Nos. 12-1146, 12-1248, 12-1254,
12-1268, 12-1269, 12-1272

In The
Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR PETITIONERS SOUTHEASTERN LEGAL FOUNDATION, INC., ET AL., NO. 12-1268

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ADDITIONAL PETITIONERS

U.S. Representative Michele Bachmann; U.S. Representative Joe Barton; U.S. Representative Marsha Blackburn; U.S. Representative Kevin Brady; U.S. Representative Paul Broun; U.S. Representative Phil Gingrey; U.S. Representative Steve King; U. S. Representative Jack Kingston; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; U.S. Representative John Shimkus; U.S. Representative Lynn Westmoreland; The Langdale Company; Langdale Forest Products Company; Langdale Timber Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Competitive Enterprise Institute; FreedomWorks; and The Science and Environmental Policy Project.

QUESTION PRESENTED

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

RULE 24.1(b) STATEMENT

The parties to the proceedings below were as follows:

***Challenges to 75 Fed. Reg. 17,004 (Apr. 2, 2010) (Triggering Rule)*:**

1. Petitioners Southeastern Legal Foundation, Inc.; U.S. Representative Michele Bachmann; U.S. Representative Marsha Blackburn; U.S. Representative Kevin Brady; U.S. Representative Paul Broun; U.S. Representative Phil Gingrey; U.S. Representative Steve King; U.S. Representative Jack Kingston; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; U.S. Representative John Shimkus; U.S. Representative Lynn Westmoreland; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Competitive Enterprise Institute; FreedomWorks; and The Science and Environmental Policy Project petitioners on review, were petitioners below.

2. Respondent United States Environmental Protection Agency, respondent on review, was a respondent below.

RULE 24.1(b) STATEMENT – Continued

3. Additional petitioners below, who are nominal respondents on review, were Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Massey Energy Company; Alpha Natural Resources, Inc.; Clean Air Implementation Project; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; Center for Biological Diversity; Peabody Energy Company; American Farm Bureau Federation; National Mining Association; Utility Air Regulatory Group; Chamber of Commerce of the United States of America; Missouri Joint Municipal Electric Utility Commission; National Environmental Development Association's Clean Air Project; Ohio Coal Association; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Federation of Independent Business; National Oilseed Processors Association; National Petrochemical & Refiners Association; North American Die Casting Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum

Association; West Virginia Manufacturers Association; Wisconsin Manufacturers and Commerce; State of Texas; State of Alabama; State of South Carolina; State of South Dakota; State of Nebraska; State of North Dakota; Commonwealth of Virginia; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; Haley Barbour, Governor of the State of Mississippi; and Portland Cement Association.

4. Petitioner-intervenor below who is nominal respondent on review, was Louisiana Department of Environmental Quality.

5. Respondents-intervenors below who are nominal respondents on review, were Environmental Defense Fund; Natural Resources Defense Council; Sierra Club; Indiana Wildlife Federation; Michigan Environmental Council; Ohio Environmental Council; National Mining Association; American Farm Bureau Federation; Peabody Energy Company; Ohio Coal Association; National Environmental Development Association's Clean Air Project; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Packaging Institute; Independent Petroleum Association of America; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of

RULE 24.1(b) STATEMENT – Continued

Home Builders; National Federation of Independent Business; National Oilseed Processors Association; National Petrochemical and Refiners Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce; Utility Air Regulatory Group; Coalition for Responsible Regulation, Inc.; Industrial Minerals Association-North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Company; Alpha Natural Resources, Inc.; and Clean Air Implementation Project.

6. A respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy, Administrator, United States Environmental Protection Agency.

***Challenges to 75 Fed. Reg. 31,514 (June 3, 2010) (Tailoring Rule)*:**

1. Petitioners Southeastern Legal Foundation, Inc.; U.S. Representative Michele Bachmann; U.S. Representative Marsha Blackburn; U.S. Representative Kevin Brady; U.S. Representative Paul Broun; U.S. Representative Phil Gingrey; U.S.

RULE 24.1(b) STATEMENT – Continued

Representative Steve King; U.S. Representative Jack Kingston; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; U.S. Representative John Shimkus; U.S. Representative Lynn Westmoreland; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. – OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.; Competitive Enterprise Institute; FreedomWorks; and The Science and Environmental Policy Project, petitioners on review, were petitioners below.

2. Respondent United States Environmental Protection Agency, respondent on review, was a respondent below.

3. Additional petitioners below, who are nominal respondents on review, were Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Massey Energy Company; Alpha Natural Resources, Inc.; The Ohio Coal Association; American Iron and Steel Institute; Gerdau Ameristeel US Inc.; Chamber of Commerce of the United States of America; Georgia Coalition for Sound Environmental Policy,

RULE 24.1(b) STATEMENT – Continued

Inc.; National Mining Association; American Farm Bureau Federation; Peabody Energy Company; Center for Biological Diversity; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; South Carolina Public Service Authority; Mark R. Levin; Landmark Legal Foundation; National Alliance of Forest Owners; American Forest & Paper Association; Environmental Development Association's Clean Air Project; State of Alabama; State of North Dakota; State of South Dakota; Haley Barbour, Governor of Mississippi; State of South Carolina; State of Nebraska; Utility Air Regulatory Group; Missouri Joint Municipal Electric Utility Commission; Sierra Club; Clean Air Implementation Project; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Independent Petroleum Association of America; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Oilseed Processors Association; National Petrochemical and Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufacturers & Commerce; National Federation of Independent Business; Portland Cement Association; Louisiana Department of Environmental Quality; Rick Perry, Governor of Texas; Greg Abbott, Attorney

RULE 24.1(b) STATEMENT – Continued

General of Texas; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas Public Utilities Commission; Texas Railroad Commission; Texas General Land Office; and State of Texas.

4. Petitioners-intervenors below who are nominal respondents on review, were National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; National Association of Home Builders; National Oilseed Processors Association; National Petrochemical and Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers & Commerce.

5. Respondents-intervenors below who are respondents on review, were Natural Resources Defense Council; Environmental Defense Fund; Sierra Club; Conservation Law Foundation, Inc.; Georgia Forest Watch; Natural Resources Council of Maine; Wild Virginia; State of New York; State of California; State of Illinois; State of Iowa; State of Maine; State of Maryland; Commonwealth of Massachusetts; State of New Hampshire; State of New Mexico; State of North Carolina; State of Oregon; Commonwealth of Pennsylvania Department of Environmental Protection; State of Rhode Island; South Coast Air Quality

RULE 24.1(b) STATEMENT – Continued

Management District; Center for Biological Diversity; National Association of Manufacturers; American Frozen Food Institute; American Petroleum Institute; Brick Industry Association; Glass Association for North America; Independent Petroleum Association for America; Indiana Cast Metals Association; Michigan Manufacturers Association; National Association of Home Builders; National Oilseed Processors Association; National Petrochemical and Refiners Association; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; Wisconsin Manufactures & Commerce; Peabody Energy Company; National Association of Manufacturers; Corn Refiners Association; National Environmental Development Association; Clean Air Project; and Utility Air Regulatory Group.

6. A respondent below, who is a nominal respondent on review, was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy, Administrator, United States Environmental Protection Agency.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Southeastern Legal Foundation, Inc. (SLF) is a non-profit Georgia corporation and constitutional public interest law firm and policy center that advocates limited government, individual economic freedom, and the free enterprise system in the courts of law and public opinion. SLF has no parent companies. No publicly held corporation has ten percent or greater ownership interest in SLF.

Petitioner the Langdale Company is a Georgia corporation and is the parent company for a diverse group of businesses, some of which were described in Petitioners' Petition. The Langdale Company has no parent companies. No publicly held corporation has ten percent or greater ownership in the Langdale Company.

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

Petitioner Langdale Farms, LLC is a Georgia Corporation in the business of producing soybeans, peanuts, cotton, pecans, tomatoes, hay, cattle, and fish. Langdale Farms, LLC is a wholly owned subsidiary of the Langdale Company. No publicly held corporation has ten percent or greater ownership in Langdale Farms, LLC.

RULE 29.6 DISCLOSURE STATEMENT
– Continued

Petitioner Langdale Fuel Company is a Georgia corporation in the business of providing fuel and lubricants for the Langdale Company's needs. Langdale Fuel Company is a wholly owned subsidiary of the Langdale Company. No publicly held corporation has ten percent or greater ownership in Langdale Fuel Company.

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

Petitioner Langdale Ford Company, Inc. is a Georgia corporation in the business of selling and servicing automobiles and trucks, including for commercial fleets. Langdale Ford Company is a wholly owned subsidiary of the Langdale Company. No publicly held corporation has ten percent or greater ownership in Langdale Ford Company.

Petitioner Langboard, Inc. – OSB is a Georgia corporation in the business of producing oriented strand board, which is used as flooring, roofing, and siding in the home construction industry. Langboard, Inc. – OSB is a wholly owned subsidiary of the Langdale Company. No publicly held corporation has

RULE 29.6 DISCLOSURE STATEMENT
– Continued

ten percent or greater ownership in Langboard, Inc. – OSB.

Petitioner Langboard, Inc. – MDF is a Georgia corporation in the business of producing medium density fiberboard, which is used, among other things, in the construction of molding, flooring, and furniture. Langboard, Inc. – MDF is a wholly owned subsidiary of the Langdale Company. No publicly held corporation has ten percent or greater ownership in Langboard, Inc. – MDF.

Petitioner Georgia Motor Trucking Association, Inc. is a Georgia corporation and trade association for the trucking industry in Georgia. The mission of the Georgia Motor Trucking Association is to promote: reasonable laws; evenhanded, common-sense administration; equitable and competitive fees and taxes; a market, political and social environment favorable to the trucking industry; and good citizenship among the people and companies of Georgia's trucking industry. It represents more than 400 for-hire carriers, 400 private carriers, and 300 associate members. Georgia Motor Trucking Association, Inc. has no parent corporation. No publicly held corporation has ten percent or greater ownership interest in the Georgia Motor Trucking Association.

Petitioner Collins Industries, Inc. is a Georgia corporation in the business of transporting building

RULE 29.6 DISCLOSURE STATEMENT
– Continued

products. Collins Industries, Inc. has no parent corporation. No publicly held corporation has ten percent or greater ownership interest in Collins Industries.

Petitioner Collins Trucking Company, Inc. is a Georgia corporation in the business of transporting pine and hardwood logs in Georgia. Collins Trucking Company, Inc. is a subsidiary of Collins Industries, Inc. No publicly held corporation has ten percent or greater ownership interest in Collins Trucking Company, Inc.

Petitioner Kennesaw Transportation, Inc. is a Georgia corporation in the business of truckload long-haul transportation of goods across the United States. Kennesaw Transportation, Inc. has no parent company. No publicly held corporation has a ten percent or greater ownership interest in Kennesaw Transportation, Inc.

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

RULE 29.6 DISCLOSURE STATEMENT
– Continued

No publicly held corporation has a ten percent or greater ownership in J&M Tank Lines, Inc.

Petitioner Southeast Trailer Mart, Inc. is a Georgia corporation in the business of selling and servicing semi-trailers. Southeast Trailer Mart, Inc. has no parent company. No publicly held company has a ten percent or greater ownership in Southeast Trailer Mart, Inc.

Petitioner Georgia Agribusiness Council, Inc. is a Georgia corporation whose mission is to advance the business of agriculture and promote environmental stewardship in Georgia. The Georgia Agribusiness Council, Inc. has no parent company. No publicly held company has a ten percent or greater ownership in Georgia Agribusiness Council, Inc.

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

Petitioner FreedomWorks is a non-profit 501(c)(4) corporation organized under the laws of the District of Columbia for the purpose of promoting individual liberty, consumer choice and competition, and has

RULE 29.6 DISCLOSURE STATEMENT
– Continued

over 870,000 members nationwide. FreedomWorks has no parent companies, and no publicly held corporation has a ten percent or greater ownership interest in FreedomWorks.

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

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 24.1(b) STATEMENT	ii
RULE 29.6 DISCLOSURE STATEMENT	x
TABLE OF AUTHORITIES	xviii
PRELIMINARY STATEMENT	1
OPINIONS AND ORDERS BELOW	2
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. The text, structure, and background of the Clean Air Act make it plain that Congress has not authorized EPA to regulate GHG emissions under PSD and Title V	7
A. *Brown & Williamson* is the correct framework for reviewing EPA's action	8
B. The *Brown & Williamson* analysis shows that Congress foreclosed regulation of GHG emissions under PSD and Title V	9
II. EPA's action depended on a gross misuse of canons of statutory interpretation	18

TABLE OF CONTENTS – Continued

Page

A. The "absurd results" doctrine does not authorize an administrative override of congressional intent 18

B. EPA cannot rely on the concept of "administrative necessity" to establish a new regulatory program that Congress has not authorized 21

III. EPA's actions create a grave threat to the constitutional separation of executive and legislative powers 23

A. Separation of powers is essential to the constitutional design 24

B. The Act can and must be interpreted to avoid EPA's separation of powers violation 26

CONCLUSION 29

APPENDIX

Relevant Sections of the Clean Air Act, 42 U.S.C. § 7401, *et seq.* .... App. 1

TABLE OF AUTHORITIES

Page

CASES

Ala. Power Co. v. Costle,
636 F.2d 323 (D.C. Cir. 1980)..................................21

Chevron U.S.A., Inc. v. NRDC, Inc.,
467 U.S. 837 (1984)..8

Clinton v. City of New York,
524 U.S. 417 (1998).....................................23, 24, 25

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988)...26, 27

Envtl. Def. Fund, Inc. v. EPA,
636 F.2d 1267 (D.C. Cir. 1980)................................21

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000)..*passim*

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
130 S. Ct. 3138 (2010)...25

Green v. Bock Laundry Mach. Co.,
490 U.S. 504 (1989)..19

Griffin v. Oceanic Contractors, Inc.,
458 U.S. 564 (1982)...14, 20

Holy Trinity Church v. United States,
143 U.S. 457 (1892)...19, 20

Horn v. Comm'r of Internal Rev.,
968 F.2d 1229 (D.C. Cir. 1992)................................19

Indus. Union Dep't, AFL-CIO v. API,
448 U.S. 607 (1980)..27

TABLE OF AUTHORITIES – Continued

Page

INS v. St. Cyr,
533 U.S. 289 (2001) ... 27

Massachusetts v. EPA,
549 U.S. 497 (2007) ... 7

MCI Telecomms. Corp. v. AT&T Co.,
512 U.S. 218 (1994) ... 9

Nixon v. Mo. Mun. League,
541 U.S. 125 (2004) ... 19

Pub. Citizen v. U.S. Dep't of Justice,
491 U.S. 440 (1989) ... 19

Sierra Club v. EPA,
719 F.2d 436 (D.C. Cir. 1983) ... 21

Solid Waste Agency of No. Cook County v. Army Corps of Eng'rs,
531 U.S. 159 (2001) ... 27

Train v. Colo. Pub. Interest Res. Group,
426 U.S. 1 (1976) ... 19

United States v. Am. Trucking Ass'ns,
310 U.S. 534 (1940) ... 19

United States v. Brown,
333 U.S. 18 (1948) ... 20

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) ... 1, 24, 25

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 1 ... 3

TABLE OF AUTHORITIES – Continued

Page

U.S. Const. art. II, § 3, cl. 1 ....3, 25, 26

U.S. Const. art. II, § 3, cl. 4 ....3, 26

STATUTES

28 U.S.C. § 1254(1) 3

Clean Air Act, 42 U.S.C. § 7401, *et seq.* ....*passim*

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009) 10

Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17004 (Apr. 2, 2010) 6

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514 (June 3, 2010) ....*passim*

Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354 (July 30, 2008) 11

OTHER AUTHORITIES

Abigail R. Moncrieff, Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Non-interference (or Why Massachusetts v. EPA Got It Wrong), 60 Admin. L. Rev. 593 (2008) 16

Page

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Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009) 17

Climate Stewardship Act of 2007, H.R. 620, 110th Cong. (2007) 16

Climate Stewardship and Innovation Act of 2007, S. 280, 110th Cong. (2007) 16

Greenhouse Gas Registry Act, H.R. 232, 111th Cong. (2009) 17

Marlo Lewis, EPA Permitting of Greenhouse Gases: What Does Legislative History Reveal about Congressional Intent?, *available at* http://www.globalwarming.org/2013/12/03/epa-permitting-of-greenhouse-gases-what-does-legislative-history-reveal-about-congressional-intent/#more-18134 (last visited Dec. 6, 2013) 16

TABLE OF AUTHORITIES – Continued

Page

PSD and Title V Permitting Guidance for Greenhouse Gases, *available at* http://www.epa.gov/nsr/ghgdocs/ghgpermitting-guidance.pdf (last visited Dec. 6, 2013) 12, 13

The Federalist Nos. 47-51 (James Madison) 23

PRELIMINARY STATEMENT

This case involves perhaps the most audacious seizure of pure legislative power over domestic economic matters attempted by the Executive Branch since *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). EPA's assumption of authority to "tailor" stationary source permitting to target a select universe of greenhouse gas (GHG) emitters on a scale and schedule of the Agency's own choosing directly contravenes the carefully chosen numerical permitting thresholds mandated by Congress in the Clean Air Act. This action is an unabashed assault on the foundational structure of the Constitution, and this Court should confront EPA's executive overreach and firmly invalidate it.

Answering the question before the Court in this case calls for more than routine judicial review of an administrative action. In a moment of unusual candor, EPA acknowledged that regulating GHG emissions under the Act's "Prevention of Significant Deterioration" (PSD) and Title V provisions would inevitably lead to "absurd results" involving "undue costs for sources and impossible administrative burdens for permitting authorities." *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514 (June 3, 2010) [hereinafter Tailoring Rule], Joint Appendix [hereinafter JA] 418-19. Further, these extreme results could never have been contemplated by Congress and would actually "undermine" the "congressional purposes" behind the PSD program and Title V of the Clean Air Act. *Id*. In

light of those acknowledged consequences, the proper template for analyzing and resolving the question of statutory interpretation presented here is supplied by this Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

In *Brown & Williamson,* this Court held that Congress had not authorized FDA to regulate tobacco products under the Food, Drug, and Cosmetic Act (FDCA), given the extreme consequences that would follow and the history of congressional actions addressing tobacco issues. The *Brown & Williamson* framework should lead the Court to similarly conclude here that Congress foreclosed PSD and Title V regulation of GHG emissions. EPA's GHG regulatory program is foreclosed by (1) the text and structure of the Clean Air Act read as a whole, (2) the legislative history of the Act, and (3) the "absurd results" and administrative impossibility that EPA itself conceded would necessarily follow if the PSD and Title V mandatory permitting thresholds were applied to GHG emissions.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 684 F.3d 102 and is reproduced at JA 191-267. The unpublished order denying rehearing en banc is reproduced at JA 139-90.

JURISDICTION

The Court of Appeals issued its opinion on June 26, 2012, and denied petitions for rehearing en banc by order dated December 20, 2012. Nine groups of petitioners filed timely petitions for writs of certiorari with this Court, and on October 15, 2013, this Court granted six of the petitions. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I of the Constitution of the United States provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1.

Article II of the Constitution provides: The President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient," and "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3, cl. 1 & cl. 4.

Relevant provisions of the Clean Air Act, 42 U.S.C. § 7471-7476, 7479, 7602(j) are reproduced at 1-30 of the appendix to this brief. Relevant rulemakings

of the U.S. Environmental Agency are reproduced at JA 268-1331.

STATEMENT OF THE CASE

Petitioners Southeastern Legal Foundation, Inc., *et al.,* hereby incorporate by reference, as if set forth in this brief, the Statement of the Case contained in the Opening Brief of Petitioners Chamber of Commerce of the United States of America, State of Alaska, and American Farm Bureau Federation (Chamber Brief) and the Statutory and Regulatory Background contained in the Brief of the Utility Air Regulatory Group (UARG Brief).

SUMMARY OF THE ARGUMENT

Congress has not authorized EPA to regulate GHG emissions under PSD and Title V. This Court's decision in *Brown & Williamson* is on all fours with the present case and provides the controlling framework for that conclusion. The text and structure of the Clean Air Act, read as a whole, plainly foreclose EPA's conclusion that PSD and Title V permitting requirements are triggered by the Agency's separate decision to regulate GHG emissions from new motor vehicles. EPA's recognition that applying the Act's PSD and Title V provisions to GHGs would produce "absurd results" and "impossible administrative burdens" that could never have been contemplated or

intended by Congress resoundingly confirms that EPA has no such authority. As in *Brown & Williamson*, there is a rich legislative backdrop of failed climate change legislation that further supports this reading of the statute.

EPA's contrary interpretation of the statute, which depended upon an assertion of unbounded administrative discretion, must be rejected as beyond the limits of proper executive authority under the Constitution. EPA misapplied the "absurd results" and "administrative necessity" canons of construction in an agenda-driven effort to aggrandize its own discretionary policy-making power at the expense of Congress. In doing so, it effected an intolerable invasion of Congress's domain that threatens to obliterate the line dividing executive from legislative power. This breakdown in the constitutional separation of powers must be avoided where, as here, there are other reasonable readings of the statute that preserve and respect the Constitution's great bulwarks.

ARGUMENT

There are two core rulings at issue in the orders under review. First, EPA ruled that the Clean Air Act compels PSD and Title V regulation of GHG emissions as an unavoidable result of the Agency's decision to regulate GHG emissions from new motor vehicles. *See* Reconsideration of Interpretation of

Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17004 (Apr. 2, 2010) [hereinafter Triggering Rule], JA 705-92. Second, though it conceded that applying the Act's mandatory numerical permitting thresholds to GHGs would produce absurd and impossible consequences never intended by Congress, EPA chose to relieve those consequences by rewriting those thresholds and constructing a regulatory framework far different from that carefully specified in the Act. In the process, EPA created a new permitting regime that would be rolled out on a scale and schedule more politically palatable and more administratively convenient. Tailoring Rule, JA 268-682.

The first ruling is based on a misconstruction of the Clean Air Act. A proper reading of the Act as a whole confirms that the statute forecloses GHG regulation under PSD and Title V. The second ruling plainly invades the legislative domain reserved exclusively to Congress under our constitutional structure. For the sake of preserving that founding structure, this Court should decisively reject EPA's effort to assume for itself unbounded law-making discretion.

I. The text, structure, and background of the Clean Air Act make it plain that Congress has not authorized EPA to regulate GHG emissions under PSD and Title V.

In *Brown & Williamson*, this Court addressed another federal agency's response to a pressing national issue – the public health problems attendant to tobacco use. Frustrated by Congress's refusal to enact legislation comprehensively addressing the issue, FDA took the dramatic step of attempting to regulate the promotion, labeling, and sale of tobacco products under the FDCA, by interpreting the term "drug" under the Act to include nicotine and the term "drug delivery device" to encompass cigarettes and smokeless tobacco. *See Brown & Williamson*, 529 U.S. at 127-29. The Court's approach to FDA's assertion of regulatory authority over tobacco products has direct relevance in the present case and should control the outcome here.[1]

[1] The grounds stated in *Massachusetts v. EPA*, 549 U.S. 497 (2007), for not applying *Brown & Williamson* to foreclose EPA from regulating GHG emissions in new motor vehicles do not hold in the present case. In *Massachusetts*, the Court observed that there had been no showing that the regulation of GHG in new motor vehicles would produce "extreme measures" and counter-intuitive results or that such regulation would be incompatible with the expressed purposes of Congress. *See* 549 U.S. at 530-31. Here, by contrast, EPA acknowledges that extending the PSD and Title V permitting requirements as written to GHG emissions would generate "absurd results" that would "vitiate much of the purpose" of the permitting thresholds and "would directly

(Continued on following page)

A. *Brown & Williamson* is the correct framework for reviewing EPA's action.

In striking down FDA's action under step one of *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), the Court in *Brown & Williamson* did not probe for subtle ambiguities in the statutory terms. Rather, the Court looked to the overall structure of the statutory regime for drug regulation and read it against the background of other congressional enactments addressing tobacco products. *See Brown & Williamson*, 529 U.S. at 132-33, 142-43. First, the Court noted that "[t]hese findings [that tobacco products are harmful] logically imply that, if tobacco products were 'devices' under the FDCA, the FDA would be required to remove them from the market." *Id*. at 135. The Court continued, "Congress, however, has foreclosed the removal of tobacco products from the market." *Id*. at 137. As a result, "[a] ban on tobacco products by the FDA would therefore plainly contradict congressional policy." *Id*. at 139. Precisely the same analysis applies here. Part C of the Act logically implies that if GHGs are "air pollutants" for purposes of PSD, EPA would be required to regulate numerous small sources. Congress, however, intended to foreclose the regulation of numerous small sources by the way the PSD provisions were drafted. In both cases, therefore, for both FDA and EPA, the agency reading of the statute requires it to do something that Congress has precluded.

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contravene Congress's intention" to limit such permitting to the largest industrial sources. Tailoring Rule, JA 457.

"In addition," the Court observed, "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Id.* at 133 (citing *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994)). In the case of tobacco regulation, the Court concluded, "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160; *see also MCI*, 512 U.S. at 231 ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion – and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements.").

B. The *Brown & Williamson* analysis shows that Congress foreclosed regulation of GHG emissions under PSD and Title V.

EPA's present action is, if anything, even more extraordinary and implausible than FDA's effort to regulate tobacco products, and the *Brown & Williamson* analysis leads to a very similar conclusion here.

The text and structure of the Act. For the reasons argued in greater detail in Argument Point I of the Chamber Brief and in the UARG Brief, the PSD and Title V provisions of the Clean Air Act, read as a whole, make it plain that Congress intended

such stationary source permitting to be triggered only for a small number of large sources and only by the emission of certain types of air pollutants, namely those that have adverse effects in the region where they are emitted.

In contrast, as EPA itself has found, the asserted dangers of GHG emissions are the opposite of local: They occur only through the mixing of gases in the upper atmosphere and the global diffusion of those gases to produce worldwide climate effects, such that a molecule of carbon dioxide released in one location will produce precisely the same potential climate effect as a molecule of carbon dioxide released on the other side of the world. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009) [hereinafter Endangerment Finding], JA 793-974, 858 ("Greenhouse gases, once emitted, become well mixed in the atmosphere, meaning U.S. emissions can affect not only the U.S. population and environment, but other regions of the world as well. Likewise, emissions in other countries can affect the United States."); *id.* at 894 ("[T]he air over the United States will by definition affect climate change only in circumstances where the air around the world is also doing so. The impacts of the air over the United States cannot be assessed separately from the impacts from the global pool, as they occur together and work together to affect the climate."). The direct exposure to carbon dioxide in the ambient air poses no human health risks, and GHGs

have no measurable or differentiated local effect on air quality. *See* Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354 (July 30, 2008), JA 975-1331, 1135.

Just as this Court concluded that tobacco products "simply do not fit" within the statutory regime enacted by Congress, *Brown & Williamson*, 529 U.S. at 143, so too is it plain that GHG emissions do not fit within the Clean Air Act's regime for local PSD and Title V permitting. Indeed, even apart from the mandatory numerical thresholds for PSD and Title V regulation contained in 42 U.S.C. §§ 7479(1) and 7602(j), discussed below, there are numerous other provisions of the Act that are incompatible with EPA's interpretation. As more fully set forth in the Chamber and UARG Briefs, the PSD and Title V provisions of the Clean Air Act form a complex, integrated, coherent whole. EPA's regulatory scheme dismantles this entire structure. For example:

(1) Section 161, 43 U.S.C. § 7471, requires implementation plans for areas designated as attainment or nonclassifiable relative to National Ambient Air Quality Standards (NAAQS). This requirement cannot work for GHGs because they are globally well-mixed and have no regional variation in concentration, and because there is no NAAQS standard by which an area can be classified;

(2) Section 162, 42 U.S.C. § 7472, provides for initial classifications of air quality areas. This provision is meaningless for GHGs because they are globally well-mixed and have no effect on local air quality;

(3) Section 163, 42 U.S.C. § 7473, limits the "maximum allowable increases" in the concentration of pollutants in attainment areas. This limitation cannot work for GHGs because they are globally well-mixed and there are no NAAQS against which an increase can be compared;

(4) Section 164, 42 U.S.C. § 7474, establishes procedures for reclassification of local air quality areas. This provision is meaningless for GHGs because they are globally well-mixed and have no effect on local air quality;

(5) Section 165, 42 U.S.C. § 7475, requires pre-construction permits, which are keyed to maximum allowable increments relative to NAAQS in local air quality areas. As a condition of permitting, this Section requires local air quality impact monitoring and analysis. These requirements make no sense for GHGs because they are globally well-mixed, have no effect on local air quality, and there are no NAAQS for such gases. For these reasons, EPA has dispensed with the statutory air quality impact analysis and monitoring requirements. *See* PSD and

Title V Permitting Guidance for Greenhouse Gases,[2] p. 48 ("Considering the nature of greenhouse gas emissions and their global impacts, EPA does not believe it is practical or appropriate to expect permitting authorities to collect monitoring data for purpose of assessing ambient air impacts of greenhouse gases.");

(6) Section 166, 42 U.S.C. § 7476, establishes procedures for promulgating regulations for pollutants with newly established NAAQS. Since EPA's new GHG program does not and cannot set a NAAQS for GHGs, the program necessarily ignores and bypasses these procedures; and

(7) EPA's interpretation is inconsistent with the Federal-State partnership construct found throughout the Act.

As with tobacco regulation under the FDCA, GHG regulation under PSD and Title V simply does not fit, and the program EPA has enacted bears essentially no resemblance to the structure carefully crafted by Congress. EPA claims this statutory debris field is compelled by a triumphalist definition for the phrase "any air pollutant" to which all contrary provisions of the Act are subordinate. But no statute can be properly read to compel its own repudiation.

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[2] *Available at* http://www.epa.gov/nsr/ghgdocs/ghgpermitting-guidance.pdf (last visited Dec. 6, 2013).

Absurd consequences. Any conceivable doubt that might exist about the impermissibility of EPA's interpretation, and the consequent encroachment into Congress's legislative domain, is erased completely by the "absurd results" and "impossible administrative burdens" that EPA acknowledged would occur from the application of the Clean Air Act's mandatory numerical permitting thresholds to GHGs. Tailoring Rule, JA 418-19, 454-55 (applying the numerical thresholds "would result in a program that would have been unrecognizable to the Congress that designed PSD" and "contrary to Congress's careful efforts to confine PSD to large industrial sources" because it would expand the program "from the current 280 sources per year to almost 82,000 sources, virtually all of which would be smaller than the sources currently in the PSD program and most of which would be small commercial and residential sources" that "would each incur, on average, almost $60,000 in PSD permitting expenses").

Once the Agency recognized that interpreting the statute to require PSD and Title V permitting for GHGs would necessarily produce extreme and absurd consequences under the mandatory terms of the Act, that realization should have been the end of the enterprise. To avoid encroaching on legislative prerogatives, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). As shown in the briefs

of petitioners, the alternative interpretation of the Act that limits stationary source permitting to certain pollutants not including GHGs is fully consistent with the plain language of the statute and the purposes of the permitting regime.

Legislative background. The conclusion that Congress has not authorized EPA to require PSD and Title V permitting for GHGs under the Clean Air Act is further confirmed by the relevant legislative background. *See Brown & Williamson*, 529 U.S. at 144 (canvassing legislative proposals in which Congress had addressed tobacco-related legislation on the understanding that FDA "lacked authority under the FDCA to regulate tobacco," including bills rejected by Congress "that would have granted the FDA such jurisdiction").

EPA acknowledged that Congress chose the 100- and 250-tons-per-year mandatory numerical PSD and Title V permitting thresholds so they would apply only to a few of the largest industrial sources that could bear the costs. *See* Tailoring Rule, JA 430-31. Because GHGs are typically emitted in volumes far greater than these statutory thresholds by small businesses – and even by many residential buildings and other non-commercial facilities like churches and schools – the application of PSD and Title V permitting requirements to GHGs cannot possibly be consistent with congressional intent. *Id.*

Congress has considered a huge volume of bills for regulating or reducing GHG emissions since

enactment of the PSD program in the 1977 Amendments to the Clean Air Act and since the addition of the Title V permitting provisions in the Clean Air Act Amendments of 1990. *See*, *e.g.*, Center for Climate and Energy Solutions, *Climate Debate in Congress*, *available at* http://www.c2es.org/federal/congress (overview of all legislative proposals related to climate change from the 106th Congress to the present) (last visited Dec. 6, 2013); *see* JA 152 (Brown, J., dissenting from denial of rehearing *en banc*), citing Abigail R. Moncrieff, Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Non-interference (or Why Massachusetts v. EPA Got It Wrong), 60 Admin. L. Rev. 593, 636-37 (2008) (finding more than 400 bills from 101st to 110th Congress); Marlo Lewis, EPA Permitting of Greenhouse Gases: What Does Legislative History Reveal about Congressional Intent?, *available at* http://www.globalwarming.org/2013/12/03/epa-permitting-of-greenhouse-gases-what-does-legislative-history-reveal-about-congressional-intent/#more-18134 (finding 692 bills from 101st through 111th Congresses) (last visited Dec. 6, 2013).

These proposals have involved a wide variety of approaches to reducing GHG emissions from stationary sources, including emission caps through permits, industry-wide emission caps, so-called "cap and trade" programs, and tax and other incentives for achieving reductions. *See*, *e.g.*, Climate Stewardship and Innovation Act of 2007, S. 280, 110th Cong. (2007) and Climate Stewardship Act of 2007, H.R.

620, 110th Cong. (2007) (bill to establish market-driven system of tradable GHG allowances to be administered by EPA; passed by House but died in Senate); Greenhouse Gas Registry Act, H.R. 232, 111th Cong. (2009) (bill to authorize EPA to create federal GHG registry; failed in House); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009) and American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) (bill to create "Pollution Reduction and Investment" program to be administered by EPA to establish economy-wide, market-based program for reducing GHG emissions; passed House but not Senate). But none of these subsequent legislative proposals indicates that Congress ever intended to extend the PSD and Title V programs beyond their limited scope.

In addition, nearly all of these bills would have involved a significant role for EPA in administering programs for reducing GHG emissions from stationary sources. Congress's repeated consideration of such legislative proposals, as it continues to grapple with the immense and divisive economic and policy implications of GHG regulation, only reinforces the plain meaning of the statute. These proposals obviously assume that EPA currently lacks the broad authority it now claims to restrict GHG emissions through PSD and Title V permits.

In sum. Just as with FDA's effort to regulate tobacco products, EPA's interpretation of the Clean Air Act that PSD and Title V stationary source permitting for GHG emissions are automatically triggered by mobile source regulation is foreclosed by the

text, structure, and legislative background of the Act. EPA has created a permitting regime for GHGs that bears no resemblance to the limited PSD and Title V programs established by Congress. This new regime cannot plausibly be squared with the statutory scheme Congress intended the Agency to administer.

II. EPA's action depended on a gross misuse of canons of statutory interpretation.

In contravention of the plain meaning of the statute and Congress's manifest intent not to authorize PSD and Title V regulation for GHG emissions under the Clean Air Act, EPA nevertheless devised a new program to do exactly that. EPA did so through the gross misapplication of two doctrines of statutory interpretation – the doctrine of "absurd results" and the doctrine of "administrative necessity." As will be discussed in Section III, below, this action by EPA raises an intolerable separation of powers issue.

A. The "absurd results" doctrine does not authorize an administrative override of congressional intent.

Resort to the "absurd results" doctrine has been approved by this Court only in the most limited circumstances. The Court has sanctioned its use to give a narrowing or specialized construction to a statutory term where applying the literal meaning or most natural reading of the term would produce an absurdly broad reach for the statutory regime or an

absurd application of a statutory requirement that could not have been intended by Congress. *See*, *e.g.*, *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132-33 (2004) ("any entity" construed to mean only private entity); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989) ("defendant" construed to mean only criminal defendant); *Train v. Colo. Pub. Interest Res. Group*, 426 U.S. 1, 23-24 (1976) ("pollutants," defined in the Federal Water Pollution Control Act to include any "radioactive materials," construed not to include three specific types of radioactive materials); *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 538-42 (1940) ("employees" construed to be limited to employees whose activities affect safety); *Holy Trinity Church v. United States*, 143 U.S. 457, 516-17 (1892) ("any alien" construed not to apply to foreign pastor).

Because of the dangers inherent in a license to stray from the natural meaning of statutory language, any invocation of the doctrine must remain true to congressional intent. *See Horn v. Comm'r of Internal Rev.*, 968 F.2d 1229, 1239 (D.C. Cir. 1992) ("The [absurd results] canon is sensible, so far as it goes, but it can only be used to further Congress' intent, not to circumvent it. . . . A canon of interpretation cannot nullify part of a statute."); *see also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in judgment) ("When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative

Branch, which we assume would not act in an absurd way."); *United States v. Brown*, 333 U.S. 18, 27 (1948) (absurd results doctrine is only justified where necessary to avoid "blind nullification of the congressional intent" behind a statute); *Holy Trinity Church*, 143 U.S. at 459 (approving invocation of the absurd results doctrine to exclude a subject from the literal scope of a statute's reach where it would be "unreasonable to believe that the legislator intended to include the particular act").

As is apparent, the "absurd results" doctrine is used only where Congress inadvertently used a term and the absurdity of a literal application requires a non-literal reading to avoid an unreasonable outcome. Here, by contrast, EPA has relied on "absurd results" as justification for *ignoring* Congress's carefully crafted, deliberate, express intent that the precisely specified numerical permitting thresholds, and only those thresholds, would define the scope of the PSD and Title V programs. Properly understood and applied, this doctrine could readily support a narrowed construction of "any air pollutant" for purposes of PSD permitting to include only pollutants having a localized effect on ambient air quality, even if the term may be given a broader meaning in the mobile source provisions of the statute. Such a narrowed construction for stationary source purposes is necessary to avoid the absurd application of the statute that EPA itself recognized would be contrary to anything Congress ever contemplated. *See Griffin*, 458 U.S. at 575. But to invoke "absurd results," as

EPA did, to alter radically the statute's strict numerical stationary source permitting requirements – by changing 250 tons-per-year to 100,000 tons-per-year and 100 tons-per-year to 75,000 tons-per-year – is an obvious misuse of the doctrine.

B. EPA cannot rely on the concept of "administrative necessity" to establish a new regulatory program that Congress has not authorized.

EPA also misused the "administrative necessity" doctrine as authority for rewriting the statute's permitting thresholds so as to enable an extension of the PSD and Title V programs to GHGs. EPA rationalized this maneuver on the ground that complying with the literal terms of the Act was impossible. Of course: It was only EPA's own deviation from the clear limits that Congress placed on the scope of these programs that rendered compliance impossible.

In approving the doctrine of administrative necessity, the D.C. Circuit has circumscribed its use to three types of regulatory accommodations: adopting limited categorical exemptions where the statute permits flexibility; crafting case-by-case determinations within the discretion of the agency; and postponing statutory deadlines to avoid administrative hardship or harsh or unintended consequences. *See Ala. Power Co. v. Costle*, 636 F.2d 323, 357-60 (D.C. Cir. 1980); *see also Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C. Cir. 1983); *Envtl. Def. Fund, Inc. v. EPA*,

636 F.2d 1267 (D.C. Cir. 1980). Here, EPA ventured well beyond any such measured precedents to fashion its own novel standard that would sanction use of "administrative necessity" whenever the Agency can (1) demonstrate the unavailability of alternatives, (2) quantify the impossible administrative burdens, and (3) achieve a favored result by claiming to deviate from the plain text of the statute as little as possible. *See* Tailoring Rule, JA 401-02. Quite apart from EPA's own culpability in creating the asserted "administrative necessity," EPA did not even hew to its own newly minted three-factor test in that there were readily available alternatives and it radically deviated from the plain text of the statute. EPA effectively converted this carefully circumscribed doctrine into an unconstrained tool of "administrative convenience."

Indeed, the authority claimed by EPA is so unconstrained that it imperils more than just one provision of the statutory scheme of PSD and Title V regulation. As shown above at pp. 11-13, EPA's reasoning eventually compels it to repudiate a panoply of other requirements of the PSD provisions that are made ridiculous or superfluous if applied to GHGs. The ensuing legal chaos shows why the use of "administrative necessity" to abrogate congressional intent should never be permitted.

III. EPA's actions create a grave threat to the constitutional separation of executive and legislative powers.

By its misconstruction and abuse of these interpretive doctrines, EPA arrogated to itself a degree of unadulterated legislative power that, if accepted, would represent a far-reaching incursion of the Executive Branch into the constitutionally assigned province of Congress. *See* JA 170-90, JA 175 (Kavanaugh, J., dissenting from denial of rehearing *en banc*) ("Allowing agencies to exercise [this] kind of statutory re-writing authority could significantly enhance the Executive Branch's power at the expense of Congress's and thereby alter the relative balance of powers in the administrative process.").

Actions, such as EPA's, by which one Branch of our Government would presume to expropriate or invade the constitutionally assigned functions of another Branch present one of the greatest threats to liberty. "In a government, where the liberties of the people are to be preserved . . . , the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other." Charles Pinckney, Observations on the Plan of Government Submitted to the Federal Convention of May 28, 1787, *reprinted in* 3 M. Farrand, Records of the Federal Convention of 1787, p. 108 (rev. ed. 1966); *see* The Federalist Nos. 47-51 (James Madison) (explaining and defending the Constitution's structural design of separated powers); *see also Clinton v. City of New York*, 524 U.S. 417, 447

(1998) (striking down the line-item veto as unconstitutional because it "gives the President the unilateral power to change the text of duly enacted statutes"); *see also id*. at 450 (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

A. Separation of powers is essential to the constitutional design.

In addressing EPA's action, it is appropriate to recall this Court's clarion repudiation of executive overreach in the *Youngstown* case. There, Members of the Court warned that the "accretion of dangerous power" is spawned by "unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring). In voting to strike down the President's Executive Order directing the Secretary of Commerce to take possession of major steel mills to head off the grave consequences of a labor shutdown of the mills during time of war, Justice Douglas returned to first principles: "In the framework of our Constitution, the president's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id.* at 587 (Douglas, J., concurring). The purpose of the separation of powers is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Id.* at 629; *see id.* at 638

(Jackson, J., concurring) ("Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitution.").

The EPA Administrator and the President of the United States apparently believe that GHGs contribute to global climate change and that global climate change poses a serious long-term risk to the Earth that demands a national policy response. They may also be frustrated by Congress's failure to enact a legislative program to respond to their concerns. But while the failure to enact a regulatory response may create challenges in some ways, "a judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010) (internal quotation marks, alterations, and citations omitted). "Legislative action may indeed often be cumbersome, time-consuming, and apparently inefficient," *Youngstown*, 343 U.S. at 629 (Douglas, J.), but the Framers of the Constitution "designed it that way," and "[t]he time and difficulty of enacting new legislation has never justified an agency's contravention of statutory limits." JA 189 (Kavanaugh, J., dissenting). *See Clinton*, 524 U.S. at 449 (Kennedy, J., concurring) ("The Constitution's structure requires a stability which transcends the convenience of the moment.").

If existing statutory authority is insufficient to meet a national challenge, the President has the duty and power under the Recommendations Clause

to "recommend" for Congress's "Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3, cl. 1. The President is expected to advocate forcefully until Congress grants the necessary regulatory authority, but in the meantime, he is obligated to ensure that the laws Congress actually has enacted are "faithfully executed." *Id.* art. II, § 3, cl. 4.

B. The Act can and must be interpreted to avoid EPA's separation of powers violation.

Ultimately, the Court in this case need not pronounce a definitive judgment on the constitutional violation effected by EPA's interpretive strategem. The separation of powers Kraken that would be unleashed if EPA's action were upheld is sufficient to trigger a superior principle: constitutional avoidance. EPA's misuse of the "absurd results" and "administrative necessity" doctrines to invade the legislative domain is put to the sword by this greater canon of construction. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (recognizing that the avoidance of serious constitutional issues wherever possible is a "cardinal principle" of statutory interpretation that "has for so long been applied by [this Court] that it is beyond debate"). To preserve the Constitution free from unnecessary judicial involvement, the avoidance canon demands that a statute be interpreted to avoid giving rise to any serious constitutional issue unless

the saving construction is unreasonable and plainly contrary to Congress's intent. "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* "If an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' the Court is obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 300 (2001).

This Court applied the avoidance canon in *Solid Waste Agency of No. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159 (2001), to reject the Army Corps of Engineers' interpretation of "navigable waters" under the Clean Water Act to extend federal authority to reach isolated patches of wholly intrastate wetlands. *See id.* at 172-73. Similarly, this Court has held that where an interpretation of a statute would result in a "sweeping delegation of legislative power" to an agency, "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 646 (1980). These cases call for a similar affirmation of constitutional boundaries: EPA's interpretation of the Clean Air Act to trigger stationary source permitting for GHGs under the PSD and Title V programs exceeded the Agency's authority in a manner that threatens an undue aggrandizement of executive power at the expense of the Legislative Branch.

As shown in Point I above, and as argued in greater detail in the briefs of other petitioners, the alternative readings of the Act that would deny EPA authority to trigger PSD and Title V permitting for stationary source emissions of GHGs avoid this unconstitutional power grab. Those alternative interpretations fully align with the statute's text and structure and honor and preserve the intent of Congress. Under the rule of constitutional avoidance, EPA's faulty interpretation, which satisfies none of these requirements, must be rejected.

CONCLUSION

For the reasons set forth above, and those discussed in the briefs of other petitioners, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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42 U.S.C. § 7471

§ 7471. Plan requirements

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

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42 U.S.C. § 7472

§ 7472. Initial classifications

(a) Areas designated as class I

Upon the enactment of this part, all –

(1) international parks,

(2) national wilderness areas which exceed 5,000 acres in size,

(3) national memorial parks which exceed 5,000 acres in size, and

(4) national parks which exceed six thousand acres in size,

and which are in existence on August 7, 1977, shall be class I areas and may not be redesignated. All areas which were redesignated as class I under regulations promulgated before August 7, 1977, shall be class I areas which may be redesignated as provided in this part. The extent of the areas designated as Class I under this section shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990.

(b) Areas designated as class II

All areas in such State designated pursuant to section 7407(d) of this title as attainment or unclassifiable which are not established as class I under subsection (a) of this section shall be class II areas unless redesignated under section 7474 of this title.

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42 U.S.C. § 7473

§ 7473. Increments and ceilings

(a) Sulfur oxide and particulate matter; requirement that maximum allowable increases and maximum allowable concentrations not be exceeded

In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under section 7475(d)(2)(C)(iv) of this title) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

(b) Maximum allowable increases in concentrations over baseline concentrations

(1) For any class I area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	5
Twenty-four-hour maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
Twenty-four-hour maximum	5
Three-hour maximum	25

(2) For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	512

(3) For any class III area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of

such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	37
Twenty-four-hour maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
Twenty-four-hour maximum	182
Three-hour maximum	700

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

> **(A)** the concentration permitted under the national secondary ambient air quality standard, or
>
> **(B)** the concentration permitted under the national primary ambient air quality standard,

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

(c) Orders or rules for determining compliance with maximum allowable increases in ambient concentrations of air pollutants

(1) In the case of any State which has a plan approved by the Administrator for purposes of carrying

out this part, the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for purposes of determining compliance with the maximum allowable increases in ambient concentrations of an air pollutant, the following concentrations of such pollutant shall not be taken into account:

(A) concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, or natural gas, or both, by reason of an order which is in effect under the provisions of sections 792(a) and (b) of Title 15 (or any subsequent legislation which supersedes such provisions) over the emissions from such sources before the effective date of such order.

(B) the concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from using natural gas by reason of a natural gas curtailment pursuant to a natural gas curtailment plan in effect pursuant to the Federal Power Act [16 U.S.C. § 791a et seq.] over the emissions from such sources before the effective date of such plan,

(C) concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities, and

(D) the increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources

which are included in the baseline concentration determined in accordance with section 7479(4) of this title.

(2) No action taken with respect to a source under paragraph (1)(A) or (1)(B) shall apply more than five years after the effective date of the order referred to in paragraph (1)(A) or the plan referred to in paragraph (1)(B), whichever is applicable. If both such order and plan are applicable, no such action shall apply more than five years after the later of such effective dates.

(3) No action under this subsection shall take effect unless the Governor submits the order or rule providing for such exclusion to the Administrator and the Administrator determines that such order or rule is in compliance with the provisions of this subsection.

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42 U.S.C. § 7474

§ 7474. Area redesignation

(a) Authority of States to redesignate areas

Except as otherwise provided under subsection (c) of this section, a State may redesignate such areas as it deems appropriate as class I areas. The following areas may be redesignated only as class I or II:

(1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore, and

(2) a national park or national wilderness area established after August 7, 1977, which exceeds ten thousand acres in size.

The extent of the areas referred to in paragraph (1) and (2) shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990. Any area (other than an area referred to in paragraph (1) or (2) or an area established as class I under the first sentence of section 7472(a) of this title) may be redesignated by the State as class III if –

(A) such redesignation has been specifically approved by the Governor of the State, after consultation with the appropriate Committees of the legislature if it is in session or with the leadership of the legislature if it is not in session

(unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area so redesignated enact legislation (including for such units of local government resolutions where appropriate) concurring in the State's redesignation;

(B) such redesignation will not cause, or contribute to, concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and

(C) such redesignation otherwise meets the requirements of this part.

Subparagraph (A) of this paragraph shall not apply to area redesignations by Indian tribes.

(b) Notice and hearing; notice to Federal land manager; written comments and recommendations; regulations; disapproval of redesignation

(1)(A) Prior to redesignation of any area under this part, notice shall be afforded and public hearings shall be conducted in areas proposed to be redesignated and in areas which may be affected by the proposed redesignation. Prior to any such public hearing a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation shall be prepared and made available for public inspection and prior to any such redesignation, the description and

analysis of such effects shall be reviewed and examined by the redesignating authorities.

(B) Prior to the issuance of notice under subparagraph (A) respecting the redesignation of any area under this subsection, if such area includes any Federal lands, the State shall provide written notice to the appropriate Federal land manager and afford adequate opportunity (but not in excess of 60 days) to confer with the State respecting the intended notice of redesignation and to submit written comments and recommendations with respect to such intended notice of redesignation. In redesignating any area under this section with respect to which any Federal land manager has submitted written comments and recommendations, the State shall publish a list of any inconsistency between such redesignation and such recommendations and an explanation of such inconsistency (together with the reasons for making such redesignation against the recommendation of the Federal land manager).

(C) The Administrator shall promulgate regulations not later than six months after August 7, 1977, to assure, insofar as practicable, that prior to any public hearing on redesignation of any area, there shall be available for public inspection any specific plans for any new or modified major emitting facility which may be permitted to be constructed and operated only if the area in question is designated or redesignated as class III.

(2) The Administrator may disapprove the redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section or is inconsistent with the requirements of section 7472(a) of this title or of subsection (a) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(c) Indian reservations

Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respect to the provisions of subsection (e) of this section.

(d) Review of national monuments, primitive areas, and national preserves

The Federal Land Manager shall review all national monuments, primitive areas, and national preserves, and shall recommend any appropriate areas for redesignation as class I where air quality related values are important attributes of the area. The Federal Land Manager shall report such recommendations, within[2] supporting analysis, to the Congress and the affected States within one year after August 7, 1977. The Federal Land Manager shall consult with the appropriate States before making such recommendations.

(e) Resolution of disputes between State and Indian tribes

If any State affected by the redesignation of an area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in any State which the Governor of an affected State or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

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42 U.S.C. § 7475

§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

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

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

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

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

any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

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

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

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

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

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

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the

emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

(iv) In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such facility will not cause or contribute to concentrations of such pollutant which exceed the following maximum allowable increases over the baseline concentration for such pollutants:

	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	325

(D)(i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

(ii) In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

(iii) In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such facility will not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which exceed the following maximum allowable increases for such areas over the baseline concentration for such pollutant and to assure that such emissions will not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less on more than 18 days during any annual period:

MAXIMUM ALLOWABLE INCREASE

[In micrograms per cubic meter]

Period of exposure	Low terrain areas	High terrain areas
24-hr maximum	36	62
3-hr maximum	130	221

(iv) For purposes of clause (iii), the term "high terrain area" means with respect to any facility, any area having an elevation of 900 feet or more above the base of the stack of such facility, and the term "low terrain area" means any area other than a high terrain area.

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

(2) Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for

purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

(3) The Administrator shall within six months after August 7, 1977, promulgate regulations respecting the analysis required under this subsection which regulations –

(A) shall not require the use of any automatic or uniform buffer zone or zones,

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

(D) shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

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42 U.S.C. § 7476

§ 7476. Other pollutants

(a) Hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides

In the case of the pollutants hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later than two years after August 7, 1977, promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions of such pollutants. In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.

(b) Effective date of regulations

Regulations referred to in subsection (a) of this section shall become effective one year after the date of promulgation. Within 21 months after such date of promulgation such plan revision shall be submitted to the Administrator who shall approve or disapprove the plan within 25 months after such date or promulgation in the same manner as required under section 7410 of this title.

(c) Contents of regulations

Such regulations shall provide specific numerical measures against which permit applications may be evaluated, a framework for stimulating improved

control technology, protection of air quality values, and fulfill the goals and purposes set forth in section 7401 and section 7470 of this title.

(d) Specific measures to fulfill goals and purposes

The regulations of the Administrator under subsection (a) of this section shall provide specific measures at least as effective as the increments established in section 7473 of this title to fulfill such goals and purposes, and may contain air quality increments, emission density requirements, or other measures.

(e) Area classification plan not required

With respect to any air pollutant for which a national ambient air quality standard is established other than sulfur oxides or particulate matter, an area classification plan shall not be required under this section if the implementation plan adopted by the State and submitted for the Administrator's approval or promulgated by the Administrator under section 7410(c) of this title contains other provisions which when considered as a whole, the Administrator finds will carry out the purposes in section 7470 of this title at least as effectively as an area classification plan for such pollutant. Such other provisions referred to in the preceding sentence need not require the establishment of maximum allowable increases with respect to such pollutant for any area to which this section applies.

(f) PM-10 increments

The Administrator is authorized to substitute, for the maximum allowable increases in particulate matter specified in section 7473(b) of this title and section 7475(d)(2)(C)(iv) of this title, maximum allowable increases in particulate matter with an aerodynamic diameter smaller than or equal to 10 micrometers. Such substituted maximum allowable increases shall be of equal stringency in effect as those specified in the provisions for which they are substituted. Until the Administrator promulgates regulations under the authority of this subsection, the current maximum allowable increases in concentrations of particulate matter shall remain in effect.

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42 U.S.C. § 7479

§ 7479. Definitions

For purposes of this part –

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

new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

(2)(A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case

basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction

commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

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42 U.S.C. § 7602. Definitions

§ 7602. Definitions

(j) Except as otherwise expressly provided, the terms “major stationary source” and “major emitting facility” mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).