

No. _____

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

COMMONWEALTH OF VIRGINIA, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- 1) Did Virginia and other Petitioners below demonstrate that there was evidence of central relevance to the EPA's Endangerment Finding not available during the comment period such that the Administrator was obligated to convene a proceeding for reconsideration with procedural rights of notice and comment?
- 2) Did the EPA correctly apply the standard for demonstrating central relevance?
- 3) Did the EPA err when it found the objections material enough to require resort to extensive new evidence outside of the record while denying the rights of notice and comment on that evidence?
- 4) Did the EPA err initially and on Petition for Reconsideration by delegating its Statutory Authority to outside entities?

PARTIES AND CORPORATE DISCLOSURE STATEMENT

The United States Court of Appeals for the District of Columbia Circuit consolidated the following cases for review:

09-1322 (Lead), 10-1024, 10-1025, 10-1026, 10-1030, 10-1035, 10-1036, 10-1037, 10-1038, 10-1039, 10-1040, 10-1041, 10-1042, 10-1044, 10-1045, 10-1046, 10-1234, 10-1235, 10-1239, 10-1245, 10-1281, 10-1310, 10-1318, 10-1319, 10-1320, 10-1321

Parties, Intervenors, and Amici

Petitioners

Alliance for Natural Climate Change Science and
William Orr (10-1049)
Alpha Natural Resources, Inc. (09-1322)
American Farm Bureau Federation (10-1026)
American Iron and Steel Institute (10-1038)
American Petroleum Institute (10-1044)
Attorney General Greg Abbott (10-1041)
Barry Smitherman, Chairman of the
Texas Public Utility Commission (10-1041)
Brick Industry Association (10-1044)
Chamber of Commerce of the United States of
America (10-1030)
Coalition for Responsible Regulation, Inc. (09-1322)
Collins Industries, Inc. (10-1035)
Collins Trucking Company, Inc. (10-1035)
Commonwealth of Virginia *ex rel.*
Attorney General Kenneth T. Cuccinelli (10-1036)
Competitive Enterprise Institute (10-1045)
Corn Refiners Association (10-1044)

**PARTIES AND CORPORATE
DISCLOSURE STATEMENT – Continued**

Freedomworks (10-1045)
Georgia Agribusiness Council, Inc. &
Georgia Motor Trucking Association, Inc. (10-1035)
Gerdau Ameristeel Corporation (10-1037)
Great Northern Project Development, L.P. (09-1322)
Industrial Minerals Association –
North America (09-1322)
J&M Tank Lines, Inc. (10-1035)
Kennesaw Transportation, Inc. (10-1035)
Langdale Company (10-1035)
Langdale Forest Products Company (10-1035)
Langdale Farms, LLC (10-1035)
Langdale Fuel Company (10-1035)
Langdale Chevrolet-Pontiac, Inc. (10-1035)
Langdale Ford Company (10-1035)
Langboard, Inc.-MDF (10-1035)
Langboard, Inc.-OSB (10-1035)
Massey Energy Company (09-1322)
National Association of Manufacturers (10-1044)
National Association of Home Builders (10-1044)
National Cattlemen’s Beef Association (09-1322)
National Mining Association (10-1024)
National Oilseed Processors Association (10-1044)
National Petrochemical and
Refiners Association (10-1044)
Ohio Coal Association (10-1040)
Peabody Energy Company (10-1025)
Portland Cement Association (10-1046)
Rosebud Mining Company (09-1322)
Science and Environmental Policy Project (10-1045)
Southeast Trailer Mart Inc. (10-1035)
Southeastern Legal Foundation, Inc. (10-1035)

**PARTIES AND CORPORATE
DISCLOSURE STATEMENT – Continued**

State of Alabama (10-1039)
State of Texas (10-1041)
Rick Perry, Governor of Texas (10-1041)
Texas Commission on Environmental Quality (10-1041)
Texas Agriculture Commission (10-1041)
U.S. Representative Dana Rohrabacher (10-1035)
U.S. Representative Jack Kingston (10-1035)
U.S. Representative John Linder (10-1035)
U.S. Representative John Shimkus (10-1035)
U.S. Representative Kevin Brady (10-1035)
U.S. Representative Lynn Westmoreland (10-1035)
U.S. Representative Michele Bachmann (10-1035)
U.S. Representative Nathan Deal (10-1035)
U.S. Representative Paul Broun (10-1035)
U.S. Representative Phil Gingrey (10-1035)
U.S. Representative Steve King (10-1035)
U.S. Representative Tom Price (10-1035)
Utility Air Regulatory Group (10-1042)
Western States Petroleum Association (10-1044)

Respondents

Environmental Protection Agency (Respondent IN ALL CONSOLIDATED CASES)

Lisa P. Jackson, Administrator, United States Environmental Protection Agency (Respondent in Nos. 10-1030, 10-1044, 10-1049, and 10-1235)

Intervenors for Petitioners

Associated Industries of Arkansas
Arkansas State Chamber of Commerce

**PARTIES AND CORPORATE
DISCLOSURE STATEMENT – Continued**

Colorado Association of Commerce & Industry
Glass Packaging Institute
Haley Barbour, Governor for the State of Mississippi
Idaho Association of Commerce and Industry
Independent Petroleum Association of America
Indiana Cast Metals Association
Kansas Chamber of Commerce and Industry
Louisiana Oil and Gas Association
Michigan Manufacturers Association
Mississippi Manufacturers Association
National Electrical Manufacturers Association
Nebraska Chamber of Commerce and Industry
North American Die Casting Association
Ohio Manufacturers Association
Pennsylvania Manufacturers Association
Portland Cement Association
State of Alaska
State of Florida
State of Indiana
State of Kentucky
State of Louisiana
State of Michigan
State of Nebraska
State of North Dakota
State of Oklahoma
State of South Carolina
State of South Dakota
State of Utah
Steel Manufacturers Association
Tennessee Chamber of Commerce and Industry
Virginia Manufacturers Association

**PARTIES AND CORPORATE
DISCLOSURE STATEMENT – Continued**

West Virginia Manufacturers Association
Wisconsin Manufacturers and Commerce

Intervenors for Respondents

City of New York
Commonwealth of Massachusetts
Commonwealth of Pennsylvania
Conservation Law Foundation
Department of Environmental Protection
Environmental Defense Fund
Natural Resources Defense Council
National Wildlife Federation
Sierra Club
State of Arizona
State of California
State of Connecticut
State of Delaware
State of Illinois
State of Iowa
State of Maine
State of Maryland
State of Minnesota
State of New Hampshire
State of New Mexico
State of New York
State of Oregon
State of Rhode Island
State of Vermont
State of Washington
Wetlands Watch

**PARTIES AND CORPORATE
DISCLOSURE STATEMENT – Continued**

Amici Curiae for Petitioners

Atlantic Legal Foundation
Landmark Legal Foundation
Mountain States Legal Foundation
National Federation of Independent Business Small
Business Legal Center

Amici Curiae for Respondents

Great Waters Coalition
Union of Concerned Scientists

Virginia, Kentucky, and Utah are States of the
Union with no interests required to be disclosed.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES AND CORPORATE DISCLOSURE STATEMENT.....	ii
TABLE OF AUTHORITIES	xi
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW.....	1
JURISDICTION.....	1
STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE PETITION ...	11
A. The Administrator Was Obligated to Grant Reconsideration Because Petition- ers Demonstrated that their Timely Ob- jections Were Based on Evidence of Central Relevance to the Outcome of the Endangerment Finding	14
B. The Administrator Misapplied the Cen- tral Relevance Standard.....	16
C. The EPA Administrator Erred by Making Determinations without Notice or Com- ment.....	17

TABLE OF CONTENTS – Continued

	Page
D. The EPA’s Reasons for Relying on the IPCC Were Undermined by the Climategate Data Provided in the Reconsideration Petitions which Data Compel the Conclusion that the Endangerment Finding Fails to meet essential Information Quality Standards such that Reconsideration Is Required.....	19
1. The EPA failed to ensure that Endangerment Finding’s information was “accurate, reliable and unbiased”	21
2. The EPA’s reliance on IPCC reports undermined the Public’s right to comment	24
3. The EPA’s reliance on IPCC reports prevented public transparency.....	25
E. In Issuing the Endangerment Finding and in Denying Rehearing, the EPA Impermissibly Delegated its Statutory Authority to Outside Entities	27
CONCLUSION.....	30

APPENDIX

<i>Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency</i> , 684 F.3d 102 (D.C. Cir. 2012)	App. 1
--	--------

TABLE OF CONTENTS – Continued

	Page
<i>Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency, Per Curiam Order, en banc, DENYING petitions for rehearing, dated December 20, 2012</i>	App. 104
42 U.S.C. § 7521	App. 164
42 U.S.C. § 7607	App. 200

TABLE OF AUTHORITIES

Page

CASES

<i>Am. Chemistry Council v. EPA</i> , No. 12A876 (Mar. 8, 2013)	11
<i>Burlington Truck Lines, Inc. v. United States</i> , 371 U.S. 156 (1962).....	28
<i>Chamber of Commerce v. EPA</i> , No. 12A871 (Mar. 5, 2013)	11
<i>Chamber of Commerce v. SEC</i> , 443 F.3d 890 (D.C. Cir. 2006).....	25
<i>Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency</i> , 684 F.3d 102 (D.C. Cir. 2012).....	1, 2, 10, 16, 17
<i>Coalition for Responsible Regulation, Inc. v. Envtl. Protection Agency</i> , No. 09-1322, 2012 U.S. App. LEXIS 25997, 2012 WL 6621785 (D.C. Cir. Dec. 20, 2012)	1, 2, 6, 12, 14
<i>Coalition for Responsible Regulation, Inc. v. EPA</i> , No. 12A877 (Mar. 8, 2013).....	11
<i>Conn. Light & Power v. NRC</i> , 673 F.2d 525 (D.C. Cir. 1982).....	24
<i>Donner Hanna Coke Corp. v. Costle</i> , 464 F. Supp. 1295 (W.D.N.Y. 1979).....	17
<i>Energy-Intensive Mfrs. Working Grp. on Green- house Gas Regulation v. EPA</i> , No. 12A879 (Mar. 8, 2013)	11
<i>Ethyl Corp. v. EPA</i> , 541 F.2d 1 (D.C. Cir. 1976)	10

TABLE OF AUTHORITIES – Continued

	Page
<i>Kennecott Corp. v. EPA</i> , 684 F.2d 1007 (D.C. Cir. 1982).....	19
<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007).....	3, 11, 14
<i>Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	28
<i>Nat’l Park & Conservation Ass’n v. Stanton</i> , 54 F. Supp. 2d 7 (D.D.C. 1999).....	28
<i>Nat’l Welfare Rights Org. v. Mathews</i> , 533 F.2d 637 (D.C. Cir. 1976).....	29
<i>Southeastern Legal Found. v. EPA</i> , No. 12A881 (Mar. 7, 2013).....	11
<i>Texas v. EPA</i> , No. 12A884 (Mar. 8, 2013).....	11
<i>U.S. Telecom Ass’n v. FCC</i> , 359 F.3d 554 (D.C. Cir. 2004).....	28
<i>West Virginia v. EPA</i> , 362 F.3d 861 (D.C. Cir. 2004).....	15

RULES

SUP. CT. R. 10.....	11
SUP. CT. R. 12(4).....	11
SUP. CT. R. 12(7).....	1
SUP. CT. R. 13(1).....	2
SUP. CT. R. 13(3).....	2
SUP. CT. R. 14(f).....	2

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1).....2
 42 U.S.C. § 75212, 16
 42 U.S.C. § 7521(a)(1).....27, 28
 42 U.S.C. § 76072, 17
 42 U.S.C. § 7607(b)(1).....1, 3
 42 U.S.C. § 7607(d)(1)(K)17
 42 U.S.C. § 7607(d)(3).....17, 29
 42 U.S.C. § 7607(d)(4)(B)(i)4, 7
 42 U.S.C. § 7607(d)(6)(A).....17
 42 U.S.C. § 7607(d)(6)(A)(i)16
 42 U.S.C. § 7607(d)(6)(B).....16
 42 U.S.C. § 7607(d)(6)(C).....5, 16
 42 U.S.C. § 7607(d)(7)(B).....3, 5, 7, 16, 17
 42 U.S.C. § 7607(d)(8).....17
 42 U.S.C. § 7607(h).....17
 Pub. L. No. 106-554, 114 Stat. 2763 (2000)21

REGULATIONS

*Advance Notice of Proposed Rulemaking for
 Endangerment Finding*, 73 Fed. Reg. 44,354
 (July 30, 2008).....28

TABLE OF AUTHORITIES – Continued

	Page
<i>Denial of Petition for Reconsideration of National Ambient Air Quality Standards for Particulate Matter</i> , 53 Fed. Reg. 52,698 (Dec. 29, 1988)	5, 15
<i>Denial of Petition to Revise NSPS for Stationary Gas Turbines</i> , 45 Fed. Reg. 81,653 (Dec. 11, 1980)	5, 15
<i>Endangerment and Cause or Contribute Findings</i> , 74 Fed. Reg. 66,496 (Dec. 15, 2009)	2, 3, 16, 19, 20, 22, 24, 25, 27, 29
<i>EPA’s Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act</i> , 75 Fed. Reg. 49,556 (Aug. 13, 2010)	2, 3, 4, 6, 9, 19, 25, 29
<i>Prevention of Significant Deterioration and Non-Attainment New Source Review: Reconsideration</i> , 68 Fed. Reg. 63,021 (Nov. 7, 2003)	5, 15

OTHER AUTHORITIES

1 Richard J. Pierce, Jr., <i>Administrative Law Treatise</i> (5th ed. 2010).....	18, 19
Congressional Budget Office, <i>The Economic Effects of Legislation to Reduce Greenhouse-Gas Emissions Rep.</i> (Sept. 17, 2009), http://www.cbo.gov/publication/41266	13

TABLE OF AUTHORITIES – Continued

	Page
David Rose, “Glacier Scientist: I knew data hadn’t been verified,” UK Daily Mail (Jan. 24, 2010), http://www.dailymail.co.uk/news/article-1245636/Glacier-scientists-says-knew-data-verified.html	23
FoxNews.com, Africa-Gate? U.N. fears of food shortages questioned (Feb. 8, 2010), http://www.foxnews.com/scitech/2010/02/08/british-scientist-says-panel-losing-credibility/	7
<i>Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency</i> (Oct. 2002), http://www.epa.gov/QUALITY/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf	21, 22, 25, 26
Int’l Inst. for Sustainable Dev., <i>Vulnerability of North African Countries to Climate Change: Adaptation and Implementation Strategies for Climate Change</i> (2003), http://www.iisd.org/cckn/pdf/north_africa.pdf	8
IPCC, <i>Climate Change 2007: Synthesis Report</i> , http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf	7
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TABLE OF AUTHORITIES – Continued

	Page
John M. Broder, <i>Greenhouse Gases Imperil Health, E.P.A. Announces</i> , N.Y. Times, Dec. 7, 2009, at A18, http://www.nytimes.com/2009/12/08/science/earth/08epa.html?_r=1&	15
John M. Broder, <i>Scientists Taking Steps to Defend Work on Climate</i> , N.Y. Times, Mar. 2, 2012, at A11, http://www.nytimes.com/2010/03/03/science/earth/03climate.html	4
Parliament of the United Kingdom – Science & Technology Comm., <i>The Disclosure of climate data from the Climatic Research Unit at the University of East Anglia: Conclusions & Recommendations</i> ¶13 (Mar. 31, 2010), http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/387/38709.htm	26
Ralph J. Cicerone, <i>Editorial: Ensuring Integrity in Science</i> , 327 <i>Science</i> 624 (2010), http://www.nasonline.org/about-nas/leadership/president/cicerone-editorial-science.pdf	26
Report of the EPA Inspector General, <i>Data Quality Processes</i> , Report 11-P-0702 (Sept. 26, 2011), http://www.epa.gov/oig/reports/2011/20110926-11-P-0702.pdf)	20, 23

TABLE OF AUTHORITIES – Continued

	Page
Testimony of Dr. Margo Thorning on The Impact of EPA Regulation of GHGs under the Clean Air Act on U.S. Investment and Job Growth before H. Subcomm. on Energy & Power (Feb. 9, 2011), American Council for Capital Formation, Publications, http://accf.org/news/publication/the-impact-of-epa-regulation-of-ghgs-under-the-clean-air-act-on-u-s-investment-and-job-growth	12, 13
Testimony of William L. Kovacs on Regulation of Greenhouse Gases under The Clean Air Act before the S. Comm. on Envt. & Public Works (Sept. 23, 2008), U.S. Chamber of Commerce, http://www.uschamber.com/issues/testimony/2008/testimony-regulation-greenhouse-gases-under-clean-air-act	12
The Independent Climate Change E-mails Review: Findings § 1.3(15) (July 2010), http://www.cce-review.org/pdf/FINAL%20REPORT.pdf	26
U.S. Dep’t of Commerce, Bureau of Economic Analysis, “National Income and Product Accounts: Gross Domestic Product, 4th Quarter and Annual 2012 (second estimate),” (Feb. 28, 2013), http://www.bea.gov/newsreleases/national/gdp/2013/gdp4q12_2nd.htm	13

PETITION FOR WRIT OF CERTIORARI
OPINION BELOW

The panel opinion affirming the rulemaking of the EPA is reported as *Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency*, 684 F.3d 102 (D.C. Cir. 2012). Both the order and opinions relating to denial of rehearing are unpublished, but are available at 2012 U.S. App. LEXIS 25997, 2012 WL 6621785, and, through PACER, as U.S.C.A.

Case No. 09-1322, Doc. 1411145 (Dec. 20, 2012).¹ See SUP. CT. R. 12(7). And both are reprinted in the Appendix (“App.”) at App. 1-103, 104-63.



JURISDICTION

Section 307 of the Clean Air Act (CAA) grants exclusive jurisdiction to the United States Court of Appeals for the District of Columbia Circuit over petitions for review that challenge nationally applicable final actions of the Administrator of the EPA. 42 U.S.C. § 7607(b)(1) (“A petition for review of . . . final action taken[] by the Administrator under [the CAA] may be filed only in the United States Court of

¹ All references to “Doc.” are to the appellate record in case number 09-1322, and collected cases, from the United States Court of Appeals for the District of Columbia Circuit and are available via that Court’s PACER system.

Appeals for the District of Columbia”). With regard to the Endangerment Finding and follow-on rulemaking, the D.C. Circuit received a number of timely petitions, and interventions, including those of the Commonwealth of Kentucky and the State of Utah, consolidated them, and, on June 26, 2012, issued an opinion denying the petitions and affirming the EPA’s rulemaking. *Responsible Regulation*, 684 F.3d at 102, 149. Timely petitions for rehearing *en banc* were received, circulated to the circuit court, voted on, and denied on a 6 to 2 vote on December 20, 2012. See *Coalition for Responsible Regulation, Inc. v. Evtl. Protection Agency (Responsible Regulation II)*, No. 09-1322, 2012 U.S. App. LEXIS 25997, 2012 WL 6621785 (D.C. Cir. Dec. 2012) (unpublished); Doc. 1411145; App. at 104-63. This petition for certiorari has been timely filed within 90 days of the denial of rehearing, see SUP. CT. R. 13(1) & (3), and so is now properly within this Court’s jurisdiction. See 28 U.S.C. § 1254(1).



STATUTES AND REGULATIONS

The statutes and regulations involved in this case are 42 U.S.C. §§ 7521 and 7607; 74 Fed. Reg. 66,496 (Dec. 15, 2009), 75 Fed. Reg. 49,556 (Aug. 13, 2010). Because they are lengthy, the relevant statutory provisions are reprinted in the Appendix and the Federal Register provisions are cited from the Joint Appendix below. See SUP. CT. R. 14(f).



STATEMENT OF THE CASE

This Court found in *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007), that the EPA had both the jurisdiction and the obligation to decide “whether sufficient information exists to make an endangerment finding” with respect to CO₂. The EPA published its Endangerment Finding on December 15, 2009. *Endangerment and Cause or Contribute Findings (Endangerment Finding)*, 74 Fed. Reg. at 66,496; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 29 of 695. Petitions for review of that finding were permitted “within sixty days from the date notice” was published in the Federal Register. 42 U.S.C. § 7607(b)(1). Virginia, Texas, and others filed timely petitions for review, invoking the jurisdiction of the United States Court of Appeals for the District of Columbia Circuit. *See id.*

By statute, the EPA Administrator must “convene a proceeding for reconsideration also of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed” if a person raising an objection to agency action can demonstrate that “the grounds for . . . objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.” *Id.* § 7607(d)(7)(B). The comment period for the Endangerment Finding closed on June 23, 2009. *See EPA’s Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under*

Section 202(a) of the Clean Air Act (RTP), 75 Fed. Reg. at 49,556, 49,560 (Aug. 13, 2010); J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), pp. 82, 86 of 695. On November 17, 2009, internal emails and documents from the Climate Research Unit (CRU) at the University of East Anglia (UEA) became available to the public. These documents were sufficiently damaging to the data upon which the EPA relied in making its Endangerment Finding that the release is now commonly known as “climategate.” See John M. Broder, *Scientists Taking Steps to Defend Work on Climate*, N.Y. Times, Mar. 2, 2012, at A11, <http://www.nytimes.com/2010/03/03/science/earth/03climate.html>. In the wake of these revelations, ten petitions for reconsideration also were timely filed within the period for appeal of the Endangerment Finding, including those of Virginia and Texas. The EPA refused to convene the statutory proceeding and flatly denied the petitions. See *RTP*, 75 Fed. Reg. at 49,557; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 83 of 695.

The Clean Air Act requires that information relied upon for rulemaking be in the administrative record, subject to public comment, and also provides for rehearing in the event additional information comes to light after the comment period has closed. With respect to the rulemaking record, Section 307(d)(4)(B) requires that “[a]ll documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.” 42 U.S.C. § 7607(d)(4)(B)(i). Once this

process is complete, Section 307(d)(6)(C) states that the “promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.” 42 U.S.C. § 7607(d)(6)(C). As for rehearing, Section 307(d)(7)(B) of the Act provides *inter alia*:

If the person raising an objection can demonstrate to the Administrator that . . . the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

42 U.S.C. § 7607(d)(7)(B).

Ever since 1980, the EPA has consistently interpreted this rehearing standard, CAA § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), as a heightened relevancy standard. That is, the EPA grants reconsideration when new evidence would “provide substantial support *for the argument* that the regulation should be revised.” *Denial of Petition to Revise NSPS for Stationary Gas Turbines*, 45 Fed. Reg. at 81,653 n.3 (Dec. 11, 1980) (emphasis added); see *Prevention of Significant Deterioration and Non-Attainment New Source Review: Reconsideration*, 68 Fed. Reg. 63,021 (Nov. 7, 2003) (codified at 40 CFR pts. 51, 52); *Denial of Petition for Reconsideration of National Ambient Air*

Quality Standards for Particulate Matter, 53 Fed. Reg. 52,698 (Dec. 29, 1988). Consistent with its past practice, the EPA announced that it would apply its usual standard to the petitions for reconsideration of the endangerment finding. *RTP*, 75 Fed. Reg. at 49,561.

In denying rehearing, the EPA relied in part on “a 3-volume, roughly 360-page Response to Petitions document,” which included both new information (developed after close of the comment period) and additional information not otherwise in the record and thus not subject to notice or comment. *RTP*, 75 Fed. Reg. at 49,556. The agency also relied upon investigations conducted by third parties:

Inquiries from the UK House of Commons, Science and Technology Committee, the University of East Anglia, Oxburgh Panel, the Pennsylvania State University, and the University of East Anglia, Russell Panel, all entirely independent from EPA, have examined the issues and many of the same allegations brought forward by the petitioners as a result of the disclosure of the private CRU e-mails. These inquiries are now complete. Their conclusions are in line with EPA’s review and analysis of these same CRU e-mails.

RTP, 75 Fed. Reg. at 49,557; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 83 of 695. However, none of these reports dealt with the central question raised by the reconsideration petitions: whether climategate undercut the reliability of the science upon which the EPA relied. *See* Pet’rs’ Opening Br. at 5-9; U.S.C.A.

Case 09-1322 Doc. 1309185, pp. 23-27 of 90. And obviously none of them addressed whether the information uncovered was of “central relevance” for purposes of 42 U.S.C. § 7607(d)(4)(B)(i) or (7)(B).

In support of rehearing, Petitioners argued that there were copious quantities of new information that had become public after the Endangerment Finding’s publication; that climategate emails suggested that the IPCC data and conclusion upon which the EPA relied were manipulated; that critical IPCC records were lost or destroyed; that the peer review process was corrupted and dissent suppressed; that IPCC personnel had conflicts of interest; and that the EPA’s reliance on IPCC data ensured that the process underlying the Endangerment Finding lacked transparency. The Rehearing Petitions also pointed out mistakes reflecting on the reliability of the underlying data, such as the EPA’s reliance on an IPCC report that purported to “distill[IPCC’s] most important science into a form accessible to politicians and policy makers.” FoxNews.com, *Africa-Gate? U.N. fears of food shortages questioned* (Feb. 8, 2010), <http://www.foxnews.com/scitech/2010/02/08/british-scientist-says-panel-losing-credibility>; see IPCC, *Climate Change 2007: Synthesis Report*, http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf. In it, IPCC claimed that anthropogenic GHGs could cut many African countries’ yields from rain-fed agriculture in half. *IPCC Synthesis Report* § 3.3.2 at 50. The source of this alarmist conclusion was a 2003 policy paper from a Canadian think tank. J.A. Vol. IX, Doc.

1339079 (Oct. 31, 2011), pp. 451-53 of 649. *See* Int'l Inst. for Sustainable Dev., *Vulnerability of North African Countries to Climate Change: Adaptation and Implementation Strategies for Climate Change* (2003) at 5, http://www.iisd.org/cckn/pdf/north_africa.pdf. Petitioners argued that climategate revealed other significant errors and misstatements that the EPA failed to detect and on which the public could not comment before the finding's publication, including the percentage of the Netherlands lying below sea level, J.A. Vol. IX, Doc. 1339079 (Oct. 31, 2011), p. 456 of 649, errors in the projection of glacier melt in the Himalayas, J.A. Vol. IX, Doc. 1339079 (Oct. 31, 2011), pp. 448-51 of 649; *see* IPCC, *Statement on the melting of Himalayan Glaciers* (Jan. 20, 2010), <http://www.ipcc.ch/pdf/presentations/himalaya-statement-20january2010.pdf>, projected Amazon rainforest die-off, J.A. Vol. IX, Doc. 1339079 (Oct. 31, 2011), pp. 453-54 of 649, and projections of more violent storms. J.A. Vol. IX, Doc. 1339079 (Oct. 31, 2011), pp. 459-61 of 649; *see* Pet'rs' Opening Br. at 12-13 n.14; Doc. 1341062 (Nov. 10, 2011), pp. 30-31 n.14 of 90.

Finally, the Petitioners argued that, in adopting the Endangerment Finding, the Administrator viewed the IPCC, the National Research Council (NRC), and the U.S. Global Change Research Program (USGCRP) as representing independent, mutually reinforcing data, rather than data sets heavily dependent on the IPCC, which derives from a small number of collaborative "climate scientists." In the 360-page RTP – which consisted of new material that

had never been commented upon by the public, that was added to the docket by the agency for the first time after the comment period, and that was created, in some instances, after the Endangerment Finding was finalized – the EPA rejected Petitioners’ objections raised in the rehearing petitions, without notice and comment, on the ground that the objections did not change the EPA’s own conclusions. 75 Fed. Reg. at 49,558 (“The petitioners do not provide any substantial support for the argument that the Endangerment Finding should be revised.”), 49,569; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), pp. 84, 95 of 695. After the close of the comment period, the EPA also added more than four hundred documents to the record, and cited more than fifty of these documents in its RTP. *RTP* Vols. I through III; J.A. Vol. X, Doc. 1339079 (Oct. 31, 2011), pp. 29 through 401 of 403. For example, the EPA in the RTP cited a newly published NRC study entitled “Advancing the Science of Climate Change” to reinforce the now questioned IPCC study, noting that it was “not aware of any published criticisms” of the study. *RTP* Vol. I at 50; J.A. Vol. X, Doc. 1339079 (Oct. 31, 2011), p. 85 of 403.

By procedural order, the D.C. Circuit identified denial of reconsideration as one of the issues to be briefed and argued. D.C. Cir. Order, Doc. 1357330 (Feb. 8, 2012), 4 of 5. On the merits, the panel decision minimized the significance of identified errors in light of the size of the record without discussing the overarching reliability issues arising from the politicized, agenda-driven science disclosed by climategate

and without considering whether the EPA applied the wrong standard. *Responsible Regulation*, 684 F.3d at 125. The panel also rejected the claim that the EPA had necessarily revised its Endangerment Finding by supplementing it, and the record. The D.C. Circuit rejected this argument on a mere ipse dixit basis without analysis or citation to authority. *Id.* at 126.

The court of appeals, by procedural order, also identified delegation issues arising from the Endangerment Finding as matters to be briefed and argued. D.C. Cir. Order, Doc. 1357330 (Feb. 8, 2012). However, the panel in its opinion expressed dislike of the word “delegate,” branding it as “little more than a semantic trick.” *Responsible Regulation*, 684 F.3d at 124. In any case, that court rejected the delegation claim based upon the “extreme degree of deference” afforded factual and scientific decisions by agencies, *id.* at 120, and the precautionary principle, which operates to increase deference as evidence becomes “‘more difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge.’” *Responsible Regulation*, 684 F.3d at 121 (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976)).

The D.C. Circuit permitted two days for oral argument on the numerous petitions challenging the Endangerment Finding and follow-on regulations. *See* D.C. Cir. Order, Doc. 1357330 (Feb. 8, 2012). However, this petition addresses only those reconsideration and delegation issues on which Virginia was lead on briefing and which Virginia argued. Other petitioners intend to present other issues by separate petitions for writs of certiorari in the coming weeks. *See*

Chamber of Commerce v. EPA, No. 12A871 (Mar. 5, 2013); *Am. Chemistry Council v. EPA*, No. 12A876 (Mar. 8, 2013); *Coalition for Responsible Regulation, Inc. v. EPA*, No. 12A877 (Mar. 8, 2013); *Energy-Intensive Mfrs. Working Grp. on Greenhouse Gas Regulation v. EPA*, No. 12A879 (Mar. 8, 2013); *Southeastern Legal Found. v. EPA*, No. 12A881 (Mar. 7, 2013); *Texas v. EPA*, No. 12A884 (Mar. 8, 2013). And, of course, parties below may advance only one petition each. Sup. Ct. R. 12(4). The parties to this brief pray the Court to grant petitions on all issues so that the decision of the D.C. Circuit may be comprehensively reviewed.



REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 contains illustrative bases for granting certiorari. Rule 10(a)-(b) deals with issues of uniformity of Federal law. Because the D.C. Circuit had exclusive jurisdiction over this appeal, considerations of uniformity could never arise. Rule 10(c) states that certiorari is appropriate where “a United States court of appeals has decided an important question of Federal law that has not been, but should be, settled by this Court.” An example of an exercise of jurisdiction predicated on unusual public importance is provided by the predecessor case of *Massachusetts v. EPA*, 549 U.S. at 505-06, which cited “the unusual importance of the underlying issue,” authority to regulate greenhouse gases, as justification for granting a writ despite no conflict between the lower courts on the issue.

It would be difficult to overstate the importance of the decision below. The judges concurring in denial of rehearing were agreed on this:

To be sure, the stakes here are high. The underlying policy questions and the outcome of this case are undoubtedly matters of exceptional importance.

Responsible Regulation II, No. 09-1322, 2012 U.S. App. LEXIS 25997 at 28, 62, 2012 WL 6621785 at 3, 14; App. at 111, 139; Doc. 1411145, pp. 8 & 32 of 52. The significant regulatory and economic burden of greenhouse gas regulation has been the subject of testimony before both Houses of Congress on multiple occasions prior to and after the EPA issued the Endangerment Finding. See Testimony of Dr. Margo Thorning on The Impact of EPA Regulation of GHGs under the Clean Air Act on U.S. Investment and Job Growth before H. Subcomm. on Energy & Power (Feb. 9, 2011), American Council for Capital Formation, Publications, <http://accf.org/news/publication/the-impact-of-epa-regulation-of-ghgs-under-the-clean-air-act-on-u-s-investment-and-job-growth> (explaining the macroeconomic effect of the Endangerment Finding); Testimony of William L. Kovacs on Regulation of Greenhouse Gases under The Clean Air Act before the S. Comm. on Env't. & Public Works (Sept. 23, 2008), U.S. Chamber of Commerce, <http://www.uschamber.com/issues/testimony/2008/testimony-regulation-greenhouse-gases-under-clean-air-act> (explaining the wide range of activities that would be made subject to EPA permitting once an Endangerment Finding had been

reached); *see generally* Congressional Budget Office, The Economic Effects of Legislation to Reduce Greenhouse-Gas Emissions Report (Sept. 17, 2009), <http://www.cbo.gov/publication/41266>. It has been estimated that the EPA's regulation of greenhouse gases could decrease U.S. investment by between five to fifteen percent over the three-year period ending in 2014, with a potential reduction in employment from between one-half to 1.5 million jobs and with compliance costs ranging in the tens of billions "annually, a figure that does not include the costs of actually acquiring and implementing the Best Available Control Technology, as required under the PSD program." *See* Thorning Testimony at 4-5, 9.

And the CBO, in modeling various legislative programs deemed by some to be more efficient than the EPA approach, estimated that such regulation will reduce the annual rate of GDP growth by less than 1 percent of GDP this decade, but would rise sharply over time as the loss in wealth "multiplies." CBO Report at 12-13 (Table 1). Obviously, even a small reduction of GDP growth results in a large loss in societal wealth, jobs, and other measures of human flourishing. U.S. Dep't of Commerce, Bureau of Economic Analysis, "National Income and Product Accounts: Gross Domestic Product, 4th Quarter and Annual 2012 (second estimate)," (Feb. 28, 2013), http://www.bea.gov/newsreleases/national/gdp/2013/gdp4q12_2nd.htm. In sum, this Petition, challenging the EPA's adoption of regulations aimed at limiting the previous conduct of citizens in order to reduce CO₂

and other greenhouse gas emissions, presents a matter of utmost importance to the vitality of our Nation. *See Responsible Regulation II*, No. 09-1322, 2012 U.S. App. LEXIS 12980 at 63; 2012 WL 6621785 at 14 (Kavanaugh, J., dissenting from denial of reh’g en banc) (“Put simply, the economic and environmental policy stakes are very high.”); App. at 139.

With respect to whether this is a case that “has not been, but should be, settled by this Court,” the judges of the panel thought that the outcome was predetermined by this Court in *Massachusetts v. EPA*. *See Responsible Regulation*, 684 F.3d at 120. But only this Court can definitely say that. Furthermore, the rehearing and delegation issues raised in this petition, and essential to public participation in the administrative process and informed agency decisionmaking, have never been decided by this Court.

Not only does this Petition raise matters of first impression, but the arguments against the EPA’s actions are weighty and substantial.

A. The Administrator Was Obligated to Grant Reconsideration Because Petitioners Demonstrated that their Timely Objections Were Based on Evidence of Central Relevance to the Outcome of the Endangerment Finding.

For over thirty years, the EPA has consistently held that a timely motion for reconsideration is due to be granted where new evidence would “provide

substantial support for the argument that the regulation should be revised.” See 45 Fed. Reg. at 81,653; 53 Fed. Reg. at 52,698; 68 Fed. Reg. at 63,021. Reversing the old saw “let’s not and say we did,” the EPA, in response, produced a 360-page, three-volume supplement to the Endangerment Finding and added numerous documents to shore up its scientific bases, but maintained that it had not reconsidered its original decision. Having supplemented its findings, the agency’s claim that the new information was unlikely to cause it to revise its action rang hollow. See *West Virginia v. EPA*, 362 F.3d 861 (D.C. Cir. 2004). The EPA, for foreign diplomatic reasons, had issued the Endangerment Finding as a free-standing document unassociated with any implementing rule. See John M. Broder, *Greenhouse Gases Imperil Health, E.P.A. Announces*, N.Y. Times, Dec. 7, 2009, at A18, http://www.nytimes.com/2009/12/08/science/earth/08epa.html?_r=1& (“The announcement was timed to coincide with the opening of the United Nations conference on climate change in Copenhagen, strengthening President Obama’s hand as more than 190 nations struggle to reach a global accord.”). Having done so, any objection cogent enough to require a response relying on extensive new extra-record evidence plainly provided substantial support for an argument that the Finding needed reworking. Indeed, the rehearing petitions were not merely likely to lead to a revision, they in fact led to a *de facto* revision. Put another way, an Endangerment Finding whose supporting bases have to be materially supplemented and reweighed to adequately respond

to objections triggers reconsideration under notice and comment standards. This is the plain meaning of 42 U.S.C. § 7607(d)(7)(B), and the court of appeals erred in holding otherwise. *See Responsible Regulation*, 684 F.3d at 125-26.

B. The Administrator Misapplied the Central Relevance Standard.

The EPA departed from its clear and consistent use of its heightened relevance standard without adequate explanation when it found that the data supplied by Petitioners did not change its mind on the Endangerment Finding. The Endangerment Finding was promulgated as the first step in rulemaking under Section 202(a) of the Clean Air Act, codified at 42 U.S.C. § 7521. *See Endangerment Finding*, 74 Fed. Reg. at 66,496; J.A. Vol. I, Doc. 1339709 (Oct. 31, 2011), p. 30 of 695. As a consequence, the associated rulemaking was required to be accompanied by “a statement of basis and purpose,” as well as “a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.” 42 U.S.C. § 7607(d)(6)(A)(i) & (d)(6)(B). In no event could the Endangerment Finding “be based (in part or whole) on any information or data which ha[d] not been placed in the docket as of the date of such promulgation.” 42 U.S.C § 7607(d)(6)(C). Thus, after promulgation on December 15, 2009, any revision to the statement of basis and purpose or to the response to comments was a revision requiring the same

process as that required in the initial promulgation. 42 U.S.C. § 7607(d)(1)(K). *See Donner Hanna Coke Corp. v. Costle*, 464 F. Supp. 1295 (W.D.N.Y. 1979) (EPA enforcement officials cannot circumvent rule-making requirements of 42 U.S.C. § 7607 by making substantial changes in testing methods without notice and hearing).

Whatever the 360-page tome “appears to be,” *Responsible Regulation*, 684 F.3d at 126, the EPA misapplied the central relevance and likelihood of revision test because, in purporting to deny reconsideration, the EPA did, in fact, revise the statement of basis and purpose and its response to comments. This is not only an arbitrary and capricious violation of the EPA’s own standard, but is also a facial violation of the Clean Air Act, or of the APA if the Endangerment Finding is not considered a rule for purposes of 42 U.S.C. § 7607(d)(8).

C. The EPA Administrator Erred by Making Determinations without Notice or Comment.

42 U.S.C. § 7607(d)(3) forbids the revision of any rule without notice and comment and limits the basis for such revision to data, information, and documents contained in the docket when the revision is published. 42 U.S.C. § 7607(d)(7)(B) requires any reconsideration to be conducted with rights of notice and comment. Moreover, 42 U.S.C. § 7607(h) declares, with exceptions not here relevant, a congressional

intent, “consistent with the policy of the Administrative Procedures Act,” that the Administrator “ensure a reasonable period for public participation of at least 30 days.” Finally, 42 U.S.C. § 7607(d)(6)(A) provides that any promulgated rule “shall be accompanied by (i) a statement of basis and purpose,” among other things. A revision of the statement of basis and purpose is, therefore, a revision requiring notice and comment. The Endangerment Finding itself is nothing more than an overarching statement of basis and purpose intended to support all subsequent rulemaking on the subject.

This is well-established:

To have any reasonable prospect of obtaining judicial affirmance of a major rule, an agency must set forth the basis and purpose of the rule in a detailed statement, often several hundred pages long, in which the agency refers to the evidentiary basis for all factual predicates, explains its method of reasoning from factual predicates to the expected effects of the rule, relates the factual predicates and expected effects of the rule to each of the statutory goals or purposes the agency is required to further or to consider, responds to all major criticisms contained in the comments on its proposed rule, and explains why it has rejected at least some of the plausible alternatives to the rule it has adopted.

1 Richard J. Pierce, Jr., *Administrative Law Treatise* 593 (5th ed. 2010). “Failure to fulfill one of these

judicially prescribed requirements of a ‘concise general statement of basis and purpose’ has become the most frequent basis for judicial reversal of agency rules.” *Id.* Supplementing the statement of basis and purpose with a 360-page response to objections, which includes data not included in the Endangerment Finding and, in some cases, not even compiled prior to its publication, is a revision that violates this scheme when conducted without rights of notice and comment. In fact, procedurally and institutionally, an agency in the present context is incapable of knowing and deciding scientific matters in the absence of notice and comment, and simply permitting reconsideration petitions affords no substitute. *See Kennecott Corp. v. EPA*, 684 F.2d 1007, 1018-19 (D.C. Cir. 1982).

D. The EPA’s Reasons for Relying on the IPCC Were Undermined by the Climategate Data Provided in the Reconsideration Petitions which Data Compel the Conclusion that the Endangerment Finding Fails to meet essential Information Quality Standards such that Reconsideration Is Required.

The EPA Administrator sought to justify her reliance on the “assessment literature” by claiming that the agency carefully reviewed the processes by which this literature was prepared, confirming thereby that these processes met the standards to which the EPA is subject in preparing scientific findings. *Endangerment Finding*, 74 Fed. Reg. at 66,511-13; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), pp. 45-47 of

695. *EPA Response to Public Comments (RTC)* at 1-2 (based on its review of IPCC procedures, “EPA has determined that the approach taken provided the high level of transparency and consistency outlined by EPA’s” information quality requirements); J.A. Vol. VII, Doc. 1339079 (Oct. 31, 2011), at 253 of 395. Based on this review, the Administrator concluded that her reliance on this literature “is entirely reasonable and allows EPA to rely on the best available science.” *Endangerment Finding*, 74 Fed. Reg. at 66,511 (footnote omitted); J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 45 of 695. Of course, as the EPA Inspector General found, not only was this not so, but the Administrator, in making the Endangerment Finding, lacked access to the information necessary to evaluate the quality of the IPCC’s scientific conclusions, violated the agency’s own peer-review standards, and, by having no procedure for evaluating the circumstances in which it is appropriate to rely on outside data, comprehensively delegated her statutory duties to the IPCC and other outside groups. *See Report of the EPA Inspector General, Data Quality Processes*, Report 11-P-0702 (Sept. 26, 2011), <http://www.epa.gov/oig/reports/2011/20110926-11-P-0702.pdf>) (“Inspector General Report”).

As discussed in the previous section, even if IPCC’s scientific procedures had been of sterling quality, the Administrator still would have been required to exercise her own judgment on climate science, and this she did not do. In issuing the Endangerment Finding, the EPA failed to comply even with its own standards for evaluating externally

generated information, insufficient as the EPA Inspector General subsequently found them to be. Accordingly, it should come as no surprise that climategate revealed that the quality of IPCC's science was anything but sterling, and that there is a yawning gap between the way IPCC operated in reality compared with the way the EPA says it did based on its review of IPCC's written procedures. Indeed, by relying so heavily on the IPCC, the agency failed to observe basic information quality standards to which it is subject.

1. The EPA failed to ensure that Endangerment Finding's information was "accurate, reliable and unbiased."

The EPA is subject to rigorous data quality obligations under the Information Quality Act (IQA), Pub. L. No. 106-554, 114 Stat. 2763 (2000), and the EPA's IQA Guidelines, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency (IQA Guidelines)* (Oct. 2002), http://www.epa.gov/QUALITY/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf. Because the Endangerment Finding meets the EPA's definition of "influential information," information having "a clear and substantial impact (i.e., potential change or effect) on important public policies or private sector decisions," *id.* at 19, the Endangerment Finding is "subject to a higher degree of quality (for example, transparency about data and methods) than

[other] information.” *Id.* at 20. The substance of the information underlying the Endangerment Finding must be “accurate, reliable and unbiased,” requiring use of “the best available science and supporting studies conducted in accordance with sound and objective scientific practices, including, when available, peer reviewed science and supporting studies; and (ii) data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies the use of the data).” *Id.* at 22.

As demonstrated in detail in the petitions for reconsideration, however, the IPCC reports frequently relied on unscientific “studies” that were prepared by advocacy groups such as the World Wildlife Fund (WWF), Greenpeace, and other similar organizations. This led, among other numerous examples, to the IPCC having to retract its embarrassing assertion, which was relied on in the *Endangerment Finding*, 74 Fed. Reg. at 66,523; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 57 of 695. *TSD*, J.A. Vol. VII, Doc. 1339079 (Oct. 31, 2011), p. 202 of 395; *RTC*, J.A. Vol. X, Doc. 1339079 (Oct. 31, 2011), p. 210 of 403, that Himalyan glaciers would melt by 2035, which turned out to be based on faulty information from an unpublished, unpeered review study by an advocacy organization. J.A. Vol. IX, Doc. 1339079 (Oct. 31, 2011), p. 448-51 of 649. The IPCC had been aware of the data problems in the study but had decided to rely on it anyway for public relations impact. The coordinating Lead Author of that section of the IPCC report, Dr. Murai Lai, has stated:

It related to several countries in this region and their water sources. *We thought that if we can highlight it, it will impact policy-makers and politicians and encourage them to take some concrete action.* It had importance for the region, so we thought we should put it in.

David Rose, “Glacier Scientist: I knew data hadn’t been verified,” UK Daily Mail (Jan. 24, 2010), <http://www.dailymail.co.uk/news/article-1245636/Glacier-scientists-says-knew-data-verified.html>.

This degree of goal-oriented “science” ought not, but can be expected to, inform decisions of momentous public policy import where an agency fails to follow its procedures, as the EPA did prior to the release of the Endangerment Finding TSD. *See* EPA Inspector General’s Report, *supra* at 28-29; *see also id.* at Executive Summary (reporting that the agency “did not meet all OMB requirements for peer review of a highly influential scientific assessment primarily because the review results and the EPA’s response were not publicly reported, and because 1 of the 12 reviewers was an EPA employee.”). What is more, while the EPA told the Inspector General that it engaged in ex post review in response to the petitions for reconsideration, *id.* at 29, the Inspector General found the agency’s procedures for reliance on outside entities to be inadequate and recommended that it “establish minimum review and documentation requirements for assessing and accepting data from other organizations.” *Id.*

2. The EPA's reliance on IPCC reports undermined the Public's right to comment.

The EPA's reliance on the "assessment literature" rendered the public's right to comment meaningless. But ex ante the agency did not think that much of a public comment period was necessary at all. While recognizing the enormous complexity of climate science: "very wide range of risks and harms that need to be considered," *Endangerment Finding*, 74 Fed. Reg. at 66,509; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 43 of 695, the EPA limited the comment period to a mere 60 days based in part on the agency's (mistaken and irrelevant) view that the public had had an opportunity to comment previously. *Id.* at 66,503; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 37 of 695.

There was another defect with the comment process. The EPA time and again responded to public comments on a particular scientific point by saying that the "assessment literature" had reached a different conclusion. The fundamental purpose of the comment process, however, is to ensure that a "genuine interchange" is carried on between the agency and the public, where the agency makes available all the underlying studies and data and the public is able to provide "meaningful commentary." *Conn. Light & Power v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982). No such interchange occurs when the Administrator dismisses public comments on the ground that a third party disagrees with them. Furthermore the EPA's reflexive citation to the "assessment literature," some of which was not part of the TSD, undermined the

substantive credibility of the agency's findings. *See Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) ("By requiring the 'most critical factual material' used by the agency be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment . . .").

Finally, in the Endangerment Finding, the EPA justified its use of third-party synthesis and assessment reports as "allow[ing] EPA to rely on the best available science." 74 Fed. Reg. at 66,511; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 45 of 695. Now, however, the EPA argues that it was entitled to deny reconsideration in part because other institutions found "no evidence of scientific misconduct or intentional data manipulation" by the climate researchers on whom the IPCC had so extensively relied. *RTP*, 75 Fed. Reg. at 49,558; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 84 of 695. Informal reconsideration without notice or comment based on a "no evidence of scientific misconduct or intentional data manipulation" standard is nowhere authorized by the Clean Air Act.

3. The EPA's reliance on IPCC reports prevented public transparency.

Under § 6.3 of the EPA's IQA Guidelines, the Endangerment Finding, as "Influential Information," was required to have "a higher degree of transparency regarding (1) the source of the data used, (2) the various assumptions employed, (3) the analytic methods applied, and (4) the statistical procedures

employed.” *IQA Guidelines* at 21. Climategate revealed the hollowness of the EPA’s claim that IPCC met this same level of transparency, as key IPCC authors routinely relied on their own studies while simultaneously refusing to disclose to other scientists the data underlying those studies. The United Kingdom House of Commons Science and Technology report cited by the EPA in denying reconsideration found an “unacceptable” “culture of withholding information – from those perceived by CRU to be hostile to global warming.” Parliament of the United Kingdom – Science & Technology Comm., *The Disclosure of climate data from the Climatic Research Unit at the University of East Anglia: Conclusions & Recommendations* ¶13 (Mar. 31, 2010), <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmstech/387/38709.htm>. Another review panel report cited by the EPA found “a consistent pattern of failing to display the proper degree of openness.” *The Independent Climate Change E-mails Review: Findings* § 1.3(15) (July 2010), <http://www.cce-review.org/pdf/FINAL%20REPORT.pdf>. As stated by the President of the National Academy of Sciences in commenting on climategate, “[f]ailure to make research data and related information accessible not only impedes science, it also breeds conflicts.” Ralph J. Cicerone, *Editorial: Ensuring Integrity in Science*, 327 *Science* 624 (2010), <http://www.nasonline.org/about-nas/leadership/president/cicerone-editorial-science.pdf>. It is also completely at odds with the “high” level of transparency demanded by the IQA Guidelines in order to ensure the high quality of the EPA’s science.

E. In Issuing the Endangerment Finding and in Denying Rehearing, the EPA Impermissibly Delegated its Statutory Authority to Outside Entities.

The EPA violated the CAA when it delegated its judgment to outside groups. Congress empowered the EPA Administrator to decide whether, “*in his judgment,*” pollutants emitted from motor vehicles endanger public health and welfare. 42 U.S.C. § 7521(a)(1) (emphasis added). But rather than independently assessing the data as required by the CAA, the EPA impermissibly delegated that responsibility to outside organizations.

By its own admission, the EPA placed “primary and significant weight on the[] assessment reports” of the IPCC, the NRC, and the USGCRP in making the endangerment finding. *Endangerment Finding*, 74 Fed. Reg. at 66,511; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 45 of 695. And rather than assessing the actual scientific data, these reports served as the EPA’s “primary scientific and technical basis” for its endangerment decision. *Id.* at 66,510; *see also* J.A. Vol. VII, TSD Executive Summary, Doc. 1339079 (Oct. 31, 2011), p. 34 of 395 (explaining that the document’s data and conclusions “are primarily drawn from the assessment reports of the Intergovernmental Panel on Climate Change (IPCC), the U.S. Climate Change Science Program (CCSP), the U.S. Global Change Research Program (USGCRP), and the National Research Council (NRC)”); *RTC* at Resp. 1-5 (“We did not develop new science to support the finding, but rather relied primarily on the conclusions of the

major assessment reports of USGCRP/CCSP, IPCC, and NRC and the evaluation of the public comments received.”); J.A. Vol. VII, Doc. 1339079 (Oct. 31, 2011), p. 256 of 394. However, to avoid an arbitrary decision, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); see 42 U.S.C. § 7521(a)(1). The EPA failed to do so here.

Federal administrative agencies generally may not delegate their authority to outside parties. *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 556 (D.C. Cir. 2004). An agency may look to outside groups for advice and policy recommendations, as the EPA did in proposed rulemakings, e.g., *Advance Notice of Proposed Rulemaking for Endangerment Finding*, 73 Fed. Reg. at 44,354 (July 30, 2008); J.A. Vol. I, Doc. 1339709 (Oct. 31, 2011), p. 122 of 695, but delegation is improper because “lines of accountability may blur, undermining an important democratic check on government decision-making.” *U.S. Telecom Ass’n*, 359 F.3d at 565-66, 568. Because outside sources do not necessarily “share the agency’s ‘national vision and perspective,’” the goals of the outside parties may be “inconsistent with those of the agency and the underlying statutory scheme.” *Id.* at 566 (quoting *Nat’l Park & Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 20 (D.D.C. 1999)).

The EPA's wrongful delegation in this case powerfully illustrates those dangers. The agency relied on the judgment of a number of outside groups, but the IPCC's Fourth Assessment Report was accorded special weight. See J.A. Vol. XI, Doc. 1339079 (Oct. 31, 2011), pp. 29 through 184 of 355. Not only did the EPA cite it more often than the others, but the USGCRP – another of EPA's major sources – also relied heavily on the IPCC Report for its “own” findings. See *Endangerment Finding*, 74 Fed. Reg. at 66,511 (noting that the “USGCRP incorporates a number of key findings from the [IPCC Report]” including “the attribution of observed climate change to human emissions of greenhouse gases, and the future projected scenarios of climate change for the global and regional scales”); J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 45 of 695. Despite the serious deficiencies of the IPCC process demonstrated in the reconsideration petitions and the fact that scientific data underlying the assessments is not in the administrative record, in violation of the CAA, see 42 U.S.C. § 7607(d)(3) (“All data, information, and documents . . . on which the proposed rule relies shall be included” in the rulemaking docket “on the date of publication of the proposed rule”), the EPA used the same assessments again to unilaterally reject reconsideration without notice or comment. 75 Fed. Reg. at 49,565-66; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), pp. 91-92 of 695; see *Nat'l Welfare Rights Org. v. Mathews*, 533 F.2d 637, 648 (D.C. Cir. 1976) (explaining that “judicial review is meaningless where the administrative record is insufficient to determine

whether the action is arbitrary and capricious”). In sum, the EPA’s delegation of its statutory duties was unreasonable and illegal.



CONCLUSION

Wherefore the petition should be granted and the Endangerment Finding reversed and remanded for further proceeding in accordance with law, including rehearing with rights of notice and comment.

Respectfully submitted,

KENNETH T. CUCCINELLI, II Attorney General of Virginia	PATRICIA L. WEST Chief Deputy Attorney General
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March 20, 2013	<i>Counsel for the Commonwealth of Virginia</i>

APPENDIX

684 F.3d 102

United States Court of Appeals,
District of Columbia Circuit.
COALITION FOR RESPONSIBLE
REGULATION, INC., et al., Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent
State of Michigan, et al., Intervenors.
Coalition for Responsible Regulation, Inc., et al.,
Petitioners

v.

Environmental Protection Agency, Respondent
American Frozen Food Institute, et al., Intervenors.
Coalition for Responsible Regulation, Inc., et al.,
Petitioners

v.

Environmental Protection Agency, Respondent
Langboard, Inc. – MDF, et al., Intervenors.
American Chemistry Council, Petitioner

v.

Environmental Protection Agency and Lisa Perez
Jackson, Administrator, U.S. Environmental
Protection Agency, Respondents
Chamber of Commerce of the United States of
America, et al., Intervenors.

Nos. 09-1322, 10-1024, 10-1025, 10-1026, 10-
1030, 10-1035, 10-1036, 10-1037, 10-1038, 10-1039,
10-1040, 10-1041, 10-1042, 10-1044, 10-1045, 10-
1046, 10-1234, 10-1235, 10-1239, 10-1245, 10-1281,

App. 2

10-1310, 10-1318, 10-1319, 10-1320, 10-1321, 10-1073, 10-1083, 10-1099, 10-1109, 10-1110, 10-1114, 10-1118, 10-1119, 10-1120, 10-1122, 10-1123, 10-1124, 10-1125, 10-1126, 10-1127, 10-1128, 10-1129, 10-1131, 10-1132, 10-1145, 10-1147, 10-1148, 10-1199, 10-1200, 10-1201, 10-1202, 10-1203, 10-1206, 10-1207, 10-1208, 10-1210, 10-1211, 10-1212, 10-1213, 10-1216, 10-1218, 10-1219, 10-1220, 10-1221, 10-1222, 10-1092, 10-1094, 10-1134, 10-1143, 10-1144, 10-1152, 10-1156, 10-1158, 10-1159, 10-1160, 10-1161, 10-1162, 10-1163, 10-1164, 10-1166, 10-1182, 10-1167, 10-1168, 10-1169, 10-1170, 10-1173, 10-1174, 10-1175, 10-1176, 10-1177, 10-1178, 10-1179, 10-1180.

Argued Feb. 28 and 29, 2012.

Decided June 26, 2012.

On Petitions for Review of Final Actions of the Environmental Protection Agency. Patrick R. Day, Harry W. MacDougald, and Jeffrey Bossert Clark argued the causes for Non-State Petitioners and Supporting Intervenors. With them on the briefs were John J. Burns, Attorney General, Office of the Attorney General of the State of Alaska, Steven E. Mulder, Chief Assistant Attorney General, Peter Glaser, Mark E. Nagle, Matthew Dukes, Paul D. Phillips, John A. Bryson, Ellen Steen, Eric Groten, John P. Elwood, James A. Holtkamp, Chet M. Thompson, Robin S. Conrad, Rachel L. Brand, Sheldon Gilbert, Quentin Riegel, Jeffrey A. Rosen, Robert R. Gasaway, William H. Burgess, Sam Kazman, Hans Bader, Matthew G. Paulson, Harry Moy Ng, Michele Marie Schoeppe, Michael R. Barr,

Alexandra M. Walsh, Adam J. White, Jeffrey A. Lamken, Timothy K. Webster, Roger R. Martella, Neal J. Cabral, Theodore Hadzi-Antich, Ashley C. Parrish, Cynthia A.M. Stroman, Scott C. Oostdyk, Gordon R. Alphonso, Shannon L. Goessling, Edward A. Kazmarek, F. William Brownell, Norman W. Fichthorn, Henry V. Nickel, and Allison D. Wood. Paul D. Clement, Mark W. DeLaquil, Andrew M. Grossman, and David B. Rivin, Jr. entered appearances.

E. Duncan Getchell, Jr., Solicitor General, Office of the Attorney General for the Commonwealth of Virginia, argued the cause for State Petitioners Texas and Virginia on Denial of Reconsideration of the Endangerment Finding and State Petitioners and Supporting Intervenors on Endangerment Finding Delegation Issues. With him on the briefs were Kenneth T. Cuccinelli, II, Attorney General, Stephen R. McCullough, Senior Appellate Counsel, Charles E. James Jr., Chief Deputy Attorney General, and Wesley G. Russell, Jr., Deputy Attorney General.

Greg Abbott, Attorney General, Office of the Attorney General for the State of Texas, Bill Cobb, Deputy Attorney General for Civil Litigation, J. Reed Clay, Jr., Special Assistant and Senior Counsel to the Attorney General, Jonathan F. Mitchell, Solicitor General, Michael P. Murphy, Assistant Solicitor General, Luther Strange III, Attorney General, Office of the Attorney General for the State of Alabama, Pamela Jo Bondi, Attorney General, Office of the Attorney General for the State of Florida, Gregory F.

Zoeller, Attorney General, Office of the Attorney General for the State of Indiana, Jack Conway, Attorney General, Office of the Attorney General for the Commonwealth of Kentucky, James D. “Buddy” Caldwell, Attorney General, Office of the Attorney General for the State of Louisiana, Bill Schuette, Attorney General, Office of the Attorney General for the State of Michigan, John J. Bursch, Solicitor General, Neil D. Gordon, Assistant Attorney General, Gary C. Rikard, Jon Bruning, Attorney General, Office of the Attorney General for the State of Nebraska, Katherine J. Spohn, Special Counsel to the Attorney General, Wayne Stenehjem, Attorney General, Office of the Attorney General for the State of North Dakota, Margaret Olson, Assistant Attorney General, Scott Pruitt, Attorney General, Office of the Attorney General for the State of Oklahoma, Alan Wilson, Attorney General, Office of the Attorney General for the State of South Carolina, Marty Jackley, Attorney General, Office of the Attorney General for the States of South Dakota, Roxanne Giedd, Chief, Civil Litigation Division, Mark L. Shurtleff, Attorney General, Office of the Attorney General for the State of Utah, and Kenneth T. Cuccinelli, II, Attorney General, Office of the Attorney General for the Commonwealth of Virginia were on the briefs for State Petitioners and Supporting Intervenors. Robert D. Tambling, Assistant Attorney General, Office of the Attorney General for the State of Alabama, entered an appearance.

Christian J. Ward, Scott A. Keller, and April L. Farris were on the brief for amici curiae Scientists in support of Petitioners.

Derek Schmidt, Attorney General, Office of the Attorney General for the State of Kansas, and John Campbell, Chief Deputy Attorney General, were on the brief for amicus curiae State of Kansas in support of Petitioners.

Martin R. Levin, Michael J. O'Neill, Donald M. Falk, Mark S. Kaufman, Steven J. Lechner, and Richard P. Hutchison were on the brief for amici curiae Landmark Legal Foundation, et al. in support of Petitioners.

Jon M. Lipshultz and Angeline Purdy, Attorneys, U.S. Department of Justice, argued the causes for respondent. With them on the brief were John Hannon, Carol Holmes, and Steven Silverman, U.S. Environmental Protection Agency, Attorneys. Thomas A. Lorenzen, Attorney, U.S. Department of Justice, entered an appearance.

Carol Iancu, Assistant Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, argued the cause for State and Environmental Intervenors in support of respondents. With her on the briefs were Martha Coakley, Attorney General, William L. Pardee, Attorney Assistant General, Sean H. Donahue, Howard I. Fox, David S. Baron, Megan Ceronsky, Vickie L. Patton, Peter Zalzal, Kamala D. Harris, Attorney General, Office of the Attorney General for

the State of California, Kathleen A. Kenealy, Senior Assistant Attorney General, Marc N. Melnick and Nicholas Stern, Deputy Attorneys General, Joseph R. Biden, III, Attorney General, Office of the Attorney General for the State of Delaware, Valerie M. Satterfield, Deputy Attorney General, George Jepsen, Attorney General, Office of the Attorney General for the State of Connecticut, Kimberly P. Massicotte, Matthew I. Levine, Scott N. Koschwitz, Assistant Attorneys General, Lisa Madigan, Attorney General, Office of the Attorney General for the State of Illinois, Gerald T. Karr, Assistant Attorney General, Thomas J. Miller, Attorney General, Office of the Attorney General for the State of Iowa, David R. Sheridan, Assistant Attorney General, Douglas F. Gansler, Attorney General, Office of the Attorney General for the State of Maryland, Mary E. Raivel, Assistant Attorney General, Michael A. Delaney, Attorney General, Office of the Attorney General for the State of New Hampshire, K. Allen Brooks, Senior Assistant Attorney General, William J. Schneider, Attorney General, Office of the Attorney General for the State of Maine, Gerald D. Reid, Assistant Attorney General, Lori Swanson, Attorney General, Office of the Attorney General for the State of Minnesota, Jocelyn F. Olson, Assistant Attorney General, Gary K. King, Attorney General, Office of the Attorney General for the State of New Mexico, Stephen R. Farris, Assistant Attorney General, Eric T. Schneiderman, Attorney General, Office of the Attorney General for the State of New York, Michael J. Myers and Yueh-Ru Chu, Assistant Attorneys General, John Kroger, Attorney

General, Office of the Attorney General for the State of Oregon, Paul Logan, Assistant Attorney-in-Charge, Robert M. McKenna, Attorney General, Office of the Attorney General for the State of Washington, Leslie R. Seffern, Assistant Attorney General, Peter F. Kilmartin, Attorney General, Office of the Attorney General for the State of Rhode Island, Gregory S. Schultz, Special Assistant Attorney General, William H. Sorrell, Attorney General, Office of the Attorney General for the State of Vermont, Thea J. Schwartz, Assistant Attorney General, Christopher King, Assistant Corporation Counsel, Corporation Counsel for the City Of New York, Ann B. Weeks, Helen D. Silver, David Doniger, Meleah Geertsma, Morgan Butler, Frank W. Rambo, Joseph Mendelson III, Craig Holt Segall, and Joanne Spalding.

Deborah Sivas, Douglas A. Ruley, Edward Lloyd, and Susan J. Kraham were on the brief for amici curiae America's Great Waters Coalition, et al. in support of respondent. James K. Thornton entered an appearance.

Jonathan F. Mitchell, Solicitor General, Office of the Attorney General for the State of Texas, argued the cause for State Petitioners and Supporting Intervenor. With him on the briefs were Gregg Abbott, Attorney General, Bill Cobb, Deputy Attorney General, J. Reed Clay, Jr., Special Assistant and Senior Counsel to the Attorney General, Michael P. Murphy and James P. Sullivan, Assistant Solicitors General, Luther Strange, Attorney General, Office of the Attorney General for the State of Alabama,

Herman Robinson, Donald Trahan, Kathy M. Wright, Gary C. Rikard, John Bruning, Attorney General, Office of the Attorney General for the State of Nebraska, Katherine J. Spohn, Special Counsel, Wayne Stenehjem, Attorney General, Office of the Attorney General for the State of North Dakota, Margaret Olson, Assistant Attorney General, Alan Wilson, Attorney General, Office of the Attorney General for the State of South Carolina, J. Emory Smith, Jr., Assistant Deputy Attorney General, Marty Jackley, Attorney General, Office of the Attorney General for the State of South Dakota, Roxanne Giedd, Chief, and Kenneth T. Cuccinelli, II, Attorney General, Office of the Attorney General for the Commonwealth of Virginia. Mark W. DeLaquil, Earle D. Getchell, Jr., Assistant Attorney General, Office of the Attorney General for the Commonwealth of Virginia, Andrew M. Grossman, David B. Rivkin, Jr., and Robert D. Tambling, Assistant Attorney General, Office of the Attorney General for the State of Alabama, entered appearances.

F. William Brownell and Peter Keisler argued the causes for Non-State Petitioners and Supporting Intervenors. With them on the briefs were Norman W. Fichthorn, Henry V. Nickel, Allison D. Wood, Charles H. Knauss, Shannon S. Broome, Timothy K. Webster, Roger R. Martella, Eric Groten, Patrick R. Day, John A. Bryson, Matthew G. Paulson, John P. Elwood, Paul D. Phillips, James A. Holtkamp, Shannon L. Goessling, Harry W. MacDougald, William H. Lewis, Jr., Ronald J. Tenpas, Gordon R. Alphonso, Edward A.

Kazmarek, Chet M. Thompson, Neal J. Cabral, Scott C. Oostdyk, Richard P. Hutchison, John J. McMackin, Jr., Robin S. Conrad, Sheldon Gilbert, Michael W. Steinberg, Levi McAllister, Jeffrey A. Rosen, Robert R. Gasaway, Jeffrey Bossert Clark, William H. Burgess, Ashley C. Parrish, Cynthia A.M. Stroman, Ellen Steen, Leslie Sue Ritts, Peter Glaser, Mark E. Nagle, Terry J. Satterlee, Thomas J. Grever, Margaret Claiborne Campbell, Bryon W. Kirkpatrick, Quentin Riegel, Elizabeth Gaudio, Elizabeth Henry Warner, Harry Moy Ng, Michele Marie Schoeppe, Thomas J. Ward, and Peter H. Wyckoff. Mark A. Behrens, Paul D. Clement, Matthew Dukes, Virginia L. Hudson, and David B. Salmons entered appearances.

Jonathan S. Massey was on the brief for amicus curiae Municipal Gas Commission of Missouri.

John G. Horne, II, Samuel B. Boxerman and Leslie A. Hulse were on the brief for amici curiae the Commonwealth of Kentucky and the American Chemistry Council in support of petitioners. Angus Macbeth entered an appearance.

Amanda Shafer Berman and Perry M. Rosen, Attorneys, U.S. Department of Justice, argued the causes for respondents. With them on the briefs were Howard Hoffman, Elliott Zenick, Brian Doster, and David Orlin, Counsel, U.S. Environmental Protection Agency. Thomas A. Lorenzen and Kim N. Smaczniak, Attorneys, U.S. Department of Justice, and John D. Gunter, II and Michele L. Walter, Counsel, U.S.

Environmental Protection Agency, entered appearances.

Sean H. Donahue and Michael J. Myers argued the causes for State and Environmental Intervenors in support of respondents. With them on the briefs were Vickie L. Patton, Pamela A. Campos, Megan Ceronsky, Petere Zalzal, Eric T. Schneiderman, Attorney General, Office of the Attorney General for the State of New York, Barbara D. Underwood, Solicitor General, Morgan A. Costello, Assistant Attorney General, Monica Wagner, Howard I. Fox, David S. Baron, Lisa Madigan, Attorney General, Office of the Attorney General for the State of Illinois, Gerald T. Karr, Assistant Attorney General, Joanne Spalding, Nathan Matthews, Craig Holt Segall, Kamala D. Harris, Attorney General, Office of the Attorney General for the State of California, Kathleen A. Kenealy, Senior Assistant Attorney General, Susan Durbin, Raissa Lerner, Marc N. Melnick, and Nicholas Stern, Deputy Attorneys General, Martha Coakley, Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, William L. Pardee and Carol Iancu, Assistant Attorneys General, David Doniger, Meleah Geertsma, William J. Schneider, Attorney General, Office of the Attorney General for the State of Maine, Gerald D. Ried, Assistant Attorney General, Ann B. Weeks, Helen D. Silver, Thomas J. Miller, Attorney General, Office of the Attorney General for the State of Iowa, David R. Sheridan, Assistant Attorney General, Douglas F. Gansler, Attorney General, Office

of the Attorney General for the State of Maryland, Mary Raivel, Deputy Attorney General, Michael A. Delaney, Attorney General, Office of the Attorney General for the State of New Hampshire, K. Allen Brooks, Senior Assistant Attorney General, Barbara Baird, William B. Wong, Peter F. Kilmartin, Attorney General, Office of the Attorney General for the State of Rhode Island, Gregory S. Schultz, Special Assistant Attorney General, Frank Rambo, Morgan Butler, Gary K. King, Attorney General, Office of the Attorney General for the State of New Mexico, Stephen Farris, Assistant Attorney General, John Kroger, Attorney General, Office of the Attorney General for the State of Oregon, Paul Logan, Assistant Attorney-in-Charge, Roy Cooper, Attorney General, Office of the Attorney General for the State of North Carolina, and J. Allen Jernigan and Marc Bernstein, Special Deputy Attorneys General. Kenneth P. Alex and Gavin G. McCabe, Deputy Assistant Attorneys General, Office of the Attorney General for the State of California, entered appearances.

Peter Glaser argued the cause for petitioners. With him on the briefs were John P. Elwood, Eric Groten, Patrick R. Day, John A. Bryson, Shannon L. Goessling, Harry W. MacDougald, Paul D. Phillips, James A. Holtkamp, Edward A. Kazmarek, Chet M. Thompson, Sam Kazman, Hans Bader, Gordon R. Alphonso, Richard P. Hutchison, Neal J. Cabral, Scott C. Oostdyk, Ronald J. Tenpas, Michael W. Steinberg, Levi McAllister, John J. McMackin Jr., Robin S.

Conrad, Rachel L. Brand, Sheldon Gilbert, F. William Brownell, Norman W. Fichthorn, Henry V. Nickel, Allison D. Wood, Ashley C. Parrish, Cynthia A.M. Stroman, Mark E. Nagle, Michael Higgins, Ellen Steen, Timothy K. Webster, Roger R. Martella, Matthew G. Paulson, Charles H. Knauss, Shannon S. Broome, Quentin Riegel, Elizabeth Gaudio, Thomas J. Ward, Harry Moy Ng, and Michele Marie Schoeppe.

Greg Abbott, Attorney General, Office of the Attorney General for the State of Texas, Bill Cobb, Deputy Attorney General for Civil Litigation, Jonathan F. Mitchell, Solicitor General, J. Reed Clay Jr., Special Assistant and Senior Counsel to the Attorney General, Michael P. Murphy, Assistant Solicitor General, Luther Strange, Attorney General, Office of the Attorney General for the State of Alabama, Samuel S. Olens, Attorney General, Office of the Attorney General for the State of Georgia, John E. Hennelly, Senior Assistant Attorney General, Gary C. Rikard, Jon C. Bruning, Attorney General, Office of the Attorney General for the State of Nebraska, Katherine J. Spohn, Special Counsel to the Attorney General, Wayne K. Stenehjem, Attorney General, Office of the Attorney General for the State of North Dakota, Margaret Olson, Assistant Attorney General, Alan Wilson, Attorney General, Office of the Attorney General for the State of South Carolina, J. Emory Smith, Jr., Assistant Deputy Attorney General, Marty Jackley, Attorney General, Office of the Attorney General for the State of North Dakota, Roxanne Giedd, Chief, Civil Litigation Division, and Kenneth

T. Cuccinelli, II, Attorney General, Office of the Attorney General for the Commonwealth of Virginia, were on the briefs for State Petitioners and Supporting Intervenor. Paul D. Clement, James W. Coleman, Wayne J. D'Angelo, Mark W. DeLaquil, E. Duncan Getchell Jr., Solicitor General, Office of the Attorney General for the Commonwealth of Virginia, Andrew M. Grossman, Virginia L. Hudson, David B. Rivkin Jr., and Robert D. Tambling, Assistant Attorney General, Office of the Attorney General for the State of Alabama, entered appearances.

Samuel B. Boxerman and Leslie A. Hulse were on the brief for amicus curiae American Chemistry Council in support of petitioners. Angus Macbeth entered an appearance.

Eric G. Hostetler, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the brief were John Hannon and Steven Silverman, Attorneys, U.S. Environmental Protection Agency.

Raymond B. Ludwiszewski argued the cause for intervenors Association of Global Automakers, et al. With him on the brief were Kathleen M. Sullivan, Sanford I. Weisburst, and William B. Adams.

Gavin G. McCabe, Deputy Attorney General, Office of the Attorney General for the State of California, argued the cause for intervenor State of California. On the brief were Kamala D. Harris, Attorney General, Kathleen A. Kenealy, Senior Assistant Attorney General, Marc N. Melnick and Nicholas

Stern, Deputy Attorneys General, Sean H. Donahue, Howard I. Fox, David S. Baron, Pamela Campos, Megan Ceronsky, Vickie L. Patton, Peter Zalzal, Joseph R. Biden, III, Attorney General, Office of the Attorney General for the State of Delaware, Valerie M. Satterfield, Deputy Attorney General, Thomas J. Miller, Attorney General, Office of the Attorney General for the State of Iowa, David R. Sheridan, Assistant Attorney General, Douglas F. Gansler, Attorney General, Office of the Attorney General for the State of Maryland, Roberta R. James, Assistant Attorney General, Lisa Madigan, Attorney General, Office of the Attorney General for the State of Illinois, Gerald T. Karr, Assistant Attorney General, William T. Schneider, Attorney General, Office of the Attorney General for the State of Maine, Gerald D. Reid, Assistant Attorney General, Martha Coakley, Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, Carol Iancu, Tracy Triplett, and William L. Pardee, Assistant Attorneys General, Gary K. King, Attorney General, Office of the Attorney General for the State of New Mexico, Stephen R. Farris, Assistant Attorney General, John Kroger, Attorney General, Office of the Attorney General for the State of Oregon, Paul Logan, Assistant Attorney-in-Charge, William H. Sorrell, Attorney General, Office of the Attorney General for the State of Vermont, Thea J. Schwartz, Assistant Attorney General, Eric T. Schneiderman, Attorney General, Office of the Attorney General for the State of New York, Michael J. Myers and Yueh-Ru Chu, Assistant Attorneys General, Peter F. Kilmartin,

Attorney General, Office of the Attorney General for the State of Rhode Island, Gregory S. Schultz, Special Assistant Attorney General, Robert M. McKenna, Attorney General, Office of the Attorney General for the State of Washington, Leslie R. Seffern, Assistant Attorney General, Christopher King, Assistant Corporation Counsel, Corporation Counsel for the City of New York, Joanne Spalding, Craig Holt Segall, David Doniger and Meleah Geertsma. Judith A. Stahl Moore, Assistant Attorney General, Office of the Attorney General for the State of New Mexico, and John D. Walke entered appearances.

Richard E. Ayres, Jessica L. Olson, and Kristin L. Hines were on the brief for amicus curiae Honeywell International, Inc. in support of respondents.

Richard L. Revesz, Michael A. Livermore, and Jennifer S. Rosenberg were on the brief for amicus curiae Institute for Policy Integrity at New York University School of Law in support of respondents.

Timothy K. Webster, Roger R. Martella, Jr., James W. Coleman, William H. Lewis, Jr., Ronald J. Tenpas, Charles H. Knauss, Shannon S. Broome, Bryan M. Killian, and Matthew G. Paulson were on the briefs for petitioners. Peter D. Keisler, Leslie A. Hulse, and Quentin Riegel entered appearances.

Amanda Shafer Berman and Perry M. Rosen, Attorneys, U.S. Department of Justice, and Elliott Zenick and Howard J. Hoffman, Counsel, U.S. Environmental Protection Agency, were on the brief for respondents. Jon M. Lipshultz, Senior Counsel,

U.S. Department of Justice, entered and [sic] appearance.

Ann Brewster Weeks, Sean H. Donahue, Vickie Patton, Peter Zalzal, Joanne Spalding, Craig Segall, David Doniger, and Meleah Geertsma were on the brief of intervenors in support of respondents. David S. Baron, Pamela A. Campos, Colin C. O'Brien, and John D. Walke entered appearances.

Vera P. Pardee, Brendan R. Cummings, and Kevin P. Bundy were on the brief for amicus curiae Center for Biological Diversity in support of respondents.

Before: SENTELLE, Chief Judge; ROGERS and TATEL, Circuit Judges.

Opinion for the Court filed PER CURIAM.

PER CURIAM:

Following the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) – which clarified that greenhouse gases are an “air pollutant” subject to regulation under the Clean Air Act (CAA) – the Environmental Protection Agency promulgated a series of greenhouse gas-related rules. First, EPA issued an Endangerment Finding, in which it determined that greenhouse gases may “reasonably be anticipated to endanger public health or welfare.” *See* 42 U.S.C. § 7521(a)(1). Next, it issued the Tailpipe Rule, which set emission standards for cars and light trucks. Finally, EPA determined that the CAA requires major stationary sources of greenhouse

gases to obtain construction and operating permits. But because immediate regulation of all such sources would result in overwhelming permitting burdens on permitting authorities and sources, EPA issued the Timing and Tailoring Rules, in which it determined that only the largest stationary sources would initially be subject to permitting requirements.

Petitioners, various states and industry groups, challenge all these rules, arguing that they are based on improper constructions of the CAA and are otherwise arbitrary and capricious. But for the reasons set forth below, we conclude: 1) the Endangerment Finding and Tailpipe Rule are neither arbitrary nor capricious; 2) EPA's interpretation of the governing CAA provisions is unambiguously correct; and 3) no petitioner has standing to challenge the Timing and Tailoring Rules. We thus dismiss for lack of jurisdiction all petitions for review of the Timing and Tailoring Rules, and deny the remainder of the petitions.

I.

We begin with a brief primer on greenhouse gases. As their name suggests, when released into the atmosphere, these gases act “like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat.” *Massachusetts v. EPA*, 549 U.S. at 505, 127 S.Ct. 1438. A wide variety of modern human activities result in greenhouse gas emissions; cars, power plants, and industrial sites all release

significant amounts of these heat-trapping gases. In recent decades “[a] well-documented rise in global temperatures has coincided with a significant increase in the concentration of [greenhouse gases] in the atmosphere.” *Id.* at 504-05, 127 S.Ct. 1438. Many scientists believe that mankind’s greenhouse gas emissions are driving this climate change. These scientists predict that global climate change will cause a host of deleterious consequences, including drought, increasingly severe weather events, and rising sea levels.

The genesis of this litigation came in 2007, when the Supreme Court held in *Massachusetts v. EPA* that greenhouse gases “unambiguous[ly]” may be regulated as an “air pollutant” under the Clean Air Act (“CAA”). *Id.* at 529, 127 S.Ct. 1438. Squarely rejecting the contention – then advanced by EPA – that “greenhouse gases cannot be ‘air pollutants’ within the meaning of the Act,” *id.* at 513, 127 S.Ct. 1438, the Court held that the CAA’s definition of “air pollutant” “embraces *all* airborne compounds of whatever stripe.” *Id.* at 529, 127 S.Ct. 1438 (emphasis added). Moreover, because the CAA requires EPA to establish motor-vehicle emission standards for “*any* air pollutant . . . which may reasonably be anticipated to endanger public health or welfare,” 42 U.S.C. § 7521(a)(1) (emphasis added), the Court held that EPA had a “statutory obligation” to regulate harmful greenhouse gases. *Id.* at 534, 127 S.Ct. 1438. “Under the clear terms of the Clean Air Act,” the Court concluded, “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.” *Id.* at 533, 127 S.Ct. 1438. The Court thus directed EPA to determine “whether sufficient information exists to make an endangerment finding” for greenhouse gases. *Id.* at 534, 127 S.Ct. 1438.

Massachusetts v. EPA spurred a cascading series of greenhouse gas-related rules and regulations. First, in direct response to the Supreme Court’s directive, EPA issued an Endangerment Finding for greenhouse gases. *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* (“Endangerment Finding”), 74 Fed. Reg. 66,496 (Dec. 15, 2009). The Endangerment Finding defined as a single “air pollutant” an “aggregate group of six long-lived and directly-emitted greenhouse gases” that are “well mixed” together in the atmosphere and cause global climate change: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. *Id.* at 66,536-37. Following “common practice,” EPA measured the impact of these gases on a “carbon dioxide equivalent basis,” (CO₂e) which is based on the gases’ “warming effect relative to carbon dioxide . . . over a specified timeframe.” *Id.* at 66,519. (Using the carbon dioxide equivalent equation, for example, a mixture of X amount of nitrous oxide and Y amount of sulfur hexafluoride is expressed as Z amount of CO₂e). After compiling and

considering a considerable body of scientific evidence, EPA concluded that motor-vehicle emissions of these six well-mixed gases “contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare.” *Id.* at 66,499.

Next, and pursuant to the CAA’s requirement that EPA establish motor-vehicle emission standards for “any air pollutant . . . which may reasonably be anticipated to endanger public health or welfare,” 42 U.S.C. § 7521(a)(1), the agency promulgated its Tailpipe Rule for greenhouse gases. *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule* (“Tailpipe Rule”), 75 Fed. Reg. 25,324 (May 7, 2010). Effective January 2, 2011, the Tailpipe Rule set greenhouse gas emission standards for cars and light trucks as part of a joint rulemaking with fuel economy standards issued by the National Highway Traffic Safety Administration (NHTSA). *Id.* at 25,326.

Under EPA’s longstanding interpretation of the CAA, the Tailpipe Rule automatically triggered regulation of stationary greenhouse gas emitters under two separate sections of the Act. The first, the Prevention of Significant Deterioration of Air Quality (PSD) program, requires state-issued construction permits for certain types of stationary sources – for example, iron and steel mill plants – if they have the potential to emit over 100 tons per year (tpy) of “any air pollutant.” *See* 42 U.S.C. §§ 7475; 7479(1). All other stationary sources are subject to PSD

permitting if they have the potential to emit over 250 tpy of “any air pollutant.” *Id.* § 7479(1). The second provision, Title V, requires state-issued operating permits for stationary sources that have the potential to emit at least 100 tpy of “any air pollutant.” *Id.* § 7602(j). EPA has long interpreted the phrase “any air pollutant” in both these provisions to mean any air pollutant that is regulated under the CAA. *See Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans* (“1980 Implementation Plan Requirements”), 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980) (PSD program); *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* (“Tailoring Rule”), 75 Fed. Reg. 31,514, 31,553-54 (June 3, 2010) (discussing history of Title V regulation and applicability). And once the Tailpipe Rule set motor-vehicle emission standards for greenhouse gases, they became a regulated pollutant under the Act, requiring PSD and Title V greenhouse permitting.

Acting pursuant to this longstanding interpretation of the PSD and Title V programs, EPA issued two rules phasing in stationary source greenhouse gas regulation. First, in the Timing Rule, EPA concluded that an air pollutant becomes “subject to regulation” under the Clean Air Act – and thus subject to PSD and Title V permitting – only once a regulation requiring control of that pollutant takes effect. *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by*

Clean Air Act Permitting Programs (“Timing Rule”), 75 Fed. Reg. 17,004 (Apr. 2, 2010). Therefore, EPA concluded, major stationary emitters of greenhouse gases would be subject to PSD and Title V permitting regulations on January 2, 2011 – the date on which the Tailpipe Rule became effective, and thus, the date when greenhouse gases first became regulated under the CAA. *Id.* at 17,019.

Next, EPA promulgated the Tailoring Rule. In the Tailoring Rule, EPA noted that greenhouse gases are emitted in far greater volumes than other pollutants. Indeed, millions of industrial, residential, and commercial sources exceed the 100/250 tpy statutory emissions threshold for CO₂e. Tailoring Rule, 75 Fed. Reg. at 31,534-36. Immediately adding these sources to the PSD and Title V programs would, EPA predicted, result in tremendous costs to industry and state permitting authorities. *See id.* As a result, EPA announced that it was “relieving overwhelming permitting burdens that would, in the absence of this rule, fall on permitting authorities and sources.” *Id.* at 31,516. Departing from the CAA’s 100/250 tpy emissions threshold, the Tailoring Rule provided that only the largest sources – those exceeding 75,000 or 100,000 tpy CO₂e, depending on the program and project – would initially be subject to greenhouse gas permitting. *Id.* at 31,523. (The Tailoring Rule further provided that regulated sources must also emit greenhouse gases at levels that exceed the 100/250 tpy emissions threshold on a *mass* basis. That is, they must emit over 100/250 tpy of actual pollutants, in

addition to exceeding the 75,000/100,000 tpy carbon dioxide equivalent. *Id.* at 31,523.)

A number of groups – including states and regulated industries – filed petitions for review of EPA’s greenhouse gas regulations, contending that the agency misconstrued the CAA and otherwise acted arbitrarily and capriciously. This appeal consolidates the petitions for review of the four aforementioned rules: the Endangerment Finding, the Tailpipe Rule, the Timing Rule, and the Tailoring Rule.

“The Clean Air Act empowers us to reverse the Administrator’s action in rulemaking if it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.’” *Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 424 (D.C.Cir.2011) (quoting 42 U.S.C. § 7607(d)(9)(A)). Questions of statutory interpretation are governed by the familiar *Chevron* two-step: “First . . . if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). But “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843, 104 S.Ct. 2778.

This opinion proceeds in several steps. Part II explains why the Endangerment Finding was neither arbitrary nor capricious, while Part III does the same for the Tailpipe Rule. Turning to stationary source regulation, Part IV examines whether any petitioners may timely challenge EPA's longstanding interpretation of the PSD statute. Because we conclude that they may, Part V addresses the merits of their statutory arguments, and explains why EPA's interpretation of the CAA was compelled by the statute. Next, Part VI explains why petitioners lack standing to challenge the Timing and Tailoring Rules themselves. Finally, Part VII disposes of several arguments that have nothing to do with the rules under review, and thus are not properly before us.

II.

We turn first to State and Industry Petitioners' challenges to the Endangerment Finding, the first of the series of rules EPA issued after the Supreme Court remanded *Massachusetts v. EPA*. In the decision ordering the remand, the Supreme Court held that EPA had failed in its statutory obligations when it "offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change." *Massachusetts v. EPA*, 549 U.S. at 534, 127 S.Ct. 1438. On remand, EPA compiled a substantial scientific record, which is before us in the present review, and determined that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to

endanger public welfare.” Endangerment Finding, 74 Fed. Reg. at 66,497. EPA went on to find that motor-vehicle emissions of greenhouse gases “contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare.” *Id.* at 66,499.

State and Industry Petitioners challenge several aspects of EPA’s decision, including (1) EPA’s interpretation of CAA § 202(a)(1), which sets out the endangerment-finding standard; (2) the adequacy of the scientific record supporting the Endangerment Finding; (3) EPA’s decision not to “quantify” the risk of endangerment to public health or welfare created by climate change; (4) EPA’s choice to define the “air pollutant” at issue as an aggregate of six greenhouse gases; (5) EPA’s failure to consult its Science Advisory Board before issuing the Endangerment Finding; and (6) EPA’s denial of all petitions for reconsideration of the Endangerment Finding. We ultimately conclude that the Endangerment Finding is consistent with *Massachusetts v. EPA* and the text and structure of the CAA, and is adequately supported by the administrative record.

A.

Industry Petitioners contend that EPA improperly interpreted CAA § 202(a)(1) as restricting the Endangerment Finding to a science-based judgment devoid of considerations of policy concerns

and regulatory consequences. They assert that CAA § 202(a)(1) requires EPA to consider, *e.g.*, the benefits of activities that require greenhouse gas emissions, the effectiveness of emissions regulation triggered by the Endangerment Finding, and the potential for societal adaptation to or mitigation of climate change. They maintain that eschewing those considerations also made the Endangerment Finding arbitrary and capricious.

These contentions are foreclosed by the language of the statute and the Supreme Court's decision in *Massachusetts v. EPA*. Section 202(a) of the CAA states in relevant part that EPA's Administrator

shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a)(1). This language requires that the endangerment evaluation “relate to whether an air pollutant ‘cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.’” *Massachusetts v. EPA*, 549 U.S. at 532-33, 127 S.Ct. 1438. At bottom, § 202(a)(1) requires EPA to answer only two questions: whether particular “air pollution” – here,

greenhouse gases – “may reasonably be anticipated to endanger public health or welfare,” and whether motor-vehicle emissions “cause, or contribute to” that endangerment.

These questions require a “scientific judgment” about the potential risks greenhouse gas emissions pose to public health or welfare – not policy discussions. *Massachusetts v. EPA*, 549 U.S. at 534, 127 S.Ct. 1438. In *Massachusetts v. EPA*, the Supreme Court rebuffed an attempt by EPA itself to inject considerations of policy into its decision. At the time, EPA had “offered a laundry list of reasons not to regulate” greenhouse gases, including

that a number of voluntary Executive Branch programs already provide an effective response to the threat of global warming, that regulating greenhouse gases might impair the President’s ability to negotiate with “key developing nations” to reduce emissions, and that curtailing motor-vehicle emissions would reflect “an inefficient, piecemeal approach to address the climate change issue.”

Id. at 533, 127 S.Ct. 1438 (citations omitted). The Court noted that “these policy judgments . . . have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment.” *Id.* at 533-34, 127 S.Ct. 1438. In the Court’s view, EPA’s policy-based explanations contained “no reasoned explanation for

[EPA's] refusal to decide" the key part of the endangerment inquiry: "whether greenhouse gases cause or contribute to climate change." *Id.* at 534, 127 S.Ct. 1438.

As in *Massachusetts v. EPA*, a "laundry list of reasons not to regulate" simply has "nothing to do with whether greenhouse gas emissions contribute to climate change." *Id.* at 533-34, 127 S.Ct. 1438. The additional exercises State and Industry Petitioners would have EPA undertake – *e.g.*, performing a cost-benefit analysis for greenhouse gases, gauging the effectiveness of whatever emission standards EPA would enact to limit greenhouse gases, and predicting society's adaptive response to the dangers or harms caused by climate change – do not inform the "scientific judgment" that § 202(a)(1) requires of EPA. Instead of focusing on the question whether greenhouse gas emissions may reasonably be anticipated to endanger public health or welfare, the factors State and Industry Petitioners put forth only address what might happen were EPA to answer that question in the affirmative. As EPA stated in the Endangerment Finding, such inquiries "muddle the rather straightforward scientific judgment about whether there may be endangerment by throwing the potential impact of responding to the danger into the initial question." 74 Fed. Reg. at 66,515. To be sure, the subsection following § 202(a)(1), § 202(a)(2), requires that EPA address limited questions about the cost of compliance with new emission standards and the availability of technology for meeting those

standards, *see infra* Part III, but these judgments are not part of the § 202(a)(1) endangerment inquiry. The Supreme Court made clear in *Massachusetts v. EPA* that it was not addressing the question “whether policy concerns can inform EPA’s actions in the event that it makes such a finding,” 549 U.S. at 534-35, 127 S.Ct. 1438, but that policy concerns were not part of the calculus for the determination of the endangerment finding in the first instance. The Supreme Court emphasized that it was holding “that EPA must ground its reasons for action or inaction in the statute.” *Id.* at 535, 127 S.Ct. 1438. The statute speaks in terms of endangerment, not in terms of policy, and EPA has complied with the statute.

State and Industry Petitioners insist that because statutes should be interpreted to avoid absurd results, EPA should have considered at least the “absurd” consequences that would follow from an endangerment finding for greenhouse gases. Specifically: having made an endangerment finding, EPA will proceed to promulgate emission standards under § 202(a)(1). Issuing those standards triggers regulation – under EPA’s PSD and Title V programs – of stationary sources that emit greenhouse gases at levels above longstanding statutory thresholds. Because greenhouse gases are emitted in much higher volumes than other air pollutants, hundreds of thousands of small stationary sources would exceed those thresholds. This would subject those sources to PSD and Title V permitting requirements despite what Petitioners claim was Congress’s clear intent

that the requirements apply only to large industrial sources. Petitioners assert that even EPA believed such overbroad regulation to be an absurd result, which it attempted to rectify by adopting the Tailoring Rule to raise the statutory thresholds, *see infra* Part VI.

However “absurd” Petitioners consider this consequence, though, it is still irrelevant to the endangerment inquiry. That EPA adjusted the statutory thresholds to accommodate regulation of greenhouse gases emitted by stationary sources may indicate that the CAA is a regulatory scheme less-than-perfectly tailored to dealing with greenhouse gases. But the Supreme Court has already held that EPA indeed wields the authority to regulate greenhouse gases under the CAA. *See Massachusetts v. EPA*. The plain language of § 202(a)(1) of that Act does not leave room for EPA to consider as part of the endangerment inquiry the stationary-source regulation triggered by an endangerment finding, even if the degree of regulation triggered might at a later stage be characterized as “absurd.”

B.

State and Industry Petitioners next challenge the adequacy of the scientific record underlying the Endangerment Finding, objecting to both the type of evidence upon which EPA relied and EPA’s decision to make an Endangerment Finding in light of what

Industry Petitioners view as significant scientific uncertainty. Neither objection has merit.

1.

As an initial matter, State and Industry Petitioners question EPA's reliance on "major assessments" addressing greenhouse gases and climate change issued by the Intergovernmental Panel on Climate Change (IPCC), the U.S. Global Climate Research Program (USGCRP), and the National Research Council (NRC). Endangerment Finding, 74 Fed. Reg. at 66,510-11. These peer-reviewed assessments synthesized thousands of individual studies on various aspects of greenhouse gases and climate change and drew "overarching conclusions" about the state of the science in this field. *Id.* at 66,511. The assessments provide data and information on, *inter alia*, "the amount of greenhouse gases being emitted by human activities"; their continued accumulation in the atmosphere; the resulting observed changes to Earth's energy balance, temperature and climate at global and regional levels, and other "climate-sensitive sectors and systems of the human and natural environment"; the extent to which these changes "can be attributed to human-induced buildup of atmospheric greenhouse gases"; "future projected climate change"; and "projected risks and impacts to human health, society and the environment." *Id.* at 66,510-11.

State and Industry Petitioners assert that EPA improperly “delegated” its judgment to the IPCC, USGCRP, and NRC by relying on these assessments of climate-change science. See *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 566 (D.C.Cir.2004). This argument is little more than a semantic trick. EPA did not delegate, explicitly or otherwise, any decision-making to any of those entities. EPA simply did here what it and other decision-makers often must do to make a science-based judgment: it sought out and reviewed existing scientific evidence to determine whether a particular finding was warranted. It makes no difference that much of the scientific evidence in large part consisted of “syntheses” of individual studies and research. Even individual studies and research papers often synthesize past work in an area and then build upon it. This is how science works. EPA is not required to re-prove the existence of the atom every time it approaches a scientific question.

Moreover, it appears from the record that EPA used the assessment reports not as substitutes for its own judgment but as evidence upon which it relied to make that judgment. EPA evaluated the processes used to develop the various assessment reports, reviewed their contents, and considered the depth of the scientific consensus the reports represented. Based on these evaluations, EPA determined the assessments represented the best source material to use in deciding whether greenhouse gas emissions may be reasonably anticipated to endanger public

health or welfare. Endangerment Finding, 74 Fed. Reg. at 66,510-11. It then reviewed those reports along with comments relevant to the scientific considerations involved to determine whether the evidence warranted an endangerment finding for greenhouse gases as it was required to do under the Supreme Court's mandate in *Massachusetts v. EPA*.

2.

Industry Petitioners also assert that the scientific evidence does not adequately support the Endangerment Finding. As we have stated before in reviewing the science-based decisions of agencies such as EPA, “[a]lthough we perform a searching and careful inquiry into the facts underlying the agency’s decisions, we will presume the validity of agency action as long as a rational basis for it is presented.” *Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512, 519 (D.C.Cir.2009) (internal quotation marks omitted). In so doing, “we give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise.” *Id.* (internal quotation marks omitted).

The body of scientific evidence marshaled by EPA in support of the Endangerment Finding is substantial. EPA’s scientific evidence of record included support for the proposition that greenhouse gases trap heat on earth that would otherwise dissipate into space; that this “greenhouse effect” warms the climate; that human activity is

contributing to increased atmospheric levels of greenhouse gases; and that the climate system is warming.

Based on this scientific record, EPA made the linchpin finding: in its judgment, the “root cause” of the recently observed climate change is “very likely” the observed increase in anthropogenic greenhouse gas emissions. Endangerment Finding, 74 Fed. Reg. at 66,518. EPA found support for this finding in three lines of evidence. First, it drew upon our “basic physical understanding” of the impacts of various natural and manmade changes on the climate system. For instance, EPA relied on evidence that the past half-century of warming has occurred at a time when natural forces such as solar and volcanic activity likely would have produced cooling. Endangerment Finding, Response to Comments (RTC) Vol. 3, at 20. Other evidence supports EPA’s conclusion that the observed warming pattern – warming of the bottommost layer of the atmosphere and cooling immediately above it – is consistent with greenhouse-gas causation. *Id.*

EPA further relied upon evidence of historical estimates of past climate change, supporting EPA’s conclusion that global temperatures over the last half-century are unusual. Endangerment Finding, 74 Fed. Reg. at 66,518. Scientific studies upon which EPA relied place high confidence in the assertion that global mean surface temperatures over the last few decades are higher than at any time in the last four centuries. Technical Support Document for the

Endangerment Finding (TSD), at 31. These studies also show, albeit with significant uncertainty, that temperatures at many individual locations were higher over the last twenty-five years than during any period of comparable length since 900 A.D. *Id.*

For its third line of evidence that anthropogenic emissions of greenhouse gases spurred the perceived warming trend, EPA turned to computer-based climate-model simulations. Scientists have used global climate models built on basic principles of physics and scientific knowledge about the climate to try to simulate the recent climate change. These models have only been able to replicate the observed warming by including anthropogenic emissions of greenhouse gases in the simulations. Endangerment Finding, 74 Fed. Reg. at 66,523.

To recap, EPA had before it substantial record evidence that anthropogenic emissions of greenhouse gases “very likely” caused warming of the climate over the last several decades. EPA further had evidence of current and future effects of this warming on public health and welfare. Relying again upon substantial scientific evidence, EPA determined that anthropogenically induced climate change threatens both public health and public welfare. It found that extreme weather events, changes in air quality, increases in food-and water-borne pathogens, and increases in temperatures are likely to have adverse health effects. *Id.* at 66,497-98. The record also supports EPA’s conclusion that climate change endangers human welfare by creating risk to food

production and agriculture, forestry, energy, infrastructure, ecosystems, and wildlife. Substantial evidence further supported EPA's conclusion that the warming resulting from the greenhouse gas emissions could be expected to create risks to water resources and in general to coastal areas as a result of expected increase in sea level. *Id.* at 66,498. Finally, EPA determined from substantial evidence that motor-vehicle emissions of greenhouse gases contribute to climate change and thus to the endangerment of public health and welfare.

Industry Petitioners do not find fault with much of the substantial record EPA amassed in support of the Endangerment Finding. Rather, they contend that the record evidences too much uncertainty to support that judgment. But the existence of some uncertainty does not, without more, warrant invalidation of an endangerment finding. If a statute is "precautionary in nature" and "designed to protect the public health," and the relevant evidence is "difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge," EPA need not provide "rigorous step-by-step proof of cause and effect" to support an endangerment finding. *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C.Cir.1976). As we have stated before, "Awaiting certainty will often allow for only reactive, not preventive, regulation." *Id.* at 25.

Congress did not restrict EPA to remedial regulation when it enacted CAA § 202(a). That section mandates that EPA promulgate new emission

standards if it determines that the air pollution at issue “may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7521(a)(1). This language requires a precautionary, forward-looking scientific judgment about the risks of a particular air pollutant, consistent with the CAA’s “precautionary and preventive orientation.” *Lead Indus. Ass’n, Inc. v. EPA*, 647 F.2d 1130, 1155 (D.C.Cir.1980). Requiring that EPA find “certain” endangerment of public health or welfare before regulating greenhouse gases would effectively prevent EPA from doing the job Congress gave it in § 202(a) – utilizing emission standards to prevent reasonably anticipated endangerment from maturing into concrete harm. *Cf. id.* (“[R]equiring EPA to wait until it can conclusively demonstrate that a particular effect is adverse to health before it acts is inconsistent with both the [CAA]’s precautionary and preventive orientation and the nature of the Administrator’s statutory responsibilities. Congress provided that the Administrator is to use his judgment in setting air quality standards precisely to permit him to act in the face of uncertainty.”).

In *Massachusetts v. EPA* the Supreme Court confirmed that EPA may make an endangerment finding despite lingering scientific uncertainty. Indeed, the Court held that the existence of “some residual uncertainty” did not excuse EPA’s decision to decline to regulate greenhouse gases. *Massachusetts v. EPA*, 549 U.S. at 534, 127 S.Ct. 1438. To avoid regulating emissions of greenhouse gases, EPA would

need to show “scientific uncertainty . . . so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming.” *Id.* Clearly, then, EPA may issue an endangerment finding even while the scientific record still contains at least “some residual uncertainty.” Industry Petitioners have shown no more than that.

In the end, Petitioners are asking us to re-weigh the scientific evidence before EPA and reach our own conclusion. This is not our role. As with other reviews of administrative proceedings, we do not determine the convincing force of evidence, nor the conclusion it should support, but only whether the conclusion reached by EPA is supported by substantial evidence when considered on the record as a whole. *See, e.g., New York v. EPA*, 413 F.3d 3, 30 (D.C.Cir.2005). When EPA evaluates scientific evidence in its bailiwick, we ask only that it take the scientific record into account “in a rational manner.” *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1187 (D.C.Cir.1981). Industry Petitioners have not shown that EPA failed to do so here.

C.

State Petitioners, here led by Texas, contend that the Endangerment Finding is arbitrary and capricious because EPA did not “define,” “measure,” or “quantify” either the atmospheric concentration at which greenhouse gases endanger public health or

welfare, the rate or type of climate change that it anticipates will endanger public health or welfare, or the risks or impacts of climate change. According to Texas, without defining these thresholds and distinguishing “safe” climate change from climate change that endangers, EPA’s Endangerment Finding is just a “subjective conviction.”

It is true that EPA did not provide a quantitative threshold at which greenhouse gases or climate change will endanger or cause certain impacts to public health or welfare. The text of CAA § 202(a)(1) does not require that EPA set a precise numerical value as part of an endangerment finding. Quite the opposite; the § 202(a)(1) inquiry necessarily entails a case-by-case, sliding-scale approach to endangerment because “[d]anger . . . is not set by a fixed probability of harm, but rather is composed of reciprocal elements of risk and harm, or probability and severity.” *Ethyl*, 541 F.2d at 18. EPA need not establish a minimum threshold of risk or harm before determining whether an air pollutant endangers. It may base an endangerment finding on “a lesser risk of greater harm . . . or a greater risk of lesser harm” or any combination in between. *Id.*

Ethyl is instructive. There, EPA made an endangerment finding for airborne lead. During its endangerment inquiry, EPA initially tried to do what Texas asks of it here: find a specific concentration of the air pollutant below which it would be considered “safe” and above which it would endanger public health. *Id.* at 56. However, EPA abandoned that

approach because it failed to account for “the wide variability of dietary lead intake” and lacked predictive value. EPA substituted a “more qualitative” approach, which relied on “predictions based on uncertain data” along with clinical studies. *Id.* at 56-57. This court upheld the endangerment finding that used that qualitative approach despite the lack of a specific endangerment “threshold.”

In its essence, Texas’s call for quantification of the endangerment is no more than a specialized version of Industry Petitioners’ claim that the scientific record contains too much uncertainty to find endangerment. EPA relied on a substantial record of empirical data and scientific evidence, making many specific and often quantitative findings regarding the impacts of greenhouse gases on climate change and the effects of climate change on public health and welfare. Its failure to distill this ocean of evidence into a specific number at which greenhouse gases cause “dangerous” climate change is a function of the precautionary thrust of the CAA and the multivariate and sometimes uncertain nature of climate science, not a sign of arbitrary or capricious decision-making.

D.

EPA defined both the “air pollution” and the “air pollutant” that are the subject of the Endangerment Finding as an aggregate of six greenhouse gases, which EPA called “well mixed greenhouse gases”: carbon dioxide (CO₂), methane (CH₄), nitrous oxide

(N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆). Industry Petitioners argue that EPA's decision to include PFCs and SF₆ in this group of greenhouse gases was arbitrary and capricious primarily because motor vehicles generally do not emit these two gases.

No petitioner for review of the Endangerment Finding has established standing to make this argument. Industry Petitioners concede that EPA's decision to regulate PFCs and SF₆ along with the other four greenhouse gases does not injure any motor-vehicle-related petitioner. Nor has any non-motor-vehicle-related petitioner shown an injury-in-fact resulting from EPA's inclusion of these two gases in the six-gas amalgam of "well-mixed greenhouse gases." At oral argument, Industry Petitioners asserted for the first time that certain utility companies – members of associations that petitioned for review of the Endangerment Finding – own utility transformers that emit SF₆. However, they never demonstrated or even definitively asserted that any of these companies would not be subject to regulation or permitting requirements but for EPA's decision to include SF₆ as part of the "well-mixed greenhouse gases" that are the subject of the Endangerment Finding. *See Sierra Club v. EPA*, 292 F.3d 895, 898-900 (D.C.Cir.2002) (requiring that a petitioner seeking review of agency action demonstrate standing by affidavit or other evidence if standing is not "self-evident" from the administrative record). Absent a petitioner with standing to challenge EPA's inclusion

of PFCs and SF₆ in the “air pollution” at issue, this court lacks jurisdiction to address the merits of Industry Petitioners’ contention.

E.

EPA did not submit the Endangerment Finding for review by its Science Advisory Board (SAB). Industry Petitioners claim that EPA’s failure to do so violates its mandate to “make available” to the SAB “any proposed criteria document, standard, limitation, or regulation under the Clean Air Act” at the time it provides the same “to any other Federal agency for formal review and comment.” 42 U.S.C. § 4365(c)(1); *see Am. Petroleum Inst.*, 665 F.2d at 1188.

To begin with, it is not clear that EPA provided the Endangerment Finding “to any other Federal agency for formal review and comment,” which triggers this duty to submit a regulation to the SAB. EPA only submitted a draft of the Endangerment Finding to the Office of Information and Regulatory Affairs pursuant to Executive Order 12,866. EPA contends that this was merely an *informal* review process, not “formal review and comment” – at least when compared with a statutory review-and-comment requirement in which other agencies are given the opportunity to provide written comments about the impacts of a proposed regulation on the reviewing agency’s universe of responsibility. *See, e.g.*,

49 U.S.C. § 32902(j). Industry Petitioners failed to respond to this contention.

In any event, even if EPA violated its mandate by failing to submit the Endangerment Finding to the SAB, Industry Petitioners have not shown that this error was “of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.” 42 U.S.C. § 7607(d)(8); *see Am. Petroleum Inst.*, 665 F.2d at 1188-89 (applying this standard to EPA’s failure to submit an ozone standard to the SAB).

F.

Lastly, State Petitioners maintain that EPA erred by denying all ten petitions for reconsideration of the Endangerment Finding. Those petitions asserted that internal e-mails and documents released from the University of East Anglia’s Climate Research Unit (CRU) – a contributor to one of the global temperature records and to the IPCC’s assessment report – undermined the scientific evidence supporting the Endangerment Finding by calling into question whether the IPCC scientists adhered to “best science practices.” *EPA’s Denial of the Petitions To Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* (“Reconsideration Denial”), 75 Fed. Reg. 49,556, 49,556-57 (Aug. 13, 2010). The petitions pointed to factual mistakes in

the IPCC's assessment report resulting from the use of non-peer-reviewed studies and several scientific studies postdating the Endangerment Finding as evidence that the Endangerment Finding was flawed. *Id.*

On August 13, 2010, EPA issued a denial of the petitions for reconsideration accompanied by a 360-page response to petitions (RTP). *Id.* at 49,556. It determined that the petitions did not provide substantial support for the argument that the Endangerment Finding should be revised. According to EPA, the petitioners' claims based on the CRU documents were exaggerated, contradicted by other evidence, and not a material or reliable basis for questioning the credibility of the body of science at issue; two of the factual inaccuracies alleged in the petitions were in fact mistakes, but both were "tangential and minor" and did not change the key IPCC conclusions; and the new scientific studies raised by some petitions were either already considered by EPA, misinterpreted or misrepresented by petitioners, or put forth without acknowledging other new studies. *Id.* at 49,557-58.

1.

EPA is required to convene a proceeding for reconsideration of a rule if a party raising an objection to the rule

can demonstrate to the Administrator that it was impracticable to raise such objection

within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.

42 U.S.C. § 7607(d)(7)(B). For the purpose of determining whether to commence reconsideration of a rule, EPA considers an objection to be of “central relevance to the outcome” of that rule “if it provides substantial support for the argument that the regulation should be revised.” Reconsideration Denial, 75 Fed. Reg. at 49,561.

State Petitioners have not provided substantial support for their argument that the Endangerment Finding should be revised. State Petitioners point out that some studies the IPCC referenced in its assessment were not peer-reviewed, but they ignore the fact that (1) the IPCC assessment relied on around 18,000 studies that were peer-reviewed, and (2) the IPCC’s report development procedures expressly permitted the inclusion in the assessment of some non-peer-reviewed studies (“gray” literature).

Moreover, as EPA determined, the limited inaccurate information developed from the gray literature does not appear sufficient to undermine the substantial overall evidentiary support for the Endangerment Finding. State Petitioners have not, as they assert, uncovered a “pattern” of flawed science. Only two of the errors they point out seem to be errors at all, and EPA relied on neither in making the Endangerment Finding. First, as State

Petitioners assert, the IPCC misstated the percentage of the Netherlands that is below sea level, a statistic that was used for background information. However, the IPCC corrected the error, and EPA concluded that the error was “minor and had no impact,” and the Endangerment Finding did not refer to the statistic in any way. *Id.* at 49,576-77. Second, the IPCC acknowledged misstating the rate at which Himalayan glaciers are receding. EPA also did not rely on that projection in the Endangerment Finding. *Id.* at 49,577.

State Petitioners also contend that a new study contradicts EPA’s reliance on a projection of more violent storms in the future as a result of climate change, but the study they cite only concerns past trends, not projected future storms. The record shows that EPA considered the new studies on storm trends and concluded that the studies were consistent with the Endangerment Finding. In sum, State Petitioners have failed to show that these isolated “errors” provide substantial support for their argument to overturn the Endangerment Finding.

2.

State Petitioners’ further argument that EPA erred in denying reconsideration fails as well. These Petitioners claim EPA erred by failing to provide notice and comment before denying the petitions for reconsideration because EPA’s inclusion of a 360-page RTP amounted to a revision of the Endangerment

Finding, and revision of a rule requires notice and comment. The RTP, however, appears to be exactly what EPA called it – a response to the petitions for reconsideration, not a revision of the Endangerment Finding itself. EPA certainly may deny petitions for reconsideration of a rule and provide an explanation for that denial, including by providing support for that decision, without triggering a new round of notice and comment for the rule.

III.

State and Industry Petitioners contend that in promulgating the Tailpipe Rule, EPA relied on an improper interpretation of CAA § 202(a)(1), and was arbitrary and capricious in failing to justify and consider the cost impacts of its conclusion that the Rule triggers stationary-source regulation under the PSD and Title V provisions. They do not challenge the substantive standards of the Rule and focus principally on EPA's failure to consider the cost of stationary-source permitting requirements triggered by the Rule. Positing an absurd-consequences scenario, Petitioners maintain that if EPA had considered these costs it "would have been forced" to exclude carbon dioxide from the scope of the emission standards, to decline to issue greenhouse gas emission standards at all, or "to interpret the statute so as not to automatically trigger stationary source regulation." Industry Tailpipe Br. 17; *see also* Industry Tailpipe Reply Br. 8-9. Both the plain text of

Section 202(a) and precedent refute Petitioners' contentions.

A.

Section 202(a)(1) provides:

The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a)(1). By employing the verb “shall,” Congress vested a non-discretionary duty in EPA. See *Sierra Club v. Jackson*, 648 F.3d 848, 856 (D.C.Cir.2011). The plain text of Section 202(a)(1) thus refutes Industry Petitioners' contention that EPA had discretion to defer issuance of motor-vehicle emission standards on the basis of stationary-source costs. Neither the adjacent text nor the statutory context otherwise condition this clear “language of command,” *id.* (citation omitted). Having made the Endangerment Finding pursuant to CAA § 202(a), 42 U.S.C. § 7521(a), EPA lacked discretion to defer promulgation of the Tailpipe Rule on the basis of its trigger of stationary-source permitting requirements under the PSD program and Title V.

The Supreme Court's decision in *Massachusetts v. EPA* compels this interpretation of Section 202(a)(1).

“If EPA makes a finding of endangerment, the Clean Air Act requires the [a]gency to regulate emissions of the deleterious pollutant from new motor vehicles.” 549 U.S. at 533, 127 S.Ct. 1438. “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.” *Id.* (emphasis added). In the Endangerment Finding, EPA determined that motor-vehicle emissions contribute to greenhouse gas emissions that, in turn, endanger the public health and welfare; the agency therefore was in no position to “avoid taking further action,” *id.*, by deferring promulgation of the Tailpipe Rule. Given the non-discretionary duty in Section 202(a)(1) and the limited flexibility available under Section 202(a)(2), which this court has held relates only to the motor-vehicle industry, *see infra* Part III.C, EPA had no statutory basis on which it could “ground [any] reasons for” further inaction, *Massachusetts v. EPA*, 549 U.S. at 535, 127 S.Ct. 1438.

The plain text of Section 202(a)(1) also negates Industry Petitioners’ contention that EPA had discretion to defer the Tailpipe Rule on the basis of NHTSA’s authority to regulate fuel economy. The Supreme Court dismissed a near-identical argument in *Massachusetts v. EPA*, rejecting the suggestion that EPA could decline to regulate carbon-dioxide emissions because the Department of Transportation

(DOT) had independent authority to set fuel-efficiency standards. *Id.* at 531-32, 127 S.Ct. 1438. “[T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities,” because EPA’s duty to promulgate emission standards derives from “a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency.” *Id.* at 532, 127 S.Ct. 1438. Just as EPA lacks authority to refuse to regulate on the grounds of NHTSA’s regulatory authority, EPA cannot defer regulation on that basis. A comparison of the relevant statutes bolsters this conclusion. *Compare* 49 U.S.C. § 32902(f) (“When deciding maximum feasible average fuel economy . . . , the Secretary of Transportation shall consider . . . the effect of other motor vehicle standards of the Government on fuel economy. . . .”), *with* 42 U.S.C. § 7521(a) (including no such direction). Nor, applying the same reasoning, was EPA required to treat NHTSA’s proposed regulations as establishing the baseline for the Tailpipe Rule. Furthermore, the Tailpipe Rule provides benefits above and beyond those resulting from NHTSA’s fuel-economy standards. *See, e.g.*, Tailpipe Rule, 75 Fed. Reg. at 25,490 (Table III.F.1-2), 25,636 (Table IV.G.1-4). Petitioners’ related contentions regarding the PSD permitting triggers are addressed in Part V.

B.

Turning to the APA, Industry Petitioners contend, relying on *Small Refiner Lead Phase-Down*

Task Force v. EPA, 705 F.2d 506, 525 (D.C.Cir.1983), and *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C.Cir.1976), that EPA failed both to justify the Tailpipe Rule in terms of the risk identified in the Endangerment Finding and to show that the proposed standards “would meaningfully mitigate the alleged endangerment,” Industry Tailpipe Br. 35. Instead, they maintain that EPA “separated these two integral steps,” *id.* at 11, and “concluded that it had no obligation to show . . . ‘the resulting emissions control strategy or strategies will have some significant degree of harm reduction or effectiveness in addressing the endangerment,’” *id.* at 11-12 (quoting Endangerment Finding, 74 Fed. Reg. at 66,508). These contentions fail.

Petitioners’ reliance on *Small Refiner*, 705 F.2d at 525, is misplaced; the court there laid out guidelines for assessing EPA’s discretion to set numerical standards and Petitioners do not challenge the substance of the emission standards. In *Ethyl*, 541 F.2d at 7, the court assessed the scope of EPA’s authority, under CAA § 211(c)(1), 42 U.S.C. § 1857f-6c(c)(1) (1970) (*currently codified as amended at 42 U.S.C. § 7545(c)(1)*), to regulate lead particulate in motor-vehicle emissions. The court rejected the argument that the regulations had to “be premised upon factual proof of actual harm,” *Ethyl*, 541 F.2d at 12, and instead deferred to EPA’s reasonable interpretation that regulations could be based on a “significant risk of harm,” *id.* at 13. Nothing in *Ethyl* implied that EPA’s authority to regulate was

conditioned on evidence of a particular level of mitigation; only a showing of significant *contribution* was required. EPA made such a determination in the Endangerment Finding, concluding that vehicle emissions are a significant contributor to domestic greenhouse gas emissions. *See, e.g.*, Endangerment Finding, 74 Fed. Reg. at 66,499. Further, in the preamble to the Tailpipe Rule itself, EPA found that the emission standards would result in meaningful mitigation of greenhouse gas emissions. For example, EPA estimated that the Rule would result in a reduction of about 960 million metric tons of CO₂e emissions over the lifetime of the model year 2012-2016 vehicles affected by the new standards. *See* Tailpipe Rule, 75 Fed. Reg. at 25,488-90. Other precedent is likewise unhelpful to Petitioners: in *Chemical Manufacturers Association v. EPA*, 217 F.3d 861, 866 (D.C.Cir.2000), “nothing in the record” indicated that the challenged regulatory program would “directly or indirectly, further the Clean Air Act’s environmental goals,” whereas here the record is fulsome, *see supra* Part II.

C.

Petitioners also invoke Section 202(a)(2) as support for their contention that EPA must consider stationary-source costs in the Tailpipe Rule. Section 202(a)(2) provides:

Any regulation prescribed under paragraph (1) of this subsection . . . shall take effect

after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

42 U.S.C. § 7521(a)(2). State Petitioners maintain the reference to compliance costs encompasses those experienced by stationary sources under the PSD program, while Industry Petitioners maintain stationary-source costs are a relevant factor in EPA's Section 202(a)(1) rulemaking. This court, however, has held that the Section 202(a)(2) reference to compliance costs encompasses only the cost to the motor-vehicle industry to come into compliance with the new emission standards, and does not mandate consideration of costs to other entities not directly subject to the proposed standards. *See Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1118 (D.C.Cir.1979).

D.

Petitioners' remaining challenges to the Tailpipe Rule fail as well. In Part II, the court rejects the contention that the Tailpipe Rule fails due to flaws in the underlying Endangerment Finding. The record also refutes Industry Petitioners' suggestion that EPA "employed a shell game to avoid," Industry Tailpipe Reply Br. 9 (capitalization removed), responding to comments regarding stationary-source costs. Industry Tailpipe Br. 19-20; *see also* Industry Tailpipe Reply Br. 14-15. EPA adequately responded to "significant

comments,” 42 U.S.C. § 7607(d)(6)(B). *See, e.g.*, Tailpipe Rule, 75 Fed. Reg. at 25,401-02; Tailpipe Rule, Response to Comments at 7-65 to 7-69. And, assuming other statutory mandates provide a basis for judicial review, *see* Industry Tailpipe Br. 21-22 (listing mandates); *see, e.g., Small Refiner*, 705 F.2d at 537-39, the record shows EPA’s compliance, *see* Tailpipe Rule, 75 Fed. Reg. at 25,539-42, and that EPA was not arbitrary and capricious by not considering stationary-source costs in its analyses. *See, e.g., Michigan v. EPA*, 213 F.3d 663, 689 (D.C.Cir.2000); *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 341-42 (D.C.Cir.1985). EPA’s economic impact assessment conducted pursuant to CAA § 317, 42 U.S.C. § 7617, does not provide grounds for granting the petitions because Petitioners’ contentions that EPA, “[i]n defiance of these requirements, . . . refused to estimate or even consider the costs of the [Tailpipe Rule] for stationary sources,” Industry Tailpipe Br. 22, are no more than another attempt to avoid the plain text of Section 202(a). *See also* 42 U.S.C. § 7617(e).

IV.

We turn next to the stationary source regulations. As noted *supra* in Part I, EPA’s interpretation of the CAA requires PSD and Title V permits for stationary sources whose potential emissions exceed statutory thresholds for *any* regulated pollutant – including greenhouse gases. Industry Petitioners now challenge EPA’s

longstanding interpretation of the scope of the permitting requirements for construction and modification of major emitting facilities under CAA Sections 165(a) and 169(1), 42 U.S.C. §§ 7475(a) & 7479(1) (“the PSD permitting triggers”). EPA maintains that this challenge is untimely because its interpretation of the PSD permitting triggers was set forth in its 1978, 1980, and 2002 Rules.

In 1978, EPA defined “major stationary source” as a source that emits major amounts of “any air pollutant regulated under the [CAA].” *Part 51 – Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Prevention of Significant Air Quality Deterioration* (“1978 Implementation Plan Requirements”), 43 Fed. Reg. 26,380, 26,382 (June 19, 1978). Industry petitioners’ challenge to the 1978 Rule in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C.Cir.1980) reflected their understanding that EPA would apply the PSD permitting program to both pollutants regulated pursuant to National Ambient Air Quality Standards (NAAQS) and other regulated pollutants. *See* Br. for Industry Pet’rs on Regulation of Pollutants other than Sulfur Dioxide and Particulates, No. 78-1006 (and consolidated cases) (Dec. 19, 1978) at 10, 12. In the 1980 Rule, EPA highlighted that to be subject to PSD review, a “source need only emit *any* pollutant in major amounts (i.e., the amounts specified in [CAA § 169(1)]) and be located in an area designated attainment or unclassifiable for that or any other pollutant.” 1980 Implementation Plan Requirements,

45 Fed. Reg. at 52,711 (emphasis in original). EPA explained that “any pollutant” meant “both criteria pollutants, for which national ambient air quality standards have been promulgated, and non-criteria pollutants subject to regulation under the Act.” *Id.* The same explanation of EPA’s interpretation appeared in the 2002 Rule. *Prevention of Significant Deterioration and Nonattainment New Source Review*, 67 Fed. Reg. 80,186, 80,239-40, 80,264 (Dec. 31, 2002).

CAA Section 307(b)(1) provides that a petition for review of any promulgated nationally applicable regulations:

“shall be filed within sixty days from the date notice of such promulgation . . . appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review . . . shall be filed within sixty days after such grounds arise.”

42 U.S.C. § 7607(b)(1). The exception encompasses the occurrence of an event that ripens a claim. *See Chamber of Commerce v. EPA*, 642 F.3d 192, 208 n. 14 (D.C.Cir.2011); *Am. Rd. & Transp. Builders Ass’n v. EPA*, 588 F.3d 1109, 1113 (D.C.Cir.2009). EPA acknowledges this precedent, but maintains that the “new grounds” exception is narrow and inapplicable because Industry Petitioners’ challenge to EPA’s interpretation of the PSD permitting triggers is based on legal arguments that were available during the normal judicial review

periods for the 1978, 1980, and 2002 Rules, and the “new ground” on which they now rely is a factual development, namely the regulation of greenhouse gases by the Tailpipe Rule. This is correct so far as it goes, but fails to demonstrate that Industry Petitioners’ challenge is untimely.

Industry Petitioners point out that two petitioners – the National Association of Home Builders (NAHB) and National Oilseed Processors Association (NOPA) – have newly ripened claims as a result of the Tailpipe Rule, which had the effect of expanding the PSD program to never-regulated sources:

- NAHB’s members construct single family homes, apartment buildings, and commercial buildings. According to the Vice President of Legal Affairs, prior to the Tailpipe Rule, no member of NAHB was a major source of any regulated pollutant, and thus no member was ever required to obtain a PSD permit. Decl. of Thomas J. Ward, Vice President of Legal Affairs for NAHB, ¶ 6 (May 10, 2011). Since the Tailpipe Rule rendered greenhouse gases a regulated pollutant, it is now certain that NAHB members that engage in construction projects that emit greenhouse gases in major amounts will have to obtain PSD permits sometime in the future. *Id.* at ¶¶ 7, 8. Indeed, EPA estimated that 6,397 multifamily buildings and 515 single family homes would trigger PSD review

annually absent the Tailoring Rule. *See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule* (“Proposed Tailoring Rule”), 74 Fed. Reg. 55,292, 55,338 (Oct. 27, 2009).

- NOPA’s members are large companies that monthly produce millions of tons of vegetable meals and over a billion pounds of oils from oilseeds, such as soybeans. *See, e.g.*, NOPA, January 2012 Statistical Report (Feb. 14, 2012) *available at* www.nopa.org ; NOPA, February 2012 Statistical Report (Mar. 14, 2012), *available at* www.nopa.org. According to the Executive Vice President of Regulatory Affairs, NOPA members operate facilities that are major sources of criteria pollutants and, for this reason, are subject to PSD review. Decl. of David C. Ailor, Executive Vice President of Regulatory Affairs of NOPA, ¶ 8 (May 10, 2011). Prior to promulgation of the Tailpipe Rule, no member’s facility had triggered PSD review by virtue of emissions of a non-criteria pollutant. *Id.* Now that greenhouse gases are a regulated non-criteria pollutant, many NOPA members will have to obtain PSD permits as result of their facilities’ emissions of a non-criteria pollutant. *Id.* at ¶¶ 9, 10. For some NOPA members this time is not far off because renovations to their facilities will result in greenhouse gas

emissions above the significance thresholds set by the Tailoring Rule, 75 Fed. Reg. at 31,567. *Id.* at ¶ 9.

Industry Petitioners thus maintain that because NAHB and NOPA filed their petitions on July 6, 2010, within 60 days of the promulgation of the Tailpipe Rule in the Federal Register on May 7, 2010, their challenges are timely.

“Ripeness, while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that an injury in fact be certainly impending.” *Nat’l Treasury Emp. Union v. United States*, 101 F.3d 1423, 1427 (D.C.Cir.1996). During an initial review period, although purely legal claims may be justiciable and, thus, prudentially ripe, a party without an immediate or threatened injury lacks a constitutionally ripe claim. *See Baltimore Gas & Elec. Co. v. ICC*, 672 F.2d 146, 149 (D.C.Cir.1982). EPA’s position would conflate the constitutional and prudential considerations. Constitutional ripeness exists where a challenge “involve[s], at least in part, the existence of a live ‘Case or Controversy.’” *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 81, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978). Prudential considerations embodied in the ripeness doctrine relate to “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *see Duke Power*, 438 U.S. at 81, 98 S.Ct. 2620. Standing to

challenge agency action exists where a petitioner can demonstrate an “injury in fact” that is fairly traceable to the challenged action and is likely to be redressed by a favorable judicial decision. *Reytblatt v. NRC*, 105 F.3d 715, 721 (D.C.Cir.1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

Had NAHB and NOPA challenged EPA’s interpretation of the PSD permitting triggers in 1978, 1980, or 2002, as EPA suggests, the court would have lacked jurisdiction under Article III of the Constitution because their alleged injuries were only speculative. See, e.g., *Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1026 (D.C.Cir.2012); *Baltimore Gas & Elec. Co.*, 672 F.2d at 149. At that time, NAHB and NOPA could have shown only the possibility that their members would be injured if EPA were someday to determine that greenhouse gases were a pollutant that endangers human health and welfare and to adopt a rule regulating the greenhouse gas emissions of stationary sources. EPA does not challenge the assertions in the NAHB and NOPA declarations, which establish no such rule was promulgated prior to the Tailpipe Rule.

The NAHB and NOPA challenges ceased to be speculative when EPA promulgated the Tailpipe Rule regulating greenhouse gases and their challenges ripened because of the “substantial probability” of injury to them. See *Baltimore Gas & Elec. Co.*, 672 F.2d at 149. Although, as EPA notes, other Industry Petitioners’ challenges to EPA’s interpretation of the

PSD permitting triggers ripened decades earlier, this court has assured petitioners with unripe claims that “they will not be foreclosed from judicial review when the appropriate time comes,” *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 473 (D.C.Cir.1998), and that they “need not fear preclusion by reason of the 60-day stipulation [barring judicial review],” *Baltimore Gas & Elec. Co.*, 672 F.2d at 149-50. EPA expresses concern that allowing NAHB and NOPA to litigate their newly ripened claims will have far-reaching implications for finality of agency actions, but “the ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of – even repetitive – . . . litigation.” *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 735, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998). Some limitations inhere in doctrines such as *stare decisis* or the law-of-the-circuit doctrine, see *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C.Cir.1996) (en banc).

Because petitioners NAHB and NOPA’s challenges to EPA’s PSD permitting triggers are newly ripened upon promulgation of the Tailpipe Rule and they filed petitions for review within sixty days thereof, their challenge to EPA’s interpretation of the PSD permitting triggers is timely.

V.

Having established that Industry Petitioners' challenges to the PSD permitting triggers are both timely and ripe, we turn to the merits of their claims.

A.

CAA Title I, Part C – entitled “Prevention of Significant Deterioration of Air Quality” (PSD) – largely focuses on the maintenance of national ambient air quality standards (NAAQS). Under the PSD program, EPA designates specific pollutants as “NAAQS pollutants” and sets national ambient air quality standards for those pollutants – requiring, for example, that the concentration of a given NAAQS pollutant may not exceed more than a certain number of parts per billion in the ambient air. *See generally* 42 U.S.C. § 7407. Thus far, EPA has designated six NAAQS pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide. None of these NAAQS pollutants is one of the six well-mixed greenhouse gases defined as an “air pollutant” in the Endangerment Finding. *See* Environmental Protection Agency, National Ambient Air Quality Standards, *available at* <http://www.epa.gov/air/criteria.html> (last visited May 3, 2012); Endangerment Finding, 74 Fed. Reg. 66,536-37.

Acting upon information submitted by states, EPA then determines whether each region of the country is in “attainment” or “nonattainment” with the promulgated air quality standard for each

NAAQS pollutant, or, alternatively, whether a region is “unclassifiable” for that pollutant. 42 U.S.C. § 7407(d)(1)(A). An area in attainment for a NAAQS pollutant is “any area . . . that meets the . . . ambient air quality standard for the pollutant.” *Id.* § 7407(d)(1)(A)(ii). By contrast, an area in nonattainment for a NAAQS pollutant is “any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national . . . ambient air quality standard for the pollutant.” *Id.* § 7407(d)(1)(A)(i). Finally, an unclassifiable area is any area that “cannot be classified on the basis of available information as meeting or not meeting the . . . ambient air quality standard for the pollutant.” *Id.* § 7407(d)(1)(A)(iii).

The PSD program applies to those areas of the United States designated as in “attainment” or “unclassifiable” for any NAAQS pollutant, *see id.* § 7471, and requires permits for major emitting facilities embarking on construction or modification projects in those regions. *Id.* § 7475(a). A separate part of Title I of the CAA, Part D, governs the construction and modification of sources in nonattainment regions. *See id.* §§ 7501, 7502. It bears emphasis that attainment classifications are pollutant-specific: depending on the levels of each NAAQS pollutant in an area, a region can be designated as in attainment for NAAQS pollutant A, but in nonattainment for NAAQS pollutant B. If a major emitting facility in such a region wishes to undertake a construction or modification project, both

Part C and Part D's substantive requirements apply – that is, the source must obtain a general PSD permit and must also abide by Part D's more stringent, pollutant-specific requirements for any NAAQS pollutants for which the area is in nonattainment. *See* 1980 Implementation Plan Requirements, 45 Fed. Reg. at 52,711-12 (“where a source emits in major amounts a pollutant for which the area in which the source would locate is designated nonattainment, Part D NSR rather than Part C PSD review should apply *to those pollutants.*”) (emphasis added).

The key substantive provision in the PSD program is CAA Section 165(a), which establishes permitting requirements for “major emitting facilities” located in attainment or unclassifiable regions. In relevant part, section 165(a) provides that “[n]o major emitting facility . . . may be constructed in any area to which this part applies unless” the facility obtains a PSD permit. 42 U.S.C. § 7475(a). To obtain a PSD permit, a covered source must, among other things, install the “best available control technology [BACT] for each pollutant subject to regulation under [the CAA]” – regardless of whether that pollutant is a NAAQS pollutant. *Id.* § 7475(a)(4). Since the Tailpipe Rule became effective, EPA has regulated automotive greenhouse gas emissions under Title II of the Act. Thus, greenhouse gases are now a “pollutant subject to regulation under” the Act, and, as required by the statute itself, any “major emitting facility” covered by the PSD program must install BACT for greenhouse gases. *See id.*

The dispute in this case centers largely on the scope of the PSD program – specifically, which stationary sources count as “major emitting facilities” subject to regulation. CAA Section 169(1) defines “major emitting facility,” for the purposes of the PSD program, as a stationary source “which emit[s], or [has] the potential to emit” either 100 tons per year (tpy) or 250 tpy of “*any air pollutant.*” 42 U.S.C. § 7479(1) (emphasis added). As discussed *supra* in Part I, whether the 100 or 250 tpy threshold applies depends on the type of source. Certain listed categories of sources – for example, iron and steel mill plants – qualify as “major emitting facilities” if they have the potential to emit over 100 tons per year of “any air pollutant.” *Id.* All other stationary sources are “major emitting facilities” if they have the potential to emit over 250 tons per year of “any air pollutant.” *Id.*

As mentioned above, since 1978 EPA has interpreted the phrase “any air pollutant” in the definition of “major emitting facility” as “any air pollutant regulated under the CAA.” *See* 1978 Implementation Plan Requirements, 43 Fed. Reg. at 26,388, 26,403; *supra* Part IV. Thus, because the PSD program covers “major emitting facilities” in “any area to which this part applies,” 42 U.S.C. § 7475, EPA requires PSD permits for stationary sources that 1) are located in an area designated as attainment or unclassifiable for any NAAQS pollutant, and 2) emit 100/250 tpy of any regulated air pollutant, regardless of whether that pollutant is itself a NAAQS pollutant.

See 1980 Implementation Plan Requirements, 45 Fed. Reg. at 52,710-11. Consequently, once the Tailpipe Rule took effect and made greenhouse gases a regulated pollutant under Title II of the Act, the PSD program automatically applied to facilities emitting over 100/250 tpy of greenhouse gases. But because immediate regulation of greenhouse gas-emitting sources exceeding the 100/250 tpy benchmark would result in “overwhelming permitting burdens that would . . . fall on permitting authorities and sources,” Tailoring Rule, 75 Fed. Reg. at 31,516, EPA’s Tailoring Rule provided that, for now, sources are subject to PSD permitting requirements only if they have the potential to emit over 100,000 tpy of greenhouse gases (for a construction project) or 75,000 tpy (for a modification project). *Id.* at 31,523; *see also infra*, Part VI.

According to EPA, its longstanding interpretation of the phrase “any air pollutant” – “any air pollutant regulated under the CAA” – is compelled by the statute. *See id.* at 31,517. Disputing this point, Industry Petitioners argue that the phrase is capable of a far more circumscribed meaning and that EPA could have – and should have – avoided extending the PSD permitting program to major greenhouse gas emitters. For the reasons discussed below, we agree with EPA that its longstanding interpretation of the PSD permitting trigger is statutorily compelled. Thus, as EPA argues, it “must give effect to the unambiguously expressed intent of Congress,” *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778, which here

requires PSD coverage for major emitters of any regulated air pollutant.

We begin our analysis, as we must, with the statute's plain language. *See Chevron*, 467 U.S. at 842, 104 S.Ct. 2778 ("First, always, is the question whether Congress has directly spoken to the precise question at issue."). CAA Section 169(1) requires PSD permits for stationary sources emitting major amounts of "*any* air pollutant." 42 U.S.C. § 7479(1) (emphasis added). On its face, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,'" *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976)). Greenhouse gases are indisputably an "air pollutant." *See Massachusetts v. EPA*, 549 U.S. at 528-29, 127 S.Ct. 1438. Congress's use of the broad, indiscriminate modifier "any" thus strongly suggests that the phrase "any air pollutant" encompasses greenhouse gases.

This plain-language reading of the statute is buttressed by the Supreme Court's decision in *Massachusetts v. EPA*. There the Court determined that CAA's overarching definition of "air pollutant" in Section 302(g) – which applies to all provisions of the Act, including the PSD program – unambiguously includes greenhouse gases. Noting that "[t]he Clean Air Act's sweeping definition of 'air pollutant' includes '*any* air pollution agent or combination of such agents. . . . which is emitted into or otherwise enters

the ambient air,” the Court held that “the definition embraces *all* airborne compounds of whatever stripe, *and underscores that intent through repeated use of the word ‘any.’*” *Id.* at 529, 127 S.Ct. 1438 (quoting 42 U.S.C. § 7602(g)) (second and third emphases added). Crucially for purposes of the issue before us, the Court concluded that “[t]he statute is unambiguous.” *Id.*

Thus, we are faced with a statutory term – “air pollutant” – that the Supreme Court has determined unambiguously encompasses greenhouse gases. This phrase is preceded by the expansive term “any,” a word the Court held “underscores” Congress’s intent to include “all” air pollutants “of whatever stripe.” *See id.* Absent some compelling reason to think otherwise, “‘any’ . . . means any,” *Ford v. Mabus*, 629 F.3d 198, 206 (D.C.Cir.2010), and Petitioners have given us no reason to construe that word narrowly here. To the contrary: given both the statute’s plain language and the Supreme Court’s decision in *Massachusetts v. EPA*, we have little trouble concluding that the phrase “any air pollutant” includes *all* regulated air pollutants, including greenhouse gases.

In reaching this conclusion, we recognize that EPA’s definition of “any air pollutant” slightly narrows the literal statutory definition, which nowhere requires that “any air pollutant” be a *regulated* pollutant. *See* 42 U.S.C. § 7479(1). But this does not make the statutory language ambiguous. Indeed, “any regulated air pollutant” is the only logical reading of the statute. The CAA’s universal

definition of “air pollutant” – the one at issue in *Massachusetts v. EPA* – provides that the term includes “any physical, chemical, biological [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.” *Id.* § 7602(g). Of course, nothing in the CAA requires regulation of a substance simply because it qualifies as an “air pollutant” under this broad definition. As discussed *supra* in Parts II and III, for example, the Act requires EPA to prescribe motor vehicle “standards applicable to the emission of any air pollutant” only if that pollutant “cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.” *Id.* § 7521(a)(1). But if “any air pollutant” in the definition of “major emitting facility” was read to encompass both regulated and nonregulated air pollutants, sources could qualify as major emitting facilities – and thus be subjected to PSD permitting requirements – if they emitted 100/250 tpy of a “physical, chemical, [or] biological” substance EPA had determined was harmless. It is absurd to think that Congress intended to subject stationary sources to the PSD permitting requirements due to emissions of substances that do not “endanger public health or welfare.” *Id.* § 7521(a)(1). Thus, “any regulated air pollutant” is, in this context, the only plausible reading of “any air pollutant.”

We find further support for this definition throughout the CAA. First, as previously mentioned, the PSD program provides that all major emitting

facilities must install BACT for “each pollutant subject to regulation under [the CAA].” *Id.* § 7475(a)(4). “Each pollutant subject to regulation under” the Act is, of course, synonymous with “any air pollutant regulated under the Act.” Thus, EPA’s interpretation of “any air pollutant” in the definition of “major emitting facilities” harmonizes the PSD program’s scope (i.e., which pollutants trigger PSD coverage) with its substantive requirements (i.e., which pollutants must be controlled to obtain a permit). In other words, because a covered source must control greenhouse gas emissions, it makes sense that major emissions of greenhouse gases would subject that source to the PSD program.

Second, a PSD permittee is required to establish that it

will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under [the CAA].

Id. § 7475(a)(3). Subsections (A) and (B) prohibit a permitted source from contributing to a concentration of NAAQS pollutants that exceeds EPA’s standards. By contrast, subsection (C) has an entirely different focus: it prohibits a permitted

source from causing or contributing to air pollution in excess of *any* CAA emission standard. Thus, as EPA notes, “what this provision establishes is that while the PSD program was certainly directed towards NAAQS-criteria pollutants, it also was directed at maintaining air quality for other pollutants regulated under other provisions.” EPA Timing & Tailoring Br. 101. EPA’s determination that “any air pollutant” means “any air pollutant regulated under the Act” – encompassing the greenhouse gases regulated under Title II – is entirely consistent with this focus.

Finally, Congress made perfectly clear that the PSD program was meant to protect against precisely the types of harms caused by greenhouse gases. The PSD provision contains a section entitled “Congressional declaration of purpose,” which provides, in relevant part, that “[t]he purposes of this part are . . . to protect public health and welfare from any actual or potential adverse effect which in the Administrator’s judgment may reasonably be anticipated to occur from air pollution.” 42 U.S.C. § 7470(1). The CAA further provides that “[a]ll language referring to effects on welfare includes, but is not limited to, effects on . . . weather . . . and climate.” *Id.* § 7602(h). As previously noted, EPA in the Endangerment Finding “marshaled . . . substantial. . . scientific evidence . . . for the proposition that greenhouse gases trap heat on earth that would otherwise dissipate into space [and] that this ‘greenhouse effect’ warms the climate.” Part II, *supra* at 28-29. It further concluded that this

“anthropogenically induced climate change” was likely to threaten the public welfare through, among other things, “extreme weather events.” *Id.* at 15-16. Thus, one express purpose of the program is to protect against the harms caused by greenhouse gases.

In sum, we are faced with a statutory term – “any air pollutant” – that the Supreme Court has determined is “expansive,” and “unambiguous[ly]” includes greenhouse gases. *Massachusetts v. EPA*, 549 U.S. at 529, 127 S.Ct. 1438. Moreover, the PSD program requires covered sources to install control technology for “each pollutant” regulated under the CAA, 42 U.S.C. § 7475(a)(4), and to establish that they “will not cause, or contribute to, air pollution in excess of *any* . . . emission standard . . . under [the CAA].” *Id.* § 7475(a)(3) (emphasis added). These provisions demonstrate that the PSD program was intended to control pollutants regulated under every section of the Act. Finally, Congress’s “Declaration of Purpose” expressly states that the PSD program was meant, in part, to protect against adverse effects on “weather” and “climate” – precisely the types of harm caused by greenhouse gases. *See id.* § 7470(1). Given all this, we have little trouble concluding that “any air pollutant” in the definition of “major emitting facility” unambiguously means “any air pollutant regulated under the CAA.”

B.

Industry Petitioners offer three alternative interpretations of the PSD permitting triggers, none of which cast doubt on the unambiguous nature of the statute.

As a preliminary matter, we note that none of Petitioners' alternative interpretations applies to Title V. To the contrary, all of the proposed alternative interpretations are based on the structure of – and purported Congressional intent behind – the PSD program. Indeed, Industry Petitioners never argue that their proposed alternative interpretations are relevant to Title V. Petitioners have thus forfeited any challenges to EPA's greenhouse gas-inclusive interpretation of Title V. *See, e.g., Nat'l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1273 (D.C.Cir.1998) (petitioners forfeit an argument by failing to raise it in their opening brief).

Industry Petitioners' first alternative is simple enough. Because the PSD program focuses on “the air people breathe in certain geographically defined . . . areas,” Coalition for Responsible Reg. Timing & Tailoring Br. 38, Industry Petitioners contend that the term “pollutant” in the PSD statute encompasses only air pollutants that, unlike greenhouse gases, “pollute locally.” *Id.* at 35. Industry Petitioners would thus apply a greenhouse gas-exclusive interpretation of “pollutant” throughout the statute's PSD provision. Under this reading, a source would qualify as a “major emitting facility” only if it emits 100/250 tpy of

“any air pollutant” except greenhouse gases. *See* 42 U.S.C. § 7479(1). Moreover, sources that *are* subject to PSD permitting requirements would be required to install BACT for “each pollutant subject to regulation under [the CAA]” – except greenhouse gases. *Id.* § 7475(a)(4).

We can easily dispose of Industry Petitioners’ argument that the PSD program’s “concerns with local emissions,” Coalition for Responsible Reg. Timing & Tailoring Br. 36, somehow limit the BACT provision. The statutory text provides, without qualification, that covered sources must install the “best available control technology for *each pollutant subject to regulation* under [the CAA].” 42 U.S.C. § 7475(a)(4) (emphasis added). Because greenhouse gases are indisputably a pollutant subject to regulation under the Act, it is crystal clear that PSD permittees must install BACT for greenhouse gases. “When the words of a statute are unambiguous . . . judicial inquiry is complete.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (internal quotation marks omitted).

Equally without merit is Industry Petitioners’ argument that the PSD program’s regional focus requires a greenhouse gas-exclusive interpretation of “any air pollutant” in the definition of “major emitting facility.” In support of this contention, Industry Petitioners note that CAA Section 161 provides that states’ implementation plans for the PSD program “shall contain emission limitations and

such other measures as may be necessary . . . to prevent *significant deterioration of air quality in each region.*” 42 U.S.C. § 7471 (emphasis added). The term “air quality,” Industry Petitioners contend, implies a focus on “the air people breathe,” and the term “in each region” suggests that Congress was concerned about local, not global, effects. See Coalition for Responsible Reg. Timing & Tailoring Br. 36. Moreover, Industry Petitioners note that when Congress enacted the PSD program in 1977, it did so “against the backdrop of a known universe of CAA-regulated pollutants.” *Id.* All these pollutants, Industry Petitioners argue, “were regulated because they could cause elevated ground-level concentrations in ambient air people breathe.” *Id.* And as Industry Petitioners point out, EPA itself has concluded that greenhouse gases are problematic for reasons other than local health and environmental concerns. In EPA’s Advance Notice of Proposed Rulemaking for the regulations at issue here, for example, the agency noted that “[a] significant difference between the major [greenhouse gases] and most air pollutants regulated under the CAA is that [greenhouse gases] have much longer atmospheric lifetimes [and] . . . can remain in the atmosphere for decades to centuries.” *Regulating Greenhouse Gas Emissions Under the Clean Air Act* (“Greenhouse Gas Advance Notice”), 73 Fed. Reg. 44,354, 44,400-01 (July 30, 2008). Moreover, “unlike traditional air pollutants,” greenhouse gases “become well mixed throughout the global atmosphere so that the long-term distribution of [greenhouse gas] concentrations is not dependant [sic] on local

emission sources.” *Id.* Thus, Industry Petitioners conclude, greenhouse gases are problematic for reasons entirely distinct from the local concerns that provided the basis for the PSD program. Given this, the phrase “any air pollutant” cannot be applied to greenhouse gases in the context of the regionally-focused PSD program.

As an initial matter, we note that the Supreme Court rejected a very similar argument in *Massachusetts v. EPA*. There, EPA attempted to distinguish between greenhouse gases and other air pollution agents “because greenhouse gases permeate the world’s atmosphere rather than a limited area near the earth’s surface.” *Massachusetts v. EPA*, 549 U.S. at 529 n. 26, 127 S.Ct. 1438. The Court held that this was “a plainly unreasonable reading of a sweeping statutory provision designed to capture ‘any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air,’” *id.* (quoting 42 U.S.C. § 7602(g)), thus rejecting the dissent’s view that “EPA’s exclusion of greenhouse gases . . . is entitled to deference.” *Id.* As the Court noted, the purported distinction between greenhouse gases and “traditional” air pollutants “finds no support in the text of the statute, which uses the phrase ‘the ambient air’ without distinguishing between atmospheric layers.” *Id.* *Massachusetts v. EPA* thus forecloses Industry Petitioners’ argument that because greenhouse gases do not “cause elevated ground-level concentrations in ambient air people breathe,” Coalition for Responsible Reg. Timing &

Tailoring Br. 36, EPA should have adopted a greenhouse gas-exclusive interpretation of “any air pollutant.”

We also have little trouble disposing of Industry Petitioners’ argument that the PSD program is specifically focused solely on localized air pollution. True, as Industry Petitioners note, one part of the PSD program requires states to “prevent significant deterioration of air quality in each region.” 42 U.S.C. § 7471 (emphasis added). But while localized air quality is obviously one concern of the PSD program, a comprehensive reading of the statute shows it was also meant to address a much broader range of harms. As an initial matter, the PSD provision’s “Congressional declaration of purpose” section expansively provides that the program is intended “to protect public health and welfare from *any* actual or potential adverse effect . . . *from air pollution.*” *Id.* § 7470(1) (emphasis added). Nothing in this section limits the PSD program to adverse effects on local air quality; to the contrary, the word “any” here gives this clause an “expansive meaning” which we see “no reason to contravene.” *New York*, 443 F.3d at 885 (internal quotation marks omitted). Indeed, the CAA expressly provides that effects on “welfare” means “effects on . . . weather . . . and climate.” 42 U.S.C. § 7602(h). It seems quite clear to us, then, that the PSD program was intended to protect against precisely the types of harms caused by greenhouse gases. This broad understanding of the PSD program’s scope is buttressed by the fact that the

program requires covered sources to control “each pollutant subject to regulation under [the CAA],” and further requires sources to comply with “*any . . . emission standard*” under the CAA. *Id.* § 7475(a)(3); (a)(4) (emphasis added). These substantive requirements amount to further evidence that Congress wanted the PSD program to cover all regulated pollutants, regardless of the type of harm those pollutants cause.

In light of the PSD program’s broad scope of regulation and the express purposes of the program, we conclude – consistent with the Supreme Court in *Massachusetts v. EPA* – that Industry Petitioners’ greenhouse gas-exclusive interpretation of “pollutant” is “a plainly unreasonable reading” of the statute. *Massachusetts v. EPA*, 549 U.S. at 529 n. 26, 127 S.Ct. 1438.

1.

For their second alternative interpretation, Industry Petitioners argue that the PSD program’s definition of “major emitting facility” establishes a “pollutant-specific situs requirement.” Am. Chemistry Council Br. 33. Under this reading of the statute, a stationary source is subject to PSD permitting requirements only if “(1) a source has major emissions of a NAAQS criteria pollutant and (2) the source is located in an area attaining *that pollutant’s*” air quality standard. Coalition for Responsible Reg. Timing & Tailoring Br. 23. Thus, for example, a

source would be subject to the PSD permitting requirements if it 1) emits over 100/250 tpy of sulfur dioxide (a NAAQS criteria pollutant), and 2) is located in an area that is in “attainment,” or is “unclassifiable,” for sulfur dioxide. But under this approach, a stationary source could never be subject to the PSD program solely because of its greenhouse gas emissions. After all, Industry Petitioners observe, EPA declined to make greenhouse gases a NAAQS criteria pollutant. Instead, EPA regulated greenhouse gases only under Title II of the Act, dealing with motor vehicle emissions. Because “no major source of [greenhouse gases] can be located in an area attaining the nonexistent [air quality standard] for [greenhouse gases],” *id.* at 24, Industry Petitioners point out that their reading of the statute would bring no new stationary sources under the PSD program’s ambit – alleviating any “absurd results” caused by excessive permitting requirements, *id.* at 25.

Industry Petitioners emphasize that, unlike their first proposed alternative, nothing in this approach would “wholly exempt [greenhouse gases] from PSD.” Coalition for Responsible Reg. Timing & Tailoring Reply Br. 20. Although a pollutant-specific situs requirement would limit the *number* of sources subject to the PSD program, nothing in this proposed reading of the statute would alter the substantive requirements for PSD permits, including the requirement that all regulated sources install BACT “for each pollutant subject to regulation under [the

CAA].” 42 U.S.C. § 7475(a)(4). So, for example, under this interpretation, a hypothetical stationary source emitting more than 100/250 tpy of sulfur dioxide and located in an area designated as “in attainment” for sulfur dioxide, must still install BACT for “each pollutant subject to regulation” under the Act, including greenhouse gases. Their key point, though, is that sources emitting only major amounts of greenhouse gases – but not major amounts of a NAAQS criteria pollutant – would escape PSD permitting requirements.

Industry Petitioners’ argument in support of this interpretation proceeds in several steps. First, they argue that the term “any air pollutant,” though “capacious and flexible by itself,” “is a chameleon term” when placed in certain contexts. Am. Chemistry Council Br. 38. Indeed, Industry Petitioners note that EPA has already narrowed the literal meaning of the term “any air pollutant” here. After all, and as discussed *supra*, although the statutory term “air pollutant” includes “any physical [or] chemical . . . substance or matter,” 42 U.S.C. § 7602(g), EPA has long maintained that the term “any air pollutant” in the definition of “major emitting facility” encompasses only air pollutants regulated under the Act. Moreover, Industry Petitioners point out that when interpreting CAA Part C, Subpart 2, entitled “Visibility Protection,” EPA determined that the term “any pollutant” in the definition of “major stationary source” meant “any visibility-impairing pollutant.” *See* Coalition for

Responsible Reg. Timing & Tailoring Br. 34 (emphasis added). The statute's definition of "major stationary source" in the visibility-protection subpart is quite similar to the definition of "major emitting facility" in the PSD subpart: for the purposes of the visibility program, a "major stationary source" is defined as a "stationary source[] with the potential to emit 250 tons or more of any pollutant." 42 U.S.C. § 7491(g)(7); *compare* 42 U.S.C. § 7479(1) ("major emitting facility" for the purposes of the PSD program is a source which "emit[s], or [has] the potential to emit," either 100 or 250 tons per year "of any air pollutant"). These narrowed interpretations, Industry Petitioners argue, prove that the seemingly capacious term "any air pollutant" is, notwithstanding that the Supreme Court called this term "expansive" and "sweeping," *Massachusetts v. EPA*, 549 U.S. at 529 nn. 25-26, 127 S.Ct. 1438, capable of a far more circumscribed meaning.

According to Industry Petitioners, EPA should have adopted that more circumscribed meaning by interpreting "any air pollutant" as establishing a pollutant-specific situs requirement. As Industry Petitioners point out, the PSD program requires permits for "major emitting facilit[ies] . . . in any area to which this part applies," 42 U.S.C. § 7479(1), and defines "major emitting facilities" as stationary sources emitting 100/250 tpy of "any air pollutant." *Id.* § 7475(a). In this context, Industry Petitioners contend, the phrases "any air pollutant" and "in any area to which this part applies" must be read in

concert. And, Industry Petitioners argue, these phrases “*together* mean” that a source is subject to PSD permitting requirements only if it emits major amounts of “any [NAAQS] air pollutant whose NAAQS an area is attaining.” Am. Chemistry Council Br. 33.

In support of this supposedly holistic interpretation of the statute, Industry Petitioners cite CAA § 163(b), a different section of the PSD provision in which the phrase “any air pollutant” and “any area to which this part applies” are used in conjunction with one another. Unlike § 165(a), which sets permitting requirements for sources covered by the PSD program, § 163 provides guidelines for *areas* designated as “in attainment” under the program. Specifically, § 163(b) limits the “maximum allowable increase in concentrations of” airborne NAAQS pollutants that may occur in an attainment area before that area’s “attainment” status is jeopardized. *See* 42 U.S.C. § 7473(b)(1). Subsections (1) through (3) of § 163(b) – not directly relevant here – set limits on the maximum allowable increases for two specific NAAQS pollutants, sulfur dioxide and particulate matter. Subsection (4) is a catchall provision, which limits the maximum allowable increases for all other NAAQS pollutants. It is in subsection (4) that Industry Petitioners find what they believe is their payoff: the terms “any air pollutant” and “any area to which this part applies” in conjunction with one another. Section 163(b)(4) provides:

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

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

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

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

42 U.S.C. § 7473(b)(4) (emphasis added). As Industry Petitioners correctly point out, in this context the phrase “any air pollutant” must mean “any NAAQS pollutant,” and “in any area to which this part applies” must mean “any area that is in attainment for that NAAQS pollutant.” After all, the statute states that the “maximum allowable concentration of any air pollutant . . . shall not exceed” either the primary or secondary national ambient air quality standards. But, as Industry Petitioners observe, national ambient air standards exist only for NAAQS pollutants, so even if “any air pollutant” in CAA § 163(b)(4) was read to include non-NAAQS pollutants, the phrase, in context, would have no practical effect for those pollutants. Moreover, “any area to which this part applies” must mean “any area that is in attainment for that NAAQS pollutant,” because if an area was in nonattainment

for a particular pollutant, Part D – rather than the PSD program – would govern emissions limits for that specific pollutant. *See id.* § 7501 (2) (“[t]he term ‘nonattainment area’ means, for any air pollutant, an area which is designated ‘nonattainment’ with respect to that pollutant”); § 7502 (c) (setting out required “Nonattainment plan provisions”). Finally, Industry Petitioners correctly note that a pollutant-specific reading of the phrase “air pollutant” must also apply to CAA § 165(a)(3)(A), which prohibits PSD permittees from “caus[ing], or contribut[ing] to, air pollution in excess of any . . . maximum allowable concentration for *any air pollutant in any area to which this part applies* more than one time per year.” *Id.* § 7475(a)(3) (A) (emphasis added). This clause, as Industry Petitioners point out, piggybacks off the NAAQS pollutant-specific definition of “maximum allowable concentration” in § 163(b)(4), prophylactically restricting PSD permittees from endangering an area’s attainment status. *See* Am. Chemistry Council Br. 32 (describing the interplay between the two provisions as “Section 163(b)(4) (and Section 165(a)(3)(A), which implements it) . . .”).

Based on all of this, Industry Petitioners conclude that because the phrase “any air pollutant in any area to which this part applies” in § 163(b)(4) means “any NAAQS pollutant in any area in attainment for that NAAQS pollutant,” an identical reading must apply to the definition of “major emitting facility.” As a result, a stationary source may be subject to the PSD program only if it emits 100/250

typy of any NAAQS pollutant and is located in an area designated as in attainment for that NAAQS pollutant. We are unpersuaded.

Although we agree that the term “any air pollutant” is, in some contexts, capable of narrower interpretations, we see nothing in the definition of “major emitting facility” that would allow EPA to adopt a NAAQS pollutant-specific reading of that phrase. The contrast with the visibility program is instructive. There, EPA determined that “any pollutant” in the definition of “major stationary source” meant “any visibility-impairing pollutant.” *See* 40 C.F.R. pt. 51, App. Y, § II.A. But as EPA notes, the entire visibility program, codified in CAA Part C, Subpart 2, deals with visibility-impairing pollutants, as reflected in that subpart’s title: “Visibility Protection.” *See* 42 U.S.C. prec. § 7491. From this, “it naturally follows that EPA’s regulations under that section should address ‘visibility-impairing pollutants.’” EPA Timing & Tailoring Br. 99 n.19. No similar guidance can be garnered from Part C, Subpart 1, which contains the phrase “any air pollutant” at issue here. Dealing with far more than NAAQS pollutants, Part C, Subpart 1 requires, for example, covered sources to install BACT for “each pollutant subject to regulation under [the CAA].” 42 U.S.C. § 7475(a)(4). Indeed, Subpart 1 is simply – and expansively – entitled “Clean Air.” *Id.* prec. § 7470. Moreover, Congress designed the PSD program broadly to protect against “adverse effect[s]” on “public health and welfare,” *Id.* § 7470(1), including

effects on global problems like weather and climate. *Id.* § 7602(h).

Furthermore, the phrases “any air pollutant” and “in any area to which this part applies” are used differently in Section 163(b)(4) and in the PSD program’s definition of “major emitting facility.” The presumption that “[a] term appearing in several places in a statutory text is generally read the same way each time it appears,” *Ratzlaf v. United States*, 510 U.S. 135, 143, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994), “readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent,” *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 76 L.Ed. 1204 (1933). Here, the focus and structure of § 163(b)(4) is entirely distinct from the PSD permitting trigger. Section 163(b)(4) provides that “[t]he maximum allowable concentration of any air pollutant in any area to which this part applies shall not exceed a [particular] concentration.” 42 U.S.C. § 7473(b)(4). By contrast, § 165(a) provides that “[n]o major emitting facility . . . may be constructed in any area to which this part applies” unless certain conditions are met, *id.* § 7475(a), and § 169(1) defines “major emitting facility” as any stationary source that emits or has the potential to emit threshold amounts of “any air pollutant,” *id.* § 7479(1). The differences between these two provisions are manifest. In § 163(b)(4), the phrases “any air pollutant” and “in any area to which

this part applies” appear next to one another, and it is the concentration of the pollutant in an area that matters. In the PSD permitting trigger, the phrases appear in different subsections and it is the location of the facility that matters. Section 163(b)(4) thus does nothing to undermine the unambiguous meaning of “any air pollutant” in the definition of “major emitting facility.”

Industry Petitioners’ pollutant-specific reading of “any air pollutant” is further undermined by contrasting Part C of the Act (the PSD program) with Part D (which regulates areas in nonattainment). Unlike Part C, Part D is expressly pollutant-specific, providing that “[t]he term ‘nonattainment area’ means, for any air pollutant, an area which is designated ‘nonattainment’ *with respect to that pollutant.*” *Id.* § 7501(2) (emphasis added). Congress thus clearly knew how to promulgate a narrow, pollutant-specific definition of “any air pollutant.” That it did so in Part D but not in Part C strongly suggests that the phrase “any air pollutant” in Part C was meant to be construed broadly. *Keene Corp. v. United States*, 508 U.S. 200, 208, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993) (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)).

A final point: Industry Petitioners observe that every area in the country has always been in attainment for at least one NAAQS criteria pollutant. *See* Tailoring Rule, 75 Fed. Reg. at 31,561. Thus, pursuant to EPA's pollutant-indifferent reading of § 165(a), under which a major emitting facility must abide by PSD requirements so long as it is located in an attainment area for *any* NAAQS pollutant, every facility in the United States has always been in an "area to which this part applies." Consequently, Industry Petitioners argue, "[i]f EPA's interpretation were right, Congress simply could have left out the phrase 'in any area to which this part applies'" in the PSD permitting trigger. Am. Chemistry Council Br. 36. But "Congress does not enact 'stillborn' laws," *id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004)), and interpretations that render statutory language superfluous are disfavored. Am. Chemistry Council Reply Br. 19. The fact that the PSD program has applied nationwide since its inception, Industry Petitioners conclude, thus militates against EPA's pollutant-indifferent approach.

This argument fails at its premise, for Industry Petitioners confuse a lack of practical import with a lack of meaning. To say that the phrase "in any area to which this part applies" is currently without practical import is quite different than showing that the phrase means nothing. Indeed, under different circumstances, the phrase would have a significant effect. If, hypothetically, one area of the country was

designated as “nonattainment” for every NAAQS pollutant, the phrase “in any area to which this part applies” would limit PSD coverage, as covered sources in that area would be subject only to Part D requirements. In fact, Environmental Intervenors point out that when Congress drafted the PSD permitting triggers “the prospect that some areas could be in nonattainment for all NAAQS was not far-fetched.” *Sierra Club Historic Reg. Br. 23*. “In the years leading up to 1977, EPA air quality data identified a number of areas that failed to meet all five of the then-current [air quality standards] for which EPA had gathered data.” *Id.* Accordingly, “in any area to which this part applies” is a meaningful phrase under EPA’s pollutant-indifferent interpretation of the PSD permitting triggers: it provides that sources need not obtain PSD permits if they are located in areas designated “nonattainment” for all six NAAQS pollutants.

In short, although we agree with Industry Petitioners that phrases like “any air pollutant” are, in certain contexts, capable of a more limited meaning, they have failed to identify any reasons that the phrase should be read narrowly here. Nor do we know of one. We thus conclude that EPA’s 34-year-old interpretation of the PSD permitting triggers is statutorily compelled: a source must obtain a permit if it emits major amounts of any regulated pollutant and is located in an area that is in attainment or unclassifiable for any NAAQS pollutant.

2.

We can quickly dispose of Industry Petitioners' third alternative interpretation, namely, that in order to regulate new pollutants through the PSD program, EPA was required to go through the process prescribed by CAA § 166. Section 166 provides specific steps that EPA must take when designating new "pollutants for which national ambient air quality standards" apply. 42 U.S.C. § 7476(a). Here, Industry Petitioners argue, EPA unlawfully failed to follow the steps laid out in Section 166, including a required study of the pollutant and a one-year delay before the effective date of regulations, before adding greenhouse gases "to the PSD [c]onstellation." Coalition for Responsible Reg. Timing & Tailoring Br. 41.

This argument fails on its face. By its terms, § 166 applies only to new "pollutants *for which national ambient air quality standards*" apply, 42 U.S.C. § 7476(a) (emphasis added), i.e., NAAQS criteria pollutants for which regions may be classified as in "attainment," "non-attainment," or "unclassifiable." And EPA never classified greenhouse gases as a NAAQS criteria pollutant. Instead, it simply determined that under § 165, major emitters of greenhouse gases are subject to the PSD program and all covered sources must install BACT for greenhouse gases. Contrary to Industry Petitioners' arguments, then, § 166 has no bearing on this addition of greenhouse gases into "the PSD [c]onstellation." Coalition for Responsible Reg. Timing

& Tailoring Br. 41. Indeed, we rejected a nearly identical argument in *Alabama Power*, holding that there is “no implied or apparent conflict between sections 165 and 166; nor . . . must the requirements of section 165 be ‘subsumed’ with those of section 166.” *Alabama Power*, 636 F.2d at 406. Stating what should have been obvious from the text of the statute, we concluded: “[S]ection 166 has a different focus from section 165.” *Id.*

Thus, because EPA has never classified greenhouse gases as a NAAQS criteria pollutant, the § 166 requirements are entirely inapplicable here. This section of the CAA has absolutely no bearing on our conclusion that EPA’s interpretation of the PSD permitting trigger is compelled by the statute itself.

VI.

Having concluded that the CAA requires PSD and Title V permits for major emitters of greenhouse gases, we turn to Petitioners’ challenges to the Tailoring and Timing Rules themselves.

As an initial matter, we note that Petitioners fail to make any real arguments against the Timing Rule. To be sure, at one point State Petitioners contend that the Timing Rule constitutes an attempt “to extend the PSD and Title V permitting requirements to greenhouse-gas emissions,” State Pet’rs’ Timing & Tailoring Br. 67. This is plainly incorrect. As discussed in the previous section, greenhouse gases are regulated under PSD and Title V pursuant to

automatic operation of the CAA. All the Timing Rule did was delay the applicability of these programs, providing that major emitters of greenhouse gases would be subject to PSD and Title V permitting requirements only once the Tailpipe Rule actually took effect on January 2, 2011. *See* Timing Rule, 75 Fed. Reg. at 17,017-19. Despite this, Petitioners confusingly urge us to vacate “[t]he Tailoring *and* Timing Rules,” *e.g.* State Pet’rs’ Timing & Tailoring Br. 24 (emphasis added), although it is unclear what practical effect vacature of the Timing Rule would have. Nonetheless, given this phrasing of their argument, and given our conclusion that Petitioners lack Article III standing to challenge *both* rules, we shall, where appropriate, discuss the Timing Rule in conjunction with the Tailoring Rule.

In the Tailoring Rule, EPA announced that it was “relieving overwhelming permitting burdens that would, in the absence of this rule, fall on permitting authorities and sources.” Tailoring Rule, 75 Fed. Reg. at 31,516. Although the PSD statute requires permits for sources with the potential to emit 100/250 tpy of “any air pollutant,” 42 U.S.C. § 7479(1), EPA noted that immediate application of that threshold to greenhouse gas-emitting sources would cause permit applications to jump from 280 per year to over 81,000 per year. Tailoring Rule, 75 Fed. Reg. at 31,554. Many of these applications would come from commercial and residential sources, which would “each incur, on average, almost \$60,000 in PSD permitting expenses.” *Id.* at 31,556. Similarly, if the Title V 100

tpy threshold applied immediately to greenhouse gases, sources needing operating permits would jump from 14,700 per year to 6.1 million per year. *Id.* at 31,562. “The great majority of these sources would be small commercial and residential sources” which “would incur, on average, expenses of \$23,175.” *Id.* And were permitting authorities required to hire the 230,000 full-time employees necessary to address these permit applications, “authorities would face over \$21 billion in additional permitting costs each year due to [greenhouse gases], compared to the current program cost of \$62 million each year.” *Id.* at 31,563.

Thus, instead of immediately requiring permits for all sources exceeding the 100/250 tpy emissions threshold, EPA decided to “phas[e] in the applicability of these programs to [greenhouse gas] sources, starting with the largest [greenhouse gas] emitters.” *Id.* at 31,514. The Tailoring Rule established the first two steps in this phased-in process. During Step One, only sources that were “subject to PSD requirements for their conventional pollutants anyway” (i.e., those sources that exceeded the statutory emissions threshold for non-greenhouse gas pollutants) were required to install BACT for their greenhouse gas emissions. *Id.* at 31,567. Step Two, which took effect on July 1, 2011, also requires PSD permits for sources with the potential to emit over 100,000 tpy CO₂e after a proposed construction project, or 75,000 tpy CO₂e after a proposed modification project. *Id.* at 31,523. Step Two further requires Title V permits for sources

which have the potential to emit over 100,000 tpy CO₂e. *Id.* at 31,516. EPA has since proposed – but has yet to finalize – a “Step Three,” which would maintain the current thresholds while the agency evaluates the possibility of regulating smaller sources. *See* EPA’s 28(j) Letter 1-2, February 27, 2012.

In the Tailoring Rule, EPA justified its phased-in approach on three interrelated grounds, each of which rests on a distinct doctrine of administrative law. First, EPA concluded “the costs to sources and administrative burdens . . . that would result from [immediate] application of the PSD and title V programs . . . at the statutory levels . . . should be considered ‘absurd results,’” which Congress never intended. *Id.* at 31,517; *see Am. Water Works Ass’n v. EPA*, 40 F.3d 1266, 1271 (D.C.Cir.1994) (“[W]here a literal reading of a statutory term would lead to absurd results, the term simply has no meaning . . . and is the proper subject of construction by EPA and the courts.”). Thus, under the “absurd results” doctrine, EPA concluded that the PSD and Title V programs “should not [immediately] be read to apply to all [greenhouse gas] sources at or above the 100/250 tpy threshold.” Tailoring Rule, 75 Fed. Reg. at 31,554. Second, emphasizing that immediate regulation at the 100/250 tpy threshold would cause tremendous administrative burden, EPA justified its deviation from this threshold on the basis of the “administrative necessity” doctrine. *Id.* at 31,576; *see Env’tl. Def. Fund, Inc. v. EPA*, 636 F.2d 1267, 1283 (D.C.Cir.1980) (“[A]n agency may depart from the

requirements of a regulatory statute . . . to cope with the administrative impossibility of applying the commands of the substantive statute.”). Finally, asserting that there exists a judicial doctrine that allows agencies to implement regulatory programs in a piecemeal fashion, EPA stated that the Tailoring Rule was justified pursuant to this “one-step-at-a-time” doctrine. Tailoring Rule, 75 Fed. Reg. at 31,578; see *Massachusetts v. EPA*, 549 U.S. at 524, 127 S.Ct. 1438 (“Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.”).

Petitioners – particularly State Petitioners – argue that none of these doctrines permit EPA to “depart unilaterally from the [CAA’s] permitting thresholds and replace them with numbers of its own choosing.” State Pet’rs’ Timing & Tailoring Br. 29. Admitting the “lamentable policy consequences of adhering to the unambiguous numerical thresholds in the Clean Air Act,” State Petitioners rather colorfully argue that EPA’s attempts to alleviate those burdens “establish only that EPA is acting as a benevolent dictator rather than a tyrant.” *Id.* at 26. And because EPA exceeded the boundaries of its lawful authority Petitioners urge us to vacate the Tailoring Rule.

Before we may address the merits of these claims, however, we must determine whether we have jurisdiction. “No principle,” the Supreme Court has repeatedly explained, “is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court

jurisdiction to actual cases or controversies.” *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (internal quotation marks omitted). The doctrine of standing “is an essential and unchanging part of the case-or-controversy requirement.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To establish standing, a petitioner must have suffered an “injury in fact” that is 1) “concrete and particularized . . . [and] actual or imminent, not conjectural or hypothetical,” 2) was caused by the conduct complained of, and 3) is “likely, as opposed to merely speculative [to] be redressed by a favorable decision.” *Id.* at 560-61, 112 S.Ct. 2130 (internal quotation marks and citations omitted).

Petitioners fall far short of these “irreducible constitutional . . . elements” of standing, *id.* at 560, 112 S.Ct. 2130. Simply put, Petitioners have failed to establish that the Timing and Tailoring Rules caused them “injury in fact,” much less injury that could be redressed by the Rules’ vacatur. Industry Petitioners contend that they are injured because they are subject to regulation of greenhouse gases, Coalition for Responsible Reg. Timing & Tailoring Br. 14. State Petitioners claim injury because they own some regulated sources and because they now carry a heavier administrative burden. State Pet’rs’ Timing & Tailoring Br. 22-23. But as discussed above, *see supra* Part V, the CAA mandates PSD and Title V coverage for major emitters of greenhouse gases. Thus, Industry Petitioners were regulated and State

Petitioners required to issue permits not because of anything EPA did in the Timing and Tailoring Rules, but by automatic operation of the statute. Given this, neither the Timing nor Tailoring Rules caused the injury Petitioners allege: having to comply with PSD and Title V for greenhouse gases.

Indeed, the Timing and Tailoring Rules actually mitigate Petitioners' purported injuries. Without the Timing Rule, Petitioners may well have been subject to PSD and Title V for greenhouse gases before January 2, 2011. Without the Tailoring Rule, an even greater number of industry and state-owned sources would be subject to PSD and Title V, and state authorities would be overwhelmed with millions of additional permit applications. Thus, Petitioners have failed to "show that, absent the government's allegedly unlawful actions, there is a substantial probability that they would not be injured and that, if the court affords the relief requested, the injury will be removed." *Chamber of Commerce v. EPA*, 642 F.3d 192, 201 (D.C.Cir.2011) (quotations and alterations omitted). Far from it. If anything, vacature of the Tailoring Rule would significantly exacerbate Petitioners' injuries.

Attempting to remedy this obvious jurisdictional defect, State Petitioners present two alternative theories, neither of which comes close to meeting the "irreducible constitutional . . . elements" of standing. *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. First, State Petitioners counterintuitively suggest that they actually want EPA to immediately "appl[y] the

100/250 tpy permitting thresholds to greenhouse-gas emissions.” State Pet’rs’ Timing & Tailoring Reply Br. 15. Admitting that vacature of the Tailoring Rule would result in astronomical costs and unleash chaos on permitting authorities, State Petitioners predict that Congress will be forced to enact “corrective legislation” to relieve the overwhelming permitting burdens on permitting authorities and sources, thus mitigating their purported injuries. *Id.*

This theory fails. To establish standing, plaintiffs must demonstrate that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision,” *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (internal quotation marks omitted), but here, State Petitioners simply hypothesize that Congress will enact “corrective legislation.” State Pet’rs’ Timing & Tailoring Reply Br. 15. We have serious doubts as to whether, for standing purposes, it is ever “likely” that Congress will enact legislation at all. After all, a proposed bill must make it through committees in both the House of Representatives and the Senate and garner a majority of votes in both chambers – overcoming, perhaps, a filibuster in the Senate. If passed, the bill must then be signed into law by the President, or go back to Congress so that it may attempt to override his veto. As a generation of schoolchildren knows, “by that time, it’s very unlikely that [a bill will] become a law. It’s not easy to become a law.” Schoolhouse Rock, *I’m Just a Bill*, at 2:41, available at <http://video.google.com/videoplay?docid=7266360872513258185#> (last visited June 1, 2012).

And even if the astronomical costs associated with a 100/250 tpy permitting threshold make *some* Congressional action likely, State Petitioners are still unable to show that it is “likely, as opposed to merely speculative,” *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130, that Congress will redress their injury. State Petitioners apparently assume that if the 100/250 tpy permitting threshold was immediately applied to greenhouse gases, Congress would exempt those pollutants from the PSD and Title V programs entirely. But this is just one of many forms “corrective legislation” could take. For example, were we to vacate the Tailoring Rule, Congress could decide to readopt its key provisions in the PSD and Title V statutes. Or it could set PSD and Title V permitting thresholds at 25,000 tpy for greenhouse gases – higher than the 100/250 tpy threshold, but lower (and thus more costly to Petitioners) than the thresholds promulgated in the Tailoring Rule. Or it could do something else entirely. All of this is guesswork, which is precisely the point: State Petitioners’ faith that Congress will alleviate their injury is inherently speculative.

State Petitioners’ second alternative theory of standing fares no better. In their reply brief, they contend that even if vacating the Timing or Tailoring Rules would indeed exacerbate their costs and administrative burdens (the purported injuries they claimed in their opening brief), “then State Petitioners can establish Article III standing under *Massachusetts* by asserting injuries caused by EPA’s

failure to regulate sooner.” State Pet’rs’ Timing & Tailoring Reply Br. 5. Essentially, State Petitioners’ reply brief contends that, contrary to the position taken in the opening brief, they want more regulation, not less, and that they wanted regulation sooner rather than later. And because the Commonwealth of Massachusetts had standing to seek regulation of greenhouse gases in *Massachusetts v. EPA*, State Petitioners argue that they now have standing to seek more regulation of greenhouse gases as well.

This argument is completely without merit. As an initial matter, we are aware of no authority which permits a party to assert an entirely new injury (and thus, an entirely new theory of standing) in its reply brief. Quite to the contrary, we have held that, where standing is not self-evident, “[i]n its *opening* brief, the petitioner should . . . include . . . a concise recitation of the basis upon which it claims standing.” *Sierra Club v. EPA*, 292 F.3d 895, 901 (D.C.Cir.2002) (emphasis added); *see also* D.C.Cir. R. 28(a)(7) (“[i]n cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing.”); *American Library Ass’n v. FCC*, 401 F.3d 489, 493-94 (D.C.Cir.2005) (discussing limitations on this principle). After all, “it is often the case . . . that some of the relevant facts are known only to the petitioner, to the exclusion of both the respondent and the court.” *Sierra Club*, 292 F.3d at 901. If “the petitioner does not submit evidence of those facts

with its opening brief,” the respondent is “left to flail at the unknown in an attempt to prove the negative.” *Id.* This principle is particularly important here, for State Petitioners’ asserted fear of global warming stands in stark contrast to the position they took throughout this litigation. In an earlier brief, for example, they characterized the Endangerment Finding as “a subjective conviction” State Pet’rs’ Endangerment Br. 19, “supported by highly uncertain climate forecasts,” *id.* at 18, and “offer[ing] no criteria for determining a harmful, as opposed to a safe, climate,” *id.* at 17. Given this, EPA could not possibly have anticipated that State Petitioners, abruptly donning what they themselves call “an environmentalist hat,” State Pet’rs’ Timing & Tailoring Reply Br. 4, would assert that global warming causes them concrete and particularized harm.

In any event, State Petitioners fail to cite any record evidence to suggest that they are adversely affected by global climate change. This is in stark contrast to the evidence put forward in *Massachusetts v. EPA*, where the Commonwealth submitted unchallenged affidavits and declarations showing that 1) rising sea tides due to global warming had “already begun to swallow Massachusetts’ coastal land,” and 2) “[t]he severity of that injury will only increase over the course of the next century.” *Massachusetts v. EPA*, 549 U.S. at 522-23, 127 S.Ct. 1438. These specific, factual submissions were key to the standing analysis in *Massachusetts v. EPA*: the

Court held that “petitioners’ *submissions as they pertain to Massachusetts* have satisfied the most demanding standards of the adversarial process.” *Id.* at 521, 127 S.Ct. 1438 (emphasis added). It is true, as State Petitioners emphasize, that the Supreme Court held that states are “entitled to special solicitude in our standing analysis.” *Id.* at 522, 127 S.Ct. 1438. But nothing in the Court’s opinion remotely suggests that states are somehow exempt from the burden of establishing a concrete and particularized injury in fact. State Petitioners, like Industry Petitioners, failed to do so here. We shall thus dismiss all challenges to the Timing and Tailoring Rules for lack of jurisdiction.

VII.

Following promulgation of the Timing and Tailoring Rules, EPA issued a series of rules ordering states to revise their PSD State Implementation Plans (SIPs) to accommodate greenhouse gas regulation. See *Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call*, 75 Fed. Reg. 53,892 (Sept. 2, 2010), 75 Fed. Reg. 77,698 (Dec. 13, 2010); *Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure to Submit State Implementation Plan Revisions Required for Greenhouse Gases*, 75 Fed. Reg. 81,874

(Dec. 29, 2010). Industry Petitioners present several challenges to these SIP-related rules. But our review in this case is limited to four EPA decisions: the Endangerment Finding, the Tailpipe Rule, and the Timing and Tailoring Rules. We thus lack jurisdiction over the SIP-related rules. Moreover, challenges to these rules are currently pending in at least two separate cases before this court. *See Utility Air Regulatory Group v. EPA*, No. 11-1037 (consolidating various challenges); *Texas v. EPA*, No. 10-1425 (challenge brought by Texas). We decline Industry Petitioners' invitation to rule on the merits of cases which are properly before different panels.

VIII.

For the foregoing reasons, we dismiss all petitions for review of the Timing and Tailoring Rules, and deny the remainder of the petitions.

So ordered.

App. 104

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed: December 20, 2012

No. 09-1322

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

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT
STATE OF MICHIGAN, ET AL., INTERVENORS

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

No. 10-1073

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

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT
AMERICAN FROZEN FOOD INSTITUTE, ET AL.,
INTERVENORS

App. 105

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

No. 10-1092

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

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT
LANGBOARD, INC.-MDF, ET AL., INTERVENORS

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

No. 10-1167

AMERICAN CHEMISTRY COUNCIL, PETITIONER

v.

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

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

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

On Petitions for Rehearing En Banc

Before: SENTELLE*, *Chief Judge*, and
HENDERSON, ROGERS*, TATEL*, GARLAND,
BROWN*, GRIFFITH, and KAVANAUGH*, *Circuit
Judges*.

ORDER

The petition of the Chamber of Commerce of the United States of America, joined by the State of Alaska, Peabody Energy Company, Southeastern Legal Foundation, et al., State Petitioners and Intervenors for Petitioners, for rehearing en banc; and the petition of the National Association of Manufacturers, et al. for rehearing en banc in No. 10-1073, et al. and No. 10-1167, et al., and the responses to the petitions were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petitions. Upon consideration of the foregoing, it is

many of the arguments her dissent now presses. In particular, it rebuffed EPA's attempt to use "postenactment congressional actions and deliberations" to obscure "the meaning of an otherwise-unambiguous statute," *id.* at 529, and found EPA's reliance on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), "similarly misplaced," *Massachusetts v. EPA*, 549 U.S. at 530. Seeking to revive the *Brown & Williamson* argument, Judge Brown suggests that the Court never considered the "far-reaching effects" of extending greenhouse gas regulation to stationary sources. *See* Dissenting Op. at 18 (Brown, J.). But this is inaccurate – the briefs before the Court explicitly raised the argument that interpreting "air pollutant" to include greenhouse gases could have tremendous consequences for stationary-source regulation. *See, e.g.*, Brief of Respondent CO₂ Litigation Group, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120), 2006 WL 3043971 at *19-*31.

To the extent Judge Brown attempts to bypass *Massachusetts v. EPA* by focusing on the statutory condition that air pollution "*reasonably be anticipated to endanger* public health or welfare," 42 U.S.C. § 7521(a)(1) (emphasis added), her quarrel is not just with the Supreme Court, but also with EPA's assessment of the science. Of course, we agree that the statute requires EPA to find a particular causal nexus between the pollutant and the harm in order to regulate. *See* Dissenting Op. at 9 (Brown, J.). But that is exactly what EPA did: it found that

“greenhouse gases in the atmosphere may *reasonably be anticipated* both to endanger public health and to endanger public welfare.” *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009). And, as the panel opinion explains, EPA’s scientific judgment about the causal relationship between greenhouse gases and climate change is a scientific determination entitled to “an extreme degree of deference.” *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 120 (D.C. Cir. 2012) (quoting *American Farm Bureau Federation v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009)). The dissent’s suggestion that EPA was somehow statutorily precluded from finding the requisite nexus between greenhouse gases and harm to public health and welfare, *see* Dissenting Op. at 10-11 (Brown, J.), is belied by the Supreme Court’s decision to remand precisely this question. *See Massachusetts v. EPA*, 549 U.S. at 532-35.

Judge Kavanaugh’s dissent relates to the scope of the Prevention of Significant Deterioration (“PSD”) program, an aspect of the panel opinion Judge Brown also rejects. Specifically, Judge Kavanaugh disagrees with EPA’s longstanding interpretation of the term “any air pollutant,” 42 U.S.C. § 7479(1), arguing that, in the context of the PSD program, “any air pollutant” refers not to all pollutants regulated under the Clean Air Act, but only to the six NAAQS pollutants. Because taking the statute at its word and interpreting “any air pollutant” to include greenhouse

gases would lead to what he considers absurd results, Judge Kavanaugh insists that EPA and this Court are obligated to read “any air pollutant” more narrowly. *See* Dissenting Op. at 3-10 (Kavanaugh, J.). This argument, however, hinges on the proposition that both readings are plausible interpretations of an ambiguous statutory provision. *See* Dissenting Op. at 2-3, 10 (Kavanaugh, J.). But as the panel opinion explains at length, the statute is clear. *See Coalition for Responsible Regulation*, 684 F.3d at 132-44. Congress did not say “certain ‘air pollutants.’” Dissenting Op. at 2 (Kavanaugh, J.). It said “any air pollutant,” and it meant it. *See Coalition for Responsible Regulation*, 684 F.3d at 136. Thus, unlike the unreasonable interpretation rejected in *Kloeckner v. Solis*, No. 11-184, slip op. at 7-13 (U.S. 2012), the panel’s interpretation of the statute is the only plausible one.

Moreover – and again, as the panel opinion explains at length, *see Coalition for Responsible Regulation*, 684 F.3d at 135-36 – considering “any air pollutant” in context buttresses rather than undermines the panel’s interpretation. The statute frames the purpose of the PSD program in broad – not NAAQS-specific – terms, emphasizing that the program’s goal is “to protect public health and welfare from any actual or potential adverse effect which . . . may reasonably be anticipate[d] to occur from air pollution.” 42 U.S.C. § 7470(1). And although certain aspects of the program are specifically directed at NAAQS pollutants, *see, e.g., id.* § 7473(b)(4), the

program as a whole plainly has a more expansive scope. For instance, covered sources are required to (1) install the best available control technology for “*each* pollutant subject to regulation under [the Act],” *id.* § 7475(a)(4) (emphasis added), and (2) demonstrate that they will not cause or contribute to “*any* . . . applicable emission standard” under the Act, *id.* § 7475(a)(3) (emphasis added).

In the end, we agree that “the question here is: Who Decides?” Dissenting Op. at 18 (Kavanaugh, J.). We also agree that “Congress (with the President) sets the policy through statutes, agencies implement that policy within statutory limits, and courts in justiciable cases ensure that agencies stay within the statutory limits set by Congress.” Dissenting Op. at 18 (Kavanaugh, J.). Here, Congress spoke clearly, EPA fulfilled its statutory responsibilities, and the panel, playing its limited role, gave effect to the statute’s plain meaning. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

To be sure, the stakes here are high. The underlying policy questions and the outcome of this case are undoubtedly matters of exceptional importance. The legal issues presented, however, are straightforward, requiring no more than the application of clear statutes and binding Supreme Court precedent. There is no cause for en banc review.

BROWN, *Circuit Judge*, dissenting from the denial of rehearing en banc: In the summer of 1974, while waiting to start classes at UCLA, I was lucky enough to obtain a summer job house sitting in the pleasant, upscale neighborhood of Pasadena. Known mostly for its Rose Parade and Rose Bowl, Pasadena is one of the more scenic exurbs of Los Angeles. I inhabited a sparsely furnished, modest-but-pricey bungalow set among the lush landscape typical of southern California. This is a place where Birds of Paradise grow ten feet tall and the magenta blossoms of Bougainvillea fall like lavish draperies from redwood garden trellises. After staying in the house more than a month and spending a restless night listening to the agitated thrashings of the jacaranda trees in a fitful wind, I stumbled bleary-eyed into the kitchen, looked out the window, and stopped – utterly dumbfounded. There – looking like it was but a few feet beyond the back fence – stood a mountain. Not a foothill. Not an unobtrusive mesa. A mountain! Closer inspection revealed not a lone majestic peak, but a whole mountain range I later identified as the San Gabriels. In those days, the air in the Los Angeles basin was so thick with smog that a mountain, or even a nearby mountain range, could simply disappear.

Although the Los Angeles basin was among the most notorious examples of the phenomenon, it was by no means unique and certainly not the worst. It was this crisis of ambient air quality that precipitated the enactment of the Clean Air Act (CAA). But as the CAA's history, language, and

structure make clear, Congress never intended the Act to serve as an environmental cure-all. It was targeted legislation designed to remedy a particular wrong: the harmful direct effects of poisoned air on human beings and their local environs. This is what Congress understood as “air pollution which may reasonably be anticipated to endanger public health” in the tailpipe emissions provision, 42 U.S.C. § 7521(a)(1). The Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), however, concluded otherwise. In dicta too suggestive to ignore, the Court implicitly assumed that climate change could provide the basis for an endangerment finding in the tailpipe context. *See id.* at 532-33.

Bound as I am by *Massachusetts*, I reluctantly concur with the Panel’s determination that EPA may regulate GHGs in tailpipe emissions. But I do not choose to go quietly. Because the most significant regulations of recent memory rest on the shakiest of foundations, Part I of this statement engages *Massachusetts’s* interpretive shortcomings in the hope that either Court or Congress will restore order to the CAA. Part II, by contrast, reflects my belief that *Massachusetts* does not compel the same result for Title V and the Prevention of Significant Deterioration of Air Quality (PSD) program. Although I agree with Judge Kavanaugh’s dissent, *Coal. for Responsible Regulation v. EPA*, Nos. 09-1322, et al. (Kavanaugh, J., dissenting from denial of rehearing en banc), I approach the inflection point from a

slightly different perspective. Part III concludes with a brief note on standing.

Because I would vote for the full court to consider the propriety of extending *Massachusetts* to Title V and the PSD program, I respectfully dissent from this denial of rehearing en banc.

I.

A.

The origins of the Clean Air Act are closely tied to fatal fogs and deadly air inversions that, for much of early postindustrial history, seemed to be the inevitable consequence of economic progress. See Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1575 (1991).¹ Initially regulated at the local and state level, air pollution became the focus of the federal government only after World War II. See *id.* at 1585-86. In October 1948, a severe temperature inversion in the industrial city of Donora, Pennsylvania increased air pollution to such an extent that traffic “was virtually stopped because of lack of visibility.” The inversion killed 20 people, *id.*, and prompted the federal government to begin researching air pollution. *Id.* at 1586. By 1961,

¹ Inversions, sometimes known as “Londoners,” occur “when a layer of hot air warmed by . . . water exists above cooler ground-level air and traps smoke and particulate matter under the warmer air.” *Id.*

President Kennedy included a plea for “an effective air pollution program” in his Special Message on the Natural Resources. *Id.* Public pressures for legislation only increased when a “Killer Smog” engulfed London in December 1962, killing at least 340, and a similar inversion in New York City allegedly claimed the lives of 200. *Id.* Eventually, legislation recommended by President Kennedy in February 1963 led to the enactment of the CAA, which President Johnson signed into law on December 17, 1963. *Id.* at 1586-87. Seven years later, President Nixon signed The Clean Air Amendments of 1970. The 1970 Amendments authorized the EPA to prescribe national ambient air quality standards (NAAQS) and created the statutory framework that still exists today.

B.

It was no happy accident that congressional draftsmen titled the legislation the “*Clean Air Act.*” Ambient air quality was the point, purpose, and focus of the CAA. Congress had set its sights on the “dirty, visible ‘smokestack’ emissions,” 136 CONG. REC. H2771-03 (1990) (statement of Rep. Roe), and smog caused by vehicle emissions. The CAA was the means by which Congress would grapple with urban air pollution and its attendant health effects, including impaired breathing, heart disease, lung damage and lung disease, and even death. If pollution was the problem, these ills were the specific harms Congress sought to combat. Even a cursory glance at the

legislative history, with its numerous charts, graphics, and statistics detailing cancer and death rates, will bear this point out. *See, e.g.*, Hearings on Air Pollution – 1968 Before the Subcomm. on Air and Water Pollution of the Sen. Comm. on Pub. Works, 90th Cong. 2nd Sess., pt. 2, 608-20 (1968) (statement of Dr. Samuel S. Epstein, Children’s Cancer Research Foundation.) (“Air Pollution – 1968”).

With the enactment of the 1990 Amendments, Congress expanded the Act beyond its singular emphasis on urban air quality to address hazardous – *i.e.*, toxic – air pollutants, acid rain, and stratospheric ozone. In regulating hazardous pollutants, Congress reemphasized the need for a close and tangible nexus between pollutant and harm. The legislative record, for example, continued to conceive of dangers in terms of their direct effects on human health and well-being. *See, e.g.*, S. Rep. No. 101-228, at 3388 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385 (“Air pollution can silently damage our lungs and heart or act swiftly in the case of exposure to toxic air pollutants. Rigorous regulation of toxic air pollutants is needed to avoid risk of serious, irreversible damage to human health.”). To the extent the regulation of stratospheric ozone and acid rain suggest a broader nexus between pollutant and harm to human health, the very particular way in which Congress handled these exceptions goes a long way toward proving the rule: Congress only expands the CAA through considered legislative acts.

In addressing these transnational phenomena, the legislature did not spin regulations out of whole cloth. With ozone concerns, for example, Congress developed solutions through international negotiations, the implementation of which led to the creation of a separate title of the CAA. *See NRDC v. EPA*, 464 F.3d 1, 3 (D.C. Cir. 2006). Likewise, years of contentious discussions with Canada helped bring about the acid rain provisions in the 1990 Amendments. *See generally* Dennis A. Leaf, *Intergovernmental Cooperation: Air Pollution from an U.S. Perspective*, 18 CAN.-U.S. L.J. 245 (1992). Simply put, when Congress became aware of new dangers, it acted judiciously in crafting workable remedies that, when they obtained the necessary political support, were worked into their own discrete provisions under the Act. Neither Congress nor the EPA attempted to force these distinct problems into existing, ill-suited regulatory schemes.

Congressman Waxman, one of the strongest proponents of stringent air pollution controls and a key force behind the 1990 Amendments, has stated that “in recent experience, no legislation has received more scrutiny during its consideration.” The Honorable Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1724 (1991). Hyperbole or not, the admission is telling. The history of the CAA is one of hard-fought incremental gains through which Congress remedied particular environmental wrongs with tailored remedies. Said the Congressman:

Discrete and extensive new programs are included to grapple with high ambient pollution levels (urban and regional smog), hazardous air pollution, acid rain, and depletion of the stratospheric ozone layer. Each of these programs [was] tailored to the problem it [sought] to address, and each [was] quite different in its approach.”

Id. at 1811. Political necessity has forced Congress to calibrate its amendments to the CAA with great specificity and care. Where our Representatives have acted with such caution, any suggestion that Congress has – through a single word – conferred upon EPA the authority to steamroll through Congressional gridlock, upend the Senate’s rejection of the Kyoto Protocol, and regulate GHGs for the whole of American industry must necessarily fail. The legislature, recall, does not “hide elephants in mouseholes.” *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001).

But we needn’t rely on interpretative canons alone to make this point. In drafting the 1990 Amendments, Congress considered – and *expressly rejected* – proposals authorizing EPA to regulate GHGs under the CAA. *See* S. Rep. No. 101-228, at 377 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3760. Even the Executive objected that an attempt to control Carbon Dioxide (CO₂) emissions – emissions not harmful to health – in order to prevent global warming was premature. *See* Administration’s Amendments – Hearings Before the Subcomm. On

Health and the Env't of the Comm. on Energy and Commerce, 101st Cong., 1st Sess. (1989) (includes Bush Administration Report on S. 1630). The Executive's critique noted that "unilateral action aimed at addressing a global problem" through a standard limiting tailpipe emissions would not be an effective means of safeguarding the global environment and would "necessarily punish national interests." *Id.* at 792, 813.

That Congress has never deviated from its decision to not regulate GHGs under the CAA was not for lack of opportunity. Congress has considered and rejected countless other bills in the years since the 1990 Amendments that would have authorized GHG regulation. By one estimate, Congressmen have proposed over 400 bills concerning GHGs between 1990 and 2009. See Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference As A Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593, 636-37 (2008) (tracking proposals). Congress's inability to break this nearly quarter-century long deadlock is incredibly suggestive: this is not an area of policymaking where the legislature has acted rashly or unthinkingly in delegating authority to agencies.

At bottom, Congress understood the dangers of "any air pollutant" in § 7521(a)(1) in terms of the ill-effects caused those who inhale the pollutants, not the broad, attenuated consequences of climate change. The CAA was drafted not to combat the

threat of flooding or the menace of heat waves, *see* Endangerment and Cause of Contribute Findings for Greenhouse Gases, 74 Fed. Reg. 66,496, 66,526 (Dec. 15, 2009) (“EPA Endangerment Finding”), but the choking, stifling, and degenerative effect of airborne pollutants on human beings and their affected localities. Congress has long quantified this harm in terms of mortality rates, *see, e.g.*, Air Pollution – 1968, 564 (statement of Dr. Roger S. Mitchell, Director, Webb-Waring Institute for Medical Research), not acreage of “costal land” lost. *Massachusetts*, 549 U.S. at 522. To put matters pointedly: the injury sufficient to establish standing need not suffice to establish endangerment as well.

Congress was of course free to circumvent this close cause-health effect nexus by devising a separate provision for GHG regulation, much as it did for stratospheric ozone, but it did no such thing. And nothing in the legislative history suggests that Congress has deviated from this status quo.

The plain language of the CAA only underscores the Act’s non-applicability to GHGs insofar as it requires the harm be of the sort “reasonably [] anticipated to endanger.” 42 U.S.C. § 7251(a)(1) – a term we know to have a discrete meaning.

C.

In the present case, this Court had “little trouble” disposing of the argument that the “PSD program is specifically focused solely on localized air pollution”

because it is “quite clear . . . the PSD program was intended to protect against precisely the types of harms caused by greenhouse gases.” CRR Slp. Op. 62-63 (emphasis added). *Massachusetts* notwithstanding, this statement is a curious thing in light of the uncontradicted legislative history just discussed.² So too is the court’s reliance on the statutory text, particularly its finding that “the CAA expressly provides that effects on ‘welfare’ means ‘effects on . . . weather . . . and climate.’” Slp. Op. 62-63 (citing 42 U.S.C. § 7602(h)).

As a textual matter, there is nothing “quite clear” about it. The Supreme Court has declared that GHGs like CO₂ are pollutants within the meaning of the Act. Under the CAA, however, EPA can regulate a pollutant only if the administrator finds that the GHG causes or contributes to “air pollution which *may reasonably be anticipated to endanger* public health or welfare.” 42 U.S.C. § 7251(a)(1) (emphasis added). But in locating the CAA’s conception of “harm” in § 7602(h), the definition of “welfare,” and not § 7251(a)(1) generally, this court effectively skirted the operative statutory language – “may reasonably be anticipated” – and rendered it nugatory. This was in error. Section 7602(h) defines only the potential *objects* of harm; the “reasonably be

² As noted, the weather and climate issues targeted by the CAA involve direct, deleterious, localized effects caused by polluted air people breathe or suspended pollutants that may be deposited on land and crops by precipitation.

anticipated” language of § 7251(a)(1) supplies the requisite *nexus* between the pollutant and the objects of its harm. The two provisions must be read together if the statute is to be interpreted faithfully. To put matters another way, the “may reasonably be anticipated” language must do some analytical work in the endangerment determination lest it be deemed surplusage. *See, e.g., Conference of State Bank Supervisors v. Conover*, 715 F.2d 604, 627 (D.C. Cir. 1983) (“[I]n construing a statute, we ‘are obliged to give effect, if possible, to every word Congress used.’” (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979))). And in view of the CAA’s legislative history, the nature of that work is clear.

In order to reasonably anticipate that a pollutant will contribute to air pollution that endangers public health or welfare, the Agency would have to conclude that pollution created by CO₂ or another GHG is a reasonably direct cause of the damage to public health and welfare. To find that CO₂ may ultimately endanger public health and welfare because sea levels will rise tells us nothing about whether CO₂ concentrations in the ambient air directly harm public health and welfare. The ingredients of a Killer Smog are few and specific; the process through which an air inversion traps particulate matter close to the ground is well understood. With both there is a direct correlation between reducing the concentration of the pollutant and reducing the negative health effects. Questions of public health impacts from air pollution have consistently been based on the direct – that is,

inhalational – effects of exposure to the pollutant. *See, e.g.*, Joint Opening Brief of Non-State Petitioners and Supporting Intervenors at 58, *Coal. for Responsible Regulation v. EPA*, No. 09-1322 (May 20, 2011); *NRDC, Inc. v. EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990) (concluding that EPA may not consider the health effects of increased unemployment when setting new health-based NAAQS).

In contrast, any harm to human health and welfare flowing from climate change comes at the end of a long speculative chain. The dissent in *Massachusetts* pointed out that EPA had described in great detail the scientific uncertainty that precluded even forming a judgment as to whether greenhouse gases endanger public welfare. *See* 549 U.S. at 553-55 (Scalia, J., dissenting). In that earlier defense of its refusal to form a judgment, EPA explained how predicting climate change involved a “complex web of economic and physical factors,” including:

[o]ur ability to predict future global anthropogenic emissions of GHGs and aerosols; the fate of these emissions once they enter the atmosphere (*e.g.*, what percentage are absorbed by vegetation or are taken up by the oceans); the impact of those emissions that remain in the atmosphere on the radiative properties of the atmosphere; changes in critically important climate feedbacks (*e.g.*, changes in cloud cover and ocean circulation); change in temperature characteristics (*e.g.*, average temperatures, shifts in daytime and evening temperatures);

changes in other climatic parameters (*e.g.*, shifts in precipitation, storms); and ultimately the impact of such changes on human health and welfare (*e.g.*, increases or decreases in agricultural productivity, human health impacts).

Id. If there can be this much logical daylight between the pollutant and the anticipated harm, there is nothing EPA is not authorized to do. If this finding is valid, in a world where six degrees of separation is the compass of all humankind, the right endangerment finding would allow EPA to rule the world. But as this Court has noted before, EPA's authority to regulate is constrained, not enlarged, by the relationship of the term "will endanger" to other sections of the CAA. See *Ethyl v. EPA*, 541 F.2d 1, 29 (D.C. Cir. 1976) (en banc).

Of course, nothing here should be taken to imply that a particular GHG does not contribute to climate change. I mean only to suggest that a pollutant might contribute to the nebulous mélange of potential drivers of climate change without having any direct, deleterious impact within the meaning of the CAA. I emphasize too that this is not a problem with science. This is a problem of statutory interpretation. Climate change, with its geologic timeframe and its many uncertainties and imponderables, is and will probably remain a subject of some controversy. EPA finds the science sufficiently convincing for its purposes and it is entitled to a certain amount of deference on questions related to its technical expertise. But it is

not necessary to quibble with the science of climate change to conclude that the endangerment finding fails on textual and logical terms. There is simply a point at which a difference in degree becomes a difference in kind and we have passed this point many times over in the course of this tortured litigation. The Supreme Court, however, has refused to recognize as much for tailpipe emissions.

II.

A.

But we need not follow *Massachusetts* off the proverbial cliff and apply its reasoning to the unique Title V and PSD provisions not considered in that case. The cascading layers of absurdity that flow from that interpretive exercise make clear that the plain language of the CAA compels no such result. As EPA's own rulemaking documents have so unabashedly explained:

To apply the statutory PSD and title V applicability thresholds literally to sources of GHG emissions would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program. These extraordinary increases in scope of the permitting programs would mean that the programs would become several hundred-fold larger than what Congress appeared to contemplate.

PSD and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed. Reg. 31,514, 31,533 (Jun. 3, 2010) (“Final Tailoring Rule”). Completely oblivious to the irony, EPA added:

For our authority to take this action, we rely in part on the “absurd results” doctrine, because applying the PSD and title V requirements literally (as previously interpreted narrowly by EPA) would not only be inconsistent with congressional intent concerning the applicability of the PSD and title V programs, but in fact would severely undermine congressional purpose for those programs.

Id. at 31,541-42. And again:

[I]n this case because a literal reading of the PSD and title V applicability provisions results in insurmountable administrative burdens. Those insurmountable administrative burdens – along with the undue costs to sources – must be considered “absurd results” that would undermine congressional purpose for the PSD and title V programs.

Id. at 31,547.

In precincts outside Washington, D.C., this litany might cause a regulator to pause and consider whether results so at odds with Congressional presuppositions could ever be justified as falling within the literal meaning of an enactment. EPA, however, proposes that the absurd result can be easily eliminated by ramping up and gradually

phasing in the requirements. Faced with the choice of reconsidering the legitimacy of an endangerment finding that sets in motion such a cluster of chaos or rewriting the statute, the agency has blithely done the latter. This is an abuse of the absurdity and administrative necessity doctrines as neither can be invoked to preempt legislative prerogatives. Permitting a statute “to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not express the ‘unambiguously expressed intent of Congress,’” but it does not grant the agency “a license to rewrite the statute.” *Mova Pharmaceuticals v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998).

But that is not the worst of it. The real absurdity – apparently as invisible to the EPA as the San Gabriels once were to me – cannot be cured by phase in, no matter how subtly Byzantine. The real absurdity is that this unprecedented expansion of regulatory control, this epic overreach, may very well do more damage to the wellbeing of Americans than GHGs could ever do.³

³ *See, e.g.*, Joint Reply Br. of Non-State Petitioners and Supporting Intervenors at *1, No. 09-1322 (Nov. 14, 2011) (“Nor does [EPA] dispute that the new rules will impose massive burdens on a struggling economy, or that its program of vehicle standards will affect global mean temperatures by no more than 0.01 degree Celsius by 2100”).

B.

A second, more elementary consideration counsels against the mechanical application of *Massachusetts's* tailpipe emissions determination to these distinct CAA provisions: deference to Congress.

As articulated in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Supreme Court's "major questions" canon gives form to the judicial intuition so strongly implicated here: Congress should not be presumed to have deferred to agencies on questions of great significance more properly resolved by the legislature. If there was ever a regulation in recent memory more befitting such a presumption than the present, I confess I do not know of it.

On familiar facts, the Supreme Court in *Brown & Williamson* rebuffed the FDA's expansionist effort to bring tobacco products within its regulatory ambit. The agency's regulation rested on a strained interpretation of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, in which it defined nicotine as a "drug" and cigarettes and smokeless tobacco as "combination products" used to deliver nicotine to the body. *See Brown & Williamson*, 529 U.S. at 125-27. Applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Court first considered the statutory structure. "[I]f tobacco products were within the FDA's jurisdiction," the majority concluded, the normal operation of the "Act would require the FDA to remove them from the

market entirely,” and this would “contradict Congress’ clear intent as expressed in its more recent, tobacco-specific legislation.” *Brown & Williamson*, 359 U.S. at 143. As the present case confirms, such absurdity is all but inevitable where an agency attempts to regulate that which “simply do[es] not fit” within its regulatory scheme. *Id.* The Court next considered Congress’s 35 year history of tobacco-specific legislation, finding it “clear” that this “legislation has effectively ratified the FDA’s previous position that it lacks jurisdiction to regulate tobacco.” *Id.* at 156.

The Court then closed its lengthy *Chevron* discussion with an appeal to first principles. The “inquiry into whether Congress has directly spoken to the precise question at issue,” the Court explained, “is shaped, at least in some measure, by the nature of the question presented.” *Id.* at 159. *Chevron* deference operates on the assumption “that a statute’s ambiguity constitutes an implicit delegation,” but this tenuous fiction need not hold true in every situation. *Id.* “In extraordinary cases,” the Court went on, “there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.” *Id.* (referencing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (“A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial

matters to answer themselves in the course of the statute's daily administration"))).⁴

Declaring *Brown & Williamson* “hardly [the] ordinary case,” the Court reasoned:

Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no “reasonable assurance of safety,” it would have the authority to ban cigarettes and smokeless tobacco entirely. Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly

⁴ *MCI Telecommunications Corporation v. AT&T Co.*, 512 U.S. 218 (1994), a case the *Brown & Williamson* Court found “instructive,” *Brown & Williamson*, 529 U.S. at 160, had advanced a similar logic. In concluding Congress had spoken to the meaning of the term “modify” as it appears in § 203(b) of the Communications Act of 1934, the Court rejected FCC’s far more expansive interpretation. The Court assumed in dicta that it was “highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion – and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.” *MCI*, 512 U.S. at 231. Certainly the same might be said here as well.

acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

Brown & Williamson, 529 U.S. at 159-60.

In view of the language, structure, and history of the CAA, I am simply unable to distinguish this logic from the present case in any meaningful way. To the contrary, with only the slightest of modifications one could rework the above text to apply to GHG emissions.⁵

⁵ Perhaps:

Contrary to its representations in *Massachusetts v. EPA*, the EPA has now asserted jurisdiction to regulate industries constituting a significant portion of the American economy. In fact, the EPA contends that, because greenhouse gases can be regulated as tailpipe emissions, it is obligated to regulate all stationary sources at admittedly "absurd" levels. Owing to its ubiquitous place in the planet's life cycle, greenhouse gases have their own unique political history. Congress, for better or for worse, has declined to create a distinct regulatory scheme for greenhouse gases, squarely rejected proposals to give the EPA jurisdiction over greenhouse gases, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the EPA has asserted, we are obliged to defer not to the

(Continued on following page)

Although the *Massachusetts* Court distinguished *Brown & Williamson*, it did so only in the context of tailpipe emissions. Its reasoning does not extend to Title V and the PSD program.

In the Court's view, *Brown & Williamson* had "found critical at least two considerations that have no counterpart in [*Massachusetts*]." 549 U.S. at 531. First, whereas the regulation of tobacco under the FDCA would have necessarily led to a ban on tobacco products – an outcome that clashed with the "common sense" intuition that Congress never meant to remove those products from circulation – the expansion of EPA's "jurisdiction would lead to no such extreme measures [because] EPA would only *regulate* emissions" and "there is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter." *Id.* But the Court spoke too soon. In the present litigation, EPA argued – and a Panel of this Court readily agreed – that in regulating tailpipe emissions under 42 U.S.C. § 7521, it is obligated to regulate stationary sources under Title V and the PSD program as well. As a threshold matter, the *Massachusetts* Court never considered these far-reaching effects. It limited its brief discussion on the merits to the tailpipe emissions question squarely before it. In this way, the Court never considered the

agency's expansive construction of the statute, but to Congress' consistent judgment to deny the EPA this power.

differing ways in which the CAA regulates tailpipes and stationary sources.

With tailpipe emissions, the inclusion of greenhouse gasses within the term “air pollutant” does not directly expand or contract the universe of vehicles and engines subject to the new standards. Consequently, the regulation’s impact will fall primarily on those manufacturers already complying with existing emission requirements. And even then, the Court explained, EPA “would have to delay any action ‘to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance.’” *Massachusetts*, 549 U.S. at 531 (quoting § 7521(a)(2)). Not so with the regulation of stationary sources. Insofar as 42 U.S.C. § 7479(1) defines “major emitting facility” to include those facilities with the “potential to emit” either 100 or 250 “tons per year or more of *any* air pollutant,” the statutory term is necessarily tied to CAA’s jurisdictional scope. Inescapably, then, the regulation of greenhouse gasses as “air pollutants” will radically expand the universe of covered entities far beyond Congress’s intentions. EPA’s decidedly extra-textual Tailoring Rule only confirms the ludicrousness of this result. Nor can it be said that the statutory safeguards operate in the same way as § 7521(a)(2). Permitting authorities may well be able to determine on a case-by-case basis what constitutes the “best available control technology” for a particular emitting facility, 42 U.S.C. § 7479(3), but this is of little consolation for

the small business owner who previously fell outside the CAA. At bottom, this outcome clashes with the “common sense” understanding that Congress would not have intended such a broad, unchecked expansion of the CAA to potentially millions of businesses from all walks of industry. The Supreme Court in *Massachusetts* simply did not have occasion to consider this absurd and “counterintuitive” outcome, but we do – and we must.

Second, the Court determined that the “unbroken series of congressional enactments” referenced in *Brown & Williamson* “made sense only if adopted ‘against the backdrop of the FDA’s consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco.’” *Massachusetts*, 549 U.S. at 531.⁶ By contrast, EPA had “not identified any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles.” *Id.* And even if it had, “Congress could not have acted against a regulatory ‘backdrop’ of disclaimers of regulatory authority” because “EPA had never disavowed the authority to regulate greenhouse gases, and in 1998 it in fact affirmed that it *had* such authority.” *Id.* When read in context, however, it is clear that the Court’s reasoning was

⁶ The suggestion here seems to be that Congress’s decision to regulate tobacco products would not, by itself, evince its intent to proscribe agencies from doing the same. Doing so in light of FDA’s statements, however, had the effect of implicitly codifying the agency’s long-held view.

building toward a wholly unspectacular point: because EPA's legislative history failed to establish congressional intent with the same weight and precision as *Brown & Williamson*, it did not justify "read[ing] ambiguity into a clear statute." *Id.* That logic is inapplicable here. In the absence of lexical clarity – which the Court had found in in [sic] CAA's "sweeping definition of 'air pollutant,'" *id.* at 528 – we need legislative history and other indicia of congressional intent to inform our understanding of how GHGs are to be regulated under other CAA provisions.⁷

The *Massachusetts* Court's effort to distinguish *Brown & Williamson* is thus unavailing where we

⁷ Consider the role of NAAQS in this regulatory system. EPA in *Massachusetts* had observed that NAAQS were established to "address air pollution problems that occur primarily at ground level" as well as "concentrations of substances in the ambient air and the related public health and welfare problems." *Massachusetts*, 549 U.S. at 558-59 (Scalia, J., dissenting). EPA thus reasoned that the regulation of the buildup of CO₂ in the upper reaches of the atmosphere – the process alleged to cause global climate change – was not akin to regulating the concentration of a substance that is polluting the air and was "beyond the scope of CAA's authorization to regulate." *Id.* In other words, EPA maintained that had Congress intended the CAA to regulate greenhouse gases [sic] and global climate change, it would have provided some better tool than NAAQS. That defense – offered in response to a demand to regulate tailpipe emissions – applies with even greater potency to Title V and the PSD program. In fact, although EPA now claims it is authorized to regulate greenhouse gases and global climate change, the agency acknowledges that the regulatory framework is as ill-suited to the task as ever.

deal not with the definitional scope of “any pollutant” and tailpipe emissions, but the particular dangers Congress sought to combat in enacting Title V and the PSD program. When read in conjunction with the CAA’s history, structure, and language, the intuitive logic of the “major questions” doctrine makes clear that the Panel erred in extending *Massachusetts*. Congress simply did not intend for EPA to convert the “Clean Air Act” to the “Warm Air Act” writ large. But that is exactly what the federal courts have done.

As the Chief Justice observed in his *Massachusetts* dissent, impatience is not a juridical principle that can be sustained under our constitutional framework. *See Massachusetts*, 549 U.S. at 535-36 (Roberts, C.J., dissenting). It certainly fares no better as a default measure of institutional choice under *Chevron*. As *Massachusetts* recognized, an agency can only exercise the authority Congress has delegated to it. *See* 549 U.S. at 534-35 (noting that EPA must “ground its reasons for action or inaction in the statute” and “exercise its discretion within defined statutory limits.”). Absurdity can never figure as an adequate substitute for authority in this threshold assessment. Nor can absurdity cure the agency’s failure to establish that the statute unambiguously compels its interpretation or that its interpretation, though discretionary, is actually consistent with statutory text, structure, and purposes. The agency seeks to avoid these pesky constraints here by invoking *Massachusetts*, but Article III judges cannot be a legitimate source of

legislative authority. By deferring to the distorted claim of delegation advanced here, this Court has transformed *Chevron* from a useful, albeit accidental, touchstone into an idol to which we surrender our constitutional faith.

III.

In rejecting State Petitioners' challenge to the Tailoring Rule for want of standing, the Panel invoked that famed preceptor of American civics, Schoolhouse Rock, to great effect. Slp. Op. at 79. ("As a generation of schoolchildren knows, 'by that time, it's very unlikely that [a bill will] become a law. It's not easy to become a law.'"). I certainly do not quarrel with such dispositive authority. Lawmaking is neither easy nor certain. In an ordinary case, the mere possibility of "corrective legislation" will not establish that redress is "likely, as opposed to merely speculative." *Lujan*, 504 U.S. at 561. But it bears repeating that this is not an ordinary case. Where the choice is between non-action or a confessedly "absurd" regulation poised to impress countless billions of dollars in costs on American industry, we have transcended the realm of the speculative. For once, the comparison with *Massachusetts* is apt. The Supreme Court found standing on the basis of an estimated rise in sea level of 20 to 70 centimeters by the year 2100, *see Massachusetts*, 549 U.S. at 542 (Roberts, C.J, dissenting) – a prediction based almost entirely on conjecture. Is it any more speculative to say that specific projections of billions of dollars in

actual regulatory costs would not suffice to compel Congress to act?

The Panel's alternative contention fares better: because Congress could remedy the issue in countless ways, not all of which inure to State Petitioners' benefit, the inquiry is "inherently speculative." *See Op.* at 79. This argument benefits from the genuine uncertainty in Congress over what, if any, role EPA should play in GHG regulation. But therein lies a frighteningly obtuse logic. If EPA actions are *ultra vires* precisely because disagreement on the Hill prevented Congress from altering the status quo and authorizing such regulation, how then can the very same deadlock be used to *defeat* Petitioners' standing to challenge the Rule through which EPA effectuates its absurdist scheme? The Court cannot have it both ways.

At bottom, bad decisions make bad law. In denying rehearing en banc, this Court has read *Massachusetts* to its illogical ends and it is American industry that will have to pay. That this Court did so is unsurprising, but certainly not fated. *Massachusetts* does not compel this outcome for the PSD and Title V provisions. Had this Court interrogated its own assumptions and yielded not to *Massachusetts's* telos but sound constitutional principles, it would have found that the matter properly belongs before Congress, not courts or agencies. As Schoolhouse Rock long ago explained:

Ring one, Executive,
Two is Legislative, that's Congress.
Ring three, Judiciary.
See it's kind of like my circus, circus.⁸

And what a circus it is.

For these reasons, I respectfully dissent from the denial of rehearing en banc.

KAVANAUGH, *Circuit Judge*, dissenting from the denial of rehearing en banc:

This case is plainly one of exceptional importance. A decision in either direction will have massive real-world consequences. The U.S. Chamber of Commerce describes the EPA regulations at issue here as “the most burdensome, costly, far-reaching program ever adopted by a United States regulatory agency.” Petition for Rehearing En Banc at 1. On the other hand, EPA issued these regulations to help address global warming, a policy issue of major long-term significance to the United States. Put simply, the economic and environmental policy stakes are very high.

Of course, our role is not to make the policy choices or to strike the balance between economic and environmental interests. That job is for Congress and

⁸ “Three Ring Government,” Schoolhouse Rocks, *available at* <http://www.schoolhouserock.tv/ThreeRing.html>.

the President when considering and enacting legislation, and then as appropriate for the Executive Branch – here, EPA, under the ultimate supervision of the President – when exercising its authority within statutory constraints. Our job as a court is more limited: to ensure that EPA has acted within the authority granted to it by Congress. In this case, I conclude that EPA has exceeded its statutory authority. I respectfully disagree with the panel opinion’s contrary conclusion, and given the overall importance of the case, I respectfully dissent from the denial of rehearing en banc.

I

A

This case concerns EPA’s implementation of the Prevention of Significant Deterioration provisions of the Clean Air Act. The Prevention of Significant Deterioration program – which is codified in Sections 7470 to 7479 of Title 42 – is designed to maintain state and local compliance with the National Ambient Air Quality Standards, known as the NAAQS. The NAAQS are currently established for six air pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide. As relevant here, the Prevention of Significant Deterioration statute requires stationary facilities that emit certain “air pollutants” to obtain permits before beginning new construction. *See* 42 U.S.C. §§ 7475(a)(1), 7479(1). To obtain a permit, the facility

must undergo a lengthy, costly process to analyze the new construction's impact on air quality and to try to demonstrate its compliance with the relevant emissions limits.

A central question in this case is how to construe the term "air pollutant" for purposes of this statutory permitting requirement. In particular, the question is whether the term "air pollutant" here covers not just the NAAQS pollutants, which can cause breathing problems or other health issues, but also greenhouse gases such as carbon dioxide, which contribute to global warming. Under the broader interpretation of "air pollutant" that encompasses greenhouse gases, a far greater number of facilities would fall within the Prevention of Significant Deterioration program and have to obtain pre-construction permits. That in turn would impose significantly higher costs on businesses and individuals that are building new commercial or residential property.

In considering a different Clean Air Act program targeted at motor vehicle emissions, the Supreme Court said that the term "air pollutant" meant "all airborne compounds of whatever stripe," which included greenhouse gases such as carbon dioxide. *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007). But all parties here, including EPA, agree that the *Massachusetts v. EPA* interpretation of the term "air pollutant" cannot control in this case, for purposes of this very different Clean Air Act program for stationary facilities. Rather, as the parties agree, we must look to the text and context of the Prevention of

Significant Deterioration statute to determine what “air pollutant” covers here.

Looking at the relevant statutory text and context, there would initially appear to be two plausible interpretations of the term “air pollutant” for purposes of the Prevention of Significant Deterioration statute: (i) more broadly, an airborne compound that is deemed harmful and is regulated by EPA in any Clean Air Act program, which would include greenhouse gases such as carbon dioxide; or (ii) more narrowly, the six air pollutants that are regulated by EPA in setting and enforcing the NAAQS, which would cover carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide, but would not include greenhouse gases such as carbon dioxide.

EPA chose the broader interpretation of “air pollutant,” thereby greatly expanding the reach of the Prevention of Significant Deterioration statute. But that broader interpretation has a glaring problem, as EPA itself recognized. In the context of the Prevention of Significant Deterioration statute, EPA’s broader interpretation would not mesh with other provisions of the statute and would lead to absurd results. That’s because the Prevention of Significant Deterioration statute requires pre-construction permits for facilities with the potential to emit more than 250 tons per year (or, for some facilities, 100 tons per year) of any covered pollutant. *See* 42 U.S.C. §§ 7475(a)(1), 7479(1). That would be a very low trigger for emissions of greenhouse gases because

greenhouse gases are emitted in far greater quantities than the NAAQS pollutants. As a result, the low trigger would mean a dramatically higher number of facilities would fall within the program and have to obtain pre-construction permits.

In an unusual twist, EPA openly acknowledged the unreasonableness – indeed, the absurdity – caused by its interpretation of the statute. If the Prevention of Significant Deterioration program were interpreted to require pre-construction permits based on emissions of greenhouse gases, EPA candidly stated that the result would be “so contrary to what Congress had in mind – and that in fact so undermines what Congress attempted to accomplish with the PSD requirements – that it should be avoided under the ‘absurd results’ doctrine.” 74 Fed. Reg. 55,292, 55,310 (Oct. 27, 2009).

But faced with those absurd consequences from the broader interpretation of the statute, EPA surprisingly did not choose the seemingly obvious option of adopting the narrower and more sensible interpretation of the term “air pollutant” for the Prevention of Significant Deterioration statute – the interpretation limited to NAAQS air pollutants. Instead, EPA plowed ahead with the broader interpretation. And then, to try to deal with the absurd repercussions of that interpretation for the Prevention of Significant Deterioration statute, EPA re-wrote the very specific 250-ton trigger in the permitting requirement of the statute, unilaterally raising that trigger for greenhouse gas emissions

from 250 tons to 100,000 tons – a 400-fold increase. *See* 75 Fed. Reg. 31,514 (June 3, 2010). EPA believed that re-writing the statute’s permitting-triggers provision in this way would reduce the number of facilities that would require pre-construction permits and thereby “tailor” the absurdity – that is, alleviate some of the absurdity caused by interpreting “air pollutant” to cover greenhouse gases.¹

This is a very strange way to interpret a statute. When an agency is faced with two initially plausible readings of a statutory term, but it turns out that one reading would cause absurd results, I am aware of no precedent that suggests the agency can still choose the absurd reading and then start rewriting other perfectly clear portions of the statute to try to make it all work out. And just recently, the Supreme Court reminded the Executive Branch and the lower courts that this is not the proper way to interpret a statute: Instead of “reading new words into the statute” to avoid absurd results, as the Government had urged in that case, the Court said that the statute should be interpreted so that “no absurdity arises in the first

¹ At the same time, EPA reserved the right to ratchet the trigger all the way back down to 250 tons, thereby bringing more and more facilities under the program at EPA’s unilateral discretion. EPA’s assertion of such extraordinary discretionary power both exacerbates the separation of powers concerns in this case and underscores the implausibility of EPA’s statutory interpretation. Put simply, the statute cannot be read to grant discretion to EPA to raise or lower the permitting triggers as EPA sees fit.

place.” *Kloeckner v. Solis*, No. 11-184, slip op. at 13 (U.S. 2012).

Even limited to this case alone, the practical implications of accepting EPA’s approach are obviously major. And if this case stands as a precedent that influences other agency decisionmaking, the future consequences likewise could be significant: Agencies presumably could adopt absurd or otherwise unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness. Allowing agencies to exercise that kind of statutory re-writing authority could significantly enhance the Executive Branch’s power at the expense of Congress’s and thereby alter the relative balance of powers in the administrative process. I would not go down that road.

B

In my view, the statutory issue here is reasonably straightforward. The Prevention of Significant Deterioration statute’s definition of “major emitting facility” subjects a facility to the permitting requirement based on the facility’s emissions of “air pollutants.” *See* 42 U.S.C. §§ 7475(a)(1), 7479(1). In the context of the Prevention of Significant Deterioration program as a whole, it seems evident that the term “air pollutant” refers to the NAAQS air pollutants.

To begin with, as explained above, interpreting “air pollutant” in this context to refer to the NAAQS

air pollutants would avoid the absurd consequences that EPA's broader interpretation creates – namely, the exponential increase in the number of facilities that would be required to obtain pre-construction permits. That single point alone provides dispositive support for the narrower, NAAQS-specific interpretation. *See, e.g., Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2004-05 (2012) (statutory context supports narrower rather than broader reading of statutory term).

Moreover, other provisions in the Prevention of Significant Deterioration statute likewise plainly use the term “air pollutant” to refer to the NAAQS air pollutants. The Prevention of Significant Deterioration program is codified in Sections 7470 to 7479 of Title 42. Of relevance here, Section 7473 sets guidelines for areas designated as in attainment of the NAAQS and requires that the “concentration of any air pollutant” in those areas not exceed certain concentrations permitted by the NAAQS. 42 U.S.C. § 7473(b)(4). The term “air pollutant” in Section 7473(b)(4) necessarily refers to the NAAQS air pollutants. In addition, several other provisions in the Prevention of Significant Deterioration statute similarly refer to Section 7473(b)(4)'s maximum concentrations for NAAQS pollutants. Each of those references thus also necessarily employs a NAAQS-specific use of the term “air pollutant.” *See, e.g.,* 42 U.S.C. § 7473(c)(1) (listing exclusions from “the maximum allowable increases in ambient concentrations of an air pollutant”); § 7474(a)(B)

(redesignations cannot cause “concentrations of any air pollutant” to exceed the maximum); *see also* § 7475(a)(3)(A) (facility may not cause air pollution in excess of “maximum allowable concentration for any pollutant”).

So it’s clear that a variety of provisions in the Prevention of Significant Deterioration statute use “air pollutant” to refer to a NAAQS air pollutant. And we presume that, unless otherwise indicated, the term “air pollutant” is used the same way throughout the Prevention of Significant Deterioration statute – and here, we have no reason to conclude otherwise. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (“identical words used in different parts of the same statute are generally presumed to have the same meaning”).

By contrast, when Congress wanted, in the Prevention of Significant Deterioration statute, to refer to a broader set of pollutants than the NAAQS pollutants, it did so expressly. Thus, a facility that requires a pre-construction permit because of its emissions of NAAQS pollutants must employ the best available control technology for emissions not just of “air pollutants” but of “each pollutant subject to regulation under this chapter,” which – now that EPA has regulated greenhouse gases in other parts of the Clean Air Act – *does* include greenhouse gases. 42 U.S.C. § 7475(a)(4). By its terms, Section 7475(a)(4) thus applies to greenhouse gases, not just the NAAQS. Importantly, however, Congress did not employ the language “each pollutant subject to

regulation under this chapter” in the statutory provision setting forth which facilities must obtain a pre-construction permit, the provision at issue in this case. And the policy distinction drawn in Section 7475(a)(4) is rather intuitive: Congress designed the statute’s permitting requirement based on facilities’ NAAQS emissions, but, once those facilities are subject to the permitting requirement, they must also meet a range of other minimum environmental standards.²

The overall objectives of the Prevention of Significant Deterioration statute also suggest that “air pollutant” refers to the NAAQS air pollutants for purposes of the permitting requirement. Importantly, the Prevention of Significant Deterioration statute applies only in areas that have met the NAAQS – that is, areas that do not have excessive emissions of the NAAQS air pollutants. If the purpose of this statute were in part to address global warming by requiring pre-construction permits for facilities that emit greenhouse gases, as EPA’s reading suggests, why would the statute target the construction of facilities only in areas that are in *compliance* with the NAAQS – and not elsewhere in the United States?

² Section 7479(1) – the definition of “major emitting facility” – speaks of “any” air pollutant. But the word “any” just begs the question of what the term “air pollutant” covers in the Prevention of Significant Deterioration program. It’s either any air pollutant regulated under the Clean Air Act or any of the NAAQS air pollutants.

That would make little sense, which in turn further suggests that EPA has misread the statute.

Moreover, as its name indicates, the Prevention of Significant Deterioration statute is designed primarily to prevent “deterioration” of an attainment area’s air quality. The relevant air quality standards that define whether an area is in attainment are the NAAQS. In a statute expressly linked to the NAAQS and designed to ensure that air quality does not “deteriorate” with respect to the NAAQS, it is somewhat illogical to read the statute as requiring pre-construction permits simply because a facility may emit substances that will *not* affect attainment of the NAAQS. Under EPA’s approach, a facility could be covered by the permitting requirement even if it emits no NAAQS air pollutants at all. That, too, makes little sense and suggests that EPA has misread the statute.

A separate canon of interpretation further demonstrates that EPA’s broad reading of the term “air pollutant” is at odds with Congress’s design. By requiring a vastly increased number of facilities to obtain pre-construction permits, EPA’s interpretation will impose enormous costs on tens of thousands of American businesses, with corresponding effects on American jobs and workers; on many American homeowners who move into new homes or plan other home construction projects; and on the U.S. economy more generally. Yet there is literally no indication in the text or legislative record that Members of Congress ever contemplated – much less intended –

such a dramatic expansion of the permitting requirement of the Prevention of Significant Deterioration statute. Courts do not lightly conclude that Congress intended such major consequences absent some indication that Congress meant to do so. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-61 (2000). Here, as elsewhere, we should not presume that Congress hid an elephant in a mousehole.

For all of those reasons – the statutory text, the absurdity principle, the statutory context as demonstrated by related statutory provisions, the overarching objectives of the statute, the major unintended consequences of a broader interpretation – the Prevention of Significant Deterioration statute as a whole overwhelmingly indicates that the permitting requirement is based on emissions of the NAAQS air pollutants.

And just to reiterate, the simple and absolutely dispositive point in this case is the following: The broader interpretation of “air pollutant” adopted by EPA produces what even EPA itself admits are absurd consequences. When an agency is faced with two plausible readings of a statutory term, but one reading would cause absurd results, the agency cannot choose the absurd reading. Here, therefore, EPA was required to adopt the narrower and more sensible interpretation of “air pollutant,” the interpretation limited to the NAAQS pollutants. As the Supreme Court has said, “interpretations of a statute which would produce absurd results are to be

avoided if alternative interpretations consistent with the legislative purpose are available.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Such an “alternative interpretation[] consistent with the legislative purpose” is readily available here.

II

If that were the end of the analysis, I would not hesitate to conclude that EPA had adopted an impermissibly broad reading of the term “air pollutant” for purposes of the permitting provision of the Prevention of Significant Deterioration statute. But before reaching that conclusion definitively, we need to consider whether EPA’s approach was mandated by the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). In that case, the Supreme Court considered the general statutory term “air pollutant” as applied to a different aspect of the Clean Air Act – the motor vehicle emissions program. The Court there interpreted “air pollutant” very broadly to mean “all airborne compounds of whatever stripe,” including greenhouse gases. *Id.* at 529.

Does *Massachusetts v. EPA* dictate EPA’s broader interpretation of “air pollutant” in the different context of the Prevention of Significant Deterioration statute? The panel opinion seemed to think so; its conclusion appears to have been heavily if not dispositively influenced by *Massachusetts v. EPA*. See, e.g., *Coalition for Responsible Regulation, Inc. v. EPA*,

684 F.3d 102, 134, 136 (D.C. Cir. 2012). In my view, however, the holding in *Massachusetts v. EPA* does not control the result in this case. Indeed, as explained more fully below, even EPA has concluded that *Massachusetts v. EPA* does not control here. The decision in *Massachusetts v. EPA* concerned the motor vehicle emissions program, a point the Supreme Court expressly noted many times in its opinion. The case did not purport to say that every other use of the term “air pollutant” throughout the sprawling and multifaceted Clean Air Act necessarily includes greenhouse gases. Each individual Clean Air Act program must be considered in context.³

³ As an analogy, take the familiar example of “no vehicles in the park.” Assume that a court has decided that the term “vehicles” generally includes bicycles, and that no bicycles are allowed in the park. Next assume that another park regulation states that “all park service vehicles must have reinforced gas tanks.” In that latter regulation, context tells us that the term “vehicles” obviously does not include bicycles. Bicycles are still vehicles in the abstract, but the gas-tank regulation logically applies only to a specific subset of vehicles (namely, motor vehicles).

So it is with “air pollutant” as used in different parts of the Clean Air Act. *Massachusetts v. EPA* held that the term “air pollutant” generally includes greenhouse gases. But that does not mean that the term “air pollutant” can never be used in a narrower sense. Greenhouse gases may qualify as “air pollutants” in the abstract, but context tells us that the Prevention of Significant Deterioration program uses the term “air pollutant” to refer only to a subset of all air pollutants (namely, the NAAQS pollutants).

Importantly, in *Massachusetts v. EPA*, the Supreme Court explicitly relied on the fact that the Clean Air Act’s “capacious definition of ‘air pollutant,’” did not appear “counterintuitive” or produce “extreme” consequences in the context of motor vehicle emissions. 549 U.S. at 531-32. But, as explained above, EPA’s capacious definition of “air pollutant” *is* counterintuitive and *does* produce extreme consequences in the context of the Prevention of Significant Deterioration statute, as EPA itself acknowledges. Moreover, in this case, an alternative and sensible interpretation of the term “air pollutant” is readily discernible from the text, context, and structure of the Prevention of Significant Deterioration statute as a whole – namely, the NAAQS-specific interpretation.

To be sure, as noted earlier, the same words used in different parts of an Act are often construed to have the same meaning. See *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). If that were an inflexible command, the *Massachusetts v. EPA* interpretation of “air pollutant” would certainly control here and throughout the entire Clean Air Act. But as the Supreme Court recently reminded us – *in the context of interpreting the Clean Air Act* – “the natural presumption that identical words used in different parts of the same act are intended to have the same meaning is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts

of the act with different intent.” *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (internal quotation marks and ellipsis omitted). As instructed by the Supreme Court, we must interpret statutory terms based on their context and in light of the statute as a whole, even if that approach on some occasions means that the same term applies differently in different parts of a statute. See, e.g., *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 596-97 (2004) (term “age” has different meanings within Age Discrimination in Employment Act); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 212-13 (2001) (term “wages paid” has different meanings within Social Security Act Amendments of 1939); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) (term “employee” has different meanings within Title VII).

The Supreme Court’s application of that interpretive principle in *Environmental Defense v. Duke Energy* – a decision issued on the same day as *Massachusetts v. EPA* – is illuminating. There, the Supreme Court confronted the Clean Air Act’s definition of a stationary source “modification.” See 549 U.S. at 567-68. That term was relevant to both the New Source Performance Standards program and the Prevention of Significant Deterioration program. The Court ruled that EPA could interpret the term “modification” differently for each of those two Clean Air Act programs, even though “the terms share a common statutory definition.” *Id.* at 574. In so holding, the Court analyzed the two programs’

different regulatory goals, noting that a “given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.” *Id.*

The Supreme Court’s interpretive approach in *Environmental Defense v. Duke Energy* – which recognizes that the meaning of a statutory term in the Clean Air Act may vary based on the particular program at issue – shows that the *Massachusetts v. EPA* interpretation of “air pollutant” in the context of the motor vehicle emissions program does not necessarily require the same interpretation of “air pollutant” in the context of the Prevention of Significant Deterioration program. In *Massachusetts v. EPA*, the Supreme Court emphasized that the regulation of greenhouse gases in the motor vehicle emissions program would not be “counterintuitive” and would not lead to any “extreme measures.” 549 U.S. at 531. Greenhouse gas standards would simply be added to the other regulations already applicable to manufacturers of new motor vehicles, and any such standards would take into account both cost and technological feasibility. *See* 42 U.S.C. § 7521(a). By contrast, the regulation of greenhouse gases in the Prevention of Significant Deterioration program would be both counterintuitive and extreme. Tens of thousands of businesses and homeowners would be swept into the Clean Air Act’s purview for the first time and hit with permitting costs averaging \$60,000, not to mention the additional costs of trying to construct and maintain the facility in compliance

with the relevant emissions limits and technological standards. *See* 75 Fed. Reg. 31,514, 31,556 (June 3, 2010). In addition, the costs associated with a vastly expanded permitting requirement would deter numerous projects from even starting in the first place. The major differences between the motor vehicle emissions program and the Prevention of Significant Deterioration program thus neatly fit the *Environmental Defense v. Duke Energy* paradigm of “distinct statutory objects calling for different implementation strategies.”

In reaching that conclusion, it bears mention that the Clean Air Act is a very complicated statute encompassing several distinct environmental programs. It is no surprise, then, that the motor vehicle emissions program and the Prevention of Significant Deterioration program are not the only parts of the Act to employ a term like “air pollutant” in a context-dependent way. For example, the visibility program applies to facilities based on their emissions of “any pollutant.” 42 U.S.C. § 7491(g)(7). In the context of that program, EPA has interpreted the term “any pollutant” to mean “any visibility-impairing pollutant,” which obviously does not include greenhouse gases. 40 C.F.R. pt. 51, App. Y, § II.A. Similarly, the nonattainment program applies to areas that have been designated as nonattainment “for any air pollutant.” 42 U.S.C. § 7501(2). In the context of that program, the term “air pollutant” is logically limited to the NAAQS air pollutants, which are the only pollutants for which an area can be

designated as nonattainment. *Id.* § 7407(d)(1)(A). All of that simply underscores that a court should exercise caution before reflexively importing the interpretations applicable to one Clean Air Act program into a distinct Clean Air Act program.

Any lingering doubt that *Massachusetts v. EPA* does not control here is dispelled when we recall that EPA itself has rejected *Massachusetts v. EPA*'s interpretation of "air pollutant" for the Prevention of Significant Deterioration statute. The Court in *Massachusetts v. EPA* said that "air pollutant" meant "all airborne compounds of whatever stripe." 549 U.S. at 529. EPA has acknowledged, however, that such a broad definition cannot possibly extend to the use of the term "air pollutant" in the Prevention of Significant Deterioration statute. EPA understood that it would be absurd to require pre-construction permits because of emissions of any airborne compound, including emissions of airborne compounds that have not been deemed harmful and regulated under the Clean Air Act. To avoid rendering the Prevention of Significant Deterioration statute an absurdity, EPA construed "air pollutant" to mean *certain* air pollutants – in particular, "any regulated air pollutant."

The critical point for present purposes – and it really is a critical point in thinking about the significance of *Massachusetts v. EPA* to the present case – is that EPA itself recognized that the *Massachusetts v. EPA* definition of "air pollutant" cannot and does not control how to interpret "air

pollutant” in the Prevention of Significant Deterioration context. As it tries to justify its broad interpretation of the Prevention of Significant Deterioration statute, EPA cannot simultaneously latch on to *Massachusetts v. EPA* and reject *Massachusetts v. EPA*.

If *Massachusetts v. EPA* does not control here – and even EPA admits that it does not – then we are back where we started. EPA was faced with two initially plausible interpretations of “air pollutant” for purposes of the permitting requirement of the Prevention of Significant Deterioration statute. One interpretation created patent absurdities and made little sense given the other statutory provisions. The other interpretation fit comfortably and sensibly within the statutory text and context. EPA nonetheless chose the first option. In my view, EPA’s reading of the statute was impermissible. An agency cannot adopt an admittedly absurd interpretation and discard an eminently sensible one.

Given all of this, the case seems reasonably straightforward. So how did the panel opinion reach the opposite conclusion? I respectfully have three main points of disagreement. First, as I read it, the panel opinion was decisively influenced by *Massachusetts v. EPA*’s interpretation of “air pollutant” in the context of the motor vehicle emissions program. But in light of the material differences between the motor vehicle emissions program and the Prevention of Significant Deterioration program, the *Massachusetts v. EPA*

interpretation cannot control here, as even EPA acknowledges. Second, the panel opinion attempted to buttress its choice of a broad interpretation of the term “air pollutant” by pointing to Section 7475(a)(4), the provision in the Prevention of Significant Deterioration program requiring covered facilities to use the best available control technology. But as explained above, Section 7475(a)(4) actually cuts the other way because it specifically refers to “each pollutant subject to regulation under this chapter,” which now does include greenhouse gases – whereas, by contrast, other statutory provisions in the Prevention of Significant Deterioration program clearly employ a NAAQS-specific interpretation of the unadorned term “air pollutant.” Third, the panel gave insufficient weight to the most critical point in this case, the absurd consequences of EPA’s broad interpretation. This was a mistake because the ultimate clincher in this case is one simple point: EPA chose an admittedly absurd reading over a perfectly natural reading of the relevant statutory text. An agency cannot do that.

III

In finding EPA’s statutory interpretation legally impermissible, I do not in any way want to diminish EPA’s vital policy objectives. EPA’s regulations for the Prevention of Significant Deterioration statute may well be a good idea as a matter of policy. The task of dealing with global warming is urgent and important. But as in so many cases, the question here is: Who

Decides? The short answer is that Congress (with the President) sets the policy through statutes, agencies implement that policy within statutory limits, and courts in justiciable cases ensure that agencies stay within the statutory limits set by Congress. A court's assessment of an agency's compliance with statutory limits does not depend on whether the agency's policy is good or whether the agency's intentions are laudatory. Even when that is true, we must enforce the statutory limits. *See Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (ruling that Executive Branch exceeded statutory authority in wartime prosecution of al Qaeda member).

In cases like this one, the bedrock underpinnings of our system of separation of powers are at stake. To be sure, courts must be wary of undue interference with an agency's action implementing its statutory responsibilities. *See American Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008) (separate opinion of Kavanaugh, J.); *see also Desert Citizens Against Pollution v. EPA*, 699 F.3d 524 (D.C. Cir. 2012); *National Environmental Development Association's Clean Air Project v. EPA*, 686 F.3d 803 (D.C. Cir. 2012); *American Petroleum Institute v. EPA*, 684 F.3d 1342 (D.C. Cir. 2012); *ATK Launch Systems, Inc. v. EPA*, 669 F.3d 330 (D.C. Cir. 2012); *Natural Resources Defense Council v. EPA*, 661 F.3d 662 (D.C. Cir. 2011); *Medical Waste Institute & Energy Recovery Council v. EPA*, 645 F.3d 420 (D.C. Cir. 2011). To take one salient and important example, the statutory scheme gives EPA significant discretion in setting the

NAAQS for the NAAQS air pollutants – a discretion the courts must respect.

But at the same time, undue deference or abdication to an agency carries its own systemic costs. If a court mistakenly allows an agency's transgression of statutory limits, then we green-light a significant shift of power from the Legislative Branch to the Executive Branch. The Framers of the Constitution did not grant the Executive Branch the authority to set economic and social policy as it sees fit. Rather, the Framers gave Congress, along with the President, that legislative role (subject to constitutional limits), and they assigned the Executive Branch the executive power to issue rules and enforce the law *within the limits set by Congress*.⁴

It is true that the legislative process can be cumbersome and frustrating, and the Executive Branch often is well-intentioned in wanting to address pressing policy concerns quickly, before the sometimes glacial congressional machinery can be

⁴ In protecting national security, the Executive has some Article II authority to act in certain circumstances in the Nation's defense even without specific congressional authorization. This is known as *Youngstown* category two. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). There is no general *Youngstown* category two authority in the domestic social and economic realms, where the Executive must have statutory authority in order to act.

stirred to action.⁵ The legislative process can be slow because the Constitution makes it far harder to enact legislation than to block it: Under the Constitution, three different entities must agree in order to enact legislation – the House, the Senate, and the President (or two-thirds of both the House and the Senate to override a President’s veto). But the Framers knew the legislative process would be laborious. They designed it that way. The time and difficulty of enacting new legislation has never justified an agency’s contravention of statutory limits. The Framers specifically contemplated, moreover, that there would be situations where the Executive Branch confronts a pressing need that it does not have current authority to address. In those circumstances, the Constitution’s Recommendations Clause provides that the President may “recommend” to Congress “such Measures as he shall judge necessary and expedient.” U.S. CONST. art. II, § 3.

Importantly, the separation of powers and checks and balances of our system are designed not just to ensure that the Branches operate within the proper spheres of their authority, but also to protect individual liberty. As the Supreme Court has

⁵ In 2009, the House of Representatives passed a global warming bill that was supported by the President. But the Senate did not pass it. In the early 2000s, Senators McCain and Lieberman sought to pass global warming legislation, but no law was ultimately enacted. Numerous other bills have been introduced over the years, and various legislative efforts are ongoing.

explained many times, “while a government of opposite and rival interests may sometimes inhibit the smooth functioning of administration, the Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. . . . The failures of . . . regulation may be a pressing national problem, but a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse.” *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3157 (2010) (internal quotation marks, alterations, and citations omitted).

As a court, it is not our job to make the policy choices and set the statutory boundaries, but it is emphatically our job to carefully but firmly enforce the statutory boundaries. That bedrock separation of powers principle accounts for my concern about this case. Here, as I see it, EPA went well beyond what Congress authorized for the Prevention of Significant Deterioration statute. I respectfully disagree with the panel’s resolution of this issue, and given the overall importance of the case, I respectfully dissent from the denial of rehearing en banc.

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 85. AIR POLLUTION PREVENTION
AND CONTROL EMISSION STANDARDS
FOR MOVING SOURCES MOTOR VEHICLE
EMISSION AND FUEL STANDARDS

42 U.S.C. § 7521. Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation. Except as otherwise provided in subsec.

(b) –

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

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

appropriate consideration to the cost of compliance within such period.

(3) (A) In general.

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

(ii) In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, type of fuel used, or other appropriate factors.

(B) Revised standards for heavy duty trucks.

(i) On the basis of information available to the Administrator concerning the effect of air pollutants emitted from heavy-duty vehicles or engines and from other sources of mobile source

related pollutants on the public health and welfare, and taking costs into account, the Administrator may promulgate regulations under paragraph (1) of this subsection revising any standard promulgated under, or before the date of, the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990] (or previously revised under this subparagraph) and applicable to classes or categories of heavy-duty vehicles or engines.

(ii) Effective for the model year 1998 and thereafter, the regulations under paragraph (1) of this subsection applicable to emissions of oxides of nitrogen (NO[X]) from gasoline and diesel-fueled heavy duty trucks shall contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh).

(C) Lead time and stability. Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning no earlier than the model year commencing 4 years after such revised standard is promulgated.

(D) Rebuilding practice. The Administrator shall study the practice of rebuilding heavy-duty engines and the impact rebuilding has on engine emissions. On the basis of that study and other information available to the Administrator, the Administrator may prescribe requirements to control rebuilding practices, including standards applicable

to emissions from any rebuilt heavy-duty engines (whether or not the engine is past its statutory useful life), which in the Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare taking costs into account. Any regulation shall take effect after a period the Administrator finds necessary to permit the development and application of the requisite control measures, giving appropriate consideration to the cost of compliance within the period and energy and safety factors.

(E) Motorcycles. For purposes of this paragraph, motorcycles and motorcycle engines shall be treated in the same manner as heavy-duty vehicles and engines (except as otherwise permitted under section 206(f)(1)) unless the Administrator promulgates a rule reclassifying motorcycles as light-duty vehicles within the meaning of this section or unless the Administrator promulgates regulations under subsection (a) applying standards applicable to the emission of air pollutants from motorcycles as a separate class or category. In any case in which such standards are promulgated for such emissions from motorcycles as a separate class or category, the Administrator, in promulgating such standards, shall consider the need to achieve equivalency of emission reductions between motorcycles and other motor vehicles to the maximum extent practicable.

(4) (A) Effective with respect to vehicles and engines manufactured after model year 1978, no emission control device, system, or element of design

shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with requirements prescribed under this title if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

(B) In determining whether an unreasonable risk exists under subparagraph (A), the Administrator shall consider, among other factors, (i) whether and to what extent the use of any device, system, or element of design causes, increases, reduces, or eliminates emissions of any unregulated pollutants; (ii) available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such device, system, or element of design, and (iii) the availability of other devices, systems, or elements of design which may be used to conform to requirements prescribed under this title without causing or contributing to such unreasonable risk. The Administrator shall include in the consideration required by this paragraph all relevant information developed pursuant to section 214 [42 USCS § 7548].

(5) (A) If the Administrator promulgates final regulations which define the degree of control required and the test procedures by which compliance could be determined for gasoline vapor recovery of uncontrolled emissions from the fueling of motor vehicles, the Administrator shall, after consultation with the Secretary of Transportation with respect to motor vehicle safety, prescribe, by regulation, fill pipe

standards for new motor vehicles in order to insure effective connection between such fill pipe and any vapor recovery system which the Administrator determines may be required to comply with such vapor recovery regulations. In promulgating such standards the Administrator shall take into consideration limits on fill pipe diameter, minimum design criteria for nozzle retainer lips, limits on the location of the unleaded fuel restrictors, a minimum access zone surrounding a fill pipe, a minimum pipe or nozzle insertion angle, and such other factors as he deems pertinent.

(B) Regulations prescribing standards under subparagraph (A) shall not become effective until the introduction of the model year for which it would be feasible to implement such standards, taking into consideration the restraints of an adequate leadtime for design and production.

(C) Nothing in subparagraph (A) shall (i) prevent the Administrator from specifying different nozzle and fill neck sizes for gasoline with additives and gasoline without additives or (ii) permit the Administrator to require a specific location, configuration, modeling, or styling of the motor vehicle body with respect to the fuel tank fill neck or fill nozzle clearance envelope.

(D) For the purpose of this paragraph, the term "fill pipe" shall include the fuel tank fill pipe, fill neck, fill inlet, and closure.

(6) Onboard vapor recovery. Within 1 year after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990], the Administrator shall, after consultation with the Secretary of Transportation regarding the safety of vehicle-based (“onboard”) systems for the control of vehicle refueling emissions, promulgate standards under this section requiring that new light-duty vehicles manufactured beginning in the fourth model year after the model year in which the standards are promulgated and thereafter shall be equipped with such systems. The standards required under this paragraph shall apply to a percentage of each manufacturer’s fleet of new light-duty vehicles beginning with the fourth model year after the model year in which the standards are promulgated. The percentage shall be as specified in the following table:

**IMPLEMENTATION SCHEDULE FOR ON
BOARD VAPOR RECOVERY REQUIREMENTS**

Model year commencing after standards promulgated	Percentage*
Fourth	40
Fifth.....	80
After Fifth	100

*Percentages in the table refer to a percentage of the manufacturer’s sales volume.

The standards shall require that such systems provide a minimum evaporative emission capture efficiency of 95 percent. The requirements of section

182(b)(3) [42 USCS § 7511a(b)(3)] (relating to stage II gasoline vapor recovery) for areas classified under section 181 [42 USCS § 7511] as moderate for ozone shall not apply after promulgation of such standards and the Administrator may, by rule, revise or waive the application of the requirements of such section 182(b)(3) [42 USCS § 7511a(b)(3)] for areas classified under section 181 [42 USCS § 7511] as Serious, Severe, or Extreme for ozone, as appropriate, after such time as the Administrator determines that onboard emissions control systems required under this paragraph are in widespread use throughout the motor vehicle fleet.

(b) Emissions of carbon monoxide, hydrocarbons, and oxides of nitrogen; annual report to Congress; waiver of emission standards; research objectives.

(1) (A) The regulations under subsection (a) applicable to emissions of carbon monoxide and hydrocarbons from light-duty vehicles and engines manufactured during model years 1977 through 1979 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.5 grams per vehicle mile of hydrocarbons and 15.0 grams per vehicle mile of carbon monoxide. The regulations under subsection (a) applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during the model year 1980 shall contain standards which provide that such emissions may not exceed 7.0 grams per vehicle mile. The regulations under subsection (a) applicable to emissions of hydrocarbons from light-duty vehicles

and engines manufactured during or after model year 1980 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970. Unless waived as provided in paragraph (5), regulations under subsection (a) applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during or after the model year 1981 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970.

(B) The regulations under subsection (a) applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during model years 1977 through 1980 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 2.0 grams per vehicle mile. The regulations under subsection (a) applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during the model year 1981 and thereafter shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.0 gram per vehicle mile. The Administrator shall prescribe standards in lieu of those required by the preceding sentence, which provide that emissions of oxides of nitrogen may not exceed 2.0 grams per vehicle mile

for any light-duty vehicle manufactured during model years 1981 and 1982 by any manufacturer whose production, by corporate identity, for calendar year 1976 was less than three hundred thousand light-duty motor vehicles worldwide if the Administrator determines that –

(i) the ability of such manufacturer to meet emission standards in the 1975 and subsequent model years was, and is, primarily dependent upon technology developed by other manufacturers and purchased from such manufacturers; and

(ii) such manufacturer lacks the financial resources and technological ability to develop such technology.

(C) The Administrator may promulgate regulations under subsection (a)(1) revising any standard prescribed or previously revised under this subsection, as needed to protect public health or welfare, taking costs, energy, and safety into account. Any revised standard shall require a reduction of emissions from the standard that was previously applicable. Any such revision under this title may provide for a phase-in of the standard. It is the intent of Congress that the numerical emission standards specified in subsections (a)(3)(B)(ii),(g),(h), and (i) shall not be modified by the Administrator after the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990] for any model year before the model year 2004.

(2) Emission standards under paragraph (1), and measurement techniques on which such standards are based (if not promulgated prior to the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990]), shall be promulgated by regulation within 180 days after such date.

(3) For purposes of this part [42 USCS §§ 7521 et seq.] –

(A) (i) The term “model year” with reference to any specific calendar year means the manufacturer’s annual production period (as determined by the Administrator) which includes January 1 of such calendar year. If the manufacturer has no annual production period, the term “model year” shall mean the calendar year.

(ii) For the purpose of assuring that vehicles and engines manufactured before the beginning of a model year were not manufactured for purposes of circumventing the effective date of a standard required to be prescribed by subsection (b), the Administrator may prescribe regulations defining “model year” otherwise than as provided in clause (i).

(B) [Repealed]

(C) The term “heavy duty vehicle” means a truck, bus, or other vehicle manufactured primarily for use on the public streets, roads, and highways (not including any vehicle operated exclusively on a rail or rails) which has a gross vehicle weight (as

determined under regulations promulgated by the Administrator) in excess of six thousand pounds. Such term includes any such vehicle which has special features enabling off-street or off-highway operation and use.

[(4)](3) Upon the petition of any manufacturer, the Administrator, after notice and opportunity for public hearing, may waive the standard required under subparagraph (B) of paragraph (1) to not exceed 1.5 grams of oxides of nitrogen per vehicle mile for any class or category of light-duty vehicles or engines manufactured by such manufacturer during any period of up to four model years beginning after the model year 1980 if the manufacturer demonstrates that such waiver is necessary to permit the use of an innovative power train technology, or innovative emission control device or system, in such class or category of vehicles or engines and that such technology or system was not utilized by more than 1 percent of the light-duty vehicles sold in the United States in the 1975 model year. Such waiver may be granted only if the Administrator determines –

(A) that such waiver would not endanger public health,

(B) that there is a substantial likelihood that the vehicles or engines will be able to comply with the applicable standard under this section at the expiration of the waiver, and

(C) that the technology or system has a potential for long-term air quality benefit and has the

potential to meet or exceed the average fuel economy standard applicable under the Energy Policy and Conservation Act upon the expiration of the waiver.

No waiver under this subparagraph [paragraph] granted to any manufacturer shall apply to more than 5 percent of such manufacturer's production or more than fifty thousand vehicles or engines, whichever is greater.

(c) Feasibility study and investigation by National Academy of Sciences; reports to Administrator and Congress; availability of information.

(1) The Administrator shall undertake to enter into appropriate arrangements with the National Academy of Sciences to conduct a comprehensive study and investigation of the technological feasibility of meeting the emissions standards required to be prescribed by the Administrator by subsection (b) of this section.

(2) Of the funds authorized to be appropriated to the Administrator by this Act, such amounts as are required shall be available to carry out the study and investigation authorized by paragraph (1) of this subsection.

(3) In entering into any arrangement with the National Academy of Sciences for conducting the study and investigation authorized by paragraph (1) of this subsection, the Administrator shall request the National Academy of Sciences to submit semiannual reports on the progress of its study and investigation

to the Administrator and the Congress, beginning not later than July 1, 1971, and continuing until such study and investigation is completed.

(4) The Administrator shall furnish to such Academy at its request any information which the Academy deems necessary for the purpose of conducting the investigation and study authorized by paragraph (1) of this subsection. For the purpose of furnishing such information, the Administrator may use any authority he has under this Act (A) to obtain information from any person, and (B) to require such person to conduct such tests, keep such records, and make such reports respecting research or other activities conducted by such person as may be reasonably necessary to carry out this subsection.

(d) Useful life of vehicles. The Administrator shall prescribe regulations under which the useful life of vehicles and engines shall be determined for purposes of subsection (a)(1) of this section and section 207 [42 USCS § 7541]. Such regulations shall provide that except where a different useful life period is specified in this title [42 USCS §§ 7521 et seq.] useful life shall –

(1) in the case of light duty vehicles and light duty vehicle engines and light-duty trucks up to 3,750 lbs. LVW and up to 6,000 lbs. GVWR, be a period of use of five years or of fifty thousand miles (or the equivalent), whichever first occurs, except that in the case of any requirement of this section which first

becomes applicable after the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990] where the useful life period is not otherwise specified for such vehicles and engines, the period shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs, with testing for purposes of in-use compliance under section 207 [42 USCS § 7541] up to (but not beyond) 7 years or 75,000 miles (or the equivalent), whichever first occurs;

(2) in the case of any other motor vehicle or motor vehicle engine (other than motorcycles or motorcycle engines), be a period of use set forth in paragraph (1) unless the Administrator determines that a period of use of greater duration or mileage is appropriate; and

(3) in the case of any motorcycle or motorcycle engine, be a period of use the Administrator shall determine.

(e) New power sources or propulsion systems. In the event a new power source or propulsion system for new motor vehicles or new motor vehicle engines is submitted for certification pursuant to section 206(a) [42 USCS § 7525(a)], the Administrator may postpone certification until he has prescribed standards for any air pollutants emitted by such vehicle or engine which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger the public health or welfare but for which standards have not been prescribed under subsection (a).

(f) High altitude regulations.

(1) The high altitude regulation in effect with respect to model year 1977 motor vehicles shall not apply to the manufacture, distribution, or sale of 1978 and later model year motor vehicles. Any future regulation affecting the sale or distribution of motor vehicles or engines manufactured before the model year 1984 in high altitude areas of the country shall take effect no earlier than model year 1981.

(2) Any such future regulation applicable to high altitude vehicles or engines shall not require a percentage of reduction in the emissions of such vehicles which is greater than the required percentage of reduction in emissions from motor vehicles as set forth in section 202(b) [subsec. (b) of this section]. This percentage reduction shall be determined by comparing any proposed high altitude emission standards to high altitude emissions from vehicles manufactured during model year 1970. In no event shall regulations applicable to high altitude vehicles manufactured before the model year 1984 establish a numerical standard which is more stringent than that applicable to vehicles certified under non-high altitude conditions.

(3) Section 307(d) [42 USCS § 7607(d)] shall apply to any high altitude regulation referred to in paragraph (2) and before promulgating any such regulation, the Administrator shall consider and make a finding with respect to –

(A) the economic impact upon consumers, individual high altitude dealers, and the automobile industry of any such regulation, including the economic impact which was experienced as a result of the regulation imposed during model year 1977 with respect to high altitude certification requirements;

(B) the present and future availability of emission control technology capable of meeting the applicable vehicle and engine emission requirements without reducing model availability; and

(C) the likelihood that the adoption of such a high altitude regulation will result in any significant improvement in air quality in any area to which it shall apply.

(g) Light-duty trucks up to 6,000 GVWR and light-duty vehicles; standards for model years after 1993.

(1) NMHC, CO, and NO[X]. Effective with respect to the model year 1994 and thereafter, the regulations under subsection (a) applicable to emissions of nonmethane hydrocarbons (NMHC), carbon monoxide (CO), and oxides of nitrogen (NO[X]) from light-duty trucks (LDTs) of up to 6,000 lbs. gross vehicle weight rating (GVWR) and light-duty vehicles (LDVs) shall contain standards which provide that emissions from a percentage of each manufacturer's sales volume of such vehicles and trucks shall comply with the levels specified in table G. The percentage shall be as specified in the implementation schedule below:

TABLE G. EMISSION STANDARDS FOR
 NMHC, CO, AND NO_x; FROM LIGHT-DUTY
 TRUCKS OF UP TO 6,000 LBS. GVWR
 AND LIGHT-DUTY VEHICLES

Vehicle type	Column A			Column B		
	(5 yrs/50,000 mi)			(10 yrs/100,000 mi)		
	NMHC	CO	NO _x	NMHC	CO	NO _x
LDTs (0-3,750 lbs. LVW) and light-duty vehicles.....	0.25	3.4	0.4*	0.31	4.2	0.6*
LDTs (3,751-5,750 lbs. LVW)	0.32	4.4	0.7**	0.40	5.5	0.97

Standards are expressed in grams per mile (gpm).

For standards under column A, for purposes of certification under section 206, the applicable useful life shall be 5 years or 50,000 miles (or the equivalent), whichever first occurs.

For standards under column B, for purposes of certification under section 206, the applicable useful life shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs.

*In the case of diesel-fueled LDTs (0-3,750 lvw) and light-duty vehicles, before the model year 2004, in lieu of the 0.4 and 0.6 standards for NO_x the applicable standards for NO_x shall be 1.0 gpm for a useful life of 5 years or 50,000 miles (or the

equivalent), whichever first occurs, and 1.25 gpm for a useful life of 10 years or 100,000 miles (or the equivalent) whichever first occurs.

**This standard does not apply to diesel-fueled LDTs (3,751-5,750 lbs. LVW).

**IMPLEMENTATION SCHEDULE
FOR TABLE G STANDARD**

Model year	Percentage*
1994.....	40
1995.....	80
after 1995.....	100

*Percentages in the table refer to a percentage of each manufacturer's sales volume.

(2) PM Standard. Effective with respect to model year 1994 and thereafter in the case of light-duty vehicles and effective with respect to the model year 1995 and thereafter in the case of light-duty trucks (LDTs) of up to 6,000 lbs. gross vehicle weight rating (GVWR), the regulations under subsection (a) applicable to emissions of particulate matter (PM) from such vehicles and trucks shall contain standards which provide that such emissions from a percentage of each manufacturer's sales volume of such vehicles and trucks shall not exceed the levels specified in the table below. The percentage shall be as specified in the Implementation Schedule below.

PM STANDARD FOR LDTs
OF UP TO 6,000 LBS. GVWR

Usual life period	Standard
5/50,000.....	0.08 gpm
10/10,000.....	0.10 gpm

The applicable useful life, for purposes of certification under section 206 and for purposes of in-use compliance under section 207, shall be 5 years or 50,000 miles (or the equivalent), whichever first occurs, in the case of the 5/50,000 standard.

The applicable useful life, for purposes of certification under section 206 and for purposes of in-use compliance under section 207, shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs in the case of the 10/100,000 standard.

IMPLEMENTATION SCHEDULE
FOR PM STANDARDS

Model year	Light-duty vehicles	LDTs
1994.....	40%*	
1995.....	80%*	40%*
1996.....	100%*	80%*
after 1996.....	100%*	100%*

*Percentages in the table refer to a percentage of each manufacturer's sales volume.

(h) Light-duty trucks of more than 6,000 lbs. GVWR; standards for model years after 1995. Effective with respect to the model year 1996 and thereafter, the regulations under subsection (a) applicable to emissions of nonmethane hydrocarbons (NMHC), carbon monoxide (CO), oxides of nitrogen (NO[X]), and particulate matter (PM) from light-duty trucks (LDTs) of more than 6,000 lbs. gross vehicle weight rating (GVWR) shall contain standards which provide that emissions from a specified percentage of each manufacturer's sales volume of such trucks shall comply with the levels specified in table H. The specified percentage shall be 50 percent in model year 1996 and 100 percent thereafter.

TABLE H. EMISSION STANDARDS
FOR NMHC AND CO FROM GASOLINE
AND DIESEL FUELED LIGHT-DUTY TRUCKS
OF MORE THAN 6,000 LBS. GVWR

LDT Test Weight	Column A			Column B			
	(5 yrs/50,000 mi)			(11 yrs/120,000 mi)			
	NMHC	CO	NO _x	NMHC	CO	NO _x	PM
3,751-5,750 lbs. TW	0.32	4.4	0.7*	0.46	6.4	0.98	0.10
Over 5,750 lbs. TW	0.39	5.0	1.1*	0.56	7.3	1.53	0.12

Standards are expressed in grams per mile (gpm).

For standards under column A, for purposes of certification under section 206, the applicable useful life shall be 5 years or 50,000 miles (or the equivalent), whichever first occurs.

For standards under column B, for purposes of certification under section 206, the applicable useful life shall be 11 years or 120,000 miles (or the equivalent), whichever first occurs.

*Not applicable to diesel-fueled LDTs.

(i) Phase II study for certain light-duty vehicles and light-duty trucks.

(1) The Administrator, with the participation of the Office of Technology Assessment, shall study whether or not further reductions in emissions from light-duty vehicles and light-duty trucks should be required pursuant to this title. The study shall consider whether to establish with respect to model years commencing after January 1, 2003, the standards and useful life period for gasoline and diesel-fueled light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less specified in the following table:

TABLE 3. PENDING EMISSION STANDARDS
FOR GASOLINE AND DIESEL FUELED
LIGHT-DUTY VEHICLES AND LIGHT-DUTY
TRUCKS 3,750 LBS. LVW OR LESS

Pollutant	Emission Level*
NMHC	0.125 GPM
NO _x	0.2 GPM
CO	1.7 GPM

*Emission levels are expressed in grams per mile (GPM). For vehicles and engines subject to this subsection for purposes of section 202(d) and any reference thereto, the useful life of such vehicles and engines shall be a period of 10 years or 100,000 miles (or the equivalent), whichever first occurs.

Such study shall also consider other standards and useful life periods which are more stringent or less stringent than those set forth in table 3 (but more stringent than those referred to in subsections (g) and (h)).

(2) (A) As part of the study under paragraph (1), the Administrator shall examine the need for further reductions in emissions in order to attain or maintain the national ambient air quality standards, taking into consideration the waiver provisions of section 209(b) [42 USCS § 7543(b)]. As part of such study, the Administrator shall also examine –

(i) the availability of technology (including the costs thereof), in the case of light-duty

vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for meeting more stringent emission standards than those provided in subsections (g) and (h) for model years commencing not earlier than after January 1, 2003, and not later than model year 2006, including the lead time and safety and energy impacts of meeting more stringent emission standards; and

(ii) the need for, and cost effectiveness of, obtaining further reductions in emissions from such light-duty vehicles and light-duty trucks, taking into consideration alternative means of attaining or maintaining the national primary ambient air quality standards pursuant to State implementation plans and other requirements of this Act, including their feasibility and cost effectiveness.

(B) The Administrator shall submit a report to Congress no later than June 1, 1997, containing the results of the study under this subsection, including the results of the examination conducted under subparagraph (A). Before submittal of such report the Administrator shall provide a reasonable opportunity for public comment and shall include a summary of such comments in the report to Congress.

(3) (A) Based on the study under paragraph (1) the Administrator shall determine, by rule, within 3 calendar years after the report is submitted to Congress, but not later than December 31, 1999, whether –

(i) there is a need for further reductions in emissions as provided in paragraph (2)(A);

(ii) the technology for meeting more stringent emission standards will be available, as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); and

(iii) obtaining further reductions in emissions from such vehicles will be needed and cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii).

The rulemaking under this paragraph shall commence within 3 months after submission of the report to Congress under paragraph (2)(B).

(B) If the Administrator determines under subparagraph (A) that –

(i) there is no need for further reductions in emissions as provided in paragraph (2)(A);

(ii) the technology for meeting more stringent emission standards will not be available as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1,

2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); or

(iii) obtaining further reductions in emissions from such vehicles will not be needed or cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii), the Administrator shall not promulgate more stringent standards than those in effect pursuant to subsections (g) and (h). Nothing in this paragraph shall prohibit the Administrator from exercising the Administrator's authority under subsection (a) to promulgate more stringent standards for light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less at any other time thereafter in accordance with subsection (a).

(C) If the Administrator determines under subparagraph (A) that –

(i) there is a need for further reductions in emissions as provided in paragraph (2)(A);

(ii) the technology for meeting more stringent emission standards will be available, as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); and

(iii) obtaining further reductions in emissions from such vehicles will be needed and cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii), the Administrator shall either promulgate the standards (and useful life periods) set forth in Table 3 in paragraph (1) or promulgate alternative standards (and useful life periods) which are more stringent than those referred to in subsections (g) and (h). Any such standards (or useful life periods) promulgated by the Administrator shall take effect with respect to any such vehicles or engines no earlier than the model year 2003 but not later than model year 2006, as determined by the Administrator in the rule.

(D) Nothing in this paragraph shall be construed by the Administrator or by a court as a presumption that any standards (or useful life period) set forth in Table 3 shall be promulgated in the rule-making required under this paragraph. The action required of the Administrator in accordance with this paragraph shall be treated as a nondiscretionary duty for purposes of section 304(a)(2) [42 USCS § 7604(a)(2)] (relating to citizen suits).

(E) Unless the Administrator determines not to promulgate more stringent standards as provided in subparagraph (B) or to postpone the effective date of standards referred to in Table 3 in paragraph (1) or to establish alternative standards as provided in subparagraph (C), effective with respect to model years commencing after January 1,

2003, the regulations under subsection (a) applicable to emissions of nonmethane hydrocarbons (NMHC), oxides of nitrogen (NO[X]), and carbon monoxide (CO) from motor vehicles and motor vehicle engines in the classes specified in Table 3 in paragraph (1) above shall contain standards which provide that emissions may not exceed the pending emission levels specified in Table 3 in paragraph (1).

(j) Cold CO standards.

(1) Phase I. Not later than 12 months after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 5, 1990], the Administrator shall promulgate regulations under subsection (a) of this section applicable to emissions of carbon monoxide from 1994 and later model year light-duty vehicles and light-duty trucks when operated at 20 degrees Fahrenheit. The regulations shall contain standards which provide that emissions of carbon monoxide from a manufacturer's vehicles when operated at 20 degrees Fahrenheit may not exceed, in the case of light-duty vehicles, 10.0 grams per mile, and in the case of light-duty trucks, a level comparable in stringency to the standard applicable to light-duty vehicles. The standards shall take effect after model year 1993 according to a phase-in schedule which requires a percentage of each manufacturer's sales volume of light-duty vehicles and light-duty trucks to comply with applicable standards after model year 1993. The percentage shall be as specified in the following table:

PHASE-IN SCHEDULE FOR
COLD START STANDARDS

Model year	Percentage
1994.....	40
1995.....	80
1996 and after.....	100

(2) Phase II.

(A) Not later than June 1, 1997, the Administrator shall complete a study assessing the need for further reductions in emissions of carbon monoxide and the maximum reductions in such emissions achievable from model year 2001 and later model year light-duty vehicles and light-duty trucks when operated at 20 degrees Fahrenheit.

(B) (i) If as of June 1, 1997, 6 or more nonattainment areas have a carbon monoxide design value of 9.5 ppm or greater, the regulations under subsection (a)(1) of this section applicable to emissions of carbon monoxide from model year 2002 and later model year light-duty vehicles and light-duty trucks shall contain standards which provide that emissions of carbon monoxide from such vehicles and trucks when operated at 20 degrees Fahrenheit may not exceed 3.4 grams per mile (gpm) in the case of light-duty vehicles and 4.4 grams per mile (gpm) in the case of light-duty trucks up to 6,000 GVWR and a level comparable in stringency in the case of light-duty trucks 6,000 GVWR and above.

(ii) In determining for purposes of this subparagraph whether 6 or more nonattainment areas have a carbon monoxide design value of 9.5 ppm or greater, the Administrator shall exclude the areas of Steubenville, Ohio, and Oshkosh, Wisconsin.

(3) Useful-life for phase I and phase II standards. In the case of the standards referred to in paragraphs (1) and (2), for purposes of certification under section 206 [42 USCS § 7525] and in-use compliance under section 207 [42 USCS § 7541], the applicable useful life period shall be 5 years or 50,000 miles, whichever first occurs, except that the Administrator may extend such useful life period (for purposes of section 206, or section 207 [42 USCS § 7525 or § 7541], or both) if he determines that it is feasible for vehicles and engines subject to such standards to meet such standards for a longer useful life. If the Administrator extends such useful life period, the Administrator may make an appropriate adjustment of applicable standards for such extended useful life. No such extended useful life shall extend beyond the useful life period provided in regulations under subsection (d).

(4) Heavy-duty vehicles and engines. The Administrator may also promulgate regulations under subsection (a)(1) applicable to emissions of carbon monoxide from heavy-duty vehicles and engines when operated at cold temperatures.

(k) Control of evaporative emissions. The Administrator shall promulgate (and from time

to time revise) regulations applicable to evaporative emissions of hydrocarbons from all gasoline-fueled motor vehicles –

- (1) during operation; and
- (2) over 2 or more days of nonuse;

under ozone-prone summertime conditions (as determined by regulations of the Administrator). The regulations shall take effect as expeditiously as possible and shall require the greatest degree of emission reduction achievable by means reasonably expected to be available for production during any model year to which the regulations apply, giving appropriate consideration to fuel volatility, and to cost, energy, and safety factors associated with the application of the appropriate technology. The Administrator shall commence a rulemaking under this subsection within 12 months after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990]. If final regulations are not promulgated under this subsection within 18 months after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990], the Administrator shall submit a statement to the Congress containing an explanation of the reasons for the delay and a date certain for promulgation of such final regulations in accordance with this Act. Such date certain shall not be later than 15 months after the expiration of such 18 month deadline.

(1) Mobile source-related air toxics.

(1) Study. Not later than 18 months after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990], the Administrator shall complete a study of the need for, and feasibility of, controlling emissions of toxic air pollutants which are unregulated under this Act and associated with motor vehicles and motor vehicle fuels, and the need for, and feasibility of, controlling such emissions and the means and measures for such controls. The study shall focus on those categories of emissions that pose the greatest risk to human health or about which significant uncertainties remain, including emissions of benzene, formaldehyde, and 1, 3 butadiene. The proposed report shall be available for public review and comment and shall include a summary of all comments.

(2) Standards. Within 54 months after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990], the Administrator shall, based on the study under paragraph (1), promulgate (and from time to time revise) regulations under subsection (a)(1) or section 211(c)(1) [42 USCS § 7545(c)(1)] containing reasonable requirements to control hazardous air pollutants from motor vehicles and motor vehicle fuels. The regulations shall contain standards for such fuels or vehicles, or both, which the Administrator determines reflect the greatest degree of emission reduction achievable through the application of technology which will be available,

taking into consideration the standards established under subsection (a), the availability and costs of the technology, and noise, energy, and safety factors, and lead time. Such regulations shall not be inconsistent with standards under section 202(a) [subsec. (a) of this section]. The regulations shall, at a minimum, apply to emissions of benzene and formaldehyde.

(m) Emissions control diagnostics.

(1) Regulations. Within 18 months after the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990], the Administrator shall promulgate regulations under subsection (a) requiring manufacturers to install on all new light duty vehicles and light duty trucks diagnostics [sic] systems capable of –

(A) accurately identifying for the vehicle's useful life as established under this section, emission-related systems deterioration or malfunction, including, at a minimum, the catalytic converter and oxygen sensor, which could cause or result in failure of the vehicles to comply with emission standards established under this section,

(B) alerting the vehicle's owner or operator to the likely need for emission-related components or systems maintenance or repair,

(C) storing and retrieving fault codes specified by the Administrator, and

(D) providing access to stored information in a manner specified by the Administrator.

The Administrator may, in the Administrator's discretion, promulgate regulations requiring manufacturers to install such onboard diagnostic systems on heavy-duty vehicles and engines.

(2) Effective date. The regulations required under paragraph (1) of this subsection shall take effect in model year 1994, except that the Administrator may waive the application of such regulations for model year 1994 or 1995 (or both) with respect to any class or category of motor vehicles if the Administrator determines that it would be infeasible to apply the regulations to that class or category in such model year or years, consistent with corresponding regulations or policies adopted by the California Air Resources Board for such systems.

(3) State inspection. The Administrator shall by regulation require States that have implementation plans containing motor vehicle inspection and maintenance programs to amend their plans within 2 years after promulgation of such regulations to provide for inspection of onboard diagnostics systems (as prescribed by regulations under paragraph (1) of this subsection) and for the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostics systems. Such regulations shall not be inconsistent with the provisions for warranties promulgated under section 207(a) and (b) [42 USCS § 7541(a),(b)].

(4) Specific requirements. In promulgating regulations under this subsection, the Administrator shall require –

(A) that any connectors through which the emission control diagnostics system is accessed for inspection, diagnosis, service, or repair shall be standard and uniform on all motor vehicles and motor vehicle engines;

(B) that access to the emission control diagnostics system through such connectors shall be unrestricted and shall not require any access code or any device which is only available from a vehicle manufacturer; and

(C) that the output of the data from the emission control diagnostics system through such connectors shall be usable without the need for any unique decoding information or device.

(5) Information availability. The Administrator, by regulation, shall require (subject to the provisions of section 208(c) [42 USCS § 7542(c)] regarding the protection of methods or processes entitled to protection as trade secrets) manufacturers to provide promptly to any person engaged in the repairing or servicing of motor vehicles or motor vehicle engines, and the Administrator for use by any such persons, with any and all information needed to make use of the emission control diagnostics system prescribed under this subsection and such other information including instructions for making emission related diagnosis and repairs. No such information may be

withheld under section [sic] 208(c) [42 USCS § 7542(c)] if that information is provided (directly or indirectly) by the manufacturer to franchised dealers or other persons engaged in the repair, diagnosing, or servicing of motor vehicles or motor vehicle engines.

Such information shall also be available to the Administrator, subject to section 208(c) [42 USCS § 7542(c)], in carrying out the Administrator's responsibilities under this section.

[(n)](f) Model years after 1990. For model years prior to model year 1994, the regulations under section 202(a) [subsec. (a) of this section] applicable to buses other than those subject to standards under section 219 [42 USCS § 7554] shall contain a standard which provides that emissions of particulate matter (PM) from such buses may not exceed the standards set forth in the following table:

PM STANDARD FOR BUSES

Model year	Standard*
1991.....	0.25
1992.....	0.25
1993 and thereafter.....	0.10

*Standards are expressed in grams per brake horsepower hour (g/bhp/hr).



* * * Current through PL 113-3, approved 2/4/13 * * *

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 85. AIR POLLUTION PREVENTION
AND CONTROL GENERAL PROVISIONS

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42 USCS § 7607

§ 7607. Administrative proceedings and judicial review

(a) Administrative subpoenas; confidentiality; witnesses. In connection with any determination under section 110(f) [42 USCS § 7410(f)], or for purposes of obtaining information under section 202(b)(4) or 211(c)(3) [42 USCS § 7521(b)(4) or 7545(c)(3)], any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the [this] Act (including but not limited to section 113, section 114, section 120, section 129, section 167, section 205, section 206, section 208, section 303, or section 306 [42 USCS § 7413, 7414, 7420, 7429, 7477, 7524, 7525, 7542, 7603, or 7606][,], the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator,

the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 202(c) [42 USCS § 7521(c)], or when relevant in any proceeding under this Act. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review.

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112 [42 USCS § 7412], any standard of performance or requirement

under section 111 [42 USCS § 7411][,], any standard under section 202 [42 USCS § 7521] (other than a standard required to be prescribed under section 202(b)(1) [42 USCS § 7521(b)(1)]), any determination under section 202(b)(5) [42 USCS § 7521(b)(5)], any control or prohibition under section 211 [42 USCS § 7545], any standard under section 231 [42 USCS § 7571] any rule issued under section 113, 119, or under section 120 [42 USCS § 7413, 7419, or 7420], or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) [42 USCS § 7410 or 7411(d)], any order under section 111(j) [42 USCS § 7411(j)], under section 112 [42 USCS § 7412][,] under section 119 [42 USCS § 7419], or under section 120 [42 USCS § 7420], or his action under section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 114(a)(3) of this Act, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I [42 USCS §§ 7401 et seq.]) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to

in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence. In any judicial proceeding in which review is sought of a determination under this Act required to be made on the record after notice and

opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as [to] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking.

(1) This subsection applies to –

(A) the promulgation or revision of any national ambient air quality standard under section 109 [42 USCS § 7409],

(B) the promulgation or revision of an implementation plan by the Administrator under section 110(c) [42 USCS § 7410(c)],

(C) the promulgation or revision of any standard of performance under section 111 [42 USCS § 7411], or emission standard or limitation under section 112(d) [42 USCS § 7412(d)], any standard under section 112(f) [42 USCS § 7412(f)], or any

regulation under section 112(g)(1)(D) and (F) [42 USCS§ 7412(g)(1)(D),(F)], or any regulation under section 112(m) or (n) [42 USCS § 7412(m) or (n)],

(D) the promulgation of any requirement for solid waste combustion under section 129 [42 USCS § 7429],

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 211 [42 USCS § 7545],

(F) the promulgation or revision of any aircraft emission standard under section 231 [42 USCS § 7571],

(G) the promulgation or revision of any regulation under title IV (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 119 [42 USCS § 7419] (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under title VI [42 USCS §§ 7671 et seq.] (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under subtitle C of title I [42 USCS §§ 7470 et seq.] (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 202 [42 USCS § 7521] and test procedures for new motor vehicles or engines under section 206 [42 USCS § 7525], and the revision of a standard under section 202(a)(3) [42 USCS § 7521(a)(3)],

(L) promulgation or revision of regulations for noncompliance penalties under section 120 [42 USCS § 7420],

(M) promulgation or revision of any regulations promulgated under section 207 [42 USCS § 7541] (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 126 [42 USCS § 7426] (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 183(e) [42 USCS § 7511b(e)],

(P) the promulgation or revision of any regulation pertaining to field citations under section 113(d)(3) [42 USCS § 7413(d)(3)],

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of title II [42 USCS §§ 7581 et seq.],

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 213 [42 USCS § 7547],

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 217 [42 USCS § 7552],

(T) the promulgation or revision of any regulation under title IV [42 USCS §§ 7641 et seq.] (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 183(f) [42 USCS § 7511b(f)] pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 of the United States Code shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5 of the United States Code.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a “rule”). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be

published in the Federal Register, as provided under section 553(b) of title 5, United States Code, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the “comment period”). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of –

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

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

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

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 109(d) [42 USCS § 7409(d)] and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such

written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

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

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

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

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b)) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after the date of enactment of the Clean Air Act Amendments of 1977 [enacted Aug. 7, 1977].

(e) Other methods of judicial review not authorized. Nothing in this Act shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section.

(f) Costs. In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties. In any action respecting the promulgation of regulations under section 120 [42 USCS § 7420] or the administration or enforcement of section 120 [42 USCS § 7420] no

court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) **Public Participation.** It is the intent of Congress that, consistent with the policy of the Administrative Procedures Act [5 USCS §§ 551 et seq.], the Administrator in promulgating any regulation under this Act, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section [sections] 107(d), 172(a), 181(a) and (b), and 186(a) and (b) [42 USCS § 7407(d), 7502(a), 7511(a) and (b), 7512(a) and (b)].
