

No. _____

**In The
Supreme Court of the United States**

ENERGY-INTENSIVE MANUFACTURERS WORKING
GROUP ON GREENHOUSE GAS REGULATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Circuit Court’s decision leaving in effect the allegedly “automatically triggered” regulation of the greenhouse-gas emissions of large industrial (“anyway”) sources under certain Clean Air Act permitting programs, and requiring nothing more of EPA, consistent with *Utility Air Regulatory Group v. EPA* and the Act, or, instead, is vacatur of the relevant rulemaking and associated regulations required and, further, is a valid scheme of regulation *not* “automatically triggered,” but, rather, predicated upon EPA conducting a rulemaking to determine how – and whether – such regulation can be modified to conform with *UARG*, to address the nullified or contradicted provisions of the programs’ statutory components, to stay within the bounds of EPA’s implicitly delegated authority over greenhouse gases, and to determine whether the regulation contributes anything to reduction of greenhouse gases?

PARTIES TO THE PROCEEDING

Petitioner is the Energy-Intensive Manufacturers Working Group for Greenhouse Gas Regulation (EIM Group). Respondents herein are the Environmental Protection Agency and Gina McCarthy, Administrator, Environmental Protection Agency.

The petitioners in related cases addressed by the consolidated judgment below, which are not petitioners herein, included the American Chemistry Council; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Brick Industry Association; the Clean Air Implementation Project; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Independent Petroleum Association of America; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Manufacturers; National Oilseed Processors Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; Wisconsin Manufacturers and Commerce; Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen’s Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.; Southeastern Legal Foundation, Inc.; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale

PARTIES TO THE PROCEEDING – Continued

Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; John Linder, U.S. Representative, California 46th District; John Shimkus, U.S. Representative, Georgia 11th District; Lynn Westmoreland, U.S. Representative, Georgia 3rd District; Tom Price, U.S. Representative, Georgia 6th District; Paul Broun, U.S. Representative, Georgia 10th District; Steve King, U.S. Representative, Iowa 5th District; Nathan Deal, U.S. Representative, Georgia 9th District; Jack Kingston, U.S. Representative, Georgia 1st District; Michele Bachmann, U.S. Representative, Minnesota 6th District; Kevin Brady, U.S. Representative, Texas 8th District; John Shadegg, U.S. Representative, Arizona 3rd District; Marsha Blackburn, U.S. Representative, Tennessee 7th District; Dan Burton, U.S. Representative, Indiana 5th District; American Iron and Steel Institute; Gerdeau Ameristeel US Inc.; Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation; Peabody Energy Company; American Farm Bureau Federation; National Mining Association; Utility Air Regulatory Group; Chamber of Commerce of the United States of America; Missouri Joint Municipal Electric Utility Commission; National Environmental Development Association's Clean Air Project; Ohio

PARTIES TO THE PROCEEDING – Continued

Coal Association; Indiana Cast Metals Association; National Federation of Independent Business; North American Die Casting Association; State of Texas; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; Commonwealth of Virginia; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; Haley Barbour, Governor of the State of Mississippi; Portland Cement Association; Georgia Coalition for Sound Environmental Policy, Inc.; South Carolina Public Service Authority; Mark R. Levin; Landmark Legal Foundation; Competitive Enterprise Institute; FreedomWorks; the Science and Environmental Policy Project; Pacific Legal Foundation.

The respondents in related cases addressed by the consolidated judgment below and movant-intervenors for respondents in certain of the cases included the U.S. Environmental Protection Agency (EPA) and Gina McCarthy, Administrator, U.S. Environmental Protection Agency; Alliance of Automobile Manufacturers; American Farm Bureau Federation; Brick Industry Association; Center for Biological Diversity; City of New York; Commonwealth of Massachusetts; Conservation Law Foundation; Environmental Defense Fund; Georgia ForestWatch; Global

PARTIES TO THE PROCEEDING – Continued

Automakers; Indiana Wildlife Federation; Michigan Environmental Council; National Environmental Development Association; Peabody Energy Company; Natural Resources Council of Maine; Natural Resources Defense Council; National Wildlife Federation; Ohio Environmental Council; Pennsylvania Department of Environmental Protection; Sierra Club; South Coast Air Quality Management District; State of California; State of Connecticut; State of Delaware; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Minnesota; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; Wetlands Watch; and Wild Virginia.

RULE 29.6 STATEMENT

Pursuant to the Court's Rule 29.6, undersigned counsel states that the petitioner has no parent corporation and that no other publicly held corporation has ownership in it.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation (“EIM Group”), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit.



OPINIONS BELOW

The unpublished Amended Judgment in *Coalition for Responsible Regulation v. EPA* (No. 09-1322, etc.) (filed April 10, 2015) is reproduced in the Appendix (“P. App.”) 1. The denials of rehearing and rehearing *en banc* are reproduced at P. App. 6, 10.



JURISDICTION

The Amended Judgment was entered on April 10, 2015, and the denials of the Petition for Rehearing and Rehearing *En Banc* were entered on August 7, 2015. (P. App. 6, 10). This Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Constitution and the Clean Air Act are reproduced at P. App. 14-43.



INTRODUCTION

This petition concerns the procedures necessary to inform, with facts, consequences and argument, the unique legal questions and associated judgments involved in applying the Clean Air Act (“CAA”) to greenhouse gases (“GHGs”) and climate change. In the proceedings leading up to the Court’s decision in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (“*UARG*”), there was no agency action that performed that function with respect to the greenhouse-gas regulation of large industrial emitters, referred to as “anyway” sources because they are regulated “anyway” for conventional pollutants under the programs at issue.

In the rulemakings that produced anyway-source GHG regulation, the only fact EPA considered relevant was the fact that it had regulated the GHG emissions of certain vehicles, rendering GHGs “subject to regulation” under the Act. Because, EPA reasoned, it was under a *Chevron* step-one command of Congress to regulate a regulated (“subject to regulation”) *conventional* pollutant under the programs at issue, it was likewise under a self-evident, unconditional *Chevron* command to regulate GHGs once *they* became otherwise regulated.

In EPA’s view, even if the differences between GHGs and conventional pollutants presented unique issues or problematic consequences when the programs were applied to them, this framed neither legal issues nor associated requisite judgments for the

Agency. It is this view that shaped the fact-deprived and policy-absent nature of the pre-*UARG* proceedings. The law made EPA do it – and the law either foreclosed or excused inquiry into what it was doing.

The *UARG* Court, by contrast, saw many problems with GHG regulation of anyway sources. The two programs at issue are Prevention of Significant Deterioration (“PSD”) and Title V. Because the Title V issues are relatively minor we will not separately discuss them in this petition.

Among the problems the Court identified, two stand out. PSD GHG regulation of anyway sources is almost entirely a scheme of industrial *energy-efficiency* regulation. *Id.*, 2447-48. And, the Court viewed it as an open question whether energy efficiency could be regulated under it at all. *Id.*, 2448. Similarly, by EPA’s own admission, aspects of the program that require considering *local* impacts make no sense for GHGs. See *id.*, 2456-58 (Alito, J., concurring in part and dissenting in part). The Court viewed this as problematic, but was unwilling to say it meant GHGs “must be categorically excluded from BACT,” and stated that it “cannot say that it is impossible for EPA and state permitting authorities to devise rational ways of complying” with the statute. *Id.*, 2449 n.9.

The Court was able to see these and the other issues it identified only because it looked beyond the rulemaking record. Its primary source was EPA’s PSD and Title V Permitting Guidance for Greenhouse

Gases (March 2011) (“Guidance”) which richly details the consequences of combining PSD’s terms with the unique characteristics of GHGs. *Id.*, 2447-49. The virtually non-existent rulemaking record left EPA an opening – and an obligation – for the future, if it chooses to proceed. As the Court said, “[I]t is not yet clear that EPA’s demands will be of a significantly different character from those traditionally associated with PSD review. In short, the record before us does not establish that the BACT provision as written is incapable of being sensibly applied to greenhouse gases.” *Id.*, 2448-49.

Even more fundamentally, the Court, unlike EPA and lower court, considered the issues it saw and addressed to be *relevant* because, unlike them, it did not apply an approach to statutory construction that deemed them *irrelevant*. That is, the Court did not rely on isolated-term, plain language alone. The Court’s approach included the “substantive effects” of the unique characteristics of GHGs as they affected the “whole statute” – in particular the statutory components of the PSD program. See *esp. Id.*, 2441-44.

EPA salvaged a remand. It may begin again, this time taking the differences between GHGs and conventional pollutants into account and understanding that they present problems to be addressed and informed judgments to be made. Once EPA does this, it is likely to discover issues even more fundamental than those identified by the Court. It is likely to conclude that PSD regulation of industrial energy efficiency, for most of the sources that would be

regulated at least, is not only unnecessary, it is counterproductive.

This petition arises from the fact that subsequent to *UARG*, in Motions to Govern Further Proceedings below, EPA, relying on reasoning that *UARG* invalidates and a reading of *UARG* that is not supportable, proposed, with the summary concurrence of the lower court, that it respond to *UARG* by reprising its prior inaction. It insists nothing more is required – in particular it need not conduct a rulemaking that addresses the issues identified in *UARG* or the more basic ones that Petitioner presented to EPA before *UARG* and again seeks an opportunity to present.

The administrative record in this case, or lack thereof, is an artifact of a destructive, reason-denying era in CAA GHG regulation that began with *Massachusetts v. EPA*, 549 U.S. 497 (2007) and should have ended with *UARG*. During that era, EPA, with the concurrence of the D.C. Circuit, thought that the term “air pollutant” in the CAA “unambiguously” included GHGs, and whatever resulted from plugging GHGs into the statute wherever “air pollutant” appeared was not a potential problem to be dealt with, it was an unassailable authorization to run with. In the proceedings below, EPA, again with the concurrence of the lower court, has used *UARG* itself to excuse the statute- and Constitution-confounding context-blindness of that era and, further, to promise its continuation.

The two issues most directly presented, concerning when vacatur and a rulemaking are required, are of independent importance. Fortunately, they are also together a ready-made context to correct the misunderstanding of *UARG* that has turned the decision against itself.



STATEMENT OF THE CASE

“Anyway” Sources and Carbon Regulation

This petition involves the regulation of “anyway” sources under the CAA’s PSD program after *UARG*. As indicated above, PSD GHG regulation is almost exclusively a scheme of energy-consumption regulation. It covers the nation’s largest industrial emitters. They fall into two general categories.

The first is power generators. These, as the Court is undoubtedly aware, are the subject of a separate and sweeping regulatory proposal, “The Clean Power Plan.”

The second category of PSD anyway sources consists primarily of the nation’s energy-intensive industries, especially our materials industries such as steel, aluminum, plastics, chemicals, glass, fiberglass, cement and paper. This category represents, depending on definitions, roughly a 10-15 percent share of the nation’s total GHG emissions – a share which has been declining steadily for decades. These industries have a unique place in climate-change policymaking.

They operate where global warming meets the global economy. In climate-change policymaking – including that by Congress when it has engaged in it – they have become known as “EITEs” because in addition to being “energy-intensive,” they are “trade-exposed.” See generally, *The Effects of H.R. 2454 on International Competitiveness and Emission Leakage in Energy-Intensive and Trade-Exposed Industries: An Interagency Report* (Dec. 2, 2009) (“Interagency Rpt.”) (Att. C to EIM Group Motion to Govern Future Proceedings) (“EIM Mot.”) (No. 09-1322, etc.) (10/21/14); *Comments of the Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation* (Dec. 26, 2009) (“EIM Cmts.”) (P. App. 44).¹

The two most basic issues with respect to EITE GHG regulation are whether regulation is necessary and whether it is counterproductive. The question of its necessity is based primarily on the fact that excessive energy consumption – unlike pollution production – is an important “first party” cost to EITEs, not a third-party cost or “externality.” See EIM Cmts. (P. App. 66-67, 88-89, 105).

The resultant absence of a theoretical basis for regulation manifests itself in the data. The last time an inter-agency task force (which included EPA)

¹ The EIM Comments contain the issues that EPA refused to consider in the previous rulemakings and, this Petition argues, it must now consider in a rulemaking before PSD GHG regulation can proceed.

examined the matter, in 2009 as part of the study cited above, it concluded that EITE sources were in fact on course to meet the President's goals for GHG reduction without regulation. See Interagency Rpt., 19.

Similarly, reflecting the same realities, Congress over the last six years has been considering – and periodically passing portions of – bipartisan, comprehensive energy-efficiency regulation referred to as “Shaheen-Portman” after its principal sponsors. Nowhere in the legislation or the legislative process associated with it has there been so much as a suggestion that *industrial* energy-efficiency regulation is necessary or appropriate. The largest portion of Shaheen-Portman enacted was in 2012 as part of P.L. 112-210 under the name “American Energy Manufacturing Technical Corrections Act,” with this stated purpose: “To allow for innovations and alternative technologies that meet or exceed desired energy efficiency goals, and to make technical corrections to existing Federal energy efficiency laws to allow American manufacturers to remain competitive.”

Likewise, the other issue, the “counterproductive” issue, which is based on the phenomenon of “carbon leakage,” has dominated consideration of whether to regulate EITEs. This problem of “leakage” has been central to every known effort to control GHGs. It results when carbon regulation of EITE production in one jurisdiction leads over time to displacement of production to unregulated or lesser regulated jurisdictions. “Leakage” of production and

emissions and thus no net environmental benefit occurs even if the alternative facilities to which production is displaced are as carbon efficient as those displaced. See gen., Interagency Rpt.; and EIM Cmts. (P. App. 44).

The situation is even more problematic. Alternative production facilities, in, for instance, China, India, or even Europe, may produce *more* CO₂ per ton of product than displaced U.S. facilities even if they are as *energy* efficient, or even if the jurisdiction in which they are located has a scheme of GHG regulation. The two reasons for this are fuel-type availability and regulatory exemptions. In most other producer countries, EITEs do not have ready access to natural gas and, therefore, rely primarily on coal or coal-gasification. With respect to regulatory exemptions, every known scheme makes special provision for EITEs. Europe, for instance, provides free carbon allowances to them.²

Carbon leakage was one of a handful of issues that dominated Congress' multi-year work on a GHG cap-and-trade bill. It was the subject of multiple hearings and bipartisan concern.³ This resulted in basic structural aspects of the legislation. The principal bill, which passed the House but never reached a vote

² European Commission, *The EU Emissions Trading System* (October 2013).

³ Some of the hearings are listed in the EIM Comments (P. App. 49) n.2.

in the Senate, adopted a “belt and suspenders” approach. It both granted free “allowances” to American EITE producers and put in place a stand-by, tariff-like mechanism (involving “international allowances”) in the event the free allowances were insufficient to prevent leakage. See H.R. 2454, Title IV, Part F, Subparts 1 & 2; Interagency Rpt., 30-38.

Pre-*UARG* Proceedings

In its briefing to the lower court in the proceedings before *UARG*, EPA summarized as follows the administrative process leading to PSD GHG regulation (emphasis its own):

“ . . . [T]he regulation of greenhouse gases from vehicles under Title II of the CAA meant these gases became a pollutant regulated under the Act, thereby making provisions of the PSD and Title V *automatically* applicable to stationary sources of that pollutant. No further action was required – *nor was any taken* – by EPA. . . .”

Coal. for Resp. Reg. v. EPA, Final Brief for Respondents, No. 10-1073 (lead), 22-23 (filed 12/14/11).

EPA’s commitment to its “no action” concept was unshakeable. For instance, in its 2009 rulemaking submission, the EIM Group said this, to no avail:

The path and destination represented by this tailoring rule and the associated rulemakings, especially as they relate to the leakage issue, constitute irrational and

illegal agency action of historic dimensions. The agency has decided – or announced it will decide – to regulate greenhouse gases *and explicitly energy efficiency in all its aspects* under the PSD program of the Clean Air Act. This is one of the most consequential regulatory actions ever taken, and the agency has deliberately taken it without consideration of the consequences.

EIM Cmts. (P. App. 52-53).

There were two principal agency actions, and each was faithful to the no-action conception.

The rule known as the “Triggering” or “Timing” Rule simply adopted the pre-conceived notion of the automatic triggering of regulation, unexamined, and addressed only the timing of the triggering event. It contains, for example, not a word of analysis – such as that the Court conducted in *UARG* – of the problematic statutory consequences created by the application of the PSD provisions to GHGs.

The Tailoring Rule was likewise faithful to the notion of “no action required,” and no facts were solicited or considered except as they related to the discretionary and rolling “tailoring” of GHG-only source regulation under prerogatives EPA mistakenly believed it had under “absurd consequences” and other supposed “doctrines.” “[A]s to *whether* the two programs applied to GHG sources,” EPA declared that its “previous regulatory action . . . made this clear,

and we do not reopen this issue in this rulemaking.” 75 F.R. 31517.

In keeping with the above, EPA said it was answering only gratuitously – “to be fully responsive” – submissions contending that PSD could not properly apply to GHGs. *Id.*, n.4. In fact, it did not answer them at all. For example, the EIM Group submitted comments on the statutory nullifications, contradictions and unworkable expansion of regulation involved. EIM Cmts. (P. App. 44). EPA did not advert to them, with the exception below.

With respect to the “necessity” and “leakage” questions, EPA responded only to “leakage.” It said it did not know enough about leakage to know whether permanent exclusions using its “absurd consequences” powers were required, and it offered this to Petitioner: “[N]othing in this rule forecloses the opportunities we may have to explore such options in the future.” 75 F.R. 31590.

During the course of the rulemakings, faithful to the no-action conception, EPA never studied the costs or benefits of anyway-source regulation, claiming these resulted “automatically,” not as a result of an agency rule. 75 F.R. 31595, 31597, 31599; EIM Cmts. (P. App. 90-93). And EPA did not submit the regulation of anyway sources to Congress under the Congressional Review Act. Instead, it submitted only the Tailoring Rule, such that, had Congress overturned it, PSD GHG regulation would not be overturned, only its mitigation would be. See 75 F.R. 31605.

Motions to Govern

After *UARG*, in its Motion to Govern Further Proceedings, EPA conceded that the relevant rules must be vacated to the extent they require a source to obtain a PSD or Title V permit based on emissions of GHGs alone. EPA Mot. (No. 09-1322 etc.) (10/21/14) 19. Under the order it proposed, in addition, EPA stated it would “consider whether any further revisions to its regulations are appropriate in light of [*UARG*] and if so, it shall undertake to make such revisions.” *Id.*, 20.

EPA made explicit, however, that whatever “further revisions” it would consider, they would not include “relief from the existing greenhouse gas BACT requirements for ‘anyway’ sources.” *Id.*, 12. With respect to this EPA stated, “the above-quoted commitments – [which involve only continuation of the existing BACT regime] – fairly and *completely* implement the substance of the Supreme Court’s holding . . . regarding the continuation of BACT requirements for greenhouse gas emissions in PSD permits required for construction and modification of ‘anyway’ sources.” *Id.*, 11 (emphasis added). “Relief from the existing greenhouse gas BACT requirements for ‘anyway’ sources is not consistent with the Clean Air Act or otherwise justified on the basis of the Supreme Court decision.” *Id.*, 12 (footnote omitted).

The Circuit Court panel, without discussion, issued an Amended Judgment in the language EPA had proposed. (P. App. 3-5.) Some petitioners filed a Motion for Rehearing and Rehearing *En Banc*, primarily addressed to the *de minimis* issue. Both were summarily denied on August 7, 2015. (P. App. 6, 10).



REASONS FOR GRANTING THE PETITION

Background: CAA-GHG Regulation as an “Unanticipated Context” Case

Much of the confusion in this case, which persists to great damaging effect even after Petitioner believed *UARG* had dispelled it, stems from the fact this case is one of a rare, but perhaps growing, category of cases involving the application of a regulatory statute to unforeseen objects of regulation and problems uniquely associated with them. In this category of cases, the new application, by virtue of its unique characteristics, contradicts or otherwise confounds the statute. This puts unusual demands on all concerned. The demands – and confusion – stem principally from the fact that the statute in these kinds of cases cannot be trusted to mean what it seems to say or, more to the point, to authorize what it seems to authorize.

Fortunately, the disjuncture is not random, it is systematic, and it can be addressed in a systematic fashion. Our principal contention is that any agency action that fails to understand this and thus fails

even to attempt to respond to it is procedurally flawed and must be vacated, to be replaced, if the scheme of regulation at issue is to exist at all, by a rulemaking that deals with the core problem.

The core problem is re-contextualization. A statute has been taken out of the context for which it was written and applied to a new context so unanticipated and so different from the actual topic addressed by the enacting congress that the meaning or import of the enacted language changes in ways that may contradict the meaning, import and purpose of the language in the original context or otherwise problematically transform it. It may even be that once the unique aspects of the new topic are understood, whole provisions of the statute have no legitimate applicability. The systematic solution is to assess the ways the context of enactment differs from the context of application and the consequences of the differences – and then take this into account in a reasoned, statute-conforming and Constitution-respecting way.

Four examples of context-switch-caused statutory transformation taken from the regulation at issue in *UARG* will illustrate the core problem and establish the background for this petition. They establish the background because the petition is based on the fact that in *UARG*'s aftermath neither the decision itself nor administrative law has been properly applied by EPA or the lower court to the last three of the four examples. These three, which are the three most important aspects of anyway-source PSD regulation, are aspects of the “automatically triggered”

regulation that EPA believes need not be the subject of rulemaking or vacatur.

All four examples are useful for another purpose that likewise frames this petition. They illustrate the interpretive negligence embodied in the three phrases that dominated EPA's thinking and shaped EPA's proceedings before *UARG* – and that are back with a vengeance in this iteration of the case. They illustrate that, contrary to what EPA persists in thinking, “automatic triggering” is not the answer, it is the problem.

The three phrases, neither statutory nor properly doctrinal, are “automatically triggered,” “self effectuated,” and “by operation of statute.” Each was resurrected below by EPA⁴ to oppose vacatur and to contend that “nothing more is required” – no rulemaking in particular – to implement *UARG* with respect to anyway sources. In fact, EPA argued, vacatur

⁴ For various formulations and uses of the phrases see EPA Mot., 14, 18; EPA Resp., 3-4, 6-7, 9-10, 26-27. Of the “automatic triggering” references, this captures well EPA's position: “This [Circuit] Court agreed with EPA that both [of the triggers at issue] applied to greenhouse gas emissions just like any other ‘pollutant.’ . . . [T]he Supreme Court ‘affirmed’ that judgment as to the scope of [the anyway-source] trigger. . . . Accordingly, the Supreme Court's decision simply cannot be read as anything other than an affirmation of this Court's determinations that the BACT requirement applies to greenhouse gases automatically by operation of the Clean Air Act and that EPA regulations implementing that requirement should continue in effect. . . .” EPA Mot. 14.

would be ineffectual, because the “automatically triggered” regulation would simply snap back into being, this time, for good measure, without any mitigation, such as a *de minimis* level. EPA’s Consolidated Response to Petitioners’ Motions to Govern Further Proceedings (“EPA Resp.”) (11/21/14), 26-27; EPA’s Response to Petition for Rehearing *En Banc* (“EPA Resp. to Pet. Reh.”) (7/1/15), 14-15.

Functionally, for EPA, each of these phrases has the same (*UARG*-defying) meaning: “without considering the differences among pollutants and the consequences or substantive effects of those differences from a whole-statute perspective.” In retrospect, perhaps it is unfortunate that the other issue dealt with in *UARG*, the regulation of the smaller entities known as “GHG only” sources, did not squarely present the “automatic triggering” issue in the unique GHG context. As the Court well documented, even with respect to *conventional* pollutants the “any air pollutant” trigger at issue for GHG-only sources was not “automatic” in the above sense. Instead, EPA picked and chose among conventional pollutants, leaving out those that didn’t fit. *Id.*, 2439-42.

The “anyway source” question *does* present the pure case – and it is by far the more important case for CAA GHG regulation. The “anyway-source trigger” triggers PSD’s core requirement, the “best available control technology” (“BACT”) requirement. To EPA this trigger, is, in fact, “*doubly* automatic” because it obliterates distinctions not just among conventional pollutants *but between them and GHGs as*

well. EPA believes the trigger *automatically applies to GHGs*, such that their differences from conventional pollutants have no role in the triggering determination. Put differently, “that which is triggered” does not matter – even if it is GHG-difference-caused statutory boundary expansion and internal statutory incoherence.

The anyway-source issue thus reflects the essential question in CAA-GHG regulation, which can be expressed in *Chevron* terms. *Chevron* clarity exists where Congress has “directly addressed the precise question at issue” and answered *that* unambiguously. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). There is nothing “direct” and “precise” about a *GHG* issue in the CAA, and, further, when the text from the original conventional-pollutant context is applied in the GHG context *new* meanings or import – *new* “ambiguity” – is created.

The GHG-CAA procedural question is what process must be followed to determine how – and whether – we can honor the original congressional judgment when its relevance and appropriateness in a new context are at issue, and when the relevant text’s meaning, import and consequences may be transformed in the new context. When do the same words in the new context represent a *different* judgment? What must inform evaluation of *that* judgment and what procedures enable informing it?

In light of this, the legal errors animating the three phrases can be succinctly stated. In an “unanticipated context” case of the type defined above, regulation is not “automatically triggered” in the sense defined above if it results in contravention or nullification of key statutory components or produces vast regulation far beyond what Congress contemplated or would ever enact. It does not “self effectuate” or “self execute” if that may result in statutory “self execution” in the sense of statutory suicide or the lesser sense of statutory self-mutilation or self-semi-negation. And, at least in CAA-GHG cases, the statute “operates” *according to UARG*, which requires that the differences between GHGs and conventional pollutants and the statutory consequences thereof be factored into the operation.

The Court will note that the four examples, below, also illustrate that the problem of transformation of meaning and import caused by a context switch exists whether the text in question was determinate in the original context or indeterminate and open-ended there. The last two examples illustrate the latter.

Numerical Thresholds. As the Court is well aware, one of the central issues in *UARG* arose from the fact that applicability of the two programs was triggered by a facility exceeding an explicit numerical threshold of emission of “any air pollutant.” Both the *UARG* Court and the opinions partially concurring with it agreed that the one thing EPA could *not* do was leave in place this provision – a *statutory*

provision – in the new GHG context. The majority held that the provision simply could not apply at all to GHGs because, in light of the consequences, they are not included in the phrase “any air pollutant.” *UARG*, 2439-47. Justice Breyer’s partial concurrence would have, instead, allowed EPA to add to the triggering threshold “except for greenhouse gases” and a new number. *Id.*, 2452-55 (Breyer, J.).

The cause of this particular problem, and of the core “anyway source” BACT problem described below, is one of the ways carbon dioxide, the principal GHG at issue, differs from conventional pollutants. This is its relative ubiquity and abundance – but, it is not its ubiquity and abundance “in the air” where, actually, it makes up a relatively small (albeit essential) part of the air’s basic constituents, a fraction of one percent. Rather, it is its relative ubiquity and abundance as a byproduct of productive human activity because of its unique chemistry. This unique chemistry underlies combustion, of which CO₂ is a necessary product along with energy in the form of heat.

“Localized” Requirements. As the Court is also aware, the PSD statutory provisions contain any number of locale-centric requirements, such as mandatory and ongoing measurement of local air quality, local impacts as to vegetation and a mandatory *hearing* at which the localized information must be produced. 42 U.S.C. §§ 7475(a)(2), (a)(6), (a)(8), (e)(1), (e)(3)(b), and (e)(3)(c). Indeed PSD’s very purpose, structure and decision-making apparatus are all about regions and local impact, since the program is

primarily about deterioration of relatively clean regions measured by “ambient” concentrations and local impacts. The essence of PSD is geography, but with respect to global warming and climate change, PSD geography is the wrong geography.

This is obvious from the global nature of climate change and its upper-atmosphere origins. Less obvious, and even more significant, is that CO₂ is “well mixed” in the air. This means that any variations in local concentrations are so transient as to be inconsequential. Variations in “ambient” levels or other localized concentration measures are, as a practical matter, irrelevant.

EPA’s response to this was to declare in the Tailoring Rule, as expanded in the Guidance, that these things could be ignored. Based in part on this, Justice Alito in his partial concurrence concluded, as the Court summarized it, that “BACT is ‘fundamentally incompatible’ with greenhouse gases.” *Id.*, 2449 n.9. The Court responded that “. . . the possibility that that requirement may be inoperative as to greenhouse gases does not convince us that they must be categorically excluded from BACT even though they are indisputably a ‘pollutant subject to regulation.’” *Id.* As this illustrates, the Court was willing to give EPA a chance to try to construct GHG BACT regulation that addresses the ways in which the statute has been confounded by it.

BACT. The problematics of BACT for CO₂ fall into two general categories. The first concerns what is commonly thought of as “control technology” and has been the thrust of the PSD program for conventional pollutants. With one principal exception, there are at present no such realistic controls for carbon dioxide. The one possible technology is carbon capture, which the Court referenced. *Id.*, 2448.

The second category of issues – the one that presents the essential problem – stems from the statute’s definition of BACT, which broadens it beyond *control* “technology” to *production* – *i.e.*, not “pollution” – methods and systems. BACT includes “production processes and available methods, systems, and techniques.” 42 U.S.C. § 7479(3). Applied to conventional pollutants this is a very limited universe. Applied to CO₂ this is potentially everything.

The problem of gargantuan statutory inflation stems from this fact: because every aspect of a basic-material facility’s design, processes, systems, and techniques consumes energy, every aspect could, depending on every other aspect of the system’s design and operation, consume less. One energy-intensive company testified in congressional hearings that it had nearly 1,000 items on its list of energy-saving possibilities.⁵ Even for the relatively simple matter of

⁵ *Hearing Before the Subcomm. on Children’s Health and Envtl. Resp. of the S. Comm. on Env. and Pub. Wrks.*, 113th Cong. (2012), Testimony of Parker Smith, Eastman Chemical Company.

the design and operation of an industrial hot water “boiler,” EPA has come up with a seemingly endless string of good ideas for more efficient operation to be included in BACT, from design changes to “a requirement for periodic maintenance and calibration of the natural gas meter and the steam flow analyzer.” Guidance, F1-3.

There are far more basic things that a scheme of energy-consumption regulation would reach – matters that are the subject of lively and ongoing debate within the management and operations ranks of energy-intensive companies. For instance, how much energy it takes to melt and maintain any given temperature of molten materials depends on everything from the particular composition of the batch of raw materials, to the rate at which production draws the molten materials from the furnace, to the efficiency of the machines that form the molten materials into finished products, to the design of the furnace in every respect, including, as one example that may not be obvious, the thickness of its (often ceramic) walls and how frequently the furnaces are replaced, since over time the walls thin and otherwise deteriorate due to furnace heat, causing them to insulate less efficiently. Moreover, virtually every energy-consuming aspect involves trade-offs with ease of production, product quality, familiarity of personnel with various technology and its repair, machine and system life and, in general, what a company might believe to be its operational and

design competitive advantages. See EIM Comments, *esp.* (P. App. 66, 107-109, 111-119).

PSD requires listing, and extensively examining, each potential pollution-affecting element of design and operations, listing options for each step in order of their pollution-reduction (Guidance, 17-18), selecting (“defaulting to”) the option that is least pollution-producing unless the applicant can prove it is too costly. *Id.*, 45. This process results in a “suite of measures with the lowest net restrictions” (*Id.*, 37) that is incorporated in a permit. Given this, the possible permit permutations explode from a few for conventional pollutants to – using the 1,000 figure – something in the billions for CO₂.

BACT regulation does not end with a permit. If there is a protest to the proposed permit, there ensues litigation before the Environmental Appeals Board (EAB), an arm of the Office of the Secretary. Indeed, the permitting guidance is built upon EAB decisions, which developed a kind of common law of BACT. If CO₂ is added, it would produce a common law of industrial operations. What were once management decisions would be the subject of administrative litigation, presumably under *Chevron* deference. The basic pattern of the litigation, as with conventional pollutants now, would be shaped by administrative law. For instance, was it arbitrary and capricious for permitting official B not to consider, or order, option x with respect to y aspect of design, when official A in another case did so? See, e.g., Guidance, 20 n.49.

Accordingly, Petitioner believes PSD GHG BACT regulation represents the most intrusive use of the Commerce Power in our history. Given carbon chemistry's relationship to industrial activity, this is true virtually by definition. For vehicle regulation the analogy would be rather than to set an emission standard, to create, instead, a particularistic permitting scheme for every aspect of the vehicle's design *and operation* that affects its use of fuel – and then let the litigation begin. The preposterous regulatory logic of PSD GHG BACT is: “to regulate one thing, an emission level, regulate everything that affects it, which, in this case, is essentially everything.”

Energy Efficiency. As indicated, automatically triggered PSD GHG BACT regulation, as EPA conceives it, is a scheme of energy-efficiency regulation. And, as indicated, for the Court it is an open question whether energy efficiency may be the subject of PSD regulation at all.

**I. ADDRESSING THE VACATUR AND RULE-
MAKING ISSUES, IMPORTANT IN THEIR
OWN RIGHT, ALSO PRESENTS THE COURT
AN OPPORTUNITY TO ADDRESS THE MIS-
UNDERSTANDING AND MISUSE OF *UARG*.**

The errors of EPA's position – and thus the errors of the lower court's implicit position – on the vacatur and rulemaking issues presented by this case are intertwined with two things. One is the resurrection of “automatic triggering” and its correlates

as discussed above. The other is a misreading and misuse of *UARG*. Ironically, EPA's misreading of *UARG* parallels its misreading of the CAA that necessitated *UARG*. It fails to read *UARG* as a whole, relying, instead, on isolated statements taken out of context, or, even, re-contextualized in a way that changes their meaning.

The most basic failure to read *UARG* as a whole is the failure to understand that the Court's rebuke of exclusive reliance on plain-language analysis in a CAA-GHG case, explicated mostly in its discussion of "GHG-only" sources in Section II(A) of its opinion, carries over to its discussion of "anyway sources" in Section II(B), and, by extension, to CAA-GHG cases generally. *Id.*, 2439-44. The essence of the Court's rebuke of the plain- and isolated-language approach that had characterized the case pre-*UARG* was that the "whole statute" and "substantive effects" have to be considered, just as the Court illustrated in its own analyses that followed the announcement of the interpretive approach.

After correcting the error of interpretive method that underlay EPA's mistaken *Chevron* step-one conception and thus all of its procedural errors, the Court proceeded to discuss the petitioners' substantive claim that PSD GHG BACT regulation was impermissible *in toto*. Now, EPA is using the Court's reluctance to go quite that far to claim that, in effect, the Court's opinion has excused EPA's *procedural* errors and exonerated its desired outcome, in its full, unmitigated breadth. Most agency claims of *post hoc*

justification for an agency action involve arguments asserted – too late – by agency appellate counsel. This very peculiar *post hoc* justification for procedural errors involves *this Court's* mixed resolution of a *substantive* claim. This is not lawful; the Agency procedures here rise or fall on their own contemporaneous merits. Cf. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

The other principal failure to attempt a “whole *UARG*” reading is EPA’s failure to confront any of the Court’s substantive findings, statements, observations, advice, *dicta* or holdings contained in its discussion of BACT regulation of anyway sources to the extent those contradict EPA’s position and tend to limit the powers and prerogatives it entails. It is fair to say the Court identified myriad ways in which the regulation, in its “automatically triggered” dimensions as explicated in EPA guidance, is statute-negating, and otherwise problematic, unreasonable, or out-of-bounds. Indeed, it is fair to say that the Court indicated that it may be that, to the almost exclusive extent the regulation amounts to energy-efficiency regulation, or perhaps anything other than a protocol for carbon-capture, it cannot exist at all.

Instead of facing up to all this, EPA de-contextualizes a few statements of the Court. We will not take up space to point out all of *UARG's* discussion of anyway-source regulation that is inconsistent with EPA’s reading, since that is virtually every sentence. We will briefly address two passages upon which EPA placed particular emphasis.

In the first, the Court was distinguishing the text of the anyway-source trigger, which in fact incorporates the phrase “subject to regulation,” from the “GHG only” trigger which does not. On that basis the Court said “the more specific phrasing of the BACT provision suggests that the necessary judgment has been made by Congress.” *Id.*, 2448. In Petitioner’s view it certainly does suggest it – with respect to conventional pollutants – and that is why, as argued above, the anyway-source trigger presents *the* characteristic issue in CAA-GHG regulation. Nothing about the passage suggests that the Court was saying that that ends the matter or ends the inquiry needed to end it, and virtually everything else the Court says indicates that it cannot.

The second is this: “EPA may, however, continue to treat greenhouse gases as a ‘pollutant subject to regulation under this chapter’ for purposes of requiring BACT for ‘anyway’ sources.” *Id.*, 2449. Most of EPA’s briefing below misappropriates this, changing the object of the verb “continue” in highly consequential ways, such as, “EPA may ‘continue’ to apply its existing regulations implementing the PSD permit BACT requirement. . . .” EPA Mot., 3-4. Based on the rest of the Court’s discussion, *of course* EPA is not foreclosed from this “subject to regulation” pathway “for purposes” of GHG BACT – after all, the Court clearly indicated it may lead to carbon capture in appropriate circumstances.

Likewise, consistent with the rest of its reasoning and statements, the Court is not saying that its

permission for EPA to continue to use this pathway ends the matter – it says only that the inquiry is not foreclosed, as it was for the GHG-only trigger. The required inquiry may result in regulation greatly reduced from the “automatically triggered” dimensions or no regulation at all if the facts support that.

In any event, the *statutory* term, unlike EPA’s substitutes, is *entirely* consistent with a requirement for a rulemaking. A pollutant, of course, can be both “subject to regulation” and “subject to *regulations*” that explore the conformance of the regulation to the statute and that set the regulation’s terms and conditions accordingly. Among its other failings, EPA’s position is based on a false dichotomy, aided by textual inexactitude.

A. VACATUR IS REQUIRED.

The D.C. Circuit and many other courts believe it is permissible to leave in effect a defective agency action if its defects, whether procedural or substantive, are immaterial. That is, if the defects are not outcome-affecting such that a court is confident that even after the defects are remedied little will change, then, under “remand without vacatur” principles, the action need not be vacated. See generally, Tatham, “The Unusual Remedy of Remand Without Vacatur,” Administrative Conference of the United States (Final Report, Jan. 3, 2014). (“Ad. Conf. R.”). The leading D.C. Circuit case expresses the standard in terms of “the seriousness of the order’s deficiencies”

and “thus the extent of doubt whether the agency chose correctly.” *Allied-Signal, Inc. v. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks omitted). In assessing its confidence level in the correctness of an agency action under review, the D.C. Circuit does not stop at the particular deficiencies adjudicated. *See Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007) (vacatur based on petitioners’ “potentially meritorious challenges,” not just those reached by the court) [quoting *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855 (D.C. Cir. 2001) (per curiam)].

This Court has not directly addressed the issue. In employing “the remedy of remanding without vacatur” these courts “act without direct guidance on or endorsement of the remedy by the Supreme Court.” Ad. Conf. R., 8.

This case does not call upon the Court to resolve the core controversy over remand without vacatur – that is, whether it should exist. It does, however, ask the Court to establish at least one situation where vacatur is required.

Though there are many ways to express it, Petitioner submits that the facts of this case would support a rule to this effect: vacatur and remand, as opposed to remand without vacatur, is required at least where the agency action is so procedurally defective that it rests on agency-devised rulemakings that foreclosed the possibility that the agency could inform itself of even the most basic and important

facts and consequences, and where this contributed to an agency action so substantively defective that it is possible that the scheme of regulation involved should not exist at all, or, if it is to survive it may be but a shadow of its prior, preposterously intrusive, internally incoherent, statute-negating and likely counter-productive self.

B. A RULEMAKING IS REQUIRED – IF THE REGULATION IS TO PROCEED.

The other principal issue directly presented concerns when a rulemaking is required. As with the general issue of vacatur, there are of course broad and contested issues involved in the general question of when an agency must conduct a rulemaking. Indeed, agencies are inclined to avoid, and are seemingly often successful in avoiding, rulemaking and the judicial review it involves, favoring informal and essentially unreviewable modes of exercising their authority. However, as with the vacatur issue, the rulemaking issue here is relatively narrow, but important.

This case, as indicated above, represents a unique class of cases characterized by the following: a regulatory statute that is sought to be applied to a context that was un contemplated by the enacting congress and that is so different from the actual legislative topic that *(i)* it results in contravention, nullification or problematic transformation of express components of the statutory scheme; *(ii)* some of the

statute's most important components may simply not work in the new context; *(iii)* it may frustrate the statute's most basic purposes in that the regulation it produces may be unnecessary or counterproductive; and *(iv)* it may result in regulation that exceeds the agency's authority even if that regulation falls within the plain terms of the statute.

Because of the potentially transformative effect of the statute's re-contextualization, none of these things can be determined without an analysis that includes the substantive effect of the statute's terms in the new, unanticipated context. Such analysis must include the differences between the context of enactment and the context of application and the difference they make. If regulation is to proceed in such instances a rulemaking is required to examine the transformed and possibly damaged statutory provisions, to create regulations that deal with them in a reasonable, statute-conforming fashion, and, prior to that, to determine if the emergent regulation should exist at all.

This class of cases, moreover, may well become more prominent as progress in science and technology accelerates and our complex, science-related federal regulatory statutes are called upon to regulate things the enacting Congresses did not contemplate. For instance, the defining characteristics of this class may be present in an effort to regulate the internet under a statute written with telephones in mind because the internet could be said to fit within the term "communications carrier" or some other statutory

classification. They might also be present if “personalized” drugs chemically tailored to the genetic and other characteristics of an individual person and an individual person’s disease were to be regulated as a “drug” under the terms of the Food, Drug and Cosmetic Act. More hypothetically – and simply to further illustrate the nature of the problem – they could be present in attempting to apply a hypothetical “Interstate Commerce Act” written with railroads in mind to other “carriers in interstate commerce” such as trucks, pipelines, airplanes, telephones, television, cable or the internet.

For the common law, a disjuncture between a classification and the rules governing the class is not a problem, since the common law is a “‘moving classification system’ in which categories change in the course of being applied.”⁶ Further, the moving categories are themselves governed by “an evolving body of principles.”⁷

This case raises fundamental questions concerning whether legal reasoning as applied in CAA-GHG cases will contribute anything other than confusion and unreason to efforts to address climate change. In addition to the legal issues presented here, there are

⁶ Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society*, 235 (Harvard) (1994) (quoting Edward Levi, *Introduction to Legal Reasoning*) (internal citations omitted).

⁷ *Id.*, 179.

pragmatic considerations. Unreasonable, overreaching and grossly inefficient modes of carbon regulation are unlikely to be sustainable. Moreover, they are likely to taint reasonable efforts and arm critics who see carbon regulation as – precisely – an occasion, perhaps even a pretext, for overreaching regulation.

II. INDEPENDENTLY IMPORTANT ISSUES IN ADMINISTRATIVE LAW ARE ENCOMPASSED WITHIN THE VACATUR AND RULEMAKING ISSUES.

Many other important issues and principles in administrative law are also present in this case, subsumed within the vacatur and rulemaking issues. Among them:

a. *Chevron step-one/step-two confusion*. Based on its briefing, EPA *still* thinks it is subject to a self-evident, unconditional, rulemaking-excusing, fact-and judgment-foreclosing *Chevron* step-one command with respect to anyway-source PSD regulation of GHGs. To this it adds the contention that *Chevron*-step precision doesn't matter anyway because there is no difference between a step-one command and step-two permission to consider something *required*, and, similarly, when the Court said "permissible" it meant to include step-one *required* in the term. EPA's Res. to Mot. Gov., 7-8, 10-13.

UARG held that the anyway-source “subject to regulation” pathway to regulation of GHGs was permissible, not mandated. See *Id.*, 2447 (“We now consider whether EPA *reasonably* interpreted the Act to require . . . ”) (emphasis added); *Id.*, 2448-49 (“The question before us is whether EPA’s decision to require BACT . . . is, *as a general matter, a permissible* interpretation of the statute under *Chevron*.”) (emphasis added). Moreover, the anyway-source pathway, even if it *were mandated* “as a general matter” for GHGs, could be trod, under *UARG*, only after first resolving the fundamental issues identified by *UARG*, among others. When an agency mistakenly believes *Congress* has made the judgment driving an outcome, the action is invalid for that reason alone. Cf. *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96 (1953); *Prill v. NLRB*, 755 F.2d 941, 947-48 (D.C. Cir. 1985).

b. *Chevron* “step zero.” *UARG* confirms that the non-delegation, non-authorization doctrine sometimes called “*Chevron* step zero”⁸ represents one of the requisite inquiries in CAA-GHG cases. *Id.*, 2444. In short, under “step zero” precedents if any given instance of CAA-GHG regulation results in vast new schemes of regulation that Congress would not have authorized, or contradicts or renders inapplicable vital elements of the statutory scheme, the regulation is not only entitled to no deference, it is undelegated and thus unauthorized.

⁸ Cass Sunstein, “Chevron Step Zero,” 92 Va. L. Rev. 187 (2006).

c. *Reasoned agency decision making.* Not just requisite elements of statutory construction, but also the basic elements of reasoned agency decision making were trumped by EPA's mistaken idea that a self-evident and unconditional *Chevron* step-one command existed to regulate anyway sources. Agency actions are arbitrary and capricious if they "entirely failed to consider an important aspect of the problem." See *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983). EPA addressed none of the uniquely important issues in this matter, among them carbon leakage – even though EPA acknowledged it might well exist. Without running afoul of *State Farm* and the requirements of reasoned decision making, an agency cannot proceed with regulation that it acknowledges may be absurd without first attempting to find out if it is. The failure to conduct a cost/benefit analysis, even of an informal sort, is another example of mistakenly foregone reasoned decision making.

d. *De Minimis.* The *UARG* Court stated, "... EPA may require 'anyway' sources to comply with greenhouse-gas BACT only if the source emits more than a *de minimis* amount of greenhouse gases. . . . The [Tailoring] rule makes clear EPA did not arrive at that number [75,000 tons] by identifying the *de minimis* level. . . . EPA must justify its selection on proper grounds." *UARG*, 2449. For the same fundamental reasons that it is an inherent aspect of all legal rules (*Id.*, 2435 n.1), a *de minimis* level, to be established on rational grounds, must set a level

rationally related to the problem addressed, that to which it is *de minimis*. If the potential for carbon leakage exists, the rational *de minimis* level for the carbon emissions of domestic EITEs is equivalent to the level of their emissions. By contrast, EPA, in the briefing below, dismissed the *de minimis* concern as *UARG* “dicta.” EPA Mot., 17.

III. IMPORTANT CONSTITUTIONAL ISSUES ARE ENCOMPASSED WITHIN THE VACATUR AND RULEMAKING ISSUES.

The constitutional issues inherent in this matter are systematic, combining, principally, questions of the limits of the Commerce Power with the vesting of that power in Congress with the fact that the Necessary and Proper clause has restrictive force and requires *congressional* judgments. The same attentiveness to facts and consequences required to be faithful to administrative law and *UARG* is necessary to avoid substantial constitutional questions; without using them to cabin the “automatically triggered” regulation, fundamental constitutional violations are implicated. See, e.g., *Solid Waste Agency v. U.S. Army Corp. of Eng’rs*, 531 U.S. 159, 172-73 (2001) (“Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result. The requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize

administrative agencies to interpret a statute to push the limit of congressional authority.”).

The central provision involved is the Necessary and Proper Clause, which assigns *to Congress* the power “[t]o make all laws necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in *any Department or Officer thereof.*” Art. I, § 8, cl. 18 (emphasis added).

In *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819), the Court, in an opinion by Chief Justice Marshall, established the test for determining whether an act of Congress has selected a means permissible under that clause to regulate a concededly proper end: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.” As Justice Scalia wrote in his concurrence in *Gonzales v. Raich*, 485 U.S. 1, 39 (2005), the requirements that the means selected be “appropriate,” “plainly adapted,” “not prohibited,” and “consistent with the letter and spirit of the constitution,” are “not mere hortatory.” The Court enforces them by striking down legislation.

It is not conceivable that the Commerce Power reaches the particularistic, prescriptive and litigation-enabling regulation of industrial energy-consumption without, at least, an express and well-founded judgment

that it is necessary and proper. Since, of course, Congress had no opportunity to make that judgment, then, at the very least, EPA must make the case that the regulation is necessary and proper in an examination that includes GHG-differentiating facts and their consequences. If EPA is not willing to defend it in those terms, why should such a judgment be ascribed to Congress?

After *Massachusetts v. EPA* the two non-legislative branches, the Executive and the Judiciary, have been stewards of the Commerce Power, to – respectively – regulate and police the regulation of GHGs under the CAA. Petitioner respectfully submits that, at least based on what took place below on Motions to Govern, neither branch has been exercising that power with care or restraint, certainly not the care or restraint that Congress – any Congress – dealing with the same matter would have shown.

To the extent there exists little substantive protection of economic liberty within the Due Process or Contracts clauses or in limits to the Commerce Power itself, then its substantive protection relies heavily on the Necessary and Proper clause, and its overall protection relies on the procedural and structural protections in which that clause's operation is embedded. These Constitution-set processes and structures have been traduced in this case by mistaken legal reasoning. The outer limits of the Commerce Power should not be established by a regulatory scheme Congress did not enact and would

never enact for very good reasons of policy and politics and the values and concerns underlying both.

As a practical matter, the Congressional Review Act plays an important part in attempting to preserve a congressional – Article I – role in GHG regulation under the CAA. *Massachusetts'* finding of an implicit delegation of the climate-change issue to EPA effectively reversed the “burden of going forward” and the “burden of enactment” in legislation. The difficulty of enacting legislation is not only itself a significant and intended feature of our constitutional structure, it is also likely to lead to moderation of legislation actually enacted. Independent agencies, unlike EPA, share some of the same dynamic by virtue of the usually bipartisan nature of the make-up of the commissions that govern them. If, as some believe, current tendencies of Congress towards inaction justify greater activism by administrative agencies to deal with new problems of potentially vast significance, principles of statutory interpretation and reasoned agency decision-making capable of dealing with such new problems are of special importance – as is the Congressional Review Act.

Especially with respect to EPA decisions on CAA-GHG regulation, it is *constitutionally* important that the CRA not be evaded, and that, in fact, honoring it be considered a term of the implicit delegation to EPA. This is one of the many reasons that if anyway-source PSD regulation of industrial energy efficiency is to exist, a reviewable rule, reviewable both by the courts and Congress, is required. The same

rulemaking record that will be useful to EPA will also be useful to the courts and Congress – beginning with its evidence and argument as to why the regulation is needed, if that can be mustered.



CONCLUSION

For the foregoing reasons, Petitioner requests that the writ be granted.

Respectfully submitted,
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**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 09-1322

September Term, 2014

FILED: APRIL 10, 2015

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

STATE OF MICHIGAN, ET AL.,
INTERVENORS

Consolidated with 10-1024, 10-1025, 10-1026, 10-1030, 10-1035, 10-1036, 10-1037, 10-1038, 10-1039, 10-1040, 10-1041, 10-1042, 10-1044, 10-1045, 10-1046, 10-1234, 10-1235, 10-1239, 10-1245, 10-1281, 10-1310, 10-1318, 10-1319, 10-1320, 10-1321

No. 10-1073

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

AMERICAN FROZEN FOOD INSTITUTE, ET AL.,
INTERVENORS

App. 2

Consolidated with 10-1083, 10-1099, 10-1109, 10-1110, 10-1114, 10-1118, 10-1119, 10-1120, 10-1122, 10-1123, 10-1124, 10-1125, 10-1126, 10-1127, 10-1128, 10-1129, 10-1131, 10-1132, 10-1145, 10-1147, 10-1148, 10-1199, 10-1200, 10-1201, 10-1202, 10-1203, 10-1206, 10-1207, 10-1208, 10-1210, 10-1211, 10-1212, 10-1213, 10-1216, 10-1218, 10-1219, 10-1220, 10-1221, 10-1222

No. 10-1092

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

LANGBOARD, INC. – MDF, ET AL.,
INTERVENORS

Consolidated with 10-1094, 10-1134, 10-1143, 10-1144, 10-1152, 10-1156, 10-1158, 10-1159, 10-1160, 10-1161, 10-1162, 10-1163, 10-1164, 10-1166, 10-1182

No. 10-1167

AMERICAN CHEMISTRY COUNCIL,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY AND LISA PEREZ
JACKSON, ADMINISTRATOR, U.S. ENVIRONMENTAL
PROTECTION AGENCY,
RESPONDENTS

CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA, ET AL.,
INTERVENORS

Consolidated with 10-1168, 10-1169, 10-1170, 10-1173, 10-1174, 10-1175, 10-1176, 10-1177, 10-1178, 10-1179, 10-1180

On Petitions for Review of Final Actions of the
Environmental Protection Agency On Remand
from the United States Supreme Court

Before: ROGERS and TATEL, *Circuit Judges*, and
SENTELLE, *Senior Circuit Judge*.

AMENDED JUDGMENT

Upon consideration of the opinion in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014); EPA's motion to govern further proceedings and the responses thereto; the State, Industry, and Public Interest parties' joint motion to govern future proceedings and the responses thereto; the motion to

govern of Environmental Respondent-Intervenors and the responses thereto; the motion of Energy-Intensive Manufacturers Group to govern future proceedings and the responses thereto; and the joint motion of the Alliance of Automobile Manufacturers and the Association of Global Automakers to govern future proceedings and the response thereto, it is

ORDERED that this court's judgment filed June 26, 2012, be amended in accordance with the Supreme Court's decision. *See UARG v. EPA*, 134 S. Ct. at 2449 (affirming in part and reversing in part). It is

FURTHER ORDERED and ADJUDGED that: (1) the regulations under review (including 40 C.F.R. §§ 51.166(b)(48)(v) and 52.21(b)(49)(v)) be vacated to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant emissions increase from a modification; (2) the regulations under review be vacated to the extent they require a stationary source to obtain a title V permit solely because the source emits or has the potential to emit greenhouse gases above the applicable major source thresholds; and (3) the regulations under review (in particular 40 C.F.R. § 52.22 and 40 C.F.R. §§ 70.12, 71.13) be vacated to the extent they require EPA to consider further phasing-in the requirements identified in (1) and (2) above, at lower greenhouse gas emission thresholds. It is

FURTHER ORDERED and ADJUDGED that the petitions for review in Nos. 09-1322, et al., 10-1073, et al., 10-1092, et al., and 10-1167, et al., otherwise be denied in their entirety. It is

FURTHER ORDERED that EPA take steps to rescind and/or revise the applicable provisions of the Code of Federal Regulations as expeditiously as practicable to reflect the relief granted in the second decretal paragraph of this judgment. It is

FURTHER ORDERED that EPA consider whether any further revisions to its regulations are appropriate in light of *UARG v. EPA*, 134 S. Ct. 2427, and if so, undertake to make such revisions.

The Clerk is directed to issue the mandate forthwith.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 09-1322

September Term, 2014

EPA-74FR66496

Filed On: August 7, 2015

Coalition for Responsible Regulation, Inc.,
et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

State of Michigan, et al.,
Intervenors

Consolidated with 10-1024, 10-1025,
10-1026, 10-1030, 10-1035, 10-1036,
10-1037, 10-1038, 10-1039, 10-1040,
10-1041, 10-1042, 10-1044, 10-1045,
10-1046, 10-1234, 10-1235, 10-1239,
10-1245, 10-1281, 10-1310, 10-1318,
10-1319, 10-1320, 10-1321

No. 10-1073

EPA-75FR17004
EPA-75FR31514

Coalition for Responsible Regulation, Inc.,
et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

American Frozen Food Institute, et al.,
Intervenors

Consolidated with 10-1083, 10-1099,
10-1109, 10-1110, 10-1114, 10-1118,
10-1119, 10-1120, 10-1122, 10-1123,
10-1124, 10-1125, 10-1126, 10-1127,
10-1128, 10-1129, 10-1131, 10-1132,
10-1145, 10-1147, 10-1148, 10-1199,
10-1200, 10-1201, 10-1202, 10-1203,
10-1206, 10-1207, 10-1208, 10-1210,
10-1211, 10-1212, 10-1213, 10-1216,
10-1218, 10-1219, 10-1220, 10-1221,
10-1222

No. 10-1092

EPA-75FR25323
EPA-75FR25324
EPA75FR25324

Coalition for Responsible Regulation, Inc., et al.,
Petitioners

v.

Environmental Protection Agency,
Respondent

Langboard, Inc. – MDF, et al.,
Intervenors

Consolidated with 10-1094, 10-1134,
10-1143, 10-1144, 10-1152, 10-1156,
10-1158,10-1159, 10-1160, 10-1161,
10-1162, 10-1163, 10-1164, 10-1166,
10-1182

BEFORE: Rogers and Tatel, Circuit Judges;
Sentelle, Senior Circuit Judge

ORDER

Upon consideration of petitioners' petition for
panel rehearing filed on May 27, 2015, it is

ORDERED that the petition be denied.

App. 9

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 09-1322

September Term, 2014

EPA-74FR66496

Filed On: August 7, 2015

Coalition for Responsible Regulation, Inc.,
et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

State of Michigan, et al.,
Intervenors

Consolidated with 10-1024, 10-1025,
10-1026, 10-1030, 10-1035, 10-1036,
10-1037, 10-1038, 10-1039, 10-1040,
10-1041, 10-1042, 10-1044, 10-1045,
10-1046, 10-1234, 10-1235, 10-1239,
10-1245, 10-1281, 10-1310, 10-1318,
10-1319, 10-1320, 10-1321

No. 10-1073

**EPA-75FR17004
EPA-75FR31514**

Coalition for Responsible Regulation, Inc.,
et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

American Frozen Food Institute, et al.,
Intervenors

Consolidated with 10-1083, 10-1099,
10-1109, 10-1110, 10-1114, 10-1118,
10-1119, 10-1120, 10-1122, 10-1123,
10-1124, 10-1125, 10-1126, 10-1127,
10-1128, 10-1129, 10-1131, 10-1132,
10-1145, 10-1147, 10-1148, 10-1199,
10-1200, 10-1201, 10-1202, 10-1203,
10-1206, 10-1207, 10-1208, 10-1210,
10-1211, 10-1212, 10-1213, 10-1216,
10-1218, 10-1219, 10-1220, 10-1221,
10-1222

No. 10-1092

EPA-75FR25323
EPA-75FR25324
EPA75FR25324

Coalition for Responsible Regulation, Inc., et al.,
Petitioners

v.

Environmental Protection Agency,
Respondent

Langboard, Inc. – MDF, et al.,
Intervenors

Consolidated with 10-1094, 10-1134,
10-1143, 10-1144, 10-1152, 10-1156,
10-1158, 10-1159, 10-1160, 10-1161,
10-1162, 10-1163, 10-1164, 10-1166,
10-1182

BEFORE: Garland, Chief Judge, and Henderson,
Rogers, Tatel, Brown, Griffith,
Kavanaugh, Srinivasan, Millett,*
Pillard, and Wilkins, Circuit Judges;
and Sentelle, Senior Circuit Judge

* Circuit Judge Millett did not participate in this matter.

ORDER

Upon consideration of petitioners' petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote; and petitioners' motion for leave to file a reply and the lodged reply, it is

ORDERED that the motion for leave to file a reply be denied. The Clerk is directed to note the docket accordingly. It is

FURTHER ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail

Deputy Clerk

**CONSTITUTIONAL AND
STATUTORY PROVISIONS**

The Constitution of the United States provides, in pertinent part, that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” U.S. Const. art. I, § 1.

The Constitution of the United States provides, in pertinent part, that “[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3.

The Constitution of the United States provides, in pertinent part, that “[t]he Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.” U.S. Const. art. I, § 8, cl. 18.

42 U.S.C. § 7470.

Congressional declaration of purpose

The purposes of this part are as follows:

- (1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipated¹ to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air², notwithstanding attainment and maintenance of all national ambient air quality standards;
- (2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;
- (3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;
- (4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and
- (5) to assure that any decision to permit increased air pollution in any area to which this

¹ So in original. Probably should be "anticipated".

² So in original. Section was enacted without an opening parenthesis.

section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decision-making process.

42 U.S.C. § 7471. Plan requirements

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

42 U.S.C. § 7472. Initial classifications

(a) Areas designated as class I

Upon the enactment of this part, all –

- (1) international parks,
- (2) national wilderness areas which exceed 5,000 acres in size,
- (3) national memorial parks which exceed 5,000 acres in size, and
- (4) national parks which exceed six thousand acres in size,

and which are in existence on August 7, 1977, shall be class I areas and may not be redesignated. All areas which were redesignated as class I under regulations promulgated before August 7, 1977, shall be class I areas which may be redesignated as provided in this part. The extent of the areas designated as Class I under this section shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990.

(b) Areas designated as class II

All areas in such State designated pursuant to section 7407(d) of this title as attainment or unclassifiable which are not established as class I under subsection (a) of this section shall be class II areas unless redesignated under section 7474 of this title.

42 U.S.C. § 7473. Increments and ceilings

(a) Sulfur oxide and particulate matter; requirement that maximum allowable increases and maximum allowable concentrations not be exceeded

In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under

section 7475(d)(2)(C)(iv) of this title) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

(b) Maximum allowable increases in concentrations over baseline concentrations

(1) For any class I area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
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Particulate matter:

Annual geometric mean	5
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Twenty-four-hour maximum	10
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Sulfur dioxide:

Annual arithmetic mean	2
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Twenty-four-hour maximum	5
--------------------------------	---

Three-hour maximum	25
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(2) For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration

of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
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Particulate matter:

Annual geometric mean	19
Twenty-four-hour maximum	37

Sulfur dioxide:

Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	512

(3) For any class III area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
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Particulate matter:

Annual geometric mean	37
Twenty-four-hour maximum	75

Sulfur dioxide:

Annual arithmetic mean	40
Twenty-four-hour maximum	182
Three-hour maximum	700

(4) The maximum allowable concentration of any air pollutant in any area to which this part applies shall not exceed a concentration for such pollutant for each period of exposure equal to –

(A) the concentration permitted under the national secondary ambient air quality standard, or

(B) the concentration permitted under the national primary ambient air quality standard,

whichever concentration is lowest for such pollutant for such period of exposure.

(c) Orders or rules for determining compliance with maximum allowable increases in ambient concentrations of air pollutants

(1) In the case of any State which has a plan approved by the Administrator for purposes of carrying out this part, the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for purposes of determining compliance with the maximum allowable increases in ambient concentrations of an air pollutant, the following concentrations of such pollutant shall not be taken into account:

(A) concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, or natural gas, or both, by reason of an order which is in effect under the provisions of sections 792(a) and (b) of title 15 (or any subsequent legislation which supersedes

such provisions) over the emissions from such sources before the effective date of such order.¹

(B) the concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from using natural gas by reason of a natural gas curtailment pursuant to a natural gas curtailment plan in effect pursuant to the Federal Power Act [16 U.S.C. 791a et seq.] over the emissions from such sources before the effective date of such plan,

(C) concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities, and

(D) the increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration determined in accordance with section 7479(4) of this title.

(2) No action taken with respect to a source under paragraph (1)(A) or (1)(B) shall apply more than five years after the effective date of the order referred to in paragraph (1)(A) or the plan referred to in paragraph (1)(B), whichever is applicable. If both such order and plan are applicable, no such action shall apply more than five years after the later of such effective dates.

¹ So in original. The period probably should be a comma.

(3) No action under this subsection shall take effect unless the Governor submits the order or rule providing for such exclusion to the Administrator and the Administrator determines that such order or rule is in compliance with the provisions of this subsection.

42 U.S.C. § 7474. Area redesignation

(a) Authority of States to redesignate areas

Except as otherwise provided under subsection (c) of this section, a State may redesignate such areas as it deems appropriate as class I areas. The following areas may be redesignated only as class I or II:

(1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore, and

(2) a national park or national wilderness area established after August 7, 1977, which exceeds ten thousand acres in size.

The extent of the areas referred to in paragraph¹ (1) and (2) shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990. Any area (other than an area

¹ So in original. Probably should be “paragraphs”.

referred to in paragraph (1) or (2) or an area established as class I under the first sentence of section 7472(a) of this title) may be redesignated by the State as class III if –

(A) such redesignation has been specifically approved by the Governor of the State, after consultation with the appropriate Committees of the legislature if it is in session or with the leadership of the legislature if it is not in session (unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area so redesignated enact legislation (including for such units of local government resolutions where appropriate) concurring in the State's redesignation;

(B) such redesignation will not cause, or contribute to, concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and

(C) such redesignation otherwise meets the requirements of this part.

Subparagraph (A) of this paragraph shall not apply to area redesignations by Indian tribes.

(b) Notice and hearing; notice to Federal land manager; written comments and recommendations; regulations; disapproval of redesignation

(1)(A) Prior to redesignation of any area under this part, notice shall be afforded and public hearings shall be conducted in areas proposed to be redesignated and in areas which may be affected by the proposed redesignation. Prior to any such public hearing a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation shall be prepared and made available for public inspection and prior to any such redesignation, the description and analysis of such effects shall be reviewed and examined by the redesignating authorities.

(B) Prior to the issuance of notice under subparagraph (A) respecting the redesignation of any area under this subsection, if such area includes any Federal lands, the State shall provide written notice to the appropriate Federal land manager and afford adequate opportunity (but not in excess of 60 days) to confer with the State respecting the intended notice of redesignation and to submit written comments and recommendations with respect to such intended notice of redesignation. In redesignating any area under this section with respect to which any Federal land manager has submitted written comments and recommendations, the State shall publish a list of any inconsistency between such redesignation and such recommendations and an explanation of such inconsistency (together with the reasons for making such redesignation against the recommendation of the Federal land manager).

(C) The Administrator shall promulgate regulations not later than six months after August 7, 1977, to assure, insofar as practicable, that prior to any public hearing on redesignation of any area, there shall be available for public inspection any specific plans for any new or modified major emitting facility which may be permitted to be constructed and operated only if the area in question is designated or redesignated as class III.

(2) The Administrator may disapprove the redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section or is inconsistent with the requirements of section 7472(a) of this title or of subsection (a) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(c) Indian reservations

Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respect to the provisions of subsection (e) of this section.

(d) Review of national monuments, primitive areas, and national preserves

The Federal Land Manager shall review all national monuments, primitive areas, and national preserves, and shall recommend any appropriate areas for redesignation as class I where air quality related values are important attributes of the area. The Federal Land Manager shall report such recommendations, within² supporting analysis, to the Congress and the affected States within one year after August 7, 1977. The Federal Land Manager shall consult with the appropriate States before making such recommendations.

(e) Resolution of disputes between State and Indian tribes

If any State affected by the redesignation of an area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in any State which the Governor of an affected State or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator

² So in original. Probably should be "with".

to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

42 U.S.C. § 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless –

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance

with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility

for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality

resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

(iv) In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such facility will not cause or contribute to concentrations of such pollutant which exceed the following maximum allowable increases over the baseline concentration for such pollutants:

**Maximum allowable
increase (in micrograms
per cubic meter)**

Particulate matter:

Annual geometric mean19

Twenty-four-hour maximum37

Sulfur dioxide:

Annual arithmetic mean20

Twenty-four-hour maximum91

Three-hour maximum325

(D)(i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any

maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

(ii) In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

(iii) In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such facility will not (during any day on which

the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which exceed the following maximum allowable increases for such areas over the baseline concentration for such pollutant and to assure that such emissions will not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less on more than 18 days during any annual period:

MAXIMUM ALLOWABLE INCREASE

[In micrograms per cubic meter]

Period of exposure	Low terrain areas	High terrain areas
24-hr maximum	36	62
3-hr maximum	130	221

(iv) For purposes of clause (iii), the term “high terrain area” means with respect to any facility, any area having an elevation of 900 feet or more above the base of the stack of such facility, and the term “low terrain area” means any area other than a high terrain area.

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated

under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

(2) Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

(3) The Administrator shall within six months after August 7, 1977, promulgate regulations respecting the analysis required under this subsection which regulations –

(A) shall not require the use of any automatic or uniform buffer zone or zones,

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

(D) shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

42 U.S.C. § 7476. Other pollutants

(a) Hydrocarbons, carbon monoxide, petrochemical oxidants, and nitrogen oxides

In the case of the pollutants hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later than two years after August 7, 1977, promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions of such pollutants. In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.

(b) Effective date of regulations

Regulations referred to in subsection (a) of this section shall become effective one year after the date of promulgation. Within 21 months after such date of promulgation such plan revision shall be submitted to the Administrator who shall approve or disapprove the plan within 25 months after such date or promulgation in the same manner as required under section 7410 of this title.

(c) Contents of regulations

Such regulations shall provide specific numerical measures against which permit applications may be evaluated, a framework for stimulating improved control technology, protection of air quality values,

and fulfill the goals and purposes set forth in section 7401 and section 7470 of this title.

(d) Specific measures to fulfill goals and purposes

The regulations of the Administrator under subsection (a) of this section shall provide specific measures at least as effective as the increments established in section 7473 of this title to fulfill such goals and purposes, and may contain air quality increments, emission density requirements, or other measures.

(e) Area classification plan not required

With respect to any air pollutant for which a national ambient air quality standard is established other than sulfur oxides or particulate matter, an area classification plan shall not be required under this section if the implementation plan adopted by the State and submitted for the Administrator's approval or promulgated by the Administrator under section 7410(c) of this title contains other provisions which when considered as a whole, the Administrator finds will carry out the purposes in section 7470 of this title at least as effectively as an area classification plan for such pollutant. Such other provisions referred to in the preceding sentence need not require the establishment of maximum allowable increases with respect to such pollutant for any area to which this section applies.

(f) PM-10 increments

The Administrator is authorized to substitute, for the maximum allowable increases in particulate matter

specified in section 7473(b) of this title and section 7475(d)(2)(C)(iv) of this title, maximum allowable increases in particulate matter with an aerodynamic diameter smaller than or equal to 10 micrometers. Such substituted maximum allowable increases shall be of equal stringency in effect as those specified in the provisions for which they are substituted. Until the Administrator promulgates regulations under the authority of this subsection, the current maximum allowable increases in concentrations of particulate matter shall remain in effect.

42 U.S.C. § 7477. Enforcement

The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

42 U.S.C. § 7478. Period before plan approval

(a) Existing regulations to remain in effect

Until such time as an applicable implementation plan is in effect for any area, which plan meets the

requirements of this part to prevent significant deterioration of air quality with respect to any air pollutant, applicable regulations under this chapter prior to August 7, 1977, shall remain in effect to prevent significant deterioration of air quality in any such area for any such pollutant except as otherwise provided in subsection (b) of this section.

(b) Regulations deemed amended; construction commenced after June 1, 1975

If any regulation in effect prior to August 7, 1977, to prevent significant deterioration of air quality would be inconsistent with the requirements of section 7472(a), section 7473(b) or section 7474(a) of this title, then such regulations shall be deemed amended so as to conform with such requirements. In the case of a facility on which construction was commenced (in accordance with the definition of "commenced" in section 7479(2) of this title) after June 1, 1975, and prior to August 7, 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to August 7, 1977.

42 U.S.C. § 7479. Definitions

For purposes of this part –

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air

pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

(2)(A) The term “commenced” as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and

either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term “necessary preconstruction approvals or permits” means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term “construction” when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term “best available control technology” means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of “best available control technology” result

in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

*Comments of the Energy-Intensive-Manufacturing
Group on Greenhouse Gas Regulation,
EPA-HQ-OAR-2009-0517 (Dec. 16, 2009)*

December 26, 2009

The Energy-Intensive Manufacturers Working Group
on Greenhouse Gas Regulation

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EPA Docket Center (EPA/DC)
Air and Radiation Docket
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Attention Docket ID No. **EPA-HQ-OAR-2009-0517**
(also: **2009-0472; 2009-0597**)

**Comments of the Energy-Intensive Manu-
facturers Working Group on Greenhouse
Gas Regulation
Regarding the Proposed Prevention of
Significant Deterioration and Title V
Greenhouse Gas Tailoring Rule**

Dear Sir or Madam:

The Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation submits these comments in response to the Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule, 74 Fed. Reg. 55292 (October 27, 2009). Because the comments are relevant to related agency proceedings that would culminate in the regulation of greenhouse gas emitters, including the

energy-intensive trade-exposed (EITE) members of the Working Group, under the Prevention of Significant Deterioration (PSD) regulatory scheme, we will file them in those dockets as well.

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INTRODUCTION AND SUMMARY

“Leakage”

The “carbon leakage” issue, sometimes also referred to as the “international competitiveness” issue, has played a central role in efforts to construct sensible greenhouse gas regulation, including the efforts of the EU, Australia, and most certainly those of the U.S. Congress. The issue is unique.

If not solved, it results in an irrational outcome: environmental regulation that causes economic harm *and* environmental harm. If one country’s regulation of GHGs raises the costs of its energy-intensive and

trade-exposed industries, production can shift to unregulated (or less regulated) countries. This means there is likely either no net environmental benefit, or, if production shifts to countries where factories may in fact be less carbon efficient, net environmental harm.

The implications of leakage are complex and reach beyond both the immediate economic harm to the regulating country and the directly associated global environmental harm. If not otherwise solved, it presents a threat to international trade relations and to international agreements on limiting greenhouse gases as well. In the United States, any unilateral imposition of carbon costs will surely be followed by calls for some form of protection against regulation-caused trade disadvantages. With respect to international negotiations, no country to date – and certainly not the United States – has believed that “unilateral disarmament” of its energy-intensive, trade-exposed sector should *precede* a negotiated settlement.

Indeed, a consensus approach has emerged among those entities that have become first movers in establishing cap-and-trade type carbon regimes, such as the EU and Australia. In these regimes, energy-intensive trade-exposed sectors are effectively exempted from regulation (fully or partially) by the grant of free “allowances” which represent the right to emit greenhouse gases. This has likewise been an integral part of Congress’ efforts to construct cap-and-trade legislation.

A consensus has also emerged as to which industries are most at risk, and this consensus is reflected in all cap-and-trade legislation pending in Congress (again, paralleling the EU and Australian efforts) in the form of objective criteria for energy intensity, trade exposure, and (alternatively) carbon intensity. Analysis and application of these criteria, in turn, has resulted in identification of approximately 45 six-digit North American Industrial Classification Code sectors. These sectors cover primary metals (e.g., aluminum and steel manufacturers), nonmetallic minerals (e.g. cement and glass); chemicals (including nitrogenous fertilizer); pulp and paper, and processing subsectors of some mineral industries (e.g, lime and soda ash). *See*, The Effects of H.R. 2454 on International Competitiveness and Emission Leakage In Energy-Intensive Trade-Exposed Industries: An Interagency Report Responding to a Request from Senators Bayh, Specter, Stabenow, McCaskill, and Brown (December 2, 2009) (“Interagency Report”).¹

The Working Group (whose members are listed in Attachment A) is comprised of leading companies in all of these sectors. As the agency knows, we have in fact worked diligently with EPA, environmental groups, labor, academics, think tanks and Congress to attempt to solve the leakage problem,² with considerable

¹ <http://www.epa.gov/climatechange/economics/economicanalyses.html#interagency>.

² See, generally, Testimony of John J. McMackin on behalf of the Energy-Intensive Manufacturers Working Group on
(Continued on following page)

success. The process is down to a manageable group of issues, which are now the focus of work in the Senate, with valuable input from EPA.

On November 25, 2008, the Working Group filed comments in response to the agency's Advance Notice of Proposed Rulemaking (ANPR) on Regulating Greenhouse Gases Under the Clean Air Act (CAA), 73 Fed. Reg. 44396 (July, 30, 2008). That notice gave every indication that the agency would conduct staged rulemakings that would thoroughly examine carbon leakage before taking action that might cause it. The Working Group's comments emphasized that this was necessary to avoid a potentially irrational and counterproductive outcome:

. . . [With respect to] the leakage issue there is a strong nexus between effective policy, statutory standards and the legal soundness of an ultimate rule. If and to the extent the statute authorizes regulation of greenhouse gases from domestic stationary sources, it also requires effective means to address the leakage issue. The statute cannot

Greenhouse Gas Regulation before the House Committee on Energy and Commerce Subcommittee on Energy and Environment, Hearing on Competitiveness and Climate Policy: Avoiding Leakage of Jobs and Emissions (March 18, 2009); before the House Committee on Ways and Means Subcommittee on Trade, Hearing on Trade Aspects of Climate Change Legislation (March 24, 2009); before the House Committee on Energy and Commerce, Subcommittee on Energy and Environment, Hearing on the American Clean Energy and Security Act (April, 23, 2009).

be presumed to require or authorize a scheme of regulation that undermines its purpose. From the statute's perspective manufacturing facilities that are subject to leakage cannot be considered to "contribute" to global greenhouse gas pollution if their production is in lieu of production that would produce more pollution and if their *regulation* would lead to greater pollution. This will of course implicate the core rationality requirement applicable to any scheme of regulation, and it applies regardless of which of the statutory pathways to stationary source regulation the agency were to choose.

Our comments, we believe, support one practical conclusion above all others. The uniqueness and complexity of the leakage issue make deliberateness essential. If the agency is to proceed with greenhouse gas regulation under the Clean Air Act, it should treat the leakage problem as a special issue, and, as the Agency stages its rulemaking proceedings, it should deal with other sectors first – leaving as much time and flexibility as possible for legislative and international action to address this unique problem. If the industrial/manufacturing sector is addressed, industries subject to leakage should be exempted or otherwise insulated from diversion of production, pending international agreements covering them.

Instead, at some point subsequent to the ANPR, the agency decided on a multi-step course of action that would result in the regulation of all large

emitters under the Clean Air Act, and it did so without any consideration of the economic or environmental consequences with respect to leakage-exposed industries or any other of the large emitters that it proposes to regulate. Thus, in addition to the “substantive” irrationality of leakage-causing regulation, the agency’s heedlessness has added the “procedural” irrationality of reaching the substantive outcome without essential analysis or findings.

***Unacknowledged Decisions,
Unconsidered Issues, Legal Errors***

The path and the destination represented by this tailoring rule and the associated rulemakings,³ especially as they relate to the leakage issue, constitute irrational and illegal agency action of historic dimensions. The agency has decided – or announced it will decide – to regulate greenhouse gases *and*

³ EPA has taken action, or proposed to take action, with respect to GHGs in a series of rulemakings that build upon one another, action in one triggering action in another, etc. *See*, Advanced Notice of Proposed Rulemaking (“ANPR”), 73 Fed. Reg. 55353 (July 30, 2008); Endangerment and Cause or Contribute Findings For Greenhouse Gases under Section 202(a) of the Clean Air Act (the “CAA”), 74 Fed. Reg. 66495 (December 15, 2009); the Light Duty Mobile Source Rule, 74 Fed. Reg. 49454 (September 28, 2009); the Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program, 74 Fed. Reg. 51535 (Oct. 7, 2009); the Tailoring Rule, 74 Fed. Reg. 55291 (October 27, 2009); and the GHG Mandatory Reporting Rule, 74 Fed. Reg. 56260 (October 30, 2009), sometimes together referred to in this comment as the “GHG Rulemaking Suite.”

explicitly energy efficiency in all its aspects under the PSD permit program of the Clean Air Act. This is one of the most consequential regulatory actions ever taken, and the agency has deliberately taken it without consideration of the consequences.

It has done so, that is, without analysis of, or findings concerning, the *economic* or *environmental* consequences. While declining to assess these, the agency has, nonetheless, engaged in elaborately quantified (albeit clearly erroneous⁴) analysis of the *administrative* costs of the regulation, with particular emphasis on the administrative costs avoided by construing, under the “absurd results” and “administrative necessity” doctrines, the statutory terms of 100 and 250 tons to mean 25,000 tons in order to exempt smaller emitters. The agency analyzes the administrative impact of the “exception,” but not the environmental or economic impact of the “rule” – *i.e.*, the regulation of all facilities that remain after giving effect to the (legally problematic) exception.

How does the agency attempt to justify this? EPA’s response is, in effect, that it did not and does not have to inform itself (or others) of the relevant environmental and economic facts because it has had and will have no opportunities to make use of facts –

⁴ See discussion at page 20. The agency implausibly (and inconsistently) contends that no significant administrative costs will be incurred or administrative burdens imposed as a result of the regulation – the extraordinary *expansion* of regulation – of non-exempted, “large” emitters

no opportunities for judgment and thus no need to inform that judgment. The outcome, under the Clean Air Act, was “triggered,” “automatic” or “self-effectuating.”⁵ The statute made EPA do it.

For this to be true in the sense necessary to justify the agency in not making relevant factual findings at *any* step in the process, each step and the whole course would have had to have been determined by forces beyond the agency’s control – *mandated* by the Act. At no point could the agency have exercised informed judgment that could make the outcome other than it is The Clean Air Act *compelled* the result, in all of its aspects and at every stage of the decisional chain, regardless of consequences, the EPA assumes.

The agency claims that its action is so text-driven, inevitable and outcome- indifferent that it need not consider the environmental and economic impact of the outcome. Actually, from all appearances, its action is so outcome-driven that the agency deliberately evaded every opportunity – every *requirement* – to assess and reveal the outcome’s impacts.

Quite apart from the fundamental interpretive errors involved, the agency’s position fails as a matter

⁵ *See, e.g.*, 74 Fed. Reg. 55340 (“[S]uch a rule would trigger PSD and title V. . . . This is because both the CAA PSD provisions and title v provisions are self-effectuating, that is, they each apply by their terms to require sources to undergo permitting requirements.”)

of fact and logic. There is only one step in the decision chain that the agency alleges is self-effectuating – the supposedly determinate, mechanistic connection between issuing of the auto rule and PSD regulation of greenhouse gases by virtue of section 165(a)(4)'s (this is a “best available technology” requirement within Part C, the PSD part of the statute) applicability to “each pollutant subject to regulation under this Act.” Somehow, the agency proceeds from this (erroneous) interpretive contention to effectively contend that all other opportunities for judgment were foreclosed it, ascribing, that is, the supposedly determinate character of one step to the whole march.

The agency's claim that it was and is without opportunities for informed judgment is not factually or logically sustainable. As indicated above, a reader of the 2008 Advanced Notice would have had little doubt, in fact, that the agency intended to conduct a thorough factual inquiry, one encompassing leakage and much else. Since then, at each step, the agency had almost unlimited opportunities to delay, phase, time, condition, trim, shape, limit or moderate its actions – in addition to those “tailoring” steps announced in the tailoring rule. This is true with respect to the endangerment finding, the motor vehicle rule (finalization of which is the actual “triggering” event of the “self-effectuating” outcome), its reconsideration of the Johnson interpretive memo, and the composition of the tailoring rule itself.

Each of these opportunities for judgment – opportunities for action or inaction – would have benefited

from consideration of the environmental and economic consequences of their exercise. So too would the agency's underlying decision to embark on this course in order to reach this destination.

An agency cannot decide whether to try to avoid, mitigate or prudentially delay a problem if it does not assess the problem, and it cannot take an action without considering its most fundamental aspects. *See, Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983) (agency actions are arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem.") An agency cannot avoid the Administrative Procedure Act's or the Clean Air Act's arbitrary and capriciousness standard and associated requirements by asserting that a calculated, multi-stage process designed to create a sweeping and unprecedented regulatory regime is not an "action" at all but, rather, just some kind of passive, automatic eventuality, the only significant part of which lies in crafting its exceptions. In the course of the Advanced Notice's discussion of the application of the administrative necessity doctrine (73 Fed. Reg. 147), the agency correctly quotes the D.C. Circuit's *Alabama Power* decision on the importance of context: "A rational approach would consider the administrative burden with respect to each statutory context . . . [including whether] the statutory *de minimis* threshold should vary depending on the specific pollutant and the danger posed by increases in its emissions." 636 F.2d 323, 405 (1979). Similarly, a rational approach to regulation of greenhouse

gases would consider the consequences flowing from and the options available with respect to each step in the march to regulation of greenhouse gases under the PSD program, and – at *some* point – consider the impact of the outcome.⁶

The agency's position of willful blindness to consequences is not only a violation of administrative law, the Clean Air Act's own arbitrary and capriciousness standard and particular provisions of the Act [as further discussed in Sections II(A) and (B)]. It also represents a particularly bald – and bold – violation of the laws, such as the Unfunded Mandates Reform Act, the Regulatory Flexibility Act, and The Paperwork Production Act, and a series of executive orders, such as EO 12866 – Regulatory Planning and Review, and EO 13132 – Federalism, all of which require identification, analysis and disclosure of the impacts of significant regulatory actions. The agency claims that its obligations under all of these – except for its obligation to assess the laudable impact of its attempted exemption of small emitters from the outcome – are overridden by the ineluctability of the outcome. To prevail, the agency's position that it had no opportunity for the exercise of informed judgment

⁶ The EPA's piecemeal approach to GJG regulation also fails to consider the collateral consequences of each individual rule on parties and sources not the primary subject of the rulemaking, even though EPA recognizes that the collateral consequences will fall on those parties and sources. Just a few of the consequences are noted at the following: 74 Fed. Reg. 55301-03; 74 Fed. Reg. 51547; 74 Fed. Reg. 66501, et seq.

will have to convince the courts that Congress in enacting those laws and the president in issuing those executive orders intended that obvious administrative options, real world consequences, common sense and logic may be ignored in the course of agency decisions whether to comply with them.

Interpretive Errors

EPA's proposed regulation of greenhouse gases under Section I, Part C, the PSD program, thus, is not saved from illegality even if its claim is correct that its issuance of the auto rule will automatically invoke PSD regulation by virtue of section 165(a)(4)'s phrase "each pollutant subject to regulation under this Act." Moreover, that claim is erroneous. It involves a flawed interpretive approach that results in a wrong interpretation.

Proper interpretation would include *all* of the relevant textual provisions of the Act, in their statutory context, an analysis of the statute's structure and function, specifically including relevant differences between different portions of the Act, *and* an examination of the issue at hand in light of the statute's purposes. In other words, proper interpretation would include textual and factual context – an integrated analysis of form and substance. By contrast, the agency's interpretive approach is an exercise in textual formalism that fails to consider relevant text. The agency's deeply flawed interpretive approach assured its deeply flawed conclusion.

The agency’s interpretive stance is an aggressively pure claim of legal formalism – one so pure as to exclude any substantive inquiry in aid of the interpretation, even an inquiry that asks if the supposedly mandated outcome is consistent with the purposes of the statutory scheme. Ironically, EPA assumes this stance that insists on the irrelevance of substantive inquiry with respect to a chain of agency actions⁷ that prominently features in the proposed tailoring rule the absurd-results and administrative-necessity doctrines – the two least “formal,” least “textual” and most “substantive” interpretive approaches known to law.

The agency’s stance is unpersuasive even as textual formalism – it is pure but incomplete formalism. As outlined in Section I below, the agency has failed to incorporate in its analysis any number of statutory provisions more fundamental to the question at hand than the single phrase upon which it hangs its hat. EPA’s interpretation of section 165(b)(4)’s phrase floats by itself, without integration into the statute. The agency has ignored the admonition, made with respect to a different part of the Act, of the Supreme Court in *Massachusetts v. EPA*, 549

⁷ EPA’s unjustified, formalistic claim encompasses the entire GHG Rulemaking Suite, the light duty vehicle rule, the tailoring rule that is the immediate subject of this comment, and the reconsideration of the Johnson memo. In each, EPA assumes the irrelevance of substantive inquiry by presuming that its actions are required by law.

U.S. 497 (2007): “We need not and do not reach the question whether on remand EPA must make an endangerment finding. . . . We hold only that EPA must ground its reasons for action or inaction in the statute.” EPA’s interpretation, and the historic decision to regulate greenhouse gases under the PSD provisions of the Clean Air Act, must be grounded in the statute, not suspended from a single phrase.

Thus, the agency cannot subject greenhouse gases to PSD regulation by *indirection* – via a textual link that it evidently saw as a pathway eliminating the “normal” legal and factual issues that would be involved in a straightforward attempt to regulate greenhouse gases under the PSD provisions. *Could* the agency do this directly? That is, could the agency, in a subsequent proceeding, marshal the factual and legal arguments necessary to support PSD regulation of greenhouse gases? We think not – especially with respect to leakage-exposed industries. That conclusion is bolstered by the agency’s discussion of the tailoring rule, which explicates two fundamental ways in which the PSD provisions do not make sense for greenhouse-gas regulation. Moreover, there are at least five essential statutory elements of regulation under the PSD provisions of the Act, and the agency has met none of them. It is unlikely that it could meet them. We discuss this in Section (I)(F).

Indeed, it is possible that it was precisely because the agency believed that it was unlikely to be successful in a direct attempt to regulate greenhouse gases under the PSD provisions of the Act that it

decided on its indirect route. In any event, the evasion of the PSD elements that would be occasioned by the agency interpretation of 165(a)(4) is another reason why that interpretation cannot be correct. It would be irrational for a statute to be constructed such that the fundamental requirements of one part can be evaded by the automatic effect of a (gratuitous) decision reached under another part for a different purpose. Statutes should be presumed to be rational.

The Decisions That Remain

Ultimately, the agency must, in connection with at least one of the three decisions it has not yet finalized (in two different rulemakings), slow down, make the required assessments, and decide on the shape of future regulation *after* its implications, both environmental and economic, have been fully identified, explored and explained. The agency, that is, has three remaining opportunities for the exercise of informed judgment.

The first decision is whether, and in what form, to issue the auto rule. Issuance of the auto rule is what the agency contends is the “triggering” event for PSD regulation of carbon emitters. Though the agency has stated when it expects this triggering event to occur (by the end of March), it has not occurred yet. As other commenters have pointed out, because the regulatory benefits of the auto rule can be achieved by the parallel regulation the agency is coordinating

with the National Highway Traffic Safety Administration, the only significant purpose of issuing the CAA portion of the rule is trigger-pulling.⁸

The complex issues driving the environmental and economic consequences of PSD regulation of greenhouse gas emissions – specifically including leakage – that should be explored prior to triggering regulation were precisely and elaborately set out in the 2008 ANPR. The agency should respect the wisdom and honor the intention of the Advanced Notice’s observations on “timing”:

. . . EPA strongly believes that we should be prepared the first time we regulate one or more GHGs under any part of the CAA to explain our approach to permitting, including full consideration of the ideas presented above [including, specifically, exemption of leakage exposed industries] for responding to the PSD implementation challenges. Coordination of the timing of tailoring strategies for PSD or nonattainment NSR to

⁸ Put another way, given that the environmental benefits from the auto rule can be achieved exclusively from the NHTSA portions of the rule, the agency enjoys discretion as to whether *it* must also regulate. In turn, the agency’s syllogism – that it has no discretion as to autos, and therefore has no obligation to consider the full costs and consequences of doing so, and, *ipso facto*, imposing PSD, is wrong. Because the agency does in fact have discretion, it can only exercise it in a lawful manner – *i.e.*, after fully identifying and examining the consequences of its action. Any other course is arbitrary, capricious and not in accordance with law.

match the effective date of the first GHG regulation is necessary to minimize confusion on the part of sources, permitting authorities, and the public, to provide for as effective a transition as possible, and to ensure that the strategies intended to avoid problems can be in place in time to prevent those problems. 73 Fed. Reg. 44510.

The second open decision is whether, assuming the agency maintains course in issuing the auto rule, it reconsiders the automatic “triggering” effect of that action that it asserts. As set out more fully below, and in submissions of other parties in response to both this rulemaking and related rulemakings, the agency’s position on this issue is inconsistent with the statute’s text and is otherwise erroneous.

The third opportunity is likewise reflected in the above passage, in its reference to “tailoring strategies.” If the agency maintains its proposed interpretation that the auto rule triggers PSD regulation, it should exempt the manufacturing/industrial sector (16 percent of emissions), or, at the least, leakage-exposed manufacturers (nine percent of emissions), through an extension of the tailoring rule. Failing that, consideration of regulation of the manufacturing/industrial sector, or at the least of energy-intensive trade-exposed industries, should be delayed until the “second phase” of the agency’s proposed regulation, which is to occur, according to the tailoring rule, six years after the regulation’s first effective date.

A failure to exempt EITEs will be arbitrary, capricious and otherwise contrary to law. As we will discuss in some detail, regulating EITEs under the PSD program would be far more “absurd” in terms of the statute’s purposes, and exempting them far more consistent with its language, than the tailoring steps the agency proposes. One key element of that conclusion is this: during the six-year period of the agency’s planned first phase and thereafter, energy-intensive trade-exposed manufacturers will be achieving, *without regulation*, greenhouse-gas emissions reductions that exceed the President’s goals.

The “Resulting Regulatory Scheme”

The unprecedented nature of the proposed regulation makes careful analysis of it essential. Adding greenhouse gases and energy efficiency to the PSD regulatory regime will fundamentally alter it – exponentially increasing its existing problems and creating new problems of a different kind.

The existing PSD New Source Review permit program is prescriptive, inefficient, selective, “discretionary,” public, and political. It is prescriptive in that it involves mandating of specific “best available” technology. It is “inefficient” in economic terms primarily for the same reason. It is selective in that it does not apply across the board to all facilities or all competitors – only those that build a new facility or make a modification that is other than routine maintenance that does not increase emissions. It is

“discretionary” in that it is administered on a “case by case” basis by (largely state) permitting authorities who have discretion to weigh local concerns and economic impacts. It is “public” in that it requires public notice and opportunity for participation. It is “political” in the sense that public officials, responding to constituent concerns, often weigh in.

As for its other salient characteristics, in the preamble to the tailoring rule (in that portion where the agency is arguing for the reasonableness of exempting emitters under 25,000 tons), EPA describes PSD regulation as often a “complicated, resource-intensive, time-consuming and sometimes contentious process.” It is also marked, again using EPA’s terms, by “uncertainty and delay.” As the agency admits, even simple applications take months and complex ones can take more than a year. And, as the ANPR discusses (and we will discuss below), the program contains perverse incentives that delay both economic and environmental improvement to manufacturing facilities – because the permit requirement can be avoided by a decision not to make capital investments, operational improvements or otherwise to restrict production.

That said, the *existing* regime is of relatively limited scope. By and large “best available control technology” for the pollutants regulated to date involves “bolt on” equipment, usually on stacks. The costs associated with it are known with some precision, and it leaves alone the core of a facility’s operation.

Adding greenhouse gases, under the agency's conception, would change everything. As the agency clearly indicates, it believes this gives it license to regulate energy efficiency and the related aspects of industrial production of process industries, including: combustion, "processes" themselves, input materials composition, use of cogeneration and combined heat and power, and anything else that might affect the production of heat or the chemical reactions that constitute an energy-intensive industrial manufacturing process. The agency even suggests its regulation may encompass what "product" a facility produces as well – presumably because some products and product designs are less carbon-intensive than others.

In energy-intensive process industries in particular, these things (even excluding what "product" to make) are in fact the essence of the business, the principal focus of engineering decisions and operations management. Because, unlike the case for all traditionally regulated pollutants, the regulation *or management* of carbon emissions does in fact rest primarily on the regulation *or management* of energy efficiency and underlying chemical processes, the agency's proposal would create a scheme of regulation of almost unlimited intrusiveness, drawing within its ambit virtually every judgment that matters for an industrial facility.

A fundamentally different regulatory dynamic than now exists within the PSD program would be created. Industrial facilities have little or no economic incentive to limit the pollutants heretofore regulated

by the CAA. With respect to greenhouse gases, the limitation of which correlates closely with energy efficiency, EITEs have powerful economic incentives. It is a scheme of second-guessing business judgments already heavily incentivized to produce energy efficiency, and it is unnecessary.

***A Threshold Unconsidered Issue:
PSD Regulation of EITEs is Not Needed.***

The agency does not need to regulate the greenhouse gas emissions of energy-intensive trade-exposed industries under the PSD program. Because energy is so important an element of these industries' costs, because domestic and international competition necessitates controlling that cost, EITEs have ample economic incentive to reduce their carbon emissions. "PSD-Unregulated" American energy-intensive trade-exposed industries are not part of the problem of the growth of greenhouse gases; they are a vital part of the solution.

The agency would be right to seek evidence of that proposition. Fortunately, it is available. As reported in the December 2 Interagency Report referred to above, the aluminum, cement, chemicals, glass, iron and steel and paper sectors achieved carbon efficiency reductions of 10-35 percent between 1998 and 2006. *Id.*, at 19. Moreover: "*Overall, taking into account both changes in output and emission intensity, EIA projects that the total energy-related CO2 emissions of the six sectors . . . would decline*

nearly 20 percent from 1996 to 2020 under business-as-usual circumstances. . . .” Id. (emphasis added). This is an amount exceeding the President’s goal of 17 percent reductions in emissions by 2020.

PSD regulation of EITEs is unnecessary. To the extent it would lead to leakage, of course, it would not be just unnecessary – it would be *environmentally* counter-productive, quite apart from its potentially devastating economic impacts.⁹

Other Considerations

There will be other consequences of this agency action, consequences that are less tangible but every bit as real and as damaging. Under the agency’s grandiose and flawed conception, PSD regulation of industry energy efficiency will create a new paradigm of government-industry relations, redefining that relationship as well as redefining, as a result of the public permit and hearing process, the nature of the relationship of the public and private spheres with respect to the planning and operations of American industry. What will be the effect of these changes? What will be the effect on the American “business climate”?

⁹ By, contrast, current legislative proposals within a cap-and-trade framework seek both to counter leakage and to increase efficiency incentives by use of sector-average-efficiency benchmarks to control allowance allocation.

There are other dimensions to this proposed action worthy of consideration by the agency. The proposal would create a regulatory scheme featuring virtually unlimited potential intrusiveness coupled with virtually unrestrained discretion. Would the resultant scheme – discretionary, uncertain and political – adequately reflect values represented by the concept of the rule of law? Will it instead resemble – or have tendencies – of regimes that are not reflective of those values? And what of constitutional values? Does the agency’s proposed action, the action of an entity created for an important but limited purpose by an executive order, give due respect to Article I, which embodies the idea that Congress shall make the laws that govern us?

Moreover, there are credible indications that issuance of the regulation – or rather the decision to follow the regulatory chain that results in PSD regulation of greenhouse gases – was intended to pressure Congress and stakeholders to accept cap-and-trade legislation. To the extent this is true, what are the implications for judicial review of the agency action? For instance, to the extent the regulation was intended to be coercive, and its coercive force is enhanced by its unreasonableness (limited somewhat by tailoring to exclude small businesses and achieve some political plausibility), is it entitled to deference?

Finally, there is another, prudential, concern that we ask the agency to consider, or reconsider. We believe that the most likely outcome of judicial review of this agency action, should the agency persist in it,

is that the courts will overturn the action in full, striking down the attempt to regulate GHGs under the PSD program. However, we acknowledge, and the agency must acknowledge, that there is some risk that the courts – even if they do nothing else – will overturn EPA’s attempt under the absurd-results and administrative-necessity doctrines to rewrite the statutory scheme to exclude all emitters under 25,000 tons. What then? The agency – and a great swath of America including small businesses, building owners and farmers – will face, just as the agency details in the tailoring preamble, an absurd situation. It will be burdensome and costly in ways that affect more than “administration.” In that event, how does the agency stop a “self-effectuating” disaster it has already “triggered”?

I. The Agency’s Proposed Regulation of Greenhouse Gases Under The PSD Provisions of the Clean Air Act Is Not Authorized by the Act, is Arbitrary, Capricious and Is Otherwise Not in Accordance with Law.

A. The Agency’s Arbitrary and Capricious Failure to Consider Essential Issues is Not Excused By Its Claim of a “Self-Effectuating” Step in the Process.

The Introduction and Summary outlines our position, consistent with other commenters, that the agency has failed in its obligation to examine and explain the consequences of its actions and the reasons it has chosen them. It has failed even to address

issues absolutely fundamental to the regulation of greenhouse gases under the PSD program. It is therefore arbitrary, capricious and not in accordance with law, under the principles and authorities cited in the Introduction and Summary.

The agency's defense, in effect, is that it made no choices – committed no acts of judgment – that would have benefited from facts and analysis with respect to the environmental and economic consequences of this historic, contentious, intrusive and inefficient new frontier in regulation. It was only doing what the law required.

As the Introduction and Summary indicates, that is not the case. The agency had innumerable opportunities to do other than what it has done. It could have shaped, conditioned delayed or phased this outcome. Or, it could have decided not to do this at all, and the Clean Air Act would not have stood in the way – so long as its judgment was considered and supported. *Informed* judgment has been needed from the first step on this regulatory path to PSD regulation, and the remaining steps likewise require it.

Note, as the Introduction and Summary indicated, that this is true quite apart from the question of whether the agency is correct in its claim that one step in the decisional process, the connection between issuance of the auto rule and “triggering” of Part C PSD regulation, is “self-effectuating.” Even if that trigger operates just as automatically as the agency says it does (and it clearly does not), the agency is not

excused from informing itself of the consequences of pulling the trigger. The alleged mechanistic and determinate character of that one step cannot be ascribed to the rest of the decisional process. At some point, before it effectuates it, the agency had and has obligation to consider the impact of the outcome.

That the outcome is not self-effectuating can be seen from a consideration of the profound discretion the agency had with respect to each of the other steps – whether to take them, whether to limit them to their context, whether to condition them, etc. These include – to list only some of the more obvious : (i) whether to make an endangerment finding (a step the Supreme Court said could be avoided with “some reasonable explanation as to why it cannot or will not exercise its discretion” to make it); (ii) whether to limit or condition that finding, per its statutory terms, to the context of “any air pollutant *from any class or classes of new motor vehicles or new motor vehicle engines*, which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. section 7521(a)(1) (emphasis added); (iii) whether to issue the CAA portion of the auto rule; and (iv) whether to exempt leakage-exposed (at a minimum) industries under an extension of the proposed tailoring rule.

At some point, before PSD regulation of greenhouse gases is effectuated, the agency needs to answer these questions, and many like them: What are the economic and environmental effects of PSD

regulation of greenhouse gases, especially to the extent it causes leakage? Is regulation workable and sensible within the statute's structure, especially as it relates to leakage? What problems, including counter-productive outcomes, will it cause? Can they be avoided or mitigated? Is regulation consistent with the statute's expressed purpose to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare *and the productive capacity of its population?*" 42 U.S.C. 7401 (emphasis added). Is it consistent with Part C's expressed purposes to "insure" a proper balance between environmental protection and economic growth, and to "assure" that PSD permits do not allow for an increase in air pollution without "careful evaluation of all the consequences of such a decision?" 42 U.S.C. 7470.

One of the commenters has referred to the agency process underlying the emergence of this regulation as a shell game. It is an apt analogy. The pea is an analysis of the economic and environmental impacts of this historic expansion of regulation. The shells are each step in the process that would produce that regulatory scheme. One can pick up every shell, and there is nothing there. There is no excuse for this in law or common sense – and certainly it is not excused by the claim of one self-effectuating step in the chain of decision, whether that particular claim is supportable or not.

B. Issuance of the Auto Rule Does Not “Trigger” PSD Regulation.

The claim is not in fact supportable. The phrase “each pollutant subject to regulation under this Act,” contained in a subsidiary provision of Section I, Part C of the Act, which establishes the PSD program, cannot properly be read to require PSD regulation of greenhouse gases because of the issuance of the auto rule. The erroneous interpretive outcome is driven by a fundamentally flawed interpretive method.

In yet another remarkably casual approach to an historic regulatory decision, moreover, the agency does not so much argue its position as assert it: it is an exercise in implicit statutory construction when explicitness is called for. Given that the agency’s position is not that it *may* regulate greenhouse gases under the PSD program but that it *must*, it carries a heavy burden of statutory construction; EPA does not even attempt to shoulder it. Given that the agency’s interpretation leads to a remarkable conclusion, *i.e.*, that the statute requires regulation of greenhouse gases under the PSD program without an examination of whether the resultant regulation makes sense, the interpretation should be rigorously constructed. EPA’s disregard for the facts related to so historic a regulatory turn is paralleled by its disregard for the textual and interpretive issues presented.

The agency’s interpretation is simplistic in that it relies on only one textual reference, when many –

many that are more *fundamental* – are relevant. It is formalistic in that it abjures any substantive inquiry in aid of its interpretation. It never asks, that is, which of possible interpretations makes sense when their consequences are evaluated in light of the statute’s purposes.

In a matter that is of such importance to the statutory scheme and that is potentially at odds with the statute’s purpose and structural integrity, statutory interpretation itself must be informed by basic facts that go to the statute’s purposes and their effectuation *vel non* in the matter at hand, as well as by *all* relevant text. This is especially the case here since, as the agency concedes in its preamble to the tailoring rule, Congress never contemplated the regulation of greenhouse gases under the PSD program. The agency’s interpretive position is, in effect: Congress never contemplated the consequences of applying Part C to greenhouse gases, and in deciding whether it applies neither shall we.

The normal deference courts afford an agency in interpreting the statute it administers results not so much from any claim the agency might have to special legal expertise as an abstract matter as from its knowledge of the operation of the statute as a practical matter, in context. *Cf., Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Administrative law, in particular, is grounded in reasonableness, common sense, context and the application of expertise and the social sciences to complex situations. It is not amenable to formalistic

claims that *ignore* realities, context and impacts in order to *avoid* economic analysis, environmental analysis or any other form of disciplined reason that policymakers normally use to assess their policies.

For example, a proper analysis would have given great weight to the conclusions reached in the preamble to the tailoring rule. While the agency did not analyze the economic and environmental impacts of PSD regulation of greenhouse gases, it did analyze the “regulatory burden” narrowly construed. It finds that when PSD regulation is applied to greenhouse gases it produces in this dimension “absurd” and unworkable results. The results are so absurd and unworkable that the agency feels it necessary to interpret 100 and 250 tons as 2,500 tons in order to exempt most emitters *and* to ask for comment on eliminating the basic “case by case” structure of the statute because it too appears to the agency to be unworkable. These things should have led the agency, instead, to question its interpretation of the automatic effect of the section 165(a)(4) phrase in question.

Had the agency examined the economic and environmental implications of regulating greenhouse gases under the PSD program, especially with respect to leakage-exposed industries, it would have found even more far reaching absurdities. We examine some of those in Part IV *post*. Those additional “absurdities” – ways in which the regulation will be counterproductive, harmful, wasteful, costly, unworkable and unnecessary – would, in a proper interpretive approach, further demonstrate that the agency’s interpretation

is erroneous. Because Congress did not contemplate regulation of greenhouse gases under the PSD program when it enacted the Clean Air Act, the question of whether the PSD program applies in this new context is inescapably a question of whether that outcome makes sense in light of the statute's – and the PSD program's – purposes, structure and operation.

The agency's interpretation clearly fails in purely textual terms. Its fundamental error is a failure to consider other aspects of the statute's text – and particularly Part C's text – that are more important. Many commenters have explicated these errors. *See, e.g.* Comments of (Certain) Associations, Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, Docket: EPA-HQ-OAR-2009-0587 (December 7, 2007), at 2-7; and Comments of Clean Air Implementation Project in the same proceeding (December 7, 2009).

The agency's position relies on the phrase “each pollutant subject to regulation under this Act” in an internal section, section 165, of Part C, the PSD part of the Act. It ignores those provisions of Part C that define its purpose and reach, sections 160 and 161. Those sections cannot reasonably be interpreted to cover regulation of GHGs without the meeting of statutory preconditions that the agency has not met, such as the setting of air quality standards and implementation plans; PSD, on a fair reading of the statute, applies only in attainment and unclassifiable

areas. Moreover, an adequate examination of section 160 would have shown the agency that Part C cannot reasonably be said to encompass regulation of greenhouse gases, especially to the extent that it can cause leakage. As our discussion in Subsection C below argues, the agency's action in fact *violates* specific elements of Section 160.

Further, the agency's textual assertion does not take into account the prefatory language of section 165 itself which refers to permit requirements "in any area to which this part applies." The agency, in addition, assumes that 165(a)(4)'s phrase "subject to regulation under this Act" is to be read as "subject to regulation *under any part* of this Act," as opposed to the functionally more sensible "subject to regulation *under the terms and conditions* of this Act." In short, the agency wrongly assumes that the doubly subordinate and ambiguous-in-isolation reference in section 165(a)(4) to describe regulated pollutants subject to its BACT requirement is so textually powerful that it obviates any need to examine PSD regulation of GHGs in light of the structure and purpose of the Act, as well as other portions of the text..¹⁰ Proper

¹⁰ Other textual elements the agency ignores, and which constitute independent and mutually reinforcing reasons for the agency to abandon its interpretation include:

a. According to the agency, Congress intended PSD to apply to large sources, focus on criteria pollutants, and be a manageable program of no more than several hundred permits issued nationwide each year. *See*, 74 Fed. Reg. 55291, 55304, 55308, and 55309. The agency discussed at great length how

(Continued on following page)

interpretation of the Act, by contrast, demonstrates that PSD regulation of Greenhouse gases is not “automatically” triggered by issuance of the auto rule.

Finally, the error of the agency’s interpretation is shown by its consequences with respect to the statute’s integrity. As discussed in Section (I)(F), “direct” application – as opposed to “indirect” application through the 164(a)(4) interpretation – of the PSD

unsuited the PSD and Title V programs are for regulating GHGs for stationary sources in the ANPR, 73 Fed. Reg. 55353 (July 30, 2008). As the agency pointed out in the preamble to the proposed Tailoring Rule, with the influx of additional applications for PSD and Title V permits that could be required under its interpretation, permitting authorities will not be able to comply with the requirement that they issue PSD permits within 18 months and Title V permits within 12 months. 42 U.S.C. 7475(c); 42 U.S.C. 7661b(c); 74 Fed. Reg. 55291, 55301, 55303, and

b. The structure of the Clean Air Act was carefully set by Congress to protect “air quality regions.” Virtually every statutory requirement flows from a characterization of existing regional air quality in comparison to safety “standards.” The authorities and responsibilities to investigate the impacts of pollutants on public health and welfare are set forth in Title I. *See*, e.g., Section 102,, 104 (specifically addressing fuels and vehicles), 105 (grants), 107 (states’ responsibility for air quality), 108 (in addition to generally identifying the criteria pollutants, Section 108(e) requires EPA to include emissions from mobile sources in its analyses of the impacts of a pollutant). Congress did not include any of these authorities addressing air pollutants generally in Title II. Any evaluations required under Title II are dependent upon analyses performed under Title I are directly related to mobile sources and fuels. Thus there is no intent that requirements under Title II should activate stationary source programs.

program to greenhouse gases would require the agency to meet at least five prerequisites it has not met and likely cannot meet. It would be irrational for a statute to be constructed such that a decision made under one part for a different purpose could evade fundamental requirements for applicability of another part. Statutes should be presumed to be rationally constructed.

C. EPA's Failure to Consider Leakage Also Violates Several Specific Provisions of the CAA.

The leakage issue has a special status with respect to the illegal nature of the agency's action in subjecting large emitters to PSD regulation without factual inquiry. Two characteristics of leakage underlie this special status: first, the special irrationality of an environmental regulation that can cause environmental harm, and, second, the unique vulnerability to economic harm of affected firms because of their trade exposure. On the latter point, in other words, EITEs will not just suffer the generalized harm that other businesses may experience as the result of regulation-caused suppression of economic activity, they will also experience *the diversion* of production elsewhere.

As indicated above, these two unique characteristics have obvious implications for the general argument concerning the illegality of the agency's action under the Administrative Procedure Act's "arbitrary and capricious" standard. Ignoring leakage, moreover,

means the agency has also clearly violated the Clean Air Act itself.

It is unusual that a regulatory statute contains not only provisions creating obligations for cost-benefit analyses but also statutory mandates of “careful consideration” of consequences. The CAA has both, in three separate provisions, each tied directly to Part C, the Prevention of Significant Deterioration provisions of the Act.

The first two are contained in Section 160 (42 U.S.C 7470) which sets out the purposes of PSD regulation. Note these two provisions’ use of the terms “insure” and “assure.”

Sec. 160. The purposes of this part are as follows:

...

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

...

(4) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

The third provision is Section 317 of the Act (42 U.S.C. 7616) that requires an economic impact assessment “as extensive as practicable” of, among

other things, “any regulation under Part C of title I (relating to prevention of significant deterioration of air quality).”

As the agency has summarized, “. . . PSD includes a set of provisions that specifically state ‘the purposes of [the PSD program],’ which are to balance environmental protection and growth.” 74 Fed. Reg. 55305. In the terms of section 165(3) the agency cannot “insure” a proper balance of economic growth and environmental protection without assessing leakage. In terms of section 165(5) it cannot “assure” that a PSD permit does not itself cause increased air pollution without an understanding of leakage and a workable means of preventing it.

D. The Agency’s Failure to Consider Exempting Leakage-Exposed Industries Under the Tailoring Rule Is Arbitrary and Capricious And Violates the CAA.

With respect to the tailoring rule: it was arbitrary and capricious for the agency not to consider exempting – or relegating to its planned second phase pending study – leakage-exposed industries. The essence of the agency’s position that it should consider exemption or phased delay of small-source regulation under the “absurd results” and “administrative necessity” doctrines is that the environmental benefits of regulating small emitters are not worth the administrative costs of regulating them. This argument is tepid in relation to that for considering the

exemption or phased delay of EITEs: without that form of tailoring both environmental and economic harm is threatened.

It should be noted that, as the agency is aware, it is not just the headline-grabbing exemption of small emitters that the agency proposes to tailor from PSD regulation. The agency is considering, and has asked for comment on, replacing the statute's case-by-case requirement with various other regulatory approaches, including "general permitting" and "presumptive BACT." In language that will be quoted in full in a later section of these comments, that agency points out that the BACT case-by-case permitting requirement "can often be a complicated, resource-intensive, time-consuming, and sometimes contentious process." 74 Fed. Reg. 55322. So, for this and related reasons, the agency is considering eliminating it: "Although this type of presumptive BACT approach – one that does not permit individualized, source-specific determinations – would depart from a literal application of the statutory requirements for BACT, it may nevertheless remain closer to Congressional intent for the PSD program than maintaining the applicability threshold at a level higher than the statutory level."

*Id.*¹¹⁻¹²

¹¹ In fact, the rigidity involved in the agency's alternatives would make virtually all of the biggest problems with PSD regulation of industry worse and, in particular, would make it even more incapable of dealing rationally with leakage.

The tailoring rule, of course, partakes of the principal deficiency of the entire decisional chain – failure to assess the environmental and economic consequences of PSD regulation of greenhouse-gas emitters. Nonetheless, the agency, in order to make its “absurd results” and “administrative necessity” arguments for excluding small emitters, makes elaborate calculations of the administrative burden placed on permitting authorities. The agency does not measure the foregone environmental benefits of regulating small emitters, which alone renders its effort of questionable validity. But, more to the point here: EPA makes a patently erroneous finding with respect to the “administrative burden” on the administrators and on the permittees of adding greenhouse gases to the existing permitting process.

The impact will be dramatic, as we will discuss in subsequent sections, to the point that we believe the process’ complexity will be beyond the capacity of the permitting authorities. This is true with respect to all large emitters because of the vast expansion of relevant considerations stemming from the agency’s unprecedented foray into energy efficiency, and it is

¹² It is worth noting that the agency’s examination in the above instance of the advisability of departing from the “literal application” of the statute in order to get “closer” to Congressional intent involves the same section of the statute in which appears the phrase “regulated under any part of the act”, a phrase so inviolable it needn’t even be examined, in the agency’s view, in light of the statute’s structure and intent, regardless of the consequences.

especially true with respect to leakage (as we will discuss below) which, done rationally, would involve a proceeding that resembles a contested antitrust merger proceeding involving global companies. At any number of points in the preamble, in fact, the agency recognizes the burdens of the greatly expanded and complex permitting universe.

Nonetheless, when it comes to making a finding with respect to the administrative burden on permit authorities the agency makes the following literally incredible and implausible assertion, concluding there will be none:

We calculated the additional burden in workload hours and costs based on the per-permit hourly workload estimates and costs based on the per-permit hourly workload estimates and costs for PSD permitting from the PSD ICR. Of the group of 130 new sources we estimated the number of industrial sources and of commercial or residential sources. *For the industrial sources, we assumed that permitting authorities would need to spend 301 hours, on a per-permit basis, for issuing permits that cover both the GHG and non-GHG emissions. This is the same amount of time that permitting authorities need to permit non-GHG emissions from industrial sources. We did not assume additional workload requirements for the GHG emissions because permitting authorities will have some experience with the emissions units, sources and configurations of these facilities. Also, although there will be new and*

unique GHG sources to consider at some of these facilities, this experience should provide some administrative efficiencies in preparing and processing GHG-based permit applications for these facilities. . . . 74 Fed. Reg. 55331 (emphasis added).

The unreality of that assertion is paralleled by the agency's claim with respect to the burden on the permittees – large emitters. In the following passage, one of the most important passage in the whole cavalcade of agency pronouncements on the path to PSD regulation of greenhouse gases, the agency is addressing all economic burdens and costs on emitters, not just the administrative costs of the permitting process. In other words, this is its explanation for not considering the potentially devastating economic consequences of its actions. The passage speaks for itself – but for the point that when the agency refers to the absence of findings of impacts in and of “this rulemaking” it is essential to bear in mind that this applies to all of its associated rulemakings, individually and collectively, as well:

“IX. What would be the economic impacts of the proposed rule?

This section of the preamble examines the economic impacts of the proposed rule including the expected benefits and costs of the proposed rule on affected entities. This proposed rule lifts, for a period of 6 years, the burden to obtain a title v operating permit required by the CAA for smaller sources of GHGs and the burden of PSD requirements

for smaller new or modifying sources of GHGs. *For larger sources of GHGs, there are not direct economic burdens or costs as a result of this proposed rule, because requirements to obtain a title v permit or to adhere to PSD requirements of the CAS are already mandated by the Act and by existing rules and are not imposed as a result of this proposed rulemaking.*” 74 Fed. Reg. 55337 (emphasis added).

At every stage in the agency’s march to regulation of greenhouse gases under Part C of the Clean Air Act the deed seems to exist in a loop of never-before-regulated, already regulated, and automatically regulated – without human agency.

Examination of EPA’s argument for exempting small emitters shows that for the agency not to consider exempting EITEs is arbitrary and capricious. The core of the agency’s rationale for exempting small emitters is that (although they have not assessed it) the environmental benefits of regulating small emitters cannot be great – and thus cannot outweigh the administrative burden associated with regulating them – because small emitters represent only seven percent of total stationary source emissions, and those small emitters will be “reducing” emissions anyway because of cost-saving pressures:

It is not possible at this time to quantify the social costs of avoided BACT [resulting from the proposed exemption]. However we note that the universe of possible emissions that would be regulated by sources excluded

under the tailoring rule is small compared to those that would remain subject to PSD. The sources excluded in the first phase of this proposal comprise only 7 percent of total stationary source GHG emissions, while 68 percent remain subject to regulation. Furthermore, we expect the emissions differences due to BACT controls for such sources to be relatively small due to the lack of available capture and control technologies for GHG at such sources that are akin to those that exist for conventional pollutants and sources, as well as the likelihood that even in the absence of BACT such sources would already be installing relatively efficient GHG technologies to save on fuel costs. . . . 74 Fed. Reg. 55340.

Similarly:

Moreover, . . . reduction from these small sources will still be occurring, notwithstanding the fact that permitting requirements would not apply to them. 74 Fed. Reg. 55338-55339.

The case for exemption of EITEs is far stronger. All EITEs (including would-be-exempted small EITEs) account for seven percent of total U.S. direct emissions. As indicated above and as will be discussed in more detail below in Section W, because EITEs' existing incentives are far greater than those of the average non-energy-intensive and non-trade-exposed emitter whether large or small, EITEs in the absence of regulation will, according to Energy Information

Agency projections, reduce their carbon emissions by 20 percent between 1996 and 2020. The carbon efficiency improvements of EITEs has been so strong that since 1980 the entire manufacturing/industrial category that includes them is down in total emissions while other sectors (including sectors that contain the majority of the exempted small emitters) are up on average over 30 percent. Despite the impression given by the preamble, the historical evidence is that the exempted small emitters that are not EITEs, unlike EITEs, will be substantially *increasing*, not decreasing, their total GHG emissions over the six-year exemption period – despite whatever energy-savings come from cost incentives.

Moreover, regulating EITEs, unlike regulating small emitters in other sectors, involves potential environmental harm, not just economic harm or administrative burden. And, as indicated above, because of exposure to foreign competition, EITEs face far greater economic harm from PSD regulation than does the average small emitter. Finally, unlike the situation with cap-and-trade or a carbon tax, because PSD regulation applies only to some domestic manufacturers it will cause “domestic leakage” under which production will move from more carbon-efficient regulated producers to less carbon-efficient domestic producers.

E. The Agency's Failure to Assess the Impact of Its Action Violates Numerous Statutes and Executive Orders Requiring Analysis of Significant Administrative Actions.

There are any number of statutes and executive orders that require executive agencies to examine and report on the impacts of their important actions. To evade them the agency resorts to variations in its familiar argument: the exception must be analyzed but not the rule, and it has taken no action because the result is self-effectuating. To prevail against charges that it has violated these mandates the agency faces an impossible task: to show that Congress in passing these laws and the President in issuing these directives were not concerned with real-world consequences and would be satisfied when the impact analysis never emerges even though the regulatory revolution surely does. Other commenters have explicated these errors, and we endorse and adopt those arguments. *See, e.g.*, Comments of Peabody Energy Company, Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, Dkt. No. EPA-JW-2009-0472 (November 25, 2009) at 7-10 [discussing violations of E.O. 12291 – Federal Regulation, EO 12866 – Regulatory Planning and Review, E.O. 13211 – Energy Effects, Unfunded Mandates Reform Act, EO 13132 – Federalism, and the Regulatory Flexibility Act]; and the Comments of the National Mining Association (November 27, 2009) in the same docket, at 4-7.

We briefly highlight two examples, Executive Order 12866 and the Unfunded Mandates Act.

Executive Order 12866 – Regulatory Planning and Review is meant both to force agencies to consider the costs and benefits of their proposals as well as to provide other parts of the government with a basis for evaluating those actions. It applies to all actions that are “significant” from both a legal and a policy point of view. In its July 2008 ANPR the agency correctly stated, “In the event EPA pursues GHG emission reduction policies under the CAA or as a result of legislative action, we are required by Executive Order 12866 to analyze and to take into account, to the extent permitted by law, the costs and benefits of the various policy options considered.” 73 Fed. Reg. 44414. Why did it fail to do so?

Whatever its motivation, its response is a replay of the shell game. Below is EPA’s description of its compliance with the Executive Order from the tailoring rule preamble. Note that the “action” and “costs and benefits” to which it refers relate to the proposed exemption, and the particular cost/benefits it calculates go solely to administrative burden:

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action” because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have

been documented in the docket for this action.

In addition, EPA prepared an analysis of the costs and benefits associated with this action. This analysis is provided in the docket for this action and the analysis is briefly summarized in section IX of this preamble. [Section IX is the section excerpted above.] 74 Fed. Reg. 55348.

Can the agency seriously believe that the exception is a “significant regulatory action” but the action to which it is an exception is not? That exempting small emitters raises novel legal or policy issues but regulating all other emitters does not? Can the Agency seriously believe that Executive Order 12866 was meant to give OMB and the Administration an opportunity to carefully consider the costs and benefits of the exception but not “the rule?” Does not OMB and the Administration – not to mention the other potential audiences for a cost-benefit analysis – need information enabling them to assess the impact of the regulation of carbon emissions on the remaining “major sources,” including, especially, those exposed to leakage? Do they not need to know the impact visited on those who are regulated as well as the impact avoided on those who are exempted?

The failing under EO 12866 is paralleled by the agency’s failure to comply with the Unfunded Mandates Act. In the preamble’s discussion of UMRA compliance EPA states, “This proposed action does not contain a federal mandate that may result in the

expenditure of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year.” 74 Fed. Reg. 55349. The agency’s assertion is likely accurate, given its definition of “action.” Whether or not it meets the requirements of UMRA depends on whether from UMRA’s point of view the only mandate in question is the exemption of small emitters from the unstudied, underlying mandate. That is not likely.

F. The Agency May Not Regulate Greenhouse Gases, Especially With Respect to Leakage-Exposed Industries, under the PSD Provisions of the Clean Air Act.

The above arguments (principally subsections A through C) establish that the agency cannot impose PSD-program regulation of greenhouse gases, especially with respect to leakage-exposed industries, by indirection – by the “automatic” effect of a decision to issue the auto rule. This suggests the further question: Could it do so directly?

Could the agency (assuming it successfully performed all impact analyses required by separate legislation and executive orders) marshal the factual and legal arguments necessary to permit it to regulate greenhouse gases under the PSD provisions of the Act? While it would be helpful if the record were better developed on the point, we believe that the record is sufficiently developed to support the answer: no it cannot. The Act does not authorize the agency to regulate greenhouse gases under the PSD program,

especially with respect to leakage-exposed industries. This is shown by consideration of the relevant text as well as the structure and purpose of the Act in light of the facts and consequences of PSD regulation of greenhouse gases.

Statutory Elements of PSD Regulation

PSD regulation of a pollutant under the Act, by its statutory terms, is comprised of five essential elements: (1) regulation of all facilities that emit over 100 or 250 tons of the pollutant; (2) under a case-by-case permit process that decides “best available technology;” (3) in accordance with “the applicable implementation plan;” (4) subsequent to the establishment of “national ambient air quality standards” (NAAQS) for the pollutant; (5) with respect to properly designated “attainment” or “unclassifiable” regions. CAA sections 160 and 161, 42 U.S.C. 7470 and 7471. The proposed regulation, at this point, fits none of those elements, and it is unlikely that PSD regulation of greenhouse gases could ever honor them, especially with respect to leakage-exposed industries.

With respect to the first two elements, EPA, in its tailoring rule preamble, says that their application to greenhouse gas regulation would produce results so absurd and administratively unworkable that the unambiguous statutory text that requires them must be rewritten by the agency to say other than what it says. While this has received much notice with respect to the 100- and 250-ton limit, it is also true with

respect to the case-by-case process required by the statute:

[T]he CAA requirement for BACT, found in sections 165(a)(4) and 169(3), mandate that BACT determinations be made for each pollutant on a “case-by-case” basis.” . . .

. . . [W]e believe that we also need to investigate a system under which presumptive BACT levels for a source category are developed through notice and comment rulemaking but applied to individual sources in that category without requiring permitting authorities to individualize BACT determination or to allow for public comment on how presumptive BACT levels would apply to an individual source. . . . [M]aintaining individual case-by-case BACT determinations may well be impractical and may warrant a presumptive BACT approach that does not authorize individualized, source-specific determinations 74 Fed. Reg. 55322.

With respect to the other three: There exist no implementation plans (and thus no plans that “shall contain emission limitations and such other measures as may be necessary”). There exists no NAAQS for greenhouse gases (and thus no possibility that the agency has found that regulation is necessary “notwithstanding” them). And, no region of the country has been designated as “attainment” or “unclassifiable” as to greenhouse gases. It is highly unlikely the agency could construct, should it attempt to do so, a sensible regulatory scheme for greenhouse gases in

keeping with statutory requirements. This is especially true with respect to leakage-exposed industries.

Statutory Purposes

As discussed in Section 1(C), section 160 of the Act establishes the purposes to be achieved by PSD regulation. These include “insuring” a proper balance of environmental benefit and economic harm and “assuring” that permits granted under the program do not lead to environmental harm “without careful evaluation of all the consequences” of the decision. As detailed in Part IV, it is not possible to meet these requirements with respect to greenhouse gas regulation under the PSD program, at least with respect to leakage-exposed industries.

II. The Agency’s Process To Date Has Evaded Adequate Notice and Comment Rulemaking – Including With Respect to Exemption of Leakage-Exposed Industries.

When EPA settled upon its strategy to trigger “self-effectuating” PSD regulation of carbon emitters the rulemakings and other proceedings framed by the Advanced Notice were abandoned. There is perhaps no clearer indication that the agency’s procedures have gone awry than the disparity between the content of the “notice” provided by the Advanced Notice and the lack of follow-up on the issues it teed-up so well. Not only has the agency skipped the subsequent proceedings contemplated by the ANPR,

it abjured the normal process of summarizing, commenting upon and issuing findings and decisions based on the thousands of comments it received in that proceeding. It failed to proceed to rulemakings structured to take into account the comments and its conclusions about them.

The 2008 ANPR had specifically listed “exemptions” for leakage exposed industries as one option to be considered to deal with the leakage problem. *Id.* at 4414. The Advanced Notice also correctly pointed out that “identifying the industries most likely to be adversely affected by domestic GHG regulation, and estimating the degree of impact, is complex in terms of data and analytical tools needed.” *Id.* The notice, moreover, sensibly contemplated, should it proceed further with PSD regulation, an examination of “tailoring strategies,” presumably examined in specifically noticed proposed rulemakings and featuring important issues such as leakage:

. . . EPA strongly believes that we should be prepared the first time we regulate one or more GHGs under any part of the CAA to explain our approach to permitting, including full consideration of the ideas presented above [*e.g.*, exemption of leakage exposed industries] for responding to the PSD implementation challenges. Coordination of the timing of tailoring strategies for PSD or non-attainment NSR to match the effective date of the first GHG regulation is necessary to minimize confusion on the part of sources, permitting authorities, and the public, to

provide for as effective a transition as possible, and to ensure that the strategies intended to avoid problems can be in place in time to prevent those problems 73 Fed. Reg. 44510.

In response to the advanced notice's invitation to comment, the Working Group emphasized the problem's complexity and the extensive and growing body of work being done to address it. In particular, we suggested both special caution in approaching the issue and targeted relief – specifically including delay and exemption – should the agency proceed with regulating greenhouse gases under the Act:

Our comments, we believe, support one practical conclusion above all others. The uniqueness and complexity of the leakage issue makes deliberateness essential. If the agency is to proceed with greenhouse gas regulation under the Clean Air Act, it should treat the leakage problem as a special issue, and, as the Agency stages its rulemaking proceedings, it should deal with other sectors first – leaving as much time and flexibility as possible for legislative and international action to address this unique problem. If the industrial/manufacturing sector is addressed, industries subject to leakage should be exempted or otherwise insulated from diversion of production, pending international agreements covering them.

The agency should return to the course it signaled in the Advanced Notice. Should it proceed to

trigger PSD regulation it should exempt leakage-exposed industries. As indicated below, much of the recent work done on the issue is responsive to the agency's call in the ANPR for data and analysis "identifying the industries most likely to be affected by domestic GHG regulation.

III. The Emergence of a Sound Basis for Identifying Leakage-Exposed Industries Combined with the Impossibility of Predicting PSD-Regime-Caused Leakage and Associated Harm Support Exemption of EITEs.

There now exists the foundations of a widely accepted and well studied basis for identifying with particularity those industrial sectors most vulnerable to leakage. The criteria are reflected in the most recent House and Senate versions of proposed cap-and-trade legislation and are analyzed in the December 2, 2009 Interagency Report referred to above, *The Effects of H.R. 2454 on International Competitiveness and Emission Leakage In Energy-Intensive Trade-Exposed Industries: An Interagency Report Responding to a Request from Senators Bayh, Specter, Stabenow, McCaskill, and Brown*. They involve objective measures, tied to specified data bases, of energy-intensity and trade-exposure, along with an alternative qualifying criterion of carbon intensity. Their application results in the qualification of approximately 45 sectors identified at the six-digit level of the North American Industrial Classification System. Descriptively, these sectors cover primary

metals (e.g., aluminum and steel manufacturers), nonmetallic minerals (e.g., cement and glass); chemicals (including nitrogenous fertilizer); pulp and paper and processing subsectors of some mineral industries (e.g., lime and soda ash).

The Working Group was actively involved in the development of the identifying criteria, building on work of the Peterson Institute and World Resources Institute,¹³ and working with Congressmen Inslee and Doyle and the House Energy and Commerce Committee. We, in conjunction with our consultant FTI Consulting, likewise provided to Congress and EPA the first analyses of the results of the applications of the criteria, both in terms of the sectors qualifying and the amounts of their emissions.¹⁴ Since then, we have been engaged in an iterative process with the agency and others to further refine the analysis.

We wish to emphasize that the single most important factor in the evolution of the legislative eligibility criteria, and the Working Group's principal goal, was certainty. The eligibility criteria governed

¹³ See, e.g., Houser, *et al.*, *Leveling the Carbon Playing Field* (Peterson Institute for International Economics and the World Resources Institute, 2008).

¹⁴ See Attachment A to the Testimony of John J. McMackin on behalf of the Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation before the House Committee on Energy and Environment Hearing on Competitiveness and Climate Policy: Avoiding Leakage of Jobs and Emissions (March 18, 2009).

the grant of allowances to counter the cost differentials that can lead to leakage. The original proposals involved considerable administrative discretion in determining which sectors would be eligible and involved the potential for significant delay before those determinations were made. The period of uncertainty could itself cause significant “structural leakage” as firms making ongoing investment and disinvestment decisions – where to add capacity and where to reduce it – would have to take into account the possibility of substantial costs from unilateral regulation from which they would not get relief. The same phenomenon will begin to occur immediately if EPA does not clarify its intentions with respect to PSD regulation of EITEs.

The Interagency Report is relevant in four principal ways. First, it provides the agency with a workable and well supported definition of industries that should be exempted from PSD regulation of carbon emissions. We caution however, that those criteria are far from perfect and were never intended to be exclusive. If the agency adopts them it should also establish an “individual showing” process for additional sectors to qualify for a leakage-protecting exemption. We strongly encourage the agency, in fact, to exempt the entire industrial sector. As will be discussed in Section IV below, the entire sector produces approximately 17 percent of total domestic emissions, with EITEs representing nine percent. The entire sector, moreover, is decreasing its emissions while other sectors have been rapidly growing. It

would be prudent, in order to avoid the potentially extreme costs and burdens of PSD regulation on manufacturing and industry and the relatively meager benefits of regulating the non-EITE eight percent of industrial emissions to exempt – or at least defer regulation of – the entire category.

Second, the Report clearly evidences the existence of the leakage problem that results from the unilateral imposition of carbon costs on energy-intensive trade-exposed industries. And, it recognizes that the extent of the problem is driven by the amount of the cost of regulation.¹⁵

¹⁵ That said, the report consistently understates the potential problem even in the context it studies – cap-and-trade legislation. For instance, it studies only an allowance price of \$20. No one believes that this represents the top end of the reasonable projected range of allowance prices over the leakage-relevant period. That period, at a minimum, includes the life of capital assets, such as furnaces and plants, about which investment decisions must be made. These time periods can be up to 50 years. Leakage, moreover, potentially increases at a non-linear, accelerating rate as the price of carbon increases. The Interagency Report correctly states that the Energy Information Agency study upon which it principally relies reached a \$20 price by the middle of the next decade, but that does not capture the rapid increase EIA assumed. *By 2020* EIA assumes a price of \$31.75. And that is under its “base case;” under other scenarios its 2020 price reaches \$93. *See*, Energy Information Administration (EIA), *Energy Market and Economic Impacts of H.R. 2454, the American Clean Energy and Security Act of 2009* (August 2009), at 13-14. Similarly, as the Interagency Report states, it has used only average data for all of the affected sectors: impacts on above-average sectors may be considerably more. By contrast, Richard D. Morgenstern of Resources for the Future

(Continued on following page)

Third, the parameters of its modeling of the costs to energy-intensive trade-exposed industries under a \$20 allowance price presents a useful basis for understanding why the costs of PSD regulation of EITEs and other facilities cannot be known. Indeed, as the comparison will help show, the “costs” of PSD regulation stem in part from its open-ended unknowability.

Fourth, as indicated above, the report demonstrates why regulation of EITEs under the PSD program is unnecessary. As the report indicates, EITEs will achieve carbon efficiency improvements by 2020 that exceed the Administration’s targets.

testified before the House Energy and Commerce Committee on March 18, 2009 at the Committee’s Hearing on Competitiveness and Climate Policy: Avoiding Leakage of Jobs and Emissions, “Over the long term, we estimate that the leakage rate for the few most-vulnerable industries can be as high as 40 percent in the case of a unilateral \$10 per ton CO2 price.” *Id.* at 5. As another example of the study’s consistent understating of the leakage problem, it argues that because some of our trading partners, such as the EU, have cap-and-trade regimes, they need not be counted in leakage assessments. In fact, the EU, like all other jurisdictions designing cap-and-trade programs, has included free allowance provisions for is EITEs.

IV. The Agency Has Failed to Assess Fundamental Aspects of Regulation of EITEs Under the PSD Regime, Including Its Costs and Benefits; Such An Assessment Would Show That Regulation Is Not Needed.

In Section I, following many commenters, we asserted that the agency failed to consider essential issues, particularly with respect to the environmental and economic impact of PSD regulation of large emitters, and we discussed the legal consequences of that failure. The fact that the agency did not consider these issues is not contested. Nonetheless, we offer in Section IV a relatively detailed description of some of the principal omissions, for several reasons. First, it will further demonstrate the important – indeed essential – character of the missing analysis. Second, it will support our contention that if the agency is to engage in “tailoring” it should consider changes beyond those it considered. Third, it will support our appeal to the agency for the second branch of our requested relief: if the agency does not delay issuance of the CAA portion of the auto rule, it should exempt or delay regulation of (at a minimum) leakage-exposed industries.

The economic/regulatory issues presented by the proposed PSD regime are complex and, in many respects, novel. The most fundamental, at least in terms of change from the current PSD program, have to do with what could be called “market-incentive parallelism.”

1. Market-Incentive Parallelism. Unlike the situation with respect to PSD regulation of the traditional CAA pollutants, regulation of energy efficiency is regulation of a manufacturing cost to which market incentives already apply. For EITEs they operate forcefully, to the point that energy efficiency has become a target of intense management focus. This phenomenon of overlapping, not opposing, market and regulatory forces underlies our discussion below (in subsection A) of the absence of need for the regulation and in subsection B of the fact that any improvements above the no-regulation baseline are likely to be risky and costly.

Many have commented on the poor fit of the Clean Air Act in general and the PSD regime in particular with regulation of greenhouse gases. The statute and associated regulatory scheme were built to deal with pollutants whose harm tends to be localized and caused at relatively low levels of concentration. Hence its basic structure is regional; it focuses on target levels of pollutants and the “attainment” or “non-attainment” of these levels within these regions; and it is administered, essentially, at a state and local level by state and local permit authorities making decisions on a case-by-case basis. It strains, to put it mildly, to deal with a pollutant whose harm comes from global concentrations. And, of course, the Act defines “major sources” at the 100- and 250-ton per year level because that is a reasonable regulatory level for emissions of the targeted pollutants – but not carbon dioxide and related gases.

2. Nexus to the Global Economy. However, a layer of even more complex and difficult issues is added when the CAA is contorted to deal with energy-intensive, trade-exposed industries and the leakage problem. There a truly global environmental problem that the Act is poorly structured to deal with meets globalism – economic features of the modern trade-impacted economy in the face of which a case-by-case local permitting process is virtually helpless. The case-by-case, local and operationally-intrusive proposed scheme of regulation cannot rationally identify which facilities and which production will face leakage at what costs

3. Scope and Intrusiveness. As discussed above, the proposed PSD permitting process under the agency's misconceived plan would make the radical shift from best available pollution control technology for traditional pollutants to regulation of the energy efficiency of a manufacturer's operations, *i.e.*, becomes a best engineering and best practices regime. Because for energy-intensive manufacturers energy management is virtually coextensive with every design and operation feature of their plants, PSD regulation would become exponentially more intrusive, more difficult and more costly.

What is an analogous regulatory regime that could be empirically analyzed? Some managed, socialist economies have commanded "what is produced where" and attempted to set production quotas, but did they attempt to control operations in a fashion this potentially extensive and intrusive? One columnist recently

called the proposal the most significant instance of regulation since the creation of the IRS, but tax regulation does not require a permit to conduct business in advance nor purport to tell the taxpayer how best to avoid costs and maximize taxable income. The closest analogy is probably the historical operation of the PSD program itself, and there is much to be learned from that – as a basis for considering the changes that will be effectuated in it. We will review the features of the existing program in Section C below, but we turn first to the threshold issue of the need for the proposed regulation.

A. The Proposed Regulation of EITEs Under the PSD Program Is Not Needed.

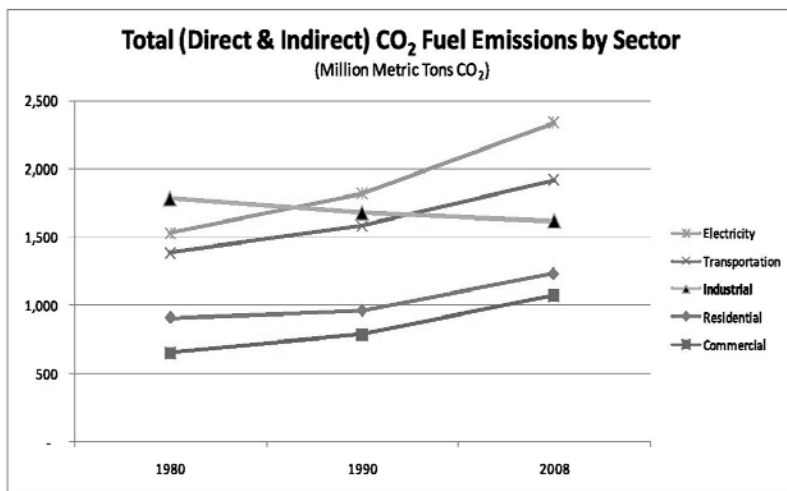
Market forces have been so effective in reducing the energy-intensity and carbon emissions of leakage-exposed industries that, as reported in the December 2 Interagency Report, the Energy Information Agency predicts that the six sectors they analyzed, aluminum, cement, chemicals, glass, iron and steel, and paper, will reduce their carbon emissions by 20 percent by 2020, on top of reductions of 10 to 35 percent in energy efficiency between 1998 and 2006. The 20 percent by 2020 estimate exceeds the President's target of a 17 percent reduction by that date. The Report's discussion highlights the specific cost-induced changes that have driven and will drive the progress:

. . . If industries continue their historical trend, they will realize significant reductions

in the energy- and emissions-intensity of their production . . . During [1998 to 2006] energy intensity [of the aluminum, cement, chemicals, iron and steel and paper sectors] fell between 10 and 35 percent. . . . Despite these past reductions in emission-and energy-intensity, significant opportunities for further reductions remain, as state-of-the-art energy management practices evolve, new technologies become commercially available, and existing technologies are more widely deployed. Recognizing these opportunities, many companies and industry groups have set aggressive forward-looking goals as part of voluntary initiatives such as EPA's ENERGY STAR, Climate Leaders, and industrial non-CO2 programs, as the Department of Energy's Climate VISION program. . . . The Energy Information Administration projects that the emission intensity of some of the key energy-intensive sectors will fall over the coming decade even in the absence of a cap-and-trade program. . . . The primary drivers of these projected improvements include: the on-going shift from the use of virgin raw materials to the less emission-intensive use of recycled materials, particularly in the aluminum, paper, and iron and steel industries; process improvements, such as the shift from a wet to a dry process in the cement industry; the penetration of more energy efficient systems and practices (e.g., combined heat and power, efficient motors, waste heat recovery); and the increased use of lower carbon fuels like natural gas and renewables.

Overall, taking into account both changes in output and emission intensity, EIA projects the total energy-related CO₂ emissions of the six sectors . . . would decline nearly 20 percent from 2006 to 2020 under business-as-usual circumstances . . . *Id.*, at 19.

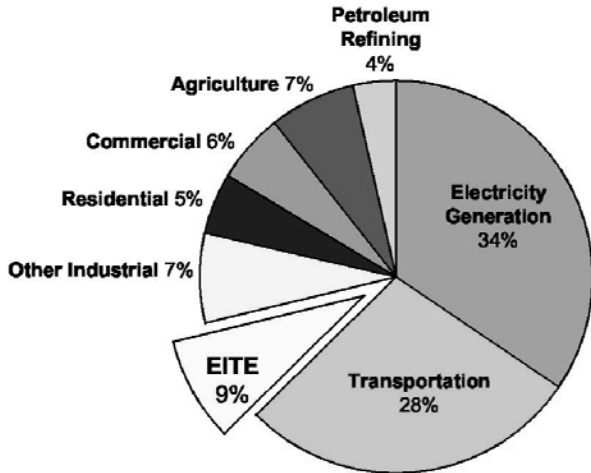
The long-term nature of this accelerating trend towards efficiency is confirmed by historical data on total emissions of the entire industrial sector. While the other principal sectors of the economy – utilities, transportation, residential/commercial and farming – have increased total emissions since 1980 by an average of over 30 percent, total emissions from the entire industrial section (including, indeed driven by, EITEs’ emission reductions) are down by about three percent.



Source: EIA -- Annual Energy Review (June 2009), Annual Energy Outlook (April 2009)

Moreover, the EITE sector represents a relatively small portion of direct greenhouse gas emissions:

Direct U.S. Greenhouse Gas Emissions by Economic Sector (2007)



Source: US Environmental Protection Agency, The US Inventory of Greenhouse Gas Emissions and Sinks: 1990-2007, April 2009

The conclusion is inescapable: American energy-intensive, trade-exposed industries in their unregulated state are not part of the problem of growing global greenhouse gas concentration; they are part of the solution. It is simply not necessary to threaten carbon leakage, as well as generalized regulation-induced economic harm, by regulating under the PSD program a small sector whose carbon emissions are shrinking in the absence of regulation at a rate that exceeds virtually all reduction targets.

B. Regulation-Forced Reductions Above the Economically Driven Baseline Improvements Will Come at Great Cost and Risk.

To conclude that the benefits of NSR/PSD regulation of EITEs' greenhouse gases would exceed its costs the agency would have to conclude that any resultant marginal improvements in world GHG levels above those that will be contributed under the base-case business-as-usual scenario exceed the costs of regulation. We do not believe that conclusion is possible. There are many reasons for this. In this section we will discuss the fact that any PSD-forced reductions above the cost-incented baseline reductions will come at high cost and risk.

The additional energy and GHG-emissions savings that energy-intensive industries will achieve each year for the foreseeable future without regulation are the result of good cost management. While it was not always the case, energy-cost management is now a matter of intense focus within U.S energy-intensive industries, featuring annual targets, benchmarks against other "best practice" facilities, accountability, "cultural changes," and compensation incentives. It is principally a matter of continuous improvement in dozens or scores of small things, many of them uncovered by modern management techniques aimed at identifying inefficiency and waste, such as "lean six sigma" When, beyond this, a company undertakes a big, expensive change to achieve energy savings, it is usually a matter of considered judgment, preceded by

considerable study and debate, often focused on production, reliability and quality concerns.

Reductions encompassed within the PSD permits will either be redundant with what companies will do anyway to achieve energy or process efficiency or they will not. What is the nature of those that are not? Why are companies not making them?

The only changes that PSD regulation will affect and that are meaningful are the ones that are, in a business sense, the most “intrusive,” “disruptive,” “costly,” “risky,” or “controversial.” They are the things that engineers and managers within a company consider, study, and debate – even argue about. It is one thing to give companies incentives to make these disruptive, costly and risky choices, through a cap-and-trade program, an energy tax, subsidies or grants. It is quite another to insert into the decision a bureaucratic decision maker via a permit process, a permit process complete with public disclosure, public participation, uncertainty and delay.

It is not possible to understand the potential reach of disruptive, non-economic regulatory change within the PSD program without understanding the breadth of the “best available technology” requirement that PSD regulation would impose in its GHG manifestation. As the agency knows, but a non-expert would not, the term in isolation is misleading. “Best” is accurate in the sense that it requires not just improvement but the *best* available improvements,

but “control technology” suggests something far too narrow. Below is a succinct summary from the ANPR:

. . . [T]he PSD requirement of greatest relevance would be the requirement that a permit contain emissions limits that reflect the Best Available Control Technology (BACT). BACT is defined as the maximum achievable degree of emissions reduction for a given pollutant (determined by the permitting authority on a case-by-case basis), taking into account energy, environmental, and economic impacts. BACT may include add-on controls, but also includes application of inherently lower-polluting production processes and other available methods and techniques for control. 73 Fed. Reg. 4497.

We will quote at a later point several other passages where the agency explains the scope of the proposed regulation. Suffice it to say, it encompasses everything one can think of that might affect energy use and GHG emissions.

Consider what would be involved in best available “improvements” to “combustion” or “processes” under a PSD GHG regime as the agency conceives it. Unlike pollution control technology to reduce the traditional CAA pollutants, control of energy and carbon emissions are not a matter of “bolting on” technology extraneous to the production process. Reductions in these areas, like the emissions themselves, are integral to the industrial processes themselves.

Carbon emissions in energy-intensive “process” industries are – very roughly – about two-thirds “combustion” and one-third “process.” These two things are the physical essence of these businesses. Unlike the situation of heating in an apartment building, for example, “combustion” and “melting” in most American process industries are in fact part of the process itself. How the raw materials are heated is a matter integral to how well and how efficiently the chemical processes that produce the product take place and the characteristics and quality of the product that results; it is an issue of constant, on-going research, trials and acceptance or rejection of new ideas. Because “process” emissions are in fact inherent in the underlying chemical reactions, by and large they can only be changed by a change in that process itself – a change by which the operation becomes a different kind of operation. To create significant reductions above the baseline levels – and thus farther above the Administration’s targets – the EPA PSD permitting process will, under the agency’s deeply mistaken conception, insert itself into the kinds of judgments that involve the most integral, disruptive, disputatious and risky capital investment and operational decisions within American industrial companies.

In addition to changes that relate directly to core combustion- and “process-related decisions of an industrial company, there are a few other loci of large-magnitude and potentially disruptive carbon reduction for energy-intensive industries that are

somewhat less directly related to combustion and process. These might include, for example, use of recycled materials, cogeneration or combined heat and power systems, and fuel switching. These have much the same dynamic: EITEs have powerful economic incentives to manage energy and emissions using these things, and they are in fact making use of them. Their economical use will be part of the baseline savings. Where they are not economical or otherwise practical, forcing them through regulation could be tremendously damaging. We will briefly discuss use of recycled materials, as an example.

To be sure, recycling is a powerful part of efforts to reduce energy and carbon emissions in manufacturing. In fact, unlike control technology for traditional pollutants which require considerable energy and thus increase GHG emissions, use of recycled materials is a “twofer.” It can greatly reduce both the energy needed to produce the product and greatly reduce carbon emissions. EPA, recognizing this, indicates use of recycled materials may become part of the permitting process.

The only increases in recycling ordered by permittees above the base-case, incentive-driven levels are ones that make no sense, and the more significant they are the more damaging they will be. Economic incentives to use recycled materials are so strong that they created the carbon-arc “mini-mill” steel industry to compete with the traditional “integrated” steel industry that uses and processes raw materials. It is not an exaggeration to say that economic incentives

are so strong in the aluminum and glass industries that companies in these industries are desperate for more recycled aluminum and glass.

The problem is supply. For instance, with respect to containers, the U.S. recycling infrastructure returns about half as much recycled material to manufacturers as does Europe's. There are many reasons for this, virtually none of which can be solved by manufacturers. A permit authority requiring a bottle or can manufacturer to use significant amounts of additional recycled material will be commanding the end of a process when the focus needs to be upstream in the recycling stream. A permit authority cannot order states to adopt container laws nor municipalities to forbid their contractors from "single streaming" collected containers into one stream that crushes and mixes metal, glass, plastic and paper – degrading the recycled material to the point much of it is useless for true recycling purposes. The proposed regulation contemplates a governmental mandate to a private entity to solve a governmental failure.

The dynamic with respect to combined heat and power and fuel switching is similar. Instances that make economic sense are and will be done. Ones that do not, if forced, could be greatly damaging. As with recycling, many of the barriers to adoption are as much governmental and regulatory as economic, or, put differently, they are made uneconomic because of aspects of regulation. The biggest issue in cogeneration is that utilities frequently prevail with respect to regulated terms upon which they must accept excess

cogenerated power. Fuel switching is an even more complex situation, with similar, unnecessary risks of regulation, though we will not discuss it here.¹⁶

The potentially unlimited ambition of the contemplated regulatory scheme and the potential for intrusion into and harm to fundamental operational decisions should the agency's conception prevail is suggested by a remarkable passage from the tailoring rule preamble. Here, the agency is discussing smaller sources (those it proposes to exempt), but it is every bit as applicable – and perhaps more so – to the situation that will face all EITEs under PSD regulation of greenhouse gases as permitting authorities consider “the near term opportunities for GHG emissions reductions” that are currently barred by “market barriers, insufficient financial and legal incentives, or other barriers”:

The near-term opportunities for GHG emissions reductions in smaller-scale stationary sources include increased energy

¹⁶ Among the fundamental gaps in the proposed scheme of regulation is its failure to deal with “indirect” emissions. The PSD program is a regulation of “direct” – on site – emissions. A manufacturer that combusts carbon-based fuel on site could reduce its regulated combustion carbon emissions to zero by switching to electricity as the source of its heat. In most instances this would result in a significant increase in total carbon emissions, since industrial uses of fuel are far more efficient, on average, than those of utilities. For many manufacturers this need not be an all-or-nothing decision, as they have electric boosting available in their furnaces.

efficiency, process efficiency improvements, recovery and beneficial use of process gases, and certain raw material and product changes that could reduce inputs of carbon or other GHG-generating materials. The use of alternative fuels and energy are also promising methods for achieving GHG reductions.

...

Controls on sources at this scale would likely involve decisions on how proposed installations of equipment and processes for a specific source category can be redesigned to make those sources more energy efficient, for example, taking cost considerations into account. However, these types of approaches have yet to be adopted widely, because of market barriers, insufficient financial and legal incentives, or other barriers. 74 Fed. Reg. 55325-26.

In any number of other respects, the agency's discussion in the context of the small emitters which it seeks to exempt is deeply revealing in the broader context. We again call the agency's attention to the passage cited on page 18 *ante* wherein the tailoring rule preamble states that there is a likelihood that "even in the absence of BACT such sources would already be installing relatively efficient GHG technologies to save on fuel costs." 74 Fed. Reg. 55340.

C. It Is Impossible to Predict or Quantify Other Costs Stemming From the Unique Nature of PSD Regulation of EITEs, But It Is Clear That They Will Be Severe.

It is in fact impossible to quantify the costs of PSD regulation of large emitters. It is impossible to know its *direct* costs because one cannot know which changes will be imposed under the BACT requirement. All the more so, it is impossible to forecast resultant leakage. Leakage estimates are a matter of considerable difficulty and variation – even under cap-and-trade regime where the increased cost is based upon an allowance price which can be estimated or posited.

However, it is other (non-leakage) *second-level* costs that are likely even more significant. These are costs that result from behavioral changes the PSD regime will cause among regulated entities, potentially regulated entities and their competitors. The costs cannot be determined empirically because the regime will be *sui generis*. Nor can it be reliably modeled for reasons of the same kind and the unknowability of direct costs. A description of the regime and some of its likely characteristics will demonstrate these difficulties – as well as show that though the costs are inherently uncertain they are also likely severe. The second level costs are primarily the result of strategic behavior by market participants attempting to optimize their position vis-a-vis a regulatory regime with the characteristics of this one.

1. Attributes of PSD regulation drawn from the Preamble and the ANPR.

As we have stressed, adding energy efficiency will fundamentally change the PSD program in scope, intrusiveness and impact. However, general attributes of the existing regime are a good place to start in attempting to understand what is coming, and the ANPR and the preamble to the tailoring rule make some basic and useful points.

To be sure, the quotations below focus on negative attributes. They are not meant to present a balanced picture of the program, nor to imply it is poorly run. The point is to illustrate what we believe are inherent attributes of a scheme of regulation that is highly prescriptive, permit-based, complex, and applies not across-the-board and equally to all facilities in an industry, but only to facilities (and then potentially to the entirety of the facility) if and when it engages in construction or modification.

The first quotation is from the preamble to the tailoring rule, the rest from the ANPR. The context of the first quotation is the agency's discussion of the rationale of its exemption of smaller emitters.

“A complicated, resource-intensive, time-consuming and sometimes contentious process.”

... [S]ection 169(3) requires that BACT emissions limits be determined “on a case-by-case basis” that reflects the use of state-of-the-art demonstrated control technology at

the time of the permit action. Thus, BACT is required to be source-specific, changes over time, and requires continual updating. The permitting authority's decision as to what control requirements constitute BACT affords flexibility to consider a range of case-specific factors, such as available control options and collateral cost, energy, and environment impacts. However full consideration of these factors requires significant data and analysis in order for permitting authorities to arrive at a case-by-case permitting decision that is appropriate for each individual source when it constructs or modifies. *For all these reasons, determining BACT for a particular source can often be a complicated, resource-intensive, time-consuming and sometimes contentious process.* 74 Fed. Reg. 55321-22 (emphasis added).

“More than a year.”

Because of the case-by-case nature of the PSD permitting decisions, the complexity of the PSD permitting requirements, and the time needed to complete the PSD permitting process, it can take several months to receive a simple PSD Permit and *more than a year* to receive a permit for a complex facility. 73 Fed. Reg. 4450 (emphasis added).

“Uncertainty and construction delays.”

. . . [T] here have been significant and broad-based concerns about PSD implementation over the years due to the program's complexity and the costs, *uncertainty*, and *construction*

delays that can sometimes result from the PSD permitting process. Id. 44501 (emphasis added).

“Incentives to keep older and inefficient sources in use longer.”

. . . [S]ome suggest that regulations that apply stringent requirements to new sources and “grandfather” existing sources may create incentives to keep older and inefficient sources longer, *diminishing the incentive for technological innovation and diffusion and reducing the environmental effectiveness and cost effectiveness of the regulation* . . . EPA examined the effect of new source review on utilities and refineries in a 2002 report . . . Id. 44500 (emphasis added).

[Results of the above report]: . . . “lost capacity, as well as lost opportunities to improve energy efficiency and improve air pollution.”

. . . [T]he report concluded (pp. 30-31) that, for existing sources, “(c)redible examples were presented of cases in which uncertainty about the exemption for routine activities has resulted in delay or resulted in the cancellation of projects which sources say are done for purposes of maintaining and improving reliability, efficiency and safety of existing energy capacity. Such discouragement results in *lost capacity, as well as lost opportunities to improve energy efficiency and reduce air pollution.*” Id. 44500, fn 270 (emphasis added).

“Artificially capping production or foregoing efficiency improvements.”

[I]n considering the potential for emissions reductions from the PSD program, it is important to note that, historically, sources generally have taken action to avoid PSD rather than seeking a permit, where possible. Companies can reduce their PTE [Potential to Emit], for example, *by artificially capping production or foregoing efficiency improvements*. While the PSD avoidance strategies can sometimes reduce emissions (e.g., limiting operating hours or installing other controls to net out), they can sometimes result in forgone environmental benefits (e.g., postponing an efficiency project). These effects are very difficult to quantify. *Id.* 44501 (emphasis added).

“Increase of other pollutants leading to added costs and delay of those control projects.”

PSD program requirements also affect numerous CAA programs that require stationary source controls that may increase emissions of pollutants other than the pollutant targeted for control (*i.e.*, “collateral increases”). . . . Because there is no exemption from PSD requirements for such pollution control projects, the collateral increase must be reviewed, *which can result in added costs and delay of those pollution control projects*. Regulation of GHGs would exacerbate these concerns because the energy demands of

many controls for criteria pollutants, HAP, and other pollutants have the potential to result in increased CO₂ emissions. *Id.*, 44503.

2. *Other Aspects of PSD Regulation of GHGs*

The above attributes, and others, will shape the proposed regulatory regime covering greenhouse gases into an extraordinarily costly, inefficient and counterproductive phenomenon.

a. Perverse Incentives. As the ANPR indicates, the structure of PSD regulation creates a disincentive to make capital improvements, increase or consolidate production. In addition to the economic inefficiency involved, this may delay adoption of pollution-reducing steps. Because once one pollutant is subject to PSD all are, disincentives to changes that stem from the necessity to control for one pollutant may cause postponement of steps to control for others.

Any number of other kinds of inefficient behavior may be incentivized. For instance, competitors tempted to avoid capital investments and “run their plants for cash” may now have the added incentive of “running their plants for carbon” to avoid BACT costs. Note that this rationale applies *only* to uneconomic reduction of carbon – the only kind that will be affected by the rule. Dominant competitors may seek to raise barriers to entry by adopting technology or production techniques that a new entrant would have to match under the regulatory scheme.

b. *“Domestic Leakage.”* Of all the perverse results of PSD regulation of the greenhouse-gas emissions of energy-intensive industries, none is more perverse than “domestic leakage.” As indicated above, the fact that only *some* domestic competitors will be subject to the regulation means that production will move from the more carbon-efficient but uneconomic-regulation-burdened domestic producers to less carbon-efficient but regulation-unburdened producers.

c. *Uncertainty and Delay.* The portion of the preamble quoted above featuring the comment that BACT determinations can often be “complicated, resource-intensive, time-consuming, and sometimes contentious” goes on to comment that if the number of PSD permitting decisions increases significantly (and here the preamble is *not* talking about application to exempted small emitters) that “these challenges will be magnified, and the BACT determinations will be a major factor contributing to the uncertainty and delay for sources seeking permits.” 74 Fed. Reg. 55322.

d. *Public and Political.* Public participation in pollution permit processes certainly can add to the contentiousness and delay involved. If the permits encompass regulation of greenhouse gases and potentially reach virtually all aspects of plant operations, the potential for disruption is significantly increased. The quotation referred to above continues, “Furthermore, the increase in workload of BACT determinations will require large investments of resources by

permitting authorities, sources, EPA and the public interested in commenting on these decisions.” Political input into the proceedings, as local officials make their views known on behalf of applicants, workers or interest groups will add to their inherent uncertainty. The public and political nature of these proceedings, when coupled with the new level of intrusiveness and extensiveness, has the potential to fundamentally affect industrial firms’ attitudes towards not only expansion of facilities but location of facilities in the U.S.

4. *Power and Discretion.* If the agency’s conception prevails, the permit authority will have a combination of improperly sweeping authority and sweeping case-by-case discretion. This will create a highly uncertain and risk-filled regulatory process. Inequality of conditions of competitors in different regions is a distinct possibility, for instance. More importantly, this combination of power and discretion threatens to undermine even-handed, standard-honoring, transparent governance.

D. Rational Regulation of Leakage Is Not Possible on a “Case by Case” Basis.

The “case-by-case” nature of PSD permitting makes it impossible to assess the leakage that a PSD GHG regime applicable to energy-intensive industries may cause. But the problem goes deeper than assessment. The case-by-case permitting structure is not amenable to rational regulation of leakage.

Under the best of circumstances, leakage, especially “structural” leakage (as opposed to “transactional” leakage applicable to one sale) that results over time from innumerable business-location and business-expansion decisions by both domestic and foreign companies (and especially those international firms that operate both in the U.S. and elsewhere) is very difficult to pin down. It depends on *expectations* by firm decision-makers about cost conditions over decades – the length of time corresponding to the expected useful lives of furnaces and plants. Uncertainty itself can drive leakage. Leakage, further, is not primarily a “case by case” phenomenon. It depends on an accumulation of cases, past and projected.

Moreover, it depends every bit as much on an assessment of market conditions, domestic and international, as it does on costs at a given plant. A rational and competent administrative proceeding about leakage would resemble a contested international antitrust merger case, replete with data and analysis on relevant product and geographic markets and the effects of various cost and price differentials over time. It would also feature expert opinion, which, if merger cases are a good precedent, would conflict.

Further, structural leakage depends on an assessment of a domestic producer’s entire domestic footprint, not just an economic assessment of a particular plant. For instance, if a U.S. manufacturer with 20 plants nationwide loses 10 percent of its domestic sales to foreign competition shipped into

ports or railed to rail heads near a border, it may well *not* be the plants near ports or border-proximate rail yards that are affected. The manufacturer may realign production at its plants across the country, and it may be plants in the heartland that lose out.

Finally, as discussed above, unlike a cap-and-trade or carbon-tax structure that applies equally to all domestic competitors, PSD costs will be imposed only on some. This will create “domestic leakage” in which production will move from regulated carbon-efficient producers to unregulated and less carbon-efficient producers. The analytical and data problems presented by this – not to mention the policy implications – are mind-boggling.

Local permitting authorities will have neither the time, expertise nor resources to begin to make a competent leakage assessment, and they cannot command the parties or sources who may hold essential information. And, if the permitting authorities cannot assess leakage, they cannot meet the PSD program’s own “fundamental requirement,” in the agency’s words quoted above, “to balance environmental protection and growth.” (74 Fed. Reg. 55305, citing section 160.) Section 160 also requires, as discussed above, that the permitting process “assure” “careful evaluation of all the consequences of” any decision that would lead to increased air pollution. A decision that caused leakage would lead to increased air pollution – if defined to include increased global concentrations of greenhouse gases.

CONCLUSION

The Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation respectfully requests that the agency: delay issuing the allegedly “triggering” aspects of the auto rule until such time as the consequences of regulating greenhouse gases under the PSD program are fully and properly assessed; revisit and amend its proposed interpretation of the “PSD-triggering” effect of the auto rule to avoid implementation of PSD greenhouse-gas regulation in its entirety or until such time as its effects can be fully assessed; and/or exempt, at a minimum, energy-intensive trade-exposed industries from its proposed regulation of greenhouse gases under the PSD program.

Sincerely,

John J. McMackin, Jr., for the

Energy-Intensive Manufacturers
Working Group on Greenhouse
Gas Regulation
