

**National Association of Home Builders**

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December 30, 2009

EPA Docket Clerk  
United States Environmental Protection Agency  
Air and Radiation Docket  
EPA Docket Center (EPA/DC)  
Mail Code 28221T  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460

**SUBMITTED VIA HAND DELIVERY AND E-MAIL**

**RE: MULTIPLE AIR DOCKET MATTERS RELATED TO GREENHOUSE GAS  
REGULATION**

Dear Sir/Madame:

On December 28, 2009, the National Association of Homebuilders ("NAHB") electronically filed comments in the following rulemaking docket: *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292 (Oct. 27, 2009), Docket Number EPA-HQ-OAR-2009-0517.

Because the NAHB believes that the Tailoring Rule is intertwined with other EPA actions under the Clean Air Act, the NAHB requests that a copy of the NAHB's Tailoring Rule comments also be filed in each of the following dockets or in the appropriate files for matters lacking assigned docket numbers:

(1) the pending remand of the International Center for Technology Assessment's ("ICTA's) rulemaking petition to EPA, *see Control of Emissions From New Highway Vehicles and Engines: Notice of Denial of Petition for Rulemaking*, 68 Fed. Reg. 52,922 (Sept. 8, 2003) (Docket Number A 2000 04), *petitions for review dismissed or denied, Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir.), *en banc denied*, 433 F.3d 66 (D.C. Cir. 2005) (per curiam), *reversed and remanded*, 549 U.S. 497 (2007), *remanded to EPA*, 249 Fed. Appx. 829 (D.C. Cir. 2007) (per curiam);

- (2) the unified Advance Notice of Proposed Rulemaking (“ANPRM”) concerning GHG regulation as a whole under the Clean Air Act (“CAA”), see *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354 (July 30, 2008) (Docket Number EPA-HQ-OAR-2008-0318);
- (3) EPA’s “Endangerment Finding,” see 74 Fed. Reg. 66,496 (Dec. 15, 2009) (Docket Number EPA-HQ-OAR-2009-0171);
- (4) EPA’s joint rulemaking setting new fuel economy/GHG emission standards for new motor vehicles with the Department of Transportation’s National Highway Traffic Safety Administration (“NHTSA”), see *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) (Docket Number EPA-HQ-OAR-2009-0472);
- (5) the EPA Environmental Appeals Board’s decision in *In re Deseret Power Elec. Coop.*, PSD Permit No. PSD OU 0002 04.00, PSD Appeal No. 07 03 (Nov. 13, 2008), affirmed by Administrator Johnson (Dec. 18, 2008) (see next entry; see also 74 Fed. Reg. 55,300 (noting Johnson Memorandum “followed a decision by the Environmental Appeals Board (EAB) in *In re Deseret Power Electric Cooperative*”));
- (6) Administrator Johnson’s interpretation of the coverage of the PSD program in Memorandum Decision, Stephen L. Johnson, Administrator, “EPA’s Interpretation of Regulations That Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program” (Dec. 18, 2008), *publicly noticed but not published in Clean Air Act Prevention of Significant Deterioration (PSD) Construction Permit Program; Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program*, 73 Fed. Reg. 80,300 (Dec. 31, 2008) (no Docket Number assigned initially; later included in Docket Number EPA-HQ-OAR-2009-0597, the docket established to reconsider the Johnson Memorandum); see also 74 Fed. Reg. at 55,299 (EPA itself noting that the Johnson Memorandum is also included in the Tailoring Rule docket);
- (7) EPA’s reconsideration of the Johnson Memorandum based on a petition by the Sierra Club and others, in *Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program*, 74 Fed. Reg. 51,535 (Oct. 7, 2009) (Docket Number EPA-HQ-OAR-2009-0597); and
- (8) the Center for Biological Diversity’s and 350.org’s pending Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act (Dec. 2, 2009) (Docket Number unavailable or unknown).

For this purpose, eight copies of the NAHB’s Tailoring Rule comments have been enclosed with this letter in the hand delivery. The e-mailed version consists of this cover letter followed immediately by NAHB’s comments in a single pdf.

If you have any questions about this filing in multiple dockets or if including the NAHB's Tailoring Rule comments in any of the matters above will not be possible, please feel free to contact me (202.266.8327), [mwatkins@nahb.com](mailto:mwatkins@nahb.com), at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read 'Matthew Watkins', with a long horizontal flourish extending to the right.

Matthew Watkins  
Environmental Policy Analyst  
Environment, Labor, Health & Safety

attachments

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December 28, 2009

Lisa Jackson, Administrator  
United States Environmental Protection Agency  
EPA Docket Center  
EPA West (Air Docket)  
Mailcode: 2822T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

SUBMITTED BY ELECTRONIC MAIL  
Docket Number: EPA-HQ-OAR-2009-0517

RE: Prevention of Significant Deterioration and Title V Greenhouse Gas  
Tailoring Rule

Dear Administrator Jackson:

On behalf of the National Association of Home Builders (NAHB), I respectfully submit the following comments on the notice of proposed rulemaking, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, as published in the *Federal Register* (Volume 74, No. 206) on October 27, 2009. NAHB represents over 200,000 individuals and firms who develop land, and construct homes and multi-family dwellings, as well as light commercial and industrial projects. NAHB's builder members will construct about 80 percent of the new housing units built in 2009.

As the voice of the homebuilding industry, NAHB is concerned about the impacts that any regulation of greenhouse gases (GHGs) under the Clean Air Act (CAA or Act) will have on our members' ability to provide safe, affordable housing for a growing population. EPA recently determined that greenhouse gas (GHG) emissions endanger public health and welfare. According to today's proposal, this determination triggers the

vast statutory authority of the CAA over GHGs, which could result in regulations affecting virtually every industrial and economic sector.<sup>1</sup> Because those industries directly regulated under the CAA will pass along compliance costs, any additional regulations will hinder the ability of our members to provide affordable and energy efficient housing. Likewise, these rules could prevent our industry from recovering from the current economic climate and prevent the creation of new homebuilding jobs. The many industries that supply the housing industry with raw materials will be adversely affected, increasing the cost of materials and equipment while reducing availability, which will have a significant detrimental impact on any one home as well as the homebuilding industry generally. Additionally, the increased regulation of energy generation may force American homeowners to pay significantly more for electricity. Finally, prevention of significant deterioration (PSD) and Title V could force the direct regulation of the housing industry under the CAA for the first time by triggering permitting requirements on countless multifamily buildings, mixed-use properties, and planned communities across the nation.

NAHB respectfully submits these comments to emphasize the significant impacts that regulating GHGs under the CAA will have on an industry that in the past has not been directly regulated. NAHB appreciates and commends the Agency's effort to account for the impacts on economic sectors that would be directly affected by PSD and Title V and its attempt to provide appropriate relief. Nonetheless, NAHB urges the Agency to consider the indirect impacts of regulation of GHGs under the CAA on the same industries EPA seeks to exempt. Additionally, the Agency's legal reasoning behind the proposal must be as robust as possible, so that a reviewing court will ultimately not find that EPA has taken steps requiring the housing industry to obtain PSD preconstruction and/or Title V operating permits. EPA should exercise the discretion the Supreme Court has provided the Agency by grounding "its reasons for action or *inaction* in the Statute" and disclaim or defer any regulatory action for the reasons stated below and in the attached legal analysis.

#### **A. The Need to Improve Energy Efficiency as a Means to Reduce GHG Emissions is Apparent**

It has been reported that residential and commercial buildings account for about 40% of all the overall GHG emissions, which includes the direct emissions

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<sup>1</sup> *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55292 (October 27, 2009).

from households as well as their electricity consumption.<sup>2</sup> Recognizing this, a number of voluntary initiatives have been implemented to reduce the overall contributions associated with building related energy use, such as improving energy efficiency and incorporating green building practices into the mainstream. Similarly, because the building process has evolved over time to produce increasingly more efficient structures, it is evident that focusing on retrofitting legacy housing stock is the cost-effective means to address GHG emissions from the residential sector.

### **1. Actions regarding energy efficiency and sustainability are already making marked progress and reducing GHG emissions**

Over the past two decades, NAHB and its members have facilitated the adoption of energy efficiency practice by designing and disseminating green building resources for the residential construction, land development and remodeling industries so members could begin to incorporate those sustainable practices into their daily routines. As a result, attention to energy efficiency, water and resource conservation, sustainable and recycled products, and indoor air quality are increasingly part of the everyday process of home building. NAHB and its members have developed a significant amount of experience and expertise in this arena, which we believe can provide a blueprint for success. We are hopeful that the Agency will rely on NAHB and the successes we have garnered as EPA develops and implements its action plan to boost energy savings and create green jobs. As NAHB's efforts have shown that voluntary initiatives and not mandates are one key to obtaining builder and consumer buy-in that garners measurable results.

#### **a. Energy codes**

NAHB has long supported and taken steps to improve the energy efficiency of the U.S. housing stock. Through participation in the International Code Council (ICC) building code development process, NAHB consistently supports proposals that would increase energy efficiency benchmarks for new homes, so long as these proposals are flexible enough to account for regional and climactic differences and do not negatively affect affordability by providing less than cost-effective paybacks.

As a result, new homes are significantly more energy efficient than older homes. In fact, homes constructed after 1991 account for only 2.5% of all energy

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<sup>2</sup> Paul Emrath, PhD, and Helen Fei Liu, PhD, *Residential Greenhouse Gas Emissions*, (April 2007), available at <http://www.nahb.org/generic.aspx?sectionID=734&genericContentID=75563>

used, while older homes account for 17.1% of national energy consumption.<sup>3</sup> Likewise, a home built to the 2009 International Energy Conservation Code (IECC) is roughly 12% to 18% more efficient than a home constructed to the 2006 IECC thresholds, depending on the climate where it is built, and nearly twice as efficient as a home built to the prevailing codes in 1985. Adding to this progress, in March 2009, NAHB unanimously approved a policy supporting efforts to achieve a 30 percent increase in energy efficiency of residential buildings above the 2006 Edition of the IECC by 2012. As the builder of eighty percent (80%) of new homes in the U.S., NAHB's members continue to play a significant role in directing and implementing these codes as well as taking other steps to improve the sustainability of the homes they build.

#### **b. Green building**

In addition to meeting the established energy codes, NAHB's National Green Building Program enables homebuilders to voluntarily attain above-code benchmarks in categories including energy, water, and resource efficiency through the American National Standards Institute (ANSI)-approved National Green Building Standard (Standard), which is applicable to both new and existing housing.<sup>4</sup> Importantly, the Standard also applies to remodeling and renovation projects so that home building professionals can voluntarily contribute to reducing this single biggest source of residential energy use, the legacy housing stock.

NAHB has led efforts to facilitate and standardize residential energy efficiency and green building practices, and has taken a number of steps since the late 1990's to move these practices into the mainstream. NAHB established its Green Building Subcommittee in 1998, and the first annual National Green Building Conference was held in 1999 for builders, remodelers and developers.

Now, the exploding market for sustainable, environmentally friendly and recycled building products, along with the greater availability of educational opportunities, has allowed NAHB to provide the home-buying public with a nationally recognizable standard definition of green building and related programs and information addressing education, recognition, and market awareness. The National Green Building Program offers many resources and tools to help builders, remodelers, home building associations, and homeowners learn how to build green, and the benefits of doing so.<sup>5</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> National Association of Home Builders, *2008 National Green Building Standard (ICC 700-2008)*, (2009).

<sup>5</sup> <http://www.nahbgreen.org/>

It is estimated that half of the homes built by NAHB members incorporate at least some green practices into their development, design, and construction. Much of that effort is due to NAHB's vision and commitment to be a leader in energy, water and environmental sustainability. Clearly, NAHB has taken a number of important steps to educate its members, and facilitate and advocate sustainable practices. NAHB believes that adopting and/or adapting federal initiatives that mirror and build upon these ongoing and successful efforts will prove to be the most efficient and effective way to meet the goals of reducing GHG emissions from the housing industry.

**2. The greatest energy efficiency savings can be found in existing housing**

While energy codes and green building for new housing are important steps to future sustainability, addressing the legacy housing stock is the most cost-effective means of reducing GHG emissions from the residential sector. As Table 1 shows, the older housing stock uses more energy per square foot than newer homes.

**Table 1:** Energy Consumption and Expenditures (Source: RECS, 2005)

Year built	Households (millions)	Energy consumption per square foot (thousand Btu's)	Expenditures per square foot (Dollars)
Before 1940	14.7	50.8	0.87
1940 to 1949	7.4	49.9	0.87
1950 to 1959	12.5	47.6	0.86
1960 to 1969	12.5	48.5	0.9
1970 to 1979	18.9	44.5	0.89
1980 to 1989	18.6	41.3	0.85
1990 to 1999	19.3	38.6	0.78
2000 to 2005	9.2	34	0.69

Correspondingly, investing in improvements to existing homes can result in a big energy savings. President Obama concurs. In a speech on December 15, 2009 at a Home Depot in Northern Virginia, he stated,

“Homes built in the first half of the last century can use about 50 percent more energy than homes that are built today. And because most of our homes and office aren't energy-efficient, much of that energy just goes to waste, while costing our families and businesses money they can't afford to throw away.

The simple act of retrofitting these buildings to make them more energy-efficient -- installing new windows and doors, insulation, roofing, sealing leaks, modernizing heating and cooling equipment -- is one of the fastest, easiest and cheapest things we can do to put Americans back to work while saving families money and reducing harmful emissions.”<sup>6</sup>

NAHB agrees. For example, a 2008 study for the California Homebuilding Foundation revealed that spending \$10,000 to retrofit a typical home built in the 1960s could eliminate about 8.5 tons of greenhouse gas emissions, whereas increasing the energy efficiency of a new home by an additional 35% would cost about \$5,000, but only cut emissions by 1.1 tons. In other words, retrofitting existing homes with energy-efficient features is four to eight times more carbon- and cost-efficient than adding further energy efficiency requirements to new housing. Recognizing this, in May 2009, Vice President Biden directed the White House Council on Environmental Quality (CEQ) to develop a proposal for federal action that would stimulate “green” job creation and boost energy efficiency by retrofitting existing homes. In response, CEQ collaborated with several federal departments and agencies to produce *Recovery Through Retrofit*, the Administration’s strategic plan to achieve this goal. Through this effort to bolster energy efficiency in the legacy housing stock, the White House will also address the issue of GHG emissions reductions from the residential sector in the most cost-efficient manner possible.

Counter to this initiative, however, EPA seems poised to regulate all housing through the PSD and Title V provisions of the CAA.<sup>7</sup> While today’s action appears to exempt residential multifamily structures and the possible aggregation of residential subdivisions, it is uncertain if EPA’s legal explanation will withstand the legal challenge that will inevitably come from environmental special interest groups.

## **B. Regulating Greenhouse Gases Via The Clean Air Act Is Imprudent**

### **1. The existing Clean Air Act is ill-suited to regulating GHGs**

NAHB is a long-time participant on EPA’s Clean Air Act Advisory Committee (CAAAC), and has been involved in a number of CAA-related issues including transportation conformity, national ambient air quality standards

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<sup>6</sup> Barack Obama, Speech: *Remarks by President on Energy Efficiency and Job Creation*, (2009) available at [http://www.cspan.org/pdf/wh121509\\_obama.pdf](http://www.cspan.org/pdf/wh121509_obama.pdf)

<sup>7</sup> 42 U.S.C. §§ 7470 - 7479

(NAAQS), and state implementation plans (SIPs) provisions. Given this body of experiences, NAHB cannot fathom attempting to control GHG emissions using the CAA, or any other established statute, (i.e. Endangered Species Act) not specifically designed to address GHGs. NAHB's standing policy is to prevent federal agencies from using existing federal environmental laws or their underlying regulatory regimes to curtail or direct future land-use activities as a means to reduce GHG emissions. The use of existing legislation to regulate GHG emissions is simply a surrogate strategy to inappropriately apply a statute to achieve an end for which it was never intended. This is both unwise and ineffective. Recognizing this, the EPA Administrator Lisa Jackson has not hesitated to voice the Agency's concerns over regulating greenhouse gases under the CAA and has stated that new legislation is imperative to reducing greenhouse gas emissions.<sup>8</sup> EPA's December 7, 2009 endangerment finding and this proposal, however, are in conflict with this view and are premature given the intensive ongoing activity on comprehensive climate change legislation in Congress.

The House of Representatives passed H.R. 2454, American Clean Energy and Security Act of 2009 (Waxman /Markey legislation). It establishes a cap-and-trade program for the purpose of regulating greenhouse gas emissions; it also exempts the use of most provisions of the CAA including the PSD and Title V programs. Similarly, Senators Boxer and Kerry have introduced S. 1733 in the Senate to address greenhouse gas pollution. Comprehensive GHG legislation is in progress and EPA is wasting its resources on this and other GHG proposals. NAHB believes it prudent to discontinue the process of regulating GHG under the CAA and not impede Congress' efforts to develop a comprehensive plan for addressing GHG emissions. Accordingly, as explained in the attached legal analysis, EPA's interpretation of the congressional intent underlying the relevant PSD and Title V provisions of the Clean Air Act, together with the further legal considerations in the attached analysis, provide an appropriate basis for exempting from Clean Air Act regulation the housing industry and other, similarly situated small GHG sources.

## **2. The proposal's legal arguments should be enhanced and extended**

By approaching the endangerment finding, vehicle emission standards, and PSD and Title V initiatives as "stand alone" actions, EPA has taken an approach that threatens to overlook the full consequences of various regulatory actions. In NAHB's comments on EPA's proposed endangerment finding, NAHB

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<sup>8</sup> E&E Publishing, Interview: *EPA Administrator outlines agency goals, priorities*, (February 27, 2009) available at [http://www.eenews.net/eep/epa\\_jackson/interview\\_full](http://www.eenews.net/eep/epa_jackson/interview_full)

requested that EPA fully consider the ramifications of any decision to make a positive finding. While the Tailoring Rule preamble responds to NAHB's concerns and gives a measure of critically needed relief to the homebuilding industry from the repercussions of PSD and Title V permitting, NAHB is concerned that this relief be made as permanent as possible, both as regards the possibility of later administrative revision and as regards any possible alterations as a result of judicial review.

The attached legal analysis is therefore respectfully provided to help further these goals. In particular, the legal analysis expands on and extends EPA's logic concerning the absurdity of applying the Clean Air Act's PSD and Title V provisions as written to small sources of GHG emissions. As further explained in the analysis, because regulation of small sources of greenhouse gases would undermine Congressional intent, the Agency should permanently exempt the housing industry (together with other, similarly situated small GHG emissions sources) from being regulated under the PSD and Title V programs.

### **C. Regulating GHG Via the CAA Will have Severe Impacts**

On December 7, 2009, EPA announced that specific greenhouse gases, namely carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), perfluorocarbons (PFC), hydrofluorocarbons (HFC), and sulfur hexafluoride (SF<sub>6</sub>), endanger public health and welfare.<sup>9</sup> It also stated that emissions from cars and light-duty trucks cause this air pollution. As interpreted by EPA, the Act now directs the Agency to establish emissions standards for new vehicles and new vehicle engines, which EPA proposed on September 28, 2009.<sup>10</sup> While not explicit, the endangerment finding and the impending tailpipe regulations could well trigger other provisions of the CAA, which direct the Agency to regulate other mobile sources *and* stationary sources that emit greenhouse gases. Notwithstanding today's action, NAHB believes that the permitting requirements of PSD and Title V will directly and indirectly subject our members to constraints on the use of construction equipment and materials, create costly delays, increase supply costs, establish never before seen permitting requirements, and increase the cost of energy, all of which will significantly affect accessibility to affordable housing. NAHB is also concerned that the Agency has not properly

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<sup>9</sup> *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66496 (December 15, 2009).

<sup>10</sup> *Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 74 Fed. Reg. 49454 (September 28, 2009).

accounted for many of the *direct* and *indirect* impacts stemming from the endangerment finding or this proposal.<sup>11</sup>

While homebuilding is not a source category of air pollution traditionally regulated by EPA under the CAA, addressing GHGs under the Act will certainly lead to significant adverse impacts, both direct and indirect, on the industry. As explained below, these impacts necessarily would have significant negative consequences on the affordability of new homes, making new housing inaccessible for millions of residents while slowing the path toward the creation of energy efficient housing.

Today's action seeks to increase the threshold for PSD and Title V permitting for stationary sources. Currently, sources with the potential to emit 100 and 250 tons per year of any air pollutant are subject to PSD and Title V programs. Today's proposal seeks to increase that threshold for sources of GHG emissions to 25,000 tons per year of carbon dioxide equivalent (CO<sub>2</sub>e) for the next six years.<sup>12</sup> This proposal would seemingly exempt the housing industry from any direct impacts for at least a 6-year period. However, NAHB fears that homebuilders and land developers will ultimately suffer the direct impacts of the CAA's onerous permitting requirements and the imposition of control technologies on multifamily structures and land slated for residential development. Once greenhouse gases become "subject to regulation" within the meaning of the Act's PSD requirements, "major emitting facilities" must apply for pre-construction permits under PSD and operating permits under Title V with respect to such GHG emissions.<sup>13</sup>

PSD and Title V permitting pose several implications for the housing industry. First, the cost of raw materials, commodities (such as concrete and glass) and energy will increase substantially because the industries that supply the housing industry will be subject to these CAA permitting obligations. These permitting schemes could require the industries that supply materials to homebuilders to augment their processes, install emissions technology, increase

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<sup>11</sup> NAHB defines direct impacts as those situations where a regulation would require a homebuilder or land developer to obtain a GHG air permit to proceed with construction, including permits that impose best available control technology on homebuilders and land developers. Indirect impacts are situations where other sectors of the economy are required to obtain GHG air permits and/or are regulated directly under the Clean Air Act based on GHG emissions, and pass along the additional costs to land developers, homebuilders, and consumers.

<sup>12</sup> CO<sub>2</sub>e is defined as a metric used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). The CO<sub>2</sub>e for a gas is determined by multiplying the mass of the gas by the associated GWP. The applicable GWPs and guidance on how to calculate a source's GHG emissions in tpy CO<sub>2</sub>e can be found in EPA's "Inventory of U.S. Greenhouse Gas Emissions and Sinks," which is updated annually under existing commitment under the United Nations Framework Convention on Climate Change (UNFCCC).

<sup>13</sup> 42 U.S.C. §7475.

efficiencies or use costly non fossil-fuel energy sources, which could lead to higher prices for their goods and services. Second, certain large-scale multi-family properties or the aggregation of lots in a single-family subdivision development could be deemed to meet the proposal's potential to emit threshold of 25,000 tons per year, would unleash a torrent of permitting and regulatory requirements for these properties.

## 1. Direct impacts - Prevention of Significant Deterioration and Title V

Under today's action, any source with the potential to emit 25,000 tons of CO<sub>2</sub>e per year is subject to the requirements of the PSD and Title V programs. PSD applies to a "major emitting facility" that exceeds the prescribed threshold and requires a pre-construction permit for any new facility or modification to a facility that results in the increase of an air pollutant, in this case GHG.<sup>14</sup> Title V requires operating permits for any "major source" of air pollution. In both cases, the potential to emit an air pollutant is considered when making a determination if the facility needs a permit.

EPA's technical support document (TSD) cites space-heating, hot water heating and cooking as the end-use sources of CO<sub>2</sub> emissions in the residential sector.<sup>15</sup> In evaluating multi-family dwellings to determine if they meet the PSD threshold, EPA looked at the emissions from commercial furnaces, boilers, and hot-water heaters and concluded that multi-family structures larger than 68,000 square feet will exceed the statutory 250 tons per year threshold, affecting approximately 61,280 buildings. However, EPA based its estimates on actual emissions from buildings and did not include estimates that meet the statute's definition of "potential to emit" (PTE) or address other uncertainties.<sup>16</sup> Therefore, the actual number of buildings that would subject to PSD and Title V is far larger. In addition, it is not known how many multifamily buildings have the potential to emit more than 25,000 tons of CO<sub>2</sub>e per year and EPA's attempt to calculate PTE from the residential sector for this proposal is inconsistent with the statute's plain meaning of PTE.<sup>17</sup> While it is irrational to believe that a natural gas or fuel oil furnace, oven, stove, hot water heater or natural gas clothes dryer would operate twenty-four hours a day, seven days a week all year long, the plain reading PTE in the statute into account that absurdity. This simple observation

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<sup>14</sup> 42 U.S.C. §§ 7501 - 7509

<sup>15</sup> U.S. E.P.A., Technical Support Document (TSD), Supporting Material: *Regulating Greenhouse Gases under the Clean Air Act: Proposed Rule*, EPA-HQ-OAR-2008-0318.0077, EPA-HQ-OAR-2008-0318.0080, EPA-HQ-OAR-2008-0318.0089, EPA-HQ-OAR-2008-0318.0091 (2008).

<sup>16</sup> *Id.*

<sup>17</sup> U.S. E.P.A., Office of Air Quality Policy and Standards, *Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation*, (2009).

squarely proves the point that housing industry should be permanently exempt from the PSD and Title V program requirements.

Furthermore, the PSD permitting process alone, as it stands today, is extraordinarily time consuming and expensive. EPA estimates that the average time to process a PSD permit application is 7.2 months.<sup>18</sup> According to the proposal, the regulation of GHG emissions is expected to result in an additional 41,000 permit applications per year, which represents a more than a one hundred and forty-fold increase above the current volume.<sup>19</sup> The proposal also states that the number of Title V operating permits would exceed six million for facilities emitting more than 100 tons per year of GHG. Regulating GHG under the PSD and Title V programs would bring the permitting process conducted by state agencies to a virtual standstill and permitting times would be measured in decades instead of months.<sup>20</sup>

These delay costs are separate from and in addition to, the actual costs of applying for a permit. Application fees can be in the tens of thousands of dollars. This does not include the cost of hiring an environmental consultant to prepare the application or of legal counsel, if required. Air quality modeling, if required, can cost hundreds of thousands of dollars. All of these costs exclude the purchase and installation of pollution controls and the implementation of work practices that may be required under the permit's terms. The inclusion of any multifamily properties (or residential buildings) in PSD and Title V will unduly burden the permit process create extensive permitting delays prior to construction, increase the costs of entitling the property. Because all of these costs will be passed onto the consumer, the direct regulation of housing will ultimately decrease housing affordability. EPA can avoid this result by specifically exempting residential properties from the PSD and Title V programs.

## **2. Indirect effects**

In addition to the direct permitting effects on the industry, it is important to recognize that any GHG regulation under the CAA or pending legislation will lead to significant adverse indirect impacts on homebuilders, and, in turn, home affordability and accessibility due to the increased cost of building materials and energy costs.

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<sup>18</sup> U.S. E.P.A., NSR 90-Day Review Background Paper (2001) at 7

<sup>19</sup> 74 Fed. Reg. 535302 (October 27, 2009).

<sup>20</sup> *Id.*

### **a. Impacts on costs and availability of building materials**

NAHB has already analyzed the carbon intensity of building materials used to construct residential housing. In 2008, NAHB conducted a study of the embodied energy of a typical house. “In general embodied emissions are the greenhouse gas emissions generated from the production, transportation, installation, maintenance, and disposal of the materials and products used to build a house. However, our study focused primarily on the “cradle to gate” embodied emissions created during production, transportation, and installation.”<sup>21</sup> In NAHB’s analysis, software developed by Athena Sustainable Materials Institute called “Impact Estimator” was used to determine the embodied energy for a typical house.<sup>22</sup> Some of the manufactured products used as raw materials for housing that were part of NAHB’s analysis were glass manufacture, Portland cement, asphalt shingles, brick, plywood, and 2x4 wood studs. The GHG emissions from the manufacture, transportation and installation of these materials were calculated. The base-line home, which was a 2,420 square foot house with a basement, vinyl siding, 2x4 wood studs 16” on center, PVC framed windows with standard glazing and no garage. Based on those calculations, the baseline house had embodied emissions of 51.4 metric tons (M) CO<sub>2</sub>e.

To better understand the indirect impact’s of today’s proposal, NAHB’s Economics Group applied its research on embodied energy to the proposed American Clean Energy and Security Act of 2009 (ACESA). Using the Energy Information Agency (EIA) analysis “Energy Market and Economic Impacts of H.R. 2454, the American Clean Energy and Security Act of 2009,” NAHB determined that the price for carbon allowances under ACESA at the end of 2009 would be between \$19 and \$87.<sup>23</sup> In this application, NAHB used the embodied emissions of a baseline house with an attached two-car garage house. NAHB estimated that for a typical single-family detached home with a two-car garage, the embodied CO<sub>2</sub> emissions from the manufactured raw materials used to build

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<sup>21</sup> Warren Carnow, *Greenhouse Gases and Home Building: Manufacturing, Transportation, and Installation of Building Materials*, (2008), available at

<http://www.nahb.org/generic.aspx?sectionID=734&genericContentID=101852&channelID=311>.

<sup>22</sup> Athena Institute, ATHENA<sup>®</sup> Impact Estimator for Buildings, (2008), available at <http://www.athenasmi.org/tools/impactEstimator/index.html>.

<sup>23</sup> U.S. Department of Energy (D.O.E.), Energy Information Administration, *Energy Market and Economic Impacts of H.R. 2454, the American Clean Energy and Security Act of 2009*, (2009); In order to address the uncertainties associated with mechanisms for offsetting cap allowances and adoption of new technology, the EIA report analyzes six main analysis cases. Across these main analysis cases, the EIA report projects prices for allowances that range from \$41 to \$191 per metric ton of CO<sub>2</sub>-equivalent (MCO<sub>2</sub>e) in 2030, which results in electricity price increases that range from 10 to 77 percent above a reference case level. NAHB analyzed the impact of changes of this magnitude would have on the housing sector if they occurred at the end of 2009. In particular, it estimated the impacts of increasing electricity prices 10 to 77 percent above current levels on renters and owners of existing homes. The projected prices for allowances in 2030 are discounted to \$19 and \$87 per MCO<sub>2</sub>e (using a 4 percent discount rate, as is employed in the EIA report).

a house are about 55.42 MCO<sub>2</sub>e.<sup>24</sup> If the CO<sub>2</sub> emissions on the raw materials were priced between \$19 and \$87 per MCO<sub>2</sub>e, as carbon allowances would be under ACESA’s low and high cost scenarios, then the costs of the materials for the manufacturers of the building materials increase by \$1,037 to \$4,831 per single family detached home. The price of the home to the home buyer would increase from \$1,371 to \$6,387 due to items such as additional financing and broker commissions that the builder would typically pay, plus the need to maintain a normal, competitive rate of profit.<sup>25</sup> These calculations are summarized in Table 2.

**Table 2:** Impacts of ACESA on the Price of a Home

	Price of allowance	
	\$19 per MCO <sub>2</sub> e	\$87 per MCO <sub>2</sub> e
Embodied emissions in a baseline home with a two-car garage (MCO <sub>2</sub> e)	55.42	55.42
Cost of emission allowance to manufacturers	\$1,037	\$4,831
Cost increase passed on to builders	\$1,162	\$5,412
Gross increase passed to ultimate buyer of the home	\$1,371	\$6,387
Median price of new single family detached homes (October 2009)	\$212,200	\$212,200
Estimated price of a new home under ACESA	\$213,571	\$218,587

In order to assess the impact that price increases such as these would have on housing affordability, NAHB typically employs a relatively straightforward approach based on mortgage underwriting standards. Standards to qualify for a mortgage are typically expressed as a fraction of prospective buyers’ income. A common measure is the “front end ratio”—the percentage of income that would be consumed by paying principal and in interest on the mortgage, as well as property taxes and property insurance—and a common standard based on this measure is that these payments should not exceed 28 percent of household income.<sup>26</sup>

<sup>24</sup> Carnow (2008).

<sup>25</sup> NAHB estimates of the magnitude of the various mark-up factors are shown in “Building Fee Increases and Reduced Housing Affordability”

[http://www.nahb.org/fileUpload\\_details.aspx?contentTypeID=3&contentID=40372&subContentID=122541](http://www.nahb.org/fileUpload_details.aspx?contentTypeID=3&contentID=40372&subContentID=122541)

<sup>26</sup> Although the priced-out analysis does not provide estimates of the changes in home sales or housing starts, it can be calculated in a straightforward manner using data that are readily available. The priced-out calculations shown here assume a down payment equal to 10 percent of the purchase price, a 30-year fixed rate mortgage with an interest rate of 5.0 percent, an annual premium of 45 basis points for private mortgage insurance, and average effective property tax and insurance rates computed from the 2008 1-year American Community Survey (ACS). The household income distribution needed for the computations also comes from the 2008 ACS. The number of households in each income bracket is adjusted using the 2007-2008 percentage change in the number of ACS households. Dollar boundaries of the income distribution are adjusted using the percentage change in the median family income estimates produced by the U.S.

Results of applying the priced-out methodology to the price increases summarized in Table 2 are shown in Table 3.

**Table 3:** Household Priced Out of the Market Under ACESA

Initial conditions		
Number of households in the U.S. in 2009	113,829,337	
Median price of new single family detached homes	\$212,200	
Income needed to qualify for a mortgage	\$57,173	
Households who qualify	53,374,923	
Under ACESA	Low cost scenario	High cost scenario
Median home price under ACESA	\$213,571	\$218,587
Income needed to qualify for a mortgage	\$57,543	\$58,894
Households who qualify	53,037,881	51,804,763
Households priced out	337,042	1,570,160

Under the low cost ACESA scenario, roughly 337,000 households are priced out of the market for a median-priced home, in that these households would qualify for a mortgage before the ACESA-generated price increase but not afterward. Under the high cost ACESA scenario, approximately 1.57 million U.S. households are priced out.

Considering the number of manufactured components that go into a home, it is clear that regulating GHGs under the CAA will only serve to drive housing prices higher, lowering affordability and keeping people in the less energy efficient and higher CO<sub>2</sub> emitting housing stock.

### **b. Energy costs**

The increased energy costs that are certain to result from any GHG regulation under the CAA will also indirectly affect housing affordability. Using the \$19 and \$87 MCO<sub>2</sub>e price cited above, NAHB estimates that each household in the U.S. would pay between 10 and 77 percent more on energy bills.

NAHB's Economics Group similarly applied the Energy Information Administration's (EIA) analysis of the ACESA with the average annual expenditures on residential energy consumption per household, based on the EIA's 2009 Residential Energy Consumption Survey (RECS).<sup>27</sup> Table 4 shows

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Department of Housing and Urban Development (HUD) between 2008 and 2009. HUD estimates median family income as part of the process of publishing the income limits that are used in most housing programs (<http://www.huduser.org/portal/datasets/il.html>)

<sup>27</sup> U.S. D.O.E., Energy Information Administration, , *Residential Energy Consumption Survey, 2009 Consumption & Expenditures Tables* (2009), available at <http://www.eia.doe.gov/emeu/recs/>.

the average annual expenditures on residential energy consumption per household, based on when the homes were built.<sup>28</sup>

**Table 4: Average Energy Costs per Household in 2009**

Decade Built	Electricity	Natural Gas	Fuel Oil
Before 1940	1,195	800	358
1940 to 1949	1,155	682	250
1950 to 1959	1,241	647	211
1960 to 1969	1,352	585	146
1970 to 1979	1,408	428	108
1980 to 1989	1,537	384	45
1990 to 1999	1,711	444	41
2000 or later	1,711	450	31

Table 5 shows the increases in average costs per households that would occur under the ACESA “low cost” scenario; i.e., assuming a 10 percent increase in electricity prices and cap allowances priced at \$19 per MCO<sub>2</sub>e.

**Table 5: Increase in Average Energy Costs: Low Cost ACESA Scenario**

Decade Built	Total	Electricity	Natural Gas	Fuel Oil
Before 1940	218.11	93.70	85.95	38.46
1940 to 1949	191.91	90.60	74.63	26.68
1950 to 1959	188.91	97.30	69.06	22.55
1960 to 1969	184.50	106.00	62.87	15.63
1970 to 1979	168.52	110.40	46.76	11.35
1980 to 1989	167.76	120.50	42.38	4.88
1990 to 1999	187.64	134.20	48.96	4.49
2000 to 2005	186.71	134.20	48.96	3.55

To account for the difference between cost to the electric power sector and price to the final consumer, Table 5 assumes the price of the allowance is marked up by roughly 40 percent, based on the gross operating surplus in the utilities industry.<sup>29</sup> Table 6 shows similar cost increases based on the ACESA “high cost” scenario, which assumes a 77 percent increase in electricity prices and cap allowances priced at \$87 per MCO<sub>2</sub>e.

<sup>28</sup> The numbers have been converted to average expenditures across all households, irrespective of their use of a particular fuel, so they can be added across columns, and inflated to 2005 levels using the difference between the August 2009 and annual 2005 prices for electricity, natural gas, and no. 2 heating oil to residential customers.

<sup>29</sup> Gross operating surplus percentage taken from the 2007 direct requirements table produced as part of the input-output accounts maintained by the U.S. Bureau of Economic Analysis:  
[http://www.bea.gov/industry/iotables/options\\_list.cfm?aggregations\\_id=0&get\\_results=show&goto=go\\_to\\_options&anon=261622&CFID=2510886&CFTOKEN=1277525f1dd94f9-B42E217F-65BF-E753-4D7B7E29A44713A1&jsessionid=a030cc51d8965dc676f11e3c524997c176a2](http://www.bea.gov/industry/iotables/options_list.cfm?aggregations_id=0&get_results=show&goto=go_to_options&anon=261622&CFID=2510886&CFTOKEN=1277525f1dd94f9-B42E217F-65BF-E753-4D7B7E29A44713A1&jsessionid=a030cc51d8965dc676f11e3c524997c176a2)

**Table 6:** Increase in Average Energy Costs: High Cost ACESA Scenario

Decade Built	Total	Electricity	Natural Gas	Fuel Oil
Before 1940	1,301.06	721.49	400.39	179.18
1940 to 1949	1,169.58	697.62	347.65	124.31
1950 to 1959	1,175.98	749.21	321.72	105.05
1960 to 1969	1,181.88	816.20	292.87	72.80
1970 to 1979	1,120.82	850.08	217.85	52.89
1980 to 1989	1,148.00	927.85	197.41	22.73
1990 to 1999	1,282.31	1,033.34	228.08	20.90
2000 to 2005	1,277.96	1,033.34	228.07	16.56

The metric used to quantify the impact of the cost increases in Tables 5 and 6 on residential energy consumers is the ratio of housing costs (including utilities) to household income. The scheme employed by the Department of Housing and Urban Development classifies households as “cost burdened” if this ratio exceeds 30 percent, and “severely cost burdened” if the ratio exceeds 50 percent.<sup>30</sup>

The results are shown in Table 7.<sup>31</sup> Out of the 104 million U.S. households (with positive income, owning or paying cash rent for a conventional housing unit), about 38 million are cost burdened, and about 17 million are severely cost burdened. Table 7 shows that the low cost ACESA scenario would cause just under 900,000 additional households (530,000 owners, 350,000 renters) to become cost burdened, and would cause about 400,000 to become severely cost burdened. In contrast, the high cost ACESA scenario would cause over 6 million households to become cost burdened, and just fewer than 3 million to become severely cost burdened.

<sup>30</sup> See, for example, *Affordable Housing Needs 2005: Report to Congress*, Appendix B:

<http://www.huduser.org/portal/publications/affhsg/affHsgNeeds.html>

<sup>31</sup> The cost increases in Tables 5 and 6 are applied to the housing costs for all owners or cash-paying renters of single family or multifamily housing units reporting positive income in the 2008 1-year American Community Survey (ACS) Public Use Microdata Sample (PUMS) produced by the U.S. Census Bureau. After being appended to the PUMS records, the cost increases by vintage are adjusted on a case-by-case basis to account for differences in energy costs by structure type and tenure, using differences in average costs reported in the RECS tables. Costs in the 2008 PUMS are not adjusted for inflation, as NAHB is projecting zero to slightly negative overall inflation for 2009. However, the total number of households is inflated to account for population growth in 2009, assuming that the 2007-2008 percentage change in the number of households is maintained through 2009.

**Table 7: Estimated Impact of ACESA on Housing Cost Burden**

	Number of Home Owners			Number of Renters		
Cost burdened at present	21,298,024			16,545,862		
Cost burdened under ACESA:	Change			Change		
Low cost ACESA scenario	21,826,304	528,280	+2.5%	16,897,799	351,937	+2.1%
High cost ACESA scenario	25,088,976	3,790,952	+17.8%	18,836,210	2,290,348	+13.8%
Severely cost burdened at present	8,431,787			8,378,796		
Severely burdened under ACESA:	Change			Change		
Low cost ACESA scenario	8,662,465	230,678	+2.7%	8,552,739	173,943	+2.1%
High cost ACESA scenario	10,076,045	1,644,258	+19.5%	9,652,570	1,273,774	+15.2%

This data shows that the average American could pay a significantly increased price for energy in the future if GHGs are regulated. While it is difficult to predict what the true price of carbon will be, it is clear in the deliberations surrounding the Waxman-Markey bill that Congress has the ability to design consumer protection measures to avoid catastrophically high energy prices. EPA does not have this ability under the CAA. Given the existing statutory structures, however, EPA has less flexibility to mitigate energy price increases and other economic impacts than does a Congress that is writing on a clean legislative slate.

While NAHB has only shown the effects on the public within the residential sector, the influences of these regulations will be felt throughout the economy through increased costs of all raw materials and increased energy costs.

**D. Small GHG Sources Should Be Categorically Excluded from CAA Regulations**

EPA is to be highly commended for the Tailoring Rule preamble’s candid, necessary, legally correct conclusion that the absurdity canon and related interpretive evidence compel the exemption of small GHG emissions sources from the Clean Air Act’s PSD and Title V requirements. However, as a remedy, the Agency believes it has the authority to create new regulatory thresholds for GHG emissions under PSD and Title V. Contrary to its arguments in the preamble, EPA lacks the authority to revise a statutory threshold and NAHB is concerned that the proposed rule will not pass legal muster. The legally proper response for the absurdity the Tailoring Rule identifies is not to change the numerical cut-points plainly written into the PSD and Title V statutes. The

appropriate response is instead to exempt GHG emissions from the operation of those statutory programs.

The absurdity asserted by the Agency does not arise from specific thresholds levels, which have worked well for decades for other pollutants, but from the fundamentally distinct characteristics of GHG emissions as compared to traditional pollutants. The distinct characteristics of GHGs along with the Agency's administrative burden argument are simply two planks in a much broader platform that supports the categorical and permanent exemption of small GHG emissions sources from compliance with all PSD and Title V requirements. The other planks in that platform are absurdities and statutory contradictions arising from restraining economic growth, imposing costs on small sources, burdening small entities with permitting regimes and requiring the issuance of meaningless permits from the standpoint of actual emissions control. Taken individually or collectively, none of these obstacles can be surmounted with additional resources, as the Agency is suggesting.

As a result, the agency must consider reasonable alternatives. A close study of the language of the Act, legislative history, and legal analyses demonstrate that a categorical and permanent exemption of small GHG emitter is not precluded. NAHB urges the Agency to adopt this alternative.

## **E. Conclusion**

NAHB strongly believes EPA should decline to regulate stationary source emissions of greenhouse gases under the CAA and that only a categorical and permanent exemption for small sources can prevent the agency from imposing adverse direct and indirect impacts on all sectors of the economy. Housing affordability and accessibility must be maintained for Americans.

Currently, both houses of Congress are deliberating over legislation to deal with greenhouse gas emissions. Matters as important and as controversial as greenhouse gas emissions control and global climate change require Congressional action and EPA should therefore take this opportunity to discontinue its pursuit of regulating GHGs under the existing Clean Air Act.

NAHB appreciates this opportunity to comment on the proposed tailoring rule and knows EPA will take these and other comments into consideration as it proceeds. If you have any question please feel free to contact me (202.266.8538) or NAHB policy analyst, Matthew Watkins at 202.266.8327 or [mwatkins@nahb.com](mailto:mwatkins@nahb.com).

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Asmus". The signature is fluid and cursive, with the first name "Susan" and last name "Asmus" clearly distinguishable.

Susan Asmus  
Senior Vice President

Attachment

# LEGAL COMMENTS ON EPA'S TAILORING RULE AND INTERRELATED AGENCY ACTIONS

## INTRODUCTION

These legal comments are submitted primarily in response to the Environmental Protection Agency's request for public comment on its proposed "Tailoring Rule." *See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292 (Oct. 27, 2009).

The Tailoring Rule's preamble makes clear that this rulemaking is no ordinary one. Apparently for the first time in its 40-year history, EPA proposes in the Tailoring Rule to invoke the absurdity canon of construction in interpreting a law it administers. As discussed below, EPA is to be commended for taking this candid, necessary, and unusual interpretive step.

In addition, and again more so than in any rulemaking in its history, EPA has identified interrelations and interconnections between the Tailoring Rule and other past, pending or contemplated actions in wide-ranging spheres of Clean Air Act regulation. The Tailoring Rule was proposed to determine which stationary sources will be subject to Prevention of Significant Deterioration controls and the Clean Air Act's Title V permitting regime. But this important stationary source rulemaking is, we learn from EPA, in fact being "triggered" by, among other things, an outsider's petition asking the Agency to regulate motor vehicle emissions; the Supreme Court's review of EPA's disposition of that petition; the controls EPA is considering on remand from the Supreme Court's review; a particular dispute over a Utah power plant permit; a memorandum from EPA's Administrator addressing the fundamentals of that permitting dispute; EPA's reconsideration of that Administrator's memorandum; and EPA's determination that greenhouse gases emissions — the connecting thread linking all this activity — "endanger" the public's health and welfare.

Finally, it should not be overlooked that the EPA actions listed above, taken together with others EPA is now taking or may take in the future to control greenhouse gas emissions, constitute the most far-reaching, expensive regulatory program ever considered in the United States.

Against this backdrop of consequential EPA proposals, coupled with complicated, interrelated EPA proceedings, and an unusual (albeit correct) EPA interpretive position, commenters with something useful to say face the difficulty of knowing where, when, and how often to say it. EPA should have useful legal perspectives ready at each and every juncture in this complex, unfamiliar, and important administrative process. Accordingly, these Legal Comments are being filed simultaneously in each of the applicable dockets readily capable of being identified. They should also be considered in connection with any related, remanded, or reconsidered actions arising from these dockets or the underlying matters they address. These dockets are as follows:

- (1) the Tailoring Rule itself (Docket Number EPA-HQ-OAR-2009-0517);

(2) the pending remand of the International Center for Technology Assessment's ("ICTA's) rulemaking petition to EPA, *see Control of Emissions From New Highway Vehicles and Engines: Notice of Denial of Petition for Rulemaking*, 68 Fed. Reg. 52,922 (Sept. 8, 2003) (Docket Number A-2000-04), *petitions for review dismissed or denied, Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir.), *en banc denied*, 433 F.3d 66 (D.C. Cir. 2005) (per curiam), *reversed and remanded*, 549 U.S. 497 (2007), *remanded to EPA*, 249 Fed. Appx. 829 (D.C. Cir. 2007) (per curiam);

(3) the unified Advance Notice of Proposed Rulemaking ("ANPRM") concerning GHG regulation as a whole under the Clean Air Act ("CAA"), *see Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354 (July 30, 2008) (Docket Number EPA-HQ-OAR-2008-0318);

(4) EPA's "Endangerment Finding," *see* 74 Fed. Reg. 66,496 (Dec. 15, 2009) (Docket Number EPA-HQ-OAR-2009-0171);

(5) EPA's joint rulemaking setting new fuel economy/GHG emission standards for new motor vehicles with the Department of Transportation's National Highway Traffic Safety Administration ("NHTSA"), *see 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) (Docket Number EPA-HQ-OAR-2009-0472);

(6) the EPA Environmental Appeals Board's decision in *In re Deseret Power Elec. Coop.*, PSD Permit No. PSD-OU-0002-04.00, PSD Appeal No. 07-03 (Nov. 13, 2008), *affirmed* by Administrator Johnson (Dec. 18, 2008) (see next entry; *see also* 74 Fed. Reg. 55,300 (noting Johnson Memorandum "followed a decision by the Environmental Appeals Board (EAB) in *In re Deseret Power Electric Cooperative*"));

(7) Administrator Johnson's interpretation of the coverage of the PSD program in Memorandum Decision, Stephen L. Johnson, Administrator, "EPA's Interpretation of Regulations That Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program" (Dec. 18, 2008), publicly noticed but not published in *Clean Air Act Prevention of Significant Deterioration (PSD) Construction Permit Program; Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program*, 73 Fed. Reg. 80,300 (Dec. 31, 2008) (no Docket Number assigned initially; later included in Docket Number EPA-HQ-OAR-2009-0597, the docket established to reconsider the Johnson Memorandum); *see also* 74 Fed. Reg. at 55,299 (EPA itself noting that the Johnson Memorandum is also included in the Tailoring Rule docket);

(8) EPA's reconsideration of the Johnson Memorandum based on a petition by the Sierra Club and others, in *Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program*, 74 Fed. Reg. 51,535 (Oct. 7, 2009) (Docket Number EPA-HQ-OAR-2009-0597); and

(9) the Center for Biological Diversity's and 350.org's pending Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act (Dec. 2, 2009) (Docket Number unavailable).

## **I. THE ABSURDITY CANON, AMONG OTHER CANONS OF CONSTRUCTION, CONTROLS THE INTERPRETATION OF THE PSD AND TITLE V PROGRAMS AND PRECLUDES THEIR APPLICATION TO THE REGULATION OF GREENHOUSE GASES.**

The absurdity canon is a long-standing and traditional, if seldom used, tool of statutory construction. *See, e.g., Rector, Etc., of Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892); *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1167 (11th Cir. 2003). The canon operates in concert with other construction canons, such as those requiring that statutes be read as a whole and in light of their overall structure. Deploying these canons, EPA has correctly concluded the Prevention of Significant Deterioration and Title V permitting statutes do not apply as written to controls on greenhouse gas emissions.

### **1. Principles of Statutory Construction.**

*Massachusetts v. EPA* is the recent Supreme Court decision involving potential regulation of GHGs under the Clean Air Act. *See Massachusetts v. EPA* 549 U.S. 497 (2007). *Massachusetts* confirms that the Clean Air Act and its application *vel non* to GHGs must be interpreted according to the framework of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). *See Massachusetts*, 549 U.S. at 527; *see also* Tailoring Rule, 74 Fed. Reg. at 55,306 (“The familiar *Chevron* two-step analysis provides the starting point for EPA’s interpretation of these statutory provisions.”).

The celebrated footnote 9 of *Chevron* requires, at the first step of a *Chevron* analysis, that courts apply the “traditional tools” of statutory interpretation. *See Chevron*, 467 U.S. at 843 n.9 (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent . . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”); *Pharmaceutical Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001) (all “traditional tools of statutory interpretation,” including “text, structure, purpose, and legislative history,” must be employed to ascertain Congress’s intent at *Chevron* step one); *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000) (court must “exhaust[] traditional tools of statutory construction” at *Chevron* step one).

The absurdity canon is one such “traditional tool” of construction. Deployed by courts as an aid in discerning the plain meaning of statutes, the canon is grounded in the premise that a Congress or other legislative body would not intend their laws to be carried in application to literal, but absurd extremes. The canon provides that, in interpreting the words of a statute, courts have “some scope for adopting a *restricted* rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute . . . .” *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (quoting *Comm’r v. Brown*, 380 U.S. 563, 571 (1965) (emphasis added)); *see also*

*Secretary of Labor, Mine Safety & Health Admin. v. National Cement Co. of Cal., Inc.*, 494 F.3d 1066, 1069 (D.C. Cir. 2007); *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996).

The implication for administrative agencies like EPA is that the absurdity canon applies at step one of a *Chevron* analysis; informs a statute’s plain meaning; and serves to constrain an agency’s discretion. For example, in *Arkansas Dairy Co-Op Association v. Department of Agriculture*, the D.C. Circuit applied the canon to reject the Agriculture Department’s litigating interpretation of Section 608c(17)(G) of the Agricultural Marketing Agreement Act. See *Arkansas Dairy Co-Op Ass’n, Inc. v. Department of Agric.*, 573 F.3d 815 (D.C. Cir. 2009). The court held that it owed “no deference” to the Department’s interpretation, which, although acceptable in terms of a literal reading of words, gave rise to absurd implications. *Id.* The court further concluded that the Department’s interpretation, even if it “had been set forth by the Secretary as part of the rulemaking,” would fail “at *Chevron* step one.” *Id.* This failure was inevitable given that, in applying “traditional tools of statutory construction,” the Department’s interpretation was shown to be contrary to clear congressional intent. *Id.* (citing *Chevron*, 467 U.S. at 842-43); see also *Sierra Club v. EPA*, 294 F.3d 155, 160-61 (D.C. Cir. 2002) (applying absurdity canon as part of *Chevron* step one).

The absurdity canon is one of a small but important set of related construction canons that serve to illuminate the plain text of statutes. These interpretive canons include ones directing that statutes be read in context, according to their purposes and as a whole. See, e.g., *Nken v. Holder*, 129 S. Ct. 1749, 1756 (2009) (“[S]tatutory interpretation turns on ‘the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.’”) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 861 (2005) (“Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, e.g., *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004) (interpreting statute in light of its ‘text, structure, purpose, and history’) . . . .”); *Omaha & C.B. St. Ry. v. ICC*, 230 U.S. 324, 333-34 (1913) (“The act must be interpreted by its own terms, and we must look to it as a whole, in order to determine whether it applies to street railroads, carrying passengers between cities divided by a state line.”)).

This interrelated set of construction canons are often employed in tandem, as they were by the Seventh Circuit in *Time Warner Cable v. Doyle*:

A literal construction is inappropriate if it would lead to absurd results or would thwart the obvious purposes of the statute. We must employ the “traditional tools of statutory construction” to ascertain whether the Congress had an intention on the precise question at issue. *Chevron*, 467 U.S. at 843 n.9. Therefore, we must remember that the true meaning of a single section of a statute . . . , however precise its language, cannot be ascertained if it be considered apart from related sections[.]

66 F.3d 867, 876-77 (7th Cir. 1995) (quotation marks and citations omitted).

The Tailoring Rule preamble thus correctly acknowledges that application of the absurdity canon necessarily requires careful consideration of statutory structure. See 74 Fed.

Reg. at 55,295 (“The judicial doctrine of ‘absurd results’ authorizes departure from a literal application of statutory provisions if it would produce a result that is inconsistent with *other statutory provisions* or congressional intent, and particularly one that would undermine congressional purposes.”) (emphasis added); *id.* at 55,304 (discussing how application of Title V to GHG emissions “would create significant tensions *with other Title V* provisions”) (emphasis added); *id.* at 55,307 (“To determine whether the intentions of the drafters differ from the result produced from literal application of the statutory provisions in question, the courts may examine the overall context of the statutory provisions, including whether there are related statutory provisions that either conflict or are consistent with that interpretation, and including whether there is legislative history that exposes what the legislature meant by the terms in question.”) (emphasis added) (footnotes and internal quotation marks omitted).

The bottom line is that the PSD and Title V provisions of the Act may not be applied to greenhouse gas emissions if doing so would lead to absurd results contrary to the overall structure and underlying purposes of the Act.

## **2. Application of the Act to PSD and Title V.**

The Tailoring Rule preamble correctly concludes that applying the absurdity, structural, and whole-statute canons establishes that Congress cannot have intended for greenhouse gases such as CO<sub>2</sub> to be subject to the Act’s Title V and PSD provisions. The Act’s PSD and Title V programs are not remote regulatory islands isolated from the remainder of the Act. Rather, Title V is designed to streamline compliance with the Act by stationary sources, while the PSD program is designed to prevent specific geographic areas from backsliding into non-compliance with the National Ambient Air Quality Standards (“NAAQS”). The two are therefore intimately intertwined with other provisions of the Act and with each other, as the DC Circuit recently explained in *Sierra Club v. EPA*:

One obligation that often comes up during the permitting process is the Prevention of Significant Deterioration (PSD) requirement, which applies to all “attainment areas” in the country — those that already have met the Act’s baseline national air-quality standards. *See id.* §§ 7470-7492. In an effort to prevent backsliding, the Act requires sources from these parts of the country to satisfy additional anti-pollution standards. Every new “major emitting facility” constructed in an attainment area, as well as every existing facility that undergoes a “major modification,” must obtain a special permit identifying specific emissions limitations, *id.* §§ 7475(a)(1), 7479(1), (2)(C), and must employ the “best available control technology” for each regulated pollutant it emits, *id.* § 7475(a)(4); *see Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 471-73 (2004).

557 F.3d 401, 403-04 (D.C. Cir. 2009).

Precisely because the PSD and Title V programs represent core elements of the Act, they must be read in context, as a whole, according the Act’s overall structure, and in a manner that avoids patent absurdity. Indeed, because the PSD program applies (and hence Title V for PSD permits applies) in areas that cannot be classified for attainment with an applicable National

Ambient Air Quality Standards, *see* 42 U.S.C. § 7407(d)(1)(A)(iii) (defining unclassifiable areas as those “that cannot be classified on the basis of available information”); § 7471 (PSD applies in areas designated unclassifiable), the PSD and Title V Programs form core sub-structural components of the Clean Air Act’s regime of stationary source regulation. Indeed, at least one court appears to have interpreted the PSD provisions as applicable in areas that have not yet been classified. *See United States v. Westvaco Corp.*, Civ. A. No. MJG-00-2602, 2009 WL 4738072, at \*2 (D. Md. Dec. 3, 2009). On that view, the PSD program, supplemented by Title V permitting, serves the even more significant purpose of maintaining the *status quo* until attainment determinations can be made for newly regulated pollutants.

In any event, EPA clearly is correct to conclude that the PSD and Title V statutes must be read in tandem. EPA is also correct to conclude that application of the Act’s plain terms to PSD and Title V, either individually or together, produce absurdities. Indeed, on examination, the evidence indicating the absurdity of applying the Act’s PSD program and Title V to greenhouse gas emissions is, if anything, even stronger than EPA acknowledges in the Tailoring Rule’s preamble.

**First**, regulating GHG emissions under the Act’s PSD and Title V requirements, either individually or in combination, would swamp state and local permitting authorities in a manner Congress cannot have intended:

If PSD and title V requirements apply at the applicability levels provided under the CAA, State permitting authorities would be paralyzed by permit applications in numbers that are orders of magnitude greater than their current administrative resources could accommodate. On the basis of the legal doctrines of “absurd results” . . . this proposed rule would phase in the applicability thresholds for both the PSD and title V programs for sources of GHG emissions.

\* \* \*

In short, without this Tailoring Rule, the administrative burdens would be immense, and they would immediately and completely overwhelm the permitting authorities. Without this tailoring rule, permitting authorities would receive approximately 40,000 PSD permit applications each year — currently, they receive approximately 300 — and they would be required to issue title V permits for approximately some six million sources — currently, their title V inventory is some 15,000 sources. These increases are measured in orders of magnitude.

\* \* \*

It is also worth noting here that, under a scenario where State or local permitting authorities do not have the resources to implement the title V or PSD programs for GHG sources at current CAA permitting applicability thresholds, EPA may withdraw its approval, in which case, EPA would become the permitting authority and the enormous resource requirements would shift to EPA to implement these programs.

Tailoring Rule, 74 Fed. Reg. at 55,292, 55,295, 55,300-01 (emphasis added). Moreover, these conclusions are based on the absurdity of applying the statute to GHG emissions above 250 tons per year. The calculations do not include the burdens of applying the PSD program to sources emitting between 100 to 250 tons per year, as the Act's Sections 165 and 169(1) require for 28 specific stationary source emissions categories. *See* 42 U.S.C. §§ 7475, 7479(1); 74 Fed. Reg. at 55,301 n.9. In other words, EPA needed to evaluate only *part* of the administrative burdens that PSD's application to GHGs would unleash before correctly realizing the absurdity of such a result. EPA's analysis also shows that the Title V burdens would be truly extraordinary. "Most significant are the more than six million sources of GHGs that would become newly subject to title V requirements because they exceed the 100-tpy threshold for GHG but did not for previously regulated pollutants. Although there are generally not applicable requirements for GHGs that apply to such sources, these six million sources would be required to submit a title V permit application within 1 year." 74 Fed. Reg. at 55,302.

**Second**, applying the Act's PSD requirements to GHG emissions would absurdly retard economic growth, as EPA correctly acknowledges. *See* 74 Fed. Reg. at 55,304 (noting the permitting "backlog would grow by tens of thousands each year following the triggering of PSD applicability — again, for at least the first few years — and thereby undermine a second express PSD provision, section 160(3)"); *see also* 42 U.S.C. § 7470(3) (one purpose of PSD program is "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources"). This negative impact on economic growth would be especially severe in the short run, when the administrative bottleneck is tightest, forcing sources to wait months or years for the permits they need before commencing construction. *See* 74 Fed. Reg. at 55,304 ("[A] literal application would render it impossible for permitting authorities to meet the requirement in CAA section 165(c) to process permit applications within 12 months."); *see also id.* (during this initial period, "the number of permit applications would increase by 150-fold," so "[p]ermitting authorities have estimated that it would take 10 years to process a PSD permit application, on average, and the resulting backlog would affect the permit applications for all sources, not just the GHG emitters."). Imposing such a constraint on the national economy during the deepest recession in a generation could lead to truly catastrophic impacts.

**Third**, applying the Act's PSD requirements to GHG emissions would absurdly bring into the ambit of PSD regulation thousands of small emissions sources, thus requiring them to put in place for the first time expensive, individualized emissions controls. *See* 74 Fed. Reg. at 55,294 ("If PSD and title V requirements apply at the applicability levels provided under the CAA, many small sources would be burdened by the costs of individualized PSD control technology requirements and permit applications."), 55,321-22 ("The permitting authority's decision as to what control requirements constitute BACT affords flexibility to consider a range of case-specific factors, such as available control options and collateral cost, energy, and environmental impacts. However, full consideration of those factors requires significant data and analysis in order for permitting authorities to arrive at a case-by-case permitting decision . . . . For all these reasons, determining BACT for a particular source can often be a complicated, resource-intensive, time-consuming, and sometimes contentious process.").

**Fourth**, applying the Act's PSD requirements to GHG emissions would absurdly bring into the PSD ambit emissions of pollutants whose putative harm to human health and welfare is dispersed throughout the globe, as opposed to being concentrated near particular emissions

sources. The PSD program is based on the setting of PSD increments. These localized increments define the maximum increase in a pollutant over baseline concentrations allowed in specific, geographically defined, air-quality control areas. The idea is for the incremental restraints to ensure that the National Ambient Air Quality Standards for a particular local area will not be violated, due to new emissions from a source in the same area. Both EPA and the courts have often recognized the importance of these geographically defined air quality increments to the overall PSD program:

We continue to believe that the PSD program is intended to allow the air quality *in each area of the country attaining the NAAQS, and with the same area classification*, to “deteriorate” by the same amount for each subject pollutant, regardless of the existing air quality when the increment is initially triggered *in a particular area*, as long as such growth allowed within the constraints of the increment does not cause adverse impacts on *site-specific AQRVs [air quality related values]* or other important values. In this way, the PSD increments avoid having a disproportionate impact on growth that might disadvantage some communities, recognizing that the increments in themselves would not address existing negative impacts but cannot allow significant new adverse impacts. Congress established the foundation for uniform national increments when it created increments for SO<sub>2</sub> and PM under section 165 of the Act.

*Environmental Defense v. EPA*, 489 F.3d 1320, 1328 (D.C. Cir. 2007) (emphasis added).

Tellingly, this core element of the PSD regime, which works well in the context of “criteria” pollutants to which a NAAQS applies, makes little or no sense as applied to pollutants like CO<sub>2</sub>. CO<sub>2</sub>, unlike criteria pollutants, has essentially the same global concentration no matter where a measurement is taken. Moreover, and relatedly, the harms from global climate change caused by CO<sub>2</sub> emissions are equally likely to be remote from, as opposed to nearby, the source of those emissions. Under such circumstances a regulatory regime focused on ambient concentrations on the basis of geographically defined increments makes little sense. The tailoring rule preamble therefore sensibly stated that the PSD increment requirements will not apply to emissions of GHGs. *See* 74 Fed. Reg. at 55,298.

***Fifth***, given that PSD requirements cannot lawfully apply to GHG emissions, the Act’s Title V requirements also cannot lawfully apply to those emissions. To apply Title V’s permitting requirements in circumstances where no substantive PSD or other control requirements were being enforced would absurdly require millions of applications from millions of sources for millions of permits that would all contain *no* substantive requirements. The purpose of the Act’s Title V was to provide efficiency in permitting. Its purpose most especially was to provide a one-stop shop where owners of stationary emissions sources could apply for and obtain all permits needed to operate. *See* 74 Fed. Reg. at 55,336 (“requiring such permits may be in tension with a primary purpose of title V to promote compliance and facilitate enforcement by gathering into one document the requirements that apply to a particular source.”).

EPA rightly emphasizes that Congress did not intend for Title V permitting to be a paper-chasing end itself, as opposed to a means toward controls on stationary source emissions.

*See id.* at 55,310 (“Moreover, these delays would undermine the overall statutory design that promotes the smooth-running of the permitting process, and the very purpose of the title V program itself. As noted elsewhere, Congress intended through title V to facilitate compliance by establishing an operating permit program that requires the source to combine in a single permit all of its CAA requirements.”). Against this backdrop, the idea that the Act requires the issuance of six million Title V permits, all meaningless from the standpoint of emissions control, is especially absurd. EPA is to be commended for identifying this absurdity and insisting that it be avoided. *See id.* at 55,316 (“We estimate that this additional volume of permitting [6.1 million] would require an annual increase in labor hours of almost 250 times the current labor allocation for title V programs. Like the increase in PSD workload, this increase in title V workload, combined with the source-by-source nature of the permitting process and the requirements for public input, would overwhelm the permitting authorities’ resources and paralyze the permit issuance process.”).

### **3. Specific Congressional Intent.**

The above analysis is based solely on the structure of the statute, together with its evident purposes and the absurd consequences of applying the PSD and Title V requirements to GHG emissions. This interpretive evidence is further confirmed, however, by specific evidence of Congress’s intent as to the application of PSD and Title V requirements to small emissions sources.

The application of PSD to GHGs is precisely the type of burden to small sources that Congress sought to prevent. In the view of Senator Muskie, one architect of the Act, “houses, dairies, farms, highways, hospitals, schools, grocery stores, and other such sources” should be excluded from, not included within, the PSD program. 123 Cong. Reg. 18,021 (June 8, 1977). The Tailoring Rule preamble rightly acknowledges that the “extraordinary increase in the scope of the permitting programs” that would result from applying PSD and Title V to small sources, coupled with the resulting burdens on the small sources and on the permitting authorities, were not contemplated by Congress in enacting the PSD and title V programs. 74 Fed. Reg. 55,295. Instead, the evidence of legislative history (resort to which is another traditional tool of construction) indicates that the program was intended to apply only to larger sources, not smaller ones. *See id.* at 55,304 (“[A] literal application of the 100/250 tpy thresholds would sweep into the PSD program tens of thousands of smaller sources that Congress did not intend to include . . . .”); *see also id.* (Title V applications would arise “in numbers — some 6.1 million — that are almost 100 times greater than what Congress expected”); *id.* at 55,309 (“[A]pplying the 100/250 tpy [tons per year] threshold literally to CO<sub>2</sub> emissions would frustrate congressional intent by subjecting to PSD sources that Congress specifically intended *not* to include.”) These passages are but a sample of the voluminous history indicating that Congress did not remotely intend for the PSD program to apply, in Senator Muskie’s words, to “houses, dairies, farms” and other small sources.

### **4. EPA’s Administrative Interpretations.**

Precisely because of considerations such as the absurdity of shoehorning GHG emissions into the existing the PSD and Title V programs, and the frustrated congressional expectations such shoehorning would produce, EPA has consistently taken the view that legislation is required

in order to authorize the agency to sensibly control GHG emissions. *See id.* at 55,299 (“In issuing the ANPR, EPA made clear that it believed that the best way to address the problems posed by GHG emissions would be through legislation directly addressing GHG emissions, rather than through use of the tools in the CAA.”). According to this thinking, new legislation is required because the existing Clean Air Act and regulation of stationary source GHG emissions presents an unworkable mismatch.

## **II. THE STATUTORY EXEMPTIONS FOR GHG EMISSIONS SHOULD BE CATEGORICAL.**

The Tailoring Rule preamble explains that “the CAA PSD provisions and the title V provisions are self-effectuating, that is, they each apply by their terms to require sources to undergo permitting requirements.” 74 Fed. Reg. at 55,340-41. Nonetheless, the Tailoring Rule preamble further proposes EPA-promulgated amendments altering these plain statutory terms. Specifically, the Tailoring Rule proposes “to establish” its own “threshold levels” as “overlays” to those that appear in the statute. *Id.* at 55,340. EPA further proposes that these agency “overlays,” not the express terms of the Act’s PSD and title V requirements, would govern, such that it would be EPA’s “proposed threshold levels, and not the statutory threshold levels, that apply to sources of GHG emissions.” *Id.* For purposes of both the PSD program and Title V, EPA’s proposed threshold levels would be set at 25,000 tons per year — at least 100 times and up to 250 times the relevant statutory levels.

As explained below, the legally appropriate response for the absurdity the Tailoring Rule correctly identifies is not to change the PSD and Title V statutory language, which constrains EPA at *Chevron* step one, but to categorically exempt small GHG emissions sources from the programs’ operation. The Supreme Court has indicated that courts will avoid absurd applications of statutes by “adopting a *restricted* rather than a literal or usual meaning” of relevant statutes. *Trans Alaska Pipeline*, 436 U.S. at 643. Here, the statutory language that might be given a restrictive interpretation includes terms such as “major stationary source,” “emissions,” and even “any air pollutant,” — a term that, although it might otherwise encompass greenhouse gases, *see Massachusetts*, 549 U.S. at 528-29, may be restrictively interpreted to avoid the absurdity of bringing greenhouse gases within the regulatory ambit of the PSD and Title V programs.

### **1. The Act must be restrictively interpreted.**

The normal remedy for a statute’s absurd application to a particular situation is for courts (or here, the agency) to conclude that the situation in question is categorically beyond the reach of the statute. *See, e.g., Bock Laundry Mach. Co.*, 490 U.S. at 510 (absurdity precludes application to civil defendants of Federal Rule of Evidence referring to “the defendant”); *In re Nofziger*, 925 F.2d 428, 433-34 (D.C. Cir. 1991) (absurdity precludes application to certain invalid indictments of statute referring to “indictment[s]”).

This recurring practice in absurdity cases, as the Tailoring Rule preamble’s survey of cases illuminates, authorizes courts to restrictively construe statutes, or statutory terms, against their literal or usual meaning, so as to exclude a particular category of persons or conduct. This practice has its origins in the Supreme Court’s decision in *Holy Trinity Church*, the font of the American absurdity canon cases. The Court in *Holy Trinity Church* deemed contrary to

Congress's intentions a single, particular application of a statute restricting immigration. The Court accordingly read the statute not to apply to certain ordained clergy that would otherwise fall within its literal ambit. See *Holy Trinity Church v. United States*, 143 U.S. 457, 5167-17 (1892) (immigration statute referring to "any alien" did not include certain clergy).

This practice of adopting restrictive readings as in *Holy Trinity Church* has since been repeated in other absurdity cases. Each of these cases has involved situations where a statute's literal or usual meaning reached types of persons or conduct falling clearly outside what was intended by the lawmaker. See, e.g., *Nixon v. Missouri Mun. League*, 541 U.S. 125, 132-33 (2004) ("any entity" does not include public entities); *Bock Laundry*, 490 U.S. 504 (Rule of Evidence referring to "the defendant" does not include civil defendants); *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 542-45 (2002) ("any claim asserted" does not include certain asserted claims dismissed on Eleventh Amendment grounds); *C.V. Sorrels v. United States*, 287 U.S. 435, 446-49 (1932) (prohibition on possessing and selling liquor does not apply to persons who possess or sell because of entrapment). The remedy in all these cases was to restrictively read the statute as whole, or a common or categorical noun within the statute, so as to exclude the outlier cases giving rise to the absurdity.

Against this backdrop, the legally proper response for the absurdity the Tailoring Rule identifies is not to change the numerical cut-points plainly written into the PSD and Title V statutes. The appropriate response is instead to exempt GHG emissions from the operation of those statutory programs. As emphasized above, courts are to avoid absurd applications of statutes by adopting a "restricted rather than a literal or usual" meanings of relevant language. *Trans Alaska Pipeline*, 436 U.S. at 643. Here, the applicable statutory language available to be given a restricted meaning as an analogue to *Trans Alaska Pipeline* includes terms such as "major stationary source," "emissions," and even "pollutant." See, e.g., 42 U.S.C. §7475(a)(4) (defining scope of the PSD program); 42 U.S.C. § 6561(2)(B) (applying Title V to "air pollutants" under 42 U.S.C. § 7602(g)). Whereas the "literal or usual meaning" of "air pollutant" under the Act includes GHGs, see *Massachusetts*, 549 U.S. at 532, at least in the context of the PSD and Title V programs, a literal and usual meaning of statutory terms cannot have been intended by Congress, for the reasons discussed above. In order to avoid absurdity, then, some literal and usual meaning must give way, and the PSD and Title V statutes must be read to exclude small sources of GHG emissions.

## **2. The plain terms of PSD and Title V.**

From a judicial review perspective, it is concerning that Section XII of the Tailoring Rule preamble, where EPA lists provisions providing "Statutory Authority" to enact the proposal, does not refer to Clean Air Act Sections 165(a)(1) and 169(1) and Clean Air Act Sections 501(2)(B) and 302(j). See 74 Fed. Reg. at 55,350 (listing Clean Air Act Sections 101, 111, 114, 116, 301, and 307(d)(7)(B), 42 U.S.C. §§ 7401, 7411, 7414, 7416, 7601, 7607(d)(7)(B)). Sections 165(a)(1) and 169(1) are, as the preamble elsewhere recognizes, the key statutory provisions establishing the applicability of the PSD program. Likewise, Sections 501(2)(B) and 302(j) are key provisions establishing the applicability of the Title V program.

Section 165(a) provides that "[n]o 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 . . . .” 42 U.S.C. § 7475(a) (emphasis added). Section 169(1) then defines “major emitting facility” as follows:

[A]ny 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.

42 U.S.C. §7479(1) (emphasis added).

This definition includes several textual and structural elements likely to be spotlighted on judicial review. **First**, the definition begins by enumerating 28 *specific* categories of sources. The numeric threshold for those sources is set expressly at 100 tons per year. **Second**, all other sources are placed by the definition in a catch-all category. The numeric threshold for these sources is set at 250 tons per year. **Third**, new or modified facilities that are nonprofit health or education institutions enjoying an exemption from the relevant State where they are located are placed entirely outside the scope of the PSD program.

The Clean Air Act’s “major source” definition for purposes of PSD thus appears as a reticulated regime in which Congress has expressly made the key numeric choices. Confronted with statutory language of this type, courts have held that agencies are not permitted to set aside such carefully delineated choices under *Chevron* step one. Compare *Great-West Life and Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (“We have observed repeatedly that ERISA is a “comprehensive and reticulated statute,” the product of a decade of congressional study of the Nation’s private employee benefit system.”); *Mertens v. Hewitt Associates*, 508 U.S. 248, 251 (1993) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980)) . . . . [This] ‘carefully crafted and detailed enforcement scheme provides ‘strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.’ *Mertens, supra*, at 254.”) (internal quotation marks omitted).

The Supreme Court applied the absurdity canon to a similar, “carefully reticulated statute” in *Conroy v. Aniskoff*, 507 U.S. 511 (1993). There, the Court reversed the Maine Supreme Court, which had wielded the absurdity canon in declining to permit an Army officer to take advantage of the Soldiers’ and Sailors’ Civil Relief Act of 1940 on grounds that it would be “absurd and illogical,” *id.* at 513, to toll limitations periods for career service personnel who had not been handicapped by their military service. Emphasizing again that the canon is a means of ascertaining — as opposed to avoiding — Congress’s intentions, the Supreme Court rejected the Maine court’s absurdity logic. *See id.* at 515-18. The Court explained that “both the history of this carefully reticulated statute, and our history of interpreting it, refute any argument that a literal construction of [it] is so absurd or illogical that Congress could not have intended it.” *Id.* at 516.

Here by contrast, Congress’s expressed intentions and the decided cases reinforce rather than undermine an application of the absurdity canon. The interpretive evidence discussed above demonstrates that Congress never intended for the PSD program, and other related statutory programs such as Title V, to apply to GHGs. Put differently, the strange and incongruous results of applying the PSD and Title V program’s specific numeric thresholds to GHGs is merely an *illustration* of the basic absurdity of applying PSD and Title V to GHGs at all. This absurdity does not arise from specific thresholds levels, which have worked well for decades for other pollutants, but from the fundamentally distinct characteristics of GHG emissions as compared to traditional pollutants.

### **3. Numeric choices are legislative choices.**

Congress’s decision to fix carefully considered *numeric* cut-points defining the application of PSD and Title V is also highly relevant. The setting of numeric, as opposed to categorical, thresholds entails the making of inherently legislative choices. The fact that numeric cut-points are at issue here renders even more questionable attempts to adjust those cut-points.

Judge Posner’s decision in *Hoctor v. Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996), is instructive in this regard. At issue in *Hoctor* was the Administrative Procedure Act’s distinction between legislative (or substantive) rules that must be promulgated using notice and comment and interpretive rules, which are exempt from notice-and-comment requirements. *Hoctor* involved two Department of Agriculture rules. One regulation had been promulgated with notice and comment and required that animal dealers house certain dangerous animals in facilities that were “appropriate” and “structurally sound.” *See id.* at 167-68. The other regulation, promulgated without benefit of notice and comment, established that “appropriate” facilities for keeping animals necessarily included perimeter fencing at least eight feet high. *See id.* at 168.

The Agriculture Department defended its eight-foot-fence rule on grounds that it merely interpreted the more general rule’s reference to “appropriate” facilities. The court rejected that argument, however, noting that the choice of a numerical, eight-foot cut-point was inherently legislative in character, rendering that rule ineligible for interpretive-rule treatment:

There is no way to reason to an eight-foot perimeter-fence rule as opposed to a seven-and-a-half foot fence or a nine-foot fence or a ten-foot fence. None of

these candidates for a rule is uniquely appropriate to, and in that sense derivable from, the duty of secure containment.

The reason courts refuse to create statutes of limitations is precisely the difficulty of reasoning to a number by the methods of reasoning used by courts. *Hemmings v. Barian*, 822 F.2d 688, 689 (7th Cir. 1987). One cannot extract from the concept of a tort that a tort suit should be barred unless brought within one, or two, or three, or five years. The choice is arbitrary and courts are uncomfortable with making arbitrary choices. They see this as a legislative function.

*Id.* at 170.

Bearing in mind that the absurdity canon applies at *Chevron* step one, it is easy to see why the canon can be applied in aid of effectuating legislative intent by excluding from statutory coverage certain categorical instances unforeseeable or unforeseen by a legislature. Applying the canon in such fashion leaves fundamental legislative choices at all times with the legislature. But, as far as present research reveals, the canon cannot be used, and has never been used, to transfer the locus of legislative choice from Congress to a court or agency. An agency therefore appears to misuse the canon when, having correctly spotted an instance where it applies, the agency employs the canon to rewrite numeric thresholds carefully and precisely delineated by Congress. As explained by *United States v. Ron Pair Enters., Inc.*, 489 U.S. at 235, 242 (1989), there is no determinate intention of the drafters to make a substitution for the absurd language written into the statute. Instead the only determinate intention is that such language not apply to particular persons or conduct; in other words that those cases be excluded from the operation of the statute altogether.

#### **4. A *Chevron* step two solution?**

Because the absurdity canon is a “traditional” construction tool, the Tailoring Rule preamble’s initial discussion of the canon correctly places the canon as falling within a *Chevron* step one analysis. See 74 Fed. Reg. at 55,306-55,307. Later in the discussion, however, the preamble indicates that, due to an absurdity, *Chevron* step two comes into play in a manner that enlarges agency discretion. The preamble states, “Because a literal application of both the PSD and title V threshold requirements produces absurd results, *EPA may develop a different application that promotes consistency with other statutory provisions* and is consistent with congressional intent.” *Id.* at 55,311 (emphasis added).

This approach should be reevaluated when the final Tailoring Rule is promulgated. Because the absurdity canon is one of the “traditional tools” of statutory construction, its application comes into play at *Chevron* step one under the familiar terms of *Chevron*’s famous footnote 9. Application of the absurdity canon, like that of other tools of construction, constrains agency discretion by according a confining meaning to the laws they administer.

The Tailoring Rule’s preamble proposes nonetheless that the agency may enjoy a *Chevron* step two authority to change the statutory figures of 100 or 250 tons-per-year to 25,000 tons-per-year under *Mova Pharmaceutical v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). In *Mova*, the Food and Drug Administration engrafted an extra-textual requirement into the

Hatch-Waxman statutory regime governing the interface between patent law and drug-marketing authorizations. But the D.C. Circuit invalidated this engraftment, the FDA’s so-called “successful defense” rule, *see id.* at 1069, under *Chevron* step one, not *Chevron* step two:

We conclude that the FDA’s successful-defense requirement is inconsistent with the unambiguously expressed intent of Congress. The rule is gravely inconsistent with the text and structure of the statute. Nor can the FDA show that the successful-defense requirement is needed to avoid “a result demonstrably at odds with the intentions of [section 355(j)(5)(B)(iv)’s] drafters.” *Ron Pair Enterprises*, 489 U.S. at 242. The FDA could have adopted a more narrow solution to the problem of first applicants who are never sued or who lose their suits. It instead adopted the broad win-first rule, which it cannot show is needed to implement congressional intent.

*Id.* The D.C. Circuit thus made clear that *Mova* was resolved on *Chevron* step one grounds under traditional tools of construction, holding at the same time that there was no absurdity for the FDA to avoid or correct under the absurdity canon as articulated in the *Ron Pair* absurdity case.

Nor do other passages in the *Mova* decision discussed in the Tailoring Rule preamble mean that *Mova* was a *Chevron* step two decision. *See* 74 Fed. Reg. at 55,307; *see also Mova*, 140 F.3d at 1068. The passages quoted in the preamble, read fully and in context, do not indicate either that the absurdity canon was applied in *Mova*, or that *Mova* was anything other than a *Chevron* step one decision. (*See* Attachment A, incorporated by reference.) The concern with the preamble’s reading of *Mova*, beyond its inconsistency with the holding of the case, is quite candidly that the preamble’s *Mova* interpretation (unlike the D.C. Circuit’s actual decision) is contrary to *Chevron* footnote 9 — and this contradiction appears so fundamental that a reliance on *Mova* in a similar fashion in a final rule could not survive judicial review, either in the D.C. Circuit or the Supreme Court.

##### **5. *Massachusetts* does not preclude a categorical remedy.**

The Supreme Court made clear in *Massachusetts* that “EPA must ground its reasons for action *or inaction* in the statute.” 549 U.S. at 535 (emphasis supplied). Hence, the agency should not ignore *Chevron* step one grounds, such as application of the absurdity canon requiring EPA’s “inaction” in regulating GHG emission from stationary, or for that matter, mobile sources of GHG emissions. *Massachusetts*’s precise holding is that EPA’s 2003 denial of a rulemaking petition submitted by the International Center for Technology Assessment was legally flawed, and that the specific arguments advanced by the agency to support that denial were legally inadequate. It should be beyond dispute that the Supreme Court did not decide in *Massachusetts* that the regulation of GHGs under the Act was legally required. And while *Massachusetts* did reject the arguments before it contending that GHGs are not “pollutants” for purposes of regulations promulgated under the Act’s section 202, *Massachusetts* did not address, much less decide, whether that holding could be extended, without absurdity and consistent with Congress’s intent, to the regulation of small, stationary GHG emissions sources assertedly subject to the Act’s PSD and Title V programs. In short, nothing in *Massachusetts* precludes a finding that small, stationary GHG emissions sources are categorically exempt from compliance

with PSD and Title V. (Further legal analysis of *Massachusetts* is presented for the agency's consideration in Attachment B to these Legal Comments. Attachment B is incorporated herein by reference.)

### **III. THE STATUTORY EXEMPTIONS FOR GHG EMISSIONS SHOULD BE PERMANENT.**

A second judicial review vulnerability presented by the Tailoring Rule preamble involves the notion that an identified absurdity may later be resolved at EPA's own initiative. This notion places great emphasis on the undoubted fact that, at least for the time being, States and EPA will be unable to apply the PSD and Title V programs as written to GHG emissions. But that fact is only one piece of the overall absurdity puzzle. Viewed in the totality of the statutory circumstances, it becomes clear that a temporary exemption is more legally vulnerable to invalidation than a permanent one.

The proposition that statutes can become absurd due to lack of enforcement resources may well draw opposition from environmental advocacy organizations. Under such a view, the Fish and Wildlife Service and the National Marine Fisheries Service might potentially deploy the absurdity canon to begin "temporarily" rewriting the Endangered Species Act, which, as is well known, is "*chronic[ly] underfund[ed]*" by Congress. *Biodiversity Legal Found. v. Norton*, 285 F. Supp. 2d 1, 2 (D.D.C. 2003) (emphasis added).

Opponents of the proposition that an absurdity can be resolved by additional implementation funding are also likely to point out that there appear to be no cases holding that the absurdity canon can be applied on a temporary basis to turn off part of a statute — with an agency (or even a court) then deciding when it is expedient to turn it back on. Indeed, temporary implementation difficulties, even ones with serious administrative and economic consequences, have been held not to give rise to the type of absurdity in application that permits deviations from statutory language.

In *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002), for example, the EPA sought a "reasonable accommodation" that would extend the District of Columbia's ozone NAAQS attainment deadline. The EPA claimed that the District's attainment had been "*temporarily stalled* due to transported pollution," *id.* at 161 (emphasis added), and the EPA asserted that "as a matter of logic and statutory structure, Congress almost surely could not have meant to require the [agency] to treat the Washington Area as one of severe nonattainment" under those circumstances. *Id.* (internal quotation marks omitted).

The D.C. Circuit rejected the argument. The EPA's "assurance" about congressional intent did "nothing to persuade" the court that the EPA's plan was consistent with the statute. *Id.* Rather, the court insisted that "there must be evidence that Congress meant something other than what it literally said before a court can depart from plain meaning." *Id.* (quoting *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996)). In the absence of supporting legislative, logical, or textual evidence, the Court explained, agencies "may not disregard the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy." *Id.* (quoting *Engine Mfrs.*, 88 F.3d at 1088).

Relatedly, the proposed Tailoring Rule states that a “step-by-step process” that removes absurdity over time “*may be relevant for this action.*” See 74 Fed. Reg. at 55,319 (emphasis added). This statement appears to emanate from the *Massachusetts* Court’s citation to *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955), for the proposition that “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.” See 549 U.S. at 524. The *Lee Optical* citation was employed in *Massachusetts* to support a finding that the causation prong of the Article III standing inquiry was met, because tackling automobile GHG emissions before tackling other GHG emissions sources was permissible, and “hardly a tentative step.” *Id.*; see also *id.* (“Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.”) In particular, the *Massachusetts* Court’s reasoning as to constitutional standing explained that a demonstration of causation of injury did not require proof that EPA’s decision not to regulate involved, not just new motor vehicles, but a broader array of GHG sources.

The Court’s rejection of the standing-specific argument before it in *Massachusetts*, based on an analogy to *Lee Optical*, is unlikely to support a bid to change temporarily the specific numerical thresholds embodied in the Clean Air Act. As an initial matter, *Lee Optical* does not translate in full measure from a legislative into an administrative context. In a legislative context, Congress is free to adopt any economic legislation that has a rational basis and is otherwise constitutional. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). In an administrative context, by contrast, agencies lack the constitutional leeway that Congress enjoys. An agency’s leeway is instead defined by *Chevron* step one’s and *Chevron* step two’s application to the statute pursuant to which the agency is acting. An agency’s degree of policy freedom is therefore variable, because it varies of necessity according to statutory context.

More fundamentally, as *Lee Optical* itself recognizes, each individual step must be independently lawful. In a legislative context this means each individual step must independently comply with constitutional norms. “That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law.” *Lee Optical*, 348 U.S. at 489. In an administrative context, in order for step-by-step action to be lawful, each individual step must independently conform, not only to constitutional norms, but also to substantive and procedural statutory norms.

The Tailoring Rule preamble’s analysis of the multiple structural problems presented by applying the PSD and Title V programs undermines the hope for a temporary or step-by-step solution to the interpretive difficulties the preamble identifies. While the administrative bottleneck problem can be ameliorated by additional permitting resources, the other issues the preamble discusses — including the absurdities and statutory contradictions arising from restraining economic growth; imposing costs on small sources; applying a geographically local control regime to globally dispersed pollutants; and requiring millions of permits with no substantive controls — present obstacles that, taken individually or collectively, cannot be surmounted with additional resources.

In sum, the Tailoring Rule’s claim that the absurdity canon applies, but perhaps only temporarily, is in danger of providing a trap for the unwary that places at risk the entire, statutorily compelled, small-source exemption from PSD and Title V. Certainly nothing in the cases discussed in the Tailoring Rule’s preamble establishes that an absurdity found by a court at

one time can subsequently be dispelled at some later time. Those cases instead hold that particular applications of the statute are either absurd or not absurd and that this determination is made based on inquiring into congressional intent at the time a statute was enacted. EPA's view that the absurdity canon applies, but only temporarily, risks drawing a successful challenge to the entire small source exemption on review.

#### **IV. AN ADMINISTRATIVE NECESSITY RATIONALE DIFFERS FROM, AND SHOULD BE USED ONLY IN CONJUNCTION WITH, THE ABSURDITY RATIONALE.**

In addition to applying the absurdity canon, the Tailoring Rule preamble proposes that EPA enjoys authority to adjust numeric thresholds appearing in the Act's Sections 165, 169(1), 302(j), and 501(2)(B) on grounds of "administrative necessity." *See* 74 Fed. Reg. at 55,311-18. The preamble further states that its absurdity and administrability rationales are "independent justifications." *Id.* at 55,303.

These two theories do indeed differ in important respects. With regard to the absurdity canon, the evidence of extreme administrative burdens is only one plank in an argument resting on a much broader platform of interpretive evidence — a platform that counsels in favor of a categorical and permanent exemption of small GHG emissions sources from compliance with all PSD and Title V requirements. Even if abundant administrative resources were available at both the federal and state levels, the absurdity of applying the Act's PSD and Title V regulatory regimes to small GHG emissions sources would remain. As regards the absurdity canon and related arguments, administrability is a strong, supplemental point that reinforces, in the current timeframe, what can be deduced based on structural and canon-based analysis concerning the PSD and Title V programs without regard to timeframe. Administrability is not the essence of the argument; it is merely a further pointer to the absurdity of applying certain statutory provisions to GHGs at all.

The fact that the administrative necessity argument is additive is not a reason to withhold reliance on it in this rulemaking. The concern with the administrative necessity rationale is, rather, that it may be subject to challenge on review. The Tailoring Rule preamble proposes to seek *fixed* and *prospective* exemptions from efforts to comply with the PSD and Title V provisions of the Act as written. Arguably, the D.C. Circuit's decision in *Alabama Power* and its progeny disfavor fixed, statutory exemptions as contrary to legislative intent. For instance, in *Sierra Club v. EPA*, 719 F.2d 436 (D.C. Cir. 1983), the court applied *Alabama Power* and denied the EPA's assertion of administrative necessity, observing, "[w]e do not see anything in the language, history, or purpose of [the statute under consideration] that authorizes approaches that deviate from the legislative mandate in response to concerns about feasibility." *Id.* at 463 (quoting *Alabama Power*, 636 F.2d at 360) (quotation marks omitted). *Sierra Club* went on to state that when a statute does not generally permit consideration of "feasibility," an "agency may avoid implementing a statute only by showing that attainment of the statutory object is impossible." 719 F.2d at 463. The concern here is obvious: litigants may use the Tailoring Rule preamble's view that streamlining procedures will eventually become available to question EPA's lack-of-short-term feasibility showing.

Another concern involves arguments that the D.C. Circuit's *Alabama Power* decision requires agencies to first make "good faith" efforts to comply with the written terms of statutes before a court can take such efforts into account in addressing statutory innovations like the proposed tailoring rule. *Id.* at 359-60. Arguably, the temporary and numerical adjustments that EPA has proposed place the agency in the uncomfortable position of being characterized as "an agency seeking vindication of an approach contrary to the explicit statutory design on the basis of its estimate of its lack of capacity to handle the task delegated to it." *Id.* *Alabama Power* arguably confronts administrative agencies with an "especially heavy" burden under such circumstances. *Id.*

In sum, a concern with the Tailoring Rule's administrative necessity rationale is that (contrary to Congress's intentions) a reviewing court might reject the rationale altogether or require EPA to begin good faith efforts to impose PSD and Title V requirement on small GHG emissions sources before allowing an administrative necessity exemption to take effect. For this reason, administrative necessity should be relied on, if at all, only as a supplement to a categorical and permanent exemption for small GHG sources grounded in the absurd-result doctrine and related interpretive evidence, such as that resident in the clear legislative history.

#### **V. NO VIABLE STRATEGY VISIBLY APPEARS FOR INSULATING TEMPORARY NUMERIC THRESHOLDS FROM JUDICIAL REVIEW.**

Against the above backdrop, the agency may naturally inquire whether the vulnerability of the Tailoring Rule preamble's proposed phased approach, which rewrites and then potentially re-adjusts the numeric applicability thresholds of the PSD and Title V programs, may be avoided by employing some creative approach to the rulemaking process. As one example, the agency might consider implementing a creative approach via a negotiated rulemaking involving all known stakeholders. *See* 5 U.S.C. § 563. Professor Lubbers ably summarizes this process as follows:

In negotiated rulemaking, the agency, with the assistance of one or more neutral advisers known as "convenors," assembles a committee of representatives of all affected interests to negotiate a proposed rule. The goal of the process is to reach consensus on a text that all parties can accept. The agency should be represented at the table by an official who is sufficiently senior to be able to speak authoritatively on behalf of the agency. Negotiating sessions, however, are not chaired by the agency representative, but by a neutral mediator or facilitator skilled in assisting the resolution of multiparty disputes.

Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 988 (2008).

In this instance, however, it may be difficult for such a brokered process to achieve consensus. The relevant interests and positions appear both divergent and deeply entrenched. In particular, the December 2, 2009, Center for Biological Diversity GHG NAAQS petition appears as a significant stumbling block.

Moreover, even if a negotiated rulemaking were successful in reaching a compromise, embodying that compromise in legally durable form (even for the first six-year period EPA is targeting for this rulemaking) would remain challenging. Achieving legal durability could well depend on showing that *all* stakeholders were adequately represented in the negotiation such that challenges to its outcome brought beyond the 60-day window in Clean Air Act Section 307(b)(1) would be time-barred. But there is an open question as to whether Section 307(b)(1) can be used to block legal challenges to the validity of regulations, especially where the relevant challenger was unaware of the regulation's initial promulgation. *See, e.g., Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289 (1978) (Powell, J., concurring) (the Clean Air Act may not be able to partake of the wartime-emergency rationale of *Yakus v. United States*, 321 U.S. 414 (1944); and *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 594 (1980) (Powell, J., concurring) (“I continue to have reservations about the constitutionality of the notice and review provisions of § 307(b).”).

Future stakeholders, including, for example, companies not yet in existence and individuals not yet born, and even non-participating current stakeholders, might not be fully bound by a negotiated rulemaking, even if EPA undertakes a broad-gauge, good-faith process that includes all principal known stakeholders. Before proceeding, EPA should assure both itself and others that its legal analysis of the statute as a whole will withstand the test of time. Otherwise, an unthinkable draconian “exempt now but regulate later” result could well be produced by the agency's sincere efforts to apply the absurdity canon and give effect to Congress's intentions.

## CONCLUSION

EPA is to be highly commended for the Tailoring Rule preamble's candid, necessary, and legally correct conclusion that the absurdity canon and related interpretive evidence compel the exemption of small GHG emissions sources from the Clean Air Act's PSD and Title V requirements. For reasons explained above, these exemptions are compelled by the terms of the Act under step one of *Chevron*. As further explained above, these exemptions should be made both *categorical* and *permanent*, as opposed to temporary and subject to adjustable numerical cut-points. Only by establishing such categorical and permanent exemptions can full effect be given to the legislative intentions the Act so plainly embodies.

## Attachment A

### Key Passage in *Mova*

The rule that statutes are to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not reflect the “unambiguously expressed intent of Congress,” \* \* \* and thus to overcome the first step of the *Chevron* analysis. *But the agency does not thereby obtain a license to rewrite the statute.* When the agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent. Of course, the agency might be able to show that there are multiple ways of avoiding a statutory anomaly, *all equally consistent* with the intentions of the statute’s drafters (and equally inconsistent with the statute’s text). *In such a case*, we would move to the second stage of the *Chevron* analysis, and ask whether the agency’s choice between these options was “based on a permissible construction of the statute.” *Id.* at 843. Otherwise, however, our review of the agency’s deviation from the statutory text will occur under the first step of the *Chevron* analysis, in which we do not defer to the agency’s interpretation of the statute.

Here, we think that the FDA’s interpretation cannot survive analysis under the first step of *Chevron* \* \* \*

*Mova*, 140 F.3d at 1068-69.

## Attachment B

### ***Massachusetts* Does Not Foreclose the Proposition That Regulation of GHG Emissions by the Clean Air Act's Stationary Source Programs Is Unauthorized**

While *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007), rejected the specific grounds EPA invoked for denying the International Center for Technology Assessment's petition for an EPA rule regulating greenhouse gas emissions from new motor vehicles under Clean Air Act Section 202(a)(1), the case did not hold that such a rule is required or even permissible under the Act. See 42 U.S.C. § 7521(a)(1). *Massachusetts* instead held that "EPA must ground its reasons for action or inaction in the statute." 549 U.S. at 535 (emphasis added). *Massachusetts* thus commands EPA to carefully examine any and all potential *Chevron* grounds under the Act requiring or permitting EPA's "inaction" on the ICTA's petition to regulate under the Act's Section 202. The relief granted by the *Massachusetts* Court was the reversal of the decision of the Court of Appeals and a remand of the case to the agency for reconsideration of its options in light of the Supreme Court's decision — including the options of finding no endangerment and the option of refusing on statutory grounds to grant the ICTA petition. See *id.* Accordingly, *Massachusetts* expressly left open the option of EPA determinations *not* to regulate new motor vehicle GHG emissions, as well as any other GHG emissions.

#### **1. Policy Discretion and Scientific Uncertainty in *Massachusetts***

*Massachusetts* arose in the unusual context of an agency denial of a petition for rulemaking. This unusual context was made still more unusual by the fact that EPA denied the ICTA's petition not just on grounds that it arose in areas of policy discretion involving large scientific uncertainties, but also on grounds that the rule being requested was *ultra vires* as a legal matter. But although questions of EPA's statutory authority were presented in *Massachusetts*, *Massachusetts* did not resolve, and could not have resolved, all statutory questions bearing on whether the regulation of GHGs is authorized under the Clean Air Act. The *Massachusetts* Court was called only to construe a limited number of Clean Air Act provisions bearing on the Administrator's particular denial decision and the judicial challenge to that denial. The *Massachusetts* decision is thus limited to a rejection of the specific rationales advanced by EPA or the D.C. Circuit on review for the conclusions (1) that GHG regulation was beyond EPA's authority; (2) that EPA had discretion to decline to regulate for reasons grounded in sources of law or policy outside the Clean Air Act; and (3) that scientific uncertainty, which would have been a sufficient ground to deny the petition, was not properly invoked by EPA's decision as an independent basis for declining to regulate.

The *Massachusetts* decision precisely parsed the types of policy discretion and scientific uncertainty that can and cannot be invoked as rationales for non-regulation. One encapsulation of the issues the *Massachusetts* Court perceived itself deciding was the Court's statement that "EPA concluded in its denial of the petition for rulemaking that it lacked authority under 42 U.S.C. § 7521(a)(1) to regulate new vehicle emissions because carbon dioxide is not an 'air pollutant' as that term is defined in § 7602. In the alternative, it concluded that even if it

possessed authority, it would decline to do so because regulation would conflict with other administration priorities.” *Massachusetts*, 549 U.S. at 500.

The Court’s ultimate rejection of EPA’s reasoning based on other policy “priorities” is instructive in understanding the relationship between an agency’s policy discretion under *State Farm* and its legal discretion under step two of *Chevron*. See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). In this regard, the *Massachusetts* court came down in favor of a tight nexus between statutory authorization and policy implementation:

The alternative basis for EPA’s decision — that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time — rests on reasoning divorced from the statutory text . . . . [EPA] has offered a laundry list of reasons not to regulate . . . . Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with [the Clean Air Act question of] whether greenhouse gas emissions contribute to climate change . . . . In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change . . . . We hold only that EPA must ground its reasons for action or inaction in the statute.

*Id.* at 532-35 (Section VII of the Court’s opinion). But, important for present purposes, so long as this requirement of a tight statutory nexus is respected, the *Massachusetts* decision mandates no particular outcome as to whether GHGs are or are not regulated under the Act. Either regulation or non-regulation is permitted by the decision.

As for scientific uncertainty, the position of the *Massachusetts* Court was again decidedly nuanced. The D.C. Circuit majority had found that EPA had relied on scientific uncertainty as a part of its basis for denying the petition. (Indeed, the D.C. Circuit noted that the State and environmental petitioners had argued that because the “EPA Administrator’s refusal to regulate rested entirely on scientific uncertainty,” it was flawed. *Massachusetts*, 415 F.3d at 58.) The Court determined that EPA’s mixing of scientific uncertainty considerations with policy discretion considerations was legal error. See *Massachusetts*, 549 U.S. at 534 (“Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. See 68 Fed. Reg. 52930-52931. If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so.”). In the Court’s view, EPA had done no more than point to the presence of this uncertainty as a reason for why it would prefer not to regulate. The Court rejected this reasoning and held that a mere pointing to uncertainties, without more, was not legally sufficient. See *id.* (“That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty . . . is irrelevant.”).

Here again, *Massachusetts*’s rejection of EPA’s particular inaction rationale was not a mandate to regulate. Even on the narrow matter of scientific uncertainties, the Court deemed EPA’s original rationale importantly different from an agency reliance on close examination of the science and an ultimate conviction that specific uncertainties appearing in that body of

science as scrutinized by the Agency afforded a sound basis for declining to regulate. *See id.* (“The statutory question is whether sufficient information exists to make an endangerment finding.”). The crux of the court’s decision as to both policy and scientific matters was that EPA had failed to either adhere to the law closely or to probe the science in detail. The legal and science discussions in the decision are thus instructive for purposes of the agency’s decisionmaking process on remand. But these discussions do not mandate any particular outcome as regards the regulation of GHG emissions.

## 2. Legal Questions Resolved in *Massachusetts*

Beyond hewing to the *Massachusetts*’s Court’s general instructions to adhere to the law, probe the science carefully, and explain its decision precisely, the critical issues for EPA arising from the *Massachusetts* remand hinge on recognizing the exact legal issues that the Supreme Court resolved in the course of rejecting EPA’s decision. Those specific legal rulings are authoritative until changed by the Supreme Court; they therefore bear careful scrutiny. Moreover, in discerning the legal issues *Massachusetts* did and did not decide, one must look to *both* decisions *Massachusetts* rejected — the one from the agency itself and the one from the D.C. Circuit on review.

The D.C. Circuit’s majority in the *Massachusetts* case consisted of Judges Randolph and Sentelle. *See Massachusetts v. EPA*, 415 F.3d at 57-59; *see also id.* at 61 (Sentelle, J., dissenting in part and concurring in the judgment) (“Although I disagree [with the majority’s holding on constitutional standing], I will accept the decision of the majority as dictating the law of this case. Having so accepted the law of the case, I will then join Judge Randolph in the issuance of a judgment closest to that which I myself would issue. With that explanation, I join in the decision to order denying the four petitions from final action of the Environmental Protection Agency.”).

The appellate court’s majority opinion essentially held that EPA possessed policy discretion to deny ICTA’s rulemaking petition on grounds (a) that regulating vehicle emissions was an inefficient piecemeal approach to the problem of global climate change; (b) that the relevant scientific uncertainties were large; and (c) that the Administrator had broad discretion to choose not to act. More specifically, the D.C. Circuit majority held as follows:

(1) Under Clean Air Act Section 202(a)(1), the Administrator was entitled, as a threshold matter, to exercise his “judgment,” to decide not to act on the ICTA petition, *see Massachusetts*, 415 F.3d at 57-58 (citing *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976));

(2) The Administrator’s judgment was a rational response to legitimate policy considerations rooted in sources of law or executive policy other than the Clean Air Act, 415 F.3d at 58;

(3) Both remedies ICTA was requesting were unworkable — (a) reducing gasoline consumption because this was a form of regulation committed exclusively to NHTSA and (b) improving tire efficiency because EPA reasonably doubted its authority to set tire efficiency standards under CAA Section 202(a)(1), *see id.*; and

(4) The Administrator’s decision to exercise his judgment in that fashion was rational in light of significant scientific uncertainty, *see Massachusetts*, 415 F.3d at 57-58.

As noted above, the D.C. Circuit’s policy and scientific rationales were rejected and modified by the Supreme Court, while the D.C. Circuit’s legal rationale concerning the “judgment” of the Administrator was rejected outright. In order to determine which arguments against regulating GHGs under the CAA were foreclosed by the *Massachusetts* Court, one must examine the issues the Court resolved as it rejected EPA’s and the D.C. Circuit’s reasoning. Careful study of *Massachusetts* shows that the Supreme Court definitively resolved the following legal issues, establishing them as precedent binding on the Executive Branch:

(1) GHGs meet the usual definition of an “air pollutant” in Clean Air Act Section 302(g), 42 U.S.C. § 7602(g), *see Massachusetts*, 549 U.S. at 529; *see also* 74 Fed. Reg. at 55,299 (agreeing that this issue was resolved by the Supreme Court).

(2) Subsequent legislative history of amendments to the Clean Air Act or connected to other statutes (such as the National Climate Program Act) did not alter the meaning of Section 302(g), *see Massachusetts*, 549 U.S. at 529-30.

(3) Contrary to arguments appearing in Justice Scalia’s dissent, GHGs were “agent[s]” of “air pollution” within the ordinary meaning of Clean Air Act Section 302(g), 42 U.S.C. § 7602(g), *see id.* at 529 n.26.

(4) *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (wherein the FDA was held to lack the authority to regulate tobacco as a “drug” or “drug delivery device”), was distinguishable because (a) conferral of authority on the FDA to regulate tobacco would have required tobacco to be banned as unsafe (and there was no analogue to that problem in this Clean Air Act situation) and (b) an unbroken chain of congressional and FDA pronouncements up that point had conceded that tobacco could not be regulated by the FDA), *see Massachusetts*, 549 U.S. at 531.

(5) The statutory reference to the Administrator’s “judgment” in making a choice to regulate under the Act’s Section 202 must be read to mean that the Administrator is authorized to determine whether an air pollutant “cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7521(a)(1). In this regard, use of the term “judgment” “is not a roving license to ignore the statutory text” but merely “direction to exercise discretion within defined statutory limits,” *Massachusetts*, 549 U.S. at 531-32.

The core rulings that impelled the *Massachusetts* Court’s to reverse the D.C. Circuit majority’s judgment were the D.C. Circuit’s approval of the emphasis the Administrator placed on policy judgment over statutory text and the D.C. Circuit’s willingness to allow the EPA significant latitude in staying its hand in the face of scientific uncertainty. Significantly, however, neither the *Massachusetts* decision, nor D.C. Circuit’s majority decision, nor the agency’s own decision analyzed the PSD issues. Indeed, the PSD program is not even mentioned in the *Massachusetts v. EPA* decision.

Nor did *Massachusetts* consider the possibility or implications of any structural mismatch between regulation of GHGs and the National Ambient Air Quality program. Indeed, the NAAQS program is mentioned in the case only by Justice Scalia’s dissent and even then only to support the dissent’s contention that the majority’s construction of the “air pollutant” language in Section 302(g) was glossing over the language in that provision about “agent[s]” of “air pollution.” See *Massachusetts*, 549 U.S. at 559 (Scalia, J., dissenting). But as noted above, the majority specifically rejected the air-pollution agent argument. The important point for present purposes is that, while any argument based on the ordinary meaning under the Act of “air pollution agent” is now foreclosed, any implications from the structure of the NAAQS program are not foreclosed.

### **3. Legal Questions Unaddressed in *Massachusetts*.**

Conspicuously absent from the list of issues resolved by *Massachusetts* is anything having to do with EPA’s inquiry on remand into the structure of the statute, either for purposes of regulation under Section 202 or under other provisions. EPA should therefore reconsider the accuracy of the Tailoring Rule’s preamble statement that *Massachusetts* “further held that GHG emissions *are subject to CAA section 202(a)* under which the Administrator must determine whether or not emissions of GHGs from new motor vehicles or motor vehicle engines cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision.” 74 Fed. Reg. at 55,299 (emphasis added).

As noted above, the *Massachusetts* Court made clear that EPA enjoys on remand a potential option of “inaction,” see *Massachusetts*, 549 U.S. at 535, so long as the Agency can justify any such inaction as required or permissible under a *Chevron* analysis of the relevant Clean Air Act provisions — including the many provisions the Court had no occasion to consider in reviewing EPA’s denial of the ICTA petition and the D.C. Circuit’s ruling upholding that denial. Indeed, the Supreme Court’s repeated admonitions that EPA should focus on remand on analyzing the statute (not extra-statutory factors) affirmatively encourages the agency to emphasize Act-based considerations such as the teachings of the absurdity, structural, and whole-statute canons. As the Supreme Court put it:

Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change *or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.*

*Id.* at 533 (emphasis added).

The passage above expressly and unmistakably recognizes that EPA is free on remand to conclude that there are other reasons that “it cannot” regulate GHGs under the Act, so long as those reasons are otherwise permissible as rooted in the Clean Air Act and different from those rejected in *Massachusetts* itself. In order to ensure appropriate agency decisionmaking under the *Chenery* and *Prill* lines of decision, EPA should expressly acknowledge that any legal avenue

not specifically foreclosed by *Massachusetts* remains open. Anything less would misconceive the proper spheres of Clean Air Act discretion and non-discretion that Congress has established to guide EPA's actions. See *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (“[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”); *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985) (“An agency decision cannot be sustained . . . where it is based not on the agency's own judgment but on an erroneous view of the law.”).

#### **4. *Massachusetts's* Narrow Review and Narrow Decision.**

The reasoning above is further reinforced by the Supreme Court's adoption of the standard of review for agency decisions denying rulemaking petitions set forth in *American Horse Protection Association, Inc. v. Lyng*, 812 F.2d 1, 3-4 (D.C. Cir. 1987). See *Massachusetts*, 549 U.S. at 527. Under this standard, refusals to promulgate rules are “susceptible to judicial review,” although “such review is ‘extremely limited’ and ‘highly deferential.’” *Id.* (quoting *National Customs Brokers & Forwarders Assn. of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989) (another case in the line of *American Horse Protection Association*)).

The “extremely limited” nature of review of rulemaking petition denials under *American Horse Protection Association* makes clear that courts in the position of the *Massachusetts* Court, narrowly reviewing an agency decision declining to regulate, should narrowly confine themselves to scrutiny of the specific reasoning advanced by the agency. Any other approach would open the door, not to “highly deferential” review, but to roving judicial inquiries that prematurely address questions that the administrative agency should be allowed to address in the first instance. Consistent with the deferential approach to reviewing rulemaking petition denials, the Supreme Court also emphasized that “EPA no doubt has significant latitude as to the manner, *timing*, content, and coordination of its regulations with those of other agencies.” *Massachusetts*, 549 U.S. at 533 (emphasis added). *Massachusetts* thus fixes no particular timing for resolution of the ICTA petition. EPA would act reasonably on remand if it allowed itself a period of months or years for consideration to ensure that it had comprehensively considered the relevant aspects of the problem.

#### **5. A Thorough, Structural Legal Analysis On Remand.**

Given the specificity of the Supreme Court's instructions on remand — and in particular the Court's indication that EPA is free to provide other reasons as to why “it cannot” regulate GHGs under the Clean Air Act — nothing in the law of preclusion restricts the field of available textual and structural Clean Air Act arguments other than the Supreme Court's particular statutory rulings. See *United States v. Seckinger*, 397 U.S. 203, 206 n.6 (1970) (Supreme Court agreeing with Court of Appeals that where a court expressly “left open” pursuit of a claim “at a later time,” a suit could not be held to be barred by principles of *res judicata*). Significantly, “[i]t is the general rule that issue preclusion attaches only ‘[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.’” *Arizona v. California*, 530 U.S. 392, 414 (2000) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27, p. 250 (1982)). Cf. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (“We have often said that drive-by jurisdictional rulings of this sort . . . have no precedential effect.”).

The Supreme Court briefs filed by the Commonwealth of Massachusetts and the other petitioners in *Massachusetts* clearly took the position that resolving the *Massachusetts* case did *not* require a resolution of questions about the applicability to greenhouse gases of the Clean Air Act's stationary source control provisions. Indeed, the petitioners in *Massachusetts* went farther and insisted that the Court could decide the case in their favor, possibly paving the way for regulation of GHGs under Title II of the Act, without any consequences for National Ambient Air Quality Standards program at all: "The NAAQS program is an entirely separate program from the mobile source program at issue in this case. Nothing in the [Act] suggests that regulation under the mobile source program must stand or fall with regulation under the NAAQS program." Petitioners Brief in *Massachusetts v. EPA*, No. 05-1120, at 28. Those petitioners went on to explain that the NAAQS and mobile source programs were separately enacted five years apart, were based on different balances of state and federal authority, and were designed with different triggering mechanisms covering different pollutants. *See id.* at 28-29. The EPA's authority to decline to regulate GHGs under the NAAQS program, in short, was not before the Court in the opinion of the petitioners. *See id.* at 29.

Likewise, while the Solicitor General's brief in *Massachusetts* did note that the NAAQS program could not be coherently applied to GHG emissions, that brief also importantly noted (immediately after making that observation) that "[t]he petition for rulemaking in this case did not request that EPA promulgate NAAQS for greenhouse gases, but instead sought regulation of greenhouse gas emissions from new motor vehicles." Brief for the Federal Respondent, at 25.

In light of the facts that the *Massachusetts* petitioners argued that the NAAQS issue was not before the Court; and that the Solicitor General's briefing did not contest that point; that neither the petitioners, nor Solicitor General, nor the *Massachusetts* Court mentioned the PSD and Title V programs; and that neither side nor the court mentioned the absurdity canon, all arguments relating to the Title V, PSD and NAAQS programs clearly remain unresolved in the wake of *Massachusetts*.

Accordingly, nothing in *Massachusetts* prevents EPA from coming to the conclusion that the PSD program cannot be applied to GHG pollutants without creating absurd results resonating with profound consequences through other provisions of the Act, and especially through Title I's stationary source programs. EPA is therefore permitted in the wake of *Massachusetts* to consider the implications of invoking absurdity as to the PSD program and other provisions of the Act. Indeed, *Chevron* step one, together with *Chenery* and *Prill*, affirmatively require such an EPA analysis.