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

COALITION FOR RESPONSIBLE REGULATION, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 09-1322 (and consolidated cases)
COALITION FOR RESPONSIBLE REGULATION, INC., et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 10-1073 (and consolidated cases)
COALITION FOR RESPONSIBLE REGULATION, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 10-1092 (and consolidated cases)

AMERICAN CHEMISTRY COUNCIL, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL. Respondents.	)	No. 10-1167 (and consolidated cases)

EPA'S RESPONSE TO PETITIONS FOR REHEARING EN BANC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 35 and 28(a)(1), counsel for Respondents acknowledges that Petitioners' En Banc Petitions (Docs. 1388743 and 1388641) set out the parties, rulings and related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rules 35 and 26.1, Respondents represent that they are a government agency and the Administrator of said agency for which a corporate disclosure statement is not required.

So certified this 12th day of October, 2012, by

/s/ Jon M. Lipshultz
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

REGULATIONS:

FEDERAL REGISTERS:

* Authorities upon which Respondent EPA chiefly relies.

GLOSSARY

PETITIONS FOR REHEAIRNG EN BANC

Chamber Pet.: United States Chamber of Commerce of the United States of America's Combined Petition for Panel Rehearing and for Rehearing En Banc (Doc. 1388743)

NAM Pet.: Petition for Rehearing En Banc, submitted by the National Association of Manufacturers and other non-governmental Petitioners (Doc. 1388641)

THE CHALLENGED EPA RULES AND ACTIONS

Endangerment Finding: "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule," 74 Fed. Reg. 66,496 (December 15, 2009)

Historic PSD Regulations:

1978 Rule: "Requirements for Preparation, Adoption, and Submittal of Implementation Plans, Prevention of Significant Air Quality Deterioration," 43 Fed. Reg. 26,380, and "Part 52 – Approval and Promulgation of State Implementation Plans," 43 Fed. Reg. 26,388 (June 19, 1978)

1980 Rule: "Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans," 45 Fed. Reg. 52,676 (Aug. 7, 1980)

2002 Rule: "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects," 67 Fed. Reg. 80,186 (Dec. 31, 2002)

Tailoring Rule: "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010)

Timing Decision: "Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs," 75 Fed. Reg. 17,004 (April 2, 2010)

Vehicle Rule: "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule," 75 Fed. Reg. 25,324 (May 7, 2010)

TERMS

Act: Clean Air Act, 42 U.S.C. §§ 7401-7671q

BACT: Best Available Control Technology

CAA: Clean Air Act, 42 U.S.C. §§ 7401-7671q

EPA: Environmental Protection Agency

GHGs: Greenhouse gases

NAAQS: National Ambient Air Quality Standards

NSPS: New Source Performance Standards

PSD (PSD Program): Prevention of Significant Deterioration, 42 U.S.C. §§7470-7492

TPY: Tons per year

TITLE V: 42 U.S.C. §§ 7661-7661f

The Court should deny the petitions for rehearing en banc filed by the United States Chamber of Commerce ("Chamber") (Doc. 1388743) ("Chamber Pet.") and National Association of Manufacturers ("NAM") (Doc. 1388641) ("NAM Pet.). The Court's June 26, 2012, decision in this matter is thorough, well-reasoned, and entirely consistent with prior decisions of this Court and the Supreme Court. Therefore, rehearing en banc is not warranted under Fed. R. App. P. 35(a)(1). Further, while the challenged actions of the Environmental Protection Agency ("EPA") address important environmental policy concerns, the rehearing petitions turn on familiar questions of administrative law and statutory construction, all of which were correctly decided by the Panel, and they therefore do not raise a "question of exceptional importance" within the meaning of Fed. R. App. P. 35(a)(2).[1]

BACKGROUND

In Massachusetts v. EPA, 549 U.S. 497 (2007), the Supreme Court directed EPA to reconsider its denial of an administrative petition to regulate greenhouse gas emissions from motor vehicles under Section 202(a) of the Clean Air Act ("CAA" or the "Act"), 42 U.S.C. § 7521(a). In December 2009, EPA issued the Endangerment Finding, which determined that greenhouse gas concentrations in the atmosphere may

[1] Although the Petition of the Chamber seeks panel rehearing as well as rehearing en banc, the Court's Order calls for EPA to file a combined response only to the petitions for rehearing en banc (Docs. 1393022, 1394425), which EPA has done. To the extent Panel rehearing is also being considered by the Court, this brief may also be considered as EPA's response to the Chamber's request for Panel rehearing.

reasonably be anticipated to endanger public health and welfare and that emissions from motor vehicles contribute to this pollution. 74 Fed. Reg. 66,496 (Dec. 15, 2009). Consistent with Section 202(a), EPA then issued greenhouse gas emissions standards for cars and small trucks. 75 Fed. Reg. 25,324 (May 7, 2010) (the "Vehicle Rule").

Once greenhouse gas emissions became regulated through the Vehicle Rule, the provisions of the CAA's prevention of significant deterioration ("PSD") and Title V operating permit programs governing stationary sources became applicable by operation of statute. As a result, the Agency took two actions necessary to assure that regulation of greenhouse gas emissions from stationary sources under these programs could be effectively implemented. First, in the "Timing Decision," 75 Fed. Reg. 17,004 (Apr. 2, 2010), EPA determined that greenhouse gases did not become "subject to regulation" (and thus subject to PSD and Title V requirements) until the Vehicle Rule was applied, starting January 2, 2011. Second, EPA issued the "Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010), to phase in PSD and Title V requirements in a feasible manner. This case presents challenges to the Endangerment Finding, the Vehicle Rule, the Timing Decision, and the Tailoring Rule, as well as a challenge to long-standing PSD regulations issued by the Agency in 1978, 1980, and 2002 ("Historic PSD Regulations"), which confirmed the automatic application, by statutory mandate, of PSD requirements to "any" pollutant regulated under the Act.

On June 26, 2012, the Court denied or dismissed all the petitions for review in a consolidated 82-page per curiam decision ("Op."). The Court held that: (1) the

Endangerment Finding was completely consistent with the administrative record and the requirements of the Act (Op. 10-39); (2) EPA was not required to consider, in the context of the Endangerment Finding, either the alleged "absurdity" of stationary source regulation of greenhouse gas emissions that would flow from promulgation of the Vehicle Rule or the potential for societal adaptation to or mitigation of climate change (Op. 22-26); (3) certain Petitioners' challenges to the Historic PSD Regulations were not untimely (Op. 45-50); (4) those regulations nonetheless were "unambiguously correct" in concluding that "any" pollutant regulated under the Act is subject to regulation under the PSD program (Op. 50-73); and (5) no Petitioner had standing to challenge the Timing or Tailoring rules, since those rules served to reduce, not increase, Petitioners' regulatory burdens (Op. 73-81).

ARGUMENT

I. THE CHAMBER'S PETITION SHOULD BE DENIED

A. The Court Correctly Held That the Regulatory Consequences for Stationary Sources Cited by Petitioners Were Irrelevant to the Endangerment Finding

The Chamber appears to argue that because it believes the consequences for stationary sources that eventually flow from the Endangerment Finding are "absurd," EPA should have refused to make that finding. Chamber Pet. 10-11. The Chamber argues this is legally justified because the Endangerment Finding led to regulation of stationary sources, and the Supreme Court in Massachusetts held "only that [greenhouse gases] are 'air pollutants' within the meaning of section [7521](a)(1)," but

did not otherwise limit EPA's discretion in making an endangerment finding other than "to instruct EPA on remand to 'ground its reasons for action or *inaction* in the statute"). Id. at 12 (emphasis in original) (citing Massachusetts, 549 U.S. at 535).

The Chamber's arguments on these points are plainly wrong. As the Panel correctly found, when Massachusetts directed EPA to "ground its reasons for action or inaction in the statute," it was referring to the factors actually listed in the pertinent provision of the statute, i.e., the largely scientific question of whether or not the air pollution may reasonably be anticipated to endanger public health or welfare. Op. 23-26 (citing 42 U.S.C. § 7521(a)(1) and Massachusetts, 549 U.S. at 532-34). As the Supreme Court further explained:

> While the statute does condition the exercise of EPA's authority on its formation of a "judgment," 42 U.S.C. § 7521(a)(1), that judgment must relate to whether an air pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare," ibid. Put another way, the use of the word "judgment" is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.

Massachusetts, 549 U.S. at 532-33. Although the Court recognized that EPA might decline to make an endangerment finding if it found the science did not support it or that "scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment," 549 U.S. at 534, the Court flatly rejected a host of policy-based rationales for inaction as "irrelevant," stressing that "[t]he statutory question is whether sufficient information exists to make an endangerment finding." Id. at 534.

Thus, the Panel was entirely correct in holding that when the Supreme Court

directed EPA to base its decision for action or inaction "in the statute," id. at 535, it was referring to the application of the scientific evidence to the public health and welfare endangerment criteria directly referenced in section 7521(a)(1), not the sort of ancillary statutory implications for stationary sources referred to by the Chamber. Under the plain language of section 7521(a)(1), as interpreted by the Supreme Court, those stationary source considerations are not relevant to the science-based inquiry of whether greenhouse gas air pollution endangers public health or welfare.

B. There Was No "Shell Game" Affecting the Chamber's Rights to Effective Judicial Review

There also is no merit to the Chamber's argument that the Court's rulings in this case perpetrated a "shell game" that ultimately deprived the Chamber of an opportunity for effective judicial review. As discussed above, the Panel correctly held that Massachusetts limited EPA's discretion in making an endangerment finding to the statutory public health and welfare endangerment criteria listed in 42 U.S.C. § 7521(a)(1). The fact that the Panel rejected the Chamber's arguments on endangerment and the consideration of stationary source regulations does not mean the Chamber had no opportunity for effective judicial review; it simply means its arguments were meritless. Moreover, nothing in the Chamber's petition provides any basis to upset the Panel's holding that the Tailoring Rule *alleviated* regulatory burdens on the Chamber and similarly-situated Petitioners, resulting in a lack of injury for

standing purposes.[2] The denial of judicial review to a party without standing is the result of the Constitution's case or controversy requirement, not a "shell game."

The Chamber's *real* concern on the "absurdity" issue rests with the linkage between regulation of greenhouse gas emissions through the Vehicle Rule and the subsequent regulation of stationary source emissions through the PSD program. However, this linkage arises not from the Endangerment Finding or the Tailoring Rule, but rather through operation of the statute. Op. 51-59. As discussed below, certain Petitioners recognized this issue and were granted the opportunity to challenge the Historic PSD Regulations on the merits of these issues. Id. at 45-50. The Court, in fact, devoted more than one-fourth of its opinion to those challenges. Id. at 39-73. The Chamber was granted leave to intervene on behalf of the Petitioners in that case and to file its own 8,750 word brief. See No. 10-1167, Docs. 1291130 and 129003. If the Chamber now regrets its choice not to file a brief, it has only itself -- not EPA or the Panel -- to blame.

C. The Court Properly Rejected the Chamber's Arguments Regarding Adaptation and Mitigation

Finally, the Court also correctly rejected the Chamber's argument that EPA was

[2] The Chamber newly asserts that it has "competitor" standing because its larger members might benefit less from the Tailoring Rule than its smaller members. Chamber Pet. 8. This wholly new standing argument was not previously argued and thus clearly is improper. See D.C. Cir. R. 28(a)(7); Sierra Club v. EPA, 292 F.3d 895, 900-01 (D.C. Cir. 2002); Op. 80-81. In any event, this theory is unavailing since the Chamber's merits arguments focus on the degree of EPA's discretion to make an Endangerment Finding under the statute, not on the reasonableness of the Tailoring Rule's relative treatment of larger and smaller emitters--a claim *no* Petitioner raised.

required to consider society's ability to adapt to or mitigate the effects of climate change in its endangerment analysis. Op. 22-25. First, to the extent the Chamber is referring to the "natural" adaptation of ecosystems, Chamber Pet. 13, it overlooks that EPA's analysis *did* expressly consider these issues to the extent they were documented in the underlying scientific literature, 74 Fed. Reg. at 66,512, and the Chamber never articulates any concrete, record-based challenge to this aspect of EPA's analysis. The statute otherwise is reasonably construed to focus on "evaluating the risks to public health and welfare from the air pollution if we do not take action to address it," rather than "how much risk will remain assuming some projection of how people and society will respond to the threat." Id. As discussed above, the Panel correctly interpreted Massachusetts as focusing the endangerment inquiry squarely on a scientific judgment as to the health and welfare effects posed by the climate change resulting from air pollution. By contrast, the approach advocated by the Chamber would "muddle the rather straightforward scientific judgment about whether there may be endangerment by throwing the potential impact of responding to the danger into the initial question." Op. 25 (quoting 74 Fed. Reg. at 66,515). Adaptation and mitigation measures are societal responses to the endangerment, i.e., to the risk of harm from climate change, not evidence that there is no endangerment. 74 Fed. Reg. at 66,513-14.[3] The Panel properly held that EPA is not required to consider the

[3] The Chamber essentially argues that there is endangerment only to the extent there is actual future injury or harm and that future societal action to avoid such harm would mean there is no endangerment. That interpretation was rejected in Ethyl

potential for future societal responses in determining the threshold scientific question of whether the air pollution endangers public health or welfare. To the extent Congress wanted EPA to consider factors unrelated to the health and welfare endangerment criteria, it was only to the limited extent specified in setting emission standards under 42 U.S.C. § 7521(a)(2), an entirely separate provision that is "not part of the [42 U.S.C. § 7521(a)(1)] endangerment inquiry." Op. 25.

Moreover, the Chamber's arguments completely ignore that gauging the likely societal responses to climate change would require the Agency to formulate estimates going decades into the future as to "the political actions likely to be taken by various local, State, and Federal governments" as well as "judgments on the business or other decisions that are likely to be made by companies or other organizations, or the changes in personal behavior that may be occasioned by the adverse impacts of air pollution." 74 Fed. Reg. at 66,514. The Chamber does not identify anything in the record that would allow EPA to make such estimates and judgments in any kind of practical or reliable fashion. Instead, the gist of the Chamber's argument is that the *possibility* of some uncertain and undefined degree of effective societal response to climate change in the decades to come is a reason for EPA to decline to recognize the *actual* adverse effects from climate change that science *today* has shown to be happening. See Chamber Pet. 14 (describing "principal thrust of Chamber's statutory

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Corp v. EPA, 541 F.2d. 1, 13 (D.C. Cir. 1976) (en banc) ("[w]hen one is endangered, harm is threatened; no actual injury need ever occur … a town may be 'endangered' by a threatening plague or hurricane and yet emerge from the danger completely unscathed.").

argument" as being that "adaptation and mitigation responses over long periods of time *might* limit any endangerment") (emphasis added). Such an approach is flatly inconsistent with Massachusetts and the Agency's duties under the statute. See Massachusetts, 549 U.S. at 534 ("Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time.").

II. NAM'S PETITION SHOULD BE DENIED

Pursuant to 42 U.S.C. § 7409, EPA has established National Ambient Air Quality Standards ("NAAQS") for six pollutants, which are regulated under various provisions of the CAA. For instance, under the CAA's PSD program, 42 U.S.C. §§ 7470-7492, EPA regulates the construction of new and modified sources to ensure that they will not emit one of the NAAQS pollutants in amounts that would threaten an area's continued attainment of the NAAQS. 42 U.S.C. § 7475(a)(3). In addition to these NAAQS-specific requirements, the PSD program requires preconstruction permits for sources emitting specific amounts of "any air pollutant" regulated under any provision of the CAA. 42 U.S.C. §§ 7475(a)(1), 7479(1).

Specifically, a "major emitting facility" may not initiate construction in "any area to which this part applies," i.e., in any area that is in attainment or unclassified for *any* NAAQS, without first obtaining a PSD permit. 42 U.S.C. § 7475(a). The PSD provisions define a "major emitting facility" as any stationary source that has the potential to emit more than 100 or 250 tons per year ("tpy") (depending on the type

of source) of "*any* air pollutant," 42 U.S.C. § 7479(1) (emphasis added), and apply to any "modification" of a facility, which is defined as a change "which increases the amount of *any* air pollutant." 42 U.S.C. §§ 7479(2)(C), 7411(a)(4) (emphasis added). To obtain a PSD permit the applicant must, among other things, apply the "best available control technology ['BACT'] for *each pollutant subject to regulation under this chapter [the CAA]*." 42 U.S.C. § 7475(a)(4) (emphasis added). Accordingly, EPA has historically applied PSD permitting requirements to any pollutant regulated under the CAA, so long as the source was in an area in attainment for *any* NAAQS pollutant. Op. 18-19, 53-54, citing EPA regulations from 1978, 1980 and 2002; NAM Pet. 4.

Because combustion processes at stationary sources result in emissions of greenhouse gases that are vastly greater than sources' emissions of other pollutants regulated under the CAA, immediate application of the 100/250 tpy threshold to all covered sources would cause overwhelming permitting burdens. Op. 54. Utilizing, inter alia, the long-applied doctrines of "administrative necessity" and "absurd results," which the courts created to assist agencies when full and immediate application of a statute's mandatory requirements prove to be at least temporarily infeasible, EPA promulgated the Tailoring Rule, which phases in application of the statutory thresholds. Op. 75. EPA did so by temporarily increasing the threshold levels for application of PSD permitting requirements to 75,000/100,000 tpy.

Petitioners challenged the facially obvious and long-applied application of the PSD program, asserting that it does not cover "any" pollutant regulated under the

CAA, but instead covers only NAAQS pollutants, of which there are only six. In response, the Panel found, under step 1 of Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984), that it is "unambiguously clear" that the PSD program applies to *any* pollutant regulated under the CAA in any area that is in attainment for any NAAQS, i.e., that the area does not have to be in attainment for the pollutant being regulated, and that this application was not the product of EPA's analysis of an ambiguous provision but rather is "compelled by the statute." Op. 54, 72.

In its Petition, NAM first asserts that no matter how unambiguous a statute, it may not be applied as stated, if doing so would lead to some "absurd results" and there is *any* way to interpret one's way around that problem. NAM Pet. 8-11. Second, NAM asserts that the Panel's decision improperly allowed EPA to create *exemptions* based on "the agency's perceptions of its costs and benefits." Id. at 8, 11-13. Neither of these assertions is remotely accurate or has any basis in law.

A. There Is No Corollary to the Chevron Doctrine That Allows a Court to Apply *Any* Interpretation of a Statute That Might Avoid Absurd Results in its Implementation, Particularly One That Subverts Congressional Intent

NAM concedes that the Panel found that the application of PSD permitting requirements to any pollutant regulated under the CAA, regardless of whether that regulated pollutant is also one of the six NAAQS pollutants, is the "unambiguous" reading of the Act. NAM Pet. 6, 8, citing Op. 63-72. Faced with a ruling of such clarity, NAM contends that even though a statute is clear on its face and, under Chevron, must therefore be applied as written, it nevertheless cannot be so applied.

Instead, in a seemingly new corollary to the Chevron doctrine, NAM asserts that a court must ignore the unambiguous directive of Congress and search for *any* other so-called "reasonable" interpretation of the statute that would avoid absurd results in its implementation, even one that, in this case, allows the very entities required to comply with the provisions of the statute to permanently escape its purview. NAM Pet. 8-11.

First, the underlying premise of NAM's argument is incorrect. There is nothing absurd about applying the provisions at issue, 42 U.S.C. §§ 7479(1) and 7475. These provisions make clear that Congress unambiguously intended to require sources that emit any pollutant regulated under the Act above the statutory thresholds to obtain permits. The "absurdity" arises not in applying PSD permitting requirements to "any pollutant," but rather surfaces only in the application of the numbers used (100/250 tpy) to determine whether a source needs a permit, when applied to this particular pollutant, and even then, only when applied immediately. Thus, EPA took steps to address only the part of the statute that leads to the absurd results, the numeric thresholds, and did so temporarily, pending enhancement of permitting authorities' ability to handle the increase in permitting activity. 75 Fed. Reg. at 31,516. This is precisely the administrative remedy called for by the Supreme Court. See, e.g., Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983) ("It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute."). Indeed, EPA's reliance on the "absurd results" doctrine echoes its

reliance on the "administrative necessity" doctrine, for which NAM now expresses no concerns.

Nevertheless, NAM contends that by applying the unambiguous language of the PSD provisions, which requires permits for sources emitting any pollutant regulated under the CAA above specified levels, and by allowing EPA to phase-in the application of these provisions to address the implementation problems associated with the immediate application of the statutory 100/250 tpy threshold to all covered sources, the Panel issued a decision in conflict with three cases. NAM Pet. 2, 8-10. Each of those cases, in fact, supports EPA's action.

In Griffin v. Oceanic Constructors, Inc., 458 U.S. 564 (1982), the Court did *not* adopt an alternative interpretation to avoid absurd results. Moreover, Griffin articulated an important statutory application factor that NAM appears to ignore: "It is true that interpretations of a statute which produce absurd results are to be avoided if alternative interpretations *consistent with the legislative purpose are available*." Id. at 575 (emphasis added). In Alabama Power Co. v. Costle, 636 F.2d 323, 360 (D.C. Cir. 1980), this Court found that the de minimis exemption may not be used to "depart from the statute, but rather [as] a tool to be used in implementing the legislative design." Finally, in Mova Pharmaceutical, Corp. v. Shalala, 140 F.3d 1060, 1068 (D.C. Cir. 1998), this Court explained: "When the agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent." The Tailoring Rule, which

does nothing more than temporarily raise the statutory thresholds, is a first step towards fully implementing the unambiguous purpose of 42 U.S.C. § 7475: to require a construction permit from every source that emits any pollutant regulated under the Act above statutory thresholds. And the Tailoring Rule does so in a manner that deviates no further from the statute than is needed, by temporarily increasing the thresholds.

Even if NAM's new Chevron corollary existed, in order for any alternative interpretation to be considered "reasonable," it must be embedded in the text of the statute and implement Congressional intent, which is decidedly not the case here. First, as the Panel detailed, the statute *compels* EPA to apply PSD requirements to any source emitting *any* pollutant regulated under the CAA. Op. 50-59. The Panel based this finding on the Supreme Court's clear statements, the express wording of the applicability provisions of the PSD statute, and the provisions of both the PSD program and the entire CAA, all confirmed by over thirty years of consistent application by EPA. Id. In a further detailed discussion, the Panel then rejected NAM's alternative "NAAQS-only" argument, under which a source would be required to obtain a PSD permit only if it emits threshold amounts of the specific NAAQS pollutant for which the area is in attainment. Op. 63-72.[4] Under NAM's

[4] Specifically, under what it terms the "pollutant-specific situs requirement," NAM attempts to distort the language of 42 U.S.C. § 7475(a) that requires a construction permit from any major emitting facility "in any area to which this Part [Part C, the PSD program] applies," as meaning only the area in which the source emits a NAAQS pollutant in an area attaining *that* pollutant's NAAQS. Op. 63.

interpretation, the PSD applicability provisions, which unequivocally declare that they apply to *any* pollutant regulated under the CAA, would instead apply to virtually *no* pollutants regulated under the Act, except for the six NAAQS pollutants. Indeed, "under this approach, a stationary source could never be subject to the PSD program solely because of its greenhouse gas emissions." Op. 64. See also Op. 63-72 (methodically debunking NAM's interpretation, based on the specific provisions of both Part C [the PSD program] and Part D of the CAA). Thus, NAM's "interpretation" would not implement Congressional intent, it would subvert it.

The fallacy of NAM's argument is further evident in its application. EPA already has applied PSD to non-NAAQS pollutants, establishing significance levels for fluorides, sulfuric acid mist, hydrogen sulfide, total reduced sulfur, municipal waste combustor organics, metals and acid gases, and solid waste landfill emissions. 40 C.F.R. § 51.166(b)(23)(i). There is no overwhelming permitting burden associated with determining applicability of PSD to these pollutants, i.e., there is no absurd result that occurs when interpreting the statute exactly how the Panel declared it must be interpreted. Yet, under NAM's "interpretation," regulation of sources emitting threshold amounts of these pollutants under the PSD program must be disallowed because they are not NAAQS pollutants.

In fact, NAM's interpretation was long ago rejected by this Court. Focusing on excluded particulates, the Court explained: "[A] standard of performance [under NSPS] might be developed [for] 'excluded particulates' though no NAAQS has been

promulgated." Alabama Power, 636 F.2d at 370, n.134. As the Court then explained:

> Once a standard of performance has been promulgated [under Sec. 111] for "excluded particulates," those pollutants become "subject to regulation" . . . . After such a [NSPS] rulemaking, a major emitting facility of excluded particulates would become subject to the preconstruction review and permit requirements of section 165.

Id. See also id. at 352 (PSD review may apply to a source even though the "emissions [ ] which caused the source to be classified as a 'major emitting facility,' may not be a pollutant for which NAAQS have been promulgated . . . ."). It is, therefore, unsurprising, that the Panel found nothing in the PSD provisions that would even "*allow* EPA to adopt a NAAQS pollutant-specific reading" of the PSD applicability provisions. Op. 68 (emphasis added).[5]

Finally, NAM asserts that because EPA historically has applied PSD to any *regulated* pollutant, rather than any pollutant, the statute must be considered to be ambiguous and therefore susceptible to NAM's NAAQS-only interpretation. NAM Pet. 10-11. But NAM offers no response to the Panel's detailed exposition of this precise point, in which it explains that EPA's reading is wholly consistent with: (a) the substantive provisions of the PSD program; (b) the Supreme Court's rulings; (c) the non-PSD provisions of the CAA; and (d) Congressional intent, and "is the only logical reading of the statute." Op. 56-59. The Panel concluded: "Given all this, we have little trouble concluding that 'any air pollutant' in the definition of 'major

[5] The NAAQS-only interpretation NAM proffers does not apply at all to Title V permitting. Op. at 59. Thus, contrary to NAM's suggestion, NAM Pet. 10-11, its alternative interpretation is *neither* faithful to the Act *nor* a solution to the problems in implementing the Act identified by EPA and NAM itself. NAM Pet. 14.

emitting facility' unambiguously means 'any air pollutant regulated under the CAA.'" Id. at 59. NAM's quest to find ambiguity fails.

In the Tailoring Rule, EPA established a process for implementing Congress' unambiguous intent to require PSD permits for sources emitting threshold amounts of any pollutant regulated under the CAA in every area in attainment for *some* NAAQS pollutant, i.e., it applied the statute as written, modifying only the numerical thresholds applicable to greenhouse gases, so as to hew as closely as possible to Congress' intent. EPA's actions are fully consistent with its authority under 42 U.S.C. § 7601(a)(1) to "prescribe such regulations as are necessary to carry out [its] functions" under the Act, and with the decisions of the Supreme Court. See Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 490 (2004) ("Congress . . . vested EPA with explicit and sweeping authority to enforce CAA requirements relating to the construction and modification of sources under the PSD program . . . ."); Massachusetts, 549 U.S. at 527 ("As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."). See also Indep. Bankers Ass'n v. Marine Midland Bank, 757 F.2d 453, 461 (2d Cir. 1985) ("Fashioning policies in response to events that were unforeseeable when the legislation was written is one of the primary functions of executive agencies.").

B. EPA Did Not Improperly Exempt Sources from PSD

In its second substantive argument, NAM asserts that by temporarily altering

the 100/250 tpy thresholds for application of the requirement to obtain a PSD permit, EPA improperly granted an exemption to thousands of sources. NAM Pet. 11-14. First, this is an argument for which Petitioners clearly lack standing, since the challenged rules did not cause an injury to Petitioners. As the Panel explained, "Industry Petitioners were regulated and State Petitioners required to issue permits not because of anything EPA did in the Timing and Tailoring Rules, but by automatic operation of the statute." Op. 77. Indeed, as the Panel found, "the Timing and Tailoring Rules actually mitigate Petitioners' purported injuries." Id.

NAM asserts that it has standing to address the *applicability* of PSD to greenhouse gases. NAM Pet. 7, n.3. EPA has no quarrel with that proposition and neither did the Panel, devoting 22 pages to the issue of applicability of PSD to greenhouse gases. But once it is determined that the PSD program is applicable to greenhouse gases, Petitioners have no standing to challenge the manner in which EPA chose to phase in the statutory requirements, since the manner chosen by EPA benefits Petitioners and causes them no injury. Indeed, as the Panel explained, vacating the Tailoring Rule would not redress Petitioners' purported injury, it would increase that injury by, in Petitioners' words, orders of magnitude. Op. 77-78.

Even if Petitioners *had* standing to challenge the tailoring mechanisms adopted by EPA, their assertion that the Tailoring Rule improperly creates an exemption from PSD requirements is facially incorrect. Petitioners cite Alabama Power for the proposition that agencies have no authority to create exemptions based upon their

"perceptions of costs and benefits." NAM Pet. 12. First, the portion of the opinion in Alabama Power upon which NAM relies concerns the application of a de minimis exemption, which EPA did not apply in the Tailoring Rule. 75 Fed. Reg. at 31,560. Second, while EPA reviewed the costs associated with the subject regulations, as it must in a Regulatory Impact Analysis, it did not grant any exemptions, based on a cost-benefit analysis or otherwise. In the Tailoring Rule EPA "did not propose any permanent exemptions of any kind," 75 Fed. Reg. at 31,590, and rejected all requests for an exemption. 75 Fed. Reg. at 31,589-95 ("[W]e do not believe special exemptions for GHG requirements are likely to be justified"); id. at 31,526 ("EPA has decided not to provide exemptions from applicability determinations"). Ironically, as outlined above, it is Petitioners' "interpretation" that would permanently exempt thousands of new sources of greenhouse gases from having to obtain PSD permits. Op. 64.

Finally, NAM asserts that an agency should be restricted in establishing the best path for addressing absurd results when the "'absurd results' are created not by the statute itself but only as a result of the agency's interpretation of it." NAM Pet. 13. But the Court did not apply an agency interpretation under Chevron step 2. To the contrary, the Panel explained that the application of PSD to greenhouse gases without a NAAQS situs requirement was "statutorily compelled." Op. 54, 72. In short, NAM has not demonstrated that the Panel erred, much less that it erred in a way the meets the standard for en banc review.

III. THE IMPORTANCE OF THE SUBJECT MATTER DOES NOT WARRANT EN BANC REVIEW

NAM argues that en banc review is warranted because the decision brings sweeping changes. NAM Pet. 4, 14. Yet, NAM admits that under its own interpretation of the statute, 83% of sources would still be subject to PSD substantive regulations (BACT). Id. at 11, n.5. So, clearly the difference is not as sweeping as NAM claims. NAM further asserts that en banc review is appropriate because the challenged "regulations represent one of the most significant expansions of EPA's authority in the agency's history . . . ." Id. at 14. But, as the Panel found, it is not EPA's regulations that caused emissions of greenhouse gases from stationary sources to become regulated; that result was compelled by the statute. Op. 54, 72.

While the subject matter of the case may be important, the challenged "proceeding" does not address "question[s] of exceptional importance." Fed. R. App. P. 35(a). Rather, it addresses basic principles of administrative law. Finally, the fact that this Court has exclusive jurisdiction to hear challenges to most CAA regulations of nationwide scope, NAM Pet. 14, provides no basis for en banc review. If it did, every similar CAA regulatory review case would be lined up for en banc review. A determination to afford en banc review "should be made only in the most compelling circumstances." Bartlett v. Bowen, 824 F.2d 1240, 1242 (D.C. Cir. 1987) (Edwards, J., concurring in denial of rehearing en banc). Such circumstances are not present here.

CONCLUSION

For the foregoing reasons, the Petitions for Rehearing should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing EPA's Response to Petitions for Rehearing En Banc, was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record for Petitioners and all other parties who have registered with the Court's CM/ECF system.

Date: October 12, 2012

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