

ORAL ARGUMENT NOT YET SCHEDULED

**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**

Respondent.

No. 09-1322 and
consolidated cases

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

Petitioners,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY**

Respondent.

No. 10-1073 and
consolidated cases

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

Petitioners,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY**

Respondent.

No. 10-1092 and
consolidated cases

**SOUTHEASTERN LEGAL
FOUNDATION, ET AL.**

Petitioners,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY**

Respondent.

No. 10-1131 and
consolidated cases

**COALITION FOR RESPONSIBLE REGULATION, INC., ET AL.,
SOUTHEASTERN LEGAL FOUNDATION, ET AL.,
COMPETITIVE ENTERPRISE INSTITUTE, ET AL.,
LANDMARK LEGAL FOUNDATION, ET AL.,
AND
OHIO COAL ASSOCIATION**

MOTION FOR STAY

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ANPR	Advanced Notice of Proposed Rulemaking
AR	IPCC Assessment Report
BACT	Best Available Control Technology
CAA	Clean Air Act
CAFE	Corporate Average Fuel Economy
CEI	Competitive Enterprise Institute
CO ₂	Carbon Dioxide
CRR	Coalition for Responsible Regulation, Inc.
CRU	University of East Anglia Climate Research Unit
EAB	Environmental Appeals Board
EPA	U.S. Environmental Protection Agency
FIP	Federal Implementation Plan
GHG	Greenhouse Gas
GNPD	Great Northern Project Development
IPCC	Intergovernmental Panel on Climate Change
LLF	Landmark Legal Foundation
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act
NHTSA	National Highway Traffic Safety Administration
NRC	National Research Council
NSPS	New Source Performance Standards
OCA	Ohio Coal Association
OSHA	Occupational Safety & Health Administration
PM	Particulate Matter
PSD	Prevention of Significant Deterioration
RLBLC	RACT-BACT-LAER Clearinghouse
SIP	State Implementation Plan
SLF	Southeastern Legal Foundation
SO ₂	Sulfur Dioxide
USGCRP	U.S. Global Climate Research Program

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INTRODUCTION

These many cases challenge four U.S. Environmental Protection Agency (EPA) rulemakings that followed the Supreme Court’s remand in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Together, the rules comprise EPA’s present strategy for regulating “greenhouse gases,” and the most pervasive scheme ever undertaken in the name of the Clean Air Act (Act or CAA). As EPA Administrator Stephen Johnson warned in 2008, when considering his Agency’s response to the *Massachusetts* remand, the “regulation of greenhouse gases under any portion of the Clean Air Act could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.” 73 Fed. Reg. 44,354, 44,355 (July 30, 2008). Because of choices since made by Administrator Johnson’s successor, that day has arrived.

Pursuant to Rule 18 of the Federal Rules of Appellate Procedure, Coalition for Responsible Regulation, Inc. and its members (collectively, CRR);¹ Southeastern Legal Foundation and its co-petitioners (collectively, SLF);² Competitive Enterprise

¹ CRR, et al., are the Petitioners in Case Nos. 09-1322, 10-1073, 10-1092, and 10-1132.

² SLF’s co-petitioners in Case Nos. 10-1035, 10-1083, 10-1094, and 10-1131, include U.S. Representatives John Linder (GA–7th), Dana Rohrabacher (CA–46th), John Shimkus (IL–19th), Phil Gingrey (GA–11th), Lynn Westmoreland (GA–3rd), Tom Price (GA–6th), Paul Broun (GA–10th), Steve King (IA–5th Jack Kingston (GA–1st), Michele Bachmann (MN–6th), Kevin Brady (TX–8th), John Shadegg (AZ–3rd), Marsha Blackburn (TN–7th), and Dan Burton (IN–5th); The Langdale Company, Langdale Forest Products Company, Langdale Farms, LLC, Langdale Fuel Company,

Institute, FreedomWorks, and Science and Environmental Policy Project (collectively, CEI);³ Landmark Legal Foundation and Mark R. Levin (collectively, LLF);⁴ and Ohio Coal Association (OCA)⁵ respectfully request an order staying each of these rulemakings pending final disposition of the merits.⁶ This identical Motion is filed today in each of the four consolidated dockets.⁷

As explained below, the rules' ultimate restrictions take effect no later than January 2, 2011. The approach of that date already is disrupting capital investment, with direct consequences for jobs, energy security, and economic recovery. By letter dated September 7, 2010, CRR, CEI, SLF, and LLF asked EPA to consider a voluntary stay (Ex. 1), and OCA today filed a similar request (Ex. 2). Understandably,

Langdale Chevrolet–Pontiac, Inc., Langdale Ford Company, Langboard, Inc.–MDF, and Langboard, Inc.–OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc., and Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; and Georgia Agribusiness Council, Inc.

³ CEI, et al., are the Petitioners in Case Nos. 10-1045 and 10-1143.

⁴ LLF is the Petitioner in Case Nos. 10-1152 and 10-1208.

⁵ OCA is the Petitioner in Case Nos. 10-1040, 10-1126, 10-1144, and 10-1145.

⁶ CEI and LLF move only to stay those rules for which they have filed petitions for review, identified *supra* notes 3 and 4.

⁷ By separate “Motion to Reallocate or, Alternatively to Exceed Page Limits for Stay Motions,” filed September 3, 2010, CRR, et al., along with other Petitioners intending to seek stays, have asked the Court—in the interest of *reducing* its overall reading—for leave to file a single motion in excess of page limits instead of four separate motions that comply with the limits.

EPA has not yet replied, but ongoing and imminent irreparable harm (as well as the Court-ordered deadline for stay motions) compel this filing.

CRR is a non-profit 501(c)(4) corporation supported by members engaged in the extractive industries, agriculture, power generation, chemical production, and manufacturing. Its purpose is to prevent the misuse of executive powers premised on anthropogenic “climate change,” at least ahead of the public will to do so as expressed through duly enacted legislation.

Founded in 1976, SLF is a national public interest law firm and policy center that advocates limited government, individual economic freedom, and the free enterprise system in the courts of law and public opinion. SLF is a 501(c)(3) non-profit corporation that shares and promotes the public interest in the proper construction and enforcement of the laws and Constitution of the United States. In addition to legislative initiatives and programs designed to inform and educate the public, the organization’s attorneys represent plaintiffs in courts throughout the country to enforce laws advancing its interests.

CEI is a non-profit 501(c)(3) corporation organized for the purpose of defending free enterprise, limited government, and the rule of law. FreedomWorks is a non-profit 501(c)(4) corporation with over 870,000 members nationwide, organized for the purpose of promoting individual liberty, consumer choice, and competition. The Science and Environmental Policy Project is a non-profit 501(c)(3) corporation

organized for the purpose of promoting sound and credible science as the basis for regulatory decisions.

Founded in 1976, LLF is a public interest law firm committed to preserving the principles of limited government, separation of powers, free enterprise, federalism, strict construction of the Constitution and individual rights. Specializing in Constitutional litigation, Landmark maintains offices in Kansas City, Missouri and Leesburg, Virginia.

OCA is an unincorporated trade association dedicated to representing Ohio's coal industry. The Association is committed to advancing the development and utilization of Ohio coal as an abundant, economic, and environmentally sound energy source.

These organizations uniformly oppose EPA's arbitrary application of the Clean Air Act to a trace constituent of clean air.

The Clean Air Act is Not a Comprehensive Greenhouse Gas Control Act.

Before the Court for review are four inter-dependent EPA actions, taken in rapid succession, to regulate greenhouse gases (GHGs) under the CAA. EPA's regime rests on the first rulemaking at issue, in which its Administrator adopts the finding of the Intergovernmental Panel on Climate Change (IPCC) to the effect that anthropogenic GHG emissions endanger public health and welfare. 74 Fed. Reg. 66,496 (Dec. 15, 2009) (Endangerment Finding). EPA thus added to the CAA pantheon a new pollutant called "greenhouse gas," defined as "the aggregate group of

... six long-lived and directly emitted greenhouse gases: Carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.” *Id.* at 66,536-37.

Because of that Finding, EPA next concluded that it should translate the latest iteration of Corporate Average Fuel Economy (CAFE) standards adopted by the National Highway Traffic Safety Administration (NHTSA) into corresponding tailpipe limits on this new “pollutant.” And so EPA and NHTSA jointly published a rule setting both new CAFE standards *and* limits on tailpipe emissions of GHGs that mimic compliance with those CAFE standards (because GHG emissions are directly proportional to fuel used), effective for Model Year 2012 cars. 75 Fed. Reg. 25,324 (May 7, 2010) (Tailpipe Rule).

But EPA did not stop with cars. In the third rulemaking, EPA announced its conclusion that its regulation of mobile source GHG emissions under Title II of the Act requires EPA also to subject *stationary* source GHG emissions to preconstruction permitting under the Title I Prevention of Significant Deterioration (PSD) preconstruction permit program and to the operating permit program under Title V. 75 Fed. Reg. 17,004 (Apr. 2, 2010) (Triggering Rule).⁸ More specifically, EPA

⁸ EPA did not arrive at this final rule by direct route. As explained in more detail in the preamble to the final Triggering Rule, a variety of administrative appeals involving PSD permits for specific projects had brought to EPA’s Environmental Appeals Board (EAB) the question of whether and when GHGs become “subject to regulation,” as that phrase is used in CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4). 75 Fed. Reg. at 17,004-06. The project opponents in those cases saw triggers for GHG-based

declared that this new air pollutant called “greenhouse gas” becomes “subject to regulation” throughout the Act on January 2, 2011, the first day on which it would be illegal to produce a car not meeting the Model Year 2012 standards. *Id.*

But the CAA is so poor a framework for GHG regulation that EPA ultimately admits the impossibility of applying some of its sections without having to violate others: The fourth and (to date) last link in EPA’s chain of regulation confesses the need to rewrite by regulation several unambiguous provisions of the Act in an effort to avoid “absurd” burdens on the public and the States, which EPA concedes that

PSD permitting in everything from the 1990 CAA Amendments’ imposition of GHG monitoring requirements on certain sources, to the *Massachusetts* decision in 2007, holding that carbon dioxide could fall within the definition of “air pollutant” under the CAA. *Id.* In an effort to communicate his position to the EAB and anyone else interested, EPA Administrator Johnson issued in 2008 a memorandum—later named for its author—expressing his view that PSD applies to any pollutant subject to “actual control” by virtue of a rule implementing the Act. *Id.* at 17,004.

In response to the Administrator’s decision to reject arguments based on other triggers (such as monitoring requirements), Sierra Club, Inc. petitioned for reconsideration, as well as for judicial review. *Sierra Club v. EPA*, No. 09-1018 (D.C. Cir. filed Jan. 15, 2009). After succeeding Mr. Johnson as EPA Administrator, Lisa Jackson granted reconsideration of the “Johnson Memo,” and undertook a notice and comment rulemaking process. 74 Fed. Reg. 51,535 (Oct. 7, 2009) (proposal). The final result of her reconsideration process is the “Triggering Rule” now before this Court, which is titled in the *Federal Register* as “Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs.” 75 Fed. Reg. 17,004.

It is because of its genesis that the rule occasionally is given the rather awkward title of “Johnson Memorandum Reconsideration Rule.” It also has been called the “Timing Rule,” because it describes the timing by which EPA intends to add GHGs into the Act’s stationary source permitting programs, and the “Subject to Regulation Rule” because it sets forth EPA’s final position on when and how GHGs become subject to regulation.

Congress never intended. 75 Fed. Reg. 31,514 (June 3, 2010) (Tailoring Rule). This rule purports to reset the CAA-specified thresholds for permit applicability from 100 or 250 tons per year of any pollutant⁹ to 75,000 or even 100,000 tons per year for GHGs. *Id.* at 31,606 *et seq.* This same rule also overrides the mechanisms that Congress established to allow for orderly implementation of new permitting requirements by the States, which serve as the Nation’s air quality permitting authorities. *Id.* at 31,579 *et seq.* (describing process by which EPA will “reinterpret” existing State laws as though they already treated GHGs as “subject to regulation”).

EPA has proposed (but not yet adopted) two further rules to circumvent the normal State Implementation Plan (SIP) process, which demonstrate the extent to which EPA is making this up as it goes along.¹⁰ The first proposed rule—assuming it is adopted in record time—would give States perhaps three weeks in December to respond to a call for revisions to their SIPs, or face a construction ban on January 2, 2011:

⁹ These thresholds are built into the definitions of “major emitting facility” and “major source” set forth at CAA §§ 169(1) and 302(j), 42 U.S.C. §§ 7479(1) and 7602(j), which establish the applicability of the PSD preconstruction permit program and Title V operating permit program, respectively. *See* CAA § 165(a), 42 U.S.C. § 7475(a) (requiring PSD permits for “major emitting facilities”) & CAA § 502(a), 42 U.S.C. § 7661a(a) (requiring Title V operating permits for all “major sources”).

¹⁰ A third rule, not yet even proposed, reportedly is on the way to patch up the Title V permit program: “We note that a number of states have a similar problem (i.e., that their title V programs do not apply to GHG-emitting sources.) We intend to address this issue through separate rulemaking.” 75 Fed. Reg. 53,892, 53,905 (Sept. 2, 2010). It remains to be seen what legal legerdemain EPA will use to make this additional “problem” disappear.

[F]or any State that receives a deadline after January 2, 2011, the affected GHG-emitting sources in that State...will be unable to receive a federally approved permit authorizing construction or modification. Therefore, after January 2, 2011, this source may not lawfully be able to construct or modify until the date that EPA either approves the SIP submittal or promulgates a FIP.

75 Fed. Reg. at 53,901 (proposed call for SIP revisions to adopt EPA GHG permitting program rules). This ax would fall not only on the thirteen States actually identified in the proposed SIP Call as having an “inadequate” SIP, but also on any others that EPA *later* determines to be inadequate, even if not identified in the proposed SIP Call. *Id.* at 53,895-96.

The second pending proposal would impose a Federal Implementation Plan (FIP) on States that fail to respond to the SIP Call, which again could befall each State in as little as three weeks after EPA has made a finding of SIP inadequacy. 75 Fed. Reg. 53,883 (Sept. 2, 2010). Among its many faults, this process comes nowhere close to complying with the Clean Air Act. *See* CAA § 110(k), 42 U.S.C. § 7410(k) (requiring EPA to allow a “reasonable time” for States to respond to SIP calls); CAA § 110(c), 42 U.S.C. § 7410(c) (requiring imposition of FIP within two years after State fails to meet its obligation to correct the deficiency within a reasonable time). In fact, as discussed below, Congress expressly and rightly provided around *five* years for new pollutants to be integrated into the PSD program.¹¹

¹¹ *See infra* at note 25 and accompanying text.

EPA of course does not confess that its schemes break the law, but admits at least that they strain it:

In view of the urgency of the task, which is to ensure that a PSD permitting authority for affected GHG sources is in place by January 2, 2011, we propose to give the final SIP Call an effective date of its publication date. We recognize that this process is highly expedited, but we believe that this is essential to maximize our and the States' opportunity to put in place a permitting authority to process PSD permit applications beginning on January 2, 2011, without which sources may be unable to proceed with plans to construct or modify.

75 Fed. Reg. at 53,900. This "urgent" need to "expedite" rule after patchwork rule to avoid shutting down industrial development does not bespeak a rational program; instead, it alerts this Court, as it should have alerted EPA, to some fundamental flaw in EPA's understanding of Congress' wishes.

As explained below, EPA is proceeding under interpretations of the CAA by which it could choose to regulate just about any human activity in the U.S., strictly or loosely or not at all, on whatever schedule it chooses. EPA's interpretation of its authority under the Act exceeds even the broad outer limits of the delegation doctrine. The immediate result of EPA's choices is a permitting program that imposes impossible obligations on the Nation's industrial base (and the States as permitting authorities), which EPA does not even try to justify with any quantifiable environmental benefits. Instead, EPA touts the "regulatory relief" afforded by the rule, the environmental costs of which are acceptable to EPA because they are too small to be quantified. 75 Fed. Reg. at 31,600. EPA's assertion of unbounded

regulatory power assesses an uncertainty tax across the entire U.S. economy, with productive enterprises unable to plan for EPA's next move because the Agency acts as though unconstrained by statute or definable objective, and because EPA's poor efforts to constrain itself—in the so-called “Tailoring Rule”—not only are self-imposed and so at best temporary, but also very unlikely to be upheld by this Court.

The Requested Stay Leaves In Place All Intended Emission Reductions.

With the arguable exception of the Tailpipe Rule, none of the four rules ties specifically expected GHG emission reductions to specifically demonstrated environmental consequences avoided: No GHG reductions directly result from the Endangerment Finding, and that Finding is not required as a legal predicate for the NHTSA CAFE standards; no marginal GHG reductions result from translating fuel economy standards into their GHG emission equivalents; and, most importantly, EPA fails to quantify any GHG reductions that would result from programs to require permits for stationary sources to emit GHGs. 75 Fed Reg. at 31,600. And the environmental “benefits” that EPA attributes to its Tailpipe Rule are not only imperceptible—saving one *one-hundredth* of a degree in average temperature increase and *one millimeter* in sea level rise over the course of the next *century*, 75 Fed. Reg. at 25,495—but will occur anyway from the improvements in fuel economy compelled by NHTSA under its separate statutory authority. EPA's Tailpipe Rule simply goes along for the ride. No Petitioner seeks to stay the CAFE standards, and so any GHG reductions intended by these rules will be retained.

But staying EPA's decision to translate CAFE standards into GHG limits will forestall all of what EPA Administrator Johnson described as the "profound" and "unprecedented" consequences of making GHGs subject to regulation under the CAA, at least until the Court has had the opportunity to adjudicate very substantial challenges to (1) the Finding on which EPA premised its Tailpipe Rule, (2) EPA's legal opinion that subjecting GHGs to regulation under Title II's mobile source control program requires permits from stationary sources under Titles I and V, and (3) the Agency's efforts to rewrite the plain language of the Act in order to accommodate its legal opinion. In any event, a stay of six or twelve months can hardly be said to be material to alleged harms for which even the direst forecasts are made in multi-decadal terms. *See* 74 Fed. Reg. at 66,514 ("the underlying science upon which the Administrator is basing her findings generally considers the next several decades—the time period out to around 2100, and for certain impacts, the time period beyond 2100").

A stay sacrifices none of the alleged benefits—there are none—but avoids all of the ongoing and irreparable harms associated with implementing EPA's regulatory scheme. Given the breadth of EPA's Endangerment Finding, which was not limited to the "greenhouse effect" attributable to vehicle emissions, the Finding is being used not only as the predicate for the Tailpipe Rules, but also for all manner of other

rulemakings and legal actions at the federal and State levels.¹² Each of these consumes public and private resources, and will need to be unwound if its underpinning—the Endangerment Finding—is later overturned.

¹² These proceedings fall into several classes.

The first encompasses further rulemakings under the CAA. Language similar to Section 202(a), 42 U.S.C. § 7521(a) is found throughout the Act, imposing obligations to regulate “pollution” that “endangers public health or welfare.” Each such mandate is now receiving the same attention as did Section 202(a) in the petition for rulemaking that led to *Massachusetts*.

EPA has received numerous petitions asking for further rulemakings to limit GHGs for various other mobile sources under Title II, including (1) aircraft engines (including their emission of water vapor!), 73 Fed. Reg. at 44,460, (2) nonroad engines (including outdoor power equipment, recreational vehicles, farm and construction machinery, logging equipment, and small marine vessels), *id.* at 44,461, and (3) ships. *Id.* at 44,459. EPA inaction on those petitions has precipitated deadline-forcing litigation. *E.g.*, *Center for Biological Diversity v. EPA*, No. 10-CV-985 (D.D.C. filed June 11, 2010). According to EPA’s web site, a proposed rule limiting GHG emissions from heavy-duty trucks and buses reportedly is imminent. <http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2060-AP61?opendocument> (Ex. 3).

Petitions also have been filed to demand rules for stationary sources, based on “endangerment” language similar to that used in Title II. For example, various petitioners have claimed that the endangerment language in CAA § 111, 42 U.S.C. § 7411, compels EPA to adopt New Source Performance Standards (NSPS) for a variety of industrial source categories, including power plants, petroleum refineries, and cement kilns. 73 Fed. Reg. at 44,399. Various lawsuits have been filed to force action on these petitions or to otherwise compel GHG limits in NSPS. *E.g.*, *New York v. EPA*, No. 08-1279 (D.C. Cir. filed Aug. 25, 2008) (challenging EPA failure to include GHG limits in refinery NSPS); *New York v. EPA*, No. 06-1322 (D.C. Cir. Sept. 24, 2007) (remanding power plant NSPS to consider effect of decision in *Massachusetts* case).

At least one rulemaking petition even seeks to force EPA to adopt a National Ambient Air Quality Standard (NAAQS) for GHGs. *See* Center for Biological Diversity, “Petition Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act” (Dec. 2, 2009) (Ex. 4). This Petition arises because the Act links EPA’s duty to set a NAAQS to a finding that a pollutant “endangers.” *See* CAA § 108(a)(1)(A), 42 U.S.C. § 7408(a)(1)(A). It would be difficult to overstate the

According to EPA, the Tailpipe Rule precipitates all of the unintended consequences for stationary sources; that is, EPA says the Act leaves it no choice but

consequences of a GHG NAAQS, which of course the whole Nation would fail to attain.

Another class of action is the State or regional rulemaking, many of which draw their substantive support from EPA's very broad Endangerment Finding. *E.g.*, New Mexico Environmental Improvement Board, Nos. 8-19(R) (filed Dec. 19, 2008) and 10-04(R) (filed June 4, 2010). In other cases, citizen groups are trying to use the Finding to compel State-level rulemaking. *E.g.*, *Public Citizen, Inc. v. Texas Comm'n on Env'tl. Quality*, No. D-1-GN-09-002426 (Texas Dist. Ct., Travis County, filed Oct. 6, 2009).

Yet another class of action predicated on the Endangerment Finding is the environmental regulatory proceeding other than those pursued under the CAA, such as demands for Environmental Impact Statements under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C). For example, relying principally on EPA's Endangerment Finding, an interest group seeking to stop the development of Powder River Basin coal reserves has petitioned the Department of the Interior to change the way that agency leases lands in the Basin. The group asserts the agency must certify the entire basin as a coal production region under the Mineral Leasing Act and conduct an environmental analysis of the alleged global warming impacts of GHG emissions from the burning of PRB coal by electric power generators across the U.S. *See* Petition of WildEarth Guardians, dated Nov. 23, 2009, at 3-4 (Ex. 10). The group also is attacking specific proposed lease sales in the Basin on the same grounds. *See WildEarth Guardians v. Salazar*, No. 10-cv-01174 (D.D.C. filed July 13, 2010).

The final class of legal action driven or sustained by EPA's Endangerment finding is the environmental tort case. Among those actions are *Comer v. Murphy Oil USA, Inc.*, 2007 WL 6942285 (S.D. Miss. 2007), *rev'd* 585 F.3d 855 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *pet. for mandamus filed*, No. 10-294 (U.S. Aug. 26, 2010) (claiming that GHG emissions from a variety of GHG-producing businesses exacerbated Hurricane Katrina); and *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp.2d 265 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *pet. for cert. filed*, No. 10-174 (U.S. Aug. 2, 2010) (claiming damage from GHGs emitted by various power producers). In the latter case, the Government now claims that the regulatory scheme at issue here displaces the federal common law (of nuisance) on which the underlying claims rely. *See* Brief for the Tennessee Valley Authority in Support of Petitioners (filed Aug. 24, 2010).

to require permits for stationary sources of GHGs once it has regulated tailpipe emissions of that same new “pollutant.” And so the Tailpipe Rule must be stayed to avoid those unintended consequences.

The Triggering and Tailoring Rules purport to impose on the States the obligation to immediately amend their permit programs in order to begin permitting GHG emissions. EPA is poised to use all manner of illegal tools to bend the States to its will, or to take over the States’ statutorily assigned role directly. Evident legal defects in the entire scheme now impose a terrible uncertainty tax on our struggling economy, as no business is able to make plans or investments in reliance on a regulatory scheme so clearly at odds with the plain language of the Act.

A Stay Serves the Public’s Interest in Orderly Policy-Making.

The law as envisioned and now created by EPA is not the product of considered policy-making. No branch of government—and certainly not the Nation’s elected representatives—set out by conscious design to create the piecemeal but pervasive regulatory programs at issue in these many pending cases.

The Legislative Branch: Congress unquestionably did not in 1970, or 1977, or even in 1990 make a conscious choice to regulate GHGs at all, much less through tailpipe limits, PSD reviews, or Title V permits at the thresholds or with the timing that EPA’s rules now require. EPA acknowledges that the CAA is “focused ... on sources of conventional pollutants and not global warming pollutants.” 74 Fed. Reg. 55,292, 55,304 (Oct. 27, 2009). When Congress intends to mandate comprehensive

EPA action in response to an issue of “air pollution,” we find that intent clearly expressed, in great detail, in entire subchapters of the Act, such as those governing local air pollution, air toxics, acid rain, and stratospheric ozone protection. In fact, the missing subchapter on “Greenhouse Gases” is *exactly* what Congress would have added to the Act were it to have enacted H.R. 2454 (111th Cong., 1st sess. 2009), called the “American Clean Energy and Security Act,” which passed the House last year, 219-212, but failed in the Senate.

The Executive Branch: Nor do the rules spring from considered policy-making by EPA to control emissions using the most efficient regulatory tools in pursuit of a specific environmental objective. EPA did not establish an environmental goal (such as a “safe” or desirable atmospheric level of GHGs); examine various means of achieving that goal; design from various options a sensible program to achieve that goal; and then present that program to the public for comment and refinement. *See Chevron, U.S.A., Inc. v. Natural Res. Defense Council Inc.*, 467 U.S. 837, 863-64 (1984) (“to engage in informed rulemaking, [an agency] must consider varying interpretations and the wisdom of its policy on a continuing basis”). Rather, EPA found endangerment without any finding of what levels endanger, either in terms of GHGs in the atmosphere or even of an environmental (e.g., temperature) endpoint, providing no way of knowing whether its program has succeeded, or even how much progress, if any, is made with each step.

Next, EPA adopted tailpipe limits, justified by the assertion that even trivial reductions are good reductions, again without any showing that the rule will yield meaningful progress toward a known “safe” level of atmospheric GHGs gases. Indeed, EPA disavows any obligation to provide that showing. 74 Fed. Reg. at 66,508 (“there is no basis to...read into the endangerment criteria an obligation that EPA show that the resulting emissions control strategy or strategies will have some significant degree of harm reduction or effectiveness in addressing the endangerment”).

EPA did not by deliberative process conclude that requiring permits of stationary sources of GHG emissions would yield defined benefits at sensible cost; rather, EPA says by interpretive rule that the law requires it to demand such permits as an ineluctable consequence of the Agency’s decision to regulate GHG emissions from cars. 75 Fed Reg. at 17,007. But while saying an Act that is silent about greenhouse gases compels greenhouse gas permits, EPA refuses to compel permits in the manner and from the sources that the Act, if applicable, explicitly would require. *Id.* at 31,514 (“This rulemaking is necessary because without it PSD and title V requirements would apply, as of January 2, 2011, at the 100 or 250 tons per year (tpy) levels provided under the CAA, greatly increasing the number of required permits, imposing undue costs on small sources, overwhelming the resources of permitting authorities, and severely impairing the functioning of the program.”). The Tailoring Rule goes on to set forth in great detail a schedule of declining thresholds and

timeframes for applying them that bear no resemblance to the straightforward obligations of the Act. *Id.* at 31,516 *et seq.* Still further rules are being prepared to fix the fixes.¹³

For all of EPA's trouble to pick which provisions of the Act it will obey and which it will disregard, the end result still is not a rational program. EPA cannot and does not ascribe any environmental benefits to regulating the stationary sources that are left in the permit programs or any environmental consequence to leaving others out. *Id.* at 31,600.

The Judicial Branch: Neither this Court nor the Supreme Court has mandated anything other than that carbon dioxide (and other GHGs) fall within the broad statutory definition of "air pollutants," and so EPA may consider whether GHGs "endanger" public health and welfare and are otherwise appropriate for regulation under the CAA. *Massachusetts*, 549 U.S. at 533. *Massachusetts* did not direct intrusive or pointless permitting programs for stationary sources; in fact, both the majority and dissenting opinions evidence the belief that the consequences of any endangerment finding would stop at tailpipe rules. *Id.* at 531-32 (Justice Stevens opining for the majority that EPA jurisdiction over GHGs would not lead to "extreme measures"); *id.* at 546-47 (Chief Justice Roberts' dissent) (observing that the "mismatch" between the petitioners' claimed injuries from catastrophic global warming and "the narrow

¹³ These pending proposals are briefly described *supra* at note 10 and accompanying text.

subject matter of the Clean Air Act provision at issue in this suit” would “suggest[] that petitioners’ true goal for this litigation may be more symbolic than anything else”).

A stay creates the opportunity for orderly disposition of legal challenges without any environmental consequences, while respectful of judicial, and the Nation’s, economy. If, as EPA itself asserts, it is “absurd” to regulate GHGs under the Clean Air Act as written, then all such regulations should be stayed. A stay will provide this Court the opportunity to assess whether the Act compels absurd regulation that accomplishes nothing but imposes impossible burdens, or whether there is a way to reconcile all provisions of the Act without absurdity.

In the meantime, the only actually intended emission reductions associated with these rulemakings—the tightened CAFE standards adopted by NHTSA under legal authority apart from the Clean Air Act—would remain in place to be implemented on the same schedule that NHTSA has proposed, while avoiding all of the unintended consequences that EPA first creates and then illegally and ineffectually struggles to avoid. In the unlikely event that the Court were to vindicate all of EPA’s actions, then they can be reinstated with no loss of any environmental benefits. In contrast, unwinding all of the collateral consequences of EPA’s rules, were they left intact for the next year of litigation, would be to unbake a cake.

ARGUMENT

In full recognition of the presumption favoring the validity of agency actions and of this Court's reluctance to stay them, still Movants submit that the circumstances here uniformly favor a stay. Behind all of EPA's actions is a finding "that elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and to endanger the public welfare of current and future generations." 74 Fed. Reg. at 66,516. But even accepting EPA's claim as true, the rules will achieve (at best) infinitesimal changes in expected climatic outcome over the course of the next *century*, and so delaying progress toward that non-event for the duration of this litigation cannot possibly have any detectable adverse effect on anyone or anything. Finally, and most fundamentally, Movants do not seek to stay the rules that are said to achieve those benefits, as they will accrue in any event from the CAFE standards adopted by NHTSA.

While the alleged consequences of anthropogenic warming are being measured over a century and the contribution of U.S. sources in fractions of a percent, EPA's efforts to prevent them yield painful side effects already acutely felt by the regulated community, State and local governments, and the U.S. economy. Even now, permit applications must be filed to seek GHG limits, even though there are no State resources or rules available to govern those applications. *See infra* at notes 29-30 and accompanying text. Even now, the States must either announce their willingness to play by EPA's new rules, adopt new rules and hire new staff, or face a takeover of

their permit programs by a federal agency equally ill-equipped to process permits. 75 Fed. Reg. at 31,582; *see also supra* note 10 and accompanying text. Even now, no business can plan with any certainty concerning the permitting or control requirements facing capital projects. *See infra* at 61 *et seq.* Even now, many other governmental actions are being predicated on the EPA Endangerment Finding. *See supra* note 12. Even now, pending tort actions rely on the Endangerment Finding to establish liability. *Id.* By the time any of this can be undone by judicial review of each EPA rule in the ordinary course, our Nation's legal landscape will be forever and inalterably changed, and Petitioners will have suffered sizable losses for which there will be no adequate remedy.

We are now witnessing the fulfillment of predictions made by former EPA Administrator Johnson, who commissioned in the wake of *Massachusetts* a careful analysis of the collateral damage that would result from using the Clean Air Act as a weapon against alleged anthropogenic climate change. He published that analysis in the form of an Advanced Notice of Proposed Rulemaking, along with his own conclusions:

I believe the ANPR demonstrates the Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct health effects, is ill-suited for the task of regulating global greenhouse gases. Based on the analysis to date, *pursuing this course of action would inevitably result in a very complicated, time-consuming and, likely, convoluted set of regulations.* These rules would largely pre-empt or overlay existing programs that help control greenhouse gas emissions and *would be relatively ineffective at reducing greenhouse gas concentrations given the potentially damaging effect on jobs and the U.S. economy.*

73 Fed. Reg. at 44,355 (emphasis added). Administrator Jackson proceeded to issue her Finding in the face of these warnings.

“The purpose of a preliminary injunction is merely to preserve the relative positions of the parties” pending the outcome of litigation. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (citation omitted). “The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.” *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (citation omitted). “These factors interrelate on a sliding scale and must be balanced against each other. ‘If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.’” *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998) (citation omitted).

It would be difficult to imagine circumstances more compelling for a stay than those presented by EPA’s patchwork quilt of GHG rules. As set forth below, Movants have abundantly demonstrated a likelihood of success on the merits, in part because one of the rules itself confesses that EPA’s regulatory program contravenes the plain language of the Act. Movants have demonstrated irreparable injury because their members will continue to suffer grave losses for which they cannot be

compensated. Conversely, it cannot seriously be maintained that anyone will suffer loss if EPA's four rules are stayed pending the outcome of this litigation: The NHTSA CAFE standards will go into effect regardless, and EPA has not even tried to quantify the GHG emission reductions to be achieved, much less the environmental benefit to be gained, with the rest of its new regime. Finally, a stay would allow time for Congress to either set in place GHG control laws, or to displace EPA's efforts to rewrite them, perhaps avoiding the need for this Court to intervene.

I. THERE IS A STRONG LIKELIHOOD THAT PETITIONERS WILL PREVAIL ON THE MERITS BECAUSE EACH LINK IN EPA'S CHAIN OF GHG REGULATION SUFFERS FATAL LEGAL WEAKNESSES.

In order to be granted its requested stay, Movants must demonstrate a likelihood of success on the merits. But in order “[t]o obtain injunctive relief, [they] need not establish an absolute certainty of success: ‘[I]t will ordinarily be enough that the plaintiff has raised serious legal questions going to the merits, so serious, substantial, difficult as to make them a fair ground of litigation and thus for more deliberative investigation.’” *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (citation omitted). This Motion sets forth only some of the defects in each of the four challenged rulemakings. While Movants expect to prevail on the merits in their challenges to each rule, a stay would be warranted even if the Court does not find a likelihood of successful challenge to every rule, because they operate as an integrated whole. *See* 75 Fed Reg. at 53,895 (“In recent months, EPA has taken four related actions that, taken together, trigger PSD applicability for GHG sources on and

after January 2, 2011...”). Even EPA acknowledges, for example, that the stationary source permitting programs would be “absurd” if EPA were not allowed to “tailor” the Act. 75 Fed. Reg. at 31,517. Because removal of just one card would bring down the whole house, the likelihood of a successful challenge to any part equips the Court to stay the whole. *Cf. New Jersey v. EPA*, 517 F.3d 574, 584 (D.C. Cir. 2008) (“Severance and affirmance of a portion of an administrative regulation is improper if there is ‘substantial doubt’ that the agency would have adopted the severed portion on its own.”) (citation omitted).

A. The Endangerment Finding Proceeds from a Misapprehension of EPA’s Obligations Under Section 202(a).

EPA’s entire GHG program rests on the validity of its Endangerment Finding under Section 202(a) of the Act. This Finding suffers many flaws. We focus here on three:

1. EPA did not exercise its own judgment. EPA did not assess the science underlying its Endangerment Finding, but simply republished the assessments of other entities, unlawfully sub-delegating its statutory duties.
2. EPA misconstrued—and thus failed to make—the judgment required by Section 202(a) of the Act. EPA wrongly believed it could find endangerment without addressing the fundamental questions necessary to enable meaningful judicial review of that finding, leading to regulation unconstrained by the “reasonable limits” required by law. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 18 n.32 (D.C. Cir. 1976).

3. EPA's scientific conclusions are irrational and unsupported by the record.

Applying an overly broad and illogical “precautionary” approach, EPA declined to confront and assess the many fundamental scientific uncertainties in the record, or to reconcile those uncertainties with its ultimate conclusions. According to EPA, so long as there is a non-falsifiable hypothesis of risk (here, that greenhouse gases can have a greenhouse effect), profound uncertainties about its extent and significance are irrelevant. This is bad science and bad law.

1. EPA Unlawfully Delegated its Statutory Judgment to Other Agencies.

Section 202(a)(1) of the Act requires the Administrator to promulgate standards when, “*in [her] judgment,*” an air pollutant emitted by motor vehicles causes or contributes to air pollution that may reasonably endanger the public health or welfare. 42 U.S.C. § 7521(a)(1) (emphasis added). Here, instead, “the Administrator ... rel[ied] on the major assessments of USGCRP, IPCC and NRC as the primary scientific and technical basis of her endangerment decision.” 74 Fed. Reg. at 66,510.¹⁴ EPA specifically *declined* to undertake “a new and independent assessment,” *id.* at 66,511, preferring to “plac[e] primary and significant weight on these assessment

¹⁴ Although EPA references the scientific assessments of the National Research Council (NRC) and the U.S. Global Climate Research Program (USGCRP), both of these agencies themselves relied heavily on the IPCC's AR4, particularly as it relates to the core scientific causation questions undermining the Endangerment Finding. At the end of the day, all paths lead back to IPCC. *See, e.g.,* 74 Fed. Reg. at 66,511; USGCRP June 2009 Report at 19-21 (available at downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf) (Ex. 5).

reports in making her decision on endangerment.” *Id.* EPA noted that the assessments by IPCC and others “address the scientific issues that the Administrator must examine for the endangerment analysis,” *id.* at 66,510, and because “EPA has no reason to believe” the assessment reports were not accurate, *id.* at 66,511, the Administrator chose to rely conclusively on them. But because the Administrator did not perform her “own assessment of all the underlying studies and information,” *id.*, she cannot confirm the accuracy, completeness, or objectivity of the assessments on which she relied. Nor can this Court, because the science and data assessed by IPCC—and the choices it made to accept or reject or weigh that science and data—are not in the administrative record.

This means that the only “judgment” EPA really made is that IPCC can be trusted to have made the endangerment assessment required by the Act. But the Act does not authorize entities other than EPA to make that assessment. *See, e.g., U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (“[F]ederal agency officials ... may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.”). A federal agency may turn to third parties to gather facts or offer advice. *Id.* at 567-68. But the agency ceases to perform its own administrative function when it allows other parties to “make crucial decisions” about the application of statutory standards to specific circumstances and when it “rubber-stamps” other parties’ decisions “under the guise of seeking their advice.” *Id.* As this Court has warned,

when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making. Also, delegation to outside entities increases the risk that these parties will not share the agency's "national vision and perspective," and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme. In short, subdelegation to outside entities aggravates the risk of policy drift ...

Id. at 565-66 (citations omitted); *see also Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095, 1143 n.41 (D.C. Cir. 1984) ("[O]ne of the rationales against excessive delegation [is] the harm done thereby to principles of political accountability. Such harm is doubled in degree in the context of a transfer of authority from Congress to an agency, and then from agency to private individuals."). Nor may the Administrator rely excessively on the factual conclusions of others, without "confront[ing] personally the essential evidence and arguments [supporting] the final standard." *United Steelworkers v. Marshall*, 647 F.2d 1189, 1217 (D.C. Cir. 1980).

This case illustrates the wisdom of this Court's caution in *U.S. Telecom Association*. "Primary and significant" reliance on the conclusions of others precludes confidence that those conclusions were reached with the "national vision and perspective" required by the CAA.¹⁵ There is no reason to believe that the individual IPCC assessment authors applied the standards that govern EPA decisions, and every reason to believe that other considerations—inconsistent with CAA standards—

¹⁵ As discussed in more detail below, an endangerment determination is informed by the relationship of the statutory term "endanger" to other provisions of the Act, and where the science is uncertain the determination "must . . . depend to a greater extent upon policy judgments and less upon purely factual analysis." *Ethyl*, 541 F.2d at 27, 29.

colored their decision-making. We now know, for example, that at least one IPCC assessment author, Dr. Murari Lal, included unfounded statements predicting the imminent demise of the Himalayan glaciers because “[w]e thought that if we can highlight it, it will impact policy-makers and politicians and encourage them to take some concrete action.” See David Rose, “Glacier Scientist: I Knew Data Hadn’t Been Verified,” *Daily Mail Online* (Jan. 24, 2010) (Ex. 6). The result-driven nature of the assessments ultimately led India to withdraw from IPCC, remarking that “[t]here is a fine line between climate science and climate evangelism” and that some IPCC authors had “misused the IPCC report.” Reconsid. Denial RTC 2-23 (Ex. 7). This is but one of many, many examples that illustrate the pitfalls inherent in off-shoring judgment, particularly to an entity whose very mission statement assumes the truth of the proposition under study.¹⁶

EPA in effect asks this Court, and the American public, to trust that IPCC did its job objectively, using the same rules of decision that govern valid rulemaking in this country. But neither this Court nor the interested public can determine whether

¹⁶ The role of the IPCC is “to assess on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation.” IPCC, *Memorandum on the Role of the IPCC and Key Elements of the IPCC Assessment Process* (Feb. 4, 2010), available at the following web site: www.ipcc.ch/pdf/press/role_ipcc_key_elements_assessment_process_04022101.pdf (Ex. 8).

IPCC in fact did so, because the innumerable choices made by its many authors are not in the record.

In fact, it took an anonymous release of materials from the University of East Anglia's Climatic Research Unit (CRU) in November 2009 to reveal how naïve was EPA's belief that it could rely on the unconfirmed analyses of foreign entities.¹⁷ These "Climategate" disclosures prove that IPCC's assessment of climate science was neither transparent nor objective. By way of example, Dr. Phil Jones, who co-authored portions of the IPCC assessment reports, stated in an e-mail that "I can't see either of these papers [contrary to the views of the IPCC authors] being in the next IPCC report," and vowed that "Kevin [Trenberth] and I will keep them out somehow—even if we have to redefine what the peer-review literature is!"¹⁸ At a minimum, these comments strongly suggest that important IPCC authors and contributors failed to apply "standards of quality based on objectivity, utility, and integrity," as EPA assumes. Although EPA now rallies to Dr. Jones' defense,¹⁹ EPA should not be in the position of having to defend IPCC authors in the first place:

¹⁷ The CRU provided IPCC with the historical temperature measures and temperature surrogates upon which IPCC based many of its critical findings. *History of the Climatic Research Unit*, [http: www.cru.uea.ac.uk/cru/about/history](http://www.cru.uea.ac.uk/cru/about/history) (last visited Sept. 10, 2010) (Ex. 9).

¹⁸ Reconsid. Denial RTC 2-27 (Ex. 7).

¹⁹ Reconsid. Denial RTC 2-27 (Ex. 7). *See also* 75 Fed. Reg. 49,556 (Aug. 13, 2010) (EPA notice denying Petitions to Reconsider based on "Climategate" materials).

Had EPA done its own work and rendered its own judgment, improper conduct by IPCC assessment authors would not be an issue.

By delegating its judgment, EPA also has insured that the climate science at issue is not in the record. Nor are the assumptions and standards informing the judgments of the IPCC authors. The net result is a scientific judgment made by IPCC, and then adopted by EPA, not supported by any record that this Court can review. This is error. *See, e.g.*, CAA § 307(d)(2)-(4), 42 U.S.C. § 7607(d)(2)-(4) (requiring EPA to include in the rulemaking docket “[a]ll data, information, and documents” upon which it relies); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (“[I]n order to allow for useful criticism, it is especially important for the agency to identify and make available *technical studies and data* that it has employed in reaching the decisions to propose particular rules.”) (citation omitted).

2. EPA Misconstrues—and so Fails to Make—the Judgment Required by Section 202(a).

Misconstruing *Massachusetts v. EPA*, EPA claims that

the Supreme Court decision held that EPA is limited to consideration of science when undertaking an endangerment finding, and that we cannot delay issuing a finding due to policy concerns if the science is sufficiently certain (as it is here) However, [the argument that CAA policy informs the judgment] ... ignores other language in the decision that clearly indicates that the Court interprets the statute to allow for the consideration only of science.

74 Fed. Reg. at 66,501. But the Supreme Court held only that EPA erred in concluding that carbon dioxide fell outside of an expansive statutory definition of “air pollutant,” *Massachusetts*, 549 U.S. at 528-32, and in assuming that it could decline to regulate without considering whether “the scientific uncertainty is so profound that it precludes ... a reasoned judgment,” *id.* at 534. The Court never said that EPA’s ultimate endangerment determination must be divorced from policy judgments. It cannot be: “Endangerment,” the statutory predicate for action, is not a scientific term with defined endpoints. It is not an objective measure, like the boiling point of water, but a value judgment, like “bad.” And so before EPA finds “endangerment,” it first must define it.

But EPA fails to do so. Its Finding is predicated on changes to “climate.” 74 Fed. Reg. at 66,497 (“The Administrator reached her determination by considering both observed and projected effects of greenhouse gases in the atmosphere, their effect on climate, and the public health and welfare risks and impacts associated with such climate change.”). “Climate” is simply “the combination of temperature, precipitation, winds, etc., characteristic of a locality or region over an extended period of time.” FUNK & WAGNALLS STANDARD COLLEGE DICTIONARY 254 (1977). This leads to a number of obvious yet unanswered questions: What levels of temperature, precipitation, or wind “endanger,” and why? What is a “safe” global temperature? Based on what criteria, for what populations, in what locations? What is a “safe” ambient concentration level of GHGs? Why? Most fundamentally, what level of

GHG yields acceptable climate conditions? Do car emissions contribute anything meaningful to the present level of GHGs in the atmosphere? Would their regulation under Section 202(a) fruitfully attack the alleged “endangerment”?

EPA either can’t answer these questions because it off-shored its judgment, or won’t answer them because it misapprehended its legal obligation to do so. The Agency wrongly limited its endangerment determination to identifying the existence of a theoretical risk, and failed in its duty to complete the analysis by establishing the facts that inform a rational policy (regulatory) response, if any. *Am. Lung Ass’n v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998) (“Where ... Congress has delegated to an administrative agency the critical task of assessing the public health and the power to make decisions of national import in which individuals’ lives and welfare hang in the balance, that agency has the heaviest of obligations to explain and expose every step of its reasoning.”).

Contrast EPA’s Section 202(a) finding here with the one reviewed at great length and in great depth in *Ethyl*. In the finding ultimately upheld after searching inquiry (and even with some dissent) in *Ethyl*, EPA had first identified a specific risk to public health (impaired brain function) and the medical marker (blood lead levels) that it would use to evaluate the risk to public health, specifically explaining the relevance of blood lead as a measure of risk to brain function. 541 F.2d at 38-39. Next, it selected a blood lead level that correlated with an acceptable degree of brain function impairment, explaining why the selected level represented the level sufficient

to avoid “endangerment” and responding to comments that urged higher and lower levels. *Id.* at 38-40. EPA also considered evidence of the extent to which U.S. populations experienced blood lead levels above this “endangerment” level. *Id.* at 40-41. Next, EPA examined all exposure pathways that contributed to the total body lead burden, including but not limited to the ambient air. *Id.* at 41-46. Based on this analysis, EPA concluded that the airborne pathway was significant enough to warrant possible regulation. *Id.* at 42-47. Finally, EPA established that the regulation of lead levels in gasoline would meaningfully lower airborne exposure, in a way that would fruitfully attack the underlying danger. *Id.* at 55-65. By the end of the rulemaking, EPA had fully explained all of the choices it made along the path of converting available scientific knowledge about lead toxicology and exposure into a policy-based finding of endangerment from automotive lead emissions sufficient to justify regulation, and allow—and survive—judicial review.

EPA’s GHG endangerment finding, in contrast, jumps from the tautology that “greenhouse gases cause a greenhouse effect” to “greenhouse gases endanger public health and welfare sufficient to warrant exactly the level of GHG reductions that happen to result from NHTSA’s imposition of the CAFE standards required by the Energy Policy and Conservation Act.” It is as though EPA, in *Ethyl*, were defending a rule to ban leaded gasoline because lead is a poison at some unknown dose; cars burning leaded gasoline can emit lead, which has some unknown effect on atmospheric lead concentrations; and banning leaded gasoline would yield some

unknown but trivial reduction in atmospheric lead levels, possibly mitigating by some unknown (but at best trivial) degree the unknown adverse effects that may result from atmospheric lead, although it is very, very possible that the ban would accomplish absolutely nothing at all.

If anything, EPA should face a far *greater* burden to explain its policy choices here than it did in *Ethyl*. Lead is strictly a poison, whereas carbon dioxide is a natural component of clean air, ingested by all plants and exhaled by all animals. Life on Earth depends on the very “danger” that EPA is trying to prevent. 74 Fed. Reg. at 66,499 (“Greenhouse gases trap the Earth’s heat that would otherwise escape from the atmosphere, and thus form the greenhouse effect that helps keep the Earth warm enough for life.”). Lead in the atmosphere—unlike carbon dioxide—serves no public health or ecological function at all, much less as a vital link between and protector of all life on Earth. Carbon dioxide has been in the atmosphere at levels higher and lower than today’s throughout geologic history,²⁰ whereas lead has no place in the natural atmosphere. Brain damage from blood lead is an unequivocal harm, whereas “climate” is a neutral construct. It changes all the time, independent of human activity. What measure of climate—temperature, precipitation, wind speed—is the level at which public health and welfare is endangered? These necessarily are value judgments: Warmer temperatures benefit some and may hurt others; more or less rain helps some and hurts others.

²⁰ See, e.g., RTC 3-52, 3-53 (Ex. 11).

Yet EPA declines to make any such judgments about the competing costs and benefits of a changing climate, except arbitrarily. *See, e.g.*, 74 Fed. Reg. at 66,524 (“the Administrator has not established a specific threshold metric for each category of risk and impacts”) & *id.* at 66,529, 66,531-32 & 66,535 (acknowledging the research establishing various benefits of warming, but asserting without meaningful discussion, proof or quantification that the asserted harms outweigh such benefits). The Agency refused to make any effort to link the Endangerment Finding to its ability to eliminate or even reduce the danger by choosing to regulate under Section 202(a) of the Act. 74 Fed Reg. at 66,516 (“it is reasonable to interpret the endangerment test as not requiring the consideration of the impacts of implementing the statute in the event of an endangerment finding as part of the endangerment finding itself”).

Ethyl demands “reasonable limits” on the risk evaluation and resulting policy response associated with an endangerment determination. 541 F.2d at 18 n.32. The emission standard compelled by any endangerment finding under Section 202(a) must be judicially reviewed under CAA § 307(d)(9), 42 U.S.C. § 7607(d)(9). Whether an emission standard is rational and therefore lawful, or is arbitrary and capricious and therefore unlawful, depends on (1) how EPA identifies and then weighs a particular risk, (2) the uncertainties associated with that risk, (3) the reasonableness of the burdens imposed by the regulatory response to the identified risk, and (4) the manner by which the risk is “fruitfully ... attacked” by the resulting regulatory response. *Ethyl*, 541 F.2d at 31 n.62; *see also Am. Lung Ass’n*, 134 F.3d at 392 (“[w]ith its delicate

balance of thorough record scrutiny and deference to agency expertise, judicial review can occur only when agencies explain their decisions with precision....”). Yet the record here offers nothing for the Court to judge, because EPA simply declares that IPCC has concluded that greenhouse gases “endanger,” and nothing more need be said to regulate, in any manner EPA chooses.

This is precisely the same erroneous interpretation of the law that OSHA made thirty years ago, leading the Supreme Court to invalidate workplace exposure limits on benzene that were based solely on feasibility, rather than meaningful mitigation of a quantified risk: “If the Government was correct in arguing that neither ... [statute] requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a ‘sweeping delegation of legislative power’ that it might be unconstitutional” *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (citation omitted). The Court further noted that the government’s position “would ... justify pervasive regulation limited only by the constraint of feasibility” and “would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit.” *Id.* at 645. Same here.

An endangerment finding under Section 202(a) does not simply identify a health and welfare risk, as EPA contends; it also establishes the criteria that will inform whether the emission standards adopted to address that risk are rational. This is how “endangerment,” an undefined statutory term, requires the application of

science to law. *Ethyl*, 541 F.2d at 26 (the endangerment determination involves “essentially legislative policy judgments”). While science provides the facts that inform the judgment, EPA must make (and explain) its policy choices based on those facts to reach a value judgment of “endangerment.” *Ethyl*, 541 F.2d at 24 (“a determination of endangerment to public health is necessarily a question of policy”). EPA here failed to do so, first by rubber-stamping the IPCC’s findings instead of making its own assessment of the evidence, and then by disavowing any obligation to explain the various policy choices it made to reach its ultimate judgment and regulatory response. *Massachusetts* corrected EPA’s error when it refused to make any judgment on GHG science. We now ask this Court to correct EPA’s error in failing to identify, explain, and rationally support the policy choices it made when transmuting that science into law.

3. EPA’s Assessment of the Record is Logically Flawed.

EPA’s approach to assessing the record from which it found anthropogenic global warming fails on multiple fronts. First, as explained above, EPA did not evaluate its own record of direct evidence. It relied instead on assessments of the direct evidence made by other entities, particularly IPCC, leaving this Court to determine whether *the IPCC’s* conclusions withstand scrutiny under the CAA. That review requires “delv[ing] into the scientific literature” so as to “understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the

agency and those bypassed; the choices open to the agency and those made.” *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130, 1145 (D.C. Cir. 1980) (citation omitted). None of that is possible here because the “evidence relied upon” and the “evidence discarded” and the “questions bypassed” by IPCC are not in the record.

A second problem with EPA’s adoption of IPCC assessments is that IPCC was not assessing the science in consideration of a specific regulatory response under the Clean Air Act. As a result, IPCC did not specifically confront and rationally explain how the substantial uncertainties in climate science affected any regulatory response. It is one thing to gather up evidence supporting the non-falsifiable and unremarkable hypothesis that greenhouse gases can have a greenhouse effect. It is quite another to explain why a particular regulatory response is rational in light of the totality of the science, both certain and uncertain. As this Court noted in *Ethyl*, “public health may properly be found endangered both by a lesser risk of a greater harm and by a greater risk of a lesser harm,” and “whether a particular combination of slight risk and great harm, or great risk and slight harm, constitutes a danger must depend upon the facts of each case.” 541 F.2d at 18 & n.32. Without meaningful consideration of the scientific unknowns, it is impossible to determine whether emissions of a particular pollutant present “a particular combination of slight risk and great harm, or great risk and slight harm.”

Presented with a non-falsifiable hypothesis of risk, the rationality of any regulatory response depends on the agency’s assessment of competing hypotheses and

the scientific uncertainties surrounding each one. If agencies are not required to confront and explain these countervailing considerations, then they become free to impose regulations based solely on “false dilemmas” and “arguments from ignorance.” *See, e.g.*, Hugh G. Gauch, Jr., *Scientific Method in Practice* 183 (2003) (“false dilemmas” acknowledge fewer alternative explanations than actually exist) (Ex. 12). Thus does correlation become confused with causation. *Id.* This case presents that very error.

i. EPA Created a “False Dilemma” by Meaningfully Evaluating Only One Possible Cause of Global Temperature Changes.

EPA reasons that because GHGs can have a greenhouse effect, and because the measured average temperatures considered by IPCC increased for several decades during a period of rising GHG concentrations, GHG emissions “very likely” caused the warming. 74 Fed. Reg. at 66,518. But this is a false dilemma, given the existence of other explanations for the warming; accordingly, the choice is not simply between concluding either (1) that anthropogenic GHGs caused warming, or (2) that there has been no warming. Instead, the proper scientific inquiry encompasses all possible causes of warming, natural and otherwise.

Correlation is never, by itself, proof of causation, especially where, as here, the record identifies many periods (including the last decade) during which GHGs and

temperature did *not* correlate.²¹ RTC 3-4 (“if a linear trend is fitted to annual global surface temperature data for the period 1998 to 2008, there is no real trend”) (Ex. 11). EPA attributes this lack of recent warming to “natural variability,” without identifying the natural mechanisms involved, and opines that this lack of warming is really just masking the underlying warming caused by GHGs. *Id.* So, according to EPA, warming is evidence of global warming, and lack of warming is evidence of global warming. Thus does EPA “prove” its theory that anthropogenic greenhouse gases are causing and will continue to cause “unnatural” warming by assuming its truth, and then summarily rejecting any contrary evidence or scientific hypotheses as “inconsistent with the assessment literature.” *See, e.g.*, RTC 3-3 (dismissing comments concerning anthropogenic emissions’ lack of influence on the climate as “inconsistent with the assessment literature”); 3-23 (same); 3-25 (same) (Ex. 11).

ii. EPA’s Arguments from Ignorance Could Rationalize Any Regulatory Action, and so Provide No Rationale at All.

Alternatively, EPA asserts that emissions of GHGs should be regulated as a precaution because it is not possible to prove that recent warming was *not* caused by increasing GHG concentrations. 74 Fed. Reg. at 66,506-07, 66,518 (acknowledging that it analyzed only “known” natural factors—“forcings”—that influence global temperatures). But this is simply an argument from ignorance, regulation as a

²¹ CRR, et al., Comments on EPA’s Proposed Endangerment Finding (June 22, 2009), at 25-29 (Ex. 13).

precaution without confirmation of causation. *Massachusetts* certainly did not call on EPA to regulate from ignorance. 549 U.S. at 534.

EPA adopts verbatim IPCC's judgment that "[i]t is extremely unlikely (<5 percent) that the global pattern of warming during the past half century can be explained without external forcing, and very unlikely that it is due to *known* natural external causes alone." 74 Fed. Reg. at 66,518 (emphasis added). But the caveat—that the assessment is based only on "known" natural causes—admits that warming may have been caused by *unknown* natural factors not yet understood. Unless these scientific uncertainties are confronted and assessed, it is irrational to draw any conclusion at a 95% certainty level.

Even a cursory review of the record demonstrates the irrationality of EPA's extraordinary level of confidence in anthropogenic GHGs as the deciding factor in temperatures over the last fifty years. IPCC's own Assessment Report (AR) explains that there are *three* principle influences on the climate system, listed in order of importance:

There are three fundamental ways to change the radiation balance of the Earth: 1) by changing the incoming solar radiation (e.g., by changes in Earth's orbit or in the Sun itself); 2) by changing the fraction of solar radiation that is reflected (called 'albedo'; e.g., by changes in cloud cover, atmospheric particles or vegetation); and 3) by altering the longwave radiation from Earth back towards space (e.g., by changing greenhouse gas concentrations). Climate, in turn, responds directly to such changes, as well as indirectly, through a variety of feedback mechanisms.

AR4 Chapter 1 at 96 (Ex. 14). Of these three factors, the sun is the most important: It provides all of the Earth's atmospheric energy. *Id.* at 96-97. According to IPCC, the influence of the sun lacks scientific consensus, leading to a "low" level of scientific understanding about the sun's overall effect on climate. AR4 Chapter 2 at 202 (Ex. 15). Second is the albedo effect, including from clouds, which controls how much solar energy is reflected back into space. AR4 Chapter 1 at 96 (Ex. 14). IPCC acknowledges "significant uncertainty" here, as well. AR4 Chapter 2 at 201 (Ex.15).²² Third and last, GHGs (the most predominant of which is water vapor) control how much heat is maintained in the atmosphere by radiating long-wave radiation back to the surface. AR4 Chapter 1 at 97 (Ex. 14). According to IPCC, the overall level of scientific understanding of the climate effects of GHGs is "high," with a scientific consensus about the physical mechanisms involved. AR4 Chapter 2 at 201 (Ex 15).

Of the three primary climate drivers, then, there is substantial *uncertainty* about the influence of the two most important. As to the third, GHGs, only a small fraction

²² EPA acknowledges that "[b]ecause cloud responses to climatic change are important for both the trapping and reflection of energy, ... clouds contribute to uncertainties in model-based results," RTC 4-3, and that "cloud modeling is important for accurately representing climate system and is subject to significant uncertainties." RTC 4-16 (Ex. 16). Still EPA never offers a reasoned explanation for how these "significant uncertainties" reconcile with the 95% certainty that it (like IPCC) assigns to GHG effects. *See also* Jason Scott Johnston, *Global Warming Advocacy Science: A Cross-Examination*, at 39-46, Research Paper 10-08, University of Pennsylvania Institute for Law and Economics (2010) (examining the IPCC's downplay of the significance of the substantial uncertainties in cloud feedbacks, even when it acknowledges those uncertainties) (Ex. 17).

of the atmospheric total is anthropogenic.²³ All airborne carbon dioxide, human and natural, comes to about 0.0385% of the atmosphere.²⁴ Yet IPCC and EPA irrationally conclude that it is “highly likely” (95%) that recent warming in the 20th century (but not prior episodes of equally rapid warming in the historical record) is caused by anthropogenic GHGs. The entire climate system, with its innumerable chaotic processes and influences and its undeniable history of constant natural cyclical variation, is posited to be controlled by a thermostat having only one knob, human emissions of GHGs. Both IPCC and EPA allow what they know about GHGs to trump what they do not know about the rest of the climate system, classic examples of reasoning by false dilemma and arguing from ignorance.

For an agency’s actions to be upheld, its “reasons and policy choices [must] conform to ‘certain minimal standards of rationality.’” *Nat’l Wildlife Fed’n v. EPA*, 286 F.3d 554, 559 (D.C. Cir. 2002) (citation omitted). EPA cannot, and does not, explain how its 95% certainty is justified on the record. There cannot simultaneously be both “significant uncertainty” about primary climate drivers and 95% certainty that anthropogenic GHGs are causing any observed warming, yet EPA concludes there is. This fails even minimal standards of rationality.

²³ Humans emit approximately 3.7% of all CO₂ released to the atmosphere. *See* AR4 Chapter 7 at 515 (Ex. 19). Anthropogenic sources are 8.0 GtC per year, natural sources 190.2 GtC per year.

²⁴ *See* Endangerment Finding TSD, § 2(c) 17 (Ex. 18).

B. The Tailpipe Rule Suffers Fundamental Legal Defects.

Movants seek a stay only of EPA's GHG Tailpipe Rule, *not* the CAFE standards promulgated by NHTSA under the Energy Policy and Conservation Act as a separate part of the same "joint Final Rule." 75 Fed. Reg. at 25,324. Therefore, the challenges to EPA's Tailpipe Rule under Section 202(a) in no way affect the fuel savings or GHG emission reductions attributed to NHTSA's new CAFE standards.

1. The Tailpipe Rule is Based Upon and Fatally Flawed by the Same Defects That Plague the Endangerment Finding.

EPA openly acknowledges that the Tailpipe Rule is premised on its Endangerment Finding. *See* 75 Fed. Reg. at 25,398-99. Therefore, the defects in the Finding deprive the Rule of the foundation required by Section 202(a).

2. EPA's Administrative Record Fails to Establish Any Non-Trivial Benefit to the Tailpipe Rule.

While Movants strongly contest the alleged effects of U.S. GHG emissions on global climate, even if correct, EPA admits that the Tailpipe Rule does effectively nothing about it. For example:

Based on the reanalysis the results for projected atmospheric CO₂ concentrations are estimated to be reduced by an average of 2.9 ppm ..., global mean temperature is estimated to be reduced by 0.006 to 0.015 °C by 2100 ..., and sea-level rise is projected to be reduced by approximately 0.06-0.14 cm by 2100....

75 Fed. Reg. at 25,495. As EPA later concedes, these estimated reductions are "small" relative to the "best estimates" for global mean temperature increases (1.8-4.0°C) and sea level rise (0.20-0.59m) projected for the Year 2100 in the absence of

the CAFE reductions. *Id.* “Small” is an overstatement: The absolute differences are barely one one-hundredth of a degree and perhaps a millimeter in sea level over the next one hundred years. “Imperceptible” would be a better term.

Regulatory actions of an administrative agency must “fruitfully attack” the problem being addressed. *See Ethyl Corp.*, 541 F.2d at 31 n. 62. Based on its record, the Tailpipe Rule clearly fails to “fruitfully attack” anthropogenic climate change. Even taking at face value EPA’s (incorrect) worst-case projections of temperature and sea-level changes, the Agency attributes at most a 0.3 percent marginal mitigation from applying the Tailpipe Rule to the U.S. automobile fleet.

A range of cases construing the CAA support the conclusion that it is not intended to address environmental consequences as trivial as those claimed for the Tailpipe Rules. For example, where some power plants’ emissions were modeled to cause an out-of-state impact of 1.5 percent of the National Ambient Air Quality Standards (NAAQS), EPA properly concluded that they did not “prevent attainment” in that other state, as proscribed by CAA § 110. *State of Connecticut v. EPA*, 696 F.2d 147, 163-165 (2d Cir. 1982) (“where the impact upon a nearby state of another state’s revision of its SIP is shown by the Agency to be so insignificant as to be fairly described as minimal, the EPA may approve that revision even where the affected state is not in compliance with the NAAQS”); *see also Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1092-93 (6th Cir. 1984) (although not specifically incorporated into the CAA, the test intended by Congress is whether one state *significantly* contributes to

NAAQS violations in another state, and EPA rightly found that a contribution of 3 percent was not significant); *New York v. EPA*, 852 F.2d 574, 580 (D.C. Cir. 1988) (out-of-state source responsible for 20 percent of total impact did not significantly contribute to NAAQS violations). Similarly, this Court has upheld NHTSA's conclusion that the differences between two vehicle mileage standards were insignificant for purposes of the National Environmental Policy Act where the more stringent standard was projected to reduce emissions by 0.68 percent and gasoline-related cancer deaths by 0.24 percent. *City of Los Angeles v. NHTSA*, 912 F.2d 478, 487-88 (D.C. Cir. 1990), *overruled on other grounds by Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996).

3. EPA's GHG Tailpipe Limits Accomplish Nothing That the NHTSA CAFE Standards Do Not Already Accomplish.

The CAFE standards and EPA's Tailpipe Rule are virtually identical, with irrelevant differences in how the two standards address air conditioning. *See* 75 Fed. Reg. at 72,330 (“[The two standards] represent a harmonized approach that will allow industry to build a single national fleet that will satisfy both the GHG requirements under the CAA and the CAFE requirements under the EPCA/EISA.”). EPA cannot rationally conclude it will address endangerment by separately requiring the same reduction in emissions that another agency already has or is simultaneously eliminating. *See Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 635-36 (1986) (rejecting certain Department of Health and Human Services anti-discrimination regulations

because, among other things, effective state level anti-discrimination programs were already in place); *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 673-74 (1976) (Burger, C.J., concurring) (Commission properly denied a petition for rulemaking that would have resulted in “the imposition of another layer of federal regulation of the same subject matter, with the inevitable potential for conflict between administrative agencies”); *Paralyzed Veterans of Am. v. Civil Aeronautics Board*, 752 F.2d 694, 713 (D.C. Cir. 1985) (finding “commendable” one agency’s decision not to issue regulations that would be redundant with another agency’s).

But EPA’s Tailpipe Rules are not just redundant: By establishing tailpipe standards under § 202(a) of the Act, EPA itself maintains that GHGs are now “subject to regulation” under a variety of other CAA programs, which has profound and pernicious effects throughout the American economy, beginning (but by no means ending) with much-expanded requirements for preconstruction permits and Title V permits. There is no rational basis for EPA to promulgate mobile source rules that do nothing more than reiterate other, independently effective legal requirements, and that offer no added environmental benefit but impose far-reaching and unintended costs on a source population (stationary sources) not even considered in the Endangerment Finding assessment.

C. The Triggering and Tailoring Rules are Illegal Solutions to a Legal Problem of EPA's Own Creation.

The Triggering Rule presents EPA's legal conclusion that the Act triggers an obligation to obtain permits for GHG emissions from stationary sources when EPA chooses to regulate GHG emissions from mobile sources, whereas the Tailoring Rule would alleviate that obligation for an arbitrary fraction of the supposedly affected source population *despite* the compulsion of the Act. In brief, EPA recognizes—under its view of the Act—that all sources which emit more than 100 tons per year of GHGs would need permits. 75 Fed. Reg. at 31,514. Because EPA's exorbitant construction of the Act would create a regulated universe with millions of sources, EPA uses the absurdity of its own reading of the Act to justify its own views about what Congress would have done had it actually intended GHGs to be regulated: The “Tailoring Rule” departs from the CAA's unambiguous thresholds and tailors the Act by setting cascading thresholds and timelines found nowhere in it. *Id.* at 31,606, *et seq.*

Of course no rule can be upheld if inconsistent with the plain language of the law that purports to authorize that rule. *Chevron*, 467 U.S. at 842-43 (“the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress”). This principle surely applies even more strongly where, as is the case with the Title V program, Congress expressly *forbade* EPA to depart from the major source thresholds. CAA § 502(a), 42 U.S.C. § 7661a(a) (“The Administrator may ... promulgate regulations to exempt one or more source categories (in whole or in part)

from the requirements of [Title V] if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator *may not exempt any major source* from such requirements.”) (emphasis added) & CAA § 302(j) (defining “major source” as one emitting 100 tons per year or more of any air pollutant).

1. EPA Could Have Avoided Absurdity with a Proper Reading of the Act.

EPA’s record includes only speculation that preconstruction permits for any source, even the largest, might have any environmental benefit. 75 Fed. Reg. at 31,600. EPA doesn’t even try to speculate that applying the Title V operating permit process to GHG emissions yields any environmental benefit. *Id.* at 31,599. Stated another way, EPA did not add GHGs to the Title I preconstruction permitting program or the Title V operating permit program as a positive or beneficial action justified by law, or policy, or a proper Regulatory Impact Analysis. Instead, EPA simply adopted tailpipe standards duplicative of NHTSA fuel economy standards, asserted that those duplicative rules require it to implement sweeping stationary source permitting regimes, and then played defense against a statute that would then otherwise impose “absurd” demands. EPA could have avoided these concededly absurd results had it simply adopted a natural reading of the Act in the first place. And because a reasonable interpretation that avoids absurdity was available, the Agency’s construction of the statute is arbitrary and capricious rulemaking. *Cf. Mova*

Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1069 (D.C. Cir. 1998) (“In effect, the [agency] has embarked upon an adventurous transplant operation in response to blemishes in the statute that could have been alleviated with more modest corrective surgery.”).

(a) “Subject to regulation” means subject to regulation at the time of the CAA’s enactment.

Part C of the Act—its PSD provisions—was written solely to prevent significant deterioration with respect to two air pollutants regulated under the Act in 1977 (sulfur dioxide (SO₂) and particulate matter (PM)). And so it is no surprise that none of its provisions makes any sense as applied to emissions of GHGs:

- Section 161 applies to “prevent significant deterioration in each region ... designated pursuant to section 7407 ... as attainment or unclassifiable.” 42 U.S.C. § 7471. Of course there are no such regions for GHGs, nor are there likely ever to be: There are no NAAQS for GHGs, and so nothing to attain. And given GHGs’ uniform distribution in the global atmosphere, neither could there be any meaningful distinctions among “regions.”
- Section 162 contemplates different PSD increments depending on geography (e.g., special protections for national parks and other Class I areas). 42 U.S.C. § 7472. Again, this makes no sense as applied to a “pollutant” that exists in trace amounts in the natural atmosphere, uniformly distributed around the globe, regulated not for purposes of protecting visibility or health, but—unlike any other pollutant regulated under the CAA—for their purported influence on global temperatures.
- Section 163 establishes increments for SO₂ and PM only, not GHGs. 42 U.S.C. § 7473.
- Section 164 allows for redesignation of Class I areas, again a concept without relevance to GHGs. 42 U.S.C. § 7474.

- Section 165 is the permit program applicable to “major emitting facilities.” In addition to demonstrating that the proposed source will not violate PSD increments, the permitting authority also must find that “the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter...” CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4). Of course, the entire purpose of the Part in which this subsection is included is to prevent deterioration to bare compliance with the NAAQS, and so a permit program requirement interpreted to apply to GHGs (which have no NAAQS) would do nothing to advance those purposes.
- Section 166, 42 U.S.C. § 7476, instructs EPA how to handle the criteria pollutants other than SO₂ and PM that existed at the time of enactment (hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides), the critical implications of which we address in detail below.
- Sections 167 (enforcement of permit requirements), 168 (preservation of prior laws) and 169 (definitions) have no substantive consequence. 42 U.S.C. §§ 7477-7479.
- Sections 169A and B relate to visibility protection, again an issue wholly unrelated to GHG emissions. 42 U.S.C. §§ 7491 & 7492.

In short, everything about Part C was drafted to govern emissions of the criteria pollutants regulated at the time of enactment, with detailed instructions on SO₂ and PM, and generalized instructions to adopt a PSD program for the other NAAQS of the time (hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides). Nothing about Part C suggests an intent to apply PSD to anything other than criteria pollutants, or to pollutants that might be regulated in the future, after enactment. And so the phrase “subject to regulation under this chapter,” as used in Section 165(a)(4), can rightly be understood in its literal, present-tense sense, as applying to pollutants subject to regulation in 1977. Not only is that the natural

reading, but also the reading that fulfills the stated purposes of Part C, is consistent with all other provisions of that Part and its legislative history, and avoids the many absurdities that otherwise cause EPA to start “tailoring” the Act (including, but not limited to, the abnegation of the tonnage thresholds, as well as the railroading of the States into hurriedly changing their SIPs through dubious procedures). Any remaining doubts about this interpretation are dispelled by reading Section 166, which directly addresses how EPA should handle “Other Pollutants” under Part C.

(b) Before EPA can add a new pollutant subject to review under Part C, Section 166 requires EPA to undertake a rulemaking to create a PSD program appropriate to that pollutant.

Part C as enacted in 1977 addressed two of the six criteria pollutants with very specific instructions on preventing significant deterioration in areas attaining those standards. Congress left the others to EPA:

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.

And so Section 166 affirms two understandings gleaned from a proper whole-statute read of the rest of Part C: First, the PSD program was enacted in 1977 to apply to then-extant criteria pollutants only; second, any future application of Part C is limited to criteria pollutants.

EPA's rules sweeping GHGs into the Act's permitting programs simply because of their regulation under Section 202(a) could not more clearly violate Congress' instructions on how to handle "other pollutants" under Part C: Section 166(a) limits PSD to new criteria pollutants, and, as to those, it requires rules specific to that new pollutant to be developed within two years after adopting its NAAQS. Rules developed pursuant to Section 166(a) become effective a year after their promulgation. This one-year delay allows Congress an opportunity to review the rules before the States become required to implement them. 72 Fed. Reg. 54,112, 54,118 (Sept. 21, 2007) (citing H.R. Conf. Rep. 95-564, at 151 (1977), 1977 U.S.C.A.N. 1502, 1532). Each State then has 21 months to submit a revised SIP meeting those new requirements and EPA must approve or disapprove the revised SIP four months later. CAA § 166, 42 U.S.C. § 7476. Under the statutorily prescribed process, States have up to five years to accommodate new pollutants within their preconstruction permitting programs.²⁵ Under EPA's recent spate of rules, the States get maybe three weeks.²⁶

²⁵ To summarize the process described previously, the clock begins after the adoption of a new NAAQS. EPA then has two years to establish rules for handling that new criteria pollutant under the PSD program, with those rules becoming effective a year later. Conforming SIP revisions must be adopted by each State and approved by EPA within 25 months after EPA adopts the implementing rules, for a total elapsed time of about 5 years from adoption of the NAAQS.

²⁶ See *supra* note 11 and accompanying text.

(c) **Adherence to the statute *avoids* absurdity and leads to sensible results.**

EPA leans most heavily on *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1980), to support its claim of authority to adjust the statute to deal with the “impossibility” of applying the statutory thresholds to GHGs, creating “administrative necessity” for ignoring the plain language of the Act. 75 Fed. Reg. at 31,543. Indeed that case very usefully instructs EPA *not* to do exactly what it proposes to do with the regulation of GHGs: What *Alabama Power* tells us is that EPA cannot create its own administrative necessity by ignoring one provision of the Act, and then solve that manufactured necessity by ignoring another.

One of the PSD rule provisions at issue in *Alabama Power* would have defined “potential to emit” without consideration of controls applied to a source. 636 F.2d at 353. The Court examined the language of the statute through the lens of Congressional intent, statutory structure, and legislative history to conclude—despite its deference to EPA—that “potential to emit” must be determined “tak[ing] into account the anticipated functioning of the air pollution control equipment designed into the facility.” *Id.* at 353-55. EPA’s decision to determine “potential to emit” without considering the effect of emission controls inflated the number of sources subject to PSD review. *Id.* at 354-55. In order to solve this problem of its own making, EPA added a “tailoring rule” akin to the present one, exempting from PSD review any source with actual (controlled) emissions below 50 tons over year. *Id.* at

355-56. As does the present Tailoring Rule, this old attempt at tailoring ignored the very same specific 100/250 ton-per-year thresholds set by statute. As it does today, “EPA concede[d] that its exemption allowing sources and modifications under 50 tons per year to forego BACT and air quality assessment is an ‘expansion’ of the limited exemption provided in section 165(b) of the Act.” *Id.* at 356. EPA nonetheless tried to defend its tailoring of the statutory PSD thresholds in 1979 the same way it now tries 30 years later: “This ‘expansion’ is defended as reflecting EPA’s judgment that application to such sources of the full preconstruction review and permit process would not be cost-effective and would strain to the limits the agency’s resources.” *Id.* This Court should reject EPA’s latest effort at a tailoring rule for the same reason it did the earlier one: “EPA’s ‘expansion’ of the section 165(b) exemption falls well beyond the agency’s exemption authority.” *Id.*

EPA’s regulation of GHGs differs little from that found defective in *Alabama Power*: Having applied the Act to a “pollutant” under programs never intended for that “pollutant,” EPA is confronted with the need to undo the “absurd” results that follow by outright defiance of crystal-clear provisions of the statute, those setting forth the applicability thresholds. The far better—and only legal—choice instead is to avoid manufacturing overbreadth in the first place.

It makes no sense to conclude that a pollutant regulated for one purpose (tailpipe standards), from one category of sources (cars), under one title of the statute (Title II), based on one set of findings (under Section 202(a)), automatically must be

regulated for an entirely different purpose (permitting programs), under a totally different regulatory scheme (Titles I and V), when emitted from a wholly separate category of sources (stationary). In order to conclude that Congress might have intended such a random and arbitrary result, one should demand very explicit evidence of that intent in the words and structure and history of the statute. The words, structure, and history here instead all side with the common-sense reading of Section 165(a)(4).

Another advantage of leaving “other pollutants” to the processes described in the section actually captioned “Other Pollutants” is that it gives EPA the flexibility that its current forcings do not. Congress, in fact, was quite sensible about adding new pollutants to the PSD program. The Act’s permitting program, including area classifications, Best Available Control Technology (BACT) reviews, and so forth, made sense as applied to PM and SO₂, but not necessarily as to the other criteria pollutants (especially ozone, for which EPA still has not crafted any PSD program). And it might make no sense as applied to any unknown future pollutant, *viz.* GHGs.

Congress left EPA relatively free to fashion—by rule—a sensible PSD program for those unknown future pollutants. Consequently, EPA—in the unlikely event that it could justify and promulgate a NAAQS for GHGs—would have the freedom to craft a PSD program appropriate to GHGs. Section 166(c) tells EPA that it may choose some other means of technology-forcing appropriate to GHGs, which at least as of today are not really susceptible to “BACT.” Section 166(e) also could be

handy in that unlikely future, as it leaves EPA without the obligation to undertake any geographical classifications (pointless for globally uniform atmospheric gases such as GHGs). EPA arguably even could set the permitting thresholds at a sensible level, as Section 166(c) allows EPA to set “specific numerical measures against which permit applications may be evaluated.” Or, most logically of all, EPA could equally maintain that the tonnage thresholds in the definition of “major emitting facility” apply only to the pollutants regulated as of 1977.

Another major advantage of complying with the statute is that it allows for orderly implementation. As noted above, the Section 166 process—unlike the “glorious mess” resulting from EPA’s piecemeal efforts and strained readings of the Act²⁷—expressly allows time for EPA to announce its expectations by rule, for Congress to have a chance to consider EPA’s plans, for the States to amend their rules to conform, and for the SIP process to work as intended.

2. The Triggering and Tailoring Rules Treat the States as Vassals, Not As the Equal Sovereigns Contemplated by the Clean Air Act.

Both the Title I and Title V permit programs are meant for implementation by each State. *See* CAA § 101(a)(3), 42 U.S.C. § 7401(a)(3) (“air pollution control at its source is the primary responsibility of States and local governments”); CAA §

²⁷In remarks at an April 2008 hearing of the House Subcommittee on Energy and Air Quality, Congressman John Dingell (D-MI) famously described the likely outcome of efforts to regulate GHGs under the Clean Air Act as a “glorious mess.” WALL ST. J. Apr. 12, 2008, at A8 (Ex. 20).

502(d)(1), 42 U.S.C. § 7661a(d)(1) (requiring States to develop Title V program within three years after EPA issues rules governing the approvability of such programs). EPA assumes that it may command the inclusion of GHGs in each State's SIP-approved preconstruction and Title V permit programs. But the Title I construction permit programs apply only to criteria pollutants: Section 110(a)(2)(C) requires each State's permit program to mandate permits only for "modification and construction of any stationary source within the areas covered by the plan *as necessary to assure that national ambient air quality standards are achieved*, including a permit program as required in parts C and D...." 42 U.S.C. § 7410(a)(2)(C). EPA has no basis, then, to disapprove a State's permit program for failing to govern emissions of a pollutant for which there is no NAAQS. And Title V is intended solely to codify otherwise applicable requirements in permits issued to stationary sources. *See, e.g.*, 75 Fed Reg. at 31,600. No requirements applicable to stationary sources are created by an EPA decision to regulate mobile source GHG emissions. EPA, in short, lacks authority under the Act to compel any State permit program to govern GHG emissions. But even if it did...

(a) States must be given time to change their rules to conform to new EPA expectations.

EPA cannot retroactively change a SIP without following all applicable procedural requirements. The Act "requires the EPA, before modifying the SIP, to suggest proposed revisions to the state, which must then hold public hearings and

respond,” and “[i]f the EPA is dissatisfied with a SIP or a portion of it, then it must either initiate the process for revising the SIP or initiate the process for promulgating a new SIP that addresses the deficiencies in the earlier one.” *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 779, 787 (3d Cir. 1987).

EPA assumes that a change in federal law—namely the adoption of the Tailpipe Rule—will or at least should automatically result in a new pollutant to be governed by State permit rules. That assumption runs into serious constitutional and statutory difficulties.

To begin with, no sovereign can delegate to another the ability to make its laws. The State must by some affirmative act ratify any changes in pollutants and applicability thresholds incorporated from federal laws before they become effective. For example, a State law incorporating EPA hazardous waste listings cannot be construed to incorporate future changes to those listings by EPA. *Ex parte Elliott*, 973 S.W.2d 737, 741 (Tex. App.-Austin 1998) (“We acknowledge that [the State statute] may be read to say that the legislature has delegated to the EPA the power to define hazardous waste ... and that definition may change from time to time at the will of the EPA without intervention by or guidance from the legislature. Such a construction would in fact place in doubt the constitutionality of this provision.”).

EPA’s demand also stumbles over at least three principal requirements of the governing federal statute. First, the Act requires all SIP revisions to be adopted only after notice and hearing. CAA § 110(l), 42 U.S.C. § 7410(l). It should go without

saying that the nearly infinite expansion of the States' PSD and Title V permitting programs to include GHGs with no State-level rulemaking at all would not satisfy that requirement.

More fundamentally, though, it is beyond EPA's power to ask this of the States, as EPA itself has not undertaken a proper rulemaking to add as a requirement for an approvable SIP any of the rule changes or "interpretations" it is now asking of the States: Many of the changes wrought by the Tailoring Rules were preceded by no proposal whatsoever, instead simply appearing in the final notice.²⁸ Accordingly, these rules fail minimum standards for proper adoption, and should be invalidated for that reason alone. *See* CAA § 307(d)(1)(J), 42 U.S.C. § 7607(d)(1)(J) (requiring formal rulemaking procedures in order to establish any requirement under the PSD program); *CSX Transp. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081-82 (D.C. Cir. 2009) (rule was not "logical outgrowth" and notice was insufficient where notice of proposed rulemaking "requested comments on no particular issue at all" with respect to relevant provision of final rule). There is no reason that States or regulated entities "should have anticipated" that EPA would impose such requirements in the final rule.

²⁸ The final rule accomplishes all of its "tailoring" by use of a multi-column, complex definition of "subject to regulation." *See* 75 Fed. Reg. at 31,606 (final definition of "subject to regulation" to be codified as 40 C.F.R. §§ 51.166(b)(48) & 52.21(b)(49)). The proposed rule included no such definition at all. *See* 75 Fed. Reg. at 55,351 *et seq.* Had EPA issued a proper proposal of its intention to reinterpret SIPs with this new definition, interested parties would have been able to comment on its many defects, some of which are identified in this Motion.

See City of Waukesha v. EPA, 320 F.3d 228, 245 (D.C. Cir. 2003) (applying section 307(d)).

And even with proper notice and comment, EPA cannot lawfully have adopted any rule that directly and immediately changes State permit programs in any respect, much less to expand the reach of the program so far that even the promulgating agency deems it “absurd.” EPA’s authority to direct the requirements for approvable SIPs derives from Section 110, which allows States at least 18 months after proper adoption of new SIP expectations before requiring their implementation by the States. CAA § 110(k), 42 U.S.C. § 7410(k). “EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states.” *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984).

Finally, even conventional SIP revision processes would not suffice here: The law that governs the treatment of new pollutants under the PSD program allows 21 months after EPA undertakes a proper rulemaking to add that new pollutant. CAA § 166, 42 U.S.C. § 7476. EPA, of course, has undertaken no such rulemaking, nor allowed any time for each State to respond.

(b) The Tailoring Rule’s demands for “loyalty oaths” reflect complete disrespect for the States as sovereign and equal partners in the implementation of the Act.

The permitting programs of all States apply to pollutants that are “subject to regulation” under the Act. In the Tailoring Rule as adopted (but not as proposed), EPA included a definition of “subject to regulation” that spans several *Federal Register*

columns, and asked each State to report back to EPA by August 2, 2010, whether it would “interpret” its existing use of the undefined phrase “subject to regulation” in its longstanding permit rules to include every specific of EPA’s convoluted plans to regulate GHGs. 75 Fed. Reg. at 31,582. EPA is asking each State, in effect, to agree that when it developed permit programs for pollutants then “subject to regulation,” that was a slip of the pen, and what it meant to write down was the dozens of paragraphs and subparagraphs of new 40 C.F.R. § 51.166(b)(48), which just happen to mimic EPA’s choices for re-writing the Act. The CAA is intended to create a working partnership between the States and the federal government. *Bethlehem Steel Corp.*, 742 F.2d at 1036. If this attempt were allowed to work here, there would be little left of Clean Air Act federalism.

II. THE RULES IMPOSE AN UNCERTAINTY TAX ACROSS THE U.S. ECONOMY, AN IRREPARABLE HARM THAT CAN NEVER BE RECOVERED.

EPA’s actions cause harm to Movants’ members that is “both certain and great,” and irreparable because they have no mechanism for recovering compensation for the economic losses they are, and will be, incurring. *Wisconsin Gas Co.*, 758 F.2d at 674. Those harms include (1) obligations to obtain permits in the absence of programs to issue them; (2) opposition to projects based on application of the Endangerment Finding; and (3) lost business opportunities based on market uncertainties.

1. EPA Interprets the Act in a Way that has Imposed a Ban on New Construction.

EPA's rules prohibit construction of any project above its "tailored" GHG emission thresholds after January 2, 2011, unless the project has had its GHG emissions approved through preconstruction permitting. 75 Fed. Reg. at 31,606 (to be codified as 40 C.F.R. §§ 51.166(b)(48), (49)(iv) & (v)). In effect, this has imposed a construction ban: Given minimum one-year processing times for PSD permits,²⁹ any business that hoped to have a PSD permit for its intended project by January 2011 needed to have filed a complete application for it at least nine months ago, even before EPA adopted its rules announcing its expectations for States to start considering GHG emissions in PSD permits. Accordingly, EPA has created an impossibility of compliance, even if the States were today equipped to handle applications for PSD permits for GHG emissions.

And they are not. Many States have announced that their permit program rules need to be amended before they require GHG emissions to be considered. 75 Fed. Reg. at 53,895.³⁰ In many states, that task can't be completed by the end of this year,

²⁹ EPA estimates that a PSD permit takes at least one year from application to issuance. 75 Fed. Reg. at 31,535.

³⁰ It is not clear that those States which have announced legal readiness have considered the constitutionality of their decisions: Many of those states are relying on the assumption that EPA's decision to regulate GHGs automatically makes that pollutant subject to regulation under their own laws, without independent rulemaking action. *But see supra* at 58.

much less by the end of last year, which is when the rules needed to be in place in order to allow permit issuance before January 2, 2011.

Of course State permitting programs require more than just rules: In order to work, they need trained personnel, financial resources, and working guidance and processing systems. EPA's decision to launch GHG-based PSD permitting with just a few months' notice places impossible burdens on those systems. EPA itself projected catastrophic consequences in terms of money, time, and resources required for GHG PSD permitting under the statutory thresholds, including an increase in permit applications from an average of 280 per year to 82,000, \$22.5 billion per year in permitting costs, and delays in permitting of as much as ten years. 75 Fed. Reg. at 31,540, 31,557. Even those States willing to accept EPA's illegal demands will have a hard time—and in many cases an impossible time under State administrative laws—adopting their own Tailoring Rules. Consequently, even States that purport to accept GHG as a pollutant already subject to regulation under their permit programs will be unable to timely limit the program to cover only those sources “tailored” by EPA.

Even States that purport to be able as a matter of law to do exactly as EPA asks likely remain unable to do so as a matter of fact. EPA recognizes that, even *with* tailoring, permit program costs will increase by over 40 percent. 75 Fed. Reg. at 31,540. EPA for the first time demands that applicants demonstrate application of BACT, and that States approve those demonstrations, for a “pollutant” for which there are no end-of-pipe controls. For pollutants other than GHG, sources going

through a BACT demonstration can rely on a wealth of EPA information and guidance. For example, EPA has developed a technology clearinghouse, referred to as the RACT-BACT-LAER Clearinghouse (RBLC), which is a searchable database of control technology determinations. The RBLC, however, has no information whatsoever on GHGs. EPA has even suggested that “BACT” for GHG might be controlling the means of production itself, or at least analyzing alternative production technologies.³¹ That, obviously, is no straightforward exercise. The uncertainty regarding what BACT will be, and how it will be demonstrated for permitting purposes, is making project planning nearly impossible for the foreseeable future. *See* Decl. of Charles H. Kerr, ¶¶ 6-18 (Ex. 21).

Even for those projects seemingly left out of GHG permitting because of “tailoring” nonetheless must plan on being brought in. As discussed above, the

³¹ The Triggering Rule, for example, conveys EPA’s expectations that the permitting authorities should use GHG BACT determinations to dictate the means of production:

[T]he CAA BACT definition requires permitting authorities selecting BACT to consider the reductions available through application of not only control methods, systems, and techniques, but also through production processes, and requires them to take into account energy, environmental, and economic impacts. Thus, the statute expresses the need for a comprehensive review of available pollution control methods when evaluating BACT that clearly requires consideration of energy efficiency. The consideration of energy efficiency is important because it contributes to reduction of pollutants to which the PSD requirements currently apply and have historically been applied.

75 Fed. Reg. at 17,020.

Tailoring Rule is at high risk of being vacated as a usurpation of Congress' (and the States') power, and it is widely and justifiably believed that those who rely on it do so at their peril.

Finally, even if the GHG permit process could be successfully and timely navigated, the resultant permits still may be attacked by interest groups in Federal or State administrative and judicial review processes. The increasing likelihood of such challenges, and the resultant delays, also contribute to the uncertainty facing businesses planning new or modified projects.

The effects of the uncertainty created by EPA's regulatory scheme are well illustrated by the experience of CRR member Great Northern Project Development (GNPD), which is in the process of developing a coal-fired electric generation project in North Dakota. Declaration of Charles H. Kerr, ¶ 5 (Ex. 21). The uncertainties of GHG regulation caused GNPD to abandon its original design and shift to more expensive coal gasification technology. *Id.*, ¶¶ 6-8. EPA's rules will require GNPD to obtain from North Dakota a PSD permit covering GHGs in order to proceed with the project. *Id.*, ¶ 13. The uncertainties associated with that process, as described above, have caused and will continue to cause significant delay, increased costs that cannot be recouped, and difficulty in securing necessary financing and long-term contracts from purchasers of the electricity that would be generated by the project. *Id.*, ¶¶ 12-16. As a result, this project may be cancelled. *Id.*, ¶¶ 14, 16.

2. The Endangerment Finding is Being Used to Support Other Challenges to Project Development.

In addition to the uncertainties associated with obtaining CAA permits, capital projects are being delayed by other legal processes based on the Endangerment Finding. For example, CRR member Alpha Natural Resources, Inc. produces coal from leased Federal lands in the Powder River Basin of Wyoming and Montana, one of the most productive coal regions in the United States. Declaration of Michael R. Peelish, ¶ 5 (Ex. 22). As discussed above, *supra* note 12, NEPA actions based on EPA's Endangerment Finding are delaying development of these reserves, and create uncertainty for producers in the Basin.

The Endangerment Finding also is catalyzing many other petitions for rulemaking that affect Movants' members. For example, one group has petitioned EPA to issue NSPS to limit GHG emissions from concentrated animal feeding operations, such as those operated by members of CRR member National Cattlemen's Beef Association. *See* Humane Society of the U.S., et al., Petition (Sept. 21, 2009) at 61-67 (Ex. 23); *see also supra* note 12.

In addition, plaintiffs are seeking damages in nuisance cases that rely significantly on EPA's Endangerment Finding. For example, CRR member Alpha Natural Resources, Inc., was one of the defendants in *Comer v. Murphy Oil, USA*, described *supra*, note 12.

3. The Rules are Depressing Markets for CRR Member Company Products.

Finally, CRR members who produce and market coal and other minerals have been experiencing or are expecting to experience negative impacts on their markets and competitiveness as a result of the impending regulation of GHG emissions. For example, Alpha Natural Resources, Inc., one of the major suppliers of steam coal for electricity generation, has seen decreases in demand for steam coal attributable to the expected impacts of GHG regulation on its utility customers. Declaration of Michael R. Peelish, ¶¶ 11-12 (Ex. 22). The drop in demand negatively affects the profitability of the company and its revenues. *Id.*

CRR member Rosebud Mining Company is similarly affected by a reduction in demand and lower net income. Declaration of James R. Barker, ¶ 12 (Ex. 24). Rosebud also has delayed indefinitely any further investment to develop the majority of its steam coal reserves, resulting in no current return on the sunk investment costs in those reserves. *Id.*, ¶¶ 13-14 .

The members of CRR member Industrial Minerals Association – North America extract industrial minerals and process them using methods that necessarily emit significant amounts of GHG. Declaration of Mark G. Ellis, ¶¶ 13, 15 (Ex. 25). Most, if not all, of its members would be subject to PSD permitting under the statutory thresholds, and many face the prospect of regulation of their process emissions. *Id.* The nature of many of the processes used by these companies makes

reductions in GHG emissions infeasible except by reductions in output, which would negatively affect revenues and yield market share to foreign competition. *Id.*, ¶¶14, 16-17. The uncertainty about GHG regulation, including the possibility that thresholds will be lowered or that the Tailoring Rule will be set aside, has adversely affected these companies' planning and business operations. *Id.*, ¶ 15.

This uncertainty tax cannot be recovered or remedied by any process for receiving compensatory damages. The harm is accordingly irreparable. *See CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673-74 (D.C. Cir. 2005) (disruption of rail service is irreparable harm where money damages would be inadequate or difficult to measure). For all these reasons, Movants have demonstrated sufficient irreparable harm to their members to justify a stay pending review of EPA's GHG regulatory scheme.

III. A STAY DELAYS NO BENEFITS OF REGULATION.

The third of the *Wisconsin Gas Co.* factors for granting a stay—"the prospect that others will be harmed if the court grants the stay"—weighs overwhelming in favor of one here. This Motion seeks no stay of the only rule that actually effectuates emission reductions, the NHTSA fuel efficiency requirements. Given EPA's unwillingness and inability to quantify any benefit to requiring permits for stationary sources of GHGs, no one could be harmed by the six- to twelve-month period during which those nonexistent benefits would be foregone. Accordingly, none of the

intended benefits of the rules will be lost during the stay period, and so no one will be harmed by the stay.

IV. A STAY WOULD ALLOW FOR RATIONAL POLICY DEVELOPMENT.

The fourth and final factor to be considered in adjudicating a stay motion is “the public interest in granting the stay.” *Wisconsin Gas Co.*, 758 F.2d at 674. A stay here respects the needs of each branch of government, perhaps allowing all branches to sway in the same direction on matters of GHG control policy. As noted in this Motion’s Introduction, the present state of affairs arrived by fits and starts, not design: The rules at issue are a consequence of Congress’ failure to add a “Greenhouse Gas Control” subpart to the Clean Air Act, the Supreme Court’s directive to EPA nonetheless to *consider* proceeding under one specific provision of the Act, and EPA—depending on one’s perspective—either making the most of a bad situation, or being given an inch and taking a mile. The 111th Congress evidently will adjourn unable to either ratify the current state of affairs or change it, but the 112th may be rather more willing to announce an opinion on behalf of the electorate. A stay would allow for the possibility that Congress finally will state its intentions to regulate GHGs under the Clean Air Act, or not, so that this Court will not have to speak for it.

Respectfully submitted this 15th day of September, 2010.

/s/ Eric Groten

Eric Groten
VINSON & ELKINS LLP
2801 Via Fortuna, Suite 100
Austin, TX 78746-7568
(512) 542-8709

/s/ Paul D. Phillips

Paul D. Phillips
Christina F. Gomez
Cathryn R. Milkey
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, CO 80202-3979
(303) 295-8131

John P. Elwood
VINSON & ELKINS LLP
The Willard Office Building
1455 Pennsylvania Avenue NW
Suite 600
Washington, DC 20004-1008
(202) 639-6500

John A. Bryson
Emily C. Schilling
HOLLAND & HART, LLP
975 F Street, N.W.
Washington, D.C. 20004
(202) 393-6500

James A. Holtkamp
HOLLAND & HART LLP
60 E. South Temple, Suite 2000
Salt Lake City, UT 84111
(801) 799-5800

Patrick R. Day
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
Cheyenne WY 82001
(307) 778-4209

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

/s/ Sam Kazman

Sam Kazman
Hans Bader
COMPETITIVE ENTERPRISE INSTITUTE
1899 L Street, NW, 12th Floor
Washington, D.C. 20036
(202) 331-2265

Counsel for Competitive Enterprise Institute, et al.

/s/ Edward A. Kazmarek

Edward A. Kazmarek
KAZMAREK GEIGER & LASETER LLP
3490 Piedmont Road NE, Suite 201
Atlanta, GA 30305
(404) 812-0840
Fax: (404) 812-0845
E-mail: skazmarek@kglattorneys.com

Shannon L. Goessling
Executive Director & Chief Legal Counsel
SOUTHEASTERN LEGAL FOUNDATION INC.
6100 Lake Forrest Drive, Suite 520
Atlanta, Georgia 30328
(404) 257-9667
Fax: (404) 257-0049
E-mail: shannon@southeasternlegal.org

Harry W. MacDougald
CALDWELL & WATSON LLP
5825 Glenridge Dr., N.E.
Building Two, Suite 200
Atlanta, GA 30328-5579
(404) 843-1956
Fax: (404) 843-2737
E-mail: hmacdougald@cwlaw.org

Counsel for Southeastern Legal Foundation Inc., et al.

/s/ Richard P. Hutchison

Richard P. Hutchison
LANDMARK LEGAL FOUNDATION
3100 Broadway, Suite 1210
Kansas City, MO 64111
816-931-5559 (phone)
816-931-1115 (facsimile)
Email: pete@landmarklegal.org

Counsel for Landmark Legal Foundation, et al.

/s/ Gordon R. Alphonso

Gordon R. Alphonso (D.C. Cir. No. 36732)
MCGUIREWOODS LLP
The Proscenium
1170 Peachtree Street N.E., Suite 2100
Atlanta, Georgia 30309
404.443.5500

Neal J. Cabral (D.C. Cir. No. 39603)
MCGUIREWOODS LLP
Washington Square
1050 Connecticut Avenue NW, Suite 1200
Washington, D.C. 20036
202.857.1700

Scott C. Oostdyk (D.C. Cir. No. 51532)
Virginia L. Hudson (D.C. Cir. No. 52805)
MCGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
804.775.1000

Counsel for Ohio Coal Association

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was on this 15th day of September, 2010, served electronically through the Court's CM/ECF system on all registered counsel and by first-class mail on those counsel not registered as listed below:

Christopher Gene King
New York City Law Department
6-143
100 Church Street
New York, NY 10007

John E. Milner
Brunini, Grantham, Grower & Hewes, PLL
P.O. Box 119
Jackson, MS 39205

Gerald D. Reid.
Office of the Attorney General
State of Maine
6 State House Station
Augusta, ME 04333-0006

Valerie Melissa Satterfield
Office of the Attorney General
State of Delaware
102 West Water Street, Third Floor
Dover, DE 19904-0000

Judith Ann Stahl Moore
Office of the Attorney General
State of New Mexico
111 Lomas Boulevard, NW, Suite 300
Albuquerque, NM 87102

J. Allen Jernigan
North Carolina Department of Justice
PO Box 629
Raleigh, NC 27602-0629

Mark J. Bennett
Office of the Attorney General
State of Hawaii
Department of Agriculture
425 Queen Street
Honolulu, HI 96813-0000

Kelvin Allen Brooks
Office of the Attorney General
State of New Hampshire
33 Capitol Street
Concord, NH 03301-6397

Joseph P. Mikitish
Office of the Attorney General
State of Arizona
1275 West Washington Street
Phoenix, AZ 85007-2926

Wayne K. Stenehjem
Office of the Attorney General
State of North Dakota
600 East Boulevard Avenue
Bismarck, ND 58505-2210

Jocelyn F. Olson
Office of the Attorney General
State of Minnesota
1400 Bremer Tower,
445 Minnesota Street
St. Paul, MN 55101

Douglas F. Gansler
Office of the Attorney General
State of Maryland
200 St. Paul Place, 20th Floor
Baltimore, MD 21202-2021

Kimberly P. Massicotte
Office of the Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

/s/ Paul D. Phillips
HOLLAND & HART, LLP

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