Sent Electronically

December 28, 2009

Air and Radiation Docket and Information Center
U. S. Environmental Protection Agency
Mailcode 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Docket: EPA–HQ–OAR–2009–0517

The American Chemistry Council (ACC)[1] appreciates the opportunity to submit comments on the Environmental Protection Agency's (EPA) Proposed Prevention of Significant Deterioration and Title V Tailoring Rule (Tailoring Rule), 74 Fed. Reg. 55292 (October 27, 2009).

ACC supports and joined in the detailed comments on this proposed rule submitted to the docket by a coalition of industry associations, dated December 28, 2009. We wish to take the opportunity to make several additional comments.

As we stated in our comments on the proposed Motor Vehicle rule (dated November 25, 2009), ACC strongly believes that EPA should not regulate greenhouse gas (GHG) emissions from stationary sources using existing Clean Air Act authority unless and until Congress has had an opportunity to consider the policy and economic implications of taking that step. Indeed, as Congress and the Administration consider measures to support our economy and address climate change, the worst possible result would be a regulatory program that paralyzes new investment and jeopardizes both existing and new jobs. The presumed investments in energy-efficiency technology that the Administration expects will launch our economic recovery and create new jobs in "greener" technologies will be subject to the stationary source permitting requirements, effectively imposing another barrier to their introduction.

If EPA were to finalize the Motor Vehicle Rule, it may conclude that it must begin with the regulation of GHGs from stationary sources pursuant to the PSD permitting program. The

---

[1] *The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $689 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure.*

PSD program requires sources to apply Best Available Control Technology (BACT) for certain emissions for new construction or major modifications of facilities. At this point in time, BACT for GHG emissions has not been established, and there are no effective or commonly used add-on controls for removing GHG emissions.

Some are advocating that BACT for coal-fired power stations should require the use of natural gas or biomass for electricity generation. In fact, EPA Administrator Lisa Jackson recently rejected a PSD permit application for a proposed new 770 MW electric generating facility using Integrated Gasification Combined Cycle (IGCC) technology located in Cash Creek, KY, on the basis that the BACT analysis did not include consideration of switching from coal to natural gas.

If EPA continues down this path, future BACT reviews could force utilities and other combustion sources to "fuel switch" from coal to natural gas, particularly in regions or states where coal is a viable fuel source. According to information contained on EPA's Clean Energy web site, nearly 50 percent of the power generated in the United States is coal-based.[2] Gas only accounts for 19 percent. Thus, a "fuel switching" mandate would have significant economic impacts throughout the country. Furthermore, it represents an unprecedented governmental intrusion into the way America does business. Those economic and socio-political impacts must be fully evaluated and understood by our elected representatives before "fuel switching" is even considered by EPA for inclusion in a BACT analysis.

In addition, even if this tailoring rule is finalized as proposed, a majority of state environmental agencies would be unable to comply with these higher PSD and Title V thresholds until their state legislatures and governors adopt the new thresholds into their respective state laws. It would likely take several years for all the states to adopt such changes. Until these changes are made, the Clean Air Act thresholds of 100/250 tpy would still apply to all new and modified facilities, subjecting all new commercial and industrial facilities to a BACT review with uncertain results.

Furthermore the proposed PTE threshold of 25,000 tpy CO_2e would capture fairly small combustion units, many of which would not currently be subject to PTE review. ACC's calculations show that natural gas fired boilers larger than 49 MMBtu/hr and bituminous coal fired boilers larger than 27 MMBtu/hr would be subject to PSD at the proposed 25,000 tpy CO_2e threshold. When compared to other PSD regulated pollutants thresholds, a gas fired boiler would need to have a heat input greater than 180 MMBtu/hr to require a PSD review for NO_X, larger than 225 MMBtu/hr for CO, larger than 455 MMBtu/hr for VOCs, and 9,100 MMBtu/hr for SO_2. By having emissions 25,000 tpy CO_2e or greater subject to PSD, EPA will be subjecting many units to PSD for the first time.

As ACC and the other organizations have noted in our joint comments, there are a number of ways EPA could avoid triggering the stationary source permitting requirements, including revising its interpretation of PSD applicability to ensure that only pollutants for which a National Ambient Air Quality Standard (NAAQS) has been established trigger PSD permitting requirements.

---

[2] See - http://www.epa.gov/cleanenergy/energy-and-you/index.html

Lastly, we note that EPA's recently promulgated GHG reporting rule will help ensure that any future Agency actions relating to GHG emission reductions will be more informed and supported by good data. But that is not the state of play today. We believe strongly that the Agency should defer taking any further action at this time to regulate GHG emissions from stationary sources under existing Clean Air Act programs.

If you would like to discuss any of the comments in more detail, please contact me at (703) 741-5219 or lorraine_gershman@americanchemistry.com.

Very truly yours,

Lorraine Krupa Gershman
Director, American Chemistry Council

COMMENTS ON EPA'S PROPOSED PREVENTION OF SIGNIFICANT DETERIORATION AND TITLE V GREENHOUSE GAS TAILORING RULE

74 Fed. Reg. 55,292 (Oct. 27, 2009)
Docket No. EPA-HQ-OAR-2009-0517

---

submitted by:

AIR PERMITTING FORUM

AMERICAN CHEMISTRY COUNCIL

AMERICAN COKE & COAL CHEMICALS INSTITUTE

AMERICAN IRON AND STEEL INSTITUTE

CORN REFINERS ASSOCIATION

INSTITUTE OF SHORTENING AND EDIBLE OILS

NATIONAL ASSOCIATION OF MANUFACTURERS

NATIONAL OILSEED PROCESSORS ASSOCIATION

RENEWABLE FUELS ASSOCIATION

DECEMBER 28, 2009

TABLE OF CONTENTS

PAGE

INTRODUCTION 1

I. EPA's Conclusion That PSD Is Automatically Triggered by GHG Regulation Under Section 202 Is Fundamentally Flawed 3

A. Relevant Statutory and Regulatory Applicability Provisions 3

B. Sections 161 and 165(a) Limit PSD Applicability Based on the Location of the Source, Thus Imposing a "NAAQS Prerequisite Requirement". 4

C. Case Law Confirms the NAAQS Prerequisite Requirement — That PSD Is Triggered Solely by Pollutants for Which EPA Has Established a NAAQS 5

D. Reading Title I as a Whole Further Confirms That Congress Has Imposed a NAAQS Prerequisite Requirement for PSD to Be Triggered 6

E. EPA Can Implement the Proper Scope of PSD Applicability Under the Existing Regulations 7

F. The Statute's NAAQS Prerequisite Requirement Means That EPA Does Not Need to Rely on the Administrative Necessity and Absurd Results Doctrines to Set Appropriate GHG Significance Levels 7

II. When an Alternative Interpretation of the Statute Avoids the Need to Rely on the "Absurd Results" and "Administrative Necessity" Doctrines, EPA Must Consider and Adopt Such Interpretation 8

III. The Agency Should Apply the NAAQS Prerequisite Requirement to Avoid Relying on the "Administrative Necessity" and "Absurd Results" Doctrines Because They Are, at Best, Legally Tenuous 10

A. The Scope of the Administrative Necessity Doctrine Is Narrow and its Use Poses Legal Risks if the Rule Is Challenged Such That a Reviewing Court Will Likely Strike Down the Rule 11

B. EPA Has Misapplied the Doctrine of Absurd Results 12

IV. Even Applying the NAAQS Prerequisite Requirement, EPA Must Interpret The Phrase "Pollutant Subject To Regulation" And Should Interpret It To Exclude GHGs 14

V. To the Extent Title V Would Require Imposition of the 100 tpy Threshold on GHGs, Increasing Statutory Major Source Thresholds for Title V Is More Properly Based on the Legal Theories of Administrative Necessity and Absurd Results 15

VI. The Proposed Major Source and Significance Levels Are Arbitrary and Capricious 17

A. The Proposal's Assumption That it Is Excluding Most Small Businesses by Adopting a 25,000 tpy Threshold Is Incorrect 17

B. The Proposal Fails to Provide (1) a Rational Basis for Selecting a 25,000 tpy Major Source Threshold as Compared With Higher Thresholds; and (2) Sufficient Information for the Public to Meaningfully Comment 17

1. The selected thresholds are not based on a health and welfare analysis 18

2. The proposal's failure to explain the basis for selection of proposed thresholds deprives the public of a meaningful opportunity to comment 18

C. The Proposal's Assumption of a 2% Modification Rate, Which Underlies its Selection of Significance Level, Is Arbitrary and Capricious 21

VII. EPA's Tailoring Rule Is Facially Invalid Because it Proposes to Illegally Rewrite SIP and Title V Approvals 21

A. The PSD Tailoring Rule's Retroactive Re-interpretation of SIP Submittals and Approvals That Occurred Years (and in Some Cases Decades) Ago Violates Established CAA SIP Revision Procedures and Is Unlikely to be Sustained by the Courts 22

B. The Proposal's Retroactive Re-interpretation of Title V Submittals and Approvals Is Similarly Risky 24

C. The Retroactive Revision of SIPs and Title V Permitting Obligations Places Sources at Risk 24

D. EPA's Approach to Ask States to Quickly Revise Their SIPs to Comport With the Increased Significance Thresholds Is Likely to Be Challenged by Activist Groups Citing to the Act's Anti-Backsliding Provisions 25

VIII. Even if EPA's Retroactive Revision of its SIP and Title V Approvals Could Be Effective for Purposes of Federal Law, the Proposed Rule Offers No Relief to Regulated Entities Obligated to Comply With State Law and With Minor NSR Permitting Requirements 25

IX. The Proposed Definition of "Carbon Dioxide Equivalent" Improperly Relies on Documents That Have Not Been Subject to Notice and Comment and Places Sources in Ongoing Enforcement Jeopardy Should Global Warming Potentials Change 26

X. EPA Should Clarify That the Pollutants it Is Addressing in This Action Are the Four Pollutants Actually Being Regulated in the Section 202 Rule 27

XI. EPA's Analysis of Minor NSR Obligations Fails to Consider That State Minor NSR Programs Generally Parallel the Federal PSD Program Coverage 28

XII. EPA's Choice to Apply PSD and Title V to GHGs Means That the Proposed Tailoring Rule Is Not a "Relief Rule" as EPA Suggests, but Rather an Affirmative Regulatory Action Requiring a Full RIA 28

A. The Failure to Estimate the Impacts of the PSD Tailoring Rule on Stationary Sources Deprives Affected Sources and State Permitting Authorities of a Meaningful Opportunity to Comment on the Rule in Violation of CAA Section 307(d) and the Administrative Procedure Act 29

B. EPA's Failure to Assess the Costs (and Benefits) of the PSD Tailoring Rule — Which Applies PSD and Title V to Sources That Would Not Otherwise Be Required to Obtain a PSD and/or Title V Permit — Violates a Host of Statutes and Executive Orders That Require Analysis and Public Review of the Regulatory Burdens 31

1. The Proposed Rule does not comply with the Paperwork Reduction Act 31

2. The Proposed Rule does not comply with the Regulatory Flexibility Act 32

3. The Proposed Rule does not comply with the Unfunded Mandates Reform Act 33

4. The Proposed Rule does not comply with Executive Orders 12866, 13132, 13175, and 13211 33

CONCLUSION 34

ATTACHMENT A

COMMENTS ON EPA'S PROPOSED PREVENTION OF SIGNIFICANT DETERIORATION AND TITLE V GREENHOUSE GAS TAILORING RULE

74 Fed. Reg. 55,292 (Oct. 27, 2009)
Docket No. EPA-HQ-OAR-2009-0517

INTRODUCTION

The following organizations ("the Associations")[1] jointly submit these comments on the Environmental Protection Agency's ("EPA" or "the Agency") Proposed Rule regarding Prevention of Significant Deterioration ("PSD") and Title V Greenhouse Gas ("GHG") Tailoring Proposed Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009) ("Proposed Tailoring Rule"):

Air Permitting Forum

American Chemistry Council

American Coke & Coal Chemicals Institute

American Iron and Steel Institute

Corn Refiners Association

Institute of Shortening and Edible Oils

National Association of Manufacturers

National Oilseed Processors Association

Renewable Fuels Association

The Associations and their members represent a sizeable and diverse collection of commercial interests. The Associations believe that comprehensive climate change legislation is the preferred approach to addressing GHG emissions and that the Clean Air Act ("CAA" or "the Act") is not well-suited to addressing GHGs. Nonetheless, because the issues addressed by the Proposed Rule will have substantial and direct implications for the Associations' members, we are providing detailed comments on this Proposed Rule.

The following summarizes the primary points raised in these comments:

First, the need for regulatory relief for the PSD program is premised on a faulty interpretation of the PSD provisions of the statute and regulations. We believe that Congress

[1] A brief description of each filing association is provided in Attachment A.

clearly intended *only* national ambient air quality standards ("NAAQS") pollutants to be the basis for a stationary source to require a PSD permit, and we urge EPA to reconsider its interpretation of the statute in this regard. Under Sections 161 and 165 of the Act, it is clear that PSD must be applied only when a source is major for a NAAQS pollutant for which the area is designated as attainment or unclassifiable, and then, within that group, only when there is a significant increase in such a NAAQS pollutant. EPA has skipped over this important step in the PSD applicability analysis to answer only the question of whether GHGs are subject to regulation and, therefore, must consider BACT under Section 165(a)(4). EPA has essentially *and incorrectly* equated the pollutants for which BACT must be considered and the pollutants that may trigger the PSD permit requirement in the first instance. In the final rule, EPA should correct this error in the applicability analysis because doing so will (1) more faithfully implement the statute and (2) limit the universe of sources that must consider BACT for GHGs to those sources that actually require a PSD permit for a project significantly increasing a NAAQS pollutant (for which the area is designated attainment or unclassifiable).[2]

Second, we request that the Agency reconsider its interpretation of Title V applicability prior to invoking the doctrines of administrative necessity and absurd results. If EPA interprets the statute to limit applicability for these programs, the Agency can substantially limit the burdens that it seeks to alleviate in this Proposed Rule. Indeed, interpreting the statute to avoid an absurd result, such as 40,000 PSD permits or 6 million Title V permits, is a prerequisite to invoking these narrow doctrines to rewrite a statute.

Third, we urge EPA to conduct a more accurate and more specific evaluation of the burdens of triggering PSD and Title V for sources. Because EPA treats this proposal as providing relief, it has not analyzed the *burdens* of triggering PSD and Title V. Because EPA did not analyze these burdens in the Section 202 rule, it must do so here.

Fourth, EPA must reconsider its proposal to revise its prior approvals of State Implementation Plans ("SIPs") and Title V programs to limit those approvals to the new major source and significance levels. In addition to being unsound legally, this proposal illustrates the fact that the Proposed Rule would not actually reduce the regulatory burdens for sources. EPA has stated that its PSD and Title V regulations must be interpreted to apply PSD and Title V to sources with potential emissions of GHGs at or above the 250 tons per year ("tpy") and 100 tpy levels.[3] State programs have adopted the very same regulatory language in their PSD programs that EPA says compels this interpretation. Because state regulations will remain in place, and because sources must comply with state law, the proposed raising of the federal thresholds does not actually change the permitting obligation for sources. EPA's need to use this questionable-at-best regulatory approach to achieve the tailoring result further illustrates the wisdom of interpreting the statute to require as a prerequisite to PSD applicability that a source be triggering PSD permitting for a NAAQS pollutant for which the area is designated attainment or unclassifiable.

We appreciate the Agency's consideration of these points as well as consideration of the numerous additional concerns raised below.

---

[2] EPA has stated that it does not intend to issue a NAAQS for GHGs, a decision with which the Associations agree.
[3] 74 Fed. Reg. at 55,300.

I. EPA's Conclusion That PSD Is Automatically Triggered by GHG Regulation Under Section 202 Is Fundamentally Flawed.

EPA assumes in the Proposed Rule that the CAA and the PSD regulations *require* the Agency to subject to PSD review any source that is major and any modification of a major source above significance levels for *any* pollutant, including GHGs. The only exception EPA would allow is for nonattainment pollutants.

The PSD applicability provisions of the statute and regulations do not have to be interpreted this way, however. In fact, the text of the statute is more naturally read to limit PSD applicability to sources that are major (or will be for a greenfield facility) for a NAAQS pollutant for which the area is designated attainment or unclassifiable and then, within that group of NAAQS major sources, to those projects that result in a significant net emissions increase of a NAAQS pollutant. Once PSD is triggered by a major NAAQS pollutant source for a NAAQS pollutant for which the area is designated attainment or unclassifiable, the statute would require consideration of BACT for pollutants "subject to regulation." EPA's analysis puts the cart before the horse, by asking first what pollutants are "subject to regulation" and then basing *all applicability determinations* of the PSD program *solely on this criterion.* Such an approach is inconsistent with the statutory and regulatory language because it completely bypasses the core applicability provisions, rendering their inclusion in the statute superfluous.

A. Relevant Statutory and Regulatory Applicability Provisions.

EPA incorrectly bases all applicability of the PSD program solely on the scope of "pollutants subject to regulation" under Section 165(a)(4). While this language is certainly relevant to the PSD program because it determines the scope of the BACT requirement, skipping directly to this phrase bypasses important statutory language that defines applicability of PSD in the first instance. Specifically, the following statutory and regulatory provisions act to constrain *at the outset* the applicability of the PSD program:
CAA § 161 states:

> In accordance with the policy of section 101(b)(1), each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) *designated pursuant to section 107 as attainment or unclassifiable.*[4]

[4] 42 U.S.C. § 7471 (emphasis added).

CAA § 165(a) states:

> No major emitting facility on which construction is commenced after the date of the enactment of this part, may be constructed *in any area to which this part applies* unless—
>
> (1) a [PSD] permit has been issued ...;
> (2) [notice, comment, and opportunity for hearing provided];
> (3) [there is a demonstration of meeting air quality requirements];
> (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter...;
> (5) [class I area requirements are met as applicable];
> (6) there has been an analysis of any air quality impacts ... as a result of growth ...;
> (7) the [owner or operator] ... agrees to conduct such monitoring as may be necessary to determine [facility emissions'] ... effect ... ; and
> (8) [certain requirements pertaining to class II and class III areas are met if applicable].[5]

Section 52.21(a)(2) of EPA's regulations provides:

> Applicability procedures. (i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source *in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.*[6]

B. Sections 161 and 165(a) Limit PSD Applicability Based on the Location of the Source, Thus Imposing a "NAAQS Prerequisite Requirement."

The text of Sections 161 and 165(a) plainly limits application of PSD to certain areas – those designated as attainment or unclassifiable *pursuant to Section 107 of the Act.* Section 107 is applicable only to NAAQS pollutants. Thus, Sections 161 and 165(a) act to limit applicability by location and this "location-limiting language" must be given meaning in the Agency's application of the statute. EPA's analysis skips directly to subparagraph (4) of Section 165(a), which defines the pollutants that are subject to BACT *once PSD permitting is already required.* Subparagraph (4) uses the phrase "pollutants subject to regulation" – and is the only part of the statute that does so.[7] Yet, EPA incorrectly assumes that it is *this* subparagraph that dictates applicability of the entire program.

---

[5] 42 U.S.C. § 7475(a) (emphasis added).
[6] 40 C.F.R. § 52.21(a)(2) (emphasis added).
[7] 42 U.S.C. § 7475(a)(1). We note further that EPA's assumed applicability approach also bypasses subparagraph (1), which requires that a PSD permit be issued and required, before a BACT requirement is imposed. *Id.*

By "skipping ahead" in this manner, EPA has failed to effectuate the applicability limitation in Sections 161 and 165(a) by interpreting that language as mere surplusage. Under EPA's interpretation, the location-limiting language of the Act would simply require that a source be located in an area that is attainment for *any* pollutant. But that is no limitation at all since every area of the country is and always has been in attainment with at least one criteria pollutant. Congress must be presumed to have been aware of this fact when it enacted Part C (the PSD provisions), making EPA's construction inconsistent with canons of statutory construction requiring all words in the statute to be given meaning.[8]

C. Case Law Confirms the NAAQS Prerequisite Requirement — That PSD Is Triggered Solely by Pollutants for Which EPA Has Established a NAAQS.

The NAAQS Prerequisite Requirement of the Act is also consistent with the holding in *Alabama Power Co. v. Costle,*[9] where the court found that *location* is the key determinant for PSD applicability and rejected EPA's contention that PSD should apply in all areas of the country, regardless of attainment status. EPA had argued that PSD permitting requirements should apply not only to attainment areas for a given pollutant, but to anywhere that a new emitting facility would "adversely affect the air quality of an area to which" PSD requirements apply.[10] The court held that this interpretation violated the CAA's plain language.[11] The court stated: "The plain meaning of the inclusion in [42 U.S.C. § 7475] of the words 'any area to which this part applies' is that Congress intended *location* to be the key determinant of the applicability of the PSD review requirements."[12] In its regulatory response to the *Alabama Power* decision, EPA gave this ruling only grudging effect. Specifically, EPA provided an exemption from PSD for nonattainment pollutants in Section 52.21(i)(2), stating that PSD "shall not apply to a major stationary source or major modification *with respect to a particular pollutant* if ... the source or modification is located in an area designated as nonattainment under section 107."[13] But, in the preamble to regulations, EPA otherwise maintained its position.[14] The 1980 Preamble stated that PSD requirements still apply to any area that is "designated ... as 'attainment' or 'unclassifiable' for *any* pollutant for which a national ambient air quality standard exists."[15] This is inconsistent with the Act, which compels the contrary interpretation that PSD is triggered only when a major source is located in an attainment area or unclassifiable area for the pollutant that the source will emit in major amounts.

---

[8] *Un ited States v. Menasche*, 348 U.S. 528, 538-39 (1955); see also *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995); *Bennett v. Spear*, 520 U.S. 154, 173 (1997) ("'[C]ardinal principle of statutory construction' [instructs that a court has a duty] 'to give effect, if possible, to every clause and word of a statute... .'")(internal citations omitted).

[9] 636 F.2d 323 (D.C. Cir. 1980).

[10] *Id.* at 364.

[11] *Id.* at 364–68.

[12] *Id.* at 365 (emphasis added).

[13] 40 C.F.R. § 52.21(i)(2) (emphasis added).

[14] 45 Fed. Reg. 52,675, 52,676 (Aug. 7, 1980).

[15] *Id.* at 52,677.

D. Reading Title I as a Whole Further Confirms that Congress Has Imposed a NAAQS Prerequisite Requirement for PSD to Be Triggered.

Other provisions in Title I provide further support for limiting PSD program applicability to new major sources of NAAQS pollutants for which an area is designated attainment or unclassifiable and to existing major sources of NAAQS pollutants undertaking a major modification for a NAAQS pollutant in such an area. Section 110(a)(2)(C) sets forth the requirements for SIPs, stating that the plans shall "include a program to provide for ... regulation of the modification and construction of any stationary source within the areas covered by the plan *as necessary to assure that [NAAQS] are achieved, including a permit program as required in parts C [PSD] and D [nonattainment New Source Review].*"[16] This language again explicitly indicates that the purpose of the PSD program is to assure the NAAQS continue to be achieved. It is therefore inconsistent with this language to apply PSD in situations when there is no significant increase of a NAAQS pollutant for which an area is designated attainment or unclassifiable. Moreover, Section 107 provides insight into the meaning of the term "air quality" in Section 161 because it requires SIPs to "specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State."[17] Finally, Section 163(b)(4) specifies that the maximum allowable concentration of "any air pollutant" in "any area" to which Part C applies shall not exceed the NAAQS, further indicating that the PSD program is focused on attaining the NAAQS.[18]

EPA's overly broad interpretation of PSD applicability in the preamble to the 1980 regulations has attracted little scrutiny because, to date, it has had negligible practical import. Until now, sources rarely, if ever, triggered PSD based solely on emissions of a non-NAAQS pollutant. Now, however, this incorrect interpretation could trigger a host of absurd results that contravene congressional intent. EPA has itself recognized that the practical result of the 1980 interpretation is not desirable, specifically soliciting comment on an approach in which BACT would be applied to GHGs only in those cases where PSD permits are otherwise required for a source (*i.e.*, where a source is triggering PSD for a NAAQS pollutant).[19] EPA can only rely on the administrative necessity rationale so long as it is strictly necessary to avoid absurd consequences that result from "the literal application of a statute."[20] That is not the case here, since the absurd consequences flow, not from a literal interpretation of the Act, but from EPA's flawed interpretation of it. EPA thus can follow a straightforward, legally sound approach to avoid the assumed administrative and legal problems presented by the promulgation of the Section 202 rule by administering the statute under its plain terms.

Accordingly, to give effect to unambiguous terms of the statute (and regulations), EPA cannot require a source to undergo PSD permitting solely on the basis of emissions of a pollutant for which there is no NAAQS.[21]

---

[16] 42 U.S.C. § 7410(a)(2)(C) (emphasis added).
[17] *Id.* at § 7407(a).
[18] *Id.* at § 7473(b)(4).
[19] 74 Fed. Reg. at 55,327.
[20] *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).
[21] *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (agency must give effect to the unambiguously expressed intent of Congress).

E. EPA Can Implement the Proper Scope of PSD Applicability Under the Existing Regulations.

EPA's interpretation of the PSD provisions as requiring only that an area be designated as attainment or unclassifiable for *some* pollutant (for which an area is designated attainment or unclassifiable) is referenced only in the preamble to the 1980 PSD rules.[22] As noted above, Section 52.21(a)(2) properly and faithfully includes the location limitation of the statutory provisions. Therefore, the *only* change that is needed for EPA to properly limit the scope of PSD applicability consistent with the statute is to announce its interpretation in the *Federal Register*. Since EPA has solicited comment on the effect of this rule regarding PSD applicability, not only in the Section 202 proposal but also in the companion proposals regarding PSD applicability,[23] it is a logical outgrowth of this and those actions for the Agency to announce that, in response to comments, it is adopting the proper scope of applicability for the PSD program.

F. The Statute's NAAQS Prerequisite Requirement Means That EPA Does Not Need to Rely on the Administrative Necessity and Absurd Results Doctrines to Set Appropriate GHG Significance Levels.

Under the NAAQS Prerequisite Requirement, EPA must still establish a significance level for GHGs because sources that are obtaining a PSD permit and increasing GHG emissions would need to determine the level of increase that triggers the BACT requirement under Section 165(a)(4). Unlike the major source threshold for PSD applicability of 100 or 250 tpy, the statute does not specify the significance levels for determining whether BACT is required for a pollutant. Thus, EPA can set a significance level without reference to the major source thresholds, as they are not relevant. The sources for which a GHG BACT analysis would be conducted would, by definition, be major emitting facilities by virtue of their emissions of a NAAQS pollutant for which an area is designated attainment or unclassifiable. The only question for EPA to answer at that point is what level of GHG emissions increase is significant enough to warrant imposition of BACT.[24] This approach would be consistent with EPA's request for comment on whether it should require BACT for GHGs only when a source is otherwise required to obtain a PSD permit.[25] Importantly, it would also leave EPA with significantly greater flexibility under the statute to set an appropriate significance level for GHGs to determine the level of emissions increase above which BACT analysis is appropriate. EPA would not be departing from a specified numerical value in the statute – *i.e.,* because the statute does not specify significance levels.

---

[22] 45 Fed. Reg. at 52,699-52,700, 52,710-52,713.

[23] Proposed Tailoring Rule, 74 Fed. Reg. at 55,294; Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, 74 Fed. Reg. 51,535, 51,547 (Oct. 7, 2009) (PSD Interpretive Memo Reconsideration).

[24] The appropriate significance levels to be issued by EPA are addressed in Section VI.B.

[25] EPA specifically seeks comment on a transition approach that would allow only those sources that are otherwise required to obtain a PSD permit to consider BACT for GHGs. 74 Fed. Reg. at 55,327. The NAAQS Prerequisite Requirement is identical in result and provides EPA with a solid statutory basis for implementing such an approach on a permanent basis.

II. When an Alternative Interpretation of the Statute Avoids the Need to Rely on the "Absurd Results" and "Administrative Necessity" Doctrines, EPA Must Consider and Adopt Such Interpretation.

EPA's two notice-and-comment proceedings specifically addressing the applicability of PSD to GHG emissions (*this* Proposed Rule and the Proposed Reconsideration of the PSD Interpretive Memo) posit a conflict between the Agency's reading of Sections 165(a) and 169(1) and the practical realities of the PSD permitting program. The Agency has proposed to resolve that conflict solely through an essentially legislative transmutation of the 100/250 tpy applicability thresholds in Section 169(1). Specifically, in the Johnson Memo and PSD Interpretive Memo Reconsideration, EPA construes Sections 165(a) and 169(1) as requiring PSD applicability to turn on levels of emissions of *any* pollutant subject to actual CAA controls, including potentially GHGs.[26] In the Proposed Tailoring Rule, however, EPA shows convincingly that Congress could not have intended those sections to operate that way in the case of GHGs because, if they did, the number of construction projects requiring PSD permits would rise to absurd levels. Indeed, EPA's supporting analysis of the relevant statutory text and legislative history on this score is irrefutable.[27] In the face of that conundrum, EPA proposes only one solution – to change the PSD applicability thresholds in the case of GHGs from "greenfield" construction projects of 100/250 tpy to 25,000 tpy of carbon dioxide equivalent ("CO_2e").

To offer only this one solution is strikingly odd. The solution in its legislative character is extreme and unprecedented. But, more importantly, it ignores the logical implication of EPA's own analysis, namely, that Congress actually had a different vision for the PSD permitting program as defined by Sections 165(a) and 169(1) – a vision that excluded GHGs. Thus, both this Proposed Rule and EPA's Proposed Reconsideration of the PSD Interpretive Memo fail to provide any serious analysis of alternative constructions of the statutory scheme. The Associations urge EPA to undertake such an analysis. Without it, EPA cannot claim to have conducted a fully-reasoned and adequately-supported rulemaking.

As explained above, this vision is consistent with the natural reading of the statutory language limiting PSD applicability for GHGs to a BACT requirement when a source is otherwise required to obtain a PSD permit for a NAAQS pollutant. If EPA adopts this interpretation, the scope of the administrative burden and the absurd result of EPA's estimated 40,000 PSD permits per year would not occur. Where a statute can be interpreted to avoid absurd results, it must be so interpreted rather than relying on judicially created exceptions.[28]

---

[26] 74 Fed. Reg. at 51,539.

[27] *See* 74 Fed. Reg. at 55,308-55,310.

[28] *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982) (Interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available); *Comm'r of Internal Revenue v. Brown*, 380 U.S. 563, 571 (1965) (same); *United States v. Am. Trucking Ass'ns., Inc.*, 310 U.S. 534, 543-44 (1940) (same); *Kaseman v. District of Columbia*, 444 F.3d 637, 642 (D.C. Cir. 2006) (same); *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 385-86 (2d Cir. 2004) (same); *Towers v. United States (In re Pac.-Atl. Trading Co.)*, 64 F.3d 1292, 1303 (9th Cir. 1995) (same); 2A Norman Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 45:12, at 94 (7th ed. 2007).

If EPA had analyzed this – or any other – alternatives under the statute, it would have concluded, as argued above, that Congress intended applicability of the PSD permitting program as defined by Sections 165(a) and 169(1) to be based only on NAAQS pollutants. EPA would also find that Congress intended applicability to be based only on criteria pollutants (*i.e.*, pollutants whose emissions have predominantly local or regional impact).

The statutory evidence for concluding that PSD permitting can only be triggered by a criteria pollutant is strong. First, the 28 source categories that Congress listed in Section 169(1) in 1977 are the very ones EPA regarded at the time as posing the greatest potential for air quality degradation due to conventional pollutants. The only way to explain the selection of those particular categories is to posit a concern only with criteria pollutants. Indeed, the only way to understand the 100/250 tpy cutoffs is also in terms of criteria pollutants.

Second, the provisions of Sections 165(a) and (e) that require air quality monitoring and air quality impact analysis in connection with PSD permitting are oriented on their face to local or regional impacts. A prime example is Section 165(e)(1), which calls for an analysis of "the ambient air quality at the proposed site *and in areas which may be affected by emissions from [the proposed] facility for each pollutant subject to regulation under the [CAA] which will be emitted from such facility.*"[29]

Third, other relevant provisions of the CAA demonstrate the same focus. A prime example is the entire system for area designations in Section 107(d) and the underlying system for establishing air quality control regions in Section 107(b). Those systems make sense only from the standpoint of managing emissions of criteria pollutants, not GHGs. Indeed, Section 161 is the provision in Part C that dictates that each SIP must contain a PSD program and that the program be designed to prevent significant deterioration of air quality in areas designated as attainment or unclassifiable under Section 107(d). That objective makes sense only from the standpoint of emissions having a local or regional impact, not emissions of GHGs.

Finally, the legislative history of the Clean Air Act Amendments of 1977, the origin of Sections 165(a) and 169(1), reveals without doubt that Congress in creating those provisions had in mind only NAAQS pollutants. Both the Senate and the House saw themselves as engaged primarily in continuing the work that a prior Congress had begun, through the 1970 Clean Air Act, to rid the Nation, especially urban areas, of unhealthy levels of smog, particulates, sulfur dioxide, and other criteria pollutants. The air quality problems of concern to the 95th Congress in 1977 did not remotely include global warming.[30] It is simply not possible, in light of this legislative history and the legislative history EPA references, to make a credible argument that the 95th Congress intended that GHG emissions could be a basis for applicability of the PSD permitting program as defined by Sections 165(a) and 169(1).

The question of whether Congress did or did not have that intention, and what effect that intention should have on the interpretation of the CAA and stationary source authorities, has yet

---

[29] 42 U.S.C. § 7465(e)(1) (emphasis added).

[30] *See, e.g.*, 123 Cong. Rec. S9162-86 (daily ed., June 8, 1977) (stage-setting remarks of Senator Muskie, the lead floor manager); *id.* at H8662-65 (daily ed., Aug. 4, 1977) (stage-setting remarks of Congressman Rogers, the lead floor manager).

to be adjudicated by any federal court. In *Massachusetts v. EPA,* the U.S. Supreme Court decided that GHGs fit within the CAA's definition of "air pollutant" for the purposes of Section 202(a)(1), which authorizes EPA to make endangerment findings as a predicate to setting tailpipe emission standards.[31] Whether GHGs are within what can be considered "air pollutants" under the Act and can be candidates for regulation under Section 202(a)(1), however, are completely different questions from the one at hand.

In sum, EPA's PSD applicability Federal Register notices for this Proposed Rule and the PSD Interpretive Memo and Reconsideration reflect a major oversight on EPA's part. EPA has been focused on whether the phrase "subject to regulation" in Section 165(a) refers only to actual control, concluding in the end that it does and then merely assuming, without analysis, that the "any pollutant" component of the total phrase "any pollutant subject to regulation" has no bounds and therefore potentially includes GHGs. But, as EPA has recognized, the 100/250 tpy thresholds *must* have some meaning. They are an integral part of the statutory fabric, and they cannot be reconciled programmatically with an unbounded reading of "any pollutant subject to regulation." While EPA has chosen to try by itself to weave new thresholds into that fabric specifically for GHGs, at the same time it has ignored the possibility – indeed the virtual certainty – that the 100/250 tpy thresholds actually signal that the 95th Congress intended applicability of the Section 165(a) PSD program be based on criteria pollutants, and that the 95th Congress did not mean to authorize EPA to base Section 165(a) PSD applicability on GHG emissions. The Associations urge EPA, at a minimum, to address that probability through a detailed and thoughtful legal analysis. Without such an analysis, any final decision to base PSD on GHG emissions can have no legitimacy.

Further, the Associations believe that, based on their own analyses as detailed in Section I above and in this Section II, the far better reading of Sections 161, 165(a), and 169(1) is that Congress did not intend to base applicability of the Section 165(a) PSD permitting program on GHG emissions.

III. The Agency Should Apply the NAAQS Prerequisite Requirement to Avoid Relying on the "Administrative Necessity" and "Absurd Results" Doctrines Because They Are, at Best, Legally Tenuous.

EPA's reliance on the administrative necessity doctrine to justify the PSD Tailoring Rule's broad departure from the plain language of the CAA is highly questionable. First, the administrative necessity doctrine is more theory than reality — while courts have occasionally cited the doctrine, EPA does not cite a single instance in which a court upheld use of the doctrine. Second, *Alabama Power* and other cases interpreting the doctrine do not support the proposal's massive "tailoring" of the PSD program.

[31] 549 U.S. 497, 528-29 (2007).

A. The Scope of the Administrative Necessity Doctrine is Narrow and its Use Poses Legal Risks if the Rule Is Challenged Such That a Reviewing Court Will Likely Strike Down the Rule.

In *Alabama Power*, a case involving a *de minimis* exemption, the D.C. Circuit articulated the doctrine of administrative necessity, recognizing that "[c]onsiderations of administrative necessity may be a basis for finding implied authority for an administrative approach not explicitly provided in the [CAA]."[32] However, the Court explained that "there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of cost and benefits."[33] Furthermore, where an agency seeks a "prospective exemption ... from a statutory command based upon the agency's prediction of the difficulties of undertaking regulation," rather than a relief after good faith effort, the agency's burden is "especially heavy."[34] The case law following the *Alabama Power* decision similarly reflects the very limited nature of the administrative necessity doctrine.[35]

While EPA certainly engages in a thorough discussion of case law in the PSD Tailoring Rule, the Agency cannot cite a *single case* to support such a broad and prospective application of the administrative necessity doctrine. In fact, EPA cannot and does not cite a single case in which a court actually relied on this doctrine in upholding a deviation from a statute. In every case relied on by the Agency, the court rejected attempts by administrative agencies to invoke the doctrine. EPA concludes the discussion of each successive case cited in the PSD Tailoring Rule with a statement such as the following: "[t]he court went on to find, however, that in this case, EPA's justification for 'administrative necessity' was not sufficient."[36] Yet, somehow, the Agency unreasonably views these cases as "reiterat[ing] the validity of the 'administrative necessity doctrine'" and "affirm[ing] that the doctrine of 'administrative necessity' c[an] be used to allow an agency to depart from the requirements of a statute."[37] EPA's own presentation of the law demonstrates that the administrative necessity doctrine is a disfavored legal theory, one unlikely to be sustained by a court.

EPA acknowledges that the D.C. Circuit "has stated that the administrative necessity doctrine is particularly difficult to assert when the agency ha[s] not yet tried to enforce the statutory requirements."[38] Furthermore, EPA admits that the Court does not favor "[c]ategorical exemptions from the clear commands of a regulatory statute."[39] Yet, in the PSD Tailoring Rule, EPA seeks to both prospectively tailor the PSD program prior to implementation and categorically exempt a broad swath of the economy, including millions of sources, from what EPA believes to be a clear command of the CAA.

---

[32] 636 F.2d at 358.
[33] *Id.* at 357.
[34] *Id.* at 359-360.
[35] *See e.g., Envtl. Def. Fund, Inc. v. EPA*, 636 F.2d 1267, 1283 (D.C. Cir. 1980) ("EDF"); *Public Citizen v. FTC*, 869 F.2d 1541, 1556-57 (D.C. Cir. 1989).
[36] 74 Fed. Reg. at 55,313.
[37] *Id.*
[38] *Id.* at 55,318 (citing *Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C. Cir.1983)).
[39] *Id.* (quoting *Alabama Power*, 636 F.2d at 358) (alteration in original).

Incredibly, EPA "believe[s] that the facts here are much more supportive of an administrative necessity application than in [all of the prior administrative necessity cases]."[40] In the PSD Tailoring Rule, EPA seeks to broaden a 250 tpy statutory cut-off to 25,000 tpy — an exemption 100 times greater than the statutory language and impacting millions of sources. On the other hand, in *Alabama Power*, EPA sought to exempt major emitting facilities with actual emissions of 50 tpy or less from PSD, a "*de minimis* exception" from the PSD program.[41] Similarly, in *EDF v. EPA*,E PA sought to exempt materials containing 50 ppm or less of a TSCA regulated substance from a prohibition on manufacture, processing, and distribution of that substance — again, a *de minimis* exception to TSCA's prohibition.[42] Yet, in both *Alabama Power* and *EDF*, the D.C. Circuit found that the Agency had not met the heavy burden of justifying administrative necessity.[43] It is difficult to imagine how the facts here are more supportive of this rare doctrine than these attempted *de minimis* exceptions to statutory requirements.

B. EPA Has Misapplied the Doctrine of Absurd Results.

EPA asserts that the effects of a literal application of the PSD thresholds and their collateral consequences "bring into play the 'absurd results' doctrine."[44] However, EPA has fundamentally misapplied the doctrine of absurd results to reach this conclusion. First, the doctrine of "absurd results" should be applied to guide EPA's interpretation of the statute in the first instance, not to support the need for rules designed to avoid a result based on an interpretation of the statute that creates an absurd result. Second, the "absurd results" doctrine simply does not support EPA's attempt to dramatically rewrite the CAA.

Moreover, as the Agency correctly states in the PSD Tailoring Rule, "[i]n cases in which the 'absurd results' doctrine of statutory construction authorizes an agency to depart from the literal meaning of the statute, the agency must do so in as limited a manner as possible to effectuate underlying congressional intent."[45] In *Mova Pharm. Corp. v. Shahala* (cited by EPA in the PSD Tailoring Rule),[46] the court applied this principle to an FDA regulatory requirement:

> We conclude that the FDA's successful-defense requirement is inconsistent with the unambiguously expressed intent of Congress. The rule is gravely inconsistent with the text and structure of the statute. Nor can the FDA show that the successful-defense requirement is needed to avoid "a result demonstrably at odds with the intentions of [the] drafters." ... The FDA could have adopted a more narrow solution to the problem ... It instead adopted the broad win-first rule, which it cannot show is needed to implement congressional intent. In effect, the FDA has embarked upon an

[40] 74 Fed. Reg. at 55,316.
[41] *Alabama Power Co.*, 636 F.2d 323.
[42] 636 F.2d 1267.
[43] *Alabama Power Co.*, 636 F.2d at 356-57; *EDF*, 636 F.2d at 1283.
[44] 74 Fed. Reg. at 55,308.
[45] *Id.* at 55,307.
[46] *Id.*

> adventurous transplant operation in response to blemishes in the statute that could have been alleviated with more modest corrective surgery.[47]

Like FDA, EPA "could have adopted a more narrow solution to the problem," (*i..e.,* the NAAQS Prerequisite Requirement) but instead chose to draft a broad exemption from CAA requirements. EPA fails to mention, let alone analyze, alternative CAA interpretations that would avoid the need to completely rewrite the PSD provisions of the statute. Instead, EPA decides to rewrite the statutory applicability thresholds as the only potential solution to the anticipated administrative burdens. The more sound and reasonable interpretation of the statute, as discussed in Section I above, would avoid a wholesale rewriting of the statute. Under the case law cited by EPA itself, if EPA finds that the results of literal application of Section 165 are truly absurd, the Agency is obligated to adopt the most limited departure from the statute. The alternative approach discussed above would solve all of the problems associated with the effect of the Section 202 Rule on the PSD program without any departure from the statute.

Furthermore, the Agency's dramatic rewriting of the CAA is not supported by absurd results case law. Courts rely on the absurd results doctrine to justify limiting or construing a particular statutory provision to apply in a manner different than the "literal application of the statute."[48] The doctrine is available for "statutory language which, at least to some degree, [is] open to interpretation" — it does not justify creating entirely new law.[49] For example, the Supreme Court has held that a provision of the bankruptcy code "which provides that 'the trustee may abandon any property of the estate that is burdensome to the estate,' does not give a trustee the authority to violate state health and safety laws by abandoning property containing hazardous wastes."[50] This is a classic application of the absurd results doctrine — the Court found that Congress clearly did not intend the abandonment clause to apply to hazardous wastes, because that would conflict with numerous environmental laws. To avoid this "absurd result," the court merely construed the law as inapplicable in a circumstance that would directly conflict with environmental law.

The unambiguous 100 tpy and 250 tpy statutory limits at issue here are not open to interpretation. In fact, the PSD applicability thresholds could not be clearer. Instead of attempting to limit or construe the CAA in a manner more in line with the "absurd results doctrine," the proposal rewrites the Act itself — which only Congress has the authority to do.

IV. Even Applying the NAAQS Prerequisite Requirement, EPA Must Interpret the Phrase "Pollutant Subject to Regulation" and Should Interpret it to Exclude GHGs.

As discussed in Section III.B above, the "absurd results doctrine" dictates that, to avoid absurd results, an agency may only depart from the literal meaning of the statute in as limited a

---

[47] 140 F.3d 1060, 1069 (D.C. Cir. 1998) (quoting *Ron Pair Enters.*, 489 U.S. at 242).

[48] *See e.g., Ron Pair Enters.*, 489 U.S. at 242-43; *In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991); *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Prot.*, 474 U.S. 494, 507 (1986).

[49] *Ron Pair Enters.*, 489 U.S. at 245.

[50] *Id.* at 243 (quoting *Midlantic Nat'l Bank,* 474 U.S. at 507).

manner as possible to effectuate underlying congressional intent. Congress created the CAA 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."[51] With the PSD program, Congress struck a delicate balance between environmental protection and economic growth.[52] EPA's interpretation – that the designation of an area as attainment or unclassifiable for any pollutant means PSD applies to all pollutants – is fundamentally inconsistent with the purpose of the Act. The repercussions created by applying PSD to GHGs are perhaps the best evidence that such an interpretation runs contrary to congressional intent. Given this, EPA could reasonably interpret the term "subject to regulation" to exclude GHGs.

This is supported by the clear indications that Congress did not intend for the PSD program to effectively authorize a national permitting system for newly classified air pollutants. If PSD applies to GHG emissions, the Agency estimates that without the proposed tailoring approach 40,000 new PSD permits will be required annually,[53] including permits for small entities not previously subject to PSD, such as hospitals, churches, schools, and small businesses. This vast expansion in permitting will do little to "protect and enhance the quality of the Nation's air resources," yet will significantly weaken the "productive capacity of the population." In addition, it will certainly stifle if not completely halt the nation's economic growth. Currently, PSD permitting requires 12-18 months *after* a complete application is filed. With this new burden, EPA and state permitting agencies will face such severe backlogs of PSD permit applications that companies will be forced to wait decades for a permit. Faced with such delays and uncertainty, many companies may forgo new projects and expansions altogether. Congress never intended to create a program of such magnitude, particularly where the expansion in permitting will do little, if anything, to improve *local* air quality. Furthermore, EPA's interpretation requires it to reinterpret historical approvals of SIPs so that they do not apply to GHGs below the new thresholds, a result that defies common sense and is at odds with the numerical thresholds in state regulations. All in all, the absurd results of EPA's proffered interpretation show that the language must be interpreted to require that EPA has issued a GHG NAAQS before GHGs can be the sole trigger for PSD.[54] Since EPA has stated in this proposal that it does not intend to issue a GHG NAAQS (and we concur that it would be inappropriate to do so), PSD permitting requirements should *not* be triggered based solely on emissions of GHGs.

As to timing, the Associations urge EPA to affirm that the BACT analysis requirement does not apply until a control regulation requires *actual compliance*. Accordingly, if EPA finalizes the Section 202 rule, under EPA's current interpretation, that rule would not trigger the PSD program until its compliance date – given fleet average requirements, ***the end of the 2012 model year***. Under the NAAQS Prerequisite Requirement of the Act, this would mean that sources otherwise obtaining a PSD permit would not be required to consider BACT for GHGs until the end of the 2012 model year, allowing permits that are currently being processed to be completed and an orderly transition. Furthermore, EPA must follow the regular SIP revision

[51] 42 U.S.C. § 7401(b)(1).
[52] One purpose of the PSD program is "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3).
[53] 74 Fed. Reg. at 55,295.
[54] The Associations concur with EPA's statement in the Proposed Rule that it is not appropriate to establish a NAAQS for GHGs. *Id.* at 55,297.

process if it intends to require GHG regulation under the PSD program; states must have an opportunity to respond to EPA's new controls before they go into effect.

V. To the Extent Title V Would Require Imposition of the 100 tpy Threshold on GHGs, Increasing Statutory Major Source Thresholds for Title V Is More Properly Based on the Legal Theories of Administrative Necessity and Absurd Results.

EPA should consider interpreting Title V's applicability provisions consistent with the intended scope of the program. Congress clearly did not intend for Title V's reference to "any air pollutant" to address pollutants like GHGs, the required monitoring for which was addressed in a statutory provision outside the Act.[55]

EPA correctly notes that Title V applicability is based on potential emissions of 100 tpy or greater of an "air pollutant." However, EPA has long recognized that the Title V program's applicability is intended to be narrower and has interpreted it as not being applicable based on emissions of CO_2.[56] EPA should conclude that it can reasonably interpret the Title V applicability provisions consistent with congressional intent regarding the scope of the Title V program. Congress' understanding of the scope of the Title V program is evidenced in the legislative history of the Clean Air Act Amendments of 1990, in which the costs of that program was considered to be so modest that they were not broken out in either the Administration's analysis or subsequent congressional analyses of the bill. Thus, there is no possibility that Congress envisioned the overwhelming costs that would be incurred, by regulators and the regulated community, if GHGs, at an emissions level of 100 tpy were pollutants for which Title V applicability could be considered. And, while EPA correctly interprets the statute as not requiring GHGs to be included in the presumptive minimum fee collection requirements of Section 502(b)(3)(B) at this time because there is no NSPS regulating GHGs, EPA also appropriately recognizes that states are mandated to demonstrate their fees will be adequate to cover the costs of the permit program. The presumptive minimum fees that Congress set for regulated pollutants would clearly be insufficient to cover the costs of a Title V permitting program that includes GHGs – at 100 or even 25,000 tpy. EPA points out in the proposal that states will clearly incur additional costs to cover the permitting of Title V sources even with the 25,000 tpy threshold and that the statute requires that these costs be passed through to regulated sources in the form of increased fees – whether based on tpy or some other metric.[57] Given these facts and the lack of benefit that would be provided by triggering Title V requirements for GHGs, EPA should consider adopting an interpretation that the Title V program does not apply based solely on emissions of GHGs.[58]

To the extent that EPA continues to interpret the Title V program as potentially applying once GHGs are regulated under Title II, the Agency's reliance on the administrative necessity

---

[55] Pub. L. No. 101-549, § 821, 104 Stat. 2399, 2699 (1990).

[56] Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, *Definition of Regulated Air Pollutant for Purposes of Title V* (Apr. 26, 1993) ("Wegman Memo").

[57] 74 Fed. Reg. at 55,347.

[58] We note that Congress specifically excluded substances regulated under Section 112(r)'s accidental release program from determining Title V applicability and it is reasonable to assume that Congress would have made a similar determination had it considered CO_2 as potentially triggering Title V applicability.

doctrine to increase the statutory major source threshold is more legally defensible than for the PSD program.[59] When the Title V regulations were first issued, the question of whether GHGs were required to be considered in determining Title V applicability was raised and the Agency issued a determination that GHGs were not considered air pollutants that could trigger Title V applicability.[60] If EPA had interpreted the statute differently, the 6 million sources that EPA now estimates would trigger Title V under a 100 tpy threshold would have been immediately subject to Title V permitting.[61] Congress clearly did not envision that the Title V program would cover 6 million sources when it approved the program as part of the Clean Air Act Amendments of 1990. Indeed, then-Chairman Dingell characterized the program as "a modest tool for bringing some clarity to the world of stationary source regulations under the federal and state clean air programs."[62] And, the Bush I Administration's EPA that authored the Title provided no separate cost estimate for the Title V program in its analysis of the Administration's bill.[63] Surely, if Congress had contemplated a program that could cover 6 million sources, these costs would have been explicitly addressed.[64] If EPA proceeds in this manner, it must provide a proper analysis of the fee implications of triggering Title V in terms of administrative costs and permit fees as discussed in more detail in Section XII below regarding the Regulatory Impact Analysis ("RIA").

VI. The Proposed Major Source and Significance Levels Are Arbitrary and Capricious.

A. The Proposal's Assumption That it Is Excluding Most Small Businesses by Adopting a 25,000 tpy Threshold Is Incorrect.

Even if EPA's proposed interpretation of the statute were correct, which it is not, the Proposed Tailoring Rule's claim that it only targets "large" sources is simply inaccurate. The proposed threshold of 25,000 tpy would still capture many small businesses. According to a California Air Resources Board list of businesses and other entities that have the potential to emit over 25,000 tpy of CO_2e, the list of sources in California that would be entangled in CAA permitting would be long and varied. Examples include: dairies, breweries, wineries, landfills, universities, food production plants and packing companies, water pollution control plants, paper

[59] It is surprising that EPA has not proposed an approach similar to that implemented for Title V and Section 112 in the 1990s, in which the Agency assumed that sources with actual emissions below a set percentage of the major source threshold would be considered minor sources for Title V purposes until states could issue synthetic minor permits to allow these sources to be minor under Title V. This approach did not require any regulatory action by the state, EPA, or the source and allowed smaller sources the time they needed to complete minor source permitting.

[60] *See* Wegman Memo.

[61] This burden would likely have been substantially greater at that time because many sources have since accepted limits on their criteria pollutant emissions which have also lowered GHG emissions.

[62] Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Commerce, U.S. House of Representatives on Title V, No. 104-32, 104th Cong. at 31 (May 18, 1995) (statement by Chairman Dingell).

[63] The Congressional Research Service indicated in its analysis of the Administration bill that the costs were unknown for the Title V program. CRS Report for Congress, Clean Air Amendments: Permits and Market-Oriented Provisions in the Administration Bill, Aug. 18, 1989.

[64] EPA's final Title V regulations estimated the number of Title V sources at 34,000 with an annual cost of $526 million.

plants, pharmaceutical factories, military installations, irrigation facilities, and farms, among others.

To illustrate, one of the Associations' member companies with over 40 U.S. facilities analyzed the impact of the proposed thresholds on its facilities and found that, while about 30% of its facilities are currently subject to Title V and PSD for current NAAQS pollutants and only 25% of its facilities will be subject to EPA's GHG reporting rule based on actual emissions, about 70% of its U.S. facilities would be subject to PSD and Title V at the proposed thresholds. The GHG Reporting Rule would only capture ten facilities based on actual emissions. Under the proposed thresholds in this rule, some 30 sites, including five technical centers and other small sites, would be subject to Title V and PSD. This is because Title V and PSD thresholds are based on *potential* emissions.[65] The types of smaller sources at this company that would be brought into the program illustrate that EPA's estimation that its 25,000 tpy threshold targets "larger sources" is incorrect.

B. The Proposal Fails to Provide (1) a Rational Basis for Selecting a 25,000 tpy Major Source Threshold as Compared with Higher Thresholds; and (2) Sufficient Information for the Public to Meaningfully Comment.

EPA proposes a major source threshold of 25,000 tpy[66] for both the PSD and the Title V operating permit program. As discussed above, reliance on the doctrines of administrative necessity and absurd results poses problems given statutory language that can be interpreted to avoid the need for raising the thresholds for the PSD program; for Title V, the administrative necessity case is stronger given the potential for 6 million sources to trigger Title V permitting requirements. To the extent that the increase in thresholds is supported by these legal doctrines, selection of a 25,000 tpy threshold is inconsistent with the record and is arbitrary and capricious.

1. The selected thresholds are not based on a health and welfare analysis.

EPA's selected major source thresholds of 25,000 tpy for PSD and Title V and significance level of 10,000-25,000 tpy for PSD are arbitrary and capricious because there is no health or welfare basis for these cut-offs. GHGs, such as CO_2, are distributed roughly equally throughout the global atmosphere. As a result, localized emissions, unlike emissions of other pollutants currently regulated under the Act, have no direct effect on the region that is the source of the emissions. This stands in sharp contrast to the pollutants currently regulated under the CAA (*e.g.*, ozone), which create local air quality problems. Therefore, GHG emissions should

[65] The difference between actual and potential emission is striking – smaller facilities had actual CO_2 emissions as low as 2,000 tpy but had potential CO_2 emissions greater than 25,000 tpy. Based on that company's analysis EPA would have to raise the thresholds to at least 100,000 tpy to avoid capturing many of these small sources. While some of these sources may be able to apply for permit modifications to limit potential emissions, many would not be able to restrict PTE to the low 25,000 tpy threshold without forgoing necessary business flexibility. The 25,000 tpy threshold is the equivalent of less than 50 MMBTU/hr of total facility boiler/combustion capacity on the cleanest fuel – natural gas.

[66] We note that EPA proposes the major source threshold and significance level in short tons. Any thresholds or significance levels should be in terms of metric tons to be consistent with other GHG regulatory programs, such as the GHG Reporting Rule.

be viewed on a global scale for purposes of setting applicability thresholds and significance levels.

On a global scale, U.S. sources with 25,000 tpy of GHG emissions are just as *de minimis* as sources with 250 tpy of GHG emissions. Yet, EPA ignores this key distinction, viewing the problem solely through a U.S.-centric lens in terms of which sources to exclude and which to include. Throughout the proposal, the Agency indicates that the thresholds have an environmental basis — the Agency reasons that sources that emit between 250 and 25,000 tpy of GHG only account for 7% of U.S. stationary source GHG emissions, noting that excluding that "smaller amount of emissions coverage would not jeopardize the environmental protection goals of PSD."[67] However, a 25,000 tpy PSD and Title V threshold no more advances the environmental protection goals of PSD than a 250 tpy threshold, because both levels are *de minimis* on a global scale. How can the Agency view 7% of U.S. stationary source GHG emissions as unworthy of regulation, yet view regulating the emissions regulated by the mobile source rule, which are about 4% of global GHGs, as essential? If EPA truly seeks to select thresholds that make sense from an environmental perspective, the chosen thresholds are completely arbitrary. This further supports adopting an interpretation of the PSD provisions that limits applicability for GHGs to instances in which a source is otherwise required to obtain a PSD permit for a criteria pollutant and of Title V that would limit applicability.

2. The proposal's failure to explain the basis for selection of proposed thresholds deprives the public of a meaningful opportunity to comment.

EPA states in the preamble that its goal was to create a threshold which minimizes administrative burden while still capturing "68 percent of national CO_2e stationary source GHG emissions (including approximately 87 percent of CO_2)."[68] However, the Agency has not justified why it selected a 25,000 tpy threshold when a 50,000 tpy or 100,000 tpy level would exclude significantly more sources from the programs while reducing emissions coverage by only a very small percentage. EPA stated in the preamble to the final GHG Reporting Rule that "based on our review, EPA has determined that the selected 25,000 metric ton CO_2e threshold will cover many of the types of facilities and suppliers typically regulated under the CAA, while appropriately balancing emission coverage and burden."[69] However, the following EPA chart (used in an overview PowerPoint presentation regarding the proposed GHG Reporting Rule)[70] shows that, based on the actual emissions analysis of the GHG Reporting Rule, a threshold of 100,000 tpy of CO_2e would eliminate over 6,600 reporters while the national downstream emissions coverage would only decrease by 2.5%. This minor drop in emissions coverage would have eliminated half of the reporters and simultaneously reduced an enormous administrative burden. Similar coverage differences should be expected for potential emission thresholds under the PSD and Title V provisions.

---

[67] 74 Fed. Reg. at 55,311.
[68] *Id.* at 55,332-55,333.
[69] 74 Fed. Reg. 56,260, 56,272-56,273 (Oct. 30, 2009).
[70] EPA, *Proposed Mandatory GHG Reporting Rule: Overview*, at slide 12 *available at* http://www.epa.gov/climatechange/emissions/downloads/GHGMandatoryReportingRule-Overview.pdf.

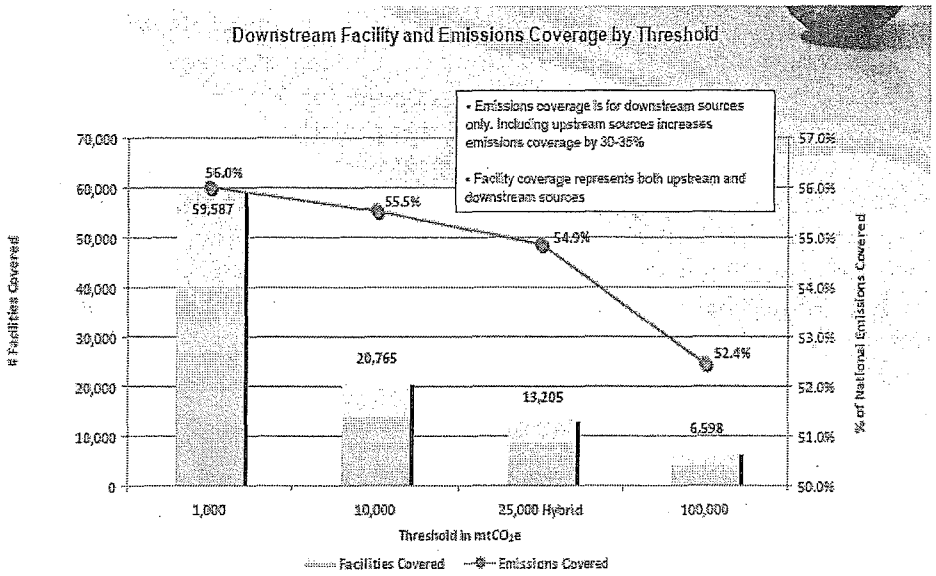

Figure 1. EPA Comparison of Number of Facilities and Emissions Covered between 1,000 and 100,000 tpy Using a 50-57% Scale

This minor change in coverage, which is obscured by EPA's choice of the scale on the right-hand side of its chart, is highlighted when the right-hand scale is normalized to 0-100% (*see* Figure 2, below). Based on this actual emissions data and assuming a comparable result for potential emissions, EPA's own data indicates that a much higher threshold would be appropriate.

We note that EPA's charts in the docket related to the coverage that would occur at the various thresholds do not explain why the Agency believes that the 25,000 tpy threshold is appropriate for the *potential emissions levels that would trigger PSD* based on EPA's reading of the statute. The only explanation found in the RIA for the Proposed Tailoring Rule is the statement that "the proposed threshold of 25,000 tpy CO_2e is also superior to the 50,000 tpy CO_2e because there is evidence that permitting authorities can run programs for the levels of permitting that would be required at 25,000 tpy CO_2e."[71] EPA does not provide any basis for this conclusion in the Proposed Rule or in the docket or indication of what this evidence might be. Moreover, state agencies have indicated that they are not prepared to address PSD for the numerous sources that would be subject to it or that would require minor New Source Review ("NSR") permits to avoid it.

Even more striking about the selection of the 25,000 tpy threshold for a major source level is EPA's explanation of why it selected that level for the GHG Reporting Rule. In that rule, EPA attempted to justify its 25,000 tpy threshold as necessary to collect the facility-specific data needed *to evaluate potential policies and regulatory programs that could have a single emission*

[71] EPA, *Regulatory Impact Analysis for the Proposed Greenhouse Gas Tailoring Rule, Final Report* at 13-14 (Sept. 2009) (EPA-HQ-OAR-2009-0517-0006) (RIA).

threshold across source categories (*e.g.*, PSD permitting).[72] Rather than allow for the data to be collected, and then evaluate the appropriate levels for triggering requirements under PSD and Title V, EPA proposes to establish a 25,000 tpy threshold for PSD and Title V. Thus, the Agency is promulgating the *lowest* possible threshold that could be established based on the data it will gather in the future. This approach is inconsistent with the very administrative necessity and absurd results doctrines the Agency invokes to justify the increased thresholds. Further, this fails to recognize the significant difference between the basis for the GHG Reporting Rule (*i.e.*, actual emissions) and the potential emissions basis used in Title V and PSD rules. This factor typically ranges between 2:1 for many larger sources of GHGs, to as high as 10:1 for smaller-to-mid-sized sources.

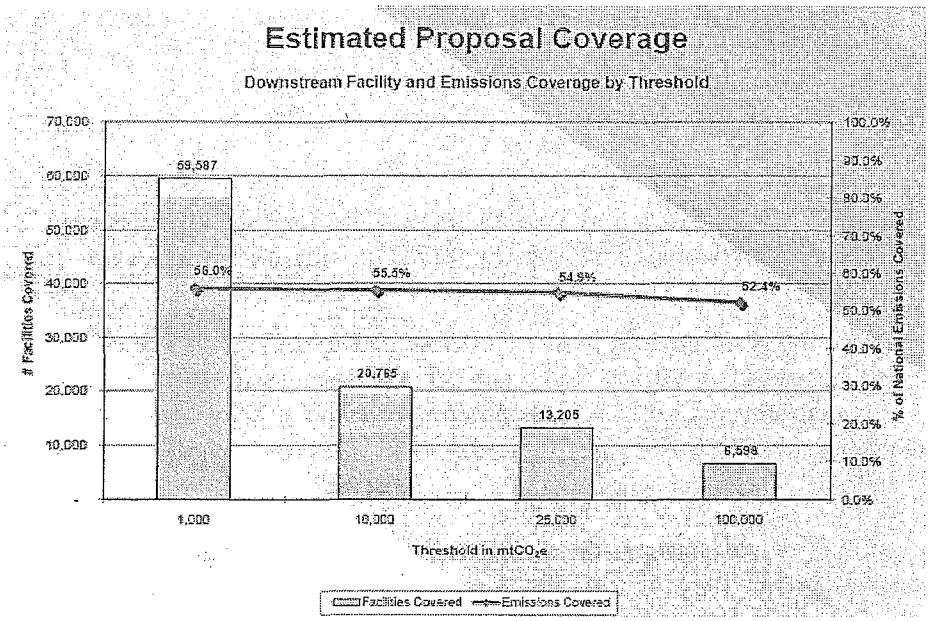

Figure 2. EPA Comparison of Number of Facilities and Emissions Covered from 1,000 and 100,000 tpy Using a 0-100% Scale for National Emissions Covered

Ultimately, EPA's analysis in the Proposed Rule's docket does not reveal how it selected the 25,000 tpy threshold. Without this information, we have been forced to look for information in EPA's other dockets. EPA must provide a reasoned explanation of how it picked the levels it has proposed for the public to meaningfully comment on the proposal.

C. The Proposal's Assumption of a 2% Modification Rate, Which Underlies its Selection of Significance Level, Is Arbitrary and Capricious.

In the proposal, EPA indicates that existing PSD facilities have a 2% modification rate. EPA based this on the existence of about 14,000 major PSD sources currently and an application rate of about 280 permits per year.[73] EPA states that it assumed that the major source

[72] 74 Fed. Reg. at 56,271-56,272.
[73] 74 Fed. Reg. at 55,331.

modification rate of 2% per year would be the same rate at which GHG sources would trigger PSD.[74] Given that the level of GHG emissions in tons per year is orders of magnitude higher than emissions of criteria pollutants, it is not valid to simply assume the same rate of modification. Indeed, because combustion sources are typically replaced more often than process lines, and given EPA's narrow interpretation of the routine maintenance, repair and replacement exclusion, the likelihood is that a significantly higher rate of modification would apply when considering GHG emissions.[75]

In reviewing the RIA, no justification for the 2% modification rate is provided there either. Indeed, the only mention of modification rates is found in the preamble to the Proposed Rule. The RIA confines itself to "new sources," which it estimates by applying growth rates in the number of units or facilities in a source category to the number of existing facilities at the respective thresholds. It is unclear from the RIA whether "new sources" includes new units at existing sources or just new greenfield plants. Assuming that the reference to "new sources" includes new units at existing plants, the growth rate approach referenced in the RIA is inappropriate. Growth rates were determined based on Economic Census data, EIA energy survey data, and various EPA regulatory impact analyses and information collection requests. As an example, EPA indicated that if the annual growth rate in a category was 1%, the number of existing facilities above a threshold was multiplied by the fractional growth rate to estimate the number of new facilities at that threshold per year. This approach is flawed because the "growth rate" does not account for the variety and types of modifications that routinely require permit analysis and would easily be more frequent than the assumed "growth rate." Neither the preamble nor the RIA explain why this is a valid approach to determining modification rates.

VII. EPA's Tailoring Rule Is Facially Invalid Because it Proposes to Illegally Rewrite SIP and Title V Approvals.

To implement its proposed PSD tailoring approach, EPA proposes a series of SIP revisions in which EPA would reach back in time to revise its approvals of SIPs to limit the federally enforceable elements to the major source and significance thresholds EPA will finalize. EPA proposes similar revisions to its Title V program approvals. EPA nowhere suggests that any state has asked for such a revision. Instead, EPA is announcing an assumption — that states lack the resources to implement EPA's view of the new challenge it is creating — and inserting into the states' plans *EPA's chosen approach* to managing the challenge, (for EPA to rewrite the states' SIPs). This approach, however, turns on its head the structure that Congress established for SIP planning. The implications of this approach would reach well beyond the current issue, and would contravene settled law on the relative roles of EPA and the states in SIP planning.

The provisions for SIPs in Section 110 establish a policy behind the SIP approach — that EPA sets the standards, but leaves states with the discretion to determine their own individual

---

[74] *Id.*

[75] Even under the 2002 NSR Reform regulations which clearly adopted an actual-to-projected actual emissions methodology, EPA requires new emissions units to project future emissions at the PTE level.

path for attaining those standards.[76] In fact, as the U.S. Court of Appeals for the Fifth Circuit recently stated, "the EPA has no authority to question the wisdom of a State's choices of emissions limitations if they are part of a SIP that otherwise satisfies the standards set forth in 42 U.S.C. § 7410(a)(2)."[77]

A. The PSD Tailoring Rule's Retroactive Re-interpretation of SIP Submittals and Approvals That Occurred Years (and in Some Cases Decades) Ago Violates Established CAA SIP Revision Procedures and Is Unlikely to Be Sustained by the Courts.

EPA's proposal to "redo" the state programs in a single rulemaking conflicts with CAA requirements for state rules submitted to EPA for approval. With respect to EPA-approved SIPs, EPA proposes to limit retroactively its approval of PSD permitting threshold level and significance level provisions that the Agency previously fully approved.[78] To accomplish this, EPA intends to add boilerplate statements limiting its prior approval to the record of all previously approved SIPs in a single rulemaking. The Agency claims to have authority to limit prior SIP approvals under Section 110(k)(6)'s provisions regarding error correction and alternatively, under Section 301(a)'s general rulemaking authority. These provisions do not provide such authority, however, because the Agency may only "limit" its prior approval of a SIP through the SIP revision process.

Section 110(k) of the Act sets forth the procedures for submittal, revision, and approval of SIPs. Nowhere does this provision authorize the novel approach that EPA offers in the proposal to revise its original approval of a SIP. To the contrary, the statute specifically provides procedures for changing a SIP that does not comply with the requirements of the Act by providing a "SIP-call" process in which EPA can call for a revision of a SIP when a plan is substantially inadequate to attain or maintain a NAAQS.[79] Moreover, Section 110(k)(6), as EPA points out in the preamble, provides for "corrections" when EPA determines that the action to approve, disapprove, or promulgate a plan or plan revision was in error, *through the same procedures as an original action would require*.[80] Section 110(*l*) states that any revision to a SIP must be adopted by a state after reasonable notice and public hearing.

EPA's proposal to invoke Section 110(k)(6) to "correct" its original approval of SIPs as being in error is legally tenuous at best because EPA's action at the time of approval was not a mistake. EPA intended to approve the language that the states submitted. Indeed, the states, in

---

[76] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 470 (2001) ("[The CAA SIP] provisions enable the Administrator to assist the States in carrying out their statutory role as primary *implementers* of the NAAQS. It is to the States that the CAA assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources.").

[77] *CleanCOALition v. TXU Power*, 536 F.3d 469, 472 n.3 (5th Cir. 2008); *see also Virginia v. EPA*, 108 F.3d 1397, 1404, 1410 (D.C. Cir. 1997) (holding that section 110 of the CAA does not give EPA the authority to condition approval of a state's plan on the state's adoption of control measures chosen by EPA).

[78] These comments address EPA's lack of ability to redo prior approval of all SIP-approved PSD thresholds and significance levels. To avoid repetition, the comments do not specifically address EPA's authority to redo approval of Title V thresholds, because the Agency also bases its authority for these revisions on CAA Section 301(a).

[79] 42 U.S.C. § 7410(k)(5).

[80] *Id.* § 7410(k)(6).

most cases, adopted the very same regulatory language that EPA had included in its own PSD regulations. Thus, the approval of this language cannot reasonably be considered a "mistake" on the Agency's part. The Agency did exactly what it intended to do. The mistake would be that the Agency did not understand the potential implications of its action. Given this, it is unlikely any court would allow EPA to revise its original action in approving these SIPs without following the procedures explicitly provided in the Act.

The proposed approach has already been held invalid in an analogous situation. The Agency made a similar attempt to evade the SIP revision process when it deleted odor regulations from Pennsylvania's federally-approved SIP. In *Concerned Citizens of Bridesburg v. EPA*, the Third Circuit rejected the Agency's contention that its approval of the odor regulations, some 13 years prior, was a "mistake," or alternatively, merely a "revision of EPA's own prior action."[81] Regarding EPA's contention that the prior approval of the odor regulations was a mistake, the Court stated: "[n]either are we persuaded by the EPA's reference to the revisions as "corrections" ... . We are not dealing here with typographical errors."[82] The original SIP approval must have been contrary to Agency policy at the time it approved the SIP, in order for the approvals to constitute "mistakes."[83] In addition, the Court held that all SIP modifications must occur through the designated revisions process.[84] Hence, EPA was required to suggest proposed revisions to the state, which must then hold public hearings and respond.[85] Only if the state did not suitably respond was the Agency free to alter the terms of a plan itself.[86]

In this Proposed Rule, the Agency similarly claims to be "limiting its prior approval" or, alternatively, correcting a mistake. As in *Concerned Citizens of Bridesburg*, EPA's approval of the current SIP regulations was no "mistake" — the applicability thresholds and significance levels are not typographical errors contrary to Agency policy. These thresholds have been federal law for years. And alternatively, if EPA seeks to limit its approval, it must do so through the SIP revision process set out in CAA Section 110(k)(5), which includes notifying the states of the SIP inadequacies and establishing reasonable deadlines for state submission of revisions.[87] Only after completing those steps may EPA possibly alter a currently approved SIP provision.

EPA also seeks to rely on its general rulemaking authority under Section 301 to justify its revision of the SIPs. This reliance is similarly misplaced. Section 301 provides in pertinent part:

> (a) Regulations; delegation of powers and duties; regional officers and employees
> (1) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter... .[88]

---

[81] 836 F.2d 777, 789 (3rd Cir. 1987).
[82] *Id.* at 786.
[83] *Id.*
[84] *Id.* at 780.
[85] *Id.* at 789.
[86] Citing Judge Posner, the Court there stated, "EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states." *Id.* (citing *Bethlehem Steel Corp v. EPA*, 723 F.2d 1303, 1309-10 (7th Cir. 1983)).
[87] 42 U.S.C. § 7410(k)(5). The SIP revision process was amended in the CAA 1990 Amendments and now differs slightly from the revision process in existence at the time *Concerned Citizens of Bridesburg* was decided.
[88] 42 U.S.C. § 7601(a)(1).

Courts have held, however, that where specific provisions "define[] the relevant functions of EPA in a particular area," "EPA cannot rely on its general authority to make rules necessary to carry out its functions...."[89] Section 110 already addresses the SIP revision-and-approval process and there is no apparent gap for the Agency to fill with its general rulemaking authority. Moreover, usurping state decision-making in this manner is plainly contrary to the structure of Title I and is unlikely to be upheld.

B. The Proposal's Retroactive Re-interpretation of Title V Submittals and Approvals Is Similarly Risky.

Like SIPs, state Title V operating permit programs are approved after notice and comment at the state level, submission to EPA, and publication of proposed approval, disapproval, or interim approval in the Federal Register and issuance of a final approval.[90] Again, there is no apparent authority for EPA to retroactively undo its approval of state program provisions without following the notification-and-revision procedures established in the statute. Moreover, even if EPA could rely on the SIP "correction" provision in Section 110(k)(6), there is no similar provision for EPA to "correct" an error in its original approval for a Title V program.

C. The Retroactive Revision of SIPs and Title V Permitting Obligations Places Sources at Risk.

The approach that EPA offers in the proposal is particularly problematic for companies that are operating facilities because the requirement to hold a permit under Part C and Title V is a *source obligation*.[91] This means that if EPA's legally risky approach is invalid, sources may have to defend citizen suits under federal law for failure to hold required permits. While a source may raise EPA's rule as a defense to a citizen suit, a court that believes EPA was not authorized to retroactively revise its SIP approvals could similarly disregard EPA's Tailoring Rule. EPA's proposal thus places sources at an unacceptable risk of enforcement through citizen suits.

Given that the plain meaning of the statutory provisions would not expand the PSD program, EPA should abandon its retroactive revised SIP approval approach and interpret the Act consistent with the NAAQS prerequisite approach explained above. Moreover, EPA should evaluate statutory interpretations that avoid the absurd results of triggering Title V as well.

---

[89] *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (1995).
[90] 42 U.S.C. § 7661a.
[91] *Id.* § 7661a(a).

D. EPA's Approach to Ask States to Quickly Revise Their SIPs to Comport with the Increased Significance Thresholds Is Likely to Be Challenged by Activist Groups Citing to the Act's Anti-Backsliding Provisions.

The CAA contains "anti-backsliding" provisions that limit relaxation in certain rules.[92] Under EPA's interpretation of PSD applicability, once the Section 202 rule requires PSD to apply to GHGs, the existing thresholds contained in SIPs could be alleged by activist groups to become binding on GHGs under the anti-backsliding arguments that these groups are currently advancing in various court cases.[93] Thus, even if a state wanted to revise its regulations similar to the federal tailoring rule and, thereby, relax the threshold, the anti-backsliding provision might prevent it. However, if EPA adopted the proper interpretation of the statute's applicability provisions, these actions would largely be unnecessary and a state would only need to adopt a significance threshold for GHGs – an action that would not be vulnerable to anti-backsliding arguments.

VIII. Even if EPA's Retroactive Revision of its SIP and Title V Approvals Could Be Effective for Purposes of Federal Law, the Proposed Rule Offers No Relief to Regulated Entities Obligated to Comply With State Law and With Minor NSR Permitting Requirements.

The Proposed Rule states clearly that EPA is only revising the SIPs and Title V programs for purposes of *federal law and enforcement.* The Agency's action will leave in place the thresholds and regulatory applicability provisions for purposes of state law. Moreover, EPA's proposed revision of its approvals would simply revise what EPA *intended to approve,* not what the states intended to submit for approval. Specifically, EPA states:

> [E]ach federally approved PSD program will have a PSD threshold level for GHG emissions of 25,000 tpy CO_2e and a significance levels [sic] for GHG emissions of [10,000 to 25,000] tpy CO_2e; and although each State PSD program—as established by the State law provisions that comprise the SIP—will have a lower threshold and significance level, those lower levels will not be federally approved and therefore not federally enforceable. To reiterate, EPA is not proposing to disapprove those provisions; rather, EPA will take no further action with respect to them.[94]

As a result, sources will apparently continue to be subject to state law provisions that impose: (1) a 100 or 250 tpy major source threshold for PSD and a 100 tpy major source threshold for Title V; and (2) a PSD significance level between 10,000-25,000 tpy. Thus, to the extent EPA could characterize this action as a relief rule, which it cannot, it actually provides no relief at all.

---

[92] 42 U.S.C. §§ 7502(e), 7515.

[93] While the Associations disagree with these arguments, the fact is that the potential for challenge exists, creating uncertainty.

[94] 74 Fed. Reg. at 55,343. EPA notes that "the lower thresholds remain on the books under state law, and sources therefore remain subject to them as a matter of state law." *Id.*

State laws will still require sources to comply with the lower thresholds. These states do not have the luxury of side-stepping the procedural requirements for adopting revised regulations that EPA attempts to invoke for purposes of federal law. That this is true is shown in the comments submitted on EPA's PSD Interpretive Memo Reconsideration by the National Association of Clean Air Agencies ("NACAA").[95] In those comments, NACAA told EPA that most states would need to revise their state laws to accommodate the new proposed thresholds; NACAA urged EPA to find another way to avoid triggering PSD based solely on GHG emissions.

There is no indication that all states are willing or able to adopt EPA's new thresholds in a timeframe that will provide relief to regulated entities. Even if willing, states must comply with their own administrative procedure requirements – revisions that reasonably can be expected to take at least a year to implement, if the states expedite action.

IX. The Proposed Definition of "Carbon Dioxide Equivalent" Improperly Relies on Documents That Have Not Been Subject to Notice and Comment and Places Sources in Ongoing Enforcement Jeopardy Should Global Warming Potentials Change.

The proposed thresholds for major source and significance levels are defined on a carbon dioxide equivalent, or CO_2e, basis as follows:

> *Carbon dioxide equivalent,* or *CO_2e,* means a metric used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). The CO_2e for a gas is determined by multiplying the mass of the gas by the associated GWP. The applicable GWPs and guidance on how to calculate a source's GHG emissions in tpy CO_2e can be found in EPA's ''Inventory of U.S. Greenhouse Gas Emissions and Sinks,'' which is updated annually under existing commitment under the United Nations Framework Convention on Climate Change (UNFCCC).[96]

Under this proposed definition, the GWP would be updated annually. Before EPA utilizes a new GWP, that GWP must be subject to notice and comment to comply with the requirements of CAA Section 307 and the Administrative Procedure Act.

In addition, an annual update of GWP would effectively create a moving target for sources conducting applicability determinations and assessing compliance with minor NSR and PSD emission limits.

PSD applicability depends on whether a new source is considered "major," and whether a change at an existing source will cause a "significant" increase. The major source and significance determinations, in turn, depend on the size of any emissions increase from the new

[95] *See* NACAA Comments dated December 7, 2009, EPA-HQ-OAR-2009-0597-0062.1.
[96] 74 Fed. Reg. at 55,351, 55,352 (to be codified at 40 C.F.R. §§ 51.166(b)(58)), 52.21(b)(60)).

or modified source. Sources are required to determine if a change will result in a significant increase prior to undertaking a project. If the project will increase emissions above significance levels, the source must obtain a PSD permit. If the source projects an increase between 50% and 100% of the significance level, it must track emissions and keep records for 5-10 years following the change.[97] If emissions later exceed the significance level notwithstanding the initial projection of an insignificant increase, the source must report to EPA and may be required to obtain a PSD permit.

If EPA changes the GWP values annually, an activity that resulted in an insignificant increase in 2011 could be considered to have caused a significant increase if the GWP is increased in 2012. Similarly, if a facility accepts a permit limit to avoid PSD, such a limit will necessarily be based on the GWP that applies when the limit was established. If the GWP increases, the facility could suddenly be considered to have made a major modification and be subject to PSD. Moreover, if a source obtains a PSD permit, it is likely that any BACT limits will be expressed in terms of CO_2 equivalence. If the GWP changes, however, a facility's actions that achieved compliance with BACT in one year may no longer "meet the limit." This type of enforcement jeopardy creates substantial uncertainty and will chill investment in more efficient technologies. At a minimum, EPA needs to ensure that applicability and compliance with limits is based on the GWP that existed when the determination was made or the limit was established.

X. EPA Should Clarify That the Pollutants it Is Addressing in This Action Are the Four Pollutants Actually Being Regulated in the Section 202 Rule.

There is some confusion in the Proposed Rule regarding which pollutants EPA believes are subject to regulation under the PSD and Title V programs when a final Section 202 rule is issued (or on the compliance date at the end of the 2012 model year as recommended above) and EPA deems these pollutants to trigger PSD and Title V permitting requirements. It appears at some points in the proposal that EPA is addressing the "group of six GHGs, on a CO_2e-basis."[98] Because the Section 202 rule will only regulate four of the six GHGs addressed in the endangerment finding (CO_2, methane, nitrous oxide, and hydrofluorocarbons), it seems clear that the scope of stationary source regulation cannot exceed that set of pollutants. Even if EPA could reasonably justify regulating all six pollutants under these programs on a discretionary interpretation, the Agency cannot simultaneously invoke the administrative necessity and "absurd results" doctrines to then tailor the scope of applicability. As the Agency is aware, these doctrines only apply where the Agency has availed itself of all reasonable discretion afforded to it and must act in the face of a clear statutory requirement that yields an absurd result or presents an administrative necessity. As a result, EPA must interpret the statute to limit applicability to those pollutants for which regulation has in fact occurred.

[97] 40 C.F.R. § 52.21(r)(6).
[98] 74 Fed. Reg. at 55,328.

XI. EPA's Analysis of Minor NSR Obligations Fails to Consider That State Minor NSR Programs Generally Parallel the Federal PSD Program Coverage.

EPA states in the Proposed Rule that minor NSR programs pursuant to Section 110(a)(2)(C) are not affected by this action because the Act "does not require that minor source programs apply to GHGs because there are no NAAQS for GHGs."[99] While it may be true that the Act does not require minor NSR programs to address non-NAAQS pollutants — as EPA should recognize is also true for the PSD program — the fact is that states have adopted applicability provisions identical to the PSD program for minor NSR. EPA has approved those programs as part of SIPs — SIPs that EPA deemed "necessary to attain and maintain" a NAAQS pursuant to Section 110. Given this approval and federalizing of the state regulations, EPA cannot now claim that minor NSR implications are irrelevant to this action. To the extent EPA interprets the Act and its PSD regulations to *require* that PSD be triggered based on a non-NAAQS pollutant, EPA cannot ignore the implications for SIP-approved minor NSR programs using the same language. Even if this was not the case, as a practical matter, EPA must address and resolve the enormous and unreasonable burden imposed by regulating GHGs under state minor NSR programs.

XII. EPA's Choice to Apply PSD and Title V to GHGs Means That the Proposed Tailoring Rule Is Not a "Relief Rule" as EPA Suggests but Rather an Affirmative Regulatory Action Requiring a Full RIA.

Rather than perform the requisite burden analysis, the Proposed Rule disowns the PSD burdens and instead claims that it "provides regulatory relief rather than regulatory requirements."[100] This is a breathtaking claim and one that is simply false — it is only due to the fact that EPA has *chosen* to interpret PSD applicability in the PSD Tailoring Rule that the motor vehicle GHG emission standards will trigger PSD permitting requirements for GHGs. Because the Act's NAAQS Prerequisite Requirement avoids any need to tailor the PSD applicability threshold, EPA must conduct a full RIA. EPA cannot simply estimate the number of sources that it has allowed to avoid an otherwise applicable burden and claim a benefit therefrom. EPA must determine how many sources it is now subjecting to PSD and Title V due to its discretionary action and assess the costs and benefits of so doing.

A. The Failure to Estimate the Impacts of the PSD Tailoring Rule on Stationary Sources Deprives Affected Sources and State Permitting Authorities of a Meaningful Opportunity to Comment on the Rule in Violation of CAA Section 307(d) and the Administrative Procedure Act.

The proposal's assessment of the number of new major sources and annual modifications appears to dramatically underestimate the costs of the rule and does not provide a rational assessment of the impacts. Determining the burdens caused by applicability of PSD based solely on GHG emissions requires EPA to estimate the number of: (1) major sources that will exist

[99] 74 Fed. Reg. at 55,298.
[100] 74 Fed. Reg. 55,337; *see also* RIA, at 4.

based solely on GHG emissions (*i.e.,* those sources that are currently minor for PSD but will become major by virtue of their GHG emissions); (2) new major sources that will be built or otherwise created each year (*e.g.,* through expansion), including the burdens associated with PSD permitting for GHGs and for any other PSD pollutant the source emits above significance levels; (3) major modifications that will trigger PSD based on another pollutant but will now require BACT for significant GHG emissions increases and the associated burden of BACT determination and installation; (4) major modifications at sites that would be major only due to GHGs but that will now be subject to significance levels for criteria pollutants and require BACT and PSD permitting for projects causing significant increases in such pollutants; (5) major modifications that will trigger PSD based on GHG emissions increases alone, including the burdens associated with obtaining PSD permits for GHGs and for any other PSD pollutant the source emits in significant amounts; (6) sources that must accept permit limits or otherwise restrict operations to avoid triggering PSD, including the cost of obtaining a minor NSR permit with such limits and the ongoing administrative burdens associated with these permits; and (7) sources that would trigger the requirement to keep 5 or 10 years of emissions records because, although PSD is not triggered, there is a reasonable possibility that PSD could be triggered. None of this information is in the docket. EPA has not even attempted to analyze it.

Moreover, to the extent information is included in the docket that would be relevant to these analyses (which is provided to show the "relief" given), it appears to dramatically understate the impacts. For example:

Underestimated 2% Modification Rate: As discussed in Section VI.C., above, the estimation of modification rates in the proposal appears to be derived by simply taking the existing major source modification rate of 2% per year for current criteria pollutants and applying it to GHGs.[101] For the reasons stated above, this approach is not valid and a realistic modification rate must be estimated and used to evaluate the burdens of the Proposed Rule.

Failure to Recognize that Sources Major Only for GHGs Would Now Be Subject to the Significance Levels for Criteria Pollutants: EPA's analysis does not consider the very significant implications of making a tremendous number of facilities major for PSD and triggering PSD modifications for criteria pollutants. As stated in Section VI, above, the implications of EPA's proposal are much more significant than simply requiring BACT for GHGs at facilities that would in the future be considered major for PSD and Title V simply because of their GHG potential emissions. Under EPA's PSD policies, if a source is major for any pollutant that can trigger PSD, it may be considered to trigger PSD for a project with a significant emissions increase for any other pollutant. Thus, a source that is major for sulfur dioxide (SO_2) in an SO_2 and particulate matter (PM_{10}) attainment area can trigger PSD for a significant increase in PM_{10} emissions even if its SO_2 emissions will not increase significantly. The same would be true under EPA's interpretation of the statute if it allows GHGs to be the basis for a source to be classified as major. A source that is "major" for GHGs — based on whatever threshold EPA establishes — could then trigger PSD for any significant increase in a criteria pollutant, even if the source's potential to emit ("PTE") is below major source thresholds for every criteria pollutant. The consequence is that many changes that facilities currently permit under the minor NSR program in a matter of weeks would now be subject to PSD and would

[101] 74 Fed. Reg. at 55,331.

trigger the full range of air quality analysis and modeling for the increases in NAAQS pollutants, even though those facilities are not major for any NAAQS pollutant for which the area is designated attainment or unclassifiable.[102] It appears that EPA has failed altogether to consider these consequences in its RIA. EPA could of course avoid these consequences by applying the NAAQS Prerequisite Requirement.

Lack of Basis for Assumption That "Larger Sources" Will Incur No Additional Costs: EPA states in the RIA that "larger sources" of GHGs will not be economically impacted because requirements to obtain a Title V operating permit or to adhere to NSR requirements are already mandated by existing rules and are not imposed as a result of this Proposed Rule.[103] This is simply not true. It is clear that otherwise minor modifications will now trigger PSD solely based on GHG emissions due to EPA's overly broad interpretation of the PSD applicability provisions. Moreover, many facilities will now be required to include GHG requirements in existing permits, imposing permit modification, monitoring, recordkeeping, and reporting burdens. EPA stated in the proposed Section 202 rule that it would be evaluating the impacts of triggering PSD and Title V in this rulemaking. Now EPA claims that it does not need to analyze these impacts.

Complete Failure to Assess the Burdens to Regulated Entities: EPA has failed to estimate *at all* the burdens on regulated entities for (1) obtaining permits, (2) conducting reasonable possibility analyses, (3) maintaining documentation, or (4) complying with BACT. These impacts must be accounted for in the rulemaking process.

Understated Impacts Due to Inaccurate Assumptions Regarding Potential Emissions: According to the RIA, potential emissions were estimated in the residential and commercial sectors for heating equipment and appliances by adjusting actual emissions upwards by a range of 85-90%.[104] But, EPA apparently did not similarly adjust upwards for industrial sectors. A similar adjustment for industrial sectors should be made because combustion equipment is sized to satisfy short-term demand due to the variability in weather and production. Thus, EPA's coverage estimates at various thresholds is understated, perhaps dramatically. Because EPA did not provide a breakdown for specific industries, the public is unable to comment on the specific elements of the analysis.

B. EPA's Failure to Assess the Costs (and Benefits) of the PSD Tailoring Rule — Which Applies PSD and Title V to Sources That Would Not Otherwise be Required to Obtain a PSD and/or Title V Permit — Violates a Host of Statutes and Executive Orders That Require Analysis and Public Review of the Regulatory Burdens.

EPA's failure to estimate the full costs of the effects of its interpretation of PSD applicability in the Proposed Rule violates several statutes and executive orders that require

[102] For example, a project causing an 11 tpy increase in $PM_{2.5}$ emissions today at a minor source for criteria pollutants would not trigger PSD and would be permitted quickly under the state's minor NSR program. Under EPA's interpretation of the statute, once GHGs are "subject to regulation" within the meaning of Section 165(a)(4), the source would require a PSD permit for PM2.5, complete with BACT, modeling, and increment analysis.
[103] *Id.* at 8.
[104] *Id.* at 10-11.

analysis and public review of regulatory burdens. Specifically, EPA's Proposed Rule fails to comply with the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and Executive Orders 12866, 13132, 13175, and 13211. This failure deprives sources and permitting authorities of a meaningful opportunity to comment on the rule in violation of CAA Section 307(d) and the Administrative Procedure Act. Furthermore, and more fundamentally, EPA has thwarted the public interest by ignoring the enormous implications that the PSD Tailoring Rule poses for the U.S. economy.

1. The Proposed Rule does not comply with the Paperwork Reduction Act.

The Paperwork Reduction Act ("PRA") requires the Agency to seek approval from the Office of Management and Budget ("OMB") prior to engaging in rulemaking that will involve information collection requirements.[105] EPA may not "conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information ... the Director [of OMB] has approved the proposed collection of information."[106] Contrary to the PRA's clear mandate, the Agency neglected to submit this Proposed Rule to OMB for approval on the basis that "this action does not impose any new information collection burden."[107] Rather, EPA claims that "this proposed action would significantly reduce costs incurred by sources and permitting authorities relative to the costs that would be incurred if EPA did not revise the rule."[108] In fact, in the RIA to the Proposed Rule, the Agency estimates that the Rule will save small sources and permitting authorities around $54 billion.[109]

To the contrary, EPA's decision to interpret the statute such that motor vehicle emission standards will trigger PSD applicability for 40,000 new PSD permit applications and 6 million Title V permits[110] is responsible for these burdens and additionally, burdens to sources with emissions over the proposed thresholds. EPA cannot evade the PRA's requirements on the basis that this Proposed Rule will lessen those burdens. EPA must at least analyze the actual burdens of imposing PSD and Title V at the thresholds it proposes. Moreover, since the Proposed Rule does not actually eliminate the PSD burdens at the state level, and unless and until states "tailor" the PSD and Title V thresholds in existing state law, the same 6 million plus sources will be subject to PSD and Title V even if a 25,000 tpy threshold is finalized.[111] Finally, it is no answer that EPA has previously submitted the PSD and Title V regulations to OMB under the PRA and has received approval based on existing criteria pollutant emissions.[112] Those approvals were based on the burdens created at that time, not the dramatic expansion of the program that EPA proposes in this rulemaking (even with the lower thresholds, doubling the number of Title V-subject sources).

---

[105] *See* 44 U.S.C. § 3507.
[106] *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 28-29 (D.C. Cir. 1998) (quoting 44 U.S.C. § 3507(a)).
[107] 74 Fed. Reg. at 55,349.
[108] *Id.*
[109] *See* RIA, at 16.
[110] *See* 74 Fed. Reg. at 55,295.
[111] As discussed in Section VIII, above, as even EPA admits, the PSD Tailoring Rule does nothing to change state law: "the lower thresholds remain on the books under State law, and sources therefore remain subject to them as a matter of State law." 74 Fed. Reg. at 55,343.
[112] 74 Fed. Reg. at 55,349.

Therefore, EPA's submission to OMB under the PRA was deficient for failure to include the costs of these additional information collection requirements on newly regulated entities. The Agency should resubmit the information collection approval request to OMB with a proper and fully inclusive analysis. Otherwise, the Agency will lack authority to collect information from stationary sources for PSD and Title V GHG emissions permitting.

2. The Proposed Rule does not comply with the Regulatory Flexibility Act.

The Regulatory Flexibility Act ("RFA") requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[113] A small entity is defined as a small business, small organization and/or a small governmental jurisdiction.[114] EPA failed to conduct a regulatory flexibility analysis of the Proposed Rule because it proposes to "certify that the rule would not have a significant economic impact on a substantial number of small entities."[115] The Agency reasoned that rather than impose burdens on small entities, the "proposed rule would relieve regulatory burden for a substantial number of small entities ... ."[116] However, EPA utterly neglected to consider the millions of small businesses, hospitals, schools, small government entities, and others that will be dramatically impacted by the rule's unprecedented and direct effect on small entities, because as discussed above, the rule imposes these burdens in the first instance, is ineffective to change state law, and will inevitably be struck down by the courts. Moreover, even at the 25,000 tpy threshold level, numerous small businesses will be affected by this rule. Therefore, it simply defies logic to state that "the program changes provided in the proposed rule are not expected to result in any increases in expenditure by any small entity."[117] EPA cannot state on the one hand that it was not obligated to address the PSD burdens raised in the Section 202 rule and on the other claim that it is not required to conduct a regulatory flexibility analysis in this rule because it "relieves" the burdens on small entities.

In this Proposed Rule, EPA "recognizes that some small entities continue to be concerned about the potential impacts of the statutory imposition of PSD requirements that may occur given the various EPA rulemakings currently under consideration concerning GHG emissions."[118] Yet, rather than actually account for these impacts as required under the RFA, EPA claims to use "the discretion afforded to it under the RFA to consult with OMB and SBA, with input from outreach to small entities, regarding the potential impacts of PSD regulatory requirements that might occur as EPA considers regulations of GHGs."[119]

That response does not satisfy the RFA and is even belied by EPA's own statements. In the RFA discussion, EPA minimizes the PSD trigger implications of the PSD Tailoring Rule to small entities. Yet, EPA elsewhere in the Proposed Rule unequivocally states that: "[the]

[113] 5 U.S.C. §§ 603(a), 605(b).
[114] *Id.* § 601(6).
[115] 74 Fed. Reg. at 55,349.
[116] *Id.*
[117] *See id.*
[118] *Id.*
[119] *Id.*

proposal is necessary because EPA expects soon to promulgate regulations under the CAA to control GHG emissions from light-duty motor vehicles and, as a result, trigger PSD and title V applicability requirements for GHG emissions. When the light-duty vehicle rule is finalized, the GHGs subject to regulation under that rule *would become immediately subject to regulation under the PSD program ... .*"[120] Furthermore, EPA admits that the Proposed Rule would do nothing to "fix" the thresholds as a matter of state law, which remain in effect.[121] In failing to include the impacts of triggering PSD and Title V in the regulatory flexibility analysis, the Agency has failed to comply with the RFA's explicit statutory requirements.

3. The Proposed Rule does not comply with the Unfunded Mandates Reform Act.

Similarly, the Agency has failed to comply with the requirements of the Unfunded Mandates Reform Act ("UMRA"), pursuant to which EPA must assess the effects of the Proposed Rule on state, local, and tribal governments and the private sector.[122] Specifically, Section 202 of the UMRA requires EPA to prepare a written statement, including a cost-benefit analysis, for proposed rules with "federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.[123] In concluding that "the revisions would ultimately reduce the PSD and title V program administrative burden that would otherwise occur in the absence of this rulemaking," EPA has not accounted for the billions of dollars that permitting authorities and stationary sources will soon be required to spend once PSD is triggered for GHGs.[124]

4. The Proposed Rule does not comply with Executive Orders 12866, 13132, 13175, and 13211.

Finally, EPA neglected to include the impacts of making GHGs subject to regulation under the Act and thereby triggering PSD in the analysis required by Executive Orders 12866, 13132, 13175, and 13211. Executive Order 12866 directs EPA to submit to OMB new significant regulations under consideration by the Agency.[125] In the Section 202 rule, EPA failed to analyze the effect on stationary sources in the cost benefit analysis and there is no indication that EPA included these impacts in its submission to OMB. In this Proposed Rule, EPA has similarly failed to analyze the costs and benefits of triggering PSD for stationary sources. Without this key information, OMB could not fully review the impacts of the Proposed Rule. Likewise, the Agency has failed to satisfy the requirements of Executive Orders 13132 (federalism),[126] 13175 (consultation and coordination with Indian tribal governments), and 13211 (energy effects), by neglecting to include impacts of the PSD trigger.[127]

---

[120] 74 Fed. Reg. at 55,294 (emphasis added).
[121] *Id.* at 55,343.
[122] 2 U.S.C. § 1531.
[123] *Id.* § 1532(a).
[124] 74 Fed. Reg. at 55,349.
[125] Exec. Order 12866 § 6(a), 58 Fed. Reg. 51,735, 51,740 (Oct. 4, 1993).
[126] Remarkably, EPA states that "this action does not have federalism implications" and "will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132."

CONCLUSION

The Associations appreciate the opportunity to submit comments on this Proposed Rule and urge the Agency to reconsider its statutory interpretations and other aspects of the proposal in accordance with the comments above.

---

74 Fed. Reg. at 55,349. This statement ignores the tremendous permitting burdens that EPA's unnecessary interpretation of the PSD applicability provisions would have to increase state permitting burdens.

[127] The reasons that EPA must account for the PSD trigger consequences are similar for these Executive Orders and, therefore, are not reiterated.

ATTACHMENT A

Air Permitting Forum: The Air Permitting Forum is a group of companies focused on implementation issues related to permitting issues under the Clean Air Act, with a particular focus on Title V and PSD permitting concerns. Forum members own and operate facilities throughout the country that are subject to Title V and PSD requirements.

American Chemistry Council: The American Chemistry Council is a nonprofit trade association whose member companies represent the majority of the productive capacity of basic industrial chemicals within the United States. The business of chemistry is a $689 billion enterprise and a key element of the nation's economy.

American Coke & Coal Chemicals Institute: The American Coke & Coal Chemicals Institute represents companies comprising over 90% of the U.S. production of metallurgical coke for iron and steelmaking and 100% of the U.S. production of chemicals produced from coke byproducts.

American Iron and Steel Institute: The American Iron and Steel Institute represents approximately 28 member iron and steel companies, and 138 associate and affiliate members who are suppliers to or customers of the steel industry. These members operate and hold ownership interests in various steel manufacturing and related operations across the United States and its producer, associate and/or affiliate members supply various customers and projects in the United States.

Corn Refiners Association: The Corn Refiners Association is the national trade association representing the corn refining (wet milling) industry of the United States. Corn refiners manufacture sweeteners, ethanol, starch, bioproducts, corn oil, and feed products from corn components such as starch, oil, protein, and fiber.

Institute of Shortening and Edible Oils: The Institute of Shortening and Edible Oils, Inc. is a trade association representing the refiners of edible fats and oils in the U.S. Its member companies process approximately 90% of the edible fats and oils produced in the U.S., which are used in baking and frying fats, salad and cooking oils, margarines and spreads, confectionary fats and as ingredients in a wide variety of foods.

National Association of Manufacturers: The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states.

National Oilseed Processors Association: The National Oilseed Processors Association is a national trade association comprised of 15 companies engaged in the production of vegetable meals and oils from oilseeds, including soybeans. NOPA's member companies process more than 1.7 billion bushels of oilseeds annually at 65 plants located throughout the country, including 60 plants which process soybeans.

Renewable Fuels Association: The Renewable Fuels Association (RFA) is the leading trade association for America's ethanol industry. Its mission is to advance the development, production, and use of ethanol fuel by strengthening America's ethanol industry and raising awareness about the benefits of renewable fuels. Founded in 1981, RFA represents the majority of the U.S. ethanol industry and serves as the premier meeting ground for industry leaders and supporters. RFA's 300-plus members are working to help America become cleaner, safer, energy independent and economically secure.