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, et al.,
Respondents.

Petition for Review of Final Action of the U.S. Environmental Protection Agency

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"Proposed Biomass Exemption" or "Proposed Exemption": Deferral for CO_2 Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs; Proposed Rule, 76 Fed. Reg. 15,249 (March 21, 2011).

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

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

Acronyms and Abbreviations:

BACT	Best Available Control Technology
CAA	Clean Air Act
CO_2	Carbon Dioxide
CRR	Coalition for Responsible Regulation
EPA	Environmental Protection Agency
NACWA	National Association of Clean Water Agencies
NAFO	National Alliance of Forest Owners
PSD	Prevention of Significant Deterioration
RTC	Response to Comments

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Opening Brief of Petitioners (Corrected), the Brief of Respondents, and the Brief of Intervenors in Support of Respondents.

INTRODUCTION

EPA has failed to meet the heavy burden required to justify the Biomass Exemption's deviation from the Clean Air Act ("CAA" or "Act"). EPA here affirmatively exempted sources from a self-executing statutory requirement. *See Coal. for Responsible Regulation, Inc. v. EPA*, No. 09-1322 et al., slip op. at 53-54, 77 (D.C. Cir. June 26, 2012) ("*CRR*") (holding that CO_2 became "subject to regulation" for prevention of significant deterioration permitting purposes "by automatic operation of the statute" when EPA's regulation of CO_2 emissions from passenger cars and trucks took effect in January 2011). This deviation from statutory command requires a compelling justification. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979). EPA failed to provide one here.

Contrary to EPA's and Intervenors' assertion, this is not a case where regulations are needed to define and implement a general statutory instruction and where this Court has sometimes allowed a measure of discretion in the staging of agency actions. *Cf., e.g.*, *Bluewater Network v. EPA,* 372 F.3d 404, 412 (D.C. Cir. 2004). EPA's latitude to exempt sources from a self-executing statutory requirement is far more limited (e.g., to conditions of administrative impossibility), and requires a rigorous demonstration that is absent from the Exemption rulemaking and its record. Nor can EPA rescue its Exemption by resort to *post hoc* rationales advanced for the first time in its brief. The Exemption must be vacated.

SUMMARY OF ARGUMENT

EPA and Intervenors do not contest this Court's jurisdiction to review the Exemption, which is inarguably a final rulemaking with permanent, adverse consequences. The Exemption permanently insulates new and modified major sources of biogenic CO_2 that commence construction during the three-year exemption period from otherwise applicable permitting and pollution control requirements. These sources may operate for decades without installing best available control technology ("BACT") and meeting other requirements of the prevention of significant deterioration ("PSD") and Title V permitting processes. These sources can escape permitting permanently even if EPA allows the Exemption to expire at the end of three years. The Exemption is final and ripe for review.

EPA and Intervenors improperly rely on extra-record evidence and *post hoc* rationalizations. Their arguments also fail on the merits. PSD and Title V applicability was triggered "by automatic operation of the statute" when motor vehicle emission standards for greenhouses gases took effect. *CRR*, slip op. at 54, 77. The self-executing character of these requirements fatally undercuts EPA's *post hoc* plea for broad discretion not to "regulate first" while it examines certain technical issues. Because the commencement of PSD permitting requirements is automatic, the statute simply does not give EPA the discretion it claims. Rather,

EPA must shoulder the much heavier burden of producing a compelling justification for the Exemption—a burden the agency failed to meet here. *CRR* also contradicts Intervenors' argument that the Exemption was merely a reconsideration of EPA's supposed "decision" to regulate biogenic CO_2 in the Tailoring Rule. The decision to regulate was made by Congress in the Clean Air Act, not by EPA.

The Exemption therefore falls unless EPA meets the heavy burden necessary to justify deviating from the statute—a burden requiring EPA to depart from the statute no further than necessary to effectuate congressional intent and to move as quickly as possible toward full compliance. *See generally Alabama Power*, 636 F.2d at 359-61; *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). Agreeing at least tacitly, EPA invokes doctrines allowing limited deviation from the statute, but it cannot prevail under any of the theories advanced. Nothing in the record shows that permitting biogenic CO_2 sources that emit more than the Tailoring Rule thresholds is administratively impossible. Moreover, EPA disavows reliance on a *de minimis* rationale and concedes it has no record to support such a theory. The agency's *post hoc* invocation of "absurd results," actually nothing more than the *de minimis* rationale going by another name, similarly lacks support. Finally, the "one-step-at-a-time" doctrine does not independently give EPA discretion to deviate from the statute's self-executing

permitting requirements. The Exemption unjustifiedly contravenes the Clean Air Act and must be vacated.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE EXEMPTION.

The Court has jurisdiction to review the Exemption. Neither EPA nor Intervenors dispute this; rather, they argue only that the Court should not reach the merits of any *future* "permanent exemption." Brief of Respondents ("EPA Br.") at 35-36; Brief of Intervenors in Support of Respondents ("Int. Br.") at 16-21. Petitioners here challenge only EPA's three-year Exemption, not any hypothetical future exemption.

The Exemption is final and reviewable. It permanently excludes the covered biogenic CO_2 sources (those with emissions exceeding Tailoring Rule thresholds) that are constructed or modified during the three-year exemption period from otherwise applicable PSD and Title V permitting requirements, including BACT. 76 Fed. Reg. 43,490, 43,492/3 (Jul. 20, 2011) (JA __); *see Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). As *CRR* confirms, those permitting requirements otherwise would apply to these sources by operation of the statute. *CRR*, slip op. at 53-54, 77. Because PSD requirements apply only to new and modified sources, *see* sections 165(a), 169(2)(C); 42 U.S.C. §§ 7475(a), 7479(2)(C), facilities built during the exemption period may operate for decades without obtaining permits

and meeting pollution control obligations.[1] Exempted facilities—which will emit higher amounts of pollution as a result—are being permitted and constructed now. Opening Brief of Petitioners ("Pet. Br.") at 25-29.

The cases cited by Intervenors on finality (Int. Br. at 18-19) are therefore inapposite. *See, e.g.*, *Am. Elec. Power Co. v. Conn.*, 131 S. Ct. 2527, 2539-40 (2011) (discussing Congress' choice to "entrust[ ] complex balancing to EPA in the first instance" in setting standards of performance under section 111); *Portland Cement Ass'n v. EPA*, 665 F.3d 177 (D.C. Cir. 2011) (finding no final action where EPA was in the process of developing such standards of performance). Nor does this case raise prudential ripeness questions, as Intervenors suggest. Once again, the cases they cite are inapplicable. *See, e.g.*, *Nat'l Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803, 812 (2003) (declining to review rule before it had been applied to a concrete situation, so as to avoid the court becoming entangled in abstract disagreements over policy); *FTC v. Standard Oil Co*., 449 U.S. 232, 241 (1980) (declining to review the agency's issuance of a complaint at an interim step in administrative adjudication); *Tex. Indep. Producers and Royalty Owners Ass'n v. EPA*, 413 F.3d 479, 483 (5th Cir. 2005) (declining to review, at the behest of

[1] Such a source could become subject to permitting and BACT at some later time if it undergoes a major modification, i.e., an emissions-increasing physical or operational change. But the possibility of a future modification is speculative and even then BACT may only reach the modification and any other affected part of the facility. Thus review at that point is no substitute for the front-end permitting of the entire facility that *CRR* recognizes is required by the Act.

industry petitioners, a rule that by its terms excused them from complying until later). The Exemption is final, having effect, and ripe for review.

II. THE CLEAN AIR ACT PRECLUDES CONSIDERATION OF EXTRA-RECORD EVIDENCE.

EPA and Intervenors rely extensively on documents that are not in the administrative record and that were created well after promulgation of the Exemption. *See* EPA Br. at 21-22, 28-32, 51; Int. Br. at 3, 10-14 (citing *inter alia* a *post hoc* "Synthesis," an EPA report proposing a framework for biogenic carbon accounting, a Science Advisory Board report, and EPA's Tailoring Rule "Step 3" proposed rulemaking). *Amicus curiae* National Association of Clean Water Agencies ("NACWA") also cites extra-record materials. But under the CAA, EPA's action must stand or fall on the docket before the agency at the time of the rule's promulgation. *See* § 307(d)(6)(C), (7)(A); 42 U.S.C. § 7607(d)(6)(C); (7)(A); *Am. Petroleum Inst. v. Costle*, 609 F.2d 20, 23-24 (D.C. Cir. 1979). These extra-record materials and the arguments relying on them cannot furnish grounds for upholding the Exemption.

III. EPA HAS FAILED TO JUSTIFY ITS EXEMPTION UNDER THE CLEAN AIR ACT OR ANY DOCTRINE ALLOWING DEVIATIONS FROM THE STATUTE.

A. The Clean Air Act Does Not Leave the Timing of PSD Applicability to EPA's Discretion.

EPA contends it had authority to decide not to "regulate first" pending scientific review of biogenic carbon accounting principles. *See* EPA Br. at 5-6. The statute, however, does not leave the timing of regulation to EPA. This Court in *CRR* confirmed that PSD permitting requirements for CO_2 took effect *automatically* when CO_2 became "subject to regulation." *CRR*, slip op. at 16, 54 (finding EPA's construction "statutorily compelled" and "unambiguously correct"). EPA cannot prevail by claiming it has discretion that this Court has held the statute does not provide.

CRR also fatally undercuts Intervenors' arguments. Intervenors urge that the Exemption reverses a supposed EPA "decision" to regulate biogenic CO_2 in the Tailoring Rule, thereby "restor[ing] the pre-Tailoring Rule status quo" and allowing a "reasonable" delay in regulation so EPA can examine the science.[2] Int.

[2] Intervenors spend the bulk of their brief attacking EPA's supposed "reversal of course" in regulating biogenic CO_2 under the Tailoring Rule, insisting that reconsideration of that aspect of the Tailoring Rule (which EPA granted) was compelled, and essentially rearguing their request for an administrative stay of the Tailoring Rule (which EPA denied). *See* Int. Br. at 22-39. These arguments rest largely on a misinterpretation of EPA's references to the U.S. Greenhouse Gas Inventory; as EPA has explained, such references were never intended to "exempt" biogenic CO_2 from regulation. *See, e.g.*, 76 Fed. Reg. at 43,494/3-95/1 (JA __-__).

Br. at 26-27. But EPA did not decide to regulate CO_2, biogenic or otherwise, in the Tailoring Rule. Congress made that decision in a self-executing statute. Nor did the "pre-Tailoring Rule status quo" exempt biogenic CO_2. Rather, the statute itself *automatically* required PSD permits for *all* CO_2 emissions above the statutory thresholds. *CRR*, slip op. at 77. EPA accurately explained this in denying NAFO's request for an administrative stay of the Tailoring Rule. EPA-HQ-OAR-2011-0083-0008 at 2 (JA __) ("As no exemption for emissions of CO_2 from biomass existed prior to the final [Tailoring Rule], an administrative stay would not result in an exemption from the requirements of PSD and Title V.").

Contrary to Intervenors' suggestion (Int. Br. at 28), Petitioners do not allege that EPA has unreasonably delayed the start of regulation in the absence of a clear statutory duty to act by a certain date. *Cf., e.g., Sierra Club v. Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987) (declining to hold delay in regulation unreasonable where statute did not instruct EPA to regulate or "require EPA even to consider [the] question"). As *CRR* confirms, the permitting requirements took hold automatically. Accordingly, unlike the situation in *Sierra Club v. Thomas*, EPA has a clear statutory duty here, and lacks discretion to delay compliance.

In the unlikely event that any of these arguments survives *CRR*, it does not belong here, but rather in the Tailoring Rule challenge by Intervenors NAFO and American Forest & Paper Association (No. 10-1209; currently held in abeyance).

In a similar vein, Intervenors incorrectly assert that EPA "excluded biomass emissions" from its greenhouse gas Endangerment Finding. Int. Br. at 4. EPA did no such thing; the Endangerment Finding treated all six well-mixed greenhouse gases, including CO_2, as a single pollutant notwithstanding their origins in "different processes" that may "require different control strategies." 74 Fed. Reg. 66,496, 66,541/3 (JA __). It did not even mention "biomass emissions." Moreover, as EPA acknowledged in the Proposed Biomass Exemption, biogenic and fossil CO_2 have exactly the same heat-trapping effect in the atmosphere, 76 Fed. Reg. 15,249, 15,254/1 (JA __), and thus share the characteristics that cause endangerment. This Court has confirmed Congress's intent to cover *any* air pollutant contributing to global warming under the PSD program. *See CRR*, slip op. at 57-59. Intervenors' misreading of the Endangerment Finding, like their misunderstanding of the statute, does nothing to save the Exemption.

B. EPA Has Failed to Demonstrate the Administrative Impossibility of Requiring Large Biogenic CO_2 Sources to Obtain Permits.

1. EPA's Assertions of Administrative Need for the Exemption Lack Record Support.

EPA fails to defend the Biomass Exemption on administrative necessity grounds. EPA Br. at 40-56. An administrative necessity exemption must be backed by a compelling demonstration that statutory compliance is "impossible," not merely difficult. *Sierra Club v. EPA*, 719 F.2d 436, 462-63 (D.C. Cir. 1983);

Envtl. Def. Fund v. EPA, 636 F.2d 1267, 1283 (D.C. Cir. 1980). Here, EPA utterly fails to show that issuing permits to the modest number of large biogenic CO_2 sources would be impossible.

EPA attempts to portray the Exemption as part-and-parcel of the Tailoring Rule, but the Exemption is a separate final action, taken in a separate rulemaking, and is based on a different rationale. The Exemption is premised on the asserted difficulty of permitting sources of a particular kind, in a specific industrial category, while the Tailoring Rule was based solely on the administrative impossibility, at least for an initial period, of permitting the vast number of facilities emitting more than the statutory thresholds irrespective of source type. EPA expressly decided in the Tailoring Rule "to address the need for tailoring through a uniform threshold-based approach, rather than through a collection of various specific exclusions." 75 Fed. Reg. 31,514, 31,526/3-27/1 (JA __-__); *see also id.* at 31,591/1 (JA __) (noting that EPA had no basis for a threshold-based exemption for biogenic CO_2 sources and that EPA did not examine "burdens with respect to specific categories" or "analyze[]the administrative burden of permitting projects that specifically involve biogenic CO_2 emissions").

While EPA is not barred from changing its approach, any new exemption for an industrial category must be made on a record that robustly supports *that* exemption—not on a prior record that by the agency's own assessment did not

support it. At a minimum, a record to support this exemption would have to specify how many above-the-thresholds biogenic CO_2 sources would require permits, and compellingly show why permitting that number would be impossible. *See* Pet. Br. at 34-35. The record here contains nothing of the sort.

What is in the Exemption record undercuts EPA. A number of state permitting agencies commented that they expected only a small number of biogenic CO_2 permit applicants (e.g., "no significant increases or decreases," "one or two" per year, "3 to 5" in power sector over the three-year period), while others declined to speculate.[3] No state demonstrated that it could not handle these modest numbers. *See* Pet. Br. at 15-16.

EPA brushes off the states' comments by claiming, without any evidence, that the states would have said the same thing about *any* industrial category of sources. EPA Br. at 44. This is pure speculation. EPA never asked the states about any other category, and EPA's brief cites no record evidence to demonstrate that permitting agencies would be saddled with overwhelmingly burdensome numbers of biogenic CO_2 sources.

[3] While the number of sources is modest, the burden on persons living near the unpermitted biomass plants built during the exemption period will be significant. Construction of even one or two plants per year will have harmful effects on persons living nearby, in terms of criteria air pollutant emissions that otherwise would have been more strictly limited. And these impacts will persist well after the three-year exemption period, because the sources that escape permitting will be allowed to operate for decades without best available pollution controls. *See* Pet. Br. at 25-29.

Even if the record had shown an impossible burden, EPA would still have had to adopt the narrowest effective solution. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (EPA "may deviate no further from the statute than is needed to protect congressional intent."). There was no need for a broad exemption. As EPA found in the Tailoring Rule, "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. at 31,591/2 (JA __). EPA notes correctly that the statute requires "case-by-case" BACT reviews in which the use of "clean fuels" is a specified control measure, and costs and other environmental impacts (positive or negative) must be evaluated. EPA Br. at 56 (quoting § 169(3), 42 U.S.C. § 7479(3)).

EPA acknowledges that BACT provides an appropriate context for considering whether "use of some biofuels may have significant positive environmental and energy benefits while others may have significant negative impacts." EPA Br. at 56; *see also id.* at 4 (distinguishing, e.g., effects of burning whole trees that take decades to re-grow and re-absorb CO_2 from effects of burning farm wastes that displace fossil fuels and would otherwise quickly decay). The agency claims this exercise would "further encumber" the permitting process. EPA Br. at 56. But showing an "encumbrance" does not demonstrate an impossibility. *See Sierra Club v. EPA*, 719 F.2d at 462-63; *Envtl. Def. Fund v.*

EPA, 636 F.2d at 1283. EPA fails to cite any record evidence, let alone make a compelling demonstration, that permitting agencies could not feasibly evaluate the relative benefits and impacts of different biomass types in BACT determinations. What the record does show is that *none* of the states expecting permit applications claimed that processing them would be impossible.

EPA repeatedly invokes the risk that requiring biogenic CO_2 sources to undergo permitting now may counter-productively deter the use of as-yet-unspecified beneficial types of biomass. But EPA's analysis ignores the countervailing environmental costs of allowing sources burning forms of biomass *known to be detrimental* to bypass the permitting process altogether. The harms produced by an overbroad exemption underscore the need to craft exemptions from statutory requirements as narrowly as possible.

Finally, EPA and Intervenors seek to avoid EPA's burden of justifying an exemption by mischaracterizing the question as when to *start* regulating biomass sources. *See, e.g.,* EPA Br. at 27 ("the prudent course is to . . . not leap to regulation and worry about scientific support later"); Int. Br. at 27-29.[4] As discussed *supra* at 7-8, however, these sources were already regulated by the

[4] EPA has the matter backwards. Its duty under the Clean Air Act is to act in a precautionary manner, not to defer action until it has elusive "certainty." "As we have stated before, 'Awaiting certainty will often allow for only reactive, not preventive, regulation.'" *CRR*, slip op. at 31 (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 25 (D.C. Cir. 1976)).

statute itself. *See CRR*, slip op. at 53-54, 77. The question posed by the Exemption was whether to *stop* regulating them. While this Court has sometimes given agencies leeway on the staging of regulations necessary to initiate sources' emission control obligations under a non-self-executing statutory provision, it is another thing entirely to exempt sources from direct, self-executing statutory prohibitions that have already been triggered. The latter requires a rigorous showing of impossibility that EPA has failed to offer. *Compare, e.g., Bluewater Network v. EPA,* 372 F.3d 404, 412 (D.C. Cir. 2004) (approving two-tiered implementation of statute that requires agency implementing regulations), *with Alabama Power*, 636 F.2d at 359 (finding agency's "burden of justification" is "especially heavy" when seeking "approval of a prospective exemption of certain categories" from the same PSD provision at issue here "based upon the agency's prediction of the difficulties of undertaking regulation").

2. EPA's *Post Hoc* Search for Statutory Authority Is Unavailing.

Petitioners demonstrated that EPA has no statutory authority to look far beyond a facility's borders and decades into the future for offsetting CO_2 absorption when deciding whether a source needs a PSD permit. Pet. Br. at 40-45. In response, EPA purports to find authority in the word "increase." EPA Br. at 47-50. Even if this were not a *post hoc* rationale, as EPA concedes (EPA Br. at 48 n.9), it would fail for two reasons.

First, EPA fails to identify the statutory context. The word "increase" appears in the Clean Air Act's definition of "modification." § 111(a)(4), 42 U.S.C. § 7411(a)(4). That definition unambiguously refers to "increases [in] the amount of any air pollutant *emitted by such source*." *Id.* (emphasis added). Those terms cannot be stretched to include CO_2 absorption occurring outside the boundaries of a "source." Second, the term "increases" appears only in the definition of "modification" and not in section 169(1)'s definition of a "major emitting facility," the term controlling whether a *new* biogenic CO_2 source needs a permit to construct. *See* 42 U.S.C. § 7479(1). Congress therefore left no gap in the Clean Air Act from which the agency can leverage authority to consider distant or delayed CO_2 absorption when determining whether a biomass source has sufficient CO_2 emissions to be a "major emitting facility" or a "major stationary source," and thus needs a PSD or Title V permit.

EPA relies on this Court's holding in *New York v. EPA* that Congress left EPA some discretion concerning the timeframe over which to calculate contemporaneous emissions for netting purposes. EPA Br. at 47-48 (citing 413 F.3d 3, 27 (D.C. Cir. 2005) ("Congress did not specify how to calculate 'increases' in emissions")). But Congress did not leave the same discretion over the *spatial* dimension; the Clean Air Act directs EPA to calculate the increases "emitted by such source." § 111(a)(4), 42 U.S.C. § 7411(a)(4). Even in the temporal

dimension, EPA stretches *New York v. EPA* beyond the breaking point by asserting that the decision provides EPA discretion to counterbalance CO_2 emissions with CO_2 absorption occurring *decades* later—and with no record support for that timeframe, let alone assurance that the regrowth and associated absorption will actually occur as assumed.

C. EPA Has Failed to Justify the Exemption Under the *De Minimis* or Absurd Results Doctrines.

1. EPA Disclaims Reliance on the *De Minimis* Doctrine and Concedes it Lacks a Supporting Record for the Exemption.

Notwithstanding its repetitive reference to *de minimis* principles throughout the proposed and final Exemption preambles, EPA disavows any reliance on the doctrine. EPA Br. at 34-36. Acknowledging "the burden of establishing that a [*de minimis*] exemption is warranted," EPA concedes it has not met this burden here: "*If and when* EPA comes to such a conclusion, it will provide the record to support it." EPA Br. 35 (emphasis in original). In light of EPA's disavowal of the doctrine and its admission that it lacks a supporting record, the Exemption cannot be upheld on *de minimis* grounds.[5]

[5] Only if the Court finds, notwithstanding EPA's disavowal, that the agency relied on the *de minimis* doctrine to justify its *current* action would the Court have occasion to decide whether EPA has met its burden to justify the Exemption on those grounds. Pet. Br. at 38-39. That question would, of course, have to be answered in light of EPA's concession that it lacks a supporting record for a *de minimis* exemption. EPA Br. at 35-36.

EPA nonetheless contends, without any legal support, that *de minimis* principles should be a "factor" in the Court's consideration of EPA's use of *other* doctrines, such as administrative necessity. EPA Br. at 35. EPA cannot have it both ways; after disclaiming reliance on the *de minimis* doctrine and conceding it lacks a supporting record, EPA cannot invoke the same doctrine in watered down form to bolster its otherwise inadequate justifications. No cases allow EPA to transform a weak showing of administrative burden into the required demonstration of impossibility by claiming that *some* of the exempted sources may *later* be found to have only *de minimis* impacts. *See* Pet. Br. at 36.

The administrative record here would not support a *de minimis* exemption in any event. In both its proposed and final Biomass Exemptions, EPA effectively admitted the possibility that certain exempted feedstocks *do* have effects that are not *de minimis*: "the use of whole, standing tress [*sic*], removes a carbon sink that, although replaced with carbon absorbing trees through recognized and even regulated forest management, may take many years or decades to complete such replacement, depending on the type of tree, location and other factors." EPA Br. at 31 (citing RTC at 9, JA __); *see also* 76 Fed. Reg. at 43,498/1, 43,499/1-2 (JA__, __); 76 Fed. Reg. 15,261/3 (JA __) (admitting possibility that some biomass feedstocks "have a significant impact on the net carbon cycle").

Yet EPA indiscriminately extended the Exemption to *all* biomass feedstocks, including whole, standing trees. *See* 76. Fed. Reg. at 43,493/1 (JA __) (excluding emissions from all "biologically-based materials other than fossil fuels and mineral sources of carbon"). The Biomass Exemption thus is grossly overbroad and could not be justified on *de minimis* grounds. *See New York v. EPA*, 443 F.3d 880, 888 (D.C. Cir. 2006) ("Reliance on the *de minimis* doctrine invokes congressional intent that agencies diverge from the plain meaning of a statue only so far as is necessary to avoid its futile application.").

2. EPA's *Post Hoc* Reliance on Absurd Results Fails.

Having acknowledged not making or supporting a *de minimis* exemption, EPA repackages the same basic position as an attempt to avoid "absurd results." This new rationale is not only *post hoc* but also lacks substantive merit.

This Court has described an agency's responsibility to "set forth the reasons for its actions" as "the fundamental requirement of nonarbitrary administrative decisionmaking." *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 949 (D.C. Cir. 2004). The Clean Air Act requires proposed and promulgated rules to set forth a "statement of basis and purpose" that summarizes "the major legal interpretations and policy considerations underlying the proposed rule." §§ 307(d)(3)(C), (d)(6)(A)(i); 42 U.S.C. §§ 7607(d)(3)(C), (d)(6)(A)(i). Axiomatically, "the courts may not accept appellate counsel's *post hoc*

rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (citations omitted).

EPA's "absurd results" rationale is entirely *post hoc*. EPA claims it "explained"—albeit in a single phrase—that the Exemption was supported by "the same rationale" as the Tailoring Rule, and thereby incorporated reliance on the absurd results doctrine. EPA Br. at 58. Yet nothing in the proposed or final Exemption actually identified "absurd results" as a rationale EPA intended to rely on. All EPA said was that its "decision to defer the applicability of PSD and Title V to biogenic CO_2 emissions is . . . supported, in part, on the same rationale as EPA used to justify the Tailoring Rule's phase-in approach." 76 Fed. Reg. at 43,496/3 (JA __). This one vague reference cannot satisfy EPA's burden to explain what it did and why. *See, e.g., Northeast Md. Waste Disposal Auth.*, 358 F.3d at 949 (holding that a single reference to "supporting information" in prior rulemaking docket insufficient to explain agency rationale).

The "absurd result" EPA invokes here is not even the same "absurd result" discussed in the Tailoring Rule. There, EPA identified administrative burdens leading to permitting paralysis as the relevant "absurd result." *See, e.g.*, 75 Fed. Reg. at 31,547/3 (JA __). Here, EPA claims the Exemption is needed to avoid the

"absurd result" of permitting biogenic CO_2 sources that it speculates may later be found to have *de minimis* effects. EPA Br. at 59. This is not at all "the same rationale . . . used to justify the Tailoring Rule," *id.* at 58, but rather a whole-cloth *post hoc* invention.

Even if this Court could reach EPA's *post hoc* argument, it would fail on the merits. The Tailoring Rule itself stated that a categorical exemption for sources of biogenic CO_2 emissions was *not* warranted on that record. 75 Fed. Reg. at 31,591/1 (JA __). Moreover, EPA's assertion that it would be "absurd" to require permits for sources that might someday prove to have negligible or negative net lifecycle emissions (EPA Br. at 58-59), is simply the disclaimed *de minimis* rationale marching under another banner. In any event, to avoid absurd results, EPA "may deviate no further from the statute than is needed to protect Congressional intent." *Mova Pharm. Corp.*, 140 F.3d at 1068. Here, EPA tacitly concedes the Exemption sweeps in sources like "whole, standing trees," EPA Br. at 31, that *should* be regulated, and is thus overbroad.

Finally, EPA simply assumes Congress would prefer to let even the largest sources burning clearly detrimental types of biomass escape permitting and pollution controls (*see* EPA Br. at 57-59), rather than risk even the possibility of requiring permits for some sources that might later be shown to have negligible or beneficial lifecycle profiles. EPA points to nothing in the statute or the legislative

history showing that Congress intended this result. If anything, the PSD program's pollution-reduction and harm-prevention purposes undercut EPA's assumption. *See CRR*, slip op. at 58.

D. EPA Has Failed to Justify the Exemption Under the "One Step at a Time" Doctrine.

1. EPA Misconstrues the Reach of the "One-Step-at-a-Time" Doctrine.

The "one-step-at-a-time" doctrine provides no independent authority to depart from the Clean Air Act's clear and self-executing commands where, as here, the agency has failed to support such departure on administrative necessity, absurd results, or *de minimis* impact grounds. It is true that where Congress directs an agency to issue regulations needed to effectuate a statutory directive, the agency has latitude in some circumstances to proceed stepwise towards full implementation, rather than tackling the whole problem at once. *See Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 288 (D.C. Cir. 1988) (noting that the agency may proceed stepwise to implement a statute whose "structure…confirms the EPA's broad discretion."). The "one-step-at-a-time" doctrine, however, applies only where agencies already have statutory discretion.

Pet. Br. at 54-57. It does not provide EPA with independent authority to exempt regulated entities from clear statutory commands.[6]

As EPA recognizes (*see* EPA Br. at 59), PSD permitting requirements for CO_2 took effect "by automatic operation of the statute" when EPA regulated vehicular greenhouse gas emissions under Title II of the Act. *CRR,* slip op. at 53-54, 77. Congress thus did not leave EPA broad leeway to create its own stepwise regulatory program for a pollutant newly subject to regulation. Because applicability of PSD permitting requirements does not hinge on EPA's implementation, the Exemption requires a compelling justification under some established doctrine of statutory construction. In the Tailoring Rule, EPA grounded its departure from the statute in a robust demonstration of administrative necessity. In such a context, the one-step doctrine may provide support for the agency to phase out an exemption and return towards full compliance with the statutory language in several steps, where each of those steps is based on a

[6] The cases cited by EPA (Br. at 35-36)—all decided under statutes that leave the agency involved some discretion in implementing a statutory goal—make this clear. *See City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989) (Endangered Species Act does not require that, for emergency listing of one population as endangered to be valid, other arguably similar populations be concurrently listed); *Grand Canyon Air Tour Coal. v. FAA,* 154 F.3d 455, 476-478 (D.C. Cir. 1998) (upholding stepwise approach to implement Congressional directive to develop a regulatory plan for achieving "substantial restoration of the natural quiet and experience of the park"); *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) (condoning agency's step-at-a-time response to a situation not involving a specific "statutory requirement" but rather the agency's informed judgment about the public interest).

demonstration of ongoing administrative necessity and minimal departure from the statute. Here, although EPA salts its one-step-at-a-time argument with references to administrative necessity (EPA Br. at 36-37), nowhere does it show on the record the existence of such necessity. *See supra* at 9-15.

2. EPA Cannot Justify the Biomass Exemption Under the Catch-All General Rulemaking Authority Found in Section 301.

Offering yet another *post-hoc* rationale, EPA asserts that Clean Air Act section 301 gives it sweeping authority to act incrementally, even in the face of clear statutory requirements.[7] EPA Br. at 38. But EPA misreads the statute, which authorizes regulation only "as necessary to carry out [the Administrator's] functions *under this chapter*"—that is, under the Clean Air Act—*not* in whatever way she "deem[s] necessary or expedient." *See* § 301(a)(1); 42 U.S.C. § 7601(a)(1) (emphasis added) (applying the latter phrase only to the Administrator's discretion to delegate non-rulemaking authority). Section 301 thus provides authority to regulate only in a manner consistent with the statute, not in ways that contravene it. This is all the more so where Congress created self-executing provisions, as in the PSD program. EPA's position is unsupportable.

Neither *Citizens to Save Spencer County v. EPA*, 600 F.2d 844 (D.C. Cir. 1979), nor *Alaska DEC v. EPA,* 540 U.S. 461 (2004), supports the proposition that

[7] Nowhere in the proposed or final Biomass Exemption does EPA make the argument that section 301 gives it broad, unfettered authority to carve exemptions from the statute's PSD applicability provisions.

the catch-all provisions of section 301(a)(1) authorize EPA to override express requirements in other sections of the Act. *Spencer County* recognized EPA's need to *reconcile* two competing express requirements of the then-new 1977 CAA Amendments, rather than leaving the choice to the states. *Spencer County*, 600 F.2d at 868. The case in no way suggests that EPA has unbounded authority to create broad, unjustified exemptions from specific statutory requirements.

In *Alaska DEC*, it was not the "general authority" of section 301(a)(1), but rather the oversight role expressly defined by Congress in CAA sections 113(a)(5) and 167, that gave EPA authority to ensure that Alaska's BACT determinations met the statute's requirements. *Alaska DEC,* 540 U.S. at 484. This case, too, does not support broad agency discretion to create exemptions from the statute's express, detailed requirements.

3. No "New Situation" or Unforeseen Condition Supports EPA's Biomass Exemption.

EPA's claim of "heightened" discretion to act in "new circumstances," EPA Br. at 39, has little meaning in the context of self-executing provisions like those at issue here. The cases offered by the agency—all involving agency actions taken under ambiguous statutes, not deviations from clear and self-executing statutory requirements—are inapposite. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 392-93 (1999) (requiring tariff where agency had discretion to evaluate situation because provisions authorizing exemptions were ambiguous); *American*

Trucking Ass'ns v. United States, 344 U.S. 298, 312 (1953) (upholding agency decision to take regulatory action as reasonable where statute did not provide specifics); *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America*, 836 F.2d 599, 608 (D.C. Cir. 1988) (noting specifically that the relevant statute was *not* self-executing, and in that circumstance finding authority for agency action in furtherance of the general statutory policy); *Indep. Bankers Ass'n. v. Marine Midland Bank*, 757 F.2d 453, 460 (2d Cir. 1985) (finding agency authority to act in furtherance of the statute's goals where statute's language was "not determinative"). Because the relevant statutory language here is self-executing, EPA has no discretion over applicability in the first instance.

IV. THE ARGUMENTS OF *AMICUS CURIAE* NACWA CANNOT SALVAGE EPA'S UNLAWFUL EXEMPTION.

In its *amicus curiae* brief in support of the Biomass Exemption, NACWA raises legal and factual issues concerning publicly owned water treatment facilities. NACWA has proffered arguments regarding EPA's legal authority that the agency did not rely on. *See, e.g.*, Brief *Amicus Curiae* of the National Association of Clean Water Agencies in Support of Respondents at 14-17. Because they did not form EPA's basis for the Exemption, the Court should not consider them. *See* § 307(d)(6)(C), (7)(A); 42 U.S.C. §7607(d)(6)(C); (7)(A); *see also Manin v. Nat'l Transp. Safety Bd.*, 627 F.3d 1239, 1243 (D.C. Cir. 2011) ("[T]he law does not

allow us to affirm an agency decision on a ground other than that relied upon by the agency.").

NACWA's factual assertions also are grounded in evidence outside the record. None of the documents cited in NACWA's brief were submitted to EPA for inclusion in the docket, and very few were even mentioned in NACWA's comment letters. *See* NACWA Comments Re: EPA Proposed National Greenhouse Gas Reporting Regime, EPA-HQ-OAR-2008-0508-0566 (JA __-__); NACWA Comments Re: Proposed GHG Tailoring Rule, EPA-HQ-OAR-2009-0517-5336 (JA __-__); NACWA Comments Re: Call for Information, EPA-HQ-OAR-2010-0560-0156 (JA __-__); NACWA Comments Re: Biogenic Emissions Deferral, EPA-HQ-OAR-2011-0083-0117 (JA __-__). As discussed *supra* at 6, this evidence lies outside the administrative record and is not properly before this Court. Parties bear the burden of ensuring that the documents on which they intend to rely appear in the administrative record. *See Appalachian Power Co. v. EPA*, 135 F.3d 791, 799 n.14 (D.C. Cir. 1998).

Finally, even if NACWA's arguments and evidence could be considered, they would not save the Exemption. At best, NACWA's brief provides evidence and arguments that EPA might have considered in crafting a far more narrowly tailored exemption. But EPA did not consider any such narrow exemption here. NACWA's brief offers no basis for upholding the Exemption.

V. THE COURT SHOULD VACATE THE BIOMASS EXEMPTION.

Vacatur is the proper remedy where, as here, an exemption violates unambiguous statutory language. *Sierra Club v. EPA*, 551 F.3d 1019, 1028 (D.C. Cir. 2008) (vacating unauthorized exemption); *see also New Jersey v. EPA*, 517 F.3d 574, 578, 583-84 (D.C. Cir. 2008) (vacating delisting of air toxics-emitting power plants from § 112 source category list where statutory prerequisites were not satisfied). As this Court held in *CRR*, the statute unambiguously prohibits the sources at issue in this case from constructing or operating without required permits. Lacking a record-supported, doctrinally sound basis, the Biomass Exemption plainly and substantively violates the Clean Air Act, and must not be allowed to stand.

Vacatur is also appropriate because there is "little or no prospect of the rule's being readopted upon the basis of a more adequate explanation of the agency's reasoning." *NRDC v. EPA*, 571 F.3d 1245, 1276 (D.C. Cir. 2008) (quoting *Ill. Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997)). Given EPA's concession that burning at least some forms of biomass (e.g., burning whole trees) "might be categorized as a net contributor of CO_2," EPA Br. at 4, there is little or no prospect that EPA will be able to readopt the blanket exemption of all biogenic CO_2 sources.

Finally, this Court has in exceptional cases granted petitioners' (or plaintiffs') requests to leave a remanded rule in effect where vacatur "would at least temporarily defeat [petitioner's] purpose" in bringing the case. *See*, *e.g., Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000); *see also Envtl. Def. Fund v. EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990) (same). Here, by contrast, Petitioners actively seek vacatur to avoid adverse environmental effects from the Exemption. Moreover, a remand without vacatur would effectively amount to an indefinite stay of the effectiveness of the court's decision. *See Honeywell Int'l Inc. v. EPA*, 374 F.3d 1363, 1375 (D.C. Cir. 2004) (Randolph, J., concurring). Given the likelihood that the full three-year exemption period would run before EPA acted, a simple remand in this instance would be equivalent to denying Petitioners any relief at all.

For all these reasons, vacatur is required.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Petitioners' Opening Brief, the Biomass Exemption must be vacated.

Respectfully submitted this 10th day of July, 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 6,560 words, as counted by counsel's word processing system.

DATED: July 10, 2012 SIGNED: /s/ Kevin P. Bundy

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Reply 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: July 10, 2012 SIGNED: /s/ Kevin P. Bundy__