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

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PETITIONERS AMERICAN CHEMISTRY COUNCIL, *ET AL.*, NO. 12-1248

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December 9, 2013

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.

PARTIES TO THE PROCEEDINGS

Petitioners herein, who were also petitioners in cases addressed by the consolidated judgment below, include the American Chemistry Council; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Iron and Steel Institute; American Petroleum Institute; Brick Industry Association; Clean Air Implementation Project; Corn Refiners Association; Glass Association of North America; Independent Petroleum Association of America; Indiana Cast Metals Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Association of Manufacturers; National Federation of Independent Business; National Oilseed Processors Association; North American Die Casting Association; Portland Cement Association; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Western States Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers and Commerce.

Other petitioners in cases addressed by the consolidated judgment below, who are not petitioners herein, include Greg Abbott, Attorney General of Texas; Alpha Natural Resources, Inc.; American Farm Bureau Federation; Michele Bachmann, U.S. Representative, Minnesota 6th District; Haley Barbour, Governor of the State of Mississippi; Marsha Blackburn, U.S. Representative, Tennessee 7th District; Kevin Brady, U.S. Representative, Texas 8th District; Paul Broun, U.S. Representative, 10th District; Dan Burton, U.S. Representative, Indiana 5th District; Chamber of Commerce of the United States of America; Coalition for Responsible Regulation, Inc.; Collins

Industries, Inc.; Collins Trucking Company, Inc.; Commonwealth of Virginia; Competitive Enterprise Institute; Nathan Deal, U.S. Representative, Georgia 9th District; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; FreedomWorks; Georgia Agribusiness Council, Inc.; Georgia Coalition for Sound Environmental Policy, Inc.; Georgia Motor Trucking Association, Inc.; Gerdau Ameristeel US Inc.; Phil Gingrey, U.S. Representative, Georgia 11th District; Glass Packaging Institute; Great Northern Project Development, L.P.; Industrial Minerals Association—North America; J&M Tank Lines, Inc.; Kennesaw Transportation, Inc.; Steve King, U.S. Representative, Iowa 5th District; Jack Kingston, U.S. Representative, Georgia 1st District; Landmark Legal Foundation; Langboard, Inc.–MDF; Langboard, Inc.–OSB; Langdale Chevrolet-Pontiac, Inc.; The Langdale Company; Langdale Farms, LLC; Langdale Ford Company; Langdale Forest Products Company; Langdale Fuel Company; Mark R. Levin; John Linder, U.S. Representative, Georgia 7th District; Louisiana Department of Environmental Quality; Missouri Joint Municipal Electric Utility Commission; National Cattlemen's Beef Association; National Environmental Development Association's Clean Air Project; National Mining Association; Ohio Coal Association; Pacific Legal Foundation; Peabody Energy Company; Rick Perry, Governor of Texas; Tom Price, U.S. Representative, Georgia 6th District; Dana Rohrabacher, U.S. Representative, California 46th District; Rosebud Mining Co.; the Science and Environmental Policy Project; John Shadegg, U.S. Representative, Arizona 3rd District; John Shimkus, U.S. Representative, Illinois 19th District; South Carolina Public Service Authority; Southeast Trailer Mart, Inc.; Southeastern Legal Foundation, Inc.; State of Alabama; State of Nebras-

ka; State of North Dakota; State of South Carolina; State of South Dakota; State of Texas; Texas Agriculture Commission; Texas Commission on Environmental Quality; Texas General Land Office; Texas Public Utilities Commission; Texas Railroad Commission; Utility Air Regulatory Group; and Lynn Westmoreland, U.S. Representative, Georgia 3rd District.

Respondents herein, who were respondents in cases addressed by the consolidated judgment below, include the U.S. Environmental Protection Agency (EPA) and Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency. Lisa Perez Jackson ceased to hold the office of Administrator, U.S. Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy, Administrator, U.S. Environmental Protection Agency.

Movant-intervenors for petitioners in certain of the cases addressed by the consolidated judgment below, who are not petitioners herein (unless identified above as petitioners herein), included Alpha Natural Resources, Inc.; American Farm Bureau Federation; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Arkansas State Chamber of Commerce; Associated Industries of Arkansas; Brick Industry Association; Chamber of Commerce of the United States of America; Coalition for Responsible Regulation, Inc.; Colorado Association of Commerce & Industry; Commonwealth of Kentucky; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Governor of Mississippi Haley Barbour; Great Northern Project Development, L.P.; Idaho Association of Commerce and Industry; Independent Petroleum Association of America; Indiana Cast Metals Association; Industrial Minerals Association-North

America; Kansas Chamber of Commerce and Industry; Langdale Chevrolet-Pontiac, Inc; Langdale Farms, LLC; Langdale Ford Company; Langdale Fuel Company; Langboard, Inc.–MDF; Langboard, Inc.–OSB; Louisiana Department of Environmental Quality; Louisiana Oil and Gas Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Association of Manufacturers; National Cattlemen's Beef Association; National Electrical Manufacturers Association; National Environmental Development Association's Clean Air Project; National Federation of Independent Business; National Mining Association; National Oilseed Processors Association; Nebraska Chamber of Commerce and Industry; North American Die Casting Association; Ohio Coal Association; Ohio Manufacturers Association; Peabody Energy Company; Pennsylvania Manufacturers Association; Portland Cement Association; Rosebud Mining Company; South Coast Air Quality Management District; Specialty Steel Industry of North America; State of Alaska; State of Florida; State of Georgia; State of Indiana; State of Louisiana; State of Michigan; State of Nebraska; State of North Dakota; State of Oklahoma; State of South Carolina; State of South Dakota; State of Utah; Steel Manufacturers Association; Tennessee Chamber of Commerce and Industry; Utility Air Regulatory Group; Virginia Manufacturers Association; Western States Petroleum Association; West Virginia Manufacturers Association; and Wisconsin Manufacturers & Commerce.

Movant-intervenors for respondents in certain of cases addressed by the consolidated judgment below included Alliance of Automobile Manufacturers; American Farm Bureau Federation; Brick Industry Association; Center for Biological Diversity; City of

New York; Commonwealth of Massachusetts; Conservation Law Foundation; Environmental Defense Fund; Georgia ForestWatch; Global Automakers; Indiana Wildlife Federation; Michigan Environmental Council; National Environmental Development Association's Clean Air Project; National Mining Association; Natural Resources Council of Maine; Natural Resources Defense Council; National Wildlife Federation; Ohio Environmental Council; Peabody Energy Company; Pennsylvania Department of Environmental Protection; Sierra Club; South Coast Air Quality Management District; State of California; State of Connecticut; State of Delaware; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Minnesota; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; Wetlands Watch; and Wild Virginia.

RULE 29.6 STATEMENT

None of the petitioners herein has a parent company, and no publicly held corporation has a 10% or greater ownership interest in any petitioner herein.

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JURISDICTION

The D.C. Circuit entered judgment on June 26, 2012, and denied timely petitions for rehearing en banc by order dated December 20, 2012. On March 8, 2013, the Chief Justice granted an extension to and including April 19, 2013, for filing a petition for a writ of certiorari. Several petitions were timely filed, and granted on October 15, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Relevant provisions of the Clean Air Act, 42 U.S.C. §§ 7401, 7407-7409, 7470-7479, 7501-7503, 7602, are reproduced at 1a-47a of the addendum to this brief. Relevant rulemakings of the U.S. Environmental Protection Agency (EPA) are reproduced at J.A. 268-682, 1399-417.

INTRODUCTION

At issue in this case is whether EPA's regulation of greenhouse gas emissions from mobile sources under Title II of the Clean Air Act automatically triggers the regulation of those emissions from stationary sources under the permitting provisions of Part C of Title I—the "prevention of significant deterioration" (PSD) program. EPA has concluded that it does and that, as a result, millions of small sources such as hospitals, universities, and residential buildings are now potentially subject to permitting requirements, a

concededly absurd result that Congress did not intend and that EPA improperly attempted to avoid by rewriting the statutory emissions thresholds that trigger PSD permitting obligations.

Six groups of petitioners have challenged the validity of EPA's stationary source regulations in these consolidated matters. While all petitioners agree that EPA's regulations cannot stand, this brief offers a distinct interpretive approach to the question presented. Whereas other parties address the meaning of "any air pollutant," and whether that term can be construed to include greenhouse gases for purposes of the PSD and Title V programs, this brief focuses instead on the interpretation of the triggering provision for the PSD permitting program.

That provision states that permitting obligations are triggered for "major emitting facilit[ies] ... in any area to which this part applies." 42 U.S.C. § 7475(a). "[T]his part" is Part C of Title I, which establishes a series of stationary source requirements, under the PSD program, designed to ensure that areas that have achieved attainment with a "national ambient air quality standard" (NAAQS) for a particular pollutant do not slip back into nonattainment (*i.e.*, to "prevent significant deterioration"). *Id.* § 7471. The key interpretive question for these purposes is whether, as EPA urges, once an area is in attainment for *any* NAAQS pollutant, Part C then "applies" to that area with respect to *all* pollutants—even those for which no NAAQS exists—or whether it instead "applies," as petitioners contend (and as EPA originally proposed, 44 Fed. Reg. 51924, 51949 (Sept. 5, 1979) (J.A. 1413-17)), to an attainment area only with respect to those particular NAAQS pollutants for which the area is attaining.

As explained below, the best interpretation of that language—indeed, the only reasonable one, considering the Act as a whole—is the latter, "pollutant-specific" interpretation. Under this 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. This conclusion follows from the fact that Part C "applies" to an area only insofar as the area is in attainment for the particular NAAQS pollutant at issue, and not with respect to other pollutants.

EPA, however, has interpreted the PSD permitting provision instead to be triggered by emissions of threshold amounts of *any* regulated pollutant, including non-NAAQS pollutants such as greenhouse gases, when the area is in attainment for *any* NAAQS pollutant, even if the facility does not emit the NAAQS pollutant for which the area is attaining (or emits no NAAQS pollutant at all). 45 Fed. Reg. 52676, 52710-12 (Aug. 7, 1980) (J.A. 1399-412). This interpretation not only misconstrues the statute but, as EPA itself concedes, produces "absurd results" by sweeping into the PSD program millions of small commercial and residential facilities that Congress never intended to be covered. 75 Fed. Reg. 31514, 31557-67 (June 3, 2010) (J.A. 459-507). To address the acknowledged absurdities created by its interpretation, EPA has asserted authority, through an unprecedented and (in the words of the dissent below) "abus[ive]" expansion of administrative law doctrines, J.A. 158-59, to rewrite other provisions of the Act that set explicit and unambiguous numerical emissions thresholds.

EPA's misinterpretation of the PSD permitting provision, and its extraordinary assertion of power to rewrite the statute, must be rejected. By correcting that interpretation, the Court would conform the

standard for triggering PSD permitting with the statutory language and structure and Congress's intent while avoiding the "absurd results" that led EPA impermissibly to rewrite other language in the Act, without prohibiting the regulation of greenhouse gases under other provisions.

STATEMENT OF THE CASE

The rules and regulations relevant here were developed over a period of more than 30 years, starting soon after enactment of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, and culminating in EPA's most recent rulemakings.

1. Two titles of the Act, Title I and Title V, address permitting obligations for stationary sources in the United States. 42 U.S.C. §§ 7471, 7661-7661c.[1]

a. Title I of the Clean Air Act establishes a framework for EPA to address concerns over ambient air quality attributed to emissions of pollutants from stationary sources. 42 U.S.C. § 7401(b)(4). Central to this regulatory scheme are the NAAQS. *Id.* §§ 7408-7409. These standards set the maximum concentrations of "NAAQS pollutants"—also known as "criteria pollutants"—that may safely be present in the local ambient air. *Id.* The NAAQS pollutants currently include ozone, sulfur dioxide, particulate matter, nitrogen oxides, carbon monoxide, and lead. 40 C.F.R. §§ 50.1-50.12. For each of these pollutants, the statute directs EPA to determine whether each "air quality control region" in the country meets the applicable NAAQS, and to designate the region accordingly as

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[1] Although this case statement discusses the Title V permitting program (and is incorporated in the brief of the State of Texas *et al.*, No. 12-1269, which addresses the Title V program), the arguments in this brief focus on the PSD program of Title I.

either in "attainment" or "nonattainment." 42 U.S.C. § 7407(d). Because these designations are "pollutant-specific," a single geographic area may be classified as in "attainment" with one NAAQS and "nonattainment" with another. See *id.*; see also *Ala. Power Co.* v. *Costle*, 636 F.2d 323, 350 (D.C. Cir. 1980).

To assist regions in maintaining compliance with the NAAQS they have attained, and making progress toward meeting those they have not, Title I establishes two independent but complementary permitting programs. The first, the PSD program of Part C, applies to the extent an area is in attainment with a NAAQS. 42 U.S.C. § 7471. The PSD permitting provision states that any "major emitting facility ... in any area to which this part applies" must obtain a permit before certain construction or modifications. *Id.* § 7475(a). "Major emitting facility" is defined as a source "with the potential to emit two hundred and fifty tons per year or more of any air pollutant." *Id.* § 7479(1).[2]

The second program, the "nonattainment new source review" (NNSR) program of Part D, applies to the extent an area is not in attainment with an applicable NAAQS. *Id.* § 7501. It precludes construction of any "major stationary source[ ] anywhere in the nonattainment area" unless the facility demonstrates, among other things, that its emissions will not exceed the "lowest achievable emission rate" for any pollutant for which the area is not attaining a

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[2] For certain facilities, the statute sets a lower emissions threshold of 100 tons per year or more of an air pollutant for a source to qualify as a "major emitting facility." 42 U.S.C. § 7479(1). For convenience, this brief refers only to the generally applicable 250 tons-per-year threshold.

NAAQS. *Id.* §§ 7502(c), 7503(a).[3] These more stringent requirements continue to apply until the local area is designated as in attainment with the relevant NAAQS. *Id.* Once it does, the PSD permitting provisions become applicable (at least with respect to that pollutant). *Id.* §§ 7471, 7501; see 45 Fed. Reg. at 52710-12 (J.A. 1399-412).

These programs were designed to act in tandem to prevent areas in attainment from slipping into nonattainment (PSD) and to bring nonattaining areas into attainment (NNSR). 42 U.S.C. §§ 7407, 7471, 7475, 7501-7502. Importantly, because these programs are complementary and "pollutant-specific," *Ala. Power,* 636 F.2d at 350, they may and often do apply concurrently to the same area and even the same facility. For instance, when a facility emits "major" quantities of both a NAAQS pollutant for which the area is in attainment and one for which it is not, the PSD program of Part C applies to the former and the NNSR program of Part D to the latter. *Id.*

b. Separate permitting obligations are imposed on certain stationary sources under Title V of the Act, which requires "major source[s]" of air pollution to obtain operating permits. 42 U.S.C. § 7661a(a). Those provisions "do[ ] not add new pollution control requirements," but instead generally mandate that a source certify compliance with requirements under other parts of the Act or other programs. 75 Fed. Reg. at 31521 (J.A. 301-05). "Major source[s]" under Title V are defined to include "any major stationary facility or source of air pollutants which directly

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[3] "Major stationary source" is defined as "any stationary facility ... [with] the potential to [emit] one hundred tons per year or more of any air pollutant." 42 U.S.C. § 7602(j).

emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." 42 U.S.C. § 7602(j).

Title V allows EPA to "exempt one or more source categories (in whole or in part)" from Title V if compliance would be "impracticable, infeasible, or unnecessarily burdensome on such categories." *Id.* § 7661a(a). But the statute flatly forbids EPA to "exempt any major source" from Title V's requirements. *Id.* Permitting authorities must approve or deny any completed operating-permit application within 18 months. *Id.* § 7661b(c).

2. Shortly after the PSD and NNSR provisions of Title I were enacted, EPA undertook rulemakings to implement them. As part of those proceedings, EPA proposed in 1979 to interpret the triggering provisions of the programs similarly, with each applicable only if a facility emits "major" quantities of a NAAQS pollutant for which the area is in either attainment (PSD) or nonattainment (NNSR) for the applicable NAAQS. 44 Fed. Reg. at 51949 (J.A. 1413-17). This interpretation was consistent with the structure and purpose of the programs, as discussed above, as well as the language of the respective triggering provisions. 42 U.S.C. § 7475(a) (requiring PSD permit for any "major emitting facility ... in any area to which this part applies"), § 7502(c)(5) (requiring NNSR permit for any "major stationary source anywhere in the non-attainment area").

In the final rule issued in 1980, however, EPA adopted a substantially different, and substantially expanded, interpretation of the PSD triggering provision (while retaining its construction of the NNSR provision). EPA held that a facility would be subject to PSD permitting if it emits "major" amounts of *any* pollutant regulated under any program of the Act,

even if it emits no NAAQS pollutants whatsoever, as long as the region in which it is located has been designated as in attainment for at least one NAAQS. 45 Fed. Reg. at 52710-12 (J.A. 1399-412).

EPA explained that, in its view, this change was mandated by the statutory language. *Id.* EPA interpreted any "major emitting facility … in any area to which this part applies," to encompass any facility emitting threshold amounts of any air pollutant that is located in an area to which Part C "applies" for any NAAQS pollutant, regardless of whether the facility actually emits that NAAQS pollutant. *Id.* EPA did not address the numerous questions raised by this interpretation. For example, it rendered the statutory phrase "in any area to which this part applies" effectively superfluous—since *all* areas in the country were then, and still are, in attainment for at least one NAAQS pollutant, see 75 Fed. Reg. at 31561 (J.A. 477-87)—and resulted in different triggers for the PSD and NNSR programs (the latter still limited to facilities emitting NAAQS pollutants) despite the similar language of the provisions and complementary nature of the programs.

This revised interpretation, although theoretically expanding the scope of the PSD program when issued, did not have any significant practical impact at that time, or for three decades thereafter. That is because facilities that emitted more than 250 tons per year of an air pollutant "subject to regulation" almost invariably also emitted 250 tons per year of a NAAQS pollutant for which the area is in attainment, and thus were subject to PSD permitting under either interpretation.

3. The practical inconsequence of the situation changed dramatically, however, with EPA's response to this Court's decision in *Massachusetts* v. *EPA*, 549

U.S. 497 (2007). *Massachusetts* held that greenhouse gases fall within the definition of "air pollutant" in Title II of the Clean Air Act, and that EPA was required to consider a rulemaking petition seeking regulation of greenhouse gas emissions from motor vehicles. *Id.* at 528-32.

In response, EPA commenced a series of rulemakings addressing greenhouse gas emissions. On December 15, 2009, it issued its *Endangerment Finding*, concluding that greenhouse gas emissions from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 74 Fed. Reg. 66496 (Dec. 15, 2009) (J.A. 793-974). On May 7, 2010, it promulgated standards restricting greenhouse gas emissions from certain vehicles. 75 Fed. Reg. 25324 (May 7, 2010) (J.A. 683-704).

With this regulation, known as the *Tailpipe Rule*, greenhouse gases became for the first time regulated under the Clean Air Act. The consequences of this action were potentially significant, as EPA recognized, in light of its interpretation of the PSD permitting provision as applying to major sources of any air pollutant "subject to regulation." Greenhouse gases are emitted by a vastly greater number of stationary sources, and at vastly higher amounts, than other pollutants the agency had previously regulated. 73 Fed. Reg. 44354, 44400-01 (July 30, 2008) (J.A. 1090-96). If greenhouse gas emissions themselves triggered PSD permitting, millions of additional sources, including relatively small commercial, civic, and even residential facilities, would be immediately swept into the PSD program under the statutory "two hundred and fifty tons per year or more" threshold. 75 Fed. Reg. at 31556-58 (J.A. 455-68). Requiring all these facilities to comply with permitting obligations

would, EPA said, "overwhelm permitting authorities," impose additional costs on these facilities and local governments of potentially billions of dollars annually, and "adversely affect national economic development." *Id.*[4]

These consequences—so clearly contrary to Congress's intent that EPA itself described them as "absurd," *id.* at 31557-58 (J.A. 459-68)—prompted the agency to undertake another rulemaking to address them. But instead of reconsidering its interpretation of the PSD provision, which had given rise to these problems, EPA asserted a right to alter the definition of "major emitting facility" by raising by orders of magnitude the statutory emissions threshold, which would have the effect of exempting a sufficient number of sources of greenhouse gas emissions to render the program manageable in the agency's view. *Id.* In the *Tailoring Rule*, EPA directed that, for the current "phase" of regulation, facilities emitting less than 100,000 tons per year of greenhouse gases—a 400-fold increase above the statutory threshold of 250

[4] As with the PSD program, EPA recognized that applying Title V permitting obligations to stationary sources of greenhouse gas emissions would produce intolerable consequences. Were EPA to apply that program under the 100 tons-per-year threshold, as required by statute, it would bring "millions of small sources into the title V program." 75 Fed. Reg. at 31533 (J.A. 353-57), with "approximately 6 million sources ... becom[ing immediately] subject to [T]itle V," as "[c]ompared to the 14,700 [T]itle V permits currently issued," *id.* at 31536 (J.A. 368-72). The annual cost for States to administer the Title V progam would increase from an estimated $62 million to $21 *billion*. *Id.* at 31540 (J.A. 385-88). In addition, the "great majority" of these newly covered sources would be small residential and commercial facilities that have never been permitted before and which would be issued "empty" permits, meaning the permit would have no applicable requirements. *Id.* at 31562-63 (J.A. 481-90).

tons per year—would not be deemed "major emitting facilities" and would thus not be subject to PSD permitting. *Id.*[5] EPA also stated it would exercise its claimed discretion to make further downward adjustments to the statutory threshold on an ongoing basis, based on its continuing assessment of the benefits and burdens of regulation. *Id.* at 31524, 31548-49 (J.A. 312-18, 419-28).

4. Numerous petitions for review were thereafter filed in the D.C. Circuit challenging, *inter alia*, EPA's interpretation of the PSD permitting provision. J.A. 193-94.

In a single judgment issued on June 26, 2012, a three-judge panel rejected all of them. *Id.* The panel acknowledged EPA's concession that its construction produces "absurd results." *Id.* at 259. Nevertheless, it concluded that the agency's interpretation must be accepted because it represented, according to the panel, the "unambiguous" reading of the statute. *Id.* at 237-41. The panel held that the alternative construction proposed by the petitioners, interpreting the PSD permitting provision as being triggered only by emissions of NAAQS pollutants, was barred by *Massachusetts* v. *EPA* because, in its view, that would require reading the term "any air pollutant" in the definition of "major emitting facility" as limited to NAAQS pollutants. *Id.* The panel noted that EPA's own definition of "any air pollutant" deviated from *Massachusetts*, by limiting that phrase to "regulated" pollutants, but deemed this "slight[ ] narrow[ing of] the literal statutory definition" necessary to avoid the

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[5] In the same rulemaking, EPA simiarly "tailored" the Title V program by revising the statutory permitting threshold from 100 tons per year to 100,000 tons per year for greenhouse gases. *See* 75 Fed. Reg. at 31567 (J.A. 503-07).

absurd results associated with applying permitting requirements to sources of non-regulated substances. *Id.* at 237-38.

The court subsequently denied several petitions for rehearing, with Judges Kavanaugh and Brown dissenting. *Id.* at 141-42. They found it "evident" that the most "straightforward" and "sensible" reading of the statute is that the trigger instead is "limited to NAAQS air pollutants." *Id.* at 173-75, 186. The PSD permitting program is focused expressly on NAAQS pollutants, they reasoned, and cannot be interpreted as applicable to sources of non-NAAQS pollutants—particularly in light of the "absurd results" concededly produced by that interpretation. *Id.* They were especially troubled by EPA's decision to address the absurdities created by its interpretation not by revisiting and adopting a more limited interpretation of the PSD permitting provision but instead, in the *Tailoring Rule*, "re-wr[iting] the very specific [emissions thresholds]" in the definition of "major emitting facility." *Id.* at 173-74. As Judge Kavanaugh put it: "When an agency is faced with two initially plausible readings of a statutory term, but it turns out that one reading would cause absurd results, I am aware of no precedent that suggests the agency can still choose the absurd reading and then start rewriting other perfectly clear portions of the statute to try to make it all work out." *Id.*

SUMMARY OF ARGUMENT

The PSD program was clearly structured to apply only to sources of those NAAQS pollutants for which the local area is in attainment. The program was designed for the express goal of ensuring that areas in attainment with a NAAQS would not fall out of compliance—*i.e.*, to "prevent[ ] ... significant deteriora-

tion," as the name and statutory language state—and many program requirements have meaning only when applied to NAAQS pollutants. See 75 Fed. Reg. at 31549 (J.A. 423-28) ("the basic purpose of the PSD program ... is to safeguard maintenance of the NAAQS"). The only real issue, then, is whether the statute can be interpreted so as to advance this fundamental purpose, limiting the program to sources of NAAQS pollutants for which the area is in attainment.

It clearly can. The PSD provision states that a "major emitting facility" is subject to permitting if it is "in any area to which this part [Part C] applies." 42 U.S.C. § 7475(a). This phrase is not defined in the statute, but in context it is most reasonably read—indeed, can only be read—as meaning that Part C "applies" to an area *only* with respect to those pollutants subject to a NAAQS that the area is attaining. *Id.* §§ 7470-7479. As such, a "major emitting facility" is "in any area to which this part applies," and subject to PSD permitting, only if it emits threshold quantities of one of these NAAQS pollutants. This "pollutant-specific" interpretation of the PSD provision accords with the statutory language and advances the undoubted purpose of the statute—to ensure the maintenance of NAAQS without imposing unnecessary regulatory burdens on sources of other pollutants.

The agency has nevertheless read the statute as imposing PSD permitting obligations on any source that qualifies as a "major emitting facility," even if the facility does not emit any NAAQS pollutant at all. 45 Fed. Reg. at 52710-12 (J.A. 1399-412). This interpretation renders several statutory clauses meaningless, including the modifying phrase "in any area to which this part applies" in the PSD permitting provi-

sion, and conflicts with the accepted construction of the identical language in 42 U.S.C. § 7473(b). It also concededly produces "absurd results" by sweeping into the PSD program millions of small commercial and residential sources that Congress never intended to be covered. 75 Fed. Reg. at 31549, 31557-67 (J.A. 423-28, 459-507).

EPA asserts it can eliminate this last problem—seemingly a dispositive ground foreclosing EPA's interpretation—by simply rewriting the definition of "major emitting facility." In particular, EPA would read the term "any air pollutant" in that definition to mean "any air pollutant *subject to regulation under the Act*" (thereby excluding non-regulated substances), and it would increase the emissions thresholds in the provision from 250 tons per year to 100,000 tons per year when the "air pollutant" is greenhouse gases. *Id.* EPA has, further, claimed authority to revise these thresholds from time to time in the future, as appropriate in the agency's judgment. *Id.* at 31573 (J.A. 528-33).

Nothing in the Clean Air Act or this Court's precedent supports this remarkable assertion of authority to rewrite the statute. When an agency concludes that its interpretation of a statute produces "absurd" consequences that Congress never intended, the proper response for the agency is to reexamine its interpretation, and if an alternative construction that avoids those consequences is available—as here—the agency must adopt that construction. *E.g.*, *Kloeckner* v. *Solis*, 133 S. Ct. 596, 606-07 (2012). Here, however, EPA treated its prior interpretation as fixed and unmovable, and chose instead to address the "absurd results" produced by its reading of the PSD permitting provision by rewriting other separate and explicit statutory directives. 75 Fed. Reg. at 31549, 31557-

67, 31573 (J.A. 423-28, 459-507, 528-33). In so doing, EPA not only committed a one-time impermissible act of statutory rewriting; it also asserted the extraordinary power, going forward, to continually readjust those statutory thresholds downward based on its ongoing assessments of the benefits and burdens of regulation, and thereby design its own climate change policy separate and apart from statutory requirements. *Id.* Under our system of separated powers, that was not a lawful option.

ARGUMENT

I. INTERPRETING THE PSD TRIGGERING PROVISION TO APPLY ONLY TO SOURCES OF NAAQS POLLUTANTS FOR WHICH THE AREA IS IN ATTAINMENT ACCORDS WITH THE STATUTORY TEXT, STRUCTURE, AND PURPOSE.

The PSD triggering provision states that a "major emitting facility … in any area to which this part applies" is subject to PSD permitting. 42 U.S.C. § 7475(a). The term "major emitting facility" is defined elsewhere in Part C as any source of at least 250 tons per year of any air pollutant. *Id.* § 7479(1). The critical question, therefore, is the meaning of the phrase "in any area to which this part applies."

Congress did not define that phrase; nor did it expressly specify to which areas Part C "applies." Two things, however, are clear: Part C is designed "to prevent significant deterioration of air quality in each region … designated pursuant to section 7407 of this title as attainment." *Id.* § 7471. And, under 42 U.S.C. § 7407(d), areas are designated as "attainment" or "nonattainment" on a pollutant-specific basis, so that the same area can be designated "attain-

ment" for one pollutant and "nonattainment" for another. *Id.*

Thus, read in isolation, the phrase "area to which this part applies" could be read in one of two ways. It might be read to mean that Part C "applies" to an area, for all purposes and all pollutants, whenever the area is in attainment with any NAAQS for any pollutant. 45 Fed. Reg. at 52710-12 (J.A. 1399-412). Under that interpretation, urged by EPA, PSD permitting requirements would be imposed on any facility that emits major amounts of any pollutant in an area that is attaining a NAAQS for any pollutant, even if the facility does not emit the pollutant whose NAAQS the area is attaining (or any NAAQS pollutant at all). *Id.* Alternatively, the phrase could be read to mean that Part C "applies" to an area only with respect to those pollutants for which the area is in attainment. 44 Fed. Reg. at 51949 (J.A. 1413-17). Under this "pollutant-specific" interpretation, advanced by petitioners (and originally proposed by EPA in 1979, *id.*), PSD permitting requirements would be imposed only on facilities emitting major amounts of a pollutant in an area that is attaining a NAAQS for that pollutant. *Id.*

While potentially ambiguous in isolation, the phrase "in any area to which this part applies," when considered in the full context of the statute, can reasonably bear only the "pollutant-specific" interpretation.[6]

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[6] No deference is due EPA's statutory construction. EPA has defended that construction only as the "unambiguous" reading of the statute, and not as a reasonable agency choice among several possible readings of an ambiguous provision. *See Chevron, U.S.A., Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 (1984); Br. for Fed. Resps. in Opp. 31-43; *cf.* Resps. Br. 13, 53 684 F.3d 102 (D.C. Cir., filed Aug. 3, 2011) (No. 10-1167). Under *SEC* v. *Chenery*

A. The statute makes clear that the only pollutants that are "subject to regulation under this Part [C]" are those NAAQS pollutants for which the area is in attainment. 75 Fed. Reg. at 31561 & n.44 (J.A. 477-487 & n.44). Part C is thus properly said to "apply" to an area only with respect to those pollutants for which the area is in attainment with a NAAQS. Indeed, Part C *cannot* "apply" to other pollutants in an area that are subject to regulation under different parts of the Act. In particular, with respect to NAAQS pollutants for which an area is not attaining, Part D of Title I—and *not* Part C—"applies" to the area in setting plan and permitting requirements. 42 U.S.C. § 7502(c). "The applicability of the PSD program to a particular source [in an area] ... is [therefore] pollutant-specific." 70 Fed. Reg. 59582, 59583 (Oct. 12, 2005).

This pollutant-specific interpretation is confirmed by the fact that another provision in Part C uses the phrase in *precisely* this way. Section 7473(b) provides:

> The maximum allowable concentration of any air pollutant *in any area to which this part applies* shall not exceed [the] concentration ... under the [relevant] national ... ambient air quality standard.

42 U.S.C. § 7473(b)(4) (emphasis added). There is no doubt, and EPA agrees (as did the panel below, J.A.

Corp., 332 U.S. 194 (1947), EPA's construction can be upheld only if the Court agrees that its interpretation was compelled by Congress. Indeed, as EPA apparently recognizes, a reading the agency acknowledges will generate absurd results that Congress did not intend could not be upheld as "reasonable" if an alternative interpretation is available, which is presumably why EPA must defend its actions as an unambiguous reading of the statute itself.

249-52), that in this provision the phrase "in any area to which this part applies" must be read as restricting the provision to those pollutants subject to a NAAQS for which the area is attaining. *Id.* Otherwise EPA would be required to perform the impossible task of establishing maximum NAAQS concentration levels for pollutants not subject to a NAAQS. *Id.*; see Resps. Br. 30-31, 684 F.3d 102 (D.C. Cir., filed Aug. 3, 2011) (No. 10-1167). "Moreover, 'any area to which this part applies' must mean 'any area that is in attainment for that NAAQS pollutant,' because if an area was in nonattainment for a particular pollutant, Part D—rather than the PSD program—would govern emissions limits for that specific pollutant." J.A. 250. The same pollutant-specific understanding of this phrase should also apply to the PSD triggering provision, particularly because these provisions were enacted at the same time in the same part of the Act. See *Powerex Corp* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) ("[I]dentical words and phrases within the same statute should normally be given the same meaning.").[7]

Moreover, to hold to the contrary, that an area is one "to which this part applies" whenever the area is in attainment for any NAAQS pollutant, would render that phrase superfluous as it appears in the PSD permitting provision. *All* areas of the country are

[7] Other PSD provisions, by contrast, could be construed to apply to non-NAAQS pollutants as well, confirming that the permitting provision should be read more narrowly. For instance, 42 U.S.C. § 7475(a)(4) mandates that facilities adopt the "best available control technology" for any air pollutant "subject to regulation under this [Act]." *Id.* This language demonstrates Congress's understanding that, although facilities would be subject to PSD permitting only because of emissions of a NAAQS pollutant, once in the program they could be required to address a broader range of pollutants.

now and always have been in attainment for at least *one* pollutant, meaning that never in the statute's history has there been a single area in the country to which Part C does not "apply" in that sense. 75 Fed. Reg. at 31561 (J.A. 477-87).[8] The phrase has practical import only if it is read as restricting "major emitting facility" to those sources emitting threshold quantities of a NAAQS pollutant for which the area is attaining. See*, e.g.*, *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed ... so that no part will be inoperative or superfluous ....") (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46.06 (6th ed. 2000)).

B. This interpretation also conforms best to the Act's structure. The permitting programs of Title I—the PSD program of Part C and the NNSR program of Part D—were designed to promote compliance with the NAAQS. See 42 U.S.C. §§ 7407, 7471, 7475, 7501-7502. For those NAAQS an area is attaining, the PSD program establishes standards to "prevent significant deterioration" of the ambient air quality with regard to that NAAQS pollutant; for those NAAQS the area is not attaining, the NNSR program mandates stricter requirements to affirmatively improve ambient air quality and "ensur[e] attainment of the applicable [NAAQS]." *Id.* Put simply, only sources that may impact the locality's continued attainment or nonattainment of a NAAQS, through their emissions of "major" quantities of a NAAQS pollutant, are targeted by these programs.

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[8] EPA does not, and could not, contend Congress was unaware of the extent of area designations when it enacted the PSD program. *See* S. Subcomm. on Environmental Pollution of the S. Comm. on Environment & Public Works, 95th Cong., A Section-by-Section Analysis of S. 252 and S. 253 Clean Air Act Amendments and S. 2533.

This structure is fundamentally inconsistent with an interpretation of the PSD provision that imposes permitting requirements on major sources of any pollutant, without regard to whether a NAAQS exists for that pollutant or whether the area is in attainment for that pollutant. While Congress *might* have crafted a nationwide permitting scheme applicable to any major source of any pollutant anywhere in the country, it clearly did not. Instead, it designed a system in which permitting is triggered only if the facility is located in a particular area that has been designated either as "attainment" or "nonattainment" for a specific NAAQS pollutant. *Id.* This design makes sense only if the permitting obligations are viewed as pollutant-specific—imposed only on facilities emitting major quantities of a NAAQS pollutant for which the area is either attaining (PSD) or not attaining (NNSR). Conversely, it would have been irrational for Congress to create a permitting program that is by its terms location- and pollutant-specific but nevertheless applies to any major source of any pollutant in any area.

Indeed, EPA does not dispute that the parallel NNSR triggering provision must be interpreted in a pollutant-specific manner. That provision states that any "new or modified major stationary source[ ] anywhere in the nonattainment area" must comply with NNSR permitting requirements. *Id.* § 7502(c)(5). Like the PSD triggering provision, it might be interpreted, if considered in isolation, to impose those requirements on any facility emitting threshold amounts of any air pollutant, including a non-NAAQS pollutant. Nevertheless, EPA has adopted a pollutant-specific reading of the NNSR provision, holding that a facility is subject to permitting only if it emits threshold quantities of a NAAQS pollutant

for which the area is not in attainment. 45 Fed. Reg. at 52710-12 (J.A. 1399-412).

The PSD triggering provision must be construed similarly. The PSD and NNSR programs were designed to work in tandem, and the scope of the two programs should be interpreted consistently. Indeed, both programs reference and rely upon the same provision, 42 U.S.C. § 7407(d), to define the areas to which they apply, see *id.* § 7471 ("attainment area"), § 7501(2) ("nonattainment area"), and that provision states that both "attainment" and 'nonattainment" areas are to be classified "for the pollutant" at issue, *id.* § 7407(d)(1)(A)(i-ii). Particularly given EPA's position that the NNSR definition of "nonattainment area" compels a pollutant-specific interpretation, see Resps. Br. 25-26, 684 F.3d 102 (D.C. Cir., filed Aug. 3, 2011) (No. 10-1167), the same interpretation should govern the PSD provision.[9]

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[9] EPA has argued that the pollutant-specific interpretation should be applied to the NNSR triggering provision, but not the PSD provision, because the term "nonattainment area" (as used in the NNSR provision) is expressly defined in Part D in a pollutant-specific manner, as "for any air pollutant, an area which is designated 'nonattainment' *with respect to that pollutant* within the meaning of section 7407(d)." 42 U.S.C. § 7501(2) (emphasis added). This argument ignores, however, that this definition incorporates 42 U.S.C. § 7407(d)—which sets forth the meaning of *both* "attainment" and "nonattainment," and (as noted above) describes each in precisely the same pollutant-specific way. *Id.* (a "nonattainment" area is "any area that does not meet … the national primary or secondary ambient air quality standard *for the pollutant*"; an "attainment" area is "any area … that meets the national primary or secondary ambient air quality standard *for the pollutant*") (emphases added). Thus, far from justifying a distinction between the PSD and NNSR programs, the definition of "nonattainment area" in Part D confirms that both "attainment area" and "nonattainment area" carry the same pollutant-

C. A pollutant-specific interpretation of the PSD triggering provision would, moreover, adhere to Congress's intent and expectations regarding the PSD program. Congress crafted the PSD program for the express purpose of "protect[ing] national ambient air quality standards." S. Rep. No. 95-127, at 27-30, 96-98 (1977). It anticipated, in accord with that purpose, that the program would apply only to sources of those pollutants, such as "particulate matter and sulfur oxides," that can affect local ambient air quality and are subject to a NAAQS. *Id.*; see 122 Cong. Rec. S12675, S12701-02 (daily ed. July 28, 1976) (statement of Sen. Tunney); 122 Cong. Rec. S13313-13326 (daily ed. Aug. 4, 1976) (statement of Sen. Hart).

Nowhere does the legislative record indicate that PSD permitting obligations would be triggered also by sources of non-NAAQS pollutants, such as smaller commercial and residential facilities. Quite the contrary, Congress recognized that requiring these facilities to comply with these obligations would be "costly" and "unreasonable." S. Rep. No. 95-127, at 96-98; S. Rep. No. 94-717, at 79-80 (1976); 122 Cong. Rec. S12775, S12809 (daily ed. July 29, 1976) (statement of Sen. McClure). The program would apply, Congress understood, only to "very large" facilities—like "industrial plant[s]," "electrical generating plants," and "new steel mills," S. Rep. No. 95-127, at 27-30, 96-98—that are, "due to their size, [ ] financially able to bear the substantial regulatory costs imposed by ... PSD [permitting] and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air." *Ala. Power*, 636 F.2d at 353. That category includes only facilities emitting major quantities of a NAAQS pollutant.

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specific meaning and that the triggering provisions of the two programs must be interpreted in that manner.

This is, notably, how the regulatory predecessor to the statutory PSD program was designed and administered. EPA promulgated regulations in 1974 requiring state implementation plans to incorporate a "prevention of significant deterioration" preconstruction review process. 39 Fed. Reg. 42510 (Dec. 5, 1974). Those regulations were expressly limited to sources "of any pollutant for which a national standard has been promulgated"—*i.e.*, NAAQS pollutants. *Id.* at 42514. Congress expressly relied on, and in many circumstances directly incorporated, those regulations in crafting the statutory PSD program enacted in 1977. S. Rep. No. 95-127, at 25-28; see 75 Fed. Reg. at 31550 n.34 (J.A. 428 n.34) (describing 1974 regulations as "precursor" to the statutory PSD program); cf., *e.g.*, *McElroy* v. *United States*, 455 U.S. 642, 648-49 (1982) (statutory language should be interpreted in light of meaning in precursor provisions).

The only reasonable reading of the phrase "in any area to which this part applies" in the PSD triggering provision—the only one consistent with the statute's language, structure, and history—is the "pollutant-specific" interpretation. Under this view, in accord with Congress's intent and expectation, only those facilities emitting major amounts of a NAAQS pollutant for which the area is in attainment—those facilities to which Part C "applies"—are subject to PSD permitting under 42 U.S.C. § 7475(a).[10]

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[10] Thus, under the correct interpretation of 42 U.S.C. § 7475(a), only emissions of NAAQS pollutants can trigger PSD permit requirements. This follows, not from any construction of the term "any air pollutant" in the definition of "major emitting facility," *cf. infra* pp. 24-26, but from the fact that Part C "applies" only to those areas that are in attainment for the pollutant at issue, and an area can be in attainment only for NAAQS pollutants.

II. EPA'S INTERPRETATION OF THE PSD TRIGGERING PROVISION CANNOT BE ACCEPTED BECAUSE IT CREATES RESULTS THAT EPA CONCEDES ARE ABSURD AND THAT, IN EPA'S VIEW, REQUIRE REWRITING THE STATUTE.

EPA nevertheless maintains that a "major emitting facility" is "in any area to which this part applies" if it is located in an area that is in attainment for any NAAQS pollutant, even if the facility does not itself emit that pollutant (or even any NAAQS pollutant at all). 45 Fed. Reg. at 52710-12 (J.A. 1399-412). The phrase "in any area to which this part applies" serves no modifying role under this interpretation, because all areas of the country are and always have been in attainment for at least one NAAQS pollutant, meaning Part C "applies" nationwide in this sense. *Supra* pp. 18-19. Under this view, any source that qualifies as a "major emitting facility" under the separate definition of that term, in 42 U.S.C. § 7479(1), is subject to PSD permitting. See 75 Fed. Reg. at 31561 (J.A. 477-87).

EPA has defended its interpretation as the "unambiguous" and "literal" meaning of the statute. *Id.* at 31516-17 (J.A. 280-84); Br. for Fed. Resps. in Opp. 31-43. Clearly it is neither. EPA's interpretation is not only inconsistent with the statute's structure and history, as discussed above, but by EPA's own admission it produces "absurd results" that Congress did not intend. EPA asserts that it was compelled, in light of these absurd results, to rewrite two separate elements of the definition of "major emitting facility"—altering the term "air pollutant" and the statutory emissions threshold—to avoid the consequences of its misconstruction.

A. The first element modified by the agency is "air pollutant." "Major emitting facility" is defined in Part C as a source of threshold amounts of "any air pollutant," 42 U.S.C. § 7479(1), and "air pollutant" is in turn defined as "any physical, chemical, [or] biological … substance [which] enters the ambient air, *id.* § 7602(g). This definition can be read, as this Court stated in *Massachusetts* v. *EPA*, to "embrace[ ] all airborne compounds of whatever stripe," including substances regulated as "air pollutants," such as greenhouse gases, but also non-regulated substances like oxygen and water vapor. 549 U.S. at 528-32. Under this view, and under EPA's interpretation of the PSD permitting provision, any source of 250 tons per year or more of *any* airborne agent would be a "major emitting facility" and subject to PSD permitting.

The statute undoubtedly cannot be interpreted in this manner. To hold that all "major" sources of non-regulated airborne agents, such as oxygen and water vapor, are covered by the PSD permitting process would mean that nearly *every* building in the country—every industrial plant, every commercial complex, every agricultural facility, and even residential buildings—could be subject to permitting, as nearly all of them do or can emit certain agents in amounts of more than 250 tons per year. See 45 Fed. Reg. at 52710-12 (J.A. 1399-412); see also 75 Fed. Reg. at 31516-17 (J.A. 280-84). All parties agree that this outcome would be inconsistent with the statute and would render the PSD program permanently unworkable. See 45 Fed. Reg. at 52710-12 (J.A. 1399-412); see also Resps. Br. 30-32, 684 F.3d 102 (D.C. Cir., filed Aug. 3, 2011) (No. 10-1167).

To avoid this result, EPA has read the term "any air pollutant" in this context as "any air pollutant

subject to regulation under the Act." See 45 Fed. Reg. at 52710-12 (J.A. 1399-412). Under this construction, only sources of regulated pollutants can qualify as a "major emitting facility" subject to PSD permitting. *Id.*

This reading, although it addressed some (but not all) of the problems with EPA's interpretation of the PSD provision, has no basis in the statutory language. The phrase "subject to regulation" appears nowhere in the definition of "major emitting facility," and the statute grants EPA no discretion to restrict or redefine the term in that manner. See 42 U.S.C. § 7479(1). Indeed, because the statute elsewhere uses the phrase "subject to regulation under this [Act]" to modify "pollutant," *id.* § 7475(a)(4), it is clear that Congress did not use or understand "any air pollutant" as inherently limited to regulated pollutants. *Russello* v. *United States*, 464 U.S. 16, 22-23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Whether or not the meaning of "any air pollutant" should be limited in some way in this context, for instance as encompassing only NAAQS pollutants (as Judge Kavanaugh concluded below, J.A. 184-85), it clearly cannot be rewritten—as EPA has done—to be modified by the absent phrase "subject to regulation under the Act."

B. EPA later deemed it necessary to further rewrite the definition of "major emitting facility," to modify the statutory 250 tons-per-year emissions threshold. When EPA adopted regulations addressing greenhouse gases in the mobile source context, and greenhouse gases became "subject to regulation," millions of small residential and commercial facilities

not previously subject to PSD permitting were immediately swept into the program, under EPA's interpretation of the PSD provision. 75 Fed. Reg. at 31547 (J.A. 415-19). EPA itself characterized this result as so plainly inconsistent with Congress's intent as to be "absurd." *Id.*

To address these remaining absurdities, left unresolved by its rewriting of "any air pollutant," EPA rewrote the emissions threshold for a "major emitting facility" from 250 tons per year, as stated in the statute, to 100,000 tons per year for greenhouse gases. *Id.* at 31560-62 (J.A. 472-85). The resulting 400-fold increase in the emissions threshold was rationalized by the agency as a "reasonable balancing of protection of the environment with promotion of economic development." *Id.* at 31573 (J.A. 529-33).

This rewriting of the emissions threshold, like EPA's rewriting of "any air pollutant," has no basis in the statute. The definition of "major emitting facility" grants no discretion to EPA to revise that limit. 42 U.S.C. § 7479(1). Quite the contrary, the fact that Congress set forth an explicit emissions threshold in this context, whereas other provisions expressly authorize EPA to undertake such determinations, see, *e.g.*, *id.* § 7476, confirms that EPA has no discretion to alter that threshold. Numerous cases from this Court and others admonish that agencies cannot unilaterally revise acts of Congress in this way. *E.g.*, *Kloeckner*, 133 S. Ct. at 606-07; *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564 (1982).[11]

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[11] *See Mova Pharm. Corp.* v. *Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (agencies faced with perceived "statutory anomaly" do not "thereby obtain a license to rewrite the statute"); *Ala. Power*, 636 F.2d at 357-58 (agencies lack "general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits").

* * *

EPA's interpretation of the PSD permitting provision cannot stand. That interpretation, as discussed above, is inconsistent with the language and structure of the statute and by the agency's own admission produces "absurd results" contrary to congressional intent. *Supra* pp. 24-27. EPA's attempts to rewrite the statute to avoid the absurdities, far from resolving the problems with its interpretation, confirm and highlight the invalidity of its approach. *Kloeckner*, 133 S. Ct. at 606-07 (an interpretation that produces "absurd results" cannot be cured by adding "new words into the statute" but must be reconsidered). Whether or not an agency's construction of the statute might otherwise be entitled to some level of deference, an interpretation that produces absurd results and requires rewriting other provisions cannot be accepted. *Id.*; see *Bd. of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) ("deference ... to agency interpretation is not to be applied to alter the clearly expressed intent of Congress").

The only reasonable construction of the phrase "in any area to which this part applies" in the PSD triggering provision is the pollutant-specific interpretation set forth above (and originally proposed by EPA, 44 Fed. Reg. at 51949 (J.A. 1413-17)). That construction would avoid all of the absurdities identified by the agency and limit the scope of the PSD program as Congress undoubtedly intended. It would not require rewriting any other aspects of the statutory definition of "major emitting facility," as EPA did, because it relies on the language of the PSD triggering provision to limit the program to facilities emitting major quantities of a NAAQS pollutant for which the area is in attainment. And, it would not preclude regulation of greenhouse gases or other air pollutants under the

PSD program or other parts of the Act, once statutory prerequisites are satisfied.[12] Regardless of how this Court resolves the arguments regarding the meaning of "air pollutant" in 42 U.S.C. § 7479(1) and the other issues raised by other petitioners, adopting the pollutant-specific interpretation of the PSD triggering provision, 42 U.S.C. § 7475(a), will ensure that the program is administered consistent with the statute and with congressional intent in at least this important respect.

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[12] Facilities subject to PSD permitting based on their emissions of NAAQS pollutants could, for example, still be required by EPA's regulations to adopt the "best available control technology" for greenhouse gas emissions under 42 U.S.C. § 7475(a)(4), assuming that greenhouse gases are properly considered a "pollutant subject to regulation" for purposes of 42 U.S.C. § 7475(a)(4). Indeed, if the Court adopts a pollutant-specific construction of the PSD triggering provision, and if the Court also concludes that greenhouse gases are a "pollutant subject to regulation" under the PSD program, approximately 83% of national greenhouse gas emissions potentially subject to regulation under EPA's construction could still be covered—which is only 3% less than the national emissions covered under the current "phase" of EPA's *Tailoring Rule*. *See* 75 Fed. Reg. at 31540, 31568, 31571, 31600 (J.A. 385-88, 507-11, 520-24, 644-48). But EPA would then no longer be able to claim the power to revise the statutory thresholds, because the "absurd results" on which it relied to do so would be avoided.

CONCLUSION

The decision of the court of appeals should be reversed, with directions that the petitions for review be granted and that EPA's interpretation of the PSD permitting provision be vacated.

Respectfully submitted,

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STATUTORY ADDENDUM

STATUTORY ADDENDUM

42 U.S.C. § 7401. Congressional findings and declaration of purpose

(a) Findings

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public

health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

42 U.S.C. § 7407. 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.

(b) Designated regions

For purposes of developing and carrying out implementation plans under section 7410 of this title--

(1) an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

(c) Authority of Administrator to designate regions; notification of Governors of affected States

The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

(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) Publication of designations and redesignations

(A) The Administrator shall publish a notice in the Federal Register promulgating any designation under paragraph (1) or (5), or announcing any designation under paragraph (4), or promulgating any redesignation under paragraph (3).

(B) Promulgation or announcement of a designation under paragraph (1), (4) or (5) shall not be subject to the provisions of sections 553 through

557 of Title 5 (relating to notice and comment), except nothing herein shall be construed as precluding such public notice and comment whenever possible.

(3) Redesignation

(A) Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as the Administrator may have available explaining the basis for the notice.

(B) No later than 120 days after receiving a notification under subparagraph (A), the Governor shall submit to the Administrator such redesignation, if any, of the appropriate area (or areas) or portion thereof within the State or interstate area, as the Governor considers appropriate.

(C) No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in

that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

(D) The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State. Within 18 months of receipt of a complete State redesignation submittal, the Administrator shall approve or deny such redesignation. The submission of a redesignation by a Governor shall not affect the effectiveness or enforceability of the applicable implementation plan for the State.

(E) The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless—

(i) the Administrator determines that the area has attained the national ambient air quality standard;

(ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;

(iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

(iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and

(v) the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

(F) The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable.

* * * *

(e) Redesignation of air quality control regions

(1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be modified accordingly.

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

(3) No compliance date extension granted under section 7413(d)(5) of this title (relating to coal conver-

sion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5) of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

42 U.S.C. § 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant--

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected

from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(1) Simultaneously with the issuance of criteria under subsection (a) of this section, the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1) of this section, which shall be comprised of technically qualified individuals representative of State and local governments, industry, and the academic community. Each such committee shall submit, as appropriate, to the Administrator information related to that required by paragraph (1).

(c) Review, modification, and reissuance of criteria or information

The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section. Not later than six months after August 7, 1977, the Administrator shall revise and reissue criteria relating to concentrations of NO2 over such period (not more than three hours) as he deems appropriate. Such criteria shall include a discussion of nitric and nitrous acids, nitrites, nitrates, nitrosamines, and other carcinogenic and potentially carcinogenic derivatives of oxides of nitrogen.

* * * *

42 U.S.C. § 7409. 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 stand-

ard 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 Administrator, 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.

* * * *

42 U.S.C. § 7470. 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, 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.

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

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

42 U.S.C. § 7471. Plan requirements

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

42 U.S.C. § 7472. Initial classifications

(a) Areas designated as class I

Upon the enactment of this part, all—

(1) international parks,

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

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

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

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

(b) Areas designated as class II

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

42 U.S.C. § 7473. Increments and ceilings

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

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

(b) Maximum allowable increases in concentrations over baseline concentrations

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

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

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

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

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

such pollutants shall not exceed the following amounts:

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

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

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

(B) the concentration permitted under the national primary ambient air quality standard,

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

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

(1) In the case of any State which has a plan approved by the Administrator for purposes of carrying out this part, the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for purposes

of determining compliance with the maximum allowable increases in ambient concentrations of an air pollutant, the following concentrations of such pollutant shall not be taken into account:

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

42 U.S.C. § 7474. Area redesignation

(a) Authority of States to redesignate areas

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

> (1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore, and
>
> (2) a national park or national wilderness area established after August 7, 1977, which exceeds ten thousand acres in size.

The extent of the areas referred to in paragraph[1] (1) and (2) shall conform to any changes in the bounda-

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

ries 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.

* * * *

42 U.S.C. § 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

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

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

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

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

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

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

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

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

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

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in

existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

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

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

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

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

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I

area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

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

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

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maxi-

mum 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.

* * * *

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

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

(2) Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

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

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

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

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

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

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

42 U.S.C. § 7476. Other pollutants

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

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

(b) Effective date of regulations

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

(c) Contents of regulations

Such regulations shall provide specific numerical measures against which permit applications may be evaluated, a framework for stimulating improved control technology, protection of air quality values, and fulfill the goals and purposes set forth in section 7401 and section 7470 of this title.

(d) Specific measures to fulfill goals and purposes

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

(e) Area classification plan not required

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

(f) PM-10 increments

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

the Administrator promulgates regulations under the authority of this subsection, the current maximum allowable increases in concentrations of particulate matter shall remain in effect.

42 U.S.C. § 7477. 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.

42 U.S.C. § 7478. 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 sec-

tion 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.

42 U.S.C. § 7479. Definitions

For purposes of this part—

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British

thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

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

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

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

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction com-

menced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

* * * *

42 U.S.C. § 7501. 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 pollutant 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.

42 U.S.C. § 7502. Nonattainment plan provisions in general

(a) Classifications and attainment dates

(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area,

the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of Title 5 (concerning notice and comment) and shall not be subject to judicial review until the Administrator takes final action under subsection (k) or (l) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonat-

tainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the attainment date determined by the Administrator under subparagraph (A) or (B) if—

(i) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(ii) in accordance with guidance published by the Administrator, no more than a minimal number of exceedances of the relevant national ambient air quality standard has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this subparagraph for a single nonattainment area.

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part.

(b) Schedule for plan submissions

At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 7407(d) of this title, the Administrator shall establish

a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title.

(c) Nonattainment plan provisions

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

(1) In general

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.

(2) RFP

Such plan provisions shall require reasonable further progress.

(3) Inventory

Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such

periodic revisions as the Administrator may determine necessary to assure that the requirements of this part are met.

(4) Identification and quantification

Such plan provisions shall expressly identify and quantify the emissions, if any, of any such pollutant or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) of this title, from the construction and operation of major new or modified stationary sources in each such area. The plan shall demonstrate to the satisfaction of the Administrator that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient air quality standard by the applicable attainment date.

(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.

(6) Other measures

Such plan provisions shall include enforceable emission limitations, and such other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified in this part.

(7) Compliance with section 7410(a)(2)

Such plan provisions shall also meet the applicable provisions of section 7410(a)(2) of this title.

(8) Equivalent techniques

Upon application by any State, the Administrator may allow the use of equivalent modeling, emission inventory, and planning procedures, unless the Administrator determines that the proposed techniques are, in the aggregate, less effective than the methods specified by the Administrator.

(9) Contingency measures

Such plan shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

(d) Plan revisions required in response to finding of plan inadequacy

Any plan revision for a nonattainment area which is required to be submitted in response to a finding by the Administrator pursuant to section 7410(k)(5) of this title (relating to calls for plan revisions) must correct the plan deficiency (or deficiencies) specified by the Administrator and meet all other applicable plan requirements of section 7410 of this title and this part. The Administrator may reasonably adjust the dates otherwise applicable under such requirements to such revision (except for attainment dates that have not yet elapsed), to the extent necessary to

achieve a consistent application of such requirements. In order to facilitate submittal by the States of adequate and approvable plans consistent with the applicable requirements of this chapter, the Administrator shall, as appropriate and from time to time, issue written guidelines, interpretations, and information to the States which shall be available to the public, taking into consideration any such guidelines, interpretations, or information provided before November 15, 1990.

(e) Future modification of standard

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

42 U.S.C. § 7503. Permit requirements

(a) In general

The permit program required by section 7502(b)(6) 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 (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[1]

(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 techniques 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.

(b) Prohibition on use of old growth allowances

Any growth allowance included in an applicable implementation plan to meet the requirements of section 7502(b)(5) of this title (as in effect immediately before November 15, 1990) shall not be valid for use in any area that received or receives a notice under section 7410(a)(2)(H)(ii) of this title (as in effect immediately before November 15, 1990) or under section 7410(k)(1) of this title that its applicable implementation plan containing such allowance is substantially inadequate.

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

(c) Offsets

(1) The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant only by obtaining emission reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the State may allow the owner or operator of a source to obtain such emission reductions in another nonattainment area if (A) the other area has an equal or higher nonattainment classification than the area in which the source is located and (B) emissions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the source is located. Such emission reductions shall be, by the time a new or modified source commences operation, in effect and enforceable and shall assure that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant from the same or other sources in the area.

(2) Emission reductions otherwise required by this chapter shall not be creditable as emissions reductions for purposes of any such offset requirement. Incidental emission reductions which are not otherwise required by this chapter shall be creditable as emission reductions for such purposes if such emission reductions meet the requirements of paragraph (1).

(d) Control technology information

The State shall provide that control technology information from permits issued under this section will be promptly submitted to the Administrator for purposes of making such information available through

the RACT/BACT/LAER clearinghouse to other States and to the general public.

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42 U.S.C. § 7602. Definitions

When used in this chapter—

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(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.

* * * *

(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).