

The EPA's position that GHGs are not "subject to regulation" under the Act cannot stand, even in the current absence of an endangerment finding under Section 202 or other sections discussed herein. Moreover, as EPA notes in the ANPR, as soon as the EPA takes any one of the required additional steps outlined here, there can be no question that New Source Review will apply to GHG-emitting major sources. The agency, therefore, should save precious time and resources and avoid further legal battles by immediately regulating GHGs under the PSD program. Doing so would allow EPA to quickly and effectively regulate GHGs from the largest emitters like coal-fired plants that contribute extensively to climate change and would avoid locking in unnecessarily high emissions. We note that doing so would also give additional certainty to the regulated community.

While it is uncontroversial that EPA should prioritize the largest pollution sources first, one of the reasons that the NSR program will be such an effective tool for reducing GHG emissions is that it applies to a wide array of sources that will emit in excess of the applicable statutory thresholds of 250 or 100 tons per year. As the EPA notes, it is generally more effective and less expensive to engineer and install controls at the time a source or major modification is being designed and built as opposed to retrofitting controls independently at an existing facility. Instead of appreciating this aspect of the act as the enormous opportunity that it is, the EPA and the commenting agency heads instead have vastly exaggerated procedural and administrability issues associated with an increase in permitting.

While all government activity inherently implicates procedural and administrability issues, federal agencies deal with such challenges every day in the ordinary course of business. The issues that the EPA has raised pale in comparison to the physical risks of continued business as usual GHG emissions. For example, the ANPR contains pages of discussion of the increase in permitting that will be required in order to cover all sources emitting more than 250 tons per year of CO<sub>2</sub>. The EPA estimates that the number of permits issued each year would increase from 200-300 per year to 2,000-3,000 per year.<sup>106</sup> The EPA asserts, without any support, that regulating smaller sources through the NSR will be inefficient and would create a problematic administrative burden. Then the EPA proposes a number of creative yet legally unsupportable proposals to "solve" the asserted problems. As a threshold matter, the asserted belief of EPA officials that the statutory requirements are burdensome or not "efficient" as they should be simply does not excuse the agency from following the law. The EPA has no authority to weaken the requirements of the statute simply because its political appointees don't like the law's requirements.

Several of the suggestions that the EPA has advanced are outside the scope of its authority. The EPA has no authority to set higher GHG major source cutoffs and significance levels. The EPA may not "calculate the costs and benefits of a PSD program for that universe of affected sources, and select a cutoff that optimizes the benefit cost ratio."<sup>107</sup> This is not the statutory standard, and such a system is subject to manipulation

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<sup>106</sup> 73 Fed. Reg. 44,498-44,499.

<sup>107</sup> *Id.* at 44,505.