

**Comments on EPA's Proposed "Prevention of Significant Deterioration and Title V
Greenhouse Gas Tailoring Rule"**

Submitted by: The National Climate Coalition

December 23, 2009

TABLE OF CONTENTS

	<u>Page</u>
I. Executive Summary	1
II. The Existing Clean Air Act Is Ill-Suited To Reducing Greenhouse Gas Emissions, And National Legislation Is The Best Mechanism To Achieve This Goal.	3
III. EPA Should Not Regulate Greenhouse Gas Emissions Through Broad Application Of NSR Or Title V; EPA Has Legal And Policy Mechanisms At Its Disposal To Avoid Or Tailor Application Of These Programs To Greenhouse Gases. EPA Should Seek Targeted Legislative Endorsement Of These Positions.....	4
A. PSD Should Only Apply To Major Sources Of Greenhouse Gases, and Major Modifications Thereto, That Are Also Major For A NAAQS Pollutant; Emissions Of A Non-NAAQS Pollutant Cannot Trigger PSD.	5
1. A Hypothetical Analysis Illustrates That Applying The Agency’s Current Interpretation Of PSD Applicability To Greenhouse Gas Sources Would Lead To Illogical Results.	8
B. EPA Should Not Establish A NAAQS For Greenhouse Gases	11
1. Establishing A NAAQS Is Inappropriate For The Regulation Of Greenhouse Gas Emissions.....	12
2. EPA Is Not Required To Promulgate A NAAQS For Greenhouse Gases.....	14
C. EPA Has Legal Authority To Avoid The Absurd, Futile Or Impossible Results, And To Reduce The Administrative Burdens, That Would Result From Literal Application Of NSR And Title V as Currently Interpreted by EPA.....	14
IV. Absent Congressional Action, Should EPA Decide To Regulate Mobile And Stationary Sources Under The Clean Air Act, It Must Select Appropriate Trigger Dates On Which PSD And Title V Requirements Would Apply To Stationary Sources.....	16
A. EPA Should Clearly Articulate In The Final Tailoring Rule That A “Pollutant” Is “Subject To Regulation” And “Control” On The “First Substantive Compliance Date” Of A Clean Air Act National Regulation That Applies To That Pollutant.....	17
B. EPA Should Clearly Articulate In The Final Tailoring Rule The Scope And Timing Of The Permitting Obligations That An Affected Source Would Face Under PSD And Title V After The “First Substantive Compliance Date.”	20
1. An Existing Source Newly Covered by Title V Due to its Greenhouse Gas Emissions Should Have At Least One Year To Submit Its Application for A Title V Permit.	20

2.	An Existing Title V Major Source Should Be Required To Amend Its Permit To Address Greenhouse Gas Emissions Only If An Emission Unit Or Activity At The Source Becomes Subject To An “Applicable Requirement” From A Regulation Or Permit Pertaining To Greenhouse Gases.....	20
3.	A Newly Constructed Source That Is A Title V Major Source Of A Greenhouse Gas, Or An Existing Source That Triggers Title V Due To Increased Greenhouse Gas Emissions From A Modification Should, With Certain Limited Exceptions, Be Required To Apply For A Title V Permit No Sooner Than “Within 12 Months Of Commencing Operation” Of The New Or Modified Source.....	21
4.	Sources Seeking Synthetic Minor Status Should Benefit From The Permit Shield Protections Afforded To Major Sources That Have Applied For But Not Received A Title V Permit, As Well As From Other Policies Designed To Smooth Transition To The New Regulatory Regimes.....	22
5.	Sources With An Administratively Complete PSD Permit Application Should Be Governed By The Regulations In Place, And The Pollutants Regulated, As Of The Date Their Applications Are Deemed Complete.....	22
V.	Should EPA Decide To Apply The PSD And Title V Programs To Greenhouse Gas Sources, It Must Tailor Their Application To Effectuate Congressional Intent.....	24
A.	EPA Should Define The Regulated “Air Pollutant” For Purposes Of PSD And Title V Applicability On An Individual Greenhouse Gas Pollutant-Specific (Not A Grouped) Basis.	24
B.	EPA Should Define The Basis Of Measurement For Purposes Of PSD And Title V As The Mass Emissions Of Each Synthetic Fluorinated Greenhouse Gas (PFC, HFC And SF6) Compared To Statutory Thresholds, And The Mass Emissions Of Each Naturally Occurring Greenhouse Gas (CO2, CH4 And N2O) Compared To Appropriately Tailored Mass-Based Applicability Thresholds.....	26
C.	EPA Should Revise Its Proposed Tailored Applicability Thresholds Under PSD And Title V.....	28
1.	EPA Should Revise Its Proposed Tailored Major Source And Modification Applicability Thresholds Under PSD.	29
2.	EPA Should Revise Its Proposed Tailored Major Source Applicability Thresholds Under Title V.	31
3.	Under Either Title V or PSD, Fugitive Emissions Should Not Be Considered In Assessing Major Source And Major Modification Applicability Except, Perhaps, for Sources Already Required to Include Fugitive Emissions Under the Current PSD and Title V Regulations.	32

VI.	Should EPA Decide To Apply PSD To Greenhouse Gas Sources, It Must Establish BACT In A Commonsense Manner That Balances Emissions Reductions And Environmental Benefit With The Cost And Administrative Feasibility Of Achieving Such Reductions.....	32
A.	EPA Should Modify Its PSD Regulations To Avoid Adverse Incentives By Providing An Exemption From BACT Requirements, Including Operational Limits, For Projects That Improve Efficiency Or Thermal Performance Of A Unit And/Or Control Greenhouse Gas Emissions.....	32
B.	EPA Should Establish Fuel- And Technology-Specific Carbon Intensity Presumptive BACT Standards For New And Modified Units For Each Category Of Anticipated Major Sources And Give Sources The Option Of Applying Presumptive BACT Or Case-by-Case BACT.....	34
VII.	Should EPA Decide to Implement PSD and Title V With Respect to Greenhouse Gases, It Should Develop Effective Streamlining Techniques To Reduce The Administrative Burden Of Applying PSD And Title V To Greenhouse Gas Emissions.	37
A.	EPA Should Redefine PTE To Reflect A Value Closer To Actual Emissions As Quickly As Possible; While This Effort Is Underway, Actual Emissions Should Be Used To Trigger Applicability Of PSD And Title V.	37
B.	EPA Should Establish General Permits Or Permits-By-Rule Under Both Title V And PSD For As Many Source Categories As Appropriate And Feasible.	38
VIII.	EPA Should Take Affirmative Steps To Harmonize State Permitting Programs With New Tailored Federal Regulations And Allow States Sufficient Time To Promulgate Their Own Tailoring Rules.....	38
IX.	Conclusion	39

I. Executive Summary

The National Climate Coalition (“NCC”) submits these comments to EPA’s Proposed “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule” (“Proposed Tailoring Rule”) on behalf of its members, companies doing business in many industry sectors that will be directly impacted by greenhouse gas regulation, including aerospace, consumer products, electronics, general manufacturing, and electric power generation. The NCC seeks to engage in dialogue with other stakeholders and to provide constructive input to EPA, in light of the Supreme Court’s decision in *Massachusetts v. Environmental Protection Agency* (*Massachusetts v. EPA*)¹ and EPA’s recent suite of proposed and final regulatory actions with respect to greenhouse gas emissions. The NCC submits these comments in conjunction with prior comments on EPA’s: (1) “Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act” (“Endangerment Finding”); (2) Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards” (“Proposed Light Duty Vehicle Rule”) and (3) the “Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program Rule” (“Proposed PSD Interpretive Rule”). We also incorporate by reference the NCC comments filed last year on EPA’s Advance Notice of Proposed Rulemaking for Regulating Greenhouse Gas Emissions Under the Clean Air Act (“ANPR”).

Because stabilizing the concentrations of greenhouse gases in the atmosphere will require the transformation of our energy, transportation and manufacturing systems, the NCC believes that the existing Clean Air Act is not the appropriate vehicle for regulation toward that goal. Rather, Congress should craft national climate legislation that balances multiple additional national priorities, including economic stability, energy independence, national security and defense, and energy reliability and affordability, and that assigns responsibility across federal departments and agencies according to their respective expertise. The NCC recognizes, however, that while Congress works to enact federal legislation, EPA must further respond to the Supreme Court’s decision in *Massachusetts v. EPA* by addressing the question of endangerment under §202(a) and, in doing so, has chosen to proceed with certain rulemakings. The NCC also recognizes that states and regions already are developing significant regulatory programs to address climate change and that prompt EPA action, *if structured appropriately and designed to avoid harmful impacts*, may provide a useful national framework for action in the form of a federal program that could avoid difficulties likely to arise under a patchwork of state and regional programs. EPA rulemaking activity may also assist Congress in developing appropriate national legislation.

The NCC believes that EPA must explicitly reject or appropriately modify in their application those elements of the Clean Air Act that clearly are poorly suited to greenhouse gas regulation and that could cause tremendous harm to our Nation’s fragile economy, which is only starting to step back from the brink of collapse. In this extraordinary context, EPA has and should use its regulatory discretion to abstain from implementing counterproductive and harmful

¹ 549 U.S. 497, 127 S.Ct. 1438 (2007) (finding that EPA had statutory authority to regulate emissions of greenhouse gases from new motor vehicles and remanding to the Agency for determinations regarding endangerment and manner of regulation).

regulatory approaches under the existing provisions of the Clean Air Act that are clearly contrary to the Congressional intent underlying that statute.² However, we also advise EPA to identify at the outset those options where Congressional actions would be valuable to confirm EPA's discretion and to seek focused legislative amendments providing that confirmation.

We believe that if EPA is forced to attempt to more fully regulate existing sources in the absence of new national climate legislation, then it should focus its efforts on applying provisions of §111 to establish national performance standards for categories of new and existing stationary sources of significant greenhouse gas emissions and to develop a national and inter-sector emissions trading program using a market-based approach. Possible options are allowance-based, emissions averaging, rate-based and/or an approach which allows the use of "offsets." Section 111 is the best among the flawed options provided by the existing Clean Air Act to address greenhouse gas emissions in a cost-effective and expeditious manner, and to establish a framework of national stationary source regulation that would likely be consistent with eventual Congressional action to establish an appropriate national climate program. Using this approach, EPA's program would provide a template for a national carbon trading market and be consistent with a legislative cap-and-trade program or other market-based approaches.

In the absence of Congressional action supplanting existing Clean Air Act programs, and in light of EPA's proposed decision in the Light Duty Vehicle Rule to regulate the emission of certain greenhouse gases from mobile sources, if EPA decides that it must also regulate these greenhouse gas emissions under PSD and/or Title V, we advise EPA to use the fullest extent of its discretion to identify the trigger date for regulation as one that gives EPA, affected sources and permitting authorities the greatest lead time for implementation. An ill-suited or hastily imposed regulatory approach has the potential to create substantial economic disruption, particularly at a time when the economy is faltering, manufacturing and sales of consumer and durable goods are plunging, and unemployment is escalating. Poorly-conceived or hastily implemented regulation, even in parallel with regulation of greenhouse gases by other developed countries, may harm the international competitiveness of United States businesses. In addition to the obvious administrative and substantive control costs of compliance, regulation of greenhouse gases under the existing Clean Air Act may create an incentive for business to locate or expand in unregulated countries, harming the United States economy without achieving any net reduction in worldwide greenhouse gas emissions. Thus, EPA's underlying principle in beginning to regulate greenhouse gas emissions under the Clean Air Act in the absence of definitive Congressional action should be: "First, do no harm."

² In order to prevent the harm to the economy that would result from application of several existing Clean Air Act programs to greenhouse gas sources in the absence of comprehensive Congressional action, we believe it could be helpful for Congress to, at a minimum, enact legislation excluding such sources from regulation under §§ 108-110 (National Ambient Air Quality Standards ("NAAQS") and State Implementation Plans ("SIPs")), 112 (Hazardous Air Pollutants), 165 and 173 (both, the Prevention of Significant Deterioration ("PSD") and Nonattainment New Source Review ("NNSR") portions of New Source Review (collectively, "NSR") and Title V (Operating Permits) -- leaving EPA free to focus its efforts on greenhouse gas regulation under § 111 of the Act, the program which we believe has the best potential under the existing Act to achieve efficient reductions of greenhouse gas emissions.

II. The Existing Clean Air Act Is Ill-Suited To Reducing Greenhouse Gas Emissions, And National Legislation Is The Best Mechanism To Achieve This Goal.

Stabilizing atmospheric greenhouse gas concentrations will require the transformation of our energy, transportation and manufacturing systems. We believe that this is the work of Congress. Federal legislation should not only take a broad, flexible multi-sector approach, but also must be designed to meet multiple objectives, including energy security, reliability and affordability; ensuring the economic competitiveness of United States businesses; energy conservation; strategic technology development; and environmental performance. Such legislation should also allow for and define the appropriate involvement of other departments and agencies with expertise in energy, environment, security and transportation in addition to EPA – something that is necessary yet not permitted under the Clean Air Act. Our highest priority must be for Congress to establish a uniform national program that will be consistent with the emerging and overarching international framework.

For a variety of reasons, the existing Clean Air Act is a poor mechanism for addressing climate change. Congressional intent in drafting the Clean Air Act was to identify and regulate sources based on their relatively large emissions affecting local and regional air quality.³ Such sources typically have also been financially able to bear the costs of regulation. By establishing major source thresholds, the Act excluded from regulation the large numbers of smaller sources that exist in the United States. The number of stationary sources subject to regulation has thus historically been relatively small. By all estimates, however, this number could grow by at least an order of magnitude, perhaps two, and affect for the first time many previously unaffected sources (*e.g.*, large retail establishments, schools, hospitals and government facilities) if greenhouse gases are regulated in the same manner as criteria pollutants under NSR, and Title V — let alone §112, which has even lower thresholds for regulation.

The permitting thresholds under the Act, moreover, are keyed to emissions levels that are meaningful only in the context of regulating the local and regional direct health and welfare impacts of criteria or hazardous air pollutants. Even small sources have emissions of carbon dioxide (“CO₂”) that would exceed current statutory permitting thresholds as a result of typical fuel use. As EPA itself underscored in the ANPR and the Proposed Tailoring Rule, the PSD and Title V programs would sweep hundreds of thousands of sources not previously subject to

³ Regulation under the Clean Air Act has historically focused on control of criteria and hazardous air pollutants to address local or regional human health, welfare and environmental impacts. The architecture of the Clean Air Act is thus premised on the concept that state, regional and federal control of emissions will improve air quality in the corresponding area. This structure is not applicable to greenhouse gases. The greenhouse effect is understood to be global -- and localized (or even United States-wide) emissions reductions will not result in environmental benefits to the United States in the absence of corresponding international action. Moreover, greenhouse gases at current and projected atmospheric concentrations have no known direct adverse human health impacts to which to link standards. Any environmental and welfare impacts only occur over substantial time, due to the indirect effects of aggregate global levels of greenhouse gases. Thus, greenhouse gases present a particular regulatory challenge. The same requirements that apply to emissions of criteria pollutants from stationary sources are not likely to provide the most effective and efficient incentives to reduce greenhouse gas emissions.

regulation into the scope of these Clean Air Act permitting programs, at great cost and consequence to the functioning of the economy and at great administrative burden on regulated sources, EPA, the states and local governments. EPA estimates that its approach in the Proposed Tailoring Rule would avoid over \$55.6 billion in the first six years of regulation – or, stated differently, in the absence of the Proposed Tailoring Rule, the cost of compliance for affected sources and permitting agencies will increase by more than \$55.6 billion, perhaps without measurably reducing domestic greenhouse gas emissions.

Paradoxically, forcing the square peg of greenhouse gas emissions into the round hole of the existing Clean Air Act also has the potential to create adverse incentives that may stifle innovation and even increase greenhouse gas emissions. This could occur, for instance, if a company decides to delay improvements that would otherwise reduce emissions intensity to avoid triggering regulatory requirements, as we have seen occur time and time again under the NSR programs. A practical example of this situation is a turbine upgrade at an electric generating station. While the project results in more energy efficient production of electricity, if that energy efficiency were projected to result in more criteria pollutant emissions on an annual basis due to increased operations, it is likely the project would not be pursued due to the time consuming and expensive requirements of the New Source Review programs, including the likely need to implement additional controls for all pollutants that exceed the NSR pollutant thresholds. That is contrary to the desired outcome.

Because the Clean Air Act is such a poor vehicle for addressing climate change, we believe that further federal legislation is the best approach to reduce emissions that may contribute to global warming. We recognize that the Supreme Court’s decision in *Massachusetts v. EPA* may require the Agency to commence regulatory action in the absence of, or in the face of delayed, Congressional action. Congress, however, is poised to act. Comprehensive climate change and energy legislation has been passed by the U.S. House of Representatives, H.R. 2454 - the American Clean Energy and Security Act of 2009 (Waxman-Markey), and the Senate is considering stand alone climate change legislation, the “Clean Energy Jobs and American Power Act” (Kerry-Boxer), and energy legislation, S. 1462 - the American Clean Energy Leadership Act of 2009 (ACELA). The NCC urges EPA and the Administration to work in support of prompt and appropriate Congressional efforts, and exercise its authority under the existing Clean Air Act only where it can adopt flexible, appropriate measures to control greenhouse gases in a manner best designed to facilitate ultimate Congressional action.

III. EPA Should Not Regulate Greenhouse Gas Emissions Through Broad Application Of NSR Or Title V; EPA Has Legal And Policy Mechanisms At Its Disposal To Avoid Or Tailor Application Of These Programs To Greenhouse Gases. EPA Should Seek Targeted Legislative Endorsement Of These Positions.

The NSR and Title V programs are not effective mechanisms for regulating greenhouse gas emissions, and as EPA has recognized, could have disastrous and unintended consequences if applied to greenhouse gas sources. Some argue that the plain language of NSR and Title V constrains EPA’s discretion to limit applicability of these programs. Although we disagree, we nonetheless urge the Agency to seek the Congressional confirmation referenced in section I – *i.e.*, to ratify EPA’s limitation of the unintended applicability of the NSR and Title V programs to greenhouse gases. If, however, Congress does not act in a timely fashion, or if the Agency is

compelled to, or otherwise decides to implement a greenhouse gas regulatory program, we strongly recommend that the Agency fully utilize the policy and legal mechanisms at its disposal so as to narrow applicability (*e.g.*, targeting only truly significant sources), to reduce administrative burden and cost, to eliminate or minimize harmful disincentives (*e.g.*, NSR applicability criteria that discourage energy efficiency upgrades), and at a minimum to ensure a common sense applicability of the NSR and Title V programs to greenhouse gases. Stated differently, we encourage the Agency to use every means at its disposal to implement the least harmful and most effective stationary source regime. We recognize that the Agency believes it is constrained by statute and must regulate stationary sources of certain greenhouse gas emissions under PSD and Title V, and we appreciate the burden the Agency faces in its attempt to appropriately tailor implementation of these programs. As discussed in section V below, we support a robust and thoughtful tailored regime. The NCC believes, however, that there are other mechanisms available to EPA, based on the statutory language, that enable it to narrow application of PSD from the outset, thus reducing the number of sources that require relief through a tailored approach. Our comments in section III(A) below lay out this approach. We encourage the Agency to review them in the context of our other comments in this document, our ANPR comments and our continued efforts to work with EPA and other stakeholders to structure an appropriate and effective regulatory regime, which we believe, if EPA must regulate under the Clean Air Act, should fall under §111. Only by EPA's use of the statute to address greenhouse gas emissions in the most reasonable and cost-effective manner, can the Agency accomplish what clearly was (and, in our view, would be determined to be) Congressional intent as to the scope of these programs. Finally, if the EPA implements the NSR and Title V programs even in a carefully tailored manner, these programs should be considered interim only and should sunset upon the commencement of an existing source greenhouse gas program ultimately enacted by Congress or, in the absence of Congressional action, by EPA.⁴

A. PSD Should Only Apply To Major Sources Of Greenhouse Gases, and Major Modifications Thereto, That Are Also Major For A NAAQS Pollutant; Emissions Of A Non-NAAQS Pollutant Cannot Trigger PSD.

As a threshold matter, we believe EPA has taken an overly broad view of the applicability of PSD to greenhouse gases that is not compelled by the language of the statute and the corresponding regulations. Sections 161 and 165(a) of the Clean Air Act and §§ 52.21(a)(2) and 51.166(a)(7)(i) of Title 40 of the Code of Federal Regulations limit applicability of the PSD program to those areas “designated” “as attainment or unclassifiable” pursuant to § 107 of the Act. EPA has made no such designations as to greenhouse gases.

Section 161 states in full:

In accordance with the policy of §101(b)(1), each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, *to prevent significant deterioration of air*

⁴ It is important to keep in mind that, in the absence of Congressional action, the NSR and Title V programs are not the best-suited tools under the Clean Air Act for EPA to use to address greenhouse gas emissions. As noted in its ANPR, section 111 of the Act provides a much better tool for such purpose. *See* The NCC's ANPR Comments.

quality in each region (or portion thereof) designated pursuant to section 107 as attainment or unclassifiable.

(Emphasis added). Section 107 applies only to NAAQS pollutants and directs that areas be designated as attainment, nonattainment or unclassifiable on a pollutant-by-pollutant basis. *See* § 107 (d)(1)(a). Thus any particular area could be attainment for some, all or none of the NAAQS pollutants; unclassifiable for some, all or none of the NAAQS pollutants; or nonattainment for some, all or none of the NAAQS pollutants.

Section 165(a)'s requirement for preconstruction PSD permitting is limited to proposed "major emitting facilities" to be constructed "in any area to which this part applies," *i.e.*, areas that have been designated as attainment or unclassifiable.⁵ As stated in Section 160(5), the purpose of the PSD permitting program is:

to assure that any decision to permit *increased air pollution in any area to which this section applies* is made only after careful evaluation of all the consequences of such decision

(emphasis added).

Although the Act does not make it perfectly clear,⁶ we believe the best interpretation of these provisions is that the PSD permitting program only applies in instances where the proposed major emitting facility will emit a pollutant in major amounts for which the area has been designated attainment or unclassifiable. In other words, the PSD program should be interpreted to apply only to: (a) proposed new sources that would be major for a NAAQS pollutant for which the area has been designated attainment or unclassifiable; and (b) those proposed modifications at existing major sources that result in a significant net emissions increase of a NAAQS pollutant for which the area has been designated attainment or unclassifiable. Stated differently, emissions of a non-NAAQS pollutant (or of a pollutant for which the area has been designated nonattainment) alone cannot trigger PSD applicability. As EPA has noted in the Proposed Tailoring Rule and elsewhere, there are no NAAQS for greenhouse gases, and EPA does not intend to establish NAAQS for greenhouse gases. *See* Proposed Tailoring Rule 74 Fed. Reg. 55297. The NCC supports the Agency in this position, as discussed in the next section.

⁵ Similarly, §§ 52.21(a)(2) and 51.166(a)(7)(i) of the regulations describes the "applicability" for PSD, and states that PSD applies to

the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act. 40 C.F.R. § 52.21(a)(2).

⁶ We note, however, that Section 161 of the Act requires states to adopt preconstruction permitting programs in their state implementation plans (SIPs), and that the Act limits the scope of the PSD program generally through the SIP provisions in Section 110. The relevant portions of that language provide first that the purpose of the SIP is limited to the "implementation, maintenance, and enforcement of" "national ambient air quality standards" (§ 110(a)(1)) and further that the preconstruction permitting program is limited to provisions "necessary to assure that national ambient air quality standards are achieved." (§§ 110(a)(2)(C)).

Thus, only after PSD is triggered by emissions of a NAAQS pollutant for which the area is designated attainment or unclassifiable would the statute impose requirements (such as BACT) on pollutants “subject to regulation,” - the starting point for EPA’s analysis and suggested regulatory timeline in the Proposed PSD Interpretive Rule, discussed in section IV(A). *See* §§ 165(a)(4), 169(3).

We disagree with the position that EPA has taken in guidance and in the preamble to the 1980 PSD regulations that PSD requirements apply to any project in an area that is designated as attainment or unclassifiable for *any* pollutant for which a NAAQS exists even if the pollutant to be emitted in major amounts from the proposed new source or modification is not one of the pollutants for which the area has been designated attainment or unclassifiable and even if the pollutant is not one for which a NAAQS has been established (the so called “major for one, major for all” policy). *See* 45 Fed. Reg. 52676, 52677-78 (Aug. 7, 1980); NSR Workshop Manual Prevention of Significant Deterioration and Nonattainment Permitting (Oct. 1990) (“NSR Workshop Manual”) at A.25-26.^{7, 8} This position - that PSD applies to a major source of some pollutant as long as that source is located in an area that is in attainment or unclassifiable for any pollutant, whether the pollutant for which the source is major and for which the area is in attainment or unclassifiable are one and the same, results in the application of PSD to projects

⁷ The NSR Workshop Manual states, at A-25-26: “As previously stated, if a new source locates in an area designated attainment or unclassifiable for any criteria pollutant, PSD review will apply to any pollutant for which the potential to emit is major (or significant, if the source is major) so long as the area is *not nonattainment* for that pollutant.” (Italics added).

⁸ It is important to note, however, that since 1990, EPA has by no means been consistent in stating this interpretation. *See, e.g.,* Shelton, et al. *New Source Review (NSR) Program Basics* (EPA OAQPS 2006), available at: <http://www.epa.gov/air/tribal/attachmts/NSRBasics110106.ppt#272,13>, More on PSD (“PSD applies to *attainment pollutants*”; “If a source emits even one pollutant (*attainment or non attainment*) in major amounts, the source will be considered major. Then all *attainment pollutants*, even those emitted in non-major amounts will be reviewed for PSD applicability by using their Significant Emissions Rate.”) (emphasis added). Notably, nowhere in this presentation does EPA indicate that PSD applicability to a project can be triggered by a proposed project’s emissions of a non-NAAQS pollutant. We believe that this interpretation represents a more natural reading of the Act’s PSD provisions in the context of the structure and purpose of those provisions and the Act as a whole, than that reflected in the 1980 preamble and 1990 Workshop Manual. *See also*, B. Buckheit, Notice of Violation, *In re Southern Indiana Gas and Electric Company*, EPA-CAA-2000-HQ-0003 (EPA OECA 2000) (“Pursuant to applicable regulations, if a major stationary source is planning upon making a major modification, then that source must obtain either a PSD permit or a nonattainment NSR permit, *depending on whether the source is located in an attainment or a nonattainment area for the pollutant being increased above the significance level.*”) (emphasis added); B. Buckheit, Notice of Violation, *In re Illinois Power Company* EPA-CAA-2000-HQ-0002 (EPA OECA 2000) (same); J. Hankinson, Notice of Violation, *In re Tampa Electric Company* EPA-CAA-2000-04-0007 (EPA OECA 2000) (same); B. Buckheit, Notice of Violation, *In re Illinois Power Company* EPA-CAA-2000-HQ-0002 (EPA OECA 2000) (same); *Ambient Air Quality Impact Report Guardian Industries Corporation*; PSD Permit Number: SJ-76-44 (EPA Reg. 9) (“The PSD regulations (40 CFR 52.21) define a “major source” as any source type belonging to a list of 28 source categories which emits or has the potential to emit 100 tons per year (tpy) or more of any *attainment pollutant* regulated under the Clean Air Act, or any other source type which emits or has the potential to emit such pollutants in amounts equal to or greater than 250 tpy.”) (emphasis added).

that would not affect air quality in relation to the NAAQS - inconsistent with the language, structure and purpose of Act's PSD provisions.⁹

1. A Hypothetical Analysis Illustrates That Applying The Agency's Current Interpretation of PSD Applicability To Greenhouse Gas Sources Would Lead To Illogical Results.

When considered together with EPA's interpretation of the scope of NNSR, it becomes quite clear that EPA's current interpretation of the scope of the PSD program is incorrect. The NNSR program only applies to "any new major stationary source or major modification *that is major for the pollutant for which the area is designated nonattainment under section 107(d)(1)(A)(i) of the Act.*" 40 CFR 51.165(a)(2)(i) (emphasis added).¹⁰ Similarly, "only if a modification results in a significant increase (and a significant net emissions increase under the plantwide source definition) *of a pollutant for which the source is major and for which the area is designated nonattainment*, do nonattainment area requirements apply." NSR Workshop Manual at F.7 (emphasis added).

Recalling, as discussed, above, that the Act limits the PSD program to areas designated as "attainment or unclassifiable," consider the following hypothetical: (a) two identical proposed new sources, which will emit only CO₂ and will emit that pollutant in major amounts, are proposed to be located in two different areas; (b) one of the areas is designated attainment or unclassifiable for all NAAQS pollutants, and the other area is designated as nonattainment for all

⁹ Moreover, this position is inconsistent with the holding in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) rejecting EPA's interpretation that PSD permitting requirements can be triggered by proposed emissions of a pollutant for which the area where the source would be constructed is designated nonattainment. *Id.* at 364-68 (stating "that Congress intended location to be the key determinant of the applicability of the PSD review requirements"). In response to the *Alabama Power* decision, EPA guidance now recognizes that a source cannot be classified as a major source or major modification for purposes of PSD based on its emissions of a particular pollutant if the area where the source will be located is designated nonattainment for that pollutant. New Source Review Workshop Manual (Draft 1990) at A.25-26. Thus, to that extent, the court in *Alabama Power*, and EPA in implementing that decision, recognized that the identity of the pollutant proposed to be emitted in major amounts and the designation status of the area where the source would be constructed *with respect to that pollutant* are critical. Unfortunately, the *Alabama Power* decision also contains non-binding *dicta* indicating that PSD applicability can be triggered by proposed emissions of a pollutant for which no NAAQS has been established, i.e., that so long as the area has not been designated nonattainment for the pollutant proposed to be emitted in major amounts, PSD applies. This *dicta* is the basis for EPA's guidance in the preamble to the 1980 PSD regulations that PSD requirements apply to any project in an area that is designated as attainment or unclassifiable for *any* pollutant for which a NAAQS exists even if the pollutant to be emitted in major amounts is not one of the pollutants for which the area has been designated attainment or unclassifiable. Now is the time for EPA to adopt a better and more natural interpretation of the Act's PSD provisions, honoring the holding of *Alabama Power* with respect to nonattainment pollutants, but rejecting its *dicta* with respect to pollutants for which no NAAQS have been established.

¹⁰ Similarly, "only if a modification results in a significant increase (and a significant net emissions increase under the plantwide source definition) of a pollutant for which the source is major and for which the area is designated nonattainment, do nonattainment area requirements apply." NSR Workshop Manual (Draft 1990) at F.7.

NAAQS pollutants, and (c) CO₂ has become “a pollutant regulated under the Act.” According to EPA’s current interpretation, the source locating in the area that is designated attainment or unclassifiable for all NAAQS pollutants would be subject to PSD (because even though there is no NAAQS for CO₂, the source’s major emissions of CO₂ would qualify it as major stationary source of a pollutant subject to regulation under the Act). *However*, the source locating in the area designated as nonattainment for all NAAQS pollutants would not be subject to PSD (because the area is not designated attainment or unclassifiable for any NAAQS pollutant) and would not be subject to NNSR because the area is not designated nonattainment for CO₂ (because there is no NAAQS for CO₂), the only pollutant for which the source is major. This consequence of EPA’s interpretation, *i.e.*, that the source locating in the clean air area would be subject to major pre-construction permitting while an identical source locating in the dirty air area would not be, is absurd. This hypothetical analysis thus strongly suggests that EPA is not properly interpreting the Act’s PSD provisions. In contrast, under the interpretation we urge (*i.e.*, that PSD major source status cannot be triggered by emissions of a pollutant for which there is no NAAQS), the source locating in the clean air area would not be subjected to more stringent permitting requirements than the source locating in the dirty air area – the logical result.

Continuing the hypothetical, suppose that each of these sources now proposes a modification that will increase CO₂ emissions more than the significance level for CO₂ established by EPA in the Tailoring Rule. Again, according to EPA’s current interpretation, the modification to the source located in the area that is attainment or unclassifiable for all NAAQS pollutants would be subject to PSD (because even though there is no NAAQS for CO₂, the source’s major emissions of CO₂ would qualify it as an existing major stationary source of a pollutant subject to regulation under the Act, and the emissions increase of CO₂ would be considered “significant”). *However*, the same modification made to an identical source located in the area designated as nonattainment for all NAAQS pollutants would not be subject to PSD (because the area is not designated attainment or unclassifiable for any NAAQS pollutant), and would not be subject to NNSR (because there is no NAAQS for CO₂). In order to avoid this illogical and inconsistent outcome, we urge EPA to implement the legally substantiated interpretation that PSD applicability to a modification cannot be based solely on an increase of emissions for which there is no NAAQS. Under this better interpretation, the modification to the source located in the clean air area will not be subjected to more stringent permitting requirements than an identical modification to the source located in the dirty air area – again, the logical result.

Finally, to complete the hypothetical analysis, consider a modification of two facilities with major CO₂ emissions, but minor emissions of a NAAQS pollutant (e.g., VOC), and that will significantly increase emissions of the NAAQS pollutant (VOC). According to EPA’s current interpretation, the modification to the source located in the area that is designated attainment or unclassifiable for all NAAQS pollutants would be subject to PSD (because even though there is no NAAQS for CO₂, the source’s major emissions of CO₂ would qualify it as an existing major stationary source of a pollutant subject to regulation under the Act, and the emissions increase of VOC is “significant”). *However*, the same modification made to an identical source located in the area designated as nonattainment for all NAAQS pollutants would not be subject to PSD (because the area is not designated attainment or unclassifiable for any NAAQS pollutant), and would not be subject to NNSR (because the existing source proposed to be modified is not major for VOC -- recalling that EPA’s guidance indicates that for NNSR to

apply to a modification there must be a significant emissions increase of a nonattainment pollutant *for which the source is also major*¹¹). Once again, EPA's current interpretation would result in a absurd outcome -- in this instance subjecting an increase of VOC in an ozone attainment area to preconstruction permitting when the same increase at an identical source in an ozone nonattainment area would not be -- indicating that EPA is not interpreting the Act's PSD provisions correctly. To resolve this situation EPA should adopt the interpretation that in order for PSD to apply to a modification, the existing source which is proposed to be modified must be major for a NAAQS pollutant (other than a pollutant for which the area is nonattainment).

In summary, as demonstrated by the above hypothetical, EPA's current interpretation of the Act's PSD applicability to non-NAAQS pollutants is logically flawed. In contrast, our position -- that these provisions should be interpreted such that PSD applicability to a project cannot be triggered independently by existing or proposed emissions of a non-NAAQS pollutant -- corrects this logical flaw and implements a more natural interpretation of those provisions that is also more consistent with their structure and purpose. We recognize that, as a practical matter, at this moment in time there is no area of the country where PSD does not apply for at least one criteria pollutant (hence the nonattainment area analysis is a purely hypothetical construct). Nonetheless, we believe this hypothetical provides a useful illustration of the need for EPA to reconsider its prior interpretations regarding the scope of the PSD program.

We believe that the interpretation of the Act's PSD provisions that we urge EPA to adopt, *i.e.*, that PSD applicability to a proposed source or modification can only be triggered by emissions of a NAAQS pollutant (other than one for which that area has been designated nonattainment), is the best implementation of the language, structure and purpose of those provisions and therefore is the best interpretation for EPA to now adopt. Because the preamble to the 1980 regulations and the NSR Workshop Manual are not judicially enforceable on their own accord, there is no requirement for the Agency to revise them prior to correcting its interpretation through a subsequent rulemaking. The operative text of the PSD regulations does not compel a reading adverse to the statutory language. To the contrary, § 52.21(a)(2) can be read to follow the statutory language. Thus, EPA does not need to change its regulations to properly limit the scope of PSD applicability consistent with the statute; the Agency is only required to announce its revised interpretation in the Federal Register.

Accordingly, we believe EPA should properly limit the scope of PSD applicability in the final Tailoring Rule if it has not already done so in the final PSD Interpretive Rule. The approach that PSD can be triggered only by a NAAQS pollutant will reduce much, but not necessarily all, applicability of PSD to greenhouse gas emissions. Where PSD would apply to a project due to its emissions of a NAAQS pollutant, EPA may interpret § 165(a)(4)'s BACT requirement to apply to greenhouse gases "subject to regulation" under the Act, including,

¹¹ Current EPA guidance indicates that "only if a modification results in a significant increase (and a significant net emissions increase under the plantwide source definition) *of a pollutant for which the source is major and for which the area is designated nonattainment*, do nonattainment area requirements apply." NSR Workshop Manual at F.7 (emphasis added)

initially, those greenhouse gases that will be regulated under the Light Duty Vehicle Rule.¹² This approach is consistent with the option proposed by EPA for comment in the Proposed Tailoring Rule - to limit PSD for greenhouse gas emissions to those projects that would otherwise be subject to PSD for traditional pollutants. *See* Proposed Tailoring Rule, 74 Fed. Reg. at 55327. A clear statement by EPA in a final regulation that PSD applies to greenhouse gas emissions only if it is otherwise triggered by a NAAQS pollutant would better conform with the statutory language, structure and purpose, and significantly reduce the burden of PSD on permitting authorities and sources otherwise affected under EPA's proposal (particularly smaller sources such as government buildings and schools, that would only become subject to PSD based on their CO₂ emissions) – a far sounder approach to reasonably implementing PSD for greenhouse gases than that proposed by EPA in the Tailoring Rule.

B. EPA Should Not Establish A NAAQS For Greenhouse Gases

The NCC supports EPA's position that it is inappropriate to establish NAAQS for greenhouse gases. This position is expressed in the Proposed Tailoring Rule¹³ and most recently in Administrator Jackson's response to a question regarding the impact of an endangerment finding:

Nothing in [EPA's Endangerment Finding] requires any regulatory action. I have never believed and this agency has never believed that setting a national ambient air quality standard for greenhouse gases was advisable.¹⁴

The NCC believes that in no case should the Agency establish a NAAQS for greenhouse gases. We believe that NAAQS are ineffective and illogical structures to address greenhouse gas emissions. Greenhouse gas emissions are believed to have only global rather than local impacts, and to mix and distribute atmospherically; thus, virtually the entire country would either be in attainment or nonattainment of any NAAQS that EPA set. Regulating greenhouse gases under NAAQS would significantly reduce the program options available to EPA and to Congress. For example § 111(d) is not available to control pollutants for which a NAAQS has been established. Additionally, their use may unduly drain EPA and other agency resources, while imposing costs on industry and consumers that are not warranted and that likely would divert economic resources from more valuable approaches.

¹² *But, c.f.*, Tailoring Rule Preamble, 74 Fed. Reg. at 55298 (“Once PSD is triggered ... a BACT review is performed for each *attainment pollutant* whose emissions exceed its PSD significance level as part of new construction or modification projects at the source.”) (emphasis added); B. Buckheit, Notice of Violation, *In re Southern Indiana Gas and Electric Company*, EPA-CAA-2000-HQ-0003 (EPA OECA 2000) (“To obtain the required permit, *the source must agree to put on the Best Available Control Technology (“BACT”) for an attainment pollutant* or achieve the Lowest Achievable Emission Rate (“LAER”) in a nonattainment area) (emphasis added); B. Buckheit, Notice of Violation, *In re Illinois Power Company* EPA-CAA-2000-HQ-0002 (EPA OECA 2000) (same); J. Hankinson, Notice of Violation, *In re Tampa Electric Company* EPA-CAA-2000-04-0007 (EPA OECA 2000) (same); B. Buckheit, Notice of Violation, *In re Illinois Power Company* EPA-CAA-2000-HQ-0002 (EPA OECA 2000) (same).

¹³ *See* 74 Fed. Reg. 55297.

¹⁴ *See* R. Bravender, “EPA chief signals opposition to Clean Air Act curbs on GHGs” (Dec. 8, 2009), available at: <http://www.eenews.net/Greenwire/2009/12/08/4>.

EPA need not establish NAAQS for greenhouse gas emissions and should not do so. The NCC encourages EPA to state clearly in the final Tailoring Rule its decision not to promulgate NAAQS for greenhouse gases and to limit the scope of any greenhouse gas regulation under NSR to those sources that trigger PSD, first as a major source/major modification of a NAAQS pollutant, and then for exceeding applicability thresholds of a greenhouse gas pollutant subject to regulation as described in section III(A). Furthermore, we urge EPA to specify that other requirements preconditioned on a NAAQS regime, such as meeting PSD increment and Class 1 area requirements, cannot and do not apply to greenhouse gas emissions

1. Establishing A NAAQS Is Inappropriate For The Regulation Of Greenhouse Gas Emissions.

The NCC believes that regulation of greenhouse gas emissions through a NAAQS is inappropriate for several reasons. The NAAQS framework of cooperative federalism is designed to address local impacts through the designation of air quality control regions according to local attainment or nonattainment of air quality standards and by SIP measures that are tailored to areas according to the degree to which they exceed the standard. This regime is not suited to address a global problem. Greenhouse gases have global rather than local impacts, and mix and distribute atmospherically. Accordingly, except in certain situations noted below, any greenhouse gas ambient air quality standard would cause the entire country either to be in attainment (and already meet the greenhouse gas standard) or in nonattainment (and already be in exceedence of the standard). The approach in §110 of the Act would have little value in directing state or national efforts to address climate change. Additionally, if the entire country were designated nonattainment,¹⁵ the nation's inability to ensure relatively near-term attainment of the standard could trigger sanctions (*e.g.*, transportation funding restrictions and increased offset ratios) that are wholly unwarranted (especially if EPA were to establish a primary NAAQS for greenhouse gases).

Even more perverse, however, given the manner in which EPA measures ambient air quality, is the prospect that some areas of the United States could actually be subject to more severe control requirements under the differential approach of §110 because they will have higher ambient concentrations of CO₂ based on their particular topographic and meteorological conditions, while at the same time contribute no more to climate change, and have no different health or welfare impact, than other areas. There is no policy basis for treating these areas differently, as could be the case under a NAAQS approach.

We are aware that certain other stakeholders favor regulation of greenhouse gas emissions under a NAAQS standard. Several environmental organizations have recently petitioned the Agency to set a NAAQS for CO₂ emissions at 350 parts per million, which would essentially place the entire country in nonattainment overnight. The NCC strongly urges EPA to deny any petition to set a nonattainment NAAQS. A nonattainment NAAQS would impose

¹⁵ The Agency is well aware of the several elements of a nonattainment designation that could potentially cripple a greenhouse gas program and make it cost ineffective, including significant restrictions on netting and trading, offset ratios in excess of 1-to-1, the application of Lowest Achievable Emissions Reductions upon equipment modification and similar provisions.

crippling costs on the economy and a have a punitive effect on businesses as they struggle to come into compliance.

Certain members of industry have also, albeit less formally, called on EPA to establish an attainment standard, with the logic that EPA has discretion regarding the date of listing, thus, no near term steps need be taken to achieve compliance with a standard that is already met. This approach would allow a tightening of the NAAQS down the road, after the development of appropriate standards and permit time for technological advancement. We believe that *if* EPA elects to set a NAAQS, then it should follow this approach and proceed with an attainment NAAQS and suspend further action until real, commercially available technology exists to capture or reduce greenhouse gas emissions. We believe, however, that the costs of regulating greenhouse gas emissions through a NAAQS approach significantly outweigh any benefits and make it an inappropriate and potentially harmful approach.

EPA must keep in mind that establishment of a greenhouse gas NAAQS creates a status – attainment or nonattainment – that would lead to significant and wasted expenditure by the States in the likely event that Congress takes a different legislative path. Establishment of a NAAQS requires very significant administrative work and expense by the States over many years. Once in place, it will be difficult for Congress to undo the damage, and it will be even more difficult to integrate a NAAQS into a national and/or international framework. EPA is not required to establish a NAAQS to regulate greenhouse gas emission from stationary sources and should not do so.

Furthermore, §108 is not an effective policy tool for regulating greenhouse gas emissions for many reasons. First, under that section, EPA may not consider the costs of meeting a standard in setting the NAAQS. Although states may consider costs in developing their SIPs, if the initial standard itself is rigid and infeasible, there is little the states can do to reduce the burden.

Additionally, there is little flexibility under a NAAQS approach to target control efforts toward particular source categories. Sections 108 and 109 impose no controls directly on sources; they establish the air quality benchmarks that determine the emission reduction obligations that states must meet through SIPs (or Federal Implementation Plans, or “FIPs”) for specific air quality control regions. §109(a)(1). A NAAQS could thus result in a patchwork of potentially inconsistent state controls on stationary and mobile sources.

Moreover, the tight timeline for issuing an initial NAAQS once a pollutant is listed makes it a poor regulatory choice that would create substantial administrative burdens on EPA and the states. EPA only has 12 months from the date of listing before it must issue air quality criteria encompassing “all identifiable effects on public health or welfare,” including interactions between the pollutant and other types of pollutants in the atmosphere, as well as information on air pollution control techniques (including on cost of installation and operation, energy requirements, emission reduction benefits, and environmental impacts of techniques) for the pollutant. §108(a)-(f). This information must then be re-evaluated every five years. §109(d). Attainment designations (proposals from the states) are due one year after the criteria are issued. §107(d)(1)(A). EPA final designations are due one year later (§107(d)(1)(B)) and SIPs within three years after the promulgation of a NAAQS (§110(a)(1)). Additionally, every state is

required to submit to EPA within 3 years of the promulgation of any new or revised NAAQS a new SIP that demonstrates that the new program elements are properly addressed. §110(a)(1).

Finally, if EPA were to establish a primary NAAQS, the states would face sanctions, in the form of more stringent offsets/highway funding restrictions, if the primary NAAQS were not attained in 10 years.

2. EPA Is Not Required To Promulgate A NAAQS For Greenhouse Gases.

Section 108(a)(1) establishes three criteria:

“[EPA] shall from time to time ... list ... each air pollutant (A) emissions of which, in [the Administrator’s] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and (C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which [the Administrator] plans to issue air quality criteria under this section.”

Section 109 thereafter requires EPA establish NAAQS for any air pollutant for which air quality criteria are issued under §108.

The language of §108(a)(1)(A) and (C) and §109 indicate that EPA is not required to list greenhouse gases for regulation via a NAAQS even now that the Administrator has made a positive endangerment finding under § 202(a). Under the plain language of the statute, the Administrator need only list the pollutant under §108 if the pollutant is one for which the Administrator “plans to issue air quality criteria.” §108(a)(1)(C) (emphasis added). EPA has never planned to issue greenhouse gas air quality criteria under §108(2), and the Agency has historically recognized that Congress and the President are in the first instance in the best position to determine how the United States would address the environmental, energy, and commerce issues raised by greenhouse gases and their control. We believe that decision is wholly consistent with the language of the statute in §108(a)(1)(C), which recognizes the Agency’s expertise in judging which pollutants should be listed, and that EPA should continue to decline to issue such criteria (and therefore to decline to list greenhouse gases under §108). We believe that EPA should also continue to decline to establish other requirements preconditioned on a NAAQS regime (*e.g.*, PSD increments and Class 1 area requirements) for greenhouse gases for the policy reasons discussed above.

C. EPA Has Legal Authority To Avoid The Absurd, Futile Or Impossible Results, And To Reduce The Administrative Burdens, That Would Result From Literal Application Of NSR And Title V as Currently Interpreted by EPA.

Faced with the particular and extraordinary challenge of regulating greenhouse gases, we support EPA’s use to the fullest extent possible of its legal authority not to implement PSD and Title V statutory requirements, based on Congressional intent, the judicial doctrines of absurdity (permitting the avoidance of absurd results contrary to Congressional intent), administrative necessity (permitting the avoidance of the burden of literal statutory interpretation through sensible policy measures) and the “step-wise” line of cases (permitting an agency to proceed in

an incremental fashion to implement part, but not all, of a statutory mandate at a time). Should EPA decide to implement PSD and Title V with respect to greenhouse gas emissions, then it must exercise all available legal authorities to tailor application to ensure a common sense result. Any approach must balance the number of sources subject to, and the percentage of greenhouse gas emissions covered by, regulation with the cost and burden to permitting authorities and sources. The Agency documented its legal authority at length in the Proposed Tailoring Rule; thus, it need not be reiterated in detail here. *See* Proposed Tailoring Rule, 74 Fed. Reg. at 55311-55320.

We acknowledge the difficult balancing act that EPA faces, as it endeavors to tailor application of PSD and Title V to avoid absurd results while deviating from statutory language as little as is necessary to administer the programs. The Agency must bear in mind that the doctrines of avoidance of absurd results and administrative necessity are designed to lessen the burden of statutory text, and not to increase it. Thus, EPA cannot and should not use either doctrine to promote regulation that would exceed statutory requirements. We believe that EPA's proposed grouping of six greenhouse gases within a common CO₂e metric could have this prohibited effect, as some sources with emissions below the mass-based statutory thresholds for PSD and Title V permitting could be pulled into these programs based on EPA's proposed approach. Therefore, for reasons discussed in section V, we favor an individual pollutant approach with appropriate applicability thresholds tailored as necessary. Moreover, we are concerned that the Agency's group approach may be read to subject several greenhouse gases to PSD and Title V on the effective date of the Light Duty Vehicle Rule that would not in fact be subject to regulation under the Light Duty Vehicle Rule – a result that is clearly impermissible. The Agency must take care in identifying pollutants subject to regulation, and in setting applicability thresholds, not to take an approach that creates the unnecessary and impermissible result of subjecting more sources to regulation than would otherwise be required by the statutory language. EPA cannot rely on administrative necessity to justify a tailoring approach that contravenes statutory definitions without first evaluating alternatives that are consistent with legislative intent and avoid the absurd results created by its interpretation, and, if such alternatives exist, selecting one. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982) (interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available); *CIR v. Brown*, 380 U.S. 563, 571 (1965) (same); *United States v. Am. Trucking Ass'ns., Inc.*, 310 U.S. 534, 543-44 (1940) (same); *Kaseman v. District of Columbia*, 444 F.3d 637, 642 (D.C. Cir. 2006) (same); *Ehrlich v. Am. Airlines, Inc.*, 369 F.3d 366, 386 (2d Cir. 2004) (same); *In re Pac.- A. Trading Co.*, 64 F.3d 1292, 1303 (9th Cir. 1995) (same); 2A N. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:12, at 94 (7th ed. 2007). Thus, EPA must avoid any approach that has the perverse impact of increasing the administrative burden of PSD and Title V on affected sources and authorities.

While EPA conducted an impressive technical analysis of the burden of PSD and Title V on affected sources and state authorities in developing its Proposed Tailoring Rule, we believe the Agency has still underestimated the impact of regulation under these programs on affected sources and permitting agencies. EPA has not previously faced a regulatory challenge of this nature and magnitude. EPA and state permitting authorities cannot possibly administer the PSD and Title V programs if the current statutory major source definitions are immediately applied to greenhouse gas emissions once they become “subject to regulation,” even if the program scope

were tailored per EPA's proposal. Even without the inclusion of greenhouse gases as Title V pollutants, permitting agencies are having extreme difficulty processing Title V applications in a timely manner. By way of example, one of the NCC members has seven of its existing 11 Title V major source sites operating under permits which have been extended beyond their original five-year terms based on their complete renewal applications. One of those renewal applications has been pending for over six years; one for over four years; and two for over three years. The same company estimates that approximately 10 additional sites would need to secure synthetic minor status or a Title V permit under EPA's proposed tailored threshold for Title V. We refer EPA to comments filed by the National Association of Clean Air Agencies and the California Air Pollution Control Officers Association on the Proposed PSD Interpretive Rule, which confirm the magnitude of the difficulties we note.

Authorities need time to establish appropriate resources and to make "first instance" determinations with respect to BACT. Furthermore, state authorities need sufficient time to promulgate their own tailoring rules consistent with EPA's final action. As noted at the December 3, 2009 meeting of the Clean Air Act Advisory Committee Climate Change Workgroup, approximately 38 states will be required to revise their state regulations to incorporate EPA's Proposed Tailoring Rule. Thus, we strongly urge the Agency to take a cautionary approach if it decides to regulate greenhouse gas emissions under PSD and/or Title V. For a tailored approach to succeed, and to avoid potentially significant economic disruption to our still fragile economy, EPA must apply its legal authority in a manner that affords sources and permitting authorities genuine relief.

IV. Absent Congressional Action, Should EPA Decide To Regulate Mobile And Stationary Sources Under The Clean Air Act, It Must Select Appropriate Trigger Dates On Which PSD And Title V Requirements Would Apply To Stationary Sources.

EPA proposed three interrelated actions within weeks of each other: the Proposed Light Duty Vehicle Rule, the Proposed PSD Interpretive Rule, and the Proposed Tailoring Rule. In the Proposed PSD Interpretive Rule, EPA supports the position that a greenhouse gas becomes a "regulated pollutant" once it is "subject to regulation" in the form of an "actual control" under a final and "effective" Clean Air Act national regulation. *See* Proposed PSD Interpretive Rule, 74 Fed. Reg. 51538-41, 51545-46. EPA proposes that the Light Duty Vehicle Rule, which it intends to finalize by March 30, 2010, would present the first such rule applicable to any greenhouse gas emissions. *See* Proposed PSD Interpretive Rule, 74 Fed. Reg. at 51547. Unless Congress enacts preemptive legislation, the combined effect of EPA's positions in the Proposed PSD Interpretive Rule, the Proposed Light Duty Vehicle Rule and the Proposed Tailoring Rule would be to subject stationary sources to PSD and Title V requirements on the "effective date" of the Light Duty Vehicle Rule – as soon as 60 days after publication of the final Light Duty Vehicle Rule in the Federal Register (approximately June 2010).¹⁶ *See* Proposed PSD Interpretive Rule, 74 Fed. Reg. at 51545-46; Proposed Tailoring Rule, 74 Fed. Reg. at 55294, 55299-55300. As discussed below and in the NCC's prior comments on the Proposed PSD Interpretive Rule and the

¹⁶ Under the Congressional Review Act, Congress has 60 days after a final rule is published in the Federal Register to review, and potentially disapprove, it, before it becomes effective. *See* Proposed PSD Interpretive Rule 74 Fed. Reg. at 51545-51546 (referring to 5 U.S.C. 801 *et seq.*).

Proposed Light Duty Vehicle Rule, we believe that a more appropriate date is the “first substantive compliance date,” which is the first date on which any greenhouse gas emissions would actually be controlled and thus subject to regulation. Moreover, we note that EPA’s suite of proposals do not describe with particularity the manner in, and the date by which, an affected source would face its first permitting obligations under these programs. We suggest that the Agency clarify these obligations, as outlined below.

A. EPA Should Clearly Articulate In The Final Tailoring Rule That A “Pollutant” Is “Subject To Regulation” And “Control” On The “First Substantive Compliance Date” Of A Clean Air Act National Regulation That Applies To That Pollutant.

Subject to the discussion in section III(A) above, regarding the scope of PSD applicability, once PSD and Title V are triggered for a greenhouse gas, the NCC supports EPA’s initial and currently-supported interpretation that the date on which a pollutant becomes subject to “actual control” under a final national rule is a better measure of the date at which a pollutant becomes “subject to regulation” than the other options discussed by EPA in the Proposed PSD Interpretive Rule.¹⁷ The NCC submitted comments on the Proposed PSD Interpretive Rule to this effect. The NCC also submitted comments on the Proposed Light Duty Vehicle Rule indicating that EPA’s preferred choice of the “effective date” of such a rule, while a better choice than promulgation date, still does not properly mark the date on which a pollutant is actually controlled. Instead, it is the “first substantive compliance date” of that national rule establishing emission standards for a greenhouse gas that is the date on which that greenhouse gas will be actually controlled and, thus, subject to regulation. In particular, we requested that the effective date for the Light Duty Vehicle Rule be set no sooner than January 2, 2011 – the first date on which a 2012 model year vehicle can be produced. *See* Light Duty Vehicle Rule, 74 Fed. Reg. 49454; 40 C.F.R. 85.2302-2304.¹⁸

The Clean Air Act and its regulations as currently interpreted by EPA require that PSD and Title V apply to each pollutant “subject to regulation” under the Clean Air Act. *See e.g.*, §§ 165(a)(4) and 169(3), 40 C.F.R. 52.21(b)(50)(iv) and § 502 and related definitions under §§ 302(j) and 501.¹⁹ As recognized by EPA however, neither the statute, nor its accompanying

¹⁷ In the Proposed PSD Interpretive Rule, EPA requests comment on various interpretations of the phrase “subject to regulation,” that would make PSD applicable to a pollutant on the basis of: (1) effective emissions limits under a final national rule; (2) the inclusion of emissions limits for specific pollutants in an individual EPA-approved state implementation plan; (3) EPA regulation requiring monitoring or reporting of emissions; (4) an EPA finding of endangerment, or (5) the grant of a Section 209 waiver. *See generally*, Proposed PSD Interpretive Rule 74 Fed. Reg. at 51535-51549.

¹⁸ EPA has substantial discretion in setting the effective date of the Light Duty Vehicle Rule. While the effective date can be no sooner than 60 days after promulgation, there is no definite limit on how long after promulgation a rule must be effective.

¹⁹ According to EPA’s discussion in the preamble to the Proposed Tailoring Rule, the trigger for Title V coverage of a pollutant is the same as the trigger for PSD coverage. Proposed Tailoring Rule, 74 Fed. Reg. at 55294 (“When the light-duty vehicle rule is finalized, the greenhouse gases subject to regulation under that rule would become immediately subject to regulation under the PSD program, meaning that from that point forward, prior to constructing any new major source or major modifications that would increase greenhouse gases, a source owner would need to apply for, and a permitting authority would

regulations, mandate the specific trigger date(s) on which a pollutant becomes “subject to regulation” or on which compliance requirements would apply. *See* Proposed PSD Interpretive Rule, 74 Fed. Reg. 51545-51546. EPA’s choice of that trigger date would, thus, be discretionary, as would its choice of a specific “effective date” of the first national rule, the Light Duty Vehicle Rule, establishing emission standards for three greenhouse gases.

Applying the “first substantive compliance date” approach to “actual control” in the context of the Light Duty Vehicle Rule, would result in PSD and Title V coverage of the three greenhouse gases subject to emissions standards under the Light Duty Vehicle Rule no sooner than January 2, 2011 – the first date on which a 2012 model year vehicle can be produced. *See* Proposed Light Duty Vehicle Rule, 74 Fed. Reg. 49454; 40 C.F.R. 85.2302-2304. This date makes sense, because no vehicle produced before that date would be subject to, and no greenhouse gas emissions would be controlled under, any emissions standard prescribed by the Light Duty Vehicle Rule. Only after the “first substantive compliance date” would the new standard be enforceable in a manner that “actually controls” and reduces emissions of those greenhouse gases.

Even if precedent did support EPA’s preferred “effective date,” the Agency maintains the discretion to choose a different date, such as the “first substantive compliance date,” as the trigger date for PSD and Title V applicability to greenhouse gas emissions. As noted by the Supreme Court in *Massachusetts v. EPA*, EPA “has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies.” 549 U.S. at 533. Additionally, as discussed in section III(C) and documented at length by EPA in the Proposed Tailoring Rule, the long-held judicial doctrines of absurd results and administrative necessity support even agency action that would deviate from statutory language, if such action is necessary to avoid results contrary to Congressional intent or due to administrative necessity. *See* Proposed Tailoring Rule, 74 Fed. Reg. 55311-55320.

Assuming for purposes of these comments that EPA will implement the “effective date” approach in the proposed Interpretive Rule rather than the “first substantive compliance date” approach advocated by the NCC, and that the effective date of the Light Duty Vehicle Rule is set close to its promulgation date, we request that EPA use the fullest extent of its discretion to postpone applicability for PSD and Title V to greenhouse gas emissions to give EPA, affected sources and permitting authorities the necessary lead time for implementation of these programs. The same doctrines of avoidance of absurd results and administrative necessity on which EPA relies to phase in and tailor application of PSD and Title V also provide the Agency discretion to

need to issue, a permit under the PSD program that addresses these increases. *Similarly, for title V it would mean that any new or existing source exceeding the major source applicability level for those regulated greenhouse gases, if it did not have a title V permit already, would have 1 year to submit a title V permit application.*”) (emphasis added); 74 Fed. Reg. at 55300 (§ 502(a) and related definitions under §§ 302 and 501, require that specified types of sources have operating permits. These include any source that emits or has a potential to emit 100 tpy of a pollutant subject to regulation (consistent with EPA’s policy interpretation.); 74 Fed. Reg. at 55300 n. 8 (“EPA included this policy interpretation that title V addresses 100 tpy sources of ‘pollutants subject to regulation’ in a memorandum from Lydia Wegman Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, ‘Definition of Regulated Air Pollutant for Purposes of Title V’ (Apr. 26 1993)”). The NCC does not endorse a 100 tpy limit for Title V applicability when applied to greenhouse gases, as discussed in Section V(C)(2).

postpone any application of these programs until such time as permitting authorities and affected sources are able to effectively implement the new requirements. In light of the tremendous burden that will be placed on permitting authorities and affected sources, we believe EPA should exercise this discretion to prevent permitting authorities from facing overnight an overwhelming backlog of permit applications.

While the trigger date the NCC promotes for PSD and Title V applicability due to the finalization of the Light Duty Vehicle Rule (*i.e.*, no sooner than January 2, 2011) could differ by only six months from that which would result from applying the minimum time between promulgation and effectiveness required by the Congressional Review Act, there are legal and policy factors that make these six months crucial (though still insufficient) for affected stationary sources and permitting authorities as they scramble to comply with PSD and Title V requirements as applied to greenhouse gases. The importance of affording EPA, affected sources and permitting authorities the necessary lead time to study and evaluate the emissions characteristics and control options for new pollutants prior to making emissions of those pollutants subject to PSD and Title V permitting requirements cannot be overstated. This is particularly true for sources that would be newly subject to Title V because of their potential to emit greenhouse gases, and would therefore need to apply for Title V permits or synthetic minor permits (and for their permitting authorities that would need to timely issue these permits). Furthermore, if phase-in approaches such as the Proposed Tailoring Rule are to provide true legal relief for potentially affected sources, the states that implement PSD and/or Title V under their own regulations will need this additional time - and likely more - to promulgate their own tailoring rules.

Thus, EPA should use the fullest extent of its discretion to interpret “subject to regulation” in the manner that provides the greatest lead time for EPA, affected sources and permitting authorities to comply with PSD and Title V requirements. The NCC believes that EPA should codify its final interpretation of what makes a pollutant “subject to regulation” for the purposes of PSD and Title V applicability in the definitions section of the federal regulations (40 C.F.R. 52.21(b) and 40 C.F.R. 71.2) and for permitting authorities with approved implementation plans (40 C.F.R. 51.166 and 40 C.F.R. 70.2), with language similar to the following:

subject to regulation under the Act means for purposes of this [section/subpart], for a particular pollutant, the first substantive compliance date with respect to an emission standard or limitation on that pollutant imposed under a final and effective national rule promulgated by the Administrator under the Act.

EPA should also make any other conforming or clarifying amendments necessary to implement this definition and its underlying policy.²⁰

²⁰ For example, EPA should take this opportunity to clarify Parts 70 and 71 to implement the guidance from the April 26, 1993 Memorandum from Lydia Wegman pertaining to the definition of “air pollutant” by amending subsection (2) of the definition major source in each of those parts as follows: “A major stationary source of air pollutants, as defined in section 302 of the Act, that directly emits or has the

B. EPA Should Clearly Articulate In The Final Tailoring Rule The Scope And Timing Of The Permitting Obligations That An Affected Source Would Face Under PSD And Title V After The “First Substantive Compliance Date.”

Taken together, EPA’s proposals address the date that the PSD and Title V programs would first apply to pollutants subject to regulation under the Light Duty Vehicle Rule. The proposals are less clear, however, on the manner in, and the date by, which an affected source would face its first permitting obligations under these programs. As discussed below, the NCC believes that EPA should clearly articulate in the final Tailoring Rule the permitting obligations that will apply to existing and new sources under both PSD and Title V, including obligations that will apply to sources that select synthetic minor status and those sources that have filed complete permit applications by the date that these programs first apply to greenhouse gases.

- 1. An Existing Source Newly Covered by Title V Due to its Greenhouse Gas Emissions Should Have At Least One Year To Submit Its Application for A Title V Permit.**

With respect to sources that would be newly subject to Title V due to their current emissions or potential emissions of any greenhouse gas, EPA should clarify that their original Title V applications would be due *no sooner than* 12 months after greenhouse gases become “subject to regulation. *See Proposed Tailoring Rule, 74 Fed. Reg. at 55294.*²¹ In the Proposed Tailoring Rule EPA indicates that any “existing source exceeding the major source applicability level for those regulated greenhouse gases, if it did not have a title V permit already, would have 1 year [from finalization of the Light Duty Vehicle Rule] to submit a title V permit application.” However, currently the Title V regulations provide that this application is due no later than 1 year after a source becomes subject to Title V “or such earlier date as the permitting authority may establish” (*see 40 C.F.R. 70.5(a)(1)(i), 40 C.F.R. 71.5(a)(1)(i)*). In the instance of Title V applicability triggered by emissions or potential emissions of a greenhouse gas, EPA should eliminate permitting authorities’ discretion to require Title V permit applications any sooner than 1 year after the source becomes subject to Title V.

- 2. An Existing Title V Major Source Should Be Required To Amend Its Permit To Address Greenhouse Gas Emissions Only If An Emission Unit Or Activity At The Source Becomes Subject To An “Applicable Requirement” From A Regulation Or Permit Pertaining To Greenhouse Gases.**

EPA should clarify a point addressed briefly in its Proposed Tailoring Rule: existing major Title V sources would not need to amend their Title V permits to address greenhouse gases unless and until an emission unit or activity at the source becomes subject to (1) an “applicable

potential to emit, 100 tons per year or more of any air pollutant that is subject to regulation under the Act ... ”

²¹ As just discussed, we believe the trigger date for the first Title V coverage of any greenhouse gas should be no sooner than the first substantive compliance date of the Light Duty Vehicle Rule. Thus, newly covered Title V sources should be required to submit their applications no earlier than January 2, 2012.

requirement” pertaining to greenhouse gas emissions that would generally require the re-opening of a permit or a renewal application or (2) the source makes a change that would cause it to become subject to an applicable requirement for greenhouse gas emissions. *See* Proposed Tailoring Rule, 74 Fed. Reg. 55302. There are currently no stationary source applicable requirements for greenhouse gas emissions.²² Thus, unless in the future the Agency generally regulates stationary source greenhouse gas emissions, existing sources would only need to revise their Title V permits to reflect PSD requirements imposed on greenhouse gas emissions in a PSD permit. We believe that EPA should clearly state in the final Tailoring Rule that, in the absence of any such applicable requirement, existing Title V sources that do not trigger PSD requirements through a major modification would not be required to revise their Title V permits in any way due to its greenhouse gas emissions.²³

3. A Newly Constructed Source That Is A Title V Major Source Of A Greenhouse Gas, Or An Existing Source That Triggers Title V Due To Increased Greenhouse Gas Emissions From A Modification Should, With Certain Limited Exceptions, Be Required To Apply For A Title V Permit No Sooner Than “Within 12 Months Of Commencing Operation” Of The New Or Modified Source.

We believe that EPA should clarify in its final Tailoring Rule that newly constructed Title V major sources of a greenhouse gas and sources undergoing modification that would have greenhouse gas emissions that trigger Title V applicability would generally need to apply for a Title V permit “within 12 months of commencing operation” of the new or modified source. While currently the Title V regulations provide that this application is due no later than 1 year after commencing operation “or such earlier date as the permitting authority may establish” (*see* 40 C.F.R. 70.5(a)(1)(ii), 40 C.F.R. 71.5(a)(1)(ii)), in the instance of Title V applicability triggered by a project’s emissions or potential emissions of a greenhouse gas, EPA should eliminate permitting authorities’ discretion to require Title V permit applications any sooner than 1 year after the new or modified source commences operation. EPA should also clarify that sources in the limited number of states that have a mandatory merged PSD and Title V permit process would have to apply for a merged permit prior to construction that would trigger applicability of both the PSD and Title V programs due to its emissions of greenhouse gases.

²² The Greenhouse Gas Reporting Rule expressly indicates that its requirements are not to be included in Title V permits. *See* Draft Final Greenhouse Gas Reporting Rule Preamble at 150 (“As currently written, the definition of ‘applicable requirement’ in 40 C.F.R. 70.2 and 71.2 does not include a monitoring rule [...] which is promulgated under Clean Air Act sections 114(a)(1) and 208.”).

²³ On a related point, the NCC believes that EPA should clarify in its final Tailoring Rule that existing sources with Title V operating permits, *and no applicable requirements for greenhouse gas emissions*, would only need to include information on greenhouse gas emissions in their regularly scheduled Title V renewal applications (and then only according to their regular five year cycle).

4. Sources Seeking Synthetic Minor Status Should Benefit From The Permit Shield Protections Afforded To Major Sources That Have Applied For But Not Received A Title V Permit, As Well As From Other Policies Designed To Smooth Transition To The New Regulatory Regimes.

The NCC believes that EPA should implement a uniform national policy with respect to the treatment of synthetic minor permit applications that extends permit shield protections afforded to major sources that have applied for Title V permits to sources that have applied for synthetic minor status. Accordingly, we believe that submission of an administratively complete synthetic minor permit application by the Title V application due date should stay (1) the obligation for a source to hold a Title V permit until all synthetic minor permit proceedings are resolved, and (2) any other initial Title V permitting obligations that may otherwise accrue prior to issuance of a final synthetic minor permit. In the event a synthetic minor permit is not ultimately issued, sources should have at least six months to submit an administratively complete Title V permit application without penalty.

We also believe EPA should provide a generous transition policy to enable sources with actual emissions below the major source threshold to secure synthetic minor permits. We believe that the best approach would be that during the first phase of EPA's Proposed Tailoring Rule, as discussed in section IV(B)(3), actual emissions should be used rather than potential to emit ("PTE") to determine Title V major source applicability. At a minimum, we believe sources with actual emissions below 75%-90% of the major source threshold should have significantly more than one year to submit their synthetic minor permit applications. If EPA's proposed major source threshold is raised, at least for Title V, along the lines we propose in section V(C)(2), then the suggested 75%-90% transition policy eligibility level could be lowered. Extending the time period for submission of significant minor applications would allow permitting authorities to use their scarce resources to address the largest emitters first, and to make sure these sources are appropriately permitted before moving on to smaller sources.

5. Sources With An Administratively Complete PSD Permit Application Should Be Governed By The Regulations In Place, And The Pollutants Regulated, As Of The Date Their Applications Are Deemed Complete.

Consistent with EPA precedent, the NCC believes the PSD program scope (and applicable BACT standard, if any) should be governed by the regulations in place and the pollutants regulated as of the date on which the source's application is first deemed complete. Such regulation should apply for purposes of any administrative or judicial review of the permit, and only information available at or prior to such time should be offered in any such proceeding. While the Clean Air Act itself is generally silent on whether grandfathering may occur, and on what criteria it may be based,²⁴ a policy such as this would be consistent with the PM10 surrogate policy EPA codified at 40 C.F.R. 52.21(c)(i)(1)(xi), where applications that were deemed complete prior to July 15, 2008 were grandfathered with respect to having to do a new

²⁴ Section 168(b) provides a limited exception for facilities on which construction was commenced after June 1, 1975, and prior to August 7, 1977, allowing the review and permitting of such facilities in accordance with the PSD regulations in effect prior to August 7, 1977. This provision is not applicable in the present context.

analysis for PM2.5. Although EPA recently granted the February 10, 2009 Petition for Reconsideration (“PM2.5 Petition”) of the Fine Particulate Matter New Source Review Rule (“PM2.5 NSR Rule”) (73 Fed. Reg. 28321 (May 16, 2008)) filed by Earthjustice and the Natural Resources Defense Council, and stayed the grandfathering provision concerning the continued use of the PM10 Surrogacy Policy in the federal PSD regulations at 40 CFR 52.21(i)(1)(xi), we believe that after additional consideration and comment, the Agency should and will uphold its grandfathering policy in that context. To do otherwise opens the door to repeated and protracted litigation on due process grounds, by those who have submitted applications, but, through no fault of their own, have not been issued a final permit by the relevant authority.

Regardless of EPA’s decision with respect to sources impacted by the PM2.5 NSR Rule, the NCC firmly believes that grandfathering remains an appropriate and necessary policy for the Agency to adopt to provide for efficient and effective implementation of its final Tailoring Rule.²⁵ The PM2.5 regulations were not the first time that EPA used the complete application benchmark as a stopping point. The trigger point of a complete application also has been used by EPA to freeze the required source inventory for PSD and NAAQS modeling so that permitting cannot be extended just by the submittal of a new application in the vicinity of a project. *See* NSR Workshop Manual at C.34. A complete application also is the trigger point EPA used to define when the minor source baseline date has been triggered. *See* 40 C.F.R. 52.21(b)(14)(ii).

Retroactive review of complete applications would not be the best use of limited permitting authority resources. If any new regulation or guidance were retroactively applied to applications already deemed complete, the application process for numerous sources would be indefinitely extended as sources would be required to do additional analysis, permitting agencies would have to verify the additional analysis and, if public notice already had been issued, that entire process would have to be repeated. Such a potentially endless approach would add significant time to the overall permit process, significant additional expense for proposed sources and potentially crippling uncertainties to projects, further hampering economic development and effectively preventing many valuable industrial (and, considering the potential scope of greenhouse gas regulations, even commercial and large-scale residential) projects from moving forward. Given that the Agency already anticipates a struggle on the part of permitting agencies to meet the requirements of the Tailoring Rule, it makes little sense to increase the burden on those agencies by re-opening completed permit applications.

²⁵ The factual justification on which the PM2.5 Petition is based is unique and is not relevant to the regulation of greenhouse gases under PSD. Petitioners emphasize the fact that the grandfathering policy and PM10 1997 Surrogacy Policy were never subject to public comment – this is certainly not the case with respect to treatment of greenhouse gases under the Proposed Tailoring Rule. Moreover, there has been a NAAQS for PM2.5 since 1997, and Petitioners specifically noted that the technical issues that led to the PM10 Surrogacy Policy had been resolved, and expressed concern that allowing facilities to grandfather in with the PM10 Surrogate Policy would cause or contribute to violation of the standards, because some areas are in attainment for PM10, but nonattainment for PM2.5. Since there is not a NAAQS for greenhouse gases, and the Agency does not plan to develop one, as discussed in section III(B), these concerns are not relevant with respect to PSD applications that may be impacted by the final Tailoring Rule.

The Proposed Tailoring Rule is silent on the treatment of sources with complete applications; thus, we encourage EPA to state clearly that its longstanding policy that applies the regulation in place on the date a permit application is deemed complete also applies in the context of final Tailoring Rule.

V. Should EPA Decide To Apply The PSD And Title V Programs To Greenhouse Gas Sources, It Must Tailor Their Application To Effectuate Congressional Intent.

The NCC supports EPA's efforts to tailor applicability of PSD and Title V to avoid absurd results, address administrative necessity and consider appropriate step-wise implementation. The Agency should effectuate Congressional intent to regulate only the largest and most significant sources. We note above that the appropriate starting point for tailoring PSD would be to limit PSD for any greenhouse gas to projects that otherwise would trigger PSD due to emissions of one or more NAAQS pollutants in areas properly designated as attainment or unclassified for such pollutant(s). Within this context, the NCC believes that EPA's proposal to phase in application of PSD and Title V is sound and enables the Agency to capture the largest sources while limiting the workload of permitting authorities to that which they can reasonably process in the near term. EPA can adjust this approach down the road as additional resources are available – or, preferably, transition to a fully developed national regulatory regime, whether imposed by EPA or Congress (as noted in sections I and II, the NCC's strong preference is for a Congressional regime). The sections below describe specific NCC recommendations for this tailoring approach during the transition years..

A. EPA Should Define The Regulated "Air Pollutant" For Purposes Of PSD And Title V Applicability On An Individual Greenhouse Gas Pollutant-Specific (Not A Grouped) Basis.

The NCC believes that the regulated pollutants for purposes of PSD and Title V applicability should be determined on a greenhouse gas pollutant-specific (not a grouped) basis. EPA's proposed approach, to define six greenhouse gases - CO₂, methane ("CH₄"), nitrous oxide ("N₂O"), hydrofluorocarbons ("HFCs"), perfluorocarbons ("PFCs"), sulfur hexafluoride ("SF₆") – as a single "air pollutant," for purposes of PSD and Title V applicability is administratively unnecessary, and would also impermissibly expand the scope of the statute to the extent, as noted below, that it could subject a small source to PSD and/or Title V regulation despite its actual emissions falling below the statutory mass-based significance thresholds for individual pollutants.²⁶ While in other circumstances EPA may generally have the discretion to

²⁶ The NCC reserves the right to comment further on the specific pollutants covered by the final Tailoring Rule. EPA has not defined what it intends to cover under each category of the pollutants "PFCs" and "HFCs" in the final Tailoring Rule. The precise definitions of PFCs and HFCs will have a significant impact on the appropriate applicability thresholds for each pollutant. In the Greenhouse Gas Reporting Rule, EPA originally proposed a definition of "fluorinated greenhouse gas" that covered a wide range of related compounds. EPA amended its definition after receiving comments that demonstrated that the Agency's proposed definition was overbroad. Similarly, it may not be appropriate to place all of the compounds that could be captured in the definitions of HFCs and PFCs together for PSD and Title V purposes. The NCC believes that EPA must clearly define in the final Tailoring Rule which pollutants,

apply a grouped pollutant approach, in the context of tailoring the PSD and Title V programs to greenhouse gases it does not, as discussed in section III(C), since a grouped pollutant approach (especially when paired with a CO₂e approach) exacerbates the absurd results and administrative burden that EPA seeks to reduce - by making more sources rather than less subject to PSD and Title V.

We note that considering pollutants on an individual basis for determining whether the PSD or Title V program would apply to a specific source does not prevent EPA or the states from considering the potential environmental benefits of facility-wide netting or of inter-pollutant emissions trading at a subsequent stage of the permitting process (e.g., by authorizing a source to seek reductions in other pollutants or to optimize on- or off-site energy use at the mitigation stage). But to group pollutants at the initial applicability stage, or when establishing control standards (e.g., BACT), would impermissibly expand, rather than tailor, the statute and greatly burden permitting agencies, individual sources and the economy generally contrary to Congressional intent.

On a related point, the NCC believes that EPA needs to clarify in the final Tailoring Rule that each of the six greenhouse gases or categories of greenhouse gases that are referenced will only become subject to PSD and Title V as “regulated pollutants” after they individually become subject to regulation under the Clean Air Act. The Proposed Light Duty Vehicle Rule only imposes emissions limitations/controls on three greenhouse gases - CO₂, CH₄ and N₂O. Although reductions in HFCs from vehicle air conditioning units can be “credited” towards emissions limitations of the other three greenhouse gases at a netting or mitigation stage, they are not controlled under the Proposed Light Duty Vehicle Rule. Thus, PSD and Title V requirements would only be triggered by the Proposed Light Duty Vehicle Rule for CO₂, CH₄ and N₂O. EPA’s Proposed Tailoring Rule fails to clearly make this distinction, and proposes an approach for the regulation of six greenhouse gases (or categories) under PSD and Title V, without specifying that PSD and Title V will, at least initially, only apply to three of them – CO₂, CH₄ and N₂O - after such pollutants become “subject to regulation” through finalization of the Light Duty Vehicle Rule.²⁷ This distinction should be an important component of a successful tailoring strategy.

and specifically which compounds within each class of pollutant (HFCs and PFCs), are covered by the rule, and provide additional opportunity for public comment on these definitions.

²⁷ While EPA’s proposed part 70 and part 71 definitions of “major source” appear to implement this concept by including the phrase “that are subject to regulation under the Act” in proposed 70.2 (definition of “major source) subsection (4), and proposed 71.2 (definition of “major source”) subsection (4), EPA has neglected to include this phrase in proposed 51.166(b)(1)(i)(d) and proposed 52.21(b)(1)(i)(d). Both 51.166(b)(1)(i)(d) and 52.21(b)(1)(i)(d) should be amended to read as follows “(d) Notwithstanding any provision to the contrary in this section, any stationary source which emits, or has the potential to emit, at least 25,000 tpy CO₂e of greenhouse gases, as defined under paragraph (b)(58) of this section, that are subject to regulation under the Act.” As discussed elsewhere in these comments, however, the NCC does not endorse (a) the 25,000 tpy CO₂e major source threshold (because it is too low), (b) grouping greenhouse gases together for purposes of determining applicability (since it only exacerbates the overly broad applicability that EPA seeks to alleviate in the Tailoring Rule based on the doctrines of “administrative necessity” and “absurd results”), or (c) the CO₂e approach (since it too exacerbates the overly broad applicability that EPA seeks to alleviate in the Tailoring Rule based on the doctrines of

B. EPA Should Define The Basis Of Measurement For Purposes Of PSD And Title V As The Mass Emissions Of Each Synthetic Fluorinated Greenhouse Gas (PFC, HFC And SF6) Compared To Statutory Thresholds, And The Mass Emissions Of Each Naturally Occurring Greenhouse Gas (CO2, CH4 And N2O) Compared To Appropriately Tailored Mass-Based Applicability Thresholds.

Subject to the comments made in section V(A) regarding the need for definitions of the compounds intended to be covered within the scope of the Tailoring Rule, the NCC believes that EPA's proposed CO₂e metric should not be applied in a cumulative fashion to greenhouse gases and should not be applied at all to PFC, HFC and SF₆; it should only be applied, if at all, to CO₂, CH₄ and N₂O, and then only to arrive at appropriately tailored individual mass-based applicability thresholds for those greenhouse gases. The doctrines of avoidance of absurd results and administrative necessity do not allow an agency to impose more stringent requirements than a statute provides. An agency cannot, thus, impose a discretionary interpretation and related requirements that lead to absurd results that must then be alleviated on grounds of administrative necessity through further deviation from the statute. Application of a CO₂e metric would produce such impermissible results in certain instances. The synthetic fluorinated greenhouse gases (PFC, HFC and SF₆), due to their chemistry, are generally two to four orders of magnitude more potent than CO₂ per unit of mass. Thus, a source with mass emissions significantly below statutory major source thresholds could be considered major based on a CO₂e measurement and EPA's proposed tailored thresholds. For example, a source with 1.3 tons per year ("tpy") SF₆ would exceed EPA's proposed thresholds, but only as a result of applying the CO₂e metric, not actual, mass emissions. In no case should a source with actual mass emissions of each greenhouse gas pollutant below the statutory threshold levels be subject to PSD or Title V based solely on its CO₂e measurement.²⁸

"administrative necessity" and "absurd results" and would also impermissibly subject some sources to PSD and/or Title V despite mass emissions below the statutory applicability thresholds).

²⁸ The NCC reserves the right to comment further on the regulatory metric covered by the final Tailoring Rule. In addition, because CO₂e is a calculated value, and relies on equivalency measures that are still being refined, we believe that it is more appropriate for EPA to use CO₂e as a tool to tailor and record corresponding mass-based equivalency thresholds in its regulations than to use CO₂e itself as a regulatory metric. There is a range of different scientific opinions on the GWPs of the various greenhouse gases, and equivalency values may be further refined as science advances. By way of example, the Second and Third Assessment Reports of the Intergovernmental Panel on Climate Change include somewhat different CO₂ equivalency values for certain greenhouse gases. Furthermore, not all non-CO₂ compounds actually have a scientifically robust and accepted GWP. In the Greenhouse Gas Reporting Rule, EPA dealt with this issue of so-called "unavailable" GWPs in the context of fluorinated greenhouse gases by explaining that the lack of GWPs for some fluorocarbons will not impede reporting because EPA is requiring reporting of production and other quantities in tons of chemicals rather than in tons of CO₂e. Lack of GWPs could have a much more profound impact under the language of the proposed Tailoring Rule as regulatory requirements are triggered either directly off of, or based upon, CO₂e calculations. The NCC believes that it is critical for EPA to clearly specify the GWPs for each pollutant, and each compound within each category of pollutant, that it intends to regulate under the final Tailoring Rule and provide additional opportunity for public comment on these factors. Additionally, we believe it would be inappropriate to subject a source or permitting authority to potential challenges based on an evolution of

Thus, subject to the comments made above regarding the need for definitions of the compounds intended to be covered within the scope of the Tailoring Rule and the GWPs associated with those compounds, the NCC recommends that EPA take a bifurcated approach based on the characteristics of the pollutants. It should measure the synthetic fluorinated greenhouse gases (PFC, HFC and SF6) on a mass basis, consistent with statutory thresholds and precedent, and apply CO2e or another equivalency metric, if at all, to arrive at appropriately tailored mass-based applicability thresholds for each of the naturally occurring greenhouse gases (CO2, CH4 and N2O). For sources of PFC, HFC and SF6, which each have low mass emissions, there is no justification under the avoidance of “absurd results” and “administrative necessity” doctrines to group these pollutants or use an equivalency metric to evaluate Title V and PSD applicability. These sources would rarely trigger such programs based on their mass emissions applied to the statutory thresholds. On the other hand, sources of CO2, CH4 and N2O will often have high mass emissions that would too easily trigger regulation at statutory levels. It thus makes more sense to apply the tailoring approach only to those three compounds.

If EPA nonetheless moves forward to implement a CO2e approach, it should seriously consider harmonizing the metric in the Proposed Tailoring Rule (short tpy) with that in the Greenhouse Gas Reporting Rule (metric tpy) to avoid confusion and ease the data management burden on both sources and permitting authorities.²⁹ The Proposed Tailoring Rule suggests a 25,000 short tpy major source threshold, while the Final Greenhouse Gas Reporting Rule adopts a 25,000 metric tpy threshold. At a minimum, if EPA insists on using short tons in the PSD and Title V programs, and if the Agency adopts its proposed threshold of 25,000 short tpy, then the major source CO2e level for PSD and Title V should be 27,557.5 short tpy (the equivalent of 25,000 metric tpy). If this adjusted major source threshold is used in conjunction with a transition rule that allows sources with actual emissions below the source level to forestall applicability (regardless of PTE), then source applicability under the Tailoring Rule will be synchronized with applicability under the EPA Greenhouse Gas Reporting Rule. (Note that, as discussed in the next section, the NCC does not believe that EPA’s proposed 25,000 short tpy major source threshold is appropriate for PSD or Title V and believes the thresholds of both programs should be adjusted upwards.)

We note that, should EPA choose to move forward with an equivalency approach and should it face legal or policy obstacles to applying a CO2-based equivalency approach (*i.e.*, CO2e) it has available the alternative approach of calculating global warming equivalency relative to N2O (*i.e.*, N2Oe). One effect of this alternative approach would be to yield emission ranges that would fall far closer to the statutory threshold levels than if a CO2e approach is used. An N2Oe approach applied to a major source threshold of 100 tpy (the Title V major source threshold, and the PSD major source threshold for listed sources) would be only slightly less stringent than the proposed threshold of 25,000 tpy CO2e (*i.e.*, 100 tpy N2O is equivalent to 29,600 tpy CO2). To the extent that an N2Oe approach would exclude sources from PSD that EPA feels should be subject to greenhouse gas standards, EPA has the option to promulgate standards for such sources under § 111.

the applicable CO2e metric, which may occur if applicability thresholds are measured in, rather than based upon, CO2e.

²⁹ Outside of this paragraph, consistent with EPA’s terminology in the Proposed Tailoring Rule, references to “tpy” mean “short tpy,” not “metric tpy.”

C. EPA Should Revise Its Proposed Tailored Applicability Thresholds Under PSD And Title V.

The NCC agrees with EPA that a tailored approach to the regulation of certain greenhouse gases (*i.e.*, CO₂, CH₄ and N₂O) under PSD and Title V is necessary and within the scope of the Agency's legal authority. Regulation of greenhouse gases under PSD and Title V will have near term and wide-ranging implications for all sectors of the U.S. economy, including potentially high compliance costs for entities and industries not ordinarily subject to the Clean Air Act. Under EPA's own estimates, its tailored approach would avoid over \$55.6 billion in the first six years of regulation – or, stated differently, in the absence of the Proposed Tailoring Rule, the cost of compliance for affected sources and permitting agencies will increase by more than \$55.6 billion. There is clear evidence of Congressional intent to limit NSR and Title V applicability to only the largest sources of pollution, which supports a tailored approach. As discussed previously, however, we disagree with EPA's proposed approach to set, for both PSD and Title V, a first phase temporary major source applicability threshold level at cumulative 25,000 tpy CO₂e. Subject to the comments made above regarding the need for definitions of the compounds intended to be covered within the scope of the Tailoring Rule and the GWPs associated with those compounds, we believe that the statutory thresholds (*i.e.*, 100/250 tpy), applied on a pollutant-specific basis, are appropriate for the HFCs, PFCs and SF₆, and tailoring is not necessary to avoid "absurd results" or address "administrative necessity" with respect to these greenhouse gases. On the other hand, CO₂, CH₄ and N₂O, which are far more ubiquitous, should be subject to higher tailored major source thresholds than those proposed by EPA and evaluated individually (perhaps using a CO₂e approach) to establish appropriate mass-based applicability thresholds under the avoidance of "absurd results" and "administrative necessity" doctrines. The following chart summarizes the applicability thresholds that we believe should be established for each of the six greenhouse gases, if and when each becomes subject to regulation.³⁰

³⁰ Because there are different opinions on the appropriate GWP of each greenhouse gas as reflected in CO₂e, as discussed in section V(B), we believe it is critical for EPA to publish the factors on which it bases its calculation of CO₂e in the final Tailoring Rule.

Pollutant	Title V Major	PSD Major³¹	PSD Significance³²
CO2	100,000 tpy	50,000 tpy	25,000 tpy
CH4	4,762 tpy ³³	2,381 tpy ³⁴	1,191 tpy ³⁵
N2O	323 tpy ³⁶	161 tpy ³⁷	81 tpy ³⁸
HFCs	100 tpy	100/250 tpy	50 tpy
PFCs	100 tpy	100/250 tpy	50 tpy
SF6	100 tpy	100/250 tpy	50 tpy

1. EPA Should Revise Its Proposed Tailored Major Source And Modification Applicability Thresholds Under PSD.

The legislative history of NSR indicates that Congress deliberately limited the range of stationary sources to which PSD would apply, to exclude large numbers of smaller sources, and to identify facilities which, due to their size, are *financially able* to bear the regulatory costs imposed by the program, and which, as a group, are *primarily responsible* for emissions of harmful pollutants. *Alabama Power Co. v. Costle*, 636 F.2d. 323, 353 (D.C. Cir. 1980) (emphasis added). In fact, as the D.C. Circuit noted in *Alabama Power*, at the time the NSR requirements were promulgated, Congress did not believe that sources of similar size to those that would be considered “major” for greenhouse gases under the existing statutory thresholds should be covered by NSR. 636 F.2d at 354. Indeed, Congress thought that it had placed the major source thresholds at a level to exclude smaller sources. *See, e.g.*, 122 Cong. Rec. 24520,

³¹ Note that if EPA agrees that the best interpretation of the Act’s PSD provisions is that PSD permitting can only be triggered by emissions of a NAAQS pollutant, then EPA would not need to set a PSD major source threshold for any greenhouse gas, only PSD significance levels.

³² As discussed in sections V(A) and (B), above, the precise definitions of the pollutants that will be covered by the final Tailoring Rule, and the GWPs of each, will have significant impact on appropriate applicability thresholds. The NCC reserves the right to comment further on the appropriate applicability thresholds after EPA publishes this information in the final Tailoring Rule.

³³ This is the equivalent of 100,000 tpy of CO2 on a GWP basis (using, by way of example, a GWP of 21 for CH4).

³⁴ This is the equivalent of 50,000 tpy of CO2 on a GWP basis (using, by way of example, a GWP of 21 for CH4).

³⁵ This is the equivalent of 25,000 tpy of CO2 on a GWP basis (using, by way of example, a GWP of 21 for CH4).

³⁶ This is the equivalent of 100,000 tpy of CO2 on a GWP basis (using, by way of example, a GWP of 310 for N2O).

³⁷ This is the equivalent of 50,000 tpy of CO2 on a GWP basis (using, by way of example, a GWP of 310 for N2O).

³⁸ This is the equivalent of 25,000 tpy of CO2 on a GWP basis (using, by way of example, a GWP of 310 for N2O).

24524 (statement of Sen. Buckley) (“We do not in any way affect public buildings, large apartment houses, and so forth. Again, the restrictions are limited to 28 specific types of sources, major polluting sources.”).³⁹ Contrary to Congress’ intent (and not accounting for sources that could be excluded from PSD applicability because they are not also major for a NAAQS pollutant - the interpretation of the Act’s PSD provisions that we urge EPA to adopt), EPA estimates that regulating sources of greenhouse gas emissions at statutory major source levels would result in approximately 40,000 new and modified stationary sources per year subject to PSD (compared to approximately 400 sources under the Proposed Tailoring Rule). *See* 74 Fed. Reg. at 55338.

To hew most closely to the plain language of the statute while also implementing Congress’ clear intent to regulate only the most significant sources, the NCC believes that EPA should bifurcate its approach, and PSD should be triggered if a source’s greenhouse gas emissions exceed the following applicable major source levels:

- for synthetic fluorinated greenhouse gas pollutants (SF₆, PFC and HFC), 100/250⁴⁰ annual tpy for each pollutant measured on an actual mass emissions basis (the statutory level), and
- for naturally-occurring greenhouse gas pollutants (CO₂, N₂O and CH₄), 50,000 tpy CO₂e⁴¹ for each pollutant expressed as a mass emissions rate.

Increasing the proposed PSD threshold from 25,000 tpy to 50,000 tpy on a CO₂e basis only reduces the percentage of greenhouse gas emissions covered by the permitting requirements on existing sources nationwide by 3% (from 68-65%), while it reduces the administrative burden by an order of magnitude – by 6,416 sources. *See* Proposed Tailoring Rule, 74 Fed. Reg. at 55333. The number of new sources subject to PSD each year would be nearly cut in half, from 128 to 77 sources. *See* Proposed Tailoring Rule, 74 Fed. Reg. at 55332. Of course, using its proposed step-wise approach, EPA can subsequently tighten the new source PSD threshold to below our recommended level of 50,000 tpy, but at a later decision point at which it would have important additional information based on actual state and federal experience in implementing the early stages of this program.

The NCC believes that EPA should set appropriate PSD significance levels for each greenhouse gas through the final Tailoring Rule, as follows:

³⁹ *See also*, 122 Cong. Rec. 24549 (statement of Sen. McClure) (“Had the committee chosen to use a broad definition for significant deterioration, many of these limited operations (a small gasoline jobber, or a heating plant at a community college) would be subject to unnecessary controls. As I noted in the markup sessions, regulation of steel mills and other heavy industries should not preclude a junior college from expanding its heating plant.”).

⁴⁰ The 100 tpy statutory PSD major source threshold is for sources listed in the first sentence of § 169(1) of the Act. The 250 tpy statutory PSD major source threshold is for all other sources as indicated in the second sentence of Section 169(1) of the Act.

⁴¹ Alternatively, the agency could use N₂Oe as a reference point for these pollutants.

- for synthetic fluorinated greenhouse gas pollutants (SF6, PFC and HFC), 50 tpy for each pollutant measured on a mass emissions basis, and
 - for the naturally occurring greenhouse gases (CO2, CH4 and N2O), 25,000 tpy of CO2e⁴² for each pollutant expressed as a mass emissions rate.
2. EPA Should Revise Its Proposed Tailored Major Source Applicability Thresholds Under Title V.

Congress also expected Title V to apply to a much smaller set of sources than would become subject to regulation if the statutory 100 tpy is used as the applicability threshold. In setting the statutory level, Congress compared the number of sources likely to be “major” under Title V to those that were “major” under the Clean Water Act at the time, and estimated that some 16,000 sources would be major.⁴³ This number is two orders of magnitude lower than the more than 6 million additional sources that EPA’s own estimate indicates would be subject to Title V if it were applied to greenhouse gases at the statutory major source threshold. By comparison, approximately 14,000 sources would be subject to Title V under EPA’s proposed tailored threshold of 25,000 tpy CO2e under the Proposed Tailoring Rule. *See* 74 Fed. Reg. at 55338. This is a difference of orders of magnitude, and presents an overwhelming resource burden that is utterly inconsistent with what Congress’ intent in developing Title V to streamline administration of operating permit requirements. Of further note, the number of sources that would be subject to EPA’s tailored threshold for greenhouse gases almost equals Congress’ original estimate of all sources that would be subject to Title V.

The NCC also believes that EPA should bifurcate its approach to Title V for greenhouse gases, to stay as close as possible to the statutory language and to effectuate Congressional intent in regulating only the most significant sources. We believe that Title V should be triggered if a new source’s emissions exceed the following applicable major source thresholds levels:

- for synthetic fluorinated greenhouse gas pollutants (SF6, PFC and HFC), 100 annual tpy for each pollutant measured on an actual mass emissions basis (the statutory level), and
- for naturally-occurring greenhouse gas pollutants (CO2, N2O and CH4), 100,000 tpy CO2e⁴⁴ for each pollutant expressed as a mass emissions rate.

As discussed in section IV(B), requiring sources to go through the paces of submitting a Title V renewal application triggered solely by greenhouse gas emissions would have no effect on greenhouse gas emission reductions - unless and until the sources are subject to greenhouse

⁴² Alternatively, the agency could use N₂Oe as a reference point for these pollutants.

⁴³ *See* S. Rep. 101-228, at 353 (“[T]he additional workload in managing the air pollution permit system is estimated to be roughly comparable to the burden that States and EPA have successfully managed under the Clean Water Act[,]” under which “some 70,000 sources receive permits, including more than 16,000 major sources”).

⁴⁴ Alternatively, the agency could use N₂Oe as a reference point for these pollutants.

gas emissions standards through final national stationary source regulations or PSD permit conditions. Therefore, the NCC believes that the initial tailored Title V major source thresholds for CO₂, N₂O and CH₄ should be set significantly higher than the initial tailored PSD major source thresholds. Increasing the thresholds from the equivalent of 25,000 tpy CO₂ to the equivalent of 100,000 tpy CO₂e only reduces the percentage of greenhouse gas emissions from sources covered by the permitting requirements on existing sources nationwide by 4% (from 68-64%), while it reduces the administrative burden by an order of magnitude – by 8,811 sources. *See Proposed Tailoring Rule, 74 Fed. Reg. at 55333.* The number of new sources subject to Title V each year would be nearly cut in half, from 128 to 66 sources. *See Proposed Tailoring Rule, 74 Fed. Reg. at 55332.*

Because Title V applicability to greenhouse gases will have little or no effect on greenhouse gas controls (while PSD possibly could, through the application of BACT), there is no reason for consistency between the Title V and PSD thresholds in the Proposed Tailoring Rule. We believe that the empty nature of the Title V requirement itself – in the absence of actual applicable requirements to control greenhouse gas emissions – provides EPA with a sound argument for avoiding the absurd, costly and time-consuming result of a paperwork requirement that has no corresponding environmental benefit.

3. Under Either Title V or PSD, Fugitive Emissions Should Not Be Considered In Assessing Major Source And Major Modification Applicability Except, Perhaps, for Sources Already Required to Include Fugitive Emissions Under the Current PSD and Title V Regulations.

In determining whether a project is a major source (under PSD or Title V) or a major modification (under PSD) for greenhouse gas emissions, the NCC believes that EPA should not consider fugitive emissions. The source categories listed in 40 C.F.R. 52.21(b)(1)(i)(c)(iii) and (i)(vii) and 40 C.F.R. 70.2 (definition of major source) (subsection (2)) may present a limited exception to this rule.⁴⁵ We believe that the language of the Proposed Tailoring Rule should be clarified accordingly.

VI. Should EPA Decide To Apply PSD To Greenhouse Gas Sources, It Must Establish BACT In A Commonsense Manner That Balances Emissions Reductions And Environmental Benefit With The Cost And Administrative Feasibility Of Achieving Such Reductions.

- A. EPA Should Modify Its PSD Regulations To Avoid Adverse Incentives By Providing An Exemption From BACT Requirements, Including Operational Limits, For Projects That Improve Efficiency Or Thermal Performance Of A Unit And/Or Control Greenhouse Gas Emissions.

Historically, to avoid triggering PSD and the requirement to install BACT, plants which have implemented efficiency improvement projects have typically had to accept emissions and

⁴⁵ Alternatively EPA could exclude fugitive emissions of greenhouses gases for purposes of determining applicability of PSD and Title V in all cases, on the basis that it has not undertaken rulemaking under Section 302(j) of the Act which specifically considered greenhouse gases.

operational limits, in order to avoid an emissions increase of any regulated pollutant that would exceed actual, historical baseline emissions (plus small annual significance levels for some compounds). Consequently, current PSD regulations provide a strong disincentive to implement efficiency improvements at or otherwise modernize existing generating facilities. To counter this adverse incentive and to capitalize promptly on near-term emission reduction opportunities, the NCC believes that EPA should modify the PSD regulations to exempt from BACT requirements (without imposing operational limits) projects that: (1) improve a unit's efficiency or thermal performance and deliver net emission reductions when measured on an output basis (e.g., production level or electricity generated), or (2) control greenhouse gas or criteria pollutant emissions. Notably, a similar exemption for emission controls is provided under the New Source Performance Standards regulations at 40 C.F.R. 60.14(e)(5).

Limiting the operations and emissions of a unit which has installed equipment that improves the environmental performance of that unit on a per unit of output basis is one of the most undesirable and counter-intuitive aspects of the PSD requirements. In the electricity sector, efficiency improvement projects are, by definition, designed to increase the amount of electricity produced per unit of fuel burned. As a result, the amount of CO₂ and other emissions per gross megawatt hour of electricity is reduced from that electric generating unit. These more efficient, lower emitting, lower carbon intensive units are the units that should be operating at maximum capacity in order to stabilize and reduce greenhouse gas emissions.

Thus, the NCC believes that EPA should revise its PSD regulations to encourage energy efficiency improvements and greenhouse gas control projects. We believe that if a project increases the efficiency or thermal performance of a unit or facility, such that the resulting intensity of all emissions is reduced on a pounds per gross megawatt hour or production basis, then that project should not trigger the "major modification" provisions of PSD. Furthermore, if the project is specifically for the collection of a greenhouse gas, then a "control project exemption" should apply and exempt any ancillary emissions from the implementation of the control project from triggering PSD on the grounds that it provides a "net environmental benefit." Without such exemptions, the potential to trigger BACT will continue to chill desirable investment in energy efficiency and result in a more carbon intensive energy system.

To the extent EPA determines that such exemptions cannot be provided under the existing Act, we urge the agency to encourage Congress to enact appropriate authorizing legislation. We note, for example, that, as one expert presenter to the EPA Advanced Coal Technology Work Group estimated, near-term cost-effective efficiency upgrades from the electricity sector alone could yield net greenhouse gas emission reductions an order of magnitude greater than California's entire AB 32 program. Likewise, a carbon control exemption will be necessary to encourage investment in carbon capture and sequestration projects at existing units. Such exemptions may not be necessary if Congress enacts comprehensive climate legislation that removes existing impediments (e.g., PSD) to such investment. But until such comprehensive legislation is enacted, EPA should seek discrete clarifying authority, if necessary, to clear the way for such critical energy-efficiency and carbon control investments.

B. EPA Should Establish Fuel- And Technology-Specific Carbon Intensity Presumptive BACT Standards For New And Modified Units For Each Category Of Anticipated Major Sources And Give Sources The Option Of Applying Presumptive BACT Or Case-by-Case BACT

The NCC believes that EPA should establish fuel- and technology-specific performance-based (*i.e.*, carbon intensity) presumptive BACT standards⁴⁶ for new and modified units for each category of anticipated major sources and provide sources the option of applying presumptive BACT or case-by-case BACT.⁴⁷ Under such a program, consistent with its precedent, EPA should evaluate a source as it is proposed and should not require a source to change fuels or alter the basic engineering design as a BACT control option or alternative. EPA would retain the authority to update any presumptive BACT standard as it gains information.⁴⁸

EPA should apply cost-effectiveness criteria for greenhouse gas emissions in a manner that reflects commercially available technologies and that is consistent with carbon prices in existing markets and expected under currently pending federal legislation. The NCC believes that at the present time a carbon reduction cost-effectiveness in the range of approximately \$10/ton CO₂e would be a reasonable benchmark. The cost-effectiveness range should be updated on an ongoing basis as market prices change, and the agency obtains information regarding the cost of various carbon reduction strategies and the commercial feasibility of technology options. Furthermore, EPA should provide by regulation that the cost effectiveness range is to be applied by permitting authorities in evaluating BACT on a case-by-case basis and that control costs exceeding that range would be presumptively economically infeasible.

We believe that the application of PSD to greenhouse gas sources, and the Agency's BACT greenhouse gas carbon intensity performance schedule, should fully sunset upon Congressional or EPA implementation of a comprehensive existing source program (regardless of whether it fully regulates all categories of greenhouse gas sources that could have been subject to EPA's PSD or Title V programs). Such a program would more effectively, and more efficiently, implement the same or comparable performance incentives through a cap and trade or other design.

⁴⁶ EPA has used a similar approach to establish "presumptive Reasonably Available Control Technology" standards under the control technique guidelines program under the statute.

⁴⁷ If the applicant or the permitting authority elects not to proceed under presumptive BACT, then the permitting authority could follow its existing process (*e.g.*, top-down BACT) for establishing BACT based on a consideration of all relevant factors. Another option that the Agency may pursue is to identify appropriate technologies that it believes would qualify for BACT, without setting an actual presumptive standard. However, to the extent a mere technology listing (as opposed to a carbon intensity presumption) requires a more time-consuming and extensive analysis by sources and permitting authorities, it may significantly reduce the streamlining benefits of our recommended presumptive BACT approach. Thus, we recommend using carbon intensity presumptions as the preferred approach and technology findings in cases where insufficient data exist to establish carbon intensity presumptions.

⁴⁸ We note, however, that future changes in BACT standards should not apply to sources with applications that were first deemed complete prior to any change in the standard.

To the extent there is uncertainty regarding the application of presumptive BACT to greenhouse gas sources, then in addition to ongoing updates, EPA can consider a more formal reassessment of this program should Congress not promptly enact comprehensive climate legislation in a manner that fully displaces the PSD program for such sources. At such future stages, EPA could consider such factors as anticipated commercialization of various greenhouse gas reduction technologies, including carbon capture and sequestration.⁴⁹

Following the pollutant-specific approach to PSD applicability outlined in section V(A), we believe that the Agency also should set each BACT standard (whether presumptive or case-by-case) on a pollutant-specific basis. The applicability and BACT-setting functions will establish the performance expectations of each source. Once the permit's performance requirements are so established, then we recognize that there may be both economic and environmental benefits of providing the source the option of meeting the permit requirement by averaging (or trading) across the full range of greenhouse gases and, as appropriate, across or outside the facility. We believe that such flexibility is wholly appropriate at the mitigation stage. Furthermore, providing such compliance flexibility would provide the agency with valuable experience in a transition to a national emissions trading program because it would develop the necessary accounting protocols and enforcement tools to underpin such a program.

In setting presumptive BACT standards for new and modified units for each category of anticipated major sources, given the immediate and transitional nature of the anticipated PSD/BACT program, we believe it is important for EPA to use fuel- and technology-specific⁵⁰ carbon intensity (*i.e.*, energy efficiency) standards, as opposed to wholly neutral standards, to avoid unintended economic disruption or wealth transfers. We believe the standards should be set on an interim basis and should be updated on a periodic basis as warranted, based on emerging data regarding any of the factors relevant to a BACT determination.⁵¹ For certain categories, as appropriate, we encourage EPA to adopt New Source Performance Standards for greenhouse gas emissions, under §111, unless and until Congress or EPA has established an existing source greenhouse gas program, in which case, we believe the PSD program should sunset.

⁴⁹ As discussed in section IV(B)(4), and as just noted above, however, the BACT standard applicable at the time that the application is deemed complete would apply for purposes of any administrative or judicial review of the permit. Thus, if and when the presumptive BACT approach sunsets, any obligations already reflected in an existing permit or complete permit application would remain constant (stated differently, the permit or permit application could not be reopened).

⁵⁰ The Congressional or EPA existing source program, which would ultimately displace this near-term transitional PSD/BACT program, may consider and, to the extent appropriate, encourage shifts in fuels and technologies as part of a more integrated consideration of strategic energy and environmental policies. The indirect pricing of greenhouse gas emissions through the compliance portions of this program would have a material effect in encouraging the rapid implementation of low-carbon technologies, carbon sinks, energy storage technologies, demand side strategies and other carbon reducing (or sequestering) outcomes.

⁵¹ Again, as discussed in section IV(B)(4), existing permits and complete permit applications could not be reopened to apply new standards.

Given the unique qualities of greenhouse gases as global pollutants, the challenges of regulating them under the ill-suited PSD program, and the fragility of the US economy - *compliance flexibility will be critical to the success of the BACT program (whether presumptive or case-by-case)*. The NCC believes that any facility with equipment subject to BACT should have the option of demonstrating compliance with the presumptive BACT standard at the affected equipment on an annual average performance basis. Such facilities should be authorized to compensate for any deviation above (*i.e.*, not in compliance with) the applicable performance standard by applying appropriate credit from qualified on- and off-site greenhouse gas reductions (*e.g.*, elsewhere at the facility), at the customer (*e.g.*, demand side), or through EPA-approved offset protocols. In addition, at least until EPA can make a formal finding, subject to notice and comment, that available offsets exist to provide sufficient cost containment, the facility also should have the option of purchasing compliance credits from an EPA-administered reserve credit pool at a predetermined price that reflects EPA's upper bound cost-effectiveness for BACT determinations.

In this time of economic uncertainty, if EPA goes forward and regulates greenhouse gases under PSD, it is of the utmost importance that the Agency does so in a manner that is supportive of, and does not chill, investment and economic development. To that end, the NCC believes that the Agency must clearly specify in the final Tailoring Rule an appropriately protective process for those sources that elect to proceed with construction. If the application of presumptive BACT is challenged by a third party, we believe the applicant should be able to elect to proceed to construct and operate at the performance levels defined by the presumptive BACT standard. If the permitting authority's final action, following available judicial review, results in a performance standard more stringent than the presumptive BACT level, then that more stringent standard should apply, but only for the periods subsequent to the final action following judicial review. The applicant should also continue to have available the compliance flexibility options listed above (*e.g.*, qualified offsets and access to an EPA-administered reserve pool of compliance credits at a ceiling price that reflects the upper bound of cost used by EPA to determine cost-effectiveness for sources subject to PSD).

Additionally, the NCC believes that EPA must adopt a commonsense approach to control of criteria pollutants, if it decides also to regulate greenhouse gas emissions under PSD. First and foremost, we believe it is important for the Agency to state clearly in the final Tailoring Rule that there is no condition under which a source that has controls in place for criteria pollutants (*e.g.*, scrubbers), that then triggers PSD for a greenhouse gas, must go back and make changes to its existing controls. While we doubt EPA would promote such an economically disastrous policy, we are concerned that without appropriate regulatory signals and protections, litigious parties may attempt to challenge permits on this basis. While such challenges would be meritless, as discussed in section IV(B)(4), they would nonetheless have a chilling effect on investment. Further to this point, we believe that EPA should also state in the final Tailoring Rule that if a source triggers PSD for greenhouse gases, it would not also trigger PSD for criteria pollutants from an existing major (NAAQS pollutant) source, unless the modification independently caused a significant net emissions increase for criteria pollutants.

Finally, we believe that the Agency must adopt a sensible policy with respect to control technologies. As discussed in the prior section, we believe sources that pursue such controls should be exempt from PSD entirely. To the extent the EPA declines to follow this approach, we

believe that, at a minimum, the Agency should state that (1) any increases in criteria pollutants from greenhouse gas control devices are presumed to be so minimal that it would not be cost-effective to control them, and thus, additional controls to capture criteria pollutants are presumptively unnecessary, and (2) it is presumed that it would not be cost-effective to control any increase in greenhouse gas emissions resulting from criteria pollutant controls, and thus, additional controls to capture greenhouse pollutants are presumptively unnecessary.

VII. Should EPA Decide to Implement PSD and Title V With Respect to Greenhouse Gases, It Should Develop Effective Streamlining Techniques To Reduce The Administrative Burden Of Applying PSD And Title V To Greenhouse Gas Emissions.

The NCC agrees with EPA that effective streamlining techniques, such as a redefinition of potential to emit (“PTE”) and use of general permits and permits-by-rule, may reduce the administrative burden of applying PSD and Title V to greenhouse gas emissions. We encourage the Agency to implement such techniques as they are developed, rather than waiting until the end of the first phase of tailored regulation.

- A. EPA Should Redefine PTE To Reflect A Value Closer To Actual Emissions As Quickly As Possible; While This Effort Is Underway, Actual Emissions Should Be Used To Trigger Applicability Of PSD And Title V.**

The NCC supports EPA’s efforts to redefine PTE to reflect a value closer to actual emissions. In practice, few stationary sources operate at their maximum capacity. However, since few stationary source categories are subject to legal restrictions on their operations, their PTE is still calculated as if they operate at maximum capacity 24 hours per day, seven days per week and emit during that entire time, whether or not they operate in this fashion.

The NCC recommends that in the first phase of application of PSD and Title V under the Tailoring Rule, as PTE is being redefined, actual emissions should be used to trigger applicability, instead of PTE. At a minimum, we believe that EPA should implement a generous transition policy for source with actual emissions below the PTE thresholds, as described in section IV(B)(3). Additionally, we believe that any “state-enforceable limits that are enforceable as a practical matter” should be explicitly recognized as limiting PTE, without the need to eventually upgrade such requirements to “federal enforceability” in a permit.

The NCC supports EPA’s efforts to evaluate and consider adopting or encouraging state permitting authorities to adopt, in lieu of individual minor source permitting, general rules for source categories that include many sources with actual greenhouse gas emissions below, but, absent such rules, PTE above, major source thresholds. These general rules could take the form of operational limitations, provided such limitations provide a streamlined method to allow a source to operate for longer hours or at a greater throughout upon request to the permitting agency, and provided such limitations do not apply to energy efficiency and pollution control improvements, as discussed in section VI(A). Such an approach would reduce emissions of greenhouse gases and may significantly reduce the number of sources subject to PSD and Title V and ease administration of those programs.

B. EPA Should Establish General Permits Or Permits-By-Rule Under Both Title V And PSD For As Many Source Categories As Appropriate And Feasible.

The NCC supports EPA's efforts to establish general permits or permits-by-rule under both Title V and PSD for as many source categories as appropriate and feasible. We encourage EPA to explore opportunities to reduce the transactional costs and time required by both options. General permits and permits-by-rule have significant potential to reduce the burden of both programs on affected sources and permitting authorities. To this end, we believe that the PSD requirement that permits be issued after "a public hearing," §165(a)(2), could be effectively modeled on the similar process for Title V. *See* §504(d) (providing that "the permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources"); 40 C.F.R. §70.6(d) (providing that permitting authorities may establish general permits); 40 C.F.R. §70.7(h) (requiring notice and comment); 40 C.F.R. §71.6(d).

General permitting and permitting-by-rule are now better suited to the PSD program than they have been historically. As discussed in section V(B) above, a Presumptive BACT process provides an effective and efficient alternative to EPA's traditional case-by-case approach, in the context of greenhouse gas emissions. Additionally, other procedural requirements under PSD that have in the past complicated a general permitting or permit-by-rule approach are not applicable in the context of greenhouse gases, (*e.g.*, Class I consultation and the analysis of air quality and other potential impacts under § 165(e)), as discussed in section III(B), above.

VIII. EPA Should Take Affirmative Steps To Harmonize State Permitting Programs With New Tailored Federal Regulations And Allow States Sufficient Time To Promulgate Their Own Tailoring Rules.

The NCC believes that EPA should take more affirmative steps to harmonize state permitting programs with new tailored federal regulations than those proposed in the Tailoring Rule. EPA incorrectly assumes that each SIP and state Title V operating program that implements directly or by reference federal PSD and Title V regulations will automatically incorporate the revised national regulations under the Proposed Tailoring Rule. To the contrary, many states have structured their regulations such that any changes to the federal regulations will require express action to revise state law, regardless of whether the change is to a numerical applicability threshold, the pollutants covered by regulation, or merely to the dates by which the rules are incorporated by reference. As noted in section II(C), approximately 38 states will need to revise their regulations to give effect to the Tailoring Rule. Thus, it is not just states that incorporate numerical national standards or that list specific applicable pollutants that will need to revise their regulations.

While we support EPA's efforts to limit or conform its prior approvals of state programs through §§ 301(a)(1) and 110(k)(6) with respect to applicability thresholds, and to conduct a separate rulemaking to conform SIPs and Title V programs that list specific applicable pollutants, we believe more deliberate action is required by EPA. The Agency should take affirmative steps to ensure that states immediately (1) either revise their regulations to raise existing lower thresholds or demonstrate that they have adequate resources and funding to manage their programs utilizing those existing lower thresholds and (2) revise their regulations to cover all newly regulated pollutants. In the absence of such action, sources remain subject to

current lower thresholds and regulated pollutants as a matter of state law. EPA cannot rely on mere encouragement to spur the states to revise their regulations in a timely fashion.

To this end, we believe that EPA should conduct separate rulemakings in the near term to thoroughly conform SIPs and Title V programs and finalize these rulemakings to take effect by the time EPA finalizes the Light Duty Vehicle Rule. We believe that EPA should issue a Notice of Determination (“NOD”), under § 502(i)(1), and a SIP call, under § 110(k)(5), to all states concurrent with its finalization of the Proposed Tailoring Rule, unless a state can demonstrate that it has commenced and is committed to finalizing any changes necessary under state law to exempt sources from its major source operating permit and PSD programs consistent with the Proposed Tailoring Rule. Issuing a NOD and a SIP call to require states to demonstrate that they have adequate personnel and funding to administer their permit programs at statutory levels, or otherwise to submit a permit program revision that raises thresholds to EPA’s tailored levels or some other level commensurate with state personnel and funding, is necessary to maintain an even playing field among the states. We believe that EPA should not finalize any action that would trigger regulated pollutant status for any greenhouse gas unless and until each state program has been amended.

On the matter of fees, we support EPA’s position that it is not necessary to amend the federal regulations to establish presumptive fees that account for greenhouse gas emissions or to mandate revisions to fee regulations in states that did not adopt the presumptive fee approach. In fact, we believe that EPA should go further than it proposes and prohibit presumptive and/or supplementary fees for greenhouse gas emissions. Current fees on traditional “regulated pollutants” emitted from sources newly covered by Title V should suffice to cover the costs of permitting.

IX. Conclusion

The National Climate Coalition appreciates the opportunity to submit these comments and looks forward to providing further input. We encourage EPA to work with Congress towards prompt and appropriate national greenhouse gas legislation. If EPA must continue to move ahead with rulemakings under the Clean Air Act, then we urge the Agency to exercise its discretion to limit application of those sections of the statute that would impose unintended economic harm and divert scarce public and private resources without commensurate benefit in stabilizing global greenhouse gas concentrations. As appropriate, in the course of regulating greenhouse gases under the statute, EPA also should seek prompt Congressional confirmation that such harmful provisions may be so limited or need not be implemented to address climate change.

Statement regarding these comments submitted by the *National Climate Coalition*:

*The positions described in these comments regarding EPA’s Proposed Tailoring Rule are intended for this context only. Different positions may be appropriate for other programs under consideration at the national, international or other (e.g., state or regional) level. Furthermore, because this proposal is an integrated package of recommendations that reconciles often conflicting individual company perspectives, no particular position should be attributed to any individual **National Climate Coalition***

member. The Coalition offers these comments recognizing that EPA will receive a variety of comments from other stakeholders. We look forward to continued dialogue with all stakeholders and commit to give serious consideration to and to comment upon constructive ideas offered by others.

Counsel: Robert A. Wyman
 Claudia M. O'Brien
 Kellie N. Ortega
 Latham & Watkins LLP
 555 Eleventh Street, N.W.
 Washington, DC 20004
 (202) 637-2200