ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTHEASTERN LEGAL FOUNDATION., ET AL.,	)	
PETITIONERS,	)	
v.	)	No. 10-1131 (filing in consolidated case No. 10-1222)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	(CONSOLIDATED WITH Nos. 10-1131, 10-1132, 10-1145, 10-1147, 10-1148, 10-1199, 10-1200, 10-1201, 10-1202, 10-1203, 10-1205, 10-1206, 10-1207, 10-1208, 10-1209, 10-1210, 10-1211, 10-1212, 10-1213, 10-1215, 10-1216, 10-1218, 10-1219, 10-1220, 10-1221)
RESPONDENT.	)	

STATE OF TEXAS' MOTION FOR A STAY OF EPA'S GREENHOUSE GAS TAILORING RULE

The State of Texas hereby moves this Court, pursuant to Rule 18 of the Federal Rules of Appellate Procedure, to stay implementation by the respondent United States Environmental Protection Agency ("EPA") of its "Prevention of Significant Deterioration and Title VI Greenhouse Gas Tailoring Rule," 75 Fed. Reg. 31,514, Att. A (June 3, 2010) ("Tailoring Rule"), pending the Court's review. The Tailoring Rule is contrary to the Clean Air Act, and its scheduled implementation is unlawful and will cause the State of Texas immediate and irreparable harm, without countervailing benefit to third parties or to the public interest.

I. INTRODUCTION

EPA acknowledges that subjecting stationary sources of greenhouse gas emissions to permit requirements under the Clean Air Act is "absurd," and yet it has made the decision to do just that. To lessen the purported "absurd results" of that act, EPA has decided to abandon the explicit thresholds for regulation that Congress set in the Clean Air Act and to limit regulation to sources that emit greenhouses gas at rates between 400 and 750 times those thresholds.

Without any lawful authority to do so, it now seeks to force the State of Texas to overhaul its permitting programs to adopt the same approach by January 2, 2011—an unprecedented and illegal schedule. EPA demands that the State of Texas short-circuit the statutory process and ignore its responsibilities to its

citizens, its industry, and ultimately to its environment. EPA would have the state adopt a new regulatory framework that, even if it ultimately proves to have no legal basis, would be difficult or impossible to repeal—effectively stymieing this Court's review of EPA's action. If Texas is unwilling or proves unable to accede to this unlawful demand, the agency has threatened to impose a permit moratorium that would halt as many as 167 projects in its first year, costing the State jobs, business opportunities, and tax revenues. In effect, due to uncertainty resulting from the agency's actions, a *de facto* construction ban is already in place.

To avoid irreparable harm and to afford this Court the opportunity to consider the legal basis of both the Tailoring Rule and EPA's accelerated implementation schedule, the State of Texas respectfully requests that this Court stay implementation of the Rule pending its review.

II. BACKGROUND

The Clean Air Act "establishes a partnership between EPA and the states for the attainment and maintenance of national air quality goals." *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). EPA sets air quality and emissions standards which the states, in turn, implement through the regulation of sources of emissions. For each state, this partnership is manifest in a State Implementation Plan ("SIP"), a compilation of state and local laws, regulations, and enforcement standards that comprise a state's approach to

complying with federal requirements, as well as scientific and technical evidence in support of that approach. States submit SIPs for approval in response to "calls" by EPA and are subject to penalties for failure to meet submission and implementation deadlines. If a state fails to submit an approvable SIP to EPA, the agency may directly administer air quality regulation, in whole or in part, within the state through a Federal Implementation Plan ("FIP"). In effect, a FIP "rescinds state authority to make the many sensitive technical and political choices that a pollution control regime demands." *Id*. at 1124.

On June 3, 2010, EPA published a final rule "tailoring" the Clean Air Act's applicability to greenhouse gas ("GHG") emissions under the Prevention of Significant Deterioration ("PSD") preconstruction permitting program and the Title V operating permit program. This Tailoring Rule redefines the term "NSR regulated pollutant" to reference a new term, "subject to regulation." That term is defined such that pollutants other than GHGs are "subject to regulation" if they are "subject to a provision in the Clean Air Act . . . that requires actual control." 40 C.F.R § 51.166 (b)(48). GHGs, however, "shall not be subject to regulation except as provided" in the definition. § 51.166 (b)(48)(i).

For GHGs, the definition provides that, beginning on January 2, 2011, PSD and Title V requirements will apply to (1) new sources that will emit or have the potential to emit in excess of 75,000 tons per year ("tpy") of GHG and are

otherwise classified as "major stationary sources" and (2) existing major stationary sources increasing emissions of a non-GHG pollutant while increasing GHG emissions by more than 75,000 tpy. On July 1, 2011, coverage will expand to include all new sources that have the potential to emit in excess of 100,000 tpy of GHG and all existing sources that emit in excess of 100,000 tpy of GHG and that undertake changes that increase GHG emissions in excess of 75,000 tpy. These tonnages must be calculated using a new formula set forth in the rule for determining "CO_2 equivalent emissions." § 51.166(b)(48)(ii).

Under these new definitions, GHGs emitted below the Tailoring Rule thresholds are *not* a "regulated NSR pollutant" and so not subject to permitting requirements. EPA predicates this rule on the "absurd results" that would allegedly otherwise result from its determination that the PSD and Title V programs apply to GHG emissions.[1]

The Rule further directs states to either reinterpret or revise their SIPs to incorporate this approach on or before January 2, 2011. Otherwise, affected GHG-emitting sources "may have to put on hold their plans to construct or modify," a result that "may have adverse consequences for the economy" of those states.[2]

[1] Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule, 75 Fed. Reg. 17,004 (April 2, 2010) ("Timing Rule"). That rule is currently pending review in *State of Texas, et al. v. Environmental Protection Agency*, No. 10-1128 (D.C. Cir.).

[2] 75 Fed. Reg. 53,890. On September 2, 2010, EPA published a proposed "SIP call" finding thirteen states' SIPs, including Texas's, "substantially inadequate" because they do not already

EPA also threatens to "move quickly to impose a Federal Implementation Plan" on any state that is unable or unwilling to regulate GHG emissions immediately.[3]

The State of Texas, which disputes the legal basis of the Tailoring Rule, commenced this action on August 2, 2010. On August 2, 19, and 30, the State asked EPA to stay the Tailoring Rule pending resolution of the State's petition for review of the Rule. *See* Atts. B-D. EPA refused to render a decision on those requests by the deadline *EPA itself proposed* for stay motions. *See* Att. E; Respondent's Mot. To Consolidate and To Amend the Schedule for Initial Filings, Aug. 20, 2010, at 4. The State now moves this Court for emergency relief.

III. ARGUMENT

Under D.C. Circuit Rule 18, the movant must demonstrate four factors to obtain a stay pending review: "(i) the likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest." *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977). "These factors interrelate on a sliding scale and must be balanced against each other." *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998).

---

implement the Tailoring Rule and requiring those states to revise their SIPs accordingly. 75 Fed. Reg. 53,892.

[3] On September 2, 2010, EPA published a proposed FIP that would apply specifically to Texas and the other twelve states subject to the SIP call. 75 Fed. Reg. 53,883.

All four factors favor a stay. The Tailoring Rule is contrary to law because it rewrites unambiguous threshold emission rates Congress specified in statutory text to solve a problem of EPA's own creation. At the same time, the accelerated implementation schedule imposed by the Rule is itself contrary to the plain language of the Clean Air Act and EPA regulations. Accordingly, the State of Texas fully expects to prevail on the merits.

In the meantime, the State suffers irreparable harm as the Rule casts a cloud of uncertainty over the State's permitting programs that has effectively frozen construction for sources, compels the State to expend significant resources to fundamentally alter its own regulatory framework, and threatens a construction moratorium for both new and existing sources. There is no possibility that a stay would injure any party. Finally, the public interest in meaningful judicial review is strong, and at no point has EPA represented that implementation of the Rule would have any positive effect on public health or welfare. Under these circumstances, the Court should act to mitigate the harm caused by EPA's unlawful actions by preserving the status quo pending its review.

A. The Petitioner Will Prevail on the Merits.

Because the Tailoring Rule is contrary to the Clean Air Act's explicit requirements, the State is likely to prevail on the merits. The Act's precise applicability thresholds were intended to afford EPA *no discretion*. EPA proffers

three theories as to why it can lawfully sidestep the Act's plain text and the limits of its discretion under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), but none are availing where a statute is insusceptible to the gloss given it by an agency. Further, EPA's implementation schedule for the Rule is itself contrary to law.

1. The Tailoring Rule Is Inconsistent with the Plain Text of the Clean Air Act.

An agency's construction of a statute that it administers is due no deference where "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Here, the Tailoring Rule contravenes "the unambiguously expressed intent of Congress." *Id*. at 843.

The Clean Air Act's applicability thresholds for PSD regulated pollutants are defined in precise numerical terms in the text of the Act. "Major emitting facilities" in Part C of the Act (the PSD program) are "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 [listed] types of stationary sources" and "any other source with the potential to emit *two hundred and fifty tons per year or more* of any air pollutant." 42 U.S.C. § 7479(1) (emphasis added). For Title V of the Act (the operating permit program), a "major source" is "any major 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." §§ 7602(j), 7661(2)(B) (emphasis added).

The Tailoring Rule sidesteps these statutory requirements by increasing the PSD applicability thresholds for GHG emissions to 75,000 tpy for some sources and 100,000 tpy for others. 75 Fed. Reg. at 31,606. The Tailoring Rule also takes the unprecedented step of defining GHG applicability thresholds in terms of "CO_2 equivalent," rather than mass emissions. *Id*. at 31,606. Thus, according to EPA, GHG emissions are *not* "subject to regulation" under the PSD and Title V programs if they amount to less than the Rule's specified thresholds, *even if the emissions exceed the limits specified in the statute*.

EPA itself freely acknowledges that the Tailoring Rule is irreconcilable with the Clean Air Act's applicability thresholds, admitting that it has abandoned the "literal meaning" of the statutory text that establishes these exact, numerical thresholds. 75 Fed. Reg. at 31,564. EPA claims, however, that adhering to "the literal statutory levels" would lead to "absurd results"—specifically, that many "small sources"[4] would be burdened by the costs of control technology and obtaining permits and that permitting agencies would face the burden of reviewing those permits. *Id*. at 31,516-17. Thus, EPA concludes, the statute must somehow be construed as being ambiguous as to the thresholds.

But Congress could not have spoken more clearly: it specified precise, numerical emission rate thresholds—*i.e.*, 100 tons/250 tons per year. These figures

[4] Notably, EPA uses the term "small sources" to refer to sources that the Clean Air Act expressly considers to be "major emitting facilities." 42 U.S.C. § 7479(1).

admit no ambiguity or vagueness. Indeed, they reflect the considered judgment of Congress to confer *no discretion* on EPA. *See Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 474-76 (2001) (discussing "the degree of agency discretion" conferred on EPA to set NAAQS). The interpretive approach adopted by EPA in the Tailoring Rule renders a central provision of the Clean Air Act mere surplusage. As the Supreme Court has observed, "The EPA may not construe the [Clean Air Act] in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman*, 531 U.S. at 585.

2. The "Absurd Results" Doctrine Cannot Be Employed to Rewrite a Perfectly Unambiguous Statutory Command.

EPA concedes that the Clean Air Act's provisions specifying tonnage thresholds are not ambiguous. Nonetheless, it claims that applying those thresholds "by their terms" to GHG emissions would create "absurd results," because PSD and Title V would then apply "to an extraordinarily large number" of "small" sources, that the sources would incur "unduly high compliance costs," and that permitting authorities would face "overwhelming" administrative burdens. 75 Fed. Reg. at 31,541. Such coverage would, EPA claims, "severely undermine" Congress' intentions. *Id*. at 31,542. Thus, the agency concludes, several statutory terms, though otherwise clear, "may be considered not to have [their] literal meaning as applied to GHG sources," giving the agency the discretion to ignore the plain terms of the statute to resolve this conflict. *Id*. at 31,548.

The absurd results doctrine applies where "words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 454 (1989) (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892)). For example, in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 510 (1989), the Supreme Court construed the broad term "the defendant" to exclude civil defendants, where refusing to draw that distinction would "deny a civil plaintiff the same right to impeach an adversary's testimony that [the law] grants [to] a civil defendant."

By contrast, the statutory tonnage thresholds are not general terms that are being applied to unforeseen factual situations. They are specific, objective commands that cannot be expanded or contracted through principles of statutory interpretation. As EPA correctly observes, in enacting the PSD program, Congress was aware of the burden of compliance and sought to exempt smaller sources through explicit tonnage thresholds. As a result, Congress, in drafting what became the 1977 Clean Air Act Amendments, actually removed provisions granting EPA discretion to establish PSD coverage by regulation, replacing them

with the specific numerical thresholds. *See* 75 Fed. Reg. at 31,550. Aware of the costs of compliance versus the benefits of pollution control, Congress struck a balance by specifying explicit tonnage thresholds.

At the same time, there *are* broad terms in the Act that are relevant to PSD and Title V program coverage, particularly the term "pollutant." The only tension that exists in the statute with respect to GHGs is between the specific, objective numerical tonnage thresholds and the general term "pollutant." If EPA seeks to avoid what it has characterized as the "absurd results" of regulating GHG emissions under PSD and Title V, it is the general term "pollutant," not the specific applicability thresholds, that must give way.

3. The "Administrative Necessity" Doctrine Does Not Justify the Tailoring Rule's Inconsistency with the Clean Air Act.

EPA's second justification for its rule, the purported "administrative necessity" doctrine, is fundamentally flawed. This doctrine, if it exists at all outside of dicta, applies where immediate and complete implementation of congressional intent is infeasible, not where an agency has found that regulation would produce "absurd results" that are contrary to congressional intent. It is not "a revisory power inconsistent with the clear intent of the relevant statute." *Alabama Power v. Costle*, 636 F.2d 323, 358 (D.C. Cir. 1980) (quoting *NRDC v. Costle*, 568 F.2d 1377 (1977)). And it is entirely unavailable where, as here, Congress has "restrain[ed] the agency by mandating standards from which no

variance is permitted." *Id.* EPA may not rely upon it as license to act contrary to the plain language of the Clean Air Act.[5]

4. The "One-Step-At-A-Time" Doctrine Is Inapplicable and Contrary to the Statutory Requirements.

EPA's third and final justification, the so-called "one-step-at-a-time" doctrine, cannot excuse an agency's failure to comply with governing statutory requirements and, in any case, fails even under EPA's own generous formulation.

EPA argues that it has inherent discretion to "implement statutory mandates one step at a time." According to EPA, it is enough that the Tailoring Rule puts the agency "on track to full compliance with the statutory requirements." 75 Fed. Reg. at 31,578. But the Tailoring Rule does not put EPA on track to compliance. Though several provisions of the Rule may commit the agency to future action, none require compliance with the Act by 2016 or at any time. Indeed, EPA disclaims any intention of eventual compliance with the Act's textual

[5] While citing a number of cases mentioning the doctrine, EPA identifies no agency action that has ever been justified by or upheld on the basis of the administrative necessity doctrine. **Rejecting necessity claims**: *N. Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509 (D.C. Cir. 1984). **Pre-*Chevron* cases that do not uphold agency action on the basis of administrative necessity**: *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), *Morton v. Ruiz*, 415 U.S. 199 (1973), *NRDC v. Train*, 510 F.2d 692 (D.C. Cir. 1974), *Ala. Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1980) (per curiam). **Merely discussing the doctrine**: *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) (per curiam); *Ala. Power*, 636 F.2d 323. **Refusing to apply the doctrine**: *EDF v. EPA*, 636 F.2d 1267 (D.C. Cir. 1980), *Sierra Club v. EPA*, 719 F.2d 436 (D.C. Cir. 1983); *Pub. Citizen v. FTC*, 869 F.2d 1541 (D.C. Cir. 1989). **Cases unrelated to administrative necessity**: *United States v. Rylander*, 460 U.S. 752 (1983), *Evans v. Williams*, 206 F.3d 1292 (D.C. Cir. 2000); *Tinsley v. Mitchell*, 804 F.2d 1254 (D.C. Cir. 1986), *Wash. Metro. Transit Auth. v. Amalgamated Transit Union*, 531 F.2d 617 (D.C. Cir. 1976), *Chairs v. Burgess*, 143 F.3d 1432 (11th Cir. 1998).

requirements. *See id*. at 31,547 n.29 ("EPA may, in future rulemaking, make a final determination that under the 'absurd results' doctrine, Congress did not intend for EPA to apply PSD to very small sources, that is, those, with emissions at or near the 100/250 tpy statutory levels.").

In essence, the "step-by-step" doctrine is simply an extension of the flawed "administrative necessity" doctrine. It would allow the agency to sidestep Congress' unambiguously expressed will in the Clean Air Act, in violation of even *Chevron's* generous limitations on agency discretion. It must be rejected.

5. The Tailoring Rule Violates the Clean Air Act by Authorizing SIP Revision by "Interpretation," Requiring Retroactive SIP Revisions, and Imposing a Construction Permit Moratorium.

Apart from the obvious illegality of the Tailoring Rule, the State is likely to prevail on the merits because EPA has violated the Clean Air Act and its own regulations in its haste to rewrite the PSD and Title V programs. Under the Act, no revision to a SIP or FIP may be applied to a source unless EPA or the state has revised the plan in accordance with the rulemaking requirements set forth in 42 U.S.C. § 7410. In particular, § 7410(i) precludes giving legal effect to any purported SIP revision that was not approved under § 7410(a) or promulgated under § 7410(c). Accordingly, EPA's command that states simply "interpret" existing SIPs to apply to sources runs afoul of the Act.

Furthermore, 40 C.F.R. § 51.166(a)(6) gives states three years to submit revised SIPs following EPA changes to PSD requirements. This regulation enforces the states' undisputed right to the first opportunity to address air quality management issues on a prospective basis. *See Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 781 (3d Cir. 1987). EPA has ignored this rule, instead requiring implementation of its new program through SIP interpretation, SIP revision, or FIP promulgation beginning January 2, 2011. Texas and other states are entitled to rely on the three-year schedule until and unless it is revised by appropriate rulemaking.

Finally, EPA's decision to impose deadlines for implementation of the Tailoring Rule in state-approved PSD programs beginning January 2, 2011 establishes a *de facto* moratorium on permitting GHG sources until SIPs can be revised to establish retroactive effective dates for GHG coverage. *See* 75 Fed. Reg. at 53,901 ("It must be emphasized that for any State that receives a deadline [for SIP revision] after January 2, 2011, the effected GHG-emitting sources in that State . . . will be unable to receive a federally approved permit."). This is unprecedented and unlawful. Throughout the history of the PSD program, EPA has never imposed a new "minimum requirement" that had an effective date before the deadlines for SIP revisions. SIPs and FIPs are legislative rules that must be applied prospectively. *See Bowen v. Georgetown University Hospital*, 488 U.S.

204 (1988). PSD is a *pre*-construction permit program that Congress structured to assure no interruption in permitting associated with implementing new requirements. *Cf. Citizens to Save Spencer County v. EPA*, 600 F.2d 844 (D.C. Cir. 1979). Nothing in the Clean Air Act authorizes a moratorium on permitting pending SIP revisions. Indeed, by construing the 2011 effective dates as establishing a PSD permit moratorium, those rules unlawfully revise approved PSD SIPs contrary to 42 U.S.C. 7410(i).

B. The Petitioner Will Suffer Irreparable Harm Without a Stay.

Until such time as this Court vacates the Tailoring Rule, the State will suffer irreparable harm. The Rule casts a cloud over the State's permitting programs, causing economic harm; deprives the State of its right to manage its air resources; requires fundamental changes to State laws that may prove unnecessary or counterproductive; and forces the state to incur significant, unrecoupable expenses.

First, EPA's threats to impose a moratorium on permitting has placed the State's permitting programs under a cloud of uncertainty, to the detriment of the State's business environment. EPA is using the threat of a construction permit moratorium to intimidate states into immediately revising their SIPs, reinterpreting them, or turning over permitting authority to EPA. Absent one of these actions, EPA explains, "the affected GHG-emitting sources in that state … *will be unable to receive a federally approved permit authorizing construction or modification*"

after January 2, 2011. 75 Fed. Reg. 53,901 (emphasis added). As a result, EPA continues, "States' affected sources confront the risk that they may have to put on hold their plans to construct or modify, a risk that may have *adverse consequences for the economy*" of affected states. *Id.* at 53,905 (emphasis added).

The result is significant uncertainty and harm to the State's business environment, with the threat of worse to come. The Texas Commission on Environmental Quality ("TCEQ") estimates that the construction ban could affect 167 projects within the first year. This would deprive Texans of jobs, deprive Texas industry of business opportunities, deprive the State of tax revenues, and place Texas at a competitive disadvantage to states that have acceded to EPA's demands. Hagle Decl., Att. F, at 14. When a business chooses to locate its facilities outside of Texas, that injury is irreparable.

Second, the Tailoring Rule will deprive Texas of its right to manage and protect its own clean air resources. The Clean Air Act expressly provides that states shall have "primary responsibility" for "air pollution prevention . . . and air pollution control at its source." 42 U.S.C. § 7401(a)(3). This includes a state's right to develop its own SIP to meet federal air quality standards. *See, e.g.*, 42 U.S.C. § 7410 (pertaining to adoption and submission of SIPs). While EPA has a right to call for revisions to SIPs it finds inadequate, it must allow the states a "reasonable" time in which to comply. 42 U.S.C. § 7410(k)(5).

EPA, however, has decided to afford Texas no such opportunity. EPA's recently published proposed SIP call, which it plans to finalize on December 1, 2010, would allow states up to twelve months to submit SIP revisions following an EPA finding of substantial inadequacy. *See* 75 Fed. Reg. 53,892 (Sept. 2, 2010) (the "SIP Call"). Because EPA intends to impose new GHG controls on stationary sources beginning January 2, 2011, approximately eleven of those twelve months would be *after* the GHG requirements are to take effect. In Texas, this would mean that there would likely be no authority to issue GHG permits for months after such permits would be required. EPA proposes to cure this problem by allowing states to volunteer for a shorter deadline for submitting their SIP revisions, even as short as three weeks. 75 Fed. Reg. at 53,901. This would enable EPA to federalize the states' GHG permitting programs "to ensure that there is no gap in PSD permitting." *Id.* EPA presents a stark choice: (1) do without preconstruction permitting or (2) surrender to a FIP. Whatever Texas' choice, the result is what this court has recognized to be a substantial injury to its interests. *Natural Res. Def. Council,* 57 F.3d at 1124.

Third, absent a stay, Texas will have to begin to revise its SIP before the Court rules on the validity of the Tailoring Rule. Texas cannot simply declare itself ready to require permits for greenhouse gas emissions from stationary sources, as EPA requests that it do, or adopt EPA's definition of the term "subject

to regulation." *See, e.g.*, *Trimmer v. Carlton*, 296 S.W. 1070 (Tex. 1927); Tex. Gov't Code § 2001.023; 30 Tex. Admin. Code § 20.3.

Rather, Texas will have to rewrite its statutes and regulations. While there is uncertainty about what the Texas Legislature might do, TCEQ will have to amend numerous rules to conform its SIP to EPA's requirements. In each instance, TCEQ will be required to prepare a regulatory analysis, to draft and publish the proposed rules, to allow for public comment, to draft a response to the comments, to draft the final rules, and, finally, to adopt the rules. This process typically takes a year. Hagle Decl., at 8.

If this Court ultimately finds the Rule to be invalid after the State has adopted EPA's new legal framework, the State would then face the choice of rescinding the new legal framework—a task that may be difficult or impossible—or keeping it in place, also at considerable expense. Further, if EPA has approved the State's revised SIP by that point, rescinding the new framework would require the agency's approval, as well. In the likely case that EPA refuses, the State would have little choice but to enforce regulations that EPA unlawfully forced it to adopt. In either scenario, the expense to the state and affront to its rights are great.

Fourth, Texas will incur significant, non-recoverable expenses if it is forced to implement the Tailoring Rule. TCEQ has undertaken a careful sector-by-sector and industry-by-industry analysis of regulated sources, examining air permitting

information dating back a decade, to determine the increased demand for air permits for GHGs under the Tailoring Rule thresholds. Hagle Decl., at 10. TCEQ has projected that it would have to hire 91 new full-time employees to handle the workload that would result from the additional permitting actions. This would cost TCEQ approximately $4.1 million each year. In addition, TCEQ would spend $933,750 in startup costs and $1,092,631 each year for benefits costs. Sifuentez Decl., Att. G, at 1-2. TCEQ's efforts to build capacity will become futile if the Court later vacates EPA's GHG scheme; indeed, the State would then face the expense of unwinding its GHG permitting operations.

C. A Stay Will Not Harm Other Parties

While Texas and other states would be harmed if the Tailoring Rule were not stayed, no party would be harmed by staying the Rule. A stay would merely preserve the status quo and allow states to apply their SIPs according to their terms, or to take other action as they see fit. It would not harm Texas' sister states, and indeed would benefit those states by preventing a moratorium on construction activities and fundamental restructuring of state air quality programs during the pendency of litigation. At the same time, if another state is lawfully able to revise its SIP to incorporate the Rule, it can do so without the Rule's revisions to the Part 51 Regulations, subject to judicial review in the Court of Appeals where the state is located.

D. A Stay Will Serve The Public Interest By Allowing Meaningful Judicial Review Of The Tailoring Rule

The public has a substantial interest "in having legal questions decided on the merits, as correctly and expeditiously as possible." *Holiday Tours*, 559 F.2d at 843. Absent a stay, EPA will move forward with implementation of the Tailoring Rule, forcing the states to adopt burdensome laws and regulations that cannot be easily repealed, even if the Rule is ultimately vacated. The public should not have to bear that burden. Nor should the public, as citizens of the states, be forced to bear the cost of developing new regulatory regimes that are likely to prove unnecessary or even detrimental. If the deadline is left in place, the public will also be denied the opportunity to participate and offer input into the creation of these new regimes. The public has an interest, as well, in the "orderly procedure" of important litigation, *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 927 (D.C. Cir. 1958), as opposed to the piling up of cases and multiplication of uncertainty. By contrast, *at no point has EPA represented that implementation of the Tailoring Rule would have any positive effects on public health or welfare*. EPA cannot now backtrack and argue that a stay would harm the public interest. *SEC. v. Chenery Corp.*, 332 U.S. 194, 196 (1947). In effect, EPA has conceded that the public interest favors the State of Texas' position.

IV. CONCLUSION

For the foregoing reasons, the motion should be granted.

Dated: September 15, 2010

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General for Civil Litigation

J. REED CLAY, JR.
Special Assistant and Senior Counsel
to the Attorney General
Office of the Attorney General of Texas
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 936-2541
Facsimile: (512) 936-0545
Email: reed.clay@oag.state.tx.us

/s/ David B. Rivkin, Jr.
David B. Rivkin, Jr.
Mark W. DeLaquil
Andrew M. Grossman
Baker & Hostetler LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5304
Phone: 202.861.1500
Facsimile: 202.861.1783
Email: mdelaquil@bakerlaw.com

Counsel to Petitioners State of Texas, Rick Perry, Governor of Texas, Greg Abbott, Attorney General of Texas, Texas Commission on Environmental

Quality, Texas Department of Agriculture, Texas Public Utilities Commission, Texas Railroad Commission, Texas General Land Office

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2010, I electronically filed the foregoing Motion with the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I have also caused a copy of the foregoing document to be served on the following individuals who are not registered CM/ECF users via First-Class Mail, postage-prepaid:

Gordon R. Alphonso
McGuire Woods LLP
1170 Peachtree Street, N.E. Suite 2100
Atlanta, GA 30309

Michael R. Barr
Pillsbury Winthrop Shaw Pittman, LLP
50 Fremont Street
San Francisco, CA 94105-2228

Sam Kazman
Competitive Enterprise Institute
1899 L Street, NW, 12th Floor
Washington, DC 20036

Patrick D. Traylor
Hogan Lovells US LLP
555 13th Street, NW
Washington, DC 20004-1109

Jon C. Bruning
Office of Attorney General
State of Nebraska
2115 State Capitol
P.O. Box 98920
Lincoln, NE 68509-8920

Matthew W. Dukes
Troutman Sanders LLP
401 9th Street, NW
Suite 1000
Washington, DC 20004-2134

Charles E. James
Office of the Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, VA 23219

Stephen P. Mahinka
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004-2541

Gerald D. Reid
Office of the Attorney General, State of Maine
6 State House Station
Augusta, ME 04333-0006

Mr. Douglas Friend Gansler
Assistant U.S. Attorney
Office of the Attorney General, State of Maryland
200 St. Paul Place
20th Floor
Baltimore, MD 21202-2021

Harry Moy Nq
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005-4070

Karen R. Harned
National Federation of Independent Business
1201 F Street, NW
Suite 200
Washington, DC 20004

Warden (La Tuna Low)
Federal Correctional Institute
Federal Satellite Low
P.O. Box 3000
Anthony, TX 88021

Troy King
Office of the Attorney General
State of Alabama
500 Dexter Avenue
Montgomery, AL 36130

Robert J. Martineau
Waller Lansden Dortch & Davis PLLC
511 Union Street
Suite 2700
Nashville, TN 37219-9966

Federal Satellite Low
P.O. Box 3000
Anthony, TX 88021

William Orr
Federal Correctional Institute
Thomas J. Ward
Ward & Associates
2020 N Street, NW
Washington, DC 20036-0000

Quentin Riegel
National Association of Manufacturers
1331 Pennsylvania Avenue, NW
North Tower - Suite 1500
Washington, DC 20004-1790

Wayne K. Stenehjem
Office of the Attorney General
State of North Dakota
600 East Boulevard Avenue
Bismark, ND 58505-2210

Mark J. Bennett
Office of Attorney General
State of Hawaii
Department of Agriculture
425 Queen Street
Honolulu, HI 96813-0000

Mr. Kelvin Allen Brooks
Office of the Attorney General, State of New Hampshire
33 Capitol Street
Concord, NH 03301-6397

Mr. J. Allen Jernigan
North Carolina Department of Justice
PO Box 629
Raleigh, NC 27602-0629

John E. Milner
Brunini, Grantham, Grower & Hewes, PLLC
P.O. Box 119
Jackson, MS 39205

By: /s/ Mark W. DeLaquil
Mark W. Delaquil