



VIA EMAIL to *a-and-r-docket@epa.gov*

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Environmental Protection Agency West (Air Docket)
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Washington, DC 20460

**Re: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule;
Proposed Rule, Docket No. EPA-HQ-OAR-2009-0517**

The Center for Biological Diversity (the “Center”) submits the following comments concerning the Proposed Rule re: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, Docket No. EPA-HQ-OAR-2009-0517, 74 Fed. Reg. 55292 (the “Tailoring Rule”). The Center is a non-profit environmental organization dedicated to the protection of imperiled species, their habitats, and the environment through science, policy, and environmental law. The Center has over 225,000 members and online activists throughout the United States. These comments are filed on behalf of our members and staff with a vital interest in reducing greenhouse gases (“GHGs”) and other air pollutants.

I. Introduction

The Center applauds the EPA’s long-awaited decision to begin reducing greenhouse pollution from smokestacks and other sources through the Clean Air Act’s successful new source review and Title V permitting programs. Both the law and sound public policy require that EPA begin to reap the benefits of this program for greenhouse gases immediately. We also support EPA’s stated intent to ensure that new source review is fully implemented immediately for the largest polluters in order to maximize pollution reductions. However, we believe that EPA has substantially overstated the resources needed to implement permitting for pollution sources emitting less than 25,000 tons per year (“tpy”) of GHGs, and has failed to establish why the agency would need a full six years to conduct a study and develop guidelines for pollution reductions for sources below the proposed threshold. As described below, EPA should revise the Tailoring Rule consistent with these comments to ensure that the agency fully complies with the Clean Air Act and that the public receives the full benefit and protection of this flagship law which has so successfully protected the air we breathe for over four decades.

II. Analysis

A. The Act's Permitting Programs Must Be Implemented Immediately To Control Emissions of Greenhouse Gases

In *Massachusetts v. EPA*, the Supreme Court determined unequivocally that GHGs are air pollutants within the meaning of the Clean Air Act (the “CAA” or the “Act”), that these air pollutants “fit well” within the Act’s capacious regulatory framework, and that EPA is authorized to regulate them. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). In other words, the question of whether EPA can and must regulate GHGs under the Act is no longer up for debate, particularly now that EPA has, at long last, found that GHGs endanger public health and welfare. Throughout the Tailoring Rule, however, EPA assumes that despite this Supreme Court ruling and its own prior GHG-related regulatory activities, the Prevention of Significant Deterioration (“PSD”) and Title V permitting requirements discussed in the Tailoring Rule are not yet in effect because EPA purportedly has not yet made GHGs “subject to regulation.” That is not the case.

The phrase “subject to regulation” in Section 165(a)(4) of the Clean Air Act, 42 U.S.C. § 7475(a)(4), the statute defining the elements and applicability of the preconstruction permitting program, cannot be re-interpreted to mean “subject to a nationwide [actual emissions control] standard, binding in all states, that EPA promulgates on the basis of its CAA rulemaking authority,” as EPA has proposed. *See* Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, 74 Fed. Reg. 51,543 [Docket No. EPA-HQ-OAR-2009-0597]. Instead, the holding of *Massachusetts v. EPA*, the unambiguous language of Section 165(a)(4), and EPA’s various “regulations” of GHGs to date have already triggered EPA’s obligations to commence the permitting programs, as fully explained in our comments submitted to the agency on that subject. *See* December 7, 2009 Comments by the Center for Biological Diversity Re: Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program; Docket No. EPA-HQ-OAR-2009-0597, incorporated herein by reference as though fully set forth herein. EPA is obligated to commence the new source review and Title V permitting programs for greenhouse gases immediately both because it has a clear statutory duty to do so and, as discussed below, because the catastrophic impacts of climate change become ever more certain to occur the longer we wait to take action.

B. A 25,000 Tons Per Year GHG Emissions Threshold Is Not Justified By Either the “Absurd Results” Nor The “Administrative Necessity” Rule of Statutory Construction

The PSD program requires permitting of all new major stationary sources and major modifications at existing major sources that emit or have the potential to emit (“PTE”) 100 or 250 (depending on the source category) tpy of a pollutant subject to regulation – in this case, the six GHGs that are the subject of the Tailoring Rule. *See, e.g.*, Sections 165(a)(1) and 169(1) of the Act, 42 U.S.C. §§ 7475(a)(1), 7479(1); 40 CFR § 51.165, 51.166, 52.21, 52.24, and part 51,

appendices S and W.¹ In addition, under Title V of the Act, a source with emissions exceeding a “major source” emissions threshold – generally 100 tpy on a PTE basis – must obtain operating permits that consolidate and provide for review of all Clean Air Act requirements applicable to the facility into a single document, and require permit holders to track, report and annually certify their compliance status concerning each permitting requirement. *See, e.g.*, Sections 501(2)(B) and 302(j) of the Act, 42 U.S.C. §§ 7661(2)(B), 7602(j). As EPA readily concedes, the relevant statutes are clear on their face, and require implementation of both permitting programs to all stationary sources that have the potential to emit either 100 or 250 tpy of an air pollutant (the “100/250 threshold”) per year; EPA cannot redefine these applicable limits by regulation where, as here, Congressional intent concerning a particular provision on a particular question is clear. Tailoring Rule, 74 Fed. Reg. 55306; *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

Nonetheless, to justify a “phased-in” approach to implementing the Act’s permitting programs for GHGs that focuses on the dirtiest polluters first, EPA cites cases in which courts have used judicial canons of statutory construction to somewhat expand or narrow the meaning of express statutory language when not doing so either would produce “absurd results” or when “administrative necessity” compelled that outcome. *See* cases cited at Tailoring Rule, 74 Fed. Reg. 55306-307 and 74 Fed. Reg. 55312-14. EPA, however, also concedes the following: “[T]he rule that statutes are to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not reflect the ‘unambiguously expressed intent of Congress,’ * * * and thus to overcome the first step of the *Chevron* analysis. *But the agency does not thereby obtain a 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.’ *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998).” Tailoring Rule, 74 Fed. Reg. 307 (emphasis added). As it is now fully settled that Congress indeed intended to regulate new or previously unrecognized air pollutants such as GHGs through the Clean Air Act, EPA cannot thwart that intent by rewriting plain statutory language to create exemptions from pollution reduction programs required by law. *See Massachusetts v. EPA*, 549 U.S. at 532. Similarly, EPA admits that expanding or narrowing clear statutory language because of alleged “administrative necessity” requires the agency to meet “a high hurdle: ‘[T]he agency [bears] a heavy burden to demonstrate the existence of an impossibility.’ . . . The Court particularly noted its reticence to uphold agency claims of administrative impossibility *when those claims are made in advance of actual efforts to administer or enforce*: ‘The agency’s burden of justification in such a case is especially heavy.’” Tailoring Rule, 74 Fed. Reg. 55312-13, citing *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1980) (emphasis added). While we endorse EPA’s stated intent to ensure that new source review for GHGs is implemented immediately for the largest polluters to maximize GHG reductions, EPA has not demonstrated that it would be impossible or absurd to implement new source review for pollution sources less than 25,000 tpy in less than the six years proposed by the agency. EPA’s current proposal goes beyond what has been previously

¹ On December 2, 2009, we and 350.org petitioned EPA to set national ambient air quality standards (“NAAQS”) for GHGs at 350 parts per million (“ppm”). Center for Biological Diversity and 350.org, *Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act*, submitted to EPA on December 2, 2009. If EPA establishes NAAQS for GHGs at 350 ppm, the permitting program for non-attainment areas (rather than the attainment area PSD program discussed herein) will be applicable to major sources of GHG emissions.

countenanced by the courts in other contexts.

EPA's main justification for the application of the "absurd results" interpretation rule is its (and the states') alleged physical inability to administer permits immediately for all sources that exceed the 100/250 tpy threshold for GHGs. In other words, complying with the 100/250 tpy threshold for GHGs would lead to "absurd results" mainly because the EPA lacks the time and resources to conform to the law. *E.g.*, 74 Fed. Reg. 55307-08 (enforcing these thresholds would result in a "number of permit applications [that] far exceed [the agencies'] administrative capacity"); 74 Fed. Reg. 55308 ("[a] literal interpretation of CAA sections 165(a)(1) and 169 (1) to apply at the 100/250 tpy levels for GHG sources would render compliance with [Section 165(c)] impossible by requiring far more permit applications than permitting authorities could process under this 12-month deadline"); 74 Fed. Reg. 55310 ("at least for an initial period of time, until streamlining methods could be developed, these numbers of sources would be well beyond the 'administrative capability' that the D.C. Circuit described EPA as having").² Thus, the heart of EPA's claim is that "administrative necessity" requires a phase-in of the permitting programs.

Notably, however, none of the cases EPA cites in support of its "administrative necessity" claim actually upheld that claim – to the contrary, these courts struck down the agencies' invocation of administrative impossibility or excessive burden to circumvent clear statutory language. *See, e.g., EDF v. EPA*, 636 F.2d 1267 (D.C. Cir. 1980) (EPA failed to show that it could not carry out the statutory command to achieve concentrations of PCBs below 50 parts per million); *Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C. Cir. 1983) (agency's claim of difficulties in enforcing emissions limitations were based on agency predictions of future enforcement difficulties rather than actual experience); *Public Citizen v. FTC*, 869 F.2d 1541 (D.C. Cir. 1989) (FTC failed to justify claim of administrative necessity in enforcing tobacco advertising warning labels). In fact, the primary case EPA cites in support of its position, *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1980), struck down an attempt by EPA to exempt sources emitting less than 50 tpy of certain pollutants from PSD permitting requirements on the basis that some 2,400 major emitting facilities would otherwise be required to obtain permits, and that the large burdens of compliance on the agency and industry would outweigh the allegedly small benefits of permitting.

We also note that the resource constraints and administrative challenges at the heart of the Tailoring Rule have been caused in large part by the agency's lengthy delay in addressing greenhouse gases under the Clean Air Act. Had EPA begun greenhouse gas reductions under all

² EPA also argues that Congress chose the 100/250 threshold to impose the costs associated with the permitting process only on large industrial entities able to defray them. Tailoring Rule, 74 Fed. Reg. 55308. However, because EPA also states that it has not yet either adopted the streamlining processes available to it to reduce the costs of implementation for emitters, nor identified the best available control technologies for GHGs nor their associated cost, EPA cannot sustain its burden of demonstrating that imposition of these as yet uncertain administrative costs resulting from application of emissions thresholds below 25,000 tpy would truly lead to "absurd results" Congress could not possibly have intended. In addition, EPA cites no evidence that facilities emitting, for example, 20,000 or 10,000 tpy of GHGs do not consist of or include large, industrial facilities, nor, indeed, that the costs of permitting most, some or even any of them will be too large for these entities to sustain. EPA does not have a "license to rewrite" the statute based on the partial cost/benefit analysis it has submitted.

applicable Clean Air Act provisions in the 1980s, early 1990s, in 1999 when petitioned by the International Center for Technology Assessment and others to regulate GHGs from automobiles, or even immediately following the Supreme Court's decision in *Massachusetts v. EPA*, EPA would already have gained considerable experience in new source review and Title V permitting programs for GHGs. While we appreciate the resource constraints faced by EPA and state agencies as a result of this previous delay, we believe that EPA now should and can spend its time and increased resources on implementing the law without further delay.

C. EPA Fails To Justify Setting The “Significance Levels” At Between 10,000 and 25,000 Tons Per Year

The PSD permitting program applies to new facilities as well as to existing major facilities undergoing a “major modification,” that is, those that make a physical change or a change in their method of operation which results in an increase in emission that is “significant.” *E.g.*, 40 CFR 52.21(b)(23). “Significant” emissions are pollutant-specific emission rates and, unless EPA has set a specific “significance” level, this means “any increase;” in other words, the value of “significance” is zero unless otherwise defined. *See, e.g.*, 40 CFR 52.21(b)(23)(ii). Here, EPA suggests setting a “significance” level for GHGs between 10,000 and 25,000 tpy, even though the threshold that defines a “major facility” in the first place is the 100/250 tpy threshold discussed above.

EPA admits, however, that it has raised significance levels above zero only where those levels represent “a *de minimis* contribution to air quality problems,” and that it “generally based significance levels at 20 percent of the NSPS.” Tailoring Rule, 74 Fed. Reg. 55297. Here, in the absence of a new source performance standard, comparing even the lower value, 10,000 tpy, to the proposed definition of a “major source,” 25,000 tpy, does not yield 20% but 40%; and neither of the proposed significance levels can be classified as “*de minimis*” in light of the fact that the statute clearly defines a “major facility” as one emitting at the 100/250 threshold. Thus, even assuming a 25,000 tpy threshold were permissible, EPA must admit that its significance level proposal would violate its own administrative precedent. As justification for setting a significance level at either of these values, EPA claims that it does not currently “have an adequate supporting record to establish a . . . health and welfare-based *de minimis* level for significance for GHGs.” Tailoring Rule, 74 Fed. Reg. 55298. That claim, however, rings hollow as the Endangerment Finding for GHGs under Section 202 of the Act and its supporting scientific studies include a wealth of information concerning both the health and the welfare effects of GHGs. Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66496, 66543 (December 15, 2009). In any event, since the preservation of public health and welfare is the core of Congressional intent in passing the Act and its amendments, a claim that such information is lacking cannot support the EPA's extremely high proposed significance thresholds, and cannot demonstrate that they “deviate no further from the statute than is needed to protect congressional intent.” *Mova Pharmaceutical Corp. v. Shalala, supra*, 140 F.3d 1060 at 1068.

Moreover, neither of the proposed significance levels – 10,000 or 25,000 tpy – is justified by any analysis showing that these thresholds are preferable to any others. No reasoned argument supports using either of these levels rather than, for example, 8,000 tpy or another

threshold. If EPA wishes to set a non-zero significance threshold, it must support its choice with reasoned analysis and demonstrate that the threshold complies with the language and intent of the Clean Air Act.

D. EPA Has Failed To Demonstrate That It Requires Six Years to Study and Implement New Source Review for Sources Emitting Less Than 25,000 Tpy

Even assuming that EPA's proposed approach is otherwise justified, EPA must meet its burden of demonstrating that it cannot fully implement the statute for at least another six years without deviating "further from the statute than is needed to protect congressional intent." *Mova Pharmaceutical Corp. v. Shalala, supra*, 140 F.3d 1060 at 1068. As EPA itself has recognized, "The Court particularly noted its reticence to uphold agency claims of administrative impossibility *when those claims are made in advance of actual efforts to administer or enforce*: 'The agency's burden of justification in such a case is especially heavy.'" Tailoring Rule, 74 Fed. Reg. 55312-13, citing *Alabama Power Co v. Costle*, 636 F.2d 323 (D.C. Cir. 1980) (emphasis added). In other words, EPA must carry the extremely high burden of demonstrating, in advance of ever having tried, that it would be physically "impossible," for six years or more, to implement the permitting programs for any sources below 25,000 tpy of emissions. As EPA admits, to carry that burden, it must complete a three-step approach: after demonstrating a physical inability to proceed, it must identify all streamlining steps it could take in administering the law; it must then prove that even if it implements all of these steps, the remaining administrative tasks still are impossible to accomplish rather than merely extremely difficult; and, only if it meets this burden, may it suggest circumventing the statute, though it may deviate no further than is needed to protect congressional intent. Tailoring Rule, 74 Fed. Reg. 55315. EPA must show that complying with the statute as written remains "impossible" throughout the period of time it claims is needed to alleviate the administrative backlog. Here, EPA fails to meet this burden. While EPA discusses predictions of the effect of implementing individual streamlining processes, maintaining that none of them alone would be sufficient to overcome the claimed administrative logjam, EPA never analyzes why it cannot administer the permitting programs as required if all of its proposals are implemented simultaneously.

For example, EPA's analysis of why the agency will be unable to accommodate the necessary Title V permits for at least six years is flawed. Under Title V of the Act, major facilities are not required to submit Title V permits until one year after they become subject to the permitting program. Tailoring Rule, 74 Fed. Reg. 55298; 42 U.S.C. §§ 7661b(c). Thus, assuming that EPA decrees that the Title V program becomes applicable to GHGs at the end of March 31, 2010, no Title V permit would have to be submitted until the end of March 31, 2011.³ Thus, the logjam EPA anticipates will not even come into effect until 15 months from now – a considerable period of time EPA could use to prepare for it. EPA, however, does not analyze, among other things, what combined effect the full implementation of its streamlining proposals (among them general permits, permits by rule, or electronic permitting)⁴ during those 15 months

³ As stated above, we believe that both the PSD and Title V permitting program effective dates have already been triggered.

⁴ We cannot comment on the legality or advisability of these and other streamlining tools before EPA describes in detail the source category or categories to which it seeks to apply them and provides the specifics of how they are to be administered. However, all streamlining tools must be carefully constructed to comply with the general

would have to reduce the cost, complexity, and number of Title V permits that would have to be submitted at that time; or how EPA can utilize the considerable funding increase provided to it for fiscal year 2010 and beyond to accomplish such tasks as hiring and training additional staff. EPA certainly fails to demonstrate that these combined streamlining processes cannot possibly resolve the issue for six years or more.

EPA also claims that it does not have sufficient data to identify the best available control technology for the reduction of GHG emissions by source. However, the issue has been at the forefront of agency consideration since at least April 2, 2007, the date when *Massachusetts v. EPA* was decided and EPA's responsibility to regulate GHGs – and thus to define and require the use of BACT – became unquestionable. Indeed, on July 30, 2008, EPA issued an Advance Notice of Proposed Rulemaking, entitled, "Regulating Greenhouse Gas Emissions under the Clean Air Act," 74 Fed. Reg. 44354 (July 30, 2009), in which EPA filled hundreds of pages of the Federal Register with detailed discussions about what technologies and methodologies can be applied to reduce GHGs from mobile as well as stationary sources. EPA solicited comments on all of these issues, and in response received over 19,000 comments, including highly technical and relevant discussions from a broad swath of industry, academia and others. Since April 2007, EPA has had nearly three years to study the issue, and as of April 2008, it had made considerable progress and has since been aided by thousands of public submissions. While the definition and application of BACT for GHGs will be significantly refined and expanded in coming years (as is the case for all other air pollutants as well), it is incorrect to claim that insufficient information exists to at least estimate costs and streamlining efficiencies of BACT and/or general permitting requirements.

EPA also discusses the manner of calculating GHG emissions by commercial and residential sources, whose emissions primarily come from boilers and combustion units, such as furnaces, water heaters and small stationary engines. Tailoring Rule, 74 Fed. Reg. 55321. EPA suggests that such calculations should be based on actual usage rather than their "potential to emit" because the latter approach "resulted in an upwards adjustment ranging from 85 to 89 percent in emissions from their actual emission values." Tailoring Rule, 74 Fed. Reg. 55302. EPA's argument that it should be allowed to redefine "potential to emit" as "actually emitting" is not justified in this instance, as the permits themselves could be streamlined by including legally and practically enforceable general limits on operational parameters. But regardless of whether streamlining occurs through general rulemaking or a simplified permit process, EPA fails to explain why the cost and time savings that could be achieved if such measures were adopted and combined with other streamlining procedures cannot work together so that new source review for GHGs can be implemented for all sources as required by law.

In sum, EPA has not yet attempted to administer new source review and Title V permitting for GHGs, or to streamline the process for sources under the proposed 25,000 tpy threshold in any manner, and yet it asserts the need for a full six years of further delay for sources under 25,000 tpy. While we agree that EPA must avoid any delays in implementation

requirements of the Clean Air Act, and must, among other things, be subject to public participation and comment, legally binding and enforceable, subject to monitoring and compliance review, and, where applicable and appropriate, allow for case-by-case application, review and challenge.

for the largest polluters, EPA should not adopt a six year time frame for sources below 25,000 tpy, but rather should move as expeditiously as possible to fully implement the new source review program to achieve all available pollution reductions as the statute and common sense require.

E. EPA's Cost-Benefit Analysis Is Seriously Flawed

EPA seeks to ground the proposed Tailoring Rule in part on a cost-benefit analysis that generally characterizes the foregone benefits of reducing GHGs as negligible, but the savings achieved through eliminating compliance with the Clean Air Act as extremely large. To arrive at these conclusions, EPA seriously distorts the analytical process and puts its thumbs heavily, and unlawfully, on the scales to achieve the outcome it prefers.

Specifically, even though EPA acknowledges the numerous, significant uncertainties involved in its assumptions throughout this rulemaking, it is somehow able to set precise price tags on the administrative burdens purportedly avoided by “small” sources that would be exempted from compliance by the Tailoring Rule. EPA claims that these sources would save some \$52 billion and \$1.15 billion, respectively, in Title V and PSD permitting costs. *See* Tailoring Rule, 74 Fed. Reg. 55338-339. Yet, EPA states that it simply cannot estimate the other side of the coin: “It is not possible at this time to quantify the social costs of avoided BACT.” *Id.* at 55340. EPA compounds the error by combining this assertion with the contradictory claims that the allegedly unquantifiable benefits of compliance “are likely to be small,” and that, “while it is extremely difficult to measure the degree of improved compliance, if any, that would be foregone [by not requiring Title V permits], . . . we expect that they would be negligible.” *Id.* at 55340.

First, EPA's attempt to rely on a cost-benefit analysis to validate the creation of a new emissions limitation is legally impermissible because “there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits.” *Alabama Power Co. v. Costle*, 636 F.2d at 357. In addition, even in cases where the use of cost-benefit analysis has been countenanced, courts have prohibited EPA from examining only one side of the equation, while asserting that the other side has zero value even though information to estimate that value exists. *E.g.*, *Center for Biological Diversity v. NHTSA*, 505 F.3d 508, 530-31 ((9th Cir. 2007). Here, estimates of the value of compliance can be reached, as information concerning the nature and cost of BACT as well as the social cost of carbon is available or can be derived from existing sources. *See, e.g.*, ANPR, Regulating Greenhouse Gas Emissions under the Clean Air Act, 74 Fed. Reg. 44354; Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49434 (September 28, 2009). In other words, EPA's failure to present a full analysis cannot withstand scrutiny.

EPA's proposal to create a minimum six-year “de minimis” exemption for the regulation of sources emitting between 250 tpy and 25,000 tpy of GHGs on the basis that such sources comprise only 7% of U.S. total stationary source GHG emissions is flawed for another reason. As EPA itself has pointed out in the final Endangerment Finding made under Section 202(a) of the Act, “no single greenhouse gas source category dominates on the global scale, and many (if

not all) individual greenhouse gas source categories could appear small in comparison to the total, when, in fact, they could be very important contributors in terms of both absolute emissions or in comparison to other source categories, globally or within the United States. If the United States and the rest of the world are to combat the risks associated with global climate change, contributors must do their part even if their contributions to the global problem, measured in terms of percentage, are smaller than typically encountered when tackling solely regional or local environmental issues. [The opposite] approach, if used globally, would effectively lead to a tragedy of the commons, whereby no country or source category would be accountable for contributing to the global problem of climate change, and nobody would take action as the problem persists and worsens.” Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66496, 66543 (December 15, 2009).

In addition, EPA ignores the effect of leaving GHG reductions to the future even though environmental damage increases the longer reduction of GHGs is delayed. As EPA has recognized elsewhere, “[a] substantial portion of CO₂ emitted into the atmosphere is not removed by natural processes for millennia, each unit of CO₂ not emitted into the atmosphere avoids essentially permanent climate change on centennial time scales.” Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49454, 49589 (September 28, 2009). As a consequence, remedial efforts get more expensive the longer they are delayed: “[The social cost of carbon, or SCC] is expected to increase over time, because future emissions are expected to produce larger incremental damages as physical and economic systems become more stressed as the magnitude of climate change increases. Indeed, an implied growth rate in the SCC can be produced by most of the models that estimate economic damages caused by increased GHG emissions in future years.” *Id.*, 74 Fed. Reg. 49613. Or, in other words, “[d]elaying mitigation efforts could result in substantially higher costs of stabilizing CO₂ concentrations.” *Id.*, 74 Fed. Reg. 49613.⁵

EPA’s approach, in any event, has no basis in light of the fact that study after study has shown that the substantial improvements in air quality achieved through the Clean Air Act have not only resulted in enormous public health, ecological, and other benefits, but have also been accomplished so efficiently that the economic value of the benefits exceeds by many times the costs of the regulations.

EPA issued the first major report evaluating the Act’s effectiveness in October 1997. Focusing on the traditional “criteria pollutants” – sulphur dioxide (SO₂), nitrogen oxides (NO_x),

⁵ Numerous studies support the conclusion that delay in GHG emission reductions causes increasing damages. See, e.g., Hans J. Schellnhuber et. al., *Solving the Climate Dilemma: The Budget Approach*, GERMAN ADVISORY COUNCIL ON GLOBAL CHANGE 15 (2009), available at http://www.wbgu.de/wbgu_sn2009_en.html (delay will result in almost unachievable reduction requirements); Sir Nicholas Stern, *Stern Review on the Economics of Climate Change* xvii, Cambridge University Press (2006), available at <http://www.sternreview.org.uk> (last visited November 24, 2009) (“[t]he social cost of carbon is likely to increase steadily over time because marginal damages increase with the stock of GHGs in the atmosphere, and that stock rises over time”); Myles Allen et al., *The Exit Strategy*, NATURE REPORTS Vol 3 (May 2009), available at www.nature.com/reports/climatechange (later GHG emission reductions are more risky, expensive and disruptive than earlier reductions).

volatile organic compounds (VOCs), particulate matter (PM), and lead – EPA found that emissions of SO₂ were 60 percent lower, emissions of VOCs 66 percent lower, emissions of NO_x 47 percent lower, emissions of CO 56 percent lower, emissions of PM from electric utilities 93 percent lower, and emissions of PM from industrial processes 76 percent lower in 1990 than they would have been without the CAA.⁶ Emissions of airborne lead had been virtually eliminated.⁷ EPA modeled the impact of the resulting improvements in air quality on human health, including impacts such as respiratory symptoms, hospital admissions, asthma attacks, and chronic sinusitis from exposure to ozone; mortality, bronchitis, hospital admissions, and lost work days from exposure to PM; hospital admissions for congestive heart failure from exposure to CO; respiratory illness from exposure to NO_x; changes in pulmonary function and respiratory symptoms from exposure to SO₂; and mortality, hypertension, coronary heart disease, strokes, and IQ loss from exposure to lead.⁸ EPA also modeled selected welfare effects including changes in crop yields from exposure to ozone, household soiling from PM, and visibility impairment from PM, NO_x and SO₂.⁹

EPA concluded that the economic benefits of CAA implementation, valued in 1990 dollars, range from \$5.6 trillion to \$49.4 trillion with a central estimate of \$22.2 trillion. The costs of compliance with the CAA analyzed by EPA included changes in patterns of industrial production, capital investment, productivity, consumption, employment, and overall economic growth. Using a 5% discount rate, EPA estimated the total costs of the CAA regulations to be \$0.523 trillion. The economic value of the Act's benefits, therefore, was *42 times* greater than its costs.

Subsequent analyses have continued to affirm both the effectiveness and efficiency of the CAA. As summarized recently, “[h]istorically, regulations under the CAA have proven to be effective, flexible, and cost efficient. . . . The Act grounds regulations in science and encourages technological development. It has also served as the basis for comprehensive monitoring and cataloging of national emissions. The Act sets up a public and transparent process, and it fosters coordination between federal agencies and with the states.”¹⁰ In light of these historical facts, there is no basis for EPA's assumption that passing up new source review and Title V permitting for sources emitting less than 25,000 tpy of GHGs is economically justified.

F. EPA May Not Create Exemptions for Major Categories of Emission Sources

An additional flaw in the Tailoring Rule is its assumption that the permitting programs will apply only to sources that are required to report their GHG emissions pursuant to the recently issued GHG reporting rule. Mandatory Reporting of Greenhouse Gases; Final Rule, 74 Fed. Reg. 56260 (October 30, 2009) (“Mandatory Reporting Rule”). While EPA may have some

⁶ EPA, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT: 1970 TO 1990 15-17 (1997), *available at* <http://www.epa.gov/air/sect812/>.

⁷ *Id.*

⁸ *Id.* at 31.

⁹ *Id.* at 32.

¹⁰ I.M. CHETTIAR & J.A. SCHWARTZ, NEW YORK UNIVERSITY SCHOOL OF LAW, THE ROAD AHEAD: EPA'S OPTIONS AND OBLIGATIONS FOR REGULATING GREENHOUSE GASES Report No. 3. (2009), *available at* <http://www.policyintegrity.org/publications/documents/TheRoadAhead.pdf>.

discretion under the Mandatory Reporting Rule to require GHG reporting only by some sources, other Clean Air Act provisions related to NSR, PSD and other provisions provide EPA with no such discretion to exempt whole classes of activities from regulation. *See, e.g.* 42 U.S.C. §§ 7475(a)(1), 7479(1). In short, smokestack emissions of GHGs, even if not subject to reporting under the Mandatory Reporting Rule, are still emissions subject to PSD and other provisions of the Clean Air Act.

Perhaps the most important example of a type of major source of GHG emissions that would be exempted from the permitting programs based on excluding sources not required to report GHGs under the Mandatory Reporting Rule is a biomass-combustion power plant. Currently, these plants are allowed to report their carbon dioxide emissions as “zero” under the assumption that the carbon dioxide emitted by the combustion of biomass is rendered neutral by the re-sequestration of carbon that is presumed to occur in the farm or forest from which the biomass was originally sourced. While some forms of biomass utilization may be viewed as close to carbon neutral when examined at a lifecycle basis over a multi-year timeframe that encompasses re-growth of the feedstock (crops or trees) and re-sequestration of carbon, the actual *emissions* (even if fully offset elsewhere) from a given power plant are still *emissions* of carbon dioxide and other GHGs. As such they fall within 42 U.S.C. §§ 7475(a)(1), 7479(1). Since the actual smokestack emissions of carbon dioxide per unit of energy generated from a biomass power plant can exceed those from a coal-fired plant, and under Department of Energy projections carbon dioxide emissions from biomass-related energy generation in the U.S. may exceed 700 million tons per year by 2020,¹¹ biomass-related emissions cannot be ignored in EPA’s regulatory scheme for GHGs. Unfortunately, the Tailoring Rule does just that.

III. Conclusion

While we are not unsympathetic to EPA’s resource constraints, and while we endorse EPA’s stated intent to avoid any delays in implementing GHG emissions reductions from the largest polluters, the agency should revise the Tailoring Rule consistent with these comments and fully implement of the new source review program as expeditiously as possible.

We appreciate the opportunity to comment on the Tailoring Rule and thank you for your consideration of these comments.

Sincerely,



Vera Pardee
Senior Attorney
Center for Biological Diversity

¹¹ http://www.eia.doe.gov/oiaf/analysispaper/biomass/figure_4.html