EPA'S CLEAR LEGAL AUTHORITY AND DISCRETION TO EXEMPT BIOMASS FROM CLEAN AIR ACT PERMITTING.

The Clean Air Act and supporting caselaw provide EPA clear legal authority to distinguish greenhouse gas (GHG) emissions from biomass combustion versus other sources, and thus exclude such emissions from Clean Air Act regulatory and permitting regimes. In particular, EPA has significant authority and discretion to not bring such emissions within the Clean Air Act framework at the outset given the lack of any adverse effect on public health or the environment from GHG emissions from biogenic sources. Thus, EPA need not reach the question of how to treat such emissions under the Prevention of Significant Deterioration (PSD) permitting program as there is ample authority for not bringing such emissions within the framework of PSD—if not the Clean Air Act—in the first instance given the lack of any adverse effect of such emissions on the environment.

As described below, EPA has historically excluded certain air emissions from the PSD and other CAA programs—even when such emissions are otherwise regulated in some contexts. The case for declining to bring GHG emissions from biogenic combustion within the PSD program is even stronger than this past precedent given the lack of any adverse net effect on public health and the environment from such emissions. In making such a decision, EPA can also properly consider any net GHG benefits that utilizing biomass for power generation or industrial processes provides vis-à-vis other fuel sources.

I. The Clean Air Act Does Not Authorize EPA to Regulate Emissions such as Biogenic GHG Emissions Which do not Adversely Effect the Environment.

A core principle underlying much of EPA regulatory authority under the Clean Air Act is that EPA shall regulate only air pollutants that endanger human health or public welfare. Unlike CO_2 emissions from other sources, emissions from the combustion of biomass will not increase net atmospheric levels of CO_2.[1] As has been well documented in numerous other contexts, net fluxes of biomass carbon to the atmosphere from the combustion of biomass in the United States are, at a minimum, "carbon neutral" in that any GHG emissions associated with the combustion of biomass are offset by biological processes that remove CO_2 from the atmosphere. Domestic forests constitute the nation's leading carbon sink. EPA itself has recognized the lack of an adverse effect from biogenic CO_2 emissions in other contexts. For example, EPA's recent Mandatory Reporting of Greenhouse Gases Rule distinguishes biogenic CO_2 from other emissions. *See generally* 75 Fed. Reg. 56,260 (Oct. 30, 2009). The Department of Energy and virtually every government agency in the world to take up the issue similarly have recognized the lack of any adverse effect from biogenic CO_2 emissions. *See* NAFO's submission on EPA's Call for Information.

[1] As has been well documented in other numerous other contexts, net fluxes of biomass carbon to the atmosphere from the combustion of biomass in the United States are, at a minimum, "carbon neutral" in that any GHG emissions associated with the combustion of biomass are diminished by the significant role domestic forests play in sequestering carbon as the nation's leading carbon sink.

Because biogenic CO_2 emissions have no adverse effect on public health or public welfare and because Congress did not specifically direct EPA to regulate such emissions under the CAA, EPA lacks regulatory authority to address them in the first instance. In the Endangerment Finding, EPA specifically concluded that that the combined emissions of GHGs from new motor vehicles and new motor vehicle engines cause and contribute to air pollution that endangers public health and welfare. EPA based this conclusion after noting that GHGs associated with these sources (primarily from the combustion of fossil fuels) represented 23 percent of total U.S. emissions of well-mixed GHGs.. 74 Fed. Reg. at 66540 (Dec. 15, 2009). Because of its "carbon neutral" lifecycle, *see supra* note 1, biogenic CO_2 is fundamentally different from GHGs emitted from sources regulated under section 202(a) of the Clean Air Act. Biogenic CO_2 resulting from combustion, unlike fossil fuel combustion, has no net effect on the atmospheric level of "well-mixed" GHGs. It is not a contributor to climate change and therefore does not cause or contribute to the endangerment of public health or welfare. Thus, EPA should properly exclude biogenic CO_2 from the scope of its Clean Air Act regulatory authority based on the lack of any adverse effects.

II. EPA Has Clear Discretion to Distinguish Biogenic CO2 Emissions from Other GHG Regulations.

In its landmark *Massachusetts v. EPA* decision, the Supreme Court recognized from the outset that EPA has significant discretion regarding the scope of climate change regulations. While the Supreme Court held that EPA has the authority to regulate emissions of GHGs from new motor vehicles based on its finding that GHGs fit within the Clean Air Act's definition of "air pollutant," the Court also made clear that EPA's determination as to when and how such regulation should proceed is within the discretion of the agency. *Massachusetts v EPA*, 549 U.S. 497, 528-29, 533 (2007). "[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Id.* at 527 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-845 (1984)); *see also Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930, 941-42 (D.C. Cir. 2006) ("The court owes particular deference to EPA when its rulemakings rest upon matters of scientific and statistical judgment within the agency's sphere of special competence and statutory jurisdiction.").[2]

In the Tailoring Rule itself, EPA surgically exercised such discretion to limit the scope and reach of GHG regulation by specifically defining the precise "greenhouse gasses" that will be "subject to regulation" as set forth in that rulemaking. *See* 75 Fed. Reg. at 31606. EPA chose

[2] Courts specifically have affirmed EPA's discretion regarding the timing and approach to the regulation of GHGs following the Court's decision in *Massachusetts v. EPA*. In rejecting a petition to compel the regulation of GHGs after the *Massachusetts* decision, Judge Tatel observed that "nothing in section 202, the Supreme Court's decision in *Massachusetts v. EPA*, or our remand order imposes a specific deadline by which EPA must determine whether a particular air pollutant poses a threat to public health or welfare." Slip op. at 2. Similarly, the Northern District of California also rejected a an argument that EPA is compelled to regulate all GHGs following *Massachusetts*. *S.F. Chapter of A. Philip Randolph Inst. v. EPA*, 2008 U.S. Dist. LEXIS 27794 at *10-11 (N.D. Cal. Mar. 28, 2008). Consistent with the D.C. Circuit's conclusion, the California court recognized that "[t]he Supreme Court was careful not to place a time limit on the EPA, and indeed did not even reach the question whether an endangerment finding had to be made at all."

to limit its definition of "greenhouse gases" to "the aggregate group of six" chemicals and excluded other chemicals that might have climate impacts. *Id.* EPA certainly could assert similar discretion to make clear that the PSD permitting program does not include GHG emissions from the combustion of biomass given that biogenic emissions in the United States do not increase net atmospheric CO_2 *and* serve to offset the utilization of fossil fuels for combustion. EPA has discretion to recognize such readily apparent benefits of substituting a carbon neutral fuel for one that releases carbon which may have been stored for literally millions of years. Such discretion is further supported by past practice; EPA has long differentiated biogenic emissions from fossil fuel emissions in its Inventory of U.S. Greenhouse Gas Emissions and Sinks. Here, EPA can and should exercise its well established discretion in interpreting the Clean Air Act requirements for the PSD permitting program by distinguishing biogenic CO_2 GHG emissions from fossil fuel GHG emissions.

III. EPA Has Limited the Regulatory Reach of the PSD Program in Other Contexts.

There is abundant support for EPA to exclude biogenic CO_2 emissions from the PSD program based on EPA's long standing implementation of the PSD program regarding other pollutants. Differentiating between sources of GHG emissions is consistent with EPA's longstanding exclusion in its PSD regulations of certain volatile organic compounds (VOCs) from the otherwise applicable statutory definition. 40 C.F.R. § 51.100(s); *see also* 40 C.F.R. §§ 52.21(b)(2)(ii) and 52.21(b)(3). Specifically, the regulation excludes certain compounds from the definition of VOCs even though they are technically "volatile" and "organic," because such compounds would have negligible environmental impact. *See* 40 C.F.R. § 51.100(s); 57 Fed. Reg. 3941, 3943-44 (Feb. 3, 1992) (disagreeing with comment that definition exceeded EPA's statutory authority, asserting that EPA's definition is a "policy choice clearly within the Agency's discretion" and explaining that "it is an administrative necessity and reasonable to define VOC to include all organic compounds except those EPA has determined to be negligibly reactive"). A similar approach is warranted for biogenic CO2 emissions as such emissions will not increase atmospheric levels of CO_2.

EPA has routinely exercised its discretion in implementing other aspects of the PSD program to avoid bringing in air pollutants in certain contexts within the reach of the PSD program. In *Alabama Power Co. v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979), the D.C. Circuit recognized EPA's discretion, in administering the Clean Air Act's provision requiring PSD review for any "modification" of a major emitting facility, "to exempt from PSD review some emission increases on grounds of de minimis or administrative necessity." Consistent with that decision, EPA's regulations, 40 C.F.R. parts 51-52, have long excluded routine maintenance, repair, and replacement from triggering New Source Review program requirements. Distinguishing biogenic CO_2 from other GHG emissions can similarly be warranted based on either a de minimis, or "neutral" impact. In this regard, we would note that having a neutral impact on public health and public welfare (and additionally having a beneficial impact with respect to diminishing the use of fossil fuels) is clearly below any possible threshold for excluding such emissions as de minimis under the Clean Air Act.[3]

[3] We would note that this position would be consistent with the Administrator's decision, to date, to not establish de minimis levels for GHGs under the Clean Air Act. We recognize that the Administrator has indicated that the level of contribution under section 202(a) of the Clean Air Act does not need to be "significant." Moreover, EPA has

IV. Conclusion

It is clear that EPA has both the legal authority and the discretion to exclude biogenic CO_2 emissions from the Clean Air Act and/or the PSD permitting program.[4] EPA should promptly reconsider the treatment of biogenic emissions in the Tailoring Rule, and reconcile the Tailoring Rule with both sound science and policy regarding renewable energy. By regulating the greenhouse gas emissions from biomass combustion identical to fossil fuels, the Tailoring Rule both ignores well settled principles regarding the net carbon neutrality of biogenic emissions in the United States and removes any regulatory incentive to utilize biomass in place of coal and other fossil fuels.

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stated in its endangerment determination that the "Administrator is not required to establish a bright line below which she would never find contribution under any circumstance." 74 Fed. Reg. at 66,542. Under the theory outlined above, however, the Administrator would not be compelled to "draw a line in the sand" on GHG emissions, but could ground her decision on the other factors cited (carbon neutrality and fuel substitution).

[4] Notably, the regulation of biogenic emissions does not comport with the CAA's stated goals for stationary sources, which are clearly aimed at reducing industrial source emissions through evolving pollution control technologies while minimizing economic harm. *See generally* 42 U.S.C. § 7470.