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

In the Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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(Additional Captions Listed on Inside Cover)

AMERICAN CHEMISTRY COUNCIL, ET AL., PETITIONERS

v.

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ENERGY-INTENSIVE MANUFACTURERS WORKING GROUP ON GREENHOUSE GAS REGULATION, ET AL., PETITIONERS

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SOUTHEASTERN LEGAL FOUNDATION, INC., ET AL., PETITIONERS

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STATE OF TEXAS, ET AL., PETITIONERS

v.

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CHAMBER OF COMMERCE OF THE UNITED STATES, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 191-267) is reported at 684 F.3d 102. Final actions of the Environmental Protection Agency (EPA) are published at 75 Fed. Reg. 31,514 (June 3, 2010) (J.A. 268-682); 75 Fed. Reg. 25,324 (May 7, 2010) (J.A. 683-704 (excerpts)); 75 Fed. Reg. 17,004 (Apr. 2, 2010) (J.A. 705-792); 74 Fed. Reg. 66,496 (Dec. 15, 2009) (J.A. 793-794 (excerpts)); 67 Fed. Reg. 80,186 (Dec. 31, 2002) (J.A. 1379-1398 (excerpts)); 45 Fed. Reg. 52,676 (Aug. 7, 1980) (J.A. 1399-1412 (excerpts)); 43 Fed. Reg. 26,388 (June 19, 1978) (J.A. 1417-1495 (excerpts)); and 43 Fed. Reg. 26,380 (June 19, 1978) (J.A. 1496-1536).

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2012. Petitions for rehearing were denied on December 20, 2012 (J.A. 139-190). The petition for a writ of certiorari in No. 12-1146 was filed on March 20, 2013. On March 7, 8, 11, and 12, 2013, the Chief Justice extended the time within which to file petitions for writs of certiorari in Nos. 12-1272, 12-1248, 12-1254, 12-1268, and 12-1269 to and including April 19, 2013. The petition in No. 12-1254 was filed on April 17, 2013. The petition in No. 12-1248 was filed on April 18, 2013. The petitions in Nos. 12-1268, 12-1269, and 12-1272 were filed on April 19, 2013. The petitions for writs of certiorari were granted on October 15, 2013, limited to the following question: "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." The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, and regulations of the Environmental Protection Agency thereunder are reprinted in an appendix to this brief. App., *infra*, 1a-99a.

STATEMENT

In *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), this Court held that the "sweeping definition of 'air pollutant'" in the Clean Air Act (CAA or Act), 42 U.S.C. 7401 *et seq.*, unambiguously covers "greenhouse gases," so named because "when * * * released into the atmosphere," they "act[] like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected

heat." 549 U.S. at 505, 528-529 (citing 42 U.S.C. 7602(g)). More recently, this Court held that the CAA's programs governing emissions from stationary sources of air pollutants supply a regulatory framework for greenhouse gases so comprehensive as to displace any claim that such emissions are an actionable public nuisance under federal common law. *American Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2533, 2537-2538 (2011) (*AEP*).

On remand from this Court's decision in *Massachusetts*, respondent EPA comprehensively assessed the effects of greenhouse-gas pollution. It concluded that greenhouse gases in the atmosphere "may reasonably be anticipated both to endanger public health and to endanger public welfare." J.A. 802. In light of that endangerment finding, and the agency's separate finding that motor-vehicle emissions contribute to that endangerment, Title II of the CAA required the EPA to promulgate regulations governing greenhouse-gas emissions from new motor vehicles. 42 U.S.C. 7521(a)(1). The EPA issued such regulations in a joint rulemaking with the National Highway Traffic Safety Administration. J.A. 683-704. In its decision below, the D.C. Circuit denied petitions for review of those findings and regulations. J.A. 191-267.

Although some petitioners sought further review of those findings and regulations (see U.S. Br. in Opp. 19-31), this Court limited its grant of certiorari to a single question (see p. 3, *supra*) that did not encompass those challenges. For purposes of deciding the question on which this Court granted review, the propriety of the EPA's regulation of motor-vehicle emissions of greenhouse gases therefore should be taken as given. The question before the Court concerns that regulation's

effect on the regulation of greenhouse-gas emissions from stationary sources under other CAA programs, particularly the Prevention of Significant Deterioration (PSD) program, 42 U.S.C. 7470-7479, which mandates pre-construction permitting for certain stationary sources of air pollutants.

Since the earliest days of the PSD program, the EPA has concluded that, once a pollutant becomes regulated under the Act (as greenhouse gases now are under Title II), two related but distinct consequences follow automatically under the PSD program. First, going forward, the PSD program will apply to (*i.e.*, require a pre-construction permit for) any stationary source that emits large quantities of that newly regulated pollutant, regardless of what other pollutants it does or does not emit. See 42 U.S.C. 7475(a), 7479(1). Second, all proposed facilities to which the PSD program applies must take certain steps with respect to that newly regulated pollutant (such as limiting their emissions based on the best available control technology for that pollutant). See 42 U.S.C. 7475(a)(4).

Applying those principles, the EPA concluded that, when the controls of its Title II greenhouse-gas regulations took effect, the PSD program would (a) require pre-construction permits for stationary sources that would emit large amounts of greenhouse gases, and (b) impose pre-construction requirements regarding emissions of those pollutants. J.A. 705-706, 771-777. The EPA concluded that the regulation of greenhouse gases under Title II likewise automatically triggered the operating-permit requirement of Title V of the Act, whose scope is defined in relevant part by terms that parallel a definitional provision that sets the scope of the PSD program. See J.A. 787-791. Various petitioners

here contest the EPA's understanding of the set of facilities to which the PSD and Title V programs apply, the EPA's understanding of what substantive requirements the PSD program imposes on covered sources, or both. Fairly read, the question on which this Court granted certiorari subsumes both issues.

1. a. In overhauling the CAA in 1970, Congress sought to address "the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles," which "has resulted in mounting dangers to the public health and welfare." 42 U.S.C. 7401(a)(2). Congress's focus on dangers to public "welfare" broadly encompasses "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to * * * property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." 42 U.S.C. 7602(h). To those ends, the Act seeks to achieve, *inter alia*, the "reduction or elimination, through any measures, of the amount of pollutants produced or created at the source." 42 U.S.C. 7401(a)(3).

b. Many of the Act's provisions, including those of central relevance here, refer to the emission of an "air pollutant." The Act defines that term to mean "any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air," including any precursors to the formation of such air pollutant. 42 U.S.C. 7602(g).

The Act regulates "air pollutants" emitted by both mobile and stationary sources. Title II establishes a framework for federal control of pollution from motor

vehicles and other mobile sources. 42 U.S.C. 7521-7590. Under Title II, if the EPA determines that a particular form of air pollution "may reasonably be anticipated to endanger public health or welfare," the agency must "prescribe * * * standards applicable to the emission of [the] air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the EPA's] judgment cause, or contribute to," that form of air pollution. 42 U.S.C. 7521(a)(1).

The Act also includes several regulatory programs that address stationary sources of air pollution, such as power plants and other industrial facilities. The program primarily at issue here is the PSD program, which establishes a pre-construction permitting process for the prevention of significant deterioration of air quality that may occur as a result of "construction" (a term of art that in the Act and in this brief includes both new construction and major modification) of certain stationary sources. 42 U.S.C. 7470-7479.

Four other CAA programs are particularly relevant in setting the context in which the PSD program operates. One program establishes New Source Performance Standards (NSPS) for specific categories of stationary sources that, "in [the EPA's] judgment * * * cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7411(b)(1)(A); see 42 U.S.C. 7411. Another program establishes National Emission Standards for Hazardous Air Pollutants (NESHAP) for nearly 200 designated especially hazardous pollutants. 42 U.S.C. 7412. A third program establishes a Nonattainment New Source Review (NNSR) permit process with respect to certain stationary sources that would emit certain pollutants and are proposed to be built in

areas where the air does not meet national standards as to those pollutants. 42 U.S.C. 7501-7515. And a fourth program regulates specific atmospherically well-mixed gases that deplete the stratospheric ozone layer. 42 U.S.C. 7671-7671q.

c. Congress enacted the PSD program in 1977. Pub. L. No. 95-95, § 127(a), 91 Stat. 731; see *Alabama Power* v. *Costle*, 636 F.2d 323, 349 (D.C. Cir. 1979) (per curiam). The program's pre-construction permitting process entails scientific analysis, commitments to monitoring, emissions limitations, and use of emissions-control technologies. See 42 U.S.C. 7475(a) and (e). As with many CAA programs, the requirements of the PSD program are often applied in the first instance by state permitting authorities acting pursuant to a state implementation plan. See 42 U.S.C. 7471; *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461 (2004) (*Alaska*).

In contrast to some CAA programs (such as Title II for motor vehicles), the PSD program does not direct the EPA to make endangerment findings as to particular pollutants. Instead, pollutants are addressed in the PSD program when (and because) they have been identified and regulated under *other* CAA provisions. For example, one aspect of the PSD program requires a covered facility to limit its emissions to a level that corresponds to application of "the best available control technology [BACT] for each pollutant subject to regulation under [the CAA]." 42 U.S.C. 7475(a)(4).[1] Another aspect of the

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[1] BACT is "an emission limitation based on the maximum degree of reduction of [a] pollutant * * * emitted from or which results from [a] 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." 42 U.S.C. 7479(3). Identification of BACT thus entails a facility-

PSD program (42 U.S.C. 7473, 7475(a)(3)(A)) limits emissions of the six "criteria" pollutants for which the EPA has established National Ambient Air Quality Standards (NAAQS) under a different part of the CAA, 42 U.S.C. 7407-7410.[2] A third aspect of the program requires the facility to comply with "any other applicable emission standard or standard of performance under [the CAA]," 42 U.S.C. 7475(a)(3)(C), such as standards issued under the NSPS and stratospheric ozone programs. Congress has exempted the hazardous air pollutants regulated under the NESHAP program from regulation under the PSD program. See 42 U.S.C. 7412(b)(6).

Although the requirements of the PSD program are broad, they apply to a limited class of sources. First, unlike some other programs that govern emissions from all sources of a given type, the PSD program is triggered only by the proposed *construction* of a stationary source. See 42 U.S.C. 7475(a), 7479(2)(C), 7411(a)(4). Second, the PSD program requires a pre-construction permit only for a "major emitting facility," defined as a "station-

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specific analysis that requires emissions controls that are not cost-prohibitive. See, *e.g.*, *Alaska*, 540 U.S. at 475-476.

[2] The criteria pollutants are carbon monoxide, lead, oxides of nitrogen, ozone, particulate matter, and sulfur oxides. 40 C.F.R. Pt. 50. None is defined by the EPA as a greenhouse gas, J.A. 232, with the immaterial exception of nitrous oxide (an oxide of nitrogen). In "nonattainment" areas for a particular criteria pollutant—those areas that do not meet national standards for that pollutant—emissions of that pollutant are regulated under the NNSR program. 42 U.S.C. 7501-7515. The PSD program regulates, *inter alia*, emissions of a particular criteria pollutant in areas that do meet a national standard for that pollutant (known as "attainment" areas) and in areas that, due to lack of information, are "unclassifiable," 42 U.S.C. 7407(d)(1)(A)(iii). Because attainment and unclassifiable areas are generally treated alike, this brief simply refers to them together as "attainment" areas.

ary source[] of air pollutants which emit[s], or ha[s] the potential to emit, [depending on the type of source, a statutory threshold of either 100 or 250 tons per year] or more of any air pollutant." 42 U.S.C. 7479(1). Third, pre-construction permitting is required only for facilities to be "constructed in any area to which this part [42 U.S.C. 7470-7492] applies." 42 U.S.C. 7475(a).

d. Title V of the CAA establishes an operating-permit program for certain stationary sources of air pollutants. 42 U.S.C. 7661-7661f. Title V imposes no additional emissions-control requirements on sources. Rather, it requires the operator of each covered source to hold a comprehensive operating permit, as a way to identify sources and assure compliance with substantive requirements imposed by other CAA provisions. 42 U.S.C. 7661c(a)-(c). Of relevance here, the Title V operating-permit requirement applies to a "major source," which 42 U.S.C. 7661(2)(B) defines to include any "major stationary source." Section 7602(j) of Title 42 in turn defines that term as a "stationary facility * * * which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant."

2. The oldest relevant EPA rulemakings implementing the PSD program (referred to as the "historic regulations") date to 1978, 1980, and 2002.

In issuing the 1978 regulation, the EPA noted that "questions ha[d] been raised" regarding the statutory requirement that sources subject to the PSD program must satisfy the BACT requirement for each pollutant that is "subject to regulation under [the CAA]." J.A. 1460 (quoting 42 U.S.C. 7475(a)(4)). The EPA confirmed its view (previously expressed in the proposed rule, 42 Fed. Reg. 57,479, 57,480 (Nov. 3, 1977)) that the phrase referred to "any pollutant regulated [by the EPA] for

any source type." J.A. 1460. Thus, the EPA explained, the BACT requirement applies to emissions of (1) "criteria pollutants," (2) "all pollutant[s] regulated under Title II of the Act regarding emission standards for mobile sources," and (3) several other categories of regulated pollutants. *Ibid.*

The 1980 regulation amended the EPA's PSD rules in response to the D.C. Circuit's decision in *Alabama Power*, *supra*, which had invalidated the agency's interpretations of several aspects of the PSD program not directly at issue here. J.A. 1402-1403. The 1980 regulation stated that, "[w]ith respect to new major stationary sources" that are subject to PSD requirements, "BACT will be required for each regulated pollutant emitted in excess of specified *de minimis* amounts." 45 Fed. Reg. at 52,722.

The 1980 regulation also discussed the analysis used to determine whether a particular source is subject to PSD program requirements. The EPA explained that "[S]ection [7475(a)] applies PSD preconstruction review to all sources that [1] are major for any pollutant subject to regulation under the Act and [2] locate in an area designated attainment or unclassified for any pollutant." J.A. 1405. The EPA observed that the first condition derives from the definition of "major emitting facility," 42 U.S.C. 7479(1), which refers to emissions exceeding specified threshold amounts "of 'any' pollutant," a term that the EPA explained "cover[s] both criteria pollutants * * * and non-criteria pollutants subject to regulation under the Act." J.A. 1404-1405. The EPA explained that the second condition derives from 42 U.S.C. 7475(a)'s "refer[ence] to [construction in] an 'area to which this part * * * applies,' which * * * Alabama Power interpreted to mean * * * areas designated [under 42

U.S.C. 7407] as attainment or unclassifiable for a particular air pollutant." J.A. 1405. The EPA further explained that, "in order for PSD review to apply to a source, the source need not be major for a pollutant for which an area is designated attainment or unclassifiable; the source need only emit *any* pollutant in major amounts (i.e., the amounts specified in [42 U.S.C. 7479(1)]) and be located in an area designated attainment or unclassifiable for that or any other pollutant." J.A. 1403 (emphasis in original, 45 Fed. Reg. 52,711).

The 2002 regulation did not break new interpretive ground on the matters at issue here, but it applied the EPA's interpretations of the PSD program provisions to generate a roster of pollutants that were then "subject to Federal PSD review and permitting requirements." J.A. 1388. That roster included the six criteria pollutants, eight types of non-criteria pollutants regulated under various CAA provisions, and the observation that the PSD program would "appl[y] automatically" to pollutants regulated in the future. J.A. 1388-1389. The resulting regulations defined the term "[r]egulated NSR [new source review] pollutant" to include pollutants regulated under various specified parts of the Act and, as a catch-all, "[a]ny pollutant that otherwise is subject to regulation under the Act." 40 C.F.R. 51.166(b)(49)(iv), 52.21(b)(50)(iv) (2003). Under the EPA's regulations, the PSD program applies to sources based on their emissions of a regulated NSR pollutant (see 40 C.F.R. 51.166(a)(7) and (b)(1)(i)(*a*)-(*b*)), and sources must satisfy the BACT requirement for emissions of regulated NSR pollutants (see 40 C.F.R. 51.166(j)(2)).

3. This Court's decision in *Massachusetts* triggered a series of EPA actions that culminated in the regulation of greenhouse-gas emissions from stationary sources.

a. In 2003, the EPA denied a petition for rulemaking that had asked the agency to regulate greenhouse-gas emissions from new motor vehicles. *Massachusetts*, 549 U.S. at 510-511. That denial was based in part on the agency's determination that greenhouse gases are not "air pollutant[s]" under the Act. *Id.* at 511-513. This Court overturned that decision, concluding that greenhouse gases fall within the "Act's sweeping definition of 'air pollutant.'" *Id.* at 528 (quoting 42 U.S.C. 7602(g)).

On remand, the EPA determined "that elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and to endanger the public welfare of current and future generations." J.A. 869.[3] The EPA further found "that emissions of the well-mixed greenhouse gases from new motor vehicles contribute to" greenhouse-gas air pollution. J.A. 960. Once the EPA made those endangerment and contribution findings, the CAA required the agency to regulate emissions of greenhouse gases from new motor vehicles. 42 U.S.C. 7521(a); *Massachusetts*, 549 U.S at 533. Accordingly, the EPA promulgated greenhouse-gas emission standards to take effect

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[3] The EPA found the relevant "air pollution" to be the atmospheric mix of six categories of "directly-emitted, long-lived and well-mixed greenhouse gases," *viz.*, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. J.A. 869-870. The EPA explained that climate change caused by greenhouse gas emissions is reasonably anticipated to, *inter alia*, increase the risk of human injury, disease, and death in many ways; adversely affect domestic food production; increase the risk of harms from extreme flooding and drought; increase the risk of storm surge and coastal flooding; and harm infrastructure, energy production, and distribution capacity. See J.A. 904-911, 931-951; *AEP*, 131 S. Ct. at 2533 (discussing the EPA's endangerment finding).

January 2, 2011, for new light-duty vehicles. J.A. 683; see 75 Fed. Reg. at 25,445.

b. Under the EPA's interpretation of the CAA set forth in the historic regulations, the agency's regulation of greenhouse-gas emissions under Title II automatically triggered corresponding changes to the requirements of the PSD program and to the range of sources to which that program applied. See J.A. 778 ("[O]nce EPA has determined to regulate a pollutant in some form under the Act and such regulation is operative on the regulated activity, the terms of the Act make clear that the PSD program is automatically applicable."); J.A. 784 ("It has been EPA's consistent position since 1978 that regulation of a pollutant under Title II triggers PSD requirements for such a pollutant."). The EPA clarified that, for purposes of the Title II regulation of greenhouse gases, the relevant date was January 2, 2011, the day the substantive emissions controls took effect. J.A. 720-753.

Accordingly, under the agency's construction of the CAA, three distinct changes would occur automatically on the above date. First, a stationary source to which the PSD program applied because of its emissions of a regulated non-greenhouse-gas pollutant (*e.g.*, a criteria pollutant) would be required to address greenhouse gases (and, in particular, to satisfy the BACT requirement for greenhouse gases) in complying with the PSD program's substantive requirements. Second, a stationary source that previously would not have been subject to the PSD program as a "major emitting facility" under 42 U.S.C. 7479(1) (because it would emit no regulated pollutant in excess of the statutory threshold) would, as of January 2, 2011, satisfy that definition—and thus its construction would be subject to the PSD program—if the source emitted greenhouse gases in excess of the

applicable threshold. Third, a stationary source that previously was not subject to the Title V program would, as of January 2, 2011, become subject to that program if it emitted greenhouse gases in excess of the applicable threshold. See J.A. 771-791.

c. As a general matter, the statutory thresholds referred to above are 100 or 250 tons per year of a particular pollutant, depending on the type of facility and program involved. See J.A. 196-197. But some greenhouse gases—most prominently, carbon dioxide from fossil-fuel combustion—"are emitted in far greater volumes than other pollutants." J.A. 198. Consequently, thousands of industrial, residential, and commercial sources would exceed the PSD program's statutory emissions threshold for greenhouse gases, and millions would do so for Title V. J.A. 461, 490-492. The EPA observed, however, that "the addition of enormous numbers of additional sources would provide relatively little benefit compared to the costs to sources and the burdens to permitting authorities." J.A. 356. For example, the agency explained that, under the PSD program, "the large number of small sources that would be subject to control constitute a relatively small part of the environmental problem." *Ibid.*

The EPA further determined that the administrative burdens resulting from the immediate expansion of the number of sources required to obtain permits pursuant to the statutory thresholds alone would, under the circumstances at that time, "overwhelm[] the resources of permitting authorities" and "severely impair[] the functioning of the programs." J.A. 268; see, *e.g.*, 42 U.S.C. 7661b(c) (requiring permitting authorities to issue or deny applications under Title V within 18 months of application); J.A. 490 (observing that "[i]t would be im-

possible for permitting authorities to meet this statutory [deadline]"). The agency recognized that Congress had deliberately employed "broad language" in the permitting provisions in "an intentional effort to confer the flexibility necessary to forestall * * * obsolescence." J.A. 468 n.41 (quoting *Massachusetts*, 549 U.S. at 532). The EPA concluded, however, that applying the statutory threshold alone at that time would frustrate rather than further congressional intent and would lead to "absurd results." J.A. 392-393.

In fashioning a regulatory regime that would avoid those untoward consequences, the EPA declined to flatly exempt sources from the coverage of the statutory requirements or to permanently alter the statutory thresholds. J.A. 327 ("EPA has decided not to provide exemptions from applicability determinations."); see J.A. 482-483, 601-627; 42 U.S.C. 7661a(a) ("[The EPA] may not exempt any major source from [Title V's] requirements."). Instead, the EPA established a framework to implement the PSD and Title V programs in an administratively feasible way, by "phasing in the applicability" of the permitting requirements, "starting with the largest [greenhouse-gas] emitters." J.A. 268 (Tailoring Rule). Under the current step of that approach, the PSD program applies to a proposed stationary source whose greenhouse-gas emissions would exceed both regulatory thresholds and the statutory thresholds specified in the CAA. See J.A. 313-316. For many sources, the regulatory thresholds are considerably higher than the statutory thresholds.[4]

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[4] The statutory threshold is 0, 100, or 250 tons per year by mass of any air pollutant, depending on the circumstances. 42 U.S.C. 7411(a), 7475(a), 7479(1) and (2)(C), 7602(j), 7661(2)(B), 7661a(a). The regulatory threshold is 75,000 or 100,000 tons per year on a

carbon-dioxide equivalent basis, depending on the circumstances. J.A. 311-318; see generally Office of Air Quality Planning & Standards, EPA, *PSD and Title V Permitting Guidance for Greenhouse Gases* 6-16 & Apps. A-E (Mar. 2011) (*Greenhouse Gas Guidance*) (explaining applications of the thresholds under different circumstances).

The regulations use a carbon-dioxide-equivalent basis because emissions of similar quantities of different greenhouse gases have widely varying environmental consequences. See 40 C.F.R. Pt. 98, Subpt. A tbl. A-1 (listing 72 compounds, each of which the EPA found to have a different potential to contribute to global warming). For example, one ton of sulfur hexafluoride emissions is treated for purposes of the regulatory thresholds as equivalent to 23,900 tons of carbon dioxide emissions, in recognition of the greater heat-trapping potential and longer life of the former compound relative to the latter. *Ibid.*

The EPA recognized that many greenhouse-gases (such as sulfur hexafluoride in the example just given) could be emitted above the regulatory threshold (on a carbon-dioxide-equivalent basis) but below the statutory threshold (on a pure mass basis). J.A. 344-349. Accordingly, the agency determined that the PSD program would apply to a source by virtue of its greenhouse-gas emissions only if *both* the statutory and regulatory thresholds were satisfied. The EPA implemented that dual-threshold approach by maintaining the statutory thresholds in its pre-existing definition of "major stationary source" (40 C.F.R. 51.166(b)(1)(i), 52.21(b)(1)(i)), while providing that a facility's greenhouse-gas emissions are "subject to regulation" (see p. 12, *supra*) only if the facility will emit them in an amount at or above the regulatory threshold (40 C.F.R. 51.166(b)(48)(i)-(v), 52.21(b)(49)(i)-(v)). The EPA made analogous changes to the Title V program. See J.A. 573-580.

Because the BACT requirement also turns on whether a pollutant is "subject to regulation" (see 40 C.F.R. 51.166(j)(2), 52.21(j)(2)), implementing the regulatory thresholds in the way the agency did had the corresponding effect (recognized by the EPA and supported by commenters) of requiring a facility subject to the PSD program to use BACT for greenhouse gases only if the facility would emit that pollutant in an amount at or above the regulatory threshold. See J.A. 506-509. The EPA anticipated, however,

Even as tailored, however, the EPA's implementation of the greenhouse-gas permitting requirements "represents 86 percent of the coverage [of aggregate stationary-source greenhouse-gas emissions on a carbon-dioxide-equivalent basis] at full implementation of the statutory * * * thresholds." J.A. 523. The EPA indicated that it will analyze extending the PSD and Title V programs to other stationary sources, and will evaluate whether that can be done without imposing prohibitive burdens on sources and permitting authorities. J.A. 316-318; see J.A. 422 ("[The] EPA seeks to include as many [greenhouse-gas] sources in the permitting programs at as close to the statutory thresholds as possible, and as quickly as possible.").

4. The court of appeals denied in part, and dismissed in part, petitions by certain States and industry groups challenging the administrative actions described above. J.A. 191-267.

a. As relevant to the question on which this Court granted certiorari, the court of appeals upheld, as "statutorily compelled," J.A. 236, the EPA's longstanding interpretations of the sources to which the PSD and Title V programs apply, and the requirements the PSD program imposes on covered sources. J.A. 232-256.

The court of appeals held that the PSD program's BACT requirement encompasses greenhouse gases. J.A. 241-242. The court explained that the "statutory

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that this BACT threshold would have no independent practical effect because the greenhouse-gas emissions of any source large enough to be subject to the PSD program would exceed that threshold. See Linda M. Chappell, Office of Air Quality Planning & Standards, EPA, *Regulatory Impact Analysis for the Final Prevention of Significant Deterioriation and Title V Greenhouse Gas Tailoring Rule* Attach. C, at 6-7 (May 2010), http://www.epa.gov/ttn/ecas/regdata/RIAs/riatailoring.pdf.

text provides, without qualification, that covered sources must install the 'best available control technology for *each pollutant subject to regulation* under [the CAA].'" J.A. 242 (quoting 42 U.S.C. 7475(a)(4)) (brackets in original). The court concluded that, "[b]ecause greenhouse gases are indisputably a pollutant subject to regulation under the Act, it is crystal clear that PSD permittees must install BACT for greenhouse gases." *Ibid.*

The court of appeals also held that a stationary source's emissions of greenhouse gases can, standing alone, trigger pre-construction review under the PSD program. J.A. 242-256. The court noted, *inter alia*, that this Court in *Massachusetts* had found "plainly unreasonable" an interpretation of the CAA's definition of "air pollutant" that would limit the term to emissions causing only local pollution. J.A. 244 (quoting 549 U.S. at 529 n.26). Some petitioners argued that, because one purpose of the PSD program is to prevent any "major emitting facility" located in an attainment area for a criteria pollutant from contributing to the deterioration of air quality in any region (see 42 U.S.C. 7475(a), (3)(A) and (B)), the term "any air pollutant" in the definition of "major emitting facility" (42 U.S.C. 7479(1)) should be construed to mean "any criteria pollutant." J.A. 246-251. Under that interpretation, the PSD program's BACT requirement would apply to greenhouse gases, but a particular proposed stationary source would be subject to the PSD program only if it would emit a criteria pollutant at a level above the statutory threshold and would be located in an attainment area for that criteria pollutant. J.A. 246-247. The court of appeals acknowledged that the context of some CAA provisions requires that the term "any air pollutant" be construed to refer only to criteria pollutants. See, *e.g.*, J.A. 252-253 (discussing 42

U.S.C. 7473(b)(4)). The court concluded, however, that petitioners had "failed to identify any reasons that the phrase should be read narrowly [in the definition of 'major emitting facility']." J.A. 255.

Because no petitioner had adequately developed any arguments concerning Title V, the court of appeals held that petitioners had forfeited their challenge to the EPA's "greenhouse gas-inclusive interpretation of Title V." J.A. 241.

Finally, the court of appeals held that "no petitioner has standing to challenge" the EPA's establishment of regulatory thresholds that would "phas[e] in the applicability of [the PSD and Title V] programs to [greenhouse-gas] sources, starting with the largest [greenhouse-gas] emitters." J.A. 194, 258 (quoting J.A. 268). The court explained that those actions did not injure petitioners, but rather reduced the costs and administrative burdens to which petitioners otherwise would have been subject "by automatic operation of the statute." J.A. 261. The court accordingly dismissed the petitions insofar as they sought review of those EPA actions. J.A. 194.

b. The court of appeals denied petitions for rehearing en banc. J.A. 139-142. Judges Brown and Kavanaugh dissented separately from the denials of rehearing. J.A. 145-190. The members of the panel (Chief Judge Sentelle and Judges Rogers and Tatel) concurred in the denials of rehearing, stating that "[t]he legal issues presented * * * are straightforward, requiring no more than the application of clear statutes and binding Supreme Court precedent." J.A. 145.

SUMMARY OF ARGUMENT

I. The EPA permissibly determined that, when a proposed facility is subject to the PSD program by reason of its non-greenhouse-gas emissions, the program's

BACT requirement applies to the source's greenhouse-gas emissions as well. A facility covered by the PSD program must satisfy the BACT requirement "for each pollutant subject to regulation under [the CAA]" that it emits. 42 U.S.C. 7475(a)(4). Once the EPA's Title II regulation of greenhouse-gas emissions from new motor vehicles took effect, greenhouse gases became "subject to regulation under [the CAA]" for purposes of that provision. The EPA has adhered since 1978 to the understanding that BACT requirements under the PSD program apply to emissions of criteria pollutants and regulated non-criteria pollutants alike, including pollutants regulated under Title II.

To be sure, some PSD program provisions either are limited by their terms to criteria pollutants, or cannot sensibly be applied to other pollutants. That observation, however, provides no basis for inferring that either the PSD program generally, or the BACT requirement in particular, is unconcerned with non-criteria pollutants. Nor is there any basis to limit the program's requirements to pollutants with purely local impact; indeed, the requirements of the PSD program have applied for decades to pollutants that, like greenhouse gases, are well-mixed in the atmosphere. Where a particular source would be subject to the PSD program *anyway* by reason of its non-greenhouse-gas emissions, applying the BACT requirement to that source creates no substantial implementation burdens, and the "absurd results" the EPA identified are not implicated. Moreover, given the substantial harms that large-scale greenhouse-gas emissions can cause, application of BACT requirements to those emissions directly serves the CAA's purposes.

Some petitioners ask this Court to overrule its recent holding in *Massachusetts* v. *EPA*, *supra*, that the CAA

term "air pollutant" includes carbon dioxide and other greenhouse gases. But *stare decisis* has particular force in statutory cases; the Court's holding in *Massachusetts* has already generated substantial reliance interests; and reconsideration of *Massachusetts* would be inconsistent with the limited nature of the question on which this Court granted certiorari. *Massachusetts* also compels rejection of petitioners' argument, premised on *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), that Congress has implicitly exempted stationary sources' greenhouse-gas emissions from CAA regulation.

II. The EPA also permissibly concluded that a source's greenhouse-gas emissions standing alone can trigger the application of the PSD program. Since 1980, the agency has interpreted the term "any air pollutant" in the CAA's definition of "major emitting facility" to include non-criteria pollutants regulated under other provisions of the Act. The EPA has also taken the position since 1980 that, so long as a "major emitting facility" is to be located in a geographic area that is in attainment for *some* criteria pollutant, the PSD program applies, whether or not the facility will emit major amounts of that pollutant. Those interpretive principles, developed and long adhered to by the expert agency charged with the Act's implementation, are entitled to substantial judicial deference.

The EPA adopted a phased-in approach to greenhouse-gas regulation because it concluded that "absurd results" would ensue if the PSD program requirements were immediately applied to all stationary sources that emit greenhouse gases in quantities above the statutory thresholds. Some petitioners contend that the agency should have avoided those consequences by instead adopting a new understanding of "major emitting facili-

ty" that exempted greenhouse gases or exempted all non-criteria pollutants. But those interpretations have no foundation in the Act's text, and they would have anomalous and untoward impacts on the agency's general administration of the PSD program. The agency's phased-in approach, by contrast, is narrowly targeted at the specific implementation problem the agency identified, *viz.*, the infeasibility of processing, in a timely fashion, the multitudinous permit applications that would have been required had the agency immediately applied only the statutory thresholds to greenhouse gases. Other petitioners argue that the PSD program applies only when a stationary source emits above-threshold amounts of a criteria pollutant in an area that is in attainment for *that* pollutant. That argument too is inconsistent with the statutory text and with the EPA's longstanding interpretation, and it (like the attempt of other petitioners to narrow the definition of "major emitting facility") would have untoward spillover effects outside the greenhouse-gas context.

III. For the same reason that the definition of "major emitting facility" reaches sources that are major by virtue of their greenhouse-gas emissions alone, the parallel term governing the Title V program ("major stationary source") brings such sources under that program too. As in the court of appeals, petitioners do not distinctly address Title V. Although some of their further-reaching arguments would contract the range of facilities to which the PSD and Title V programs alike would apply, many of their arguments depend on statutory features unique to the PSD program and therefore are no basis for limiting Title V.

ARGUMENT

This Court limited its review of the EPA's greenhouse-gas rulemaking to the question "[w]hether 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." That question subsumes three disputed issues: (1) Did the EPA permissibly conclude that, when a particular source is subject to the PSD program based on its emissions of non-greenhouse-gas pollutants, the program's substantive requirements (*e.g.*, the BACT requirement) apply to the source's greenhouse-gas emissions? (2) Did the EPA permissibly conclude that a particular source's greenhouse-gas emissions standing alone can subject that source to the PSD program? (3) Did the EPA permissibly conclude that the Title V program applies to some sources solely because of their greenhouse-gas emissions? The answer to each question is yes.

I. THE EPA PERMISSIBLY DETERMINED THAT THE SUBSTANTIVE REQUIREMENTS OF THE PSD PROGRAM, PARTICULARLY THE BACT REQUIREMENT, APPLY TO THE GREENHOUSE-GAS EMISSIONS OF SOURCES SUBJECT TO THE PROGRAM

When the EPA's regulation of mobile-source greenhouse-gas emissions under Title II took effect in 2011, greenhouse gases became a "pollutant subject to regulation under" the CAA. 42 U.S.C. 7475(a)(4). The PSD program's substantive requirements, and in particular the BACT requirement (see *ibid.*), therefore apply to greenhouse-gas emissions from stationary sources that are covered by the program, including sources that are subject to the program because of their non-greenhouse-gas (*e.g.*, criteria-pollutant) emissions. That conclusion is

not put in doubt by petitioners' arguments that focus instead on the EPA's further determination (see Part II, *infra*) that a facility that emits threshold amounts only of greenhouse gases is subject to the PSD program.[5]

A. The Text, Purpose, And History Of The PSD Program Show That It Imposes Requirements With Respect To Greenhouse-Gas Emissions

1. To decide whether the PSD program imposes requirements with respect to greenhouse-gas emissions, this Court should "begin 'where all such inquiries must begin: with the language of the statute itself.'" *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 132 S. Ct. 1670, 1680 (2012) (quoting *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). "If the intent of Congress is clear" from that text, "that is the end of the matter." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984).

The central PSD program requirement at issue here and in the EPA's rulemaking is the requirement that facilities subject to the PSD program limit their emissions based on BACT "for each pollutant subject to regu-

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[5] Of the emissions from stationary sources that emit greenhouse gases in amounts above the regulatory thresholds, the vast majority of greenhouse gases come from sources that would be subject to the PSD program in any event based on their emissions of criteria pollutants. See Am. Chemistry Council (ACC) Br. 29 n.12. Accordingly, with respect to the aggregate control of greenhouse gases, the question whether the BACT requirement applies to those sources' greenhouse-gas emissions has much greater practical significance than the question (discussed in Part II, *infra*) whether a source's greenhouse-gas emissions alone can subject it to the PSD program. The Court's resolution of the latter issue will immediately affect only the limited set of sources that emit greenhouse gases in amounts above the regulatory threshold, but that would not otherwise be subject to the PSD program based on their emission of some other pollutant.

lation under [the CAA] emitted from, or which results from, such facility." 42 U.S.C. 7475(a)(4); accord 42 U.S.C. 7479(3) (defining BACT in terms of "the maximum degree of reduction of each pollutant subject to regulation under [the CAA]"). Greenhouse gases are an "air pollutant" as that term is defined in the CAA. *Massachusetts*, 549 U.S. at 528-529 (citing 42 U.S.C. 7602(g)). And because greenhouse gases are now "subject to regulation under [the CAA]"—under Title II in particular—"it is crystal clear that PSD permittees must install BACT for greenhouse gases." J.A. 242; accord J.A. 177 (Kavanaugh, J., dissenting from the denials of rehearing en banc) ("By its terms, Section 7475(a)(4) * * * applies to greenhouse gases.").[6]

2. The PSD program serves to "protect public health and welfare from any actual or potential adverse effect * * * from air pollution." 42 U.S.C. 7470(1) (footnote omitted). "Air pollution," in turn, is the product of "air pollutants." See 42 U.S.C. 7602(g) (defining "air pollutant" to mean "any air pollution agent or combination of such agents"). The requirement that facilities subject to the PSD program limit their emissions based on BACT for "each pollutant subject to regulation under [the CAA]," 42 U.S.C. 7475(a)(4), effectuates the broad purposes of that program.

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[6] The EPA has treated greenhouse gases emitted from a stationary source as subject to regulation (and thus subject to the BACT requirement) only when emitted at or above the regulatory threshold, rather than requiring the use of BACT when greenhouse gases are emitted at any level. See note 4, *supra*. If that threshold has any effect in practice (but see *ibid.*), its effect is to narrow the requirements of the PSD program. Its existence therefore provides no basis for doubting the EPA's conclusion that the PSD program's requirements apply to greenhouse-gas emissions.

That link between means and ends is well illustrated by the CAA's application to greenhouse gases. The EPA determined that greenhouse-gas emissions endanger public health and welfare in ways that may prove to be more widespread, longer-lasting, and graver than the effects of any other pollutant regulated under the Act. See p. 13 and note 3, *supra*. The EPA's regulation of greenhouse-gas emissions from mobile sources is premised on that endangerment finding. But greenhouse-gas emissions from stationary sources have the same environmental effects as like emissions from mobile sources, especially because greenhouse-gas emissions are well-mixed in the atmosphere, J.A. 957-958. By directing that Title II regulation of a particular pollutant automatically triggers the BACT requirement for stationary sources subject to the PSD program, Congress obviated the need for a (duplicative) EPA finding that greenhouse-gas emissions from stationary sources likewise endanger public health and welfare.

3. The EPA's longstanding interpretation of the Act's structure, and Congress's ratification of that interpretation, confirm the automatic operation of the PSD program's requirements once a pollutant is "subject to regulation under [the CAA]." 42 U.S.C. 7475(a)(4).

The EPA concluded in the 1978 historic regulation that the phrase "subject to regulation under [the CAA]" in 42 U.S.C. 7475(a)(4) referred to "any pollutant regulated [by EPA] for any source type," including "all pollutant[s] regulated under Title II of the Act regarding emission standards for mobile sources." J.A. 1460. The 1980 historic regulation reiterated that, "[w]ith respect to new major stationary sources, BACT will be required for each regulated pollutant emitted in excess of specified *de minimis* amounts." 45 Fed. Reg. at 52,722.

The EPA's interpretation was thus settled by the time Congress amended the CAA in 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990 Amendments). Before 1990, the NESHAP program, 42 U.S.C. 7412 (1988), regulated some sources of emissions of seven air pollutants that the EPA had designated as "hazardous air pollutant[s]" (HAPs), *i.e.*, pollutants associated with "an increase in mortality or an increase in serious * * * illness," 42 U.S.C. 7412(a)(1) (1988). Because HAPs were "subject to regulation under [the CAA]," 42 U.S.C. 7475(a)(4), the EPA regulated emissions of HAPs from stationary sources under the PSD program. Compare 40 C.F.R. 61.01(a) (1990) (listing HAPs), with 40 C.F.R. 51.166(b)(23)(i) (1990) (establishing *de minimis* significance levels under the PSD program for emissions of several HAPs).

In the 1990 Amendments, Congress unlinked the PSD program from the NESHAP program, while otherwise leaving intact the EPA's understanding of the phrase "subject to regulation under [the CAA]." Section 301 of the 1990 Amendments, 104 Stat. 2531, overhauled the NESHAP program by establishing a much longer statutory list of HAPs and elaborating on the regulatory framework for HAPs. Of particular significance here, the 1990 Amendments exempted HAPs from "the provisions of [the PSD program]." 42 U.S.C. 7412(b)(6). That action reflected Congress's awareness that regulation of HAPs under the NESHAP program would otherwise have triggered the PSD program's requirements as well. By enacting a targeted exemption unique to HAPs, while otherwise leaving intact the CAA provisions that govern the PSD program, Congress effectively ratified the EPA's understanding of those provisions. See, *e.g.*,

Sebelius v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-828 (2013).

B. Petitioners' Arguments Regarding The Substantive Requirements Of The PSD Program Lack Merit

Largely renewing arguments rejected below, petitioners contend that no substantive requirements of the PSD program can be applied to a source's greenhouse-gas emissions, even if that source is indisputably subject to the program by reason of its emissions of other (*e.g.*, criteria) pollutants. As the court of appeals recognized, "none of [those arguments] cast[s] doubt on the unambiguous nature of the statute." J.A. 241.

1. The PSD program's inclusion of features specific to criteria pollutants does not defeat application of its more general provisions to non-criteria pollutants

Some parties appear to contend that the PSD program is unconcerned with regulating greenhouse-gas emissions because, in their view, the program addresses only the six NAAQS criteria pollutants (see pp. 8-9 and note 2, *supra*). See, *e.g.*, Coal. for Responsible Regulation (CRR) Br. 16-25. That deeply flawed understanding of the PSD program would exclude not only emissions control for greenhouse gases, but also emissions control for any non-criteria pollutant—such as sulfuric acid mist and hydrogen sulfide—a category comprising the majority of the pollutants that the 2002 historic regulation identified (without objection) as subject to the program's requirements. See p. 12, *supra*.

Some features of the PSD program were drafted with criteria pollutants (and the associated attainment area designations for those pollutants) in mind, and some PSD program provisions regulate only criteria pollutants. See, *e.g.*, 42 U.S.C. 7475(a)(3)(A) and (B). Other

CAA provisions governing the PSD program, however, unambiguously cover criteria and non-criteria pollutants alike. See, *e.g.*, 42 U.S.C. 7475(a)(4) (BACT requirement applies "for each pollutant subject to regulation under [the CAA]"). Some PSD program requirements, moreover, focus specifically on *non*-criteria pollutants. See, *e.g.*, 42 U.S.C. 7475(a)(3)(C) (imposing, in addition to requirements relevant to criteria pollutants, requirements related to "any *other* applicable emission standard * * * under [the CAA]") (emphasis added). Treating the PSD program as categorically inapplicable to non-criteria pollutants cannot be reconciled with those features of the statutory scheme.

Some petitioners point to the existence of *some* PSD requirements specific to criteria pollutants, and appear to infer that *all* PSD requirements are limited to criteria pollutants. The more natural inference, however, is that each requirement should simply be applied to the class of pollutants to which the requirement is relevant. For example, emissions of a non-criteria pollutant would not "cause * * * air pollution in excess of any * * * national ambient air quality standard," 42 U.S.C. 7475(a)(3)(B), because a non-criteria pollutant is (by definition) one for which no such standard exists. By contrast, as other respondents explain, facilities can (and routinely do) use "the best available control technology for [a non-criteria] pollutant." 42 U.S.C. 7575(a)(4).[7]

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[7] Some parties argue that the EPA unlawfully failed to utilize the rulemaking procedures of 42 U.S.C. 7476. CRR Br. 16-25. The court of appeals correctly found that "[t]his argument fails on its face" because Section 7476 "applies only to new 'pollutants *for which national ambient air quality standards*' apply, i.e., NAAQS criteria pollutants." J.A. 256 (quoting 42 U.S.C. 7476(a)) (emphasis added by court of appeals); see *Alabama Power*, 636 F.2d at 406

2. The PSD program is not limited to "local" pollutants

Other petitioners contend that the PSD program addresses only "'air pollutants' that deteriorate ambient air quality—*i.e.*, the air people breathe—in specific, geographic air quality control areas," and that the wide dispersion and global effects of greenhouse gases therefore make them unsuited for PSD regulation. Util. Air Regulatory Grp. (UARG) Br. 25-32 (citation omitted); see Chamber of Commerce (Chamber) Br. 15-18; S.E. Legal Found. (SLF) Br. 9-13.

That argument largely relies on an understanding of the Act's terminology that this Court rejected in *Massachusetts*. As used in several statutory provisions that govern the PSD program, the term "ambient air" refers simply to outdoor air that exists throughout the atmosphere. See *Train* v. *NRDC*, 421 U.S. 60, 65 (1975); 40 C.F.R. 50.1(e) (defining "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access"). In *Massachusetts*, the Court rejected the dissent's view that the Act is concerned only with pollution "at ground level or near the surface of the earth," 549 U.S. at 560 (Scalia, J., dissenting), explaining that the Act "uses the phrase 'the ambient air' without distinguishing between atmospheric layers," *id.* at 529 n.26.

Petitioners also point out (UARG Br. 26-27; Energy-Intensive Mfrs. (EIM) Br. 20-21) that the PSD program requires certain monitoring and an "analysis * * * of the ambient air quality * * * in areas which may be affected by emissions from such facility for each pollu-

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(rejecting a similar argument regarding Section 7476's effect on the scope of Section 7475).

tant subject to regulation under [the CAA]." 42 U.S.C. 7475(e)(1); see 42 U.S.C. 7475(e)(2) and (3)(B). Because greenhouse gases are well-mixed in the atmosphere and their effects are not traceable to particular sources of emissions, petitioners contend that requiring each permit applicant to perform such an analysis of greenhouse-gas emissions would be of little value. Petitioners further assert that the EPA (in a guidance document) "concedes" that the analysis provisions are "contradicted * * * or nullified" if applied to greenhouse gases. EIM Br. 21.

Petitioners misunderstand both the statute and the EPA's statements. The monitoring requirement in Section 7475(e)(2) is beside the point because it is written in terms that are specific to criteria pollutants. The analysis requirements in Section 7475(e)(1) and (3)(B) do apply to greenhouse gases, but the form and degree of analysis that is feasible and appropriate will necessarily vary among pollutants. That is precisely what the EPA recognized in explaining that certain forms of impact analysis either were not feasible for greenhouse gases (because analytical tools were unavailable) or were unlikely to offer meaningful insights (because the contribution of greenhouse gases to climate change is already well-established). *Greenhouse Gas Guidance* 48. The agency explained that "the most practical way" to conduct the required analysis would be to use a facility's amount of greenhouse-gas emissions as an "appropriate and credible proxy" for its impact, and then to follow the established BACT analysis for limiting that impact. *Ibid.* And even if petitioners were correct that the analysis provisions impliedly exclude greenhouse-gas emissions, that would provide no reason to exclude greenhouse-gas emissions from the coverage of PSD

program requirements (like the BACT requirement) that are both literally *and* practically applicable.

In any event, Congress has never embraced the distinction petitioners would draw between local and well-mixed atmospheric pollutants in the context of the PSD program. Before the 1990 Amendments, the EPA regulated certain well-mixed gases that deplete the ozone layer, 53 Fed. Reg. 30,566 (Aug. 12, 1988), and thus these were subject to the PSD program's requirements. In the same 1990 Amendments that exempted HAPs from the PSD program (see pp. 28-29, *supra*), Congress overhauled the restrictions on those ozone-depleting substances (see 1990 Amendments § 602(a), 104 Stat. 2648) without enacting any similar exemption, on the evident understanding that those well-mixed gases were proper subjects of PSD regulation. The same is true of greenhouse gases.

3. No absurd consequences arise from enforcing the PSD program's requirements for greenhouse gases emitted by sources to which the program indisputably applies

a. Many petitioners argue that, because the EPA identified "absurd results" that would occur if it immediately implemented the PSD and Title V programs based on greenhouse-gas emissions at the statutory thresholds, greenhouse-gas emissions should never be subject to the requirements of the PSD program, even when emitted by sources indisputably subject to that program. Chamber Br. 19-20, 23-32; SLF Br. 14-15; Tex. Br. 3-8; UARG Br. 20-25. That argument is unsound.

The precise problem the EPA faced with respect to the PSD program was that immediately requiring permits for sources newly subject to that program—*i.e.*, the numerous sources that emit only greenhouse gases (and

no other pollutant) in quantities at or above the applicable statutory threshold—would overload the permitting system. See pp. 15-16, *supra*. That problem arises, however, only in deciding whether a source requires a pre-construction permit because of its greenhouse-gas emissions. By contrast, when a particular proposed source is indisputably subject to the PSD program based on its *non*-greenhouse-gas emissions (*e.g.*, if the source would emit more than 250 tons per year of a criteria pollutant for which the relevant area is in attainment), requiring that source to limit its greenhouse-gas emissions based on BACT would create no similar implementation problems because that requirement would not increase the number of PSD permit applications. See J.A. 508. Indeed, although Judge Kavanaugh dissented from other aspects of the decision below, he agreed that a facility subject to the PSD program "because of its emissions of [criteria] pollutants must employ [BACT] for emissions not just of" those pollutants, but for greenhouse-gas emissions as well. J.A. 177; see ACC Br. 18 n.7.

b. Some petitioners ask this Court to overrule *Massachusetts*'s interpretation of the statutory term "air pollutant" as including carbon dioxide and other greenhouse gases. Tex. Br. 24-29. But "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what [the Court has] done.'" *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989)). Petitioners alternatively suggest (Tex. Br. 25-27) that the term "air pollutant" be construed to encompass greenhouse-gas emissions from mobile sources but not greenhouse-gas emissions from stationary sources. That distinction has

no grounding in the CAA's text, and it would disserve the Act's purposes, because greenhouse-gas emissions from stationary sources have the same deleterious environmental effects as like emissions from motor vehicles. See pp. 26-27, *supra*.[8]

Principles of *stare decisis* have particular force here because the EPA, this Court, and private parties have relied substantially on *Massachusetts* since that decision was issued. For example, concluding that greenhouse-gas emissions from stationary sources cannot be regulated under the CAA would destroy the premise on which this Court decided *AEP*, *supra*. In holding "that the [CAA] and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants," 131 S. Ct. at 2537, the Court stated that "[t]he critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law," *id.* at 2538.[9]

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[8] Although the *Massachusetts* Court recognized that its decision could lead to regulation of greenhouse emissions from motor vehicles, it did not allude to the potential effect of its ruling on stationary sources. But "the briefs before the [*Massachusetts*] Court explicitly raised the argument that interpreting 'air pollutant' to include greenhouse gases could have tremendous consequences for stationary-source regulation." J.A. 142 (Sentelle, C.J., Rogers and Tatel, JJ., concurring in the denials of rehearing en banc).

[9] In so holding, this Court accepted the argument of the *AEP* utility defendant-petitioners (some of whom are members of the trade association petitioners in this case) based on the very regulations they now attack:

> [The] EPA has interpreted the Act to provide it with authority to consider restrictions on greenhouse gas emissions from mo-

The contention that greenhouse gases are not "air pollutant[s]" within the meaning of the CAA also ignores the limited nature of the question on which this Court granted certiorari, which takes as given the EPA's antecedent motor-vehicle regulations. The validity of those regulations depends in turn on the *Massachusetts* Court's holding that greenhouse gases are "air pollutant[s]" subject to regulation under the Act.

c. Some petitioners briefly suggest that the Act's requirements for determining BACT, 42 U.S.C. 7479(3), become "hopelessly muddled" when applied to greenhouse-gas emissions. Chamber Br. 18-19; see EIM Br. 23-26. That contention is unfounded. As with any new application of a flexible statutory provision, the application of the BACT requirement to greenhouse-gas emissions has required proposed sources and permitting authorities to adapt established concepts and tools for use in a new context. But the EPA issued extensive guidance on the subject shortly after the requirement went into effect. That guidance was built around the established process and concepts for determining BACT, and it provided key ideas for adapting them to greenhouse-gas emissions. See *Greenhouse Gas Guidance* 17-46 & Apps. F, G, H, J, K. As the respondent States note, issuing permits for facilities subject to the BACT re-

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> bile and stationary sources, including those of these defendants. See 75 Fed. Reg. 31514 [the Tailoring Rule, J.A. 268-682].
>
> * * * * *
>
> [The CAA] delegates regulatory authority over carbon dioxide emissions to EPA, and thus displaces federal common law claims addressing those emissions.

Pet. Br. at 43, 46, *AEP*, *supra* (No. 10-174).

quirement for greenhouse gases has proceeded in the normal course without significant delay.

4. FDA *v.* Brown & Williamson Tobacco Corp. *is inapposite*

Relying on *FDA* v. *Brown & Williamson Tobacco Corp.*, *supra*, many petitioners argue that Congress has implicitly exempted stationary sources' greenhouse-gas emissions from CAA regulation. SLF Br. 8-18; EIM Br. 13-26; Tex. Br. 3-8; Chamber Br. 22-23. In *Brown & Williamson*, this Court held that, notwithstanding the textual possibility of regulating tobacco products as drugs or medical devices under the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 *et seq.*, "[s]uch [regulation] is inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA." 529 U.S. at 126. That conclusion rested on three features of the FDCA and tobacco-specific legislation that have no analogues here. Indeed, because the Court in *Massachusetts* has already *rejected* the proposed analogy between FDCA regulation of tobacco products and CAA regulation of greenhouse-gas emissions, see 549 U.S. at 530-531, petitioners' *Brown & Williamson* argument is in substance a contention that *Massachusetts* should be overruled.

First, this Court explained in *Brown & Williamson* that, if tobacco products were regulated under the FDCA at all, they would necessarily be banned entirely, despite Congress's clear assumption that tobacco products would be sold. 529 U.S. at 133-139, 142-143. By contrast, the Court concluded in *Massachusetts* that subjecting greenhouse gases to the CAA "would lead to no * * * extreme measures" of that sort because the "EPA would only *regulate* emissions." 549 U.S. at 531.

The PSD program's BACT requirement represents just that sort of balanced regulation. See note 1, *supra*.

Second, *Brown & Williamson* identified "six separate pieces" (529 U.S. at 143) of "tobacco-specific legislation * * * enacted subsequent to the FDCA" (*id.* at 126) and "against the backdrop of the [Food and Drug Administration's (FDA)] consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco" (*id.* at 144). By contrast, Congress has never enacted comparable legislation specific to greenhouse-gas emissions, and the EPA had never (until the action overturned in *Massachusetts* itself) disavowed the authority to regulate greenhouse gases under the CAA. 549 U.S. at 531.[10]

Third, the *Brown & Williamson* Court found it counterintuitive that Congress would delegate "in so cryptic a fashion" authority to regulate a product as significant as tobacco. 529 U.S. at 160. But even if the Congress that enacted the CAA had been unaware of the threat from greenhouse-gas emissions, there is nothing cryptic about its definition of "air pollutant," nor anything "counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter." *Massachusetts*, 549 U.S. at 531; see *id.* at 532 ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (brackets in

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[10] Some petitioners point to unenacted bills that would have applied to greenhouse-gas emissions. SLF Br. 15-17. But the Court in *Brown & Williamson* looked to "legislation that [Congress] has enacted," 529 U.S. at 126, and specifically declined to "rely on Congress' failure to act—its consideration and rejection of bills that would have given the FDA this authority" over tobacco products, *id.* at 155.

original) (quoting *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998)).

II. THE EPA PERMISSIBLY CONCLUDED THAT GREENHOUSE-GAS EMISSIONS STANDING ALONE CAN TRIGGER THE APPLICATION OF THE PSD PROGRAM TO PARTICULAR SOURCES

In the 1980 historic regulation, the EPA explained that "[S]ection [7475(a)] applies PSD preconstruction review to all sources that are major for any pollutant subject to regulation under the Act [*i.e.*, that emit any regulated pollutant in amounts exceeding the statutory thresholds] and locate in an area designated attainment or unclassified for any [criteria] pollutant." J.A. 1405; see pp. 11-12, *supra*. That test rested on two subsidiary determinations. First, the EPA construed the term "any air pollutant" in Section 7479(1)'s definition of "major emitting facility" to mean "any pollutant subject to regulation under the Act," including regulated non-criteria pollutants. Second, the EPA made clear that PSD program requirements can be triggered even though the regulated pollutant emitted in above-threshold amounts is not the *same* pollutant as the one for which the area is in attainment. See J.A. 1403-1405. The agency has adhered to those interpretive principles since 1980.

Petitioners seek to create the impression that, in adopting the rules at issue here, the EPA contrived a newfangled regulatory structure to bring greenhouse gases within the agency's purview. That version of events is baseless. Once the EPA's Title II regulation of greenhouse-gas emissions from motor vehicles took effect on January 2, 2011, the agency could have *declined* to treat greenhouse-gas emissions as a trigger for PSD program requirements only by *abandoning* one or both of the longstanding interpretive principles described in

the preceding paragraph. Indeed, petitioners acknowledged this below in pressing the D.C. Circuit to permit them to challenge the historic regulations directly, decades after their promulgation. J.A. 225-231. Except to the extent that some petitioners seek to re-litigate *Massachusetts*, all of petitioners' challenges to the use of greenhouse-gas emissions as a trigger for PSD program requirements involve attacks on those longstanding principles. In any event, petitioners' statutory arguments are flawed on their own terms.

A. In Administering The PSD Program, The EPA Has Permissibly Interpreted The Term "Major Emitting Facility" To Include Stationary Sources Whose Emissions Of Regulated Non-Criteria Pollutants Exceed Threshold Levels

1. The central pre-construction permitting requirements of the PSD program are contained in 42 U.S.C. 7475(a). That provision states that "[n]o major emitting facility * * * may be constructed in any area to which this part [42 U.S.C. 7470-7492] applies unless" those requirements are met. The term "major emitting facility" is defined to mean a stationary source that emits "any air pollutant" in amounts that exceed specified statutory thresholds. 42 U.S.C. 7479(1). In light of this Court's holding in *Massachusetts* that greenhouse gases are an "air pollutant," that definition unambiguously covers a source that emits greenhouse gases in above-threshold quantities.

2. The PSD program's pre-construction permitting requirement does not apply to *every* "major emitting facility" as defined in Section 7479(1), but only to facilities to be "constructed in any area to which this part [42 U.S.C. 7470-7492] applies." 42 U.S.C. 7475(a). Because the PSD program is generally administered through a

state implementation plan, the phrase "area[s] to which this part applies" is most naturally understood as a reference to the geographic areas for which States must adopt plans. Those areas consist of "each region (or portion thereof) designated pursuant to [42 U.S.C. 7407] as attainment" for one or more criteria pollutants. 42 U.S.C. 7471; see 42 U.S.C. 7472(b) (referring to "areas * * * designated pursuant to [42 U.S.C. 7407] as attainment"), 7407(d)(1)(A) (designation of attainment status by "area"). Accord *Alabama Power*, 636 F.2d at 364-368.

Thus, the PSD program's pre-construction permitting requirements apply only in a geographic area that is in attainment for one or more criteria pollutants. As the EPA has recognized since 1980, however, the regulated pollutant(s) that a particular facility will emit in major quantities need not be the *same* pollutant(s) for which the relevant area is in attainment. See J.A. 1405 ("[N]either [Section 7475(a)] nor [Section 7479(1)] links the pollutant for which the source is major and the pollutant for which an area is designated attainment."). Rather, it is sufficient if the facility will emit above-threshold quantities of *some* regulated pollutant, and the area in which the facility is located is in attainment for *some* criteria pollutant. See J.A. 1407-1409 (offering illustrations).

3. The EPA's interpretation tracks the intent expressed in the Act's legislative history. See, *e.g.*, S. Rep. No. 127, 95th Cong., 1st Sess. 32 (1977) ("The chief tool to be used in implementing the no significant deterioration requirements is the permit that must be issued by the State for *any* major emitting facility to be located in *any* clean-air area.") (emphases added). That interpretation also conforms to the seminal D.C. Circuit decision

construing the PSD program's scope. See *Alabama Power*, 636 F.2d at 352 ("The definition [of 'major emitting facility'] is not pollutant-specific, but rather identifies sources that emit more than a threshold quantity of any air pollutant. * * * [T]he air pollutant, emissions of which caused the source to be classified as a 'major emitting facility,' may not be a [criteria] pollutant for which NAAQS have been promulgated.") (footnotes omitted).

B. Petitioners' Arguments Regarding The Stationary Sources To Which The PSD Program Applies Lack Merit

Petitioners identify various alternative ways in which the EPA might have construed the provisions governing the range of sources subject to the PSD program. Those arguments are inconsistent with the statutory text and with this Court's decision in *Massachusetts*. And even if the EPA could permissibly have adopted one of those alternative interpretations, none of them accords with the agency's longstanding interpretation of that program, and none shows that the EPA's straightforward interpretation was forbidden by the statute.

1. Petitioners offer no compelling reason to interpret "any air pollutant" more narrowly than "any pollutant subject to regulation under the Act"

a. Petitioners argue that, notwithstanding its literal breadth, the term "any air pollutant" in Section 7479(1)'s definition of "major emitting facility" should be read to exclude greenhouse gases. *E.g.*, Chamber Br. 20-21; UARG Br. 24-25. Those contentions largely parallel petitioners' *Brown & Williamson*-based argument that, even if a particular stationary source is subject to the PSD program based on its emissions of other pollutants, it need not satisfy the BACT requirement for its green-

house-gas emissions. See pp. 37-39, *supra*. As already explained, that argument lacks merit.

b. The EPA has long construed the term "any air pollutant," as it appears in Section 7479(1), to mean "any air pollutant *subject to regulation under the Act*." See pp. 11-12, *supra*. The agency therefore did not view greenhouse-gas emissions as a trigger for PSD program requirements until the agency separately regulated motor-vehicle emissions of greenhouse gases under Title II. Some petitioners argue that, because the EPA has adopted that narrowing construction of the term "any air pollutant," the Court may appropriately narrow the term still further to exclude greenhouse gases. See Chamber Br. 20-21. That argument is unsound.

The relevant statutory context supports the EPA's longstanding view that a source's emissions of *un*regulated pollutants will not, by themselves, trigger PSD program requirements. See pp. 11-12, *supra*; J.A. 237-238; cf. *O'Connor* v. *United States*, 479 U.S. 27, 29-30 (1986) (concluding that "any taxes," in the context of a treaty addressing taxes in Panama, meant any *Panamanian* taxes). The requirements of the PSD program address only pollutants that are regulated in some way under the Act. See, *e.g.*, 42 U.S.C. 7475(a)(3)(B) (requirement with respect to "national ambient air quality standard"), 7475(a)(4) (requiring BACT for "each pollutant subject to regulation"). Since the substantive requirements of the PSD program do not address unregulated pollutants, no useful purpose would be served by treating emissions of such pollutants as a trigger for preconstruction review.[11]

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[11] The purpose of the PSD program is "to protect public health and welfare from any actual or potential adverse effect * * * reasonably * * * anticipate[d] to occur from air pollution." 42

In any event, the limitation to regulated air pollutants was adopted by the EPA in 1980 and has guided the agency's administration of the PSD program requirements since that time. Under bedrock principles of administrative law, the EPA's approach must be upheld so long as it reflects "a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). Deference to that approach is particularly appropriate here. The application of a statute as complex and technical as the CAA is within the unique and special expertise of the administering agency. See *Chevron*, 467 U.S. at 865; cf. *AEP*, 131 S. Ct. at 2539 ("It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions."). And the Court has accorded special deference to agency interpretations that have remained consistent over a long period. See *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 575 (2007); *Alaska*, 540 U.S. at 487.

Petitioners' proposed alternative limiting construction, by contrast, is of recent vintage; it has been rejected by the expert agency; and it was self-evidently crafted to produce a particular result in a particular case, rather than to promote the sound long-term administration of the PSD program. It bears emphasis, moreover, that the premise of petitioners' argument—that "any air pollutant" could encompass unregulated pollutants—more naturally supports an argument that the EPA

U.S.C. 7470(1). If such an "adverse effect" is "reasonably anticipate[d]," then the corresponding pollutant will be regulated, either by congressional direction or as the subject of an endangerment finding by the EPA under another program.

should have given the term a *broader* meaning than it did. Yet petitioners do not advocate that broader construction because it would not serve their interests (in that it would then follow logically, in light of *Massachusetts*'s holding that greenhouse gases are "air pollutant[s]," that greenhouse-gas emissions *can* trigger PSD program requirements). Given petitioners' ultimate agreement that the EPA's limiting construction is correct as far as it goes, their faux-literalist critique provides no basis for further narrowing the definition of "major emitting facility."

c. Any interpretation narrower than the EPA's would lead to substantial anomalies in the Act's broader context. The NSPS program authorizes the EPA to regulate categories of "stationary sources" that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. 7411(b)(1)(A), by establishing standards of performance for new or modified sources in each category. 42 U.S.C. 7411(b)(1)(B); see 42 U.S.C. 7411(a)(1) (defining "standard of performance" as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction").

In *AEP*, this Court found it "plain that [the NSPS program of] the Act 'speaks directly' to emissions of carbon dioxide from [stationary sources]." 131 S. Ct. at 2537; see 79 Fed. Reg. 1430 (Jan. 8, 2014) (notice of proposed rulemaking on performance standards for greenhouse-gas emissions from new electric utility generating units). Under petitioners' interpretation, the term "any air pollutant" would *include* greenhouse gases in 42 U.S.C. 7521(a)(1) (the Title II provision addressing emission standards for new motor vehicles), see *Massa-*

chusetts, *supra*; would *exclude* greenhouse gases in 42 U.S.C. 7479(1) (which defines "major emitting facility" for purposes of the PSD program); and would again *include* greenhouse gases in 42 U.S.C. 7411(a)(3) (defining the application of the NSPS program), see *AEP*, *supra*—all without any indication from Congress that it was using the term differently, and notwithstanding this Court's recognition that the CAA's definition of "air pollutant," applicable throughout the statute, "unquestionably" encompasses greenhouse gases, *Massachusetts*, 549 U.S. at 529 n.26.[12]

2. The absurdity of implementing PSD and Title V permitting immediately for all sources emitting greenhouse gases above the statutory thresholds does not justify permanently excluding all such sources from those programs

All petitioners rely heavily on the agency's own determination that "absurd results" would ensue if the PSD and Title V programs' requirements were immediately applied to all stationary sources emitting greenhouse gases in amounts above the statutory thresholds.

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[12] One petitioner notes that the EPA has interpreted the term "any pollutant," within the definition of "major stationary source" that appears in the CAA provision addressing visibility protection, as including only "visibility-impairing pollutants." UARG Br. 24 (quoting 42 U.S.C. 7491(g)(7) and 40 C.F.R. Pt. 51, App. Y, § III.A.2) (emphasis, brackets, and internal quotation marks omitted). But because the visibility program's requirements address only visibility-impairing pollutants (42 U.S.C. 7491(b)(2)(A))—in contrast to the wider-ranging requirements of PSD program—no significant purpose would be served by applying the visibility program to a broader range of sources. As the court of appeals recognized, that part of the Act does not indicate that Congress elsewhere used the term "any pollutant" in a more limited manner. See J.A. 251-252.

UARG Br. 27-28; ACC Br. 24-29; EIM Br. 20-21, 30-31; SLF Br. 14-15, 18-21; Tex. Br. 17-20; Chamber Br. 23-32. To avoid those untoward consequences, the agency prescribed much higher regulatory thresholds that currently exclude from the PSD and Title V programs numerous facilities that would otherwise have been covered. See pp. 15-18 & note 4, *supra*. Petitioners contend (*e.g.*, Chamber Br. 23-32) that, because the agency viewed those higher thresholds as necessary to the workable implementation of the PSD and Title V program, the agency must have erred in its antecedent determination that greenhouse-gas emissions could trigger the programs' requirements. That argument lacks merit.

a. Since the 1980 historic regulation, the EPA has interpreted the term "any air pollutant" in Section 7479(1)'s definition of "major emitting facility" to mean "any air pollutant subject to regulation under the Act." See pp. 11-12, *supra*. That interpretation has not of itself led to any absurd result; the definition of "major emitting facility" had been applied for decades to all regulated pollutants without difficulty and without serious objection.[13] The EPA also has not suggested that it would be unwise, let alone absurd, to apply the PSD and Title V programs' requirements to facilities that emit no criteria pollutants but emit very large quantities (*i.e.*, above the regulatory thresholds) of greenhouse gases.

Rather, the precise problem the EPA foresaw was that existing permitting mechanisms (under both the PSD and Title V programs, at both state and federal

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[13] Most "major emitting facilit[ies]" are classified as such because of their emissions of one or more criteria pollutants. But as other respondents note, some facilities have qualified only because of their emission of some other (non-criteria, non-greenhouse-gas) regulated pollutant.

levels) had inadequate capacity to immediately receive and timely process the massive number of permit applications that would be required if those applications were demanded from every source that emitted (or proposed to emit) greenhouse gases in amounts above the statutory threshold. See pp. 15-16, *supra*. That created a practical conflict between Congress's directive that the EPA implement the PSD and Title V programs as to sources of a certain size measured in a certain way, and Congress's directive that the program proceed through expeditious processing of permits (see 42 U.S.C. 7475(c), 7661a(b)(6)-(7), 7661b(c)). That difficulty can be traced to the fact that, for some greenhouse gases—most prominently, carbon dioxide—the threshold amounts set forth in the Act are a poor proxy for magnitude of practical impact.[14]

To address that problem, the EPA established regulatory thresholds that execute the PSD and Title V programs as to the largest sources of greenhouse-gas emissions while keeping the current permitting system functional. The agency indicated it would revisit the regula-

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[14] The Act's legislative history suggests that those thresholds were settled on with a relative handful of known sources and known types of pollutants in mind. See 123 Cong. Rec. 24,549 (1976) (reproducing memorandum from the Director of the EPA's Office of Air Quality Planning and Standards). Most of the compounds the EPA classified as greenhouse gases would not produce implementation concerns if classified as a distinct pollutant because most would, if emitted in excess of the statutory thresholds, necessarily exceed the regulatory threshold. For example, any facility that emitted sulfur hexafluoride in excess of the statutory threshold (250 tons per year) would necessarily surpass the regulatory threshold (because those emissions represent nearly six million tons of greenhouse gases on a carbon-dioxide-equivalent basis). See note 4, *supra*.

tory thresholds, and recognized that as it did so, it would need to consider interpretations of the Act and permitting strategies that would ameliorate or eliminate the burden those programs could impose on smaller sources whose coverage Congress may not have anticipated. J.A. 588-595 (discussing some such streamlining measures); 74 Fed. Reg. 55,292, 55,320-55,325 (Oct. 27, 2009) (proposed rule) (same). Under the circumstances, the EPA's approach was within its "broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Massachusetts*, 549 U.S. at 527.

b. Petitioners suggest that the EPA should instead have avoided those implementation problems by abandoning its longstanding interpretation of the definition of "major emitting facility" (see pp. 11-12, *supra*) in favor of an interpretation that exempted greenhouse gases or exempted all non-criteria pollutants (see pp. 52-55, *infra*). But the desire to avoid the use of non-statutory emissions thresholds could support that approach only if petitioners' alternative interpretations of the relevant statutory language were themselves textually defensible. As the court of appeals correctly concluded (J.A. 241-255), the term "any air pollutant" in the definition of "major emitting facility" cannot be construed in the manner petitioners advocate.

Just as this Court, "when confronting a constitutional flaw in a statute, * * * limit[s] the solution to the problem," *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 328 (2006), so too an agency that confronts conflicting statutory commands "may deviate no further from the statute than is needed to protect congressional intent," *Mova Pharm. Corp.* v. *Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). For two reasons, the EPA's solution to the im-

plementation problem it identified is more consonant with that principle than are petitioners' alternatives.

First, the solution that the EPA adopted is narrowly tailored to the specific problem—the unsuitability of relying entirely on the statutory emissions thresholds to gauge emissions of certain greenhouse gases—that the agency identified. Petitioners, by contrast, ask this Court to overturn *general* interpretive principles that have guided the EPA's overall administration of the PSD program since 1980 and that generally have not produced any untoward administrative burden. Petitioners' proposed alternatives may be convenient means of achieving the result they desire in this case, but they clash with the statutory text and produce new sets of anomalies in the PSD program's application outside the sphere of greenhouse-gas regulation. See pp. 42-46, *supra*; pp. 52-55, *infra*.

Second, although the EPA found that *immediate* application of the statutory thresholds would be unworkable, the agency did not disavow the goal of ultimately applying those thresholds alone. Rather, the agency stated that it "will implement the phase-in approach by applying PSD and title V at threshold [regulatory] levels that are as close to the statutory levels as possible, and do so as quickly as possible, at least to a certain point." J.A. 310. To be sure, the EPA acknowledged that it is currently uncertain whether the phase-in process can feasibly be continued to the point that only the statutory thresholds remain. See J.A. 310-311, 421-422. But such an acknowledgment of future uncertainty is quite different from simple disregard of the statutory thresholds. "Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. They instead whittle away at them over time, refining their

preferred approach as circumstances change and they develop a more nuanced understanding of how best to proceed." *Massachusetts*, 549 U.S. at 524 (citation omitted).

Although the Congress that enacted the CAA "might not have appreciated the possibility that burning fossil fuels could lead to global warming," Congress drafted the CAA in broad terms "to confer the flexibility necessary to forestall * * * obsolescence." *Massachusetts*, 549 U.S. at 532. The EPA's determination that a phased-in implementation of the statutory thresholds was necessary in this context "may indicate that the CAA is a regulatory scheme less-than-perfectly tailored to dealing with greenhouse gases." J.A. 205. In contrast to petitioners' construction, however, the EPA's interpretation of "major emitting facility" is congruent with the statutory text and structure, and it best implements Congress's purpose in enacting the PSD program to "protect public health and welfare" from adverse effects resulting "from air pollution," 42 U.S.C. 7470(1), including adverse "effects on * * * weather" and "climate," 42 U.S.C. 7602(h).[15]

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[15] Some petitioners argue (*e.g.*, ACC Br. 27-28) that *Kloeckner* v. *Solis*, 133 S. Ct. 596 (2012), forbids an agency interpretation of a statute that produces any "absurd results." But that case is inapposite because the statute at issue there spoke in "crystalline fashion" (*id.* at 604) against the government's interpretation. Petitioners cite no case in which this Court did what they seek: reject an agency's longstanding interpretation of a statute (ameliorated by regulatory measures tailored to avoid implementation problems that arise in one particular context) in favor of a textually indefensible and practically anomalous reading of the statute. See *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd re-

3. There is no merit to petitioners' argument that the PSD program can be triggered only by the emission of a criteria pollutant by a source located in an area in attainment for that pollutant

Some petitioners argue that the PSD program "'applies' * * * to an attainment area only with respect to those particular [criteria] pollutants for which the area is attaining." ACC Br. 2. Under that view, "PSD permitting obligations are triggered only when a facility emits major amounts of a pollutant in an area that is in attainment for *that* pollutant." *Id.* at 3; see J.A. 175-180 (Kavanaugh, J., dissenting from the denials of rehearing en banc). Because the concept of "attainment" under the CAA applies only to criteria pollutants, this theory implies that a facility's greenhouse-gas emissions standing alone would never bring it under the PSD program. Petitioners' premise is mistaken, their reasoning is faulty, and their conclusion would produce significant anomalies in applications of the PSD program unrelated to greenhouse gases.

a. As petitioners recognize (ACC Br. 7-8), since 1980 the EPA has consistently taken the position that, "in order for PSD review to apply to a source, the source need not be major for a pollutant for which an area is designated attainment or unclassifiable." J.A. 1403. Rather, under the EPA's longstanding approach, "[Section 7475(a)] applies PSD preconstruction review to all sources that are major for any pollutant subject to regulation under the Act and locate in an area designated attainment or unclassified for any pollutant." J.A. 1405.

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sults are to be avoided *if alternative interpretations consistent with the legislative purpose are available.*") (emphasis added).

That longstanding agency interpretation is entitled to substantial judicial deference. See p.44, *supra*.

b. Whereas other petitioners seek to narrow the established understanding of "major emitting facility" (see pp. 42-46, *supra*), the statutory language on which these petitioners rely is the phrase "constructed in any area to which this part [42 U.S.C. 7470-7492] applies." 42 U.S.C. 7475(a). The PSD program "applies" in the areas for which 42 U.S.C. 7471 requires state implementation plans, *i.e.*, "in each region * * * designated * * * as attainment" for one or more criteria pollutants. See pp. 40-41, *supra*. More generally, the question whether a particular body of law "applies" in a particular "area" at a particular point in time would ordinarily have a single yes-or-no answer.

To be sure, the requirements and prohibitions that applicable laws impose will depend on the nature of the conduct sought to be regulated. If (for example) a proposed stationary source does not have the potential to emit above-threshold quantities of *any* regulated pollutant, the source will not be a "major emitting facility" and its construction and operation will be unconstrained by Section 7475(a). It would be quite odd, however, to say that, with respect to such a facility, the PSD program does not "apply" in the relevant geographic "area." That reading should be rejected unless the larger statutory context weighs strongly in its favor.

c. The PSD program's pre-construction review requirements cover any "major emitting facility" that is to "be constructed in any area to which [the program] applies." 42 U.S.C. 7475(a). Petitioners recognize (ACC Br. 23 n.10) that, under their interpretation of Section 7475(a), no facility will be subject to PSD program requirements unless it emits criteria pollutants. If Con-

gress had wished to impose that limitation, however, by far the most natural way of doing so would have been to define "major emitting facility" by reference to criteria-pollutant emissions. Indeed, as other respondents explain in detail, the House's version of the PSD program would have so provided. But the Conference Committee adopted, and Congress enacted, the Senate's version, which defined that term more broadly to encompass sources that emit above-threshold quantities of "any air pollutant." 42 U.S.C. 7479(1); see H.R. Rep. No. 564, 95th Cong., 1st Sess. 55, 60-61, 91, 152, 172 (1977) (Conf. Rep.). Thus, while the applicability of PSD program requirements turns on both (a) the nature and quantity of the pollutants a particular source will emit, and (b) the "area" in which the source will "be constructed," petitioners anomalously seek to shoehorn into the second criterion a consideration that is much more naturally linked to the first.[16]

d. Petitioners' principal textual objection is that the EPA's interpretation renders the phrase "to which this part applies" in Section 7475(a) superfluous, because "[*a*]*ll* areas of the country are now * * * in attainment for at least *one* pollutant." ACC Br. 18-19. As the court of appeals explained, that argument "confuse[s] a lack of practical import with a lack of meaning." J.A. 254. And as other respondents explain, the enacting Congress had

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[16] Petitioners also would import the criteria-pollutant-specific meaning of the phrasing in 42 U.S.C. 7473(b)(4). ACC Br. 17-18. But as the court of appeals explained, the separation of "any air pollutant" in Section 7479(1) from "in any area to which this part applies" in Section 7475(a) distinguishes those usages from the concatenated usage of the phrases in the very different context of Section 7473(b)(4). See J.A. 249-253.

some reason to believe that the provision might limit the application of the PSD program in some places.

e. Petitioners' approach would produce significant anomalies, and would potentially create perverse incentives, for facilities that emit above-threshold amounts of a single criteria pollutant. Such a source is a "major emitting facility" even under the narrowest reading of that term. Under the EPA's longstanding approach, the PSD program applies to such a facility if the area in which it locates is in attainment for *any* criteria pollutant (which is, in practice, anywhere in the Nation, see J.A. 480). That approach ensures that the facility will, *inter alia*, satisfy the BACT requirement for its emissions of *all* regulated pollutants.

Under petitioners' approach, by contrast, such a facility could avoid BACT requirements for all other regulated pollutants simply by locating in an area that is in nonattainment for the particular criteria pollutant that caused it to *be* a "major emitting facility." Although the source would be subject to the NNSR program, see pp. 7-8 & note 2, *supra*, that program imposes requirements only with respect to the criteria pollutant itself. See J.A. 1406-1407. Congress could not plausibly have intended to make available that sort of regulatory arbitrage.

III. THE EPA PERMISSIBLY CONCLUDED THAT THE TITLE V PROGRAM APPLIES TO SOME SOURCES SOLELY BECAUSE OF THEIR GREENHOUSE-GAS EMISSIONS

The Title V operating-permit program covers, *inter alia*, any "major source." 42 U.S.C. 7661a(a). Through a series of statutory cross-references, that term (like the PSD program's definition of "major emitting facility") is defined (in part) by reference to a source's emissions of threshold amounts of "any air pollutant." See p. 10,

supra. As with the definition of "major emitting facility," the EPA interprets "any air pollutant" to refer to any air pollutant subject to regulation under the Act. J.A. 787-790. The Title V program's purpose of ensuring that existing sources with substantial emissions comply with requirements imposed under the Act is particularly well served by that broad understanding. And as explained (pp. 40, 43-45, *supra*), greenhouse gases are encompassed within any reasonable interpretation of "any air pollutant."

As in the court of appeals (see J.A. 241), petitioners offer no substantial argument specific to Title V. Some of petitioners' arguments with respect to the PSD program may also apply to Title V, but other arguments are irrelevant because they rely on inferences from provisions of the PSD program that have no counterpart in Title V. Compare Tex. Br. 7 ("*Brown & Williamson* should lead the Court to * * * disapprove EPA's attempts to regulate greenhouse-gas emissions under the PSD and Title V programs.") with ACC Br. 15-23 (advocating an interpretation of the range of facilities that are subject to the PSD program, based on 42 U.S.C. 7475(a)'s reference to "in any area to which this part applies," which has no counterpart in Title V). All parties appear to agree, however, that if this Court accepts the EPA's determination that greenhouse-gas emissions alone can trigger the PSD program's requirements, then it should also accept the EPA's like interpretation of the Title V program.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 42 U.S.C. 7407 provides in pertinent part:

Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * * * *

(d) Designations

(1) Designations generally

(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

(B) Promulgation by EPA of designations

(i) Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

(ii) In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator intends to make a modification, the Administrator shall notify the State and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

(iii) If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or portions thereof) in the State designated as nonattainment, attainment, or unclassifiable, the Administrator shall act on such designations in accordance with the procedures under paragraph (3) (relating to redesignation).

(iv) A designation for an area (or portion thereof) made pursuant to this subsection shall remain in effect until the area (or portion thereof) is redesignated pursuant to paragraph (3) or (4).

(C) Designations by operation of law

(i) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(A), (B), or (C) of this subsection (as in effect immediately before November 15, 1990) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

(ii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before November 15, 1990) is designated by operation of law, as an attainment area for such pollutant within the meaning of subparagraph (A)(ii).

(iii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(D) (as in effect immediately before November 15, 1990) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

* * * * *

2. 42 U.S.C. 7409 provides:

National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Ad-

ministrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) National primary ambient air quality standard for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and

shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or ener-

gy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

3. 42 U.S.C. 7411 provides in pertinent part:

Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

* * * * *

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

* * * * *

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary

sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

* * * * *

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State

shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors,

remaining useful lives of the sources in the category of sources to which such standard applies.

* * * * *

4. 42 U.S.C. 7412(b)(6) provides:

Hazardous air pollutants

(b) List of pollutants

(6) Prevention of significant deterioration

The provisions of part C of this subchapter (prevention of significant deterioration) shall not apply to pollutants listed under this section.

5. 42 U.S.C. 7470 provides:

Congressional declaration of purpose

The purposes of this part are as follows:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[1] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air)[2], notwithstanding attainment and maintenance of all national ambient air quality standards;

(2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas,

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[1] So in original. Probably should be "anticipated".

[2] So in original. Section was enacted without opening parenthesis.

national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

6. 42 U.S.C. 7471 provides:

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.

7. 42 U.S.C. 7472 provides:

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.

8. 42 U.S.C. 7473 provides:

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.[1]

(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.A. § 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.

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[1] So in original. The period probably should be a comma.

(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.

9. 42 U.S.C. 7474(a) provides:

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[4] (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.

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[4] So in original. Probably should be "paragraphs".

10. 42 U.S.C. 7475 provides:

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 regula-

tion 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 continu-

ous 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.

11. 42 U.S.C. 7476 provides:

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[1] 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.

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[1] So in original. Probably should be "of".

(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.

12. 42 U.S.C. 7477 provides:

Enforcement

The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

13. 42 U.S.C. 7478 provides:

Period before plan approval

(a) Existing regulations to remain in effect

Until such time as an applicable implementation plan is in effect for any area, which plan meets the requirements of this part to prevent significant deterioration of air quality with respect to any air pollutant, applicable regulations under this chapter prior to August 7, 1977, shall remain in effect to prevent significant deterioration of air quality in any such area for any such pollutant except as otherwise provided in subsection (b) of this section.

(b) Regulations deemed amended; construction commenced after June 1, 1975

If any regulation in effect prior to August 7, 1977, to prevent significant deterioration of air quality would be inconsistent with the requirements of section 7472(a),

section 7473(b) or section 7474(a) of this title, then such regulations shall be deemed amended so as to conform with such requirements. In the case of a facility on which construction was commenced (in accordance with the definition of "commenced" in section 7479(2) of this title) after June 1, 1975, and prior to August 7, 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to August 7, 1977.

14. 42 U.S.C. 7479 provides in pertinent part:

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.

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(2)(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.

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15. 42 U.S.C. 7491 provides in pertinent part:

Visibility protection for Federal class I areas

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(b) Regulations

Regulations under subsection (a)(4) of this section shall—

(1) provide guidelines to the States, taking into account the recommendations under subsection (a)(3) of this section on appropriate techniques and methods for implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a)(3)), and

(2) require each applicable implementation plan for a State in which any area listed by the Administrator under subsection (a)(2) of this section is located (or for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area) to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal specified in subsection (a) of this section, including—

(A) except as otherwise provided pursuant to subsection (c) of this section, a requirement that each major stationary source which is in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date, and which, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment, and

(B) a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal specified in subsection (a) of this section.

In the case of a fossil-fuel fired generating powerplant having a total generating capacity in excess of 750 megawatts, the emission limitations required under this paragraph shall be determined pursuant to guidelines, promulgated by the Administrator under paragraph (1).

* * * * *

(g) Definitions

For the purpose of this section—

* * * * *

(7) the term "major stationary source" means the following types of stationary sources with the potential to emit 250 tons or more of any pollutant: fossil-fuel fired steam electric plants of more than 250 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 250 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 250 million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities.

16. 42 U.S.C. 7501 provides:

Definitions

For the purpose of this part—

(1) REASONABLE FURTHER PROGRESS.—The term "reasonable further progress" means such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.

(2) NONATTAINMENT AREA.—The term "nonattainment area" means, for any air pollutant, an area which is designated "nonattainment" with respect to that pollutant within the meaning of section 7407(d) of this title.

(3) The term "lowest achievable emission rate" means for any source, that rate of emissions which reflects—

(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pol-

lutant in excess of the amount allowable under applicable new source standards of performance.

(4) The terms "modifications" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

17. 42 U.S.C. 7502(c)(5) provides:

Nonattainment plan provisions in general

* * * * *

(c) Nonattainment plan provisions

The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

* * * * *

(5) Permits for new and modified major stationary sources

Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.

18. 42 U.S.C. 7503(a) provides:

Permit requirements

(a) In general

The permit program required by section 7502(b)(6)[1] of this title shall provide that permits to construct and operate may be issued if—

(1) in accordance with regulations issued by the Administrator for the determination of baseline emissions in a manner consistent with the assumptions underlying the applicable implementation plan approved under section 7410 of this title and this part, the permitting agency determines that—

(A) by the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained, such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources (as determined in accordance with the regulations under this paragraph) prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 7502 of this title) reasonable further progress (as defined in section 7501 of this title); or

(B) in the case of a new or modified major stationary source which is located in a zone

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[1] See References in Text note below.

(within the nonattainment area) identified by the Administrator, in consultation with the Secretary of Housing and Urban Development, as a zone to which economic development should be targeted, that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which exceed the allowance permitted for such pollutant for such area from new or modified major stationary sources under section 7502(c) of this title;

(2) the proposed source is required to comply with the lowest achievable emission rate;

(3) the owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under common control with such person) in such State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under this chapter; and[2]

(4) the Administrator has not determined that the applicable implementation plan is not being adequately implemented for the nonattainment area in which the proposed source is to be constructed or modified in accordance with the requirements of this part; and

(5) an analysis of alternative sites, sizes, production processes, and environmental control tech-

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[2] So in original. The word "and" probably should not appear.

niques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.

Any emission reductions required as a precondition of the issuance of a permit under paragraph (1) shall be federally enforceable before such permit may be issued.

19. 42 U.S.C. 7602 provides in pertinent part:

Definitions

When used in this chapter—

* * * * *

(g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by trans-

formation, conversion, or combination with other air pollutants.

* * * * *

(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).

* * * * *

20. 42 U.S.C. 7661(2) provides:

Definitions

As used in this subchapter—

* * * * *

(2) Major source

The term "major source" means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following:

(A) A major source as defined in section 7412 of this title.

(B) A major stationary source as defined in section 7602 of this title or part D of subchapter I of this chapter.

21. 42 U.S.C. 7661a(a) provides:

Permit programs

(a) Violations

After the effective date of any permit program approved or promulgated under this subchapter, it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source (as provided in subchapter IV-A of this chapter), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts[1] C or D of subchapter I of this chapter, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter. (Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.) The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this chapter, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.

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[1] So in original. Probably should be "part".

22. 40 C.F.R. 51.166 provides in pertinent part:

Prevention of significant deterioration of air quality.

(a)(1) *Plan requirements.* In accordance with the policy of section 101(b)(1) of the Act and the purposes of section 160 of the Act, each applicable State Implementation Plan and each applicable Tribal Implementation Plan shall contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality.

* * * * *

(7) *Applicability.* Each plan shall contain procedures that incorporate the requirements in paragraphs (a)(7)(i) through (vi) of this section.

(i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as this section otherwise provides.

(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements.

(iv) Each plan shall use the specific provisions of paragraphs (a)(7)(iv)(*a*) through (*f*) of this section. Deviations from these provisions will be approved only if the State specifically demonstrates that the submitted provisions are more stringent than or at least as stringent in all respects as the corresponding provisions in paragraphs (a)(7)(iv)(*a*) through (*f*) of this section.

(*a*) Except as otherwise provided in paragraphs (a)(7)(v) and (vi) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase (as defined in paragraph (b)(39) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

* * * * *

(b) *Definitions.* All State plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

(1)(i) *Major stationary source* means:

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 250 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 plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(*b*) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)(a) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant; or

(*c*) Any physical change that would occur at a stationary source not otherwise qualifying under para-

graph (b)(1) of this section, as a major stationary source if the change would constitute a major stationary source by itself.

* * * * *

(2)(i) *Major modification* means any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase (as defined in paragraph (b)(39) of this section) of a regulated NSR pollutant (as defined in paragraph (b)(49) of this section); and a significant net emissions increase of that pollutant from the major stationary source.

* * * * *

(4) *Potential to emit* means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

* * * * *

(8) *Construction* means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions.

* * * * *

(12) *Best available control technology* means an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each a regulated NSR pollutant which would be emitted from any proposed major stationary source or major modification which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combination techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR parts 60 and 61. If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

* * * * *

(23)(i) *Significant* means, in reference to a net emissions increase or the potential of a source to emit

any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

POLLUTANT AND EMISSIONS RATE

Carbon monoxide: 100 tons per year (tpy)

Nitrogen oxides: 40 tpy

Sulfur dioxide: 40 tpy

Particulate matter: 25 tpy of particulate matter emissions. 15 tpy of PM_{10} emissions

$PM_{2.5}$: 10 tpy of direct $PM_{2.5}$ emissions; 40 tpy of sulfur dioxide emissions; 40 tpy of nitrogen oxide emissions unless demonstrated not to be a $PM_{2.5}$ precursor under paragraph (b)(49) of this section

Ozone: 40 tpy of volatile organic compounds or nitrogen oxides

Lead: 0.6 tpy

Fluorides: 3 tpy

Sulfuric acid mist: 7 tpy

Hydrogen sulfide (H_2S): 10 tpy

Total reduced sulfur (including H_2S): 10 tpy

Reduced sulfur compounds (including H_2S): 10 tpy

Municipal waste combustor organics (measured as total tetra-through octa-chlorinated dibenzo-p-dioxins and dibenzofurans): 3.2 x 10^{-6} megagrams per year (3.5 x 10^{-6} tons per year)

Municipal waste combustor metals (measured as particulate matter): 14 megagrams per year (15 tons per year)

Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tons per year)

Municipal solid waste landfill emissions (measured as nonmethane organic compounds): 45 megagrams per year (50 tons per year)

(ii) *Significant* means, in reference to a net emissions increase or the potential of a source to emit a regulated NSR pollutant that paragraph (b)(23)(i) of this section, does not list, any emissions rate.

(iii) Notwithstanding paragraph (b)(23)(i) of this section, *significant* means any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilometers of a Class I area, and have an impact on such area equal to or greater than 1 $\mu g/m^3$ (24–hour average).

* * * * *

(48) *Subject to regulation* means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the Administrator in subchapter C of this chapter, that requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:

(i) *Greenhouse gases* (GHGs), the air pollutant defined in § 86.1818–12(a) of this chapter as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation except as provided in paragraphs (b)(48)(iv) through (v) of this section.

(ii) For purposes of paragraphs (b)(48)(iii) through (v) of this section, the term tpy CO_2 *equivalent emissions* (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(*a*) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials. For purposes of this paragraph (b)(48)(ii)(a), prior to July 21, 2014, the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

(*b*) Sum the resultant value from paragraph (b)(48)(ii)(a) of this section for each gas to compute a tpy CO_2e.

(iii) The term *emissions increase* as used in paragraphs (b)(48)(iv) through (v) of this section shall mean that both a significant emissions increase (as calculated using the procedures in (a)(7)(iv) of this section) and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR

pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in paragraph (b)(23)(ii) of this section.

(iv) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(*a*) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(*b*) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(v) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(48)(iv) of this section, the pollutant GHGs shall also be subject to regulation:

(*a*) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(*b*) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(49) *Regulated NSR pollutant*, for purposes of this section, means the following:

(i) Any pollutant for which a national ambient air quality standard has been promulgated. This includes, but is not limited to, the following:

(*a*) $PM_{2.5}$ emissions and PM_{10} emissions shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures. On or after January 1, 2011, such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for $PM_{2.5}$ and PM_{10} in PSD permits. Compliance with emissions limitations for $PM_{2.5}$ and PM_{10} issued prior to this date shall not be based on condensable particulate matter unless required by the terms and conditions of the permit or the applicable implementation plan. Applicability determinations made prior to this date without accounting for condensable particulate matter shall not be considered in violation of this section unless the applicable implementation plan required condensable particulate matter to be included;

(*b*) Any pollutant identified under this paragraph (b)(49)(i)(b) as a constituent or precursor to a pollutant for which a national ambient air quality standard has been promulgated. Precursors identified by the Administrator for purposes of NSR are the following:

(*1*) Volatile organic compounds and nitrogen oxides are precursors to ozone in all attainment and unclassifiable areas.

(*2*) Sulfur dioxide is a precursor to $PM_{2.5}$ in all attainment and unclassifiable areas.

(*3*) Nitrogen oxides are presumed to be precursors to $PM_{2.5}$ in all attainment and unclassifiable areas, unless the State demonstrates to the Administrator's satisfaction or EPA demonstrates that emissions of nitrogen oxides from sources in a specific area are not a

significant contributor to that area's ambient $PM_{2.5}$ concentrations.

(*4*) Volatile organic compounds are presumed not to be precursors to $PM_{2.5}$ in any attainment or unclassifiable area, unless the State demonstrates to the Administrator's satisfaction or EPA demonstrates that emissions of volatile organic compounds from sources in a specific area are a significant contributor to that area's ambient $PM_{2.5}$ concentrations.

(ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act;

(iii) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act;

(iv) Any pollutant that otherwise is subject to regulation under the Act as defined in paragraph (b)(48) of this section.

(v) Notwithstanding paragraphs (b)(49)(i) through (iv) of this section, the term *regulated NSR pollutant* shall not include any or all hazardous air pollutants either listed in section 112 of the Act, or added to the list pursuant to section 112(b)(2) of the Act, and which have not been delisted pursuant to section 112(b)(3) of the Act, unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Act.

* * * * *

(c) *Ambient air increments and other measures.* (1) The plan shall contain emission limitations and such other measures as may be necessary to assure that in areas designated as Class I, II, or III, increases

in pollutant concentrations over the baseline concentration shall be limited to the following:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Class I Area	
$PM_{2.5}$:	
Annual arithmetic mean	1
24-hr maximum	2
PM_{10}:	
Annual arithmetic mean	4
24-hr maximum	8
Sulfur dioxide:	
Annual arithmetic mean	2
24-hr maximum	5
3-hr maximum	25
Nitrogen dioxide:	
Annual arithmetic mean	2.5
Class II Area	
$PM_{2.5}$:	
Annual arithmetic mean	4
24-hr maximum	9
PM_{10}:	
Annual arithmetic mean	17

24-hr maximum	30
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	512
Nitrogen dioxide:	
Annual arithmetic mean	25

Class III Area

$PM_{2.5}$:	
Annual arithmetic mean	8
24-hr maximum	18
PM_{10}:	
Annual arithmetic mean	34
24-hr maximum	60
Sulfur dioxide:	
Annual arithmetic mean	40
24-hr maximum	182
3-hr maximum	700
Nitrogen dioxide:	
Annual arithmetic mean	50

For any period other than an annual period, the applicable maximum allowable increase may be exceeded during one such period per year at any one location.

(2) Where the State can demonstrate that it has alternative measures in its plan other than maximum allowable increases as defined under paragraph (c)(1) of this section, that satisfy the requirements in sec-

tions 166(c) and 166(d) of the Clean Air Act for a regulated NSR pollutant for which the Administrator has established maximum allowable increases pursuant to section 166(a) of the Act, the requirements for maximum allowable increases for that pollutant under paragraph (c)(1) of this section shall not apply upon approval of the plan by the Administrator. The following regulated NSR pollutants are eligible for such treatment:

(i) Nitrogen dioxide.

(ii) $PM_{2.5}$.

(d) *Ambient air ceilings.* The plan shall provide that no concentration of a pollutant shall exceed:

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

(2) The concentration permitted under the national primary ambient air quality standard, whichever concentration is lowest for the pollutant for a period of exposure.

* * * * *

(j) *Control technology review.* The plan shall provide that:

(1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emission standards and standard of performance under 40 CFR parts 60 and 61.

(2) A new major stationary source shall apply best available control technology for each a regulated NSR

pollutant that it would have the potential to emit in significant amounts.

(3) A major modification shall apply best available control technology for each a regulated NSR pollutant for which it would be a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

(4) For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the least reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

(k) *Source impact analysis*—(1) *Required demonstration.* The plan shall provide that the owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reduction (including secondary emissions), would not cause or contribute to air pollution in violation of:

(i) Any national ambient air quality standard in any air quality control region; or

(ii) Any applicable maximum allowable increase over the baseline concentration in any area.

(2) SIGNIFICANT IMPACT LEVELS. The plan may provide that, for purposes of $PM_{2.5}$ the demonstration required in paragraph (k)(1) of this section is deemed to have been made if the emissions increase from the new stationary source alone or from the modification alone would cause, in all areas, air quality impacts less than the following amounts:

Pollutant	Averaging time	Class I area	Class II area	Class III area
$PM_{2.5}$	Annual	0.06 μgm^3	0.3 μgm^3	.03 μgm^3
	24-hour.....	0.07 μgm^3	1.2 μgm^3	1.2 μgm^3

* * * * *

(m) *Air quality analysis*—(1) *Preapplication analysis.* (i) The plan shall provide that any application for a permit under regulations approved pursuant to this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(*a*) For the source, each pollutant that it would have the potential to emit in a significant amount;

(*b*) For the modification, each pollutant for which it would result in a significant net emissions increase.

(ii) The plan shall provide that, with respect to any such pollutant for which no National Ambient Air Quality Standard exists, the analysis shall contain such air quality monitoring data as the reviewing authority determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(iii) The plan shall provide that with respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

(iv) The plan shall provide that, in general, the continuous air monitoring data that is required shall have been gathered over a period of one year and shall represent the year preceding receipt of the application, except that, if the reviewing authority determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), the data that is required shall have been gathered over at least that shorter period.

(v) The plan may provide that the owner or operator of a proposed major stationary source or major modification of volatile organic compounds who satisfies all conditions of 40 CFR part 51 appendix S, section IV may provide postapproval monitoring data for ozone in lieu of providing preconstruction data as required under paragraph (m)(1) of this section.

* * * * *

(o) *Additional impact analyses.* The plan shall provide that—

(1) The owner or operator shall provide an analysis of the impairment to visibility, soils, and vegetation that would occur as a result of the source or modification and general commercial, residential, industrial, and other growth associated with the source or modification. The

owner or operator need not provide an analysis of the impact on vegetation having no significant commercial or recreational value.

(2) The owner or operator shall provide an analysis of the air quality impact projected for the area as a result of general commercial, residential, industrial, and other growth associated with the source or modification.

* * * * *

23. 40 C.F.R. 52.21 provides in pertinent part:

Prevention of significant deterioration of air quality.

(a)(1) *Plan disapproval.* The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable, in subparts B through DDD of this part. The provisions of this section have been incorporated by reference into the applicable implementation plans for various States, as provided in subparts B through DDD of this part. Where this section is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(2) *Applicability procedures.* (i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as this section otherwise provides.

(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements. The Administrator has authority to issue any such permit.

(iv) The requirements of the program will be applied in accordance with the principles set out in paragraphs (*a*)(2)(iv)(a) through (*f*) of this section.

(*a*) Except as otherwise provided in paragraphs (a)(2)(v) and (vi) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a signif-

icant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

* * * * *

(b) *Definitions.* For the purposes of this section:

(1)(i) *Major stationary source* means:

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 250 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 plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants,

glass fiber processing plants, and charcoal production plants;

(*b*) Notwithstanding the stationary source size specified in paragraph (b)(1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant; or

(*c*) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source, if the changes would constitute a major stationary source by itself.

* * * * *

(2)(i) *Major modification* means any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase (as defined in paragraph (b)(40) of this section) of a regulated NSR pollutant (as defined in paragraph (b)(50) of this section); and a significant net emissions increase of that pollutant from the major stationary source.

* * * * *

(4) *Potential to emit* means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not

count in determining the potential to emit of a stationary source.

* * * * *

(8) *Construction* means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions.

* * * * *

(12) *Best available control technology* means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR parts 60 and 61. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the re-

quirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

* * * * *

(23)(i) Significant means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

POLLUTANT AND EMISSIONS RATE

Carbon monoxide: 100 tons per year (tpy)

Nitrogen oxides: 40 tpy

Sulfur dioxide: 40 tpy

Particulate matter: 25 tpy of particulate matter emissions

PM_{10}: 15 tpy

$PM_{2.5}$: 10 tpy of direct $PM_{2.5}$ emissions; 40 tpy of sulfur dioxide emissions; 40 tpy of nitrogen oxide emissions unless demonstrated not to be a $PM_{2.5}$ precursor under paragraph (b)(50) of this section

Ozone: 40 tpy of volatile organic compounds or nitrogen oxides

Lead: 0.6 tpy

Fluorides: 3 tpy

Sulfuric acid mist: 7 tpy

Hydrogen sulfide (H_2S): 10 tpy

Total reduced sulfur (including H_2S): 10 tpy

Reduced sulfur compounds (including H_2S): 10 tpy

Municipal waste combustor organics (measured as total tetra-through octa-chlorinated dibenzo-p-dioxins and dibenzofurans): 3.2×10^{-6} megagrams per year (3.5×10^{-6} tons per year)

Municipal waste combustor metals (measured as particulate matter): 14 megagrams per year (15 tons per year)

Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tons per year)

Municipal solid waste landfills emissions (measured as nonmethane organic compounds): 45 megagrams per year (50 tons per year)

(ii) *Significant* means, in reference to a net emissions increase or the potential of a source to emit a regulated NSR pollutant that paragraph (b)(23)(i) of this section, does not list, any emissions rate.

* * * * *

(49) *Subject to regulation* means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the Administrator in subchapter C of this chapter, that requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:

(i) *Greenhouse gases (GHGs),* the air pollutant defined in §86.1818-12(a) of this chapter as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, per-

fluorocarbons, and sulfur hexafluoride, shall not be subject to regulation except as provided in paragraphs (b)(49)(iv) through (v) of this section and shall not be subject to regulation if the stationary source maintains its total source-wide emissions below the GHG PAL level, meets the requirements in paragraphs (aa)(1) through (15) of this section, and complies with the PAL permit containing the GHG PAL.

(ii) For purposes of paragraphs (b)(49)(iii) through (v) of this section, the term tpy *CO_2 equivalent emissions (CO_2e)* shall represent an amount of GHGs emitted, and shall be computed as follows:

(*a*) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A-1 to subpart A of part 98 of this chapter—Global Warming Potentials. For purposes of this paragraph, prior to July 21, 2014, the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

(*b*) Sum the resultant value from paragraph (b)(49)(ii)(*a*) of this section for each gas to compute a tpy CO_2e.

(iii) The term *emissions increase* as used in paragraphs (b)(49)(iv) through (v) of this section shall mean that both a significant emissions increase (as calculated using the procedures in paragraph (a)(2)(iv) of this section) and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy CO_2e instead of applying the value in paragraph (b)(23)(ii) of this section.

(iv) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(*a*) The stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy CO_2e or more; or

(*b*) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more; and,

(v) Beginning July 1, 2011, in addition to the provisions in paragraph (b)(49)(iv) of this section, the pollutant GHGs shall also be subject to regulation

(*a*) At a new stationary source that will emit or have the potential to emit 100,000 tpy CO_2e; or

(*b*) At an existing stationary source that emits or has the potential to emit 100,000 tpy CO_2e, when such stationary source undertakes a physical change or

change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2e or more.

(50) *Regulated NSR pollutant,* for purposes of this section, means the following:

(i) Any pollutant for which a national ambient air quality standard has been promulgated. This includes, but is not limited to, the following:

(*a*) $PM_{2.5}$ emissions and PM_{10} emissions shall include gaseous emissions from a source or activity, which condense to form particulate matter at ambient temperatures. On or after January 1, 2011, such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for $PM_{2.5}$ and PM_{10} in PSD permits. Compliance with emissions limitations for $PM_{2.5}$ and PM_{10} issued prior to this date shall not be based on condensable particulate matter unless required by the terms and conditions of the permit or the applicable implementation plan. Applicability determinations made prior to this date without accounting for condensable particulate matter shall not be considered in violation of this section unless the applicable implementation plan required condensable particulate matter to be included.

(*b*) Any pollutant identified under this paragraph (b)(50)(i)(*b*) as a constituent or precursor for a pollutant for which a national ambient air quality standard has been promulgated. Precursors identified by the Administrator for purposes of NSR are the following:

(*1*) Volatile organic compounds and nitrogen oxides are precursors to ozone in all attainment and unclassifiable areas.

(*2*) Sulfur dioxide is a precursor to $PM_{2.5}$ in all attainment and unclassifiable areas.

(*3*) Nitrogen oxides are presumed to be precursors to $PM_{2.5}$ in all attainment and unclassifiable areas, unless the State demonstrates to the Administrator's satisfaction or EPA demonstrates that emissions of nitrogen oxides from sources in a specific area are not a significant contributor to that area's ambient $PM_{2.5}$ concentrations.

(*4*) Volatile organic compounds are presumed not to be precursors to $PM_{2.5}$ in any attainment or unclassifiable area, unless the State demonstrates to the Administrator's satisfaction or EPA demonstrates that emissions of volatile organic compounds from sources in a specific area are a significant contributor to that area's ambient $PM_{2.5}$ concentrations.

(ii) Any pollutant that is subject to any standard promulgated under section 111 of the Act;

(iii) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act;

(iv) Any pollutant that otherwise is subject to regulation under the Act as defined in paragraph (b)(49) of this section.

(v) Notwithstanding paragraphs (b)(50)(i) through (iv) of this section, the term *regulated NSR pollutant* shall not include any or all hazardous air pollutants either listed in section 112 of the Act, or added to the list pursuant to section 112(b)(2) of the Act, and which have not been delisted pursuant to section 112(b)(3) of the Act, unless the listed hazardous air pollutant is

also regulated as a constituent or precursor of a general pollutant listed under section 108 of the Act.

* * * * *

(c) *Ambient air increments.* In areas designated as Class I, II or III, increases in pollutant concentration over the baseline concentration shall be limited to the following:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Class I Area	
$PM_{2.5}$:	
Annual arithmetic mean	1
24-hr maximum.....	2
PM_{10}:	
Annual arithmetic mean	4
24-hr maximum.....	8
Sulfur dioxide:	
Annual arithmetic mean	2
24-hr maximum.....	5
3-hr maximum.....	25

Nitrogen dioxide:	
Annual arithmetic mean	2.5
Class II Area	
$PM_{2.5}$:	
Annual arithmetic mean	4
24-hr maximum	9
PM_{10}:	
Annual arithmetic mean	17
24-hr maximum	30
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	512
Nitrogen dioxide:	
Annual arithmetic mean	25
Class III Area	
$PM_{2.5}$:	
Annual arithmetic mean	8
24-hr maximum	18
PM_{10}:	
Annual arithmetic mean	34
24-hr maximum	60
Sulfur dioxide:	
Annual arithmetic mean	40
24-hr maximum	182
3-hr maximum	700

Nitrogen dioxide:

Annual arithmetic mean	50

For any period other than an annual period, the applicable maximum allowable increase may be exceeded during one such period per year at any one location.

(d) *Ambient air ceilings.* No concentration of a pollutant shall exceed:

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

(2) The concentration permitted under the national primary ambient air quality standard, whichever concentration is lowest for the pollutant for a period of exposure.

* * * * *

(j) *Control technology review.* (1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emissions standard and standard of performance under 40 CFR parts 60 and 61.

(2) A new major stationary source shall apply best available control technology for each regulated NSR pollutant that it would have the potential to emit in significant amounts.

(3) A major modification shall apply best available control technology for each regulated NSR pollutant for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a

physical change or change in the method of operation in the unit.

(4) For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the latest reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

(k) *Source impact analysis*—(1) *Required demonstration.* The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of:

(i) Any national ambient air quality standard in any air quality control region; or

(ii) Any applicable maximum allowable increase over the baseline concentration in any area.

(2) *Significant impact levels.* For purposes of $PM_{2.5}$, the demonstration required in paragraph (k)(1) of this section is deemed to have been made if the emissions increase from the new stationary source alone or from the modification alone would cause, in all areas, air quality impacts less than the following amounts.

* * * * *

(m) *Air quality analysis*—(1) *Preapplication analysis.* (i) Any application for a permit under this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(*a*) For the source, each pollutant that it would have the potential to omit in a significant amount;

(*b*) For the modification, each pollutant for which it would result in a significant net emissions increase.

(ii) With respect to any such pollutant for which no National Ambient Air Quality Standard exists, the analysis shall contain such air quality monitoring data as the Administrator determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(iii) With respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

(iv) In general, the continuous air quality monitoring data that is required shall have been gathered over a period of at least one year and shall represent at least the year preceding receipt of the application, except that, if the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), the data

that is required shall have been gathered over at least that shorter period.

(v) For any application which becomes complete, except as to the requirements of paragraphs (m)(1)(iii) and (iv) of this section, between June 8, 1981, and February 9, 1982, the data that paragraph (m)(1) (iii) of this section, requires shall have been gathered over at least the period from February 9, 1981, to the date the application becomes otherwise complete, except that:

(*a*) If the source or modification would have been major for that pollutant under 40 CFR 52.21 as in effect on June 19, 1978, any monitoring data shall have been gathered over at least the period required by those regulations.

(*b*) If the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data over a shorter period (not to be less than four months), the data that paragraph (m)(1) (iii) of this section, requires shall have been gathered over at least that shorter period.

(*c*) If the monitoring data would relate exclusively to ozone and would not have been required under 40 CFR 52.21 as in effect on June 19, 1978, the Administrator may waive the otherwise applicable requirements of this paragraph (v) to the extent that the applicant shows that the monitoring data would be unrepresentative of air quality over a full year.

(vi) The owner or operator of a proposed stationary source or modification of volatile organic compounds who satisfies all conditions of 40 CFR part 51 Appendix S, section IV may provide post-approval monitoring data for ozone in lieu of providing preconstruc-

tion data as required under paragraph (m)(1) of this section.

(vii) For any application that becomes complete, except as to the requirements of paragraphs (m)(1) (iii) and (iv) pertaining to PM_{10}, after December 1, 1988 and no later than August 1, 1989 the data that paragraph (m)(1)(iii) requires shall have been gathered over at least the period from August 1, 1988 to the date the application becomes otherwise complete, except that if the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data over a shorter period (not to be less than 4 months), the data that paragraph (m)(1) (iii) requires shall have been gathered over that shorter period.

(viii) With respect to any requirements for air quality monitoring of PM_{10} under paragraphs (i)(11) (i) and (ii) of this section the owner or operator of the source or modification shall use a monitoring method approved by the Administrator and shall estimate the ambient concentrations of PM_{10} using the data collected by such approved monitoring method in accordance with estimating procedures approved by the Administrator.

* * * * *

(o) *Additional impact analyses.* (1) The owner or operator shall provide an analysis of the impairment to visibility, soils and vegetation that would occur as a result of the source or modification and general commercial, residential, industrial and other growth associated with the source or modification. The owner or operator need not provide an analysis of the impact on

vegetation having no significant commercial or recreational value.

(2) The owner or operator shall provide an analysis of the air quality impact projected for the area as a result of general commercial, residential, industrial and other growth associated with the source or modification.

(3) *Visibility monitoring.* The Administrator may require monitoring of visibility in any Federal class I area near the proposed new stationary source for major modification for such purposes and by such means as the Administrator deems necessary and appropriate.

24. 40 C.F.R. 52.22 provides:

Enforceable commitments for further actions addressing the pollutant greenhouse gases (GHGs).

(a) *Definitions.* (1) *Greenhouse Gases (GHGs)* means the air pollutant as defined in § 86.1818-12(a) of this chapter as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(2) All other terms used in this section shall have the meaning given in § 52.21.

(b) *Further action to regulate GHGs under the PSD* program.

(1) *Near term action on GHGs.* The Administrator shall solicit comment, under section 307(b) of the Act, on promulgating lower GHGs thresholds for

PSD applicability. Such action shall be finalized by July 1, 2012 and become effective July 1, 2013.

(2) Further *study and action on GHGs.*

(i) No later than April 30, 2015 the Administrator shall complete a study projecting the administrative burdens that remain with respect to stationary sources for which GHGs do not constitute a regulated NSR pollutant. Such study shall account, among other things, for permitting authorities ability to secure resources, hire and train staff; experiences associated with GHG permitting for new types of sources and technologies; and, the success of streamlining measures developed by EPA (and adopted by the states) for reducing the permitting burden associated with such stationary sources.

(ii) Based on the results of the study described in paragraph (b)(2)(i) of this section, the Administrator shall propose a rule addressing the permitting obligations of such stationary sources under § 52.21 and § 51.166 of this chapter. The Administrator shall take final action on such a rule no later than April 30, 2016.

(iii) Before completing the rule described in paragraph (b)(2)(ii) of this section, the Administrator shall take no action to make the pollutant GHGs subject to regulation at stationary sources that emit or have the potential to emit less than 50,000 tpy CO_2e, or for physical changes or changes in the method of operations at stationary sources that result in an emissions increase of less than 50,000 tpy CO_2e (as determined using the methodology described in § 52.21(b)(49)(ii).)

25. 40 C.F.R. 70.1 provides:

Program overview.

(a) The regulations in this part provide for the establishment of comprehensive State air quality permitting systems consistent with the requirements of title V of the Clean Air Act (Act) (42 U.S.C. 7401, *et seq.*). These regulations define the minimum elements required by the Act for State operating permit programs and the corresponding standards and procedures by which the Administrator will approve, oversee, and withdraw approval of State operating permit programs.

(b) All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements. While title V does not impose substantive new requirements, it does require that fees be imposed on sources and that certain procedural measures be adopted especially with respect to compliance.

(c) Nothing in this part shall prevent a State, or interstate permitting authority, from establishing additional or more stringent requirements not inconsistent with this Act. The EPA will approve State program submittals to the extent that they are not inconsistent with the Act and these regulations. No permit, however, can be less stringent than necessary to meet all applicable requirements. In the case of Federal intervention in the permit process, the Administrator reserves the right to implement the State operating permit program, in whole or in part, or the Federal program contained in regulations promulgated under title V of the Act.

(d) The requirements of part 70, including provisions regarding schedules for submission and approval or disapproval of permit applications, shall apply to the permitting of affected sources under the acid rain program, except as provided herein or modified in regulations promulgated under title IV of the Act (acid rain program).

(e) Issuance of State permits under this part may be coordinated with issuance of permits under the Resource Conservation and Recovery Act and under the Clean Water Act, whether issued by the State, the U.S. Environmental Protection Agency (EPA), or the U.S. Army Corps of Engineers.

(f) States that choose to receive electronic documents must satisfy the requirements of 40 CFR Part 3—(Electronic reporting) in their program.

26. 40 C.F.R. 70.2 provides:

Definitions.

The following definitions apply to part 70. Except as specifically provided in this section, terms used in this part retain the meaning accorded them under the applicable requirements of the Act.

Act means the Clean Air Act, as amended, 42 U.S.C. 7401, et seq.

Affected source shall have the meaning given to it in the regulations promulgated under title IV of the Act.

Affected States are all States:

(1) Whose air quality may be affected and that are contiguous to the State in which a part 70 permit, per-

mit modification or permit renewal is being proposed; or

(2) That are within 50 miles of the permitted source.

Affected unit shall have the meaning given to it in the regulations promulgated under title IV of the Act.

Alternative operating scenario (AOS) means a scenario authorized in a part 70 permit that involves a change at the part 70 source for a particular emissions unit, and that either results in the unit being subject to one or more applicable requirements which differ from those applicable to the emissions unit prior to implementation of the change or renders inapplicable one or more requirements previously applicable to the emissions unit prior to implementation of the change.

Applicable requirement means all of the following as they apply to emissions units in a part 70 source (including requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates):

(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA *through* rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter;

(2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act;

(3) Any standard or other requirement under section 111 of the Act, including section 111(d);

(4) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act;

(5) Any standard or other requirement of the acid rain program under title IV of the Act or the regulations promulgated thereunder;

(6) Any requirements established pursuant to section 504(b) or section 114(a)(3) of the Act;

(7) Any standard or other requirement under section 126(a)(1) and (c) of the Act;

(8) Any standard or other requirement governing solid waste incineration, under section 129 of the Act;

(9) Any standard or other requirement for consumer and commercial products, under section 183(e) of the Act;

(10) Any standard or other requirement for tank vessels under section 183(f) of the Act;

(11) Any standard or other requirement of the program to control air pollution from outer continental shelf sources, under section 328 of the Act;

(12) Any standard or other requirement of the regulations promulgated to protect stratospheric ozone under title VI of the Act, unless the Administrator has determined that such requirements need not be contained in a title V permit; and

(13) Any national ambient air quality standard or increment or visibility requirement under part C of ti-

tle I of the Act, but only as it would apply to temporary sources permitted pursuant to section 504(e) of the Act.

Approved replicable methodology (ARM) means part 70 permit terms that:

(1) Specify a protocol which is consistent with and implements an applicable requirement, or requirement of this part, such that the protocol is based on sound scientific and/or mathematical principles and provides reproducible results using the same inputs; and

(2) Require the results of that protocol to be recorded and used for assuring compliance with such applicable requirement, any other applicable requirement implicated by implementation of the ARM, or requirement of this part, including where an ARM is used for determining applicability of a specific requirement to a particular change.

Designated representative shall have the meaning given to it in section 402(26) of the Act and the regulations promulgated thereunder.

Draft permit means the version of a permit for which the permitting authority offers public participation under § 70.7(h) or affected State review under § 70.8 of this part.

Emissions allowable under the permit means a federally enforceable permit term or condition determined at issuance to be required by an applicable requirement that establishes an emissions limit (including a work practice standard) or a federally enforceable emissions cap that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject.

Emissions unit means any part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act. This term is not meant to alter or affect the definition of the term "unit" for purposes of title IV of the Act.

The EPA or the Administrator means the Administrator of the EPA or his designee.

Final permit means the version of a part 70 permit issued by the permitting authority that has completed all review procedures required by §§ 70.7 and 70.8 of this part.

Fugitive emissions are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.

General permit means a part 70 permit that meets the requirements of § 70.6(d).

Major source means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping and that are described in paragraph (1), (2), or (3) of this definition. For the purposes of defining "major source," a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same Major Group (i.e., all have the same two-digit code) as described in the Standard Industrial Classification Manual, 1987.

(1) A major source under section 112 of the Act, which is defined as:

(i) For pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tons per year (tpy) or more of any hazardous air pollutant which has been listed pursuant to section 112(b) of the Act, 25 tpy or more of any combination of such hazardous air pollutants, or such lesser quantity as the Administrator may establish by rule. Notwithstanding the preceding sentence, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources; or

(ii) For radionuclides, "major source" shall have the meaning specified by the Administrator by rule.

(2) A major stationary source of air pollutants, as defined in section 302 of the Act, that directly emits, or has the potential to emit, 100 tpy or more of any air pollutant subject to regulation (including any major source of fugitive emissions of any such pollutant, as determined by rule by the Administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of section 302(j) of the Act, unless the source belongs to one of the following categories of stationary source:

(i) Coal cleaning plants (with thermal dryers);

(ii) Kraft pulp mills;

(iii) Portland cement plants;

(iv) Primary zinc smelters;

(v) Iron and steel mills;

(vi) Primary aluminum ore reduction plants;

(vii) Primary copper smelters;

(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) Hydrofluoric, sulfuric, or nitric acid plants;

(x) Petroleum refineries;

(xi) Lime plants;

(xii) Phosphate rock processing plants;

(xiii) Coke oven batteries;

(xiv) Sulfur recovery plants;

(xv) Carbon black plants (furnace process);

(xvi) Primary lead smelters;

(xvii) Fuel conversion plants;

(xviii) Sintering plants;

(xix) Secondary metal production plants;

(xx) Chemical process plants—The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;

(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) Taconite ore processing plants;

(xxiv) Glass fiber processing plants;

(xxv) Charcoal production plants;

(xxvi) Fossil-fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input; or

(xxvii) Any other stationary source category, which as of August 7, 1980 is being regulated under section 111 or 112 of the Act.

(3) A major stationary source as defined in part D of title I of the Act, including:

(i) For ozone nonattainment areas, sources with the potential to emit 100 tpy or more of volatile organic compounds or oxides of nitrogen in areas classified as "marginal" or "moderate," 50 tpy or more in areas classified as "serious," 25 tpy or more in areas classified as "severe," and 10 tpy or more in areas classified as "extreme"; except that the references in this paragraph to 100, 50, 25 and 10 tpy of nitrogen oxides shall not apply with respect to any source for which the Administrator has made a finding, under section 182(f)(1) or (2) of the Act, that requirements under section 182(f) of the Act do not apply;

(ii) For ozone transport regions established pursuant to section 184 of the Act, sources with the potential to emit 50 tpy or more of volatile organic compounds;

(iii) For carbon monoxide nonattainment areas:

(A) That are classified as "serious," and

(B) in which stationary sources contribute significantly to carbon monoxide levels as determined under rules issued by the Administrator, sources with the potential to emit 50 tpy or more of carbon monoxide; and

(iv) For particulate matter (PM-10) nonattainment areas classified as "serious," sources with the potential to emit 70 tpy or more of PM-10.

Part 70 permit or *permit* (unless the context suggests otherwise) means any permit or group of permits covering a part 70 source that is issued, renewed, amended, or revised pursuant to this part.

Part 70 program or *State program* means a program approved by the Administrator under this part.

Part 70 source means any source subject to the permitting requirements of this part, as provided in §§ 70.3(a) and 70.3(b) of this part.

Permit modification means a revision to a part 70 permit that meets the requirements of § 70.7(e) of this part.

Permit program costs means all reasonable (direct and indirect) costs required to develop and administer a permit program, as set forth in § 70.9(b) of this part (whether such costs are incurred by the permitting authority or other State or local agencies that do not is-

sue permits directly, but that support permit issuance or administration).

Permit revision means any permit modification or administrative permit amendment.

Permitting authority means either of the following:

(1) The Administrator, in the case of EPA-implemented programs; or

(2) The State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to carry out a permit program under this part.

Potential to emit means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the Administrator. This term does not alter or affect the use of this term for any other purposes under the Act, or the term "capacity factor" as used in title IV of the Act or the regulations promulgated thereunder.

Proposed permit means the version of a permit that the permitting authority proposes to issue and forwards to the Administrator for review in compliance with § 70.8.

Regulated air pollutant means the following:

(1) Nitrogen oxides or any volatile organic compounds;

(2) Any pollutant for which a national ambient air quality standard has been promulgated;

(3) Any pollutant that is subject to any standard promulgated under section 111 of the Act;

(4) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or

(5) Any pollutant subject to a standard promulgated under section 112 or other requirements established under section 112 of the Act, including sections 112(g), (j), and (r) of the Act, including the following:

(i) Any pollutant subject to requirements under section 112(j) of the Act. If the Administrator fails to promulgate a standard by the date established pursuant to section 112(e) of the Act, any pollutant for which a subject source would be major shall be considered to be regulated on the date 18 months after the applicable date established pursuant to section 112(e) of the Act; and

(ii) Any pollutant for which the requirements of section 112(g)(2) of the Act have been met, but only with respect to the individual source subject to section 112(g)(2) requirement.

Regulated pollutant (for presumptive fee calculation), which is used only for purposes of § 70.9(b)(2), means any "regulated air pollutant" except the following:

(1) Carbon monoxide;

(2) Any pollutant that is a regulated air pollutant solely because it is a Class I or II substance to a stan-

dard promulgated under or established by title VI of the Act; or

(3) Any pollutant that is a regulated air pollutant solely because it is subject to a standard or regulation under section 112(r) of the Act.

Renewal means the process by which a permit is reissued at the end of its term.

Responsible official means one of the following:

(1) For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(i) The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(ii) The delegation of authority to such representatives is approved in advance by the permitting authority;

(2) For a partnership or sole proprietorship: a general partner or the proprietor, respectively;

(3) For a municipality, State, Federal, or other public agency: Either a principal executive officer or ranking elected official. For the purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic

unit of the agency (e.g., a Regional Administrator of EPA); or

(4) For affected sources:

(i) The designated representative in so far as actions, standards, requirements, or prohibitions under title IV of the Act or the regulations promulgated thereunder are concerned; and

(ii) The designated representative for any other purposes under part 70.

Section 502(b)(10) changes are changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

State means any non-Federal permitting authority, including any local agency, interstate association, or statewide program. The term "State" also includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Where such meaning is clear from the context, "State" shall have its conventional meaning. For purposes of the acid rain program, the term "State" shall be limited to authorities within the 48 contiguous States and the District of Columbia as provided in section 402(14) of the Act.

Stationary source means any building, structure, facility, or installation that emits or may emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act.

Subject to regulation means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the Administrator in subchapter C of this chapter, that requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:

(1) *Greenhouse gases (GHGs),* the air pollutant defined in § 86.1818-12(a) of this chapter as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation unless, as of July 1, 2011, the GHG emissions are at a stationary source emitting or having the potential to emit 100,000 tpy CO_2 equivalent emissions.

(2) The term *tpy CO_2 equivalent emissions (CO_2e)* shall represent an amount of GHGs emitted, and shall be computed by multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A-1 to subpart A of part 98 of this chapter—Global Warming Potentials, and summing the resultant value for each to compute a tpy CO_2e. For purposes of this paragraph, prior to July 21, 2014, the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from

agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

Whole program means a part 70 permit program, or any combination of partial programs, that meet all the requirements of these regulations and cover all the part 70 sources in the entire State. For the purposes of this definition, the term "State" does not include local permitting authorities, but refers only to the entire State, Commonwealth, or Territory.

27. 40 C.F.R. 70.3 provides:

Applicability.

(a) *Part 70 sources.* A State program with whole or partial approval under this part must provide for permitting of the following sources:

(1) Any major source;

(2) Any source, including an area source, subject to a standard, limitation, or other requirement under section 111 of the Act;

(3) Any source, including an area source, subject to a standard or other requirement under section 112 of the Act, except that a source is not required to obtain a permit solely because it is subject to regulations or requirements under section 112(r) of this Act;

(4) Any affected source; and

(5) Any source in a source category designated by the Administrator pursuant to this section.

(b) *Source category exemptions.* (1) All sources listed in paragraph (a) of this section that are not major sources, affected sources, or solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act, may be exempted by the State from the obligation to obtain a part 70 permit until such time as the Administrator completes a rulemaking to determine how the program should be structured for nonmajor sources and the appropriateness of any permanent exemptions in addition to those provided for in paragraph (b)(4) of this section.

(2) In the case of nonmajor sources subject to a standard or other requirement under either section 111 or section 112 of the Act after July 21, 1992 publication, the Administrator will determine whether to exempt any or all such applicable sources from the requirement to obtain a part 70 permit at the time that the new standard is promulgated.

(3) [Reserved]

(4) The following source categories are exempted from the obligation to obtain a part 70 permit:

(i) All sources and source categories that would be required to obtain a permit solely because they are subject to part 60, subpart AAA—Standards of Performance for New Residential Wood Heaters; and

(ii) All sources and source categories that would be required to obtain a permit solely because they are subject to part 61, subpart M—National Emission Standard for Hazardous Air Pollutants for Asbestos, §61.145, Standard for Demolition and Renovation.

(c) *Emissions units and part 70 sources.* (1) For major sources, the permitting authority shall include

in the permit all applicable requirements for all relevant emissions units in the major source.

(2) For any nonmajor source subject to the part 70 program under paragraph (a) or (b) of this section, the permitting authority shall include in the permit all applicable requirements applicable to emissions units that cause the source to be subject to the part 70 program.

(d) *Fugitive emissions.* Fugitive emissions from a part 70 source shall be included in the permit application and the part 70 permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.