ORAL ARGUMENT NOT YET SCHEDULED

No. 11-1101 (Consolidated with 11-1285, 11-1328, and 11-1336)

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

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

Petition for Review of Final Agency Action

OPENING BRIEF OF PETITIONERS (CORRECTED)

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DATED: March 15, 2012 (corrected filing)

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CENTER FOR BIOLOGICAL DIVERSITY, et al.,	)	
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
Respondent.	)	

PETITIONERS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 15(c)(3) and 28(a)(1), Center for Biological Diversity, Coastal Conservation League, Conservation Law Foundation, Dogwood Alliance, Georgia ForestWatch, Natural Resources Council of Maine, Natural Resources Defense Council, and Wild Virginia ("Petitioners") submit this certificate as to parties, rulings, and related cases:

(A) Parties and *Amici*

(i) Parties, Intervenors, and *Amicus Curiae* Who Appeared in the District Court:

These cases are consolidated petitions for review of final agency actions, not appeals from rulings of a district court.

(ii) Parties to the Consolidated Challenges:

Case No. 11-1101:

Petitioners are Center for Biological Diversity, Conservation Law Foundation, and Natural Resources Council of Maine.

Respondents are the United States Environmental Protection Agency and Lisa P. Jackson, Administrator of EPA.

Intervenors in Support of Respondents are American Forest & Paper Association, American Wood Council, Biomass Power Association, Corn Refiners Association, Florida Sugar Industry, National Oilseed Processors Association, Rubber Manufacturers Association, Treated Wood Council, Renewable Fuels Association, Utility Air Regulatory Group, and National Alliance of Forest Owners.

Case Nos. 11-1285, 1328, 1336

Petitioners are Center for Biological Diversity, Conservation Law Foundation, Natural Resources Council of Maine, Georgia ForestWatch, and Wild Virginia (Case No. 11-1285), Natural Resources Defenses Council (Case No. 11-1328), and Coastal Conservation League and Dogwood Alliance (Case No. 11-1336).

Respondents in all above-mentioned consolidated cases are EPA and Lisa P. Jackson.

Intervenors in Support of Respondents are American Forest & Paper Association, American Wood Council, Biomass Power Association, Corn Refiners Association, Florida Sugar Industry, National Oilseed Processors Association, Rubber Manufacturers Association, Treated Wood Council, Renewable Fuels Association, Utility Air Regulatory Group, and National Alliance of Forest Owners.

(iii) *Amici Curiae*

Petitioners are aware of no *amici curiae* in any of these consolidated cases.

(iv) Circuit 26.1 Disclosures

Petitioners' disclosures under Circuit Rule 26.1 are in a separate disclosure statement, below.

(A) Rulings Under Review

These Petitions for Review challenge (1) the Environmental Protection Agency's decision to grant a petition for reconsideration filed by the National Alliance of Forest Owners, as published in *Deferral for CO_2 Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs: Proposed Rule* at 76 Fed. Reg. 15,249 (Mar. 21, 2011) and (2) the Environmental Protection Agency's final rule titled *Deferral for CO_2 Emissions From Bioenergy and Other Biogenic Sources Under*

the Prevention of Significant Deterioration (PSD) and Title V Programs: Final Rule at 76 Fed. Reg. 43,490 (July 20, 2011).

(B) Related Cases

Petitioners are aware of one additional case related to the EPA final actions challenged here, *National Alliance of Forest Owners et al. v. Environmental Protection Agency* (Case No. 10-1209). Pursuant to this Court's Order of May 27, 2011, that case was severed from *Coalition for Responsible Regulation et al. v. Environmental Protection Agency* (Case No. 10-1073 and consolidated cases) and held in abeyance pending further order of this Court.

Respectfully submitted, this 15th Day of March, 2012

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	11-1328, and 11-1336
Respondent.	)	

PETITIONERS' RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Petitioners make the following disclosures.

Center for Biological Diversity. Center for Biological Diversity, a not-for-profit organization organized under the laws of the State of New Mexico, is focused on the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health. Its core organizational missions include securing protection for species threatened by the impacts of global warming, ensuring compliance with applicable law in order to reduce greenhouse emissions and other air pollution, and educating and mobilizing the public on global warming and air quality issues. Center for Biological Diversity has no parent companies, and no publicly held company has a 10% or greater ownership interest in Center for Biological Diversity.

Coastal Conservation League. Coastal Conservation League is a nonprofit organization organized under the laws of the State of South Carolina and incorporated under Section 501(c)(3) of the Internal Revenue Code that works to protect the natural environment and communities of the South Carolina coastal plain. Coastal Conservation League has no parent companies, and no publicly held company has a 10% or greater ownership in Coastal Conservation League.

Conservation Law Foundation. Conservation Law Foundation is a not-for-profit corporation organized under the laws of the Commonwealth of Massachusetts that uses law, science, policy, and the business market to find pragmatic, innovative solutions to New England's toughest environmental problems. Conservation Law Foundation has no parent companies, and no publicly held company has a 10% or greater ownership interest in Conservation Law Foundation.

Dogwood Alliance. Dogwood Alliance is a nonprofit organization organized under the laws of the State of North Carolina and incorporated under Section 501(c)(3) of the Internal Revenue Code. Dogwood Alliance works to preserve and restore native forest ecosystems in the southeastern United States. Dogwood Alliance has no parent companies, and no publicly held company has a 10% or greater ownership interest in Dogwood Alliance.

Georgia ForestWatch. Georgia ForestWatch is a nonprofit organization organized under the laws of the State of Georgia and incorporated under Section 501(c)(3) of the Internal Revenue Code that works to promote healthy forests and watersheds in national forest lands in Georgia. Georgia ForestWatch has no parent companies, and no publicly held company has a 10% or greater ownership interest in Georgia ForestWatch.

Natural Resources Council of Maine. Natural Resources Council of Maine, a not-for-profit corporation organized and existing under the laws of the State of Maine, is a membership organization dedicated to preserving the quality of the air, water, forest and other natural resources of the State of Maine, for the benefit of its people and its environment. Natural Resources Council of Maine has no parent companies, and no publicly held company has a 10% or greater ownership interest in Natural Resources Council of Maine.

Natural Resources Defense Council. Natural Resources Defense Council, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization dedicated to improving the quality of the human environment and protecting the nation's endangered resources. The Natural Resources Defense Council has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Wild Virginia. Wild Virginia is a nonprofit organization organized under the laws of the State of Virginia and incorporated under Section 501(c)(3) of the Internal Revenue Code. Wild Virginia works to preserve wild forest ecosystems in Virginia's National Forests. Wild Virginia has no parent companies, and no publicly held company has a 10% or greater ownership interest in Wild Virginia.

Respectfully submitted, this 15th Day of March, 2012

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

BACT	Best Available Control Technology
CBD	Center for Biological Diversity
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CFI	Call For Information
CO	Carbon Monoxide
CO_2	Carbon Dioxide
EPA	Environmental Protection Agency
GHG	Green House Gas
NAAQS	National Ambient Air Quality Standards
NAFO	National Alliance of Forest Owners
NOx	Nitrogen Oxides
NRDC	Natural Resources Defense Council
NSR	New Source Review
PM	Particulate Matter
$PM_{2.5}$	Particulate Matter of 2.5 microns diameter
PSD	Prevention of Significant Deterioration
RTC	Response to Comments
SELC	Southern Environmental Law Center

JURISDICTIONAL STATEMENT

Petitioners seek review of a final action of the Environmental Protection Agency (EPA) entitled *Deferral for CO_2 Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs*, 76 Fed. Reg. 43,490 (July 20, 2011) ("Biomass Exemption" or "Exemption") (JA ___). The petition in No. 11-1101 was filed on April 7, 2011. The petition in No. 11-1285 was filed on August 15, 2011. The petitions in Nos. 11-1328 and 11-1336 were filed on Sept. 19, 2011. All petitions for review were filed within the 60-day period provided under Clean Air Act Section 307(b)(1), which gives this Court exclusive jurisdiction over petitions to review final EPA actions of nationwide applicability. 42 U.S.C. § 7607(b)(1); *see also* 76 Fed. Reg. at 43,491/1 (JA ___). Pursuant to section 307(b)(2), this includes jurisdiction to review any final action deferring performance of a nondiscretionary statutory action to a later time. 42 U.S.C. § 7607(b)(2)

STATEMENT OF THE ISSUES

In the final action under review, the Environmental Protection Agency issued a rule exempting stationary sources of biogenic carbon dioxide (CO_2) pollution from the construction and operating permit requirements of the Clean Air Act. EPA identified neither any express authority, nor any gap or ambiguity, in the

Act that might authorize this exemption. Rather, EPA relied on last-resort doctrines allowing deviations from statutory requirements in extremely narrow circumstances. This presents the following issues:

1. Is the exemption authorized under the administrative necessity doctrine?
2. Is the exemption permissible or authorized under the *de minimis* doctrine?
3. Is the exemption authorized by the "one-step-at-a-time" doctrine?

STATUTES AND REGULATIONS

Pertinent parts of statutes and regulations are reproduced in an addendum to this brief.

STATUTORY AND REGULATORY FRAMEWORK

A. The Clean Air Act's Construction and Operating Permit Programs

1. Prevention of Significant Deterioration Construction Permits

The Clean Air Act's Prevention of Significant Deterioration (PSD) program requires each new or modified "major emitting facility" to obtain a construction permit showing that the facility meets specific pollution control requirements. Sections 165 and 169, 42 U.S.C. §§ 7475, 7479,[1] are the core provisions of the permit program. *See Ala. Power Co. v. Costle*, 636 F.2d 323, 352 (D.C. Cir. 1979). Section 165(a) prohibits construction of any "major emitting facility"

[1] This brief generally refers to statutory provisions by their Clean Air Act section numbers. Parallel U.S. Code citations are given when provisions are first mentioned.

without a permit. To obtain a permit, Section 165(a)(4) requires the facility, among other things, to meet an emission limitation reflecting the "best available control technology" ("BACT") for "each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." Section 165(a)(2) also requires a public hearing where interested persons may submit data and views about air quality impacts, control technology options, alternatives to building the proposed facility, and other appropriate considerations.

Section 169(1) defines a "major emitting facility" as any "stationary source[ ] … which emit[s], or [has] the potential to emit" more than 100 or, depending on the source type, 250 tons per year of "any air pollutant."[2] Section 169(3) defines BACT, in pertinent part, as:

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

In 2010 EPA issued the "Tailoring Rule" to phase in PSD permitting for sources of greenhouse gas emissions in a series of steps. 75 Fed. Reg. 31,514

[2] Long-standing EPA regulations define "any air pollutant" to mean any "regulated NSR [new source review] pollutant." 40 C.F.R. § 51.166(a)(7) and (b)(1) (requiring permits of "major stationary sources" that emit certain amounts of "regulated NSR pollutant[s]"). *See, e.g.*, 43 Fed. Reg. 26,380, 26,403, 26,406 (June 19, 1978).

(June 3, 2010) (JA ___). Step 1 (which ran from January 2 through June 30, 2011[3]) covered only major emitting facilities that already required a permit due to their emissions of non-greenhouse gases. Under Step 1, as part of obtaining a PSD permit, these sources had to meet BACT for their greenhouse gases if those emissions would increase by the equivalent of at least 75,000 tons of CO_2 per year. *Id.* at 31,523/1-2 (JA ___). In Step 2 (which began July 1, 2011) extends coverage to the largest greenhouse gas emitting sources that were not already required to get PSD permits: A new source currently needs a permit if it has the potential to emit at least 100,000 tons of greenhouse gases per year, and a modified source needs a permit if it will increase those emissions by at least 75,000 tons. *Id.* at 31,523/3 – 31,524/1 (JA ___-___). EPA also committed to further actions after Step 2 to bring additional sources into the PSD program over time.

2. Title V Operating Permits

Section 502(a) of the Act prohibits the operation of any "major source" without obtaining an operating permit. 42 U.S.C. § 7661a(a). Under Section 501(2), a "major source" means "any stationary source (or any group of stationary sources located within a contiguous area and under common control)," and

[3] In an April 2010 final rule, EPA determined that PSD (and Title V) requirements would begin to apply to greenhouse gases on January 2, 2011, the date on which EPA's greenhouse gas emission standards for light-duty motor vehicles took effect. *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs,* 75 Fed. Reg. 17,004 (Apr. 2, 2010) (JA ___),

includes any "major stationary source" under Section 302(j), i.e., any source that "directly emits, or has the potential to emit," at least 100 tons per year of any air pollutant. 42 U.S.C. §§ 7661(2), 7602(j). The Tailoring Rule phases in the applicability of Title V to greenhouse gas emission sources on the same schedule as PSD.

3. State and Federal Permitting Agencies

The PSD and Title V programs are mostly implemented by state permitting authorities operating under plans approved by EPA, or as EPA's delegates under federal plans. EPA directly implements permitting programs in areas with no approved or delegated plan, and on federal lands and in Indian country.[4]

FACTUAL BACKGROUND

A. Biogenic CO_2 Emissions and the Carbon Cycle

Plant life takes up CO_2 in order to grow, and therefore such "biogenic" material can be said to sequester CO_2 from the atmosphere while it is alive. When plant life dies, or is harvested and burned, its stored CO_2 is released, either gradually through decomposition, or immediately upon combustion. Center for Biological Diversity, *et al.* Comments (EPA-HQ-OAR-2011-0083-0350.1) ("CBD

[4] *See* 42 U.S.C. § 7410(a)(2)(C) and 40 C.F.R. § 51.166(a) (providing for state implementation plans, including PSD programs); 42 U.S.C. § 7410(c) and 40 C.F.R. § 52.21(a)(1) (providing for federal implementation plans covering PSD). *See also* 40 C.F.R. §§ 70.1(a), 70.4 (state Title V permitting programs) and 40 C.F.R. §§ 71.1, 71.4 (EPA administration of Title V permitting programs).

Comments") at 15-16 (JA ___-___). CO_2 released when biomass is burned has the identical heat-trapping properties of CO_2 released when fossil fuels are combusted. As EPA has recognized, once emitted to the atmosphere, "it is not possible to distinguish between the radiative forcing associated with a molecule of CO_2 originating from a biogenic source and one originating from the combustion of fossil fuel." 76 Fed. Reg. 15,249, 15,254/1 (Mar. 21, 2011) (JA ___).

Because CO_2 from plant matter is released immediately on burning, but grown back (if at all) only over time, there is a "debt" period for each ton of carbon released but not yet resequestered. This debt persists even if regrowth eventually catches up to the sequestration levels that would have been reached had the biomass not been harvested but had continued growing. CBD Comments at 16 (JA ___); Booth Decl. ¶¶ 25, 26, 32; Natural Resources Defense Council Comments (EPA-HQ-OAR-2011-0083-0104) ("NRDC Comments") at 12 (JA ___). For the fastest growing biomass crops (e.g., perennial grasses), regrowth can be achieved in a year. But for other types of biogenic fuel (e.g., whole trees), the debt period may extend for decades or centuries. CBD Comments at 16 (JA ___). When new areas of forest or other vegetation are harvested for fuel, total CO_2 emissions can *exceed* the amount released directly from the facility where the fuel is burned. One reason is that the soil itself stores carbon, and when trees are cut, soil carbon is released into the atmosphere as CO_2. *Id*., Exhibit 11 (JA ___-___).

The forest products industry asserts that the net CO_2 emissions from burning any biogenic fuel are zero. *See* National Alliance of Forest Owners (NAFO) Comments (EPA-HQ-OAR-2011-0083-0074) at 3 (JA ___). But EPA itself has found that this claim is not supportable: while *some* biogenic feedstocks may re-sequester given amounts of CO_2 in a short period, the agency acknowledges that the scientific evidence demonstrates this is certainly not true for *all* biogenic fuel. Indeed, in the final rule EPA acknowledges the possibility that burning some biomass feedstocks actually causes significant net CO_2 *increases*. 76 Fed. Reg. at 43,498/1, 43,499/1 (JA ___, ___).

B. Regulation of Greenhouse Gases from Massachusetts v. EPA to the Tailoring Rule.

The pathway to the Biomass Exemption starts with the Supreme Court's holding in *Massachusetts v. EPA*, that CO_2 and other greenhouse gases are "air pollutants" under Section 302(g) of the Act, 42 U.S.C. § 7602(g), and the Court's conclusion that EPA had to make a science-based determination whether they may reasonably be anticipated to endanger public health and welfare. 549 U.S. 497 (2007). In 2009, EPA made its determination that these pollutants do indeed endanger public health and welfare, and in 2010 EPA established emission standards for greenhouse gas emissions from motor vehicles under Section 202(a)(1), 42 U.S.C. § 7521(a)(1). 74 Fed. Reg. 66,496 (Dec. 15, 2009)

(Endangerment Finding) and 75 Fed. Reg. 25,324 (May 7, 2010) (Vehicle Standards).

As described above, EPA also determined that greenhouse gases became regulated air pollutants on the effective date of the vehicle standards, triggering the PSD and Title V permit requirements. *Supra* at 4, n.3. EPA also issued the "Tailoring Rule" to implement PSD and Title V permitting for greenhouse gas emission sources in a series of steps covering the largest emitters first. *Supra* at 3-4.

C. The Tailoring Rule's Treatment of Biogenic CO_2

The Tailoring Rule provided that all CO_2 directly emitted from a source must be counted towards the permitting thresholds, regardless whether it originated from burning fossil fuel or biomass. 75 Fed. Reg. at 31,527/2-29/3, 31,590/1-91/1 (JA ___-___, ___-___). Thus, any source with sufficient direct CO_2 emissions needs to obtain a PSD permit and meet BACT. In the Tailoring Rule, EPA declined to adopt the suggestion by certain industries, including paper mills and private forest growers, that all biogenic CO_2 was "'carbon neutral' (i.e., that combustion or oxidation of such materials would cause no net increase in GHG emissions on a lifecycle basis)" and should be exempted from PSD and Title V permit applicability determinations regardless of their characteristics. *Id.* at 31,590/3 (JA ___). Nonetheless, EPA said it would seek further comment on the

treatment of biogenic CO_2 emissions under the PSD and Title V programs. EPA asserted its understanding that "there is flexibility to apply the existing regulations and policies regarding BACT in ways that take into account [biomass fuels'] lifecycle effects on GHG concentrations." *Id.* at 31,591/2 (JA ___).

D. The Proposed Biomass Exemption.

In March 2011, EPA proposed a sharp change of course. In a notice of proposed rulemaking, 76 Fed. Reg. 15,249 (Mar. 21, 2011) (JA ___), EPA granted a petition for reconsideration of the Tailoring Rule from NAFO. EPA explicitly rejected the claim that all biomass fuels are carbon neutral. *See* 76 Fed. Reg. at 15,261/3 (JA ___) (possibility remains that some biomass fuels will have a significant impact on the net carbon cycle). Nonetheless, EPA proposed a three-year categorical exclusion of all "biogenic CO_2 emissions" from any applicability or BACT determinations required under the PSD and Title V permitting programs. *Id.* at 15,249/3 (JA ___). EPA also said it intended to undertake a subsequent rulemaking, during the three-year exemption period, on how biogenic CO_2 emissions "should be treated and accounted for in PSD and Title V permitting" after that period. *Id.* at 15,251/3 (JA ___).

EPA opaquely asserted that, absent the proposed exemption, "there would be significant and unique complexities" related to "the unique characteristics and attributes of biogenic CO_2 feedstocks," leading to "additional permitting burden in

terms of time and resource requirements" beyond that previously anticipated in the Tailoring Rule. *Id.* at 15,259/3 (JA ___). EPA did not expressly state where those asserted burdens and complexities would be experienced. The Tailoring Rule required no consideration of lifecycle emissions in applicability decisions (i.e., when determining if a source emits sufficient CO_2 to require a permit). And EPA further stated its view that "interim guidance" on BACT determinations "will help alleviate some of this burden." *Id.*; *see also* 75 Fed. Reg. at 31,591/2 (JA ___) (Tailoring Rule on consideration of biomass lifecycle emissions in BACT for greenhouse gases).

Regardless, in the proposed Exemption, EPA stated that it believed it had the authority to exempt all biogenic CO_2 emissions from PSD applicability and from BACT: "EPA believes it has the authority to exclude biogenic CO_2 emissions from the PSD and Title V requirements for the proposed three-year deferral period and will be exploring whether a permanent exemption is permissible for at least some and perhaps all types of feedstocks." 76 Fed. Reg. at 15,260/3 (JA ___). EPA acknowledged, however, that

> since the relevant provisions of the Act apply to "any air pollutant" or any "air pollutant subject to regulation," the terms of the [Clean Air Act] suggest that the PSD and Title V requirements should apply to CO_2 emissions from bioenergy or other biogenic sources in the same manner as they apply to emissions of CO_2 from any other type of source, since such emissions are constituents of the regulated pollutant [greenhouse gases].

Id.

After this decidedly brief reference to the statutory language, EPA turned immediately to the *de minimis* doctrine. EPA pointed to examples of prior *de minimis* determinations exempting sources from PSD permit requirements on the basis that compliance would yield only trivial benefits. In each prior example, however, the agency's trivial benefits analysis bore strictly on emissions coming directly from the source in question. *See id*. at 15,261/2 (JA ___). In this proposal, however, EPA asserted that it could consider not only the direct CO_2 emissions from biomass-burning sources, but also the absorption of CO_2 by plants growing tens or hundreds of miles away, even if controlled by some other entity.

On the factual side, EPA claimed it had "sufficient information" to conclude that "at least *some* biomass feedstocks that may be utilized to produce energy have a negligible impact on the net carbon cycle." *Id.* at 15,261/2 (emphasis added) (JA ___). As an example, EPA suggested "residue material (*e.g.,* sawdust from milling operations) that would have decomposed under natural circumstances" over 10-15 years," and asserted that "the gain from regulating emissions from combustion of this feedstock for bioenergy *could* be considered to be trivial." *Id.* at 15,261/2-3 (emphasis added) (JA ___). EPA did not further describe what "sufficient information" supported this conclusion. Instead, EPA asserted that future scientific assessment might identify other such feedstocks:

> It appears that the potential may exist for EPA to determine that other types of biomass feedstocks would have a negligible impact on the net

> carbon cycle impact after further detailed examination of the science associated with biogenic CO_2 emissions. Thus, if EPA were to require all bioenergy facilities to limit emissions of CO_2 before this assessment is complete, it *may later determine* that such actions have yielded trivial gain.

Id. at 15,261/3 (emphasis added) (JA ___). Finally, EPA made clear its understanding that other biogenic feedstocks can have non-trivial impacts:

> [T]he possibility also remains that more detailed examination of the science of biogenic CO_2 will demonstrate that the utilization of some biomass feedstocks for bioenergy production *will have a significant impact on the net carbon cycle*, making application of the PSD program requirements to such emissions necessary to fulfill Congressional intent.

Id. (emphasis added).

EPA then considered three alternatives to continuing the Tailoring Rule without change (i.e., alternatives to counting only direct emissions when determining whether PSD permits are required and to addressing lifecycle factors, if at all, only in the BACT stage). First, the agency could "apply PSD and Title V to all facilities with biogenic CO_2 emissions that emit at or above the Tailoring Rule thresholds, but without making any effort to take into account net carbon cycle impacts." *Id*. at 15,262/2 (JA ___). This would have reduced the administrative burdens of the Tailoring Rule, by eliminating consideration of the lifecycle characteristics of biogenic CO_2 in BACT determinations. EPA, however, rejected this alternative because:

> we believe that it is *conceivable* that as a result of the scientific examination of biogenic CO_2 emissions [to be conducted over the next three years], we could conclude that the net carbon cycle impact for some biomass feedstocks is negligible. Accordingly, this could result in regulation that yields trivial gain as previously discussed.

Id. (emphasis added). In other words, EPA preferred exempting all biomass-burning sources from permitting, however large the volume of their direct or net emissions, in order to avoid requiring permits for any sources that might later be considered to have *de minimis* impacts based on off-site phenomena.

As a second alternative, EPA said it could base permit applicability on case-by-case determinations of the lifecycle CO_2 emissions of each biomass facility, rather than its direct CO_2 emissions. *See id.* at 15,261/3-15,262/2 (JA ___-___). Even though this option would distinguish between biogenic feedstocks with positive and negative lifecycle CO_2 impacts, EPA asserted that it would impose too heavy an administrative burden. Here EPA mixed administrative burden and *de minimis* rationales: "[G]iven the potential that the utilization of at least some biomass feedstocks *may* have a negligible impact on the net carbon cycle, engaging in this type of burdensome analysis *may not be an optimal use* of the limited resources of PSD and Title V permitting authorities." *Id.* at 15,262/2 (emphasis added) (JA ___).

Even before seeking comment, EPA rejected both of these alternatives in favor of a third option. The agency instead proposed a blanket three-year

exemption under which no biomass-burning sources – even those with clear net adverse carbon cycle impacts – would undergo PSD or Title V permitting. *Id*. at 15,262/1 (JA ___).

E. Comments on the Proposed Exemption

EPA received numerous comments opposing the proposed exemption. For example, the Center for Biological Diversity (CBD), the Natural Resources Defense Council (NRDC), and others told EPA that it lacked legal authority to create an exemption from PSD and Title V applicability based on off-site, "net" lifecycle emissions. *See, e.g.,* CBD Comments at 6-8 (JA __-___). These and other commenters also submitted that the exemption was scientifically unwarranted because combusting many biomass feedstocks will in fact increase CO_2 emissions, even considered on a lifecycle basis. *Id*. at 6, 12, 14-16 (JA ___, ___, ___-___); *see also* NRDC Comments at 1, 11-14 (JA ___, ___-___). CBD stated that "the most recent and thorough of the studies [submitted to EPA] overwhelmingly demonstrate that biomass burned for energy generation is not 'always carbon neutral'." CBD Comments at 12 (JA ___). In fact, there are "greater carbon emissions per unit energy from biomass than fossil fuels," and scientists have concluded that "'using standing trees for bioenergy immediately transfers carbon to the atmosphere ... increasing overall [GHG] emissions for several decades.'" *Id.* at 16 (JA ___).

CBD also cited studies contradicting EPA's suggestion that combusting "waste" feedstocks expected to decompose within 10-15 years would have a *de minimis* impact. *Id.* at 14, 22-25 (JA ___, ___-___). NRDC and others submitted that EPA currently had the tools to limit the exemption, and that "the science does not justify" exempting feedstocks like whole trees that "are extremely likely to increase net CO_2 emissions for more than 20 years." *See* NRDC Comments at 11-14 (JA __-___).

EPA also received comments from states undercutting the agency's contention that a blanket exemption was needed to avoid unmanageable administrative burdens. For example, Arkansas expected only "one or two" PSD permits "possibly involving biomass sources" per year over the next three years, and did not anticipate a "drastic increase" in biomass Title V permits. Arkansas Department of Environmental Quality Comments (EPA-HQ-OAR-2011-0083-0033) at 2 (JA ___). Florida found it "difficult to predict" how many permits it would need to process. Florida Department of Environmental Protection Comments (EPA-HQ-OAR-2011-0083-0038) at 2 (JA __). Georgia identified five pending applications, but stated that it was "uncomfortable commenting on future resource constraints; [because] it would be speculation only, and not based on facts." Georgia Department of Natural Resources Comments (EPA-HQ-OAR-2011-0083-0094) at 1 (JA __). Minnesota expected only one to two applications

over the Exemption Rule time frame, and identified no pending applications. Minnesota Pollution Control Agency Comments (EPA-HQ-OAR-2011-0083-0102) at 1 (JA __). Oklahoma anticipated "no significant increases or decreases" in permit applications over the next three years. Oklahoma Department of Environmental Quality Comments (EPA-HQ-OAR-2011-0083- 0037) at 1 (JA __). Oregon expected only three to five biomass power plant applications over the same period. Oregon Department of Environmental Quality Comments (EPA-HQ-OAR-2011-0083-0058) (JA __). Pennsylvania found itself "unable to advise EPA, at this time, of the estimated number and type of biomass sources that will be operating in Pennsylvania within the next three years." Pennsylvania Department of Environmental Protection Comments (EPA-HQ-OAR-2011-0083-0135) at 2 (JA __). South Carolina, while currently processing four applications, nonetheless found it "impossible to predict how many biomass applications will be received in the future." South Carolina Department of Health and Environmental Control Comments (EPA-HQ-OAR-2011-0083-0124) at 3 (JA __).

F. The Final Exemption

On July 20, 2011, EPA adopted the Biomass Exemption as proposed, i.e., a blanket exemption for sources burning any kind of biomass fuels, without differentiation, from all PSD or Title V permitting requirements. 76 Fed. Reg. 43,490 (JA ___). The agency asserted once again that determining the net carbon

cycle impact of biogenic emissions is a complex and uncertain undertaking, and "would therefore entail extensive workload requirements by many of the permitting authorities." *Id*. at 43,496/1. EPA also restated its belief that it has authority to undertake a future rulemaking to exempt sources of biogenic CO_2 permanently, based on lifecycle considerations. *See* 76 Fed. Reg. at 43,498/2 (JA ___). In addition, EPA added an argument that the Exemption was supported by the "one-step-at-a-time doctrine."[5] *Id.* at 43,497/1 to 43,498/2 (JA ___-___).

In neither the final Exemption notice nor the response-to-comments document did EPA provide any substantial responses to the key comments highlighted above. Notably, EPA provided no cogent response to comments disputing the authority of permitting agencies to look beyond the direct emissions of biomass-burning sources in determining whether such sources require PSD or Title V permits. EPA provided no substantive response to comments from states calling into question the seriousness of the administrative burdens they would face addressing biomass-burning sources. And EPA did not provide any substantive response to comments demonstrating the adverse lifecycle CO_2 emissions from burning various biomass feedstocks, or the adverse public health consequences of the Exemption.

[5] In the proposal, EPA had specifically found this doctrine irrelevant. 76 Fed. Reg. at 15,255/3 n.13 (JA ___).

Instead, in rote fashion EPA repeated a boilerplate response to each substantive comment, reasserting belief in its authority and views about the complexity of the science issues involved, and saying that it would deal with all such issues in its future rulemaking. *See, e.g.,* Summary of Public Comments and Responses (EPQ-HQ-OAR-2011-0083-0359) at 67, 68, 71, and 94. (JA ___-___, ___, and ___)

Petitioners filed these petitions for review.

SUMMARY OF ARGUMENT

The Clean Air Act requires all new and modified stationary sources to obtain preconstruction and operating permits if they have the potential to emit CO_2 or other greenhouse gases into the atmosphere in amounts exceeding the thresholds set forth in EPA's June 2010 Tailoring Rule. The Biomass Exemption challenged here creates a broad and unjustified exemption to that requirement. Under the Tailoring Rule, a biomass-burning source would have triggered PSD and Title V permitting if the facility itself emitted sufficient CO_2. Under the Exemption, the same facility now escapes the permitting programs altogether. Under the Tailoring Rule, such a facility would have had to meet BACT for CO_2 and any other regulated pollutant such as fine particles or nitrogen oxides it emitted in significant amounts. Instead, these facilities are now exempt from BACT. And even facilities

that trigger PSD and Title V because they emit sufficient amounts of *other* air pollutants no longer need to meet BACT for their biogenic CO_2 emissions.

The Exemption is contrary to law and arbitrary and capricious. EPA failed to identify any statutory authority affirmatively supporting the Exemption, nor has it identified any gap or ambiguity in the language of the statute permitting it. Additionally, EPA failed to justify the Exemption under the doctrines on which it does rely.

First, EPA invoked the "administrative necessity" doctrine, but it failed to carry its heavy burden of demonstrating that considering biogenic CO_2 emissions in the PSD and Title V permitting processes would create administrative difficulties rising to the level of *impossibility*. Nor did EPA show that the Biomass Exemption was narrowly tailored to excuse statutory compliance only to the degree demanded for administrability.

Second, EPA improperly invoked the *de minimis* doctrine in several ways. EPA did not show that a *de minimis* exemption from permitting based on "lifecycle" CO_2 emissions is consistent with the Clean Air Act. The agency identified no affirmative statutory authority for subtracting distant off-site CO_2 absorption from the facility's own CO_2 emissions when determining whether the facility needs a permit, and no statutory gap or ambiguity from which such authority could reasonably be inferred. For these reasons, a *de minimis* exemption

based on lifecycle CO_2 emissions is contrary to the statute. Further, EPA exempted *all* biomass-burning sources, even though the agency claimed to have data showing trivial lifecycle emissions for only *some* such sources. EPA put off all relevant scientific and factual determinations to a future rulemaking, and thus failed to demonstrate in this rulemaking that *any* of the emissions it exempted from the permitting programs were truly *de minimis* or trivial. In fact, EPA admitted that some types of biomass fuel may be significant net CO_2 emitters, e.g., fuels whose emissions when burned add to atmospheric CO_2 for decades or centuries, regardless of what countervailing off-site factors are considered.

Third, EPA failed to show an independent basis for invoking the "one-step-at-a-time" doctrine when the grounds for administrative necessity and *de minimis* exemptions are lacking.

For these reasons, the Biomass Exemption is "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law; [and] … in excess of statutory … authority, or limitation." 42 U.S.C. § 7607(d)(9)(A), (C). It must be vacated and remanded.

STANDING

Petitioners have standing to challenge EPA's Biomass Exemption because their members' health, recreational, and aesthetic interests are harmed by the additional air pollution, forest degradation, and harm to wildlife that have occurred

and will occur as a result of exempting biomass-burning power plants and industrial facilities from the PSD permit program, and by the loss of procedural opportunities to advocate for strong pollution controls and alternatives to construction of those facilities. These harms are the direct result of EPA's decision to exempt biogenic CO_2 from greenhouse gas permitting, and so reversing the Biomass Exemption would remedy these injuries.

To demonstrate Article III standing, Petitioners must establish that at least one of their members has standing to sue in his or her own right, that Petitioners seek to protect interests that are germane to their organizational purposes, and that the participation of individual members is not needed. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). A member has standing if he or she would suffer an injury-in-fact that is both fairly traceable to EPA's action and redressable by a favorable decision of the court. *Lujan vs. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Petitioners meet these requirements. They are nonprofit organizations whose purposes include protecting public health and the environment from air pollution, including air pollution from biomass-burning facilities, and preventing degradation of forest ecosystems, including deterioration due to the extraction of biomass fuels consumed by such facilities. *See* Siegel Decl. ¶¶ 4, 10-13; Lopez Decl. ¶¶ 4-5; Harwood Decl. ¶¶ 3, 9-11; Houston Decl. ¶ 6; Reed Decl. ¶¶ 5, 9-11; Quaranda

Decl. ¶ 2; Davis Decl. ¶¶ 4-5; Hitner Decl. ¶¶ 5-6. Petitioners have associational standing on behalf of their members who have been, and will continue to be, injured by EPA's action as explained below. The facts supporting these injuries, their traceability to EPA's Exemption, and their redressability by reversing that Exemption are evident in the record of this rulemaking and in the declarations submitted with this brief.

Biomass combustion results in harmful air pollutants such as CO_2, particulate matter (PM), nitrogen oxides (NOx). While the former contributes to climate change, the latter two are associated with a host of respiratory and cardiac problems. *See* Sahu Decl. ¶ D.1. In addition, increased demand for biomass feedstocks will contribute to an increased pressure for harvesting, including logging and even clearcutting. *See* Booth Decl. ¶¶ 16 and 32; Plantinga Decl. ¶ 7.[6] This increased logging is reasonably expected to adversely affect forest habitat and other forest-related environmental values, Booth Decl. ¶ 17, as well as to increase

[6] *See also* Dogwood Alliance Comments (EPA-HQ-OAR-2011-0083-0119) ("Dogwood Comments") at 2 (JA ___) (logging rates in the Southeastern United States could double in response to increased demand for biomass fuel) and 4 (JA ___ and ___); Natural Resources Defense Council (EPA-HQ-2011-0083-0104) ("NRDC Comments") at 19-23 (JA __-___) and EPA-HQ-OAR-2011-0083-0104 at 19-23 (JA ___-___) and The Wilderness Society Comments (EPA-HQ-OAR-2011-0083-0065) at 2 (JA ___); Wild Earth Guardians Comments (EPA-HQ-OAR-2011-0083-0131) at 1-2 (JA ___-___) (Industry information and studies based on U.S. Forest Service data similarly show that logging residues are insufficient to supply proposed biomass facilities in other regions across the country – necessitating an increase in whole-tree logging).

atmospheric CO_2, *id.* ¶¶ 20-30. Both air pollution and forest harms will increase as a result of exempting biomass-burning facilities from PSD permitting.

As explained above, all new or modified major emitting facilities must obtain preconstruction permits that comply with the PSD program's BACT and public participation requirements. If a biomass plant is a major emitting facility because of its CO_2 emissions, it must comply with BACT for each other regulated pollutant, including $PM_{2.5}$, and NO_x, that it has the potential to emit above EPA-established significance thresholds. *See* 42 U.S.C. § 7475(a)(4); 40 C.F.R. §§ 51.166(j), 52.21(j); *see also* Sahu Decl. ¶¶ D.2-3 and 8-10. EPA has established significance thresholds of 10 tons per year for fine particulate matter ($PM_{2.5}$) and 40 tons per year for NO_x. *See* 40 C.F.R. §§ 51.166(j)(2), (3), 52.21(j)(2), (3); 51.166(b)(23), 52.21(b)(23). A typical biomass-burning facility emitting sufficient biogenic CO_2 to require a PSD permit under the Tailoring Rule will also emit more than 10 tons per year of $PM_{2.5}$ and 40 tons per year of NO_x, and thus would have required BACT for those two pollutants. *See* Sahu Decl. ¶¶ E.1.i and ii, E.2. Under the Exemption, however, the same facility can be constructed without BACT limits for those two pollutants and others. The additional pollution from such facilities harms Petitioners' members.[7]

[7] Many states also issue permits under state law for new sources that do not require PSD permits. However, such permits generally do not impose emission limits as stringent as BACT. Sahu Decl. ¶ 6. A facility exempted from BACT and other

If a biomass-burning facility requires a PSD permit, it also will be subject to the public participation requirements of Section 165(a)(2), giving Petitioners' members the opportunity to advocate for stringent BACT limits and to press for alternatives. The alternatives analysis is a "distinct" and broader inquiry than whether a particular permit complies with BACT. *See Sierra Club v. EPA*, 499 F.3d 653, 654-55 (7th Cir. 2007). Consideration of the "need" for a facility is a proper part of the alternatives analysis. *In re Prairie State*, PSD Appeal No. 05-05, 13 E.A.D. 1, 31 (EAB 2006). A permitting agency thus may deny a PSD permit on the basis of public input showing the facility is not needed or that any need can be met by a smaller plant, or that there are alternative designs or methods of operation that are better for air quality. *See id*.

A permitting authority also must consider the "environmental … impacts" of control options when determining BACT. *See* Section 169(3), 42 U.S.C. § 7479(3). In the case of a facility intended to burn whole trees, for example, permitting agencies must consider, and members of the public have the opportunity to comment on, adverse environmental impacts to the forests from which the trees will be harvested.

PSD permit requirements under EPA's Biomass Exemption would be allowed to emit more pollution under such a state law permit. That difference in pollution harms Petitioners' members.

By exempting proposed biomass-burning facilities from PSD permit requirements, EPA has deprived Petitioners' members of these procedural opportunities to advocate lack of need for a proposed facility or unacceptable environmental impacts.

Members of Petitioners' organizations live, work, or recreate in the vicinity of specific biomass-burning facilities that were permitted as minor sources but did not commence construction by July 1, 2011,[8] or were proposed after July 1, 2011 and obtained minor source permits in direct reliance on the Biomass Exemption, and so in each case are currently exempt from PSD permit requirements as the result of the Biomass Exemption. A non-exclusive list of such projects is provided in the declaration of expert Ron Sahu. Sahu Decl. ¶¶ E.1 and E.2, Table 1. These members have already been harmed by the loss of procedural opportunities to question the need for the facilities or to advocate for more effective air pollution controls. They will also be harmed by exposure to higher pollution levels if the plants are constructed without BACT. If the Biomass Exemption is reversed, of these facilities, those which have not yet commenced construction will have to

[8] As EPA explained in the Tailoring Rule, PSD permits would be required of facilities that (a) obtained minor source permits prior to July 1, 2011 and (b) would have the potential to emit above the greenhouse gas thresholds for Step 2, but (c) failed to commence construction by that date. 75 Fed. Reg. at 31,594/1-2 (JA ___-___); *see also* 42 U.S.C. §7475(a)(1), (4) (no major emitting facility may construct without a permit that complies with BACT for each pollutant subject to regulation).

comply with PSD permit requirements they previously avoided; even if the plants commence construction under the illegal Exemption, upon a reversal of the Exemption they can be required to source more sustainably grown fuel and/or comply with more stringent limits requiring full operation and maintenance of their pollution control equipment. This will directly redress the harms these members have suffered.[9]

The member declarations demonstrate that specific members are currently living, working, or recreating near these proposed plants and are suffering harms redressable by reversal of the Exemption. *See, e.g.,* B. Laffitte Decl. ¶¶ 8 ("Given that my farm is immediately adjacent to [the proposed Allendale plant], I am extraordinarily concerned that construction of this facility without more effective air pollution control devices will be harmful to my health"), and 10 (if Allendale had gone through PSD, "the plant's air permit would allow the plant to emit less PM, NOx, and CO"); Colacino Decl. ¶¶ 5-7 (lives near the Klamath Falls

[9] These facts demonstrate that Petitioners' members are squarely within the zone of interest protected by the PSD program, which is aimed at reducing air pollution while protecting other environmental values. *See, e.g.,* 42 U.S.C. § 7470 (purpose of Part C is to protect public health and welfare from adverse effects of air pollution); *id.* at § 7479(3) (BACT requires permitting authority to take into account environmental impacts); *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1074-75 (D.C. Cir. 1998) (court must "consider the purposes of the specific statutory provision that is at issue…, read in the context of the statutory scheme as a whole"); *Animal Legal Defense Def. Fund v. Glickman*, 154 F.3d 426, 444 (D.C. Cir. 1998) (zone inquiry is "generous and relatively undemanding").

Bioenergy plant and states that "we believe and fear that [our hiking, dog-walking, and bird-watching] activities will be diminished by the Klamath Falls Bioenergy plant, and that they will no longer be safe and healthy activities if the biomass-burning plant is sited here without stringent controls"; "My wife is prone to asthma, so is especially affected by air pollution"; "I am concerned about the effects that additional air pollution from the Klamath Falls Bioenergy plant will have on my health…"), 11 (if the Klamath Falls Bioenergy plant had to comply with BACT, "there would be less health-threatening pollution in my community"), and 13 (alternatives such as energy efficiency "would reduce air pollution from burning biomass at the plant, and also from the many trucks that would drive through the community to deliver fuel to the plant."); Ludtke Decl. ¶¶ 5 ("I suffer from asthma. My husband uses an inhaler while exercising due to reactive lung tissue…. [M]y husband and I live approximately 2 miles from [the proposed Concord Biomass Plant], and I am concerned that construction of this facility without the appropriate air pollution control mechanism will be harmful to my and my husband's health") and 10-12 ("I am familiar with air pollution issues because I, and other members of my family, have engaged in endurance sporting activities for 30 years or more"; "my husband, daughter, and I all suffer from impaired respiratory function that will be exacerbated by additional air pollution from this

plant."); *see also* Booher Decl. ¶¶ 7, 10-15 (harms from the Wadley plant); Govus Decl. ¶¶ 5, 16-20.

The declaration of expert Ron Sahu demonstrates that the exemption from BACT requirements deprives Petitioners' members of the benefits of stringent BACT limits, notably for harmful particulate matter and nitrogen oxides, Sahu Decl. ¶¶ D.1 (health effects of air pollutants) and E.1-E.2 (describing lower limits for biomass power plants permitted as minor sources that would likely result from PSD permitting), which will result in their exposure to higher levels of harmful pollution and restrictions on their activities.

The Exemption also harms members who recreate in or enjoy the forests from which fuel for the facilities is harvested, as they are deprived of the opportunity to raise concerns about impacts on forests and the opportunity to mitigate those impacts through alternatives or BACT. Colacino Decl. ¶¶ 5 (describing hiking in Winema National Forest near Klamath Falls) and 8 ("I also am concerned that the Klamath Falls Bioenergy Plant will harm the forests and wildlife areas that my wife and I use and enjoy" because the plant intends to source woody biomass from nearby public lands); Nowicki Decl. ¶¶ 11-17 (exemption rule will increase demand for biomass fuels from plants in Amador, Calaveras and El Dorado Counties, resulting in more intensive logging and harm to forest habitat and wildlife in Eldorado, Tahoe, and Stanislaus National Forests where he

recreates); *see also* Booth Decl. ¶¶ 17-19 (exemption rule will increase demand for biomass fuels, resulting in more intensive logging and harm to forest habitat and wildlife); Plantinga Decl. ¶¶ 5-7 (exemption will result in decreased costs of sourcing fuel from whole trees, which in turn will result in trees being harvested earlier than without the Exemption). In particular, the Exemption prevents Petitioners' members from seeking CO_2 BACT limits that restrict the plants to combusting only sustainably harvested biomass feedstocks with low lifecycle carbon emissions, instead of burning fuel from whole trees. *See* Colacino Decl. ¶ 12 (if the Klamath Falls plant had to comply with BACT for CO_2, it might have to comply with a "requirement to burn only more sustainably grown fuel from sources other than the forests that I and my wife use and enjoy.")

These injuries are concrete and actual or imminent: the Biomass Exemption has already allowed proposed biomass-burning facilities to avoid the public process for major sources and, if unremedied, will allow the facilities to be constructed and operated (a) emitting higher levels of air pollution to which nearby members will be exposed, and (b) running on fuels that degrade forests that members use and enjoy. These injuries are fairly traceable to EPA's Exemption. Were it not for the Exemption, these plants would be subject to BACT and the analysis of needs and alternatives. These injuries can be reduced, and are therefore redressable, by vacating or remanding the Exemption.

ARGUMENT

I. STANDARD OF REVIEW

Under section 307(d)(9) of the Clean Air Act, this Court may reverse EPA's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 42 U.S.C. § 7607(d)(9)(A), (C).

II. THE ADMINISTRATIVE NECESSITY DOCTRINE DOES NOT SUPPORT THE BIOMASS EXEMPTION

To justify the three-year Biomass Exemption, EPA asserted that it was necessary to take a "step back" from the Tailoring Rule because considering biogenic CO_2 emissions under that rule had proven to be more "complex[ ]" and "uncertain[ ]" than anticipated. 76 Fed. Reg. at 43,496/1-3 (JA ___). But the "administrative necessity" doctrine imposes a heavy burden on EPA. It must show that complying with the statute is literally *impossible*, not merely complicated. EPA failed to carry its burden of showing that the Tailoring Rule created "impossible" burdens for permitting agencies addressing facilities emitting biogenic CO_2. Further, the "administrative necessity" doctrine prohibits an agency from carving out an exemption any wider than needed to resolve the asserted impossibility. Even if EPA had demonstrated that meeting the otherwise applicable statutory requirements was an impossibility, the exemption it created was far broader than necessary to address the issue.

A. The Administrative Necessity Doctrine Allows Departure From Statutory Commands Only Under Very Narrow Circumstances

Categorical exemptions from express statutory requirements on grounds of "administrative necessity" are disfavored. *Ala. Power*, 636 F.2d at 358. This Court has emphasized that EPA bears a "heavy burden" to demonstrate administrative "impossibility," lest government officials "seize on a remedy made available for extreme illness and promote it into the daily bread of convenience." *Id.* at 359; *see also Sierra Club v. EPA*, 719 F.2d 436, 462-63 (D.C. Cir. 1983) (agency must make a rigorous showing of administrative impossibility).

This Court noted in *Alabama Power* that courts have upheld "streamlined" procedures only where strict statutory compliance "would, as a practical matter, *prevent* the agency from carrying out the mission assigned to it by Congress," or "when practical considerations make it *impossible* for the agency to carry out its mandate." 636 F.2d at 358-359 (emphasis added). The Court also emphasized that "there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits." *Id.* at 357.

Later decisions have confirmed the extremely limited scope of "administrative necessity" exemptions and the heavy burden EPA bears. In *Environmental Defense Fund v. EPA*, the agency failed to show that it "[could not] carry out" relevant "statutory commands" to regulate an entire class of sources of

polychlorinated biphenyls, and thus could not sustain an exemption for low concentrations on "administrative necessity" grounds. 636 F.2d 1267, 1283 (D.C. Cir. 1980); *see also Sierra Club v. EPA*, 719 F.2d at 462-63 (predictions that plume rise determinations would be "difficult" and fell "far short"). Moreover, the doctrine does not allow an agency to deviate from the statute any more than the minimum extent necessary. *See, e.g., Pub. Citizen v. FTC,* 869 F.2d 1541, 1556 (D.C. Cir. 1998) (administrative necessity doctrine creates only a "narrow range of inherent discretion in an agency to create case-by-case exceptions in order to come within the practical limits of *feasibility*" (emphasis original)); *see also Mova Pharm. Corp.*, 140 F.3d at 1069 (agency faulted for "embark[ing] upon an adventurous transplant operation in response to blemishes in the statute that could have been alleviated with more modest corrective surgery").

EPA has entirely failed either to carry its initial burden to show administrative impossibility or to fashion the narrowest exemption necessary to preserve the statute's administrability.

B. EPA Failed to Demonstrate that There Are Impossible Burdens Associated With Regulating Biogenic CO_2 Under the Tailoring Rule

EPA failed to show that treating facilities emitting biogenic CO_2 just like other CO_2-emitting sources under the Tailoring Rule created "impossible" burdens for permitting agencies. While claiming that complexity and uncertainty associated with accounting for lifecycle CO_2 emissions from biomass fuels would

"entail extensive workload requirements by many of the permitting authorities," 76 Fed. Reg. at 43,496/1 (JA ___), EPA did not specify *where exactly* in the permitting process the feared complexity and uncertainty would come into play. Nevertheless, the Agency promulgated a broad exemption from the phrase "subject to regulation," affecting PSD applicability (decisions about which sources required permits) for plants burning all kinds of biomass. This runs counter to both the Tailoring Rule and 30 years of practice in implementing the PSD program, under which applicability decisions are made strictly on the basis of a source's own emissions and without regard to the lifecycle emissions of its fuel.

EPA also noted in the Tailoring Rule that it believed that for sources burning biomass "there is flexibility to apply the existing regulations and policies regarding BACT in ways that take into account their lifecycle effects on GHG concentrations." 75 Fed. Reg. 31,591/2 (JA ___). Yet in the Biomass Exemption EPA now backs away even from this alternative approach in favor of a broad exemption from PSD applicability.

EPA's argument boils down to an assertion that regulating sources of biogenic CO_2 emissions, including having to make BACT determinations taking into account lifecycle fuel characteristics would paralyze the permitting agencies. The record, however, severely undercuts EPA's contentions. A number of state permitting agencies – the very permitting authorities EPA wishes to spare from

paralysis – said in comments that they expected only a small number of new and modified biogenic CO_2 sources to require PSD permits under the Tailoring Rule, and that they could handle the load. Other state agencies offered no projections of the number of such permits they anticipated or reasons why they could not manage. *See supra* at 15-16. No state agency asserted that it faced an impossible task in considering plants over the Tailoring Rule thresholds with biogenic emissions.

Mere assertions that the burden of permitting biogenic CO_2 sources has increased are patently insufficient to establish administrative impossibility. *Sierra Club*, 719 F.2d at 462-63; *Envtl. Def. Fund*, 636 F.2d at 1283. A rational assessment of that burden must address two components: How difficult would the required BACT determinations be, were a PSD permit required, and how many such determinations must be made. EPA provided no data on either component. EPA did not quantify its statements about the difficulty of making individual BACT determinations for biogenic CO_2 emissions, or explain how and why this changed between the Tailoring Rule and the Biomass Exemption. Nor did EPA address whether the number of biomass sources presenting themselves for permitting had increased or decreased. Without such information, EPA could make no rational assessment of the overall burden, let alone demonstrate

impossibility. Without such analysis, there is no record showing that proceeding under the Tailoring Rule approach would result in "impossible" burdens.

EPA's thin factual assertions in this rulemaking concerning the burden of permitting biomass-burning sources stand in stark contrast to the agency's robust showing in the Tailoring Rule regarding the burdens of permitting tens of thousands – or even millions – of additional sources. *See* Final Tailoring Rule, 75 Fed. Reg. 31,534/3-41/2 (detailed, quantitative examination of the number of new sources, workload hours, and dollar costs associated with immediately requiring PSD and Title V permits for all greenhouse gas sources above statutory thresholds, and for less inclusive alternatives) (JA ___-___). Likewise, EPA's showing here is a far cry from the "thousands" of case-by-case determinations that the *Alabama Power* Court found persuasive in backing up a claim of administrative necessity. 636 F.2d. at 358 (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968)).

C. EPA Failed to Justify Rejecting the Narrower Alternative of Ignoring Lifecycle Factors at the BACT Stage During the Three-Year Exemption Period

Even if EPA had validly established the administrative impossibility of making BACT determinations for biogenic CO_2 emissions sources under the original Tailoring Rule, the agency would not have been justified in issuing a blanket exemption that excused all biogenic CO_2 emissions from counting towards

permit applicability. As noted above, the administrative necessity doctrine does not allow agencies to hack out broad exemptions from statutory commands but rather tolerates deviations from the statute only to the extent necessary to avoid the identified administrative impossibility. *See Pub. Citizen v. FTC*, 869 F.2d at 1556. Here, EPA acknowledged that it could have resolved any administrative overload simply by carrying out PSD and Title V permitting for biomass-burning sources "without making any effort to take into account net carbon cycle impacts" at either the applicability or BACT stages. 76 Fed. Reg. 43,496/3 (JA at ___).

The agency offered no legally adequate reason for rejecting this option. EPA said only that "this [alternative] could result in regulation of sources with trivial or positive impacts on the net carbon cycle" during EPA's three-year analytical period. *Id.* There is no case law allowing EPA to upgrade a weak showing of administrative burden into a demonstration of impossibility by claiming that some sources – even though administratively feasible to cover – may in the end have *de minimis* impacts. In other words, EPA hacked a *total* exemption from the Act because it feared that *some* regulation under this alternative might have little benefit – a cost-benefit approach this Court has expressly prohibited. *Pub. Citizen*, 869 F.2d at 1556.

Moreover, EPA did not even consider the competing evil of its sweeping categorical exemption – namely, that it gives complete regulatory immunity to *all*

biogenic CO_2 sources, including those with *adverse* impacts on the net carbon cycle. Nowhere did EPA provide factual support for its assertions that requiring PSD permits for some potentially trivial net CO_2 emitters would be more harmful than exempting biomass-burning sources that in fact increase atmospheric carbon pollution. Nor did EPA assert that there is any statutory barrier to the narrow option of ignoring lifecycle factors in the PSD process during the three-year period. Absent a statutory conflict, EPA lacked authority to reject the narrower statutory deviation in favor of the broader one that EPA selected.

The Biomass Exemption excuses *all* biogenic CO_2 sources from PSD permitting in order to avoid even potential regulation of some as-yet-undetermined class of sources with speculatively "trivial" effects. This is even more egregious than the Federal Trade Commission's overbroad exemption of all promotional goods from the requirement to carry tobacco warning labels, which this Court struck down in *Public Citizen* because it was not tailored to the few promotional goods the agency had shown were too small to bear a warning, but rather extended to *all* such items no matter their size. 869 F.2d at 1556. The administrative necessity doctrine does not authorize the Biomass Exemption, and the Court must vacate it.

III. THE *DE MINIMIS* DOCTRINE DOES NOT SUPPORT THE BIOMASS EXEMPTION

In addition to relying on administrative necessity, EPA also makes frequent reference to a second last-resort doctrine, the *de minimis* doctrine. Making sense of the agency's jumble of statements about the *de minimis* doctrine is no easy task. EPA repeatedly used the phrase *de minimis* to describe a category of emissions it hypothesizes contribute little or no "net" CO_2 to the atmosphere, once off-site sequestration of CO_2 in growing biomass is taken into account. 76 Fed. Reg. 43,498/2-43,499/1 (JA ___–___). As Petitioners show below, however, the Clean Air Act does not authorize EPA to take off-site CO_2 absorption into account in determining whether sources require PSD and Title V permits, and EPA lacks authority to change the statutory framework under color of making a *de minimis* exemption, even on a temporary basis. Moreover, in addition to explaining the three-year exemption for all biogenic CO_2 in the current rule, EPA also presented a *de minimis* rationale to justify future permanent exemptions for some or all biogenic CO_2:

> EPA believes it has the authority to exclude biogenic CO_2 emissions from the PSD and Title V requirements, if scientific analysis supports conclusions about the nature of biogenic CO_2 in question that in turn support such an exclusion; the agency will be using the three-year deferral period to better understand the science associated with biogenic CO_2 emissions and to explore whether or not a permanent exemption is permissible for at least some and perhaps all types of feedstocks.

76 Fed. Reg. 43,498/2 (JA ___).

In this opaque discussion, EPA has left it quite unclear whether it is relying on the *de minimis* doctrine to support the present Biomass Exemption, or whether it is only advertising that doctrine as the basis for a future rulemaking. If the Court finds that EPA did not rely on the *de minimis* doctrine in making the present exemption, then it need not determine in this case the limits on EPA's authority to make future exemptions. If, however, the Court finds that EPA did rely on the *de minimis* doctrine to support the present Exemption, then the Court must decide now whether EPA has legal authority to do so, and whether EPA set forth a rational basis on this record for invoking the doctrine.

A. The Clean Air Act Does Not Allow a *De Minimis* Exemption Based on Off-Site CO_2 Absorption

As with exemptions borne of administrative necessity, an agency bears a heavy burden to justify a categorical *de minimis* exemption. "Determination of when matters are truly *de minimis* naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing." *Ala. Power*, 636 F.2d at 360; *see also Sierra Club*, 719 F.2d at 462-463 (agency must make a rigorous showing with regards to the *de minimis* doctrine). A *de minimis* exemption likewise must be no broader than necessary. *New York v. EPA*, 443 F.3d 880, 888 (D.C. Cir. 2006) (an agency relying on the *de minimis* doctrine may "diverge from the plain meaning of a statute only so far as is necessary to avoid its futile application"). *See also Shays v. Fed. Elections*

Comm'n, 414 F.3d 76, 114 (D.C. Cir. 2005) ("situations covered by a *de minimis* exemption must be truly *de minimis*"). As EPA itself acknowledges, 76 Fed. Reg. 43,498/3 (JA ___), the *de minimis* doctrine does not allow EPA to take actions "contrary to the express terms of the statute." *Ober v. Whitman,* 243 F.3d 1190 (9th Cir. 2001); *see also Ohio v. EPA,* 997 F.2d 1520, 1534-35 (D.C. Cir. 1993). The Clean Air Act, as shown below, unambiguously provides that whether a source needs a PSD or Title V permit turns on the amount of regulated pollutants that the source itself emits. Nowhere does EPA identify a gap or ambiguity in the statute that would make it reasonable for the agency to give the source a credit for off-site CO_2 absorption, offsetting its own emissions.

The *de minimis* doctrine does not provide EPA with authority to "exercise a 'revisory power'" to change the statute. *Ala. Power*, 636 F.2d at 361. As this Court has held, the *de minimis* doctrine does not allow EPA to change the statute's meaning based on a view that the costs of carrying out the statute exceed its benefits or based on other factors that are not relevant to the underlying statute. *Id.*

1. The Clean Air Act Does Not Allow Consideration of Off-Site Factors in PSD and Title V Permit Applicability Decisions

Nowhere in the proposed or final rule notices did EPA identify either any statutory language that permits it, under either Step 1 or 2 of *Chevron v. NRDC* to reach beyond the borders of a source to consider lifecycle emissions when determining whether the source requires a PSD or Title V permit. As shown

below, all of the relevant statutory terms – "major emitting facility," "stationary source," "emits," "potential to emit," "any air pollutant," "subject to regulation," "directly," or "from" – require EPA to count the amount of emissions that the source itself emits when determining if a biomass-burning source needs a PSD or Title V permit. 467 U.S. 837 (1984). None of those terms is in any way ambiguous, leaving no room for considering off-site CO_2 absorption in permit applicability decisions. Analysis begins with the term "major emitting facility." Under Section 165(a)(1), "no major emitting facility" may be constructed without a PSD permit. 42 U.S.C. § 7475(a). Section 169(1) defines a "major emitting facility," in relevant part, as a "stationary source[ ] of air pollutants which *emit*[*s*], or [*has*] *the potential to emit*," certain amounts of any air pollutant "*from*" the source. 42 U.S.C. § 7479(1) (emphasis added). The term "stationary source" itself is defined in Section 111(a)(3) as "any building, structure, facility, or installation which *emits* or *may emit* any air pollutant." 42 U.S.C. § 7411(a)(3) (emphasis added). These terms do not admit of the far-ranging inquiry into off-site uptake of CO_2 invoked by EPA.

Both this Court and the Supreme Court have held that EPA may define "stationary source" and "major emitting facility" as broadly as an industrial plant as a whole, defined as a set of geographically contiguous or adjacent facilities that are under common ownership and control. *See Ala. Power,* 636 F.2d at 396

("facility" and "installation" may be defined "broadly enough to encompass an entire plant."); *Chevron*, 467 U.S. at 861-62 (same for "building, structure, facility, or installation"). Thus, the statutory terms permit EPA or state agencies to count the contemporaneous emission increases and decreases within a given industrial plant when determining, on net, whether a construction project has caused a sufficient emissions increase to trigger the requirement to obtain a PSD permit. But nothing in these statutory terms, or the Courts' decisions, allows EPA to stretch the maximum geographic ambit of "major emitting facility" to reach sites far distant from the facility in question, let alone under the ownership and control of other entities.

The same analysis holds for Title V operating permits. Under Section 502(a), each "major stationary source" requires an operating permit. 42 U.S.C. § 7661a(a). "Major stationary source" is defined in Section 302(j) as "any stationary facility or source of air pollutants which directly emits, or has the potential to emit" specified levels of "any pollutant." 42 U.S.C. § 7602(j).

EPA has never before asserted authority for sources to "net out" of PSD or Title V permitting by taking into account distant, off-site, and later emissions decreases, let alone by taking into account distant off-site CO_2 absorption from the atmosphere. To the contrary, EPA has long held that "secondary emissions" – "emissions which occur as a result of … the operation of a major stationary source

or modification, but *do not come from the major stationary source or major modification itself*" – "do not count in determining the potential to emit of a stationary source." *See* 40 C.F.R. § 51.166(b)(4), (18) (emphasis added). Whether they increase or decrease, these distant emissions "occur[ing] as result of" the source do not count in determining whether the source needs, or does not need, a permit. *Id.* § 51.166(b)(18). It would be an even greater stretch to count CO_2 absorption during the growth of trees or crops on wholly separate and distant sites, owned or operated by unrelated entities, when determining how much pollution a biomass-burning source emits or has the potential to emit.

The terms "emit" and "potential to emit" are also equally clear. "Emit" means "to send forth; discharge" or "give forth or release." *Emit Definition*, Dictionary.com, http://dictionary.reference.com/browse/emit?s=t (last visited Mar. 14, 2012). "Potential to emit" means a source's theoretical maximum emissions "under its physical and operational design." *See, e.g.,* 40 C.F.R. § 51.166(b)(4). The plain meaning of "emit" or "potential to emit" does not encompass anything off-site. There certainly is no ambiguity that allows for reasonably interpreting the terms to encompass carbon absorption during plant growth extrinsic to the emitting source.

EPA's final rule implements the Biomass Exemption by excluding CO_2 emissions resulting from the combustion of any type of biomass from the mass of

the greenhouse gas emissions that must be tallied to determine PSD applicability, so that such "biogenic CO_2" is excluded from the statutory phrase "any air pollutant subject to regulation." *See, e.g.*, *Id*. § 51.166(b)(48)(ii)(a). But that phrase's component terms do not allow such an interpretation. The Supreme Court decided in *Massachusetts v. EPA* that CO_2 and other greenhouse gases are unambiguously "air pollutants." 549 U.S. at 528-29, 532. And as EPA itself recognizes, greenhouse gases (including CO_2) became a pollutant "subject to regulation" for PSD permitting purposes at the very latest when EPA's motor vehicle standards took effect in January 2011. 75 Fed. Reg. 17,004 (Apr. 2, 2010)(JA ___).

As EPA acknowledged in the proposal, "since the relevant provisions of the Act apply to 'any air pollutant' or any 'air pollutant subject to regulation,' the terms of the [Act] suggest that the PSD and Title V requirements should apply to CO_2 emissions from bioenergy or other biogenic sources in the same manner as they apply to emissions of CO_2 from any other type of source, since such emissions are constituents of the regulated pollutant [greenhouse gases]." 76 Fed. Reg. at 15,260/3 (JA ___). In fact, the unambiguous statutory terms do more than "suggest" this result; they require it.

The limitations in the terms in Sections 169, 165, and 502 become more evident when looking at other provisions of the Act. When Congress has intended

EPA to take "lifecycle greenhouse gas emissions" into account in the Clean Air Act, it has provided so expressly. The renewable motor fuels program in Section 211(o) expressly directs the Administrator to ensure that the "lifecycle greenhouse gas emissions" associated with various renewable motor fuels will be equal to, or less than, the "baseline lifecycle greenhouse gas emissions" of conventional petroleum-based fuels. *See* Section 211(o), 42 U.S.C. § 7545(o). There is nothing like this authority to take lifecycle emissions into account in the Act's PSD or Title V provisions for stationary sources.

Similarly, Congress was explicit when it wished EPA to take into account off-site emissions decreases in stationary source permitting decisions. Section 173 of the Act provides that to obtain a permit to construct in a nonattainment area (an area where pollutant concentrations already exceed a national ambient air quality standard), a new or modified major stationary source must obtain emission reduction offsets, which the statute expressly provides may come from *other sources* in the same region. *See* 42 U.S.C. § 7503(a)(1)(A) (source must obtain "sufficient offsetting emissions reductions … such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source[,] will be sufficiently less than total emissions from existing sources … so as to represent … reasonable further progress").

In sum, there is no statutory authority and no statutory ambiguity or gap that allows consideration of lifecycle CO_2 emissions in PSD and Title V permit applicability determinations.

2. The *De Minimis* Doctrine Does Not Allow EPA to Introduce Legislatively Excluded Factors into Permit Applicability Decisions

As noted above, the *de minimis* doctrine is not a roving license to consider factors that are irrelevant under the terms of the statute. At most, the *de minimis* doctrine allows EPA to move away from the statutory terms only when full compliance with them would produce nothing but trivial benefits. For example, *Alabama Power* concluded that Section 165 by its terms required EPA to issue permits for modifications that resulted in *any* emissions increase from a source. The Court then held that EPA could exclude emissions increases so small that regulating them would "yield a gain of trivial or no value." *Ala. Power,* 636 F.2d at 361. But the Court also made clear that EPA may not "exercise a 'revisory power'" to change what an "emissions increase" means. *Id.* Thus, while EPA may treat very small emissions increases from a source itself as *de minimis*, it has no authority to excuse the source's own substantial emissions increases because of off-site emissions decreases or off-site CO_2 absorption. In short, the *de minimis* doctrine does not allow EPA to change what the statute tells it to measure in the course of determining whether the amount emitted is *de minimis.*

Indeed, using the *de minimis* doctrine as EPA does here makes a mockery of the doctrine itself. The doctrine exists to permit agencies to ignore genuine trifles. But here EPA claimed authority to *fabricate* "net trifles" by pairing very large source-specific emissions increases with hypothesized major offsets in far distant forests or fields that might occur, if at all, at some other time. Creating a huge loophole on that basis is well beyond the limited exemption that this Court recognized in *Alabama Power.* .

B. EPA Has No Record Support for a Categorical *De Minimis* Exemption for Biogenic CO_2 Emissions.

EPA's record simply does not support reliance on the *de minimis* doctrine to create a categorical exemption for all biogenic CO_2. First, EPA cannot reasonably base a *current* categorical exemption on the possibility that a *future* analysis and a future rulemaking may provide the factual support for it. Second, like the agency's overbroad administrative necessity rationale, EPA cannot base an exemption for *all* biogenic CO_2 emissions on the possibility that EPA may eventually decide that *some* such emissions are *de minimis.* Third, EPA utterly neglected other statutorily relevant effects of the exemption it created, including criteria pollutant emissions increases and forest harms.

1. <u>EPA May Not Base an Exemption on Speculative Future Fact-Finding About Lifecycle CO_2 Emissions</u>

Even assuming it had authority to do so, EPA has failed to show that the benefits of requiring biomass-burning sources to obtain PSD and Title V permits are trivial. Instead of a demonstration of present facts, EPA offered only faint-hearted speculation that future analysis may show some biomass feedstocks may – or may not – prove to yield trivial benefits. EPA "*believe[s]* that it is *conceivable* that as a result of the scientific examination of biogenic CO_2 emissions, we *could* conclude that the net carbon cycle impact for *some* biomass feedstocks is trivial, negative, or positive." 76 Fed. Reg. at 43,496/3 (JA ___) (emphasis added). But, the *de minimis* doctrine does not allow EPA to make an exemption in advance of demonstrating the basis for it. *See NRDC v. EPA*, 966 F.2d 1292, 1306 (9th Cir. 1992) ("Because of the lack of data, we cannot know whether [EPA's exemption] will indeed have only a *de minimis* effect.").

2. EPA Failed to Tailor its Biogenic CO_2 Exemption as Narrowly as Possible

Further, EPA lacks authority to exempt *all* biomass feedstocks now on the basis of future scientific analysis and a subsequent rulemaking that it speculates may show trivial regulatory benefits for *some* such feedstocks. 76 Fed. Reg. at 43,496/3, 43,498/3-43,499/1-2 (JA ___, ___-___). The *de minimis* doctrine requires EPA to demonstrate that trivial benefits attend the entire category being exempted, not just part of that category. An exemption may not be any broader than needed to avoid futile regulation. *See New York*, 443 F.3d at 888. Far from

tailoring the Biomass Exemption as narrowly as possible, the agency extended its breadth as far as possible. *See* 76 Fed. Reg. at 43,493/1 (defining "biogenic CO_2 emissions" as including those from "combustion or decomposition" of all "biologically based materials other than fossil fuels and mineral sources of carbon," including the "biological fraction" of tires and other solid wastes) (JA ___). EPA acknowledged that different types of biomass have very different lifecycle carbon profiles. Some feedstock types, the agency asserted, may later be shown to have "a negligible impact on the carbon cycle." 76 Fed. Reg. at 15,261/2 (JA ___). Other feedstock types, the record shows, remain net CO_2 emitters over very long time periods – decades or more. *See supra* 15. And for some types – for example, because of the loss of carbon stored in soils converted from forest to agriculture, or simply clear cut – re-growth may never fully recapture the emissions lost to the atmosphere, keeping them from being carbon neutral over any timeframe. CBD Comments at 16, 24-25 (JA __, ___-___); Wild Virginia, et al. Comments (EPA-HQ-OAR-2010-0560-0455) at 18 (JA ___).[10] And, as the agency

[10] *See also* Booth Decl. ¶¶ 17, 19, and 26 (citing Michael Ryan, et al., *A Synthesis of the Science on Forests and Carbon for U.S. Forests,* Ecological Society of America: Issues in Ecology, Report No. 13 (Spring 2010) at 7). These studies were among many submitted in response to EPA's "Call for Information on Greenhouse Gas Emissions Associated with Bioenergy and Other Biogenic Sources," 75 Fed. Reg. 41,173 (July 15, 2010) ("CFI"), Docket No. EPA-HQ-OAR-2010-0560. This information has been on record before the Agency at least since the Fall of 2010, and has been incorporated into the record for this proceeding. *See* Incorporation by Reference (EPA-HQ-OAR-2011-0083-0003) (JA ___).

also stated: "[t]he possibility also remains that ... the utilization of some biomass feedstocks for bioenergy production will have a significant impact on the net carbon cycle, making application of the PSD program requirements necessary to fulfill congressional intent." 76 Fed. Reg. at 43,499/1-2 (JA ___).

Moreover, the record demonstrates that for the same usable energy output (e.g., megawatt-hours of electricity), the *direct* emissions of CO_2 from combusting at least some forms of biomass are greater than CO_2 emissions from burning fossil fuels. Some biomass fuels burn less efficiently than fossil fuels because they contain more moisture, and energy must be expended evaporating that water. For example, the record reveals that a source burning chipped-up whole trees and residues produces almost four times more CO_2 per megawatt-hour of electricity than a comparably sized natural gas plant, and twice the CO_2 emissions per megawatt-hour of a comparably sized coal plant. *See* CBD Comments at.[11]

In comments on the proposed three-year exemption, certain petitioners reminded EPA of its duty to set the narrowest possible exemptions, and demanded that EPA restrict any exemption to only a subcategory of biomass feedstocks that the agency could then demonstrate has clearly trivial carbon cycle impacts. *See,*

[11] *See, e.g.,* Clean Air Task Force Comments, et al. on CFI (CFI Docket Nos. EPA-HQ-OAR-2010-0560-0066.2, EPA-HQ-OAR-2010-0560-0157.1, and EPA-HQ-OAR-2010-0560-0564432.1) (comment submittals covering recent peer reviewed studies demonstrating that all biomass does not provide carbon benefits, particularly in the near term) (JA __).

e.g., NRDC Comments at 23 (JA __) (noting that only "biomass feedstocks that will not add to net carbon emissions going forward from the present time," could be the subject of a current *de minimis* exemption).

In short, the record demonstrates, and EPA acknowledged, that not all biomass energy facilities produce trivial or inconsequential CO_2 emissions on a net lifecycle basis. Thus even if some facility-fuel pairings were eventually shown to be carbon neutral, EPA's record would still not support a three-year *de minimis* exemption from PSD permitting for *all* sources of biogenic CO_2 emissions. This situation is in complete contrast to *Ohio v. EPA*, a CERCLA case cited by EPA to support the Exemption. *See* 76 Fed. Reg. 43,498/3 (JA ___).

In *Ohio*, the agency could claim, on the basis of detailed studies, that regulating would mean reviewing sites where as little as "a single molecule of hazardous material" remained. 997 F. 2d at 1534. Here, in contrast, EPA has only just begun studying the issue, and admits the distinct possibility that the effect of exempting all major sources of biomass CO_2 now will be to exempt sources whose CO_2 emissions actually are significant on a life-cycle basis. 76 Fed. Reg. at 43,499/1-2 (JA ___). Further, in *Ohio* EPA did not create an exemption for all sites based on findings that only some had *de minimis* quantities of hazardous materials remaining. Rather, the rule upheld in *Ohio* exempted only those few sites where the remaining amount of hazardous material was deemed "safe" under

health-based standards, i.e., the site was fit for unlimited and unrestricted public use. 997 F.2d at 1534. Instead of supporting the Biomass Exception, *Ohio* shows how thoroughly short of the *de minimis* mark it falls.

3. EPA Did Not Demonstrate That Other Impacts Will be *De Minimis*

As badly as EPA failed to show that the CO_2 impacts of the Biomass Exemption will be *de minimis*, it failed even to assess the impact on emissions of *criteria* pollutants from biomass-burning plants. The record before the agency demonstrates that sources burning some biomass fuels produce not only more CO_2 per megawatt-hour than sources burning coal or natural gas, but also more criteria pollutants – including $PM_{2.5}$, and NO_x, and carbon monoxide (CO). Partnership for Policy Integrity Comments (EPA-HQ-OAR-2011-0083-0357) at slides 40-44 (JA ___-___). As explained above, when a biomass-burning facility is subject to PSD and requires a permit because of its CO_2 emissions, then it must also comply with BACT for its other regulated pollutants. *See supra* 3. But under the Exemption, these facilities can be constructed and operated for their entire lifetimes without meeting BACT for those pollutants.

Additionally, under Section 165(a)(3) and (a)(5), these facilities would have to meet other PSD requirements, including a demonstration that their criteria pollutant emissions will not cause or contribute to exceedances of relevant health-based national ambient air quality standards (NAAQS) or the maximum allowable

pollution increases ("increments") allowed in PSD areas. 42 U.S.C. § 7475(a)(3), (5). Under the Exemption, however, biomass-burning facilities with significant criteria pollutant emissions can be constructed without making these health protection demonstrations.

EPA had ample evidence that the health risks – including risks of early death – from these extra $PM_{2.5}$ and NO_x emissions are not *de minimis*. *See, e.g.*, Dogwood Comments at 3 (JA ___).[12] EPA failed even to assert, let alone demonstrate, that the consequences of these emissions will be trivial or of no benefit. EPA simply dismissed these concerns about health impacts in some instances as mere "form letters" in "general opposition" to EPA's rule and therefore not meriting detailed response. *See generally*, Response to Comments (EPA-HQ-OAR-2011-0083-0359) (RTC) at 146,[13] 178,[14] and Appendix A at A-9 and Appendix B (JA __, ___, and __ and ____).

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[12] *See also* Dr. William Blackley Comments (EPA-HQ-OAR-2011-0352)April 30, 2011 (noting serious concerns about the increased health risks of particulate matter associated with biomass combustion) (JA ___), and CBD Comments at 57 (EPA's proposal will result in non-trivial increases in conventional air pollution emissions that threaten human health) (JA ___).

[13] Offering no direct response to evidence submitted in CBD Comments that EPA's proposal will result in non-trivial increases in conventional air pollution emissions that threaten human health.

[14] Offering only that EPA is "studying the question" of biogenic CO_2 emissions, in response to Petitioner Dogwood Alliance's concerns about the health impacts of increases in non-CO_2 air pollution as a result of the Exemption.

EPA similarly failed to show that the Biomass Exemption will produce *de minimis* impacts on forest resources. Petitioners Dogwood Alliance and Center for Biological Diversity, et al., pointed out significant risks to forests from biomass-burning facilities constructed or modified during the three-year exemption period. *See* Dogwood Comments at 1-3 (JA ___), CBD Comments at18-22 (JA ___-___). Rather than address these "particular circumstances," in *Alabama Power*, EPA said only that it will "keep [the comments] in mind," and that "the Agency is proceeding as expeditiously as possible." 636 F.2d at 360; RTC at 63, 117-18 (JA ___, ___-___). EPA provided no evidence whatsoever that impacts of the Biomass Exemption on forest resources will be trifling or inconsequential.

IV. THE ONE-STEP-AT-A-TIME DOCTRINE DOES NOT SUPPORT THE BIOMASS EXEMPTION

EPA mistakenly tries to bolster its case for the Biomass Exemption by relying on what it "call[s] the 'one-step-at-a-time' doctrine." 76 Fed. Reg. at 43,494/1 (JA ___); *see also id.* at 43,497/1-43,498/2 (JA ___-___). The agency misconstrues the reach of this doctrine, which applies to how an agency exercises the discretion Congress has conferred. *See, e.g. Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207-08 (D.C. Cir. 1984) (condoning stepwise use of congressionally conferred discretion). The doctrine simply does not give agencies more discretion than that. In the context of the administrative necessity doctrine, and others that authorize agencies to depart from a statute's express terms, one-

step-at-a-time may apply to the way they exercise the limited discretion the departure doctrine allows. The doctrine, however, does not by itself justify exempting otherwise regulated entities from the requirements of a statute. Nor can EPA use this doctrine to expand the limited authority conferred by the administrative necessity and *de minimis* doctrines, without vitiating the strict limits courts have imposed.

The Court has recognized that Congress may write statutes that deal with matters incrementally. *See, e.g., Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955) ("reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"); *see also Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 903 (D.C. Cir. 1999) (this Court noting that "Congress may, of course, approach matters one step at a time"). This Court also has recognized that agencies may regulate incrementally where Congress entrusts an agency with broad authority to exercise its judgment in a given area. *See, e.g. Nat'l Ass'n of Broadcasters*, 740 F.2d at 1207-08 (noting that the challenged agency rules "are not a statutory requirement" and upholding their exemption of one class of businesses against the argument that the agency's rationale applied equally to other, unexempted, businesses); *Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 29, 35 (D.C. Cir. 2002) (reviewing rate setting

required by statute to be "just and reasonable" and finding "the Commission is free to undertake reform one step at a time").

But where a statute, as here, prohibits facilities from constructing or operating without a permit and limits agency discretion to make exemptions based on off-site emission reductions or absorption, the "one-step" doctrine does not by itself create latitude for an agency to diverge from its clear statutory mandate. Here, having failed to offer any positive statutory authority for the Biomass Exemption, or that either the administrative necessity or *de minimis* doctrines warrant exempting biogenic sources wholesale, the agency adds nothing by asserting that it can proceed one-step-at-a-time.

EPA did not show that the Biomass Exemption was an administrative necessity (as it did for the Tailoring Rule) or warranted under the *de minimis* doctrine, and the agency here did not rely on the absurd results doctrine. Thus, there is no basis for proceeding one step at a time. Having failed to identify a legitimate source of discretion for a blanket exemption, EPA cannot rely on the one-step-at-a-time doctrine as authority for the piecemeal exercise of discretion that it does not actually have.

Allowing an agency to use the one-step-at-a-time doctrine this way would largely render the administrative necessity, *de minimis*, and absurd results doctrines dead letters. All three doctrines are tightly circumscribed to ensure that

agencies do not flout congressional direction. If agencies could conjure up discretion to stray from the explicit language of a statute simply by asserting that they were proceeding one step at a time, there would never be any need to prove administrative necessity or the other conditions, and there would be no requirement to tailor the exemption or deviation from statutory text as narrowly as possible.

This rulemaking contrasts sharply with the Tailoring Rule. There EPA applied the one-step-at-a-time doctrine in a manner consistent with the strict limitations of the other doctrines it invoked, namely administrative necessity and absurd results. EPA primarily grounded the Tailoring Rule in those doctrines, making a detailed, record-based analysis of what would constitute the very least amount of non-compliance necessary. *See, e.g., supra* 35 (calculations to assess and alleviate administrative burden). EPA then used the one-step-at-a-time doctrine to buttress its stepwise approach to full implementation, making enforceable commitments to a schedule for continuing to evaluate compliance down to the statutory thresholds. *See, e.g.,* 75 Fed. Reg. at 31,607/1-2 (promulgating new 40 C.F.R § 52.22(b) setting out additional steps toward implementing the statutory thresholds) (JA ___). No comparable record exists here. And with the failure to justify either administrative necessity or *de minimis* regulatory benefits, EPA lacks a basis for invoking the one-step doctrine.

CONCLUSION

Because EPA did not show that the Biomass Exemption was either needed to avoid an impossible administrative burden or would have only trivial effects, and the agency lacked any other authority for the Exemption, the Exemption was not adopted in accordance with law and was in excess of the agency's statutory authority and/or limitations, and should be vacated on that basis.

Respectfully submitted, this 15th Day of March, 2012

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Opening Brief of Petitioners contains 13,576 words, as counted by counsel's word processing system.

DATED: March 15, 2012 SIGNED: /s/ Nathaniel S.W. Lawrence

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Opening Brief of Petitioners** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record who have registered with the Court's CM/ECF system.

DATED: March 15, 2012 SIGNED: __/s/ Nathaniel S.W. Lawrence__
[printed name]