ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 10-1092 (Lead) and Consolidated Cases (Complex)

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

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

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, LISA P. JACKSON, ADMINISTRATOR, AND THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

Respondents.

On Petitions for Review of *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Non-State Petitioners and Supporting Intervenors state as follows:

The Court's Order of March 22, 2011 (Doc. No. 1299440) rejected petitioners' briefing proposal and required these 67 parties, representing a variety of interests, to file joint briefing subject to a combined word limit, and does not otherwise provide for separate argument where those interests may diverge. Any given argument presented or incorporated in this brief should not be construed as necessarily representing the views of each of these parties.

A. Parties and *Amici*

PETITIONERS:

Case No. 10-1092: Coalition for Responsible Regulation, Inc.; Industrial Minerals Association–North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Company; Alpha Natural Resources, Inc.

Case No. 10-1094: Southeastern Legal Foundation, Inc.; John Linder (U.S. Representative) (GA-7th); Dana Rohrabacher (U.S. Representative) (CA-46th); John Shimkus (U.S. Representative) (IL-19th); Phil Gingrey (U.S. Representative) (GA-11th); Lynn Westmoreland (U.S. Representative) (GA-3rd); Tom Price (U.S. Representative) (GA-6th); Paul Broun (U.S. Representative) (GA-10th); Steve King (U.S. Representative) (IA-5th); Nathan Deal (U.S. Representative) (GA-9th); Jack Kingston (U.S. Representative) (GA-1st); Michele Bachmann (U.S. Representative) (MN-6th); Kevin Brady (U.S. Representative) (TX-8th); John Shadegg (U.S. Representative) (AZ-3rd); Dan Burton (U.S. Representative) (IN-5th); The Langdale Company; Langdale Forest Products Company; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.

Case No. 10-1134: American Iron & Steel Institute

Case No. 10-1143: Competitive Enterprise Institute; FreedomWorks; The Science and Environmental Policy Project

Case No. 10-1144: Ohio Coal Association

Case No. 10-1152: Mark Levin and Landmark Legal Foundation

Case No. 10-1156: Gerdau Ameristeel US Inc.

Case No. 10-1158: Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation

Case No. 10-1159: Portland Cement Association

Case No. 10-1160: Chamber of Commerce of the United States of America

Case No. 10-1161: Utility Air Regulatory Group

Case No. 10-1162: National Mining Association

Case No. 10-1163: Peabody Energy Company

Case No. 10-1164: American Farm Bureau Federation

Case No. 10-1166: National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Federation of Independent Business; National Oilseed Processors Association; National Petrochemical and Refiners Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce & Industry; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce

Case No. 10-1182: State of Texas; Governor Rick Perry (TX); Attorney General Greg Abbott (TX); Texas Commission on Environmental Quality; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; Commonwealth of Virginia; Haley Barbour, Governor of the State of Mississippi

RESPONDENTS: United States Environmental Protection Agency (Respondent in all consolidated cases); National Highway Traffic Safety Administration (Respondent in Nos. 10-1094 and 10-1143); and Lisa P. Jackson, Administrator, United States Environmental Protection Agency (Respondent in Nos. 10-1160 and 10-1166)

PETITIONERS' INTERVENORS: State of Georgia; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc; Langdale Ford Company; Langboard, Inc.–MDF; Langboard, Inc–OSB

RESPONDENTS' INTERVENORS: Global Automakers (f/k/a Association of International Automobile Manufacturers, *see* Doc. No. 1310060); Alliance of Automobile Manufacturers; Natural Resource Defense Council, Environmental Defense Fund, Sierra Club; Commonwealth of Massachusetts; States of California, Delaware, Illinois, Iowa, Maine, Maryland, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington; Pennsylvania Department of Environmental Protection; City of New York

AMICUS CURIAE FOR PETITIONERS: American Chemistry Council

AMICI CURIAE FOR RESPONDENTS: Institute for Policy Integrity at New York University School of Law; Honeywell International, Inc.

B. Ruling Under Review

These petitions challenge EPA's and NHTSA's final rule entitled *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010) ("LDVR").

C. Related Cases

There are numerous cases related to the cases relevant to this case that have been consolidated into three separate groupings, as follows:

(1) Twenty-six cases consolidated under lead case **No. 09-1322:** sixteen cases challenging EPA's "Endangerment Rule," 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Rule"); and ten cases challenging

EPA's denial of petitions for reconsideration of that rule, 75 Fed. Reg. 49,556 (Aug. 13, 2010) ("Reconsideration Denial")

(2) Forty-one cases consolidated under lead case **No. 10-1073**: seventeen petitions challenging EPA's "Timing Rule," 75 Fed. Reg. 17,004 (April 2, 2010), and twenty-four petitions challenging EPA's "Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010)

(3) Twelve cases consolidated under lead case **No. 10-1167**: three petitions challenging each of the following four EPA Rules: (a) *Part 51 – Requirements for Preparation, Adoption, and Submittal of Implementation Plans: Prevention of Significant Air Quality Deterioration*, 43 Fed. Reg. 26,380 (June 19, 1978); (b) *Part 52 -- Approval and Promulgation of State Implementation Plans: 1977 Clean Air Act Amendments to Prevent Significant Deterioration*, 43 Fed. Reg. 26,388 (June 19, 1978); (c) *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52,676 (Aug. 7, 1980); and (d) *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR); Baseline Emissions Determination; Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, 67 Fed. Reg. 80,186 (Dec. 31, 2002)

Pursuant to Rule 28(a)(1)(C), Petitioners and Petitioner-Intervenors state that Case No. 10-1172, *American Forest & Paper Association, Inc. v. EPA*, challenges the LDVR, 75 Fed. Reg. 25,324. That case has been severed from these consolidated cases and placed in abeyance. *See* Doc. Nos. 1307858 (motion to sever), 1310090 (stipulation), 1310387 (order placing case in abeyance).

Petitioners also state that Case Nos. 10-1165 and 10-1171, both filed July 6, 2010, challenged the LDVR as a constructive denial of then-pending petitions for reconsideration of the Endangerment Rule, 74 Fed. Reg. 66,496. After EPA formally denied the petitions for reconsideration of the Endangerment Rule on July 29, 2010,

75 Fed. Reg. 49,556, petitioners in Nos. 10-1165 and 10-1171 voluntarily moved to dismiss those cases. *See* Doc No. 1262187, in No. 10-1165; Doc. No. 1260748 in No. 10-1171 (orders dismissing cases).

Prior Procedural Rulings: On November 16, 2010, this Court ordered that these consolidated cases be designated as complex. *See* Order in *Coalition for Responsible Regulation v. EPA*, No. 10-1092, Doc. No. 1277651 (Nov. 16, 2010). Through orders issued December 10, 2010 [Doc. No. 1282576] and March 18, 2011 [Doc. No. 1299003 in Case No. 10-1167], this Court ordered that these consolidated cases, as well as the three groupings of cases listed above, be scheduled for oral argument before the same panel.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the Non-State Petitioners and Petitioners-Intervenors provide the following corporate disclosures:

Alpha Natural Resources, Inc. is a Delaware corporation engaged in the business of coal mining and gas production. Alpha Natural Resources, Inc. has no parent companies. No publicly held corporation has a 10% or greater ownership interest in Alpha Natural Resources, Inc.

American Farm Bureau Federation ("AFBF") is a non-profit voluntary general farm organization founded in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF represents more than 6 million member families through membership organizations in all fifty states and Puerto Rico. AFBF has no member companies, and no publicly held companies have an ownership interest in AFBF.

The American Frozen Food Institute ("AFFI") is a trade association that serves the frozen food industry by advocating its interests in Washington, D.C., and communicating the value of frozen food products to the public. The AFFI is comprised of 500 members including manufacturers, growers, shippers and warehouses, and represents every segment of the $70 billion frozen food industry. As a member-driven association, AFFI exists to advance the frozen food industry's agenda in the 21st century. The AFFI has no parent company, and no publicly held company has a 10% or greater ownership interest in the AFFI.

American Iron & Steel Institute ("AISI") is a non-profit, national trade association headquartered in the District of Columbia. AISI has no parent corporation, and no publicly held company has a ten percent or greater ownership interest in AISI. AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI is comprised of 24 member companies, including integrated and electric furnace steelmakers, and 138 associate and affiliate members who are suppliers to or customers of the steel industry. AISI's member companies represent approximately 75 percent of both U.S. and North American steel capacity.

American Petroleum Institute ("API") is a national trade association that represents all aspects of America's oil and natural gas industry. API has

approximately 400 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of industry. API has no parent company, and no publicly held company has a 10% or greater ownership interest in API.

The Brick Industry Association ("BIA") is a national trade association representing small and large brick manufacturers and associated services. Founded in 1934, the BIA is the recognized national authority on clay brick construction, representing approximately 270 manufacturers, distributors, and suppliers that generate approximately $9 billion annually in revenue and provide employment for more than 200,000 Americans. BIA has no parent company, and no publicly held company has a 10% or greater ownership interest in BIA.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is a non-profit corporation organized under the laws of the District of Columbia. It has no parent company and does not issue stock. It is a trade association within the meaning of Circuit Rule 26.1 (b). The U.S. Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than 3,000,000 businesses and professional organizations of every size and in every economic sector and geographic region of the country. A central function of the U.S. Chamber is to advocate for the interests of its members in important matters before courts, Congress, and the Executive Branch.

Coalition for Responsible Regulation, Inc. is a non-profit membership corporation organized under the laws of the State of Texas for the purpose of promoting social welfare, particularly to ensure that the Clean Air Act is properly applied with respect to greenhouse gases, and its members include businesses and trade associations of businesses engaged in activities that would likely be subject to regulation under the Clean Air Act for greenhouse gas emissions. Coalition for Responsible Regulation, Inc. has no parent companies. No publicly held corporation has a 10% or greater ownership interest in Coalition for Responsible Regulation, Inc.

Collins Industries, Inc. is a Georgia corporation in the business of transporting building products. Collins Industries, Inc. has no parent corporation. No publicly held corporation has 10% or greater ownership interest in Collins Industries, Inc.

Collins Trucking Company, Inc. is a Georgia corporation in the business of transporting pine and hardwood logs in the state of Georgia. Collins Trucking

Company, Inc. is a subsidiary of Collins Industries, Inc. No publicly held corporation has 10% or greater ownership interest in Collins Trucking Company, Inc.

Competitive Enterprise Institute is a non-profit 501(c)(3) corporation organized under the laws of the District of Columbia for the purpose of defending free enterprise, limited government, and the rule of law. It has no parent companies. No publicly held corporation has a 10% or greater ownership interest in it.

The Corn Refiners Association ("CRA") is the national trade association representing the corn refining (wet milling) industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture starches, sweeteners, corn oil, bioproducts (including ethanol), and animal feed ingredients. CRA has no parent company, and no publicly held company has a 10% or greater ownership interest in CRA.

The Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation ("Energy-Intensive Manufacturers' Group") is a trade association formed for the purpose of promoting the general policy interests of its members. The Energy-Intensive Manufacturers' Group represents companies from a broad swath of United States manufacturing, including the ferrous and non-ferrous metal, cement, glass, ceramic, chemical, paper, and nitrogen fertilizer industries. The Energy-Intensive Manufacturers' Group has no parent company, and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public. As such, no publicly held company has a 10% or greater ownership interest in the Energy-Intensive Manufacturers' Group.

FreedomWorks is a non-profit 501(c)(4) corporation organized under the laws of the District of Columbia for the purpose of promoting individual liberty, consumer choice and competition, and has over 870,000 members nationwide. It has no parent companies, and no publicly held corporation has a 10% or greater ownership interest in it.

Georgia Agribusiness Council, Inc. is a Georgia corporation whose mission is to advance the business of agriculture and promote environmental stewardship to enhance the quality of life for all Georgians. The Georgia Agribusiness Council, Inc. has no parent company. No publicly held company as a 10% or greater ownership in the Georgia Agribusiness Council, Inc.

Georgia Motor Trucking Association, Inc. is a Georgia corporation that serves as the "voice" of the trucking industry in Georgia, representing more than 400 for-hire carriers, 400 private carriers, and 300 associate members. The mission of the

Georgia Motor Trucking Association is to promote: reasonable laws; even-handed, common-sense administration; equitable and competitive fees and taxes; a market, political and social environment favorable to the trucking industry; and good citizenship among the people and companies of Georgia's trucking industry. Georgia Motor Trucking Association, Inc. has no parent corporation. No publicly held corporation has 10% or greater ownership interest in the Georgia Motor Trucking Association.

Gerdau Ameristeel Corporation ("Gerdau Long Steel North America" or "GLN"), headquartered in Tampa, Florida, manufactures steel at facilities located throughout the United States and Canada. Gerdau S.A., which is approximately 47% owned by Metalurgica Gerdau S.A., has a 10% or greater indirect ownership interest in GLN.

The Glass Packaging Institute ("GPI") represents the interests of the glass container industry. GPI's 45 member and associate member companies bring a diverse array of products to consumers, producing glass containers for food, beer, soft drinks, wine, liquor, cosmetics, toiletries, medicine and more. GPI members either manufacture glass containers or provide essential supplies to those operations, such as machinery, raw materials, recyclable materials, inspection equipment, energy, transportation and other services. GPI has no parent company, and no publicly held company has a 10% or greater ownership interest in GPI.

Great Northern Project Development, L.P. is a Delaware limited partnership engaged in the business of developing, constructing, and operating coal gasification projects. Great Northern Project Development, L.P. has no parent companies. No publicly held corporation has a 10% or greater ownership interest in Great Northern Project Development, L.P.

Industrial Minerals Association–North America ("IMA-NA") is a trade association representing the interests of producer member companies that extract and process industrial minerals, and associate member companies that provide goods and services to the industrial minerals industry. IMA-NA has no parent companies. No publicly held corporation has a 10% or greater ownership interest in IMA-NA.

J&M Tank Lines, Inc. is a Georgia corporation in the business of transporting industrial grade products, such as lime, calcium carbonate, cement, and sand, as well as food grade products such as flour, and agricultural grade products such as salt. J&M Tank Lines, Inc. operates a fleet of 265 tractors and 414 tanks, with 9 terminals located in Georgia, Alabama, and Texas. J&M Tank Lines, Inc. has no

parent company. No publicly held corporation has a 10% or greater ownership in J&M Tank Lines, Inc.

Kennesaw Transportation, Inc. is a Georgia corporation in the business of truckload long-haul transportation of goods, serving an area from Georgia south to Florida, north to Illinois, and west to Washington, Oregon, California, Nevada and Arizona. Kennesaw Transportation, Inc. has no parent company. No publicly held corporation has a 10% or greater ownership interest in Kennesaw Transportation, Inc.

Landmark Legal Foundation 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. Landmark Legal Foundation is a non-profit, public interest law firm organized under the laws of the State of Missouri. Landmark has no parent companies, subsidiaries or affiliates that have issued shares to the public.

Langboard, Inc.–MDF is a Georgia corporation in the business of producing Medium Density Fiberboard (MDF). MDF is used in various applications including molding, flooring and furniture. Langboard, Inc.—MDF is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has 10% or greater ownership in Langboard, Inc.—MDF

Langboard, Inc.–OSB is a Georgia corporation in the business of producing Oriented Strand Board (OSB). OSB is used in the home construction industry as a panel in flooring, roofing and siding.

Langdale Chevrolet-Pontiac, Inc. is a Georgia corporation in the business of selling and servicing Chevrolet and Pontiac automobiles. Langdale Chevrolet-Pontiac, Inc. is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has 10% or greater ownership in Langdale Chevrolet - Pontiac, Inc.

The Langdale Company is a Georgia corporation and is the parent company for a diverse group of businesses, some of which are described elsewhere in this Certificate. The Langdale Company has no parent companies. No publicly held corporation has 10% or greater ownership in the Langdale Company.

Langdale Farms, LLC is a Georgia Corporation in the business of producing soybeans, peanuts, cotton, pecans, tomatoes, hay, cattle, and fish. Langdale Farms,

LLC is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has 10% or greater ownership in Langdale Farms, LLC.

Langdale Ford Company is a Georgia corporation in the business of selling and servicing Ford automobiles and trucks with one of the largest new car and truck dealerships in the area with sales, service, parts, body repair and commercial/fleet departments. Langdale Ford Company is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has 10% or greater ownership in Langdale Ford Company.

Langdale Forest Products Company is a Georgia corporation and is a leading producer of lumber, utility poles, marine piling and fence posts. Langdale Forest Products Company is a wholly owned subsidiary of the Langdale Company. No publicly held corporation has 10% or greater ownership in Langdale Forest Products Company.

Langdale Fuel Company is a Georgia corporation in the business of providing fuel for The Langdale Company's needs. It is comprised of two divisions which provide wholesale Fuel and Lubricants. Langdale Fuel Company is a wholly owned subsidiary of The Langdale Company. No publicly held corporation has 10% or greater ownership in Langdale Fuel Company.

The Michigan Manufacturers Association ("Michigan MA") is a private nonprofit organization and is the state of Michigan's leading advocate exclusively devoted to promoting and maintaining a business climate favorable to industry. Michigan MA represents the interests and needs of over 2,500 members, ranging from small manufacturing companies to some of the world's largest corporations. Michigan MA's members operate in the full spectrum of manufacturing industries, which account for 90% of Michigan's industrial workforce and employ over 500,000 Michigan citizens. Michigan MA has no parent company, and no publicly held company has a 10% or greater ownership interest in Michigan MA.

Mississippi Manufacturers Association ("Mississippi MA") has served as the voice of industry in the State of Mississippi since 1951. Mississippi MA diligently works to maintain a strong manufacturing environment in the State and is the voice of approximately 2,200 member companies in Mississippi. Mississippi MA addresses the needs of today's manufacturer through active involvement in federal and state legislative and regulatory issues, as well as educational and training opportunities. Mississippi MA represents their interests in the areas of the environment, industrial and employee relations, taxation, energy, workforce development and transportation.

Mississippi MA has no parent company, and no publicly held company has a 10% or greater ownership interest in Mississippi MA.

National Association of Home Builders ("NAHB") is a not-for- profit trade association organized for the purposes of promoting the general commercial, professional, and legislative interests of its approximately 160,000 builder and associate members throughout the United States. NAHB's membership includes entities that construct and supply single family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB does not have any parent companies that have a 10% or greater ownership interest in NAHB, and no publicly held company has a 10% or greater ownership interest in NAHB.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM has no parent company, and no publicly held company has a 10% or greater ownership interest in the NAM.

National Cattlemen's Beef Association ("NCBA") is a trade association representing more than 140,000 cattle breeders, producers, and feeders in the United States. NCBA has no parent companies. No publicly held corporation has a 10% or greater ownership interest in NCBA.

National Federation of Independent Business ("NFIB") is the nation's leading association of small businesses and has a presence in all 50 States and the District of Columbia. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB has no parent company, and no publicly held company has a 10% or greater interest in NFIB.

The National Mining Association ("NMA") is a non-profit, incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public, although NMA's individual members have done so.

The National Oilseed Processors Association ("NOPA") is a national trade association that represents 16 companies engaged in the production of vegetable meals and oils from oilseeds, including soybeans. NOPA's member companies process more than 1.7 billion bushels of oilseeds annually at 66 plants located throughout the country, including 61 plants that process soybeans. NOPA has no parent company, and no publicly held company has a 10% or greater ownership interest in NOPA.

The National Petrochemical and Refiners Association ("NPRA") is a national trade association whose members comprise more than 450 companies, including virtually all United States refiners and petrochemical manufacturers. NPRA's members supply consumers with a wide variety of products and services that are used daily in homes and businesses. These products include gasoline, diesel fuel, home-heating oil, jet fuel, asphalt products, and the chemicals that serve as "building blocks" in making plastics, clothing, medicine, and computers. NPRA has no parent company, and no publicly held company has a 10% or greater ownership interest in NPRA.

The Ohio Coal Association ("the Association") is an unincorporated trade association dedicated to representing Ohio's coal industry. The Association has not issued shares or debt securities to the public and has no parent companies, subsidiaries, or affiliates that have any outstanding shares or debt securities issued to the public.

Peabody Energy Company ("Peabody") is a publicly-traded company and, and to its knowledge, has no shareholder owning ten percent or more of its common stock with the exception of BlackRock, Inc., which reported that at December 31, 2009, it owned approximately 10.96% of Peabody's outstanding common stock. Peabody's principal business is the mining and sale of coal.

The Portland Cement Association is a non-for-profit trade association that represents more than thirty companies in the United States and Canada engaged in the manufacture of portland cement. The Portland Cement Association conducts market development, engineering, research, education, technical assistance and public affairs programs on behalf of its member companies. Its mission focuses on improving and expanding the quality and uses of cement and concrete, raising the quality of construction, and contributing to a better environment. The Portland Cement Association is a "trade association" within the meaning of Circuit Rule 26.1 (b). It has no parent corporation, and no publicly held company owns a 10 percent or greater interest in the Portland Cement Association.

Rosebud Mining Co. is a Pennsylvania corporation engaged in the business of bituminous coal mining primarily in Ohio and Pennsylvania. Rosebud Mining Company has no parent companies. No publicly held corporation has a 10% or greater ownership interest in Rosebud Mining Company.

The Science and Environmental Policy Project is a non-profit 501(c)(3) corporation organized under the laws of the State of Virginia for the purpose of promoting sound and credible science as the basis for regulatory decisions. It has no parent companies, and no publicly held corporation has a 10% or greater ownership interest in it.

Southeast Trailer Mart, Inc. is a Georgia corporation in the business of selling new and used semi-trailers, along with providing related parts and services. Southeast Trailer Mart, Inc. has no parent company. No publicly held company has a 10% or greater ownership in Southeast Trailer Mart, Inc.

Southeastern Legal Foundation, Inc. ("SLF") is a non-profit Georgia corporation and constitutional 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 has no parent companies. No publicly held corporation has 10% or greater ownership interest in SLF.

The Specialty Steel Industry of North America ("SSINA") is a national trade association comprised of 17 producers of specialty steel products, including stainless, electric, tool, magnetic, and other alloy steels. SSINA members produce steel by melting scrap metal in electric arc furnaces and account for over 90 percent of the specialty steel manufactured in the United States. The SSINA has no parent company, and no publicly held company has a 10% or greater ownership interest in the SSINA.

The Tennessee Chamber of Commerce and Industry ("the Tennessee Chamber") is Tennessee's largest statewide, broad-based business and industry trade association. It is a private, not-for-profit trade association that serves as the primary voice of diverse business interests on major employment and economic issues facing public policy decision-makers in Tennessee. It fosters harmonious relationships between the various elements of the Tennessee business community and serves as an umbrella organization for companies, trade associations and chambers of commerce to work together for the economic health of the state. The Tennessee Chamber has no parent company, and no publicly held company has a 10% or greater ownership interest in the Tennessee Chamber.

Utility Air Regulatory Group ("UARG") is a not-for-profit association of individual electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

West Virginia Manufacturers Association ("WVMA") represents the interests of manufacturers across the State of West Virginia to state and federal agencies, legislators, regulators and policy-makers. WVMA has no parent company, and no publicly held company has a 10% or greater ownership interest in WVMA.

The Wisconsin Manufacturers and Commerce ("WMC") is a business trade association with nearly 4,000 members, and is dedicated to making Wisconsin the most competitive State in the nation to do business through public policy that supports a healthy business climate. Its members are Wisconsin businesses that operate throughout the State in the manufacturing, energy, commercial, health care, insurance, banking, and service industry sectors of the economy. Roughly one-fourth of Wisconsin's workforce is employed by a WMC member company. WMC has no parent company, and no publicly held company has a 10% or greater ownership interest in WMC.

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TABLE OF AUTHORITIES

Cases

* Authorities upon which we chiefly rely are marked with asterisks

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GLOSSARY OF TERMS

ANPRM	Advance Notice of Proposed Rulemaking, *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354 (July 30, 2008) (JA __)
CAA	Clean Air Act
CAFE	Corporate Average Fuel Economy program or standards
CH_4	Methane
CO_2	Carbon Dioxide
Doc No.	Refers to the serial number assigned by the electronic CM/ECF system to documents and orders filed in this Court
DOE	U.S. Department of Energy
DOT	U.S. Department of Transportation
EISA	Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (Dec. 19, 2007)
Endangerment Joint Br.	Joint Opening Brief of Non-State Petitioners and Supporting Intervenors, filed May 20, 2011 in *Coalition for Responsible Regulation v. EPA*, No. 09-1322
Endangerment TSD	*Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* (Dec. 7, 2009), Dkt. EPA-HQ-OAR-2009-171-11645
EPA	U.S. Environmental Protection Agency
EPA RIA	EPA, *Final Regulatory Impact Analysis: Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, April 2010, Dkt. EPA-HQ-OAR-2009-0472-11578 (JA __)

EPCA	Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871
GHG(s)	Greenhouse gas(es)
HFCs	Hydrofluorocarbons
LDV	Light-Duty Vehicles
LDVR	Final Rule, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010) (JA __)
NAAQS	National Ambient Air Quality Standards
NHTSA	National Highway Traffic Safety Administration
NHTSA RIA	NHTSA, *Final Regulatory Impact Analysis: Corporate Average Fuel Economy for MY2012-MY2016 Passenger Cars and Light Trucks* (March 2010) (JA __)
N_2O	Nitrous Oxide
NPRM	Notice of Proposed Rulemaking
OMB	Office of Management and Budget
Paperwork Reduction Act	44 U.S.C. §§ 3501-3520
PFCs	Perfluorocarbons
ppm	Parts per million
Proposed LDVR	Proposed Rule, *Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 74 Fed. Reg. 49,454 (Sept. 28, 2009) (JA __)
PSD	Prevention of Significant Deterioration

Regulatory Flexibility Act	5 U.S.C. §§ 601-612
RTC	EPA, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards: EPA Response to Comments Document for Joint Rulemaking*, Doc. No. EPA-HQ-OAR-2009-472-11581 (JA __)
SF_6	Sulfur hexafluoride
Tailoring Rule	Proposed Rule, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292 (Oct. 27, 2009) Final Rule, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010)
Tailoring RIA	EPA, *Regulatory Impact Analysis for the Final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, Final Report (May 2010), Dkt EPA-HQ-OAR-2009-0517-19161
Title V	Clean Air Act §§ 501-507, 42 U.S.C. §§ 7661-7661f
Timing Rule	Final Rule, *Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010).
tpy	Tons per year
Unfunded Mandates Reform Act (UMRA)	Pub. L. No. 104-4, 109 Stat. 48, Title II codified at 2 U.S.C. §§ 1531-1538

JURISDICTIONAL STATEMENT

Petitioners seek review of EPA's final rule, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*; 75 Fed. Reg. 25,324 (May 7, 2010) ("LDVR"). Multiple timely petitions for review were filed challenging this final agency action, which were consolidated. The Court has jurisdiction under Clean Air Act ("CAA") § 307(b)(1).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are reproduced in the addendum. Throughout this brief, citations are provided to sections in the CAA, rather than the U.S. Code sections into which the CAA provisions are codified. Appendix B provides a cross-reference table.

STATEMENT OF ISSUES

1. Whether EPA violated the CAA's requirements, misinterpreted *Massachusetts v. EPA*, and improperly deemed itself lacking in discretion by: **(a)** failing to perform the risk assessment required under CAA § 202(a), **(b)** failing to consider the consequences of its LDVR under its statutory interpretation, and **(c)** imposing GHG regulation for reasons that are not "grounded in the statute."

2. Whether EPA's LDVR violates the CAA and is arbitrary, capricious, and otherwise contrary to law because: **(a)** EPA failed to address the concededly "absurd" consequences produced by its view that the LDVR automatically triggers regulation of stationary source GHG emissions; **(b)** EPA unlawfully failed to analyze the

substantial costs and burdens imposed by the stationary source regulation that, in EPA's view, was automatically triggered by its promulgation of the LDVR; **(c)** notwithstanding EPA's conclusion to the contrary, its decision to regulate automobile GHG emissions under the CAA's Title II cannot automatically trigger regulation of stationary source GHG emissions under CAA Title I; and **(d)** EPA reopened its interpretation of the Act's PSD permitting triggers but failed to recognize the illegality of that interpretation and the consequences of that illegality for GHG emissions controls.

3. Whether EPA's LDVR violates the CAA and is arbitrary, capricious, and otherwise contrary to law because it functionally duplicates NHTSA's fuel-economy standards and will not meaningfully avert any climate-related endangerment.

STATEMENT OF CASE AND FACTS

In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court directed EPA to reconsider a 1999 rulemaking petition filed under CAA § 202(a) seeking to impose controls on GHG emissions from new motor vehicles. On remand, EPA initially opened a single regulatory docket and issued an Advance Notice of Proposed Rulemaking ("ANPRM") to deal comprehensively with the questions posed by the prospect of imposing GHG emissions controls on the Nation's economy. *See* 73 Fed. Reg. 44,354 (July 30, 2008) (JA __). These questions include EPA's authority to impose GHG emissions controls on new motor vehicles and on stationary and agricultural emission sources; the necessary prerequisites for invoking that authority; and whether EPA's rulemaking record would provide an adequate basis for regulation.

In its ANPRM, EPA asserted that the rulemaking petition, although limited to seeking GHG emissions controls on motor vehicles, could not be granted without triggering a cascade of burdensome and potentially unintended regulatory consequences. EPA explained that, in its view, the CAA's provisions "are interconnected in multiple ways such that a decision to regulate one source" of GHG emissions could potentially "lead to regulation of other source categories of GHGs." *Id.* at 44,418. EPA also asserted that "CAA standards applicable to GHGs for one category of sources could trigger" CAA Prevention of Significant Deterioration ("PSD") requirements "for other categories of sources that emit GHGs." *Id.*

Numerous commenters explained that the CAA does not provide a workable platform for regulating stationary source GHG emissions. The Department of Energy ("DOE"), for example, cautioned that EPA's response to the rulemaking petition should be carefully considered given its potential to trigger onerous and costly stationary source regulation under the PSD program. *See id.* at 44,367. Under that program, certain new and modified stationary sources are required to obtain PSD permits that reflect the "best available control technology" ("BACT"), which in the context of CO_2 emissions effectively means controls on the use of fossil fuels or energy consumption. *Id.* at 44,371. According to DOE, EPA staff failed to "explain in clear, understandable terms the extraordinary costs, burdens and other adverse consequences, and the potentially limited benefits, of the United States unilaterally using the [CAA] to regulate GHG emissions." *Id.*

In January 2009, a change in Presidential administrations brought a new agenda to EPA. That changeover could not, however, alter the fundamental tensions between regulating GHG emissions and the legal framework of the CAA's stationary source emissions programs. Nor could EPA free itself of its obligation to consider whether there were alternatives that would not affect stationary sources. As EPA later asserted, absent such alternatives, "[a]pplying the PSD thresholds to sources of GHG emissions literally results in a PSD program that is so contrary to what Congress had in mind — and that in fact so undermines what Congress attempted to

accomplish with the PSD requirements — that it should be avoided under the 'absurd results' doctrine." 74 Fed. Reg. 55,292, 55,310 (Oct. 27, 2009).

Nonetheless, the new EPA Administration arrived in 2009 with a pre-formed conviction that EPA must regulate GHG emissions. *See* Endangerment Joint Br. 5-6. Accordingly, although EPA had previously acknowledged the fundamental mismatch between its CAA legal authority and regulating GHG emissions from stationary sources, it ultimately decided to impose controls on such emissions. EPA also decided to proceed in piecemeal fashion, spreading its reasoning across four separate rules. In the process, EPA never fully addressed the fundamental contradictions between the text and structure of the CAA and EPA's attempts to regulate stationary source GHG emissions under the PSD program. Nor did it consider the heavy burdens that would be imposed on stationary sources. Instead, EPA asserted that, once it determined that worldwide GHG levels may reasonably be anticipated to endanger public health and welfare, it was compelled to promulgate automobile GHG emission regulations and that, in turn, doing so automatically triggers stationary source regulation under the CAA's PSD and Title V permitting programs.

As a preliminary step, EPA finalized its Endangerment Rule, concluding that a mix of six GHGs — CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6 — together constitute a single "air pollutant" emitted by new automobiles that contributes to harmful "air pollution," even though automobiles do *not* emit two of the substances (PFCs and SF_6) and emit two others (CH_4 and N_2O) in relatively minute amounts. EPA then

concluded that, because of its Endangerment Rule, it was legally obligated to promulgate a separate rule under CAA § 202(a) to restrict GHG emissions from new motor vehicles. *See* 75 Fed. Reg. at 25,398-99. This was the first time EPA had ever separated an endangerment determination from its resulting emissions standard rulemaking.

EPA's automobile emissions rule, the focus of these consolidated petitions, was finalized as a joint rule together with a companion rule of the National Highway Traffic Safety Administration ("NHTSA") on April 1, 2010. *See* 75 Fed. Reg. at 25,324 (JA __). By promulgating its rule, NHTSA fulfilled its obligations under the Energy Independence and Security Act of 2007 ("EISA") to adopt a new round of corporate average fuel economy ("CAFE") standards. For its part, EPA effectively converted those CAFE standards into GHG limits on tailpipe emissions. *See id.* at 25,371 (JA __). But it identified nothing meaningful that EPA-promulgated automobile-emissions rules would add to NHTSA's fuel-economy standards. Nor did EPA undertake a risk assessment of endangerment specific to its consideration of the LDVR; instead, it adopted "assessment reports" prepared by other entities to announce that GHG emissions generally "endanger" public health and welfare. *See id.* at 25,398-99 (JA __) ("relied heavily upon" assessment reports), *id.* at 25,491 (JA __) ("key findings … primarily drawn from assessment reports"). According to EPA's interpretation of model results reported by the Intergovernmental Panel on Climate Change ("IPCC"), its final rule would have *no* perceptible effect on climate. *See* EPA

RIA 7-124 (JA __) (by 2100, LDVR could reduce global mean temperature by approximately 0.006–0.015°C and reduce global mean sea level rise by approximately 0.06–0.14 centimeters). Moreover, EPA and NHTSA each examined the effect of its own rule on climate (assuming the other agency's rule was not adopted) and each found its rule would achieve essentially the same results as the other agency's. *Compare* 75 Fed. Reg. at 25,637, Table IV.G.2-2 *with id.* at 25,496, Table III.F.301. EPA nonetheless concluded that the extent to which projected climate effects might be addressed or mitigated by its standards was irrelevant and that EPA had neither the obligation nor the discretion to consider NHTSA's standards when framing its regulatory decisions. *See, e.g.*, RTC 7-78 to -79 (JA __) (noting comments that the proposed LDVR was duplicative of NHTSA's standards and directing reader to Endangerment Rule for response); *see also* 74 Fed. Reg. at 66,507-08 (portion of the Endangerment Rule cited by EPA in the RTC on the LDVR as responding to this issue and noting that "[t]he effectiveness of a potential future control strategy is not relevant").

EPA also concluded that its decision to regulate new automobile GHG emissions automatically triggered, beginning January 2, 2011, regulation of stationary source GHG emissions under the CAA's PSD and Title V programs. *See*, *e.g.*, 74 Fed. Reg. at 55,294 (when the LDVR "is finalized, the GHGs subject to regulation under that rule would become immediately subject to regulation under the PSD program").

In EPA's view, once it promulgated its LDVR, the PSD and Title V requirements for GHGs would apply to stationary sources without further action.

EPA recognized, however, that its interpretation of the statute causes "absurd results" never intended by Congress. In particular, EPA recognized that its interpretation subjects thousands of stationary sources, including small, non-industrial sources, to PSD and Title V regulation, and creates (by EPA estimates) $22.5 billion in permitting paperwork costs alone. 75 Fed. Reg. at 31,540 (Table V-I). These absurd consequences are contrary to Congress's intent and exceed available administrative capabilities. To cure the absurdity its interpretation created, EPA then sought to reduce the number of permits its LDVR would require by rewriting ("tailoring") the statutory PSD thresholds for stationary source emissions, raising them, for GHGs, several orders of magnitude higher. Although EPA solicited comments on all aspects of this proposed statutory rewrite, announcing that all alternatives would be considered, *see* 74 Fed. Reg. at 55,317, 55,320, 55,327, it ultimately rejected interpretations of the CAA that would have avoided absurd results and, instead, chose to adopt an interpretation that required rewriting the statutory text to try to avoid the absurdity created by that very interpretation. *See* 75 Fed. Reg. 31,514 (June 3, 2010).

SUMMARY OF ARGUMENT

EPA's LDVR violates the CAA and is inconsistent with the requirements of non-arbitrary, reasoned decision-making for three fundamental reasons. ***First***, EPA

relied on an impermissible interpretation of the CAA and the Supreme Court's decision in *Massachusetts*, and failed to justify its LDVR in light of any defined endangerment risk to public health or welfare. (*See* Section I.). ***Second***, EPA failed to take into consideration the substantial burdens resulting from its regulatory approach, and impermissibly interpreted its LDVR as automatically triggering stationary source regulation under the CAA's PSD and Title V programs, even while acknowledging that its interpretation produces profound and absurd consequences for stationary source owners and states that Congress did not intend. (*See* Section II.) ***Third***, EPA failed to demonstrate that the LDVR will meaningfully avert any claimed endangerment to public health or welfare. EPA's own projections show that the LDVR will have essentially no effect on any public health or welfare endangerment beyond the concededly negligible effects already produced by NHTSA's standards. (*See* Section III.)

STANDING

Petitioners' standing to bring these challenges is self-evident because they are companies and associations representing members that face substantial additional and costly regulatory burdens as a result of EPA's final regulatory action. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-63 (1992) (when parties are "object[s]" of governmental action, "there is ordinarily little question that the action … has caused [them] injury"); *National Coal Ass'n v. Lujan*, 979 F.2d 1548, 1551-52 (D.C. Cir. 1992). There is "little question" that, as the object of regulation that EPA asserts is triggered

by EPA's rule, petitioners and their members suffer concrete, particularized injury, and that "a judgment preventing … the action will redress" that injury. *Sierra Club v. EPA*, 292 F.3d 895, 900–01 (D.C. Cir. 2002); *see also SCAQMD v. EPA*, 472 F.3d 882, 895-96 (D.C. Cir. 2006). Moreover, given petitioners' strong interests in ensuring that EPA adopts rational regulatory policies, and because the questions presented concern EPA's failure to comply with legal requirements, association petitioners have standing to represent their members' interests. *See Sierra Club*, 292 F.3d at 898.

The significant harms faced by petitioners and their members are addressed in declarations previously submitted to the Court. As the declarations explain, petitioners and their members will face increased costs for purchasing or leasing new vehicles. *See* Bidet Decl. (Ex. A). In addition, because EPA's imposition of restrictions on vehicles' GHG emissions operates, in EPA's view, as an automatic trigger of regulation of thousands of additional stationary sources not currently covered under the PSD program, petitioners and their members face increased costs for complying with stationary source requirements. Several will, as a direct result of the LDVR and EPA's statutory interpretation, become subject to PSD permitting requirements. *See* Friedman Decl. (Ex. B); Ailor Decl. (Ex. C); Ward Decl. (Ex. D); Manning Decl. (Ex. E); Putman Decl. (Ex. F); McCracken Decl. (Ex. G). Others will be subject to increased regulation, higher operational costs, and related commercial burdens. *See* Kerr Decl. (Ex. H); Peelish Decl. (Ex. I); Barker Decl. (Ex. J); *see also* Frontczak Decl. (Ex. K); Sweeney Decl. (Ex. L); Ellis Decl. (Ex. M).

ARGUMENT

The LDVR is invalid because it violates applicable statutory requirements and is not the product of reasoned decision-making.

I. EPA'S RULE RELIES ON AN IMPROPER INTERPRETATION OF THE STATUTE AND *MASSACHUSETTS V. EPA*.

Section 202(a)(1) requires EPA's Administrator to "prescribe … standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles … which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." EPA's Administrator must therefore determine: **(1)** whether a substance is an air pollutant emitted by new motor vehicles; **(2)** whether "in [her] judgment" emissions of that pollutant from motor vehicles "cause or contribute to air pollution"; **(3)** whether the resulting air pollution "may reasonably be anticipated to endanger public health or welfare"; **(4)** the content of the standards applicable to such emissions; and **(5)** the class of vehicles to which the standards would apply.

Courts have interpreted these requirements as obligating EPA to justify its regulation in light of the identified endangerment risk. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 525 (D.C. Cir. 1983); *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc). Instead, EPA separated these two integral steps. EPA concluded that it had no obligation to show — and even that it lacked discretion to consider whether –- "the resulting emissions control strategy or strategies will have

some significant degree of harm reduction or effectiveness in addressing the endangerment." 74 Fed. Reg. at 66,508. This conclusion violates the statute and the principle, recognized in *Small Refiner* and *Ethyl*, that the emissions control must be justified in light of the identified endangerment risk. In neither the LDVR nor any of its related rules did EPA ever articulate a legal and logical connection between the alleged endangerment risk and the emissions standards it selected. *See* Endangerment Joint Br. 23-29. EPA also failed to justify its interpretation that the LDVR automatically triggers stationary source regulation, and failed to address the enormous burdens and costs imposed on stationary sources as a result of its LDVR.

EPA's errors stem in large part from its misinterpretation of *Massachusetts*. EPA appears to believe that, once it promulgated its Endangerment Rule, it was required to promulgate automobile emissions standards without regard to whether those standards would mitigate any defined endangerment, and without considering whether they would trigger absurd regulatory consequences for other emissions sources under other CAA programs. That view misunderstands *Massachusetts* and ignores fundamental objections to EPA's approach. Just as *Massachusetts* held that EPA may not reject a rulemaking petition based on considerations untethered to the statutory text, EPA cannot engage in regulating GHG emissions without undertaking a well-reasoned evaluation of mandatory statutory factors and considering the implications of its action throughout the relevant statutory framework.

Massachusetts held that EPA's initial decision to deny rulemaking could not be sustained because "EPA ha[d] offered no *reasoned explanation* for its refusal to decide whether greenhouse gases cause or contribute to climate change." 549 U.S. at 534 (emphasis added). The Court rejected the "policy considerations" EPA invoked in denying the rulemaking petition and emphasized that EPA may not rest its decision whether to regulate on "reasoning divorced from the statutory text." *Id.* at 532. *Massachusetts* did *not* hold that GHG regulation is required by the CAA: The Court expressly declined to address "whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding." *Id.* at 534-35. Instead, the Court held that "EPA must ground its reasons for action *or inaction* in the statute." *Id.* at 535 (emphasis added); *id.* at 533 (EPA's "reasons for action or inaction must conform to the authorizing statute"); *id.* (EPA must "exercise discretion within defined statutory limits").

Massachusetts held, of course, that GHGs are "air pollutants" within the scope of CAA § 302(g). *Id.* at 528-29. But, as Section 202(a) makes clear, that is merely a necessary, not a sufficient, pre-condition for regulation. Were it otherwise, *Massachusetts* would have ordered outright reversal of EPA's decision instead of remanding to EPA. Indeed, *Massachusetts* expressly left open the possibility that EPA would not promulgate motor vehicle standards for reasons "ground[ed] … in the statute." *Id.* at 535. And it specifically left open the possibility that EPA could

determine that scientific uncertainties preclude reasoned decision-making on that issue. *Id.* at 534-35.

The limited nature of the Court's holding follows from the narrow relief the *Massachusetts* petitioners sought. In particular, they sought only a remand that would ensure that "the question whether to regulate these pollutants is evaluated according to the legal standard set forth in the Clean Air Act." Petitioners' Br., *Massachusetts v. EPA*, No. 05-1120 at 3, *available at* 2006 WL 2563378. "A judgment in favor of petitioners," they explained, "will not mandate regulation of air pollutants associated with climate change, nor will it dictate a particular answer to the question whether such pollutants are endangering public health or welfare." *Id.* Indeed, the petitioners took pains to emphasize that a remand for consideration under the appropriate standard was the only relief they sought. *Id.* ("that is all").

The LDVR is invalid because it relies on a profoundly mistaken view of EPA's authority under the statute. EPA wrongly believes it had no choice but to promulgate an emission-limiting rule that does not specifically address or meaningfully mitigate the endangerment identified in its risk assessment and that does not take into consideration (indeed, deliberately ignores) the stationary source regulatory consequences EPA concludes flow from promulgating the LDVR. This alone means that EPA's action cannot be sustained. *See Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985) ("agency decision cannot be sustained … where it is based not on the agency's own judgment but on an erroneous view of the law"). In addition, for reasons

explained below, the conclusion that EPA's legal premise for its regulatory action is fatally flawed is reinforced by EPA's departure in other respects from statutory requirements and its failure to conduct reasoned decision-making.

II. EPA FAILED TO JUSTIFY ITS CONCLUSION THAT THE LDVR TRIGGERS STATIONARY SOURCE REGULATION AND ERRED IN FAILING TO CONSIDER THE LDVR'S ASSERTED STATIONARY SOURCE IMPACTS.

Although EPA views its LDVR as an automatic trigger for PSD and Title V requirements for stationary sources, it acknowledges that triggering those requirements produces profound and absurd consequences for stationary source owners and states. EPA nonetheless refused to consider the asserted stationary source impacts of its LDVR and to adapt its regulatory action accordingly. Moreover, EPA failed to interpret the relevant statutes in light of the CAA's localized PSD permitting requirements, even though that failure produced the absurd results EPA identified.

A. EPA Unlawfully Failed To Analyze The Consequences Of Its Chosen Action.

EPA has been unequivocal that, in its view, the LDVR triggers stationary source permitting requirements that would result in "absurd" consequences by imposing enormous costs and burdens on the private and public sectors. *See* 74 Fed. Reg. at 55,294. According to EPA, "the January 2, 2011 trigger date for GHG PSD applicability will subject an extraordinarily large number of sources, more than 81,000, to PSD each year, an increase of almost 300-fold." 75 Fed. Reg. at 31,554. As EPA

acknowledged, "[m]ost industry stakeholders who commented on the ANPR[M] believe that triggering Title V and PSD [requirements] … would be disastrous and that a regulatory gridlock would ensue." 74 Fed. Reg. at 55,303. A study that "most of the industry" believed "underestimated the impacts" documented that "regulating GHGs under the CAA would cause 1,000,000 commercial buildings, nearly 200,000 manufacturing operations, and about 20,000 large farms to become CAA-regulated stationary sources." *Id.* As EPA acknowledged, the new requirements would increase the volume of permit applications by "orders of magnitude" and would "immediately and completely overwhelm the [state] permitting authorities." *Id.* at 55,295.

In considering the LDVR, EPA had available options that would have avoided or at least deferred the "absurd" stationary source burdens. EPA nonetheless deemed the burdens imposed on stationary sources irrelevant in its LDVR rulemaking. EPA's approach violates the statutory requirements and does not satisfy the basic requirements of reasoned decision-making.

1. EPA Failed To Address The "Absurd Consequences" For Stationary Source Regulation.

EPA concluded that, under its reading of the statute, regulating motor vehicle GHG emissions under CAA § 202(a) *necessarily* results in subjecting stationary sources of GHG emissions to regulation under the PSD and Title V provisions — and that, in turn, such regulation contradicts congressional intent by producing "absurd consequences." 74 Fed. Reg. at 55,294-300. In its Section 202(a) rulemaking action,

EPA should have taken into account the "absurd consequences" it believed would stem from regulating GHG emissions under the PSD and Title V programs. EPA indisputably failed to do so. EPA's statement of basis and purpose for the LDVR, and the record supporting the rule, are devoid of any discussion of the absurd consequences that (in EPA's view) automatically flow from acting under the Title II motor vehicle provisions to subject GHG emissions to regulation.

Had EPA taken into account the absurd consequences it identified, it would have been forced, as a matter of statutory construction, to exclude CO_2 from the set of GHGs regulated by the LDVR, to decline to establish motor vehicle GHG rules under CAA § 202(a), or otherwise to interpret the statute so as not to automatically trigger stationary source regulation. EPA instead took the position that the absurd consequences of stationary source regulation need not be addressed in its LDVR because they "were not contained in the proposed rule, but instead flow from the operation of other provisions of the CAA." RTC 5-454 n.63 (JA __). Even accepting EPA's premise, that position lacks any basis in law or logic. Nearly every agency action has consequences that result from the application of statutory provisions; if agencies could avoid consideration of an action's consequences on the grounds that those consequences result from operation of the statute in conjunction with the agency action, the requirement for reasoned agency decision-making would be a nullity. Indeed, the premise of EPA's Tailoring Rule is that, given the "absurd" consequences of stationary source GHG regulation, "Congress did not intend for

[EPA] to follow [a] literal reading" of the Act. 75 Fed. Reg. at 31,541. According to EPA, the "most important reason" justifying its departure from the express statutory text is the practical consequence of regulating stationary sources. *Id.* at 31,563. But that is precisely the sort of "policy concern[]" that should have "informed" EPA's action in deciding whether (and, if so, when) to promulgate the LDVR. *See Massachusetts*, 549 U.S. at 534-35 (expressly declining to decide, and leaving EPA to address, "whether policy concerns can inform EPA's actions in the event that it makes … [an endangerment] finding" for motor vehicle GHG emissions). Indeed, it is a "policy concern" that provides EPA with a compelling reason –- one that is precisely "ground[ed] ... in the statute," *id.* at 535 –- *not* to regulate motor vehicle GHG emissions.

The Department of Transportation ("DOT"), through NHTSA, also failed to explain its about-face in acceding to CAA joint regulation in tandem with DOT-led EISA regulation. At the ANPRM stage, DOT observed that "using the [CAA] as a means for regulating [GHG] emissions presents *insurmountable* obstacles," given the localized-pollutant design of stationary source CAA programs. 73 Fed. Reg. at 44,362 (JA __) (emphasis added). Nowhere in the joint proposed or final LDVR and EISA rules or in NHTSA's regulatory impact analysis did DOT explain why it was changing course. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (agencies may not change positions *sub silentio*). Like EPA, DOT failed to address the strong

policy concerns "ground[ed] … in the statute" for *not* having EPA regulate motor vehicle GHG emissions under the CAA.

2. EPA Failed To Consider The Burdens Resulting From Its Interpretation Of The LDVR.

Even though the LDVR and the stationary source regulations EPA believes were triggered constitute one of the most expensive and burdensome sets of administrative regulations ever promulgated by an environmental agency, EPA refused to consider the costs and other burdens of these regulations in its LDVR rulemaking. According to EPA, it need not consider the LDVR's effects on stationary source requirements because those effects were purportedly only "indirect" and the "analysis of such impacts would not aid EPA in determining what GHG standards to adopt." RTC 5-456 (JA __). EPA is wrong. It should have considered the stationary source impacts to determine whether the LDVR added enough to NHTSA's fuel-economy regulations to justify the burdens it imposes on stationary sources. EPA's rationale that no matter how heavy, the burdens imposed would not have influenced its decision to promulgate the LDVR — and, in its view, pull the GHG permitting trigger — is arbitrary and capricious. EPA was obligated at least to examine the question.

Moreover, EPA instructed commenters to "direct any comments relating to potential adverse economic impacts on small entities from PSD requirements for GHG emissions to the docket for the PSD tailoring rule." 74 Fed. Reg. 49,454,

49,629 (Sept. 28, 2009) (JA __). The LDVR thus stated that EPA's Tailoring Rule would address stationary source impacts. 75 Fed. Reg. at 25,401-02 (JA __). But, then, in its Tailoring Rule, EPA *refused* to address those impacts on grounds that the Tailoring Rule provided only relief, and did not impose costs, because any costs were imposed by the LDVR. 75 Fed. Reg. at 31,597 (permitting requirements "are already mandated by the Act and by existing rules and are not imposed as a result of the Tailoring Rule"); *see also id.* at 31,554 (stating that its LDVR "will trigger the applicability of PSD for GHG sources").

This attempted "Catch-22" — evading comments and refusing to address the core issue of stationary source regulation in any of EPA's related rulemakings –- is plainly improper. *See Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1293-94 (D.C. Cir. 2000) (agency may not "use shell games to elude review"). More fundamentally, EPA's failure to consider the stationary source impacts violates Section 202 and is inconsistent with its statutory obligation to respond to "significant comments." CAA § 307(d)(3), (5), (6); *see id.* § 307(d)(1)(J), (K) (applying CAA § 307(d) requirements to EPA's PSD and Section 202 rulemakings). Unlike some other sections of the CAA, nothing in Section 202 prohibits EPA from taking costs into account. *See Michigan v. EPA*, 213 F.3d 663, 678-79 (D.C. Cir. 2000) (showing of "clear congressional intent" in the form of the "text, structure, or history" of the applicable CAA section is required to bar EPA from considering costs). Section 202 even mandates consideration of certain costs and, although it does not go so far as to

require an analysis of the "social costs" of the rule, *see Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1118 (D.C. Cir. 1979), Congress intended that EPA consider at least industry compliance costs as a critical factor. Considering stationary source impact is thus plainly consistent with Section 202.

EPA's failure to consider the burdens imposed on stationary sources is flatly contrary to multiple mandates from Congress and the President:

- ***CAA Section 317***, which expressly applies to Section 202 rulemaking, *see* CAA § 317(a)(5), requires EPA to perform an economic impact assessment, which must contain an analysis of a proposed rule's compliance costs, inflationary or recessionary effects, competitive effects, effect on consumers, and impact on energy use.
- ***The Regulatory Flexibility Act*** requires EPA to prepare an analysis that describes the effects of a proposed rule on small businesses, or certify that there are no such effects. 5 U.S.C. §§ 603(a), 605(b).
- ***The Unfunded Mandates Reform Act*** requires EPA to assess its rules' impact on state, local, and tribal governments and the private sector, and prepare a written statement, including a cost-benefit analysis, for proposed rules with "federal mandates" that

may result in expenditures of $100 million or more in any single year. 2 U.S.C. § 1532(a).

- ***The Paperwork Reduction Act*** requires EPA to seek approval from the Office of Management and Budget before creating a rule that will impose significant information-collection obligations. 44 U.S.C. § 3507; *see also Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 28-29 (D.C. Cir. 1998).
- ***Executive Order 12898*** requires an agency to identify and address disproportionate effects of its actions on minority and low-income populations in the United States. 59 Fed. Reg. 7,629 (Feb. 11, 1994)
- ***Executive Order 13211*** requires an agency to conduct an analysis of its rule's impact on energy supply, distribution, and use. 66 Fed. Reg. 28,355 (May 18, 2001).

In defiance of these requirements, EPA refused to estimate or even consider the costs of the LDVR for stationary sources. EPA did not give meaningful consideration to less costly regulatory alternatives that could have achieved the statutory objectives. 2 U.S.C. § 1535. EPA never submitted a request to the Office of Management and Budget for approval of the massive stationary source information collection requirements compelled by its promulgation of the LDVR in conjunction

with its statutory interpretation. 75 Fed. Reg. at 31,603. Its summary certification that the LDVR will "not have a significant economic impact on a substantial number of small entities," 75 Fed. Reg. at 25,541 (JA __), is contradicted by EPA's own repeated statements that the LDVR will "trigger the applicability of PSD for GHG sources at the 100/250 tpy [tons per year] threshold levels as of January 2, 2011." 75 Fed. Reg. at 31,554. Indeed, as the Small Business Administration noted, "whether viewed separately or together, EPA's RFA certifications for the three GHG rule proposals lack a factual basis and are improper" because the "GHG rules are likely to have a significant economic impact on a large number of small entities." Comments of the Small Business Administration on EPA's Tailoring Rule (Dec. 23, 2009), Dkt. EPA-HQ-OAR-2009-0517-4867.1, *available at* http://www.archive.sba.gov/advo/laws/comments/epa09_1223.html. And, although EPA's GHG requirements will place disproportionate burdens on low-income populations because of the regressive impact of increasing energy costs, *see* 73 Fed. Reg. at 44,410 n.58 (JA __), EPA failed to perform even a cursory analysis of these burdens or the rule's impact on energy supply, distribution, and use. 75 Fed. Reg. at 31,603, 31,605.

When an agency fails to consider factors identified as relevant by Congress and the President, as EPA has failed to do here, it has not "examined the relevant data," or examined each "important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *see Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984) ("the reviewing court will consider the contents of the

preliminary or final regulatory flexibility analysis, along with the rest of the record, in assessing not only the agency's compliance with the Regulatory Flexibility Act, but the validity of the rule under other provisions of law"). Indeed, the requirement of reasoned rulemaking is heightened under the CAA. *Small Refiner*, 705 F.2d at 518-19 (agency must set forth, *inter alia*, "the major legal interpretations and policy considerations underlying the proposed rule"); *see also* CAA § 307(d)(3)(C). EPA's failure to estimate or consider the costs of the LDVR for stationary sources is therefore unlawful, arbitrary, and capricious.

3. EPA Improperly Failed To Give Meaningful Consideration To The Option Of Deferring Regulation.

Section 202(a) imposes on EPA no deadline for promulgating regulations. In fact, *Massachusetts* expressly recognized that, with respect to any decisions on when and how to set automobile emissions standards, EPA has "significant latitude as to the manner, timing, [and] content" of its regulations and "coordination of its regulations with those of other agencies." 549 U.S. at 533.

In light of its discretion under the statute, EPA should have seriously considered comments objecting to EPA's approach and recommending that EPA at least defer establishing regulations under CAA § 202(a) while (1) NHTSA's new fuel economy standards reduced vehicle GHG emissions; (2) States increased their administrative resources as necessary to address PSD and Title V permit applications; and (3) EPA and States developed appropriate streamlining techniques for permits

and permit proceedings. Doing so would have obviated (or, at a minimum, deferred) any perceived need by EPA to rewrite the CAA's plain language (in its Tailoring Rule). It also would have allowed EPA to avoid taking any action that, in the Agency's view, would trigger PSD and Title V requirements for GHG emissions from stationary sources, large or small. In light of EPA's own interpretation of the statute, its discretion as to the timing of any GHG motor vehicle standards, and the vanishingly small benefits that EPA projected its regulation would produce, *see infra*, EPA's decision not to defer regulation was arbitrary and capricious.

EPA asserted that the benefits of delay would be outweighed by the LDVR's "important GHG reductions as well as benefits to the automakers and to consumers." RTC 7-68 (JA __). But, for reasons discussed below, EPA admitted the LDVR will yield no significant benefits that would not be achieved by NHTSA's statutorily mandated fuel-economy standards. And, in any event, EPA could not rationally consider the costs or benefits of its LDVR without considering the substantial burdens that, in EPA's view, promulgating the LDVR imposed on stationary sources.

B. Because Title II Rulemaking Does Not Govern Title I Regulation, EPA Should Have Made An Interpretive Inquiry Focused On Its Lack Of Statutory Authority To Promulgate Title I, Part C PSD Controls On Non–Localized Pollutants.

As noted above, EPA maintained that its decision to promulgate automobile emissions regulations under CAA Title II automatically triggers regulation of stationary source GHG emissions under the CAA's PSD program. According to

EPA, "[w]hatever the pollutant is that is regulated elsewhere" under the CAA, "it is that pollutant to which PSD ... applies," and the Agency "do[es] not have discretion to interpret the GHG 'air pollutant' differently for purposes of PSD or [T]itle V." 75 Fed. Reg. at 31,528. In EPA's view, PSD program requirements must "apply to GHGs upon the date that the ... tailpipe standards for light-duty vehicles ... take effect." 75 Fed. Reg. 17,004, 17,007 (Apr. 2, 2010). It is thus EPA's position that "GHGs become subject to regulation" under the CAA on January 2, 2011, the date on which EPA deemed the LDVR requirements to take effect, and that the PSD "program requirements" also "begin to apply upon that date." 75 Fed. Reg. at 31,522.

EPA misconstrues the scope of its discretion and authority to implement the CAA's PSD provisions. EPA is wrong that regulating motor vehicle GHG emissions under CAA § 202(a) requires that GHGs become air pollutants "subject to regulation" under the PSD program. On the contrary, EPA not only has discretion to determine that the Title II LDVR does not automatically inject GHGs into the Title I PSD program, EPA also had the obligation to consider the structural fit, or lack thereof, between GHGs and the PSD program and the statutory consequences of injecting GHGs into that program.

The CAA includes a spectrum of statutory programs, each addressing different pollutants, different sources of pollution, and different pollution problems, and each using different regulatory mechanisms of different geographical focus. *See, e.g.*, CAA Title I (stationary source emissions); CAA Title II (mobile source emissions); CAA

Title IV (acid rain); CAA Title VI (stratospheric ozone protection). These statutory programs are not self-executing. Instead, rulemaking is required under each program to address, in light of the elements and contours of each program, the specific air pollutant, pollution sources, and pollution problems the program is designed to address. *See*, *e.g.*, CAA §§ 109(a), 111(b), 112(d)(1), 120(a)(1)(A), 123(c), 161, 169A(a)(4).

These differences come into stark relief when comparing the Title II provisions at issue in the LDVR with the PSD provisions of Title I, Part C. Title II addresses emissions from new motor vehicles found by EPA to constitute an endangerment to public health or welfare. *See id.* § 202(a)(1). In marked contrast, the PSD program addresses regulation of a defined class of stationary sources that emit, in amounts exceeding 100 or 250 tpy (depending on source category), air pollutants that deteriorate air quality in defined geographical regions within a State. *See id.* §§ 107, 161, 165(a). Regardless of EPA's views about the suitability of GHG emissions for regulation under Title II, GHGs are quite different from the conventional "air pollutants" that regulation under the PSD program addresses. The concern with GHG emissions, as EPA recognizes, stems not from their local effects but from their indirect, global effects –- *i.e.*, the "additional heating effect caused by the buildup of anthropogenic GHGs in the [global] atmosphere" and the associated potential effects on global climate. 73 Fed. Reg. at 44,423 (JA __). Regulation of GHG emissions is thus in no fashion driven by any health or environmental concern with local emissions

in defined geographical areas causing elevated ground-level exposures to a pollutant in the air that people breathe –- *i.e.*, the sort of emissions that result in the "deterioration" of localized "air quality" to which, as the plain language of the CAA makes clear, the PSD program is directed. CAA § 161.

Massachusetts held that the definition of "air pollutant" in CAA § 302(g) is "capacious" and that GHGs do not fall outside that definition's scope, thereby authorizing EPA to consider, under CAA § 202(a)(1), whether "to regulate the emission of such gases *from new motor vehicles*." 549 U.S. at 532 (emphasis added). But that conclusion does not speak to, much less resolve, questions concerning EPA's authority to regulate GHG emissions from stationary sources under the Title I, Part C, PSD program. In this regard, an analogue is found in CAA § 169A(g)(7), which defines "major stationary source[s]" for purposes of the CAA's visibility-protection program as "stationary sources with the potential to emit 250 tons or more of *any pollutant*" (emphasis added). Consistent with the statutory scheme, EPA's visibility regulations reasonably apply this statutory phrase and the visibility program only to those air pollutants that impair visibility. *See* 40 C.F.R. pt. 51, App. Y, § III.A.2.

So too here. EPA should have conducted, but failed to conduct, an interpretive inquiry considering the definition of "major emitting facility" in the PSD provisions. CAA § 169(1). This definitional inquiry should in turn have recognized the localized structure of the PSD program of which the definitional question forms a central part, and the statutory consequences of regulating GHGs in that program.

EPA has never interpreted "major emitting facility" literally to make stationary sources with major emissions of "any air pollutant" a "major emitting facility." Instead, EPA has limited the regulatory definition of "major emitting facilities" to include only those sources with major emissions of pollutants that are "regulated [new source review] pollutant[s]" under the PSD program. 40 C.F.R. § 51.166(b)(1)(i)(*a*), (*b*); *id.* § 52.21(b)(1)(i)*(a), (b)*.

Accordingly, EPA had a statutory obligation to inquire into the PSD program's structure. Specifically, rather than reject any analysis of structural fit or statutory consequences on the grounds that the statute mandates an automatic PSD trigger based on Title II regulation, EPA was obligated to inquire into whether the overall statutory scheme contemplates regulation of GHGs as pollutants "subject to regulation" under the PSD program. Had EPA undertaken this inquiry — as it was required to do — it would have found that PSD regulation of GHGs produces a complete regulatory mismatch. Indeed, EPA's conclusion that treating GHGs as pollutants subject to PSD regulation would produce absurd results contrary to congressional intent alone requires excluding GHGs from the PSD program as a matter of statutory construction under *Chevron* step one. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

Even if the Court disagrees, however, and decides the statute does not speak directly to this matter, it is indisputable that EPA at least enjoyed interpretive discretion that it failed to appreciate or acknowledge in the proceedings below. In

particular, EPA had interpretive discretion to adopt a construction of the PSD triggering provisions based on, and informed by, the function and regulatory contours of the PSD program. By analogy, even though the CAA specifies for purposes of visibility protection that a major stationary source is one "with the potential to emit 250 tons or more of *any pollutant*," CAA § 169A(g)(7) (emphasis added), EPA had the discretion to limit the visibility program's applicability to a small category of pollutants — those that impair visibility –- and not to every substance that falls within the Act's broad definition of air pollutant. *See* 40 C.F.R. pt. 51, App. Y, § III.A.2. Because EPA had — and exercised — discretion to limit the scope of the pollutants subject to the Title I, Part C, visibility program, it necessarily likewise had discretion to limit the scope of the pollutants subject to the Title I, Part C, PSD program under section 169(1)'s reference to "any air pollutant." EPA's refusal to acknowledge its statutory discretion, and to reasonably exercise that discretion, requires reversal. *Prill*, 755 F.2d at 947-48.

Regulation of GHGs as an "air pollutant" under Title II does not, and cannot, have automatic consequences that trigger application of the PSD program under Title I, Part C — as EPA should have recognized when it acknowledged that PSD regulation of GHG emissions would inevitably produce "absurd" consequences. EPA's contrary conclusion that it lacks any discretion to exclude GHGs from regulation under the PSD program is reversible error.

C. The LDVR Reopened EPA's Interpretation Of The PSD Permitting Triggers, But EPA Failed To Address The Legality Of That Interpretation.

The LDVR is also invalid because EPA should have recognized that, by promulgating the LDVR, it reopened its interpretation of the *situs* requirement for PSD permitting and that its interpretation is contrary to the statute.

As explained in the briefing submitted in Case No. 10-1167, the Title I, Part C, PSD provisions of the CAA require PSD permits only for major emitting facilities located "in any area to which this part applies." CAA § 165(a). Part C applies only to areas designated attainment or unclassifiable for a national ambient air quality standard ("NAAQS"); it does not apply to nonattainment areas. *See id.* § 161. EPA has for 30 years interpreted these provisions to establish a pollutant-indifferent *situs* requirement, concluding that a major source of any pollutant must obtain a PSD permit so long as it is located in an area designated attainment or unclassifiable for *any pollutant*, including pollutants the source does not emit in major amounts. *See* 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980). The error in that interpretation has become glaring in light of EPA's LDVR. Under EPA's interpretation, because of its LDVR, all sources that are "major emitting facilities" solely because of their GHG emissions must obtain PSD permits, even though there are no NAAQS for GHGs, because every area of the country is in attainment with, or unclassifiable for, at least one NAAQS. *See* 75 Fed. Reg. at 31,561.

EPA reopened its interpretation of the PSD program's *situs* requirement when it promulgated the LDVR. *See Sierra Club v. EPA*, 551 F.3d 1019, 1025 (D.C. Cir. 2008). Because of the LDVR, the PSD program applies not only to a vast new quantity of sources (tens of thousands, up from only a few hundred each year), but also to whole new types of sources (commercial and residential facilities, not just large industrial facilities). And to accommodate the influx of stationary sources precipitated by its LDVR, EPA fundamentally revised its PSD program.

Had EPA properly reconsidered its pollutant-indifferent interpretation of the PSD *situs* requirement, however, it would have recognized that its interpretation is not permissible. The Act's text, structure, and purpose compel a pollutant-specific interpretation, one that requires PSD permits only if the pollutant whose emissions qualify a source as a "major emitting facility" is the pollutant for whose NAAQS the source area in question is designated attainment or unclassifiable. NAAQS do not exist for GHGs. Under the statute, then, no source that is a "major emitting facility" solely because of its GHG emissions would have to obtain a PSD permit, as no area of the country is in attainment with, or unclassifiable for, the *nonexistent* NAAQS for GHGs. Accordingly, no new PSD permits would be required as a result of the LDVR.

III. EPA FAILED TO DEMONSTRATE THAT ITS RULE WILL MEANINGFULLY AVERT ANY CLAIMED ENDANGERMENT OF PUBLIC HEALTH OF WELFARE.

EPA concedes that its LDVR essentially duplicates NHTSA's fuel-economy standards and that the only difference between its regulatory authority and NHTSA's is EPA's ability to consider GHGs emitted from automobiles because of operation of their air conditioning systems. 75 Fed. Reg. at 25,327 (JA __). According to EPA and NHTSA's own projections in the record, the LDVR will have essentially no effect on any public health or welfare endangerment beyond the concededly negligible effects already produced by the NHTSA standards. The LDVR is thus contrary to the CAA's requirements, as explained in *Ethyl*.

A. The LDVR Does Not Meaningfully Avert Any Predicted Danger Not Already Averted By NHTSA's Fuel Standards.

EPA cannot justify the LDVR because EPA failed to explain how the LDVR significantly and meaningfully averts any predicted danger. The CAA's legislative history indicates the purpose of the CAA's endangerment criterion is "[t]o emphasize the preventive or precautionary nature of the [A]ct, *i.e.*, to assure that regulatory action can effectively prevent harm before it occurs." H.R. Rep. No. 95-294, at 49 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1127. The fundamental purpose of CAA provisions, like section 202(a)(1), that incorporate the endangerment criterion is to regulate emissions when such regulation is determined by the agency to be effective in meaningfully addressing the cause of endangerment –- not "regulation for regulation's

sake." As EPA has acknowledged, the *Ethyl* decision provides the conceptual foundation for the 1977 amendments to the CAA endangerment provisions, including section 202(a)(1), that succeeded, and codified, that decision. 74 Fed. Reg. 18,886, 18,891-92 (Apr. 24, 2009). *Ethyl* is thus particularly relevant to a proper, statutorily grounded conception of the prerequisites to regulations issued by EPA under section 202(a)(1).

In *Ethyl*, which affirmed EPA's regulation of lead in fuels under CAA Title II, EPA carefully justified its decision to regulate fuels' lead content at specified levels with evidence showing that the levels it selected would prevent at least a considerable part of the public health danger posed by exposure to lead. EPA established that "lead automobile emissions were, far and away, the most readily reduced significant source of environmental lead," and that regulating gasoline lead at the levels it proposed would avert much of the underlying danger. *See* 541 F.2d at 31 & n.62, 55-65. In *Ethyl*, the Court determined that an affirmative endangerment finding was warranted, at least in part, because "the lead exposure problem can fruitfully be attacked through control of lead additives" in vehicle fuels. *Id.* at 31 n.62.

Ethyl makes clear that EPA need not remove entirely a particular health or welfare danger. EPA must, however, be able to conclude that the resulting regulation is capable of meaningfully and substantially reducing the extent of that danger. *See id.*; *see also Small Refiner*, 705 F.2d at 525 (EPA explained its decision to regulate lead emissions at specified levels). Accordingly, before adopting any LDVR, EPA must be

able to show that any such EPA-established automobile-emissions standards would meaningfully mitigate the alleged endangerment, a burden EPA failed to satisfy here (even apart from its disregard of any mitigation of climate-change effects resulting from the NHTSA standards).

The LDVR does not add anything meaningful to NHTSA's standards. According to both EPA's and NHTSA's projections in the record, the (imperceptible) benefits from the LDVR will be fully achieved by NHTSA's rules alone. The LDVR reports projected modifications in global climate change effects that will result by the year 2100 from the NHTSA standards and from the EPA standards in terms of decreases in atmospheric CO_2 concentration, reduction in global mean surface temperature, and reduction in global mean sea level rise. According to NHTSA, its standards will result in the following by 2100:

- A 2.7 parts per million ("ppm") decrease in atmospheric CO_2 concentration;
- A 0.011 degree Celsius reduction in global mean surface temperature; and
- A 0.09 centimeter reduction in global mean sea level rise.

75 Fed. Reg. at 25,637, Table IV.G.2.-3 (JA __). EPA's estimates of projected impacts of its LDVR over the same nine-decade period are essentially identical to NHTSA's estimates of the impacts of NHTSA's standards:

- A 2.7-3.1 ppm decrease in atmospheric CO_2 concentration;

- A 0.006 to 0.015 degree Celsius reduction in global mean surface temperature; and
- A 0.06 to 0.14 centimeter reduction in global mean sea level rise.

Id. at 25,495, Table III.F.3-1 (JA __).

These two sets of estimates are, for all practical purposes, the same. Because NHTSA had no option after EISA's enactment but to issue new fuel-economy standards, *see*, *e.g.*, EISA § 102, 49 U.S.C. § 32902, EPA had to take that into account and show how its emission standards *are necessary* to achieve any projected health or welfare benefits. In other words, EPA should have treated NHTSA's regulation as establishing a baseline for automobile GHG emissions when it was considering whether to issue the Endangerment Rule and its LDVR. Indeed, this was DOT's original position, now abandoned without explanation. See 73 Fed. Reg. at 44,363 (JA __). Moreover, to the extent (if any) the LDVR will achieve benefits over and above benefits from NHTSA's standards, the LDVR is still not adequately reasoned because EPA failed to identify the LDVR's specific marginal benefits. In particular, EPA failed to explain why any such marginal benefit was worth the "absurd results" EPA asserts the LDVR triggers for stationary sources.

B. The LDVR Is Unsupportable On The Basis Of EPA's Rulemaking Record Because, According To EPA, Any Benefits Of That Rule In Addressing Global Climate Change Effects Are Vanishingly Small.

Even if EPA's emission standards did not duplicate NHTSA's fuel economy standards, the LDVR still could not satisfy the CAA and *Ethyl* because, according to EPA's projections, the LDVR results in benefits so small as to be imperceptible.

EPA acknowledges that "the magnitude of the avoided climate change projected here is small." 75 Fed. Reg. at 25,496 (JA __). EPA characterizes the projected changes in temperature and sea level rise resulting from the LDVR as "small relative to the IPCC's 2100 'best estimates' for global mean temperature increases (1.8-4.0 °C) and sea level rise (0.20-0.59 m [20 to 59 centimeters]) for all global GHG emissions sources for a range of emissions scenarios." *Id.* at 25,495 (JA __). Indeed, when one converts EPA's projections to percentages of the IPCC's 2100 estimates, the LDVR will avoid as little as 0.15% of the IPCC-projected temperature rise by 2100 and as little as 0.10% of the IPCC-projected sea-level rise by that year. *See* Endangerment Joint Br. 7, 9-10. Such minuscule changes –- projected to occur nine decades from now –- cannot be said to mitigate meaningfully the EPA-posited endangerment to public health and welfare, especially given that those same reductions are projected to result from NHTSA's rules.

The projected estimates with regard to atmospheric CO_2 concentration are similarly negligible. EPA estimates the atmospheric concentration of CO_2 will range

between 535 and 983 ppm in 2100. *See* Endangerment TSD 195. Even assuming the LDVR achieves the maximum EPA-estimated reduction of 3.1 ppm by 2100, *see* 75 Fed. Reg. at 25,496, Table III.F.3-1 (JA __), the projected concentration of atmospheric CO_2 in that year would remain virtually unchanged –- ranging from between 531.9 and 979.9 ppm.

In short, according to EPA's own estimates, the projected changes in global atmospheric CO_2 concentration, temperature, and sea level that EPA attributes to the LDVR are vanishingly small, to the point of being all but unquantifiable, especially on any scale perceptible to humans. Indeed, by EPA's admission, such projected changes are simply "*too small to address quantitatively in terms of their impacts on resources*." 74 Fed. Reg. at 49,744 (emphasis added). Where, as here, the agency-projected benefits of regulation are negligible, the CAA is not properly implemented by imposing massive regulatory burdens. *Cf. Connecticut v. EPA*, 696 F.2d 147, 163-65 (2d Cir. 1982) (where air-quality impact of state's revision to a NAAQS implementation plan is "minimal," EPA "may approve that revision" even if the affected state is not in compliance with NAAQS); *Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1092-93 (6th Cir. 1984) (insignificant contributions to NAAQS violations not covered by CAA).

Indeed, the contrast between the situation posed by the LDVR and that addressed by this Court in *Ethyl* –- where the regulation at issue was found to be capable of addressing to a very considerable extent the endangerment associated with the targeted pollution –- could not be more sharply drawn. EPA cannot justify the

LDVR given the exceedingly small magnitude of the effects that it projects, particularly in light of the fact that all of those small effects will be achieved by the unchallenged NHTSA standards, promulgation of which –- unlike EPA's standards under EPA's view of the CAA –- created no "absurd results" at odds with Congress's intent.

CONCLUSION

The Court should vacate or vacate and remand the LDVR in whole or in part.

Respectfully submitted,

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FINAL BRIEF:

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure And Circuit Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 9,149 words as determined by the word-counting feature of Microsoft Word 2000.

/s/ Ashley C. Parrish
Ashley C. Parrish

Dated: June 3, 2011

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APPENDIX A

ADDENDUM OF STATUTORY AND REGULATORY PROVISIONS

In accordance with Rule 28 of the Federal Rules of Appellate Procedure, and D.C. Circuit Rule 28(a)(5), this Addendum sets forth the relevant parts of the pertinent statutes and regulations cited in this brief.

APPENDIX A — STATUTORY ADDENDUM

I. Clean Air Act Section 107, 42 U.S.C. § 7407:

§ 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) Designated regions

For purposes of developing and carrying out implementation plans under section 7410 of this title--

(1) an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

(c) Authority of Administrator to designate regions; notification of Governors of affected States

The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

(d) Designations

(1) Designations generally

(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as--

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

(B) Promulgation by EPA of designations

(i) Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

(ii) In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions

thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator intends to make a modification, the Administrator shall notify the State and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

(iii) If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or portions thereof) in the State designated as nonattainment, attainment, or unclassifiable, the Administrator shall act on such designations in accordance with the procedures under paragraph (3) (relating to redesignation).

(iv) A designation for an area (or portion thereof) made pursuant to this subsection shall remain in effect until the area (or portion thereof) is redesignated pursuant to paragraph (3) or (4).

(C) Designations by operation of law

(i) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(A), (B), or (C) of this subsection (as in effect immediately before November 15, 1990) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

(ii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before November 15, 1990) is designated by operation of law, as an attainment area for such pollutant within the meaning of subparagraph (A)(ii).

(iii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(D) (as in effect immediately before November 15, 1990) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

(2) Publication of designations and redesignations

(A) The Administrator shall publish a notice in the Federal Register promulgating any designation under paragraph (1) or (5), or announcing any designation under paragraph (4), or promulgating any redesignation under paragraph (3).

(B) Promulgation or announcement of a designation under paragraph (1), (4) or (5) shall not be subject to the provisions of sections 553 through 557 of Title 5 (relating to notice and comment), except nothing herein shall be construed as precluding such public notice and comment whenever possible.

(3) Redesignation

(A) Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as the Administrator may have available explaining the basis for the notice.

(B) No later than 120 days after receiving a notification under subparagraph (A), the Governor shall submit to the Administrator such redesignation, if any, of the appropriate area (or areas) or portion thereof within the State or interstate area, as the Governor considers appropriate.

(C) No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under subparagraph (A), the Administrator shall

promulgate such redesignation, if any, that the Administrator deems appropriate.

(D) The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State. Within 18 months of receipt of a complete State redesignation submittal, the Administrator shall approve or deny such redesignation. The submission of a redesignation by a Governor shall not affect the effectiveness or enforceability of the applicable implementation plan for the State.

(E) The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless--

(i) the Administrator determines that the area has attained the national ambient air quality standard;

(ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;

(iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

(iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and

(v) the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

(F) The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable.

(4) Nonattainment designations for ozone, carbon monoxide and particulate matter (PM-10)

(A) Ozone and carbon monoxide

(i) Within 120 days after November 15, 1990, each Governor of each State shall submit to the Administrator a list that designates, affirms or reaffirms the designation of, or redesignates (as the case may be), all areas (or portions thereof) of the Governor's State as

attainment, nonattainment, or unclassifiable with respect to the national ambient air quality standards for ozone and carbon monoxide.

(ii) No later than 120 days after the date the Governor is required to submit the list of areas (or portions thereof) required under clause (i) of this subparagraph, the Administrator shall promulgate such designations, making such modifications as the Administrator may deem necessary, in the same manner, and under the same procedure, as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with clause (i) of this subparagraph, a designation for an area (or portion thereof), the Administrator shall promulgate the designation that the Administrator deems appropriate.

(iii) No nonattainment area may be redesignated as an attainment area under this subparagraph.

(iv) Notwithstanding paragraph (1)(C)(ii) of this subsection, if an ozone or carbon monoxide nonattainment area located within a metropolitan statistical area or consolidated metropolitan statistical area (as established by the Bureau of the Census) is classified under part D of this subchapter as a Serious, Severe, or Extreme Area, the boundaries of such area are hereby revised (on the date 45 days after such classification) by operation of law to include the entire metropolitan statistical area or consolidated metropolitan statistical area, as the case may be, unless within such 45-day period the Governor (in consultation with State and local air pollution control agencies) notifies the Administrator that additional time is necessary to evaluate the application of clause (v). Whenever a Governor has submitted such a notice to the Administrator, such boundary revision shall occur on the later of the date 8 months after such classification or 14 months after November 15, 1990, unless the Governor makes the finding referred to in clause (v), and the Administrator concurs in such finding, within such period. Except as otherwise provided in this paragraph, a boundary revision under this clause or clause (v) shall apply for purposes of any State implementation plan revision required to be submitted after November 15, 1990.

(v) Whenever the Governor of a State has submitted a notice under clause (iv), the Governor, in consultation with State and local air pollution control agencies, shall undertake a study to evaluate whether the entire metropolitan statistical area or consolidated metropolitan statistical area should be included within the nonattainment area. Whenever a Governor finds and demonstrates to the satisfaction of the Administrator, and the Administrator concurs in such finding, that with respect to a portion of a metropolitan statistical area or consolidated metropolitan statistical area, sources in the portion do not contribute significantly to violation of the national ambient air quality standard, the Administrator shall approve the Governor's request to exclude such portion from the nonattainment area. In making such finding, the Governor and the Administrator shall consider factors such as population density, traffic congestion, commercial development, industrial development, meteorological conditions, and pollution transport.

(B) PM-10 designations

By operation of law, until redesignation by the Administrator pursuant to paragraph (3)--

(i) each area identified in 52 Federal Register 29383 (Aug. 7, 1987) as a Group I area (except to the extent that such identification was modified by the Administrator before November 15, 1990) is designated nonattainment for PM-10;

(ii) any area containing a site for which air quality monitoring data show a violation of the national ambient air quality standard for PM-10 before January 1, 1989 (as determined under part 50, appendix K of title 40 of the Code of Federal Regulations) is hereby designated nonattainment for PM-10; and

(iii) each area not described in clause (i) or (ii) is hereby designated unclassifiable for PM-10.

Any designation for particulate matter (measured in terms of total suspended particulates) that the Administrator promulgated pursuant to this subsection (as in effect immediately before November 15, 1990) shall remain in effect for purposes of implementing the maximum allowable increases in concentrations of particulate matter (measured in terms of total suspended particulates) pursuant to section

7473(b) of this title, until the Administrator determines that such designation is no longer necessary for that purpose.

(5) Designations for lead

The Administrator may, in the Administrator's discretion at any time the Administrator deems appropriate, require a State to designate areas (or portions thereof) with respect to the national ambient air quality standard for lead in effect as of November 15, 1990, in accordance with the procedures under subparagraphs (A) and (B) of paragraph (1), except that in applying subparagraph (B)(i) of paragraph (1) the phrase "2 years from the date of promulgation of the new or revised national ambient air quality standard" shall be replaced by the phrase "1 year from the date the Administrator notifies the State of the requirement to designate areas with respect to the standard for lead".

(6) Designations

(A) Submission

Notwithstanding any other provision of law, not later than February 15, 2004, the Governor of each State shall submit designations referred to in paragraph (1) for the July 1997 PM2.5 national ambient air quality standards for each area within the State, based on air quality monitoring data collected in accordance with any applicable Federal reference methods for the relevant areas.

(B) Promulgation

Notwithstanding any other provision of law, not later than December 31, 2004, the Administrator shall, consistent with paragraph (1), promulgate the designations referred to in subparagraph (A) for each area of each State for the July 1997 PM2.5 national ambient air quality standards.

(7) Implementation plan for regional haze

(A) In general

Notwithstanding any other provision of law, not later than 3 years after the date on which the Administrator promulgates the designations referred to in paragraph (6)(B) for a State, the State shall submit, for the entire State, the State implementation plan revisions to meet the requirements promulgated by the Administrator under section 7492(e)(1) of this title (referred to in this paragraph as "regional haze requirements").

(B) No preclusion of other provisions

Nothing in this paragraph precludes the implementation of the agreements and recommendations stemming from the Grand Canyon Visibility Transport Commission Report dated June 1996, including the submission of State implementation plan revisions by the States of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, or Wyoming by December 31, 2003, for implementation of regional haze requirements applicable to those States.

(e) Redesignation of air quality control regions

(1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be modified accordingly.

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

(3) No compliance date extension granted under section 7413(d)(5) of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5) of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

II. Clean Air Act Section 109(a), 42 U.S.C. § 7409(a):

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator--

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

III. Clean Air Act Section 111(b), 42 U.S.C. § 7411(b):

§ 7411. Standards of performance for new stationary sources

* * *

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

IV. Clean Air Act Section 112(c), (d)(1), 42 U.S.C. § 7412(c), (d)(1):

§ 7412. Hazardous air pollutants

* * *

(c) List of source categories

(1) In general

Not later than 12 months after November 15, 1990, the Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories and subcategories of major sources and area sources (listed under paragraph (3)) of the air pollutants listed pursuant to subsection (b) of this section. To the extent practicable, the categories and subcategories listed under this subsection shall be consistent with the list of source categories established pursuant to section 7411 of this title and part C of this subchapter. Nothing in the preceding sentence limits the Administrator's authority to establish subcategories under this section, as appropriate.

(2) Requirement for emissions standards

For the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section, according to the schedule in this subsection and subsection (e) of this section.

(3) Area sources

The Administrator shall list under this subsection each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under this section. The Administrator shall, not later than 5 years after November 15, 1990, and pursuant to subsection (k)(3)(B) of this section, list, based on actual or estimated aggregate emissions of a listed pollutant or pollutants, sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section. Such regulations shall be promulgated not later than 10 years after November 15, 1990.

(4) Previously regulated categories

The Administrator may, in the Administrator's discretion, list any category or subcategory of sources previously regulated under this section as in effect before November 15, 1990.

(5) Additional categories

In addition to those categories and subcategories of sources listed for regulation pursuant to paragraphs (1) and (3), the Administrator may at any time list additional categories and subcategories of sources of hazardous air pollutants according to the same criteria for listing applicable under such paragraphs. In the case of source categories and subcategories listed after publication of the initial list required under paragraph (1) or (3), emission standards under subsection (d) of this section for the category or subcategory shall be promulgated within 10 years after November 15, 1990, or within 2 years after the date on which such category or subcategory is listed, whichever is later.

(6) Specific pollutants

With respect to alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the Administrator shall, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) of this section. Such standards shall be promulgated not later than 10 years after November 15, 1990. This paragraph shall not be construed to require the Administrator to promulgate standards for such pollutants emitted by electric utility steam generating units.

(7) Research facilities

The Administrator shall establish a separate category covering research or laboratory facilities, as necessary to assure the equitable treatment of such facilities. For purposes of this section, "research or laboratory facility" means any stationary source whose primary purpose is to conduct research and development into new processes and products, where such source is operated under the close supervision of technically trained personnel and is not engaged in the manufacture of products for commercial sale in commerce, except in a de minimis manner.

(8) Boat manufacturing

When establishing emissions standards for styrene, the Administrator shall list boat manufacturing as a separate subcategory unless the Administrator finds that such listing would be inconsistent with the goals and requirements of this chapter.

(9) Deletions from the list

(A) Where the sole reason for the inclusion of a source category on the list required under this subsection is the emission of a unique chemical substance, the Administrator shall delete the source category from the list if it is appropriate because of action taken under either subparagraphs (C) or (D) of subsection (b)(3) of this section.

(B) The Administrator may delete any source category from the list under this subsection, on petition of any person or on the Administrator's own motion, whenever the Administrator makes the following determination or determinations, as applicable:

(i) In the case of hazardous air pollutants emitted by sources in the category that may result in cancer in humans, a determination that no source in the category (or group of sources in the case of area sources) emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source (or group of sources in the case of area sources).

(ii) In the case of hazardous air pollutants that may result in adverse health effects in humans other than cancer or adverse environmental effects, a determination that emissions from no source in the category or subcategory concerned (or group of sources in the case of area sources) exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source (or from a group of sources in the case of area sources).

The Administrator shall grant or deny a petition under this paragraph within 1 year after the petition is filed.

(d) Emission standards

(1) In general

The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in accordance with the schedules provided in subsections (c) and (e) of this section. The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for any standard applicable to any source under subsection (i) of this section as the result of the authority provided by this sentence.

V. Clean Air Act Section 120(a), 42 U.S.C. § 7420(a):

§ 7420. Noncompliance penalty

(a) Assessment and collection

(1)(A) Not later than 6 months after August 7, 1977, and after notice and opportunity for a public hearing, the Administrator shall promulgate regulations requiring the assessment and collection of a noncompliance penalty against persons referred to in paragraph (2)(A).

(B)(i) Each State may develop and submit to the Administrator a plan for carrying out this section in such State. If the Administrator finds that the State plan meets the requirements of this section, he may delegate to such State any authority he has to carry out this section.

(ii) Notwithstanding a delegation to a State under clause (i), the Administrator may carry out this section in such State under the circumstances described in subsection (b)(2)(B) of this section.

(2)(A) Except as provided in subparagraph (B) or (C) of this paragraph, the State or the Administrator shall assess and collect a noncompliance penalty against every person who owns or operates--

(i) a major stationary source (other than a primary nonferrous smelter which has received a primary nonferrous smelter order under section 7419 of this title), which is not in compliance with any emission limitation, emission standard or compliance schedule under any applicable implementation plan (whether or not such source is subject to a Federal or State consent decree), or

(ii) a stationary source which is not in compliance with an emission limitation, emission standard, standard of performance, or other requirement established under section 7411, 7477, 7603, or 7412 of this title, or

(iii) a stationary source which is not in compliance with any requirement of subchapter IV-A, V, or VI of this chapter, or

(iv) any source referred to in clause (i), (ii), or (iii) (for which an extension, order, or suspension referred to in subparagraph (B), or Federal or State consent decree is in effect), or a

primary nonferrous smelter which has received a primary nonferrous smelter order under section 7419 of this title which is not in compliance with any interim emission control requirement or schedule of compliance under such extension, order, suspension, or consent decree.

For purposes of subsection (d)(2) of this section, in the case of a penalty assessed with respect to a source referred to in clause (iii) of this subparagraph, the costs referred to in such subsection (d)(2) shall be the economic value of noncompliance with the interim emission control requirement or the remaining steps in the schedule of compliance referred to in such clause.

(B) Notwithstanding the requirements of subparagraph (A)(i) and (ii), the owner or operator of any source shall be exempted from the duty to pay a noncompliance penalty under such requirements with respect to that source if, in accordance with the procedures in subsection (b)(5) of this section, the owner or operator demonstrates that the failure of such source to comply with any such requirement is due solely to--

(i) a conversion by such source from the burning of petroleum products or natural gas, or both, as the permanent primary energy source to the burning of coal pursuant to an order under section 7413(d)(5) of this title or section 1857c-10 of this title (as in effect before August 7, 1977);

(ii) in the case of a coal-burning source granted an extension under the second sentence of section 1857c-10(c)(1) of this title (as in effect before August 7, 1977), a prohibition from using petroleum products or natural gas or both, by reason of an order under the provisions of section 792(a) and (b) of Title 15 or under any legislation which amends or supersedes such provisions;

(iii) the use of innovative technology sanctioned by an enforcement order under section 7413(d)(4) of this title;

(iv) an inability to comply with any such requirement, for which inability the source has received an order under section 7413(d) of this title (or an order under section 7413 of this title issued before August 7, 1977) which has the effect of permitting a delay or violation of any requirement of this chapter (including a requirement of an applicable

implementation plan) which inability results from reasons entirely beyond the control of the owner or operator of such source or of any entity controlling, controlled by, or under common control with the owner or operator of such source; or

(v) the conditions by reason of which a temporary emergency suspension is authorized under section 7410(f) or (g) of this title.

An exemption under this subparagraph shall cease to be effective if the source fails to comply with the interim emission control requirements or schedules of compliance (including increments of progress) under any such extension, order, or suspension.

(C) The Administrator may, after notice and opportunity for public hearing, exempt any source from the requirements of this section with respect to a particular instance of noncompliance if he finds that such instance of noncompliance is de minimis in nature and in duration.

VI. Clean Air Act Section 123(c), 42 U.S.C. § 7423(c):

§ 7423. Stack heights

* * *

(c) Regulations; good engineering practice

Not later than six months after August 7, 1977, the Administrator, shall after notice and opportunity for public hearing, promulgate regulations to carry out this section. For purposes of this section, good engineering practice means, with respect to stack heights, the height necessary to insure that emissions from the stack do not result in excessive concentrations of any air pollutant in the immediate vicinity of the source as a result of atmospheric downwash, eddies and wakes which may be created by the source itself, nearby structures or nearby terrain obstacles (as determined by the Administrator). For purposes of this section such height shall not exceed two and a half times the height of such source unless the owner or operator of the source demonstrates, after notice and opportunity for public hearing, to the satisfaction of the Administrator, that a greater height is necessary as provided under the preceding sentence. In no event may the Administrator prohibit any increase in any stack height or restrict in any manner the stack height of any source.

VII. Clean Air Act Section 161, 42 U.S.C. § 7471:

§ 7471. Plan requirements

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

VIII. Clean Air Act Section 165(a), 42 U.S.C. § 7475(a):

§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

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

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

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

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

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

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

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

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on

air quality in any area which may be affected by emissions from such source; and

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

IX. Clean Air Act Section 169(1), 42 U.S.C. § 7479(1):

§ 7479. Definitions

For purposes of this part--

> **(1)** The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

X. Clean Air Act Section 169A(a)(1), (a)(4), (g)(7), 42 U.S.C. § 7491(a)(1), (a)(4), (g)(7):

§ 7491. Visibility protection for Federal class I areas

(a) Impairment of visibility; list of areas; study and report

(1) Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution.

* * *

(4) Not later than twenty-four months after August 7, 1977, and after notice and public hearing, the Administrator shall promulgate regulations to assure (A) reasonable progress toward meeting the national goal specified in paragraph (1), and (B) compliance with the requirements of this section.

* * *

(g) Definitions

For the purpose of this section--

* * *

(7) the term "major stationary source" means the following types of stationary sources with the potential to emit 250 tons or more of any pollutant: fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than 250 million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities.

XI. Clean Air Act Section 202(a)(1)-(3), 42 U.S.C. § 7521(a)(1)-(3):

§ 7521. Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b) of this section--

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(3)(A) In general

(i) Unless the standard is changed as provided in subparagraph (B), regulations under paragraph (1) of this subsection applicable to emissions of hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter from classes or categories of heavy-duty vehicles or engines manufactured during or after model year 1983 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.

(ii) In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator

may base such classes or categories on gross vehicle weight, horsepower, type of fuel used, or other appropriate factors.

XII. Clean Air Act Section 302(g), 42 U.S.C. § 7602(g):

§ 7602. Definitions

When used in this chapter--

* * *

(g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

XIII. Clean Air Act Section 307(d)(3), (5)-(6), 42 U.S.C. § 7607(d)(3), (5)-(6):

§ 7607. Administrative proceedings and judicial review

* * *

(d) Rulemaking

* * *

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of--

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

* * *

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data,

or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

XIV. Clean Air Act Section 317, 42 U.S.C. § 7617:

§ 7617. Economic Impact Assessment

(a) Notice of proposed rulemaking; substantial revisions

This section applies to action of the Administrator in promulgating or revising--

(1) any new source standard of performance under section 7411 of this title,

(2) any regulation under section 7411(d) of this title,

(3) any regulation under part B of subchapter I of this chapter (relating to ozone and stratosphere protection),

(4) any regulation under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality),

(5) any regulation establishing emission standards under section 7521 of this title and any other regulation promulgated under that section,

(6) any regulation controlling or prohibiting any fuel or fuel additive under section 7545(c) of this title, and

(7) any aircraft emission standard under section 7571 of this title.

Nothing in this section shall apply to any standard or regulation described in paragraphs (1) through (7) of this subsection unless the notice of proposed rulemaking in connection with such standard or regulation is published in the Federal Register after the date ninety days after August 7, 1977. In the case of revisions of such standards or regulations, this section shall apply only to revisions which the Administrator determines to be substantial revisions.

(b) Preparation of assessment by Administrator

Before publication of notice of proposed rulemaking with respect to any standard or regulation to which this section applies, the Administrator shall prepare an economic impact assessment respecting such standard or regulation. Such assessment shall be included in the docket required under section 7607(d)(2) of this title and shall be available to the public

as provided in section 7607(d)(4) of this title. Notice of proposed rulemaking shall include notice of such availability together with an explanation of the extent and manner in which the Administrator has considered the analysis contained in such economic impact assessment in proposing the action. The Administrator shall also provide such an explanation in his notice of promulgation of any regulation or standard referred to in subsection (a) of this section. Each such explanation shall be part of the statements of basis and purpose required under sections 7607(d)(3) and 7607(d)(6) of this title.

(c) Analysis

Subject to subsection (d) of this section, the assessment required under this section with respect to any standard or regulation shall contain an analysis of--

(1) the costs of compliance with any such standard or regulation, including extent to which the costs of compliance will vary depending on (A) the effective date of the standard or regulation, and (B) the development of less expensive, more efficient means or methods of compliance with the standard or regulation;

(2) the potential inflationary or recessionary effects of the standard or regulation;

(3) the effects on competition of the standard or regulation with respect to small business;

(4) the effects of the standard or regulation on consumer costs; and

(5) the effects of the standard or regulation on energy use.

Nothing in this section shall be construed to provide that the analysis of the factors specified in this subsection affects or alters the factors which the Administrator is required to consider in taking any action referred to in subsection (a) of this section.

(d) Extensiveness of assessment

The assessment required under this section shall be as extensive as practicable, in the judgment of the Administrator taking into account the time and resources available to the Environmental Protection Agency and other duties and authorities which the Administrator is required to carry out under this chapter.

(e) Limitations on construction of section

Nothing in this section shall be construed--

(1) to alter the basis on which a standard or regulation is promulgated under this chapter;

(2) to preclude the Administrator from carrying out his responsibility under this chapter to protect public health and welfare; or

(3) to authorize or require any judicial review of any such standard or regulation, or any stay or injunction of the proposal, promulgation, or effectiveness of such standard or regulation on the basis of failure to comply with this section.

(f) Citizen suits

The requirements imposed on the Administrator under this section shall be treated as nondiscretionary duties for purposes of section 7604(a)(2) of this title, relating to citizen suits. The sole method for enforcement of the Administrator's duty under this section shall be by bringing a citizen suit under such section 7604(a)(2) for a court order to compel the Administrator to perform such duty. Violation of any such order shall subject the Administrator to penalties for contempt of court.

(g) Costs

In the case of any provision of this chapter in which costs are expressly required to be taken into account, the adequacy or inadequacy of any assessment required under this section may be taken into consideration, but shall not be treated for purposes of judicial review of any such provision as conclusive with respect to compliance or noncompliance with the requirement of such provision to take cost into account.

XV. 49 U.S.C. § 32902, as amended by Energy Independence and Security Act § 102, Pub. L. No. 110-140, 121 Stat. 1492, 1498-1501 (Dec. 19, 2007):

§ 32902. Average fuel economy standards

(a) Prescription of standards by regulation.--At least 18 months before the beginning of each model year, the Secretary of Transportation shall prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer in that model year. Each standard shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year.

(b) Standards for automobiles and certain other vehicles.--

(1) In general.--The Secretary of Transportation, after consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, shall prescribe separate average fuel economy standards for--

(A) passenger automobiles manufactured by manufacturers in each model year beginning with model year 2011 in accordance with this subsection;

(B) non-passenger automobiles manufactured by manufacturers in each model year beginning with model year 2011 in accordance with this subsection; and

(C) work trucks and commercial medium-duty or heavy-duty on-highway vehicles in accordance with subsection (k).

(2) Fuel economy standards for automobiles.--

(A) Automobile fuel economy average for model years 2011 through 2020.--The Secretary shall prescribe a separate average fuel economy standard for passenger automobiles and a separate average fuel economy standard for non-passenger automobiles for each model year beginning with model year 2011 to achieve a combined fuel economy average for model year 2020 of at least 35 miles per gallon for the total fleet of passenger and non-passenger automobiles manufactured for sale in the United States for that model year.

(B) Automobile fuel economy average for model years 2021 through 2030.--For model years 2021 through 2030, the average fuel economy required to be attained by each fleet of passenger and non-passenger automobiles manufactured for sale in the United States shall be the maximum feasible average fuel economy standard for each fleet for that model year.

(C) Progress toward standard required.--In prescribing average fuel economy standards under subparagraph (A), the Secretary shall prescribe annual fuel economy standard increases that increase the applicable average fuel economy standard ratably beginning with model year 2011 and ending with model year 2020.

(3) Authority of the Secretary.--The Secretary shall--

(A) prescribe by regulation separate average fuel economy standards for passenger and non-passenger automobiles based on 1 or more vehicle attributes related to fuel economy and express each standard in the form of a mathematical function; and

(B) issue regulations under this title prescribing average fuel economy standards for at least 1, but not more than 5, model years.

(4) Minimum standard.--In addition to any standard prescribed pursuant to paragraph (3), each manufacturer shall also meet the minimum standard for domestically manufactured passenger automobiles, which shall be the greater of--

(A) 27.5 miles per gallon; or

(B) 92 percent of the average fuel economy projected by the Secretary for the combined domestic and non-domestic passenger automobile fleets manufactured for sale in the United States by all manufacturers in the model year, which projection shall be published in the Federal Register when the standard for that model year is promulgated in accordance with this section.

(c) Amending passenger automobile standards.--The Secretary of Transportation may prescribe regulations amending the standard under subsection (b) of this section for a model year to a level that the Secretary decides is the maximum feasible average fuel economy level for that model year. Section 553 of title 5 applies to a proceeding to amend the standard.

However, any interested person may make an oral presentation and a transcript shall be taken of that presentation.

(d) Exemptions.--**(1)** Except as provided in paragraph (3) of this subsection, on application of a manufacturer that manufactured (whether in the United States or not) fewer than 10,000 passenger automobiles in the model year 2 years before the model year for which the application is made, the Secretary of Transportation may exempt by regulation the manufacturer from a standard under subsection (b) or (c) of this section. An exemption for a model year applies only if the manufacturer manufactures (whether in the United States or not) fewer than 10,000 passenger automobiles in the model year. The Secretary may exempt a manufacturer only if the Secretary--

(A) finds that the applicable standard under those subsections is more stringent than the maximum feasible average fuel economy level that the manufacturer can achieve; and

(B) prescribes by regulation an alternative average fuel economy standard for the passenger automobiles manufactured by the exempted manufacturer that the Secretary decides is the maximum feasible average fuel economy level for the manufacturers to which the alternative standard applies.

(2) An alternative average fuel economy standard the Secretary of Transportation prescribes under paragraph (1)(B) of this subsection may apply to an individually exempted manufacturer, to all automobiles to which this subsection applies, or to classes of passenger automobiles, as defined under regulations of the Secretary, manufactured by exempted manufacturers.

(3) Notwithstanding paragraph (1) of this subsection, an importer registered under section 30141(c) of this title may not be exempted as a manufacturer under paragraph (1) for a motor vehicle that the importer--

(A) imports; or

(B) brings into compliance with applicable motor vehicle safety standards prescribed under chapter 301 of this title for an individual under section 30142 of this title.

(4) The Secretary of Transportation may prescribe the contents of an application for an exemption.

(e) Emergency vehicles.--**(1)** In this subsection, "emergency vehicle" means an automobile manufactured primarily for use--

(A) as an ambulance or combination ambulance-hearse;

(B) by the United States Government or a State or local government for law enforcement; or

(C) for other emergency uses prescribed by regulation by the Secretary of Transportation.

(2) A manufacturer may elect to have the fuel economy of an emergency vehicle excluded in applying a fuel economy standard under subsection (a), (b), (c), or (d) of this section. The election is made by providing written notice to the Secretary of Transportation and to the Administrator of the Environmental Protection Agency.

(f) Considerations on decisions on maximum feasible average fuel economy.--When deciding maximum feasible average fuel economy under this section, the Secretary of Transportation shall consider technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.

(g) Requirements for other amendments.--**(1)** The Secretary of Transportation may prescribe regulations amending an average fuel economy standard prescribed under subsection (a) or (d) of this section if the amended standard meets the requirements of subsection (a) or (d), as appropriate.

(2) When the Secretary of Transportation prescribes an amendment under this section that makes an average fuel economy standard more stringent, the Secretary shall prescribe the amendment (and submit the amendment to Congress when required under subsection (c)(2) of this section) at least 18 months before the beginning of the model year to which the amendment applies.

(h) Limitations.--In carrying out subsections (c), (f), and (g) of this section, the Secretary of Transportation--

(1) may not consider the fuel economy of dedicated automobiles;

(2) shall consider dual fueled automobiles to be operated only on gasoline or diesel fuel; and

(3) may not consider, when prescribing a fuel economy standard, the trading, transferring, or availability of credits under section 32903.

(i) Consultation.--The Secretary of Transportation shall consult with the Secretary of Energy in carrying out this section and section 32903 of this title.

(j) Secretary of Energy comments.--**(1)** Before issuing a notice proposing to prescribe or amend an average fuel economy standard under subsection (a), (c), or (g) of this section, the Secretary of Transportation shall give the Secretary of Energy at least 10 days from the receipt of the notice during which the Secretary of Energy may, if the Secretary of Energy concludes that the proposed standard would adversely affect the conservation goals of the Secretary of Energy, provide written comments to the Secretary of Transportation about the impact of the standard on those goals. To the extent the Secretary of Transportation does not revise a proposed standard to take into account comments of the Secretary of Energy on any adverse impact of the standard, the Secretary of Transportation shall include those comments in the notice.

(2) Before taking final action on a standard or an exemption from a standard under this section, the Secretary of Transportation shall notify the Secretary of Energy and provide the Secretary of Energy a reasonable time to comment.

(k) Commercial medium- and heavy-duty on-highway vehicles and work trucks.--

(1) Study.--Not later than 1 year after the National Academy of Sciences publishes the results of its study under section 108 of the Ten-in-Ten Fuel Economy Act, the Secretary of Transportation, in consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, shall examine the fuel efficiency of commercial medium- and heavy-duty on-highway vehicles and work trucks and determine--

(A) the appropriate test procedures and methodologies for measuring the fuel efficiency of such vehicles and work trucks;

(B) the appropriate metric for measuring and expressing commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency performance, taking into consideration,

among other things, the work performed by such on-highway vehicles and work trucks and types of operations in which they are used;

(C) the range of factors, including, without limitation, design, functionality, use, duty cycle, infrastructure, and total overall energy consumption and operating costs that affect commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency; and

(D) such other factors and conditions that could have an impact on a program to improve commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency.

(2) Rulemaking.--Not later than 24 months after completion of the study required under paragraph (1), the Secretary, in consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, by regulation, shall determine in a rulemaking proceeding how to implement a commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency improvement program designed to achieve the maximum feasible improvement, and shall adopt and implement appropriate test methods, measurement metrics, fuel economy standards, and compliance and enforcement protocols that are appropriate, cost-effective, and technologically feasible for commercial medium- and heavy-duty on-highway vehicles and work trucks. The Secretary may prescribe separate standards for different classes of vehicles under this subsection.

(3) Lead-time; regulatory stability.--The commercial medium- and heavy-duty on-highway vehicle and work truck fuel economy standard adopted pursuant to this subsection shall provide not less than--

(A) 4 full model years of regulatory lead-time; and

(B) 3 full model years of regulatory stability.

XVI. Paperwork Reduction Act of 1980 § 2(a), Pub. L. No. 96-511, 94 Stat. 2812, 2819-21 (Dec. 11, 1980), codified in part as amended at 44 U.S.C. § 3507(a):

§ 3507. Public information collection activities; submission to Director; approval and delegation

(a) An agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information--

(1) the agency has--

(A) conducted the review established under section 3506(c)(1);

(B) evaluated the public comments received under section 3506(c)(2);

(C) submitted to the Director the certification required under section 3506(c)(3), the proposed collection of information, copies of pertinent statutory authority, regulations, and other related materials as the Director may specify; and

(D) published a notice in the Federal Register--

(i) stating that the agency has made such submission; and

(ii) setting forth--

(I) a title for the collection of information;

(II) a summary of the collection of information;

(III) a brief description of the need for the information and the proposed use of the information;

(IV) a description of the likely respondents and proposed frequency of response to the collection of information;

(V) an estimate of the burden that shall result from the collection of information; and

(VI) notice that comments may be submitted to the agency and Director;

(2) the Director has approved the proposed collection of information or approval has been inferred, under the provisions of this section; and

(3) the agency has obtained from the Director a control number to be displayed upon the collection of information.

XVII. Regulatory Flexibility Act § 3(a), Pub. L. No. 96-354, 94 Stat. 1164, 1166-67 (Sept. 19, 1980), codified in part as amended at 5 U.S.C. § 603:

§ 603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

(b) Each initial regulatory flexibility analysis required under this section shall contain--

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as--

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

XVIII. Regulatory Flexibility Act § 3(a), Pub. L. No. 96-354, 94 Stat. 1164, 1167-68 (Sept. 19, 1980), codified in part as amended at 5 U.S.C. § 605(b):

§ 605. Avoidance of duplicative or unnecessary analyses

* * *

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

XIX. Unfunded Mandates Reform Act of 1995 § 202, Pub. L. No. 104-4, 109 Stat. 48, 64 (Mar. 22, 1995), codified at 2 U.S.C. § 1532:

§ 1532. Statements to accompany significant regulatory actions

(a) In general

Unless otherwise prohibited by law, before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement containing--

(1) an identification of the provision of Federal law under which the rule is being promulgated;

(2) a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to State, local, and tribal governments or the private sector, as well as the effect of the Federal mandate on health, safety, and the natural environment and such an assessment shall include--

(A) an analysis of the extent to which such costs to State, local, and tribal governments may be paid with Federal financial assistance (or otherwise paid for by the Federal Government); and

(B) the extent to which there are available Federal resources to carry out the intergovernmental mandate;

(3) estimates by the agency, if and to the extent that the agency determines that accurate estimates are reasonably feasible, of--

(A) the future compliance costs of the Federal mandate; and

(B) any disproportionate budgetary effects of the Federal mandate upon any particular regions of the nation or particular State, local, or tribal governments, urban or rural or other types of communities, or particular segments of the private sector;

(4) estimates by the agency of the effect on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if and to the extent that the agency in its sole

discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material; and

(5)(A) a description of the extent of the agency's prior consultation with elected representatives (under section 1534 of this title) of the affected State, local, and tribal governments;

(B) a summary of the comments and concerns that were presented by State, local, or tribal governments either orally or in writing to the agency; and

(C) a summary of the agency's evaluation of those comments and concerns.

(b) Promulgation

In promulgating a general notice of proposed rulemaking or a final rule for which a statement under subsection (a) of this section is required, the agency shall include in the promulgation a summary of the information contained in the statement.

(c) Preparation in conjunction with other statement

Any agency may prepare any statement required under subsection (a) of this section in conjunction with or as a part of any other statement or analysis, provided that the statement or analysis satisfies the provisions of subsection (a) of this section.

XX. Unfunded Mandates Reform Act of 1995 § 205, Pub. L. No. 104-4, 109 Stat. 48, 66 (Mar. 22, 1995), codified at 2 U.S.C. § 1535:

§ 1535. Least burdensome option or explanation required

(a) In general

Except as provided in subsection (b) of this section, before promulgating any rule for which a written statement is required under section 1532 of this title, the agency shall identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, for--

(1) State, local, and tribal governments, in the case of a rule containing a Federal intergovernmental mandate; and

(2) the private sector, in the case of a rule containing a Federal private sector mandate.

(b) Exception

The provisions of subsection (a) of this section shall apply unless--

(1) the head of the affected agency publishes with the final rule an explanation of why the least costly, most cost-effective or least burdensome method of achieving the objectives of the rule was not adopted; or

(2) the provisions are inconsistent with law.

(c) OMB certification

No later than 1 year after March 22, 1995, the Director of the Office of Management and Budget shall certify to Congress, with a written explanation, agency compliance with this section and include in that certification agencies and rulemakings that fail to adequately comply with this section.

XXI. 40 C.F.R. § 51.166(b)(1)(i) (2011)

§ 51.166 Prevention of significant deterioration of air quality

* * *

(b) Definitions. All State plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

(1)(i) Major stationary source means:

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)(a) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source if the change would constitute a major stationary source by itself.

XXII. 40 C.F.R. pt. 51, App. Y, § III.A.2 (2010)

APPENDIX Y TO PART 51—GUIDELINES FOR BART DETERMINATIONS UNDER THE REGIONAL HAZE RULE

* * *

III. HOW TO IDENTIFY SOURCES "SUBJECT TO BART"

* * *

A. *What Steps Do I Follow to Determine Whether a Source of Group of Sources Cause or Contribute to Visibility Impairment for Purposes of BART?*

* * *

2. What Pollutants Do I Need to Consider?

You must look at SO_2, NO_X, and direct particulate matter (PM) emissions in determining whether sources cause or contribute to visibility impairment, including both PM_{10} and $PM_{2.5}$. Consistent with the approach for identifying your BART-eligible sources, you do not need to consider less than de minimis emissions of these pollutants from a source.

As explained in section II, you must use your best judgement to determine whether VOC or ammonia emissions are likely to have an impact on visibility in an area. In addition, although as explained in Section II, you may use PM_{10} an indicator for particulate matter in determining whether a source is BART-eligible, in determining whether a source contributes to visibility impairment, you should distinguish between the fine and coarse particle components of direct particulate emissions. Although both fine and coarse particulate matter contribute to visibility impairment, the long-range transport of fine particles is of particular concern in the formation of regional haze. Air quality modeling results used in the BART determination will provide a more accurate prediction of a source's impact on visibility if the inputs into the model account for the relative particle size of any directly emitted particulate matter (i.e. PM_{10} vs. $PM_{2.5}$).

XXIII. 40 C.F.R. § 52.21(b)(1)(i) (2011)

§ 52.21 Prevention of significant deterioration of air quality.

* * *

(b) Definitions. For the purposes of this section:

(1)(i) Major stationary source means:

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source, if the changes would constitute a major stationary source by itself.

APPENDIX B

CLEAN AIR ACT CROSS REFERENCES

APPENDIX B — CLEAN AIR ACT CROSS REFERENCES

Section		Title Of CAA
Clean Air Act	U.S. Code (42 U.S.C.)	
101-193	7401-7515	**Title I:** Air Pollution Prevention And Control
160-169b	7470-7492	**Title I, Part C:** Prevention Of Significant Deterioration
201-250	7521-7590	**Title II:** Emission Standards for Moving Sources
401-416	7651-7651o	**Title IV:** Acid Deposition Control
501-507	7661-7661f	**Title V:** [Stationary Source] Permits
601-618	7671-7671q	**Title VI:** Stratospheric Ozone Protection

Clean Air Act	U.S. Code (42 U.S.C.)	Name Of Specific Sections
107	7407	Air quality control regions
109	7409	National primary and secondary ambient air quality standards
111	7411	Standards of performance for new stationary sources
112	7412	Hazardous air pollutants
120	7420	Noncompliance penalty
123	7423	Stack heights
161	7471	Plan requirements

Clean Air Act	U.S. Code (42 U.S.C.)	Name Of Specific Sections
165	7475	Preconstruction permits
169	7479	Definitions
169A	7491	Visibility protection for Class I areas
202	7521	Emission standards for new motor vehicles or new motor vehicle engines
302	7602	Definitions
307	7607	Administrative proceedings and judicial review
317	7617	Economic impact assessment

APPENDIX C

DECLARATIONS

EXHIBIT A

No. 09-1322 (Lead) and Consolidated Cases (COMPLEX)

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

COALITION FOR RESPONSIBLE REGULATION, *ET AL.*,

Petitioners,

v.

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

Respondents.

DECLARATION OF DOMINIQUE BIDET

I, Dominique Bidet, declare under penalty of perjury under the laws of the United States of America that the following is true and correct to the best of my knowledge, information, and belief, and is based on my own personal knowledge.

1. My name is Dominique Bidet. I am the President and CFO for National Cement Company, Inc. ("National Cement"). In my capacity as the above, I oversee operations and financial planning and control. Based upon the foregoing, I am knowledgeable about National Cement's tactical operations and long term strategies. I am also familiar with EPA's final rule entitled Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed.

Reg. 66,496 (Dec. 15, 2009), which EPA believes requires it to issue greenhouse gas regulations for new motor vehicles.

2. National Cement, a company headquartered in California, manufacturers cement, produces ready-mixed concrete and conducts other activities complementary to these core operations in California, Alabama and Georgia. It is a member in good standing of the Portland Cement Association, which is a petitioner in this case.

3. The U.S. Environmental Protection Agency's Endangerment Rule and its rule regulating automobile emissions will require National Cement to incur increased expenditures, as explained below.

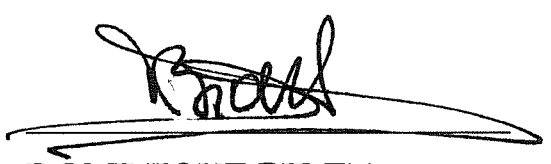
4. As the Agency admits, EPA's GHG rule will make new vehicles more expensive. *See, e.g.,* 75 Fed. Reg. 25,324, 25,649 (May 7, 2010).

5. National Cement and its subsidiaries routinely lease and purchase autos and other light vehicles for official use by their employees. These vehicles are used by the employees for conducting company business, including, but not limited to outside sales, purchasing, plant and related facility operations.

6. Based on National Cement's estimate of the average lease durations (for leased vehicles) and average useful life (for owned vehicles), National Cement determined that it (and its subsidiaries) will lease and/or purchase approximately 300 automobiles and other light vehicles between 2012 and 2017. The increase in costs for the new vehicles resulting from EPA's GHG regulations will thus directly affect National Cement (and its subsidiaries) and will increase its costs of doing business.

7. EPA has interpreted the Clean Air Act to mean that GHG regulations for vehicles can trigger Prevention of Significant Deterioration (PSD) permitting for greenhouse gases, and that interpretation will also impose new requirements on National Cement' stationary source facilities. These requirements include, among others, recordkeeping mandates. National Cement operates two cement plants within the United States. Because they emit carbon dioxide and other substances, they are likely to be affected by any EPA regulations seeking to regulate stationary source GHG emissions.

Executed this 19th day of May, 2011.



DOMINIQUE BIDET
President and CFO
National Cement Company, Inc.

EXHIBIT B

DECLARATION OF DAVID N. FRIEDMAN

I. Introduction

1. My name is David N. Friedman. I am the Senior Director of Regulatory Affairs at NPRA, the National Petrochemical and Refiners Association, in Washington, D.C. I am the Secretary for NPRA's Environmental Committee and I am responsible for the development and communication of NPRA positions on environmental public policy issues and regulatory initiatives.

2. A significant portion of my professional responsibilities at NPRA includes working with senior executives of NPRA member companies on compliance with new federal and state regulatory requirements under the Clean Air Act (CAA), including the recently finalized greenhouse gas (GHG) prevention of significant deterioration (PSD) rules. I have been employed by NPRA for 6 years. Prior to my employment at NPRA, I performed similar duties for private corporations in the refining industry and for other national trade associations. I have a total of 20 years of experience with the stationary source permitting requirements of the CAA.

3. NPRA is a national trade association that represents corporations that own and operate over 98 percent of the United States' domestic petroleum refining capacity and over 90 percent of our nation's petrochemical production capacity. NPRA member companies manufacture and supply to consumers, both individual and corporate, a wide variety of essential products and services that are the backbone of the nation's transportation economy and are used daily, if not hourly, by families, farmers and industries across the nation. These products include gasoline, diesel fuel, home heating oil, jet fuel, asphalt products, and the petrochemicals that serve as "building blocks" in thousands of products used every day by consumers and businesses, including plastics, clothing, medicine and computers.

4. Petrochemical plants use oil and natural gas liquids as feedstocks to manufacture many products that are in turn used as raw materials by other businesses to manufacture finished goods used by consumers every day. There are 88 petrochemical plants in the United States[1] that employ approximately 214,000 individuals directly. It is estimated that the domestic petrochemical industry directly and indirectly supports over 1.4 million jobs in the United States.[2] Worldwide, the petrochemical industry is highly competitive, with extensive new capacity being constructed in the Middle East, South America and the Far East over the past decade. Domestic petrochemical manufacturers must compete internationally with foreign companies that enjoy significant competitive advantages ranging from direct and indirect government subsidies, cheap and abundant raw materials, lower wages and less stringent environmental protections. It is therefore imperative that U.S. facilities be able to maximize production from their current operations.

5. After EPA promulgates a National Ambient Air Quality Standard (NAAQS) for a criteria pollutant, preconstruction review and permitting requirements applied to new and

[1] Stated in EPA GHG reporting rule (74 FR 16536; 4/10/09).

[2] Petrochemicals in Goods Critical to the United States Economy, Presentation by CMAI, July 8, 2010.

modified sources of criteria pollutants in all states, but the contours of those requirements differ depending on whether the sources are located in an attainment or nonattainment area. For areas that are in attainment with a particular NAAQS, the PSD program contained in Title I, Part C of the CAA, applies. EPA, however, has interpreted the CAA such that PSD permitting can be triggered solely on the basis of emissions of non-criteria pollutants, i.e., pollutants for which no NAAQS has been set. In 2010, EPA promulgated the so-called Tailpipe Rule, 75 Fed. Reg. 25,324 (May 7, 2010), which for the first time regulated GHG emissions from cars and light duty vehicles. This development, in conjunction with EPA's prior interpretation that the PSD program can be applied to stationary sources due solely to emissions of non-criteria pollutants, have caused EPA to assert that GHG emissions alone can trigger the need for PSD permitting.

6. In general, the PSD program applies to both new and modified refineries and petrochemical plants. The primary impact of the PSD program on refineries and petrochemical plants is the result of modifications to a facility to comply with environmental mandates, to increase production or efficiency, or to expand a facility's manufacturing capacity. A refinery emits approximately 10 metric tons CO2e per year per barrel/day of crude oil capacity. As a result, an average-size (118,000 b/d) domestic refinery would emit approximately 1 million metric tons CO2e per year. EPA also has estimated that the average domestic petrochemical facility emits about 625,000 metric tons CO2e each year.[3] Applying the GHG PSD rule to these average CO2e emissions levels, almost all refinery and petrochemical plants in the nation would have the potential to emit over 100,000 TPY of CO2e. NPRA's members are therefore harmed by EPA's interpretation of the CAA at issue in this case in several concrete ways.

a. As a result, every time one of these manufacturing facilities undertakes a physical change or change in method of operation, such as a modification or expansion, it will, under the rule, be forced to include a GHG PSD analysis in its permit application if the project will result in a CO2e increase of 75,000 TPY or more. The analysis in its own right is complex and will require significant time and resources. EPA has estimated that the average PSD permit costs $125,000 and requires 866 hours to complete. The inclusion of such an analysis, in and of itself, will have a significant negative impact on the operations of these manufacturing

[3] EPA has defined the petrochemicals industry as follows. "For this proposed GHG reporting rule, the reporting of process related emissions in the petrochemical industry is limited to the production of acrylonitrile, carbon black, ethylene, ethylene dichloride, ethylene oxide, and methanol. The petrochemicals source category includes production of all forms of carbon black (e.g., furnace black, thermal black, acetylene black, and lamp black) because these processes use petrochemical feedstocks; bone black is not considered to be a form of carbon black because it is not produced from petrochemical feedstocks. ... There are 88 facilities operating petrochemical processes in the U.S., and 9 of these operate either two or three types of petrochemical processes (e.g., ethylene and ethylene oxide). We estimate petrochemical production accounts for approximately 55 million metric tons CO2e." (74 FR 16536; 4/10/09). Dividing the 55 million metric tons by the 88 facilities means that the average petrochemical facility emits about 625,000 metric tons CO2-equivalent each year.

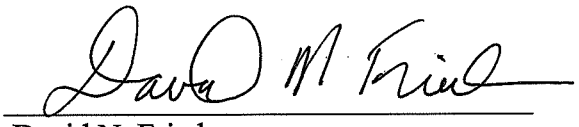
plants and on the ability of these plants to perform upgrades or expansions to assure safe and efficient operation or to respond to increases in consumer and customer demands for transportation fuels and petrochemical products.

b. Facilities that determine the increase from a project is less than the significance level, and therefore does not trigger PSD permitting, will still face significant burdens. The federal PSD rules require sources to track emissions for 5 to 10 years following a project if the projected increase would be greater than 37,500 tpy CO2e but less than 75,000 tpy CO2e. Moreover, some states require facilities to analyze PSD applicability based on the potential increases in emissions, not the maximum projected actual emissions.

c. Furthermore, NPRA is aware of several specific instances where members are planning projects now that would not trigger application of the PSD program for emissions of any criteria pollutants but will trigger PSD permitting due solely to emissions of GHG. For example, two companies plan to expand existing facilities by undertaking projects that will require the installation of new process heaters. The projects will not cause a significant net increases of emissions of criteria pollutants above the EPA de minimis thresholds for criteria pollutants, but calculations indicate they will cause increases that will require PSD permitting solely for GHGs. These projects are located in attainment areas for criteria pollutants. These companies are harmed because they now have to go through the PSD permit process, with the attendant permit cost, delay, and implementation and compliance costs that they would not otherwise have endured. Another oil and gas company plans to install combustion turbines that will have emissions of criteria pollutants below major source levels but will have more than 100,000 tons per year of GHGs. Thus, the source would not require a PSD permit under Petitioners' interpretation but requires a PSD permit under EPA's interpretation. That company is preparing the PSD application now.

d. Finally, NPRA members own or operate numerous smaller sources that are minor not major emitting facilities for NAAQS-pollutants, such as petroleum fuel terminals, chemical terminals, and small petrochemical facilities. Many of these source, however, would be major emitting facilities, and would trigger applicability of the PSD regulations, if the statutory thresholds (100 or 250 tons per year) for emissions of GHGs were utilized according to the Clean Air Act. In fact, one company tells us that if the significance level for GHGs for modifications were aligned with the statutory major source thresholds, under EPA's interpretation, each of its refineries in several states would trigger PSD for GHGs even though the company would not otherwise trigger PSD for any other pollutant at any refinery during the year.

I, David N. Friedman, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this tenth day of May, 2011.



David N. Friedman

EXHIBIT C

DECLARATION OF DAVID C. AILOR, P.E., EXECUTIVE VICE PRESIDENT-REGULATORY AFFAIRS OF THE NATIONAL OILSEED PROCESSORS ASSOCIATION IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS

1. I am David C. Ailor, and I make this Declaration in support of the opening brief filed by the National Association of Manufacturers and others to the motion to dismiss filed by the U.S. Environmental Protection Agency (EPA) in *National Association of Manufacturers, et al., v. EPA*, Nos. 10-1176, 10-1178, 10-1179, 10-1180 (consolidated into lead case *American Chemistry Council v. EPA*, No. 10-1167).

2. I am currently Executive Vice President-Regulatory Affairs of the National Oilseed Processors Association (NOPA). NOPA is a national trade association headquartered in Washington, D.C. that represents companies engaged in the production of food, feed and renewable fuels from oilseeds, including soybeans. At NOPA, my responsibilities include formulating policy positions; developing regulatory responses; analyzing regulations and legislation; providing "early warning" on pending legislation and regulatory issues; directing lobbyists and outside counsel in support of same; and, working with relevant regulatory agencies to ensure the reasonableness of regulations being developed. As NOPA's lead technical staff member, I also provide technical support and guidance to NOPA members and NOPA's various committees and respond to various technical inquiries and requests for information.

3. I have extensive education and experience in both the environmental area and the food processing side of the agriculture industry. I have spent my entire 35-year career in the environmental field. Most of that period - 25 years - has been focused on addressing environmental issues related to the food processing side of agriculture.

4. For the last 21 years (from 1989-2010) I have been directing the regulatory and legislative efforts of NOPA (Washington, D.C.) on issues related to the Clean Air Act (CAA); Clean Water Act (CWA); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); Superfund Amendments and Reauthorization Act (SARA); Oil Pollution Act of 1990 (OPA'90); Resource Conservation and Recovery Act (RCRA); Toxic Substances Control Act (TSCA); Occupational Safety and Health Act; and, the Federal Food, Drug and Cosmetic Act (FFDCA).

5. My previous professional experience also includes project engineering and environmental engineering positions with Frito Lay (1985-1989); the American Coke and Coal Chemicals Institute (1989-2005); The Standard Oil Company of Ohio (1981-1985); TRW, Inc. (1978-1981); and, the California Air Resources Board (1977-1978). I am a registered Professional Engineer (Ohio), and hold an M.S.C.E. degree from Purdue University (1977) and a B.S.C.E. degree from North Carolina State University (1975).

6. The analysis presented in this declaration was prepared by me based on my knowledge and experience of the industry that I represent and my direct inquiry of NOPA member companies.

7. On May 7, 2010, EPA issued the *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (Tailpipe Rule), which regulated for the first time Greenhouse Gases (GHGs) under the Clean Air Act (CAA).

8. Prior to issuance of the Tailpipe Rule, many NOPA member companies operated facilities that were major stationary sources under the prevention of significant deterioration (PSD) regulations by virtue of their potential emissions of pollutants for which EPA had issued a national ambient air quality standard (NAAQS). Those facilities, however, had never triggered PSD permitting requirements because of an increase in a non-NAAQS pollutant. Thus, these facilities were not harmed by EPA's interpretation that non-NAAQS pollutants could trigger PSD permitting requirements.

9. With the issuance of the Tailpipe Rule, the Environmental Protection Agency asserts that GHG emissions can by themselves trigger PSD permitting requirements. Thus, NOPA member company facilities will for the first time trigger PSD review because a project increases emissions of a non-NAAQS pollutant. Even with EPA's issuance of its *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010), based on my knowledge of the industry, there will be projects at NOPA member facilities that exceed the significance threshold EPA has promulgated and thus trigger PSD permitting requirements based solely on GHG emissions. This will result in facilities triggering the requirement to obtain a PSD permit when they otherwise would not have had to obtain such a permit.

10. Finally, NOPA members would be subject to the PSD program due to increases of emissions of GHGs above the statutory thresholds in the Clean Air Act, should those thresholds be held to apply.

11. Like other sectors of the food industry of which it is a part, the U.S. oilseed processing industry is a high volume, low margin business that operates in a very competitive international marketplace. The industry is also very energy-intensive in terms of power produced onsite and power purchased off the grid. As a consequence, costs commensurate with any carbon reduction program, including the GHG regulatory programs which EPA is pursuing and to which NOPA members are now subject, harms NOPA's members and will threaten the viability of not only the oilseed processing industry and the oilseed growers which supply it with oilseeds, but other sectors of manufacturing in the U.S., resulting in companies moving more and more operations out of the country.

12. The harm to NOPA's members caused by EPA's interpretation of the CAA and promulgation of the Tailpipe Rule would be redressed were the Court to grant the petitions for review in this case.

* * *

I, David C. Ailor, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 10th day of May 2011.

David C. Ailor, P.E.
Executive Vice President – Regulatory Affairs
National Oilseed Processors Association

EXHIBIT D

DECLARATION OF THOMAS J. WARD, NATIONAL ASSOCIATION OF HOME BUILDERS

1. I am Thomas J. Ward, and I make this Declaration in support of the opening brief filed by the National Association of Manufacturers and others to the motion to dismiss filed by the U.S. Environmental Protection Agency ("EPA") in *National Association of Manufacturers, et al., v. EPA*, Nos. 10-1176, 10-1178, 10-1179, 10-1180 (consolidated into lead case *American Chemistry Council v. EPA*, No. 10-1167).

2. I am currently Vice President of Legal Affairs for the National Association of Home Builders ("NAHB"), where my responsibilities include oversight of NAHB's litigation and legal services programs. As such, I am well-versed with the federal, state, and local permitting obligations of NAHB members.

3. NAHB is a trade association, headquartered in Washington, D.C., whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all consumers to have safe, decent and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 160,000 members are single-family or multifamily home builders, residential land developers, remodelers, or some combination of these. As such, NAHB and its members are strongly affected by laws governing the building industry and regulatory restrictions on residential development.

4. The economic effects of EPA's regulation of greenhouse gas ("GHG") emissions from a large number of new and modified residential facilities are of concern to NAHB. NAHB acts to implement organizational policy adopted by its Board of Directors on the scope of the EPA's use of the Clean Air Act to regulate GHG emissions. NAHB's current organizational policy, adopted February 2007, urges:

> action to prevent federal agencies from using existing federal environmental laws (e.g., the Clean Air Act or Endangered Species Act) or their underlying regulatory regimes to curtail or direct future land-use activities as a means to reduce GHG emissions.

Further, this policy established NAHB's intent to:

> support green building programs that are based on the NAHB Model Green Home Building Guidelines [such at the National Green Building Standard] or voluntary energy efficiency programs that are consistent

with NAHB's criteria including, but not limited to, the Energy Star Program® for residential homes.

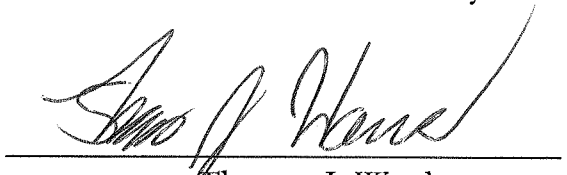
5. On May 7, 2010, EPA issued the *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010) ("Tailpipe Rule"), which regulated for the first time GHG under the Clean Air Act ("CAA").

6. Prior to issuance of the Tailpipe Rule, the members of NAHB were never considered major emitting facilities under Clean Air Act Section 169 or major stationary sources under the prevention of significant deterioration ("PSD") regulations issued by EPA or in any approved State implementation plan under 40 C.F.R. part 51 or 52. These members' facilities had therefore never been subject to the requirement to obtain a PSD permit. Our home builder members' facilities were not affected by EPA's longstanding interpretation of the CAA that emissions of a pollutant for which no national ambient air quality standard ("NAAQS") had been issued can trigger PSD permitting requirements.

7. Various NAHB members engage in construction projects that do, however, emit more than 100 or 250 tons per year of GHGs. EPA itself has expressly stated that, because of the Tailpipe Rule, approximately 6,400 multifamily buildings and 515 single family homes constructed annually will be considered major sources under EPA's longstanding interpretation of the CAA, even though there is no GHG NAAQS, assuming those statutory PSD triggers are applied to GHGs. EPA, Regulatory Impact Analysis for the Proposed Greenhouse Gas Tailoring Rule, at Table 70 (Sept. 2009). If EPA had interpreted the CAA correctly, however, new major stationary sources or modifications of existing major stationary sources that result in a significant increase of GHG emissions would *not* trigger PSD permitting requirements.

8. EPA's long-standing interpretation that PSD permitting may be required for non-NAAQS pollutants did not harm NAHB members until the issuance of the Tailpipe Rule. Because of EPA's interpretation, the Tailpipe Rule triggers the applicability of the PSD program to thousands of single and multifamily construction projects due solely to emissions of GHGs above the statutory threshold.

I, Thomas J. Ward, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 10th day of May, 2011.



Thomas J. Ward

EXHIBIT E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CHEMISTRY COUNCIL, Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator, U.S. Environmental Protection Agency, Respondents.	Case No. 10-1167 (Consolidated with Case Nos. 10-1168, 10-1169, 10-1170, 10-1173, 10-1174, 10-1175, 10-1176, 10-1177, 10-1178, 10-1179, 10-1180)

DECLARATION OF JAMES P. MANNING MARATHON PETROLEUM COMPANY LP

I, James P. Manning, declare under penalty of perjury under the laws of the United States of America that the following is true and correct:

1. I am the Environmental, Safety and Security Manager, Refining Environmental, Safety and Security Analysis and Technology for Marathon Petroleum Company LP ("Marathon"). Marathon is the fifth largest petroleum refiner in the United States and has a downstream business which includes refineries, pipelines, bulk storage terminals and marketing facilities. In my capacity as Environmental, Safety and Security Manager, I am familiar with construction projects our six refineries are planning to conduct and the environmental permits that will be needed for such projects. I also have general familiarity with the air permitting requirements of Marathon's other downstream operations. Marathon is a member of the National Association of Manufacturers, the American Petroleum Institute, the National Petrochemical & Refiners Association, and the American Chemistry Council, petitioners in this case. I make this declaration in support of the petitioners' opening brief.

2. The U.S. Environmental Protection Agency ("EPA") has interpreted the Clean Air Act ("CAA") to mean that emissions of pollutants for which there are no National Ambient Air Quality Standards ("NAAQS") can trigger applicability of the Prevention of Significant Deterioration ("PSD") permitting program for the construction of new sources or major modifications to existing sources. On May 7, 2010, EPA issued the Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) ("Tailpipe Rule"), which regulates Greenhouse Gas ("GHG") emissions from cars and light duty trucks under the CAA. EPA asserts that its interpretation,

together with its promulgation of the Tailpipe Rule, triggers applicability of the PSD program to GHG emissions from stationary sources. As a result, Marathon is harmed.

3. Specifically, Marathon has approved funding a hydrocracker expansion at one of its facilities that will require the installation of a large new process heater. The geographic area in which the facility is located is in "attainment" for certain "criteria" pollutants for which a NAAQS has been established (e.g., nitrogen oxides, lead, and sulfur dioxide). This project would not trigger PSD permitting based on its criteria pollutant emissions because any increases will be below the de minimis thresholds that EPA has set. However, based on Marathon's analysis, the project will trigger PSD permitting for emissions of GHGs under EPA's interpretation of its regulations and the CAA.

4. Marathon is harmed by application of EPA's interpretation of the CAA to this project in a variety of ways. For example, those harms include the costs of the PSD permitting process; delays associated with obtaining a PSD permit that could impact the planned timing of the project; and the impact of any substantive terms and conditions of the PSD permit that will be imposed upon Marathon.

5. In addition to the project described above, Marathon is also harmed by EPA's interpretation that GHGs can trigger PSD permitting because it is now subject to that interpretation for GHG emissions and must maintain records for at least five years of every project that increases GHG emissions that has a reasonable possibility of triggering PSD permitting (even if no PSD permit is ultimately required) under 40 C.F.R. § 52.21(r)(6).

6. Finally, Marathon or its wholly-owned subsidiaries own or operate sources that are not major emitting facilities for NAAQS-pollutants. A number of these sources, however, would potentially be major emitting facilities, and would trigger applicability of the PSD regulations, under EPA's interpretation of the CAA if the statutory thresholds (100 or 250 tons per year) for emissions of GHGs were applicable according to the CAA.

Executed this 10th day of May, 2011.

James P. Manning

James P. Manning

EXHIBIT F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CHEMISTRY COUNCIL, Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator, U.S. Environmental Protection Agency, Respondents.	Case No. 10-1167 (Consolidated with Case Nos. 10-1168, 10-1169, 10-1170, 10-1173, 10-1174, 10-1175, 10-1176, 10-1177, 10-1178, 10-1179, 10-1180)

DECLARATION OF STACY S. PUTMAN

I, Stacy S. Putman, declare under penalty of perjury under the laws of the United States of America that the following is true and correct:

1. I have been with INEOS Olefins & Polymers USA, LLC ("INEOS") for nine years and currently hold the position of Safety, Health, Environmental & Quality Manager with regulatory and compliance responsibilities for four facilities in Texas and California. INEOS is a member of the National Petrochemical and Refiners Association, a petitioner in this case. We are the fourth largest marketer of olefins in North America. Our high purity olefins are valued for use as chemical intermediates in processes that produce a variety of consumer products. Our high density polyethylene and polypropylene are used to make a wide variety of plastic products that consumers value for convenience, safety, hygiene, ease of use, light-weighting, durability and recyclability. I make this declaration in support of the petitioners' opening brief.

2. The U.S. Environmental Protection Agency ("EPA") has interpreted the Clean Air Act to mean that emissions of greenhouse gases ("GHGs") alone can trigger the Prevention of Significant Deterioration ("PSD") permitting program for the construction of new sources or major modifications to existing sources. As a result of this interpretation, together with EPA's promulgation of the so-called Tailpipe Rule (which regulates GHG emissions from cars and light-duty trucks), INEOS is now subject to and harmed by EPA's PSD regulations.

3. For example, INEOS operates an ethylene manufacturing facility near Alvin, Texas. The plant is currently a major source for emission of certain pollutants for which EPA has established National Ambient Air Quality Standards ("NAAQS"). The geographic area in which the plant is located is in "attainment" for these pollutants (CO, NO2, and PM). Therefore, a PSD permit would be required for any major modification to that plant that would cause a net

increase in those pollutants above the de minimis thresholds that EPA has set. Prior to promulgation of the Tailpipe Rule, however, no PSD permit would have been required for a project that caused only GHG emissions to increase significantly.

4. INEOS is currently planning to install a process heater at the Alvin, Texas plant for, among other reasons, the purpose of increasing capacity and product yields. Based on preliminary design information, the project is not expected to trigger PSD permitting due to emissions of any NAAQS-pollutant. However, the project will trigger PSD permitting for emissions of GHGs under EPA's interpretation of its regulations and the Clean Air Act.

5. INEOS is harmed by the application of EPA's interpretation of the Clean Air Act here (specifically, the requirement to obtain a PSD permit due to emissions of GHGs) due to: the costs of the PSD permitting process; project delay related to the PSD permitting process (and associated costs), which is estimated to take 12 months and potentially more; and the substantive terms and conditions of the PSD permit that will be imposed upon INEOS, which represent a potential competitive disadvantage.

6. Finally, INEOS owns or operates many sources that are not major emitting facilities for NAAQS-pollutants. Many of these source, however, would be major emitting facilities, and would trigger applicability of the PSD regulations, if the statutory thresholds (100 or 250 tons per year) for emissions of GHGs were utilized according to the Clean Air Act.

Executed this 9 day of May, 2011.

Stacy S. Putman

EXHIBIT G

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

AMERICAN CHEMISTRY COUNCIL,	)	
Petitioner,	)	Case No. 10-1167
v.	)	(Consolidated with Case Nos. 10-1168, 10-1169, 10-1170, 10-1173, 10-1174, 10-1175, 10-1176, 10-1177, 10-1178, 10-1179, 10-1180)
U.S. ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator, U.S. Environmental Protection Agency,	)	
Respondents.	)	

DECLARATION OF MICHELLE R. MCCRACKEN

I, Michelle R. McCracken, declare under penalty of perjury under the laws of the United States of America that the following is true and correct to the best of my knowledge, information, and belief, and is based on my own personal knowledge.

1. I am a Manager, EH&S for The Williams Companies, Inc. ("Williams") Midstream Business Unit and have held that position since January, 2010. In my position, I am responsible for managing multi-media environmental, health, and safety compliance activities for Williams gathering and processing assets. Williams is an integrated natural gas company, which engages in, among other things, midstream gas and liquids processing. Williams is a member of the American Petroleum Institute, a trade association petitioner in this case.
2. My responsibilities include managing staff assessing the Clean Air Act permitting requirements for construction projects that Williams undertakes.

3. As explained below, the U.S. Environmental Protection Agency's (EPA) position (as a result of the Tailoring Rule) that greenhouse gases (GHGs) can trigger Prevention of Significant Deterioration (PSD) permitting for a facility that is not classified as a major source, major stationary source, or major emitting facility for criteria pollutants will impose new requirements on numerous facilities that Williams currently operates and on projects that are planned at Williams facilities. For example;
4. ***The Markham Gas Processing Plant :*** Williams operates a facility in Markham, Texas that is classified as a minor New Source Review (NSR) source for all criteria pollutants (pollutants for which there is a National Ambient Air Quality Standard (NAAQS)) under Title I of the Clean Air Act.
    a. The Markham facility has the potential to emit more than 100,000 tons per year of GHGs and thus would be classified as a "major" source under EPA's New Source Review/Prevention of Significant Deterioration (NSR/PSD) regulations.
    b. Williams is currently in the planning stages to expand its Markham facility. This will involve installation of combustion turbines and an amine treating unit.
    c. While the facility will remain a minor NSR source for criteria pollutants, the GHG emissions associated with the installation of the planned equipment will exceed the significance level of 75,000 tons per year of GHGs that EPA has established.
    d. Under EPA's interpretation of the statute, this installation will require PSD permitting for the newly proposed equipment for GHGs.
    e. Under the interpretation of the statute advocated by petitioners in this case, this installation would not require a PSD permit.
    f. Obtaining a PSD permit will delay the installation of the proposed project, will require expenditures of funds to prepare the permit application and complete the permitting process, will require a determination of best available control technology and compliance with such requirements.

5. ***The Frewen Lake Compressor Station:*** Williams operates a facility near Wamsutter, Wyoming that is classified as a minor NSR source for all criteria pollutants (pollutants for which there is a NAAQS) under Title I of the Clean Air Act.

a. The Frewen Lake facility currently has the potential to emit less than 100,000 tons per year of GHGs and thus would be classified as a "minor" source under EPA's NSR/PSD regulations.
b. Williams is currently in the planning stages to expand its Frewen Lake facility. This will involve installation of combustion turbines and an amine treating unit.
c. While the facility will remain a minor NSR source for criteria pollutants, the GHG emissions associated with the installation of the planned equipment will exceed the significance level of 1000,000 tons per year of GHGs that EPA has established.
d. Under EPA's interpretation of the statute, this installation will require PSD permitting for the newly proposed equipment for GHGs.
e. Under the interpretation of the statute advocated by petitioners in this case, this installation would not require a PSD permit.
f. Obtaining a PSD permit will delay the installation of the proposed project, will require expenditures of funds to prepare the permit application and complete the permitting process, will require a determination of best available control technology and compliance with such requirements.

Executed this 6th day of May, 2011.

Michelle R. McCracken

Michelle R. McCracken
Manager, EH&S
Williams Midstream

EXHIBIT H

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 Respondents.	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

Declaration of Charles H. Kerr, Chairman of the Board, Great Northern Project Development, L.P.

I, Charles H. Kerr, swear or affirm under penalty of perjury, the following:

1. I am Chairman of the Board of GNPD, Inc., the general partner of Great Northern Project Development, L.P. (collectively, "GNPD"), petitioner in the above-captioned case, and I have firsthand knowledge of the facts set forth herein.

2. I am more than twenty-one (21) years of age and I am competent to make this affidavit.

3. I have been with GNPD since its inception in 2001. I served as GNPD's President and Chief Executive Officer from 2004 to 2009, and became Chairman of the Board in 2009.

4. GNPD is a member of the Coalition for Responsible Regulation, Inc.

5. GNPD is a privately-held company formed to pursue the development, construction, and operation of energy projects. GNPD is currently developing a coal-to-electricity project in South Heart, North Dakota ("South Heart Project") through its subsidiary, South Heart Development LLC ("South Heart Development"). South Heart Development LLC and Allied Syngas Corporation each have a 50 percent ownership share in South Heart Coal LLC, which owns the mine that will produce the coal for the South Heart Project, and South Heart Energy Development LLC ("South Heart Energy"), which will own and operate the South Heart Project plant.

6. The South Heart Project originally was developed as a direct combustion, circulating fluidized bed facility that would economically produce steam at a high temperature and pressure in order to generate electricity. However, as a direct result of the uncertainties surrounding regulation of greenhouse gases ("GHG"), South Heart Development concluded that it would be difficult, if not impossible, to

obtain power sales contracts, the requisite financing and to successfully permit a coal-to-electricity facility that did not include provisions for CO2 emission reduction. As a result, South Heart Development investigated alternative technologies capable of reducing CO2 emissions and concluded that the most viable option for the South Heart Project was to pursue development of a coal gasification plant.

7. Coal gasification technology, through a chemical reaction, converts coal into a synthetic gas ("syngas", a gaseous mixture of carbon monoxide and hydrogen), which is then burned in combustion turbines to generate electricity. Coal gasification plants like the one considered for the South Heart Project use advanced gas cleanup technologies to remove various pollutants from the syngas before it is combusted, which could include the removal of the majority of the CO2 released during the gasification process (which is the current South Heart Project design). Such plants can also control the composition of the product syngas by increasing hydrogen content to further reduce its carbon content post combustion.

8. Unlike conventional plants, coal gasification plants are configured in such a way that it is technically possible on a commercial scale to capture a high purity carbon dioxide stream. This CO2 stream would include CO2 released during gasification plus other carbon compounds removed from the syngas before it is combusted. Removing those other carbon compounds from the pre-

combustion syngas is costly and is not necessary to the operation of a gasification plant, but doing so would independently reduce carbon dioxide emissions resulting from the combustion of the syngas. By contrast, the configuration of conventional direct fired coal-to-electricity plants allows the capture of CO2 only from the post-combustion flue gas. CO2 in the flue gas is much more dilute and is currently not feasible to capture on a commercial scale. South Heart Development believes that adoption of a gasification design would place the project in the best position to comply with carbon regulations and future Best Available Control Technology ("BACT") standards, but this is not certain because the specific requirements for BACT standards for electricity generating units have not yet been established. Gasification plants have high capital costs and perform at lower thermal efficiencies that require more fuel than conventional plants that directly combust coal. An additional cost of switching to gasification technology for the South Heart Project would be the requirement to preprocess the coal to lower its moisture content and increase its Btu content to make it suitable for gasification. As a result, gasification plants are substantially more expensive and complicated to develop than conventional plants. The cost and complexity rise higher still in gasification plants with each additional amount of carbon removed from the pre-combustion syngas.

9. The uncertainties surrounding the regulation of GHGs are irreparably harming South Heart Development by delaying the South Heart Project, increasing the costs of planning the project, and potentially forcing South Heart Development to the more expensive gasification design with unknown carbon capture requirements. The project's financial prospects would worsen if the facility were required to capture and permanently sequester carbon dioxide. The harm to South Heart Development increases each day that the project is delayed. A conventional design is likely economic to construct and operate in the absence of carbon regulations but given the uncertainties surrounding the regulation of GHGs, perception by customers and lenders that GHG reduction is necessary, GNPD believes a conventional plant cannot currently be built, financed or permitted. Nonetheless, South Heart Development has invested substantial sums in this project and in order to protect and potentially extract value from its investment to date, concludes it is currently prudent to continue pursuing the project while South Heart Development attempts to discern what regulatory requirements it will face.

10. EPA's issuance of the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Finding"), and the regulations that EPA has promulgated as a result of the Endangerment Finding, threaten to require reductions in carbon dioxide emissions for any coal-fired facility, potentially

through carbon capture and sequestration. Currently, the only commercially demonstrated technology capable of carbon capture in an electrical generation unit requires gasification as a prerequisite. South Heart Development's investigation of gasification technology demonstrated that the additional costs of gasification without carbon capture and permanent CO2 sequestration makes it commercially disadvantaged to conventional plants. A *requirement* to reduce carbon emissions through carbon capture and permanent sequestration or some other means would worsen the economic prospects of the South Heart Project, especially if those requirements involved retrofitting the facility after construction. As a result, EPA's regulations substantially threaten the viability of South Heart Development and its coal-to-electricity project.

11. Upon issuance of the Endangerment Finding, EPA moved forward with regulating emissions of GHG from motor vehicles. On May 7, 2010, EPA and the National Highway Traffic Safety Administration ("NHTSA") issued vehicle GHG emission standards and average fuel economy standards for light-duty vehicles. 75 Fed. Reg. 25,324 (May 7, 2010). EPA maintains that this action triggered regulation of GHG under other provisions of the Clean Air Act, specifically stationary source permitting under the Prevention of Significant Deterioration ("PSD") and Title V programs. When the stationary source provisions are triggered, the statutory text would require all sources that emit more than 100 tons

per year of carbon dioxide equivalent to apply for a Title V operating permit. New sources that emit more than 100 tons per year or 250 tons per year of carbon dioxide equivalent (depending on the source category), and existing sources that undertake major modifications that are projected to increase emissions of GHG by any amount, would be required by statute to go through the PSD permitting process. The South Heart Project, as currently configured, would exceed these thresholds.

12. EPA's Tailoring Rule will phase in the statutory thresholds for triggering stationary source permitting for GHG. Pursuant to the Tailoring Rule, beginning in January 2011, new or modified sources that must undergo PSD permitting for pollutants other than greenhouse gases, but also will increase emissions of GHG by 75,000 tons per year of carbon dioxide equivalent, will trigger PSD permitting for GHG. As of July 1, 2011, sources with the potential to emit 100,000 tons per year of carbon dioxide equivalent will be considered major sources subject to PSD review, and major modifications at existing sources resulting in net GHG emissions increases of 75,000 tons per year of carbon dioxide equivalent will be subject to PSD review. Title V permitting for GHG also will be phased in as follows: between January and July 2011, only those sources that must apply for, renew, or revise their permits for pollutants other than GHG must incorporate GHG-specific requirements into their permits, and after July 2011,

sources that emit more than 100,000 tons per year of carbon dioxide equivalent will be required to obtain a Title V permit. EPA states in the Tailoring Rule that it will undertake another rulemaking that will take effect by July 1, 2013 that may lower these thresholds for PSD and Title V applicability. I am aware that the Tailoring Rule and its increased major source thresholds are being challenged. I am also aware that the Endangerment Finding, which is the underlying foundation upon which EPA is embarking on GHG regulation and rule making, is also being challenged.

13. The uncertainty of the challenge to the Endangerment Finding, the regulation of stationary sources of GHG, the uncertainty surrounding how PSD permitting will be implemented, and the uncertainty surrounding what the Best Available Control Technology will be for the South Heart Project have resulted in, and continue to cause, significant delays, increased costs that cannot be recouped and difficulty generating investment in and customers for electricity generated by the project.

14. The uncertainty surrounding how PSD permitting for GHG will be implemented by states is causing on-going and irreparable harm to South Heart Development. Under the statutory thresholds and pursuant to EPA's Tailoring Rule, the South Heart Project's potential GHG emissions trigger applicability of PSD and Title V permitting requirements specific to GHG. South Heart Energy

has initiated the process of preparing its PSD permit application for submission to the North Dakota Department of Health and originally planned to submit that application in 2010. However, the uncertainty surrounding the scope and implementation of EPA's GHG regulations and North Dakota's implementation of PSD permitting for GHG has delayed preparation of the permit application and increased planning costs.

15. As part of its PSD permit application, South Heart Energy will be required to analyze carbon dioxide emissions control in a BACT analysis and consider GHG emissions for Title V permitting. A BACT analysis could lead to the establishment of CO2 emission control requirements and emission limits that would apply to the South Heart Project. Because BACT is a moving target, South Heart Energy has been unable to conform the project to a standard set of rules and regulations. For example, it is unclear whether sequestration will be considered BACT or how carbon sequestration will be treated under PSD permitting. Depending on the structure of any future sequestration rules, South Heart Development may or may not be allowed to recover some carbon capture costs by selling CO2 to oil and gas producers for use in enhanced oil recovery. In fact, South Heart Development has determined that a gasification plant that is designed with carbon capture and permanent sequestration is currently uneconomic. This uncertain regulatory environment has made it impossible for South Heart

Development to (i) lock in a firm engineering design for equipment specifications, cost analysis and emissions profile modeling, and (ii) secure contracts from CO2 off-takers needed to transfer custody and control of the CO2 to be sequestered. If BACT is determined to require carbon capture and permanent sequestration, it will likely result in cancellation of the South Heart Project.

16. The process of PSD and Title V permitting for emissions of carbon dioxide from the South Heart Project, including the BACT demonstration and expected permit challenges by environmental groups, is resulting in substantial delays and adding costs to the project development budget. One-half of all additional costs are absorbed by GNPD. In the face of continued uncertainty and a potential *requirement* to capture and permanently sequester CO2, GNPD is prudently reconsidering the financial and physical viability of the South Heart Project.

17. In addition to project development costs, the uncertainties surrounding whether the South Heart Project can be successfully permitted is causing South Heart Development's potential customers to withhold commitments to the project. South Heart Development cannot finalize contracts for long-term base load generation that customers will need, starting in the next four to six years, with the uncertainty surrounding the time it will take to address the complexities of GHG permitting for the project. The inability to generate additional interest in the

purchase of the project's electric power output also could result in cancellation of the project.

18. The threat of GHG regulation is also causing South Heart Development's potential lenders to withhold commitments to finance the construction of the Project. Inability to secure financing will, at the very least, substantially delay and potentially cause the cancellation of the South Heart Project.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 15, 2010.

Charles H. Kerr

EXHIBIT I

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 Respondents.	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

DECLARATION OF MICHAEL R. PEELISH, EXECUTIVE VICE PRESIDENT AND CHIEF SUSTAINABILITY OFFICER, ALPHA NATURAL RESOURCES, INC.

I, Michael R. Peelish, swear or affirm under penalty of perjury the following:

1. I am Executive Vice President and Chief Sustainability Officer at Alpha Natural Resources, Inc. ("Alpha Natural Resources"), Petitioner in the above-captioned case, and I have firsthand knowledge of the facts set forth herein.

2. I am more than twenty-one (21) years of age and I am competent to make this declaration.

3. Alpha Natural Resources is a major supplier of thermal coal to electric utilities and manufacturing industries across the country, and a leading producer and exporter of metallurgical coal used in the steelmaking process. Alpha Natural Resources operates 60 mines and 14 coal preparation plants in Virginia, West Virginia, Kentucky, Pennsylvania, and Wyoming, and employs 6,200 individuals throughout the United States.

4. Alpha Natural Resources is a member of the Coalition for Responsible Regulation, Inc.

5. Alpha Natural Resources controls approximately 1.6 billion tons of coal reserves in the eastern United States, and approximately 700 million tons of coal reserves, through either fee title or federal lease, in Wyoming's Powder River Basin. In 2009, Alpha Natural Resources sold 47.2 million tons of coal. Of this total, approximately 39 million tons was steam coal, including approximately 38 million tons used for electricity generation and approximately 900,000 tons sold for industrial boilers. Alpha Natural Resources sold 8.13 million tons of eastern metallurgic coal in 2009 for use in steelmaking.

6. EPA's issuance of the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg.

66,496 (Dec. 15, 2009) ("Endangerment Finding"), and the regulations that EPA has promulgated as a result of the Endangerment Finding, are threatening substantial and irreparable economic harm to coal producers like Alpha Natural Resources, which produce primarily steam coal for use in the generation of electricity.

7. Upon issuance of the Endangerment Finding, EPA moved forward with regulating emissions of greenhouse gases from motor vehicles. On May 7, 2010, EPA and the National Highway Traffic Safety Administration ("NHTSA") issued vehicle greenhouse gas emission standards and average fuel economy standards for light-duty vehicles. 75 Fed. Reg. 25,324 (May 7, 2010). EPA maintains that this action triggered regulation of GHG under other provisions of the Clean Air Act, specifically stationary source permitting under the Prevention of Significant Deterioration ("PSD") and Title V programs. When the stationary source provisions are triggered, the statutory text would require all sources that emit more than 100 tons per year of carbon dioxide equivalent to apply for a Title V operating permit. New sources that emit more than 100 tons per year or 250 tons per year of carbon dioxide equivalent (depending on the source category), and sources that undertake major modifications at existing sources that are projected to increase emissions of greenhouse gases by any amount, would be required by statute to go through the PSD permitting process. *Id*.

8. EPA proposes in its Tailoring Rule to phase-in the statutory thresholds for triggering stationary source permitting for GHG. Pursuant to the Tailoring Rule, beginning in January 2011, new or modified sources that must undergo PSD permitting for pollutants other than greenhouse gases, but will also increase emissions of greenhouse gases by 75,000 tons per year of carbon dioxide equivalent, will trigger PSD permitting for greenhouse gases. As of July 1, 2011, sources with the potential to emit 100,000 tons per year of carbon dioxide equivalent will be considered major sources subject to PSD review, and major modifications resulting in net greenhouse gas emissions increases of 75,000 tons per year of carbon dioxide equivalent will be subject to PSD review. Title V permitting for greenhouse gases also will be phased in as follows: between January and July 2011, only those sources that must apply for, renew, or revise their permits for pollutants other than greenhouse gases must incorporate greenhouse gas applicable requirements into their permits, and after July 2011, sources that emit more than 100,000 tons per year of carbon dioxide equivalent will be required to obtain a Title V permit. EPA states in the Tailoring Rule that it will undertake another rulemaking that will take effect by July 1, 2013, that may lower these thresholds for PSD and Title V applicability. I am aware that the Tailoring Rule and the increased thresholds are being challenged.

9. The thermal coal dryers located at two of Alpha Natural Resources' facilities will emit more than 25,000 tons per year of carbon dioxide equivalent in 2011 and therefore would be subject to the statutory thresholds for Title V and PSD permitting. Neither of these facilities is currently subject to Title V or PSD requirements.

10. Even though 25,000 tons per year is less than the initial thresholds found in the Tailoring Rule, the suite of GHG regulations issued by the EPA creates substantial uncertainty for companies such as Alpha Natural Resources that emit 25,000 tons per year or even 100 tons per year of carbon dioxide equivalent. Alpha Natural Resources faces the prospect of potentially inconsistent regulation by the states, the prospect of lower emissions thresholds under the upcoming July 1, 2013 modifications to the Tailoring Rule, and the prospect that the Tailoring Rule will not withstand judicial review. This uncertainty irreparably harms Alpha Natural Resources' ability to plan for physical or operational changes at its coal preparation plants.

11. The Endangerment Finding and the associated regulation also is substantially affecting Alpha Natural Resource's profitability outlook for domestic steam coal production. The combustion of coal, by its very nature, results in the emission of substantial amounts of carbon dioxide. EPA's conclusions that greenhouse gases "may reasonably be anticipated both to endanger public health

and to endanger public welfare," 74 Fed. Reg. at 66,497, affects the perception of coal as a viable long-term source of electricity and makes coal a less desirable commodity. Moreover, the uncertainty surrounding the regulation of stationary sources of greenhouse gases is having a substantial impact on demand for coal, particularly steam coal for electricity generation.

12. I am aware that a number of our utility customers are switching units to natural gas, dropping planned expansions, or shutting down coal-fired facilities altogether as a result of, in large part, costs associated with the pending regulation of greenhouse gases. Electric utilities and independent power producers that are adding capacity are being pressured by EPA's regulations, and by the uncertainty arising from those regulations, to design and construct electric generating units that do not use coal. New electric generating units will remain in service for decades, effectively locking in the lower demand for coal. Our coal stockpiles are as high as they've ever been, and I expect this trend to continue. Indeed, our 2010 production forecast for utility customers is down. A further reduction in the demand of coal from utility customers reasonably can be expected to result in decreased revenues that cannot be remedied in future years, thereby causing irreparable harm to Alpha Natural Resources.

13. Alpha Natural Resources' mining operations also use substantial amounts of electricity, which Alpha Natural Resources purchases from local power

producers. Alpha Natural Resources purchases on average a total of 860,707,186 kilowatt hours of electricity annually, which comprises approximately seven percent of its operating costs.

14. In light of the substantial amount of electricity that Alpha Natural Resources uses in its operations, any increase in the costs of electricity resulting from the regulation of greenhouse gases emitted from coal-fired electric generation units will increase Alpha Natural Resources' operating costs, thereby inflicting harm on Alpha Natural Resources.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 13, 2010.

Michael R. Peelish

EXHIBIT J

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 Respondents.	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

DECLARATION OF JAMES R. BARKER, EXECUTIVE VICE PRESIDENT, ROSEBUD MINING COMPANY

I, James R. Barker, swear or affirm under penalty of perjury the following:

1. I am Executive Vice President of Rosebud Mining Company ("Rosebud"), Petitioner in the above-captioned case, and I have firsthand knowledge of the facts set forth herein. I am over the age of twenty-one (21) and I am competent to make this declaration.

2. I have been employed with Rosebud for nine years. I began employment with Rosebud in February of 2001 handling general accounting duties. In March of 2001, I became Manager of Finance & Administration. In 2008, I progressed to Executive Vice President.

3. Rosebud is a privately-held company established in 1979 that mines and processes bituminous coal from 18 deep mines and seven coal preparation plants in Pennsylvania and Ohio. Rosebud employs 1,150 individuals.

4. Rosebud is a member of the Coalition for Responsible Regulation, Inc.

5. In 2009, Rosebud produced approximately 5.4 million tons of coal, which Rosebud sold to utilities, metallurgical coal brokers, and industry for use in boilers. Approximately sixty-five percent of the coal Rosebud produced was sold to utilities for use in electricity generation; thirty-three percent was sold to metallurgical coal consumers for coke production; and the remaining two percent was sold for use in industrial boilers.

6. In 2010, however, Rosebud shifted additional resources to the development of metallurgical coal. This year, approximately forty-nine percent of the coal Rosebud is producing is sold to metallurgical coal consumers; forty-nine percent is sold to electricity generation; and two percent is sold for use in industrial boilers. One of the key factors driving this shift is the depressed market for domestic steam coal used in electricity production.

7. Rosebud's mining reserves are primarily steam coal for electricity generation. Unlike steam coal, metallurgical coal has special properties necessary for the production of coke, which is used in steel manufacturing. Out of the 500 million tons of coal reserves controlled by Rosebud, only about 100 million tons are metallurgical coal reserves. These metallurgical coal reserves are in areas that have already have been extensively mined and therefore the most valuable reserves are gone. Rosebud is essentially mining left over, unmined coal reserves that often times have poorer mining conditions than some of its steam coal mines or reserves.

8. EPA's issuance of the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Finding"), and the regulations that EPA has promulgated as a result of the Endangerment Finding, are threatening the economic viability of coal producers like Rosebud.

9. Upon issuance of the Endangerment Finding, EPA moved forward with regulating emissions of greenhouse gases from motor vehicles. On May 7, 2010, EPA and the National Highway Traffic Safety Administration ("NHTSA") issued vehicle greenhouse gas emission standards and average fuel economy standards for light-duty vehicles. 75 Fed. Reg. 25,324 (May 7, 2010). EPA maintains that this action triggered regulation of GHG under other provisions of the Clean Air Act, specifically stationary source permitting under the Prevention of Significant

Deterioration ("PSD") and Title V programs. When the stationary source provisions are triggered, the statutory text would require all sources that emit more than 100 tons per year of carbon dioxide equivalent to apply for a Title V operating permit. New sources that emit more than 100 tons per year or 250 tons per year of carbon dioxide equivalent (depending on the source category), and sources that undertake major modifications at existing sources that are projected to increase emissions of greenhouse gases by any amount, would be required by statute to go through the PSD permitting process. *Id.* EPA has issued a Tailoring Rule that would increase these statutory thresholds for at least three years. I am aware that the Tailoring Rule and the increased thresholds are being challenged.

10. The combustion of coal, by its very nature, results in the emission of substantial amounts of carbon dioxide. EPA's conclusions that greenhouse gases "may reasonably be anticipated both to endanger public health and to endanger public welfare," 74 Fed. Reg. at 66,497, affects the perception of steam coal as a viable long-term source of electricity and makes coal a less desirable commodity. Moreover, I am aware that the uncertain regulatory climate is driving utility and industrial customers to switch from coal to natural gas, which is decreasing overall demand.

11. In a commodities market, even small shifts in demand can have a substantial impact on pricing of the commodity across the market. Rosebud is

seeing a reduction in market demand in coal that is translating into lower sale prices for the coal, and thus lower net income for Rosebud. Furthermore, it is becoming increasingly difficult to attract capital for the development of steam coal.

12. In large part as a result of this shift in demand and reduction in market investment that accompanies the ongoing uncertainty surrounding the long-term viability of steam coal used for electricity, Rosebud is engaged in a significant refocusing of its business on the development of metallurgical coal for export. For Rosebud, this means focusing on development of the fraction of its coal reserves that produce metallurgical coal and allowing steam coal reserves, in which Rosebud has invested millions of dollars, to remain largely undeveloped.

13. In light of the depressed long-term prospects for steam coal production, Rosebud will delay indefinitely the development of the majority of its steam coal reserves. These delays translate into lost opportunities for revenues, growth, and employment that will not be recouped unless prospects improve for the long-term viability of steam coal.

14. Rosebud's mining operations also use nearly 86 million kilowatt hours of electricity annually, which Rosebud purchases from local power producers. Rosebud spends approximately $6.5 million annually on the purchase of electricity. In light of the substantial amount of electricity that Rosebud uses in its operations, any increase in the costs of electricity resulting from the regulation of

greenhouse gases will increase Rosebud's operating costs and reduce profitability margins.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on SEPTEMBER 10, 2010.

James R. Barker

EXHIBIT K

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PEABODY ENERGY COMPANY	)	**No. 10-1025**
	)	**(Consolidated with:**
Petitioner,	)	**09-1322, 10-1024,**
	)	**10-1026, 10-1030,**
v.	)	**10-1035, 10-1036,**
	)	**10-1037, 10-1038,**
UNITED STATES ENVIRONMENTAL	)	**10-1039, 10-1040,**
PROTECTION AGENCY,	)	**10-1041, 10-1042,**
	)	**10-1044, 10-1045,**
Respondent.	)	**10-1046, 10-1049)**

AFFIDAVIT OF STANDING BY
PEABODY ENERGY COMPANY

Mary L. Frontczak respectfully submits this Affidavit demonstrating that Peabody Energy Company has standing to challenge the Endangerment Finding[1] of the United States Environmental Protection Agency ("EPA"), and in support thereof, states as follows:

I. Introduction

1. I am Vice President and Assistant General Counsel at Peabody. In that capacity, I am responsible for understanding how various environmental regulations affect Peabody's mining operations. I have, therefore, become familiar

[1] *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act,* 74 Fed. Reg. 66,496 (Dec. 15, 2009). For convenience, I will refer to these findings as the Endangerment Finding.

with the Endangerment Finding and how it will affect Peabody.

2. Peabody is the world's largest private-sector coal company. Our products fuel approximately 10 percent of America's and 2 percent of the world's electricity. Last year Peabody shipped 238 million tons of coal. The company has 340 electricity generating and industrial customers in nearly 40 states and 19 countries. In the United States, Peabody companies operate three large surface mines in the Powder River Basin of Wyoming that produce about 150 million tons per year; three surface mines in the Southwest that produce about 14 million tons per year; an underground mine in Colorado that produces about 8.6 million tons per year; and a number of surface and underground mines in the Illinois Basin that collectively produce about 32 million tons per year. Peabody's 2007 domestic coal production of about 200 million tons per year equaled about 17.4 percent of total domestic production.[2]

II. Endangerment Finding and Regulatory Context

3. In the Endangerment Finding, the EPA Administrator found that the emission of six so-called greenhouse gases ("GHGs") by new motor vehicles and new motor vehicle engines "causes, or contributes, to air pollution which may reasonably be anticipated to endanger public health or welfare," within the

[2] *See* Technical Support Document, *The Coal Sectors, Proposed Rule for Mandatory Reporting of Greenhouse Gases*, Office of Air and Radiation, U.S. Environmental Protection Agency, January 28, 2009, EPA-HQ-OAR-2008-0037, Ex. 10.

meaning of section 202(a)(1) of the Clean Air Act ("CAA"), 42 U.S.C. § 7521(a)(1). The six GHGs include carbon dioxide ("CO_2") and methane.

4. The Endangerment Finding determined that, for regulatory purposes, the "aggregate group" of the six GHGs will be deemed to constitute one "air pollutant," measured in "units" of "carbon dioxide equivalent," or "CO_2e."[3] EPA used a formula to determine the "global warming potential" of each of the GHGs. Under this formula, one ton of CO_2 is equal to one ton of CO_2e and one ton of methane is equal to 21 tons of CO_2e.[4]

5. According to the Administrator, having made the Endangerment Finding, she is obligated under CAA § 202(a)(1) to issue regulations restricting the emissions of the six GHGs from new motor vehicles and new motor vehicles engines.[5] The Administrator promulgated such regulations on April 1, 2010, applicable to light-duty vehicles (cars and light-duty trucks) ("Motor Vehicle Rule").[6]

6. In addition, the Administrator states that once the Motor Vehicle Rule "takes effect," the six GHGs will become "regulated air pollutants" for purposes of

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[3] Endangerment Finding, 74 Fed. Reg. at 66499/1 and 66499 n.4.

[4] Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act (Dec. 7, 2009) at 11.

[5] Endangerment Finding, 74 Fed. Reg. at 66501-02.

[6] *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards* (April 1, 2010) (not yet published in Federal Register).

the Prevention of Significant Deterioration ("PSD") pre-construction air quality permit program.[7] Under CAA § 165, 42 U.S.C. § 7475, before commencing construction, a new "major" stationary source of regulated air pollutants must obtain a PSD permit subject to a number of conditions, including a requirement that the permittee undertake Best Available Control Technology ("BACT") requirements for such pollutants. Additionally, under CAA § 165, an existing "major" stationary source of regulated air pollutants must obtain a PSD permit before commencing any activity constituting a "modification" of that source that will result in a "significant" emissions increase. Under CAA § 169(1), 42 U.S.C. § 7475(1), a "major" stationary source is one that is within 28 categories of sources and has the potential to emit ("PTE") at least 100 tons per year ("tpy") of the regulated air pollutant, or is within any other source category and has a PTE of at least 250 tpy of the regulated air pollutant.

7. The Administrator further states that once the Motor Vehicle Rule "takes effect," the six GHGs will become "regulated air pollutants" for purposes of the Title V operating permit program.[8] Under Title V of the CAA, 42 U.S.C. § 7661-7661f, any stationary source emitting 100 tpy or more of a regulated air pollutant must obtain an operating permit to do so. Under section 502(b)(3) of the

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[7] *Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs* (Mar. 29, 2010) ("Johnson Memorandum Reconsideration") at 1-2.

[8] *Id.*

CAA, 42 U.S.C. § 7661a(b)(3), the source must pay Title V permit fees, and under section 592(b)(2) of the CAA, 42 U.S.C. § 7661a(b)(2), the source must monitor and report emissions.

8. According to EPA, EPA will phase in GHG regulatory requirements under the PSD and Title V programs, with certain sources becoming subject to these requirements on January 2, 2011, and other sources becoming subject on a yet-to-be-announced schedule. Under its proposed "Tailoring Rule,"[9] EPA had stated that (a) the first sources to be regulated would be those with a PTE of at least 25,000 tpy of CO_2e for new sources and 10,000-25,000 tpy of CO_2e (the exact amount to be specified in the final regulation) for modified sources and (b) sources with PTEs below these thresholds and at or above the statutory 100/250 tpy thresholds for PSD and 100 tpy for Title V would be subject to regulation in six years. Subsequently, however, EPA has indicated that the final Tailoring Rule will contain different thresholds phased in over time, with all sources with PTEs at or above the statutory 100/250 tpy thresholds subject to regulation by 2016.[10]

III. Peabody Has Standing

Peabody has standing for the following reasons:

A. Standing as a Result of Ownership of Motor Vehicles

[9] *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55292 (Oct. 27, 2009).

[10] Letter of EPA Administrator Lisa P. Jackson to Senator Jay D. Rockefeller IV (Feb. 22, 2010), http://epa.gov/oar/pdfs/LPJ_letter.pdf.

9. EPA's GHG Motor Vehicle Rule applies to cars and light duty trucks beginning with model year 2012. Peabody owns and will continue to own the cars and light duty trucks to which the motor vehicle regulations apply and which are necessary to conduct mining operations. In particular, the mid-size and full-size pickup trucks that the motor vehicle regulations will regulate[11] are commonly used for a variety of purposes by Peabody in mining operations. For instance, we estimate that we have 204 vehicles that are of the type that will be regulated under the Motor Vehicle Rule at our North Antelope Rochelle Mine complex near Gillette, Wyoming, 37 such vehicles at our Rawhide and Caballo mines near Gillette, Wyoming, another four at our Gillette administrative office, 47 at our Black Mesa mine complex in Northeast Arizona, 55 at our Lee Ranch and El Segundo mines in New Mexico, and 126 at our TwentyMile mine in Colorado. Many of these vehicles are pickup trucks. As our existing motor vehicles depreciate, Peabody will purchase new motor vehicles that will be subject to EPA's GHG regulations beginning with model year 2012.

10. EPA states that the Motor Vehicle Rule will increase the cost of new motor vehicles.[12] As a result, Peabody will pay more for new motor vehicles than it would have paid absent the GHG regulations, and Peabody's choice of vehicles

[11] *See* Motor Vehicle Rule, *e.g.*, at 30.

[12] *See* Motor Vehicle Rule, Regulatory Impact Analysis, Ch. 6 (Apr. 2010), http://www.epa.gov/otaq/climate/regulations/420r10009.pdf.

will be constrained..

11. Since the Endangerment Finding, in EPA's view, automatically triggered a legal obligation by EPA to promulgate the Motor Vehicle Rule, and since the Motor Vehicle Rule will increase the cost of motor vehicles to Peabody, the Endangerment Finding causes injury in fact to Peabody.

12. Declaring the Endangerment Finding to be invalid, as Peabody seeks, will redress Peabody's injury. Absent the Endangerment Finding, EPA will not be legally obligated to regulate GHG emissions from new motor vehicles that Peabody will buy, and indeed EPA will be legally prevented from issuing such regulations.

B. Standing as a Result of Loss of Markets

13. Peabody sells its coal to electric generation and industrial sources. As stated, Peabody's coal fuels 10 percent of electric generation in the United States.

14. Because of the Endangerment Finding and the Motor Vehicle Rule that directly results from such Endangerment Finding, virtually all of Peabody's actual and potential buyers will become subject to PSD regulation for GHG emissions. CO_2 is the inevitable byproduct of the combustion of coal and other fossil fuels. Thus, any electric generating unit ("EGU") or other facility that emits

CO_2 in amounts above the statutory 100 tpy PSD level,[13] or above the proposed Tailoring Rule 25,000 tpy PSD threshold, is a "major" source of CO_2 emissions and, therefore, subject to PSD regulation for such emissions.

15. EPA data confirm that virtually all EGUs and other industrial facilities that purchase coal will be subject to PSD regulation for CO_2e emissions as a result of the Endangerment Finding. According to EPA, of the total of 2,237 existing EGUs that combust fossil fuels, all emit more than 100 tpy, with CO_2 accounting for the vast majority of the CO_2e.[14] EPA data for other large industrial facilities that burn coal show similar numbers.[15]

16. Because these existing facilities will be "major" sources of GHG emissions for purposes of the PSD program, they will not be able to make "major modifications" without undertaking BACT to control CO_2 emissions. According to EPA, existing coal-fired EGUs and other industrial facilities frequently undertake modifications.[16] Given EPA's Endangerment Finding and resulting motor vehicle

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[13] EGUs and other large industrial facilities to which coal is sold are set forth on the CAA § 169(1) list and are therefore subject to the 100 tpy PSD "major" source threshold.

[14] EPA, Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation (July 7, 2009), attached hereto as Exhibit A, at 11.

[15] *Id.* at 16-52.

[16] Beginning in the early 2000s, EPA began a series of enforcement actions against coal-fired electric utilities alleging that they had undertaken numerous "major modifications" that subjected them to PSD requirements. According to EPA's enforcement website, since 2002 it has entered into settlements with 19 different companies, with a number of the settlements covering multiple coal-fired powerplants. *See* http://www.epa.gov/oecaerth/resources/cases/civil/caa/coal/index.html. EPA has also pursued enforcement actions growing out of alleged "major

regulations, when such facilities make modifications, they will become subject to BACT for their CO_2 emissions.

17. There is significant uncertainty at this point as to exactly what the nature of BACT for GHGs will be for existing coal plants that undertake "major modifications." EPA has authored a document indicating that coal-fired EGUs could be required to improve efficiency by 2 percent and possibly by as much as 5 percent.[17] These efficiency improvements would be obtained through a variety of plant work, including "optimizing the performance of any of the feed water, boiler, turbine-generator, condenser, heat rejection, and auxiliary systems, improving control systems, installing higher efficiency pumps, fans, and drives, and reducing the moisture content of solid fuels." All of these improvements would cost money, likely in the tens of millions or even hundreds of millions of dollars.

18. Moreover, any new EGU or large industrial facility that uses coal will unquestionably have a PTE for CO_2 above the 100 tpy statutory threshold (and indeed above whatever interim thresholds are promulgated in the final Tailoring Rule). Thus, any such facilities will be obligated to undertake CO_2 BACT. Because of strong demand for new power generation, there has been strong interest in the construction of new coal-fired EGUs over the last decade. According to the

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modifications" of coal-fired cement manufacturing facilities. *See* http://www.epa.gov/oecaerth/civil/caa/cement/index.html.

[17] U.S. EPA, *Technical Support Document for the Advanced Notice of Proposed Rulemaking for Greenhouse Gases; Stationary Source, Section VII*, June 2008, Exhibit B hereto.

Department of Energy, as of October 2009, 37 new coal-fired powerplants representing 19,998 megawatts were under construction, near construction or permitted.[18]

19. This demand, however, has proved fragile, as just the threat of CO_2 regulation has contributed to a wave of cancellations and delays. According to the firm SourceWatch, 18 new proposed coal units were cancelled in 2009.[19]

20. Although EPA has not yet indicated specifically what BACT requirements will be for coal-fired EGU GHG emissions, any technology to reduce GHG emissions will cost significant amounts of money. Moreover, in a recent decision involving a coal-fired powerplant, EPA ruled that the developer, in evaluating BACT options, was required to consider utilizing natural gas as a fuel instead of coal in order to reduce emissions.[20] Similarly, EPA recently convened a task force for the purpose of considering what BACT should be for a number of different types of facilities. A number of task force members recommended that coal plant developers should consider substitution of natural gas as BACT.[21]

21. In sum, GHG BACT will result in significant additional costs for coal plants and potentially lead to conversion of coal plants to natural gas plants. The

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[18] *See* http://www.netl.doe.gov/coal/refshelf/ncp.pdf.

[19] *See* http://www.sourcewatch.org/index.php?title=Portal:Coal_Issues.

[20] *See* EPA Order, Exhibit C hereto, at 7-10.

[21] *See* Exhibit D hereto.

Endangerment Finding, therefore, causes injury in fact to Peabody, as the largest supplier of coal in the United States, through potential loss of markets for its coal. That injury would be addressed if the Endangerment Finding were overturned, because EPA in that event would not be authorized to regulate GHG emissions through the PSD process.

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IV. Conclusion

22. I attest under penalty of perjury the truth and accuracy of the foregoing facts.

Mary L. Frontczak

STATE OF MISSOURI, ss.

Subscribed and sworn before me this 15th day of April, 2010.

My Commission Expires:

WANDA J. MARTIN
NOTARY PUBLIC - NOTARY SEAL
STATE OF MISSOURI
ST. LOUIS CITY
MY COMMISSION EXPIRES 10/20/2013
COMMISSION #09511270

EXHIBIT L

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL MINING ASSOCIATION	)	
	)	**No. 10-1024**
	)	**(Consolidated with:**
Petitioners,	)	**No. 09-1322, 10-1025,**
	)	**10-1026, 10-1030,**
v.	)	**10-1035, 10-1036,**
	)	**10-1037, 10-1038,**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	**10-1039, 10-1040,**
	)	**10-1041, 10-1042,**
	)	**10-1044, 10-1045,**
Respondent.	)	**10-1046, 10-1049)**
	)	

AFFIDAVIT OF STANDING BY THE NATIONAL MINING ASSOCIATION

Katie Sweeny respectfully submits this Affidavit demonstrating that the National Mining Association ("NMA") has standing to challenge the Endangerment Finding[1] of the United States Environmental Protection Agency ("EPA"), and in support thereof, states as follows:

I. Introduction

1. I am General Counsel of NMA. In that capacity, I am responsible for representing NMA on a number of issues, including environmental regulation,

[1] *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act,* 74 Fed. Reg. 66,496 (Dec. 15, 2009). For convenience, we will refer to these findings as the Endangerment Finding.

before the EPA and other bodies. I have therefore become familiar with the Endangerment Finding and how it will affect NMA members.

2. NMA is a non-profit, incorporated national trade association representing all major producers of coal, metals, and minerals in the United States as well as numerous ancillary mining-related businesses. The principal purpose of the Association is to represent those with interests in these industries in the important public policy issues affecting the development and use of these resources.

II. Endangerment Finding and Regulatory Context

3. In the Endangerment Finding, the EPA Administrator found that the emission of six so-called greenhouse gases ("GHGs") by new motor vehicles and new motor vehicle engines "causes, or contributes, to air pollution which may reasonably be anticipated to endanger public health or welfare," within the meaning of section 202(a)(1) of the Clean Air Act ("CAA"), 42 U.S.C. § 7521(a)(1). The six GHGs include carbon dioxide ("CO_2") and methane.

4. The Endangerment Finding determined that, for regulatory purposes, the "aggregate group" of the six GHGs will be deemed to constitute one "air pollutant," measured in "units" of "carbon dioxide equivalent," or "CO_2e."[2] EPA used a formula to determine the "global warming potential" of each of the GHGs.

[2] Endangerment Finding, 74 Fed. Reg. at 66499/1 and 66499 n.4.

Under this formula, one ton of CO_2 is equal to one ton of CO_2e and one ton of methane is equal to 21 tons of CO_2e.[3]

5. According to the Administrator, having made the Endangerment Finding, she is obligated under CAA § 202(a)(1) to issue regulations restricting the emissions of the six GHGs from new motor vehicles and new motor vehicles engines.[4] The Administrator promulgated such regulations on April 1, 2010, applicable to light-duty vehicles (cars and light-duty trucks) ("Motor Vehicle Rule").[5]

6. In addition, the Administrator states that once the Motor Vehicle Rule "takes effect," the six GHGs will become "regulated air pollutants" for purposes of the Prevention of Significant Deterioration ("PSD") pre-construction air quality permit program.[6] Under CAA § 165, 42 U.S.C. § 7475, before commencing construction, a new "major" stationary source of regulated air pollutants must obtain a PSD permit subject to a number of conditions, including a requirement that the permittee undertake Best Available Control Technology ("BACT") requirements for such pollutants. Additionally, under CAA § 165, an existing

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[3] Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act (Dec. 7, 2009) at 11.

[4] Endangerment Finding, 74 Fed. Reg. at 66501-02.

[5] *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards* (April 1, 2010).

[6] *Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs* (Mar. 29, 2010) ("Johnson Memorandum Reconsideration") at 1-2.

"major" stationary source of regulated air pollutants must obtain a PSD permit before commencing any activity constituting a "modification" of that source that will result in a "significant" emissions increase. Under CAA § 169(1), 42 U.S.C. § 74759(1), a "major" stationary source is one that is within 28 categories of sources and has the potential to emit ("PTE") at least 100 tons per year ("tpy") of the regulated air pollutant, or is within any other source category and has a PTE of at least 250 tpy of the regulated air pollutant.

7. The Administrator further states that once the Motor Vehicle Rule "takes effect," the six GHGs will become "regulated air pollutants" for purposes of the Title V operating permit program.[7] Under Title V of the CAA, 42 U.S.C. § 7661-7661f, any stationary source emitting 100 tpy or more of a regulated air pollutant must obtain an operating permit to do so. Under section 502(b)(3) of the CAA, 42 U.S.C. § 7661a(b)(3), the source must pay Title V permit fees, and under section 592(b)(2) of the CAA, 42 U.S.C. § 7661a(b)(2), the source must monitor and report emissions.

8. According to EPA, EPA will phase in GHG regulatory requirements under the PSD and Title V programs, with certain sources becoming subject to these requirements on January 2, 2011, and other sources becoming subject on a

[7] *Id.*

yet-to-be-announced schedule. Under its proposed "Tailoring Rule,"[8] EPA had stated that (a) the first sources to be regulated would be those with a PTE of at least 25,000 tpy of CO_2e for new sources and 10,000-25,000 tpy of CO_2e (the exact amount to be specified in the final regulation) for modified sources and (b) sources with PTEs below these thresholds and at or above the statutory 100/250 tpy thresholds for PSD and 100 tpy for Title V would be subject to regulation in six years. Subsequently, however, EPA has indicated that the final Tailoring Rule will contain different thresholds phased in over time, with all sources with PTEs above the statutory 100/250 tpy thresholds subject to regulation by 2016.[9]

III. NMA Has Standing

NMA has standing for the following reasons:

A. Standing as a Result of Ownership of Motor Vehicles

9. EPA's GHG Motor Vehicle Rule applies to cars and light duty trucks beginning with model year 2012. NMA members own and will continue to own the cars and light duty trucks to which the motor vehicle regulations apply and which are necessary to conduct mining operations. In particular, the mid-size and full-size pickup trucks that the motor vehicle regulations will regulate[10] are

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[8] *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55292 (Oct. 27, 2009).

[9] Letter of EPA Administrator Lisa P. Jackson to Senator Jay D. Rockefeller IV (Feb. 22, 2010), http://epa.gov/oar/pdfs/LPJ_letter.pdf.

[10] *See* Motor Vehicle Rule, *e.g.*, at 30.

commonly used for a variety of purposes throughout the mining sector. As their existing motor vehicles depreciate, NMA members will purchase new motor vehicles that will be subject to EPA's GHG regulations beginning with model year 2012.

10. EPA states that the Motor Vehicle Rule will increase the cost of new motor vehicles.[11] As a result, NMA members will pay more for new motor vehicles than they would have paid absent the GHG regulations.

11. Since the Endangerment Finding, in EPA's view, automatically triggered a legal obligation by EPA to promulgate the Motor Vehicle Rule, and since the Motor Vehicle Rule will increase the cost of motor vehicles to NMA members, the Endangerment Finding causes injury in fact to NMA's members.

12. Declaring the Endangerment Finding to be invalid, as NMA seeks, will redress the injury to NMA members. Absent the Endangerment Finding, EPA will not be legally obligated to regulate GHG emissions from new motor vehicles that NMA members will buy, and indeed EPA will be legally prevented from issuing such regulations.

B. Standing as a Result of Ownership of Stationary Sources Subject to PSD and Title V

13. NMA also has standing because NMA members own stationary

[11] *See* Motor Vehicle Rule, Regulatory Impact Analysis, Ch. 6 (Apr. 2010), http://www.epa.gov/otaq/climate/regulations/420r10009.pdf.

sources that will become subject to PSD and Title V regulation as a result of the fact that, in EPA's view, the Endangerment Finding mandates the Motor Vehicle Rule and the Motor Vehicle Rule triggers PSD and Title V regulation.

14. Coal mines are stationary sources that emit both methane and CO_2. As stated, methane and CO_2 will be regulated as CO_2e when EPA, pursuant to the Endangerment Finding, puts into effect its regulations of GHG emissions from new motor vehicles and motor vehicle engines. According to EPA, 103 underground coal mines emit more than 25,000 tpy of CO_2e and 238 emit more than 100 and 250 tpy of CO_2e.[12] As a result, these underground coal mines are "major" sources subject to regulation under the PSD and Title V program both at the statutory 250 tpy and 100 tpy, respectively, thresholds and at the 25,000 tpy proposed Tailoring Rule threshold for those programs.

15. Underground coal mines that are "major" stationary sources of GHGs for purposes of the PSD program as a result of the EPA regulation that flows from the Endangerment Finding may from time-to-time undertake "major modifications," such as by expanding mining operations into new or adjacent reserves. Under EPA's view of the applicable statutory requirements, NMA members will not be able to undertake such "major modifications" without first

[12] EPA, Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation (July 7, 2009), attached here as Exhibit A, at 57.

obtaining a PSD permit subject to various conditions, including BACT controls for methane and CO_2 emissions. Moreover, NMA members will not be able to construct new underground coal mines emitting CO_2e above the applicable thresholds without first obtaining a PSD permit subject to various conditions, including BACT controls for methane and CO2 emissions.

16. Similarly, as a direct consequence of EPA promulgation of the Endangerment Finding and the motor vehicle GHG regulations that are mandated by the Endangerment Finding, coal mines will be required to expend money preparing and submitting Title V permit applications. Coal mines will also be subject to Title V permit conditions that, at a minimum, will include monitoring and reporting and payment of fees.

17. Since the Endangerment Finding, in EPA's view, automatically triggers a legal obligation by EPA to promulgate GHG regulations applicable to new motor vehicles, the Endangerment Finding causes injury in fact to NMA's members by making them subject to PSD and Title V regulation. According to EPA, because of the Endangerment Finding, EPA must issue regulations restricting GHG emissions from new motor vehicles and such regulations, when they "take effect," automatically and as a matter of law, make GHG emissions subject to regulation under the PSD and Title V programs. Since NMA members own coal mines which emit GHGs above the "major" source PSD threshold and above the

Title V threshold, either as set forth in the statute or in the proposed Tailoring Rule, issuance of the Endangerment Finding, in EPA's view, causes such coal mines to become subject to regulation under those programs.

18. Declaring the Endangerment Finding to be invalid, as NMA seeks, will redress the injury to NMA members in becoming subject to PSD regulation for GHG emissions. Absent the Endangerment Finding, EPA will not be legally obligated to regulate GHG emissions from new motor vehicles, and indeed EPA will be legally prevented from issuing such regulations. As a result, absent the Endangerment Finding, NMA members will not become subject to PSD regulation for GHG emissions.

C. Standing as a Result of Improper Definition of "Air Pollutant"

19. NMA challenges EPA's determination that all six GHGs are a single "air pollutant" that will be regulated in units of CO_2e. NMA asserts that had EPA not improperly defined the six GHGs as a single pollutant in units of CO_2e, EPA could not validly have determined that motor vehicle emissions of methane "cause or contribute" to air pollution which "may reasonably be anticipated to endanger the public health or welfare" within the meaning of CAA § 202(a)(1). NMA asserts that if, as the CAA requires, methane were defined as a separate air pollutant, EPA would have been required to find that new motor vehicles do not emit sufficient methane to "cause or contribute" to such air pollution.

20. As a result, NMA suffers injury in fact that was caused by EPA's improper definition of the term "air pollutant." Had EPA properly defined methane as a separate "air pollutant"—and therefore found that methane emissions from new motor vehicles and new motor vehicle engines do not cause or contribute to air pollution—EPA would not be legally authorized to regulate methane emissions under CAA § 202(a)(1). In that event, coal mines would not be "major" sources of methane emissions and therefore subject to regulation under the PSD program.

21. NMA's injury in this regard would be redressed if the improper definition were invalidated, as NMA seeks here. Given such invalidation, EPA could not validly conclude that methane emissions from new motor vehicles and new motor vehicle engines "cause or contribute" to air pollution, EPA could not therefore regulate such methane emissions, and EPA could not therefore make coal mine methane emissions subject to PSD and Title V regulation.

D. Standing as a Result of Loss of Markets

22. More than 90 percent of coal produced in the United States is sold to electric generating units ("EGUs") as fuel. Almost the entire balance is sold to other large industrial customers as fuel.

23. Because of the Endangerment Finding and the Motor Vehicle Rule that directly results from such Endangerment Finding, virtually the entire market

for coal will become subject to PSD regulation for GHG emissions. CO_2 is the inevitable byproduct of the combustion of coal and other fossil fuels. Thus, any EGU or other facility that emits CO_2 in amounts above the statutory 100 tpy PSD level,[13] or above the proposed Tailoring Rule 25,000 tpy PSD threshold, is a "major" source of CO_2 emissions and therefore subject to PSD regulation for such emissions.

24. EPA data confirm that virtually all EGUs and other industrial facilities that purchase coal will be subject to PSD regulation for CO_2e emissions as a result of the Endangerment Finding. According to EPA, of the total of 2,237 existing EGUs that combust fossil fuels, all emit more than 100 tpy of CO_2e and 2,076 emit more than 25,000 tpy of CO_2e, with CO_2 accounting for the vast majority of the CO_2e.[14] EPA data for other large industrial facilities that burn coal show similar numbers.[15]

25. Because these existing facilities will be "major" sources of GHG emissions for purposes of the PSD program, they will not be able to make "major modifications" without undertaking BACT to control CO_2 emissions. According to EPA, existing coal-fired EGUs and other industrial facilities frequently undertake

[13] EGUs and other large industrial facilities to which coal is sold are set forth on the CAA § 169(1) list and are therefore subject to the 100 tpy PSD "major" source threshold.

[14] Exhibit A hereto at 11.

[15] *Id.* at 16-52.

modifications.[16] Given EPA's Endangerment Finding and resulting motor vehicle regulations, when such facilities make modifications, they will become subject to BACT for their CO_2 emissions.

26. There is significant uncertainty at this point as to exactly what the nature of BACT for GHGs will be for existing coal plants that undertake "major modifications." EPA has authored a document indicating that coal-fired EGUs could be required to improve efficiency by 2 percent and possibly by as much as 5 percent.[17] These efficiency improvements would be obtained through a variety of investments to modernize the plants, including "optimizing the performance of any of the feed water, boiler, turbine-generator, condenser, heat rejection, and auxiliary systems, improving control systems, installing higher efficiency pumps, fans, and drives, and reducing the moisture content of solid fuels." All of these improvements would cost money, likely in the tens of millions or even hundreds of millions of dollars.

27. Moreover, any new EGU or large industrial facility that uses coal will

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[16] Beginning in the early 2000s, EPA began a series of enforcement actions against coal-fired electric utilities alleging that they had undertaken numerous "major modifications" that subjected them to PSD requirements. According to EPA's enforcement website, since 2002 it has entered into settlements with 19 different companies, with a number of the settlements covering multiple coal-fired powerplants. *See* http://www.epa.gov/oecaerth/resources/cases/civil/caa/coal/index.html. EPA has also pursued enforcement actions growing out of alleged "major modifications" of coal-fired cement manufacturing facilities. *See* http://www.epa.gov/oecaerth/civil/caa/cement/index.html.

[17] U.S. EPA, *Technical Support Document for the Advanced Notice of Proposed Rulemaking for Greenhouse Gases; Stationary Source, Section VII*, June 2008, Exhibit B hereto, at 16-19.

unquestionably have a PTE for CO_2 above either the 100 tpy statutory or 25,000 tpy proposed Tailoring Rule threshold or indeed above whatever threshold is included in the final Tailoring Rule. Thus, any such facilities will be obligated to undertake CO_2 BACT. Because of strong demand for new power generation, there has been strong interest in the construction of new coal-fired EGU over the last decade. According to the Department of Energy, as of October 2009, 37 new coal-fired powerplants representing 19,998 megawatts were under construction, near construction or permitted.[18]

28. This demand, however, has proved fragile, as just the threat of CO_2 regulation has contributed to a wave of cancellations and delays. According to the firm SourceWatch, 18 new proposed coal units were cancelled in 2009.[19]

29. Although EPA has not yet indicated specifically what BACT requirements will be for coal-fired EGU GHG emissions, any technology to reduce GHG emissions will cost money. Moreover, in a recent decision involving a coal-fired powerplant, EPA ruled that the developer, in evaluating BACT options, was required to consider utilizing natural gas as a boiler fuel instead of coal.[20] Similarly, EPA recently convened a task force for the purposes of considering what BACT should be for a number of different types of facilities. A number of task

[18] *See* http://www.netl.doe.gov/coal/refshelf/ncp.pdf.

[19] *See* http://www.sourcewatch.org/index.php?title=Portal:Coal_Issues.

[20] *See* EPA Order, Exhibit C hereto, at 7-10.

force members recommended that coal plant developers should consider substitution of natural gas as BACT.[21]

30. In sum, GHG BACT will result in additional costs for coal plants and potentially lead to conversion of coal plants to natural gas plants. The Endangerment Finding, therefore, causes injury in fact to NMA members through loss of markets for their coal. That injury would be addressed if the Endangerment Finding were overturned, because EPA in that event would not be authorized to regulate GHG emissions through the PSD process.

E. NMA Associational Standing

31. NMA has standing to bring this petition on behalf of its members. As shown above, individual NMA members have standing to bring this petition in their own right. Moreover, the interests at stake here are the interests that NMA was formed to protect. As a part of advocating in public forums for the interests of its members, NMA frequently files comments on environmental issues affecting mining with the EPA, filed comments on the Endangerment Finding before the Agency, and frequently litigates in court on behalf of mining, including on environmental issues.[22]

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[21] *See* Exhibit D hereto.

[22] For example, NMA was a litigant in the recent cases of *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008); *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008); and *NRDC v. EPA*, 550 F.3d 561 (D.C. Cir. 2008).

IV. Conclusion

32. I attest under penalty of perjury to the truth and accuracy of the foregoing facts.

Katie Sweeney

DISTRICT OF COLUMBIA, ss.

Subscribed and sworn before me this 15 day of April, 2010.

July 14, 2012
My Commission Expires:

District of Columbia : SS
Subscribed and Sworn to before me
this 15 day of April, 2010
John Clermont Egan
Notary Public, D.C.
My commission expires July 14, 2012

EXHIBIT M

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 Respondents.	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

DECLARATION OF MARK G. ELLIS, INDUSTRIAL MINERALS ASSOCIATION – NORTH AMERICA

I, Mark G. Ellis, swear or affirm under penalty of perjury the following:

1. I am President of the Industrial Minerals Association – North America ("IMA-NA"), Petitioner in the above-captioned case, and I have firsthand knowledge of the facts set forth herein.

2. I am more than twenty-one (21) years of age and I am competent to make this declaration.

3. I have been with IMA-NA since February 2004.

4. IMA-NA is a trade association that represents the interests of producer member companies that extract and process industrial minerals, and associate member companies that provide goods and services to the industrial minerals industry. IMA-NA represents approximately 50 member companies that produce ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, magnesia, mica, soda ash, talc, wollastonite, and other industrial minerals that are key components of glass, paper, cosmetics, construction materials, electronics, and numerous other materials and products. IMA-NA also represents approximately 55 associate member companies, which include equipment manufacturers, environmental consultants, trucking companies, Class I railways, and other industries that service the industrial minerals industry.

5. IMA-NA is a member of the Coalition for Responsible Regulation, Inc.

6. IMA-NA was incorporated in 2002 for the purpose of coordinating the efforts of the industrial minerals industry to address problems of common concern to the industry; to create a better understanding with the public of the problems affecting the industrial minerals industry; to protect and advance the interests of the industry; to represent and act for the industry before all divisions of

government; to undertake educational initiatives; and to act on behalf of the industry where group, rather than individual, action is more effective, desirable, and economical.

7. IMA-NA is governed by a General Assembly that consists of member company representatives from each of the industrial minerals sections, which are divided by type of mineral produced. The members of each section elect a chairman who also serves as a member of both the Board of Directors and the Executive Committee. The Executive Committee is comprised of the officers of the Association, and all industrial mineral section chairpersons who are not officers. IMA-NA has six standing committees; one of those committees, the Environmental Affairs Committee, also has a CO_2 Task Force that addresses member concerns related to the regulation of carbon dioxide.

8. Member companies must pay annual dues of between $10,000 and $12,500. Associate companies also are required to pay annual dues, although the dues vary.

9. IMA-NA's member companies will face substantial new regulation and increased costs as a result of the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Finding"), and the vehicle and stationary source regulation that flows from the Endangerment Finding.

10. As required by the Clean Air Act, upon issuance of the Endangerment Finding, EPA moved forward with regulating emissions of greenhouse gases ("GHGs") from motor vehicles. On May 7, 2010, EPA and the National Highway Traffic Safety Administration ("NHTSA") issued vehicle greenhouse gas emission standards and average fuel economy standards for light-duty vehicles. 75 Fed. Reg. 25,324 (May 7, 2010). EPA maintains that this action triggered regulation of GHG under other provisions of the Clean Air Act, specifically stationary source permitting under the Prevention of Significant Deterioration ("PSD") and Title V programs. When the stationary source provisions are triggered, the statutory text would require all sources that emit more than 100 tons per year of carbon dioxide equivalent to apply for a Title V operating permit. New sources that emit more than 100 tons per year or 250 tons per year of carbon dioxide equivalent (depending on the source category), and sources that undertake major modifications at existing sources that are projected to increase emissions of greenhouse gases by any amount, would be required by statute to go through the PSD permitting process. *Id.*

11. On June 3, 2010, EPA published the "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" (the "Tailoring Rule"). 75 Fed. Reg. 31,514 (June 3, 2010). EPA proposes in its Tailoring Rule to phase-in the statutory thresholds for triggering stationary source permitting for GHG.

Pursuant to the Tailoring Rule, beginning in January 2011, new or modified sources that must undergo PSD permitting for pollutants other than greenhouse gases, but also will increase emissions of greenhouse gases by 75,000 tons per year of carbon dioxide equivalent, will trigger PSD permitting for greenhouse gases. As of July 1, 2011, new sources with the potential to emit 100,000 tons per year of carbon dioxide equivalent will be considered major sources subject to PSD review, and major modifications resulting in net greenhouse gas emissions increases of 75,000 tons per year of carbon dioxide equivalent will be subject to PSD review. Title V permitting for greenhouse gases also will be phased in: between January and July 2011, only those sources that must apply for, renew, or revise their permits for pollutants other than greenhouse gases must incorporate greenhouse gas applicable requirements into their Title V permits, and after July 2011, sources that emit more than 100,000 tons per year of carbon dioxide equivalent will be required to obtain a Title V permit. EPA states in the Tailoring Rule that it will undertake another rulemaking that will take effect by July 1, 2013, that may lower these thresholds for PSD and Title V applicability. I am aware that the Tailoring Rule and the increased thresholds are being challenged.

12. As part of the PSD permitting process, sources will be required to demonstrate that they have installed the Best Available Control Technology ("BACT") for carbon dioxide. The process of PSD and Title V permitting for

carbon dioxide emissions, including a BACT demonstration for carbon dioxide, will require a substantial investment of time, resources, and money by IMA-NA member companies.

13. Under the statutory thresholds for emissions of carbon dioxide, most, if not all, of IMA-NA's member companies will be required to address emissions of carbon dioxide through Title V and PSD permitting.

14. For some industrial minerals, the emission of carbon dioxide is an inherent and unavoidable aspect of converting the natural feedstock into the finished product. For example, lime is produced by driving carbon dioxide from calcium carbonate. The industrial process used to produce magnesia liberates carbon dioxide from the source mineral, magnesite. All domestic soda ash is produced by driving carbon dioxide from trona or other naturally-occurring carbonate minerals. Nearly all foreign soda ash is produced by a synthetic method that does not directly use trona or carbonate minerals but nonetheless causes the unavoidable release of carbon dioxide from chemical reactions that are integral to the process. Synthetic soda ash production is much more energy intensive, and the synthetic process emits up to twice as much carbon dioxide per ton of soda ash, as compared to the natural process. IMA-NA member companies in these industries would be irreparably harmed by the EPA's greenhouse gas regulations because the

only way they could reduce the inherent emissions of carbon dioxide from these processes would be to produce less lime, soda ash, or magnesia.

15. At least eleven (11) of IMA-NA's member companies emit in excess of 25,000 tons per year of carbon dioxide equivalent. Even though 25,000 tons per year is less than the initial thresholds found in the Tailoring Rule, the suite of GHG regulations issued by the EPA creates substantial uncertainty for companies that emit 25,000 tons per year or even 100 tons per year of carbon dioxide equivalent. Such companies face the prospect of stricter and potentially inconsistent regulation by the states, the prospect of lower emissions thresholds under the upcoming July 1, 2013 modifications to the Tailoring Rule, and the prospect that the Tailoring Rule will not withstand judicial review. This uncertainty irreparably harms the IMA-NA's member companies' ability to plan and conduct business operations.

16. Few if any feasible means are available for IMA-NA member companies to reduce GHG emissions. This is true even in industries where the liberation of carbon dioxide from feedstocks is not an integral part of the production process. It is necessary to use boilers, heaters, dryers, engines, generators, compressors, and other fossil fuel combustion units to extract and process industrial minerals. Fossil fuel combustion units are widespread in the industry and the emission of carbon dioxide from such units is unavoidable. In

some cases it may be possible to switch the combustion units to fuels that are less carbon intensive than their current fuels. However, switching fuels is often not technically possible, it requires substantial capital and operating costs, it may require regulatory approval and it can result in other adverse environmental impacts. In some cases it may be possible to reduce GHG emissions through conservation or efficiency measures. However, these measures are not always possible, can require substantial capital and operating costs, and have limited effectiveness. I am aware of no other commercially-feasible means to reduce GHG emissions from IMA-NA member companies except to downsize those companies' operations, which would obviously cause irreparable harm. It is not currently possible to capture and sequester carbon on a commercial scale, and traditional emissions control devices such as scrubbers and thermal oxidizers are not effective on carbon dioxide. A number of member companies have already begun to voluntarily take those steps that are feasible to reduce their GHG emissions. The lack of options for achieving GHG reductions is likely to cause direct and irreparable harm to IMA-NA member companies by raising the costs of complying with potential BACT requirements. The lack of options for complying with GHG regulations is already harming member companies irreparably by creating uncertainty that discourages IMA-NA members from pursuing business opportunities.

17. The GHG regulations will irreparably harm IMA-NA member companies by causing their customers to switch to alternative products or to switch to foreign suppliers that are not subject to the regulations, thus causing the IMA-NA member companies to lose market share and simultaneously reducing the size of the market. In addition, IMA-NA member companies will be unable to pass the full costs of compliance to their customers and will instead be forced to absorb a portion of the compliance costs. Alternative products are available for a number of commercial applications of industrial minerals, including diatomite, magnesia, soda ash and clays. Producers of soda ash and magnesium are particularly vulnerable to foreign competition. This would also cause environmental harm because, as described above, foreign soda ash production uses a synthetic process that emits up to twice as much carbon dioxide as the natural process used domestically.

18. Furthermore, IMA-NA member companies, particularly those within the borate, calcium carbonate, feldspar, industrial sand, mica, and soda ash industries, are extremely energy intensive. Based on a survey of member companies conducted in 2008, each of these industries allocate between 30 percent and 40 percent of total expenses to electricity and other direct costs of energy.

19. In light of the substantial amount of electricity that IMA-NA member companies use in their operations, any increase in the cost of electricity resulting

from the regulation of greenhouse gases emitted from coal-fired electric generation units will increase IMA-NA member companies' costs, thereby inflicting injury on these member companies.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 9-13-10.

Mark G. Ellis

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 3rd day of June 2011, served a copy of the foregoing documents electronically through the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Ashley C. Parrish
Ashley C. Parrish