

BEFORE THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Proposed Rule:)	
Prevention of Significant Deterioration and)	EPA-HQ-OAR-2009-0517
Title V Greenhouse Gas Tailoring Rule)	
)	
74 Fed. Reg. 55,292 (Oct. 27, 2009))	

COMMENTS OF:

ALLIANCE FOR CLIMATE PROTECTION
CLEAN AIR TASK FORCE
CLIMATE SOLUTIONS
ENVIRONMENT AMERICA
ENVIRONMENTAL DEFENSE FUND
NATURAL RESOURCES DEFENSE COUNCIL
CITIZENS FOR PENNSYLVANIA’S FUTURE (PENN FUTURE)
SIERRA CLUB

1. Introduction and Overview

The undersigned organizations fully support actions by U.S. Environmental Protection Agency (“EPA” or “the Agency”) to regulate greenhouse gases under the Clean Air Act (“CAA” or “the Act”). This proposal is a significant step towards that end, as it enables workable implementation of the Act’s Prevention of Significant Deterioration (“PSD”) and Title V operating permit mandates for stationary sources, focusing first on the largest emitters of greenhouse gases.

As Administrator Jackson finds in the recently finalized Endangerment Finding, elevated levels of certain greenhouse gases that are the result of human activity, including carbon dioxide (“CO₂”), methane (“CH₄”), nitrous oxide (“N₂O”), hydroflourocarbons (“HFC”), perflourocarbons (“PFC”) and sulfur hexafluoride (“SF₆”) (collectively, “GHGs”), “endanger the public health and welfare of current and future generations.” Endangerment and Cause or Contribute Findings for Greenhouse Gases Under §202(a) of

the Clean Air Act, 74 Fed. Reg. 66,496, 66,523 (Dec. 15, 2009)(“Final Endangerment Finding”). Furthermore, “without substantial and near-term efforts to significantly reduce emissions,” the accumulation of these greenhouse gases will continue, and “lead to ever greater rates of climate change.” *Id.* at 66,518. Because CO₂ and the other GHGs have long lifetimes – from decades to centuries, “present day and near-term emissions” of these air pollutants will continue to influence world climate “for the remainder of this century and beyond.” *Id.* at 66,518-66,519.

Each new or modified large stationary source permitted without consideration of its climate-forcing impacts, and without the requirement to control its GHG emissions to the extent technically feasible, will significantly impact climate not only during its lifetime, but hundreds of years later. For example, a new 500 megawatt coal-fired power plant combustion source permitted today (even though highly efficient by today’s terms), if permitted without GHG controls can be expected to emit on the order of 4,000,000 tons per year (“TPY”) of CO₂ over a plant lifetime of 60 years or more. Those emissions will continue to have negative radiative forcing impacts for 100 or more years after the CO₂ emitted by the facility, due to the long atmospheric residence lifetime of CO₂. In short, “current greenhouse gas emissions essentially commit present and future generations to cope with an altered atmosphere and climate....” *Id.* at 66,519.

The undersigned public health and environmental organizations agree that these circumstances require immediate action by the Administrator to regulate major sources of GHGs under the Clean Air Act’s PSD and Title V programs. However, as described further herein, we also agree with the Agency’s assessment in the proposed rule that immediate imposition of these requirements on all sources will cause significant administrative difficulties. In these unusual and limited circumstances, it is appropriate for the Agency to act immediately on the largest sources, and to do so by taking a “step by step” approach to implementing the full requirements of the PSD and Title V programs to stationary source greenhouse gas emissions. Indeed, full statutory compliance can best be achieved in these circumstances by implementing the Act’s requirements in two or more phases. Specifically, this approach allows the Agency, after finalizing a first regulatory phase applicable to the largest sources, to collect more information about emissions from various smaller sized stationary sources, and to more

fully consider what mechanisms may be available to regulate more sources in phase II and beyond, as warranted, based *inter alia* on that collected information.

2. EPA's Proposal

To carry out its legal responsibilities to address GHG from major stationary sources of those emissions, EPA proposes to establish an orderly method for applying PSD and Title V requirements to such sources. In particular, the agency puts forward a phased approach to regulation, tailored to assure that both the federal EPA and the state and local agencies charged with implementing these programs can reasonably carry out their responsibilities under the Act.

Because CO₂ is a *product* of the combustion of fossil fuels, it is emitted from a combustion source on a far larger scale – two to three orders of magnitude greater – than the criteria air pollutants which are the *byproducts* of that combustion. For example, a natural gas fired boiler burning 50 million BTU/hr heat input at a “high NO_x rate” of 0.5 lb/MMBTU produces approximately 25,000 TPY of CO₂, but only about 109 TPY of NO_x, if it were assumed to be operating at full potential 24 hours per day, 365 days of the year; a “low NO_x rate” or 0.1 lb NO_x /MMBTU boiler of the same size would generate 21.9 TPY of NO_x but 25,000 TPY CO₂.¹ As this example demonstrates, the universe of combustion sources that emit greater than 100 or 250 TPY of the greenhouse gas CO₂, alone, is much larger than those currently covered by the PSD program. Smaller commercial, industrial, and residential boilers combusting fossil fuels that would not trigger criteria pollutant PSD applicability would trigger greenhouse gas applicability if the permitting process for GHGs is not implemented in a phased manner as EPA has proposed. Moreover, because by statutory definition, the best available control technology (“BACT”) analysis for new or modified sources pollutant emissions is undertaken on a case-by-case basis,² EPA correctly observes that the PSD permit review

¹ EPA evaluates “potential to emit” as “the amount of emissions that can be emitted from a source operating at full capacity. . . . 24 hours per day, 365 days per year. . . .” U.S. EPA, Technical Support Document for Greenhouse Gas Emissions Threshold Evaluations 5, 10 (July 7, 2009), EPA HQ-OAR-2009-0517-0004 (“TSD for Threshold Evaluation”).

² 42 U.S.C. § 7479(3); *see also* New Source Review Workshop Manual (Draft 1990), Chapter B. EPA recently has convened a working group under the Clean Air Act Advisory Committee (“CAAAC”),

necessarily is a facility-specific process requiring significant agency resources, whether the permit-issuing authority is EPA or a state or local entity.

The 28 industrial source categories specified in 42 U.S.C. § 7479(1),³ contain relatively few sources, nearly all of which are significant CO₂ or CO₂e emitters.⁴ Indeed, for GHGs, EPA's TSD shows that virtually all of the existing facilities in these categories would be subject to PSD requirements, regardless whether EPA sets the threshold at 100 TPY or at 25,000 TPY. These sources comprise more than 80 percent of total stationary source CO₂e emissions.⁵

EPA's analysis also indicates, however, that there are over 1,000,000 existing sources in all source categories "with the potential to emit it 250 tons per year or more" of GHGs, 42 U.S.C. §7479(1), and therefore some 20,000 major modifications would be triggered per year (at the two percent per year "major" modification rate EPA asserts is representative of the program currently), if the 250 TPY threshold were implemented.⁶ Additionally, EPA anticipates nearly 20,000 new sources with the potential to emit 250 tons per year or more of GHGs— for a total of some 40,000 new and modified source PSD permit reviews per year if a 250 TPY applicability threshold were implemented. EPA further observes that absent some phased or tailored approach, the Act's requirement that "any" source emitting 100 TPY or more of any air pollutant must hold a Title V permit would sweep into the program approximately 6,000,000 sources (of which only 14,700 or

charged with providing advice to the CAAAC, and through the CAAAC to the Agency, on how BACT reviews should be conducted for GHGs.

³ 42 U.S.C. § 7479(1). These industries include: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process) primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, [and] charcoal production facilities. The statute defines a major source of any other kind to be one "that emits or has the potential to emit more than 250 tons per year of any air pollutant."

⁴ See TSD for Threshold Evaluation, at Tables 8, 9, 13, 16, 19, 25, 29, 35, 38, 39, 42, 43, 45, 46, 48, 49, 56, 61, and the supporting documentation found in the docket at EPA H-Q-OAR-2009-0517-0004.1-0004.8.

⁵ See *id.*, particularly Tables 1 and 8, showing that the 2,237 sources emitting 100 TPY of GHGs in the electricity generating sector make up 76 percent of total stationary source CO₂ emissions at all thresholds considered (2373 Tg/3088 Tg = 0.76).

⁶ See 42 U.S.C. §§ 7475(a), 7479(2)(C), 7411(a); see also 40 C.F.R. §§52.21 (a)(2) (iii)(PSD review required for "major" modifications of major sources).

so currently hold Title V permits) – so that there would need to be 5,985,000 new Title V permit applications within a year.⁷ Table 1 below summarizes EPA’s analysis of the potential scope of the PSD and Title V programs at various applicability thresholds.

Table 1. Summary of EPA’s Analysis

Threshold (Tons)	100			250			25,000			Between 250 and 25,000		
	Existing Sources	New Sources Per Year	Annual Emissions	Existing Sources	New Sources Per Year	Annual Emissions	Existing Sources	New Sources Per Year	Annual Emissions	Existing Sources	New Sources Per Year	Annual Emissions
Single Family	3,925,000	33,000	51	45,350	515	2				45,350	515	2
Multi Family	610,500	11,300	54	137,000	6,400	42	160	3	1	136,840	6,397	41
Commercial	1,355,921	22,123	119	731,477	12,041	105	1,161	7	9	730,316	12,034	97
Industrial Combustion	156,783	481	371	91,472	295	364	4,215	18	224	87,257	277	140
Other Industrial	10,026	58	636	8,334	38	761	4,619	12	756	3,715	26	6
MWC	75	2	6	75	2	6	74	2	6	1	0	0
Oil and Gas	4762	48	88	4762	48	88	1253	13	62	3,509	35	27
Underground Coal Landfills	238	0	40	238	0	40	103	0	34	135	0	6
Farm Engines	37,351	299	0.5	37,351	299	0.5				0	0	0
Power Generation	2,237	93	2,373	2,237	93	2,373	2,076	73	2,373	161	20	0
Total	6,102,893	67,404	3,865	1,058,296	19,731	3,782	13,661	128	3,464	1,044,635	19,603	318

(Summarized from EPA TSD for Thresholds; annual emissions in Tg per year)

These numbers can be contrasted with the existing situation, under which EPA reports it believes there are fewer than 300 new and modified sources triggering PSD review annually, and approximately 14,700 facilities currently holding Title V permits nationwide. While many of the sources that trigger PSD or Title V requirements for GHGs also do so for criteria pollutants (this is particularly true for combustion sources, and those sources in the 28 delineated industrial categories), it is clear that the scope of the PSD and Title V programs would be expanded significantly through an immediate application of the statute’s literal terms.

EPA’s selected PSD applicability threshold of 25,000 TPY, by contrast, maintains the same relative numbers of annual permit reviews for new sources (approximately 130) and modified sources (270) as currently take place under the PSD program for criteria and other air pollutants.⁸ Table 1 also demonstrates that setting the first phase threshold for PSD review at 25,000 TPY CO₂e still brings within the ambit of the program 91 percent of the annual emissions from the sources that would be covered by the 250 TPY applicability threshold.⁹

⁷ 74 Fed. Reg. at 55,302.

⁸ See 74 Fed. Reg. at 55,331. EPA notes “these estimates compare to the 280 PSD permits that are currently issued in a typical year” for new and modified major sources of other air pollutants. *Id.* When a 10,000 TPY major modification threshold is selected, that number increases to on the order of 2000 permits per year, which the Agency asserts is a reasonably administrable number, *id.* at 55,334.

⁹ From Table 1 and EPA’s TSD for Threshold Evaluation: (3464 Tg/3782 Tg) = 0.9159.

3. EPA Demonstrates the Need For A Phased Administrative Approach to PSD/Title V Implementation for GHGs Reflecting the Characteristics of GHGs and Congress’s Purpose for These Statutory Programs

The administrative burden described above represents the rare instance where some departure from the literal terms of the statute is appropriate, through a phased or “step-by-step” approach to fully implementing the statute’s requirements. A phased approach allows the Agency to begin regulating the largest sources of GHG emissions as soon as possible while collecting more information about emissions from various categories of smaller sized stationary sources, as well as more fully considering regulatory mechanisms that may be available to streamline the permitting program in subsequent phases.

A. The Problem of Climate Change Demands Immediate Regulatory Action to Control the Largest Sources of CO₂.

Climate change poses significant present and urgent future challenges to our country and the globe. The Administrator has stated that “climate change ... [has] the potential to affect essentially every aspect of human health, society and the natural environment.” Final Endangerment Finding, 74 Fed. Reg. at 66,523. She has emphasized the “urgency of the threat of climate change and the compelling scientific evidence” for that threat. *Id.* at 66,500.

The risks Americans face from climate change are both immediate and substantial. “Observations show that climate change is currently affecting U.S. physical and biological systems in significant ways.” *Id.* at 66,518. Among other significant public health and welfare impacts due to changing climate, “sea level is rising along much of the U.S. coast, and the rate of change will very likely increase in the future.” *Id.* at 66,533. “Observed sea level rise is already increasing the risk of storm surge and flooding in some coastal areas.” *Id.* at 66,535. In addition, “climate change has already altered, and will likely continue to alter, the water cycle, affecting where, when, and how much water is available for all uses.” *Id.* at 66,532.

EPA further notes that the “increase in adverse impacts during the time before additional controls can be implemented is a serious public health concern.” *Id.* at 66,530. Given the current impact of climate change and the long-lived nature of greenhouse gases

in the atmosphere, the Agency has a duty to act immediately to reduce emissions of heat-trapping gases into the atmosphere. This is particularly important given the long life of many of the sources covered by the PSD program. New combustion sources of GHGs permitted without GHG controls will have deleterious climate impacts not only for the decades-long life of the source, but for the century that follows.

B. *A Step by Step Approach to Regulation is Warranted By These Unusual Circumstances.*

EPA's proposed rule immediately addresses GHG emissions from the largest stationary sources in an initial regulatory phase. The Supreme Court has recognized the appropriateness of a staged approach to address climate change in *Massachusetts v. EPA*, 549 U.S. 497, 524 (citations omitted) (2007), stating “[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop, . . . They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.”

Implementing the PSD and Title V programs for GHGs as EPA has proposed, represents such an effort to begin at once with initial steps towards fully implementing the Act with respect to GHGs, to combat this significant and complex environmental problem for which time is of the essence. EPA's proposal, which would govern 91 percent of the emissions regulated under a 250 TPY threshold, is akin to taking an initial “emergency listing” step toward full protection of an threatened species, for which the failure to act quickly has the potential to undermine the species protection purpose of the Endangered Species Act. *See City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989). The proposed tailoring rule provides just such a “first step towards a complete solution,” *id.* at 935, in a situation requiring immediate action.

The D.C. Circuit has upheld an agency's decision to proceed in a stepwise fashion, in *Grand Canyon Air Tour Coalition v. FAA*, 154 F3d 455 (D.C. Cir. 1998). In that case, the court heard challenges to three rules, one final and two proposed, issued by the FAA to comply with a Congressional mandate to regulate Grand Canyon overflights to achieve “substantial restoration of natural quiet.” *Id.* at 460 (quoting 16 U.S.C. §3b(1)). In response to an argument that the final rule was insufficient because it did not fully achieve “substantial restoration,” the court deferred to the Agency's decision to

implement the mandate in a stepwise manner. *Id.* at 477, *see also id.* at 473 (noting that a phased attack on a regulatory problem can have substantial benefits); *General Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1058 (D.C. Cir. 1989) (the ICC was not required to deal with the entire breadth of a statutorily mandated reform program in “one fell swoop” but could take a stepwise approach initially directed at the “phase of the problem which seem[ed] most acute to the regulatory mind.”)(internal quotation and citation omitted). Given the clear, time-critical need to move ahead, and where the evidence establishes that full implementation would result in administrative paralysis, it would be unreasonable for an agency *not* to act in a stepwise fashion.

The D.C. Circuit has noted that the Agency can take a step by step approach towards fully implementing a statutory mandate, when faced with a complex environmental problem that cannot readily be effectively implemented all at once: “the Agency might properly take one step at a time [in implementing comprehensive federal recycling program].” *United States Brewers Ass'n v. EPA*, 600 F.2d 974, 982 (D.C. Cir. 1979) (citations omitted).¹⁰ Moreover, in such circumstances, faced with a challenge to a partially implemented statutory mandate, the court will not void that part that has been implemented, but rather will simply order completion of the whole. *U.S. Brewers*, at 982. “[A]n agency's failure to regulate more comprehensively is not ordinarily a basis for concluding that the regulations already promulgated are invalid Unless the agency's first step takes it down a path that forecloses more comprehensive regulation, the first step is not assailable merely because the agency failed to take a second.” *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 287 (D.C. Cir. 1988)(holding that the court had no jurisdiction over a challenge that “regulation has not fully implementing the statutory goal,” and discussing *United Technologies Corp. v. EPA*, 821 F.2d 714, 720-21 (D.C. Cir. 1988)).

The present situation, in which immediate, complete compliance with the statutory requirements is not administratively feasible, is analogous to an Agency's inability to comply with a statutorily-enacted deadline, “when circumstances preclude the

¹⁰ The current situation, while clearly the result of Agency delay in meeting its responsibility under the Act to regulate GHGs, differs from cases in which the Agency has missed a specific statutory deadline for action, *see Hercules, Inc. et al., v. EPA*, 938 F.3d 276, 282 (D.C. Cir. 1991), in which a step-by-step approach to implementation might be foreclosed.

formulation of adequate guidelines by that date,” such that enforcing compliance would be futile. *NRDC v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1974) (asserting “[t]he delay required to give meaningful consideration to the technical intricacies of promising control mechanisms may well speed achievement of the goal of pollution abatement by obviating the need for time-consuming corrective measures at a later date.”).

We caution the Agency that even when implementing a program in a step-by-step manner, departure from statutory text should be considered only in the most extreme and dire circumstances of administrative burden. EPA’s primary responsibility is to fulfill its statutory purpose as directed by Congress, and the text and structure of a statutory directive must inform and direct each and every action the Agency takes. Step-by-step implementation as the Agency proposes does not provide license to unmoor this or any other EPA action from its statutory anchor. Commenters do recognize however that where (as here), an urgent, complex environmental problem requires immediate attention, and complete adherence to the statutory text renders agency action administratively infeasible, a phased implementation plan is appropriate, particularly one providing immediate applicability of a program to sources that emit the vast majority of the pollutant in question.¹¹

C. Administrative Necessity Justifies EPA’s Initial Focus on Large Sources of GHGs

EPA correctly observes that the current challenge is just the type envisioned by the D.C. Circuit when it noted that “considerations of administrative necessity may be a basis for finding implied authority for an administrative approach not explicitly provided for in the statute.” *Alabama Power*, 636 F.2d 323, 357 (D.C. Cir, 1979). While departure from express statutory provisions is met with extreme disfavor, when administrative constraints are such that an agency is not able to implement Congress’ purpose, a cabined, limited departure from the plain text as part of regulatory development may be upheld. *Id.* at 357. The highly unusual circumstances justifying

¹¹ We note further that where changes can be made to enable full implementation of the statute, they must be made in a timely manner. The Agency has a continuing obligation to ensure compliance with the statute, and must continually evaluate its progress and if needed request additional resources. We recognize that EPA acknowledges that its departure from the statutory text is “time limited,” 74 Fed. Reg. 55,318, and commits to “assess and identify cost-effective opportunities available ... to achieve GHG reductions through means other than PSD.” *Id.* at 55,320.

reliance on this rarely available option may be created, as it is here, by shortages “of the technical personnel needed to administer a program,” or by other “need to adjust to available resources.” *Id.* at 358-59. EPA undoubtedly bears an even “heav[ier] burden” here in claiming administrative necessity, as the Agency is looking ahead at the prospect of administrative difficulty, as opposed to asserting its inability to implement regulations in a manner fully consistent with a statutory command after making an effort to do so. See *id.* at 359, *see also Sierra Club v. EPA*, 719 F.2d 436, 463 (Agency must typically show a good faith effort to enforce statute as written, and may not rely on “mere predictions” in demonstrating the need to utilize the administrative necessity exception). Nevertheless, this is just the kind of situation in which prospective action by the Agency is essential, and the Agency more than meets its heavy burden here. As shown in Table 1, *supra* EPA’s analysis offers much more than a “mere prediction” of the expected difficulty in implementing the statutory commands as written for GHG emissions from stationary sources. The Agency estimates that PSD permitting activity will expand from approximately 280 permits per year to more than 40,000 permits a year. 74 Fed. Reg. at 55,301. For the Title V program, the initial demand would be even greater, with just under six million new sources applying for Title V permits within a year, as compared with the 14,700 existing Title V permits.¹² EPA correctly notes that, as compared with the current levels of PSD and Title V permitting activity, the Agency and the state and local permitting authorities would be overwhelmed by the immediate application of the statute’s literal terms.

Moreover, overwhelming the program could cause a breakdown of the permitting process, leading to a situation in which even the largest sources are operating outside the bounds of the law or simply not able to operate because of the long delays in receiving

¹² The Supreme Court has recognized that suddenly-triggered case-by-case review for tens of thousands of permit applicants is infeasible. *E.I. duPont de Nemours v. Train*, 430 U.S. 112, 132-133 (1977) (EPA’s authority to establish effluent limitations for categories of plants was bolstered by administrative infeasibility of case-by-case effluent limits for plants) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968)). The Court has also acknowledged the need for administrative relief when demand for hearings would increase by an order of magnitude. *Weinberger v. Hynson*, 412 U.S. 609, 621 (1973) (Where petitioner’s theory would require FDA to hold hearings for 4000 drugs when previously only 434 hearings had been conducted, Court stated “If FDA were required automatically to hold a hearing for each product whose efficacy was questioned by the study ... we have no doubt that it could not fulfill its statutory mandate.”).

permits. Clearly “the availability of enforcement resources [is] relevant to the administrative necessity exemption,”¹³ *EDF v. EPA*, 636 F.2d 1267, 1283 (D.C. Cir. 1980). EPA has amply demonstrated the infeasibility of immediately implementing fully the literal terms of the statute, and offers a workable first phase alternative. 74 Fed. Reg. 55,301-55,303.

In this rare instance, where the Agency is confronted both with significant existing harms to human health and the environment, and knowledge that failure to act expeditiously endangers both current and future generations, and where the Agency provides detailed analysis indicating the administrative infeasibility of immediately applying the 100 TPY and 250 TPY statutory applicability thresholds, we agree that limited departure from the statutory text is appropriate. More specifically, we agree that it is appropriate in these highly unusual circumstances for the Agency, as it has, to establish an interim multi-step regulatory program that is consistent with the stated purpose, structure, and legislative history of the Act, to provide specific timeframes for taking the next step toward full implementation, and revising that program to be more fully consistent with the statutory mandate. We emphasize that in the absence of the remarkable situation presented here, such an approach to plain statutory language would be outside the bounds of the Agency’s power.

a. EPA’s Proposed Threshold for PSD New Source Applicability Is Consistent With the Underlying Purpose of this Section of the CAA

The doctrine of administrative necessity is anchored in respect for Congressional intent. *See Alabama Power*, 636 F.2d at 359 (“ ‘We cannot conclude . . . that Congress has given authority inadequate to achieve with reasonable effectiveness the purpose for which it has acted.’ ”) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968)). Thus any departure from the statute must be implemented in a manner consistent with Congress’ design, goals, and implementation choices. For instance, in assessing EPA’s decision to provide a categorical exemption from a bar on emissions credits for dispersion techniques, the court considered whether the proposed deviation

¹³ As EPA has proposed here, the administrative necessity approach also enables the Agency to focus . . . enforcement resources narrowly” to reduce a regulatory burden through consideration of streamlining options in the second phase under a phased approach. *Sierra Club v. EPA*, 719 F.2d 436, 464 (D.C. Cir. 1983).

“further[s] the goals of the statute.” *Sierra Club v. EPA*, 719 F.2d at 462. In addition, in determining the degree of departure from the statutory text, the Agency should also assess the impacts of the lack of regulation.¹⁴ *See, e.g., EDF v. EPA*, 636 F.2d at 1283 (noting concern with Agency’s inability to determine amount of pollutant that would not be regulated under departure from TSCA).

As noted above, the statute’s language evinces Congressional intent and purpose for this program to address “major sources” of air pollution. Because greenhouse gases, particularly CO₂, are emitted by any given combustion source at levels that are orders of magnitude higher than the criteria air pollutant emissions levels from the same source, smaller sized sources can and do emit more than 250 TPY of GHGs. As EPA has explained, for that reason, immediately applying the statutory 250 ton per year applicability threshold for GHG emissions from “all other sources” will create a system that is infeasible to administer. The Agency can, however, address this problem through a “step by step” approach, as discussed above, and as proposed in the preamble. In the first phase of that “step by step” approach, it is consistent with the purpose of the statute for the Agency, as it has, to choose a threshold that minimizes the administrative difficulties of implementing this program for all sources of GHGs while addressing the largest sources of pollution. As the court in *Alabama Power* noted, Congress intended to identify those facilities and industries with large sources and high emissions levels, that can both more readily bear the burden of the requirement to clean up, and which are primarily responsible for the problem. *See Alabama Power*, 636 F.2d at 353.

The goals of the PSD program, moreover, include protecting public health and welfare from air pollution and insuring “economic growth ... consistent with the preservation of existing clean air resources.” 42 U.S.C. § 7470(1), (3). Congress paid special attention to very large industrial sources, placing a heavier regulatory burden on those sources that generated the most emissions. *See* 42 U.S.C. §7479(1).

EPA’s proposed phased approach and its Phase I regulatory thresholds for PSD and Title V applicability are consistent with these purposes. In the first phase of the

¹⁴ See note 9 *supra*, describing that setting the PSD first phase threshold at 25,000 TPY will bring 91 percent of stationary source CO₂ under the ambit of the PSD program, as compared with the 250 TPY threshold; similarly, adopting a 25,000 TPY threshold for the Title V program brings in 89.6 percent of the CO₂e emissions associated with the 100 TPY applicability threshold-- and both are achieved at far lower administrative burden.

program, all large sources of GHGs will be covered by the PSD and Title V programs. Indeed, the 25,000 TPY threshold will encompass virtually all of the sources in the 28 categories enumerated by Congress to bear heavier regulatory burdens under the Act.¹⁵ Additionally, EPA estimates that GHG emissions brought under the ambit of the PSD program under the proposed 25,000 TPY applicability threshold represent 68% of the nation's *total* CO₂e from all stationary sources, or 87 percent of all stationary source CO₂ (which has an atmospheric lifetime of upwards of 100 years). 74 Fed. Reg. at 55,332-333, *see also* Proposed Endangerment Finding, 74 Fed. Reg. 18,895 n.18 (describing EPA's basis for assumed atmospheric lifetimes of the six GHGs). By comparison, if EPA were to implement a 250 TPY threshold for GHGs, 72% of total stationary source GHG emissions would be regulated, but with far greater administrative burden.¹⁶ Put differently, the 25,000 TPY threshold captures 91 percent of the GHG emissions that would be brought under the PSD program under the 250 TPY threshold.¹⁷ The 25,000 TPY threshold thus captures a very significant portion of the emissions that Congress intended be covered, and does so by focusing first on the largest sources.

Furthermore, EPA clearly demonstrates that setting a threshold lower than 10,000 TPY would overwhelm permitting agencies with an unmanageable surge in demand for PSD permits.¹⁸ *See* 74 Fed. Reg. at 55,332, 55,301. Where the Agency and state and local permitting authorities are overwhelmed by this type of sudden increase in workload, permits cannot be approved in a timely manner and Congress' intent that PSD enable economic growth "in a manner consistent with the preservation of existing clean air resources" will be frustrated. 42 U.S.C. § 7470(3).

The 25,000 TPY threshold also is consistent with that chosen for EPA's recently finalized GHG reporting rule. Proposed Rule, Mandatory Reporting Rule for Greenhouse

¹⁵ EPA's data show that the vast majority of existing sources in these 28 industries are covered by the major source definition whether the GHG major source applicability threshold is set at 100 TPY or at 25,000 TPY.

¹⁶ Table 2 of the TSD for Threshold Evaluation indicates that the 25,000 TPY threshold will cover 3,464 Tg per year of CO₂e, while a 250 TPY threshold covers 3782 Tg. Total stationary source emissions can be calculated from the TSD data and EPA's preamble to yield an estimate of 5094 Tg/year of stationary source emissions. That result can be used to calculate the estimated coverage at 250 TPY threshold (3782 tpy/5094 Tg/yr = 74% as compared with 68 percent of all CO₂e captured at the 25,000 TPY threshold.

¹⁷ *See supra* note 9.

¹⁸ As the Agency notes, even a "1,000 metric ton CO₂e/year threshold would increase the number of reporters by an order of magnitude, thus changing the focus of the program from large to small emitters." 74 Fed. Reg. at 56,727.

Gases, 74 Fed. Reg. 16,448, 16,467 (April 10, 2009)(“Proposed Reporting Rule”). In that context, the Agency stated that the 25,000 TPY threshold provides “comprehensive coverage of emissions with a reasonable number of reporters, thereby creating the robust data set necessary for the quantitative analysis of the range of likely GHG policies, programs and regulations.” Final Rule, Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,260, 56,272 (Oct. 30, 2009)(“Final Reporting Rule”). While the reporting rule assessment does not address permitting authorities’ ability to meet the demand for permits for new and modified major sources, it does demonstrate EPA’s assessment that at least as an initial matter, the sources covered include those largest sources that Congress intended to be included in the PSD program.

During EPA’s outreach efforts to potentially regulated industries as part of the development of the Reporting Rule, “many industry stakeholders that EPA met with expressed support for a 25,000 TPY CO₂e threshold because it sufficiently captures the majority of GHG emissions in the U.S., while excluding smaller facilities and sources.” Proposed Reporting Rule, 74 Fed. Reg. at 16,467 (also noting that “the 25,000 metric ton threshold [] effectively targets large industrial emitters, which are responsible for some 90 percent of U.S. emissions.”). The 25,000 TPY threshold similarly enables uniform coverage in the first phase of the PSD program for GHGs. “[H]aving a uniform threshold [is] an equitable approach [to reporting] because like facilities [can] be compared across sectors and no one industry [will] be disproportionately affected or subjected to a lower or higher threshold.” Final Reporting Rule, 74 FR at 56,272. Such reasoning similarly justifies selecting a 25,000 TPY threshold for the first phase of EPA’s step-by-step program for implementing PSD for GHGs.

b. EPA’s Proposed 10,000 TPY Threshold for “Major Modifications” for GHGs is Similarly Justified by Administrative Necessity.

In its October 27, 2009 *Federal Register* notice, EPA proposes a range for an appropriate PSD significance level of between 10,000 and 25,000 TPY on a CO₂e basis, and states that “based on comments received and the supporting record” the Agency “will establish a singular value for the GHG significance level.” *Id.* at 55,326. As discussed below, commenters support the Agency setting a 10,000 TPY “significance”

threshold for modified major stationary sources of GHG, as the phase I approach justified by administrative need, and most closely tailored to the language of the statute.

The phased program for applicability and a 10,000 TPY significance threshold, as EPA has proposed, also enables the PSD program to continue to function as Congress intended, when applied to GHGs. The cornerstone of the PSD program is case-by-case evaluation of large sources of air pollution. 42 U.S.C. § 7475 (a)(4); *see, e.g., In re: Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 1999 EPA App. LEXIS 2, * 26, *33 (BACT determination is among the most vital aspects of the permitting process). It is at the point at which such existing sources undergo major modification that increase emissions “significantly” that they are brought within the statute’s requirement to hold a permit with emissions limits reflecting BACT pollution controls. As described above, the BACT review is a case-by-case analysis of all the options available as the basis for the PSD permit’s emissions limits for a specific major source proposal. While the “major source” GHG threshold set by the tailoring rule defines the number of existing sources that potentially will be included in the program in the future on the basis of their GHG emissions, it is therefore the significance level that controls the *rate* and *frequency* at which these sources will be subject to the case-by-case PSD review and will require “application of production processes and available methods, systems and techniques” for control of GHGs. 42 U.S.C. § 7479(3).

Accordingly, it is important at phase I to ensure that permit-issuing authorities are able to give adequate attention to each permit application. Since modifications make up the vast majority of the PSD program’s permitting demands, EPA must set the significance level at annual tonnage amounts that will allow state and federal agencies to continue to administer both the GHG preconstruction permitting programs and the multitude of air quality management responsibilities that these agencies already must handle. U.S. EPA, “Methodology for Estimating Modified Sources That Would be Subject to PSD Permitting for GHGs” (August 2009), EPA-HQ-OAR-2009-0517-0007 (“Modification Methodology”). As noted below, a significance level of 10,000 TPY CO₂e should under EPA’s analysis allow these agencies to function effectively and would focus agency resources to the sources Congress intended to regulate.

EPA states in the preamble to its proposal that there are currently fewer than 300 permits for modified major stationary sources reviewed per year under the PSD program. 74 Fed. Reg. at 55,307. In the proposal, EPA describes a “temporary” or “phase one” range for a PSD modification significance level of 10,000 to 25,000 TPY CO₂e. 74 Fed. Reg. at 55,326. EPA will select a singular number within this range for the PSD program’s modification significance level. Though theoretically any number within the range is an option, EPA’s analysis focuses on the administrative difference between setting the significance level for GHG modifications in the PSD program at 10,000 TPY CO₂e as compared to setting it at 25,000 TPY CO₂e. Commenters agree with the Agency that a significance level of 10,000 TPY CO₂e is the preferred option.

EPA estimates that under a PSD applicability threshold of 25,000 TPY CO₂e, approximately 13,600 existing sources would be “major.” 74 Fed. Reg. at 55,331, *see also* Table 1, *supra*. Next, EPA estimates that under its current program, approximately two percent of major sources undergo major modification, each year. The Agency reasonably assumes that the same rate of annual modifications would occur at the 10,000-25,000 TPY threshold levels. *Id.*; *see also* Modification Methodology at 2.

While EPA notes that there is little data on the types of operational changes that lead to significant increases in GHG emissions, another way to analyze this is to compare the size of the project in GHG terms with the size of projects triggering PSD for criteria pollutants. When that metric is used for new source applicability, EPA’s data suggest that there are approximately 128 new sources each year at the 25,000 TPY level – a number that is fewer than the new source numbers now requiring PSD review for criteria pollutants. *Compare* Table 1, *supra* (column 3 total of 128 new sources per year, 13,661 existing sources at 25,000 TPY CO₂e threshold, which, if 2 percent per year are modified, represents 273 modifications per year), *with* 74 Fed. Reg. at 55,331 (EPA now evaluates 130 new source permits and 270 modifications per year). This reflects the fact that for combustion sources (which make up far and away the largest numbers of GHG emitters), GHGs are emitted at predictably several orders of magnitude higher levels than the criteria pollutants emitted by the same sources.¹⁹ Setting the threshold below the applicability threshold, at 10,000 TPY therefore will have the same effect on numbers of

¹⁹ This relationship is linear and predictable for combustion sources.

modifications per year as EPA's current practice of setting major modification thresholds for criteria pollutants at levels that are fractions of the statutory applicability levels of 100 TPY and 250 TPY. *Compare* 40 C.F.R. §52.21 (23)(b) (setting major source thresholds for NOx and SO2 at 40 TPY) *with* 42 U.S.C. §7479(1)(statutory definition of "major stationary source.").

Because fossil fuel combustors make up the lion's share of major GHG (particularly CO₂) emitters, EPA also notes that its choice of significance level is "driven by [its] analysis of combustion units" in particular the permitting burdens expected at the 10,000 and 25,000 TPY CO₂e significance levels. 74 Fed. Reg. at 55,334. At the 10,000 TPY CO₂e significance level, EPA asserts that approximately two thousand new sources of these kinds could be expected, and that many of these may be added at existing major stationary sources. Though EPA estimates that actual PSD modification permit numbers would be "something below 2000," they would still be "well above the current number." *Id.* In light of these numbers, EPA advocates a significance level no lower than 10,000 TPY CO₂e, but offers no evidence that, in taking boilers and stationary engines into consideration, a 10,000 TPY CO₂e significance level is administratively infeasible. Significantly, EPA also states that for PSD modifications, "10,000 TPY CO₂e should be *administratively feasible* for other sources of GHG emissions" besides boilers. *Id.* (emphasis added).

If, on the very terms of EPA's analysis, a significance level of 10,000 TPY is feasible, the agency must, under the legal doctrines it invokes, elect to choose the more closely drawn 10,000 TPY CO₂e significance level as compared to the 25,000 TPY CO₂e level. The doctrine of administrative necessity allows a departure from clear statutory language only to the degree absolutely required. EPA does note that the 10,000 TPY modification significance level would capture a number of smaller combustion units, sources arguably not contemplated by Congress in creating the PSD program, but that "at the same time it does not capture an enormous number of very small combustion units that would overwhelm permitting authorities from an administrative standpoint." *Id.* All told, under EPA's analysis, the 10,000 TPY CO₂e significance level for modifications would increase the total number of PSD permits for both new and modified sources from approximately 400 to about 800 a year, while choosing the 25,000 significance level

would keep the permitting burden at approximately 400. However, EPA asserts this increase is still administratively feasible, and justified because it is below the selected applicability threshold, and thus is more narrowly tailored to the language of the statute. EPA therefore should choose the 10,000 TPY CO₂e significance level, as it is both administratively feasible and conforms more closely to the clear language of the statute.

c. EPA's Step-by-Step Approach to Implementing its Title V Obligations, and the Selection of an Initial 25,000 TPY Threshold for Title V Applicability is Justified on Grounds of Administrative Necessity.

EPA similarly proposes a step-by-step approach to meeting its obligations under the CAA's Title V operating permit program for GHGs, beginning with stationary sources emitting 25,000 TPY CO₂e of greenhouse gases, and justified on administrative necessity grounds. 74 Fed. Reg. at 55,334-36. EPA's proposal would provisionally apply in lieu of the statute's requirement that "any stationary source which directly emits or has the potential to emit 100 TPY or more of any air pollutant" must hold a Title V operating permit. 42 U.S.C. §7602(j); *see also* 42 U.S.C. §§ 7661(2)(B), 7661a(a) (applying statutory definition to Title V program); *see also* 74 Fed. Reg. at 55,307.

EPA's proposed phase-in of its Title V operating permit obligations is consistent with the statute's requirement that sources that hold a PSD permit must also hold a Title V permit, 42 U.S.C. §7661a(a), and also rationalizes the extraordinary administrative burden arising from the nearly six million sources that would need to apply for a Title V permit within one year, because they emit more than 100 TPY of GHG. Because Title V applicability effectuates a series of stepwise administrative, procedural and technical obligations to carry out the operating permit program, if all six million sources were immediately swept into the program, the capacity of permitting authorities would be stretched well beyond their ability to implement the statutory command.

[T]hese six million sources would be required to submit a title V permit application within 1 year. Permitting authorities would need to issue these permits within 18 months of receipt of a complete application, and these permits would need to include any requirements for non-GHGs that may apply to the source, such as provisions of an applicable SIP. For any such requirements, permitting authorities would also need to develop terms addressing the various compliance assurance requirements of

title V, including monitoring, deviation reporting, six-month monitoring reports, and annual compliance certifications.

74 Fed. Reg. at 55,302. EPA further found that

... this massive influx of permit applications would overwhelm permitting authorities' administrative resources. Indeed, permitting authorities report that they currently are having difficulty keeping up with their existing permit workloads. The Title V Operating Permits System database, which tracks permit issuance, confirms that issuance of many permits is already delayed. By increasing the volume of permits by over 400 times, the administrative burden would be unmanageable.

Id. EPA further estimates that if the 100 TPY threshold were implemented, “the average permitting authority would need 570 more FTEs to support its title V permitting program.” *Id.* at 55,303. EPA’s proposed step-by-step approach, beginning with the 25,000 TPY first phase applicability threshold, is determinedly designed to avoid immediately imposing that increased administrative burden.

The text and statutory structure of Title V reflect Congress’ recognition that the operating permit program cannot be implemented instantaneously, even when the high volumes of sources at issue here are not considered. For example, a three-year phase-in for acting on permit applications submitted in the aftermath of newly operative Title V permit programs, was provided by Congress, in contrast with the standard 18 month review process. 42 U.S.C. § 7661b(c). And to help alleviate administrative burdens, Title V plainly authorizes the permitting authority to rely on general permits “covering numerous similar sources.” 42 U.S.C. § 7661c(d).

Moreover, timely implementation is the thread that ties together an effective operating permit program. EPA is delegated responsibility to craft implementing regulations that incorporate “streamlined” procedures “for expeditiously determining when applications are complete, for processing such applications, for public notice, . . . and for expeditious review of permit actions.” 42 U.S.C. §7661a(6). Conversely, EPA is delegated the responsibility to create a hammer to prevent “unreasonable delay by the permitting authority” set forth in an unambiguous statutory mandate to treat a permit as final for purposes of judicial review when the permitting authority’s action is untimely. 42 U.S.C. §7661a(7).

Title V's close attention to effective, timely implementation is pivotal to the defining purpose of the operating permit program – to strengthen accountability and enforceability by assembling in a single, accessible operating permit all of the Clean Air Act requirements that apply to the source. 74 Fed. Reg. at 55,310. Immediately incorporating millions of new sources into an already strained administrative process would undermine the fundamental aim of Title V by delaying operating permit updates and ultimately obscuring the focus on transparency and accountability for large emitters that is the basis for environmental protection under the law. See 74 Fed. Reg. at 55,306. EPA's proposal reviews the implications of several initial triggering thresholds and is judiciously calibrated to achieve stepwise progress in addressing greenhouse gases without eroding the effective administration of today's Title V operating permit program and its protections. See 74 Fed. Reg. at 55,334-55,336.

4. EPA's Tailoring Rule Should Rest only on Administrative Necessity

As EPA explained in the proposal, the statutory applicability thresholds for PSD and Title V to sources of GHG emissions present difficult challenges, in large part because their immediate imposition would result in a sudden and dramatic increase in the number of sources subject to these programs. These difficulties can be overcome by taking a phased approach to implementation, which as discussed above is justified in these circumstances.

Additionally, EPA's proposal presents two alternate legal theories that could support EPA's adjustment of the applicability thresholds upward in order to avoid extreme burdens, namely, the doctrine of "administrative necessity" and the doctrine under which statutes should be construed so as to avoid "absurd results." The absurd results doctrine also has been invoked by the D.C. Circuit and the Supreme Court in analyzing whether an agency's limited departure from clear statutory language is justified because of the outcome it would entail. In *U.S. v. Rutherford*, the court noted that "exceptions to clearly delineated statutes will be implied only where essential to prevent "absurd results" or consequences at variance with the policy of the enactment as a whole." 442 U.S. 544, 552-54 (1979). The Court has since greatly circumscribed the doctrine, however, and in recent years, has been hesitant to allow departures from clear

statutory language. See, e.g., *Department of Housing and Urban Development v. Pearlle Rucker*, 535 U.S. 125 (2002) (overturning Court of Appeals in holding it was not absurd for housing authority to evict tenants for drug-related activity in their homes even though tenants did not know the activity was occurring), *Michael Donald Dodd v. U.S.*, 545 U.S. 353 (2005) (holding statute of limitations on prisoners' right to file motions for relief from sentence was clear, and though strict, was not absurd). The D.C. Circuit further has emphasized that the doctrine of absurd results falls within *Chevron's* "step one" analysis, where "seemingly clear statutory language does not reflect the "unambiguously expressed intent of Congress." 467 U.S. 837, 842 (1984). When this is the case, the "agency may deviate no further from the statute than is needed to protect congressional intent." *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998).

We respectfully submit that EPA's first phase tailoring rule should rest only on the administrative necessity doctrine, and that EPA should defer consideration of whether application of the statutory thresholds to sources of GHGs would constitute an "absurd result" until it has completed the further proceedings contemplated in the proposal related to potential means of "streamlining" the programs. The burdens EPA cites as the reasons for not applying the thresholds to GHG sources are largely administrative in character, and result from immediate application of two complex programs to a very large class of sources with no (or virtually no) phase-in period. EPA has reasonably proposed to address those burdens, by provisionally adjusting the applicability thresholds in a first phase of a step-by-step program toward full implementation of the statutory mandates, and additionally by promising a comprehensive review of possible means to "streamline" both programs in later phases. By these means, these programs might be applied to additional smaller stationary sources of GHG, to more closely comply in later phases with the statutory text while reducing costs and administrative burdens.

As noted above, the administrative necessity doctrine rests upon demonstrated infeasibility of fully implementing the statute as written. See, e.g., *Alabama Power Co.*, 636 F.2d at 357-58, 360 & n. 86 ("The agency's burden of justification for [a delay in applicability] is substantially less than that required when the agency seeks to exempt rather than defer regulation."). In contrast, the "absurd result" doctrine allows a court to reject a "literal application of a statute" when it would "produce a result demonstrably at

odds with the intentions of its drafters,” or “thwart the obvious purpose of the statute.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (citation and internal quotation marks omitted).

While EPA has persuasively demonstrated why the administrative necessity doctrine applies, as discussed above, we submit that it would be advisable for EPA to defer any decision on whether, or to what extent, the Act as written is “demonstrably at odds” with congressional intent until after the “first phase” of implementation described in the proposal. To a significant degree, the problems cited in the proposal stem from existing limitations in administrative resources, many of which are temporal in nature, and potentially may be eliminated or mitigated through “streamlining” measures if applied in later phases of EPA’s full implementation of its mandate. EPA has not yet fully examined means by which the PSD and Title V programs can be adjusted to ease the transition for GHGs, and does not propose to do so in this initial phase. After EPA has examined the streamlining measures cited in the proposal – and others that may emerge from public comment, from EPA’s further review, and from experience implementing the programs as proposed – the agency in later phases may be able to implement the statute as written in a common sense way that alleviates burdens. At least pending an effort to accommodate the statutory text to GHG sources via existing statutory authorities and exercises of administrative judgment that effectively address concerns about burdens – and given that the administrative necessity doctrine adequately justifies a delay in implementing the programs for smaller sources – EPA need not and should not rely on the absurd result doctrine.

The proposal notes that the legislative history indicates that Congress expected the PSD program to be restricted to a relatively small number of sources that are large emitters of air pollution, 74 Fed. Reg. at 55308-09, but that expectation does not, standing alone, suffice to trigger the absurd result doctrine. Congress did not restrict the PSD or Title V programs to a closed category of sources or pollutants – here, as elsewhere, the Act provides flexibility to respond to new, or newly recognized, threats to public health and welfare. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (noting that the Act’s “broad language . . . reflects an intentional effort to confer the flexibility necessary to forestall . . . obsolescence”). EPA should be hesitant to conclude that the

application of that structure to newly identified problems – even when awkward and challenging – is “demonstrably at odds” with congressional intent until reasonable means of accommodation have been rigorously examined.

Indeed, once it has fully considered any possible means of streamlining the application of the PSD and Title V programs to smaller GHG sources, in a second phase of its implementation of these programs for GHGs, EPA may conclude that the statutory thresholds can apply as written. Alternatively, EPA may conclude that an adjustment in the thresholds more modest than that adopted in this first phase would suffice to prevent excessive burdens for permitting authorities and sources. EPA, however, should not reach any conclusion about whether applying the statutory thresholds to GHG sources is incompatible with congressional intent until the agency has fully examined possibilities for accommodation.

5. EPA has appropriately selected a CO₂e metric in this proposal.

EPA seeks comments on the GHG metric it should use for PSD purposes.²⁰ We agree with EPA that it has the authority to select an appropriate metric to measure greenhouse gases in the PSD program. There are two basic metrics EPA could use to measure emissions in the PSD context: the mass (cumulative or individual) of the greenhouse gases a source emits, or the global warming potential-adjusted masses of these gases. *See* 74 Fed. Reg. 55,292, 55,327 (Oct. 27, 2009). As EPA explains, global warming potential (“GWP”) is a widely-used metric which employs internationally-recognized conversion factors to compare greenhouse gases based upon their climate properties. The GWP is a conversion factor: multiplying the raw mass of a given gas by its GWP gives the mass of carbon dioxide that would be required to produce an equivalent climate impact, referred to as “CO₂e”.

To select a metric, EPA should consider both its statutory charge and the metric’s policy effects. The Clean Air Act’s text gives EPA the discretion to select a CO₂e metric, and policy considerations support that choice.

A. Statutory Mandates and Flexibility

²⁰ This metric will also, of course, apply for the purposes of Title V permits, which record all of a facility’s Clean Air Act obligations. Because the metric used for the PSD program will therefore drive the Title V decision, we focus on the PSD program here.

Under the Act, the PSD program applies to “major emitting facilities” which, in 28 major, listed, industries “have the potential to emit one hundred tons per year or more of any air pollutant,” and, in all others, “two hundred and fifty tons per year or more.” 42 U.S.C. §§ 7475(a), 7479(1); *see also* 40 C.F.R. § 52.21(b)(1)(i) (analogous regulatory definition of “major stationary source”). These thresholds suggest that PSD thresholds should be set based upon an air pollutant’s mass. They do not, however, specify how EPA is to measure the mass of an air pollutant composed of several different chemical compounds, as is the case with greenhouse gases. In such cases, using a conversion factor like GWP is one sensible way of determining the effective mass of a collective pollutant.

This flexibility arises primarily because the statutory thresholds are based upon the mass of “any air pollutant.” *Id.* § 7479(1); *see also* 40 C.F.R. § 52.21(b)(50) (defining “regulated NSR pollutant” for program purposes as including “any pollutant that . . . is subject to regulation under the Act”). As the Supreme Court has recognized, the Act’s definition of “air pollutant” is “capacious,” *Massachusetts v. EPA*, 549 U.S. 497, 531 (2007), including “any . . . substance or matter which is emitted into or otherwise enters the ambient air,” 42 U.S.C. § 7602(g). EPA thus has ample authority to define a given ‘air pollutant’ in ways that will fulfill its statutory mandate to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare.” *See* 42 U.S.C. § 7401(b)(1); *see also id.* § 7470 (similar PSD program purposes).

It is not at all uncommon for EPA to use this flexibility to recognize ‘collective’ air pollutants comprised of many individual compounds based upon shared threats to health and welfare resulting from shared physical properties. Such EPA-created group pollutants include sulfur oxides, nitrogen oxides, volatile organic compounds, and particulate matter. Recognizing a shared ‘greenhouse gas’ pollutant, measured and regulated in part as CO₂e, is consistent with this tradition.

EPA has done so here by defining the greenhouse gas pollutant at issue as “the combined mix of six key directly-emitted, long-lived and well-mixed greenhouse gases” in the final endangerment finding. *See* 74 Fed. Reg. 66,496, 66,516, 66,536 (Dec. 15,

2009). Although EPA recognized that it retained authority to take “different control strategies” for different constituents of the mix, *see id.* at 66,541, it emphasized the need to reduce the mix’s overall impacts, *see id.* at 66,534-66,536. This cumulative focus supports a GWP-based approach, without foreclosing gas-specific control efforts.²¹

Because greenhouse gases’ central threat to health and welfare arises from their cumulative climate-altering properties, rather than direct exposure, focusing on their GWPs, along with the absolute quantity of emissions of individual gases, is an appropriate regulatory approach. To protect the public, EPA ultimately has to control the net GWP of all the greenhouse gases it has regulated. While reducing the mass of greenhouse gas emissions achieves this goal, focusing on decreasing the GWP of the mix of the pollutants is the more effective way to make progress.

Put differently, perhaps the most effective way to measure the quantity of this collective pollutant emitted by a given source is to put all its constituent gases on equal terms by using their GWP. Indeed, it is difficult to sensibly discuss, or properly regulate, emissions of the mix of greenhouse gases without using this common currency.

In particular, the CO₂e metric is likely necessary to make the 25,000 TPY threshold workable as a practical matter. Without it, EPA would have to set a complex series of gas- and mixture- specific mass-based thresholds, designed to replicate the effect of a 25,000 TPY CO₂e threshold. This is because for any given mixture of gases with varying GWPs, the mass of a mixture equivalent to the 25,000 TPY CO₂e threshold varies depending on the concentration of each gas. As a result, EPA would need to set mass-based thresholds for each gas and for each combination of gases. That panoply of thresholds would be very hard to administer. So, as part of maintaining the viability and clarity of the thresholds EPA believes are administratively necessary, the simple CO₂e metric must, too, be maintained.

In sum, because this collective pollutant – which contains a shifting mix of gases with different GWPs – is most readily measured as CO₂e, reading the PSD program’s thresholds as referring to the mass of CO₂e a source emits is a reasonable way of

²¹ Similarly, the mandatory greenhouse gas reporting rule tracks cumulative changes in CO₂e. Generally, it requires facilities to report both the mass of their emissions *and* to convert these emissions to CO₂e. *See, e.g.*, 40 C.F.R. §§ 98.2(b) (requiring reporters to calculate CO₂e) & 98.32 (complementary individual gas reporting requirement for general stationary source fuel combustion sources).

regulating the “mix” of greenhouse gases. As EPA rightly observes, this *entire* mix is subject to regulation under the Act,²² so basing the PSD thresholds on the GWP-adjusted mass of the entire mix appropriately tailors the PSD program to the pollutant.

B. Policy Considerations

We agree with EPA that the CO₂e metric also has several policy advantages: it provides sources with some flexibility to optimize their greenhouse gas reductions across the range of constituent gases and it also makes it easier to measure and administer net reductions in climatic effects, as opposed to the masses of individual pollutants. *See* 74 Fed. Reg. at 55,329-30. EPA expresses some concerns, however, that this approach could cause a few problems at the margins. We believe that these issues are manageable.

First, EPA is concerned that a few rare facilities emitting very small quantities of high GWP gases may be included in the PSD program under a CO₂e threshold even though they would be excluded by the statutory 100/250 TPY threshold. 74 Fed. Reg. at 55,330. As a general matter, we agree with EPA that sources which would be excluded by the statutory threshold should also be excluded under EPA’s tailoring approach. Setting an applicability floor at the statutory mass-based threshold is one sensible way of addressing this problem.

Because EPA will be collecting mass-based emissions data under the mandatory greenhouse gas reporting rule, such a floor doesn’t appear, at first blush, to be as “complex and confusing to administer” as EPA fears. *See id.*

Second, EPA suggests that it is “possible”, in “rare instances” that the CO₂e metric will cause problems with the PSD netting analysis. *See id.* EPA posits that a facility emitting two greenhouse gases with different GWPs may make a modification that alters the balance between the two gases, reducing its emissions on a mass basis, but increasing them on a CO₂e basis, and so triggering PSD review because its emissions have increased under that metric. *Id.* EPA suggests it could exempt such facilities by

²² We extensively discussed the meaning of “subject to regulation” for the purposes of the PSD program, *see* 42 U.S.C. § 7475(a)(4), in our comments on the Johnson Memo. Those comments are attached and incorporated by reference here. Even under EPA’s present unduly restrictive interpretation, all the gases included in the Final Endangerment Finding must be included in the PSD program’s requirements. The relevant pollutant (GHGs) also is recognized and regulated (via controls on certain constituent gases) in the new vehicle standards EPA has proposed.

requiring that both the raw mass and CO₂e-adjusted mass of their emissions increase before the PSD program applies.

We do not think that this alteration is practically necessary or desirable. Initially, such circumstances are likely rare, as the vast majority of facilities in the program emit one dominant gas – carbon dioxide for a coal power plant, or methane for a gas processing facility, say -- not many different gases in similar volumes. These facilities are unlikely to be in situations where shifts between two greenhouse gases will affect their total CO₂e-adjusted emissions in an important way.

But even for facilities where this shift occurs, requiring a PSD analysis makes sense. The CO₂e metric measures the harm greenhouse gases do, so facilities which increase their emissions on that metric should be subject to the PSD program. The fact that the CO₂e metric produces that result is a point in its favor, not a flaw.

EPA's challenge, however, is that the term "modification" is defined by statute, for PSD purposes, as "any change in . . . a stationary source which *increases* the amount of any air pollutant emitted." 42 U.S.C. §§ 7411(a)(4) (emphasis added); 7479(2)(C). EPA has at least two options to conform its approach to this statutory constraint:

Initially, EPA should consider whether the fact that it has opted to assess greenhouse gases with a CO₂e metric allows it to use that metric to determine what constitutes an "increase" for modification purposes, just as it plans to use that metric to determine compliance with the other baseline PSD thresholds. There are some indications that EPA may carefully interpret the statutory term to fulfill the goals of the PSD program. For instance, EPA has already glossed the term 'increase' in its regulations by elaborating on the netting concept in the first place, and by setting specific thresholds for 'significant' increases. *See, e.g.*, 40 C.F.R. § 52.21(b)(23), (40). The Supreme Court has observed that EPA's interpretation of "modification" "need do no more than fall within the limits of what is reasonable, as set by the Act's common definition" and that "[a] given term . . . may take on different characters from association with distinct statutory objects calling for different implementation strategies." *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574, 576 (2007). A CO₂e-based gloss on "increase" may therefore be appropriate here.

Alternately, given that this netting problem will be quite rare, EPA might opt simply to require a net increase in the mass of greenhouse gases emitted by a source before PSD applies. This approach hews most closely to the statute. On the other hand, it blurs the important focus on the GWP of a source's emissions, and may, in a few very rare instances, allow a source to increase its emissions, as measured on a CO₂e basis, without going through PSD. Given that sources will be tracking their total mass emissions through the mandatory reporting rule, EPA could probably add this backstop without too much trouble, although going through netting calculations for particularly complex sources could still be difficult in some cases.

In summary, EPA's CO₂e metric is a workable way of measuring the pollutant EPA is seeking to control – the mix of greenhouse gases, rather than any individual gas. If EPA continues to use a 25,000 TPY threshold, it makes more sense to root that threshold in CO₂e than in absolute mass, as the CO₂e metric better captures facilities which are significant sources of high GWP gases.

6. BACT Streamlining for Smaller Sources

The Proposed Rule suggests that the Agency, after finalizing the first phase of its PSD implementation scheme, set out in this proposal, intends to further evaluate three additional means of “streamlining” PSD and Title V requirements for smaller sources of greenhouse gases: changing the definition of potential to emit, establishing “presumptive BACT” limits, and general permits. 74 Fed. Reg. at 55,311, 55,315. EPA should carefully vet these and other options and take care to avoid deviation from statute in all but the most dire circumstances. The latter two, in particular, sharply depart from the text of the Act's Prevention of Significant Deterioration provisions, and thus are only available if those provisions are impossible to administer absent their use. *See supra* Section 3. As the Agency has acknowledged, even where such justification exists, the Agency may only “depart from the statute “to the smallest extent possible and must remain as close as possible to congressional intent.” 74 Fed. Reg. at 55,320. While the Agency's streamlining proposals may have some potential role in the design of future phases of the implementation of this and other CAA programs for some greenhouse gases, as a matter of law that role is likely to be restricted to particular source categories,

and will need to be justified on the precise facts presented by each such category. Moreover, absent an extraordinary showing of necessity, these streamlining options should not be used in conjunction with a major source threshold in excess of the statutory limit.

We encourage EPA as it further develops the next phase of its implementation approach to reach out to stakeholders in a systematic manner to identify a broader range of streamlining methods than those mentioned in this proposal, and in particular to solicit suggestions of methods that are wholly consistent with the text of the Act.

A. Potential to Emit

The Proposed Rule suggests the Agency will in the future consider phasing in two changes to the definition of potential to emit (“PTE”), intended to reduce the burden of administering PSD and Title V programs for greenhouse gases. The first is “defin[ing] the source so that its PTE more closely tracks its actual emissions,” for example by “defin[ing] furnaces (which have the potential to emit year round) to include the thermostats to which they are attached.” *Id.* at 55,321. Second, the agency suggests the promulgation of prohibitory rules “that limit a source’s operation” sufficiently to ensure that the source’s potential emissions remain below the thresholds. *Id.*

These approaches may be relevant for specific, smaller sources of greenhouse gases; detailed comments necessarily await the definition of the source-categories for which EPA intends in later phases to modify the definition of “potential to emit” (“Step 1” of the 7-step alternative PTE analysis EPA describes). *Id.* at 55,321. In general, the Agency’s proposals are likely to prove most appropriate where: (1) applied only to sources with the potential to emit relatively small quantities of carbon dioxide – for example, 500 tons or less per year²³, if operated all day, year-round, and/or (2) they provide accurate, enforceable limitations on the design capacity of the source(s) in question.

We caution the Agency that any future efforts to reduce the scope of PSD and Title V through re-defining “potential to emit” risk running afoul of the text of the Clean Air Act, and require independent (and stringent) justification. The Act does not allow the

²³ Based on the information in the proposed rulemaking, it does not appear that significant benefits would accrue from applying this proposal to other, less ubiquitous, greenhouse gases.

Agency to conflate PTE with a source's actual emissions. The disjunctive phrase "emits, or has the potential to emit," 42 U.S.C. § 7479(1), as well as "[t]he very term itself – 'potential to emit,'" are "clear indication that Congress did not intend determinations of whether a source is 'major' to be based on actual emissions in day-to-day operations." *Duquesne Light Co. v. E.P.A.*, 698 F.2d 456, 474 (D.C. Cir. 1983); *see also Alabama Power*, 636 F.2d at 354 (remanding EPA regulation because "under EPA's interpretation of 'potential to emit,' the actual emissions calculation called for by the verb 'emit' would lose all significance"); *New York v. E.P.A.*, 413 F.3d 3, 39-40 (D.C. Cir. 2005) ("[t]he juxtaposition of the terms 'emit' and 'potential to emit' indicates that when Congress enacted the NSR program in 1977, it was conscious of the distinction between actual and potential emissions . . .").

Any restrictions on a source's operations to reduce the source's PTE also must be enforceable, as a practical matter. *National Mining Ass'n v. E.P.A.*, 59 F.3d 1351, 1363 (D.C. Cir. 1995) (discussing definition of PTE in Section 112, and noting consensus that only "effective controls," in contrast with those that "do not really restrain an operator from emitting pollution" may be considered in assessing potential to emit").²⁴ EPA's current regulations reflect those restrictions, defining PTE as "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design," and treating "physical or operational limitation[s] on the capacity of the source . . . as part of its design [only] if the limitation or the effect it would have on emissions is federally enforceable." 40 C.F.R. 52.21(b)(4). *See also* Air Enforcement Division, Office of Enforcement and Compliance Monitoring, "Limiting Potential to Emit in New Source Permitting" (June 13, 1989) at 2(Attachment 4 hereto).

We encourage the Agency to retain that basic definition, even as it seeks to streamline its programs to accommodate greenhouse gases. Prohibitory rules should, accordingly, impose constraints that are monitored and enforceable. Likewise, if a source is defined to include additional design elements that reduce greenhouse gas emissions, those reductions should be enforceable as a practical matter. If the Agency forgoes the

²⁴ We note that the definition of "major source" in Section 169 differs from that in Section 112, in that it does not include the words "considering controls" after "potential to emit." 42 U.S.C. 7479(b)(6), suggesting that it offers less latitude to the Agency in defining potential to emit at levels below the full design capacity of the source.

necessary elements of enforceability, it will need to make a source-specific demonstration that its departure from the Act's requirements is justified.

Lastly, the Agency lacks information allowing precise quantification of most sources' greenhouse gas emissions. Given that uncertainty, the Agency may wish to employ a generous margin of error in crafting rules that exclude sources from Clean Air Act regulation. See Memorandum from John S. Seitz & Eric Schaeffer, Potential to Emit (PTE) Guidance for Specific Source Categories (April 14, 1998) at 5 (using 50% margin "to account for uncertainty in the emissions estimate"), EPA-HQ-OAR-2009-0517-0003.

B. Presumptive BACT and General Permits

The Proposed Rule asserts that the Agency plans, in developing future implementation phases of its effort to apply the PSD program to GHGs, to evaluate two mechanisms that would enable "mov[ing] from a system under which permitting authorities set BACT limits on an individual, case-by-case basis to a system under which they make BACT determinations for common types of equipment and sources, and apply those determinations to individual sources with little to no additional revision or analysis." 74 Fed. Reg. 55,322. First, EPA suggests establishing "presumptive BACT" levels for purposes of PSD compliance, pp. 164-171. And second, it suggests the use of general permits for both PSD and Title V programs. *Id.* at 55,321-55,324.

General permits may prove useful in administration of a Title V program for sources subject to Title V solely by virtue of their greenhouse gas emissions. If applied to the PSD program, however, either presumptive BACT as described above or general permits – or any other method of establishing categorical BACT limits – would violate the text of the Act. They may therefore only be imposed on the basis of source - and pollutant-specific demonstrations of necessity.

1. The PSD Provisions Do Not Contemplate the Use of General Permits or Presumptive BACT.

General permits relying on categorical BACT limits, which EPA also suggests it will consider in the future, 74 Fed. Reg. at 55, 315, 55,319, 55, 320, depart from the text of the PSD provisions in two areas. First, and most importantly, the Act demands that BACT limits be set at the "maximum degree of reduction" of pollution from each individual emitting facility. 42 U.S.C. § 7479(3). Amplifying the need to achieve these

facility-specific maximum reductions, the Act expressly requires that BACT determinations be made on a “case-by-case” basis. 42 U.S.C. § 7479(3); *see also In re Northern Michigan Univ. Riley Heating Plant*, 14 E.A.D. ___ PSD Appeal No. 08-02, Slip Op. at 12 (E.A.B. 2009). A categorical, one-size-fits-all BACT limit violates that congressional command to deliver pollution reductions appropriate to each particular source. The more the sources subject to a categorical limit vary in the manner of their emissions, the greater that violation.

Second, general permits relying on categorical BACT determinations may not be implemented in a manner that deprives the public of the ability to “appear and submit written or oral presentations on the air quality impact of [a proposed] source, alternatives thereto, control technology requirements, and other appropriate considerations.” 42 U.S.C. § 7475(a)(2). *See In re Prairie State Generating Station*, 12 E.A.D. 176, 179-80 (E.A.B. 2005) (noting that avoidance of public participation requirements “is neither harmless, inconsequential, nor trivial” (citation omitted)).

The presumptive BACT concept described in the rulemaking suffers from similar flaws to the extent that it would circumvent the required case-by-case analysis and public participation requirements.

2. *General Permits and Presumptive BACT Should be Considered Only Under Limited Circumstances, If at All.*

In light of those statutory commands, we have deep concerns that presumptive BACT limits or general PSD permits could be crafted at any stage of EPA’s step-by-step implementation of the PSD program for GHGs, without violating the Act. If the Agency wishes to use such tools in later phases, it must provide specific justifications for them under the applicable legal doctrines, and limit their use to the minimum necessary to permit administration of the PSD program. The adequacy of such justifications cannot be judged absent specific regulatory language, which is not proposed as part of this rulemaking. In making such proposals in the future, if at all, the Agency should minimize its departure from the Act’s requirements.

To that end, these tools should be considered in the future only for smaller sources of GHG emissions – those subject to the 250 TPY limit provided in the Act. 42 U.S.C. § 7479(1). They should not be available to any of the major sources that Congress

subjected to the 100 TPY major source threshold. 42 U.S.C. § 7479(1). Those sources are not so numerous as to create difficult administrative burdens. And since these are industrial air pollution sources to which Congress specifically intended PSD requirements to apply; relaxing BACT requirements for those sources would be a direct contradiction of congressional intent. Finally, the streamlining proposals should only be considered for those sources that are not subject to any other Clean Air Act requirements – the “great majority” of the permittees provoking the rule-making. 74 Fed. Reg. 55,304.

The Agency should explore more limited methods of streamlining BACT determinations, which might allow for administration of PSD requirements for sources of greenhouse gases, either for all sources or for particular categories of sources, while minimizing transgression of the Act’s requirements.

7. State SIP and Title V Programs

EPA and the states should collaborate on an expeditious, smooth transition in carrying out obligations to address greenhouse gases under the PSD and Title V programs. EPA sets out an approach that would apply the proposed tailoring thresholds immediately to EPA-approved state permitting programs, as a matter of necessity to ameliorate the administrative burden on EPA and the states contemporaneous with greenhouse gas applicability. See 74 Fed. Reg. at 55,341-55,346. At the same time, EPA recognizes the dual, cooperative state and federal partnership in administering PSD and Title V permit programs under the Clean Air Act.

While EPA may take a variety of immediate actions to align administration of greenhouse gas pollution control obligations and tailoring, EPA should also promptly call for corrective adjustments to state PSD and Title V operating permit programs in a manner that further advances durable state program administration of these transitional issues. It is eminently reasonable for EPA to call for a SIP revision under section 110(k)(5) to correct any inadequacies in the state-administered PSD planning rules (or, if appropriate, to allow for a negative declaration that SIP adjustments are unnecessary). Section 110(k)(5) provides a calibrated procedural mechanism for PSD, authorizing EPA to publicly notify the states of SIP inadequacies and to establish reasonable deadlines for the submission of corrective SIP revisions. 42 U.S.C. §7410(k)(5). Considering the

imperative for action and the narrow rule adjustments, EPA should establish an expeditious deadline for states to submit corrective plan revisions. Further, EPA can ease state adoption of PSD permit program revisions and expedite EPA's own review and approval of the states' adjustments by adopting model guidelines to help inform state rulemaking. EPA should promptly start the process with the aim to complete it by the end of 2010. The same basic framework and timelines can apply to the Title V permit program and state administration of corrective adjustments. Here, too, EPA can promptly issue a notice of deficiency and call for expeditious corrective action. *See* 42 U.S.C. § 7661a(i). We encourage EPA and the states to coordinate in developing approaches that expeditiously, efficiently and effectively carry out obligations under the Clean Air Act to address greenhouse gases consonant with the long-standing federal and state partnership in administering the nation's clean air laws.

8. EPA Appropriately Has Taken Action Towards Regulating Stationary Source GHGs under the Clean Air Act.

The need for near term action to combat climate change, and particularly to regulate GHGs under available authorities found in the CAA, has been long-discussed, even litigated in the Supreme Court. *Massachusetts v. EPA*, 549 U.S. 497 (2007). Given that context, Commenters feel compelled to respond on this record to comments that have been submitted in the related proceeding reconsidering the Johnson Memo. Prevention of Significant Deterioration, Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, Docket No. EPA-HQ-OAR-2009-0597, *published at* 74 Fed. Reg. 51,535 (Oct. 7, 2009). In that docket, commenters hostile to controlling greenhouse gases have offered a slew of unconvincing rewrites of EPA's Clean Air Act obligations, which they contend will render the tailoring rule unnecessary.²⁵ We address these proposals here because, if accepted, they would imperil the stability of EPA's tailoring effort and, quite possibly, undermine other aspects of the Clean Air Act.

Some commenters argue that EPA can avoid issuing the light-duty vehicle rules at all. Others suggest that the endangerment finding and light-duty vehicle rules do not

²⁵ These comments appear in the docket for EPA's Johnson Memo reconsideration proceedings. We assume that their authors will file similar objections in this docket.

trigger PSD because vehicles are regulated under a separate subchapter of the Clean Air Act. Relatedly, a few argue that EPA must make some additional finding before the PSD program applies. Finally, still others propose that EPA depart radically from the statutory text and declare that only a pollutant for which EPA has issued a National Ambient Air Quality Standard (a “NAAQS”) can trigger PSD.

None of these proposals are within the scope of EPA’s request for comments or of this rulemaking. They are suggestions to fundamentally alter the Clean Air Act and the PSD program, not simply to tailor its application with regard to greenhouse gases.²⁶ But, even if they were properly offered, these comments are ill-taken.

A. The Effect of the Light-Duty Vehicle Rules

EPA cannot, and should not, delay issuing the light-duty vehicle rules, as some commenters suggest. These rules are the result of a historic agreement between automakers, regulators, and environmentalists, and will dramatically reduce greenhouse gas emissions even as they help the U.S. automobile industry compete globally. *See* 74 Fed Reg. at 49,458. They will save billions of gallons of fuel and prevent millions of metric tons of greenhouse gas emissions. *See id.* at 49,481. Delaying these rules will worsen the climate crisis and imperil America’s economy – and doing so in order to block EPA’s attempt to carefully phase in stationary source pollution requirements is perverse.

In any event, EPA cannot legally decline to issue the light-duty vehicle rules. The Clean Air Act makes clear that the EPA “*shall* by regulation prescribe . . . standards applicable to the emission of any air pollutant” which “may reasonably be anticipated to endanger public health or welfare” and whose emissions are due, in whole or in part, to motor vehicles. 42 U.S.C. § 7521(a)(1) (emphasis added). As the Supreme Court put it, “[i]f EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles.” *Massachusetts v. EPA*, 549 U.S. at 532. As EPA must issue the light-duty vehicle rules, and as those

²⁶ Likewise, neither the light-duty vehicle rules nor the endangerment finding on which they in part rely are on the table in this proposal. The endangerment finding has been finalized, *see* 74 Fed. Reg. 66,496 (Dec. 15, 2009), and the comment period on the light-duty vehicle rules has closed, *see* 74 Fed. Reg. 49,454 (Sept. 28, 2009).

rules have substantial immediate economic and environmental benefits, it would be irresponsible and dangerous for EPA to delay in carrying out its duties.

These rules, once issued, will trigger the PSD program and its BACT requirements.²⁷ The program applies to facilities emitting “any air pollutant” and BACT is required for any “pollutant subject to regulation under this chapter.” *See* 42 U.S.C. § 7479(1), (3). The “chapter” of the U.S. Code the provision refers to is “Chapter 85 – Air Pollution Prevention and Control.” Both subchapter I, which contains the PSD program, and subchapter II, which contains the vehicle program, are, of course, included in Chapter 85. Thus, once pollutants are regulated under the vehicle program, they also immediately fall within the BACT program. It would be very strange if they did not: if a pollutant endangers health and welfare, it must be controlled whether it is emitted from an exhaust pipe or a smokestack. *See, e.g.*, 42 U.S.C. § 7470(1) (declaring that the PSD program is designed to “protect public health and welfare from any actual or potential adverse effect . . . from air pollution”). Moreover, as the PSD program applies to “any air pollutant” – not just those for which an endangerment finding has been made – it would make no sense for it to be *less* comprehensive than the endangerment-triggered vehicle rules.

Nonetheless, commenters have come up with an assortment of purportedly required additional steps, ranging from secondary endangerment findings to invented balancing tests. None have any statutory grounding. One commenter, for instance, suggests that EPA must first issue greenhouse gas regulations under 42 U.S.C. § 7476, which directs the agency to “conduct a study and . . . promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions” of certain pollutants. This argument has been conclusively rejected by the D.C. Circuit, which held that BACT applies to each pollutant without any § 7476 finding, as that section “has a different focus from [PSD permitting].” *Alabama Power*, 636 F.2d at 406. The opposing view is “contradicted by the plain language” of the statute.” *See id.* In fact,

²⁷ In fact, BACT was triggered long ago, as greenhouse gases have long been subject to regulation under the Act – a point that has grown increasingly clear over the years as more and more regulatory requirements, from approved state implementation programs, to the California vehicle rules, to the mandatory federal greenhouse gas reporting rule have been brought to bear. We have pointed this out to EPA in many forums. Our most recent comments on this point, filed on the Johnson Memo reconsideration proposal, are Attachments 1, 2, and 3 hereto, and incorporated by reference.

this section only directs EPA to provide an additional layer of protection, offering additional standards and techniques for “protection of air quality values.” *See* 42 U.S.C. § 7476(c). Nothing else in the PSD program is conditioned on these supplemental rules – and, in fact, EPA has issued no such rules for most pollutants regulated under the BACT provisions.

The other novel ‘prerequisites’ are equally insubstantial. For instance, some commenters posit that EPA has to officially find that greenhouse gases endanger “air quality” before the PSD program applies. No such requirement appears in the statute and, again section 165, “in a litany of repetition, provides, without qualification that each of its major substantive provisions” is immediately effective “with regard to each pollutant subject to regulation under the Act.” *Alabama Power*, 636 F.2d at 406. Another suggestion – that EPA must formally balance economic development against environmental protection before applying BACT requirements – is ill-taken for the same reason. And, in any event, EPA already takes “economic impacts and other costs” into account in each facility’s BACT analysis. *See* 42 U.S.C. § 7479(3).

Finally, a few hostile commenters take a different tack and argue that the light-duty vehicle rules don’t render greenhouse gases “subject to regulation” until cars built according to the new rules roll off the assembly line. But, even if EPA’s Johnson Memo ‘actual control’ interpretation of “subject to regulation” was correct, which it is not, it’s obvious that the vehicle rules actually control emissions the moment they are promulgated. At that moment, they will create a legally-binding framework which will immediately begin restructuring the programs and priorities of the entire auto industry in the name of emission control. This is regulation, if anything is.

The contrary position is completely incoherent. Among other flaws, it has the potential to delay the PSD program’s vital public health and welfare purposes for years, for reasons entirely untethered to the program’s purposes. It makes no sense to make pollution reductions from stationary sources wait upon controls on some other source of the same dangerous pollution. Moreover, this approach would produce enormous regulatory uncertainty. How are EPA and industry to know the precise moment when a given source – perhaps a particular car on a particular assembly line – is “actually

controlling” its emissions? The program has never run on such a constrained and idiosyncratic track, and should not begin to do so now.²⁸

In short, there is absolutely no serious argument that the light-duty vehicle standards do not trigger the PSD program. Because they do, EPA is absolutely right to prepare to implement that program before the vehicle standards are finalized.

B. The NAAQS Argument

As we have demonstrated in various records before the Agency, the PSD program applies the moment a pollutant is subject to regulation. Some commenters nonetheless maintain that EPA can avoid this result by tying the PSD program to the NAAQS system in unprecedented ways. They are wrong.

These commenters suggest that EPA should ‘reinterpret’ the PSD program to insert an extra-statutory “NAAQS prerequisite.” Although different commenters describe this idea differently, the core theme is that only a pollutant for which EPA has set a NAAQS could trigger PSD. Once PSD had been triggered, a source would still have to control all other pollutants, including greenhouse gases. This interpretation is illegal — and would itself never survive the ‘administrative necessity’ and ‘absurd results’ narrow tailoring tests that a statutory departure must meet.

The commenters spin their argument out of the PSD permitting program’s ban on constructing a “major emitting facility” . . . “in any area to which this part applies” without a permit containing BACT. *See* 42 U.S.C. § 7475(a). They suggest that the “area[s] to which this part applies” are areas classified under NAAQS, and therefore that a PSD permit is required only where a facility emits large amounts of a pollutant for which a NAAQS has been set (a “criteria” pollutant).

This approach immediately runs into fatal statutory problems. The statute’s reference to “any area to which this part applies” has nothing to do with the PSD threshold triggers. Instead, that clause just distinguishes the PSD program, in Part C of the statute, from the nonattainment new source review program in Part D. Nothing in that distinction limits the permitting requirements of the PSD program to criteria pollutants. In other words, although it is true that the PSD program applies in areas

²⁸ We discuss other problems with such an odd interpretation in our attached Johnson Memo reconsideration comments.

which have been classified as in attainment with NAAQS (or which are unclassifiable) for criteria pollutants, its pollutant-by-pollutant structure broadens its reach to pollutants for which no NAAQS have been promulgated, and to areas which are nonattainment for some pollutants but not others. Thus, as we explain in more detail below, the “in any area” clause in the statute’s PSD permitting section only carves out some areas, and pollutants, for *stricter* review. It does not exempt any pollutants from *all* review.

A closer look at the structure of the statute makes this point clear. To begin with, EPA promulgates NAAQS for each of a handful of criteria pollutants, *see* 42 U.S.C. § 7409(a), and either EPA or the states designate all areas in each state as either in attainment, nonattainment, or unclassifiable for each criteria pollutant, *see id.* § 7407(d). As a result, an area may simultaneously be in attainment for one pollutant and out of attainment for another.

Thus, Part D, the strict nonattainment new source review program, applies on a pollutant-by-pollutant basis. *See, e.g., id.* § 7501(1), (2) (referring to “the relevant air pollutant” for Part D purposes, and to nonattainment “with respect to that pollutant”). A plant to which Part D applies will conduct a Part D review *only* for nonattainment pollutants and a Part C PSD review for every other pollutant it emits, regardless of whether a NAAQS has been promulgated for each of these pollutants.

In other words, the NAAQS attainment/nonattainment distinction matters only for determining which pollutants get a Part D review. The presence or absence of a NAAQS has *never* been relevant to any other aspect of the Part C BACT process. And rightly not, as, again, the PSD program applies to all “major emitting facilit[ies]” which emit large quantities of “any air pollutant” and BACT is plainly required for “each pollutant subject to regulation.” *Id.* §§ 7475(a)(3), 7479(1),(3).

This approach is the only sensible way of handling the mixtures of pollutants many industrial sources emit, only a few of which are included in the NAAQS program. If a source is emitting enough of an air pollutant to exceed the high thresholds of the PSD program, then the proper response to protect public health and welfare is to subject the source immediately to “an emission limitation based on the maximum degree of reduction” available, *see id.* § 7479(a)(3), not wait until EPA promulgates a NAAQS for that pollutant.

Congress says exactly that in its “declaration of purpose” for the PSD program, stating that the program is designed to “protect public health and welfare from any actual or potential adverse effect which . . . may reasonably be anticipate[d] to occur from air pollution . . . notwithstanding attainment and maintenance of all national ambient air quality standards.” *Id.* § 7470(1) (emphasis added). As the D.C. Circuit put it in the seminal *Alabama Power* ruling, if a source becomes a major emitting facility, subject to PSD, by “emit[ing] more than a threshold quantity of any air pollutant”:

Once a source has been so identified, it may become subject to section 165’s [the PSD permitting program’s] substantial administrative burdens and stringent technological control requirements for each pollutant regulated under the Act, even though the air pollutant, emissions of which caused the source to be classified as a “major emitting facility,” may not be a pollutant for which NAAQS have been promulgated or even one that is otherwise regulated under the Act.

Alabama Power, 636 F.2d at 352.

Nonetheless, hostile commenters argue that EPA should upend this long-settled point, ignore the basic structure of the PSD program, and decline to regulate facilities which are major emitters of greenhouse gases unless they either also emit a criteria pollutant over the threshold or EPA sets a NAAQS for greenhouse gases. This alternative proposal would not ‘tailor’ the program. It would just ignore the statute.

In summary, the hostile commenters are offering unwise policy advice, not just flawed legal arguments. EPA is attempting to chart a moderate course, spending its regulatory resources wisely as it works to solve the greatest environmental and humanitarian crisis the world faces. EPA’s work is vital to creating a smooth transitional path as we move towards a clean energy economy and a solution to the climate crisis. Obstructing that course with specious arguments for ever-longer delays ignores these threats and undermines EPA’s careful approach.

Conclusion

The undersigned organizations are pleased to have the opportunity to submit these comments to the Agency, and look forward to working with EPA as it takes further steps to implement GHG regulatory programs for stationary sources.

Respectfully submitted,

ALLIANCE FOR CLIMATE PROTECTION
Christine Simeone

CLEAN AIR TASK FORCE
Ann B. Weeks
Helen D. Silver

CLIMATE SOLUTIONS
Ross Macfarlane

ENVIRONMENT AMERICA
Emily Figdor

ENVIRONMENTAL DEFENSE FUND
Vickie Patton
Pamela Campos

NATURAL RESOURCES DEFENSE COUNCIL
David Doniger
John Walke

CITIZENS FOR PENNSYLVANIA'S FUTURE (PENN FUTURE)
Charles McPhedran

SIERRA CLUB
Joanne Spalding
David Bookbinder
Craig Segall

DATED: December 28, 2009

