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Environmental Protection Agency
1200 Pennsylvania Avenue, NW
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Re: Docket ID No. EPA-HQ-OAR-2009-0597. American Petroleum Institute's Comments on the U.S. Environmental Protection Agency's Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program.

To Whom It May Concern:

The American Petroleum Institute ("API") appreciates this opportunity to submit comments on the U.S. Environmental Protection Agency's ("EPA's") "Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program," ("reconsideration") referenced above.[1]

API is the primary trade association of America's oil and natural gas industry, representing nearly 400 members involved in all aspects of the industry. The regulation of greenhouse gases ("GHGs") under the Clean Air Act ("CAA" or "the Act") would have potentially profound effects both on its members' products – which mostly are fuels combusted for the production of energy – and on the methods its members employ to find and extract hydrocarbon resources and to convert them into useful products for the good of the nation.

Thus, our members have a great interest in this reconsideration of the Johnson Memorandum. In the Federal Register notice, EPA sets out five possible alternative interpretations and states that EPA supports continuation of the current "actual control" interpretation contained in the Johnson Memorandum, which avoids confusion and delays in permitting. API wholly supports this interpretation and urges EPA to adopt this construction. The "actual control" interpretation—*i.e.*, a pollutant is "subject to regulation" under the CAA

[1] 74 Fed. Reg. 51535 (Oct. 7, 2009).

only when it is subject to a requirement controlling its emissions—is supported by the text and legislative history of the Act, as well as policy considerations, all of which are more fully discussed below.

EPA should not adopt the competing interpretations that would deem GHGs subject to the PSD program by virtue of other actions by EPA or States. As more fully discussed below, API believes EPA should decline to adopt any of the other interpretations. Some argue that EPA's proposed endangerment finding for GHG emissions from vehicles under CAA Section 202 should trigger the PSD program.[2] As the Johnson Memorandum explains, however, even a final endangerment finding is merely a prerequisite to regulation and does not itself control emissions of GHGs or trigger the PSD program. Others argue that the PSD program is triggered by EPA's approval of State Implementation Plans (SIPs) that include GHG regulations or EPA's waiver under CAA Section 209 allowing California's mobile source standards. But those GHG standards arise under state law, not under the federal CAA, and therefore would not make GHGs subject to the PSD program.

API further believes that EPA should take the opportunity provided by reconsideration of the Johnson Memorandum to clarify that PSD will not apply to any GHG until a National Ambient Air Quality Standard (NAAQS) has been issued for that GHG. As explained further below, this view is consistent with the statute and with EPA's regulations and is the most appropriate way to avoid the "absurd results" predicted in the Tailoring Rule if the PSD program is applied to GHG's. In the alternative, EPA should exercise its discretion to interpret the term "pollutants subject to regulation" to exclude GHG's. At a minimum, EPA must clarify that the time at which the PSD program will apply to GHG's is not the date of promulgation of the 202 rule, but rather the compliance date for Model Year 2012 under that rule.

For all of these reasons, API:

- **Supports EPA's preferred interpretation on the question of when PSD is triggered, which would make PSD applicable to a pollutant on the basis of an EPA regulation requiring "actual control" of emissions of a pollutant;**
- **Believes that EPA should take the opportunity provided by the Johnson Memorandum to clarify that PSD will not apply to GHG's until a NAAQS has been issued;**
- **Believes in the alternative that EPA should exercise its discretion to interpret the term "pollutants subject to regulation" to exclude GHG's; and**
- **Believes that at a minimum EPA should clarify that the 202 Rule will not trigger PSD for GHG's until the "compliance date" for Model Year 2012.**

[2] 74 Fed. Reg. 18886 (Apr. 24, 2009).

I. EPA Must Retain the "Actual Control" Interpretation Set Forth in the Johnson Memorandum.

A. The "Actual Control" Interpretation is Supported by the Statutory Text, is Consistent with Past Agency Practice, and is Sound Public Policy.

1. The Text of the Clean Air Act Supports the "Actual Control" Interpretation

a. "Subject to Regulation." The CAA mandates that PSD permits must contain BACT emission limits for "each pollutant subject to regulation under" the Act.[3] As the Johnson Memorandum explains in construing the "regulated NSR pollutant" regulation, that phrase is best understood to mean pollutants subject to requirements that mandate control or limit emissions of the pollutant. Johnson Memo. at 7. That interpretation aligns with the common meaning of "regulation," and is suggested by Congress's choice not to include an article such as "a" before the word "regulation" in the phrase "subject to regulation." *Id.* at 6-8. At a minimum, nothing in the phrase "subject to regulation" compels a contrary reading.[4]

Some have contended that the phrase "subject to regulation" includes air pollutants that could be regulated in the *future*. As a textual matter, the primary definition of "subject" found in dictionaries connotes being *presently* under control of a regulation.[5] More importantly, the placement of the phrase "subject to regulation" within the statute requiring BACT limits strongly suggests that the phrase refers to presently controlled (and thus "regulated") pollutants. *See* CAA §§ 165(a)(4), 169(3), 42 U.S.C. 7475(4), 7479(3). Otherwise, PSD permitting authorities would be forced to guess what pollutants could *possibly* come under regulation and somehow impose BACT limits on them—before EPA had developed BACT standards. In sum, the most plausible textual reading of Sections 165 and 169 suggests that BACT limits are required for pollutants subject to requirements that actually control or limit emissions. No such requirement established under the CAA applies to GHGs.

b. Section 821's Monitoring and Reporting Requirements. The foregoing analysis refutes a "monitoring and reporting" interpretation. Under that view, some parties have argued that regulations requiring monitoring and reporting of carbon dioxide, promulgated pursuant to Section 821 of the CAA Amendments of 1990, sweep carbon dioxide into the PSD program. *See* 74 Fed. Reg. 51541-42.[6] However, because Section 821 does not call for *controls* of emissions,

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[3] CAA §§ 165(a)(4), 169(3), 42 U.S.C. 7475(4), 7479(3).

[4] It has been argued that because Congress expressly defined the terms "emission limitation" and "emission standard" in CAA Section 302, but instead used the term "regulation" with regard to the BACT requirement, Congress must have intended those terms to have different meanings. *Deseret*, slip op. 29 n. 27. The Johnson Memorandum's definition of "regulation" does not render Section 302 redundant, however, because it sweeps more broadly. Whereas Section 302 addresses limits on the quantity, rate, or concentration of emissions, the Memorandum's definition also includes controls on emissions achieved through other means, such as import or production restrictions. *See Deseret*, slip op. 30 n.27.

[5] *E.g.*, Random House Webster's Unabridged Dictionary (2d ed. 2001) (defining "subject" as "being under domination, control, or influence (often fol. by *to*)"); American Heritage Dictionary of the English Language (4th ed. 2006) (defining "subject" as "[b]eing in a position or in circumstances that place one under the power or authority of another or others").

[6] 40 C.F.R. part 75 (promulgated under Pub. L. No. 101-549, § 821, 104 Stat. 2699).

it does not subject carbon dioxide (or other GHGs) to regulation for purposes of the PSD program.

It has also been argued the term "regulations" used in Section 821 must be given the same meaning as the word "regulation" used in the BACT requirements. *In re Deseret Power Elec. Coop.*, PSD Appeal No. 07-03, slip op. at 31, 2008 EPA App. LEXIS 47 (EAB Nov. 13, 2008). But those words "take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Envt'l. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007); *see Deseret*, slip op. 31-32. Within the context of the BACT requirements of CAA Sections 165 and 169, "subject to regulation" most naturally refers to actual controls or limits. In contrast, in the context of CAA Section 821, "regulations" most naturally refers to the result of EPA's rulemaking process, regardless of its content.

In addition, as *Deseret* cogently explained, the interpretive canon, that favors giving the same term the same meaning, has little force here because the terms were enacted 13 years apart, have no functional relationship within the CAA, and are not even codified near each other.[7] Those facts eviscerate any implication that the 1990 Congress intended Section 821 to bear on the phrase "subject to regulation" in the BACT requirements enacted in 1977. Simply put, Section 821 provides no basis to launch a massive expansion of the PSD program to GHGs.

2. The "Actual Control" Interpretation is Consistent with Past Agency Practice

a. Regulatory History of the PSD Program. The regulatory history of the PSD program provides further evidence that the program does not extend to GHG emissions by virtue of mere monitoring or reporting requirements. This history is relevant on several grounds. First, it refutes Petitioners' contention that the Johnson Memorandum breaks with past EPA interpretations. Second, as EPA reconsiders the Johnson Memorandum, past interpretations and practice should constrain EPA's discretion because an interpretation that conflicts with an established agency position is more susceptible to challenge as being substantively arbitrary or capricious. Similarly, EPA's past views and practice give rise to reliance expectations by regulated parties, which ought to increase EPA's burden to justify a change in course. Finally, because EPA's earliest views about the PSD program may be probative of Congress's intended purposes for the program, deviation from those views may violate the Act itself.

b. 1978 Preamble to PSD Regulations. In claiming that the Johnson Memorandum breaks with previous EPA interpretations, Petitioners rely heavily on the preamble to the 1978 final rulemaking for PSD regulations, issued in response to the CAA of 1977.[8] The preamble interpreted the phrase "subject to regulation under this Act" in Sections 165 and 169 of the Act as: "any pollutant regulated in Subchapter C of Title 40 the Code of Federal Regulations for any source type." *Deseret* slip op. 3, 40-42. This then includes all criteria pollutants subject to NAAQS review, pollutants regulated under the Standards of Performance for new Stationary Sources (NSPS), pollutants regulated under the National Emissions Standards for Hazardous Air

[7] *Deseret*, slip. op. 34 (discussing Section 821 of Pub. L. No. 101-549 104 Stat. 2699 (1990) (codified in Title IV of CAA, 42 U.S.C. § 7651k) and Sections 165 and 169 of Title I of CAA, enacted as part of Pub. L. 95-95, 91 Stat. 685 (1977)).

[8] Amended Petition for Reconsideration, at 5-6, 15-18; *see also* 74 Fed. Reg. 51,542.

Pollutants (NESHAP), and all pollutants regulated under Title II of the Act regarding emissions standards for mobile sources.[9]

As the Johnson Memorandum explains, its interpretation is consistent with the 1978 preamble because each of the regulations, then included in Subchapter C—pollutants regulated under NAAQS, NSPS, NESHAP, and Title II—required control of pollutant emissions. Johnson Memo. 12.

Petitioners have argued that CO_2 is "regulated" in Subchapter C because the CO_2 monitoring and reporting regulations promulgated in 1993 in response to Section 821 appear in Subchapter C.[10] But the 1978 preamble set forth its interpretation in relation to the regulations existing in then-current Subchapter C, and nothing indicates that EPA intended the PSD program to expand with other types of regulations that could later be added to Subchapter C.

More importantly, the 1978 preamble does not answer the fundamental question whether monitoring and reporting requirements constitute "regulations" that trigger the PSD permitting requirement. Instead, the 1978 preamble uses the phrase "pollutant regulated in" without defining what makes a pollutant "regulated." For that reason, the Johnson Memorandum concluded that the 1978 preamble does not specifically resolve whether CO_2 is presently "subject to regulation" for purposes of the PSD program. Johnson Memo. 12.

Additionally, the 1978 preamble favors the Johnson Memorandum's position in that each type of regulations listed therein brought only traditional, local pollutants under the PSD program. That result was entirely consistent with Congress's expectations for the program's scope, as explained earlier. Viewed in this light, it is Petitioners' position that would constitute a break with the 1978 preamble.

c. 1980 Regulatory Impact Assessment. Further evidence that EPA has heeded Congress's intent that the PSD program encompass a limited number of pollutants subject to actual emission controls is found in an early assessment of the program scope. Pursuant to a statutory mandate,[11] EPA commissioned an impact assessment of proposed revisions to the 1978 PSD regulations. *See* 44 Fed. Reg. 51924, 51945 (Sept. 5, 1979). The resulting assessment described how the scope of the PSD program would change under the revised regulations.[12] This assessment is particularly relevant because the revised regulations do not differ materially from the current PSD regulations.

During a 19-month period for which EPA administered the prior version of the PSD regulations, permits were issued to 634 sources. Regulatory Assessment, at 7. The Assessment predicted that during a comparable time frame, approximately 150 new sources and 133 modified sources would be subject to the revised PSD permitting requirements. *Id.* at 17-18.

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[9] 43 Fed. Reg. 26,388, 26,397 (June 19, 1978); *see also Deseret*, slip op. 38-39.

[10] Amended Petition for Reconsideration, at 5-6, 15-18; *see also Deseret*, slip op. 42 n. 43.

[11] CAA Section 317(a) requires EPA to conduct an economic impact assessment for regulations and revisions to regulations issued under the PSD program. 42 U.S.C. 7617(a)(4).

[12] 45 Fed. Reg. 52676, 52729 (Aug. 7, 1980) (discussing the PEDCo Environmental, Inc., Regulatory Impact Assessment for the September 5, 1979, Proposed Regulations for Prevention of Significant Deterioration (1980) (hereinafter "Regulatory Assessment").

Thus, EPA anticipated that the PSD regulations would require less than 300 sources in a 19-month period to undergo the permitting process. In addition, the types of sources for which a PSD permit would be required were primarily large industrial facilities, such as iron and steel plants, refineries, smelters, incinerators, mining operations, and electrical-generating facilities. *Id.* at 21. The Assessment thus shows that EPA understood its mandate under the PSD program to extend the program only to the largest industrial emitters and only for traditional, local pollutants. That understanding cannot be squared with now subjecting GHGs to the PSD program. Doing so would expand the program far beyond anything Congress—or the EPA closest to the Congress that created the PSD program—ever imagined.

d. 2008 ANPR. In July 2008, EPA issued an Advance Notice of Proposed Rulemaking ("ANPR") to consider whether and how CO_2 and other GHGs might be regulated under the CAA. 74 Fed. Reg. 44354 (July 31, 2008). Thus, the ANPR states EPA's historical view that stationary sources of CO_2 are not currently subject to the PSD program. *Id.* at 44400.

e. EPA Permitting Practices. The Johnson Memorandum presented an additional piece of evidence that had been missing in *Deseret*: information about EPA's past permitting practices. Johnson Memo. 11. The Johnson Memorandum noted that EPA staff "reviewed permits issued under [the PSD] program and have not identified any federal PSD permits that establish limitations on the emission of pollutants that were only subject to monitoring and reporting requirements established under the Act at the time the permit issued." *Id.* This confirms what all the evidence suggests, and what regulated parties already know: EPA has never subjected GHG emissions to the PSD program. Doing so now would constitute a major break from the established agency practice.

3. Policy Considerations Favoring the "Actual Control" Interpretation.

Both the Johnson Memorandum and EPA's proposed reconsideration emphasize that policy considerations favor the "actual control" interpretation. As EPA explains, the interpretation leaves EPA with much-needed flexibility to review a pollutant's health and welfare effects, as well as its emission characteristics and control options for various source types before triggering PSD requirements. Without those tools, EPA would be hindered in its ability to use regulations to gather information, for fear of triggering PSD for a pollutant.

For all of these reasons, API supports keeping the current "actual control interpretation" contained in the Johnson Memorandum.

B. Alternatives to the "Actual Control" Interpretations Are Not Legally Supportable, Are Contrary to Past Practice, and/or Are Contrary to Public Policy Considerations.

The proposed reconsideration solicits comments on whether various other actions by EPA or States would make GHGs subject to regulation.

1. Endangerment Finding. EPA asked for comments on whether an endangerment finding, standing alone, should render a pollutant subject to the PSD program. 74 Fed. Reg. 51543. For the reasons discussed above, a pollutant is not "regulated" for purposes of triggering PSD requirements, unless it is subject to a requirement that limits the pollutant's emissions. EPA

could establish such emission controls through any of multiple CAA regulatory provisions only after finding that the pollutant endangers public health or welfare.[13] An endangerment finding is thus a prerequisite to issuing emission-control standards, but does not itself impose actual control of emissions and would not trigger PSD requirements.

2. Endangerment Finding Under Section 202 or Section 111. EPA has proposed making an endangerment finding under CAA Section 202(a), responding to *Massachusetts v. EPA*.[14] An affirmative endangerment finding standing alone should *not* bring GHGs under the PSD program. That is because the endangerment finding would not itself require any actual control of emissions. *See* ANPR, 73 Fed. Reg. 44421. Instead, the endangerment finding is a prerequisite to such control requirements being separately adopted via notice-and-comment rulemaking. As EPA has explained, "GHGs would become regulated pollutants under the Act if and when EPA subjects GHGs to control requirements." *Id.*

3. State Controls on GHG Emissions Approved in SIPs. EPA's proposed reconsideration seeks comment on whether a pollutant should be considered "subject to regulation" by virtue of EPA-approved GHG controls in SIPs. 74 Fed. Reg. 51542. EPA refers to this as the "SIP interpretation." *Id.* In promoting the SIP interpretation, Petitioners have pointed to EPA's approval of Delaware's SIP, which includes emission controls of GHGs. 73 Fed. Reg. 23101 (Apr. 29, 2008); *see* Amended Petition for Reconsideration 10-13. Because EPA's approval of the SIP does not constitute a NAAQS, a NSPS, or a federal standard regulating ozone-depleting substances, *see* 40 C.F.R. § 52.21(b)(50)(i)-(iii), Petitioners must contend that approval of the SIP made GHGs "otherwise subject to regulation under the Act." 40 C.F.R. § 52.21(b)(50)(iv).

Petitioners' argument misunderstands the nature of SIP requirements. In approving Delaware's SIP revision, EPA explained that "EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, *this action merely approves state law* as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law." 73 Fed. Reg. 23102 (Apr. 29, 2008) (emphasis added). EPA's approval means only that Delaware's choice to regulate GHGs under state law does not violate the CAA. EPA's approval, therefore, does not make GHGs regulated pollutants under the CAA.

4. California Standards. First, California's standards are not regulations "under the [Clean Air] Act." As a textual matter, authority to regulate tailpipe emissions pursuant to the CAA is found in Section 202, which directs *EPA* to establish federal emission standards for any pollutant that endangers public health or welfare. Such standards must be established through EPA's notice-and-comment rulemaking. CAA § 307(d)(1)(K). Only upon such an endangerment finding and rulemaking would there be a tailpipe emission standard promulgated "under the Act."

By contrast, regulations adopted by California (and then by other States) may be *allowed* by EPA, but are not themselves issued *under* the CAA. Section 209(b) merely contains a qualified withdrawal of federal preemption that permits California to adopt its own standards pursuant to State legislative authority. Although EPA must approve California's standards, EPA's review is rather limited: The primary criterion for California regulations is that they must

[13] *See* CAA §§ 108(a), 111(b)(1), 115, 202(a)(1), 211(c)(1), 213(a)(4), 231, 615.
[14] 74 Fed. Reg. 18886 (Apr. 24, 2009).

be "in the aggregate, at least as protective of public health and welfare as applicable Federal standards." CAA § 209(b)(1). If each of California's standards is at least as stringent as the comparable EPA standard (and certain other requirements are met), then the California standards are deemed at least as protective, and EPA is required to grant the waiver. CAA § 209(b)(2).[15] Because Section 209(b) simply allows "California to blaze its own trail with minimum federal oversight," *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1297 (D.C. Cir. 1979), EPA approval of California's regulations should not be viewed as bringing the regulations "under the Act."

II. EPA Should Interpret the PSD Applicability Provisions of the Statute and Regulations to Avoid Triggering PSD for the Vast Majority of Sources Rather than Relying on the Absurd Results and Administrative Necessity Doctrines to Rewrite Statutory Thresholds.

In the Reconsideration Notice, EPA states that issues related to "interpretation of PSD applicability definitions" will be addressed in this reconsideration process. EPA notes that during the public comment period for other GHG rulemaking actions, such as the GHG Mandatory Reporting Rule (74 Fed. Reg. 16447 (April 10, 2009) and the proposed Endangerment Finding (74 Fed. Reg. 18885 (April 24, 2009)), it received some comments that discussed the interpretation of the PSD applicability issues. EPA further directs "all parties that might have submitted comments regarding interpretation of the PSD applicability definitions in those other rulemakings to submit new comments in accordance with the requests in this reconsideration process." 74 Fed. Reg. 51535, 51546. In response to this comment request, API submits that the CAA and EPA's PSD regulations are properly interpreted to apply PSD to GHGs only for those sources that are otherwise major for PSD based on their emissions of criteria pollutants for which a NAAQS has been issued. Moreover, the statute and regulations can easily be, and most naturally are, interpreted to apply PSD to such otherwise major sources only in situations where PSD is otherwise being triggered for a criteria pollutant.

In short, while EPA is correct that the term "subject to regulation" is critical to determining which pollutants are subject to the BACT requirement, it is not correct to state that *solely* this term dictates PSD applicability. The CAA does not contemplate that PSD will be triggered solely by emissions of a non-NAAQS pollutant. Rather, EPA's PSD regulations should be interpreted to apply PSD to GHGs only for those sources that are otherwise major for PSD, based on their emissions of criteria pollutants for which a NAAQS has been issued. EPA's proposed Tailoring Rule seeks to ameliorate the effects of automatically triggering PSD based on issuance of the Section 202 rule but before EPA can rely on administrative necessity to justify a tailoring approach that contravenes statutory definitions, EPA must evaluate alternatives to avoid the absurd results created by its interpretation. *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); *CIR 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.*, 369 F.3d 366, 386 (2d Cir. 2004) (same); *In re Pac.-*

[15] In addition, Section 209(b)(1) prohibits EPA from waiving preemption if it determines that California's standards are not necessary "to meet compelling and extraordinary conditions" or California's "standards and accompanying enforcement procedures are not consistent with section 7521(a) [CAA sec. 202(a)] of this title." 42 U.S.C. § 7543(b)(1).

A. Trading Co., 64 F.3d 1292, 1303 (9th Cir. 1995) (same); 2A N. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:12, at 94 (7th ed. 2007).

A. The GHG-PSD Problem Is Created by Interpreting the Statute and Regulations to Require that PSD Applicability Is Dictated Solely through the Phrase "Subject to Regulation."

In the proposed Tailoring Rule, EPA states that if it issues a final rule regulating GHG emissions from motor vehicles under Section 202 of the CAA: (1) GHGs would become pollutants "subject to regulation" under the CAA, and (2) the CAA and EPA's regulations would require:

> (a) any source with potential GHG emissions at or above 100 or 250 tons per year (tpy) (depending on the source category) to be classified as a major PSD source; and (b) a PSD permit for any new major PSD source and for any existing major PSD source if it makes a modification that results in a significant increase in GHG emissions.

Solely looking at the 250 tpy threshold, EPA states that these interpretations will result in the existing 280 PSD permit applications per year increasing to more than 40,000 applications. The potential expansion of PSD requirements to more than 140-times the number of facilities currently subject to PSD is often referred to as the "GHG-PSD problem." EPA recognizes this as a problem, finding that this increase in PSD applications would overwhelm federal and state permitting authorities.

To solve the GHG-PSD problem, EPA proposes in its Tailoring Rule to rely on the controversial legal doctrines of "administrative necessity" and "absurd results" to ignore the statutory major source and significance emission thresholds for PSD. For GHGs, EPA would temporarily adopt a major source threshold of 25,000 tpy and a significance level of 10,000-25,000 tpy for six years and then decide whether to make those levels permanent or reduce them.

B. Prior to Resorting to the "Administrative Necessity" and "Absurd Results" Doctrines to Rewrite Statutory Thresholds, EPA Is Obliged to Consider Statutory Interpretations that Eliminate the GHG-PSD Problem.

EPA has stated in the proposed Tailoring Rule that one avenue to mitigate the GHG-PSD problem is for the Agency to apply the PSD program only to those sources that would otherwise trigger PSD for a criteria pollutant (i.e., sources that had to get a permit anyway) if such sources would also experience a significant increase in GHG emissions. 74 Fed. Reg. 55327. EPA could interpret the existing statute and regulations consistent with their plain language, specifically Sections 161, 165, and 169, (and section 52.21(a)(2) of the regulations) as defining major sources and major modifications (i.e., modifications that result in emissions that exceed applicable significance levels) based solely on emissions of air pollutants for which EPA has established a NAAQS. The statute does not state that PSD applies to all pollutants subject to regulation; the statute only requires BACT apply to all pollutants subject to regulation for sources that trigger PSD. EPA should separate its analysis of the definition of when PSD is

triggered from the definition of where BACT applies consistent with the statute. Under the suggested interpretation, sources and modifications will not be classified as major requiring a PSD permit based on GHG emissions unless: (1) EPA issues a NAAQS for GHGs; or (2) a facility that is already major for traditional pollutants triggers PSD for a non-GHG pollutant (e.g., for ozone, SO2) (and the facility experiences a significant GHG emissions increase).

As explained below, the CAA supports this interpretation, and although EPA's historical statements in preambles to the PSD rules that interpreted these provisions are inconsistent with the statutory and regulatory language, EPA has the opportunity to correct the inconsistency in this interpretative ruling or to change its interpretation (at least for GHGs). Contrary to EPA's assertion that the final mobile source rule will trigger 40,000 GHG PSD permits without a Tailoring Rule and some 400 with one (an estimate EPA concedes has "great uncertainty" because it has no data on the number of modifications that would be expected), under this approach, there would be no increase in the number of PSD permits required per year and the estimates would have a great deal of certainty.

Under this approach, GHG emissions would still be regulated. Any new or existing source that triggers PSD for a non-GHG pollutant will also be subject to BACT, if the source also experiences a significant GHG emission increase. This is consistent with statutory and regulatory requirements for BACT for "pollutants subject to regulation." This would effectively and appropriately limit the number of PSD permits and BACT determinations for GHGs to larger sources that trigger PSD for other pollutants.

The proposed Tailoring Rule indicates that it relies on two principles of law to support its findings that GHG emissions alone (unaccompanied by significant net emission increases in criteria pollutants) can trigger PSD permit requirements and the conclusion that absent an "administrative necessity" based regulatory relief rule, there will be 40,000 PSD applications per year. These principles are: (1) the CAA requires that GHGs, as regulated pollutants, be considered in determining whether a source is a major source for purposes of PSD, even though there is no NAAQS for GHGs; and (2) if a source is major for GHGs, it is therefore major for all other regulated pollutants – the "major for one, major for all" policy that EPA has applied to all but nonattainment NSR pollutants under the program for years. However, the CAA does not dictate these principles. While EPA has interpreted the PSD statutory provisions in this manner, this reading is not compelled by the statute. Moreover, *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), indicates that EPA's reading of the statute is incorrect to the extent it uses pollutants for which no NAAQS has been issued to classify a source as major or to be the "sole trigger" for PSD review due to a significant increase.

C. EPA's reading of the statute cannot be reconciled with its text.

EPA's conclusion that PSD applies to GHGs solely based on whether they are "subject to regulation" is based on the premise that the definitions section of the statute (Section 169) takes precedent over the applicability provisions. However, the definitions are simply not relevant if there is no applicability in the first instance. In this case, applicability requires a designation of attainment or unclassifiable with the NAAQS. EPA has taken the position that as long as an area is designated attainment or unclassifiable for any pollutant for which a NAAQS has been issued,

PSD applies to all pollutants "subject to regulation" under the CAA. This means that sources may be classified as major based on emissions of any pollutant subject to regulation, regardless of whether a NAAQS has been issued for that pollutant. As discussed below, the only exception EPA allows is for pollutants for which an area is designated nonattainment – and there, only because the *Alabama Power* decision required it.

Contrary to EPA's prior interpretation, CAA Sections 161 and 165 *precondition* applicability of the PSD program to those areas designated as attainment or unclassifiable under Section 107 for a NAAQS. Section 161 states that EPA is to promulgate regulations "to prevent significant deterioration of air quality in each region ... designated pursuant to section 107 [NAAQS designations] as attainment or unclassifiable." 42 U.S.C. 7471. Section 165(a) prohibits construction of a major emitting facility "in any area to which this part applies" unless the PSD permit requirements are met. 42 U.S.C. 7475(a). NAAQS designations are made on a pollutant by pollutant basis. The applicability of the PSD program in a given area must be based on the attainment status of the area for the pollutant in question. If there is no NAAQS, there can be no attainment status, and therefore the fact that a source has major emissions of a non-NAAQS pollutant should not make it a PSD major source.

The only part of the PSD statutory provisions that imposes requirements broadly on pollutants "subject to regulation" is the definition of BACT. Thus, if a source makes a modification that increases emissions significantly of a NAAQS pollutant, all pollutants "subject to regulation" must be controlled. Nothing in the statute requires a source that is major to be subject to the significance levels for non-NAAQS pollutants if there is no significant increase of a NAAQS pollutant for which the area is designated attainment or unclassifiable.

D. There Are No Absurd Results Under this NAAQS Prerequisite Approach.

If EPA were to interpret the statute to (1) only classify a source as major under PSD if a source is newly built or an existing minor source increases its emissions above the major source thresholds for a NAAQS pollutant (for which the area is classified attainment or unclassifiable), and (2) only classify a project as a modification if it experiences a significant increase of a NAAQS pollutant or precursor, EPA would thereby limit the PSD program to its current workload (i.e., around 280 PSD permits per year). Those facilities that trigger PSD for a non-GHG NAAQS pollutant would have to consider BACT for all pollutants "subject to regulation" (including GHGs when they become subject to regulation) if a significant increase in GHG occurs. Therefore, this reconsideration and the PSD tailoring rule is relevant for determinations of BACT.

E. The NAAQS Prerequisite Approach Is Consistent with Alabama Power v. Costle.

Before the 1979 *Alabama Power* decision, EPA tried to employ an even broader reach for the PSD program than the 1980 rule reflects. EPA sought to include nonattainment pollutants in the program, arguing to the D.C. Circuit that this was necessary to prevent nonattainment areas from damaging air in attainment areas. The EPA brief stated that the designation language in Section 161 was "only a starting point," that these identifications did "not shape the 'area' to which the PSD review requirements apply, and that preconstruction review must precede the

construction anywhere of a major emitting facility which will adversely affect the air quality of an area to which [Title I, Part C] applies." 636 F.2d at 364. The Court rejected EPA's reasoning:

> The plain meaning of the inclusion in section 165 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. That this is the correct interpretation is underscored by the inclusion of the same words in section 165(a)(3)(A), and by the precise language employed by Congress in those provisions where its concern was more source (rather than area) specific. *Id.* at 365.

EPA issued revised regulations to respond to the remand from the D.C. Circuit in *Alabama Power* on August 7, 1980. 45 Fed. Reg. 52676 (Aug. 7, 1980). EPA argued in response to several comments objecting to the inclusion of non-NAAQS pollutants in the program that the scope of the *Alabama Power* holding was limited to its ability to apply PSD review to nonattainment pollutants. EPA stated that it would interpret the statute to classify sources as major for PSD purposes on the basis of any pollutant for which the area is "not in nonattainment," and impose the "major for one, major for all" policy. EPA justified this decision on the basis of the definition of major emitting facility (emissions of any pollutant) and of BACT (pollutants subject to regulation under the Act) but never addressed what the Court said was the "key determinant" of the applicability of the PSD review requirements – location. 45 Fed. Reg. at 52681. EPA dealt with the Court's holding by putting an exclusion in § 52.21(i)(5).

The 1980 PSD rules were challenged by numerous industrial parties. Those challenges were administratively stayed for over 20 years and ultimately resolved in *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005). The policy announced in the preamble of using non-NAAQS pollutants to trigger PSD applicability (as compared with applying BACT to non-NAAQS pollutant when the NAAQS pollutant triggers) was not raised in the briefs in the *New York* case. It is not surprising that this issue was not briefed because there was no indication that the policy had any impact since sources were not triggering PSD routinely when they were not otherwise subject to the program for a NAAQS pollutant increase. There was simply no effect of the policy – until now.[16]

III. Alternatively, EPA Should Clarify in the Johnson Memorandum that the Term "Pollutants Subject to Regulation" Excludes GHG's.

The Phrase "Pollutants Subject to Regulation" Is Also Most Reasonably Interpreted to Exclude GHGs. If EPA did not interpret the statutory provisions regarding applicability as discussed in II.A, above, EPA should recognize the unique nature of GHGs and that Congress did not intend such a pollutant to trigger PSD. The endangerment finding under CAA Title II is distinctly different from the air quality purposes of the PSD program. Specifically, GHG

[16] The issue litigated by industry in 1979 was EPA's decision to regulate, under the PSD program, pollutants for which an area was not in attainment. The Court emphasized that location was the key factor in Congress's decision. If that is true, then EPA's 1980 remand should have addressed the question of whether PSD is triggered on a pollutant by pollutant basis–so that the location, the attainment or nonattainment status, would be based on the pollutant in question. Instead, EPA decided to simply carve out nonattainment pollutants from PSD.

emissions from motor vehicles are required to be regulated under Title II where, in the Administrator's judgment, such emissions "may reasonably be anticipated to *endanger public health or welfare*." *See* 42 U.S.C. 7511(a)(1) (emphasis added).

To the extent anthropogenic GHG emissions may reasonably be viewed as presenting an "endangerment" to "public health or welfare" within the meaning of Title II, it does not follow that EPA is thereby authorized, much less compelled, to regulate GHGs from stationary sources under the CAA's PSD program. In contrast to Title II, the PSD program is focused *not* on emissions that may "endanger public health or welfare," but, rather, is specifically directed towards the protection of "air quality"—*i.e.*, the air that people breathe. Reflecting Congress's intent in this regard, the CAA provides that:

> each applicable implementation plan shall contain emission limits 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 [CAA § 107] of this title as attainment or unclassifiable.

See 42 U.S.C. § 7471 (emphasis added). The regulation of GHGs—where that regulation is intended to address the effects that GHGs has on global climate change, rather than its effect on local "air quality"—does not constitute a measure to control GHGs which is "necessary" to "prevent significant deterioration" of local "air quality."

Rather than trying to justify rewriting the CAA's 100/250 tpy thresholds for PSD applicability, EPA could rely on the fact that Congress never intended the PSD program to apply to emissions of a substance such as CO_2 that, while constituting an "air pollutant" under the broad definition of CAA § 302(g), does not pose any threat to "air quality." To that end, EPA should recognize that the CAA's PSD provisions, including the requirement that proposed new (or modified) "major emitting facilities" be subject to BACT "for each pollutant subject to regulation" under the Act, must be understood in the context of the fundamental purpose and scope of the PSD program, as is made clear on the face of CAA § 161.

That is, while CAA § 165(a)(4) may provide that a proposed new "major emitting facility" (or a proposed "modification" to an existing facility) must be subject to BACT "for each pollutant subject to regulation under" the Act, this requirement should be read as applying only to such pollutants *that have an adverse impact on "air quality" – i.e.*, air that people breathe. Accordingly, while EPA has taken the position that the regulation of GHGs under CAA Title II may otherwise cause CO_2 to be deemed a "pollutant" that is "subject to regulation" under the Act, it does not follow from the statute that it is a pollutant that EPA must regulate under Part C.

EPA itself has already gone a long way towards making a strong case that Congress never intended the PSD program to apply to thousands of stationary sources, many of which are quite small in comparison to the large industrial sources to which the requirements of the PSD program have heretofore exclusively applied. The preamble to EPA's proposed Tailoring Rule is replete with statements by the Agency that point out how inconsistent with congressional intent

would be the regulation of such small sources. EPA's assessment on that score is correct: Congress selected the 250/100 tpy threshold emission levels that trigger PSD requirements with the goal of restricting the PSD program to a limited number of the largest, industrial emitters. H.R. Rep. 95-294 (1977), at 144-45 ("[I]ndirect and mobile sources and smaller stationary sources would not be subject to [PSD] permit provisions."); S. Rep. 95-127 (1977), at 96-97; ("Such a [permitting] process is reasonable and necessary for very large sources, such as new electrical generating plants or new steel mills. But the procedure would prove costly and potentially unreasonable if imposed on construction of storage facilities for a small gasoline jobber or on the construction of a new heating plant at a junior college . . . ."). In order to secure its passage in 1977, supporters of the PSD program stressed that it would not impact smaller sources, such as residential, commercial, or agricultural facilities. *E.g.*, Senate Debate on S. 252, June 8, 1977 (reprinted in 1977 Legis. Hist. 725) (statement of Sen. Muskie) ("Major emitting facilities . . . do not include houses, dairies, farms, highways, hospitals, schools, grocery stores, and other such sources"); Senate Debate on S. 3219, July 29, 1976 (reprinted in 1977 Legis. Hist. 5201-02) (statement of Sen. Buckley) ("The provisions for analyzing significant deterioration involve only specified types of major new industrial sources. . . . [T]hese are limited in number and they are the major pollution sources. The provisions of this bill have no impact whatsoever on commercial or residential development."). Yet, treating GHGs as a pollutant "subject to regulation under the Act" would dramatically expand the PSD program in the precise manner that Congress sought to avoid because the PSD program would then encompass a multitude of smaller, non-industrial sources that emit GHGs in excess of the 100/250 tpy threshold levels.

Simply put, Congress never intended the PSD program to encompass GHGs. Indeed, the 100/250 tpy applicability thresholds, as set forth in the definition of "major emitting facility" under CAA § 169(1), are concrete evidence of Congress's expectation that the PSD program would only apply to large sources of "criteria pollutants" and other pollutants that degrade "air quality." Yet, while EPA's proposed PSD Tailoring Rule acknowledges the problem, EPA has drawn the wrong conclusion as to the remedy. Rather than attempting to rewrite these threshold limits, EPA should instead conclude that Congress never intended the regulation of GHGs under the PSD program because such emissions do not degrade air quality.

IV. At a Minimum, the Johnson Memorandum Must be Revised to Reflect the Correct Date on which the 202 Rule Will Trigger PSD for GHG's: the "Compliance Date" for Model Year 2012, not the Date of Promulgation.

Timing of "Actual Control" Interpretation's Effect. One point upon which the Johnson Memorandum could be clearer is whether a pollutant becomes "subject to regulation" at the moment a rule controlling it is promulgated, or whether instead, it becomes subject to regulation at the moment that a rule first actually controls the pollutant. This point is particularly salient because the first regulation that will limit GHGs could be a Section 202 standard for automobile emissions. Section 202 regulations, however, do not take effect immediately upon promulgation. Rather, recognizing the obvious need for lead time, vehicle standards only "take effect after such period as [EPA] finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." 42

U.S.C. § 7521(a)(2). In light of that constraint, EPA has proposed vehicle GHG emission standards that do not take effect until model year 2012. *See* 74 Fed. Reg. 49454.

As the Johnson Memorandum explains, the plain meaning of "regulation" in the phrase "subject to regulation" requires that a pollutant be under "control." Johnson Memo. 7-8. And, plainly enough, if regulation of a pollutant has not yet taken effect, that pollutant is not yet under control. As EPA later explained in its proposed reconsideration: "No party is required to comply with a regulation until it has become final *and effective*. Prior to that date, an activity covered by a rule is not in the ordinary sense 'subject to' any regulation." 74 Fed. Reg. 51545 (emphasis added). EPA's language – "final *and effective*" – dovetails with the lead time requirement in Section 202(a)(2), that tailpipe regulations do not "take effect" until the model year to which the standards apply, which is the first compliance deadline.

Despite that reasoning, the Johnson Memorandum suggested that a pollutant becomes a "regulated NSR pollutant" at an earlier point—"upon *promulgation* of a regulation that requires actual control of emissions." Johnson Memo. 14 (emphasis added). Likewise, EPA's proposed Tailoring Rule for the PSD program states that the PSD program would be triggered "when a rule controlling those pollutants is promulgated (and even before that rule takes effect)." *See* Proposed PSD Tailoring Rule, 74 Fed. Reg. at 55300. Yet, "promulgation" of a rule is not a sensible triggering point because a promulgated regulation no more "controls" a pollutant than does a proposed regulation.

EPA's proposed reconsideration of the Johnson Memorandum endorses what we regard as a more reasoned view. EPA recognizes that "the term 'subject to regulation' in the statute and regulation is most naturally interpreted to mean that PSD requirements apply when the regulations addressing a particular pollutant become final *and effective*." 74 Fed. Reg. at 51545-46 (emphasis added). EPA noted that "subject to regulation" in the "ordinary sense" means that a control has taken effect. It also recognized that requiring PSD controls of GHGs immediately upon promulgation of the section 202 rule would frustrate the purposes of the Congressional Review Act, 5 U.S.C. 801 *et seq*, which provides a 60 day period before a new major rule goes into effect, so that Congress may review the rule and reject it if necessary. EPA is correct—it is difficult to imagine that any rule could be more "major" than newly applying carbon controls to over a million sources. An interpretation of "subject to regulation" that was triggered by promulgation would directly conflict with the Congressional Review Act.

The proposed reconsideration also further clarifies that the Johnson Memorandum was mistaken in reading two other prongs of the "regulated NSR pollutant" regulation as turning upon promulgation, when they should have been read to turn upon the first compliance date of the statute. 74 Fed. Reg. 51546. Thus, both the CAA and the "regulated NSR pollutant" regulation dictate that a pollutant only becomes "subject to regulation" when a final rule controlling it takes effect. In the case of EPA's proposed Section 202 vehicle emission standards, that point would not occur until the first compliance date for model year 2012 standards. *See* note 4, *supra*.

This interpretation is also dictated by policy considerations. As noted, EPA has pressed forward with an endangerment finding for GHGs under CAA Section 202 and related vehicle emission regulations. But EPA has recognized the current administrative impossibility of

instituting PSD requirements for all the sources that would qualify as "major stationary" sources, if carbon dioxide was treated like a typical regulated NSR pollutant. *See* Proposed PSD Tailoring Rule, Section VI (explaining that the number of permit applications would grow by "150-fold, an unprecedented increase that would far exceed administrative resources").

Moreover, there is agency precedent for delaying implementation of PSD requirements to account for administrative difficulties. As noted above in Part III.A.2, EPA has long withheld enforcement of BACT requirements for $PM_{2.5}$ because of the lack of adequate modeling techniques for $PM_{2.5}$.[17] As evidenced by the proposed Tailoring Rule, the administrative and technical problems posed by requiring PSD permits and BACT for GHGs dwarfs the problems posed by $PM_{2.5}$.

Given that agency precedent and the fact that EPA has confirmed that it would be administratively impossible to implement a PSD rule in the near future, it would be arbitrary and capricious for EPA to interpret the words "subject to regulation" to apply to a pollutant for which there was a promulgated control that had not yet taken effect. EPA could not justify twisting this term to reject what it has recognized as its "ordinary meaning," 74 Fed. Reg. at 51545, in order to produce a result, which it has recognized is "absurd" and "impossible to implement." *See* Proposed PSD Tailoring Rule, Section VI. Nor can EPA simultaneously tie its hands in the Johnson Memorandum reconsideration, and insist on the need for interpretive latitude in the proposed Tailoring Rule.

Since the "compliance date" for Model Year 2012 is not presently a fixed date under the terms of the 202 Rule, EPA should, for the benefit of the regulated community, take the opportunity in either the Johnson Memorandum reconsideration or in the Tailoring Rule to establish a firm calendar date that will be deemed, for stationary source PSD purposes, to be the compliance date for Model Year 2012.

V. The Johnson Memorandum Is a Valid and Prudent Action That EPA Should Maintain While It Undertakes a Comprehensive Approach to GHG Regulation.

As EPA and perhaps Congress move toward regulating GHG emissions, regulated entities face great uncertainty. Questions about the PSD program's applicability are particularly pressing in the wake of *Deseret* and the potential widespread, burdensome nature of the BACT requirement. The Johnson Memorandum is not only correct in affirming the "actual control" interpretation as outlined above, but also plays an important role in removing some of this uncertainty. The Memorandum was validly issued and remains in effect while EPA reconsiders it.

Petitioners have claimed that the Johnson Memorandum is invalid because EPA issued it without undergoing notice-and-comment procedures. Amended Petition 4-9. In their view, the Memorandum puts forth substantive rules that were subject to notice-and-comment requirements. They contend that EPA must therefore withdraw the Memorandum and proceed, if at all, through notice-and-comment procedures. *Id.*

[17] *See* Final Rule, Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$), 28321, 28324 (May 16, 2008) (explaining that a NAAQS for $PM_{2.5}$ was issued in 1997 but that PSD requirements for PM_{10} have served as surrogate for $PM_{2.5}$ requirements).

In reconsidering the Johnson Memorandum, EPA is undergoing notice-and-comment procedures and thereby curing any possible procedural faults in the Memorandum's issuance. The battle over the Memorandum's pedigree may therefore last only while EPA finishes its reconsideration. The Memorandum should continue to be given effect for two reasons. First and foremost, EPA expressly declined to stay the Memorandum's effectiveness. *See* EPA Grant of Petition for Reconsideration (Feb. 17, 2009). While EPA also noted that the Memorandum was not the Agency's "final word," federal PSD permitting authorities remain bound to follow the Memorandum until EPA says otherwise.[18] Moreover, the parties who challenged the Memorandum agreed to a stay of the litigation in the D.C. Circuit, premised on the Memorandum continuing in effect, and so acquiesced to that status.

Second, the Memorandum is an interpretive action exempt from notice-and-comment procedures, rather than a substantive rulemaking.[19] The line between interpretive rules and substantive (also known as legislative) rules has long been "enshrouded in considerable smog."[20] In discerning that line, the D.C. Circuit has long emphasized the rule's effect on regulated parties and the agency, reasoning that rules are substantive when they have "legal force" with "binding effects on private parties or on the agency."[21] Recently, however, the D.C. Circuit has classified a rule as "interpretive" even though it creates some new legal duties or alters primary conduct. *See Cent. Texas Tele. Coop, Inc. v. FCC*, 402 F.3d 205, 213-14 (D.C. Cir. 2005). The court there instead emphasized the logical relationship between the purported interpretation and the underlying rule: An interpretive rule "must 'derive a proposition from an existing document whose meaning compels or logically justifies the proposition. The substance of the derived proposition must flow fairly from the substance of the existing document.'" *Id.*

In light of those principles, the Johnson Memorandum is fairly characterized as interpreting the "regulated NSR pollutant" regulation. Its interpretation flows fairly from the phrase "subject to regulation" in subpart (iv) and the three preceding subparts which each describe similar regulations. *See* 40 C.F.R. § 52.21(b)(50). In addition, its interpretation draws on agency history and policies underlying the CAA. *Cf. Cent. Texas*, 402 F.3d at 215 (holding FCC rule to be interpretive partly because FCC derived it by reasoning from the Act's purposes). To be sure, the Johnson Memorandum bears some marks of a substantive rule in that it purports to bind EPA and regulated parties to its interpretation and implications, where EPA administers the PSD program, although not in approved States. Yet, the Johnson Memorandum does not greatly alter the status quo because it makes clear what has long been true—that the PSD program does not apply to GHG emissions. For those reasons, the Memorandum appears more akin to an interpretive rule than a substantive rule.

API appreciates the opportunity to submit these comments. We look forward to working with the Agency.

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[18] The Johnson Memorandum does not bind state officials administering approved PSD permitting programs. *See* Memo. 2-3 & n.1.

[19] Section 307(d)(1) specifies when notice-and-comment procedures are required and incorporates the exception established under the Administrative Procedure Act for "interpretative rules." 42 U.S.C. 7607 (citing 5 U.S.C. § 553(b)(A)).

[20] *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc).

[21] *GE v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002); *see also American Mining Congress v. Mining Safety & Health Administration*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

Sincerely,

Kyle B. Isakower