ORAL ARGUMENT NOT YET SCHEDULED

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

COALITION FOR RESPONSIBLE REGULATION, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 09-1322 (and consolidated cases)
COALITION FOR RESPONSIBLE REGULATION, INC., et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 10-1073 (and consolidated cases)
COALITION FOR RESPONSIBLE REGULATION, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 10-1092 (and consolidated cases)

SOUTHEASTERN LEGAL FOUNDATION, INC., et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 10-1131 (and consolidated cases)

EPA'S RESPONSE TO MOTIONS TO STAY

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GLOSSARY

PARTIES

Movants: the Petitioners that filed the Motions to Stay, including the National Association of Manufacturers and 7 other Petitioners ("NAM Mot."); the Coalition for Responsible Regulation, Inc. and its co-Petitioners along with Petitioners from four other Petitions ("CRR Mot."); and the State of Texas, which filed one motion to stay solely the Tailoring Rule ("Texas Tailoring Mot.") and another to stay three other EPA actions ("Texas Mot."). EPA also refers herein to stay briefs filed as "Responses" to the Stay Motions by: Peabody Energy ("Peabody Resp."); American Farm Bureau Federation ("Farm Bureau Resp."); and Utility Air Regulatory Group ("UARG Resp.").

THE CHALLENGED EPA RULES AND ACTIONS

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 (December 15, 2009)

Vehicle Rule: "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule," 75 Fed. Reg. 25,324 (May 7, 2010)

Timing Decision: "Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs," 75 Fed. Reg. 17,004 (April 2, 2010)

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

RELATED PROPOSED RULES

FIP Rule: "Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan," 75 Fed. Reg. 53,883 (Sept. 2, 2010)

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

TERMS

Act: Clean Air Act, 42 U.S.C. §§ 7401-7671q

BACT: Best Available Control Technology

CAA: Clean Air Act, 42 U.S.C. §§ 7401-7671q

CAFE: Corporate Average Fuel Economy

CO_2e: Carbon dioxide equivalent

EPCA: Energy Policy and Conservation Act, 49 U.S.C. § 32902

FIP: Federal Implementation Plan

GHG: Greenhouse gas

GWP: Global Warming Potential

IAC: Climate Change Assessments: Review of the Processes and Procedures of the IPCC (InterAcademy Council, 2010)

IPCC: United Nations Intergovernmental Panel on Climate Change

NAAQS: National Ambient Air Quality Standards

NHTSA: National Highway Traffic Safety Administration

PSD: Prevention of Significant Deterioration, 42 U.S.C. §§ 7470-7492

RTC: Response to Comments

RTP: Response to Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act

SIP: State Implementation Plan

TITLE V: 42 U.S.C. §§ 7661-7661

TSD: Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act: Technical Support Document (December 7, 2009)

TPY: Tons per year

USGCRP: United States Global Change Research Program

Movants seek to stay a regulatory process, and its statutory consequences, that Congress ordered in the Clean Air Act and that the Supreme Court set inexorably in motion in Massachusetts v. EPA, 549 U.S. 497 (2007). There, the Court held that greenhouse gases *are* "air pollutants" under the plain language of the Clean Air Act. Id. at 529. Per the Court's express instruction, EPA's Administrator was therefore *required* to determine whether, in her judgment, greenhouse gas emissions from new motor vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Id. at 533. The Act *obligates* EPA to regulate such emissions from new motor vehicles if an "endangerment finding" is made. Id. Once motor vehicle regulations take effect, the express provisions of the Act *automatically* subject stationary sources of greenhouse gases to corresponding regulation under separate provisions of the statute. Thus, once an endangerment finding is made, this chain of consequences is unavoidable under the clear regime Congress created in the Clean Air Act.

EPA has taken four distinct actions related to greenhouse gases. The first two – EPA's Endangerment Finding and its Vehicle Rule – are governed by section 7521(a)[1] of the Act, which covers emissions of pollutants from new motor vehicles and new motor vehicle engines; these two actions flow directly from the Supreme Court's directive in Massachusetts that EPA determine if endangerment results from greenhouse gases and from the statutory requirement that EPA regulate such

[1] Statutory references are to Title 42 of the United States Code, unless noted.

emissions if endangerment is found. Based on an exhaustive review and analysis of the science, in late 2009 the Administrator exercised her judgment to conclude that emissions of greenhouse gases from new motor vehicles contribute to air pollution that is reasonably anticipated to endanger public health and welfare, due to the effects of greenhouse gases on climate. This Endangerment Finding led directly to promulgation of the Vehicle Rule, in which EPA set standards for the emission of greenhouse gases for new motor vehicles built for model years 2012-2016. By statute, those emissions standards are set after considering two factors: the time necessary to develop and apply the requisite technology to meet the standard, and the cost to the automobile industry of complying within the set time period. § 7521(a)(2). The *indirect* effects of such regulation – such as the "triggering effect" such regulations may have with respect to stationary source permitting requirements under the Act – do not alter EPA's statutory obligation to decide endangerment and to issue the standards if endangerment is found.

The other two EPA actions – EPA's Timing Decision and its Tailoring Rule – are governed by sections 7470-7492 and by Title V of the Act, which establish the two principal CAA permitting programs for stationary sources: the prevention-of-significant-deterioration ("PSD") preconstruction permit program, and the Title V operating permit program. Unlike the Endangerment Finding and the Vehicle Rule, these two actions do *not* flow directly from the Supreme Court's instruction in Massachusetts. Rather, they reflect EPA's efforts to define and cabin the timing and

breadth of stationary source regulation that would otherwise automatically ensue, purely by operation of statute, once greenhouse gases become subject to regulation under the Act through any means. Both are palliative actions: they *reduce* the regulatory burdens on stationary sources and permitting authorities by *delaying* the date on which sources will be subject to the Act's permitting requirements and by *limiting*, at least for a time, the number and size of the sources that must obtain permits.

Movants vehemently oppose *any* regulation of greenhouse gas emissions from stationary sources under the Act, fearing the possibility that even *some* stationary sources will be required to address greenhouse gas emissions in construction and operating permits. Thus, they flail variously at EPA's four actions in an attempt to halt that which is imposed by operation of statute. But their efforts are for naught: their objection, at bottom, is not really to EPA's actions; rather, it is to the decisions Congress made and to the strict requirements Congress itself imposed on sources of air pollution.

These limits are plain and significant. For instance, while the Supreme Court recognized in Massachusetts that the Administrator ultimately must exercise her *judgment* in determining whether endangerment exists, and that this entails discretion, her *reasons* for exercising her judgment "must conform to the authorizing statute." 549 U.S. at 533. Thus, in determining whether atmospheric concentrations of greenhouse gases may endanger public health or welfare, the Administrator must rest her decision on the science and facts. Id. at 533-34. "Policy judgments" – such as

those Movants raise in their Stay Motions regarding the difficulty, inconvenience, or cost of stationary source permitting – "have nothing to do with whether greenhouse gas emissions contribute to climate change." Id. Thus, they may not be considered. Similarly, while EPA may have some "latitude as to the manner, timing, content, and coordination" of its motor vehicle regulations if endangerment is found, id., the statute does not permit EPA to decline to issue standards under section 7521 on the grounds that such regulation would implicate stationary source permitting.

EPA's discretion with respect to stationary source permitting is similarly limited by Congress' express direction. Under section 7475, once a pollutant is subject to regulation under the Act, that pollutant *must* be addressed in PSD permits. EPA's discretion is limited to determining *when* a pollutant should be considered "subject to regulation" under the Act. Thus, in the Timing Decision, EPA had discretion to decide that greenhouse gases would be "subject to regulation" when the Vehicle Rule begins to apply to new vehicles (on January 2, 2011). But EPA had no discretion to decide that section 7475 does not apply at all to stationary sources' greenhouse gas emissions. Similarly, while EPA in its Tailoring Rule raised the numerical thresholds that would trigger permitting requirements under section 7475 (and similar provisions under Title V) for greenhouse gases, it raised them *only as much as necessary, and only as long as necessary,* to avoid an absurd result – permit gridlock as a result of overwhelmed permitting authorities – and for reasons of administrative necessity. EPA lacked discretion to raise those thresholds any more than absolutely necessary to effectuate

congressional intent, and it certainly lacked discretion after promulgating the Vehicle Rule to decline to regulate greenhouse gases under the PSD program.

Movants cast a wide net in their arguments. They ignore a well-settled principle of administrative law – that every agency action is to be measured against the statutory provisions applicable to it and reviewed on the basis of its own record – and attack EPA's Endangerment Finding, Vehicle Rule, Timing Decision, and Tailoring Rule as if they were a single, monolithic agency action, rather than four unique actions addressing separate and distinct statutory requirements.[2] They attempt as well to relitigate the fundamental issue that the Supreme Court resolved in Massachusetts: whether greenhouse gases can be regulated at all under the Clean Air Act. In their zeal to challenge *any* possible underpinning of EPA's actions, Movants even seek to stay the Tailoring Rule – a rule intended to *alleviate*, for literally *millions* of stationary sources, the very regulatory burdens Movants abhor. Regarding the relief they seek, one group of Movants takes an extraordinary tack: they concede that the Endangerment Finding and the Vehicle Rule should *not* be stayed, but ask that the Court stay the Vehicle Rule's "triggering effect" for stationary source regulation. NAM Mot. 12. In short, they essentially seek to stay the Clean Air Act itself.

The Court, however, cannot stay the Clean Air Act, and Movants cannot meet the high standards for issuance of a stay of any of *EPA's* actions pending review.

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[2] EPA maintains that the distinct EPA actions are best adjudicated by separate panels and opposes coordination of all four actions, as set forth in EPA's cross-motion for partial consolidation. See Dkt. 1265175.

Movants cannot establish any – let alone all – of the elements required for issuance of a stay: that movants are likely to succeed on the merits; that they will be irreparably harmed absent a stay; that a stay would redress the harms of which they complain; and that these factors clearly outweigh the substantial harms to others and to the public interest that will occur if a stay is issued. The Motions for Stay should be denied.

BACKGROUND

I. Statutory Background

A. Statutory Provisions Related to Vehicles

Title II of the CAA, §§ 7521-7590, establishes a regulatory framework for controlling pollution from motor vehicles and other mobile sources. Under section 7521(a)(1), EPA "shall" prescribe regulations establishing standards for "the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [EPA's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Once EPA makes such an "endangerment finding," the Act requires EPA to issue corresponding emission standards, taking into account specified technological and cost considerations. § 7521(a)(2). Standards promulgated under section 7521(a) take effect only "after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." Id. States are preempted from adopting their own new motor vehicle standards, § 7543(a), but EPA

may waive preemption for California standards that are, in the aggregate, at least as protective as federal standards and otherwise consistent with the CAA. § 7543(b) Other States may adopt California standards for which a waiver has been granted. § 7507.

Separately, the Energy Policy and Conservation Act ("EPCA") directs the Secretary of Transportation to prescribe corporate average fuel economy standards for specified categories of vehicles. 49 U.S.C. § 32902(b)(1). The Secretary has delegated that authority to NHTSA. CAFE standards "shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in [a] model year." 49 U.S.C. § 32902(a).

B. Clean Air Act Provisions Related to Stationary Sources

1. The PSD Program

The purpose of the prevention of significant deterioration program, adopted in 1977, is "to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution … notwithstanding attainment and maintenance of all national ambient air quality standards." § 7470(1).[3] Under PSD, a "major emitting facility"

[3] One of EPA's responsibilities under the Act is to promulgate national ambient air quality standards, or "NAAQS," for certain air pollutants that may endanger public health or welfare. §§ 7408-7409; Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 462 (2001). EPA has established NAAQS for six pollutants: nitrogen dioxide, ozone, sulfur dioxide, coarse and fine particulate matter, carbon monoxide, and lead. §§

may not initiate construction or major modifications of its facility without first obtaining a construction permit. §§ 7475(a)(1), 7479(1)&(2)(C). The Act defines a "major emitting facility" as a stationary source that emits or has the potential to emit 100 or 250 tons per year ("tpy") (depending on the type of source) of "any air pollutant." § 7479(1).[4] A modification of an existing major emitting facility is defined as a physical change or change in the method of operation that results in an increase in the amount of "any air pollutant" emitted by that source. §§ 7479(2)(C), 7411(a)(4).

To receive a PSD permit, an applicant seeking to construct or make a modification to a major emitting facility must implement "best available control technology ['BACT'] for each pollutant subject to regulation under [the Act]." § 7475(a)(4). In pertinent part, the Act defines BACT as:

> [A]n emission limitation based on the maximum degree of reduction of *each pollutant subject to regulation* under this chapter [the CAA] 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 … for control of each such pollutant.

§ 7479(3) (emphasis added). See also 40 C.F.R. § 52.21(b)(12).

7408, 7409; 40 C.F.R. Pt. 50. Areas that do not meet the NAAQS for a particular pollutant are designated "nonattainment areas."

[4] See also 40 C.F.R. § 52.21(b)(50)(iv) (explaining that the PSD permit requirement is triggered by emissions of a "Regulated NSR Pollutant," including "[a]ny pollutant that otherwise is subject to regulation under the Act."); 40 C.F.R. § 51.166(b)(49)(iv) (applying PSD to "[a]ny pollutant that is otherwise subject to regulation under the Act.").

2. Title V of the Clean Air Act

Title V of the Act, §§ 7661-7661f, establishes an *operating* permit program covering stationary sources of air pollutants. It applies to, among others, any "major source" within the meaning of section 7661(2), including stationary sources that emit or have the potential to emit 100 tpy or more of "any air pollutant." § 7602(j). Unlike PSD, Title V does not impose substantive pollution control requirements. Instead, Title V operating permits assure compliance with emissions limits and other applicable requirements of the CAA. § 7661c(a).

3. **Implementation of CAA Requirements for Stationary Sources**

While Congress and EPA establish the standards to be achieved in the PSD program, the States predominantly manage the program to achieve these standards through state implementation plans ("SIPs"). See §§ 7410, 7471; 40 C.F.R. § 51.166 (criteria for EPA approval of a state PSD program). A SIP is a set of state-promulgated (and EPA-approved) regulations that provides for implementation and enforcement of emissions standards under the various CAA programs administered by EPA. The standards set by States may be no less stringent than the CAA and EPA's implementing regulations. § 7410(k)(1)(A). In the event a State is unable or unwilling to design its program to obtain EPA approval of its SIP, EPA will issue federal regulations in the form of a Federal Implementation Plan ("FIP") that will apply within that State until a SIP is approved. § 7410(c); 40 C.F.R. § 52.21(a)(1).

EPA can instruct a State to revise its SIP where it is inadequate to meet the requirements of the CAA (commonly referred to as a "SIP Call"). See § 7410(k)(5).

Similar to SIPs, each State has its own approved Title V program, listed at 40 C.F.R. part 70, App. A. Title V sets out the minimum requirements for a Title V permit program and for permits, requires States to develop programs in accordance with those requirements, and authorizes EPA to promulgate, administer and enforce a federal Title V program in various circumstances, including where a State does not have an EPA-approved program. § 7661a; 40 C.F.R. parts 70, 71.

II. EPA Rules and Actions Challenged and Implicated in This Action

A. The Endangerment Finding and the Denial of Reconsideration of the Endangerment Finding – Challenged in Case No. 09-1322

In 1999, EPA received a request that it regulate new motor vehicles, pursuant to section 7521(a), because greenhouse gas emissions from motor vehicles contributed to air pollution which may reasonably be anticipated to endanger public health or welfare. EPA denied that request in 2003, resulting in the Supreme Court's decision in Massachusetts v. EPA, 549 U.S. 497 (2007), in which that Court concluded that greenhouse gases *are* "air pollutants" within the meaning of the Act and directed EPA to make an endangerment determination or explain why it could not do so.

Acting in accordance with the Supreme Court's instructions, EPA published the Endangerment Finding on December 15, 2009. 74 Fed. Reg. 66,496. EPA began by defining the "air pollution" referenced in section § 7521(a) to be the atmospheric

mix of six long-lived and directly-emitted greenhouse gases: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). Id. at 66,497, 66,516-22.[5] EPA then found that this air pollution may, in fact, be "reasonably be anticipated both to endanger public health and to endanger public welfare." Id. at 66,497, 66,523-36.

The Administrator then made findings pertaining to the "cause or contribute" criterion in section 7521(a). EPA defined the relevant "air pollutant" as "the aggregate group of the same six long-lived and directly-emitted greenhouse gases …." 74 Fed. Reg. at 66,536. See also id. at 66,499. EPA then found that emissions of this "air pollutant" from new motor vehicles and new motor vehicle engines "contribute" to the "air pollution" for which the endangerment finding was made. Id. at 66,499, 66,537-45.

Subsequently, EPA received ten petitions seeking administrative reconsideration of the Endangerment Finding. Generally speaking, these petitions challenged the scientific basis underlying the Endangerment Finding, largely based on the content of certain e-mail communications among various climate scientists, alleged errors on the part of the United Nations Intergovernmental Panel on Climate

[5] These gases have different heat-trapping capacities and atmospheric lifetimes and thus are measured under the pollutant denominated as "greenhouse gases" based on their global warming potential ("GWP"), which is measured in carbon dioxide equivalents ("CO_2e"). 75 Fed. Reg. at 31,519. For example, one ton of carbon dioxide equals one ton of CO_2e; one ton of methane equals 21 tons of CO_2e; and one ton of sulfur hexafluoride equals 23,900 tons of CO_2e. Id.

Change, and certain additional technical studies that the petitioners believed to be pertinent. On July 29, 2010, EPA denied the petitions, fully explaining why the technical and science-related arguments presented by the petitioners did not warrant reconsideration. 75 Fed. Reg. 49,556, 49,557-58, 49,563-78, 49,584 (Aug. 13, 2010).

B. The Vehicle Rule – Challenged in Case No. 10-1092

Because sections 7521(a)(1) & (2) require EPA to issue regulations for motor vehicles once it makes the specified endangerment and contribution findings, EPA issued greenhouse gas emission standards for cars and light trucks for model years 2012-2016. 75 Fed. Reg. 25,324 (May 7, 2010). In accordance with a carefully-designed federal policy,[6] the Vehicle Rule was promulgated as part of a joint rulemaking with NHTSA, which simultaneously promulgated CAFE standards for the same vehicles. EPA and NHTSA first developed a joint technical analysis of (among other things) available technologies and their costs and effectiveness. Id. at 25,348–96. Each agency then developed standards under its separate statutory authorities.

EPA's Vehicle Rule requires each manufacturer to meet its own fleet-wide emission standard for cars, and separately, light trucks, based on the vehicles it chooses to produce each year. Id. at 25,405. Manufacturers may earn credits toward

[6] In May 2009, the Administration announced a National Fuel Efficiency Policy ("the National Program") with the goal of establishing consistent, harmonized, and streamlined federal and state requirements that would reduce greenhouse gas emissions and improve fuel economy for all light-duty vehicles sold in the United States, while allowing automakers to sell a single fleet of vehicles nationally. 75 Fed. Reg. 25,326/2; 74 Fed. Reg. 24,007 (May 22, 2009).

meeting their fleet-wide standards by improving air conditioning systems to increase system efficiency and reduce hydrofluorocarbon refrigerant leakages. Id. at 25,424-31. The Rule also sets separate standards to cap tailpipe nitrous oxide and methane emissions. Id. at 25,421-24.

EPA's greenhouse gas emission standards are consistent with, but separate from, CAFE standards. EPA's standards are projected to result in significantly *greater* greenhouse gas emission reductions than the corresponding CAFE standard as a result of certain differences between the CAA and EPCA. For example, EPA's standards encompass reductions in greenhouse gases that can be achieved by air-conditioning system improvements, which NHTSA had no statutory authority to address. Id. at 25,342. Conversely, EPCA, unlike the CAA, allows a manufacturer to pay a fine in lieu of meeting CAFE standards. Id. at 25,342. The result is that projected CO_2e emissions avoided under EPA's standards, during the useful life of model year 2012-2016 vehicles, will be 962 metric million tons, whereas projected CO_2 emissions avoided under the CAFE standards, during the same useful life, will be 655 million metric tons. Thus, EPA standards are projected to result in *47 percent greater* reductions. Id. at 25,636, Table IV.G.1-4, and 25,490, Table III.F.1-2.

In 2004, the State of California approved state greenhouse gas standards for new light-duty vehicles for model years 2009 through 2016. On June 30, 2009, EPA granted California's request for a waiver of federal preemption for those standards under the CAA. 74 Fed. Reg. 32,744 (July 8, 2009). Thirteen States and the District

of Columbia, comprising approximately 40 percent of the U.S. light-duty vehicle market, have adopted California's standards, as they are permitted to do by section 7507. In accordance with the National Program, California revised its state program to make clear that compliance with the EPA Model Year 2012-2016 light-duty vehicle greenhouse gas standards is deemed to be compliance with California's greenhouse gas standards. 75 Fed. Reg. at 25,327-28. Accordingly, so long as the Vehicle Rule remains effective, automakers will be able to meet California standards by complying with EPA's standards. If EPA's federal greenhouse gas program was no longer an alternative compliance option for meeting the California standards, automakers would instead have to comply with California standards (in both California and the other States that have adopted them), which are not aligned with the CAFE standards. Among the differences, California standards are absolute and uniform. They are not expressed as manufacturer-specific standards determined by a manufacturer's choice of which vehicles to produce. Cal. Code Regs. Tit. 13, § 1961.1 (Ex. 1); 75 Fed. Reg. 25,329. Thus, without an alternative compliance option, each auto manufacturer would be faced with the costly prospect of manufacturing at least two fleets of vehicles for domestic sale, one that meets both California standards and less stringent CAFE standards for sale in the States that have adopted California standards, and a separate fleet that just meets the CAFE standards for sale elsewhere. 75 Fed. Reg. at 25,326.

C. The Timing Decision – Challenged in Case No. 10-1073

In 2008 EPA issued its "PSD Interpretive Memo," also called the "Johnson Memo." The PSD Interpretive Memo provided EPA's interpretation of a pre-existing definition in its PSD regulations delineating the "pollutants" that are taken into account in determining whether a source must obtain a PSD permit and the pollutants each permit must control. EPA had previously defined the pollutants that must be taken into account for both of these purposes to include "[a]ny pollutant that otherwise is subject to regulation under the Act." 40 C.F.R. § 52.21(b)(1), (b)(2), (b)(50)(iv), (j)(2)-(3). In the PSD Interpretive Memo, EPA explained that monitoring and reporting requirements under the Act were insufficient to make a pollutant "subject to regulation" and that a pollutant is not "regulated" unless it is covered by an EPA regulation that requires *actual control* of emissions.

In the 2010 Timing Decision, EPA reaffirmed this interpretation of the term "subject to regulation," and refined its interpretation regarding exactly when "regulation" of a pollutant begins, for purposes of both PSD and Title V permits. EPA then concluded that the Vehicle Rule would require actual control of greenhouse gas emissions on January 2, 2011 – the first date on which model year 2012 cars subject to the greenhouse gas emission limitations in the Vehicle Rule may be introduced into commerce. Thus, greenhouse gas emissions would be "subject to regulation" for PSD and for Title V purposes on that date. 75 Fed. Reg. at 17,019/3, 17,023. EPA subsequently codified this approach as part of the Tailoring Rule. 75 Fed. Reg. at 31,606-07.

D. The Tailoring Rule – Challenged in Case No. 10-1131

The purpose of the Tailoring Rule is to establish an effective administrative process by which PSD and Title V permit requirements for greenhouse gases can be phased in after January 2, 2011, once those requirements are triggered under the statute by the Vehicle Rule. EPA recognized that immediately implementing PSD and Title V permit requirements for *all* sources meeting the statutory thresholds of 100/250 tpy for greenhouse gas emissions would "overwhelm [ ] the resources of permitting authorities and severely impair [ ] the functioning of the program [ ]." 75 Fed. Reg. at 31,514.[7] Following consideration of extensive public comments, EPA adopted a series of steps by which PSD and Title V permit requirements could be phased in, starting with the largest sources of greenhouse gas emissions.

During Step I, which begins on January 2, 2011, *no source* will be subjected to PSD permitting solely by virtue of its greenhouse gas emissions. Instead, only a source that *already* requires a PSD permit by virtue of its potential to emit *non-*

[7] For example, EPA estimated that without the Tailoring Rule, PSD permit applications would increase nationwide from 280 per year to over 81,000, a 300-fold increase, requiring state permitting authorities to add almost 10,000 full-time employees and incur additional costs of $1.5 billion per year. Id. at 31,535-40, 31,554. EPA's analysis further showed that Title V permit applications would jump from 14,700 per year to 6.1 million as a result of application of Title V to greenhouse gases, a 400-fold increase. When EPA assumed just a 40-fold increase in applications – one-tenth of the actual increase – and no increase in employees to process them, the processing time for Title V permits would jump from 6-10 months to ten *years*. Hiring the nearly 230,000 full-time employees necessary to address the actual increase in permitting functions would result in an increase in Title V administration costs of $21 billion per year. Id. at 31,535-40, 31,577.

greenhouse gases covered by the PSD program must address its greenhouse gas emissions, and even then only if its new construction or modification project will have the potential to emit 75,000 tpy on a carbon-dioxide-equivalent (CO_2e) basis of net greenhouse gases. 75 Fed. Reg. 31,523-24. Greenhouse gas emissions are not considered in determining whether a source needs to obtain a PSD permit until Step II, which begins on July 1, 2011. After this date, a source will be subject to PSD permitting requirements if: (a) it meets the standards established in Step I (a so-called "anyway" source); or (b) the source has the potential to emit the statutory thresholds of greenhouse gases (100/250 tpy) on a mass basis and also has the potential to emit 100,000 tpy on a CO_2e basis (or 75,000 net tpy CO_2e for a modification project). Id. Similar thresholds apply under Title V. Id. The Tailoring Rule also lays out a specific process for considering *further* reductions in these thresholds (and consequent expansion of the permit program), as determined to be appropriate following additional study and consideration of the implementation of Steps I and II during the initial years of the program. See id. at 31,525, 31,586-88.

These phased measures will alleviate the administrative burden on state permitting authorities (and greatly reduce the costs to both permitting authorities *and* sources), while having comparatively little impact on the volume of greenhouse gas emissions subjected to regulation under the programs. For example, even at Step II, only about 550 additional sources will require PSD or Title V permits due solely to their emissions of greenhouse gases. Id. at 31,540. At the same time, however, the

Step II requirements will still reach fully 86% of the greenhouse gas emissions that would be covered using the statutory 100/250 tpy thresholds. Id. at 31,571. Thus, the Tailoring Rule will assure that the lion's share of the environmental benefits of full statutory implementation are secured, while preserving the integrity of the permit system and saving billions of dollars in administrative and compliance costs.[8]

This tailoring of the statutory thresholds is effectuated through EPA's revision of the definition "subject to regulation" in a way that limits the reach of the terms "major source," "major emitting facility," and "major modification" in EPA's PSD and Title V regulations. Id. at 31,580-81. Because PSD is administered through SIPs or a FIP, implementation plans may need to be amended to apply the revised definitions established in the Tailoring Rule, as may state programs under Title V.

E. Proposed Implementation Process

Recognizing that the provisions of certain States' SIPs might not allow them to automatically apply these revised definitions without amending their SIP, EPA has issued two proposed rules which ensure that if a given State is not in a position to implement the permitting requirements for greenhouse gases by January 2, 2011, *EPA* can perform that task for that State, until the State is able to revise its SIP.

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[8] EPA estimated that application of the Step II thresholds would result in combined increased permitting costs to all state authorities of about $105 million per year, as compared to combined permitting costs of $22.5 *billion* per year when applying the statutory threshold. 75 Fed. Reg. at 31,540. The Step II measures will also relieve permit applicants (the stationary sources themselves) of nearly $50 billion per year in Title V compliance permitting costs under the tailored thresholds and another $5.5 billion under the PSD program. Id. at 31,597-99.

Specifically, on September 2, 2010, EPA issued a proposed "SIP Call" to 13 States to amend their SIPs to ensure that their PSD programs cover greenhouse gases and do so at the levels established in the Tailoring Rule. 75 Fed. Reg. 53,892. Also on September 2, 2010, EPA issued its Proposed FIP Rule. 75 Fed. Reg. 53,883 Under this Rule, if any State is unable to – or refuses to – amend its SIP, EPA will, as *required* under section 7410(c), issue a FIP for that State under which "EPA will be responsible for acting on permit applications *for only the GHG portion of the permit*, and the State will retain responsibility for the rest of the permit." Id. at 53,890 (emphasis added). EPA is taking similar steps to ensure that state Title V permitting programs are able to permit greenhouse gas sources consistent with the thresholds of the Tailoring Rule.[9]

ARGUMENT

I. STANDARD FOR GRANTING A STAY

A stay is an "extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). In order to grant such extraordinary relief, the Court must determine:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably

[9] All of these proposed rules and contemplated procedures are intended to *alleviate* the concerns of permitting authorities. They are, however, not final and, therefore, not challenged in *any* petition for review. Despite this, Movants attack both their effectiveness and validity here. See Part II,B,2, infra.

> injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 129 S. Ct. 1749, 1761 (2009) (citation omitted).

Here, Movants seek to stay four separate and independent agency actions. Though some Movants attempt to stay all EPA actions based on alleged flaws in some, the standard under which agency actions are reviewed remains individualized: each must be reviewed based on its *own* administrative record and based on the statutory factors applicable to *that* action. See CAA § 7607(d)(7); Nat'l Ass'n of Homebuilders v. Corps of Eng'rs, 417 F.3d 1272, 1282 (D.C. Cir. 2005) ("on APA review, [Corps' permitting] action necessarily stands or falls on that administrative record and its statutory permitting authority under the CWA").

II. MOVANTS FAIL TO MAKE THE REQUIRED STRONG SHOWING THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS

A. Movants Are Not Likely to Establish that the Endangerment Finding Should be Deemed Invalid

In the Endangerment Finding, the Administrator determined that greenhouse gases in the atmosphere may reasonably be anticipated to endanger public health and welfare. 74 Fed. Reg. at 66,497/2. A wealth of scientific information "compellingly supports" this finding. Id. That greenhouse gases slow the loss of Earth's heat is a "basic scientific fact," over which there is no dispute. See 75 Fed. Reg. at 49,564/1-2. Nor is there any real dispute that atmospheric greenhouse gas levels are increasing, that this increase is driven largely by human activity, and that increased greenhouse

gases in the atmosphere have an effect known as "radiative forcing." Id. at 49,564/2-65/1; see also Massachusetts, 549 U.S. at 504 (noting that "well-documented" increase in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere).[10] Multiple lines of evidence indicate that average temperatures are increasing, climate change is occurring, and greenhouse gases are the primary driver of that change. 74 Fed. Reg. at 66,517/2-18/3; 75 Fed. Reg. at 49,564/1-67/1. The Administrator evaluated this evidence and determined that both current and projected impacts of climate change may reasonably be anticipated to endanger public health and welfare. 74 Fed. Reg. at 66,524/3-26/2, 66,530/3-35/3.

In making the Endangerment Finding, the Administrator "[gave] careful consideration to all of the scientific and technical information in the record." 74 Fed. Reg. at 66,510/3. She relied primarily on thorough assessments of climate change science prepared by the Intergovernmental Panel on Climate Change, the United States Global Change Research Program, and the National Research Council, as the scientific and technical basis for the Endangerment Finding. Id. As EPA explained, these assessments: (1) comprehensively address the scientific issues the Administrator had to examine; (2) represent the current state of knowledge on those issues; and (3) underwent "rigorous and exacting…peer review by the expert community, as well as

[10] "Radiative forcing" refers to a change in the energy balance of the planet, and is not the same thing as climate change. 75 Fed. Reg. at 49,565/1.

rigorous levels of U.S. government review and acceptance." Id. at 66,510/3-11/1.[11] This review process offered EPA "strong assurance" that the underlying research material "has been well vetted by both the climate change research community and by the U.S. government," and that these assessments "essentially represent the U.S. government's view of the state of knowledge on greenhouse gases and climate change." Id. at 66,511/1; see also RTC 1-14 (Ex. 2) (discussing IPCC development process).

Movants nibble at the edges of the Endangerment Finding and the science on which it is based, flyspecking isolated purported deficiencies that, Movants contend, render that Finding unsupportable. These weak attacks cannot stand against the vast body of record evidence supporting the Administrator's conclusions. Movants have thus failed to demonstrate that they are likely to succeed on the merits of their challenge to the Endangerment Finding.

1. EPA Properly Construed and Applied the Legal Framework for the Endangerment Finding

Section 7521(a)(1) directs EPA to determine whether the "air pollution" in question – the concentration of six well-mixed greenhouse gases in the atmosphere –

[11] Movants argue that EPA was not entitled to rely on these assessments because they allegedly were not crafted using "the same rules of decision that govern valid rulemaking in this country." CRR Mot. 27; see generally id. at 26-27; Texas Mot. 15. Neither the IPCC nor any other body on whose assessment the Administrator relied made any decisions concerning the Endangerment Finding. It is EPA's job as the decisionmaker, not that of the IPCC or any other independent body, to follow applicable "rules of decision" – and EPA did so.

"may reasonably be anticipated to endanger public health or welfare." If EPA answers this question in the affirmative, then the Administrator's task is to determine whether or not emissions of an "air pollutant" – here, the aggregate group of these same six greenhouse gases – from new motor vehicles or engines "in [her] judgment cause, or contribute to" this "air pollution." Id. The Act calls for the Administrator to make an endangerment finding when, in her judgment, she reasonably determines the statutory criteria are met, even if there are "varying degrees of uncertainty" in some of the underlying scientific and technical issues. See 74 Fed. Reg. at 66,505-06; see also Massachusetts, 549 U.S. at 533-34.

Movants' legal argument focuses largely on the first part of this standard, i.e., whether greenhouse gases "may reasonably be anticipated to endanger public health or welfare." Purporting to rely principally on this Court's seminal decision in Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) (en banc), Movants argue that to address this issue, EPA first must quantitatively define specific risk factors Movants believe to be determinative of the endangerment question.[12] They then argue that EPA may only find that an endangerment exists if the Agency analyzes the extent to which "car emissions contribute anything meaningful to the present level of GHGs in the atmosphere." CRR Mot. 31; see also Texas Mot. 10-11.

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[12] See CRR Mot. 30: "What levels of temperature, precipitation, or wind 'endanger,' and why? What is a 'safe' global temperature? Based on what criteria, for what populations, in what locations? What is a 'safe' ambient concentration of GHGs? Why? Most fundamentally, what level of GHG yields acceptable climate conditions?" See also id. at 31.

Movants' argument not only conflicts with the action-forcing instruction from the Supreme Court in Massachusetts,[13] but also stands Ethyl completely on its head, as the very point of Ethyl was to *reject* a similar attempt to throw up a string of empirical hurdles for EPA to clear before making an endangerment finding. In essence, Movants argue that the statute requires a type of definitive factual finding – rather than an informed exercise of judgment – regarding endangerment, but this very argument has already been rejected by this Court. Ethyl, 541 F.2d at 20-29. As EPA recognized, Ethyl emphasized that endangerment determinations in CAA provisions like this are properly regarded as "precautionary" in nature. 74 Fed. Reg. at 66,506-07. As such, "[r]egulatory action may be taken before the threatened harm occurs; indeed, the very existence of such precautionary legislation would seem to demand that regulatory action precede, and, optimally, prevent, the perceived threat." Ethyl, 541 F.2d at 13. The Court thus stressed that in reviewing the Administrator's endangerment determination "we will not demand rigorous step-by-step proof of cause and effect" (as petitioners in that case advocated). Id. at 28. Instead, the Court will uphold the determination as long as it is "rationally justified." Id.

[13] In Massachusetts, the Supreme Court made clear that EPA cannot decline to make an endangerment finding merely because there is "some residual uncertainty;" only uncertainty that is "so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming" could justify such inaction. 549 U.S. at 534. Neither can the Administrator consider policy matters that "have nothing to do with" her exercise of judgment on the science of endangerment. Id. at 533-34.

Movants' argument that there can be no rational basis to find endangerment unless EPA first defines the circumstances that would constitute a *lack* of endangerment is inconsistent with Ethyl. The Court there was explicit: that endangerment is a fact-specific case-by-case determination, with no specific minimum threshold for either *risk* or *severity* of harm to show endangerment. Ethyl, 541 F.2d at 18-20; see also 74 Fed. Reg. at 66,509. Instead, EPA is to judge both the likelihood of harm occurring and the severity of the harm if it were to occur, as varying combinations of risk and harm could all amount to endangerment. 541 F.2d at 18-20. Likewise here, EPA does not need to define the myriad possible combinations of risk of harm and severity of harm, covering the very wide range of climate and environmental circumstances involved, that would *not* constitute endangerment before it can make a fully rational judgment that the specific facts and circumstances here *do* in fact amount to endangerment.[14]

As the Supreme Court noted in Massachusetts, Congress in the 1977 CAA amendments revised several "endangerment" provisions (including the provision at issue here) to replace the former "will endanger" language with the present "may reasonably be anticipated to endanger" language for the express purpose of embracing Ethyl's precautionary, preventative approach and rejecting the type of empirical

[14] Cf. Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1161-62 (D.C. Cir. 1980) (In determining the ambient level of an air pollutant that is requisite to protect public health with an adequate margin of safety, under section 7409, EPA is not required to first define a protective ambient level and then determine a margin of safety from that point.).

burden of proof advocated by the petitioners in that case (and in this one). See Massachusetts, 549 U.S. at 506 n.7 ("Congress amended [§ 7521(a)(1)] in 1977 to give its approval to the decision in [Ethyl, 541 F.2d at 25], which held that the Clean Air Act 'and common sense . . . demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.'").[15] In sum, EPA properly rejected the same arguments, advanced by Movants here, that the Agency is required to define what is not endangerment or is required to make specific, quantitative determinations of the risk of harm before making an endangerment finding, or, similarly, that the Agency must find that some defined minimum quantum of harm is likely to occur or actually occurring before it may find endangerment. 74 Fed. Reg. at 66,508-09.[16]

Similarly, there is no merit to Movants' suggestion that EPA cannot make an endangerment finding under section 7521(a)(1) unless it can also show that the emission standards resulting from such a finding would "fruitfully attack[]" the risk of

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[15] The House Committee Report accompanying the 1977 CAA Amendments, cited in Massachusetts, provides extensive discussion of Ethyl and Congress' intent to endorse that decision by amending the Act's various "endangerment" provisions. See H.R. Rep. No. 95-294, at 43-51, reprinted in 1977 U.S.C.C.A.N. 1121-29. See also Massachusetts v. EPA, 415 F.3d 50, 76-77 (D.C. Cir. 2005) (Tatel, J., dissenting) (discussing this same legislative history), rev'd, 549 U.S. 497 (2007).

[16] Movants cite Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980), in support of their argument that EPA failed to provide an adequate record for review because it did not adequately explain its decision. See CRR Mot. 35. But that case involved the rationality of the actual regulatory standard adopted by OSHA, not the type of threshold determination of risk and endangerment involved here.

harm that is the basis for the finding. See CRR Mot. 34 (citing Ethyl, 541 F.2d at 31 n.62). This argument is based, almost entirely, on one misleading quote from one footnote in Ethyl. When this quote is read in proper context, and in conjunction with the governing statutory provisions here, it clearly *refutes* rather than supports Movants' argument. See 74 Fed. Reg. at 66,507-08. In the portion of Ethyl cited by Movants, the Court was specifically addressing arguments that EPA's endangerment finding should only have considered the *incremental* effects on public health of lead from fuel additives, not the *cumulative* effects of such lead combined with lead from other sources. The Court's main point was that it believed the incremental approach advocated by petitioners there was inappropriate for gauging whether an endangerment was posed by lead-containing fuel additives.[17] By contrast, the Court pointed out (in the text quoted by Movants) that the incremental effect of lead from fuel additives could be a relevant consideration in deciding what *control requirements* might later be appropriate to address that endangerment under the provisions of section 7545 in place at that time.[18] Thus, read in proper context, the snippet of text on which Movants rely simply states that while the efficacy of potential regulatory

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[17] See Ethyl, 541 F.2d at 30-1 (stating that "Congress understood that the body lead burden is caused by multiple sources" and that "[i]t did not mean for 'endanger' to be measured only in incremental terms").

[18] Ethyl, 541 F.2d at 3 n.62 ("While the incremental effect of lead emissions on the total body lead burden is of no practical value in determining whether health is endangered, it is of value, of course, in deciding whether the total lead exposure problem can fruitfully be attacked through control of additives."); see also 74 Fed. Reg. at 66,508 (discussing this aspect of Ethyl).

approaches may be relevant *to the selection of control requirements* under the CAA provision at issue in that case, it has no relevance to determining the threshold question of whether or not the air pollution endangers public health or welfare.

As EPA explained, under the provisions of the statute applicable here, Congress has separated the criteria governing the endangerment and contribution findings from the factors governing the establishment of corresponding emission standards. See 74 Fed. Reg. at 66,507. And as the Supreme Court made clear in Massachusetts, the endangerment and contribution criteria are limited to the determination of whether greenhouse gas concentrations in the atmosphere constitute "air pollution" that may reasonably be anticipated to endanger public health or welfare, and whether vehicle emissions cause or contribute to that air pollution. Id. (citing Massachusetts, 549 U.S. at 532-34). Questions regarding the effectiveness of any particular set of control strategies that may be applied to new motor vehicles are simply "not relevant to deciding whether air pollution levels in the atmosphere endanger" or "whether emissions of greenhouse gases from new motor vehicles contribute to such air pollution." 74 Fed. Reg. at 66,508.[19]

[19] This separation between the endangerment determination and the setting of standards is reflected in other "endangerment" and standard-setting provisions in the Act, particularly those relevant to the establishment of NAAQS. The "endangerment" finding under section 7408(a)(1) can lead to the listing of an air pollutant, which leads to the development of "air quality criteria" under section 7408(a)(2), and then to establishment of a NAAQS under section 7409 at the level that is "requisite" to protect public health and welfare (the former with an "adequate

Moreover, even when EPA adopts corresponding emission standards, the statute does not require EPA to set such standards at a level that eliminates as much of the "endangerment" as possible, without consideration of other factors, and it does not spell out any minimum level of effectiveness for such standards in terms of alleviating the air pollution problem in question. Instead, the statute directs EPA to set emission standards at a level that is reasonable *overall* in light of applicable environmental, cost and technology considerations. § 7521(a)(2); see also 75 Fed. Reg. 25,324, 25,403-04 (May 7, 2010) (discussing application of these standards in establishing vehicle emissions standards for greenhouse gases).

Movants' approach would not only conflict with the statutory design, but would also be unworkable in practice. In essence, it would require EPA, at the time of the endangerment finding, to project the result and effectiveness of "perhaps not one, but even several, future rulemakings stretching over perhaps a decade or decades." 74 Fed. Reg. at 66,508. Contrary to Movants' argument, there is nothing in the statute or applicable judicial precedent that supports, let alone compels, such an irrational and unwieldy approach.[20]

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margin of safety"). EPA is not required to know the results of the subsequent NAAQS standard-setting to make the endangerment finding under section 7408(a)(1).

[20] As noted, CRR faults EPA for not answering the question whether "car emissions contribute anything meaningful to the present level of GHGs in the atmosphere." CRR Mot. at 31. EPA, however, made the only determination called for by Congress – whether such emissions from new motor vehicles cause or contribute to the air pollution that endangers. CRR does not contest EPA's contribution determination.

2. EPA Exercised Its Own Judgment and Appropriately Relied on Assessments Prepared by the IPCC and Other Bodies as the Primary Scientific Basis for the Endangerment Finding

EPA did not in any way delegate its judgment by relying on the thorough assessments prepared by the IPCC, the USGCRP, and others as the primary scientific and technical basis for the Endangerment Finding. 74 Fed. Reg. at 66,510/2-12/1; 75 Fed. Reg. at 49,581-82. In EPA's view, these assessments were the best source materials for determining the state of science with regard to climate change. 74 Fed. Reg. at 66,511. The assessments synthesize a broad body of scientific studies, and ultimately demonstrate the broad scientific consensus on how greenhouse gases affect the climate, as well as the impact of present and projected future climate changes on human health, society, and the environment. 75 Fed. Reg. at 49,581/2.

EPA did not simply rubber-stamp these assessments. RTP 3-2 (Ex. 3); 75 Fed. Reg. at 49,581/1-82/1. In fact, EPA evaluated the assessments and their conclusions in several ways: by reviewing the process employed to develop them, by reviewing their substantive content in light of in-house expertise, by taking into consideration the depth of scientific consensus the assessments represented, and by considering trends in the science. RTP 3-2 (Ex. 3). In addition, both EPA's proposed conclusions on the state of the science and its rationale for relying primarily on these assessment reports underwent notice and comment. 74 Fed. Reg. at 18,886, 18,894 (Aug. 24, 2009). A lengthy technical support document detailing the scientific basis

for the Endangerment Finding was *twice* subjected to public review, and was modified as warranted in response to comments. 74 Fed. Reg. 66,510/2-3.

As this Court has stated frequently, an agency does not improperly delegate its authority or judgment merely by using work performed by outside parties as the factual basis for its decision making. See U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 568 (D.C. Cir. 2004);[21] United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1216-17 (D.C. Cir. 1980). Consistent with these authorities, although the IPCC assessment and other scientific assessments compiled and reviewed by EPA provided the principal *source materials* for EPA's action, EPA exercised its own judgment both regarding the state of the science and in finding endangerment based on this science.[22]

In United Steelworkers, this Court rejected an argument that an agency had improperly relied on outside consultants where the petitioning party "[could not] buttress its general allegation of excessive reliance with any specific proof that the Assistant Secretary failed to confront personally the essential evidence and arguments" at issue. 647 F.2d at 1217. As the Court elaborated, "unsupported

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[21] In U.S. Telecom Ass'n, the D.C. Circuit concluded that an agency had acted unlawfully by *expressly* sub-delegating its decision-making authority to state commissions. 359 F.3d at 565. Movants do not allege that EPA expressly delegated its Section 7521 (a) authority, nor did EPA do so.

[22] See, e.g., 74 Fed. Reg. at 66,497/2 ("The Administrator has determined" that the body of scientific evidence compellingly supports an endangerment finding; major assessments by USGCRP, IPCC, and others "serve as the primary scientific basis supporting the Administrator's endangerment finding"); see generally id. at 66,497/2-99/2; RTP 3-2 (Ex. 3) (describing numerous "actions taken that evidence EPA's comprehensive and in-depth exercise of judgment").

allegation[s]" could not "overcome the presumption that agency officials and those who assist them have acted properly." Id. Movants' conclusory assertion that the Administrator did not exercise her own judgment, see, e.g. CRR Mot. 24-26, Texas Mot. 12-15, is not only "unsupported" by "specific proof," but it is directly contradicted by the record. Neither do Movants cite any legal authorities to support their argument that an independent exercise of judgment required EPA to re-examine the thousands of studies reviewed, analyzed, and synthesized by the IPCC, the USGCRP, and others (see CRR Mot. 25; Texas Mot. 12) – in other words, to expend vast resources re-doing work already done by highly-qualified bodies, carefully reviewed by EPA, and subjected to public comment.

Movants' contention that EPA erred in relying on assessment reports without placing the underlying studies in the administrative record is equally meritless. See Texas Mot. 17; CRR Mot. 29. This Court has flatly rejected this argument in prior cases under the Act. See Coalition of Battery Recyclers Ass'n v. EPA, 604 F.3d 613, 622-23 (D.C. Cir. 2010); American Trucking Ass'ns v. EPA, 283 F.3d 355, 372 (D.C. Cir. 2002) ("requiring agencies to obtain and publicize the data underlying all studies on which they rely 'would be impractical and unnecessary'")(citation omitted).

3. "Climategate" does not undercut the reliability of the IPCC Report

Trying to shore up their allegation that EPA erroneously relied on the IPCC assessment reports, Movants point to alleged deficiencies in the IPCC's assessment of climate change science and the so-called "Climategate" e-mails. CRR Mot. 27-29;

Texas Mot. 16-17. Movants have not, however, demonstrated that minor and isolated errors undermine the weight of scientific authority on which the Administrator relied in making the Endangerment Finding. See supra at 20-22; see generally 75 Fed. Reg. at 49,557/1-58/2 (reviewing "Climategate" allegations and concluding that the scientific findings underlying the Endangerment Finding remain "robust, credible, and appropriately characterized by EPA").

Movants point first to an acknowledged misstatement concerning the projected rate at which Himalayan glaciers are receding.[23] CRR Mot. 27; Texas Mot. 16 n.2. As EPA explained when this issue was raised in the petitions for reconsideration, this particular statement was one error in one study out of a multi-volume assessment containing thousands of pages of findings and conclusions. RTP 2-2 (Ex. 4); see also 75 Fed. Reg. at 49,558/1, 49,576/2-77/1.[24] More importantly, EPA did not rely on this projection in the Endangerment Finding. Id. An isolated error concerning the projected rate of recession in Himalayan glaciers does not undermine the overall climate change findings, nor does it have any meaningful implication for the Administrator's determination that elevated atmospheric concentrations of

[23] CRR erroneously claims that flaws in the IPCC assessment process led India to withdraw from the IPCC. CRR Mot. 27. CRR cites a comment submitted with a petition for reconsideration, in response to which EPA demonstrated that petitioners had mischaracterized the quoted Indian official's position. RTP 2-23 (Ex. 4); see generally 75 Fed. Reg. at 49,578/1-79/2.

[24] Even then, the error went only to the projected *rate* at which Himalayan glaciers are receding, not to the fact that they *are* receding. See RTP 2-2 (Ex. 4).

greenhouse gases may reasonably be anticipated to endanger public health and welfare *in the United States*. Id. at 49,558/1-2; 74 Fed. Reg. 66,514.

CRR also cites a single e-mail from Dr. Phil Jones, a co-author of some IPCC assessment reports, as purported evidence that "IPCC's assessment of climate science was neither transparent nor objective." CRR Mot. 28. The full e-mail demonstrates only that Dr. Jones personally disapproved of the quality of certain studies (which were, in any event, ultimately included in the IPCC assessment). RTP 2-27 (Ex. 4). EPA's conclusion that this isolated incident does not undermine the validity of the IPCC's assessment is similar to that reached separately by the Independent Climate Change E-Mails Review Investigation.[25] Id. at 58.

Texas points to the August 30, 2010 InterAcademy Council's independent report to the United Nations as supposedly identifying significant flaws in the IPCC review process. Texas Mot. 15-17. The Council's Report postdates even EPA's decision on the petitions for reconsideration, and thus it cannot be part of the administrative record or a basis for review in this matter. To the extent that the Court deems the report relevant, however, it is important to note that while the Council drew no conclusions about the scientific validity of the IPCC assessment reports, it recognized that "many scientists noted that neither the leaked e-mails nor the IPCC

[25] This Review was called for by the University of East Anglia following the publication of e-mails from that University's Climatic Research Unit. Although funded by the University, the Review's work and findings are wholly independent. See http://www.cce-review.org/About.php (last visited October 26, 2010).

errors undermined the principal scientific findings regarding human contributions to climate change." IAC 7-8 (Ex. 5).[26] With regard to the IPCC assessment process, the Council concluded that while there was room for improvement, the existing process "has been successful overall and has served society well." IAC 51 (Ex. 5). Movants have, in sum, failed to demonstrate that a bare handful of insignificant, isolated errors in the exhaustive IPCC assessment delegitimize the vast bulk of the scientific statements and findings contained in that and other assessments, or rendered EPA's decision to rely on those assessments unreasonable, arbitrary or capricious. See 75 Fed. Reg. at 49,558/1-2; Coalition of Battery Recyclers, 604 F.3d at 623-24.

4. The Record Supports EPA's Scientific Conclusions

There is no real dispute over most of the scientific underpinnings of the Endangerment Finding. See supra at 20-21. CRR's attack is directed primarily at a single point: EPA's assessment of the extent to which climate change observed to date is caused by the undisputed human-induced increase in atmospheric greenhouse gases. CRR Mot. 38-42. CRR's limited and scattered attack on the extensive evidence

[26] The Council does point to the "weak evidentiary basis" for one conclusion regarding the potential economic cost associated with sea level rise. See Texas Mot. 17. The Council made this statement because the IPCC based this conclusion on a small number of unpublished studies. IAC 33 (Ex. 5). There are, however, many well-documented physical and ecological impacts from sea level rise discussed in the TSD for the Endangerment Finding. See TSD at 35-38 (Ex. 6). The Administrator relied on this evidence, not on the IPCC's conclusions on potential economic costs, in making the Endangerment Finding.

supporting EPA's conclusions regarding climate change is, however, rebutted by the vast administrative record.

CRR contends that EPA created a "false dilemma" by allegedly evaluating only a single cause of climate change.[27] CRR Mot. 38-39. The record demonstrates, however, that EPA considered *multiple* potential influences on climate. 74 Fed. Reg. at 66,517/2-518/3. Neither was EPA's determination based on the simplistic assumption that "[t]he entire climate system… is… controlled by a thermostat having only one knob." CRR Mot. 42. EPA acknowledged that both natural and anthropogenic factors have contributed to observed global warming over the past 50 years. 74 Fed. Reg. at 66,518/2. EPA's ultimate conclusion that anthropogenic greenhouse gas emissions have caused most of the past half century of warming is

> based on multiple lines of evidence. The first line of evidence arises from our basic physical understanding of the effects of changing concentrations of [greenhouse gases], natural factors, and other human impacts on the climate system. The second line of evidence arises from indirect, historical estimates of past climate changes that suggest that the changes in global surface temperature over the last several decades are unusual…. The third line of evidence arises from the use of computer-based climate models to simulate the likely patterns of response to the climate system to different forcing mechanisms (both natural and anthropogenic).

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[27] CRR appears to argue that EPA was required to evaluate not only known possible causes of climate change, but also *unknown* factors that might affect the global climate. See CRR Mot. 39-40. EPA was not, however, required to invent (and then eliminate) endless possible causes of climate change. Cf. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978) ("common sense" suggested that NEPA statement of alternatives was not wanting "simply because the agency failed to include every alternative device and thought conceivable by the mind of man").

RTC 3-3 (CRR Mot. Ex. 11). The May 2010 assessment of the science of climate change by the National Research Council of the National Academies of Science is a clear affirmation of EPA's scientific judgment. 75 Fed. Reg. at 49,558/1-2.

CRR also points to short-term stretches of ten years or less during which increases in greenhouse gas levels do not correlate to increases in temperature. CRR Mot. 38-39. As EPA explains in the same response to comments that CRR cites, however, the relationship between warming and greenhouse gas emissions "is complex and non-linear." RTC 3-4 (CRR Mot. Ex. 11). Precisely *because* greenhouse gas emissions are not the only determinant of temperature change, examining trends over five to ten years provides only limited insight into the long-term trend in temperatures (and in fact may be misleading on that point). Id. [28]

CRR further argues that because there are uncertainties regarding some influences on climate, EPA cannot reasonably link recent warming to anthropogenic greenhouse gas emissions.[29] CRR Mot. 40-42. This argument reflects a fundamental

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[28] CRR mischaracterizes EPA's position as "warming is evidence of global warming, and lack of warming is evidence of global warming." CRR Mot. 39. EPA did not cite short-term temperature stability as evidence of warming. It stated only that the existence of short periods during which average temperatures remain stable, or even drop, does not demonstrate that there is no cause-and-effect relationship between greenhouse gas concentrations and long-term global temperature trends. RTC 3-4 (CRR Mot. Ex. 11).

[29] CRR errs in stating that the three "primary climate drivers," CRR Mot. 41, identified by the IPCC are listed in order of importance. The IPCC makes no claim about the relative importance of these factors. CRR's claim that "there is substantial

misunderstanding of the science of climate change. First, the fact that the percentage of carbon dioxide in the atmosphere appears to be low (and the proportion attributable to anthropogenic emissions even lower) does not mean anthropogenic greenhouse gas emissions have not caused recent warming. As EPA explained, a gas that composes only a small percentage of the atmosphere can nonetheless have a large radiative effect. RTC 2-19 (Ex. 7). In addition, the best estimates of *natural* external climate forcers over the last several decades (e.g., solar activity and volcanoes) are that they have had a cooling, not warming, effect. TSD at 50 (Ex. 6); RTC 3-23 (Ex. 8). The pattern of observed warming is consistent with warming from greenhouse gases, but inconsistent with warming from natural forcings. TSD at 49-50 (Ex. 6); RTC 3-23 (Ex. 8); 75 Fed. Reg. at 49,566. It is therefore unlikely that there can be a purely natural explanation for the recent and significant warming. 75 Fed. Reg. at 49,566. Indeed, observed warming can only be reproduced with models that contain *both* natural and anthropogenic forcings. Id.

Neither did EPA "summarily reject," CRR Mot. 39, evidence conflicting with EPA's conclusions. EPA's proposed judgment on the science and on endangerment was subjected to public comment. 74 Fed. Reg. at 18,898. Before issuing the final Endangerment Finding, the Agency reviewed and considered all comments received, and it produced an eleven-volume response addressing all significant science, legal,

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uncertainty about the influence of the two most important" climate drivers, CRR Mot. 41, is thus inaccurate.

and policy issues raised by commenters. Id. Where evidence or hypotheses contrary to EPA's conclusions were rejected, it was because they were not consistent with the "deep body of science that has been built up over several decades and the direction it points in," 75 Fed. Reg. at 49,558, not due to any lack of analysis on EPA's part.

5. EPA Reasonably Defined the Relevant "Air Pollution" and "Air Pollutant" to Be a Mix of Six Greenhouse Gases

Section 7521(a) authorizes EPA to prescribe regulations establishing standards for "the emission of any *air pollutant* from any class or classes of new motor vehicles or new motor vehicle engines, which in [EPA's] judgment cause, or contribute to, *air pollution* which may reasonably be expected to endanger public health or welfare." (emphasis added.) Texas' attack on EPA's determination that both the "air pollution" and "air pollutant" at issue consist of a mix of six greenhouse gases even though motor vehicles emit only four of those gases, Texas Mot. 18-19, is wholly unfounded.

In the Endangerment Finding, EPA defined the "air pollution" that may reasonably be anticipated to endanger public health and welfare as "the combined mix of six key directly-emitted, long-lived and well-mixed greenhouse gases." 74 Fed. Reg. at 66,516/3. Together, these six greenhouse gases "constitute the root cause of human-induced climate change and the resulting impacts on public health and welfare." Id. This is true regardless of whether new motor vehicles emit these gases. EPA further defined the "air pollutant" that contributes to endangerment to be an "aggregate group of the same six . . . greenhouse gases." 74 Fed. Reg. at 66,536/3.

This was reasonable for several reasons, including that these gases are all directly-emitted, long-lived, and have well-understood radiative forcing effects. 74 Fed. Reg. at 66,537/1. Defining an air pollutant as a mix of compounds with related properties is also consistent with past EPA practice under the Act. Id. at 66,540/3-41/3.[30]

The fact that motor vehicles do not emit *all* of the six greenhouse gases included in the definitions of "air pollution" and "air pollutant" does not undermine the reasonableness of those definitions.[31] See 74 Fed. Reg. at 66,541/1 (fact that six substances share common relevant attributes "is true regardless of the source category being evaluated for contribution"). As EPA explained, moreover, the Administrator would have made the same contribution finding even if the Agency had defined the air pollutant as a group of the four compounds that Texas acknowledges are emitted by Section 7521(a) sources. 74 Fed. Reg. at 66,541/2; Texas Mot. 18-19.

In sum, Movants have failed to demonstrate that they are likely to succeed on the merits of their challenge to the Endangerment Finding.

B. Movants Are Not Likely to Establish that the Vehicle Rule Should Be Deemed Invalid

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[30] "Air pollutant" is statutorily defined as "any pollution agent *or combination of such agents*…which is emitted into or otherwise enters the ambient air." § 7602(g)(emphasis added).

[31] Texas asserts that EPA "acknowledged in the Endangerment Finding that emissions of [nitrous oxide and methane] do not endanger the public health or welfare." Texas Mot. 18-19. Texas cites the Vehicle Rule, not the Endangerment Finding – and in neither did EPA state that these two gases do not endanger public health and welfare.

Movants do not challenge any substantive aspect of the Vehicle Rule. Their various Vehicle Rule merits arguments boil down to either the untenable position that EPA acted unlawfully by promulgating standards that Congress directed EPA to promulgate, or an improper effort to relitigate issues already decided by the Supreme Court in Massachusetts. Neither position holds any likelihood of success.

1. EPA Did Not Err by Promulgating Standards That It Had a Nondiscretionary Duty to Promulgate

CRR and Texas argue that EPA – having made an Endangerment Finding – should have declined to promulgate greenhouse gas emission standards because, in Movants' view, the standards *do not do enough* to prevent global climate change. See CRR Mot. 43-45; Texas Mot. 22-24. But nothing in section 7521 allows EPA to refuse to promulgate standards – much less *compels* EPA to refuse to do so – on grounds that vehicle standards will not by themselves cure global climate change. To the contrary, section 7521 plainly requires EPA to promulgate standards for air pollutants that contribute to an endangerment, regardless of how much of the endangerment can be ameliorated through such standards.

Section 7521(a)(1) provides in relevant part that EPA "*shall* by regulation prescribe . . . standards" for any air pollutant from new motor vehicles that contributes to an endangerment. (emphasis added.) The word "shall" indicates a command that admits of no discretion on the part of the person instructed to carry out the directive. Ass'n of Civilian Technicians v. FLRA, 22 F.3d 1150, 1153 (D.C.

Cir. 1994). Put simply,"[i]f EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles." Massachusetts, 549 U.S. at 533.

Moreover, contrary to Movants' characterizations, the Vehicle Rule *will* materially address the threat of climate change. As the Supreme Court acknowledged in Massachusetts, "the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere," and "[j]udged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations… ." Id. at 524-25. The Vehicle Rule will produce huge reductions in greenhouse gas emissions. EPA projects that the Rule will generate CO_2e reductions of 962 million metric tons over the lifetime of model year 2012-2016 vehicles. 75 Fed. Reg. at 25,490, Table III.F.1-2. Assuming the standards continue through later model years, by 2050 the CO_2e reductions will constitute a 22.8 percent reduction from the levels of CO_2e estimated to be emitted from the U.S. transportation sector without the rule, a 6 percent reduction of CO_2e emitted from all domestic activities over the same period without the rule, and a 0.8 percent reduction of CO_2e emitted from the *entire world's activities* over the same period without the Rule. 75 Fed. Reg. at 25,489, Table III F.1-1. The Rule will result in measurable reductions in atmospheric CO_2 concentrations, global mean surface temperature, sea level rise, and ocean acidifying effects. 75 Fed. Reg. at 25,496, Table III.F.3-1.

The Vehicle Rule also will produce substantial non-climate-change related environmental and energy security benefits. It will significantly reduce emissions of non-greenhouse gas pollutants and will reduce petroleum imports, thus reducing financial and strategic risks caused by potential supply disruptions. 75 Fed. Reg. at 25,497, 25,531-34, Tables III.G-1, III.H.8-1-2. EPA assessed the monetary benefits of the Rule and found its net present value (i.e., benefits minus costs) to be over $643 billion and maybe as much as $2 trillion. 75 Fed. Reg. at 25,536-37, Table III.H.10-3. But regardless of the scope of the Rule's benefits, EPA did not err by promulgating standards that it had a nondiscretionary duty to promulgate.

CRR and Texas' related argument – that EPA should have declined to regulate greenhouse gas emissions from motor vehicles in view of NHTSA's separate authority to set fuel efficiency standards – similarly fails. See CRR Mot. 45-46; Texas Mot. 23-24. This argument was specifically considered and rejected in Massachusetts, where EPA contended (as CRR and Texas do now) that it had discretion to decline to regulate greenhouse gas emissions from motor vehicles given NHTSA's authority to adopt fuel economy standards under EPCA. The Supreme Court disagreed, explaining:

> [T]hat [NHTSA] sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's "health" and "welfare," 42 U.S.C. § 7521(a), a statutory obligation wholly independent of [NHTSA's] mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.

549 U.S. at 532. Movants cannot distinguish Massachusetts, and they do not even try.

Further, CRR and Texas mischaracterize the Vehicle Rule to the extent they suggest that EPA standards do not accomplish anything beyond what is accomplished by CAFE standards. There are, in fact, important differences arising from the agencies' respective authorities under the CAA and EPCA. See supra at 6-7. For example, EPA's standards encompass reductions in greenhouse gases that can be achieved by air-conditioning system improvements, which NHTSA had no statutory authority to address. In addition, manufacturers may opt to pay a fine in lieu of meeting CAFE standards, an option not available under EPA's program. 75 Fed. Reg. at 25,342. The upshot is that EPA standards are projected to result in 47 percent greater reductions – many hundreds of millions of tons – than projected under the CAFE standards over the lives of model year 2012-2016 vehicles. 75 Fed. Reg. 25,636, Table IV.G.1-4; 75 Fed. Reg. 25,490, Table III.F.1-2.

2. EPA Appropriately Considered All Required Impacts

NAM and Texas contend that EPA had an obligation, in establishing standards under section 7521, to assess compliance costs that might be incurred by stationary sources indirectly under other statutory programs (i.e., the PSD and Title V programs). NAM Mot. 33-40; Texas Mot. 20-22. They are mistaken. Nothing requires EPA, upon promulgating section 7521 standards, to assess costs to stationary sources arising indirectly under other statutory provisions.

As noted, section 7521(a)(2) provides:

> Any regulation prescribed under paragraph (1) of this subsection . . . shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

The "cost of compliance within such period" phrase refers to the costs to *vehicle manufacturers* subject to regulation under section 7521, and to the period of time vehicle manufacturers need to develop technology to meet vehicle standards.[32]

Although EPA had no duty to consider indirect stationary source costs, EPA did, in fact, consider such costs in the context of deciding whether it should delay setting standards. See 75 Fed. Reg. at 25,402; Vehicle RTC 7-67 to 7-68 (Ex. 9). EPA identified compelling reasons in support of its decision to promulgate standards now. EPA explained first that although it had some discretion with respect to the timing of standards, its discretion was not unlimited, and that three years had already passed since the Supreme Court had directed EPA to take appropriate actions under section 7521. 75 Fed. Reg. at 25,402. EPA explained further that any additional delay in setting standards would frustrate implementation of the National Program for regulation of motor vehicles, resulting in substantial prejudice to vehicle

[32] See Motor & Equip. Mfrs. Ass'n v. EPA, 627 F.2d 1095, 1118 (D.C. Cir. 1979) ("Section [7521's] 'cost of compliance' concern, juxtaposed as it is with the requirement that the Administrator provide the requisite lead time to allow technological developments, refers to the economic costs of motor vehicle emission standards and accompanying enforcement procedures," and does not encompass indirect costs incurred by the automotive parts and services industry.).

manufacturers and consumers. Instead of being able to comply with one consistent set of federal greenhouse gas and fuel economy standards under the CAA and EPCA, vehicle manufacturers would be compelled to comply with three separate federal and state regulatory regimes: NHTSA's CAFE standards, California's greenhouse gas standards (in California and all States that have adopted them), and EPA's greenhouse gas standards (when later promulgated). As a result, automakers would be unable to sell a single fleet nationally. 75 Fed. Reg. at 25,326. EPA further explained that consideration of indirect stationary source costs has no relevance to the issue of the appropriate level at which to set vehicle emission standards. Vehicle RTC 5-456 (Ex. 9).

EPA additionally explained that it intended to address concerns about burdens associated with stationary source permitting in other EPA actions focused specifically on implementation of the PSD program, and EPA subsequently did just that, in the Tailoring Rule. Indeed, in that rulemaking EPA extensively assessed impacts to both permitting authorities and stationary sources arising from the application of PSD and Title V programs, including specific projections of costs, permit application burdens and economic impacts. 75 Fed. Reg. at 31,533-41, 31,595-602. In short, EPA provided compelling reasons in support of its decision not to further delay vehicle standards that it had a nondiscretionary duty to promulgate.

NAM and Texas' citation to the Regulatory Flexibility Act ("RFA") is also unavailing. See NAM Mot. 35-36; Texas Mot. 21. This Court "has consistently

rejected the contention that the RFA applies to small businesses indirectly affected by the regulation of other entities." Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855, 869 (D.C. Cir. 2001). To the extent that small entities must comply with PSD permitting program requirements after greenhouse gas regulations for motor vehicles go into effect, such compliance is imposed by section 7475 and not by the Vehicle Rule. See Vehicle RTC at 5-454-55 (Ex. 9).[33]

C. The PSD and Title V Programs of the Clean Air Act Apply to Greenhouse Gas Emissions from Stationary Sources

In the Timing Decision, EPA concluded that the Vehicle Rule automatically "triggers" application of PSD and Title V for greenhouse gases in two ways: it requires sources to take greenhouse gases into account in determining whether they need to obtain PSD and Title V permits, and it requires that certain PSD permits contain limits on greenhouse gas emissions.[34] EPA did not have discretion to avoid

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[33] Similarly, NAM's scattershot arguments (NAM Mot. 36-37) regarding the Unfunded Mandates Reform Act ("UMRA"), the Paperwork Reduction Act ("PRA"), CAA Section 317, and Executive Orders 12898 and 13211 lack any merit. See Allied Local & Reg'l Mfrs. Caucus v. EPA, 215 F.3d 61, 81, n.22 (D.C. Cir. 2000) (failure to prepare UMRA cost-benefit analysis may not be a basis for invalidating rule); Tozzi v. EPA, 148 F. Supp. 2d. 35, 47 (D.D.C. 2001) (failure to comply with PRA not subject to judicial review); § 7617(e) (prohibiting judicial review); Exec. Order Nos. 12898 and 13211 (specifying they do not create any right of judicial review). Moreover, EPA fully documented its compliance with these provisions and executive orders in promulgating the Vehicle Rule. See, e.g., 75 Fed. Reg. at 25,531-34, 25,539-43; Vehicle RTC 5-456; Ch. 8 of Draft Regulatory Impact Analysis.

[34] Unless otherwise indicated, the phrase "Timing Decision" in this section refers both to EPA's PSD Reconsideration action, see 75 Fed. Reg. 17,004, and the portions of the Tailoring Rule that codify that action, see 75 Fed. Reg. at 31,606-07.

or delay this conclusion based upon potential implementation problems: "Once EPA has determined to regulate a pollutant in some form under the Act and such regulation is operative on the regulated activity, the terms of the Act make clear that the PSD program is automatically applicable." 75 Fed. Reg. at 17,020/2-3; see also id. at 17,023/2-3 (similar conclusion for Title V).

Movants can only prevail in their attack on the Timing Decision if they can persuade the Court to read limits into the Act's provisions that are not present in its language, with respect to both applicability to covered sources and the pollutants that a permit must control. Movants' arguments must fail under step one of Chevron USA Inc., v NRDC for the reasons below. 467 U.S. 837, 843-44 (1984). Even if the Court reaches step two of a Chevron analysis, however, Movants' obligation is not satisfied simply by showing that their reading of the statute has some "advantage" over EPA's reading. See CRR Mot. 55. Rather, Movants must show that EPA's reading is *unreasonable*. Here, it is Movants' proposed alternative reading, not EPA's, that is an unreasonable interpretation of the Act.

1. The Emission of "Any Pollutant" May Subject a Source to PSD

The PSD program applies, by the express terms of the Act, to the construction or modification of each stationary source that "emit[s], or has the potential to emit, [a specified quantity] per year or more of *any air pollutant*." §§ 7475, 7479(1) (emphasis added). Movants would give a narrow reading to this broad language, arguing that a source is subject to PSD only if it emits "a particular NAAQS pollutant [in] a

sufficient amount." NAM Mot. 20. But this Court effectively rejected this very argument years ago, holding that a source may be a major emitting facility (and therefore potentially subject to PSD) by reason of its emission of "*any* air pollutant . . . even though the air pollutant . . . may not be a pollutant for which NAAQS have been promulgated." Alabama Power v. Costle, 636 F.2d 323, 352 (D.C. Cir. 1979) (emphasis added). EPA subsequently promulgated a regulation effectuating this holding, which has been in place for more than 30 years. See 45 Fed. Reg. at 52,676, 52, 710/3-11/1 (Aug. 7, 1980) (Ex. 10); see also id. at 52,711/2.[35] EPA's interpretation is "required by Alabama Power and sections [7475(a)] and [7479(1)] of the Act," id. at 52,711/1; it is not an exercise of EPA's discretion.

The "modification" provision of Section 7479 also shows how a source may be included in the PSD program by virtue of its emission of non-NAAQS pollutants. The type of "modification" that may require a PSD permit under § 7475(a) is defined in section 7479(1)(C) to include any "modification" described in section 7411(a). That section, in turn, defines a "modification" as a change "which increases the amount of *any air pollutant*." § 7411(a)(4) (emphasis added). Thus, in determining the

[35] NAM argues that section 7479(1) "cannot be read literally," NAM Mot. 20, because EPA announced in 1980 that it would apply PSD to a source only if the source emits a sufficient quantity of any pollutant "subject to regulation." This longstanding refinement does not support NAM's conclusion, however, because there is *no* reasonable interpretation of section 7479(1) that would exclude *pollutants actually regulated under the Act* from the definition of "any pollutant." Even if EPA's historical reading of section 7479(1) is a departure from the meaning of the text, NAM proposes an even greater departure.

applicability of the PSD program to sources, the Act itself requires EPA to look beyond the statutory provisions establishing PSD to provisions that are not limited to NAAQS pollutants.[36]

Movants essentially ignore these applicability provisions, deriding them as mere definitions of "no substantive consequence." NAM Mot. 20, CRR Mot. 50. Setting aside the purely semantic question of whether a definition is "substantive," EPA and the Court cannot ignore the clear statutory requirement that if a source is a major emitter of *any* regulated pollutant, it is subject to the PSD program.

2. The Act Imposes PSD Permit Requirements in All Areas That Are "Attainment" or "Unclassifiable" For Any Pollutant

A source described above – i.e., a major emitter of "any air pollutant" that will be constructed or modified – must obtain a PSD permit if it will be located in an "area to which this part applies." § 7475(a). "This part" refers to Title I, part C of the Act, which establishes the PSD program and includes requirements for all areas that are designated as "attainment" or "unclassifiable" for any NAAQS pollutant. § 7471. EPA thus determined in 1980 that a source must obtain a PSD permit if it will be located in an area designated "attainment" or "unclassifiable" for *any* NAAQS pollutant, regardless whether it emits more than the threshold quantity of that same

[36] Movants' omission of any reference to this modification provision is particularly salient in the context of their stay motion, as the majority of new PSD permit requirements would result from modifications. See 75 Fed. Reg. at 31,538/1.

pollutant. 45 Fed. Reg. at 52,710/3-11/1 (Ex. 10).[37] NAM and Texas argue that this longstanding interpretation of the Act cannot be correct because, regardless of whether a source meets the definition of "major emitting facility," it is subject to PSD only if it will be located in an area designated as "attainment" or "unclassifiable" for a specific NAAQS pollutant that the source emits at levels above the statutory threshold. See NAM Mot. 17-19; Texas Mot. 25-27.

The Act, however, contains no such limitations. Section 7475(a) takes the set of "major emitting facilities" identified in section 7479(1) and further defines which of those sources must obtain a PSD permit, but it is the "area," not the pollutant, that determines whether "this part applies." See § 7475(a). Under EPA's interpretation, "this part applies" to all areas of the country (because every area is designated "attainment" or "unclassifiable" for at least one NAAQS pollutant), but this is a necessary consequence of a literal reading of the Act. See 45 Fed. Reg. at 52,711/1-2 (Ex. 10). It is therefore irrelevant whether an area can be designated "attainment" or "unclassifiable" for greenhouse gases per se. See NAM Mot. 17, Texas Mot. 26-27.[38]

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[37] NAM admits that EPA first took this position years ago and claims it was "unlawful." NAM Mot. 19. However, EPA has consistently applied this position since that time, without giving rise to challenges. See 75 Fed. Reg. at 31,561/3-62/1. This not only makes the position presumptively reasonable, see id. at 31,562/1, but any challenge to it is also now time-barred. See infra pp. 56-57.

[38] NAM claims, see Mot. 18-19, that this approach ignores Alabama Power. In that case, this Court held that "this part" does not "apply" to sources located "outside of clean air areas." 636 F.2d at 367; see id. at 364-65. EPA's regulations comply with this holding, exempting sources that are located in a non-attainment area for a

Any remaining ambiguity on this point disappears when section 7475(a) is read in conjunction with section 7479(1), which provides that the PSD program applies to any source that is a major emitter of "any pollutant." Although the broad definitions in section 7479(1) cannot expand the scope of the PSD permit requirement in section 7475(a), neither should section 7475(a) be read to make the broad definition of "major emitting facility" in section 7479(1) superfluous. Under Movants' strained reading, such a facility would be subject to section 7475(a) due to its emission of "any pollutant," but this would have absolutely no effect unless that source *also* emitted a NAAQS pollutant at or above the statutory threshold *and* was located in an "attainment" or "unclassifiable" area for that same pollutant. If Congress intended to limit the PSD program as Movants suggest, it chose unusually obscure language by which to do so, when it could easily have defined "major emitting facility" as a source emitting NAAQS pollutants, instead of "any pollutant," at sufficient levels.

NAM argues, and UARG agrees, that the PSD applicability provisions cannot apply to greenhouse gases because the PSD program is concerned primarily with *local* air quality. NAM Mot. 25; UARG Resp. 15-17. Citing section 7471, these parties would insert the word "local" into sections 7475 and 7476, where it does not appear. In contrast, Congress demonstrated its concern for *interstate* air quality in the PSD

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pollutant from PSD permit requirements for that pollutant. See 40 C.F.R. § 52.21(i)(2). Even if this carve-out is necessary for an area's nonattainment pollutants, however, the PSD program may still "apply" to that area for all other pollutants because it is designated "attainment" or "unclassifiable" for some pollutant.

program. See § 7470(4). Congress may not have explicitly addressed air pollutants of global effect, but the language Congress *did* use simply does not limit the program to pollutants of local effect. See infra pp. 57-59

3. PSD Permits Must Address *All* Pollutants Regulated Under the Act

In addition to reading limits that do not exist into the source-specific and geography-specific provisions of the statute, Movants would limit the plain language of the Act that defines which pollutants are subject to control. PSD permits must require BACT for "each pollutant subject to regulation under *this chapter*." § 7475(a)(4) (emphasis added). "This chapter" refers to Title 42, chapter 85 of the U.S. Code – the *entire* Clean Air Act. Greenhouse gases are a "pollutant," Massachusetts, 549 U.S. at 532, and the Vehicle Rule imposes actual controls on greenhouse gases. Thus, under the express terms of the statute, PSD permits must contain BACT for greenhouse gases.

This Court has already held that the phrase "subject to regulation under this chapter" is a clear statement that "would not seem readily susceptible to misinterpretation." Alabama Power, 636 F.2d at 404. Indeed, within section 7475, Congress itself distinguished pollutants subject to regulation under "this *chapter*" from areas that are affected by "this *part*," § 7475(a), (a)(4) (emphasis added). See also § 7576(e) (describing the even narrower set of air pollutants "for which a [NAAQS] has been established"). EPA's regulations since Alabama Power have recognized that pollutants subject to control under *any* provision of the Act are covered under the

PSD program. See 45 Fed. Reg. at 52,722/2 (Ex. 10). Although EPA recognizes some ambiguity regarding the meaning of the statutory term "subject to regulation," see generally 75 Fed. Reg. at 17,007-14, it is unambiguous that it must at least encompass "each pollutant" that is currently subject to *actual control* under the Act.

Despite the statutory language, the case law, and decades of regulation applying this interpretation, Movants posit an alternative, "whole-statute" reading that would require controls only for pollutants that are subject to a NAAQS. See CRR Mot. 49-52; Texas Mot. 25-27. Under their various interpretations, the PSD provisions "can rightly be understood" to apply only to the six pollutants mentioned in sections 7473 and 7476, CRR Mot. 49-51, or at least only to "conventional pollutants," NAM Mot. 24-26. They also claim that, under section 7476, the establishment of a NAAQS is the exclusive means by which a pollutant becomes regulated under the PSD program. Id. at 51. Thus, reading limitations into the Act where none are present, Movants would read section 7475(a)(4) to impose controls upon each pollutant "subject to regulation under *section 7409 of* the Act, *for which a NAAQS has been established and a designation has been made*."

Section 7476 does not bear the weight that Movants place upon it. See CRR Mot. 51-52. This Court has already rejected the argument that the scope of the BACT requirement in section 7475 "is qualified by section [7476];" those sections simply have a "different focus." Alabama Power, 636 F.2d at 405-06. Section 7476 directs EPA to promulgate regulations addressing other NAAQS pollutants, but that section

cannot defeat the separate, explicit requirement that a PSD permit must include BACT "for each pollutant subject to regulation under this *chapter* [i.e., the entire Act]." § 7475(a)(4) (emphasis added). It also cannot defeat the requirement in section 7475(a)(3)(C) that PSD permits ensure compliance with any other applicable "emission standard" and "standard of performance" under the Act as a whole. § 7475(a)(3)(C).[39] Both of these provisions show that the scope of PSD permitting requirements is broader than NAAQS pollutants only.

Additional clear evidence against Movant's interpretation is found in the 1990 amendments to section 7412 of the Act, which lists hazardous air pollutants and provides for emission controls for those pollutants. In section 7412(b)(6), Congress provided that "[t]he provisions of Part C of this subchapter [i.e., PSD] shall not apply to pollutants listed under this section." The only possible explanation for this express exclusion is that Congress in 1990 believed that the PSD program otherwise *would* include the non-NAAQS pollutants listed under section 7412.

The various provisions of the Act, including the PSD program, can therefore only be rationalized as this Court has already done: "The language of the Act does not limit the applicability of PSD only to one or several of the pollutants regulated under the Act…." Alabama Power, 636 F.2d at 404. EPA did not "ignore" this

[39] NAM attempts to interpret section 7475(a)(3)(C) to mean only that a PSD permit may not be issued to a source that is already violating a standard under the Act. NAM Mot. 17 n.11. This reading fails to recognize that Section 7475(a)(3)(C) also applies to *construction* permits for new sources that have not yet been built, and that therefore cannot already be violating a standard.

Court's ruling in Alabama Power, see NAM Mot. 19; rather, EPA adopted the very approach "*required* by Alabama Power." 45 Fed. Reg. at 52,711 (emphasis added) (Ex. 10). It is Movants who ignore the fact that the Court in Alabama Power rejected the very BACT argument they now advance.

4. The PSD "Trigger" For Greenhouse Gas Regulation Is Based Solely Upon EPA Decisions That Are Now Beyond Challenge

As the foregoing sections show, the "triggering" aspect of the Timing Decision was the ineluctable result of the application of statutory text, EPA's regulatory interpretations of that text, and a seminal opinion of this Court to a newly regulated pollutant. To the extent Movants challenge the application of those regulations to greenhouse gases, their arguments are barred. Review of regulations promulgated under the CAA is available only within 60 days of the relevant Agency action. § 7607(b). Although NAM claims that the *application* of the existing statutory interpretation to greenhouse gases is "new grounds" to challenge those regulations, see NAM Mot. 19 & n.15, this Court has made clear that "new grounds" cannot be based on substantive arguments that could have been made as a challenge to the underlying agency action. See Nat'l Mining Ass'n v. DOI, 70 F.3d 1345, 1350 (D.C. Cir. 1995); Am. Road & Transp. Builders Ass'n v. EPA, 588 F.3d 1109, 1112-13 (D.C. Cir. 2009), cert. denied, No. 09-1485, 2010 WL 3834336 (Oct. 4, 2010). Movants

could have, and were required to, challenge EPA's regulations at the time they were promulgated.[40]

5. Congress Intended EPA to Apply the Act to New Pollutants

Despite the plain language of the Act, and assuming that their challenges are timely, Movants try to forge a Chevron step two argument. The foregoing discussion demonstrates that EPA's interpretations, even if not compelled by the Act, are at least reasonable and indeed are superior to Movants' alternative readings. However, Movants also argue that EPA cannot reasonably apply PSD requirements specifically to greenhouse gases because Congress could not have so intended. NAM Mot. 24-26.

This argument is contrary to the Supreme Court's decision in Massachusetts. There, the Supreme Court rejected EPA's argument "that Congress did not intend it to regulate substances that contribute to climate change," holding that "[t]he statutory text forecloses EPA's reading." 549 U.S. at 528. The Court considered it irrelevant that Congress had no specific intent with respect to greenhouse gases:

> While the Congress that drafted [§ 7521(a)(1)] might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances

[40] This issue is currently before the Court in Am. Chemistry Council v. EPA, No. 10-1167, in which various petitioners have challenged regulations from 1978, 1980, and 2002 that, together, automatically require PSD permitting to take into account any pollutant regulated under the Act. EPA has moved to dismiss those challenges as time-barred. See Respondent's Motion to Dismiss (Sept. 10, 2010). No petitioner moved to stay those regulations pending review. Even if the Court were to stay the Timing Decision itself, those longstanding regulations would continue to require that the Act be applied as EPA announced in the Timing Decision. As a result, a stay cannot remedy Movants' alleged harm.

> and scientific development would soon render the Clean Air Act obsolete. The broad language of [§ 7521(a)(1)] reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.

Id. at 532. There is no meaningful difference between the language the Supreme Court considered and the language of the PSD provisions of the Act. Movants' demand for "very explicit evidence" of Congress' intent with respect to greenhouse gas regulation, CRR Mot. 55, is an attempt to bypass the deference due to EPA under the Chevron standard and the Court's Massachusetts holding.[41]

There is also no merit to Movants' argument that adopting BACT for greenhouse gases is somehow different from adopting BACT for conventional pollutants. See NAM Mot. 26. While BACT for other pollutants often includes "add-on" control technologies, the statute calls for a broader assessment of "production processes and available methods, systems, and techniques… for control of each such pollution." § 7479(3). EPA has long recognized that this phrase encompasses both add-on controls and inherently lower-polluting processes. See, e.g., In re Knauf Fiber Glass, GMBH, 8 E.A.D. 121, 129 (E.A.B. 1999). Thus, even if Movants are correct that "mandated energy efficiency" is likely to be the only available BACT for the control of greenhouse gases, the use of a more efficient process or design to reduce pollution is consistent with both the statute and with EPA's practice.

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[41] NAM, Mot. 26, cites FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000), to suggest that Congress would not delegate regulatory authority over greenhouse gases to EPA. But see Massachusetts, 549 U.S. at 530-32 (distinguishing Brown & Williamson and finding it without application in the greenhouse gas context).

As the Supreme Court suggested in Massachusetts, the question is not which pollutants Congress may have had in mind when it enacted the PSD provisions of the Act. Rather, it is whether the Act's provisions *must* apply, or can *reasonably* apply, to new pollutants (including greenhouse gases) consistently with the text and purpose of the statute. See § 7470(1) (purposes of the PSD program); see also § 7602(h) (noting that "effects on welfare" in statutory purpose provisions include, inter alia, effects on climate). This question is left to EPA, which must "use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms." United States v. Haggar Apparel Co., 526 U.S. 380, 393 (1999).

6. Movants Do Not Seriously Challenge EPA's Inclusion of Greenhouse Gases in The Title V Permitting Program

EPA's analysis of the triggering effect of the Vehicle Rule applied not only to the requirements for preconstruction permits under the PSD program, but also to the requirements for operating permits under Title V of the Act. The purpose of Title V is to collect all regulatory requirements applicable to, inter alia, a major source of air pollutants and to assure compliance with such requirements. 75 Fed. Reg. at 17,023. Since 1993, EPA has interpreted Title V as requiring a permit for a major source of any pollutant that is "subject to regulation under the Act." Id. at 17,022-23. Movants' arguments against greenhouse gas regulation based on the provisions of the PSD program simply have no application to Title V. Title V has no provisions comparable

to the PSD provisions on which Movants rely, NAM Mot. 7, and nothing in Title V attaches its requirements only to NAAQS pollutants. .

CRR argues that if this Court were to invalidate the regulation of greenhouse gas emissions under PSD, then Title V could not apply to greenhouse gases because there would be no applicable requirements to include in a Title V permit. CRR Mot. 57. However, under the CAA, each source that is a "major source" for any air pollutant, including greenhouse gases, must obtain a Title V permit. See §§ 7661a(a) (permit requirement for major sources); 7661(2)(definition of major stationary source); 7602(j); 75 Fed. Reg. at 17,022-23 (noting that EPA applies this requirement to each source that is a major source of any air pollutant that is otherwise subject to regulation). Even if PSD did not impose any greenhouse gas requirements, a source's greenhouse gas emissions could still make it a "major source," required to obtain an operating permit that assures compliance with *other* applicable requirements under the Act. Nearly every source newly subject to Title V will be subject to some applicable requirements (and EPA intends to consider further how to address permits that would contain no applicable requirements). See 75 Fed. Reg. 31,566/2-3.

D. The Tailoring Rule Is a Valid Exercise of EPA's Authority

Although EPA's application of the absurd results, administrative necessity, and step-at-a time doctrines *reduces* Movants' harm by *orders of magnitude,* Movants nonetheless move for a stay of the Tailoring Rule on the grounds that EPA has improperly applied each of these doctrines. Texas Tailoring Mot. 7-13; NAM Mot.

27-33. Other than complaining that these doctrines are not often utilized, Movants clearly fail to carry their burden of showing a likelihood of success on the merits.

1. The Absurd Results Doctrine Was Properly Invoked

Movants assert that under Chevron Step I, the meaning of the statutory threshold in sections 7479(1) and 7602(j) of the CAA, which describe a "major emitting facility" or "major stationary source" as one that emits 100/250 tons per year of any pollutant, is clear, and therefore EPA cannot tailor that threshold to a different number, in this case 100,000 tpy. Yet, as this Court explained, "where a literal reading of a statutory term would lead to absurd results, the term simply 'has no meaning … and is the proper subject of construction by EPA and the courts." Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1271 (D.C. Cir. 1994). This situation is not at all unusual, as the "case law is replete with examples of statutes the ordinary meaning of which is not necessarily what the Congress intended." Id; see also United States v. American Trucking Ass'n, 310 U.S. 534, 543-44 (1940).

Although termed "absurd results," the name is somewhat misleading because this doctrine allows an agency to depart from the literal meaning of a statute where "'acceptance of that meaning would lead to absurd results … *or* would thwart the obvious purpose of the statute.'" In re Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 633 (1978)(emphasis added), quoting Commissioner v. Brown, 380 U.S. 563, 571 (1965). See also United States v. Bryan, 339 U.S. 323, 338 (1950). These cases are consistent with Chevron, which states that "the court, as well as the agency, must give

effect to the unambiguously expressed *intent* of Congress," thus requiring fidelity to actual congressional intent, not necessarily the literal language of the statute. 467 U.S. at 842-43 (emphasis added). Indeed, under a Chevron Step One inquiry, the Court must look not "only at the plain language of a statute… [but also] to its object and policy.'" Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1067-68 (D.C. Cir. 1998).

The method by which an agency may best effectuate congressional intent in the face of conflicting literal language is through *implementation* of the statute in a manner that cleaves to that intent. As this Court explained:

> When Congress delegates a function to an agency, we believe that an important element of congressional purpose is that the function be carried out sensibly and efficiently. Congress recognizes that it can only legislate, not administer, so it necessarily relies on agency action to make "common sense" responses to problems that arise during implementation, so long as those responses are not inconsistent with congressional intent.

Cablevision Syst. Dev. Co. v. Motion Picture Ass'n of Am., 836 F.2d 599, 612 (D.C. Cir. 1988); see also Negusie v. Holder, 129 S. Ct. 1159, 1171 (2009)(Stevens, J., concurring in part).

The Tailoring Rule effectuated a "common sense" administration of the CAA. The Rule captures sources that emit fully 86% of the greenhouse gas emissions that would be captured if the literal 100/250 tpy statutory threshold were applied, thus staying true to the central purposes of the PSD and Title V permitting programs. Moreover, the Tailoring Rule seeks to control emissions from pollutants that have the potential to harm public health and welfare, § 7470(1), while focusing initially on the

large emitters that are, as Congress intended, more "financially able to bear the substantial regulatory costs imposed by the PSD provisions." Alabama Power, 636 F.2d at 353-54; 75 Fed. Reg. at 31,552 (citing similar intent related to Title V). Finally, the Rule does so while implementing Congress' express requirement that these permitting programs be administered expeditiously so as "to *avoid a logjam of permit applications* … [to] ensure that permitting process will work with a minimum of disruption and delay." 136 Cong. Rec. S2107 (Mar. 5, 1990) (emphasis added); see also §§ 7661a(b)(6)-(9). Thus, the Tailoring Rule is precisely the type of "deviat[ion] from the statute tha[t] is needed to protect congressional intent." Mova Pharm., 140 F.3d at 1068.

In an argument that exalts labels over substance, Movants assert that because EPA relied on the "absurd results" doctrine to tailor the threshold, EPA must concede that its own interpretation that the PSD provision even covers greenhouse gases is absurd and cannot be upheld. NAM Mot. 20-24, CRR Mot. 18, 48, Texas Mot. 27.[42] First, this argument assumes it is necessary to reach a Chevron Step Two analysis, which, as outlined in part II.C, supra, is not the case. Even applying Chevron Step Two, it is *Movants'* interpretation (no coverage of greenhouse gases under PSD) rather than EPA's interpretation (tailored coverage) that is the greater deviation from

[42] Movants also assert that EPA could (and presumably must) avoid "absurdity" by interpreting the general term "pollutant" *not* to include greenhouse gases. Texas Tailoring Mot. 11; CRR Mot. 18; UARG Resp. 10-20. But the Supreme Court has foreclosed that possibility by holding that the term "air pollutant" plainly encompasses greenhouse gases. Massachusetts, 549 U.S. at 532.

congressional intent. EPA may not interpret the subject statutory provisions so as to avoid absurd results in their *implementation*, if to do so eviscerates Congress' intent (reflected in the flexible manner in which it structured the CAA, Massachusetts, 549 U.S. at 532) to cover *any* pollutant that potentially endangers public health and welfare. EPA's Tailoring Rule *hews as closely as possible to* congressional intent, but does so in a manner that avoids the absurd results in implementation that Congress clearly could not have intended.

2. EPA Properly Invoked the Administrative Necessity and Step-at-a-Time Doctrines

As EPA explained, although the doctrines upon which it relies to deviate from the literal statutory thresholds can be applied in an interrelated manner, each also stands on its own as a separate and independent basis to affirm the Tailoring Rule. 75 Fed. Reg. at 31,516. Thus, even were the absurd results doctrine not itself a complete and valid basis for issuing the Tailoring Rule, the administrative necessity and step-at-a-time doctrines would still authorize EPA's multi-stepped treatment of the 100/250 tpy threshold to achieve statutory compliance over time.

Under the administrative necessity doctrine, "an agency may depart from the requirements of a regulatory statute … 'to cope with the administrative impossibility of applying the commands of the substantive statute.'" Envtl. Def. Fund v. EPA, 636 F.2d 1267, 1283 (D.C. Cir. 1980)(citation omitted). Even where the agency is not authorized to create a *de minimis* exemption, "administrative necessity may be a basis

for finding implied authority for an administrative approach not explicitly provided in the statute" where applying the commands of the substantive statute "would, as a practical matter, prevent the agency from carrying out the mission assigned to it by Congress." Alabama Power, 636 F.2d at 358 (explaining application of this and related doctrines in interpreting PSD applicability).

EPA undoubtedly has a heavy burden to establish that carrying out the mandate of the literal terms of the statute is administratively impossible. Yet that burden is met in this case – a conclusion reinforced by Movants' claims. Here, EPA performed a comprehensive study of the processes, costs, manpower, expertise, and resources available to state permitting authorities to provide full and timely compliance with the statutory requirements necessary to process the 82,000 PSD and 6.1 million Title V permit applications that would result from application of the literal thresholds. EPA concluded that the application of "the specified [statutory] levels of emissions at the present time – in advance of the development of streamlining methods and greater permitting authority expertise and resources – would create undue costs for sources and impossible administrative burdens for permitting authorities." 75 Fed. Reg. at 31,547.

The four-step process created in the Tailoring Rule is precisely the type of solution the courts look to in cases of impossible administrative burdens. As the Supreme Court stated in Massachusetts, "[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop" and thus can implement

regulation "'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" 549 U.S. at 524, quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955); see also Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 478 (D.C. Cir. 1998). While Texas asserts that EPA may not utilize such a process unless it is designed to result in full compliance with the statutory requirements, Texas Tailoring Mot. 12, other Movants' arguments belie Texas' concern. See, e.g., NAM Mot. 10 (explaining that EPA will conduct rulemakings in Steps III and IV to expand coverage "potentially all the way down to the statutory thresholds of 100 or 250 tpy").

It is unnecessary for EPA to present in response to the Stay Motions its detailed explanation of how EPA and the States will be administratively unable to meet the overwhelming burdens resulting from application of the literal 100/250 tpy threshold, because *nowhere* do Movants dispute EPA's conclusions. Indeed, Movants contend that even utilizing the tailored threshold of 100,000 tpy, it is essentially impossible to implement PSD and Title V for greenhouse gases in an expeditious manner (an assertion with which EPA disagrees). NAM Mot. 47-50; CRR Mot. 62-64.[43] Movants thus fail to make the requisite strong showing that they will prevail on the merits.

[43] Movants' assertion that the agency must first try literal application before it can utilize administrative necessity is inapposite here where, in contrast to the cases Movants rely upon, EPA has already studied the administrative burdens and Movants do not contest EPA's conclusions that those burdens are overwhelming.

III. MOVANTS HAVE NOT ESTABLISHED THAT THEY WILL SUFFER IRREPARABLE HARM PENDING FINAL RESOLUTION OF THEIR CLAIMS ABSENT A STAY

Movants' allegations of harm, collectively, break down into two broad categories: (1) economic harm to businesses and industry from the direct and indirect costs associated with greenhouse gas regulation of stationary sources; and (2) harm to States, like Texas, primarily in the form of increased regulatory responsibilities and associated costs. These allegations, however, are wholly insufficient to meet the very rigorous showing of the type of concrete and irreparable injury necessary to warrant a stay. Winter v. NRDC, 129 S. Ct. 365, 374 (2008).[44]

A. The Alleged Harm to Regulated Industries and Other Non-State Movants Is Not Concrete, Imminent, or Irreparable[45]

Industry Movants claim they will suffer irreparable injury as a result of the costs of having to comply with PSD and Title V for greenhouse gases, including a so-called "uncertainty tax" that purportedly results from EPA's regulation of greenhouse gases. CRR Mot. 61-7; NAM Mot. 40-51. For numerous reasons, none of the injuries they allege withstands scrutiny.

First: Economic loss *does not* constitute irreparable harm. "Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the

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[44] See also Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006); Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring) .

[45] For clarity, EPA has divided its arguments into harm alleged by the non-state movants, collectively referred to herein as "Industry Movants," and harm alleged by Texas (and any other states), even though EPA recognizes there is some overlap.

absence of a stay are not enough." Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985); see also Sampson v. Murray, 415 U.S. 61, 90 (1974). Instead, "[r]ecoverable monetary loss may constitute irreparable harm *only* where the loss threatens the very existence of the movant's business." Wis. Gas, 758 F.2d at 674 (emphasis added). This rule applies even where movants challenge government regulation and monetary damages are not available in the event they ultimately prevail. See, e.g., Astellas Pharma US, Inc. v. FDA, 642 F. Supp. 2d 10, 22 (D.D.C. 2009); Biovail Corp. v. FDA, 519 F. Supp. 2d 39, 48-49 (D.D.C. 2007); Mylan Pharms., Inc. v. Shalala, 81 F. Supp. 2d 30, 42 (D.D.C. 2000). Although varied in type, all of the harm alleged by Industry Movants is economic harm emanating from application of the challenged EPA actions, which cannot support a stay.

Second: Industry Movants allege that the uncertainty caused by EPA's actions triggers a long chain of economic harms to various industries and then to the public, NAM Mot. Ex. 19 (Thorning Dec.) ¶¶ 5,19; CRR Mot. Ex. 22 (Peelish Dec.) ¶ 11; and that the threat of these harms will lead industries to move their operations abroad where regulatory burdens are less. Plants may close, jobs may be lost, and the national economic recovery may be impacted, they say. NAM Mot. 42-45; CRR Mot. 2. Even if these were accurate predictions (which they are not), they are allegations based on wholly hypothetical events.[46] Creason Dec. (Ex 11) ¶ 8. Allegations of

[46] Movants' speculative harm extends to contentions that interest groups will use the Endangerment Finding to support various types of administrative petitions and

harm based on speculation, no matter how potentially large, do not establish the type of irreparable harm necessary to justify a stay.[47]

Third: Industry Movants' *entire* irreparable harm argument is based on an incorrect premise: that a stay will provide their constituent members with greater certainty. In fact, the opposite is true: the existence of EPA's regulations *decreases* the uncertainty surrounding the greenhouse gas-related requirements industry will face under the Act. As the Fourth Circuit recently stated: "Without a single system of permitting [promulgated by EPA], it would be virtually impossible to predict the

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judicial challenges. CRR Mot. 66. Many of the examples Movants cite (such as common law nuisance suits) were filed well before the Endangerment Finding was made, thus making it impossible to say that the Endangerment Finding triggered such suits. In fact, many industry parties are themselves relying on EPA's ability to regulate greenhouse gas emissions under the Clean Air Act in court filings arguing that federal common law of nuisance has been "displaced" in this context, including in cases pre-dating the Endangerment Finding. See, e.g., Conn. v. Am. Elec. Power Co., 582 F.3d 309, 371-88 (2d Cir. 2009), petition for certiorari filed, 79 U.S.L.W. 3092 (Aug. 2, 2010)(No. 10-174). In any event, it is well-settled that the mere possibility of adverse precedent is not, by itself, enough to constitute "injury" sufficient to confer standing (see, e.g., Ala. Mun. Distributors Group v. FERC, 312 F.3d 470, 473 (D.C. Cir. 2002); Nat'l Lime Ass'n. v. EPA, 233 F.3d 625, 636 (D.C. Cir. 2000)), let alone irreparable harm.

[47] See, e.g., Comm. in Solidarity with People of El Salvador v. Sessions, 929 F.2d 742, 745-746 (D.C. Cir. 1991) ("Injunctions … will not issue to prevent injuries neither extant nor presently threatened, but only merely 'feared'"); Mylan Pharms., Inc. v. Shalala, 81 F. Supp. 2d at 42-43 (listing cases) ("[c]ourts within the Circuit have generally been hesitant to award injunctive relief based on assertions about lost opportunities and market share," finding such injury too speculative to establish irreparable harm.). See also Nat'l Park Hospitality Ass'n v. Dep't. of Interior, 538 U.S. 803, 811 (2003) ("Mere uncertainty as to the validity of a legal rule" not a hardship for purposes of the ripeness analysis); Diamond Shamrock Corp. v. Costle, 580 F.2d 670, 673 n.1 (D.C. Cir. 1978) (uncertainty because of regulation's pending effect is not harm for purposes of ripeness analysis).

standard for lawful emissions …." N.C. ex rel. Cooper v. Tenn. Valley Auth., 615 F.3d 291, 306 (4th Cir. 2010) (internal quotations omitted).

The Timing Decision resolves uncertainty over exactly when greenhouse gases (and other pollutants) become "subject to regulation" under the Clean Air Act, and the Tailoring Rule provides certainty by clarifying for numerous entities potentially covered for the first time by the PSD and Title V stationary source permit provisions when and under what circumstances they will face regulation, at least through 2016. Indeed, issuing a stay will strip away the certainty for thousands (for PSD) and potentially millions (for Title V) of entities that are *not* regulated under the Tailoring Rule, and that are rightfully relying on that Rule in their business planning. Any supposed uncertainty caused by the possibility that the Tailoring Rule may be invalidated (which is present in *any* challenge to *any* regulation) cannot be alleviated by a stay, because that uncertainty will remain until the Court issues its final decision.

Fourth: Industry Movants' alleged harms are both exaggerated and built on incorrect assumptions. NAM alone among the Movants attempts to quantify nationwide harm, asserting that the greenhouse gas PSD rules will lead to a chain of economic events ending in the same amount of losses *as the recent recession*. NAM Mot. 43. NAM makes no attempt, however, to identify the period over which these alleged losses will occur. It never even attempts to identify, much less quantify, the amount of the alleged harm that will occur *during the stay period* – that is, during this litigation. Creason Dec. (Ex 11) ¶¶ 3-4. The most glaring defect in this argument, however, is

NAM's premise: it *assumes* that EPA's stationary source rules – which by their terms affect only a very small sector of the U.S. economy – will have the same overall cost as the recent cap-and-trade legislative efforts, which would have affected almost the entire economy. Creason Dec. ¶¶ 4-5. From this, NAM piles incorrect assumption upon incorrect assumption, leading to an outrageously inaccurate and unsupported conclusion. Creason Dec. ¶¶ 9-10; Evans Dec. (Ex. 12) ¶¶ 4, 8.

Fifth: Industry Movants cannot show that *any* alleged rise in investment costs, loss in demand, or subsequent loss of market share or profits is directly caused by the challenged EPA regulations, as opposed to the many other present uncertainties in the markets. Creason Dec. ¶ 7. Movants' own declarants acknowledge that: (i) various factors affect business decisions regarding expansion and operations, including changing technology, access to new energy resources, and market dynamics, NAM Mot. Ex. 23 (Isakower Dec.) ¶ 18; (ii) currently, industry faces massive uncertainty from, among other things, the expiration of tax cuts and changes in health care, NAM Mot. Ex. 20 (Huether Dec.) ¶ 12; and (iii) "uncertainty, from *whatever the cause*, increases the risk of an investment and raises the 'hurdle rate' that a project must earn." NAM Mot. Ex. 19 (Thorton Dec.) ¶ 19 (emphasis added). It simply is impossible to determine, without pure speculation, that uncertainty about regulation of greenhouse gases is the specific motivation that has caused specific businesses to refrain from investing in a new facility or major modifications, rather than just prudence in light of the present economic environment or a host of other factors – or

that delaying a decision on the merits for a number of months will motivate such entities to go forward with investments in plant infrastructure.

Sixth: Industry Movants' claims that the PSD BACT requirement for greenhouse gases will cause irreparable harm are self-contradictory. NAM asserts that BACT will cause "dramatic" harm to its members, NAM Mot. 46, but simultaneously asserts that BACT costs are uncertain, contributing to their "uncertainty injury." NAM Mot. 42. Not only are these assertions contradictory, each is also overstated. Movants have not demonstrated that BACT costs will rise to the level of irreparable harm because BACT is decided on a case-by-case basis and is dependent on many factors, including costs and energy, environmental, and economic impacts. § 7479(3); 40 C.F.R. §§ 51.166(b)(12), 52.21(b)(12). Importantly, since BACT must be achievable considering costs and economic impacts, the statute *precludes* EPA from inflicting the degree of economic harm that Movants must show to obtain a stay of EPA's action. In any event, many BACT decisions are expected to be based on energy efficiency, which many companies already implement to reduce operating costs. McCarthy Dec. (Ex. 13) ¶ 100.[48]

[48] Even Movants concede that BACT requirements will cause essentially no harm until at least Step 2 commences in July 2011 because until then, BACT only applies to sources already subject to PSD permitting. NAM Mtn. 23-24 (explaining that Step 1, which continues past July 2012, "adopts Movant's result"). This concession not only evidences a lack of imminent harm, it also admits that at least some application of BACT for greenhouse gases is appropriate, i.e., permissible under the statute.

Seventh: Industry Movants allege that the costs of obtaining PSD and Title V permits will irreparably harm regulated sources, NAM Mot. 45-46, CRR Mot. 62-63, but these allegations also fail on multiple grounds. This amounts to little more than concern about the potential burdens faced by any regulated entity at the nascency of a new regulation, which without more, simply does not constitute irreparable harm. Wis. Gas Co., 758 F.2d at 674. See also, e.g., A.O. Smith Corp. v. FTC, 530 F.2d 515, 528 (3d Cir. 1976).

EPA estimates that the costs of obtaining a PSD permit average about $84,500 and a Title V permit about $46,400. 75 Fed. Reg. at 31,534. Nothing before the Court indicates such a cost "threatens the very existence of" Movants' members, Wis. Gas Co., 758 F.2d at 674, or imposes extreme hardship on Petitioners' operations. See A.O. Smith Corp., 530 F.2d at 515 ("These are not 'small' corporations; there is no contention that compliance … would render any appellee unable to meet its debts as they come due. Nor is there any contention that the cost of compliance would be so great vis-à-vis the corporate budget that significant changes in a company's operations would be necessitated.") Industry Movants' speculation that permitting authorities will face long delays in issuing PSD or Title V permits, CRR Mot. 62-64, is just that – speculation, and, as discussed immediately below, inconsistent with the actual facts. Evans Dec. ¶ 5.

B. Speculative Concerns Regarding Implementation of Permitting Programs Do Not Establish Irreparable Harm

1. The Initiation of Administrative Processes to Administer Permitting for Greenhouse Gas Emissions Does Not Constitute Irreparable Harm

Texas asserts that it will suffer irreparable harm from having to develop an expanded permitting process and then, if Texas is successful on the merits, having to undo that process. Texas Mot. 35-38. Texas, however, bluntly stated in submissions to EPA that it has absolutely *no intention* of administering PSD and Title V for greenhouse gases. Ex. 14 Thus, it cannot suffer the harm it alleges.

Even if Texas were to reverse course and decide to administer PSD and Title V for greenhouse gases, it still would suffer no irreparable harm. Texas claims it lacks funding to administer an expanded permitting program. Texas Mot. 38-39. But this is true of almost every public body that is required to implement a new program, which generally is funded only to meet present obligations. Like Movants' argument about the "uncertainty" resulting from challenged regulations, this argument is the victim of its own excess: if the normal activities that accompany a new regulatory effort are irreparable harm, then every challenged federal regulation would per se be deemed to create irreparable harm.

In any event, the costs Texas alleges it will incur are greatly exaggerated: more than *half* of Texas' averred costs would result only after full implementation of Title V. As explained below, implementation of Title V would not likely require major outlays during the pendency of this litigation. McCarthy Dec. ¶¶ 108,117,123. This is particularly telling because Texas does little to estimate its costs during the relatively

short period it will take the Court to resolve these cases on the merits and does not consider such factors as the actual permit schedule requirements. Finally, Texas' assertions that it will be irreparably harmed simply by having to expand its existing PSD and Title V administrative procedures to cover greenhouse gases are not credible, as most other States are doing the same without significant problems.

2. There Need Be No *De Facto* "Construction Moratorium" in Texas

Texas next asserts that EPA's actions "threaten to impose a permit moratorium," and indeed goes so far as to insist (with no support whatsoever) that "a *de facto* construction ban is already in place." Texas Tailoring Mot. 2, 4. As Movants correctly point out, section 7475 prohibits a source from constructing or modifying a facility without a PSD permit issued in accordance with CAA requirements. According to Texas, because it will not have in place by January 2, 2011 a revised SIP that covers greenhouse gases, a business in Texas will be unable to obtain a construction permit after that date – hence, a "*de facto* construction moratorium." Texas Tailoring Mot. 14.

Texas' assertions do not establish irreparable harm for several reasons. First, Texas has no standing to assert as a basis for a stay, harm that may accrue to businesses in the State resulting from a lapse in permitting authority.[49] Second, the

[49] See, e.g., Mass. v. Mellon, 262 U.S. 447, 485-86 (1923), explaining that while the doctrine of *parens patriae* allows states to bring suit on behalf of their citizens in certain circumstances by asserting a "quasi-sovereign interest," a State may not sue the federal government as *parens patriae* because it is the United States, and not the State, that

very rules Texas cites to support its argument that a permitting lapse will occur establish the exact *opposite*: no such lapse need occur and Texas can affirmatively take steps to avoid such a lapse.

As EPA explains in the proposed FIP Rule, "*absent further action by EPA*, those States' affected sources confront the risk they may have to put on hold their plans to construct or modify …." 75 Fed. Reg. at 53,890 (emphasis added). That is *precisely* the reason that EPA will issue a FIP: to ensure that there is an effective permitting program in each State, so that no *de facto* "construction moratorium" need occur. Id. at 53,885-86; see also 75 Fed. Reg. at 53,892 (proposed SIP Call). Indeed, Texas readily admits that EPA can, and is prepared to, act to prevent a lapse of permitting authority in any willing State, by handling the greenhouse gas portion of the permitting process pending the State's development of an appropriate SIP. Texas Tailoring Mot. 5. [50]

At bottom, Texas' complaint is with Texas. Texas asserts that its legislature will not act swiftly enough or that its administrative processes grind too slowly. Texas Tailoring Mot. 17-18. Even *if* Texas is for some reason unable to accelerate this

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represents the people as *parens patriae* in their relations to the federal government. See also Ctr. for Biological Diversity v. DOI, 563 F.3d 466, 476-78 (D.C. Cir. 2009).

[50] Texas argues that because EPA allows a State to accept delegation of enforcement of the FIP, "this indicated that EPA lacks capacity to process permit applications." Texas Mot. 40. On the contrary, EPA *allows* States to accept delegation of a FIP, *so long as they agree and have the resources to properly administer it*. Texas' assertion that EPA lacks the resources to implement the FIP in Texas (or in other states) is not supported by evidence of any kind. In fact, EPA expects to have adequate resources to administer a FIP. McCarthy Dec. ¶ 61.

process (which it has not established), it can alternatively take the easier path of simply accepting EPA's offer to implement the greenhouse gas portion of the State's permitting programs through a FIP, while it amends its SIP, as many other States have done or intend to do. And, if Texas accepts a FIP to avoid a lapse in permitting authority, it can nevertheless retain control by accepting a delegation, as some of the FIP States have, which will then allow it to issue the greenhouse gas permits and retain much discretion in how it does so. McCarthy Dec. ¶¶ 57-60. If Texas chooses not to take any of these paths, it cannot then claim irreparable harm from *EPA's* actions. To state the obvious, a movant "cannot rely on its own actions to create the risk of irreparable injury which it then seeks to avoid by the issuance of a preliminary injunction." Vantico Holdings S.A. v. Apollo Mgmt., 247 F. Supp. 2d 437, 454 (S.D.N.Y. 2003).

3. Movants' Challenges to the Workability of EPA's Implementation Process Are Speculative and Demonstrably Untrue

In the absence of an actual moratorium, all Movants (and "Responding" Petitioners) conjure up an administrative quagmire, speculating that EPA's proposed procedures will not succeed, so that by January 2, 2011, some states will not have a permitting authority, which will lead to a *de facto* "construction ban." They assert that many of the rest of the States will be unable to incorporate the Tailoring Rule thresholds into their SIPs by January 2, 2011, and so will face a flood of permit applications from small sources, which will then clog the system and thereby lead to a

de facto "construction ban" in those States, too. NAM Mot. 48-49; CRR Mot. 62-64. All of this is based on utter speculation about how the implementation process anticipated by future rulemakings will proceed or, at best, on incomplete information about the status of state implementation of greenhouse gas permitting. See, e.g., Peabody Resp. 16-18. Therefore, it can hardly be considered the type of "concrete" and "imminent" harm that justifies a stay. Wis. Gas, 758 F.2d at 674.[51] Moreover, Movants misapprehend (or mischaracterize) the regulatory process to be followed by EPA.

In fact, EPA is developing a comprehensive implementation process for greenhouse gas permitting and, based on a recent survey of each state and many local districts, in all States – with the possible exception of just Texas – the mechanisms are in place (or soon will be) for routine greenhouse gas permitting beginning January 2, 2011. McCarthy Dec. ¶¶ 4-5, 98, Att. 1. EPA's implementation process divides the States into three groups for PSD permitting purposes, depending on the SIP status of each State. The first group includes the seven States and various territories and localities whose PSD programs are *already* implemented through a FIP, which means

[51] Cf. Texas v. United States, 523 U.S. 296, 301 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (quoting Longshoremen v. Boyd, 347 U.S. 222, 224 (1954)("[d]etermination of the scope … of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.")).

that EPA regulations, including the tailored thresholds, already govern. 75 Fed. Reg. at 53,888 n.7; id. at 53,898 n.11; McCarthy Dec. ¶¶ 28-30.

The second group is represented by 12 States and four localities that operate under an EPA-approved SIP but whose PSD program *does not currently apply* to greenhouse gases. McCarthy Dec. ¶¶ 34, 55. Texas is part of this second group, needing to take action to have authority to cover greenhouse gases and to do so at the tailored thresholds. Absent EPA's implementation plan, come January 2, 2011, sources in these states that need a permit for their greenhouse gas emissions under section 7475(a)(1) will not have a permitting authority available to issue one, and therefore could be unable to proceed with construction.

EPA's implementation plan for these states is found in its September 2, 2010, proposed SIP Call, in which EPA proposed to find that these SIPs are "substantially inadequate" because they do not apply PSD to greenhouse gases, to require these States to submit a corrective SIP revision applying PSD to greenhouse gases, and to establish a deadline for their SIP revision. 75 Fed. Reg. at 53,892. This deadline must, by statute, be a reasonable period not to exceed 18 months. § 7410(k)(5). Here, EPA has established a 12-month deadline but has further allowed the states to agree to an earlier deadline, as early as December 22, 2010. 75 Fed. Reg. at 53,901. EPA expects to finalize the SIP Call by December 1, 2010. McCarthy Dec. ¶ 52.

If a State fails to submit its proposed SIP revision by its deadline, EPA *must* then issue a FIP for that State, which, in this case, EPA intends to do immediately

upon a State's failure to act by its deadline. 75 Fed. Reg. at 53,897, 53,904 (citing § 7410(c)(1)). Thus, *any* State – including Texas – may avoid a lapse in permitting authority either by (i) submitting a SIP revision that EPA can approve prior to January 2, 2011, or (ii) allowing EPA to set a December 22, 2010 deadline for its SIP revision so that EPA can promulgate a FIP in that State on December 23, 2010 (while the State *simultaneously* proceeds with the preparation of its SIP amendments). Id. at 53,904/3-05/1. In other words, each of these States, including Texas, has the full power to *ensure* that a lapse in permitting authority does not occur, simply by asking for an early SIP revision deadline that will allow prompt implementation of a FIP. In fact, most of the States and other jurisdictions have adopted this FIP approach, and the rest are expected to have approved SIP revisions by or very close to January 2, 2011.[52]

The third and final group is the 30 States and six localities that have an approved SIP that already covers greenhouse gases but at the statutory levels (100/250 tpy). These States need to amend their SIPs to incorporate the tailored thresholds to ensure that they will not be obligated to enforce PSD for greenhouse

[52] Of the jurisdictions subject to the SIP Call, EPA expects that by January 2, 2011, seven States and one locality will be subject to a FIP, and two States and one locality will have approved SIPs. McCarthy Dec. ¶ 55. Of the rest, two States and one locality are expected to have an approved SIP revision or FIP in the first quarter of 2011, and one locality is expected to have an approved SIP in the first half of 2011. Id. The gaps in these states are not expected to present any meaningful difficulty because of the brief period of time involved or lack of sources needing permits during that short period of time. Id.

gases at the statutory levels. Recognizing that some of these States will not have approved SIP revisions by January 2, 2011, EPA and these States have been working cooperatively to ensure that sources below the Tailoring Rule thresholds nevertheless will not be covered by PSD under either federal or state law as of January 2, 2011, or very shortly thereafter. EPA will rescind its previous approval of each of these State's SIPs to the extent they apply PSD to sources emitting greenhouse gases under the Tailoring Rule thresholds of 75,000/100,000 tpy. 75 Fed. Reg. at 31,579. EPA proposed this solution in the Tailoring Rule and expects to finalize it by the end of the year. Id. at 31,579; McCarthy Dec. ¶¶ 73-74, 90. This will eliminate the *Federal* law requirement that greenhouse gas sources below the Tailoring Rule thresholds obtain permits.

At the same time, the States are revising (or interpreting) their own statutes or regulations to eliminate the same requirement under state law even before these States have approved SIP revisions. Twenty-three of the thirty States in this category and three localities will revise (or can interpret) their state law so that it applies only to sources above the Tailoring Rule thresholds by January 2, 2011; five States and three localities anticipate that the state law changes will be in place by February 2, 2011; and one additional State anticipates that state law changes will be in place by mid-February 2011. McCarthy Dec. ¶ 97. Thus, notwithstanding Petitioners' dire forecasts of "debilitating uncertainty," the oncoming "train wreck," and the "glorious mess" associated with the States' purported inability to apply EPA's proposed processes,

Farm Bureau Resp. 2; Peabody Resp. 3, 20; CRR Mot. 56, for all practical purposes by January 2, 2011 or very soon thereafter, greenhouse gas permitting requirements for PSD sources, as limited by the Tailoring Rule to just the largest sources, will essentially be fully implemented throughout the country. There is, therefore, no reason to expect any lapse in permitting authority or long permitting delays.

As detailed supra, while Title V generally is not implemented through SIPs, it follows a basically parallel track to PSD in applying federal Title V requirements through state programs approved by EPA or, in lieu thereof, through a federal Title V program. EPA intends to take steps similar to those outlined for PSD to ensure that all state Title V programs cover greenhouse gases and do so at the tailored thresholds. McCarthy Dec. ¶¶ 112-115. Nevertheless, unlike PSD (which prohibits a source from constructing or modifying its facility without a permit issued in compliance with federal law, § 7475), in States where the approved Title V program does not apply to sources which are "major" only as a result of greenhouse gas emissions, such a source may continue to operate its facility *without even applying for a permit* generally until up to one year following the date the state Title V requirements are amended to apply to such sources or federal requirements are issued in lieu thereof. § 7661b. Because a source generally has up to a year after becoming subject to Title V to submit its permit application, § 7661b(c), 40 C.F.R. § 70.5(a)(1), EPA does not anticipate that any source will have to submit Title V applications solely as a result of being "major" for greenhouse gas emissions under Title V, or that States will have to act on such

applications, until sometime in 2012. See McCarthy Dec. ¶¶ 117, 123. By that time, these cases will have been decided, so there is no imminent, irreparable harm justifying issuance of a stay.

4. Movants' Arguments Regarding the Legality of EPA's Implementation Plans Are Meritless

In a series of arguments that are opaque at best, Movants assert that even if EPA's implementation process runs smoothly, that process may not be utilized because it violates certain provisions of the CAA or EPA's regulations that "require" States be given three (or five) years to amend their SIPs so as to cover greenhouse gases. CRR claims that section 7576 imposes a five-year period for SIP revisions that implement a PSD program to control a new pollutant, and until then, PSD does not apply. CRR Mot. 52. UARG and Texas claim that 40 C.F.R. § 51.166(a)(6) gives States three years to amend their SIPs to address greenhouse gases. Texas Tailoring Mot. 14, UARG Resp. 7. These timing arguments (which go only to PSD, not to Title V) are misplaced on several levels.

First, Movants' arguments do not even apply to 38 states. As outlined above, for eight States (category 1 above), PSD already is applied to greenhouse gases through a FIP, so provisions regarding the time allowed to amend a SIP are irrelevant. As further outlined above, for thirty additional States (category 3 above), their SIPs *already* apply PSD to greenhouse gases because they broadly apply to any "pollutant

subject to regulation." These States are amending their SIPs only to ensure that such application occurs at the tailored thresholds rather than the statutory thresholds.

Second, Movants' argument that in the remaining twelve states, EPA's regulations, including the Tailoring Rule, impose a construction ban unless the sates revise their SIPs, UARG Resp. 9-10, is flatly wrong. It is based on the wholly incorrect premise that absent a SIP amendment in those States, sources located there can obtain construction permits without having to address greenhouse gases until the State amends its SIP to affirmatively cover these pollutants. In fact, the opposite is true. As discussed above, since the beginning of the statutory PSD program, EPA has interpreted section 7475(a) as directly prohibiting construction or modification of a stationary source unless it obtains a PSD permit, which covers any regulated pollutant, including newly-regulated pollutants. This obligation on a source is independent of the obligation on states to have a PSD SIP that conforms with the statute, including covering newly regulated pollutants. See 67 Fed. Reg. at 80,186, 80,240 (Dec. 31, 2002) ("The PSD program applies automatically to newly regulated NSR pollutants"). Accordingly, if a SIP fails to comply with this requirement to cover newly-regulated pollutants, and the state therefore lacks authority to issue permits covering a new pollutant, such as greenhouse gases, without a FIP the source will be unable to obtain a permit covering all pollutants "subject to regulation" and the source will be prohibited from construction, by operation of section 7475(a)(1). Thus, even if the twelve States *could* take up to three years to amend their SIP, it is unclear why they

would want to, since it would deprive sources in their States a permitting authority from which to obtain the permit still required by *statute*, not by a SIP. [53]

Third, Movants mischaracterize the Tailoring Rule as amending 40 C.F.R. § 51.166 to impose the requirement that PSD apply to greenhouse gases. CRR Mot. 14, 59-60, Texas Tailoring Mot. 14, UARG Resp. 4-10. In arguing that EPA itself requires a three-year SIP review period, Movants cite 40 C.F.R. § 51.166(a)(6)(i), which provides that "[a]ny State required to revise its [SIP] *by reason of an amendment to this section [51.166]* … shall adopt and submit such plan revision to [EPA] … no later than three years after such amendment." (Emphasis added). But it is not the Tailoring Rule that required States to revise their SIP PSD program to cover any newly regulated pollutants, including greenhouse gases. It is the statute, confirmed by EPA's long-standing requirement and reiterated in the 2002 regulatory revisions to the PSD program, that leads to the necessity (not even a requirement) for twelve states to amend their SIPs. The Tailoring Rule is *deregulatory*: it ameliorates impacts that result

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[53] In a recent decision the 7th Circuit, mistakenly citing to PSD provisions when the issue before the court involved the *separate* and different non-attainment provisions of §§ 7501-7515, concluded that sources could continue to abide by permitting requirements in an existing SIP until amended, even if that SIP does not comport with the law. United States v. Cinergy Corp., No. 09-3344, 2010 WL 4009180 (7th Cir. Oct. 12, 2010). (See Ex. 15 at 14-15, Petitioners' brief, explaining that the dispute was based on non-PSD provisions.) In stark contrast to the non-attainment provisions actually at issue in Cinergy – which are not self-executing and must therefore be enforced through a SIP – PSD *is* self-executing; it is the *statute* (§ 7475), *not* just the SIP, that prohibits a source from constructing a project without a permit issued in accordance with the Act. Thus, until an applicable implementation plan reflects the statutory requirements of the CAA, a source subject to PSD *cannot* construct its project.

from the operation of the statute, which is what requires PSD to be applied to greenhouse gases.[54] Thus, 40 CFR § 51.166(a)(6)(i) has no applicability here.

In fact, the only EPA action even arguably "requiring" the twelve states to amend their SIPs is occurring through the proposed SIP Call. As outlined above, EPA is calling for amendments to the various SIPs pursuant to section 7410(k)(5). Under the express terms of that section, "[t]he Administrator shall notify the State of the inadequacies [done through the SIP Call], and may establish reasonable deadlines (*not to exceed 18 months* after the date of such notice) for the submission of such plan revisions." Id. (Emphasis added.) Here, the Administrator issued the SIP Call with a reasonable deadline of 12 months.

Movants question the validity of the procedure outlined by EPA in the proposed SIP Call as well as the proposed FIP Rule, see, e.g., CRR Mot. 8, but neither of these, nor other related proposed or contemplated procedures Movants question, is

[54] Movants mischaracterize EPA's statements in the Tailoring Rule as *requiring* states to interpret their "subject to regulation" provisions to incorporate the Tailoring Rule thresholds and avoid a SIP revision. CRR Mot. 60-61, Texas Tailoring Mot. 13. The Tailoring Rule does not require this interpretation; it says that States *may* be able to do so, and in fact, eight are doing so. 75 Fed. Reg. at 31,581; McCarthy Dec. ¶ 95. UARG argues that it is unlawful for states to apply the Tailoring Rule thresholds through an interpretation of existing SIP language. See UARG Resp. 10. However, UARG ignores the fact that many states "intend their [PSD] rules to apply in the same manner as EPA's counterpart rules." 75 Fed. Reg. at 31,581/3. Accordingly, these states can interpret "subject to regulation" to automatically include any newly-regulated pollutant in their PSD permitting program in a manner similar to EPA – and, in the case of greenhouse gases, by incorporating the applicability thresholds that EPA established in the Tailoring Rule, as a component of the "subject to regulation" provision -- without having to take additional regulatory action.

yet final agency action. A petitioner cannot challenge a non-final action of an agency. Bennett v. Spear, 520 U.S. 154, 177-78 (1997); P&V Enters. v. Corps of Eng'rs, 516 F.3d 1021, 1026 (D.C. Cir. 2008). Not surprisingly, no Petitioner has filed a petition for review of those proposed actions. If Movants believe EPA's implementation procedures as detailed in the SIP Call and FIP Rule are illegal, they must first seek to address their concerns to EPA through the administrative process.

Movants' reliance on other provisions to mandate some multi-year time period is similarly misplaced. Movants rely on section 7410(a), which is inapplicable here, where section 7410(k)(5) is being utilized, but in any event this provision specifically declares that SIP amendments may be required "within 3 years (*or such shorter period as the Administrator may prescribe*)." § 7410(a) (emphasis added). CRR separately claims that EPA's regulatory process violates section 7410(*l*), which requires a State to subject any SIP revisions to prior notice and comment. CRR Mot. 58-59. But nothing EPA has done forecloses this process; in fact, EPA has afforded the States a full year to complete their SIP revision processes. 75 Fed. Reg. at 53,896/1.[55] CRR

[55] CRR further asserts the processes EPA is following for implementation of the tailored thresholds were not fully explained in the *proposed* Tailoring Rule and, therefore cannot be incorporated in the final Tailoring Rule. CRR Mot. 59. While certain definitions changed in the final rule, those changes were a logical outgrowth of the original proposal. CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1079-80 (D.C. Cir. 2009); City of Portland v. EPA, 507 F.3d 706, 715 (D.C. Cir. 2007). Moreover, CRR was required to file an administrative petition for reconsideration if it wanted to challenge this issue, which it has not done. See § 7607(d)(7); Appalachian Power Co. v. EPA, 249 F.3d 1032, 1065 (D.C. Cir. 2001). The procedures that Movants actually assert to be improper are those in the proposed SIP Call and FIP

also asserts that under section 7476, EPA cannot require a State to regulate a new pollutant until 21 months after EPA issues a rule announcing the existence of this new pollutant. CRR Mot. 60. This provision, however, applies only to certain NAAQS pollutants, not other pollutants "subject to regulation," like greenhouse gases. See supra 54-56 (discussing inapplicability to section 7476 to non-NAAQS pollutants and why, in any event, it does not impose a 21-month deadline for covering a new NAAQS pollutant).

Finally, UARG cites section 7410(i), which states that except for certain enumerated actions, which include both SIP revisions and FIPs, "no … action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator." This provision does not apply to the SIPs that automatically update to apply PSD to greenhouse gases because for them, "no … action modifying any [SIP] requirement … [is being] taken," nor does it apply to SIP amendments required under a different subsection of 7410, subsection (k)(5), which expressly provides that EPA may issue a SIP Call requiring a SIP revision and may call for the revision to be submitted at any time the Administrator deems reasonable.

5. Texas Has No Sovereign Right That Will be Irreparably Harmed

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rule, which, as noted, are not final. EPA accepted comments on those until October 4, 2010. 75 Fed. Reg. at 53,883, 53,892.

Texas acknowledges that EPA's proposed FIP would effectively relieve Texas of its administrative burdens and of any hypothetical lapse of permitting authority. Because this concession would otherwise defeat its stay motion, Texas asserts that a FIP would somehow deprive Texas of its sovereign right to manage and protect its own clean air resources. Texas Tailoring Mot. 16. See also CRR Mot. 60-61. However, no such sovereign right exists. Although the CAA directs States to prepare implementation plans subject to EPA's approval and oversight, it is replete with provisions that permit EPA to direct the state to meet federal standards or withdraw that State's authority to implement the Act in appropriate circumstances.

A State's PSD and Title V permitting programs must comport with all EPA regulations and requirements and must be approved by EPA. §§ 7661a(b),(d); 7410(a)(2)(C). If EPA determines that the state program fails to meet all requirements, EPA is specifically authorized to "eliminate[] the state's ability to manage its own pollution control regime." Virginia v. Browner, 80 F.3d 869, 874, 882-84 (4th Cir. 1996) (State's sovereign rights are not infringed when EPA exercises its right to enforce Title V). If a State does not comply with EPA regulations, that State is subject to multiple levels of sanctions by EPA and to imposition of a FIP. NRDC v. Browner, 57 F.3d 1122, 1123-24 (D.C. Cir. 1995). Ultimately, if a State decides that it does not wish to comply with the requirements that EPA establishes, it may refuse to submit a SIP. The full burden of enforcing federal regulations then

reverts to the federal government. See, e.g., Hodel v. Va. Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981).

Moreover, the State's authority to administer its SIP is even more restricted with regard to EPA's PSD requirements. See Citizens to Save Spencer County v. EPA, 600 F.2d 844, 868 (D.C. Cir. 1979) ("Congress clearly prescribed a somewhat larger role for the federal government in the formulation of PSD requirements than in some other aspects of the Act …."). Thus, while the state-federal partnership remains vibrant, "[t]he Act nevertheless does provide for an aggressive federal role in rescinding or modifying a state plan in the case of a breach by the state of federally-mandated air pollution standards and implementation procedures." Id. at 852 n.9.

Even if Texas is correct that EPA's regulations somehow infringe its sovereign rights, Texas has not explained how that constitutes irreparable harm. As noted above, Texas may exercise its rights as a State by taking up to a year to amend its SIP: a FIP will merely be in place to ensure against any lapse in permitting authority while Texas exercises that "right." During this time Texas would continue to be the permitting authority for non-greenhouse gas emissions; the FIP would cover only greenhouse gas emissions.

Even with a FIP, Texas may be assured that it has substantial control over the permitting process by accepting a delegation from EPA of the authority to administer the FIP. It is true that under these circumstances, Texas would need to act in accordance with requirements contained in EPA's regulations – the most important

of which are the BACT requirements – but those requirements are similar to the requirements already in Texas' SIP for other pollutants. Thus, Texas would experience little difference in issuing greenhouse gas permits acting as a delegatee under the FIP than it would were it to act under its own approved SIP. McCarthy Dec. ¶ 59. In particular, because the BACT provision is inherently discretionary, Texas would have substantial discretion in administering that requirement. Thus, Texas is not irreparably harmed.[56]

C. Movants' Purported Harm Will Not Be Redressed by a Properly Issued Stay

Even if one were to assume that Movants could establish that they are harmed by application of PSD and Title V to greenhouse gases, their Motions for a stay must still fail because the relief they seek, a stay of each of the challenged rules, will not afford them the desired relief, a fact that dooms their motion. Wis. Gas, 758 F.2d at 674 (requiring that a stay movant "show that the alleged harm will directly result from the action which the movant seeks to enjoin"). Most of the Movants' arguments unjustifiably lump all the challenged EPA actions into one basket, claiming they are

[56] Texas complains that it may have to revise state laws to address Title V permit fees and suggests that sources would be required to pay Title V permits fees as a result of their greenhouse gas emissions. Texas Mot. 32-35. Notably, its declarant does not state that Texas is authorized to collect fees based on emissions of greenhouse gases. Furthermore, as noted above, if the Title V program in Texas does not apply to sources solely as a result of greenhouse gases emissions then such sources will not be subject to Title V at all until such time as the program is amended or federal requirements are promulgated. In any event, a rise in fees charged to permit applicants is neither irreparable harm nor harm that can be asserted by Texas.

harmed by all.[57] In fact, however, no Movant has alleged *any* direct harm from greenhouse gas regulation of mobile sources through the Endangerment Finding and Vehicle Rule. A stay of either of those two mobile source actions *solely to address alleged harms resulting from stationary source regulation* of greenhouse gases is completely unwarranted. The triggering effect that *mobile source* regulation of greenhouse gas emissions has with respect to *stationary source* regulation of such emissions is a product of the statute, not of EPA's regulations, and there is no basis to stay an otherwise proper rule solely on the basis of its collateral, and unavoidable, statutory implications.

A stay of the two stationary source actions also will fail to provide Movants with the relief they seek. As Movants recognize, this Court's stay of a regulation pending review preserves the status quo that existed prior to the promulgation of the regulation. NAM Mot. 1, 11 (citing Cobell v. Kempthorne, 455 F.3d 301, 314 (D.C. Cir. 2006)). As detailed supra, the Timing Decision affirms and refines EPA's pre-existing interpretation of the underlying statutes, clarifying the date on which PSD and Title V will apply to greenhouse gases. A stay of the Timing Decision would not eviscerate EPA's 1980 and 2002 rulemakings or its 2008 interpretation (the Johnson Memo), or the separate 1993 memorandum for Title V, in which EPA established that the PSD program and Title V apply automatically to each pollutant (not merely NAAQS pollutants) subject to regulation under the Act. See supra pp. 57-59.

[57] Here, Movants seek to stay, in various combinations, *each* of the four EPA actions being challenged. See Texas Tailoring Mot. 2; CRR Mot. 2; NAM Mot. 2.

Similarly, all of the alleged harm Movants describe, i.e., the economic effects and administrative burdens related to the PSD and Title V process and the uncertainty that occurs with having to address a new regulatory regime, will be reduced by orders of magnitude by the Tailoring Rule. Indeed, Movants cite at length to the harm that will occur *without* the Tailoring Rule, in support of their assertion that EPA has not established the proper process for SIP approval of the tailored thresholds by the States. See, e.g., NAM Mot. 7 n.3, 9 n.7, 48-51.

When a court finds upon full review of the merits that an agency has improperly promulgated a rule, it may remand it to the Agency or, if necessary, vacate it. Indep. U.S. Tanker Owners Comm. v. Dole, 809 F.2d 847, 854 (D.C. Cir. 1987); Steinhorst Assocs. v. Preston, 572 F. Supp. 2d 112, 125 (D.D.C. 2008). The Court should not exercise more expansive powers, i.e., order an agency to refrain from enforcing a statute or to refrain from applying interpretations in preexisting regulations not being challenged here, merely because Movants also seek a stay.

IV. THE PUBLIC INTEREST AND IMPACTS TO OTHER PARTIES DISFAVOR A STAY[58]

Astonishingly, Movants assert that *no one* will be harmed by a stay of EPA's actions. See, e.g., Texas Tailoring Mot. 6 ("There is no possibility that a stay would injure any party."); CRR Mot. 11 ("A Stay sacrifices none of the alleged benefits – there are none …."). First, any stay of a federal regulation necessarily impinges upon

[58] In a request for a stay, the analysis of harm to others and impact on the public interest merge. Nken, 129 S. Ct. at 1762.

an important public interest. As the Supreme Court explained in addressing a request to stay an agency order, "the parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders that the legislature has made final." Nken, 129 S. Ct. at 1757. Environmental regulations in particular serve an important public interest, one that cannot be quantified in typical terms of costs or lost opportunities. See United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 702 (1973). Thus, a stay in this case, by definition, impinges upon an important public interest.

That is particularly true here, given the statute and actions involved. As outlined supra, the very purpose of the CAA is to "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." § 7401(b)(1). This critical public interest is specifically repeated in the PSD provisions of the Act, which were enacted "to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipated to occur from air pollution … notwithstanding attainment and maintenance of all [NAAQS]." § 7470(1). A stay of *any* of the rules at issue here – whether such stay is limited just to regulation of stationary sources (as sought by NAM), or extends to the regulation of mobile sources as well (as sought by Texas and CRR) – clashes with this vital and congressionally-identified public interest. On this ground alone, the public interest easily bests Movants' speculative claims of harm to themselves, as well as their claims that no one

will be harmed if a stay is issued. See, e.g., United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 497 (2001).

The Endangerment Finding, moreover, provides a veritable roadmap of the many ways in which a stay of EPA's actions – or of the statutory permitting programs for stationary sources – would harm the public interest. The Administrator determined that greenhouse gas emissions threaten both public health and welfare, detailing impacts that include, inter alia, direct temperature effects, air quality effects, the potential for changes in vector-borne diseases, and the potential for changes in the severity and frequency of extreme weather events. 74 Fed. Reg. at 66,496, 66,523-30. These impacts in turn affect food production and agriculture, forestry, water resources, energy, infrastructure, settlements, ecosystems and wildlife, as well as national security. Id. at 66,496, 66,530-35. Because Congress delegated to *EPA* the authority and the obligation to assess the impacts of pollutants on public health and welfare, the Court should give *substantial* weight to the Administrator's determinations in weighing the impacts of a stay on the public interest. See Cuomo v. U.S. Nuclear Reg. Comm'n, 772 F.2d 972, 978 (D.C. Cir. 1985) (affording special weight to NRC views on the public interest because "Congress, the elected representatives of the entire nation … decreed [that NRC] should be responsible for the 'national security, public health, and safety' concerns associated with nuclear power"). Moreover, the Supreme Court has recognized the important public interests affected by greenhouse

gases, including harm unique to States as opposed to just the interests of their citizens. Massachusetts, 549 U.S. at 521-27.

Stationary sources are the *primary* source of U.S. anthropogenic greenhouse gas emissions.[59] Thus, even Movants' own expert concedes that the regulation of greenhouse gas emissions is "good public policy [and] I support regulation of greenhouse gas emissions from motor vehicles *and stationary sources* as a prudent approach to reducing the risks of global climate change …." NAM Mot. Ex. 17 (Graham Dec.) ¶ 3 (emphasis added).

Movants weakly attempt to minimize the harm to the public by asserting that a stay would affect only the short term, whereas climate change occurring as a result of greenhouse gas emissions is a process that occurs over decades. Movants' own submissions demonstrate the flaw in this logic. For example, a single state, Texas, estimates that 161 large facilities will be subject to PSD permitting over the first year of the program. Texas Tailoring Mot., Hagle Aff. at 11. If enforcement of the PSD program is stayed even for just the next year while the parties address the merits, those facilities in Texas – and many more in the other States and territories – will escape the statutory requirement of a PSD permit that requires greenhouse gas controls in perpetuity (unless they undertake a subsequent modification that triggers

[59] While mobile sources contribute over 23% of total domestic greenhouse gas emissions, electricity generation alone contributes 34% and the industrial sector an additional 19% percent, making stationary sources by far the largest class of greenhouse gas emitters. 74 Fed. Reg. at 66,496, 66,537-40; 75 Fed. Reg. at 31,519.

PSD). This is because PSD is a *pre*-construction permitting program: a source that is built without having to obtain a permit, with its attendant emission controls, may operate indefinitely without those controls. Because many of these facilities – especially the largest emitters among them, coal-fired power plants – will likely operate for many decades, and because greenhouse gases remain in the atmosphere with their heat-increasing properties for decades to centuries, 75 Fed. Reg. at 31,519, the effect of even one year's worth of these entities escaping regulation will have essentially an effect that will be felt for hundreds of years. This long-term effect is not one that has been lost on this Court. See, e.g., Spencer County, 600 F.2d at 860 (in addressing the precise date on which application of PSD should begin, Court explains that "the rate of deterioration of air quality in various regions will be determined by the resolution of this question").

Movants contend the benefits from regulating greenhouse gas emissions are speculative "because BACT is not yet known." NAM Mot. 56. Of course, if the environmental benefits of BACT limitations are too speculative to weigh on the public interest side of the ledger, then surely so are the economic harms that Movants assert from having to comply with BACT. See supra at 72. In any case, when assessing the public benefits of a regulatory program, those benefits do not have to be quantified with exactitude. The fact that newly constructed sources will have to include BACT instead of no controls at all indicates that the application of the PSD program to greenhouse gases will control those sources' potential emissions.

Movants characterize their own increased costs as an important public interest because of loss of jobs or increased consumer costs for their products. Central among their arguments is the "phenomenon" of "carbon leakage": they contend that because of EPA's regulation of greenhouse gases, sources will "escape" U.S. regulation and move their facilities to countries like China, India and Brazil, where they can pollute unabated, and that this harms the public interest. NAM Mot. 56-57. First, this is an oft-repeated threat, first made when the CAA was enacted and again at every major amendment, and it has never come to pass. Indeed, many businesses recognize the benefits of structuring their business strategy around compliance with greenhouse gas regulation, not running away from it. Creason Dec. ¶ 7 n.2 (citing corporate study). Second, Movants' arguments about the extent of "leakage" are based on estimates from the proposed economy-wide cap-and-trade legislation; movants have made no estimates about the impact, if any, that the much narrower PSD regulations would have. Id at ¶ 11. Third, Movants' conclusion that emissions will actually *increase* if PSD applies to greenhouse gases (NAM Mot. 56-57), assumes that most businesses subject to regulation in the United States will flee the country. It does not account for the vast majority of businesses, which undoubtedly will choose *not* to flee the country and, therefore, will reduce their greenhouse gas emissions in compliance with the Act's requirements, or for the fact that power plants – the largest domestic emitters of greenhouse gases – cannot relocate to "pollution-friendly" environs. Finally, Movants' premise is wholly speculative because it assumes that the

countries they identify will not implement controls for greenhouse gases emissions from stationary sources.

Finally, Movants assert that a stay should be granted because regulation of greenhouse gases is an issue better handled by Congress. CRR Mot. 14, 22, 69. While that may or may not be true, the Supreme Court settled this matter in Massachusetts, and EPA has no authority to ignore the existing Congressional mandates of the CAA. Certainly, this Court may not grant a stay based on the possible chance that Congress *may* enact a law that *may* somehow impact compliance with the specific provisions of the CAA here at issue.

Separately, staying the Vehicle Rule will result in substantial prejudice and harm to the auto industry and consumers of vehicles. To support the National Program, California has revised its standards such that compliance with the Vehicle Rule is deemed to be compliance with California's standards. 75 Fed. Reg. at 25,328. If the Vehicle Rule were stayed, EPA's federal greenhouse gas regulations would no longer be an alternative compliance option for meeting the California standards. Without such an alternative compliance option, automakers would instead have to comply with California standards (in both California and the other States that have adopted them), which are not aligned with NHTSA's fuel economy standards (see supra at 14). This would present myriad problems for the auto industry in terms of product planning and vehicle distribution. Not surprisingly then, the auto industry has intervened *in support* of EPA's Vehicle Rule and opposes a stay. California has likewise intervened

and opposes a stay, as have many other states. A stay of the Vehicle Rule would also lead to a loss of emissions reductions from Model Year 2012 vehicles that would be sold during the pendency of a stay, with the emission losses occurring over the full life time of the vehicles.

Movants cannot establish that the speculative harm they claim they will face absent a stay outweighs the substantial harms to others and to the public interest that will occur – immediately and with consequences lasting centuries – if a stay is issued.

CONCLUSION

For the foregoing reasons, all motions to stay in these actions should be denied.

Respectfully submitted,

DATED: October 28, 2010

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing EPA'S Response to Motions to Stay, 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 are required to have registered with the Court's CM/ECF system.

Date: October 28, 2010

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