realize its goal of imposing GHG emission limits on cars while preserving the status quo for stationary sources. Specifically, Movants request the Court stay the effects of the Tailpipe Rule, Tailoring Rule, and PSD Interpretive Rule on stationary sources, such that GHG emissions are not subject to PSD and Title V pending this appeal. Movants do *not* request a stay of the Tailpipe Rule as applied to cars.

Such narrowly tailored relief is within the Court's authority, would serve the interests of justice, and meets the standards for a stay. Pursuant to the Administrative Procedure Act (APA), this Court has broad equitable discretion to "postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. This authority allows the Court to preserve the status quo for stationary sources without disrupting the requirements for cars.[10]

ARGUMENT

I. MOVANTS ARE LIKELY TO SUCCEED ON THE MERITS

EPA's grand effort to leverage regulating car GHG emissions into regulation of stationary-source emissions fails both steps of *Chevron*. EPA ignored unambiguous

[10] As contemplated by Fed. R. App. P. 18(a)(1) and Circuit Rule 18(a)(1) Movants have requested relief from EPA by: (1) submitting an administrative petition to EPA on July 6, 2010, requesting that EPA stay implementation portions of the Tailoring Rule (Exh. 8); and (2) submitting a further petition for EPA to stay the stationary source impacts of its GHG regulations on the grounds expressed in this request on September 8, 2010, (Exh. 9). EPA has not responded to either request.

CAA provisions linking PSD exclusively with the NAAQS program. Emissions of a pollutant triggers PSD permitting if, and only if, the pollutant is subject to a NAAQS and the source is located in an attainment area for that pollutant. GHGs are not such a pollutant, so GHG emissions alone cannot trigger PSD permitting.

At the very least, the CAA does not require EPA's contrary view that emissions of a non-NAAQS pollutant (like GHGs) trigger PSD permitting. Even assuming no clear statutory answer to that question, EPA's interpretation fails *Chevron* Step 2 because it is unreasonable. EPA effectively has conceded as much. The very impetus for the Tailoring Rule's revision of statutory thresholds was EPA's recognition that requiring sources to obtain PSD permits solely based on GHG emissions is "absurd" and inconsistent with Congress's vision for the PSD program. Congress did not enact the CAA to bring any part of the American economy to a dead stop, and EPA's interpretation of the CAA threatening that result is unreasonable, arbitrary, and capricious. In addition, EPA's view that GHGs are subject to regulation under the PSD program—which is plainly focused on local air quality—is unreasonable. Congress never intended the PSD program to regulate pollutants like GHGs.

EPA's further attempt to contain the absurdities is itself unlawful. To justify the raw legislative power it exercised in the Tailoring Rule, EPA invoked rarely used absurdity, administrative-necessity, and step-by-step doctrines. EPA cannot rewrite the CAA until it has tried every reasonable way of applying what Congress wrote. Not only did EPA decline to do so here; it misapplied these doctrines as well.

EPA also has committed egregious procedural errors by taking actions to control GHG emissions from stationary sources while at the same time explicitly ignoring multiple requirements to analyze its actions' full impacts, including their costs and benefits. EPA's failure to perform any of the required impact analyses on stationary sources further renders its actions uninformed and arbitrary and capricious.

A. EPA's Interpretation of the PSD Triggering Provisions Violates the CAA and Is Arbitrary and Capricious

The familiar two-step *Chevron* framework for evaluating the lawfulness of agency regulation requires an agency to show either that Congress unambiguously dictated the agency's interpretation or that the interpretation, while not mandated by Congress, is nonetheless consistent with the statute and reasonable. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). EPA's view that a stationary source that emits sufficient quantities of GHGs must obtain a PSD permit falters at both *Chevron* steps. That view is inconsistent with the statute because it obliterates limitations in several CAA provisions (particularly Sections 161, 165(a), and 107) that tether the PSD program to emissions of NAAQS pollutants in attainment areas for those pollutants. Those CAA provisions compel Movants' reading (*Chevron* Step 1), and, thus, plainly demonstrate that the CAA is open to that reading (*Chevron* Step 2). EPA's competing reading is not remotely reasonable, as even EPA concedes that it leads to extreme impracticalities and absurdities.

1. The CAA Plainly Dictates That a Source Triggers PSD Permitting Only if it Emits a NAAQS Pollutant in an Area Designated Attainment for That Pollutant

A proper analysis of PSD triggering begins with CAA Sections 161 and 165, as well as Section 107, which those sections incorporate. Collectively, they explicitly limit PSD permitting to emissions of NAAQS criteria pollutants in attainment areas.

a. The Clean Air Act Clearly Limits The PSD Program To NAAQS Criteria Pollutants In Attainment Areas

CAA Section 107(d) establishes a structure for states to determine which requirements apply to them for each particular NAAQS by establishing the process of designating an area as "attainment," "nonattainment," or "unclassifiable" for each pollutant *for which "a new or revised [NAAQS]" has been issued.* 42 U.S.C. § 7407(d). Section 107(d) thus explicitly links the designation determinations exclusively to NAAQS criteria pollutants. In turn, Section 107's designation determinations are the critical prerequisite to determining if the PSD program is triggered.

CAA Section 161, the first substantive provision of Part C (the PSD provisions), incorporates those limitations by limiting the PSD program to areas designated under Section 107 as attainment or unclassifiable:

> In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, *to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.*

42 U.S.C. § 7471 (emphasis added). Section 161's geographic limitations come as no

surprise. The purpose of the PSD program is to assure that NAAQS continue to be achieved. *See* 42 U.S.C. § 7410(a)(2)(C) (describing PSD permit program as "necessary to assure that [NAAQS] are achieved"). In fact, almost all of the 1977 CAA amendments focused on attainment of NAAQS, and essentially codified EPA's original PSD program, which had been focused solely on NAAQS pollutants. *See* S 95-127 (95th Cong., 1st Sess.), at 27; 75 Fed. Reg. at 31,549.

Finally, CAA § 165(a) limits the facilities for which a PSD permit is required:

> No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area *to which this part applies* unless—
>
> (1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part; …
>
> (3) the owner or operator of such facility demonstrates, as required pursuant to section 110(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any
>
> *(A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year,*
>
> *(B) national ambient air quality standard in any air quality control region,* or
>
> (C) any other applicable emission standard or standard of performance under this chapter;
>
> (4) the proposed facility is subject to the best available control technology for *each pollutant subject to regulation* under this Act.

42 U.S.C. § 7475(a) (emphasis added). These provisions limit the PSD program in at least two ways. First, Section 165's reference to "any area to which this part applies" reflects and incorporates Section 161's geographic limitation and Section 107(d)'s

limitations to NAAQS criteria pollutants. Second, Section 165(a)(3)(A) and (B) bolster these limits by explicitly referring to NAAQS and increments for NAAQS.[11]

Because there is no NAAQS for GHGs, no region is designated attainment or unclassifiable for GHGs. No stationary source, then, is located in a region designated attainment or unclassifiable for GHGs. The bottom-line is that no source triggers PSD permitting simply because it emits GHGs above the statutory thresholds.

EPA's contrary view that emissions of GHGs trigger PSD permitting for some 80,000 stationary sources annually entirely ignores the unequivocal import of Sections 161 and 165 and, by extension, Section 107. Indeed, EPA's view utterly fails to effectuate the location-limiting language Congress wrote into the foundations of the PSD program. EPA reads Sections 161 and 165 to require PSD permits for a source emitting above the statutory thresholds *for one pollutant* as long as the source is located in an area that is attainment *for any pollutant*. That is no limitation at all. Every area of the country is, *and always has been*, in attainment for at least one criteria pollutant. *Id.* at 31,561. Congress must have been aware of that fact when it enacted the PSD program, yet EPA apparently believes that Section 161 and 165 were a nullity at the

[11] The last clause (C) is simply a prohibition on issuing a PSD permit to a source that is in violation of other applicable standards under the Act. The provision is not intended to subject non-criteria pollutants to PSD, but rather to ensure that a source does not have a track record of noncompliance before it is issued a PSD permit that authorizes significant increases in emissions of a NAAQS pollutant.

moment they became law. Because EPA does not give effect to every clause and word of the statute, EPA's approach to the PSD program is unlawful.[12]

b. *Alabama Power* Requires EPA to Make Location the Basis for Triggering PSD

In *Alabama Power Co. v. Costle,* 636 F.2d 323 (D.C. Cir. 1980), this Court held that location is the key determinant for PSD applicability. EPA had argued that PSD permitting requirements should apply not only to sources in attainment areas for a given pollutant, but to sources located *anyplace* where a new emitting facility would "adversely affect the air quality of an area to which" PSD requirements apply. 636 F.2d at 364. Though predating *Chevron*, the Court essentially rendered a *Chevron* Step 1 holding that EPA's interpretation violated the CAA's plain language: "The plain meaning of the inclusion in [Section 165, 42 U.S.C. § 7475] of the words 'any area to which this part applies' is that Congress intended *location* to be the key determinant of the applicability of the PSD review requirements." *Id.* at 365.

To date, EPA has given the ruling only limited effect, providing only a narrow exemption from PSD for nonattainment pollutants in 1980 and 2002 rules. *See* 40 C.F.R. § 52.21(i)(2) (PSD "shall not apply to a major stationary source or major modification *with respect to a particular pollutant* if … the source or modification is

---

[12] *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *see also Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995); *Bennett v. Spear*, 520 U.S. 154, 173 (1997) ("'[C]ardinal principle of statutory construction' [instructs that a court has a duty] 'to give effect, if possible, to every clause and word of a statute.'")(internal citations omitted).

located in an area designated as nonattainment under section 107") (emphasis added). In adopting this exemption, however, EPA maintained its unlawful position that PSD requirements apply to any area that is "designated ... as 'attainment' or 'unclassifiable' for *any* pollutant for which a national ambient air quality standard exists." 45 Fed. Reg. 52,675, 52,677 (Aug. 7, 1980).[13] Because EPA has no discretion to ignore this Court's rulings about the plain meaning of the CAA, the longevity of EPA's interpretation is no sign of its validity.[14] Moreover, the question whether emissions of a non-NAAQS pollutant could trigger PSD permitting was unimportant before, and EPA cannot argue that Movants' interpretation is foreclosed by earlier regulations.[15]

2. At The Very Least, EPA's Interpretation Leads to Absurd and Unreasonable Results by EPA's Own Admission

In contending that the CAA compels its interpretation that PSD permitting is required for any source emitting GHGs above the thresholds, EPA misreads Sections 169(1) and 165(a)(4) while ignoring entirely Sections 161, 165(a), and 107.

---

[13] *See also PSD and Nonattainment New Source Review*, 67 Fed. Reg. 80,186 (Dec. 31, 2002).

[14] *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

[15] The regulation of GHGs is a new ground for challenging prior interpretations. Plus, EPA conducted a rulemaking reopening its rules and solicited comments on how the PSD provisions should be interpreted in light of its decision to regulate GHGs. *See*, *e.g.*, 74 Fed. Reg. 51,546-47, 74 Fed. Reg. 55,316-17, 55,327. If EPA's rules could be read to require the result that GHG emissions can trigger PSD permitting, EPA should have changed them to comport with the statute.

a. EPA's Interpretation Is Not Compelled By the CAA

CAA Section 169(1) defines the term "major emitting facility" to include certain sources with potential to emit "any air pollutant." 42 U.S.C. § 7479(1). A broad definition of "major emitting facility," however, cannot change the scope of the PSD program (set out in Sections 161, 165(a), and 107) that is applied to major emitting facilities, because definitions cannot expand limitations Congress writes into the operative provisions of a statute.[16] EPA has, moreover, conceded that the term "any air pollutant" in 169(1) cannot be read literally. 75 Fed. Reg. at 31,560.

EPA's reliance on Section 165(a)(4) is even more unavailing. Section 165(a)(4) prescribes an *obligation* of stationary sources that *are already required to* obtain PSD permits: applying BACT to each pollutant "subject to regulation." It is not germane to defining the class of sources that must obtain PSD permits in the first instance.

b. EPA's View Unreasonably Creates "Absurd" Results

To give Congress's words effect, PSD permitting is required only for stationary sources in an attainment area for a particular NAAQS pollutant emitting a sufficient amount of that pollutant. But even if EPA could fight Movants to a draw, it would only thereby show that the CAA does not specifically resolve the question whether a stationary source's emissions of GHGs *alone* can require that source to obtain a PSD

[16] *See, e.g.*, *Allison Engine Co. v. U.S. ex rel. Sanders*, 128 S. Ct. 2123, 2129 (2008) (holding that an expansive definition does not "alter the meaning" of an operative provision using the defined term nor require that the operative provision "not be read literally").

permit. In other words, the CAA would be silent, and EPA's regulation would stand or fall at *Chevron* Step 2. Were that the battle line, EPA indisputably loses. Indeed, its perfunctory assertions aside, 75 Fed. Reg. at 31,548, 31,558, EPA has effectively conceded as much: despite claiming that it "would have authority under *Chevron* Step 2 to establish a reasonable interpretation that is consistent with the PSD provisions," and "that the tailoring approach so qualifies," 75 Fed. Reg. at 31,517, EPA admitted that its approach leads to burdens that "should be considered 'absurd results.'" *Id.*

At *Chevron* Step 2, courts "must reject administrative constructions of [a] statute … that frustrate the policy that Congress sought to implement." *Continental Air Lines v. Dep't of Transp.*, 843 F.2d 1444, 1453 (D.C. Cir. 1988). Here, EPA embraced the very interpretation that it recognized leads to "absurd" results. According to EPA, its interpretation creates a scenario where "PSD permit issuance would be unable to keep up with the flood of incoming applications, resulting in delays, at the outset, that would be at least a decade or longer." 75 Fed. Reg. at 31,557. "During this time, tens of thousands of sources a year would be prevented from constructing or modifying." *Id.* As a result, EPA's interpretation "slow[s] construction nationwide for years, with all of the adverse effects that this would have on economic development." *Id.* EPA has said this outcome would "not be appropriate," Exh. 4 at 2 (statement of Gina McCarthy), would be "administratively infeasible," 75 Fed. Reg. at 31,516, and would "adversely affect national economic development," *id.* at 31,557.

It defies logic for an interpretation to be absurd yet also reasonable for *Chevron* purposes. Where an agency's "reading upsets the statutory balance struck by Congress and leads to irrational results in practice, … its interpretation is unreasonable under *Chevron* step two." *Int'l Alliance of Theatrical & Stage Employees v. N.L.R.B.*, 334 F.3d 27, 35 (D.C. Cir. 2003). The absurdities that drove the Tailoring Rule fundamentally reveal the unreasonableness of EPA's view.

EPA argues the Tailoring Rule, by totally rewriting the numerical thresholds Congress wrote into the CAA, mitigates the absurdities. In statutory interpretation, two wrongs—even if taken one step at a time—do not make a right. EPA cannot adopt an unreasonable interpretation of the statute, then, to rectify that mistake, obliterate other unambiguous provisions Congress wrote. Thus, when courts have acknowledged the potential for an agency to regulate in order to avoid an absurdity, they have cautioned that the absurdity must clearly result from "the *literal* application of a statute."[17] If a reasonable reading avoids absurd results, it *must* be adopted.[18]

---

[17] *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 242 (1989) (emphasis added); *In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991); *Midlantic Nat'l Bank v. NJ D.E.P.,* 474 U.S. 494, 507 (1986).

[18] *Kaseman v. D.C.*, 444 F.3d 637, 642 (D.C. Cir. 2006) (interpretations should "avoid 'untenable distinctions,' 'unreasonable results,' or 'unjust or absurd consequences.'); *In re Chapman*, 166 U.S. 661, 667 (1897) ("Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.").

EPA's actions cannot be reasonable, moreover, because they frustrate the goals of the PSD program. Congress created the CAA 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) (emphasis added). In the PSD program, Congress balanced environmental goals with economic growth. One purpose of the program, for instance, is "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3). No permissible interpretation of the PSD permitting triggers could contravene those congressional purposes yet survive *Chevron* Step 2.

But that is exactly EPA's position. EPA concedes its reading is enormously impractical for permitting authorities, stationary sources, and the American economy. *See infra* II.C. And EPA further showed convincingly that Congress did not intend the results that would follow from requiring tens of thousands of sources to obtain PSD permits each year simply because they emit more than 100 or 250 tpy of GHGs. EPA's supporting analysis of the relevant statutory text and legislative history on this score is irrefutable. *See* 74 Fed. Reg. at 55,308-10.

For these reasons, EPA's interpretation of the PSD trigger is unreasonable, arbitrary, and capricious. By contrast, Movants' interpretation that PSD permitting is triggered by only emissions of NAAQS pollutants in area designated attainment for those pollutants is reasonable. EPA, in fact, has admitted that the consequence of Movants' interpretation "has particular appeal," 75 Fed. Reg. at 31,568, and has

adopted Movants' result (though not their statutory analysis) for the first six months of 2011, *see* 40 C.F.R. 52.21(b)(21)(iv). It is easy to see why. Movants' interpretation is what Sections 161 and 165(a) mandate, requires no new PSD permits and so "can be implemented efficiently and with an administrative burden that is manageable," 75 Fed. Reg. at 31,568, and also does not necessarily foreclose EPA from regulating GHGs through the PSD program. A stationary source that triggers PSD due to NAAQS pollutant emissions in an attainment area could possibly be required, under Section 165(a)(4), to adopt BACT for other pollutants subject to regulation. While that approach is reasonable in the sense that it would not lead to absurdities (no new permits would be required), requiring sources to adopt BACT for GHGs is unreasonable for reasons discussed in the next section.

B. GHGs Cannot Reasonably be Considered Subject to Regulation for PSD Purposes

EPA committed an additional *Chevron* misstep. Whether or not GHG emissions can trigger PSD permitting, EPA unreasonably asserts that GHGs are pollutants "subject to regulation" within the meaning of Section 165(a)(4), without even beginning the necessary analysis to support that claim. Section 165(a)(4) is the PSD provision requiring that, when a source otherwise triggers PSD, it apply BACT to pollutants "subject to regulation" under the Act. 42 U.S.C. § 7475(a)(4). Congress did not intend for the PSD program in general, and BACT in particular, to apply to unconventional, non-NAAQS pollutants, particularly GHGs. EPA readily concedes

Congress did not have GHGs in mind when it formulated the PSD provisions of the Act. 75 Fed. Reg. at 31,549, 31,555, 31,561, 31,559 n.41 (Congress "might not have appreciated the possibility that burning fossil fuels could lead to global warming"). The text of the PSD provisions and their application to GHGs bear that out.

The 28 source categories listed in Section 169(1) as major emitting facilities potentially subject to the PSD program are the very ones EPA thought (in 1977, when the PSD program was added) posed the greatest threat to air degradation *because they emitted conventional air pollutants*—that is, pollutants with local air quality impacts. Naturally, Congress included only those source categories in Section 169(1) because Congress, too, was concerned about only conventional pollutants. GHGs, by contrast, are emitted by many more categories of sources. The emissions cutoffs in Section 169(1) reflect the same concern. Whereas conventional pollutant emissions of 100 and 250 tpy are significant, GHG emissions of 100 and 250 tpy are commonplace. The thresholds make sense only if Congress envisioned only conventional pollutants as "subject to regulation."

The PSD program itself is geared toward conventional pollutants. The program is principally concerned with "air quality," 42 U.S.C. § 7471, that is, the air people breathe. GHG emissions have no nexus to local air quality. Instead, they are distributed globally. For that reason, PSD provisions focusing on local or regional impacts of a pollutant cannot encompass GHGs. For instance, the provisions of

Sections 165(a) and (e) require air quality monitoring and air quality impact analysis. Such *local* monitoring and *local* analysis is illogical for emissions of GHGs.

EPA's own predictions about BACT for GHGs show the unreasonableness of EPA's view. Adopting BACT for GHGs is fundamentally different than adopting BACT for conventional pollutants: BACT for GHGs will involve not just the "add on" controls that typify BACT for traditional pollutants, but a new and entirely novel regime of mandated energy efficiency for stationary sources. *See*, *e.g.*, 73 Fed. Reg. 44354, 44497; 74 Fed. Reg. 55325-26; Declaration of Bliss M. Higgins § V.E. (Exh. 10); Declaration of Steven R. Peterson §§ III.B., IV. (Exh. 11). There is no indication Congress intended EPA to reinvent the scope of BACT to control energy use itself. It is difficult to believe Congress would "enact so significant a [measure] without a clear indication of its purpose to do so," *United States v. O'Brien*, 130 S. Ct. 2169, 2172 (2010), because Congress does not typically "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).[19]

In short, EPA's view that GHGs can be "subject to regulation" for PSD purposes is not remotely consistent with Congress's vision for the PSD program.

[19] *Cf. FDA v. Brown & Williamson Tobacco,* 529 U.S. 120, 133 (2000) ("We must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").

C. EPA's Invocation of Disfavored Doctrines Does Not Authorize it to Violate the Plain Language of the Clean Air Act Where the Agency Can Interpret the Act in an Otherwise Reasonable Manner

In an effort to resolve the massive problems its interpretations create, EPA adopted the Tailoring Rule as a "fix" to its self-caused problems by revising the CAA's unambiguous emissions thresholds from 100 and 250 tpy to 100,000 tpy. To justify its infidelity to the Act's language and congressional intent, EPA relies upon seldom invoked legal doctrines—the absurdity, administrative necessity, and newly-coined "one-step-at-a-time" doctrines. None justifies EPA's decision to take a pen to the Act and rewrite it. All are doctrines of last resort, and their use is unlawful as EPA could have adopted other reasonable interpretations of the CAA, discussed above, to *avoid* the absurdities that those doctrines attempt to *mitigate*. Moreover, because EPA did not apply the doctrines correctly in setting its new, arbitrary thresholds, the Tailoring Rule will not last long enough to contain the absurdities.[20]

None of the doctrines EPA cited sustains the Tailoring Rule. EPA believed, however, that each doctrine not only "supports [the Tailoring Rule] separately, but the three also are intertwined and support our action in a comprehensive manner." 75 Fed. Reg. at 31,517. There is no precedent for the idea that three interpretive

[20] EPA's reliance on the doctrines might fail for another reason, too. In the Tailoring Rule, EPA purports to give regulated entities with less than 100,000 tpy of GHG emissions a pass, exempting them from complying with the statutory permitting requirements. Those requirements are not merely regulatory; they are enforced with criminal sanctions as well. 42 U.S.C. § 7413(c). EPA has not demonstrated that it has power, even under its last-resort doctrines, to dole out criminal immunities.

doctrines could collectively support an interpretation when none could support it individually. Unlike Dr. Frankenstein, EPA cannot give life to dead doctrines just by stitching them together.

1. The Doctrine of Absurd Results Is Unavailing

The absurdities of applying PSD to GHGs are not seriously in dispute. But before an agency can rewrite an unambiguous congressional command to avoid absurdities, it must be unwaveringly clear that the absurdities result from "the literal application of a statute."[21] Ignoring the text of a statute must be the very last resort, for "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."[22] An agency cannot create exigent circumstances and then change unambiguous statutory terms to "solve" the exigency, just as police officers cannot manufacture exigent circumstances to justify a warrantless search under the Fourth Amendment.[23]

As shown, the emergency situation that EPA cites as justifying its statutory

---

[21] *Ron Pair Enters.*, 489 U.S. at 242. *See Nofziger*, 925 F.2d at 434 . Even then, there may be no power to revise the statute's literal requirements when the "absurdity" is consistent with legislative intent. *See, e.g.*, *TVA v. Hill*, 437 U.S. 153 (1978).

[22] *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 575 (1982) (citing *United States v. Am. Trucking Ass'ns., Inc.*, 310 U.S. 534, 543-44 (1940)). *See Kaseman v. District of Columbia,* 444 F.3d 637, 642 (D.C. Cir. 2006); *see also Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 385-86 (2d Cir. 2004); *Towers v. United States*, 64 F.3d 1292, 1303 (9th Cir. 1995); 2A Singer, *Statutes and Statutory Construction* § 45:12, at 94 (7th ed. 2007).

[23] *See, e.g., United States v. Webster*, 750 F.2d 307, 327 (5th Cir. 1984).

revision is one the Agency itself created because *none* of its actions was statutorily compelled. The Court cannot condone EPA's resort to the absurdity doctrine.

2. The Administrative Necessity Doctrine Is Unavailing

Not only did EPA err in calling upon the administrative necessity doctrine (because of the reasonable interpretations EPA rejected, no *necessity* was actually presented), EPA also erred in its application of the doctrine. No court has upheld an agency's response to a claimed administrative necessity as transformative as the one EPA crafted in the Tailoring Rule, and this Court has specifically advised that agencies should not resort to the doctrine without first trying to apply the statute as written.

In *Alabama Power*, the Court recognized that "[c]onsiderations of administrative necessity may be a basis for finding implied authority for an administrative approach not explicitly provided in the [CAA]." 636 F.2d at 358. Yet the Court cautioned that "there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of cost and benefits." *Id.* at 357. Where an agency seeks a "prospective exemption ... from a statutory command based upon the agency's prediction of the difficulties of undertaking regulation," rather than relief after good-faith effort, the agency's burden is "especially heavy." *Id.* at 359-60. The case law following *Alabama Power* similarly reflects the rarity of the doctrine.[24]

---

[24] *See Envtl. Def. Fund v. EPA*, 636 F.2d 1267, 1283 (D.C. Cir. 1980); *Public Citizen v. FTC*, 869 F.2d 1541, 1557(D.C. Cir. 1989) ("While agencies may safely be assumed to have discretion to create exceptions at the margins of a regulatory field, they are not (cont.)

Through the Tailoring Rule, EPA seeks to prospectively alter the requirements of the PSD program and categorically exempt a broad swath of stationary sources from complying with the CAA. Yet EPA could not cite a single case in which a court approved a prospective application of the administrative necessity doctrine; in fact, EPA acknowledged that "the administrative necessity doctrine is particularly difficult to assert when the agency ha[s] not yet tried to enforce the statutory requirements." 75 Fed. Reg. at 55,318 (citing *Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C. Cir.1983)). EPA also could not cite a single case in which a court approved a broad exemption based on the administrative-necessity doctrine; in fact, EPA acknowledged that "[c]ategorical exemptions from the clear commands of a regulatory statute" are disfavored. *Id.* (quoting *Alabama Power*, 636 F.2d at 358). The lack of authority is easily explained: no court has ever approved such reliance upon this doctrine.

Despite flouting the limitations that keep the doctrine narrow, EPA asserted its belief "that the facts here are much more supportive of an administrative necessity application than in" all the prior administrative necessity cases. 74 Fed. Reg. at 55,316. In light of this Court twice rejecting *de minimis* exceptions in *Envtl. Def. Fund* and *Alabama Power Co* based upon administrative necessities, EPA's assertion that its total revision of the PSD thresholds satisfies the doctrine is simply incredible.

---

thereby empowered to weigh the costs and benefits of regulation at every turn; agencies surely do not have inherent authority to second-guess Congress' calculations.").

3. The So-Called One-Step-At-A-Time Doctrine Is Unavailing

Recognizing that the absurdity and administrative-necessity doctrines were not going to support the extraordinary Tailoring Rule, EPA conjured up a new "judicial doctrine," dubbed the "one-step-at-a-time" doctrine. 75 Fed. Reg. at 31,544. EPA claims this "doctrine" allows it to rewrite unambiguous statutory language as long as it promises to comply with that language sometime in the future. The cases EPA cobbled together as the foundation for its novel doctrine create no such doctrine. In any case, the Tailoring Rule is nothing like the agency actions in those cases.

Consider two of the cases upon which EPA placed the most weight. EPA cited *National Association of Broadcasters v. FCC,* 740 F.2d 1190, 1210 (D.C. Cir. 1984) ("*NAB*"), for the proposition that "incremental agency action is most readily justifiable 'against a shifting background in which facts, predictions, and policies are in flux and in which an agency would be paralyzed if all the necessary answers had to be in before any action at all could be taken.'" In *NAB*, the FCC had promulgated a rule fully in accord with its authorizing statute but had not resolved all issues raised by the rule, preferring to resolve them later. The court held that the FCC could "engage in incremental rulemaking," in other words, could defer resolving questions raised by a rulemaking, unless the agency was restructuring an "entire industry on a piecemeal basis through a rule that utterly fails to consider how the likely future resolution of crucial issues will affect the rule's rationale." 740 F.2d at 1210. EPA's GHG actions, particularly the Tailoring Rule, are completely different. The Tailoring Rule might

superficially seem to be incremental regulation because it does not answer all questions it raises. But the Tailoring Rule is manifestly *not* in accordance with the CAA. It is a complete revision of the CAA, and EPA has no power to do that either incrementally or in one fell swoop. Moreover, EPA's actions are the sort of industry-wide restructuring which precludes incremental rulemaking.

EPA also heavily relies upon *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455 (D.C. Cir. 1998). There, the FAA issued a rule after the statutory deadline that fell just short of achieving a statutory goal, so the FAA proposed two follow-up rules to meet the goal. The Court held the FAA could issue rules incrementally to achieve the statutory goal. EPA's revision of the CAA emissions thresholds bears no resemblance to *Grand Canyon*. Unlike EPA, the FAA did not ignore or revise statutory requirements, but just implemented them incrementally. By contrast, the Tailoring Rules discards the CAA's emissions thresholds and only vaguely hints at some future rulemaking that may approach the statutory requirements.

EPA's revision of the CAA's thresholds is also not akin to cases (like *Grand Canyon*) where an agency issues rules after a statutory deadline. Late rulemakings are not unusual, which is why District Courts have jurisdiction for CAA unreasonable delay suits. *See* 42 U.S.C. § 7604. But more significantly, late rulemakings only "revise" a statute insofar as they change a *procedural* provision of a statute that applies to an agency itself. In the Tailoring Rule, EPA is purporting to revise a *substantive*

requirement that applies to regulated entities. The two are worlds apart. The one-step-at-a-time doctrine (if it even exists) thus does not justify the Tailoring Rule.

D. EPA Failed to Assess the Consequences of and Alternatives to Its Rules Rendering the Rulemakings Arbitrary and Capricious

By EPA's own admission, "EPA seeks to include as many GHG sources in the permitting programs at as close to the statutory thresholds as possible, and as quickly as possible." 75 Fed. Reg. at 55,295. Yet as it embarks on this program, EPA has steadfastly ignored requirements to analyze the consequences of the rules on the sources they will affect.

EPA asserts that it need not analyze and disclose the costs or benefits flowing from the stationary source impacts of its rules, other than to take credit for the asserted "relief" provided by the Tailoring Rule's dampening and delay of some costs. Under EPA's view, only the relatively small costs associated with car impacts must be considered, and both the public and the agency are left uninformed about what consequences may arise from the heavy costs and other impacts associated with stationary source controls.

1. EPA's Failure To Engage In Required Regulatory Impacts Analysis Renders the Rules Arbitrary and Capricious

EPA's refusal to consider the most significant effects of its actions makes them "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" as well as being adopted "without observance of procedure required by law." 42 U.S.C. § 7607(d)(9)(A),(D). An agency acts arbitrarily and capriciously if it does not

"examine the relevant data," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), or make its decision "based on a consideration of the relevant factors," *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281, 285 (1974). Here, EPA "entirely failed to consider an important aspect of the problem," so its actions must be reversed. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

Both Congress and the executive branch have directed EPA, before taking final action, to assess all the impacts of its actions and to consider the benefits of alternative approaches. EPA's decision making was not appropriately informed because it did not comply with those commands.

Section 202(a). Under Section 202(a), regulations may only "take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." 42 U.S.C. § 7621(a). In adopting the Tailpipe Rule, EPA gave *no* consideration to the cost of compliance with the stationary source regulations that EPA believes the rule triggers. *See* 75 Fed. Reg. at 25414-21. *See* Part I.D.2 EPA's rulemaking thus was unlawfully uninformed.

Contrary to its assertions, *see* 75 Fed. Reg. at 25401-02, EPA cannot avoid the statutorily required analysis merely by pointing to the Tailoring Rule. First, the Tailoring Rule includes no analysis of the stationary source impacts that the Tailoring Rule leaves in place. Second, by adopting the rules separately, EPA decided to implement the Tailpipe Rule whether or not the Tailoring Rule takes effect; thus it

must address the impacts of the Tailpipe Rule in that rule itself. Third, there is serious doubt that the Tailoring Rule will provide the relief EPA intends (as shown, it is unlawful), and EPA has not analyzed this contingency.

Regulatory Flexibility Act. Under the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603(a) & 605(b), EPA must prepare an analysis that describes the effects of a proposed rule on small businesses, or certify that there are no such effects. Here, EPA's summary certification that the Tailpipe Rule will "not have a significant economic impact on a substantial number of small entities," 75 Fed. Reg. at 25,541, is contradicted by EPA's own repeated statements that the Tailpipe Rule will "trigger the applicability of PSD for GHG sources at the 100/250 tpy threshold levels as of January 2, 2011." 75 Fed. Reg. at 31,554. EPA has estimated that countless new sources will require permits because of the Tailpipe Rule:

> PSD permit issuance would be unable to keep up with the flood of incoming applications, resulting in delays, at the outset, that would be at least a decade or longer, and that would only grow worse over time as each year, the number of new permit applications would exceed permitting authority resources for that year. Because PSD is a preconstruction program, during this time, tens of thousands of sources each year would be prevented from constructing or modifying. In fact, it is reasonable to assume that many of those sources will be forced to abandon altogether plans to construct or modify.

75 Fed. Reg. at 31,557.[25]

[25] In the past, EPA has argued that the RFA does not require EPA to consider the costs of imposing PSD requirements on small entities through the Tailpipe Rule, relying upon this Court's statement that "[a]n agency is under no obligation to (cont.)

Even the government's own Small Business Administration noted that, "whether viewed separately or together, EPA's RFA certifications for the three GHG rule proposals lack a factual basis and are improper" because "[th]e GHG rules are likely to have a significant economic impact on a large number of small entities."[26] EPA violated the RFA by failing to perform the requisite analysis and by certifying, counter to its own admissions, that the Tailpipe Rule will not affect small businesses.

Unfunded Mandates Reform Act. Under UMRA, 2 U.S.C. § 1535, EPA must consider regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. Here, EPA's sole proclaimed goal is regulating emissions from motor vehicles, yet it has ignored apparent alternatives that would fully realize that goal while avoiding the heavy burdens on stationary sources. Indeed, EPA has flouted UMRA by promising to impose as heavy a burden on stationary sources as it can. 75 Fed. Reg. at 31,548.

---

conduct a small entity impact analysis of effects on entities which it does not regulate" and need not perform such an analysis for a rule that "did not subject [Petitioners] to regulation." *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 467 (D.C. Cir. 1998). But such precedent is inapposite here. By EPA's own admission the Tailpipe Rule will trigger impacts on countless small sources, including, as EPA air chief Gina McCarthy has acknowledged, sources that "clearly were not appropriate at this point to even consider regulating." Exh. 4 at 2 (statement of Gina McCarthy); *see also* Declaration of Karen R. Harned (Exh. 12) ¶¶ 16-19 (EPA's Tailpipe Rule small business certification contradicted by own Tailoring Rule analyses).

[26] Comments of the Small Business Administration on EPA's Tailoring Rule (Dec. 23, 2009) http://www.sba.gov/advo/laws/comments/epa09_1223.html.

The Paperwork Reduction Act. Similarly, under the PRA, 44 U.S.C. §§ 3501-3521, EPA must seek approval from the Office of Management and Budget before creating rules that will involve information collection requirements. EPA never submitted a request for approval of the massive information collection requirement imposed by its rules on sources newly subject to permitting requirements. 75 Fed. Reg. at 31,603.

CAA Section 317. Likewise, EPA failed to perform the economic impact assessment required by CAA § 317, 42 U.S.C. § 7617, which, by law must contain an analysis of a proposed rule's compliance costs, inflationary or recessionary effects, competitive effects, effect on consumers, and impact on energy use.

Executive Order 12898. This order directs an agency to identify and address disproportionate effects of their actions on minority and low-income populations in the United States. Yet EPA's GHG rules will place heavy, disproportionate burdens on exactly these populations. Declaration of Roger H. Bezdek (Exh. 13) ¶¶8-14; *see also* Declarations of Niger Innis (Exh. 14), Amy Noone Frederick (Exh. 15), Harold C. Alford (Exh. 30). And despite Administrator Jackson's promise that she would make environmental justice "central to [the Agency's] vision," *see* Remarks to the National Environmental Justice Advisory Council (July 21, 2009)(Exh. 16), the agency failed to perform even a cursory analysis of these burdens. 75 Fed. Reg. at 31,605.

Executive Order 13211. Finally, EPA explicitly ignored Executive Order 13211's requirement that EPA conduct an analysis of its rules' impact on energy supply, distribution, and use. 75 Fed. Reg. at 31,603.

According to John D. Graham, Ph.D., the former Administrator of the Office of Informational and Regulatory Affairs in the U.S. Office of Management of Budget, these missing analyses are necessary to solicit public input on key aspects of rulemaking and to ensure that a full range of options are considered. Declaration of John D. Graham (Exh. 17) ¶ 7.[27] Further, the public can analyze and debate alternative regulatory strategies only if EPA allows stationary source controls to be open for public comment and deliberation. *Id.* ¶¶ 6-7.

EPA's failure to engage in *any one* of the above required analyses shows that its actions are unlawful, uninformed, and not transparent. By ignoring and bypassing *all* of the required analyses, EPA proves that it has acted truly arbitrarily.

2. EPA Arbitrarily Foreclosed Informed Decision Making

Like the Scarecrow in the *Wizard of Oz* pointing Dorothy in opposite directions on the Yellow Brick Road, EPA's contradictory directions have misled the public. In requesting comments on its proposed Tailpipe Rule, EPA instructed commenters *not to comment* on stationary source effects, stating that they should "direct any comments relating to potential adverse economic impacts on small entities from PSD

[27] Specifically, Dr. Graham indicates EPA should have performed scientific and engineering analyses (e.g., risk assessments of pollutants and feasibility analyses of various control technologies), regulatory impact analyses (including benefit-cost analyses of alternatives), impact analyses relevant to small businesses (including consultation with a panel of small businesses before proposal), assessments state and local government impacts, and paperwork-reduction requirements to ensure that unnecessary requirements are not imposed before controls can be applied). *Id.*

requirements for GHG emissions to the docket for the PSD tailoring rule." 74 Fed. Reg. at 49,629. Then, in the proposed Tailoring Rule, EPA identified the Tailpipe Rule as the action creating PSD and Title V requirements for GHGs. 74 Fed. Reg. at 55,294. EPA asserted that the Tailoring Rule merely "provides regulatory relief rather than regulatory requirements." *Id.* at 55,337. EPA maintained this stance in the final rules and, true to its word, refused to respond to comments on stationary-source impacts.[28]

For example, EPA received comments on the proposed Tailoring Rule stating that its increase of thresholds for PSD and Title V did nothing to address the impacts on minor new source review.[29] *See* Comments of NAM *et al* on EPA's Proposed Tailoring Rule (Exh. 18) at 25. EPA simply failed to respond to these comments. *See* EPA's Response to Comments on the Proposed Tailoring Rule at 120, 122-25 (Exh. 32). EPA has completely failed to analyze whether and to what extent minor new source review requirements will now apply to GHGs, given that many states have permitting thresholds as low as 1-5 tpy.

---

[28] The final Tailpipe Rule stated that the Tailoring Rule would address stationary source impacts, 75 Fed. Reg. at 25401-02, and the final Tailoring Rule, in turn, said it only provided relief, and did not impose costs, because any costs were imposed by the Tailpipe rule. *Id.* at 31,597 (permitting requirements "are already mandated by the Act and by existing rules and are not imposed as a result of the Tailoring Rule"); *see also id.* at 31,554 (acknowledging that it is the Tailpipe Rule that "will trigger the applicability of PSD for GHG sources at the 100/250 tpy threshold levels as of January 2, 2011").

[29] Most state minor new source review programs use similar terms to EPA's major new source review program in determining the scope of applicability.

EPA's shell-game is an archetype of arbitrary and capricious agency action. *Motor Vehicle Mfrs.*, 463 U.S.at 43; *Bowman Transp.*, 419 U.S. at 285.

II. MOVANTS WILL SUFFER IRREPARABLE HARM ABSENT STAY

Movants will be irreparably harmed without a stay. *Nken*, 129 S. Ct. at 1761; *see also* D.C. Cir. Rule 18(a)(1). Irreparable injury is injury for which a movant will not be adequately compensated through money damages or other corrective relief if ultimately successful on the merits. *Virginia Petroleum Jobbers Ass'n v. Fed. Power Com'n,* 259 F.2d 921, 925 (D.C. Cir. 1958). Courts recognize irreparable harm includes economic harm in suits against the government where "Plaintiffs can obtain no remedy in damages against the state because of the Eleventh Amendment." *Cal. Pharms. v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009); *Kan. Health Care Ass'n v. Kan. Dep't of Soc.,* 31 F.3d 1536, 1543 (10th Cir. 1994) ("Because the Eleventh Amendment bars a legal remedy in damages ... plaintiffs' injury was irreparable."). Here, Movants will never be able to force EPA to restore lost jobs or to recover damages from EPA for the economic harm its rules will cause. Thus, the harm they face is irreparable.

Movants and their members will face four types of harms pending appeal:

- *First*, the new burdens and uncertainty generated by EPA's first-ever GHG regulatory regime are harming all sectors of the American economy.
- *Second*, even by EPA's own estimates, sources *over* the Tailoring Rule thresholds will face hundreds of millions of dollars in delays and in administrative costs starting January 2, 2011, not counting the vastly more significant costs of implementing GHG controls which EPA has not defined.
- *Third,* construction will virtually freeze in states that have notified EPA that the Tailoring Rule cannot be effectively implemented in their states.

- *Fourth*, all sources relying on the Tailoring Rule will be subject to compliance risks of retroactive application of PSD and citizen suits alleging CAA violations for emitting GHGs above the statutory thresholds without a permit.

These harms are verified by a wide range of supporting evidence, including:

- *EPA's admissions*. EPA's own analysis—while inadequate and incomplete—nevertheless shows severe harm to Movants.
- *Macroeconomic testimony*. This testimony demonstrates negative effects on investment and economic recovery, as well as the "leakage" of carbon emissions and jobs to other countries. *See* Declarations of Margo Thorning (Exh. 19), Roger H. Bezdek (Exh. 13), and Steven R. Peterson (Exh. 11).
- *Sector specific testimony*. This testimony evidences specific harms to a wide range of sectors of the economy, including Movants and their members. *See* Declarations of David Huether (Exh. 20), Paul Emrath (Exh. 21), David N. Friedman (Exh. 22), Kyle Isakower (Exh. 23), Jennifer White Gradnigo (Exh. 24, Karen R. Harned (Exh. 12), David C. Ailor (Exh. 25), Scott Manley (Exh. 26), and Katie Sweeney (Exh. 27).
- *PSD and Title V Permitting Testimony*. This testimony identifies the key uncertainties and harms of extending PSD and Title V permitting requirements to emissions of GHGs. *See* Declaration of Bliss M. Higgins (Exh. 10).

A. Stationary Source GHG Controls Will Irreparably Harm Movants and the Economy

1. EPA's GHG Regulations Will Create Overarching Uncertainty For Industry

Adding GHGs to PSD permitting introduces many new harms in the form of uncertainties which then cascade into broader economic and other impacts:

- Uncertainty about the GHG emission levels that trigger PSD permitting requirements, given that not all states can immediately implement the Tailoring Rule and given the risk that the Tailoring Rule will be invalidated and GHG PSD requirements will apply retroactively (Higgins Dec. § V.G.);
- Uncertainty about the increased complexity of preparing GHG PSD permit applications, due to the novelty of GHG emission issues, the GHG BACT analysis, and the need for GHG air modeling, and other factors (*Id.* §V.A.-D.);

- Uncertainty about agency review and permitting, due to the same issues that drive the increased complexity of the application process, but especially due to the BACT determination, and the fact that the greatly increased number of permit applications will stretch already limited agency resources (*Id.* § V.E.);
- Uncertainty about increased scrutiny and potential challenges to GHG PSD permits, in light of the "spotlight" on these issues, especially given that EPA has the authority to review state PSD permitting actions and, generally, any interested party has the right to seek judicial review of such permits through state law procedures (*Id.* § V.F.).

2. Uncertainty Surrounding EPA's Regulation Of Stationary Source GHG Emissions Will Reduce Private Investment, Impacting The Fragile U.S. Economic Recovery

EPA acknowledges that these uncertainties "could adversely affect national economic development." 75 Fed. Reg. at 31,557. The economic health of the domestic industrial sector, which has become leaner as a result of the recent economic contraction, is one of the few bright spots among domestic economic indicators. *See* Thorning Dec. ¶¶ 14-17. As a result, and because dramatic reductions in gross private domestic investment since late 2007 are the largest contributor to slow GDP growth, the primary driver of the domestic recovery will be business investment and expansion. *Id.* Such investment will be stifled by EPA's GHG regulatory regime, which will impose hundreds of millions (if not billions) of dollars in permitting costs, multi-year permitting delays, and substantial regulatory uncertainty, discussed above. This regulatory uncertainty will increase the "hurdle rate" (or required rate of return) on investments and thus the cost of capital for investments. Thorning Dec. ¶ 19-22.

Early indications are that this uncertainty already is stifling new investment. Huether Dec. ¶ 12.

As a conservative approximation, the uncertainty surrounding EPA's regulatory regime, excluding the impact on energy-intensive industries, will increase the cost of capital 6.0% to 8.5%. Thorning Dec. ¶ 22; *see also* Peterson Dec. § VI.; Bezdek Dec., Att. at 2-3, 24-47. Under conservative assumptions about elasticity of investment, this would decrease U.S. investment between 5% and 15%—equivalent to losses of $97 to $290 billion dollars in 2011 and $100 to $301 billion dollars in 2014, which rival the losses the U.S. has experienced since the fourth quarter of 2007. Thorning Dec. ¶ 22.

3. EPA's Regulatory Regime Will Increase Production Costs and Energy Costs, Reducing the Competitiveness of U.S. Industry, and Putting Vulnerable Populations at Risk

Even for projects that proceed, rising regulatory and capital costs will be passed on, increasing input costs for downstream firms and increasing energy costs. *Id.* ¶ 21, 36-38. The energy sector is virtually certain to face substantial new costs, which will increase energy prices significantly. *See, e.g.,* Isakower Dec. ¶¶ 15-21, 55; Bezdek Dec., Att. pp. 2-3, 24-47; Thorning Dec. ¶ 36; *see also* Friedman Dec. ¶¶ 19-28; Sweeney Dec. ¶¶ 37-42. Energy prices will also rise because of supply constraints resulting from project cancellations and delays attributable to new PSD requirements. Even under the Tailoring Rule, expanding the PSD program is likely to delay new investment in shale gas extraction and therefore significantly reduce natural gas supply. Isakower Dec. ¶¶ 54-55. Also at risk is the nation's coal supply, with the coal

industry uncertain as to (i) whether coal mine fugitive methane emissions will trigger PSD, (ii) how to measure those emissions, (iii) how to apply BACT, and (iv) whether the states in which half of all U.S. coal is produced will be able to implement Tailoring in time. Sweeney Dec. ¶¶ 22-30, 33-34. Rising energy prices are a cause for special concern, because economic expansion is linked with energy costs. *See* Thorning Dec. ¶ 36.

The cost increases attributable to EPA's GHG regulations will also harm U.S. competitiveness, resulting in the loss of U.S. jobs, investment, and production to overseas industry, particularly developing countries. Thorning Dec. ¶¶ 37-39; Peterson Dec. § VI.C. For example, by delaying and raising the cost of expansion projects, EPA's GHG regime will increase production costs and risks reducing the competitiveness of the domestic oil seed processing sector, which will lose market share and production to processors in Brazil and Argentina—energy intensive countries which lack GHG controls. *See* Ailor Dec. ¶¶ 23-26.

In addition, new manufacturing and processing investment typically involves more energy-efficient technology. Peterson Dec. § VI.C. By stifling this investment, businesses will forgo achievable environmental and efficiency benefits. Further, because PSD permitting reaches new sources and new investment, *id.*, sectors growing more rapidly or in their infancy, such as renewable energy, will be most harmed—thereby stunting the transformation of the energy sector. EPA's GHG rules also will discourage expanded renewable fuel production projects and virtually bar the

productive use of agricultural waste. Gradnigo Dec. ¶¶ 18, 20. These harms will be most severe in rural areas economically dependent on corn refining. *Id.* ¶¶ 11, 18-19.

Rising energy costs and reduced employment will disproportionately impact vulnerable, low-income, minority, and elderly populations. Bezdek Dec. ¶¶ 5-14. For example, rising energy prices are a major contributor to homelessness among minorities and other groups. *Id.*, Att. p. xii. *See also* Emrath Dec. ¶ 47 and Table 10.

B. EPA's Regulations Will Levy Hundreds of Millions of Costs on Stationary Sources of GHGs Above Tailoring Rule Thresholds

1. EPA Estimates Permitting Costs Alone Will Be More Than $250 Million During the Pendency of This Litigation

EPA itself concedes harms will accrue to sources emitting GHGs above Tailoring Rule thresholds. Using data on the current PSD program, EPA estimates that a PSD permit costs approximately $84,500 per applicant, 75 Fed. Reg. at 31,534, and that, under the Tailoring Rule, approximately 900 new projects and modifications will require a permit in the next 30 months, *id.* at 31,540. The resulting $229 million in administrative costs over the first two and half years of EPA's program, *see* RIA at 19, actually understates the real cost because it does not account for the novelty of GHG permitting. *See* Higgins § V.A-E. That is, per-applicant costs will likely exceed $84,500 because, as EPA acknowledges, it will take longer to "develop control recommendations" and to respond to "comments from various stakeholders, [and] from citizens groups to equipment vendors, who will seek to participate in the permit

process." 75 Fed. Reg. at 31,540. These increased costs undoubtedly will apply to residential, commercial, and industrial sources. *See, e.g.,* Harned Dec. ¶¶ 8, 12-14 .

Similarly, EPA has estimated that 550 new sources will need to obtain a Title V permit, 75 Fed. Reg. at 31,540, at an average administrative cost of $46,350. RIA at 35. The resulting $25.5 million in costs does not account for the increased difficulties of GHG permitting or the unique uncertainties of adding GHGs to the Title V program and, too, is fraught with additional uncertainties related to the inclusion of GHG emissions, uncertainties that cause harm. Higgins Dec. § VIII.

2. Unknown Costs of Adopting GHG Best Available Control Technology Will Dramatically Increase Costs

EPA has not estimated the costs of adopting BACT for GHGs, citing "lack of available data." RIA at 15. EPA has acknowledged that "costs to sources to install BACT controls, while still uncertain at this point, would likely add additional costs across a variety of sources." 75 Fed. Reg. at 31,534. That is a significant understatement. While the increased complexity, time lag, and scrutiny of the permitting process itself will impose irreparable harm on the regulated community and collateral harm on the economy, harms associated with BACT could be even more dramatic than the harms of the permitting process. BACT is traditionally accomplished with add-on pollution controls, like scrubbers, but there is no proven add-on control for GHGs. Higgins Dec. § V.E.2. The nascent technology in development, if selected as BACT, would be extremely expensive to implement. *Id.*

While EPA has not issued guidance about BACT for GHG emissions, it will likely never be definitive because, by statute, BACT must be determined "case-by-case" by the SIP-approved agency, not EPA. *See* 42 U.S.C. § 7479(c); Higgins Dec. § V.E.1.

3. Permitting Delays Will Add Significant Costs

Even *with* the Tailoring Rule, EPA projects that authorities will have to process 1,605 PSD applications per year rather than 688, a 233% increase. 75 Fed. Reg. at 31,540. Each application will be more complex, because each must determine what BACT is for GHGs, among a host of other novel determinations. Higgins Dec. § V.

Given the increase in permits even with the Tailoring Rule, and the challenges of deciding BACT case by case, significantly longer permitting times are unavoidable. Both EPA and states acknowledge these actions will push the permitting program to the brink of collapse. RIA at 6. According to Illinois, "[t]he cumulative efforts of Illinois EPA to address the Tailoring Rule is placing an enormous resource drain on our already stressed resources and involves the pulling of personnel from their normal day-to-day activities to assist in planning and implementation of the Tailoring Rule." Letter from Illinois EPA on Final Tailoring Rule (July 29, 2010) at 1 (along with all state letters, Exh. 28).

Among those impacted will be those mandated to proceed with projects, despite increased costs, to comply with new regulatory requirements. For example, refineries are obligated to implement new EPA low-sulfur non-road fuels requirements and anticipated state low-sulfur heating oil requirements, which will

require new installations and other modifications likely to trigger PSD permitting on the basis of GHG emissions. *See* Isakower Dec. ¶¶ 34-44; Friedman Dec. ¶¶ 30-31. PSD permitting delays would put these refiners in a catch-22 which is quintessential irreparable harm—the low-sulfur fuels requirements may trigger a mandate to comply with PSD, which results in a risk of noncompliance with the fuels requirement. *See id.*

C. EPA Has Indicated its Regulations Will Cause a Construction Freeze in States That Cannot Implement the Tailoring Rule

Despite EPA's speculation that the harms imposed by the Tailpipe Rule will be ameliorated by the Tailoring Rule, many states have warned EPA that, under state law, the Tailoring Rule cannot be implemented by January 2, 2011, or for months or years afterward.[30] This delay is hardly surprising since states attempting to implement the

[30] *See*, *e.g.*, Letter from Governor Fruedenthal of Wyoming (Sept. 9, 2010) at 1 ("The Wyoming Environmental Quality Act prevents the State of Wyoming from regulating greenhouse gasses … Consequently, I am unable to respond to your request concerning a timeline when the State would be in a position to revise the [SIP] to apply PSD to sources of Greenhouse Gas emissions."); Letter from Texas on Final Tailoring Rule (Aug. 2, 2010) at 3 ("The United States and Texas Constitutions, United States and Texas statutes, and EPA and TCEQ rules all preclude TCEQ from declaring itself ready to require permits for greenhouse gas emissions from stationary sources."); Letter from Illinois EPA on Final Tailoring Rule (July 29, 2010) at 1 ("Illinois must revise both its statutes and regulations to implement the Tailoring Rule"); Comments from Illinois EPA on Proposed Tailoring Rule (Dec. 28, 2009) at 12 ("We believe a reasonable estimate of the time needed to enact the needed revisions to our laws and regulations is a minimum of one to two years from the date we begin the formal process, which has not yet started."); Comments from Kentucky Division for Air Quality on Proposed Tailoring Rule (Dec. 28, 2009) ("The legislative changes required to modify the thresholds for GHGs would be closer to two years instead of the seventy-five days EPA proposes"); Comments from New Jersey Division of Air Quality on Proposed Tailoring Rule (Dec. 23, 2009) at 4 (EPA (cont.)

Tailoring Rule will have to alter state statutes and regulations.[31] This will take significant time, given the legislative and regulatory processes required in each state. Before that process is completed, millions of sources the Tailoring Rule is supposed to exempt could require permits. In the meantime, construction will stop.

A construction freeze entails many harms. Nationwide, a construction freeze would increase the cost of new and modified residential buildings—which would not otherwise be subject to PSD permitting—resulting in a decrease of roughly $730 million per year investment in multifamily developments, an annual loss of $385 million in wages, 8,091 jobs across pertinent industries, and $235 million in tax and fee revenue to federal, state, and local governments. Emrath Dec. ¶¶ 32-40. Reduced residential investment would keep approximately 1.8 million households out of the housing market; those 1.8 million are more likely to be minorities, the elderly, and single-mother households. *Id.* ¶¶ 41-47 and Table 10; *see also* Bezdek Dec. ¶¶ 5-14.

1. EPA Acknowledges a Construction Freeze in States That Cannot Implement the Tailoring Rule

EPA has conceded the catastrophic harm that its Tailpipe Rule will cause in states until they can implement the Tailoring Rule. Nationwide, new permitting

---

"should provide at least 2 years for states to revise statutes and rules."). Notably, NAM on July 30 requested EPA make these public communications with all 50 states available for review; EPA to date has not done so. *See* July 30, 2010 Letter re: Public Availability of State and Local Permitting Authority Responses Regarding Tailoring Rule Implementation (Exh. 29).

[31] *See, e.g.,* Letter of Wyoming at 1; Letter of Illinois at 1.

burdens would fall on the 6.1 million sources newly covered by the Title V operating permit program, and on the 81,485 planned facilities that would need PSD pre-construction permits annually. 75 Fed. Reg. at 31,540. EPA has indicated this would impose a construction freeze in each state, preventing construction of the 81,485 projects that would otherwise be built, because PSD requires companies to obtain a permit *before* construction. As EPA has explained, "the extraordinarily large number of permit applications would overwhelm permitting authorities and slow their ability to process permit applications to a crawl." 75 Fed. Reg. at 31,557.

EPA has cited estimates that a mere ten-fold increase in permitting would "result in permitting delays of 3 years." *Id.* Given the 120-fold increase EPA anticipates, *id.* at 31,540, delays would lead to a total construction freeze. EPA has predicted, "[t]hroughout the country, PSD permit issuance would be unable to keep up with the flood of incoming applications, resulting in delays, at the outset, that would be at least a decade or longer, and that would only grow worse over time." *Id.* at 31,557. "[T]ens of thousands of sources each year would be prevented from constructing or modifying. In fact, it is reasonable to assume that many of those sources will be forced to abandon altogether plans to construct or modify. *Id.*

2. EPA Estimates Permitting Costs Of $78 Billion Annually

Although EPA has never estimated the cost of a construction freeze—only that it "could adversely affect national economic development[,]" *id.*—or the costs to millions of sources of implementing BACT if they somehow obtained a permit, *id.* at

31,534, EPA has estimated that the *administrative* cost of so many permits would amount to $78 billion annually. RIA at 18.[32] A construction freeze would cause irreparable harm to investment, jobs, and tax revenue.

D. Implementing the Tailoring Rule Will Not Stop Irreparable Harm

Even in states where the Tailoring Rule is implemented, sources between the statutory threshold and the Tailoring Rule threshold will face significant compliance uncertainty, a risk of lawsuits challenging implementation, and citizen's suits.

1. Sources Constructed Without PSD Permits Will Face Retroactive Risks Where Federal Tailoring Or State Implementation Rules Are Invalidated

EPA's Tailoring Rule and state analogs are almost certain to be held unlawful, at the very least in some states, because they directly contradict the CAA and prevailing state laws. Even states that have said that they will meet EPA's deadlines for revising SIPs have stated that they can do so only with emergency processes that heighten the chance their rules will be invalidated.[33] When the Tailoring Rule or a

---

[32] This estimate is a result of its estimates that each Title V permit currently costs $46,350, RIA at 35, and each PSD permit costs $85,000. 75 Fed. Reg. at 31,534. EPA's estimate would actually be significantly higher, but it estimated that the largest subset of these newly covered sources, residential and commercial sources, would only incur a cost of $59,000 per-PSD permit and $23,200 per Title V permit. *Id.* EPA's reduced estimate is based on EPA's unsupported speculation that permits will be simpler for smaller residential sources, *id.*, even though such sources present particularly novel questions due to the unprecedented nature of GHG controls and control technology for such small sources. *See, e.g.,* Harned Dec. ¶¶ 12-13.

[33] *See*, *e.g.*, Missouri Letter to EPA on Final Tailoring Rule (July 27, 2010) at 3 ("It may be possible to propose an emergency rulemaking on the basis of a compelling (cont.)

state analog is invalidated, projects without a PSD permit may then be in violation of the CAA. Higgins Dec. § V.F-G. Significant penalties and citizen suits could result.

CAA Section 304, 42 U.S.C. § 7604, also authorizes citizen suits against "any person who proposes to construct or constructs any new or modified major emitting facility without a permit required" under the statute. Motivating such suits could be broader environmental concerns, attorneys fees, *see id.* § 7604(d), or any "NIMBY" opposition to a project. Citizen plaintiffs will have every incentive to bring ruinous suits against any commercial, residential, or manufacturing GHG source they disfavor. Without a stay, small businesses are particularly ill-equipped to defend against such lawsuits, as they generally lack the necessary resources. *See, e.g.,* Harned Dec. ¶¶ 7-9.

These risks are particularly acute because the CAA is a criminal statute. *See* 42 U.S.C.§ 7413(c)(1) (felony for failure to obtain a PSD permit). The CAA plainly requires a PSD permit for construction of major stationary sources and modifications at the statutory emission thresholds, with no provision for altering those thresholds. Thus, without a stay, law-abiding companies will take little comfort in the Tailoring Rule's ability to shield criminal liability under Section 7413 when approaching a new or modified project with emissions above the statutory thresholds. Companies would be relying on the Department of Justice exercising prosecutorial discretion and this

---

governmental interest pursuant to Section 536.025, RSMo."); Indiana Letter to EPA on Final Tailoring Rule (July 23, 2010) at 2.

enforcement uncertainty is a significant disincentive to undertake projects during litigation. Only a judicial stay of EPA's actions as they affect stationary sources can ameliorate the risk of prosecution.

2. The "SIP-Gap" Phenomenon Will Leave Risks Even In States That Can and Do Implement the Tailoring Rule

Even in states that rapidly adopt the Tailoring Rule, the increased thresholds will not automatically and instantly offer protection for those entities seeking to construct a facility or undertake a modification that will have GHG emissions between the CAA statutory and increase Tailoring Rule thresholds, due to the so-called "SIP-gap." In SIP-approved states, SIP revisions are subject to review and approval by EPA. In the time between state approval and EPA approval, *pre-existing* state rules can be enforced by citizen suits. *See* Higgins Dec. § V.G.3.; Manley Dec. ¶ 22. This phenomenon will act as a further disincentive to projects.

III. A PARTIAL STAY WILL NOT HARM EPA OR OTHER PARTIES

Because the narrow requested relief will not harm EPA or any other parties, the third factor, *Nken*, 129 S. Ct. at 1761; D.C. Cir. Rule 18(a)(1), decisively weighs in favor of relief.

A. By Leaving EPA's Car Standards Intact, the Partial Stay Will Not Undermine EPA's Stated Objectives for this Regulatory Scheme

The limited relief Movants seek preserves EPA's stated goal of controlling GHG emissions from cars. This is the atypical case where a stay will not frustrate EPA's ability to realize its expressed goals. A stay of the effects of EPA's Tailpipe

Rule on stationary sources will not undermine the goal of the joint rulemaking "to establish a National Program consisting of new standards for light-duty vehicles that will reduce greenhouse gas emissions and improve fuel economy." 75 Fed. Reg. at 25,324. Emission-reducing standards will remain in place to reduce GHG emissions. *See id.* at 25,330.

EPA itself has attempted a stationary-source "stay" by evading the CAA's statutory thresholds through the Tailoring Rule. *See, e.g.,* 75 Fed. Reg. at 31,596-98. EPA recognizes that its Tailoring Rule "stay" effectuates its goal of regulating automotive emissions while "relieving the[] resource burdens" on stationary sources and permitting authorities. 75 Fed. Reg. at 31,514. Indeed, EPA believes relief for stationary sources "is necessary." *See* 75 Fed. Reg. at 31,516-17. Yet the Tailoring Rule will not work, is unlawful, and will not, therefore, provide stationary sources the "necessary" benefits; a judicial stay, on the other hand, would succeed where the Tailoring Rule fails.

Finally, EPA cannot argue that a stay undermines any theoretical benefits from stationary source GHG controls because EPA *never has estimated any such benefit.*[34] Nor

[34] No analysis of stationary source GHG emissions is provided in the Endangerment Finding, Tailpipe Rule, or PSD Interpretive Rule. In the Tailoring Rule, EPA estimated the percentage of *total* GHG emissions by stationary sources under the Tailoring Rule thresholds and CAA statutory thresholds, but never attempted to estimate the relative *reductions* in emissions in those sources resulting from application of PSD BACT to any sources. *See* 75 Fed. Reg. at 31,599-600.

has EPA cited stationary-source GHG reductions as a justification for its rulemakings. On the Clean Air Act's fortieth birthday, Administrator Jackson noted that past CAA regulations of local air pollutants had resulted in benefits far in excess of their costs, but in this case, EPA has never estimated any benefits at all from regulating GHG emissions from stationary sources. Remarks on the 40th Anniversary of the CAA (Sep. 14, 2010) (Exh. 33) at 3.[35]

B. The Partial Stay Will Benefit States and the Regulated Community

As detailed above, EPA's GHG regulatory regime imposes harsh and "absurd" consequences for state and local permitting agencies and industrial, commercial, and residential stationary sources—a fact recognized by EPA itself. A stationary-source stay will replace chaos and confusion with clarity and legal certainty for states and the regulated community. Indeed, if Movants' challenges are ultimately successful (as they will be), a stay will spare states and the regulated community the burden of implementing an ineffective scheme for regulating GHGs from stationary sources.

Even if EPA salvages some of its program, states and the public would benefit from a stay pending litigation. EPA published *proposals* regarding additional fixes it believes are needed to implement its actions barely two weeks ago, on September 2.

[35] Furthermore, each of the previous regulations that Administrator Jackson cited were undertaken to implement (rather than avoid) congressional directives. And, in each case, both Congress and EPA took a hard look at the cost and benefits of regulating. As Professor Graham has testified, it is precisely such regulatory impact analyses, which are responsible for the CAA's successes, that EPA has refused to perform here. Graham Decl. ¶¶ 6-7.

75 Fed. Reg. 53,883; 75 Fed. Reg. 53,892. Regulators have at most only months to address the Tailoring Rule; the public has less time in which to comment. Higgins Dec. §V.G. EPA's rush is unnecessary and unwise, and a temporary stay will give all the actors time to breathe.

C. A Partial Stay Will Not Harm the Environment

Although none of EPA's stated objectives include achieving any benefits from reductions in *stationary source* GHG emissions, any such benefits would not be compromised by the relief requested here. Neither Title V permits nor PSD permits will achieve immediate environmental benefits: Title V does not "add new requirements for pollution control itself, but rather collects all of a facility's applicable requirements under the CAA in one permitting mechanism," 75 Fed. Reg. at 31,599, and GHG emissions reductions from the PSD program remain purely speculative because BACT is not yet known, *see, e.g.*, *id* at 31,534.

In fact, a stay will likely *advance* environmental concerns by discouraging "carbon leakage"—*i.e.*, the relocation of industrial production to energy-intensive developing countries where GHG emissions are not regulated. Carbon leakage is likely to follow from EPA's GHG regulations because they decrease the competitiveness of domestic industries, delay and stifle domestic investment, and decrease foreign investment in U.S. manufacturing. *See* Thorning Dec. ¶¶ 37-39; Peterson Dec. § VI.C. Those burdens encourage relocation to and investment in developing nations, including China, India, and Brazil, where industry is significantly

more energy intensive than U.S. industry. Thorning Dec. ¶ 39. For example, China and India's new capital investments result in twice the energy intensity of new US investments, and their existing infrastructure is four-times as energy intensive. *Id.* ¶ 40. Moreover, such nations lack the U.S.' strict environmental controls, thereby leading to greater emissions of other pollution than would the same quantum of industrial production in the U.S. *Id.* ¶¶ 39-43.

Because GHG emissions in any one location will have the same impact on global GHG concentrations as an identical volume of emissions anywhere else in the world, any benefit EPA could claim by reducing domestic GHG emissions would be more than offset by higher emissions from other nations, leading to a net *increase* in global GHG emissions. Even within the U.S., the rules will discourage investment in more energy-efficient technologies, source upgrades, and the replacement of less efficient existing sources because such steps could trigger PSD permitting—resulting in lost opportunity to increase U.S. energy efficiency and reduce GHG emissions per unit of production. Peterson Dec. § VI.C. Such international trade considerations are a key component of legislative climate change controls, but are not and cannot be addressed by EPA regulation.

IV. THE REQUESTED STAY IS IN THE PUBLIC INTEREST

A partial stay pending litigation is in the public interest. *Nken*, 129 S. Ct. at 1761; D.C. Cir. Rule 18(a)(1). A stay would protect the U.S. economy from extensive harm and, perhaps counter intuitively, would avoid increasing global GHG emissions.

A. A Stay Would Serve The Public Interest By Preserving The Status Quo From Inevitable, Adverse Impacts To The Economy

As described previously, the harsh consequences for the U.S. economy during the pendency of litigation warrant a stay that preserves the status quo for stationary sources. Even under the Tailoring Rule, those consequences include cost increases in planned projects through direct permitting costs and lengthy delays, unknown costs of control technology, and increases in the cost of capital due to the substantial regulatory uncertainty. With or without an effective Tailoring Rule, such impacts will kill projects when business investment in such projects is an essential driver of economic recovery at this fragile economic period Thorning Dec. ¶¶ 10, 22, 29; Peterson Dec. §§ III, VI; Bedzek Dec., Att. pp. 2-3, 24-47; Isakower Dec. ¶¶ 13-21. As discussed above, increases in energy and goods will have particularly harsh impacts on vulnerable populations. Bedzek Dec. ¶¶ 5-14; Emrath Dec. ¶ 47 and Table 10.

Those harms do not compare to the impacts to the economy if, as is likely, EPA's Tailoring Rule is not fully effective. This outcome is a virtual certainty in states unable to implement the rule in time, *see supra* § II.C, and even for those states that have said they will be able to meet the deadline, the threat of invalidation of these rules through direct challenge, permit challenges, or citizen enforcement suits remains. EPA's own analyses acknowledge the resulting burdens on states and industrial, commercial, and residential sectors will be overwhelming and absurd—amounting, as EPA has said, to a freeze on construction of new and existing sources.

A stay would alleviate this threat to the economy by providing breathing room and by clarifying legal obligations while a judicial determination of the legality of EPA's regulatory is pending at this fragile and novel time.

B. A Stay Will Lessen The Risk Of Increased Global GHG Emissions

EPA declined to quantify *any* benefits associated with the emissions reductions in its regulation of stationary source GHG emissions, *see, e.g.*, 75 Fed. Reg. at 31,599-600. Nevertheless, all available evidence suggests this regime will do more harm than good, in light of the negligible benefits associated with the limited domestic GHG emissions that would be achieved and the fact that such reductions will be more than offset by higher GHG emissions outside of EPA's jurisdiction. EPA's GHG regulatory regime will lead to carbon "leakage" by shifting production from more energy efficient domestic facilities to higher energy-intensive facilities elsewhere. *See supra* II.A.3; Thorning Dec. ¶¶ 37-40; Peterson Dec. § VI.C.

C. Current EPA Leadership Prefers New Legislation

EPA Administrator Jackson and air chief Gina McCarthy have both repeatedly admitted that legislation addressing GHG emissions from stationary sources would be preferable to command-and-control GHG permitting under the CAA. On July 9, 2009, in testimony before the Senate Subcommittee on Clean Air and Nuclear Safety, Gina McCarthy summarized the Agency's view, discussing "greenhouse gas pollution control." "As Administrator Jackson has repeatedly said, the best approach would be to address this through comprehensive energy legislation." *See* Gina McCarthy,

Testimony Before the Senate Subcommittee on Clean Air and Nuclear Safety (July 9, 2009) (Exh. 31).

Administrator Jackson acknowledged this in a May 14, 2009 letter to the Senate, stating: "Legislation regarding the reduction of greenhouse gases is the preferred approach—it allows for, among other things, the development of an economy-wide cap and trade program, which the Administration supports." In the same letter, Administrator Jackson specifically endorsed a statement from EPA's Advanced Notice of Proposed Rulemaking on GHGs which emphasized the "complexity and interconnections inherent in CAA regulation of GHGs," and concluded that they "reflect that the CAA was not specifically designed to address GHGs and illustrate the opportunity for new legislation to reduce regulatory complexity." 73 Fed. Reg. at 44,397. A stay would provide the legislative branch additional time to contemplate EPA's preference of comprehensive legislation, and would allow the judicial branch the opportunity to dispassionately review EPA's unprecedented regulation of GHG stationary sources.

CONCLUSION

For the foregoing reasons, Movants respectfully request the Court stay the effects of the Tailpipe Rule, Tailoring Rule, and PSD Interpretive Rule on stationary sources, such that GHG emissions are not subject to PSD and Title V until final resolution of this appeal.

Dated September 15, 2010 Respectfully submitted,

For the National Association of Manufacturers, et al. Petitioners:

/s/ Timothy K. Webster
Timothy K. Webster
Roger R. Martella, Jr.
William E. Gerard
James W. Coleman
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Charles H. Knauss
David B. Salmons
Shannon S. Broome
Bryan M. Killian
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000

Matthew G. Paulson
Brian Faulkner
BAKER BOTTS LLP
98 San Jacinto Boulevard
1500 San Jacinto Center
Austin, TX 78701
(512) 322-2500

For the National Mining Association:

/s/ Peter Glaser
Peter Glaser
TROUTMAN SANDERS LLP
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004-2134
(202) 274-2998

For the Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation:

/s/ Ronald J. Tenpas
Ronald J. Tenpas
Michael W. Steinberg
Levi McAllister
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5435

John J. McMackin, Jr.
Williams & Jensen, PLLC
701 8th Street, N.W.
Suite 500
Washington, DC 20001
(202) 659-8201

For the American Iron and Steel Institute and Gerdau Ameristeel US Inc.:

/s/ Chet M. Thompson
Chet M. Thompson
CROWELL &MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 6
24-2655

For the Missouri Joint Municipal Electric Utility Commission:

/s/ Terry Satterlee
Terry J. Satterlee
Thomas J. Grever
SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108
(816) 474-6550

For the Clean Air Implementation Project:

/s/William H. Lewis
William H. Lewis, Jr.
Ronald J. Tenpas
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-5145

For the National Environmental Development Association's Clean Air Regulatory Project:

/s/ Leslie Sue Ritts
Leslie Sue Ritts
THE RITTS LAW GROUP, PLLC
620 Fort Williams Parkway
Alexandria, VA 22304
(703) 823-2292

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Petitioners' Motion For Partial Stay Of EPA's Greenhouse Gas Regulations" was on this 15th day of September, 2010, served electronically through the Court's CM/ECF system on all registered counsel and by first-class mail on those counsel not registered as listed below:

Christopher Gene King
New York City Law Department
6-143
100 Church Street
New York, NY 10007

John E. Milner
Brunini, Grantham, Grower & Hewes, PLL
P.O. Box 119
Jackson, MS 39205

Gerald D. Reid.
Office of the Attorney General
State of Maine
6 State House Station
Augusta, ME 04333-0006

Valerie Melissa Satterfield
Office of the Attorney General
State of Delaware
102 West Water Street, Third Floor
Dover, DE 19904-0000

Judith Ann Stahl Moore
Office of the Attorney General
State of New Mexico
111 Lomas Boulevard, NW, Suite 300
Albuquerque, NM 87102

J. Allen Jernigan
North Carolina Department of Justice
PO Box 629
Raleigh, NC 27602-0629

Mark J. Bennett
Office of the Attorney General
State of Hawaii
Department of Agriculture
425 Queen Street
Honolulu, HI 96813-0000

Kelvin Allen Brooks
Office of the Attorney General
State of New Hampshire
33 Capitol Street
Concord, NH 03301-6397

Joseph P. Mikitish
Office of the Attorney General
State of Arizona
1275 West Washington Street
Phoenix, AZ 85007-2926

Wayne K. Stenehjem
Office of the Attorney General
State of North Dakota
600 East Boulevard Avenue
Bismarck, ND 58505-2210

Jocelyn F. Olson
Office of the Attorney General
State of Minnesota
1400 Bremer Tower,
445 Minnesota Street
St. Paul, MN 55101

Douglas F. Gansler
Office of the Attorney General
State of Maryland
200 St. Paul Place, 20th Floor
Baltimore, MD 21202-2021

Kimberly P. Massicotte
Office of the Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

/s/ Timothy K. Webster