ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COALITION FOR RESPONSIBLE REGULATION, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 09-1322 (and consolidated cases)
COALITION FOR RESPONSIBLE REGULATION, INC., et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 10-1073 (and consolidated cases)
COALITION FOR RESPONSIBLE REGULATION, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 10-1092 (and consolidated cases)

SOUTHEASTERN LEGAL FOUNDATION, INC., et al., Petitioners,	)	
v.	)	No. 10-1131 (and consolidated cases)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

STATE AND ENVIRONMENTAL INTERVENORS' JOINT RESPONSE TO MOTIONS TO STAY

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GLOSSARY

PARTIES

Movants: The Petitioners that filed the Motions to Stay, including the National Association of Manufacturers and several other Petitioners ("NAM Mot."); the Coalition for Responsible Regulation, Inc. and its co-Petitioners along with Petitioners from four other Petitions ("CRR Mot."); and the State of Texas, which filed one motion to stay solely the Tailoring Rule ("Tex. Tailoring Mot.") and another to stay three other EPA actions ("Tex. Mot.").

Intervenors: States and Environmental organizations have intervened to support EPA as to one or more of the agency actions under review. Arizona, Connecticut, and Minnesota are intervenors in the Endangerment cases. Delaware, Vermont, Washington, and New York City are intervenors in the Endangerment and Vehicle Rule cases. New Hampshire is an intervenor in the Endangerment and Tailoring Rule cases. North Carolina has intervened in the Tailoring Rule case. California, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, New York, Oregon, the Pennsylvania Department of Environmental Protection, and Rhode Island are intervenors in the Endangerment, Vehicle Rule, and Tailoring Rule cases. Intervenors joining this response also include the nonprofit public interest environmental organizations Center for Biological Diversity; the Conservation Law

Foundation; the Environmental Defense Fund; Georgia ForestWatch; the Indiana Wildlife Federation; the Michigan Environmental Council; the Ohio Environmental Council; the National Wildlife Federation; the Natural Resources Council of Maine; the Natural Resources Defense Council, the Sierra Club, Wetlands Watch and Wild Virginia.

Respondent: Intervenors also refer herein to EPA's Response to Motions to Stay ("EPA Resp.").

THE CHALLENGED EPA RULES AND ACTIONS

Endangerment Finding: "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule," 74 Fed. Reg. 66,496 (Dec. 15, 2009)

Vehicle Rule: "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule," 75 Fed. Reg. 25,324 (May 7, 2010)

Timing Decision: "Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs," 75 Fed. Reg. 17,004 (Apr. 2, 2010)

Tailoring Rule: "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010)

RELATED PROPOSED RULES

FIP Rule: "Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan," 75 Fed. Reg. 53,883 (Sept. 2, 2010)

SIP Call: "Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call," 75 Fed. Reg. 53,892 (Sept. 2, 2010)

TERMS

Act: Clean Air Act, 42 U.S.C. §§ 7401-7671q

BACT: Best Available Control Technology

CAA: Clean Air Act, 42 U.S.C. §§ 7401-7671q

CAFE: Corporate Average Fuel Economy

CO2e: Carbon dioxide equivalent

EPCA: Energy Policy and Conservation Act, 49 U.S.C. § 32902

FIP: Federal Implementation Plan

GHG: Greenhouse gas

GWP: Global Warming Potential

IAC: Climate Change Assessments: Review of the Processes and Procedures of the IPCC (InterAcademy Council, 2010)

IPCC: United Nations Intergovernmental Panel on Climate Change

NAAQS: National Ambient Air Quality Standards

NEPA: National Environmental Policy Act, 42 U.S.C. § 4321

NHTSA: National Highway Traffic Safety Administration

Part C: 42 U.S.C. §§ 7470 – 7492

Part D: 42 U.S.C. §§ 7501 – 7515

PSD: Prevention of Significant Deterioration, 42 U.S.C. §§ 7470-7492

RTC: Response to Comments

RTP: Response to Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act

SIP: State Implementation Plan

SMAQMD: Sacramento Metropolitan Air Quality Management District

SCAQMD: South Coast Air Quality Management District

TCEQ: Texas Commission on Environmental Quality

TITLE V: 42 U.S.C. §§ 7661-7661f

TSD: Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act: Technical Support Document (December 7, 2009)

TPY: Tons per year

USGCRP: United States Global Change Research Program

STATE AND ENVIRONMENTAL INTERVENORS' JOINT RESPONSE TO MOTIONS TO STAY

State and Environmental Intervenors in support of Respondents respectfully submit this joint response in opposition to the stay motions filed by petitioners Coalition for Responsible Regulation, *et al.*, the State of Texas, and National Association of Manufacturers, *et al*. CRR and Texas ask this Court to stay four separate EPA decisions concerning the application of the Clean Air Act to greenhouse gases: (1) the Endangerment Finding, 74 Fed. Reg. 66,496 (Dec. 15, 2009); (2) the Vehicle Rule, 75 Fed. Reg. 25,324 (May 7, 2010); (3) the Timing Decision, 75 Fed. Reg. 17,004 (Apr. 2, 2010), and (4) the Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010). NAM asks the Court to stay the latter three decisions as to stationary sources but does not seek a stay of the Vehicle Rule "as applied to cars" or the Endangerment Finding. NAM Mot. at 12.

The stay motions should be denied in all respects. Despite hundreds of pages of briefing, thousands of pages of exhibits, scattershot assertions of illegality, and extravagant claims of harm, the stay motions are, in the end, insubstantial. Movants' central claims on the merits are foreclosed by the Clean Air Act's text and by judicial precedent, including *Massachusetts v. EPA*, 549 U.S. 497 (2007), and *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979); their allegations of irreparable harm are vague, often unconnected to the actual

decisions under review, and unsubstantiated; and Movants simply ignore significant harms that a stay would cause other parties and the public interest.

STATUTORY AND REGULATORY BACKGROUND

The background is set forth at pages 6-19 of EPA's Response.

INTRODUCTION

Movants are not regulated by, and do not suffer any direct injury from, the Endangerment Finding or the Vehicle Rule. The Timing Decision and the Tailoring Rule serve only to reduce burdens on regulated entities and permitting authorities. Movants' real quarrel is not with the four agency actions, but with the Clean Air Act itself, which obligates EPA to issue an endangerment determination based on science, and to issue motor vehicle standards once an endangerment determination is made, and which expressly extends preconstruction permitting requirements to sources of "each pollutant subject to regulation" under the Act, 42 U.S.C. §§ 7475(a)(4), 7479(3). Absent a showing of a probable *constitutional* violation (and irreparable harm), a court cannot enjoin a federal statute. *Cf. United States v. Oakland Cannabis Buyers' Coop*., 532 U.S. 483, 497-98 (2001); *TVA v. Hill*, 437 U.S. 153, 194-95 (1973).[1]

[1] Because the agency actions Movants seek to stay either do not affect them or actually benefit them, and because the harms they allege to stationary sources flow from operation of statutory provisions that cannot be enjoined here, there is

Movants ask for the extraordinary remedy of a stay based upon legal contentions that are flatly contrary to the Clean Air Act's text. First, overlooking *Massachusetts*, Movants contend that Section 202(a), 42 U.S.C. § 7521(a), allowed EPA to decline to find endangerment, or to decline to set vehicle emission standards after having found endangerment, based on concerns about costs for stationary sources of permitting programs that apply when a pollutant is subject to regulation under the Act. But the carefully wrought criteria in Section 202(a) command the endangerment decision to be made on scientific grounds alone and restrict the consideration of costs to those relating to vehicle manufacturing. *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1118 (D.C. Cir. 1979). Congress's decisions concerning whether, how, when, and where in the administrative process to consider regulatory compliance costs must be respected. *See*, *e.g.*, *Whitman v.*

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genuine doubt whether Movants can demonstrate the injury, causation, and redressability required for Article III standing – which is their burden as to "each claim" for relief, *Wilderness Soc'y v. Norton*, 434 F.3d 584, 591 (D.C. Cir. 2006). *See*, *e.g.*, *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 815, 820 (D.C. Cir. 2006) (industry petitioners had failed to show injury from agency's failure "to regulate their industry more pervasively"); *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 939-40 (D.C. Cir. 2004) (redressability lacking where "[e]ven if appellants prevailed on the merits in their challenge" to regulations, the underlying statute and previously promulgated regulations "would still be in place"). While recognizing that standing is a separate issue (and normally a prior one), *cf. In re Navy Chaplaincy*, 534 F.3d 756,762-63 (D.C. Cir. 2008); *id.* at 766 n.2 (Rogers, J., dissenting), this Response addresses the stay factors – which overlap Article III to some extent, *see*, *e.g.*, *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1508 (D.C. Cir. 1995) – and shows that the Movants have not demonstrated injury that can be redressed by a stay.

Am. Trucking Ass'ns, 531 U.S. 457, 465-66 (2001); *Union Elec. Co. v. EPA*, 427 U.S. 246, 258-69 (1976); *TVA*, 437 U.S. at 172-73; *City of Portland v. EPA*, 507 F.3d 706, 712 (D.C. Cir. 2007); *see also Massachusetts,* 549 U.S. at 533 (EPA may not introduce "policy judgments . . . [that] have nothing to do with whether greenhouse gas emissions contribute to climate change").

Second, Movants assert that even after vehicle emissions of greenhouse gases become regulated under Section 202(a), stationary sources of those pollutants are exempt from the Title I, Part C permitting program. But the Act expressly extends this permitting program to each new or modified major source located in any clean air area, and expressly requires each such source to install modern pollution controls for "each air pollutant subject to regulation" under the Act. This has been EPA's settled understanding of the statutory language for more than 30 years.[2] Legal arguments that are contrary to statutory language are not likely to succeed. While this alone is reason enough for denying their motions, Movants also fail to show irreparable harm from EPA's actions (or how a stay

[2] EPA first explained in 1980 that this interpretation is compelled by the Act's unambiguous language and by *Alabama Power*, 636 F.2d at 361 n.90, 405-07. *See* 45 Fed. Reg. 52,676, 52,710-12 (Aug. 7, 1980); *see also* 43 Fed. Reg. 26,388, 26,397 (June 19, 1978). Movant NAM and others have recently attempted to seek judicial review of EPA regulations adopted in 1978, 1980, and 2002 – an effort EPA has moved to dismiss as time-barred by Section 307(b) of the Act, 42 U.S.C. § 7607(b). *See*, *e.g.*, *Am. Chemistry Council v. EPA*, No. 10-1167 (D.C. Cir. filed July 6, 2010).

would remedy the harms they allege), and they disregard the serious harms a stay would cause to intervenor states and the public interest.

THE STAY STANDARD

A stay is an "extraordinary remedy," *Cuomo v. U.S. Nuclear Reg. Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985), amounting to "an 'intrusion into the ordinary processes of administration and judicial review.'" *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009) (quoting *Va. Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958)). Thus, a stay "is not a matter of right, even if irreparable injury might otherwise result" to the proponent. *Nken*, 129 S. Ct. at 1757.

In considering whether to grant a stay, a court will examine four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 129 S. Ct. at 1761 (citation and internal quotations omitted). The first factor requires Movants to make a "strong" showing of likely merits success. *Id.* A "mere 'possibility' of relief" is insufficient to justify a stay regardless of Movants' showings with respect to the remaining factors. *Id.* (citation omitted).

As to the second factor, Movants' alleged irreparable harm must be "both certain and great; it must be actual and not theoretical." *Wis. Gas Co. v. FERC*,

758 F.2d 669, 674 (D.C. Cir. 1985). The claimed injury must be "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (citation and internal quotations omitted). Movants claiming irreparable harm must demonstrate that "the alleged harm will directly result from the action which the movant seeks to enjoin" and must substantiate any claim that irreparable injury is likely to occur by "provid[ing] proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." *Id.* at 674; *see also Winter v. NRDC,* 129 S. Ct. 365, 375 (2008). "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Wis. Gas Co.*, 758 F.2d at 674.

Even where Movants meet the likelihood of success prong and show some irreparable injury, a stay must nonetheless be denied where Movants have "failed to demonstrate that the balance of equities or the public interest strongly favors the granting of a stay." *Cuomo*, 772 F.2d at 978. For example, irreparable harm does not warrant a stay where "its prevention will visit similar harm on other interested parties." *Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982). In litigation involving "the administration of regulatory statutes designed to promote the public interest, [the public interest factor] necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes." *Va.*

Petroleum Jobbers Ass'n, 259 F.2d at 925. Applying the public interest prong requires respecting the choices of "Congress, the elected representatives of the entire nation," as "decreed" by statute, *Cuomo*, 772 F.2d at 978, as well as "the decision of the [Administrator] as reflecting the best interests of the public in h[er] expert judgment," *Ambach*, 686 F.2d at 987. Movants must make strong, independent showings on all four of the factors – especially with respect to the first two factors – to justify issuance of a stay. *See Nken*, 129 S. Ct. at 1761; *see also Davis v. PBGC*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

I. MOVANTS HAVE NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS

A. Movants' Attacks upon the Endangerment Finding Are Groundless

1. The Scientific Basis of the Endangerment Finding Is Sound

Movants attack EPA's scientific determinations on two fronts: that the work of one of the scientific bodies on which EPA relied, the IPCC, is so suspect that it taints EPA's conclusions, Tex. Mot. at 14-18, CRR Mot. at 26-29; and that EPA ignored other possible causes of global warming, CRR Mot. at 38-42. EPA considered and rejected both lines of attack. Neither has merit, let alone overcomes the "extreme degree of deference" EPA receives on such technical

judgments. *See City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003) (citations omitted).

Notably, Movants do not challenge the credibility of the U.S. Global Change Research Program ("USGCRP") and National Research Council ("NRC"), on which EPA also relies. Congress created the USGCRP to direct a "comprehensive and integrated United States research program which will assist the Nation and the world to understand, assess, predict, and respond to human-induced and natural processes of global change." 15 U.S.C. § 2931(b). The NRC, in turn, coordinates the work of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. *See* RTP, Vol. 3 at 23; 15 U.S.C. § 2934 (NRC reports should help direct "policy decisions relating to climate change"); 42 U.S.C. § 7607(d)(3) (EPA Clean Air Act rulemakings must discuss and respond to "any pertinent findings . . . by the National Academy of Sciences"). The conclusions of either of these *unchallenged*, independent bodies would suffice to support EPA. *See* MacCracken Dec. (Ex. 32) ¶¶ 13-23 (all three bodies produce "highly credible scientific assessment reports").

The IPCC's international preeminence is widely accepted. For example, the Senate acknowledges the IPCC's work is "viewed throughout most of the international scientific and global diplomatic community as the definitive statement on the state-of-the-art knowledge about global climate change." S. Exec.

Rep. No. 102-55, 102d Cong., 2d Sess. at 3, 9 (1992). Congress recognizes the need to "coordinat[e] . . . [U.S.] global change research activities . . . with such activities of other nations and international organizations." 15 U.S.C. § 2934.

Even so, EPA carefully considered each of Movants' allegations regarding the credibility of the IPCC's work, and properly rejected them as being meritless. *See, e.g.*, RTP, Vol. 3 at 7 (Movants "routinely misunderstand or mischaracterize the scientific issues they are raising, resorted to hyperbole [and] broadly impugned the ethics and scientific integrity of climate scientists in general . . . with no basis or support," and "inordinate[ly] rel[ied] on blogs . . . and literature that is neither peer-reviewed nor accurately summarized"). In addition, EPA noted that all independent reviews have upheld the credibility of the IPCC's work. *See* RTC, Vol. 1 at 9-15 (extensively describing the IPCC's peer review process); *see also* RTP, Vol. 2 at 6 (discussing reports upholding IPCC results); MacCracken Dec. (Ex. 32) ¶ 34 (same).

Movants also seek to impugn the work of the IPCC by misciting the extra-record InterAcademy Council ("IAC") Report, which, in fact, reconfirmed the value of the IPCC's work while recommending specific structural reforms to further strengthen the organization. EPA Resp. Ex. 5 ("IAC Report") 51 ("[T]he IPCC assessment process has been successful overall and has served society well"); MacCracken Dec. (Ex. 32) ¶ 18 ("[T]he IAC did not call the IPCC's core

scientific conclusions, or their basis, into question."). In relying on the IAC to *deride* the IPCC as "unaccountable volunteer scientists," Tex. Mot. at 15, Texas ignores the IAC's statement that the group of volunteer scientists and government representatives working together on behalf of the IPCC "*are the major strength of the organization*." IAC Report 1 (emphasis added).

In addition, Texas's claim that the IAC found that the IPCC's sea-level rise projections rested on a "weak evidentiary basis," Tex. Mot. at 17, is misleading. That phrase is actually drawn from the IAC's narrow critique of a specific IPCC estimate of the economic costs of rising seas. The IAC found that the IPCC should have noted that this narrow finding was based on only a few studies, IAC Report 33, but did not describe it as an error, much less question the broader link between climate change and sea level rise. *See* MacCracken Dec. (Ex. 32) ¶ 36. Indeed, if there is any problem with the IPCC's sea-level rise projections, it is that they are too conservative. As EPA explained, "[w]ith regard to sea level rise projections, several very recent [USGCRP] assessment studies suggest that, if anything, future sea level rise is likely to be near or above the high end of the IPCC projections." RTC, Vol. 4 at 61; *see also* MacCracken Dec. (Ex. 32) ¶ 38 (EPA's sea level rise conclusions are "quite cautious[]").

CRR advances a second line of attack, asserting that EPA ignored that some "unknown" quality of the sun and clouds may actually be causing global

warming. CRR Mot. at 38-42. In fact, EPA considered and rejected this allegation as being "inconsistent with the vast majority of the scientific literature." 74 Fed. Reg. at 66,518; *see also id.* at 66,517-19; 75 Fed. Reg. 49,556, 49,563-69 (Aug. 13, 2010); RTC, Vols. 3, 4; RTP, Vol. 1. EPA explained that the well-respected climate models, and data on which it relies, take these influences into account, and show that the massive increase in greenhouse gases is the primary driver of climate change. *See, e.g.*, RTC, Vol. 3 at 19-25; RTC, Vol. 4 at 10-30; MacCracken Dec. (Ex. 32) ¶¶ 26-28 (concluding that EPA accurately identified the distinctive "fingerprint" of greenhouse gases). According to EPA, natural factors, like clouds – which actually reflect heat back into space – and the sun would on their own "likely have produced cooling, not warming." RTC, Vol. 3 at 21; *see also* RTC, Vol. 4 at 10; MacCracken Dec. (Ex. 32) ¶¶ 26-28.[3] The well-documented increase in the concentration of carbon dioxide by 38 percent from pre-industrial levels, which "exceeds by far [its] natural range over the last 800,000 years," provides further support for EPA's conclusion, and for rejecting CRR's red herring. *See* TSD at 17.

[3] EPA also noted that CRR's suggestion that global warming has stopped in the last decade, CRR Mot. at 39, is incorrect. *See* RTC, Vol. 3 at 3; MacCracken Dec. (Ex. 32) ¶ 29.

2. EPA Applied the Correct Standard to Assess Endangerment

Not only do CRR and Texas misread the law, they also misread the record. *See* EPA Resp. at 20-29. Specifically, Movants' contention that EPA was required to "define" or quantify a threshold for endangerment, CRR Mot. at 30; Tex. Mot. at 12, lacks any statutory or case law support.[4] *See* EPA Resp. at 23-27. Moreover, their demand for a quantitative threshold – *i.e.*, a level below which endangerment would *not* occur – overlooks the compelling agency record demonstrating that adverse climate impacts *have already occurred, and are continuing to occur*.[5]

In any event, EPA *did* define endangerment, referencing the extensive discussion of that concept by the Supreme Court in *Massachusetts*, by this Court in

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[4] *See Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 223 (D.C. Cir. 2007) (rejecting petitioner's argument that "EPA should have defined what is protective of human health or the environment numerically, in terms of the threshold risk level that will trigger" specified requirements under the Resource Conservation and Recovery Act; there was "nothing in the statutory language that compels such a numerical definition").

[5] *See, e.g.*, 75 Fed. Reg. 66,517-18 ("Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level"; "The scientific evidence is compelling that elevated concentrations of heat-trapping greenhouse gases are the root cause of recently observed climate change"; "The attribution of observed climate change to anthropogenic activities is based on multiple lines of evidence"; "Observations show that climate change is currently affecting U.S. physical and biological systems in significant ways").

Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976), and by the drafters of the 1977 amendments that gave section 7521(a)(1)'s endangerment language its current wording. *See Massachusetts*, 549 U.S. at 506 n.7 (Congress amended 42 U.S.C. § 7521(a) "to give its approval to" *Ethyl*). EPA drew at length from these sources and others, distilling decisional principles that offered ample guidance for the agency's exercise of its judgment. 74 Fed. Reg. at 66,505-09; 74 Fed. Reg. 18,886 18,890-93 (Aug. 24, 2009). It applied these principles meticulously to the record, weighing actual and projected impacts of greenhouse gas emissions, and both the adverse and beneficial impacts of those emissions, to conclude that the endangerment threshold was met. 74 Fed. Reg. at 65,523-36, 65,537-45; *see also* MacCracken Dec. (Ex. 32) ¶ 30 (this conclusion is "very soundly supported and consistent with the findings of the national and international scientific communities"). EPA's careful and detailed discussion belies claims that it reached these conclusions "arbitrarily" or "without meaningful discussion, proof or quantification." CRR Mot. at 34.[6]

[6] CRR's reliance (Mot. at 35) on *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607 (1980), discredit EPA's work, is thus utterly inapposite, as that case turned on inadequate record evidence, while the record here is extraordinarily careful and complete. *Compare id.* at 626 (OSHA set its standard at *1 part per million*) *with id.* at 652 n.60 (OSHA "acknowledged that there was no empirical evidence to support the conclusion that there was any risk whatsoever of deaths due to exposures *at 10 ppm*," and relied instead on a "theory" that some deaths were likely at lower levels) (emphases added).

B. Movants' Challenges to the Vehicle Rule Are Groundless

EPA ably explains why Movants' challenges to the Vehicle Rule are unlikely to succeed. *See* EPA Resp. at 40-47; *see also id.* at 26-28 (discussion of *Ethyl Corp.*). The Vehicle Rule addresses greenhouse gas emissions from American motor vehicles that exceed the entire national emissions of almost every other country in the world (including Japan, Germany, and Brazil), 74 Fed. Reg. at 66,539, and also does more to reduce those emissions than the concurrently announced fuel economy standards, *see, e.g.*, 75 Fed. Reg. at 25,345, 25,347; Walsh Dec. (Ex. 35) ¶¶ 4-8. Once EPA had determined (properly) that motor vehicles "contribute" to the global warming endangerment EPA had also found to exist, the agency had a statutory obligation to promulgate a vehicle rule, without regard to stationary source costs that might be triggered under other parts of the Clean Air Act. *See* 42 U.S.C. § 7521(a)(1) ("shall"); *Massachusetts*, 549 U.S. at 533; *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1118 (noting that 42 U.S.C. § 7521(a)'s concern with "cost of compliance" is narrow, encompassing only "the economic costs of motor vehicle emission standards and accompanying enforcement procedures").

Indeed, requiring EPA to consider such stationary source impacts in the Vehicle Rule would be unworkable. In sharp contrast to § 7521(a) standards, which are set in a *national* rulemaking by EPA, Prevention of Significant

Deterioration ("PSD") Best Available Control Technology ("BACT") determinations are made "on a case-by-case basis," mostly by numerous *state* permitting authorities. 42 U.S.C. § 7479(3). Moreover, such BACT determinations evolve over time as new and modified sources of many different kinds apply for PSD permits. Indeed, the House Report observes that "any attempt to determine uniform national costs and benefits" of the PSD program "obviously would be meaningless," H.R. Rep. No. 95-294, at 177 (1977), and Congress sensibly declined to impose on EPA the quixotic task of estimating stationary source BACT costs in adopting regulations under 42 U.S.C. § 7521.

C. Movants' Arguments Concerning the Timing Decision and Tailoring Rule Are Meritless

Movants seek to stay the two EPA actions pertaining to stationary sources of greenhouse gases – the Timing Decision and the Tailoring Rule – even though those actions actually benefit them. Movants cannot demonstrate any likelihood of success, because their contentions conflict with the plain language of the Clean Air Act, with this Court's decision in *Alabama Power*, 636 F.2d at 323, and with EPA's long-standing interpretations embodied in regulations that are long past time for challenge.

1. Plain Language, Court Precedent, and Long-Standing Agency Regulations Show That the Preconstruction Permitting Requirements Apply to Major New or Modified Emitters of Each Pollutant Regulated Under the Act

EPA's Response refutes Movants' arguments that preconstruction permitting applies only to sources of pollutants for which a National Ambient Air Quality Standard ("NAAQS") has been promulgated. The plain text of the Act applies the Part C permitting program to sources emitting sufficient amounts of "*any* air pollutant," 42 U.S.C. §§ 7475(a), 7479(1), EPA Resp. at 48-50, and requires implementation of control measures for "*each* pollutant subject to regulation," 42 U.S.C. § 7475(a)(4) (emphasis added).[7]

The words "any" and "each" have expansive meanings. *See Massachusetts*, 549 U.S. at 528-29 ("repeated use of the word 'any'" underscores "sweeping" definition of "air pollutant"); *see also Sierra Club v. EPA*, 536 F.3d 673, 677-78 (D.C. Cir. 2008) ("each" is an inclusive term encompassing every individual member of a group); *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006)

[7] The only statutory exception to this scheme appears in the 1990 amendments to Section 112, where Congress provided a specific permitting provision for sources of hazardous air pollutants and exempted those pollutants from Section 165 permitting. *See* 42 U.S.C. § 7412(b)(6). These amendments confirm that Congress viewed the preconstruction permitting program as applicable to non-NAAQS pollutants. EPA Resp. at 55. EPA and states have further refined the provision "each pollutant subject to regulation" to require, with regard to major modifications, that there be a significant net emissions increase of "each pollutant subject to regulation" for BACT to be triggered for such pollutant. *See, e.g.*, 40 CFR 52.21(j)(3).

(Supreme Court "has read the word 'any' to signal expansive reach when construing the Clean Air Act") (citing *Harrison v. PPG Indus., Inc*., 446 U.S. 578, 588-89 (1980)).

Requirements that apply to "any" and "each" pollutant cannot be limited to only *some* pollutants. *See New York v. EPA*, 413 F.3d 3, 40-41 (D.C. Cir. 2005). Indeed, this Court confirmed more than 30 years ago that the Part C permitting program cannot be limited as Movants suggest. *Ala. Power*, 636 F.2d at 352 (describing "major emitting facility" definition as "jurisdictional" and noting, "the air pollutant [that] caused the source to be classified as a 'major emitting facility' *may not be a pollutant for which NAAQS have been promulgated* . . ") (emphasis added). Accordingly, NAM's contention that a source cannot be a "major emitting facility" by virtue of emitting non-NAAQS pollutants – including greenhouse gases – must fail.

NAM's arguments ignore the plain text and structure of the Act. EPA Resp. at 51. Area designations under Section 107, 42 U.S.C. § 7407, are pollutant-specific. An area can be designated attainment or unclassifiable for some NAAQS pollutants and nonattainment for others, and a source in such area can be subject to both Part C and Part D permitting. Part D requirements apply to the pollutant for

which the area is designated nonattainment,[8] and Part C requirements apply to all of the source's other regulated pollutants, including non-NAAQS pollutants. Far from being unlawful, these criteria derive directly from the statute and have applied continuously since *Alabama Power* and EPA's 1980 regulations.[9]

Movant CRR argues that Section 166, 42 U.S.C. § 7476, limits Part C's applicability to criteria pollutants. CRR Mot. at 51. But *Alabama Power* rejected a substantially identical argument that "review under Section 165 is qualified by Section 166." 636 F.2d at 405-06. The Court noted that "Section 165, in a litany of repetition, *provides without qualification that each of its major substantive provisions shall be effective after 7 August 1977 with regard to each pollutant subject to regulation under the Act. . . ." Id.* at 406 (emphasis added, footnotes omitted). Movants ask the Court to find that, because Section 166(a) *requires* EPA to issue PSD regulations when a new NAAQS is issued, EPA is *prohibited* from issuing such regulations for other pollutants. This Court has rejected an analogous argument as "border[ing] on sophistry":

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[8] *See* 42 U.S.C. § 7503(a)(1)(A) (requiring major new sources to obtain emission reductions assuring "reasonable further progress"); 42 U.S.C. § 7501(1) (defining "reasonable further progress" to include "reductions in emissions of *the relevant air pollutant* as are required by this part . . . for the purpose of ensuring attainment of *the applicable national ambient air quality standard*") (emphasis added).

[9] *See* 45 Fed. Reg. at 52,711. Even if there were any ambiguity in the statutory language, Movants have failed to show that EPA's reading is an unreasonable interpretation. EPA Resp. at 48, 54-56.

> [W]e are unconvinced that the word "shall" expresses not only a mandatory direction, but also a limiting principle . . . . We know of no usage . . . that suggests that the use of "shall" mandating one act implies a corresponding "shall not" forbidding other acts not inconsistent with the mandated performance . . . ."

Fed. Trade Comm'n v. Tarriff, 584 F.3d 1088, 1090-91 (D.C. Cir. 2009) (citation and internal quotation marks omitted).

In the end, Movants fail to explain why, if Congress intended to limit preconstruction review under Section 165 only to NAAQS pollutants or some other narrow set of pollutants, Congress did not say so. *See* 75 Fed. Reg. at 31,561 ("Congress certainly knew how to specifically describe certain air pollutants"). Instead, Congress ensured that the program would apply broadly "to protect public health and welfare from any actual or potential adverse effect," 42 U.S.C. § 7470(1), including effects on "weather" and "climate," *Id.* § 7602(h), by covering "any air pollutant." *Id.* § 7479(1). For all these reasons, Movants have not shown a likelihood of success on the claim that Part C preconstruction permitting cannot apply to major sources of greenhouse gases once those pollutants become subject to regulation.

Finally, Movants have no basis for their complaint that EPA failed to consider the overall costs and benefits of applying Part C's permitting requirements to greenhouse gas sources in the Timing Decision or the Tailoring Rule. No such analysis is required, because Part C is triggered by operation of the

Clean Air Act. *See* EPA Resp. at 2-3. Instead, the Act expressly requires major emitting facilities to undergo a case-by-case BACT analysis that takes costs and other factors into account. Section 169(3) defines BACT to mean:

> 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.

42 U.S.C. § 7479(3) (emphasis added). Congress itself made the decision that major sources must undergo this BACT review for "each pollutant subject to regulation," and provided for a case-by-case, source-specific consideration of the relevant costs and benefits. It is well settled that agencies and courts must honor such congressional choices concerning how, when, and where in the administrative process costs shall be considered. *See supra* p. 4 (citing cases). The statute simply leaves no room for the free-floating cost-benefit analysis that Movants desire. In any event, the agency could not refuse to apply the program on the basis of such an analysis given that preconstruction permitting is compelled by the Act's plain text.

2. Administrative Necessity Justifies EPA's Decision to Phase in Greenhouse Gas Regulation

Correctly understanding that Section 165 permitting applies to greenhouse gases once they are regulated pollutants, EPA acknowledges that it must implement the statute. At no point does EPA deny that the plain language of Section 169(1) sets the thresholds for "major" status at 100 and 250 tons per year

(depending on the source type). While EPA has "no general administrative power to create exemptions to statutory requirements," this Court has recognized "Exemptions Born of Administrative Necessity," stating: "Certain limited grounds for the creation of exemptions are inherent in the administrative process, and their unavailability under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent to foreclose them." *Ala. Power*, 636 F.2d at 357.

The Tailoring Rule addresses the fact that greenhouse gases are emitted from stationary sources in much higher volumes than pollutants previously subject to regulation. As a result, applying the 100 and 250 ton per year thresholds in Section 169(1) literally would sweep in many sources that have not previously been subject to permitting under Section 165, inundating permitting agencies with more applications than they can immediately process.

In the preamble to the proposed Tailoring Rule, EPA acknowledged that agencies have a "high threshold to justify the use of the [administrative necessity] doctrine." 74 Fed. Reg. 55,292, 55,316 (Oct. 27, 2009). Permitting greenhouse gases emissions under the PSD program provides just such a rare case, where administrative necessity justifies provisionally departing from the literal language of the statute to ensure that air permitting does not grind to a halt.

Movants mischaracterize the Tailoring Rule as providing sources with permanent exemptions from the statutory requirements instead of a deferral of regulation for a limited time. *See* NAM Mot. at 30 (arguing that the Tailoring Rule provides "broad exemption[s]" and "[c]ategorical exemptions"). As this Court observed in *Alabama Power*, the distinction is an important one because the agency's burden of justification is "substantially less than that required when the agency seeks to exempt rather than defer regulation." 636 F.2d at 360 n.86. The Tailoring Rule adopts an incremental approach to preconstruction permitting that allows EPA and state agencies to move toward literal application of the statute. Indeed, EPA commits in the Rule to complete additional rulemakings by July 1, 2012 and April 30, 2016, examining ways to process permits for additional sources more efficiently, and if possible, the agency will – as it must – require implementation at lower thresholds. 75 Fed. Reg. at 31,524-25.

The record in this case fully supports the agency's conclusion that a phase-in approach is needed to fulfill Congress's intent while not paralyzing air permitting programs. EPA relies to a large degree on evidence submitted by states – including state petitioners – to support its conclusion that immediately applying the statutory thresholds to greenhouse gases would result in permit paralysis. 75 Fed. Reg. at 31,535-36; *see* EPA Resp. at 16 n.7. EPA has demonstrated that without provisional administrative relief, "practical considerations make it impossible for

the agency to carry out its mandate." *Ala. Power*, 636 F.2d at 359; *see also NRDC v. Train,* 510 F.2d 692, 712-13 (D.C. Cir. 1975) (courts "cannot responsibly mandate" enforcement of statutory deadline when the Administrator "demonstrates that additional time is necessary").

As this Court admonished in *Mova Pharm. Corp. v. Shalala*, EPA has no "license to rewrite the statute. When the agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent." 140 F.3d 1060, 1068 (D.C. Cir. 1998). Movants try to bootstrap EPA's acknowledgment of administrative difficulties into an argument that it is "absurd" to apply the preconstruction permitting program to greenhouse gases at all, yet EPA's phased-in approach does far less violence to the intent of Congress than Movants' interpretation would.

The administrative necessity doctrine dictates that EPA must move expeditiously toward compliance with congressional intent. In contrast, Movants would have this Court read "any air pollutant" and "each air pollutant subject to regulation" out of the statute. This approach is similar to the one that the Court rejected in *Mova*, 140 F.3d at 1069 ("FDA has embarked upon an adventurous transplant operation in response to blemishes in the statute that could have been alleviated with more modest corrective surgery."). *See also Logan v. United States*, 552 U.S. 23, 33 (2007) (rejecting statutory interpretation that "would

correct one potential anomaly while creating others"); *Whitman*, 531 U.S. at 486 ("The EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion."). *Cf. South Coast Air Quality Mgmt. Dist. v. EPA,* 472 F.3d 882, 896-98 (D.C. Cir. 2006) (upholding EPA's regulatory translation of Congress's classification ranges and deadlines in the Act's nonattainment provisions to implement revised eight-hour ozone NAAQS). This Court should recognize EPA's authority to phase in greenhouse gas regulation and reject Movants' invitation to eviscerate key provisions of the Act.

II. MOVANTS HAVE FAILED TO SHOW IRREPARABLE HARM

A. Movants Have Not Demonstrated States Will Suffer Irreparable Harm

Movants speculate that on January 2, 2011, many states will be legally unprepared to implement the Section 165 permit program for greenhouse gas emission sources, leading to a *de facto* "construction moratorium" in some states and a flood of permit applications from small sources in others.[10] NAM Mot. at 48-50; Tex. Tailoring Mot. at 15-16; CRR Mot. at 62-63.

None of this will happen. With the exception of Texas, all other states are taking action on their own and/or in cooperation with EPA to ensure that: (1)

[10] On the question of irreparable harm, Movants' focus, and ours, is on preconstruction permits under Section 165. Title V does not require permits prior to construction.

every source that needs a Section 165 preconstruction permit under the Tailoring Rule will be able to get it from either state or federal authorities, and (2) every source that does *not* need a preconstruction permit under the Tailoring Rule will be able to proceed without one. *See* EPA Resp. Ex. 13 ("McCarthy Dec.") ¶¶ 4-5, 55, 98. According to a detailed October 28, 2010 analysis by the National Association of Clean Air Agencies ("NACAA") (the association of the nation's state and local air pollution control agencies), "every state but one is poised to ensure that sources can obtain preconstruction permits [for greenhouse gases] under the Clean Air Act . . . by January 2, 2011 or very shortly thereafter." McCarthy Dec. attach. 3 ("NACAA Report"); *see also* Declaration of David J. Shaw ("N.Y. Dec.") (Ex. 15) ¶ 8 & Ex. B (Sept. 15, 2010 NACAA Report).

Further, EPA has initiated a series of rulemaking actions that will assure that no source needing a Section 165 permit under the Tailoring Rule will be unable to get it as a result of delay by a state in changing its rules, and that smaller sources will not be forced to seek permits. 75 Fed. Reg. 53,883 (Sept. 2, 2010) (proposed FIP Rule); 75 Fed. Reg. 53,892 (Sept. 2, 2010) (proposed SIP Call); 75 Fed. Reg. at 31,525 (describing limitation of prior SIP approvals to levels above the Tailoring Rule thresholds). Pursuant to these actions, Section 165 permitting will be implemented in time to avoid any potential permitting delays, in *all states except Texas*, either: (1) by the state under its own regulations; (2) by the state under

federal regulations; or (3) by EPA under federal regulations. *See* NACAA Report; McCarthy Dec. attach. 1. The attached declarations from state air pollution officials from across the country further show – contrary to Petitioners' unfounded speculation – that states are ready, willing, and able to implement PSD permitting for greenhouse gas emissions come January 2, 2011, or shortly thereafter. Declaration of Kathrine Pittard ("SMAQMD Pittard Dec.") (Ex. 2) ¶¶ 7-9; Declaration of Mohsen Nazemi ("SCAQMD Dec.") (Ex. 3) ¶ 3; Affidavit of Anne Gobin ("Conn. Aff.") (Ex. 4) ¶¶ 4-10; Affidavit of Ali Mirzakhalili ("Del. Aff.") (Ex. 5) ¶¶ 3, 5-8; Declaration of Douglas P. Scott ("Ill. Dec.") (Ex. 7), ¶ 4; Affidavit of Catharine Fitzsimmons ("Iowa Aff.") (Ex. 6) ¶¶ 3-4; Declaration of James P. Brooks ("Me. Dec.") (Ex. 10) ¶¶ 5-7; Declaration of George S. Aburn ("Md. Dec.") (Ex. 9) ¶¶ 3-4; Declaration of Nancy L. Seidman ("Mass. Dec.") (Ex. 8) ¶¶ 3-5; Declaration of Robert R. Scott ("N.H. Dec.") (Ex. 12) ¶¶ 3-5; Declaration of William O'Sullivan ("N.J. Dec.") (Ex. 13) ¶ 4; Affidavit of Jim Norton ("N.M. Aff.") (Ex. 14) ¶¶ 1-3; N.Y. Dec. (Ex. 15) ¶ 7; Declaration of Dr. Donald R. Van Der Vaart ("N.C. Dec.") (Ex. 11) ¶ 5; Declaration of Andrew Ginsburg ("Or. Dec.") (Ex. 16) ¶¶ 7-9; Declaration of Douglas L. McVay ("R.I. Dec.") (Ex. 17) ¶¶ 3-5; Declaration of Richard Valentinetti ("Vt. Dec.") (Ex. 18) ¶¶ 3-4; Declaration of Stuart A. Clark ("Wash. Dec.") (Ex. 19) ¶ 3. [11]

[11] Movants strain to create a false impression that numerous states are at risk of a

Texas is the sole state that is both refusing to change its own regulations and resisting EPA's backstop procedure to assure that sources can get a federally-issued permit. *See* Tex. Tailoring Mot. attach. 2 ("Texas Letter to Lisa Jackson") 1 ("On behalf of the State of Texas, we write to inform you that Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions."). But Texas is *unwilling*, not unable, to meet the Clean Air Act's requirements for greenhouse gases. Texas has authority under current state law to make the necessary regulatory changes. *See* Tex. Health & Safety Code § 382.0205 (TCEQ may by rule "control air contaminants as necessary to protect against adverse effects related to . . . climatic changes, including global warming"). Texas also has the option of letting EPA issue Section 165 permits for greenhouse gas emission sources, but is refusing that option as well. A party cannot claim injury from self-inflicted wounds, or from delays to which the party itself contributed. *See Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C.

"construction moratorium" for greenhouse gas sources – *i.e.*, will be unable to issue needed permits. For instance, NAM points to Illinois and New Jersey as examples of states allegedly unable to implement permitting in conformity with the Tailoring Rule by January 2, 2011. NAM Mot. at 48 n.30. However, both states anticipate being fully ready by that date. *See* Ill. Dec. (Ex. 7) ¶ 4 & Ex. A (explaining that no state law changes are needed); N.J. Dec. (Ex. 13) ¶ 4 (noting that the state does "not need to undertake a regulatory or legislative process to implement the Tailoring Rule") & Ex. A.

Cir. 2006) ("[S]elf-inflicted harm doesn't satisfy the basic requirements for standing. Such harm does not amount to an 'injury' cognizable under Article III . . . As the association has *chosen* to remain in the lurch, it cannot demonstrate an injury sufficient to confer standing."); *see also Majorica, S.A. v. R.H. Macy & Co.*, 762 F.2d 7, 8 (2d Cir. 1985) ("Lack of diligence, standing alone, may . . . preclude the granting of preliminary injunctive relief, because it goes primarily to the issue of irreparable harm."); *Cuomo*, 772 F.2d at 977 ("Such self-imposed costs are not properly the subject of inquiry on a motion for stay."); *Va. Petroleum Jobbers Ass'n*, 259 F.3d at 926-27 ("[h]ypothetical, self-inflicted losses" do not justify a stay).

Further, the harms that Texas alleges it will suffer are highly speculative and unsubstantiated. Texas claims that the possibility of a "construction moratorium" that could affect as many as 167 sources in 2011[12] is causing "uncertainty and harm to the State's business environment," Tex. Tailoring Mot. at 16, even though EPA is preparing to carry on necessary permitting if the state defaults. A party moving for a stay is required to demonstrate that the injury claimed is "both certain

[12] Texas's estimates of both the number of projects that could be affected and the administrative burden associated with the permitting of such projects fail to account for the fact that no new permits are required at all under the EPA rules for the first half of 2011 on the basis of greenhouse gas emissions alone, resulting in gross inflation of the alleged harm estimated during the stay period. *See* 75 Fed. Reg. at 31,540.

and great" and "actual . . . not theoretical." *Wis. Gas Co.*, 758 F.2d at 674. According to Texas's own director of air permitting, EPA's actions will avoid any alleged moratorium, so long as EPA devotes the necessary staff to permitting. Tex. Tailoring Mot. attach. 6 ("Hagle Dec.") 14. EPA has committed unequivocally to do so. *See* 75 Fed. Reg. at 53,890 (proposing a FIP to fulfill EPA's statutory role as "back-up permitting authority" to "assure businesses, to the maximum extent possible and as promptly as possible, that a permitting authority is available to process PSD permit applications").

Texas claims it is being "robbed" of its right to manage its own clean air program because EPA has not allowed Texas enough time to make SIP revisions and is forcing the state to surrender to a FIP. Tex. Tailoring Mot. at 30-32. Again, Texas's alleged harm is of its own making. Other states expect to be able to amend their SIPs in a timely manner. *See* McCarthy Dec. ¶¶ 55, 98 & attachs. 1-3; N.Y. Dec. (Ex. 15) Ex. B; *see also* Del. Aff. (Ex. 5) ¶¶ 6-7; Iowa Aff. (Ex. 6) ¶ 4; Me. Dec. (Ex. 10) ¶ 7; Md. Dec. (Ex. 9) ¶ 4; N.H. Dec. (Ex. 12) ¶ 5; N.M. Aff. (Ex. 14) ¶ 2; N.C. Dec. (Ex. 11) ¶ 5; R.I. Dec. (Ex. 17) ¶ 5; Vt. Dec. (Ex. 18) ¶ 4; Wash. Dec. (Ex. 19) ¶ 3. Further, for the small number of states like Texas that will not be ready in time, EPA has made clear that it will step in only for as long as it takes the states to develop their own program, and encourages those states to retain as much discretion as possible over their air permitting programs by agreeing to

implement the federal requirements as EPA's delegatees. *See* 75 Fed. Reg. at 53,890. States with currently-delegated permitting programs, such as Illinois, have been cooperating with EPA in this manner for years and maintain substantial discretion in processing permit applications and otherwise managing their clean air resources. *See* Ill. Dec. (Ex. 7) ¶¶ 5-6.

Texas also complains about the administrative expenses of carrying out a permit program. Tex. Tailoring Mot. at 18-19. However, as Texas has no intention of implementing the Tailoring Rule in the near term, it appears that EPA, not Texas, will bear any administrative expenses for administering a permit program under a FIP. *See* McCarthy Dec. ¶ 61 (stating that EPA "expects to have adequate resources" to implement permitting in states lacking delegation). Further, Texas concedes that the Clean Air Act requires the cost of permit programs to be covered by fees paid by regulated entities. Hagle Dec. 13. To the extent that Texas administers its own permit program in the future, Texas has not shown that it will be unable to make any necessary regulatory amendments to begin to recover these costs.

No other state has submitted any evidence of irreparable harm from administrative expenses related to implementing greenhouse gas permitting under the Tailoring Rule thresholds. To the contrary, many states have determined that they will have adequate resources. *See, e.g.*, SCAQMD Dec. (Ex. 3) ¶¶ 3-7 (staff

will be able to carry out the permit actions required by the Tailoring Rule and has sufficient knowledge and expertise to specify greenhouse gas BACT on a case-by-case basis, which is likely to focus largely on energy efficiency); Declaration of Larry Greene ("SMAQMD Greene Dec.") (Ex. 1) ¶¶ 5-8 (existing staff are adequate to, and have the ability to, implement the rule); Conn. Aff. (Ex. 4) ¶ 9 (state has adequate resources to process permits at Tailoring Rule thresholds under current and approved permitting staffing levels); Del. Aff. (Ex. 5) ¶ 8 (state has adequate resources to implement the Tailoring Rule); Me. Dec. (Ex. 10) ¶ 8 (state has adequate resources to process permits at Tailoring Rule thresholds under current and approved permitting staffing levels); Md. Dec. (Ex. 9) ¶ 4 (state currently has adequate resources to implement permitting under the Tailoring Rule); Mass. Dec. (Ex. 8) ¶ 5 (state will have sufficient resources to administer permitting programs upon approval of SIP); N.J. Dec. (Ex. 13) ¶¶ 5-6 (estimating, between Jan. 2 and July 2, 2011, no additional permits and two pending applications that would require a GHG BACT evaluation, "which is not expected to be a major workload," and after July 2, 2011, seven landfill facilities that will require Title V permits); N.M. Aff. (Ex. 14) ¶ 4 (state has adequate resources to implement the Tailoring Rule); N.C. Dec. (Ex. 11) ¶ 6 (state has the necessary resources to begin permitting of greenhouse gas sources under Tailoring Rule); Or. Dec. (Ex. 16) ¶ 10 (state has adequate resources to conduct rulemaking and

implement permitting for greenhouse gases); Vt. Dec. (Ex. 18) ¶ 6 (state has adequate resources to process permits at Tailoring Rule thresholds); Wash. Dec. (Ex. 19) ¶ 4 (state has adequate resources to implement greenhouse gas permitting under the Tailoring Rule).[13]

B. Movants' Claims of Irreparable Economic Harm to Private Firms or the Economy at Large Are Speculative and Unsubstantiated

Movants claim various harms to private firms or the economy at large, but their submissions are "speculative, unsubstantiated and of a nature which clearly does not warrant the issuance of a stay." *Wis. Gas Co.*, 758 F.2d at 672. Movants fail to "show that the alleged harm will directly *result from the action which movant seeks to enjoin*." *Id*. at 674 (emphasis added). Although they bemoan the alleged costs of "GHG regulation," *see, e.g*., CRR Mot. at 67 (citing Peelish Dec. ¶¶ 11-12), Movants and their Declarants utterly fail to make the required showing that *the specific agency decisions* at issue here will have any significant effect on their companies or industries – let alone an effect that is "certain and great" and "of

[13] In fact, because the purpose of the Tailoring Rule is to relieve the potentially crippling administrative burdens that would result from immediate application of the statutory Clean Air Act thresholds, states have determined that the administrative burden would be much greater *without* the Tailoring Rule. *See, e.g.*, Del. Aff. (Ex. 5) ¶ 4; Ill. Dec. (Ex. 7) ¶ 8; Iowa Aff. (Ex. 6) ¶ 5; Me. Dec. (Ex. 10) ¶ 9; Md. Dec. (Ex. 9) ¶ 5; Mass. Dec. (Ex. 8) ¶ 7; N.M. Aff. (Ex. 14) ¶ 5; N.Y. Dec. (Ex. 15) ¶¶ 10-11; Or. Dec. (Ex. 16) ¶ 11; Vt. Dec. (Ex. 18) ¶ 7; Wash. Dec. (Ex. 19) ¶ 4.

such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Wis. Gas Co.*, 758 F.2d at 674 (citation omitted).

Broad claims about effects on entire industries are also insufficient to meet the "requirement that the movant substantiate that the claim of irreparable injury is 'likely' to occur." *Id.* at 674 (citation omitted). Bare allegations that EPA's actions will result in "project cancellations," raise energy prices, and harm "all sectors of the American economy," NAM Mot. at 40, 43, are transparently speculative – as are the claims that private citizens will "bring ruinous suits against any commercial, residential, or manufacturing GHG source they disfavor," *id.* at 52. Likewise, CRR fails to show how collateral uses of the Endangerment Finding (*e.g.*, references to it in NEPA litigation) will cause any of its members any harm during the period of a potential stay. *See* CRR Mot. at 13 n.12.

Many of the Declarants fail to establish even that their projects will have to undergo preconstruction or Title V permitting for greenhouse gases during the period of a potential stay. Indeed, many of the Declarants acknowledge that the firms they represent will *not* be seeking to construct facilities with emissions exceeding the Tailoring Rule's thresholds during the potential stay period, and so will not be affected at all. *See*, *e.g.*, CRR Mot. at 67-68 (citing Ellis Dec. ¶ 15); *Id.* at 67 (citing Peelish Dec. ¶ 9); Brick Dec. (Ex. 22) ¶¶ 14-20 (noting that harms claimed by Corn Refiners' Association are without foundation). Finally, some of

the claims about harm are simply wrong. *See* Brick Dec. (Ex. 22) ¶¶ 15, 26 (noting that alleged harms to ethanol refiners are not supported by the facts about that industry).

When Declarants do claim that a specific project will suffer direct impact from EPA's rules, those claims lack substantiation. For example, CRR Declarant Charles Kerr, CRR Mot. Ex. 21 ("Kerr Dec."), states that Great Northern Project Development ("GNPD") abandoned a potentially profitable conventional coal plant design in favor of a gasification design as a "direct result of the uncertainties surrounding regulation of greenhouse gases." Kerr Dec. ¶ 6. Kerr fails to note that this design shift occurred long before any of the EPA greenhouse gas regulations he is challenging were even proposed. *See* Letter from Richard Southwick, Permitting & Envtl. Manager, South Heart Coal, to Illona Jeffcoat-Sacco, Exec. Sec'y, North Dakota Pub. Serv. Comm'n (Jan. 23, 2008) (Ex. 36) (expressing intent to construct a coal gasification facility).

Similarly, Kerr seeks to blame EPA's actions for the difficulties faced by a proposed power plant in North Dakota. But Kerr fails to mention other obstacles – from local zoning issues to concerns about the plant's impact on a nearby national park.[14] Kerr speculates that a future BACT emissions limit might result in a

[14] In addition to failing to mention when key events occurred, Mr. Kerr also neglects to note that the project has faced serious other hurdles, including zoning issues and problems concerning adverse impacts of its conventional emissions on

"potential" requirement to adopt carbon capture and sequestration. Kerr Dec. ¶ 16. Kerr's speculation is premature and unsubstantiated given the fact that BACT would be assessed case-by-case taking into account costs and "local differences in raw materials or plant configurations, differences that might make a technology 'unavailable' in a particular area," *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 488 (2004). Contrary to his own speculation, GNPD recently asked that land in Stark County, North Dakota be rezoned, requesting a conditional use permit to construct an "electric power generating plant." Application for Industrial District Zoning and Conditional Use Permits South Heart Project (Ex. 39) 1.

General allegations about decreasing demand for coal or uncertainty in the coal markets also miss the mark. See CRR Motion Exs. 22, 24. For instance, CRR Declarant Michael Peelish "altogether ignores other compelling economic factors that have contributed to the trends he observes," including (1) a sharp drop in natural gas prices, which leads firms to switch from coal to gas; (2) a reduction in electricity demand due in part to the recession that has reduced demand for coal;

Theodore Roosevelt National Park, which is only 15 miles away from the proposed project site. *See Dakota Res. Council v. Stark County Bd. of County Comm'rs*, Nos. 08C-282 (S.W. Jud. Dist. N.D. July 22, 2009) (reversing zoning decision to rezone land from agricultural to industrial use, which would have allowed operation of a coal mine) (Ex. 37); *Dakota Res. Council v. Stark County Bd. of County Comm'rs*, No. 10C-315 (S.W. Jud. Dist. N.D. filed May 6, 2010) (Ex. 38). Mr. Kerr also fails to mention that the company has not yet submitted a preconstruction permit for the proposed coal gasification facility.

and (3) higher construction costs (which rose 76 percent between 2005 and 2008) that have led to coal plant project cancellations. Keohane Dec. (Ex. 28) ¶ 36 (referring to CRR Ex. 22 ¶¶ 12, 36-37). These ongoing trends cannot be ascribed to EPA's regulations, which are not yet in effect.

Movants claim that EPA's actions will have sweeping macroeconomic effects, but provide no credible proof that the overall economy would suffer significant, let alone irreparable, economic harm during the stay they seek. Two of NAM's declarants – Bezdek (NAM Mot. Ex. 13) and Thorning (NAM Mot. Ex. 19) – based their harm projections on analyses of unenacted economy-wide carbon cap-and-trade legislation. According to Dr. Dallas Burtraw, an economist at Resources for the Future, analyses "regarding the economic impacts of a cap and trade program are irrelevant to assessing the impacts of the more modest vehicle standards and preconstruction review requirements" at issue in this case. Burtraw Dec. (Ex. 23) ¶ 15. Burtraw notes that EPA's vehicle standards will save car owners an average of $3,000 (over and above any higher vehicle costs) over the life of the vehicles, through fuel savings. *Id.* ¶ 8. And, for stationary sources, "[b]ecause the emission limitation reflecting BACT will be determined in the future for each covered source on a case-by-case basis, taking costs into account, it is impossible to demonstrate now that the costs of those requirements will be

excessive for the sources or burdensome – or even noticeable – for the overall economy." *Id.* ¶ 11.

NAM's assertions about purported effects on the cost of capital and U.S. investment are dressed up as expert predictions, but in fact are groundless. *See* NAM Mot. at 43 (citing Thorning Dec. ¶ 22). Thorning's analysis (the most heavily cited in NAM's Motion) is rife with rudimentary flaws. Keohane Dec. (Ex. 28) ¶¶ 23-29. For example, Thorning relies only on general sources about the relationship between capital and investment that are utterly unrelated to EPA's action. *See id*. ¶¶ 23-24 (noting that the report cited by Thorning is on "general risk management and insurance, and makes no mention whatsoever of the EPA, GHG regulation, or even how regulatory uncertainty might affect capital investment"). Thorning's claim that a "risk premium" of 30-40 percent would be "appropriate" is entirely unsupported, and thus her macroeconomic assertions derived from that claim are completely baseless. *Id*. ¶ 25 (referring to Thorning Dec. ¶ 22).

While Movants repeatedly claim harm from "uncertainty," they fail to provide any concrete evidence. Nor can they assign responsibility for any such "uncertainty" to EPA's rules. *See id*. ¶¶ 24, 39. First, corporate and governmental uncertainty over greenhouse gas regulation long predated the EPA actions at issue here. For example, coal companies have long recognized (in securities filings, and

elsewhere) that future greenhouse gas regulation poses economic risks for them, and markets have already incorporated those risks into coal prices and coal company valuations.[15] Second, EPA's Timing Decision and Tailoring Rule actually *reduce* that uncertainty by providing structure, definite thresholds, and clear timelines for permitting obligations. *See id.* ¶ 39 (noting that a stay "would exacerbate such uncertainty"); *see also* Bradley Dec. (Ex. 21) ¶¶ 9-11; Miller Dec. (Ex. 33) ¶ 10; Arensmeyer Dec. (Ex. 20) ¶¶ 4-6; Knapp Dec. (Ex. 29) ¶¶ 4-6. In any event, a stay, because only provisional, could not resolve any uncertainty of which Movants complain.

III. A STAY WOULD SUBSTANTIALLY INJURE THE STATES AND THE PUBLIC AND IS CONTRARY TO THE INTERESTS OF BUSINESSES PREPARING FOR IMPLEMENTATION

Staying any one of EPA's separate actions at issue for even a short period would create substantial harm for intervenor states and their citizens, for members of the intervenor environmental organizations, and for the public at large, by allowing many millions of tons of additional greenhouse gases to be emitted that

[15] *See* Corporate Library, *et al.*, Climate Risk Disclosure in SEC Filings 19-20 (Ceres and EDF 2009) (examining coal companies' disclosures of regulatory and other risk associated with greenhouse gas regulation in 2008 filings and discussing risk factors); *see also* Securities and Exchange Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,290, 6,290-91 (Feb. 8, 2010) (noting the variety of international, federal, regional, and state regulatory programs that may affect companies' business).

would persist in the atmosphere for decades and even hundreds of years after the time period of a potential stay. A stay is also manifestly contrary to the public interests reflected in the Clean Air Act. When litigation concerns "the administration of regulatory statutes designed to promote the public interest," the question of where the public interest lies is "crucial" and "[t]he interests of private litigants must give way to the realization of public purposes." *Va. Petroleum Jobbers Ass'n*, 259 F.2d at 925, 927.

The injurious impacts on state sovereigns and to the important public interest in the protective, carefully designed and stable implementation of statutory requirements to reduce deleterious air pollution weigh heavily against a stay.

A. A Stay Would Harm the States and the Public by Allowing Large and Prolonged Increases in Injurious Air Pollution

As the Supreme Court recognized in *Massachusetts v. EPA*, a state has a "special position and interest" in "preserv[ing] its sovereign territory" and "protecting its quasi-sovereign interests," as well as its citizens, from the harms of greenhouse gas emissions. 549 U.S. at 518, 519-20. States are already being directly harmed by the inundation of coastal areas, due to sea level rise and more frequent storm surges. *See id.* at 521-23, 526 ("[T]he rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts."); *see also* Md. Dec. (Ex. 9) ¶ 6 ("With more than 3,000 miles of

coastline, Maryland is among those states that will be most impacted by the effects of climate change."); Me. Dec. (Ex. 10) ¶ 3 (noting that Maine's fifteen coastal state parks and associated infrastructure will be impacted by erosion and inundation); Mass. Dec. (Ex. 8) ¶ 8 (explaining that 75 percent of Massachusetts' population is located in coastal areas); 74 Fed. Reg. at 66,533, 66,534-36 ("[S]ea level is rising along much of the U.S. coast, and the rate of change will very likely increase in the future, exacerbating the impacts of progressive inundation, storm-surge flooding, and shoreline erosion."). States will also have to grapple with severe heat and exacerbation of harmful ozone (smog) levels,[16] more frequent severe weather events, reduced water supplies and snowpack, decreased water quality, increased wildfires, and loss of biodiversity. *See* Md. Dec. (Ex. 9) ¶¶ 6-7; Me. Dec. (Ex. 10) ¶ 3; Wash. Dec. (Ex. 19) ¶ 5; Or. Dec. (Ex. 16) ¶ 12; Conn. Aff. (Ex. 4) ¶ 11; R.I. Dec. (Ex. 17) ¶ 8; N.H. Dec. (Ex. 12) ¶ 6; Mass. Dec. (Ex. 8) ¶ 8; Croes Dec. (Ex. 26) ¶¶ 5-10; *see also* 74 Fed. Reg. at 66,524-25.

A stay would cause lasting damage to these state interests because it would allow the production of long-lived vehicles, and the construction of long-lived

[16] Some harms, in particular the health impacts of elevated temperatures and reduced air quality, disproportionately affect vulnerable populations, including those already in poor health, the elderly, infants, and young children. *See* 74 Fed. Reg. at 66,524-25, 66,526, 66,534; Croes Dec. (Ex. 26) ¶ 9. Thus, vulnerable populations would bear the brunt of many of the harms that would be caused by such a stay.

stationary sources, without greenhouse gas controls. These sources would then emit higher pollution levels throughout their lives – as much as 15 years or more for vehicles, and 60 years or more for stationary sources such as power plants. Furthermore, the damage from these emissions would persist for well over a century, given the long atmospheric lifetime of greenhouse gas pollutants, contributing to climate change for many years.

Even a one-year stay would result in the release of many millions of tons of greenhouse gas emissions that would otherwise have been avoided under the rules. A stay of the Vehicle Rule (or the underlying Endangerment Finding) just for model year 2012 (which begins January 2, 2011) would allow vehicles built during that model year to emit an additional 35.8 million tons of carbon dioxide equivalent over their lifetimes, even with application of NHTSA's fuel economy standards. *See* 75 Fed. Reg. at 25,344, 25,347; Walsh Dec. (Ex. 35) ¶ 7. At the same time, Americans would lose $17.4 billion in monetized benefits over those vehicle lifetimes. *See* 75 Fed. Reg. at 25,345, 25,347; Walsh Dec. (Ex. 35) ¶ 7.

Likewise, a one-year stay of the permit requirements could result in the release of hundreds of millions of extra tons of greenhouse gas emissions by allowing the construction of dozens of new or modified major stationary sources that will operate for decades without any greenhouse gas controls. At least 21 major coal plants and oil refineries are positioned to receive draft or final Section

165 permits during 2011 and together have the potential to emit greenhouse gases ranging from 30 million to 90 million tons of carbon dioxide annually. *See* Krust Dec. (Ex. 30) ¶¶ 5-8. Achieving even a modest efficiency improvement of five percent at a 1000 megawatt coal-fired plant could reduce its emissions by 460,000 tons of carbon dioxide per year, or a total of 27.6 million tons of carbon dioxide over the 60 year operational life of a plant. *See* Schoengold Dec. (Ex. 34) ¶ 10.

These additional dangerous emissions would persist in the atmosphere for far longer than the stay itself – up to a hundred years or more. *See* Endangerment TSD at 16-19; Schoengold Dec. (Ex. 34) ¶ 4; Hansen Dec. (Ex. 27) ¶ 15; MacCracken Dec. (Ex. 32) ¶ 39. Each increment of emissions would have a cumulative effect on the composition of the atmosphere and climate warming that would persist for generations. *See* Hansen Dec. (Ex. 27) ¶ 15; MacCracken Dec. (Ex. 32) ¶ 40; Schoengold Dec. (Ex. 34) ¶ 4.[17] Emissions allowed by a stay will

[17] In addition to conflicting with the Clean Air Act's fundamental objective of protecting public health and welfare, a stay would also undercut the Act's important objective of promoting advances in emission control technology. EPA's greenhouse gas emissions standards for new motor vehicles and case-by-case BACT determinations reflect the core technology-advancing policies of the Clean Air Act. *See, e.g.,* S. Rep. No. 95-127, at 17-18 (1977) (Congress intended BACT, as "[p]ossibly the most important" of the 1977 Act's many technology-fostering measures, to spur "improvements in the technology of pollution control."). Such technological advances are crucial to addressing climate change in the long run, and to reducing the costs of doing so. Keohane Dec. (Ex. 28) ¶ 3. Regulatory requirements to limit air pollution have a central role in spurring advances in air pollution control technology. *See* Keohane Dec. (Ex. 28) ¶ 43. For example, the advent of requirements to limit sulfur dioxide emissions was closely linked to the

increase the risks of dangerous, abrupt climate change. Growing scientific evidence shows that global warming is accelerating the rate of loss of the Greenland and Antarctic ice sheets. *See* Endangerment TSD at 67-78; Hansen Dec. (Ex. 27) ¶¶ 21-22; MacCracken Dec. (Ex. 32) ¶ 45. This ice sheet instability indicates that the earth's temperature is near a threshold or tipping point that, once crossed, will trigger uncontrollable disintegration of the ice sheets, and concomitant sea level rise of several meters starting during this century. *See* Hansen Dec. (Ex. 27) ¶¶ 18-23; MacCracken Dec. (Ex. 32) ¶ 45. Continuation of the current global emission trajectory will make crossing tipping points unavoidable. *See* Hansen Dec. (Ex. 27) ¶¶ 23, 29, 33. Thus, each day of delay in reducing greenhouse gases increases the risk of crossing a tipping point and the harms to the public. *See* Hansen Dec. (Ex. 27) ¶ 34; MacCracken Dec. (Ex. 32) ¶ 44.

Further, the discharge of such additional emissions during the stay will make

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development of technologies to control such emissions. *See* Keohane Dec. (Ex. 28) ¶ 43 & Figure 3 (showing annual U.S. patent filings relevant to sulfur dioxide control systems before and after clean air legislation in the U.S. Congress); *see also* Walsh Dec. (Ex. 35) ¶¶ 9-10 (noting that motor vehicle pollution control technologies developed and commercialized in the U.S. have been adopted worldwide); ICF, *The Clean Air Act Amendments: Spurring Innovation and Growth While Cleaning the Air* 2-3 (Oct. 27, 2005) (listing technological advances for control of sulfur dioxide and nitrogen oxides from stationary sources and innovations in vehicle pollution control due to the 1990 Clean Air Act Amendments).

mitigation of the above impacts more difficult and costly for states that are engaged in their own efforts to reduce climate change impacts. Many of the state intervenors are mitigating climate impacts by taking steps under their own control to reduce greenhouse gas emissions. For example, states are participating in regional greenhouse gas cap and trade programs, have adopted California's passenger vehicle low emission and greenhouse gas standards, and have created state-specific programs and initiatives to reduce emissions.[18]

Because EPA's regulation of greenhouse gases significantly advances the goal of minimizing impacts, state intervenors strongly support EPA's efforts. *See, e.g.,* N.H. Dec. (Ex. 12) ¶ 6 ("Tailoring Rule is an important part of limiting [greenhouse gas] emissions in New Hampshire and the rest of the nation"); *see also* Md. Dec. (Ex. 9) ¶ 8; Wash. Dec. (Ex. 19) ¶ 8; Iowa Aff. (Ex. 6) ¶ 7; Conn. Aff. (Ex. 4) ¶ 12; R.I. Dec. (Ex. 17) ¶ 7; N.M. Aff. (Ex. 14) ¶ 6; Mass. Dec. (Ex. 8)

[18] *See* Md. Dec. (Ex. 9) ¶ 8; Wash. Dec. (Ex. 19) ¶¶ 6-7; R.I. Dec. (Ex. 17) ¶ 8; N.M. Aff. (Ex. 14) ¶ 6; Mass. Dec. (Ex. 8) ¶ 9; N.Y. Dec. (Ex. 15) ¶ 12. Washington's adoption of California "clean car" standards, for instance, will reduce greenhouse gas emissions from motor vehicles in the state by 30% by 2016. Wash. Dec. (Ex. 19) ¶ 7. Similarly, Maryland has enacted legislation to reduce statewide greenhouse gas emissions by 25% by the year 2020 and to develop a plan to reduce such emissions by up to 95% by the year 2050. *See* Md. Dec. (Ex. 9) ¶ 8. *See also* Wash. Dec. (Ex. 19) ¶ 6 (noting that the Washington legislature has committed to reducing emissions to 1990 levels by 2020, and to 50% below 1990 levels by 2050). States like Massachusetts have made implementation of these programs a priority, even though government resources have been stretched by the current economic situation. *See* Mass. Dec. (Ex. 8) ¶ 9.

¶ 10; Croes Dec. (Ex. 26) ¶ 18. A stay of the regulations, in contrast, would allow emissions that would be prevented and would worsen the harms states face.

As EPA explains, EPA Resp. at 45-46, a stay of the national Vehicle Rule would severely disrupt implementation and compliance with one of the most important intergovernmental accords in the history of pollution control, coordinating automakers' compliance with the state greenhouse gas vehicle standards and the national Vehicle Rule. 75 Fed. Reg. at 25,327-28; *see* Cackette Dec. (Ex. 24) ¶¶ 8-11; *see also* Cal. Code Regs. tit. 13,§ 1961.1(a)(1)(A)(ii)2. Disrupting this coordinated compliance would place the continuing cooperative efforts of the federal government, California, and the auto manufacturers under great uncertainty. *See* 75 Fed. Reg. 62,739, 62,741 (Oct. 13, 2010) (notice of intent to conduct joint EPA and DOT rulemaking on model year 2017- 2025 light-duty vehicle greenhouse gas emission and fuel economy standards working closely with the California Air Resources Board); Presidential Memorandum Regarding Fuel Efficiency Standards (May 21, 2010), www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-fuel-efficiency-standards (last visited Oct. 30, 2010).

In addition, if the Tailoring Rule is stayed, states will be saddled with the unmanageable administrative burdens the rule is designed to avoid. *See* Md. Dec. (Ex. 9) ¶ 5; Me. Dec. (Ex. 10) ¶ 9; Wash. Dec. (Ex. 19) ¶ 4; Or. Dec. (Ex. 1f6) ¶

11; Del. Aff. (Ex. 5) ¶ 4; N.M. Aff. (Ex. 14) ¶ 5; N.J. Dec. (Ex. 13) ¶¶ 5-6; Mass. Dec. (Ex. 8) ¶ 7; N.Y. Dec. (Ex. 15) ¶¶ 10-11; *see also* 75 Fed. Reg. at 31,540. In Iowa, for example, which has already adopted state regulations to implement the Tailoring Rule, about 10-20 facilities would need permits under the Tailoring Rule. *See* Iowa Aff. (Ex. 6) ¶ 5. If the rule is stayed, however, the number of permits climbs to 410. *See id.* The state intervenors generally have adequate resources to handle the permitting load expected under the Tailoring Rule. *See* SCAQMD Dec. (Ex. 3) ¶¶ 4-6; SMAQMD Greene Dec. (Ex. 1) ¶ 7; Md. Dec. (Ex. 8) ¶ 4; Me. Dec. (Ex. 10) ¶ 8; Wash. Dec. (Ex. 19) ¶ 4; Or. Dec. (Ex. 16) ¶ 10; Conn. Aff. (Ex. 4) ¶ 9; Del. Aff. (Ex. 5) ¶ 8; N.C. Dec. (Ex. 11) ¶ 6; N.J. Dec. (Ex. 13) ¶¶ 5-6; N.M. Aff. (Ex. 14) ¶ 4; Vt. Dec. (Ex. 18) ¶ 6; Mass. Dec. (Ex. 8) ¶ 5. However, the "overwhelming administrative burden" that would ensue without the rule "could . . . result in severe impairment or delay in the functioning" of permitting programs in states like New York. N.Y. Dec. (Ex. 15) ¶ 10; *see also* Md. Dec. (Ex. 9) ¶ 5; Ill. Dec. (Ex. 7) ¶ 8.

B. A Stay Would Adversely Affect Businesses That Are Preparing for Implementation and That Depend on a Stable, Predictable Regulatory Roadmap

A stay would be contrary to the interests of businesses preparing to comply with EPA's rules. By disrupting rules carefully designed to provide a measured, workable implementation framework, a stay would create uncertainty for

companies with existing and proposed sources both above and below the Tailoring Thresholds. *See* Bradley Dec. (Ex. 21) ¶¶ 1, 9-11 (Clean Energy Group) ("EPA has demonstrated a careful, measured approach, seeking input from industry and other stakeholders, and limiting the initial scope of regulation through the Tailoring Rule."); Miller Dec. (Ex. 33) ¶ 10 (Calpine Corporation); Knapp Dec. Ex. 29 ¶¶ 4, 6 (South Carolina Small Business Chamber of Commerce); Collette Dec. (Ex. 25) ¶¶ 5, 8 ("A stay would create the situation where small businesses would not know whether or not their sources would be subject to PSD.").

A stay would create uncertainty for power companies – such as Calpine Corporation, Exelon Corporation, National Grid, New York Power Authority, NextEra Energy, PG&E Corporation, and Seattle City Light – that are preparing to meet BACT for greenhouse gases consistent with the EPA's clear ground rules. *See* Bradley Dec. (Ex. 21) ¶¶ 1, 9-11 (EPA's rules "make clear which sources are required to comply with PSD for GHG emissions and which are not, and when the obligations of covered sources take effect."). A stay would, for example, intensify regulatory uncertainty for Calpine Corporation by de-stabilizing the permit implementation framework and creating risks "that could negatively affect the financing of new generation projects that would reduce the overall GHG footprint of the electricity sector." Miller Dec. (Ex. 33) ¶ 10. Calpine owns ninety-three power plants, some of which exceed the Tailoring Rule thresholds. *See* Miller

Dec. (Ex. 33) ¶¶ 4, 7, 8. At one such plant, Russell City Energy Center in Alameda County, California, Calpine has committed to carry out BACT for greenhouse gases. *See* Miller Dec. (Ex. 33) ¶ 9. A stay would be contrary to the interests of businesses that have been preparing for implementation of the rules, exacerbating rather than alleviating regulatory uncertainty.

A stay would also adversely impact the interests of large and small businesses, investors, and entrepreneurs that benefit from the rules. *See* Lederer Dec. (Ex. 31) ¶ 5. The Small Business Majority opposes a stay because it would "delay and disrupt efforts to achieve controls of greenhouse gas emissions under the Clean Air Act" and could "delay investments in small businesses that would be important sources of innovation." Arensmeyer Dec. (Ex. 20) ¶¶ 4-6; *see also* Collette Dec. (Ex. 25) ¶¶ 4-8 (Main Street Alliance). A hiatus on implementation would also adversely affect small business interests, such as the South Carolina Small Business Chamber of Commerce, that are pursuing clean energy technologies as business growth opportunities. *See* Knapp Dec. (Ex. 29) ¶¶ 4-6.

In sum, by disrupting a clearly delineated framework for implementation, a stay would "exacerbate rather than ameliorate uncertainty," creating a volatile regulatory environment that delays capital investment and prolongs "the period of 'limbo' before the regulations take effect." Keohane Dec. (Ex. 28) ¶ 30.

CONCLUSION

The motions for a stay should be denied in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing State and Environmental Intervenor Joint Response to Motions to Stay was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record in No. 09-1322 (and consolidated cases), No. 10-1073 (and consolidated cases), No. 10-1092 (and consolidated cases), and No. 10-1131 (and consolidated cases), who are required to have registered with the Court's CM/ECF system. I will also cause a copy of the foregoing document to be sent by first-class mail postage prepaid, to any non-CM/ECF users who have appeared in these cases.

Date: November 1, 2010 /s/ Violet Lehrer
Violet Lehrer