EPA's Missed Opportunity to Ground Its GHG Tailoring Rule in the Statute: What the *Situs* Argument Would Mean for the Future of the PSD Program

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On February 28 and 29, 2012, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit heard oral argument in a series of closely watched lawsuits[1] challenging regulations issued by the U.S. Environmental Protection Agency (EPA) to regulate greenhouse gas (GHG) emissions from automobiles and manufacturing facilities under the Clean Air Act (CAA).[2] Many observers consider the suite of GHG lawsuits,[3] brought by industry groups and state petitioners, among the most significant in CAA and administrative law in the last 30 years.[4] This is because the D.C. Circuit's decision will address the proper scope of EPA's prevention of significant deterioration (PSD) program and of rarely invoked judicial doctrines of last resort like "absurd results" and "administrative necessity." Moreover, the court's decision will address those issues in the context of GHG emissions, one of the most politically and scientifically charged issues of our times.

In these rulemakings, EPA made a "public health and welfare endangerment" finding for GHGs emitted from cars and, based on that finding, issued regulations limiting those emissions from cars. Critical in EPA's rulemakings was the Agency's determination that regulating such emissions for vehicles would also mean that preconstruction permitting requirements would be triggered for thousands and thousands of "stationary sources"—from large industrial plants to office buildings and large residences—many of which had never previously been regulated by the Act's permitting programs. EPA concluded such permitting burdens would grind to a halt air permitting issuance throughout the country, overwhelming federal, state, and local permitting agencies and distorting the Act's permitting regime into something that would be unrecognizable by the U.S. Congress that enacted it. Given its view of the statute, EPA chose to rewrite the statutory provisions it considered the culprits in causing this unintended onslaught of permitting requirements—the "major source thresholds" of 100 and 250 tons per year (tpy)—to 100,000 tpy.

The following discussion demonstrates that EPA need not and should not have turned to doctrines of "last resort," such as administrative necessity and absurd results, to justify rewriting the Act's major source thresholds. Instead,

Authors' Note: Chuck Knauss served on EPA's Clean Air Act Advisory Committee for many years and presented the statutory interpretation discussed in this Article to EPA in that forum. Shannon Broome served on the Clean Air Act Advisory Committee's Climate Change Work Group and was instrumental in the development of that group's Phase I and Phase II Reports addressing GHG BACT and permitting requirements. The authors wish to thank Bryan Killian, Richard Pavlak, and Joshua Stadtler for their contributions to the development of this Article. This Article derives from materials filed with the court and in the rulemaking record. It does not address the other industry arguments regarding PSD applicability raised in the rulemaking or before the court.

1. Coalition for Responsible Regulation, Inc. v. EPA, No. 09-1322 (D.C. Cir.); Coalition for Responsible Regulation v. EPA, No. 10-1073 (D.C. Cir.); Coalition for Responsible Regulation, Inc. v. EPA, No. 10-1092 (D.C. Cir.); American Chemistry Council v. EPA, No. 10-1167 (D.C. Cir.).
2. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
3. Alabama Power Co. v. Costle, 636 F.2d 323, 10 ELR 20001 (D.C. Cir. 1979), a 90-page opinion, defined the contours of EPA's PSD program, and *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 14 ELR 20507 (1984), a case also addressing the CAA's preconstruction permitting program, established a two-step test for evaluating agency actions that courts of appeal routinely follow to this day.
4. A clear indication of the importance of the cases was that the panel of Chief Judge David B. Sentelle and Circuit Judges Judith W. Rogers and David S. Tatel decided to hold two days of argument and to do so in the ceremonial courtroom with its substantial seating capacity, while also providing two overflow rooms for the public to attend the argument, one with a live video feed, and one with audio feed only. (The overflow rooms were utilized on both days.) A typical D.C. Circuit oral argument usually attracts a handful of observers beyond the parties and their lawyers, and occasionally news reporters.

EPA should have implemented statutory language that by its terms limited applicability of the PSD permit program. Giving effect to this limiting language, referred to as the "*situs* requirement," would have managed the stationary source construction permitting implications of regulating GHGs from automobile tailpipes. If EPA had taken this simple step, *no* additional major source construction permits would have been required, and EPA would have been able to impose GHG controls only on the large sources Congress intended to regulate under PSD, and would do so only when those plants were obtaining permits anyway. *Situs* offered EPA a statutorily based way of implementing its decision that GHGs could fall within the scope of the PSD permit program, without also creating absurd results and administrative necessities. EPA chose time and again to reject the implementable path that *situs* offered.[5]

I. Background

The EPA actions at issue in the GHG cases included the following.

- **The Endangerment Finding**[6]: On December 15, 2009, EPA issued its final action, *Endangerment and Cause or Contribute Findings for GHGs Under Section 202(a) of the Clean Air Act*, which found that six GHGs may reasonably be anticipated to endanger public health or welfare within the meaning of CAA §202(a)(1).[7]
- **The Tailpipe Rule**[8]: On May 7, 2010, EPA issued, in conjunction with the National Highway Transportation Safety Administration (NHTSA), regulations limiting GHG emissions from the tailpipes of light-duty vehicles, i.e., cars, and establishing new Corporate Average Fuel Economy (CAFE) standards beginning with 2012 models.[9] In this rulemaking, EPA stated its conclusion that issuance of the Tailpipe Rule under Title II of the CAA for "mobile sources" would trigger permitting requirements under CAA Title I, Part C, the PSD permitting program, and under CAA Title V, the operating permits program, that apply to "stationary sources"[10] emitting GHGs in amounts of 100 tpy or 250 tpy emissions. For the typical pollutants regulated under the CAA, 100 or 250 tpy of emissions represents a relatively large industrial facility, but, for GHGs, an ordinary office building, apartment complex, or very small manufacturing facility could exceed these emission levels.[11] Indeed, EPA's Tailoring Rule found that over 80,000 PSD permits *per year* would be required if the statutory major source thresholds were applied to GHGs.[12]
- **The Subject to Regulation Decision and Tailoring Rule (Tailoring Rule Case)**: EPA took two actions that it claimed would help address the drastic effects for stationary source permitting programs through issuance of the Tailpipe Rule. On April 2, 2010, EPA

5. As a member of the EPA Clean Air Act Advisory Committee (CAAAC), author Chuck Knauss raised the *situs* approach at the very first meeting of the CAAAC's newly-formed CAAAC Climate Change Work Group on October 6, 2009. *See* Interim Phase I Report of the Climate Change Work Group of the Permits, New Source Review and Toxics Subcommittee, CAAAC, Feb. 3, 2010, at 3-4, *available at* http://www.epa.gov/oar/caaac/climate/2010_02_InterimPhaseIReport.pdf. The approach was discussed further with the Agency and in a series of Work Group conference calls with all stakeholders and was subsequently formally presented in a *White Paper* to the CAAAC's Climate Change Work Group. *See* Chuck Knauss, *White Paper for EPA Climate Change Workgroup: Scope of the PSD Problem to Be Addressed: Why There Is No Automatic PSD Trigger or "NAPT" Simply Because GHGs Become Regulated Under the Clean Air Act* (Jan. 8, 2010 and rev. Feb. 8, 2010) (*White Paper*), *available at* http://www.kattenlaw.com/files/upload/2010-02-08_Knauss_White_Paper_for_EPA_Climate_Change.pdf. The *White Paper* was again submitted to EPA as an attachment to an administrative petition that the authors of this Article filed on the Tailoring Rule. Nat'l Ass'n of Manufacturers et al., *Petition to Reconsider, Rescind, and/or Revise EPA's Prevention of Significant Deterioration Regulation*, filed July 6, 2010, The interpretation was also raised in comments prepared by the authors that clients submitted on the proposed Tailoring, Timing, and Tailpipe Rules. *See* Air Permitting Forum et al., *Comments on the Proposed Rule Regarding Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas (GHG) Tailoring Proposed Rule (Proposed Tailoring Rule)*, 74 Fed. Reg. 55292 (Oct. 27, 2009), filed Dec. 28, 2009, EPA-HQ-OAR-2009-0517-5181.1; Alliance of Automobile Manufacturers, *Comments Regarding Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Proposed Rule*, 74 Fed. Reg. 55292 (Oct. 27, 2009), filed Dec. 28, 2009, EPA-HQ-OAR-2009-0517-5083; Air Permitting Forum, *Comments on the Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards (Motor Vehicle Rule)*, 74 Fed. Reg. 49454 (Sept. 28, 2009) filed Nov. 25, 2009, EPA-HQ-OAR-2009-0472-7253; Air Permitting Forum, *Comments on the Proposed Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program (PSD Interpretive Memorandum) (Proposed Reconsideration)*, 74 Fed. Reg. 51535 (Oct. 7, 2009), filed Dec. 7, 2009, EPA-HQ-OAR-2009-0597-0085.
6. 74 Fed. Reg. 66496 (Dec. 15, 2009) (Endangerment Finding).
7. *See id.*
8. Light-Duty Vehicle Greenhouse Gas Emissions Standard and Corporate Average Fuel Economy Standards; Final Rule (Tailpipe Rule), 75 Fed. Reg. 25324 (May 7, 2010).
9. *See id.* at 25326-28.
10. EPA describes "stationary sources" as "non-moving sources, fixed-site producers of pollution such as power plants, chemical plants, oil refineries, manufacturing facilities, and other industrial facilities." U.S. EPA, Air Pollution Control Orientation Course, *Sources of Pollutants in the Ambient Air—Stationary Sources*, http://www.epa.gov/apti/course422/ap3b.html (last visited Apr. 2, 2012).
11. This is particularly true because the CAA determines "applicability" of Title I and Title V based on "potential emissions" of a facility, not how much the facility actually emits. *See* CAA §302(j); 42 U.S.C. §7602(j). In general, "potential emissions" are determined by assuming that a facility operates at its maximum emitting level for the maximum number of hours permitted, assuming operation of installed pollution control equipment. *See, e.g.*, 40 C.F.R. §52.21(b)(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.

12. *See* 75 Fed. Reg. 31514, 31533, 31563, 31576 (June 3, 2010).

issued a decision determining that the Tailpipe Rule would not trigger stationary source impacts until the first compliance date for the Tailpipe Rule.[13] Then, on June 3, 2010, EPA issued a rule designed to ameliorate the impact of its decision that the Tailpipe Rule would trigger PSD.[14] Termed the Tailoring Rule, it raised the statutory 100/250 tpy major source thresholds.[15]

- **The Grounds Arising After (GAA) or Historic Regulations Case**: In its PSD regulations, issued in 1980, EPA interpreted the CAA as meaning that PSD permitting can be triggered by any pollutant "subject to regulation" under the Act, not just by pollutants for which the Agency has established national ambient air quality standards (NAAQS).[16] Although the CAA generally imposes a 60-day statute of limitations for challenging EPA final rules, petitioners brought this case—asking the court to invalidate EPA's historic interpretation—under an exception to that rule that allows challenges if "new grounds arise" after the 60-day deadline.[17]

While a court ruling is not expected for some months, what can be said now is that *if* the Endangerment Finding is upheld by the court, and *if* the Tailpipe Rule is also upheld, and *if* EPA's conclusion that regulation under the Tailpipe Rule brings GHGs within the purview of the PSD program is upheld, the *situs* argument would backstop EPA's progression to apply the statutory major source thresholds to emissions of GHGs—a progression that EPA acknowledges would lead to some 82,000 PSD permits per year, as compared with the current levels in the hundreds.[18]

This Article explains the *situs* argument under the CAA and how its adoption would implement "statutorily compelled tailoring" rather than a tailoring approach that abrogates to EPA the authority to determine which plants are subject to PSD and which are not. It also outlines the opportunities that EPA had to avoid the "absurdities" and "administrative necessities" it claimed required it to revise plainly written statutory thresholds as it was moving toward issuing the Tailpipe Rule in 2009 and 2010. Finally, the Article explains the practical implications of implementing *situs* as was originally dictated by statutory language, contemplated by the Congress, and required by the *Alabama Power Co. v. Costle* decision.

II. What Is the *Situs* Requirement?

Title I, Part C, of the CAA establishes a PSD preconstruction permit program that requires some sources of air emissions to obtain permits before beginning construction or undertaking a modification.[19] Knowing that obtaining PSD permits would be hard and implementing them costly, Congress required them only for "facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for" air pollution.[20] As the D.C. Circuit found: "The numbers of sources that meet these criteria . . . are reasonably in line with EPA's administrative capability."[21]

Before EPA issued the Tailpipe Rule and concluded that GHG emissions alone would trigger PSD permitting requirements, the Agency counted just a few hundred PSD permits issuing each year—a total consistent with congressional intent to limit the PSD program to a manageable number of large industrial sources.[22] Yet, because of the Tailpipe Rule, EPA estimated the annual number of PSD permits would explode to over 82,000 and include many small and nonindustrial sources.[23] Exceeding EPA's administrative capability, each permit would take "a decade or longer" to obtain.[24] While EPA admitted that such an explosion of PSD permits is "inconsistent with Congress's expressed intent," the Agency nonetheless contended that the "literal application" of the Act compels it.[25] The fault lies not in the CAA, however, but in the Agency's improper interpretation of it. Specifically, the problem arose from EPA's failure to read and implement the operative applicability terms of the PSD program—the *situs* legal requirement.

13. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Action on Reconsideration of Interpretation (Subject to Regulation or STR Decision), 75 Fed. Reg. 17004, 17019-20 (Apr. 2, 2010).
14. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule (Tailoring Rule), 75 Fed. Reg. 31514, 31537 (June 3, 2010). The Tailoring Rule also addressed EPA's determination that Title V permitting would be triggered by GHGs, estimating some 6 million additional Title V sources compared with about 15,000 sources under the program prior to GHG regulation. Title V applicability is not the subject of this Article.
15. *See* CAA §169(1), 42 U.S.C. §7479(1) (defining "major emitting facility" as certain enumerated types of "stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more" and "any other source with the potential to emit two hundred and fifty tons per year or more"); *see also* CAA §501(2)(B); 42 U.S.C. §7661(2)(B) (incorporating that definition into Title V).
16. Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans (1980 PSD Rules), 45 Fed. Reg. 52676 (Aug. 7, 1980); *see also* Part 51—Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Prevention of Significant Air Quality Deterioration, 43 Fed. Reg. 26380 (June 19, 1978); Part 52—Approval and Promulgation of State Implementation Plans, 1977 Clean Air Act Amendments to Prevent Significant Deterioration; Final Rule, 43 Fed. Reg. 26388 (June 19, 1978); Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR); Final Rule and Proposed Rule, 67 Fed. Reg. 80186 (Dec. 31, 2002).
17. CAA §307(b)(1), 42 U.S.C. §7607(b)(1).
18. Even with the existing permit workload, the typical time period for issuance of a permit is over one year. EPA estimated in the Tailoring Rule that with an annual PSD permit burden of about 82,000, delays in permit issuance would be "at least a decade or longer" and that the delays would "only grow worse over time" Tailoring Rule, 75 Fed. Reg. at 31557.
19. CAA §165, 42 U.S.C. §7475.
20. *Alabama Power*, 636 F.2d at 353.
21. *Id.* at 354.
22. *See* Tailoring Rule, 75 Fed. Reg. at 31514, 31537.
23. *Id.* at 31556.
24. *Id.* at 31557.
25. *See* Proposed Tailoring Rule, 74 Fed. Reg. 55292, 55308 (Oct. 27, 2009).

A. Situs: *Location as Key Determinant for PSD Triggering*

The PSD program in Part C of Title I was enacted to prevent air quality in areas in attainment with NAAQS from worsening to the point that they are no longer in attainment.[26] The first substantive PSD provision, §161, tethers the PSD program to attainment areas. It requires implementation plans to "contain emission limitations and such other measures as may be necessary . . . to prevent significant deterioration of air quality in each region (or portion thereof) designated . . . as attainment" pursuant to §107.[27]

Preconstruction or premodification permitting is the central PSD requirement.[28] Section 165(a) commands that "[n]o major emitting facility . . . may be constructed in any area to which this part applies" unless the facility has a PSD permit.[29] Securing and satisfying a PSD permit are demanding obligations. To get one, a facility must show, among other things, that its emissions will not cause air quality to exceed any NAAQS,[30] which is to say, a facility must show that its emissions will not cause an attainment area to become a nonattainment area. After a PSD permit is issued, a facility must install best available control technology (BACT) for each pollutant subject to regulation under the Act.[31] Given the burdens of applying for, then implementing, PSD permits, the threshold question for the Agency should have been which sources need them, and that question was plainly answered in the statutory text.

CAA §169(1) defines a "major emitting facility" potentially subject to PSD permitting as being one with "major" emissions—more than 100 or 250 tpy—of "any air pollutant."[32] Yet, that definition does not answer the question of which of those facilities must obtain a PSD permit, as not all major emitting facilities must. Section 165(a) explains that only those "in any area to which this part applies" must do so.[33] The phrase "in any area to which this part applies" in §165(a) must be read together with the term preceding it—"major emitting facility"—as establishing a pollutant-specific *situs* requirement. Together, the terms establish a location-specific emissions requirement, i.e., PSD permits are necessary only if a source has major emissions of a pollutant *and* only if the source is located in an area attaining that pollutant's NAAQS.

Further textual basis for the *situs* interpretation is that Congress used the phrase "in any area to which this part applies" only three other times throughout all of the CAA, each time in PSD provisions: §163(b)(4); §165(a)(3)(A); and §165(c).[34] Each use supports the *situs*-based pollutant-specific reading of §165(a). Each time, the phrase is preceded by the term "any air pollutant" or its derivative, "major emitting facility." Such repetition indicates that the phrase has a uniform meaning, for the principle that like words should be interpreted alike is strong when "the subject matter to which the words refer" is "the same in the several places where they are used."[35]

The other provisions make sense only when the phrase and its preceding term are read together as setting a *situs* requirement. Section 163(b)(4) provides that:

> 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.[36]

If the phrase "in any area to which this part applies" established a pollutant-indifferent *situs* requirement, §163(b)(4) would apply to noncriteria pollutants, but EPA could not actually set a "maximum allowable concentration" because noncriteria pollutants have no primary or secondary NAAQS. In §163(b)(4) (and §165(a)(3)(A), which implements it), then, the entire phrase "any air pollutant in any area to which this part applies" must be read as a symbiotic, pollutant-specific whole.

The textual conclusion is straightforward. Congress used the phrase "in any area to which this part applies" *only* in Part C of the Act and *only* after the term "any air pollutant" or its derivative, "major emitting facility." Each time, the term and the phrase together mean "any air pollutant whose NAAQS an area is attaining" or "a major source of any air pollutant whose NAAQS an area is attaining."

The pollutant-specific *situs* interpretation follows from the structure of the Act. Part C, which contains the PSD provisions, applies only to areas designated pursuant to §107 as attaining a pollutant's NAAQS.[37] Because §107 area designations are pollutant-specific, a single area may be in attainment with one NAAQS while in nonattainment with another. One stationary source may be located in an area designated as attainment for one pollutant and

26. *See* Wisconsin Elec. Power Co. v. Reilly, 893 F.2d 901, 904, 20 ELR 20414 (7th Cir. 1990); *Alabama Power*, 636 F.2d at 349; *see also* CAA §160, 42 U.S.C. §7470.
27. CAA §161, 42 U.S.C. §7471.
28. Because the PSD provisions define the term "construction" to encompass modifications of existing facilities, CAA §169(2)(C), 42 U.S.C. §7479(2)(C), this Article's references to "construction" encompass modifications as well.
29. 42 U.S.C. §7475(a)(1).
30. CAA §165(a)(3), 42 U.S.C. §7475(a)(3).
31. CAA §165(a)(4), 42 U.S.C. §7475(a)(4); *see* CAA §169(3), 42 U.S.C. §7479(3) (defining BACT).
32. 42 U.S.C. §7479(1).
33. 42 U.S.C. §7475(a).
34. *See* 42 U.S.C. §§7473(b)(4), 7475(a)(3)(A), 7475(c).
35. Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932).
36. 42 U.S.C. §7473(b)(4) (emphases added).
37. *See* CAA §161, 42 U.S.C. §7471; *see also* CAA §110(a)(2)(C), 42 U.S.C. §7410(a)(2)(C):
    > Each implementation plan . . . shall . . . include a program to provide for . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D.

as nonattainment for another, i.e., in an area "to which this part applies" and "to which this part" does not apply. Congress' word choice in §165(a) and the other PSD provisions—modifying expansive terms like "any air pollutant" and its derivative, "major emitting facility," with the phrase "in any area to which this part applies"—is in keeping with that variability. A *situs* requirement allows the PSD program to fit uniquely designated areas across the country.

In short, the text of the CAA sets up the following complementary permitting triggers: given the attainment and nonattainment designations of a particular location, construction of a source in the location is subject to nonattainment new source review (NNSR) permitting[38] if it emits major amounts of a local nonattainment pollutant, to PSD permitting if it emits major amounts of a local attainment pollutant, and to both programs if it emits major amounts of local attainment and nonattainment pollutants. Thus, PSD permitting requirements do not apply across-the-board to any major emitting facility emitting any pollutant. Congress could have structured such a program—e.g., "No major emitting facility . . . may be constructed that emits any air pollutant subject to regulation under this chapter unless . . . a permit has been issued"—but did not. Instead, Congress wrote the PSD program to apply only to major facilities that emit a pollutant in "any area" that is in "attainment" for that specific pollutant.[39] Once that threshold is met, then—and only then—does the "subject to regulation" language on which EPA relies become operative. The statutory language allows no other permitting option.

The *Alabama Power* court held that the Act contains a *situs* requirement for PSD—i.e., that a new source triggering PSD must be "major" for a pollutant for which the area is designated attainment was established long ago. In the first proposed regulations EPA issued after Congress codified the PSD program, EPA understood that Congress required PSD permits only for sources whose major emissions threaten an area's attainment of NAAQS.[40] Yet, disregarding the statutory location limitations, EPA did not distinguish between a source's local area and neighboring areas: EPA required PSD permits for any source whose major emissions threatened *any area's* attainment designation.[41] *Alabama Power* vacated that area-unspecific requirement: "The plain meaning of the inclusion in [§165] of the words 'any area to which this part applies' is that Congress intended location to be the key determinant of the applicability of the PSD review requirements."[42] Section 165 "does not, by its own terms, apply to sources located outside of" attainment areas; no other provisions of the Act "justify the application of the permit requirements of [§165] to sources not located in, but impacting upon," other areas.[43]

B. *EPA's Non-*Situs *Interpretation: Any Pollutant in Any Area Triggers PSD*

Contrast the *situs* interpretation with EPA's interpretation—one it claimed in the Tailoring Rule was "compelled" or, if not compelled, then at least reasonable,[44] and then, in briefing in the case, switched back to compelled alone under *Chevron* Step 1.[45] EPA interprets Part C as requiring PSD permits for sources with major emissions of only non-NAAQS pollutants and has thus expanded the PSD program to do much more than merely prevent significant deterioration. EPA reached that result by interpreting §165(a) as establishing a pollutant-indifferent *situs* requirement—one that essentially read the location provisions out of the statute, EPA accomplished this by relying on §169(1) as its cornerstone and divorcing that provision from the location-specifying applicability language in §165(a).[46]

Section 169(1)'s definition of the bare term "major emitting facility" as a source with major emissions of "any air pollutant" does not shed any light, however, on what Congress meant in §165(a) when modifying that term with the phrase "in any area to which this part applies." EPA contended in briefing that interpreting §165(a) to establish a pollutant-specific *situs* requirement renders §169(1)'s broad definition of "major emitting facility" superfluous.[47] But a limitation in an operative provision does not render a broad definitional provision superfluous.[48]

EPA further looked to three statutory provisions that it believed incorporate non-NAAQS pollutants into the PSD program and thus, in its view, *require* that non-NAAQS pollutants "trigger" PSD permitting: (1) §165(a)(4), requiring PSD permit holders to adopt BACT for "each pollutant subject to regulation"; (2) §165(a)(3)(C), requiring PSD permit applicants to show that they will not violate any "applicable emissions standard or standard of performance"; and (3) §110(j), substantially echoing §165(a)(3)(C).[49] Of these, EPA placed the most weight on §165(a)(4).[50] In EPA's view, since those provisions encom-

38. NNSR is the preconstruction permitting program that applies in areas that are not attaining NAAQS. It includes more stringent control requirements than PSD and imposes requirements for sources that increase emissions to offset them, so that an area can continue to make progress toward attainment. CAA §162, 42 U.S.C. §7472.
39. *See* CAA §165(a), 42 U.S.C. §7475(a); CAA §161, 42 U.S.C. §7471.
40. *See* 1980 PSD Rules, 45 Fed. Reg. at 52710.
41. *See Alabama Power*, 636 F.2d at 364; *see also* Requirements for Preparation, Adoption, and Submittal of State Implementation Plans; Approval and Promulgation of State Implementation Plans; Proposed Rule (1979 Proposed PSD Rules), 44 Fed. Reg. 51924, 51949 (Sept. 5, 1979).
42. 636 F.2d at 365.
43. *Id.* at 367, 368.
44. *See* Tailoring Rule, 75 Fed. Reg. at 31533-79.
45. *See, e.g.*, Final Brief for Respondents at 36-37, 57-58, Coalition for Responsible Regulation, Inc. v. EPA, No. 10-1073 (D.C. Cir. filed Dec. 14, 2011).
46. *See* 1980 PSD Rules, 45 Fed. Reg. at 52711; Tailoring Rule, 75 Fed. Reg. at 31547, 31560.
47. *See* EPA Opp'n to Stay Motion at 52, Coalition for Responsible Regulation, Inc. v. EPA, No. 10-1073 (D.C. Cir. filed Oct. 28, 2010).
48. *See* Allison Engine Co. v. U.S. ex rel. Sanders, 553 U.S. 662, 670 & n.1 (2008).
49. *See* 42 U.S.C. §§7475, 7410(j).
50. *See* STR Decision, 75 Fed. Reg. at 17010 ("The controlling language in the PSD provisions is the 'subject to regulation' language in sections 165(a)(4) and 169(3)."); *see also* Tailoring Rule, 75 Fed. Reg. at 31561; *see also id.* at 31562 (listing noncriteria pollutants for which BACT have been adopted).

pass non-NAAQS pollutants, the PSD permitting triggers encompass non-NAAQS pollutants, too.[51]

This logic, however, put the cart before the horse. There has never been a logical reason why the PSD permitting triggers must be coextensive with the substantive PSD requirements, like §165(a)(4)'s BACT requirement. On the contrary, *when* PSD permitting is triggered is a separate issue from *what* an applicant must show to obtain a PSD permit, which in turn is separate from *what* a permit holder must do once it has one. This construct is not uncommon. For example, in CAA §112, Congress established requirements for "hazardous air pollutants." Under §112(a)(1), a source is considered "major" triggering applicability if it emits only one pollutant above the 10-ton-per-year "major source threshold" but once applicability is triggered, *all* of its hazardous air pollutant emissions (whether major or not) are subject to control.[52]

Similarly, that GHGs may be subject to substantive requirements once PSD applicability is triggered does not mean that GHGs themselves can trigger the requirement to obtain the permit in the first instance. EPA has inappropriately embraced subparagraphs, like §165(a)(4), as controlling the main paragraph in §165(a); that is, EPA inappropriately read post-triggering substantive requirements as controlling the PSD permitting triggers. It did so even though that interpretation would lead to impossible administrative burdens if PSD could be triggered by GHGs.

EPA's interpretation also ignored *Alabama Power*'s holding that location is the key determinant in PSD applicability. The Agency's only attempt to comply with *Alabama Power* was its 1980 decision to create an "exemption" from PSD for nonattainment pollutants. However, that was not the Court's holding. Rather, it held: "The plain meaning of the inclusion in [§165] of the words 'any area to which this part applies' is that Congress intended *location to be the key determinant of the applicability of the PSD review requirements*."[53]

Notwithstanding this direction from the *Alabama Power* Court, EPA concluded in 1980 that PSD permitting would be trigged whenever a source emits major amounts of *any* regulated pollutant, so long as the source is located in an area in attainment with *any* NAAQS—even NAAQS for pollutants the source does not emit. The result of this interpretation is that PSD would apply in every area of the country because, at that time and ever since then, every area of the country was in attainment with at least one NAAQS pollutant. Thus, under EPA's reading, the "in any area to which this part applies" language would be entirely superfluous and EPA's regulatory authority for PSD would dramatically expand.

C. Situs: *EPA Had to Choose Any Reasonable Interpretation Before Rewriting the Statute*

EPA was compelled to adopt the *situs* interpretation if doing so would avoid the absurdity and administrative necessity caused by EPA's interpretation. EPA should not have been so quick to conclude that Congress enacted a statute that produces absurdities. The presence of absurd results under the CAA's complex regime typically signals that EPA, not Congress, has erred—either by adopting an interpretation foreclosed under *Chevron* Step 1 or, when more than one construction is theoretically possible, by adopting an interpretation that deviates from congressional intent. In either case, EPA was required to fix its own mistake.

Alabama Power teaches that EPA cannot create an administrative necessity by incorrectly or unreasonably interpreting one provision of the CAA to produce absurd results and then solve that manufactured absurdity by ignoring another provision. There, EPA had unlawfully defined "major emitting facility" too broadly, inflating the number of sources subject to PSD.[54] To solve the problem, EPA added a "tailoring rule" exempting certain sources from PSD review, ignoring the specific statutorily set 100/250-tpy thresholds.[55] The Court rejected that tailoring rule as beyond the Agency's limited exemption authority. EPA's only lawful choice was to avoid manufacturing overbreadth in the first place.[56]

At bottom, for a doctrine of "last resort" like "administrative necessity" or "absurd results" to sustain the Tailoring Rule, EPA was required to show that the rule was necessary to alleviate an absurd, administrative necessity imposed by the CAA itself. But, contrary to EPA's assertions, the CAA does not literally require issuing some 82,000 PSD permits annually. EPA arrived at that conclusion because it ignored Congress' command that PSD permits are needed only

51. Once, EPA interpreted the PSD permitting triggers the same way. In proposing regulations in 1979, EPA stated its plan "to apply PSD review to a source if the source locates in an area designated attainment . . . for a pollutant which the source emits in major amounts." 1980 PSD Rules, 45 Fed. Reg. at 52710. Specifically, EPA proposed requiring PSD permits for "any major stationary source or major modification that . . . [w]ould be constructed in an area which is designated under section 107 as attainment . . . for a pollutant for which the source or modification would be major . . . ." 1979 Proposed PSD Rules, 44 Fed. Reg. at 51949. Between the proposed and final rules, however, EPA changed its mind. In the preamble to the final 1980 PSD Rules, EPA stated its decision "to modify the September 5 proposal somewhat." 1980 PSD Rules, 45 Fed. Reg. at 52710. In fact, EPA modified the proposal completely, concluding that

> except with respect to nonattainment pollutants, PSD review will apply to any source that emits any pollutant in major amounts, if the source would locate in an area designated attainment . . . for *any* criteria pollutant. . . . It should be noted 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 . . . ; the source need only emit *any* pollutant in major amounts (i.e., the amounts specified in section 169(1) of the Act) and be located in an area designated attainment . . . for that *or any other pollutant*.

Id. at 52710-11 (last emphasis added). EPA essentially switched its interpretation of §165(a) from a pollutant-specific *situs* requirement to a pollutant-indifferent one. Under the new approach, PSD permitting would be triggered whenever a source emits major amounts of *any* regulated pollutant, so long as the source is located in an area in attainment with any NAAQS—even NAAQS for other pollutants. According to EPA, the "literal" requirements of the Act compelled the switch. *Id.* at 52711.

52. 42 U.S.C. §7412(a)(1) and (d).

53. 636 F.2d at 365 (emphasis added).

54. *Alabama Power*, 636 F.2d at 353-55.

55. *Id.* at 355-56.

56. *Id.* at 353, 356-57.

for stationary sources located in certain areas. Interpreted properly, the PSD permitting *situs* requirement requires no new PSD permits after the Tailpipe Rule. Because at the very least, (1) the CAA is reasonably read to require PSD permits only for sources located in attainment areas for a particular NAAQS, (2) that interpretation would avoid the absurdity and administrative necessity completely, and (3) the Act does not compel EPA's contrary interpretation, EPA lacked authority to promulgate the Tailoring Rule.

D. Situs: *The Practical Implication for the PSD Program*

The practical implication for the PSD program if *situs* was adopted is that not a single additional PSD permit would be required. Moreover, BACT for GHGs could be imposed for significant GHG emission increases when a source was otherwise required to obtain a PSD permit. As discussed above, *situs* is an interpretation that is consistent with the language of the CAA and the *Alabama Power* decision. Even if the Court were to reject petitioners' arguments in the Endangerment and Tailpipe Cases, this interpretation would ameliorate the absurd results that would otherwise flow from the Agency's actions. Applying the *situs* requirement, a PSD permit is required for:

(1) "new sources:" construction of a new major stationary source of a NAAQS pollutant for which the area where it will be located is designated attainment; or

(2) "existing sources:" a modification of an existing major stationary source of a NAAQS pollutant for which the area where the source is located is designated attainment.

Once that trigger occurs, all pollutants "subject to regulation" must meet the substantive requirements of the program. If EPA had adopted the *situs* requirement, only a plant that was required to obtain a PSD permit for a NAAQS pollutant for which its area was designated attainment would be required to consider controls for GHG emissions. GHG emissions themselves could not make a source "major," and GHG emissions could not cause an otherwise major source to trigger PSD "modification" permitting.

Thus, adopting *situs* would limit the requirement for BACT for GHG emissions to the existing number of PSD permits being issued today, currently numbering in the hundreds annually. And, even if a source was obtaining a PSD permit for an attainment NAAQS pollutant, BACT would apply to GHGs only if the new source or modification would also result in a significant increase in GHG emissions (as EPA has defined that term, 75,000 tpy of carbon dioxide (CO_2)-equivalent emissions).

Indeed, if EPA had simply implemented the statutory *situs* requirement, there would be no "absurd result" or "administrative necessity" because not even a single additional PSD permit would be required as compared with some 82,000 permits annually resulting from EPA's non-*situs*, pollutant-indifferent interpretation. As depicted in the following table (which was included in the industry briefs to the Court) and illustrative examples, the administrative burdens EPA cite as the basis for the Tailoring Rule are problems of its own making.

Table 1 depicts the impacts of the different approaches to GHG regulation under the PSD program. The following examples were provided in Knauss' *White Paper* to illustrate the plant-specific implications of implementing

Table 1: Effects of Implementing the Statutory *Situs* Requirement on PSD Permitting

	Current Program	100/250 Major, 100 Modification Thresholds	EPA Step-1: "Anyway" Source Approach 75,000 Major Modification	EPA Step-2: 100,000 Major Source; 75,000 Major Modification	*Situs* Interpretation of PSD Program
Annual Number of PSD New Construction Actions	240	19,889	240	242	240
Annual Number of PSD Modification Actions at Covered Major Sources	448	62,284	448	1,363	448
Facilities Potentially Subject to BACT for GHGs Annually	0	82,173	688	1,605	688

Note: All columns other than "*Situs* Interpretation of PSD Program" based on estimates articulated at Tailoring Rule, 75 Fed. Reg. at 31540.

situs for PSD applicability,[57] as compared with how EPA had depicted the results of its interpretation and the resulting significant streamlining in the permitting process.

1. Examples Where *Situs* and EPA's Non-*Situs* Interpretation Yield Different Results

Example 1: New minor NAAQS pollutant source with major levels of GHG emissions

A new plant is built in an attainment area for all criteria pollutants. It has potential emissions of NAAQS pollutants less than major source thresholds, but potential GHG emissions will be greater than the major source threshold.

- *Situs* result: PSD does not apply because the source is not major for any NAAQS pollutant for which the area is designated attainment. Therefore, no PSD permit would be required and GHG emissions from the plant would not be subject to BACT.
- EPA's non-*situs* result: PSD would apply because the source is "major" for GHGs and the significance level would apply for all criteria pollutant emissions. Therefore, GHG emissions from the plant would be subject to BACT.

Example 2: Existing minor NAAQS pollutant source with GHG emissions greater than major source threshold

An existing plant is located in an attainment area for all NAAQS pollutants. Potential emissions of all NAAQS pollutants are less than the major source threshold, but potential emissions of GHGs would exceed the major source threshold. The facility undertakes a project that increases GHG emissions above the GHG significance levels but otherwise remains a minor source for criteria pollutants, despite causing some increases in emissions of those NAAQS pollutants.

- *Situs* result: PSD does not apply because the source is not a major source for a NAAQS pollutant for which the area is designated in attainment. GHGs would not be subject to BACT.
- EPA's non-*situs* result: PSD would apply because the source is major for GHGs and the significance level would apply for all NAAQS pollutant emissions. This would mean that both GHGs and any NAAQS pollutants for which the project causes increases in emissions would be subject to BACT, even though the source remains minor for NAAQS pollutants.

Example 3: Existing major NAAQS pollutant source with project only increasing GHGs above significance levels

An existing source that is major for sulfur dioxide (SO_2), a NAAQS pollutant, but minor for all other NAAQS pollutants, in an area that is in attainment for SO_2. The source undertakes a project that increases GHG emissions by more than the significance level of 75,000 tpy, but all NAAQS pollutant emissions either decrease or, if they increase, the increase is less than the applicable significance levels for those NAAQS pollutants.

- *Situs* result: PSD does not apply and does not require BACT for GHGs because, although the facility is a major emitting facility, it has not increased emissions above significance levels for any NAAQS pollutant for which the area is designated in attainment. Therefore, the project is not triggering PSD permitting requirements for a NAAQS pollutant for which the area is designated attainment. Since PSD is not applicable, the question of BACT for GHG emissions would not be reached, even if GHG emissions would increase above the significance level for GHGs.
- EPA's non-*situs* result: PSD would be triggered based solely on the increase in GHG emissions, and the project would require a PSD permit and BACT for GHGs.

2. Examples Where *Situs* and EPA's Non-*Situs* Interpretation Yield the Same Results

Example 4: New major NAAQS pollutant source with significant GHG emissions level

A new plant is being built in an SO_2 attainment area with potential emissions of SO_2 over 250 tpy and of GHGs over 75,000 tpy of CO_2-equivalent emissions.

- *Situs* result: PSD permitting is triggered because the source is major for SO_2, a NAAQS pollutant for which the area is designated attainment. BACT would be required for SO_2 and GHGs. The source is a new major emitting facility of an attainment pollutant and there is a significant increase in GHG emissions.
- EPA's non-*situs* result: Same outcome as under *situs*.

Example 5: Existing major NAAQS pollutant source with modification project increasing attainment NAAQS pollutant and GHG emissions above significance levels

An existing plant located in an attainment area for all NAAQS pollutants. The plant has potential emissions of nitrous oxides (NO_x), a NAAQS pollutant for which the area is designated attainment, above the major source threshold. It undertakes a project that increases NO_x, SO_2, and GHG emissions above significance levels.

- *Situs* result: PSD is triggered by NO_x and SO_2. BACT is required for NO_x and SO_2, as well as GHGs.
- EPA's non-*situs* result: PSD is triggered by NO_x, SO_2, and GHGs. BACT is required for all three pollutants, just as would be required under *situs*.

Example 6: Existing major NAAQS pollutant source with modification project increasing attainment NAAQS pol-

57. These examples assume EPA's 75,000 tpy CO_2-equivalent significance level is in place.

lutant above significance levels and GHG emissions below significance levels.

An existing plant located in an attainment area for all NAAQS pollutants. The plant has potential emissions of NO_x, a NAAQS pollutant for which the area is designated attainment, above the major source threshold. It undertakes a project that increases NO_x and SO_2 100 tpy each (significance levels are 40 tpy for each of these pollutants) and GHG emissions by 50,000 tpy (below the 75,000 tpy significance level).

- *Situs* result: PSD is triggered by NO_x and SO_2. BACT is required for NO_x and SO_2. BACT is not required for GHGs.
- EPA's non-*situs* result: Same outcome as under *situs*.

The above examples demonstrate how implementation of the *situs* requirement would result in controls of GHGs under the PSD program—sources would be required to install BACT for GHGs if they were otherwise required to obtain a PSD permit for an attainment NAAQS pollutant (examples 4 and 5) . Significantly, under this statutorily compelled "tailoring," GHGs on their own do not trigger PSD permitting requirements (examples 1, 2, 3, and 6).

The upshot is that under *situs,* no source would be major solely as a result of GHG emissions. This aspect of *situs* provides relief for the smaller sources EPA has said it believes were not intended to be covered by PSD. Second, and this is the relief for larger sources provided by the *situs* interpretation, no major NAAQS pollutant source would have to evaluate PSD applicability for GHGs unless it already would trigger PSD permitting for a NAAQS pollutant. In other words, only if a source otherwise must apply for a PSD permit for an attainment pollutant would it even think about GHG BACT, and even then, GHG BACT would apply only if the project would also result in a 75,000 tpy CO_2-equivalent increase. Thus, applying *situs,* even a very large increase of GHG emissions from a plant modification would not trigger PSD on its own. This approach is entirely consistent with the purposes of the PSD program—to prevent areas that are attaining NAAQS from falling into nonattainment. As Chairman John Dingell (D-Mich.)[58] has opined, the CAA, and particularly its case-by-case preconstruction permitting programs, are ill-suited for regulating GHGs. The *situs* interpretation recognizes this.

III. Lost Opportunities to Adopt *Situs* and Thereby Avoid the "Glorious Mess"

EPA has had numerous opportunities to correct the mistake it made in the rulemaking following *Alabama Power*—a correction that would have avoided the "glorious mess" created by concluding that GHGs can trigger the requirement to obtain a PSD permit. The *situs* interpretation approach was presented to EPA by one of the authors of this Article before the Agency finalized any of the actions challenged in the GHG cases. Clean Air Act Advisory Committee (CAAAC) members from all stakeholder groups expressed interest in its possibilities. Members of the public also recommended the approach in comments to EPA on its proposed GHG rules, explaining that if EPA's interpretation of the Act led to absurd results that perhaps a reconsideration of that interpretation was a more reasonable way to proceed than dramatically elevating the major source thresholds.

If GHGs must become a part of the PSD program upon EPA regulation of GHG tailpipe emissions, the Act's *situs* requirement establishes a way within the confines of the statutory language that the program can accommodate that consequence in a measured, implementable manner. EPA need only have implemented that requirement. It did not need to invoke rarely used judicial doctrines to rewrite Congress' clear major source thresholds and arrogate to itself the decision of which sources are required to bear the significant burdens of PSD permitting. It is unclear why the Agency chose to reject an interpretation of the statute that would have removed, based on statutory interpretation, the impacts for small sources that the Agency claimed it wanted to avoid and that would have substantially limited the impact on larger sources by only requiring GHG controls if such large sources otherwise were applying for a PSD permit. EPA could have claimed victory from an environmental perspective as well: adopting *situs* would have captured only 3% fewer GHG emissions than EPA's non-*situs* approach (83% versus 86%).[59]

At this juncture, the parties await the Court's decision. Regardless of that decision, however, as the Agency proposes its next step in the Tailoring Rule series, it may regret having not adopted *situs* because EPA now faces serial rulemakings to "comply" with the statutory major source thresholds and repeat justifications for lowering, maintaining, or even raising the thresholds in years to come.

58. In 2008, Chairman John D. Dingell of the House Committee on Energy and Commerce declared that regulating GHGs under the CAA would result in a "glorious mess." *Strengths and Weaknesses of Regulating Greenhouse Gas Emissions Using Existing Clean Air Act Authorities*, Hearing on Climate Change Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce, 110th Cong. (Apr. 12, 2008) (statement of Chairman John D. Dingell).

59. *See* Tailoring Rule, 75 Fed. Reg. at 31540.