ORAL ARGUMENT SCHEDULED FOR FEBRUARY 28, 2012

No. 10-1073 (Lead) and Consolidated Cases (Complex)

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

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

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND LISA P. JACKSON, ADMINISTRATOR,

Respondents.

On Petitions for Review of Final Agency Actions of the U.S. Environmental Protection Agency

JOINT REPLY BRIEF OF NON-STATE PETITIONERS AND SUPPORTING INTERVENORS

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

1980 Rule Opening Brief	Joint Opening Brief of Industry Petitioners, *American Chemistry Council v. EPA*, No. 10-1167 (filed May 10, 2011)
1980 Rule Reply Brief	Joint Reply Brief of Industry Petitioners, *American Chemistry Council v. EPA*, No. 10-1167 (filed July 20, 2011)
Act	Clean Air Act
Agency	U.S. Environmental Protection Agency
BACT	Best Available Control Technology
CAA	Clean Air Act
CO_2	Carbon Dioxide
Endangerment Rule	Proposed Rule, *Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 18,886 (Apr. 24, 2009) Final Rule, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009)
EPA	U.S. Environmental Protection Agency
FIP	Federal Implementation Plan
GHG(s)	Greenhouse Gas(es)
HAPs	Hazardous Air Pollutants
MACT	Maximum Achievable Control Technology
NAAQS	National Ambient Air Quality Standards

Part C	Clean Air Act §§160-169B, 42 U.S.C. §§7470-7492 (the CAA provisions containing the PSD and visibility programs)
PSD	Prevention of Significant Deterioration, Clean Air Act Title I, Part C, §§160-169, 42 U.S.C. §§7470-7479
SIP	State Implementation Plan
Tailoring Rule	Proposed Rule, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292 (Oct. 27, 2009) Final Rule, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010)
LDVR	*Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010)
Timing Rule	Final Rule, *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010)
Title V	Clean Air Act §§501-507, 42 U.S.C. §§7661-7661f
tpy	tons per year

SUMMARY OF ARGUMENT

EPA's position is remarkable. EPA interprets the Clean Air Act ("CAA" or "Act") to require an exponential expansion of permitting programs costing more than $20 billion annually. This interpretation, it claims, forces it to ignore unambiguous statutory provisions to avoid such a calamity. EPA contends it can rewrite—potentially repeatedly—explicit statutory thresholds to achieve *its* view of CAA permitting programs' proper scope. But "EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion," *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 485 (2001). Congress never envisaged Prevention of Significant Deterioration ("PSD") and Title V applying to greenhouse gases ("GHGs") and, even EPA concedes their inclusion would produce results Congress could not have intended. Rather than question how it ended up so far afield and consider whether its interpretation of the Light-Duty Vehicle Rule ("LDVR") might mean EPA is wrong, EPA argues its hands are tied—once it regulated GHGs as a pollutant under the CAA's motor-vehicle provisions, it *had* to regulate stationary-source GHG-emitters under PSD and Title V.

Indeed, EPA's statutory construction led to an interpretational dead-end, where EPA concluded it was compelled to invoke last-resort doctrines—"absurd results," "administrative necessity," and so-called "one-step-at-a-time"—and to rewrite clear statutory text, *i.e.*, provisions establishing 100 and 250 tons-per-year ("tpy") major-source thresholds. The Act cannot be read to produce absurd results or to compel or

allow regulations that contradict clear statutory commands. EPA's claim that it could invoke disfavored doctrines to rewrite the statute are unavailing. Moreover, that EPA's interpretation necessitated deviating from clear text is evidence the interpretation is wrong. Under basic principles of statutory interpretation, EPA was obligated to identify a reasonable construction that avoids absurd results and fulfills congressional intent without rewriting unambiguous statutory thresholds. Instead, EPA clung to its faulty interpretation, concluding it lacked discretion to adopt a reasonable interpretation that comports with statutory text and congressional intent. EPA's action is unlawful and must be set aside. *See Prill v. NLRB*, 755 F.2d 941, 947-48 (D.C. Cir. 1985).

Non-State Petitioners' ("Petitioners") opening brief identifies three statutory interpretations that comport with plain statutory text and obviate any need for judicial doctrines like those EPA invoked. Non-State.Pet.Br.10-12. EPA's brief conflates these interpretations, as if Petitioners had made but a single *Chevron-step-two* argument and incorrectly suggests the "fight" is over whose interpretation is "more reasonable." In reply, Petitioners address each argument and show they were fully available to EPA.

The broadest argument (Non-State.Pet.Br.27-41) explains two tests must be met for a CAA §302(g)[1] "air pollutant" to be a "PSD pollutant"—*i.e.*, a pollutant

[1] Unless indicated, statutory citations are to the CAA, 42 U.S.C. §§7401-7671q.

eligible for PSD regulation. First, to be a pollutant intended for PSD regulation, a pollutant must be one that is emitted, in amounts above the 100/250-tpy thresholds, *only* by a limited number of *large* sources. Second, consistent with the CAA's PSD provisions, the pollutant must "deteriorate" air quality in a CAA §107 area—a discrete area. Both criteria must be met for PSD to cover a pollutant when "regulated" under the Act; *neither* is met for GHGs. GHGs, accordingly, cannot be a PSD pollutant, and the Tailoring/Timing Rules' inclusion of GHGs in PSD must be set aside.

Petitioners also explained PSD is limited to "areas to which [Part C] applies"—areas designated attainment for a particular national ambient air quality standard ("NAAQS") pollutant, such that GHGs, not being subject to a NAAQS, could not themselves make a source major or be the *reason* PSD permitting is required. Had EPA implemented this "situs-requirement," explicit in statutory language, *no additional PSD permits would have been required.* (Non-State.Pet.Br.21-27). EPA responds with scattershot arguments, none of which explains why it ignored plain statutory language and interpreted the Act to render the situs language superfluous. Had it implemented this statutory requirement, EPA would have applied only Tailoring Rule Step-1, producing no absurd results—and Step-2 wouldn't exist.

Third, any GHG regulation is governed by CAA §166, Non-State.Pet.Br.41-46, which EPA concedes it did not follow. Observance of this specific congressional directive governing "other pollutants" under the PSD program would have avoided any need to ignore other provisions of the Act.

EPA's Timing/Tailoring Rules are unlawful for other reasons: EPA impermissibly included GHGs in Title V; the Tailoring Rule's effective-date provisions, and consequences EPA attributes to them, are arbitrary and unlawfully override State primacy in CAA implementation; no basis exists for deeming six GHGs "subject to regulation" when only four are regulated; and EPA failed to undertake required analyses. Finally, EPA's jurisdictional objections are unavailing.

ARGUMENT[2]

I. EPA UNLAWFULLY INTERPRETS THE ACT TO CREATE ABSURD RESULTS ON WHICH EPA IMPERMISSIBLY RELIES TO REWRITE THE STATUTE.

As Petitioners' opening brief explains, EPA's Timing/Tailoring Rules' interpretation of the statute—*i.e.,* once EPA's LDVR takes effect, GHGs "automatically" may trigger PSD permitting—transforms PSD into a program covering myriad small sources for emissions of a pollutant that does not deteriorate air quality. *See, e.g.*, 75 Fed. Reg. 17,004, 17,020 (Apr. 2, 2010)(J.A.__). EPA cannot construe the CAA to apply PSD in a fashion that unmistakably produces results contrary to the text and congressional intent and cannot use that perverse interpretation to justify rewriting numerical statutory thresholds with fixed meaning.

EPA offers no satisfactory response. Instead, EPA asserts, because "limiting construction[s]" of statutory PSD provisions are unavailable to avoid absurd results, it

[2] *See* Non-State.Pet.Br.i (noting any given argument should not be construed as necessarily representing the views of each petitioner).

must use "administrative necessity" and "one-step-at-a-time" "doctrines" to rewrite statutory language defining PSD applicability. But limiting constructions *do* exist;[3] EPA is *not* statutorily compelled to contravene congressional intent. Moreover, "administrative necessity" and "one-step-at-a-time" cannot be invoked to achieve results that contravene congressional intent. EPA concedes as much, saying "administrative necessity" applies only if the statute "commands" the "virtually impossible." EPA.Br.58-59. Here, the CAA "commands" the "impossible" *only if* the Act is construed—as EPA construes it—to command *what Congress indisputably never intended*.

EPA's cases, EPA.Br.64-65, support Petitioners, demonstrating that statutory language that can have more than one meaning can and should be construed—narrowly if need be—to implement congressional intent and avoid absurd results. But statutory language *not* susceptible to interpretation—*e.g.*, explicit 100/250-tpy thresholds—cannot be ignored or rewritten. *Citizens to Save Spencer Cnty. v. EPA*, 600 F.2d 844, 870 (D.C. Cir. 1979). Because EPA *can* interpret statutory PSD provisions to avoid absurd results that contravene congressional intent, judicially-created "doctrines" can provide no basis for EPA's unlawful action.

[3] Petitioners' arguments are *not* "a talisman for no regulation whatsoever." EPA.Br.71. PSD is but one of numerous CAA programs. *See infra* Section II.A. Moreover, PSD itself could apply in a more limited manner than EPA applies it to require controls for GHGs under the situs-requirement. *See infra* Section II.B.

Even if limiting constructions were unavailable, no authority would exist for EPA's approach. EPA has "no general administrative power to create exemptions to statutory requirements"; where it seeks "a prospective exemption ... from a statutory command based upon [its] prediction of the difficulties of undertaking regulation," rather than relief after good-faith effort, its burden is "especially heavy."[4] *Alabama Power Co. v. Costle*, 636 F.2d 323, 357, 359-60 (D.C. Cir. 1979).

The Tailoring Rule prospectively alters statutory PSD provisions by exempting a broad swath of sources. But EPA cites no case approving prospective application of—and none approving broad exemptions based on—"administrative necessity." EPA concedes "[c]ategorical exemptions from the clear commands of a regulatory statute" are disfavored. 75 Fed. Reg. 31,514, 31,578 (June 3, 2010)(J.A.__)(quoting *Alabama Power*, 636 F.2d at 358). No court has approved such reliance upon this doctrine.

EPA's "judicial doctrine," dubbed "one-step-at-a-time," 75 Fed. Reg. 31,544 (J.A.__), does not permit rewriting unambiguous statutory language if only EPA promises to comply some day. The cases EPA cobbles together for this heretofore-unknown doctrine offer it no support.

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[4] *See EDF v. EPA*, 636 F.2d 1267, 1283 (D.C. Cir. 1980); *Public Citizen v. FTC*, 869 F.2d 1541, 1557 (D.C. Cir. 1989)(agencies lack "inherent authority to second-guess Congress' calculations").

In *National Association of Broadcasters v. FCC,* 740 F.2d 1190 (D.C. Cir. 1984), the agency rule, while fully consistent with its authorizing statute, deferred resolution of some issues. This Court held that "incremental rulemaking" was permissible only where such rulemaking would not restructure an "'entire industry on a piecemeal basis'" and where the incremental rule takes account of "how the likely future resolution of crucial issues will affect the rule's rationale." *Id.* at 1210. The Tailoring Rule, by contrast, is a complete, industry-restructuring CAA revision and manifestly *not* compliant with statutory text. EPA may not implement that rule incrementally *or* all at once.

EPA's statutory-threshold revision likewise bears no resemblance to the action in *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455 (D.C. Cir. 1998). There, the FAA had authority to regulate incrementally to meet a statutory goal; it did not ignore or revise statutory requirements. Here, *no scenario* exists in which EPA could find feasible or consistent with congressional intent a goal of permitting about 82,000 PSD per year or 6,000,000 Title V sources—the results of EPA's statutory interpretation.

II. HAD IT ADOPTED ANY OR ALL OF THE THREE INTERPRETATIONS PETITIONERS OFFERED, EPA COULD HAVE IMPLEMENTED THE STATUTE WITHOUT REWRITING UNAMBIGUOUS TEXT.

EPA claims its hands are tied. According to EPA, it *had to* promulgate the Timing/Tailoring Rules, which EPA admits depart from unambiguous CAA requirements, because, it asserts, no other way will make sense of Congress's work.

But Petitioners showed that EPA's hands are *not* tied and that EPA's explanations to the contrary are hollow. Petitioners set out three *Chevron-step-one* defects with EPA's interpretation, and three distinct, *statutorily grounded* interpretations that do *not* necessitate any new rules that rewrite unambiguous statutory provisions: ***First,*** PSD regulation is limited to large industrial sources and cannot embrace pollutants that do not deteriorate air quality (Section II.A., *infra*); ***second,*** the PSD program is constrained by a situs requirement that EPA ignores (Section II.B., *infra*); and ***third,*** whenever EPA introduces new pollutants into the PSD program, it must follow CAA §166's procedural dictates, yet EPA refused to do so before adopting the rules under review here newly regulating GHGs (Section II.C., *infra*).

EPA offered no meaningful response but instead merely reaffirmed its counter-textual interpretation to justify rewriting clear statutory text. Nor did EPA explain why, even if these three interpretations described by Petitioners were deemed permissible options for interpreting the Act, adoption of any or all of them would fail to avert the trainwreck that EPA argues it aimed to avoid through the Tailoring Rule.

A. GHGs Cannot Be a PSD Pollutant.

As Petitioners' opening brief explained, EPA was required to narrow the universe of CAA §302(g) "air pollutants" to those Congress intended the PSD program regulate. Non-State.Pet.Br.II.B. Considering the statutory language and congressional intent regarding that program's nature and coverage, EPA could, and should, have excluded GHGs from the "air pollutants" regulated under PSD.

1. Congress Provided for PSD Regulation of Only Those Pollutants That (a) Are Emitted, in Amounts Above the Statutory 100/250-tpy Thresholds, by Only a Limited Number of Large Sources and (b) Deteriorate Air Quality.

The first fundamental characteristic of a PSD pollutant derives from CAA §169(1)'s plain language, which limits the sources subject to PSD. A source is "major" under PSD based on the amount a particular pollutant is emitted from the source, with the statutory 100/250-tpy thresholds the dividing line between "major" or "large" (*i.e.*, in Congress's view, large enough to warrant PSD regulation) and "minor" or "small" (too small for PSD). Congress understood a PSD pollutant as one that is emitted in amounts above the statutory 100/250-tpy thresholds only by relatively few sources. 75 Fed. Reg. at 31,555 (J.A.__)("Congress intended that PSD be limited to a relatively small number of large industrial sources"; "Congress's mechanism for limiting PSD was the 100/250-tpy threshold…"). Thus, 100/250-tpy defines which *pollutants* are to be PSD-regulated—*only* those pollutants that "a relatively small number of large industrial sources" emit in amounts above the statutory thresholds. The statute's 100/250-tpy line has a singular meaning that is *not* subject to alteration through "interpretation."

Second, PSD pollutants are those whose regulation furthers the PSD provisions' purposes. The CAA identifies-again using specific language-the type of pollution Congress addressed in its PSD provisions. EPA and states must develop regulations and measures "necessary…to prevent significant *deterioration of air quality*"

in specific geographic areas designated under CAA §107. CAA §161 (emphasis added). GHGs, particularly CO_2, do not deteriorate air quality in §107 areas. Non-State.Pet.Br.35-39 & n.9.

Although §169(1) defines "major emitting facility" in reference to a source's emissions of "any air pollutant," EPA has long narrowed PSD-pollutant coverage to "regulated" "air pollutants." 75 Fed. Reg. at 31,550 (J.A.__)("EPA has interpreted the statutory PSD applicability provisions to apply more narrowly—to any air pollutant *subject to regulation*—than their literal meaning ('any air pollutant')"); EPA.Br.98.

EPA was required in *this* rulemaking to further narrow coverage to satisfy the statutory PSD provisions' plain language and purposes. Because the most prevalent GHG, CO_2, is emitted over 100/250-tpy by many thousands of *even the smallest sources,* which (as EPA agrees) Congress never intended be subject to PSD, and because CO_2 does not "deteriorate" ambient air "quality," EPA should have concluded GHGs cannot be a pollutant covered by PSD.

EPA argues the statutory language and purpose are irrelevant because the LDVR's promulgation settles the matter. EPA maintains that, as of the LDVR's take-effect date, GHGs are "automatically" subject to all PSD requirements, notwithstanding that regulating GHGs would expand PSD into a program Congress could not have recognized. EPA's "Congress-made-me-do-it" argument causes it to ignore or rewrite immutable statutory language: (i) setting numerical applicability thresholds, and (ii) evincing congressional intent that PSD address only air-quality-

deteriorating pollutants. No statute can be interpreted to compel regulation that produces results unmistakably contradicting congressional intent.

The "absurdity" doctrine does not justify ignoring §169(1)'s 100/250-tpy thresholds and creating, by rule, a new 100,000-tpy threshold for GHGs. The statutory thresholds bounding PSD applicability are not susceptible to interpretation, and EPA's disregard of them is unlawful, warranting vacatur of EPA's determination to subject GHGs to PSD. By contrast, "pollutant" *as used in the PSD provisions is* susceptible to interpretation, and it is EPA's construction of that term to encompass GHGs within PSD that produces absurd results.

The "absurdity" doctrine compels a narrow construction of a statutory term (*e.g.*, "employee"[5]) where a broader interpretation yields results contravening congressional intent. Because EPA found that applying the congressionally-mandated 100/250-tpy thresholds to GHGs would make PSD unworkable, EPA could and should have invoked the "absurdity" doctrine—*not to* ignore clear statutory thresholds and establish new, higher thresholds, but to exclude GHGs from PSD regulation. *Cf. Massachusetts v. EPA*, 415 F.3d 50, 70 (D.C. Cir. 2005)(Tatel, J. dissenting)(while "regulating CO_2 emissions from automobiles is perfectly feasible," if "states' limited ability to meet CO_2 NAAQS renders these provisions unworkable as to CO_2," absurd-results canon might "justify" an "exception *limited to the particular unworkable provision*,

[5] *E.g., U.S. v. Am. Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940).

i.e., the NAAQS provision" (emphasis added) EPA had ample discretion to consider whether GHGs should become a PSD pollutant. As Petitioners explained, the CAA establishes a spectrum of programs addressing different pollutants, and different sources, using different regulatory mechanisms of different geographic focus, for the purpose of addressing distinct problems. Non-State.Pet.Br.2. Because the CAA is not self-implementing, the specific elements of each such program (including the pollutants it covers) have been addressed through rulemaking. Non-State.Pet.Br.29-32.

Following the 1977 CAA Amendments, EPA interpreted Part C's terms "any air pollutant" and "any pollutant" in, respectively, §169(1)'s 100/250-tpy-thresholds (PSD) and §169A(g)(7)'s 250-tpy-threshold provision (visibility). As noted, for PSD EPA narrowed "any air pollutant" to those pollutants that are regulated. In its visibility rules, EPA through rulemaking narrowed "any pollutant" to only those CAA §302(g) pollutants that impair visibility. 40 C.F.R. Pt. 51, App. Y, §§II.A.3, III.A.2, 70 Fed. Reg. 39,104, 39,160, 39,162 (July 6, 2005)(J.A.__). EPA's response to this tailoring of pollutant coverage to mirror a specific CAA program's purposes is to suggest that, because §169A(g)(7) in Part C "is titled 'Visibility protection for Federal Class I Areas,'" it "naturally follows that EPA's regulations under that section should address 'visibility-impairing pollutants.'" EPA.Br.99.n.19. Exactly so. And because Part C is entitled "Prevention of Significant Deterioration of Air Quality," the §302(g)

"air pollutants" Congress intended to regulate under PSD include only those that "deteriorate" air "quality."

Treating GHGs (particularly CO_2) as a PSD pollutant does violence to the CAA's language and congressional intent. Although GHGs became a regulated pollutant when CAA Title II standards took effect, GHGs were not included as an "air pollutant" under Title I's PSD program until EPA promulgated the Tailoring Rule—a rule that calls for treating GHGs differently from every other PSD pollutant. The Tailoring Rule revised 40 C.F.R. §§51.166(b) and 52.21(b) to include (for the first time) a definition of "subject to regulation." This regulatory provision, in turn, defines (for the first time) "GHGs" for PSD purposes and specifies (for the first time) the circumstances under which GHGs become "subject to regulation" under PSD. 75 Fed. Reg. at 31,606 (J.A.__).

Finally, EPA's position that the LDVR's promulgation triggered a *Chevron-step-one mandate* to regulate GHGs under PSD simply reinforces the unlawfulness of EPA's action. As discussed above, no such mandate exists. Agency action "must be declared invalid," even if otherwise supportable as an "exercise of [agency] discretion," if "not based on the [agency's] own judgment but rather on the unjustified assumption that it was Congress' judgment" that such action was "desirable or required." *Transitional Hosps. Corp. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000)(quoting *Prill*, 755 F.2d at 948)(internal quotations omitted); *PDK Labs., Inc.*

v. DEA, 362 F.3d 786, 797-98 (D.C. Cir. 2004); *Sea-Land Serv., Inc. v. DOT*, 137 F.3d 640, 646 (D.C. Cir. 1998).

2. EPA's Arguments as to Why GHG Emissions Must Be PSD-Regulated Are Meritless.

The presence in the ambient air of the principal GHG, CO_2, does not "deteriorate air quality" under any reasonable understanding of the phrase. Accordingly, regulation of a GHG like CO_2 cannot be a "measure[]" "necessary" to "prevent significant deterioration of air quality" in CAA §107 areas. CAA § 161; *see* Non-State.Pet.Br.35-39. In response, EPA argues "no ambient air or local impacts exception to PSD" exists, and claims "'ambient air' refers simply to outdoor air," which "exists anywhere in the atmosphere." EPA.Br.108-09 (citing *Train v. NRDC*, 421 U.S. 60, 65 (1975)). EPA disregards its long-standing definition of "ambient air" as only "that portion of the atmosphere, external to buildings, *to which the general public has access*." 40 C.F.R. §50.1(e)(emphasis added). The issue is whether GHGs create "deterioration" of the "quality" of such "ambient air." They do not. CO_2's presence in the ambient air—that portion of the atmosphere people breathe—is necessary for life itself and, as EPA concedes, existing and anticipated future concentrations of CO_2 in the air to which the public is exposed present no direct health risk. 74 Fed. Reg. 18,886, 18,901 (Apr. 24, 2009)(J.A.__); Non-State.Pet.Br. 37 & n.9.

Equally inapposite is the significance EPA ascribes to §165(e)(1)'s reference to "ambient air quality at the proposed site." EPA claims this language shows that,

"[w]hen Congress wanted to refer to *local* ambient air quality" under PSD, it used this formulation. EPA.Br.109. But the statute's focus on prevention of ambient-air-quality deterioration arises from §107's requirement, referenced in §161, that each state delineate geographic "air quality control region[s]" that usually consist of areas no larger than a county. Tellingly, §165(e)(1) distinguishes between "ambient air quality at the proposed site *and in areas which may be affected by emissions from such facility*," and requires air quality analysis for both categories of areas. CAA §165(e)(1)(emphasis added).

That *Massachusetts v. EPA*, 549 U.S. 497, 529 n.26 (2007), rejected "attempt[s] to exclude greenhouse gases" from CAA "coverage" based on "ambient air" definitions, EPA.Br.109-10, is inapposite. There is no dispute that GHGs are "air pollutants" under §302(g). *Massachusetts*, 549 U.S. at 528-32. The distinct question here is whether EPA must treat—or, conversely, has an obligation or (at least) discretion *not* to treat—"air pollutants" that do not "deteriorate" ambient air "quality" *as PSD pollutants* where EPA made an endangerment finding unrelated to ambient air-quality deterioration and then regulated vehicles' GHG emissions. While §302(g) encompasses GHGs, and "such gases [are emitted] from…motor vehicles," *id.* at 532, the Court nowhere addressed—and, thus, its holding could not resolve—whether EPA has authority or an obligation to treat GHGs as PSD pollutants.

Furthermore, while EPA is correct that "a stated purpose of the PSD program is 'to protect public health and welfare from *any* actual or potential adverse effect [that

may]…occur from air pollution,'" and that "effects on welfare" encompass "impacts to the environment," which may include "climate," EPA.Br.111 (quoting CAA §§160(1), 302(h)(emphasis supplied by EPA)), CAA §161 cannot be read to embrace all health and welfare effects of air pollution. If it did, Part C PSD would swallow the rest of the Act. Instead, §160(1)'s reference to protecting "public health and welfare" from "air pollution" refers to "pollution" that potentially threatens health and welfare through "degradation" of "air quality."

Finally, EPA claims Petitioners argued in *American Electric Power Co. v. Connecticut*, 131 S.Ct. 2527 (2011)("*AEP*"), "that EPA in fact *has* authority to regulate greenhouse gases because it is required to do so under the CAA, and *specifically under PSD*." EPA.Br.50. The certiorari petition EPA cites merely observed, however, that the CAA "has been *interpreted*" by EPA, in the Tailoring Rule, as "provid[ing] EPA with authority" to address regulation of stationary-source GHG emissions, and EPA's actions are "subject to judicial review." Cert.Pet., *AEP*, No. 10-174 at 21, 23 (filed Aug. 2, 2010)(emphasis added)(J.A.__, ___). While *AEP* described EPA's CAA Title I rulemakings, it did not address or resolve questions concerning any authority to regulate GHGs under PSD, and observed that federal common law would be displaced even if "EPA [were] to decline to regulate carbon-dioxide emissions *altogether*." 131 S.Ct. 2527 at 2538-39 (emphasis added).

B. EPA's Attempts to Read the PSD-Situs Requirement Out of the Statute Must Be Rejected.

Even if GHGs could be PSD pollutants, EPA fails to explain why, notwithstanding *Alabama Power's* holding that "location" is "the key determinant" of PSD *applicability*, it refuses to implement §§161 and 165's location-limiting language. *Alabama Power*, 636 F.2d at 365. Implementing the situs-requirement avoids entirely the absurd results produced by EPA's interpretation, which by creating its own absurdities is, *by definition*, neither compelled nor reasonable. If EPA even has *discretion* to implement the situs-requirement, it cannot *choose* its absurd-results interpretation to invoke judicially-disfavored doctrines of last resort to rewrite statutory thresholds. In short, the situs-requirement is statutorily-compelled "tailoring" that EPA ignores to maintain unfettered discretion to *choose* its own major-source thresholds.

1. EPA Fails to Address Location-Limiting Statutory Language Dictating Narrower PSD Applicability.[6]

Rather than engage Petitioners' textual analysis, EPA attempts diversion by calling the situs-requirement a PSD applicability "exception." EPA.Br.97. In fact, the CAA says a major emitting facility is required to obtain a preconstruction PSD permit *only* if located in an "area to which this part"—Title I, Part C—"applies," CAA

[6] As EPA requests this Court to consider its briefing in the 1980 Rule case, EPA.Br.97, Petitioners request the same. Indus.Pet.Opening.Br., *Am. Chemistry Council v. EPA*, No. 10-1167 at 30-47 (filed May 10, 2011)("1980.Rule.Op.Br."), Indus.Pet.Reply.Br., *Am. Chemistry Council*, No. 10-1167 at 11-22 (filed July 22, 2011)("1980.Rule.Reply.Br.").

§165(a), and Part C applies only in an area designated as attaining a NAAQS. *See id.* §161. This is no *exception* to PSD applicability—it *is* the applicability provision. EPA ignores the applicability provision and uses a *definition* to expand its authority. *See* 1980.Rule.Op.Br.37-39.

NAAQS designation occurs on a pollutant-by-pollutant basis, not across-the-board for every pollutant subject to CAA regulation. *Alabama Power*, 636 F.2d at 350. This important limitation on application of the program means a single geographic area may be in attainment with one NAAQS while in nonattainment with another, so that the PSD program applies only to a major facility that emits a pollutant "in any area to which" that specific pollutant has been "designated…as attainment." CAA §§165(a), 161.

A contrary interpretation would read the situs-requirement out of the Act—exactly what EPA did here: EPA claims a PSD permit is required if a facility is located in an area attaining *any* NAAQS—including a NAAQS for a pollutant the facility does not even emit. EPA.Br.98-100; *see* 75 Fed. Reg. at 31,560-62 (J.A.__). But this is no limitation at all and renders the statutory location-limiting language superfluous: every area is (and always has been) in attainment with at least one NAAQS, *id.,* so every "major facility" satisfies EPA's interpretation of the situs-requirement. Non-State.Pet.Br.22. EPA offers no meaningful response.

Rather than question its interpretation—conceded to cause absurd results, 75 Fed. Reg. 31,554-55 (J.A.__)—EPA *reaffirms* its interpretation. EPA argues, because a

facility that has already triggered the requirement to obtain a PSD permit must apply Best Available Control Technology ("BACT") "for each pollutant subject to regulation," CAA §165(a)(4), and because such a facility must analyze air quality at the site "for each pollutant subject to regulation under [the CAA]," *id.* §165(e)(1), any plant is deemed subject to PSD if it emits "any air pollutant" subject to regulation. EPA.Br.99. But the "substantive PSD requirements" have *no bearing* on the threshold *applicability* question of which facilities must apply for PSD permits in the first instance—the only question relevant to this argument.

PSD permitting requirements do not apply across-the-board to any major emitting facility emitting any pollutant. Congress could have structured such a program—*e.g.*, "No major emitting facility … may be constructed that emits any air pollutant subject to regulation under this chapter unless … a permit has been issued"—but did not. Instead, Congress wrote the PSD program to apply only to major facilities that emit a pollutant in "any area" that is in "attainment" for that specific pollutant. *See* CAA §§165(a), 161. Once that threshold is met, then—*and only then*—does the "subject to regulation" language on which EPA relies become operative.

If EPA simply implemented the statutory situs-requirement, there would be no "absurd result," "administrative necessity," or need for "steps" because not even a single additional PSD permit would be required as compared with approximately 82,000 permits annually resulting from EPA's interpretation. As Table 1 shows, the

administrative burdens EPA cites are problems of its own making that cannot form the basis for the Timing/Tailoring Rules. Moreover, contrary to EPA's suggestion that Petitioners would wholly exempt GHGs from PSD, the situs-interpretation would impose BACT on GHGs for the permits listed in Table 1, Column E, an administratively manageable number.

Table 1*					
	[A]-Current Program	[B]-100/250 Major, 100 Modification	[C]-Step-1: "Anyway" Source approach 75k Major Modification	[D]-Step-2: 100k Major Source 75k Major Modification	[E]-CAA-Situs-Requirement §§161, 165 PSD Program
Number of PSD New Construction Actions	240	19,889	240	242	240
Number of PSD Modification Actions at Covered Major Sources	448	62,284	448	1,363	448
Facilities Potentialy Subject to GHG BACT	0	82,173	688	1,605	688

*Columns A-D estimates from 75 Fed. Reg. at 31,540, Table V-l (J.A.__).

2. *EPA's Rebuttals Do Not Support Its Reading of the Statute.*

1. While EPA now argues its absurd results finding involved only the "overall administration" and not the "application" of the PSD and Title V programs

to GHG stationary sources, EPA.Br.10, EPA stated in the final Tailoring Rule the opposite:

> [W]e rely in part on the "absurd results" doctrine, because *applying* the PSD and title V requirements literally (as previously interpreted narrowly by EPA) would … be inconsistent with congressional intent concerning the *applicability* of the PSD and title V programs….

75 Fed. Reg. at 31,541-42 (J.A.__)(emphasis added). *LePage's 2000, Inc. v. Postal Regulatory Comm'n*, 642 F.3d 225, 231 (D.C. Cir. 2011)(court cannot accept post-hoc rationalizations). Regardless, if EPA's reading of the Act produces "absurd results," that alone must lead EPA to inquire whether there are readings that will not produce such results—not to rewrite statutorily-fixed thresholds.

2. EPA misrepresents Petitioners' argument, saying "Petitioners contend that PSD is limited to only [NAAQS pollutants]," EPA.Br.9, and "Petitioners' 'solution' would ensure that virtually no new pollutants regulated under the CAA—not just [GHGs]—would become subject to PSD, *regardless* of whether their regulation would result in significant administrative burdens," EPA.Br.11. EPA further claims Petitioners' interpretation means "greenhouse gases are wholly exempt from regulation under PSD." EPA.Br.38. Untrue. Implementing the situs-requirement means that if a facility triggers PSD applicability (for an attainment NAAQS), all pollutants "subject to regulation" must apply BACT. Thus, as Table 1 shows, EPA's claim that effectuating the Act's situs-requirement would create a regulatory loophole is patently misleading.

3. EPA similarly claims that because the PSD program's "substantive criteria" are not merely directed at NAAQS, but also prohibit emission increases exceeding "any other emission standard…under this chapter," all pollutants must trigger PSD. EPA.Br.100-101. But, again, PSD's substantive requirements do not determine applicability. *See supra*.

4. EPA seeks similar support from a singular clause of §160(1), stating among the purposes "'protect[ing] public health and welfare… *notwithstanding attainment and maintenance of all national ambient air quality standards*.'" EPA.Br.101. But this clause merely reflects that the PSD program was enacted to prevent air quality in areas in attainment with a NAAQS from worsening to the point that they are *no longer in attainment*. *See Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 904 (7th Cir. 1990)(PSD is "to ensure that operators of regulated sources in relatively unpolluted areas would not allow a decline of air quality to the minimum level permitted by NAAQS"); *Alabama Power*, 636 F.2d at 349; *see* CAA §160. Far from indicating PSD regulates every facility emitting any pollutant regulated under any CAA provision, this language confirms PSD is a situs- and pollutant-specific program, hence the statutory limitation to "area[s] to which this part applies." CAA §165(a).

5. EPA makes scattershot claims that §§165(a)(3) and 160(1) undermine support for the situs-requirement. EPA.Br.99-103. Not so. As Petitioners' Briefs in the 1980 Rule case explain, 1980.Rule.Op.Br.31-34, 1980.Rule.Reply.Br.14-15, these provisions *support* the situs-requirement. EPA attempts obfuscation by pointing to

broader substantive requirements applicable once PSD permitting is triggered, then claiming that implementing the situs-requirement would require it to ignore those. Again, the situs-requirement limits only PSD-program triggering, not the scope of pollutants subject to substantive requirements once applicability is triggered.

6. EPA claims §169(2)(C)'s *definitional* incorporation of §111(a)'s modification definition, referencing "any air pollutant," means all PSD applicability is dictated by *that definition* rather than Part C's *applicability* provisions. As noted, *supra*, a broad definition does not override limitations in an operative provision. To say "any air pollutant" may be "a catchall[,] … to say this is not to define what it catches," *Flora v. U.S.*, 362 U.S. 145, 149 (1960). Such a catchall does not override operative provisions that limit applicability.

7. The 1990 CAA amendments' exclusion of hazardous air pollutants (HAPs) from PSD is not "particularly telling." EPA.Br.104. Before 1990, seven then-listed-HAPs would have been considered "subject to regulation" for *BACT* under §165(a)(4). When it added 188 HAPs in 1990, Congress enacted §112(b)(6) to ensure pollutants subject to new maximum achievable control technology ("MACT") requirements would not have to comply with duplicative, potentially-conflicting BACT, thus excluding HAP from BACT. Thus, this change merely shows Congress's policy choice that HAPs be *controlled* under §112.

8. EPA also incorrectly claims the situs-requirement violates the canon that all words of a statute must be given meaning. EPA.Br.100. It is *EPA's* interpretation

that renders language superfluous: Because every area of the country has always been in attainment with at least one NAAQS, EPA's interpretation renders §165(a)'s language superfluous, reading the situs-requirement out of the statute, *see* 1980.Rule.Op.Br.35–36, a point EPA does not dispute. 1980.Rule.Op.Br.17–18. By contrast, under Petitioners' reading, BACT would apply to all pollutants subject to regulation "under this chapter."

9. EPA incorrectly claims that *Alabama Power* resolved the question of PSD applicability triggers in its *dicta* regarding the "major emitting facility" definition. EPA.Br.86. "Before a judicial construction of a statute…may trump an agency's, the court must hold that the statute unambiguously requires the court's construction." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 985 (2005). Not only is the *Alabama Power* language *dictum* but EPA admits it never fully implemented it. *See* EPA.Br.98, EPA.Br., *Am. Chemistry Council*, No. 10-1167 at 16–17, 19n.8, 32–33 (filed Aug. 3, 2011)("1980.Rule.EPA.Br."). EPA has never required PSD permits for major sources of unregulated pollutants, which would have immediately overwhelmed the PSD program, Non-State.Pet.Br.42–43, instead only covering sources with major emissions of "any regulated air pollutant." EPA's nonliteral interpretation of §169(1), deviating from *Alabama Power*'s *dictum*, belies EPA's contention that it must now adhere to that *dictum* to ignore the situs-requirement. Moreover, EPA's attempt to reread the passage as meaning PSD applies "so long as the source is constructed in an

area that is in attainment for any NAAQS" is not what the Court was addressing and must be rejected.

C. *Alabama Power* Does Not Exempt EPA from §166's Mandatory Rulemaking Procedures.

As Petitioners' explained, Part C's plain text codifies Congress's intent to apply PSD only to emissions of criteria pollutants regulated in 1977, with the option—expressed in §166—to add others, provided EPA observes its mandatory, sensible rulemaking procedures. Non-State.Pet.Br.41-45. While tacitly conceding it failed to follow those procedures here, EPA argues that this Court's 30-year-old *Alabama Power* decision exempted it from §166 compliance in this novel attempt to regulate GHGs. EPA is mistaken.

EPA simplistically asserts that because §166 "says nothing" explicitly about non-NAAQS pollutants, it "contains no requirements" that EPA conduct a rulemaking before applying PSD to them. EPA.Br.107. But as its caption indicates, §166 applies to "[o]ther pollutants" without qualification or limitation. EPA imputes to Congress the nonsensical intention to impose detailed requirements for adding criteria pollutants to PSD (the very "NAAQS" pollutants for which significant deterioration is to be prevented), while leaving EPA's discretion unbounded—and inclusion automatic—for "other pollutants."

EPA is wrong to suggest §166 imposes no relevant "requirements,": §166 prescribes the regulations EPA "shall promulgate" before subjecting new pollutants to

PSD, the time when such regulations "shall become effective," and the substantive content of those regulations. CAA §166(a-c). EPA would sweep away all these textual obligations—and the others discussed in Petitioners' opening brief—merely because §166 does not use the magic words "non-NAAQS pollutants." EPA cites no authority for Congress's obligation to have done so.

Instead of advancing a coherent interpretation of §166, EPA block-quotes from *Alabama Power*. But EPA ignores important context: The petitioners there advanced a different argument, seeking to postpone PSD regulation of the four "automotive pollutants" specified in §166(a). *Alabama Power,* 636 F.2d at 405-06. In rejecting that argument, the Court relied on §165's express reference to "7 August 1977" as an effective date. *Id.* at 406. By contrast, Petitioners here argue that Part C as a whole, including §166, forecloses regulating GHG emissions under PSD. *Alabama Power* did not address GHGs, which—although now deemed an "air pollutant" under §302(g)—unquestionably are a different sort of "air pollutant" than the parties or Court had in mind in 1977-78. *See, e.g., Massachusetts*, 549 U.S. at 507 (not until late 1970s that government "began devoting serious attention" to human activity provoking climate change).

In any event, if *Alabama Power* is inviolable for all time and contexts, then EPA's rules here plainly fail: *Alabama Power* expressly held that EPA may not generate absurdities by interpreting the PSD program to have atextually expansive scope and then remediate those absurdities by "grant[ing] broad exemptions" that conflict with

statutory thresholds. 636 F.2d at 354-61. "Age is no antidote to clear inconsistency with a statute," particularly where a change in circumstances has recently removed that interpretation from its prior "unscrutinized and unscrutinizable existence." *Brown v. Gardner,* 513 U.S. 115, 122 (1994)(citation omitted); *see also Cooper Indus., Inc. v. Aviall Servs., Inc.,* 543 U.S. 157, 165-67 (2004)(rejecting as inconsistent with statute's "clear meaning" interpretation endorsed for nearly 20 years). Indeed, EPA's now-cited *Alabama Power* language has been rendered largely obsolete by the novel characteristics of GHGs and unprecedented absurdities flowing from EPA's effort to regulate them under PSD. *See Irons v. Diamond*, 670 F.2d 265, 267-68 & n.11 (D.C. Cir. 1981); *D.C. Circuit Policy Statement on En Banc Endorsement of Panel Decisions* (Jan. 17, 1996)(panel may overrule portion of an "old or obsolete decision…rendered obsolete by subsequent…developments").

III. THE COURT HAS JURISDICTION.

A. Petitioners Have Standing.

EPA cannot meaningfully dispute that its suite of GHG regulations will impose massive regulatory and economic burdens on Petitioners by, among other things, regulating potentially millions of stationary sources that have never before been subject to regulation. EPA nonetheless contends that because "Congress's directive [is] to, in the first instance, apply PSD and Title V to sources that emit 'any air pollutant' regulated under the Act," EPA.Br.10, no judicial relief would redress Petitioners' injuries. EPA.Br.80.

All of EPA's (and its intervenors') standing arguments are reduced to a simple formulation: petitioners whose arguments should be determined not to prevail on the merits also must be found to lack standing even to present them to the Court. But EPA's position means that every case must be resolved on its merits for the Court to determine that a controversy exists. EPA's circular argument is flatly inconsistent with *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-102 (1998), which ended the practice of assuming Article III jurisdiction to decide the merits. Here, EPA asks this Court to circumvent *Steel Company*, by assuming EPA's success on the merits to determine standing. But "uncertainty about whether a cause of action exist[s]" is "*not*…an Article III redressability question." *Id.* at 96; *see Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 364 (D.C. Cir. 2005)(Williams, J., concurring)("showing of a substantive right would thwart a major function of standing doctrine—to avoid premature judicial involvement in resolution of issues on the merits"). Accordingly, "nonexistence of a cause of action [is]…no proper basis for a…[standing] dismissal." *Steel Co.*, 523 U.S. at 96; *see also Bell v. Hood*, 327 U.S. 678, 682 (1946).

Contrary to EPA and environmental-intervenors' argument, to determine standing, this Court must assume Petitioners' claims have merit. Here, accepting Petitioners' arguments would eliminate or limit regulation of their GHG emissions. Petitioners are *injured in fact* by GHG regulation under PSD/Title V, regulation is directly traceable to challenged Agency conduct, and a favorable decision would redress Petitioners' injury. Nothing more is required. Non-State.Pet.Br.14-15.

B. The Petitions Are Timely.

EPA argues that Petitioners' situs-argument is untimely because Petitioners should have filed them in 1978, 1980, or 2002. EPA.Br.84-96. In its unsuccessful motion to hold the challenges to the 1978, 1980, and 2002 PSD rules in abeyance, however, EPA conceded Petitioners may properly challenge its interpretation *in this case*. *See* EPA Mot. to Consolidate and Hold in Abeyance, *Util. Air Regulatory Grp. v. EPA*, No. 11-1037, at 19 (filed Apr. 25, 2011). As EPA explained, "[a]mong the central issues that the petitioners in the Timing Decision and Tailoring Rule cases have indicated they intend to raise is whether the CAA's PSD provisions automatically applied to GHG-emitting stationary sources once the [LDVR] took effect on January 2, 2011. … *This is procedurally proper, since EPA did explain its construction of the PSD provisions in the Tailoring Rule*." *Id.* (emphasis added). Whether the statute automatically compels PSD regulation of GHGs or provides EPA discretion to narrow applicability was thus a central issue in the rulemaking and is in this case. Moreover, regarding the PSD-situs requirement, the Tailoring Rule actually and constructively reopened the issue of PSD-permitting triggers. *See* 1980.Rule.Op.Br.24-28; 1980.Rule.Reply.Br.4-11. Petitioners request this Court to consider its brief in the 1980 Rule case, regarding EPA's actions to actually and constructively reopen PSD applicability provisions, *see* EPA.Br.97, and respond below to new points EPA has raised. Contrary to EPA's assertions and unlike the cases cited in its brief, EPA did not "merely respond," but actively solicited comments to find ways to alleviate these burdens (elevating major-

source thresholds for GHGs) "*and any others that may occur to stakeholders or the public*." 74 Fed. Reg. 55,292, 55,317 (Oct. 27, 2009)(J.A.__)(emphasis added); *see id.* at 55,320 (J.A.__); *cf.* EPA.Br.92-93; *see also, e.g.*, *Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011)(petitioners submitted unsolicited comments). Petitioners commented directly in response to this request and EPA's Final Rule responded at length to these comments, including the comment that PSD can be triggered only by sources emitting major amounts of a criteria pollutant in an area attaining the pollutant's NAAQS. Ultimately, EPA actually adopted this "criteria-pollutant-only" approach to PSD as Step-1 of its program under administrative necessity, while rejecting it as a statutory interpretation. *See* 75 Fed. Reg. at 31,560–62 (J.A.__). Whether PSD and Title V programs automatically apply to GHG-emitting facilities, and whether PSD can be triggered only by NAAQS pollutants, was at play in this proceeding.

Moreover, as EPA acknowledges, agencies constructively reopen interpretations when "revision of accompanying regulations 'significantly alters the stakes of judicial review' as the result of a change that could not have been reasonably anticipated." 1980.Rule.EPA.Br.49. Because EPA's recent actions radically expanded and reshaped the PSD program in ways no one could have anticipated,[7] *see*

[7] EPA can hardly claim that Petitioners could have known in 1978, 1980, or even 2002 that EPA would regulate GHGs at all, much less under PSD. PSD was not raised in the 1999 rulemaking petition that led to *Massachusetts* nor was it briefed or

(Continued . . . .)

1980.Rule.EPA.Br.27-28, EPA constructively reopened its interpretation regarding stationary source permit triggers. *Kennecott Utah Copper Corp. v. DOI,* 88 F.3d 1191, 1214 (D.C. Cir. 1996). EPA contends that allowing this challenge to proceed would open the door to repeated challenges to PSD rules whenever new pollutants are added. EPA.Br.93-94. But no other pollutants could expand PSD's regulatory scope as GHGs would—precisely why EPA took unprecedented steps to revise thresholds for GHG-emitting sources. That until now, no one has needed to challenge the interpretation (because they were not injured) shows no danger of repeated reopening challenges. If application of PSD and Title V to GHGs does not present a sea change, no case does.

Indeed, claims regarding application of PSD (and Title V) to GHGs could not have been raised in 1980 because they were unripe: Title V did not even exist until 1990, and GHGs were not considered a §302(g) "air pollutant" until after *Massachusetts*. During an initial review period, although purely legal claims may be justiciable and thus prudentially ripe, a party without immediate or threatened injury lacks a constitutionally ripe claim. 1980.Rule.Op.Br.22-23; 1980.Rule.Rep.Br.7-8. Petitioners' undisputed evidence shows that their members' injuries just occurred. *See* Non-State.Pet.Br.App.C, Exh. 1-10.

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discussed in the Court of Appeals or Supreme Court decisions. Moreover, Petitioners claims just ripened. 1980.Rule.Op.Br.21-24. Petitioners also were not required to exhaust administrative remedies, Env.Br.25. 1980.Rule.Br.28-30; 1980.Rule.Rep.Br.23-24.

Finally, EPA is wrong that challenging constructively reopened rules only occurs in challenges to *those* rules. *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008)(constructive reopening of 1994-regulation for petition filed only against 2008 rulemaking). Even if EPA is correct, Petitioners did challenge EPA's prior rules.

IV. THE TAILORING RULE IS UNLAWFUL FOR ADDITIONAL REASONS; EPA'S RESPONSES ARE UNAVAILING.

A. EPA's Interpretation of the Tailoring Rule as Imposing a Construction Moratorium Is Unlawful.

EPA revised 40 C.F.R. §51.166 to introduce a definition of a term previously undefined in those rules—"subject to regulation"—and specified that, as of January 2, 2011, GHGs will become "subject to regulation" for new sources that are otherwise "major" (*i.e.,* due to non-GHG emissions), and for existing "major" sources being "modified." 40 C.F.R. §51.166(b)(48)(iv)*(a)-(b)*; 75 Fed. Reg. 31,606 (J.A.__). In promulgating this regulatory revision, EPA explained that it might have to "impose a FIP through 40 C.F.R. 52.21" on states with already- approved State Implementation Plans ("SIPs") that cannot be construed consistent with *revised* §51.166, so as to ensure "GHG sources" could continue to "be permitted" after January 1, 2011. *Id.* at 31,582-83 (J.A.__).

Petitioners observed that if—as EPA asserted—a consequence of the Tailoring Rule's §§51.166 and 52.21 revisions is a construction moratorium, that makes EPA's action unlawful. The CAA provisions, Petitioners explained, could not be construed as authorizing a moratorium. *See* Non-State.Pet.Br.51-53.

EPA now claims this Court "lacks jurisdiction" to consider Petitioners' argument because "any 'construction moratorium' that may result…applies by operation of statute, *not* by application of the Tailoring Rule." EPA.Br.116. EPA characterizes Petitioners' position as mere disagreement with "EPA's explanation in the preamble to the Tailoring Rule of what would occur under the plain terms of the PSD provisions" if states did not amend SIPs before 2011. EPA.Br.117-118.

Jurisdiction exists. It is EPA's actions in the Timing/Tailoring Rules, including specific revision to 40 C.F.R. §51.166(b) adding new paragraph (b)(48), that impose the January 2011 applicability date that creates the construction moratorium EPA claims "flows" from that date's promulgation.

EPA asserts the CAA's PSD provisions are "self-implementing," and that provisions of CAA §110, specifying how states incorporate the PSD program into implementation plans, are of no consequence. "It's simple," EPA argues. "[C]onstruct without a permit that 'conform[s] to the requirements of the [PSD program],' and you violate the statute." EPA.Br.119 (alterations in original).

EPA errs by ignoring that, under §110, new CAA requirements do *not* apply automatically without SIP revisions. The *only* way stationary-source requirements of an "applicable implementation plan" can change is pursuant to procedures established in CAA §§110(a) and (c); *see* §110(i). Until those procedures are followed in a state to impose the Tailoring Rule's new GHG requirements, that state may continue to issue

legally-valid PSD permits authorizing construction, without accounting for GHG emissions. *See* Non-State.Pet.Br.51-53.

EPA's own regulations so provide. EPA attempts to explain away the three-year SIP-revision deadline in 40 C.F.R. §51.166(a)(6) by noting that this provision applies only when a state is required to revise its SIP "by reason of an amendment" to 40 C.F.R. §51.166 itself. EPA.Br.122-123. But EPA, in the Tailoring Rule, *chose* to "amend[]" 40 C.F.R. §51.166(b) expressly by creating, for the first time, a regulatory definition of "subject to regulation" that, by its terms, requires GHGs be regulated as PSD pollutants beginning January 2011, but *only* GHG emissions exceeding quantities specified uniquely *by that regulation*. EPA thus required states to revise SIPs "by reason of an amendment" to 40 C.F.R. §51.166 40 C.F.R. §51.166(a)(6)(i) therefore guarantees each state three years to adopt and submit to EPA a SIP revision reflecting the Tailoring Rule's PSD-rule amendments, and each state in the meantime may issue valid PSD permits without regard to, and without addressing, GHGs.

Because EPA nevertheless insists its actions here impose a construction moratorium in states that have not incorporated the Tailoring Rule's amendments into SIPs, the Tailoring Rule's imposition of GHG requirements is unlawful.

B. EPA's Non-Transition Rule Is Arbitrary.

EPA's refusal to allow states to implement the new program prospectively through SIPs, as required by law, made the transition provisions all the more critical. EPA acknowledges it "allowed grandfathering in other circumstances" but barred it

here. EPA tries to defend disparate treatment of similar sources by arguing "a Step 2 source that begins actual construction after Step 2 would likely be doing so without having any permit meeting [PSD] requirements." EPA.Br.125-26 (quoting 75 Fed. Reg. 31,594). That describes the consequence of, but supplies no rationale for, EPA's "no grandfathering" decision.

EPA admits it failed to provide notice but argues "grandfathering" *vel non* is a "logical outgrowth" of every rule with an effective date. EPA.Br.127. But EPA proposed neither transition-rule language nor rationale. "[S]omething is not a logical outgrowth of nothing." *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005)(citation omitted); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 519 (D.C. Cir. 1983)(proposal must contain "detailed explanation" of "reasoning").

C. The Tailoring Rule Violates §502(a)'s Prohibition on Exempting Major Sources from Title V.

EPA claims none of Petitioners' arguments address Title V applicability. Not so. Because Congress plainly did not intend to apply Title V to millions of small sources, and because §502 specifically forbids exempting "major sources," the more general statutory term "any pollutant" must be construed to exclude GHGs. Non-State.Pet.Br.46-47, *Cf. Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)("a specific statute will not be controlled or nullified by a general one"). Petitioners' interpretation prevents violating the "major source" prohibition.

EPA's contention that it is not "exempt[ing]" sources but phasing-in sources is belied by its concession that it is creating "effective temporary exemptions." EPA.Br.113. EPA's suggestion that §502 bars only "permanent" exemptions, *id.* at 114, has no grounding in the statute. Finally, EPA repeats its suggestion that Petitioners lack standing because the Tailoring Rule gives "relief." But that argument depends on this Court first rejecting Petitioners' merits claim, an impermissible order-of-decision. *See Steel Co.*, 523 U.S. at 93-102.

D. EPA Cannot Regulate GHGs Not "Subject To Regulation."

Although the LDVR regulates only four of six gases classified as GHGs, EPA says it may—indeed, must—regulate all six for stationary sources. EPA.Br.128-31. This creates near-limitless authority to regulate substances *not* subject to regulation when EPA considers them "associated" with regulated substances. EPA's determination conflicts with the term's plain meaning and contradicts the Timing-Rule determination that "subject to regulation" *only* includes "each pollutant subject to either" a CAA provision or EPA regulation "requir[ing] actual control of emissions of *that pollutant*." 75 Fed. Reg. 17,004 (J.A.__)(emphasis added).

E. EPA Cannot Use Shell Games to Avoid Addressing Regulatory Impacts.

EPA wrongly claims it lacked discretion to consider CAA interpretations that would not trigger PSD requirements for GHGs and contends cost considerations are precluded. EPA.Br.133-34. The Act requires reasoned, non-arbitrary regulation that

considers "salient problems ." *Panhandle E. Pipe Line Co. v. FERC*, 890 F.2d 435, 439 (D.C. Cir. 1989)(citation omitted); CAA §307(d)(9). Nothing in Titles I or V exempts EPA from this obligation. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Contrary to EPA's suggestion, that includes consideration of costs where not statutorily foreclosed. *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000).

The "salient problem" here is the totality of burdens of regulating stationary-source GHG emissions. EPA's attempt to calculate Tailoring Rule "relief" did not satisfy applicable requirements.[8] The calculations are irrelevant because lifting every shell in EPA's game reveals that EPA *never considered* stationary-source burdens, belying EPA's claim that its regulatory response "as a whole" is "fair, reasonable, and faithful" to its duties. EPA.Br., *Coalition for Responsible Regulation v. EPA*, No. 09-1322 at 4 (filed Aug. 18, 2011). While identifying the LDVR as the statutory trigger, EPA ignores the rule's *promulgated* "subject to regulation" definition., 75 Fed. Reg. at 31,606 (J.A.__). EPA should have considered burdens *here;* failure to do so makes its rule arbitrary.

CONCLUSION

The petitions for review should be granted.

[8] EPA cannot casually dismiss its failure to satisfy additional statutory and Executive Order requirements. EPA.Br.135-37. Even absent direct judicial review, EPA's failure deprives the rule of "required rational support" and "the general legal requirement of reasoned, nonarbitrary decisionmaking." *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984)(Scalia, J.).

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Joint Reply Brief of Non-State Petitioners and Supporting Intervenors contains 8,552 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count. I further certify that the foregoing brief is in compliance with this Court's order dated March 21, 2011, establishing a briefing schedule and stating that the Reply Briefs for Remaining Petitioners and Supporting Intervenors not exceed a combined total of 14,000 words.

/s/ Shannon S. Broome
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Dated: November 16, 2011

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that on this 16th day of November, 2011, I caused to be electronically filed the foregoing Joint Reply Brief of Non-State Petitioners and Supporting Intervenors with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system.

All registered CM/ECF users will be served by the Court's CM/ECF system.

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