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U.S. Environmental Protection Agency
Mailcode: 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments of the American Petroleum Institute on the Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule

To Whom It May Concern:

The American Petroleum Institute ("API") appreciates the opportunity to provide the following comments on the proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55292 (Oct. 27, 2009) ("Tailoring Proposal"). API is the primary trade association of America's oil and natural gas industry, representing almost 400 members involved in all aspects of the industry. The regulation of greenhouses gases ("GHGs") under the Clean Air Act ("CAA") 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, API and its members have a strong interest in making sure that EPA thoroughly and completely considers the implications of possibly regulating GHGs under the Prevention of Significant Deterioration ("PSD") and Title V permitting programs.

The following comments make seven primary points:

- First, EPA lacks authority to raise the statutory 100/250 tons per year ("tpy") thresholds set forth in the CAA. The "absurd results" and "administrative necessity" doctrines that EPA seeks to use are narrow and limited doctrines that simply cannot support such a significant departure from clear statutory requirements. Moreover, EPA cannot properly invoke the doctrines because EPA can easily avoid the claimed "absurd results" by deferring the regulation of GHGs under the CAA. EPA cannot unnecessarily create "absurd results" by its

own discretionary action and then seek to mitigate them by invoking "administrative necessity," particularly when the proposed mitigation directly contravenes the statute.

- Second, even if EPA decides to regulate GHGs under the CAA, the agency can avoid creating "absurd results" by construing the PSD program as applying in a more limited fashion. Consistent with the Clean Air Act and EPA's rules, PSD ramifications can be significantly reduced by limiting the applicability provisions of PSD to criteria pollutants. This "no PSD without a NAAQS" approach is consistent with and derives from a suggestion by EPA in the Tailoring Proposal itself.

- Third, EPA can and should interpret the phrase "pollutants subject to regulation" to exclude GHGs. This simple and straightforward approach again provides EPA a way to avoid "absurd results" without stretching the "administrative necessity" doctrine further than it can lawfully reach.

- Fourth, if EPA does proceed to regulate GHGs under the CAA, the Tailoring Proposal must be modified to reflect the correct date on which stationary sources will become subject to PSD. The date that GHGs become "subject to regulation" can be no earlier than the date the substantive GHG standards actually apply to affected entities -- in other words, in the case of the Section 202 Motor Vehicle Rule, no earlier than October 1, 2011 when regulated entities actually become subject to an emission control requirement for Model Year 2012.

- Fifth, the Tailoring Proposal is ineffective because of serious issues with existing SIP and Title V program approvals and underlying state laws and regulations. Because the Tailoring Proposal is ineffective at generating the relief it claims, it fails under the "administrative necessity" doctrine. EPA's proposed method of amending State Implementation Plans ("SIPs") to accommodate the Tailoring Rule is unlawful. EPA must defer regulating GHGs under the CAA at least until the Tailoring Rule is completed, states have time to amend their rules and laws and submit amended SIPs to EPA, and EPA has proposed and finalized approval of the SIP revisions.

- Sixth, EPA must fully assess the potential regulatory impacts of regulating GHG emissions from large sources under the PSD and Title V programs. Nowhere in the suite of inter-related rulemakings that will result in massive new regulatory burdens by triggering GHG PSD for stationary sources does EPA properly assess and disclose what those regulatory burdens will be. This is contrary to a host of statutes and Executive Orders, and must be remedied before EPA can lawfully promulgate the rules in question.

- Seventh, EPA must revise several specific aspects of its proposal, including: (a) limiting the applicability of PSD and Title V to four specific GHGs; (b) more fully vetting potential "streamlining" techniques before proceeding with a GHG regulatory program; and (c) eliminating an unlawful incorporation by reference.

API's comments below fully demonstrate that EPA's Tailoring Proposal is both unnecessary and unlawful. API's comments also provide several paths for EPA action that we believe are clearly preferable to the Tailoring Proposal. API further believes that, given the way in which three pending agency actions are inter-related -- the Tailoring Proposal, the 202 Rule, and the Johnson Memo Reconsideration -- EPA should consider all comments submitted in any of the dockets in all other actions in which they are relevant.

In that regard, attached and incorporated by reference into these comments are API's comments on two parallel actions – EPA's proposed GHG standards for automobiles and light duty trucks[1] and EPA's proposed reconsideration of the "Johnson Memo."[2]

I. EPA cannot justify the PSD tailoring rule under the "absurd results" or "administrative necessity" doctrine.

EPA explains in the preamble to the Tailoring Proposal that it and the states will be thrust into an essentially impossible situation if GHGs become regulated under PSD and Title V. The Agency predicts that "[t]he number of sources subject to PSD permits would increase from less than 300 per year to some 41,000 per year, and the number of sources subject to the title V requirements would grow from less than 14,000 to some 6.1 million."[3] As a result, EPA and the states will be unable to issue PSD permits within 12 months after a complete application is submitted, as required by § 165(c), and will be unable to balance the dual goals of ensuring "that economic growth will occur in a manner consistent with the preservation of existing clear air resources," which are among the Congressional goals set out for the PSD program in § 160(3).[4] Moreover, the significant expansion in the scope of PSD applicability will "frustrate Congressional intent" because "the "typical plant[s]" … that Congress thought would be excluded from PSD due to the relatively small amounts of their conventional pollutants would in fact be included due to the CO_2 emissions from their heating or electricity generating equipment."[5]

Similarly, with regard to Title V, "a literal application of the 100 tpy threshold requirement in CAA §§ 502(a), 501(2)(B), and 302(j) would be in tension with a specific CAA requirement, that of CAA § 503(c), which imposes a time limit of 18 months from the date of receipt of the completed permit application for the permitting authority to issue or deny the

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[1] 74 Fed. Reg. 49454 (Sept. 28, 2009) ("GHG Vehicle Proposal").

[2] 74 Fed. Reg. 51535 (Oct. 7, 2009)("Johnson Memo Reconsideration Proposal").

[3] 74 Fed. Reg. at 55307.

[4] *Id.* at 55308.

[5] *Id.* at 55309.

permit."[6] In addition, "these delays would undermine the overall statutory design that promotes the smooth-running of the permitting process" because "the extraordinary numbers of these sources would sweep aside Congress' carefully constructed program, with its multi-step process and deadlines of as short as 45 days – and instead, backlog the permit authorities for many years."[7]

To alleviate these problems, EPA suggests that it has authority and justification to invoke two judge-made doctrines that, in limited cases, allow regulatory agencies to depart from statutory requirements. The "absurd results" doctrine is potentially applicable in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."[8] Similarly, the doctrine of "administrative necessity" recognizes "a narrow range of inherent discretion in an agency to create case-by-case exceptions in order to come within the practical limits of feasibility in administering a statute."[9] EPA correctly points out that the use of these doctrines is to be avoided if at all possible: "[I]f we are compelled to promulgate regulatory requirements that depart from the statutory requirements, we recognize that we must do so to the smallest extent possible and must remain as close as possible to congressional intent."[10] While EPA is correct in noting the existence and limited applicability of these doctrines, the Agency is not justified in invoking these doctrines in the context of triggering PSD for GHG's.[11]

A. The Tailoring Proposal directly conflicts with clear statutory language. The limited doctrines of "absurd results" and "administrative necessity" cannot save such a broad departure from explicit statutory requirements.

The courts have made clear that, "In statutory interpretation it is a given that statutes must be construed reasonably so as to avoid absurdities – manifest intent prevails over the letter .... Legislatures are presumed to act reasonably and statutes will be construed to avoid unreasonable

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[6] *Id.* at 55310.

[7] *Id.* at 55310-55311.

[8] *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 233, 242 (1989) (internal quotes and cites omitted).

[9] *Public Citizen v. F.T.C.*, 869 F.2d 1541, 1556 (D.C. Cir. 1989) (internal quotes and cites omitted).

[10] 74 Fed. Reg. at 55320.

[11] The absurd results and administrative necessity doctrines may be more efficacious in the Title V context because EPA's proposed tailoring does not involve elimination of substantive control requirements and may be more easily justified based on the extent of the burden and the lack of available alternatives.

and absurd results."[12] In other words, the doctrine of "absurd results" is a doctrine of statutory interpretation that give a regulatory agency flexibility in discerning the meaning of a statute it is responsible for implementing. However, in the case of the PSD program, there is no uncertainty as to the meaning of the 100/250 tpy applicability thresholds. There is no deeper meaning to be gleaned from these numbers and no reasonable alternative interpretation that brings them into a new focus. EPA is not seeking to construe the law – instead, EPA is seeking to *rewrite* the law. This is simply not a justifiable application of the "absurd results" doctrine.[13]

Similarly, the doctrine of "administrative necessity" provides exceedingly narrow authority for a regulatory agency's to create exemptions from the law: "In the absence of an authorization to take feasibility into account in administering a particular statute, the agency may avoid implementing a statute only by showing that attainment of the statutory objectives is impossible."[14] In this case, EPA has failed to meet this extraordinarily highly burden.

As explained more fully below, EPA has several "less taxing"[15] ways of construing the CAA such that the administrative "train wreck" described in the preamble to the Tailoring Proposal can be avoided. For example, as explained in Section I.B. below, EPA has authority and ample justification to defer the regulation of GHGs under the CAA. EPA also can reasonably construe the CAA such that PSD applicability is based only on consideration of criteria pollutants (see Section II) and can reasonably interpret the term "pollutants subject to regulation" as not encompassing GHGs (see Section III). EPA even can proceed with a GHG regulatory program, but manage the PSD and Title V implications by limiting the number of GHGs regulated at this time (see Section VII.A.). In the face of such choices, EPA has not satisfied the burden of proving an "impossibility" that can only be resolved by invoking the doctrine of "administrative necessity."

B. EPA cannot unnecessarily manufacture the circumstances that give rise to its claims of "absurd results" and "administrative necessity."

The single biggest flaw in the Agency's analysis is its failure to acknowledge that the "absurd results" and "administrative necessity" are completely a product of EPA's decision to proceed with a GHG standard for motor vehicles at this time. There is absolutely nothing that

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[12] *In re Franklyn C. Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991).

[13] *Cf. Nixon v. Missouri Municipal League*, 541 U.S. 125, 132-133 (2004)(the term "any" may be construed narrowly or broadly to accomplish Congressional intent); *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 542-545 (2004)(the term "any claim asserted" should not be construed to include claims dismissed as violating the 11th Amendment); *In re Nofziger*, 925 F.2d at 434 (the phrase "no indictment" should be construed to mean "no *valid* indictment").

[14] *Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C. Cir. 1983).

[15] *Id.*

compels EPA to promulgate this standard at this time[16] and, as EPA explains in detail in the Tailoring Proposal, there is every reason for the Agency to defer regulating GHGs while the Agency puts rules and processes in place that would appropriately limit and manage the spill-over effects under PSD and Title V.

The Agency's rush to issue the GHG standards for motor vehicles is particularly ill-founded and arbitrary given that the standard as proposed is not needed – virtually all of the "benefits" associated with regulating GHGs from motor vehicles under the CAA would be accomplished by the parallel Department of Transportation ("DOT") Corporate Average Fuel Economy ("CAFE") standards. According to the joint EPA/DOT proposal:

> [EPA's] 250 grams per mile of CO_2 equivalent emissions limit is equivalent to 35.5 mpg. if the automotive industry were to meet this CO_2 level all through fuel economy improvements. As a consequence of the prohibition against NHTSA's allowing credits for air conditioning improvements for purposes of passenger car CAFE compliance, NHTSA is proposing fuel economy standards that are estimated to require a combined (passenger car and light truck) average fuel economy level of 34.1 mpg by MY 2016.[17]

In other words, EPA's proposed GHG standards for motor vehicles are only 4% more stringent in the aggregate than DOT's proposed CAFE standards. Such a minor incremental benefit is unjustifiable in the face of the "absurd results" described in the Tailoring Proposal. In short, EPA cannot have it both ways – the Agency cannot impose a discretionary rule on the one hand and then claim that it has no choice but to skirt the law on the other hand to address PSD and Title V ramifications that it claims are unavoidable. This is particularly true here, where EPA's rule will result in only minor incremental benefits to those that will flow from a parallel rulemaking by another federal agency. If EPA has a reasonable means of avoiding the absurd results, it must avail itself of that option. "Administrative necessity" and "absurd results" are limited doctrines and cannot be used to fix an avoidable problem.

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[16] The CAA imposes no fixed deadline within which EPA must respond to a petition for rulemaking, such as the petition from the International Center for Technology Assessment asking EPA to regulate GHG emissions from motor vehicles. Similarly, the CAA does not set a deadline for EPA to establish regulations under § 202(a)(1) once it determines that pollution constitutes an endangerment to health or the environment and that given emissions contribute to that endangerment. Moreover, Petitioners have tried, but failed, to convince the D.C. Circuit to put EPA on a legally binding schedule for responding to the remand in *Massachusetts v. EPA*. Given the absence of any legally enforceable deadlines and the existence of the parallel and more appropriate effort by DOT to revise its CAFE standards, EPA has ample justification to defer finalizing CAA GHG regulations at this time.

[17] 74 Fed. Reg. at 49468.

II. Even if EPA proceeds with the GHG tailpipe standards, the Agency can avoid creating "absurd results" by construing the PSD program as applying in a more limited fashion.

In the Tailoring Proposal, EPA raises the possibility of dealing with the "absurd results" caused by regulating GHGs under the PSD and Title V programs "by defining the sources in the first phase subject to permitting for GHGs to include only sources that are or become subject to title V or PSD permitting obligations under the existing 100/250 tpy statutory thresholds on the basis of their emissions of a non-GHG pollutant."[18] By way of example, EPA suggests that "a new source that triggered PSD for a non-GHG regulated NSR pollutant and that also emits GHGs, or an existing source going through a modification that triggered PSD for a non-GHG regulated NSR pollutant and which also increased its GHG emissions would have to do a BACT analysis for GHGs."[19]

According to EPA, this approach would ensure that "the first phase of permitting would apply to the largest sources of GHG that are currently subject to CAA regulation based on emissions of non-GHG pollutants."[20] EPA observes that a PSD significance threshold for GHGs would still need to be established to make this approach workable.

API believes that, if EPA decides it must proceed with the § 202 rule, this approach is an appropriate way to avoid the severe adverse consequences of triggering PSD for stationary sources of GHGs. Conducting a BACT analysis for GHGs in the context of a PSD permit that was triggered for other purposes would be a significant burden, but would be far less of a burden than implementing PSD in a manner that allows GHG emissions themselves to trigger the need for a permit. Moreover, API agrees with EPA that this approach would, in fact, have the effect of focusing GHG BACT requirements on the large sources of "conventional pollutants" on which Congress clearly intended the PSD program to focus.

Notably, EPA does not set forth an express legal rationale for this approach. Presumably, the Agency is proposing to accomplish it by way of the "absurd results" or "administrative necessity" doctrine. API believes that an added benefit of pursuing this approach is that it has a firm legal basis in the CAA itself, thus avoiding the need to resort to "absurd results" or "administrative necessity."

The PSD program can and should be interpreted such that only emissions of criteria pollutants are relevant in determining the need for a permit. Taken together, four CAA provisions require this result. First, § 161 sets out the basic obligation that all state

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[18] 74 Fed. Reg. at 55327.

[19] *Id.*

[20] *Id.*

implementation plans must "contain emission limitations and such other measures as may be necessary ... to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section [107] as attainment or unclassifiable." This provision unambiguously requires PSD programs to be designed to protect "air quality." This is in keeping with the title of Part C itself – Prevention of Significant Deterioration of Air Quality. The fact that PSD must apply in areas designated under § 107 as attainment or unclassifiable is an indication that the term "air quality" should be interpreted to be limited to criteria pollutants.

Second, § 165(a) spells out the general prohibition to constructing with a PSD permit "in any area to which this part applies." As explained above, § 161 defines the areas to which the Part C PSD program applies. EPA's own regulations firmly tie these provisions together:

> *Applicability procedures.* (i) The requirements of this section apply to the construction of any new major stationary source ... or any project at an existing major stationary source in an area designated as attainment of unclassifiable under section 107(d)(1)(A)(ii) or (iii) of the Act.[21]

Third, § 107 (which is referenced in § 161 and EPA's rules) defines the scope of the term "air quality." This section provides that states have primary responsibility for assuring "air quality" by preparing and submitted a plan that shows how the National Ambient Air Quality Standards ("NAAQS") will be attained and maintained – *i.e.*, the term "air quality" is tied firmly to the criteria pollutants.

Fourth, § 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. This provision is relevant for two reasons. First, the phrase "any area to which this part applies" expressly ties the PSD program to criteria pollutants. Second, the term "any air pollutant" is tied to the NAAQS. So, when the term "any air pollutant" is used in the § 169 definition of "major emitting facility," it should clearly be interpreted as a reference only to criteria pollutants.

These provisions unambiguously signal that PSD applicability should be based solely on criteria pollutant emissions. Thus, EPA's alternative proposal to address GHGs in a BACT determination only when PSD is triggered for other pollutants is firmly grounded in the express terms of the Act.

III. Alternatively, EPA can and should interpret the term "pollutants subject to regulation" to exclude GHGs.

As explained in Section III of API's comments on the Johnson Memo Reconsideration Proposal, the phrase "pollutants subject to regulation" is most reasonably interpreted to exclude GHGs. GHGs do not deteriorate "air quality" and Congress did not intend such pollutants to

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[21] 40 C.F.R. 52.21(a)(2).

trigger PSD. The endangerment finding under CAA Title II is distinctly different from the air quality purposes of the PSD program. Specifically, GHG 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*."[22]

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.[23]

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.

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[22] *See* CAA § 202(a)(1) (emphasis added).

[23] *See* CAA § 161 (emphasis added).

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 Tailoring Proposal 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 100/250 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.[24] 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.[25] 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 the Tailoring Proposal 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. The tailoring rule must be modified to reflect the correct date of PSD applicability for GHGs.

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[24] 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 . . . .").

[25] *See, 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.").

In the Agency's proposed reconsideration of when a pollutant becomes "subject to regulation" for purposes of the PSD program, the issue of *when* a regulation causes a pollutant to become "subject to regulation" is addressed.[26] EPA explains that the term "subject to regulation" "is most naturally interpreted to mean that PSD requirements apply when the regulations addressing a particular pollutant become final and effective."[27]

This approach is carried through to the Tailoring Proposal, where EPA asserts that "it is EPA's position that new pollutants become subject to PSD and title V when a rule controlling those pollutants is promulgated (and even before that rule takes effect)."[28] As a result, "as soon as GHGs become regulated under the light-duty motor vehicle rule, GHG emissions will be considered pollutants "subject to regulation" under the CAA and will become subject to PSD and title V requirements."[29]

As explained in Section I above, given that EPA has asserted the doctrines of "absurd results" and "administrative necessity" as the legal bases for the tailoring rule, the Agency has an obligation to interpret the relevant CAA provisions in the manner that minimizes the degree to which EPA must depart from the otherwise clear statutory requirements. With regard to timing, this means minimizing the duration of any departure from clear statutory commands.

EPA has interpretive latitude when it comes to deciding when a pollutant becomes regulated for PSD and Title V purposes. The Agency devotes several pages of the Johnson Memo Reconsideration Proposal to vetting two possible approaches. However, the Johnson Memo Reconsideration Proposal and the Tailoring Proposal fail to explore the additional realistic options. Most notably, the Agency has failed to consider the approach that is clearly best in the context of the § 202 rule: that a pollutant does not become subject to regulation until emissions control requirements *actually apply* to regulated entities.

Under this option, if there is a lag between the effective date of a given rule and the first compliance deadline for emissions control requirements, the latter date would fix the time that a pollutant actually becomes "subject to" regulation because that is the date that regulated entities are actually obligated to control emissions of the pollutant. This is an entirely reasonable construction of the words "subject to" because, prior to the time that emissions control requirements actually apply, regulated entities are not "subject to" any enforceable emissions control requirement.

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[26] 74 Fed. Reg. at 51545-51546.

[27] *Id.*

[28] 74 Fed. Reg. at 55300.

[29] *Id.*

With regard to the proposed GHG Vehicle Standards, vehicle manufacturers are not actually obligated to comply with the emissions control requirements until model year ("MY") 2012. There are, of course, certification requirements and other administrative obligations that attach earlier, but the standards themselves are not applicable until MY 2012. Thus, for this rule, regulated entities are not subject to an emissions control requirement until at least October 1, 2011. Arguably, the "subject to" date could be pushed even further back than this because compliance for MY 2012 is not required to be demonstrated until after the model year. But, at a minimum, EPA can – and must, given its obligation to minimize departures from otherwise clear statutory mandates when invoking "absurd results" or "administrative necessity" – determine that GHGs do not become subject to PSD requirements before October 1, 2011.

V. The Tailoring Proposal is ineffective because EPA's proposed method of updating SIPs and existing Title V program approvals is legally infirm and because it does not address necessary changes to underlying state laws and regulations. Because the Tailoring Proposal is ineffective at generating the relief it claims, it fails under the "administrative necessity" doctrine.

EPA severely understates the problems caused for its proposed tailoring approach by existing SIP and Title V program approvals and, more importantly, by underlying state laws and regulations that must be changed through state administrative and legislative processes before the relief allegedly granted by the Tailoring Proposal will be effective. These issues are significant and collectively render the Tailoring Proposal legally infirm at the federal level and ineffective at providing any relief in many states. Given its ineffectiveness, the Tailoring Proposal cannot be justified under the "administrative necessity" doctrine.

Further evidence that EPA is seeking to prematurely regulate GHGs is the legally deficient proposal for dealing with the SIP corrections that will be needed to implement the proposed major source and significance thresholds for GHGs. Acting as if it has no choice but to regulate GHGs at this time (which, as explained in Section I above is a faulty premise), EPA proposes to unilaterally amend all relevant SIPs to accommodate the tailoring rule on the grounds that the states have failed to demonstrate that they have adequate funding and resources to regulate GHGs under the PSD program at the statutory major source thresholds.[30] EPA would accomplish the SIP amendments either by: (1) invoking its general rulemaking authority under § 301;[31] or (2) declaring that the Agency made a mistake in its prior SIP approval that may be corrected pursuant to § 110(k)(6).

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[30] 74 Fed. Reg. at 55341-55343.

[31] Note that EPA also cites § 553 of the Administrative Procedure Act ("APA") as authority for accomplishing the unilateral SIP amendments. These comments do not address this argument in detail because CAA § 307(d)(1) expressly provides that the administrative rulemaking procedures of APA § 553 do not apply to "the promulgation or revision of an implementation plan by the Administrator under section [110(c)] of this title."

Under either theory, EPA's action would be patently unlawful. As a result, even if the tailoring rule itself survives judicial review, it would be a nullity in many jurisdictions due to existing state law and regulations and, in other states, it would become null if the Agency's method of amending SIPs is challenged. The unavoidable result would be regulation of GHGs under PSD according to the statutory 100/250 tpy thresholds. The preamble to the Tailoring Proposal amply demonstrates the chaos that would ensue.

Even without a challenge to the rule itself or EPA's method of amending SIPs, many states' laws and rules directly incorporate the term "subject to regulation" in one way or another that would make it difficult to quickly adopt EPA's tailoring approach and, typically, state laws and rules incorporate the statutory major source thresholds, as the federal laws and rules do.[32] A challenge to any part of the rule will make it even more difficult for those states to change state law or rules pending the final outcome of the challenge. Few states will want to invest the resources to change state rules pending certainty over EPA's authority to change the rules and to approve state rule changes. Given the legal vulnerability of the Agency's actions and the fact that the Agency unquestionably has authority to defer its GHG Vehicle Standards, it would be irrational and arbitrary for EPA to do anything other than defer the vehicle standards for a period at least sufficient for states to amend their own laws and regulations to conform to the tailoring rule and for EPA to conduct the rulemaking necessary to approve the amended SIPs.

There are four independent and fundamental flaws with EPA's proposed method of amending SIPs to accommodate the Tailoring Rule:

(1) SIP amendments would be necessary because EPA is taking new discretionary action and, as such, there is no past "error" to correct. Reiterating a theme that runs throughout these comments, to the degree that states have a problem with inadequate funding or resources, that problem is wholly a product of EPA's decision to move ahead with a standard regulating GHGs under the CAA. Neither EPA nor any of the states with SIP-approved PSD programs made a mistake when the PSD SIPs were previously developed by the states and

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[32] *See, e.g.*, Comments from South Carolina on EPA's GHG Vehicle Proposal, submitted by Letter from Robert W. King, Jr., P.E., Deputy Commissioner, South Carolina Department of Health and Environmental Control to U.S. Environmental Protection Agency, *et.* a, Re: Federal Register/Vol. 74, No. 186/Monday, September 28, 2009/Proposed Rules at 4 (Nov. 24, 2009)("Regarding the impact to state and local permitting authorities, one of the areas that EPA has not fully evaluated is that many states, including South Carolina, have state-specific rules that EPA has required be promulgated and approved into the State Implementation Plans that address threshold levels for NSR pollutants. What EPA has also failed to recognize is that regardless of the thresholds they establish in the "tailoring rule," business and industry (and possibly other sources) within a SIP approved state are still subject to the state specific regulations – which comply with the Clean Air Act.").

approved by EPA. The notion that EPA erred in approving the existing SIPs is a fiction and, thus, provides no basis whatsoever for EPA to issuing a regulation "correcting" the error.

(2) A "SIP call" is the exclusive mechanism to correct an inadequate SIP. Section 110(k)(5) – the so-called "SIP call" provision" – is EPA's sole and exclusive mechanism for seeking to correct a SIP that it has been determined to be inadequate. The terms of § 110(k)(5) are abundantly clear: "*Whenever* the Administrator finds that the applicable implementation plan for any area is substantially inadequate … to otherwise comply with any requirement of this Act, the Administrator *shall* require the State to revise the plan as necessary to correct such inadequacies." (emphasis added). The word "whenever" is all-encompassing. There is no rational way that EPA could interpret this word to mean "whenever, unless EPA decides to take a different approach" – which is exactly how EPA is proposing to construe § 110(k)(5) in the Tailoring Proposal.

Moreover, the word "shall" creates a mandatory duty on the part of the Administrator. If Congress had intended EPA to have discretion, it would have used the word "may." Congress chose not to provide such discretion under this provision. The sum of these words is that *any* time that EPA finds a SIP to be substantially inadequate, § 110(k)(5) is the mechanism that must be used to rectify the problem.

The Tailoring Proposal explains EPA's view that, if GHGs become regulated under PSD, all existing SIP-approved PSD programs will be substantially inadequate because the programs "will become too large for States to administer with their current levels of personnel and funding."[33] Consequently, EPA does not have the discretion to invoke § 110(k)(6) or its general rulemaking authority under § 301. EPA must rectify the problem using § 110(k)(5).

In addition, EPA must complete an adequate burden analysis (which it has not yet done) for requiring PSD for GHGs to determine if existing SIPs, as proposed to be amended, would be adequately supported by levels of state resources. In other words, will states be able to bear the increased burden of PSD permitting for GHGs with existing or additional state resources? If a state will not have adequate resources to administer PSD for GHGs for sources to be covered in any revised SIP, EPA cannot approve the SIP revision. The determination must be made on a state-by-state basis and not as EPA proposes to do it in the Tailoring Proposal.

Notably, EPA acknowledges in the Tailoring Proposal that it has authority to solve the "problem" here by issuing a SIP call under § 110(k)(5). However, EPA explains that it "is not proposing or soliciting comment" on this approach because the SIP call process will take too long.[34] Again, to the degree there is time pressure here, it is of EPA's own making. The only rational approach for EPA to follow if it concludes that SIPs are inadequate is for the Agency to

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[33] *Id.* at 55343.

[34] *Id.*

promulgate the Tailoring Rule, issue a SIP call, review and approve the amended SIPs, and only then move forward with a GHG regulatory program.

(3) The general rulemaking authority of § 301(a) is unavailing in the face of an express statutory provision directly on point. The third fundamental flaw with EPA's reasoning is its invocation of the general rulemaking authority of § 301(a). Even setting aside the argument above that § 110(k)(5) is the sole and exclusive mechanism for "correcting" inadequate SIPs, EPA is vastly overstating its authority under § 301(a). As the D.C. Circuit has observed, § 301(a)(1) "does not provide the Administrator with Carte blanche authority to promulgate any rules, on any matter relating to the Clean Air Act, in any manner that the Administrator wishes."[35] Where the CAA includes express provisions – which, in this case, § 110(k)(5) provides for dealing with any SIP that EPA determines to be inadequate – EPA is obligated to follow those express provisions and may not invoke its general rulemaking authority in an attempt to evade its express obligations.

(4) There is no *de facto* inadequacy in any state SIP. Fourth, and perhaps most fundamentally, the possible need to regulate GHGs under PSD does not create a *de facto* inadequacy in any state SIP. Instead, it creates a prospective obligation that must be satisfied through amending EPA's minimum PSD SIP elements in § 51.166 and providing states an opportunity to develop and submit appropriate SIPs for EPA review and approval. This situation is virtually identical to the situation EPA faced when it adopted the 2002 "NSR Reform" rule. Tellingly, in that rule EPA explained its obligations as follows:

> The Act does not specify a date for submission of SIPs when we revise the PSD and NSR rules. We believe it is appropriate to establish a date analogous to the date for submission of new SIPs when a NAAQS is promulgated or revised. Under section 110(a)(1) of the Act, as amended in 1990, that date is 3 years from promulgation or revision of the NAAQS. Accordingly we have established 3 years from today's revisions as the required date for submission of conforming SIP revisions. We have made conforming changes to the PSD regulations at § 51.166(A)(6)(i) to indicate that State and local agencies must adopt and submit plan revisions within 3 years after new amendments are published in the Federal Register.[36]

Given that the regulation of GHGs under PSD and any corresponding tailoring rules are new requirements for states that are not included in any existing SIP, EPA *must* follow the procedures established in 2002 and is not authorized to unilaterally amend SIPs on the grounds that the existing approvals are in error. In doing so, EPA must acknowledge that all SIPs that refer to "NSR regulated pollutant" or "pollutant subject to regulation" did not include GHGs at the time the SIP was approved. This would be consistent with 1 C.F.R. §§ 51.1(f) and 51.11, which require materials incorporated by reference in agency regulation to be "limited to the

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[35] *Citizens to Save Spencer County v. EPA*, 600 F2d. 844, 872 (D.C. Cir. 1979).

[36] 67 Fed. Reg. 80186, 80241 (Dec. 31, 2002).

edition of the publication that is approved" and any subsequent changes to the incorporated publication to be accomplished through an amendment to the relevant C.F.R. section. Thus, those states with such general references would also have three years to change state rules to include GHGs for PSD and submit a SIP to demonstrate the state agency's ability to administer the program for GHGs.

VI. EPA must fully assess the potential regulatory impacts of regulating GHG emissions from large sources under the PSD and Title V programs.

The regulation of GHGs under the PSD program will have vast scope and effect. Yet, EPA has utterly failed to conduct a robust assessment of the key policy and economic ramifications of this action and has failed to provide any reasoned basis for proceeding with a GHG regulatory program in the face of the collateral effects that flow from regulating GHGs under PSD. In fact, the Agency is unfortunately engaged in a regulatory "shell game" that is unbefitting of a regulatory action of such profound consequences.

Starting with the proposal to find endangerment and contribution, EPA mentions PSD *once* in the context of that action. In footnote 29, EPA explains that the Agency's current position is that a positive endangerment finding will not cause GHGs to become subject to PSD. EPA indicates that the potential PSD ramifications of regulating GHGs are not within the scope of the Endangerment Proposal and suggests that the Johnson Memo Reconsideration Proposal, "not this rulemaking, would be the appropriate venue for submitting comments on the issue of whether a final, positive endangerment finding under section 202(a) of the Act should trigger the PSD program, and the implications of the definition of air pollutant in that endangerment finding on the PSD program."[37] Notably, there is no mention here of the ramifications of regulating GHGs under PSD.

EPA's Johnson Memo Reconsideration Proposal is equally unavailing. EPA declares that the Johnson Memo Reconsideration Proposal is a significant regulatory action under Executive Order ("E.O.") 12866, but provides no regulatory impact analysis or any other assessment of possibly regulating GHGs under PSD. Instead, EPA expresses generalized concerns, but points to the Tailoring Proposal as the forum for addressing the concerns:

> We are concerned about millions of small and previously unpermitted sources becoming immediately subject to PSD permitting as a result of finalization of that rule. The basis for this concern, and EPA's approach to addressing it, are explained in a separate notice published in the Proposed Rules section of this Federal Register known as the GHG Tailoring Rule.[38]

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[37] 74 Fed. Reg. 18886, 18905 (Apr. 24, 2009) ("Endangerment Proposal").

[38] 74 Fed. Reg. at 51547.

Somewhat more helpfully, EPA declares that the Tailoring Proposal is a significant regulatory action under E.O. 12866 and actually provides a regulatory impact analysis ("RIA") for the rule.[39] But, the RIA simply provides an assessment of the ramifications of *excusing* certain relatively-low emitting sources from PSD. Again, there is no assessment whatsoever of the policy or economic consequences of regulating the remaining sources under PSD. To this point, EPA simply asserts that, "For larger sources of GHGs, there are no direct economic burdens or costs as a result of this proposed rule, because requirements to obtain a title V operating permit or to adhere to PSD requirements of the CAA are already mandated by the Act and by existing rules and are not imposed as a result of this proposed rulemaking."[40] In other words, the Proposed Vehicle Standards are the precipitating event with regard to PSD, but the burdens or costs associated with regulating GHGs under PSD are attributable to "the Act" and "existing rules" rather than the vehicle standards.

Lastly, the GHG Vehicle Proposal is equally bereft of relevant analysis. Again, PSD is mentioned only once in the proposal. In this case, EPA notes "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 greenhouse gas emissions."[41] EPA further explains that small business concerns will be assessed in the context of the Tailoring Proposal.

In sum, the Endangerment Proposal points to the Johnson Memo Reconsideration Proposal. The Johnson Memo Reconsideration Proposal and the GHG Vehicle Proposal point to the Tailoring Proposal. And the Tailoring Proposal points back to the GHG Vehicle Proposal. All of these proposals implicitly or explicitly acknowledge the ramifications of regulating GHGs under PSD, but none of them provide any reasoned analysis of the policy, economic, or other relevant implications.

This represents an unlawful abdication by EPA of its obligation to engage in reasoned, record-based rulemaking. EPA seems to be saying that it is not responsible for the regulation of GHGs under PSD and, therefore, has no duty to fully assess and justify such a massive regulatory program. This is simply not true. As explained in Section I above, EPA has substantial discretion with regard to the timing of any GHG standards under the CAA. Moreover, as discussed in Section II above, EPA has substantial discretion to interpret Subpart C in a manner that avoids a vast expansion in the applicability of the program. Thus, EPA is not at the unavoidable precipice that it suggests. There is time and room for the necessary deliberation.

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[39] *Id.* at 55348-55349.

[40] *Id.* at 55337.

[41] *Id.* at 49629.

In any event, EPA's suggestion that it is excused from engaging in reasoned decision making in this case because the statute or existing regulations require GHGs to be covered by PSD once GHGs become regulated under the CAA is false. The fact is, GHG will not be regulated under PSD unless and until EPA takes a regulatory action. And, the CAA expressly requires EPA to comprehensively assess the implications of its regulations.

Specifically, when EPA engages in CAA rulemaking, § 307(d)(3) requires EPA to prepare a "statement of basis and purpose" that includes a summary of "the major legal interpretations and policy considerations underlying" the rule. More fundamentally, § 307(d) imposes on EPA an obligation to regulate in a non-arbitrary manner. According to the D.C. Circuit, one indicia of arbitrary rulemaking is a failure by the Agency to identify and assess key policy considerations.[42] There can be no doubt that a failure to fully assess the implications of triggering PSD for GHGs would violate the requirements of both § 307(b)(3) and § 307(d). As a result, EPA must develop the necessary analysis and provide an opportunity for public comment prior to taking any action that would cause GHGs to be regulated under PSD or Title V.[43]

EPA's failure to analyze and present to the public the potential impacts of its proposed GHG actions has real and immediate effects on issues of intense public concern. The economic and other consequences of triggering PSD, even if limited to sources above 25,000 tpy are significant, in part because this threshold does not eliminate the range of sources that EPA seems to assume. The California Air Resources Board has published a list of businesses and other entities that have reported emissions over 25,000tpy of CO_2eq in that state. The list is long and varied. Examples include: dairies, breweries, wineries, landfills, universities, food production plants and packing companies, paper plants, pharmaceutical factories, irrigation facilities, and farms, among others.[44]

VII. Additional Comments on Specific Issues

As described above, API has serious doubts as to EPA's legal authority to adopt the Tailoring Rule. However, if EPA decides to finalize the rule, several significant changes should be made.

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[42] *Small Refiner Lead Phase-Down Task Force v. EPA*, 702 F.2d 506, 519 (D.C. Cir. 1983) ("For its decision to be sustained, the agency must consider all of the relevant factors and demonstrate a reasonable connection between the facts on the record and the resulting policy choice.").

[43] Similarly, as explained in Section I of API's comments on EPA's GHG Vehicle Proposal (and incorporated by reference into these comments), EPA has failed to conduct several additional statutorily required analyses; including assessments under the Paperwork Reduction Act and the Regulatory Flexibility Act.

[44] *See*, http://www.arb.ca.gov/cc/reporting/ghg-rep/ghg-reports.htm

A. EPA should not regulate CO_2 at this time.

The vast majority of the problem associated with regulating GHGs under the PSD program is related to CO_2. Thus, another way for EPA to minimize any departure from otherwise clear statutory mandates is for EPA to finalize the GHG Vehicle Standards, but not with respect to CO_2 – only with regard to the other three GHGs at issue. This way, EPA still would achieve the additional increment of fuel efficiency as compared to the NHTSA standard, but would avoid the "absurd results" of regulating CO_2 under PSD. Note that this approach would require EPA to conclude that only GHGs actually regulated (or the group that is regulated) become regulated for PSD purposes. But, as explained in Section VI, above, this is what EPA must do anyway.

B. PSD and Title V must not apply to the two GHGs addressed in the Endangerment Proposal, but not regulated in the GHG Vehicle Standard.

EPA proposes the "metric" by which GHGs would be regulated under PSD and Title V as "the group of six GHGs, on a CO_2e-basis."[45] EPA explains that this is the best approach because: (1) this approach "addresses the combined radiative forcing of the GHGs emitted;" (2) the combined approach encompasses "a greater variety of possible future regulatory approaches;" (3) the combined approach would be consistent with EPA's recently-adopted GHG reporting rule; and (4) this metric "could allow more flexibility for designing and implementing control strategies that maximize reductions across multiple GHGs."[46]

EPA notes that its proposed GHG Vehicle Standards would regulate only four of the six GHGs addressed in the Agency's proposed endangerment finding and that the GHG Vehicle Standards would set separate limits for each of the four. However, EPA asserts that § 202(a) provides flexibility as to how an "air pollutant" defined as a group of compounds may be regulated and that the proposed determination to regulate the six GHGs as a single pollutant comprised of a group would dictate the proper approach under PSD and Title V.[47]

There are two fundamental flaws in EPA's proposed "metric" for regulating GHGs under PSD and Title V. First, as clearly explained in the Tailoring Proposal, if EPA relies on the doctrine of "absurd results" or "administrative necessity" to legally justify the Tailoring Rule, it must use all available discretion to minimize the departure from the otherwise clear requirements of the statute.[48] In this case, EPA is not *required* by law to treat GHGs as a group under PSD

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[45] 74 Fed. Reg. at 55328.

[46] *Id.* at 55329

[47] *Id.* at 55330.

[48] *Id.* at 55320.

and Title V and is not *required* to regulate all six GHGs even though only four of the GHGs are actually proposed to be regulated under the GHG Vehicle Standards. EPA notes that it has flexibility to adopt other approaches, yet sets out a series of policy considerations that it contends supports a decision to regulate the six GHGs as a group under PSD and Title V.[49]

In fact, regulating the six GHGs as a group under PSD and Title V will not *minimize* the proposed departure from the otherwise clear requirements of the act. Rather, with regard to applicability of PSD and Title V, the proposed approach will *increase* the likelihood that a source will trigger PSD or Title V because grouping emissions of the six GHGs will increase the amount of regulated emissions at any site that emits more than one GHG. Similarly, regulating the two additional GHGs under PSD and Title V that are not covered by the GHG Vehicle Rule will increase the likelihood that PSD or Title V will be triggered for sources that emit those GHGs. Thus, if EPA ultimately decides to rely on "administrative necessity" or "absurd results," EPA must regulate GHGs individually under PSD and Title V, and must not regulate GHGs not covered by the GHG Vehicle Standards.

Second, notwithstanding EPA's assertions to the contrary, setting individual standards for the four GHGs proposed to be covered by the GHG Vehicle Standards will leave EPA no choice but to regulate the four GHGs individually under PSD and Title V. EPA cannot have it both ways, in that it cannot declare the six GHGs to be a single pollutant under PSD and Title V, while at the same time regulate four of the six GHGs individually under the Title II rule. It is the GHG Vehicle Standards that will cause GHGs to be "subject to regulation" for purposes of PSD and Title V, so it is the GHG Vehicle Standards that dictates how these GHGs will be regulated. Any other result is wholly arbitrary and, therefore, does not pass muster under § 307(d).

C. EPA must provide a more detailed explanation of possible "streamlining" approaches before using them as part of the justification for adopting the Tailoring Rule.

Section VII of the Tailoring Proposal preamble sets out a series of "streamlining options" that EPA might take in the future to alleviate the "absurd results" and administrative chaos that would come from regulating GHGs under the statutory PSD and Title V regulatory thresholds. EPA suggests that it might develop new ways to determine potential to emit ("PTE") for GHGs, establish "presumptive BACT" under PSD, issue general permits or permits by rule, and adopt new electronic permitting methods.[50] EPA also explains that it plans to explore various mechanisms for regulating GHG emissions from "small" sources outside the context of PSD and Title V.[51]

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[49] *Id.*

[50] *Id.* at 55320-55325.

[51] *Id.* at 55325-55326.

API has two primary concerns with these ideas. First, each of these issues is highly complex and likely to be highly controversial. If EPA intends to pursue such ideas, it must do so in a more deliberate and systematic way. For example, EPA's rules requiring emissions limits to be "federally enforceable" in order to be effective in limiting PTE were systematically struck down by the D.C. Circuit in the mid 1990s.[52] EPA has yet to even propose a regulation addressing these cases and proposing a new method of assessing PTE that does not run afoul of the court's concerns. Thus, EPA is decidedly giving short shrift to this complex and evolving issue by suggesting "flexibilities" for GHG purposes that may or may not square with the regulations EPA ultimately adopts on remand/vacatur of its prior rules.

Moreover, if EPA holds out these ideas as part of the solution to the "absurd results" that its separate, discretionary regulatory actions will unleash, EPA must give life to these ideas by issuing a specific and detailed proposal *before* taking action that would cause GHGs to be subject to PSD and Title V. As noted many times in these comments, EPA has an obligation to minimize the degree to which it departs from the otherwise clear requirements of the CAA. Putting a GHG regulatory program into motion prior to establishing the rules that are needed to make the program workable does anything but minimize the proposed departure from the law.

Second, to the degree EPA determines that it needs to identify and implement "streamlining" techniques, the Agency should first solicit comment as to what techniques might be available and workable. Only after identifying the full range of possibilities should EPA select the approaches that merit further scrutiny and invest time and effort into developing these approaches. For example, EPA has a longstanding policy under which it asserts that BACT determinations be conducted in a "top down" fashion. Some states follow this approach as well. While the legal and policy merits of this policy have always been suspect, they are doubly so in a world where GHGs are subject to PSD. EPA could substantially reduce the cost of the PSD program and significantly simplify the BACT determination process by allowing all of the statutory factors to be balanced, rather than giving predominant weight to control effectiveness. Furthermore, EPA should consider how PSD BACT requirements might be applied and streamlined for sources subject to regional or state GHG controls and cap and trade programs (*e.g.*, California's global Warming Solutions Act of 2006, or "AB 32"). These and many other ideas deserve to be vetted and developed prior to regulating GHGs under PSD or Title V.

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[52] *See Nat'l Mining Ass'n v. EPA*, 59 F.3d 1362 (D.C. Cir. 1995); *Chemical Manufacturers Ass'n v. EPA*, 70 F.3d 637 (D.C. Cir. 1995); *Clean Air Implementation Project v. EPA*, No. 96-1224, 1996 WL 393118 (D.C. Cir. 1996).

D. EPA cannot tie the definition of "global warming potential" to a non-regulatory document that may be changed without notice and comment rulemaking.

EPA proposes to define the term "carbon dioxide equivalent" or "CO_2e" in 40 C.F.R. §§ 51.166(b)(58) and 52.21(b)(60). These proposed definitions would provide that, "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 (UNFCC)."

This proposal would allow the global warming potential ("GWP") of PSD regulated GHGs to be amended by way of the Inventory of U.S. Greenhouse Gas Emissions and Sinks. The Inventory is published on an annual basis by EPA and is not adopted using notice and comment rulemaking procedures. Accordingly, the proposed definition violates the § 307(d) rulemaking requirements, as well as regulations of the Director of the Federal Register,[53] because EPA's proposed definition CO_2e could be modified by the Agency without using the notice and comment procedures. This must be rectified in the final rule.

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Thank you again for the opportunity to submit these comments on the Tailoring Proposal. As detailed in the comments above, EPA's tailoring approach is fundamentally flawed and EPA cannot lawfully promulgate the rule in its present form. The "absurd results" and "administrative necessity" doctrines are simply inadequate to support such massive "tailoring" that directly conflicts with clear statutory language. Issues with SIP and Title V approvals, and with underlying state laws and regulations, also render the Tailoring Rule ineffective and legally infirm. Further, the "absurd results" that EPA seeks to correct through the rule can easily be avoided. EPA could simply delay promulgating the § 202 Rule, which is not necessary in the face of DOT's CAFE rule. Or, EPA could interpret PSD requirements to avoid a massive triggering of GHG PSD for stationary sources, using the "no PSD without a NAAQS" approach foreshadowed by EPA in the preamble to the draft Tailoring Rule.

EPA also could solve or delay many issues simply by specifying the correct date of PSD applicability for GHGs (the compliance date for Model Year 2012). EPA could also promulgate the § 202 Rule only with respect to the three GHGs that would constitute a valid supplement to DOT's CAFE rule, and not with respect to CO_2. In short, API's comments amply demonstrate

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[53] *See* 1 C.F.R. §§ 51.1(f) and 51.11, which require materials incorporated by reference in agency regulations to be "limited to the edition of the publication that is approved" and any subsequent changes to the incorporated publication to be accomplished through an amendment to the relevant C.F.R. section.

that EPA's proposed Tailoring Rule is unlawful and unnecessary, and provide several preferable alternative paths for EPA action. We urge EPA to proceed in accordance with our suggestions.

Please contact Michele Schoeppe at 202-682-8251, if you have any questions.

Sincerely,

Kyle Isakower
Director of Policy Analysis

Attachments (2)