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

SOUTHEASTERN LEGAL FOUNDATION, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 10-1131 (and consolidated cases
COALITION FOR RESPONSIBLE REGULATION, INC., et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 10-1073 (and consolidated cases)

RESPONDENT'S OPPOSITION TO MOTION FOR COORDINATION OF CASES AND CROSS-MOTION FOR CONSOLIDATION OF CONSOLIDATED CASE NO. 10-1131 WITH CONSOLIDATED CASE NO. 10-1073

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INTRODUCTION

The two above-captioned sets of consolidated cases consist of, respectively:

A. 26 petitions for review of the "Tailoring Rule" promulgated by Respondent United States Environmental Protection Agency ("EPA"), which specifies how permit requirements for stationary sources of greenhouse gas emissions are to be phased in for purposes of the prevention-of-significant-deterioration ("PSD") and Title V operating permit ("Title V") programs under the Clean Air Act ("CAA" or the "Act") -- promulgated at 75 Fed. Reg. 31,514 (June 3, 2010) and challenged in No. 10-1131 and consolidated cases; and

B. 18 petitions for review of EPA's decision on reconsideration of a 2008 EPA interpretive memo addressing PSD applicability issues related to the Tailoring Rule (the "PSD Reconsideration Decision") -- promulgated at 75 Fed. Reg. 17,004 (April 2, 2010) and challenged in No. 10-1073 and consolidated cases.

Together, the two EPA actions challenged in these petitions are referred to herein as the "Stationary Source Actions," because they both address permitting requirements related to greenhouse gas emissions *solely* from *stationary sources*.

In their "Motion for Coordination of Related Cases" ("Coordination Motion"), a subset of the petitioners in consolidated case Nos. 10-1131 and 10-1073 ("Movant Petitioners") seeks to have these cases designated "complex," and then "coordinated" before a single panel -- but not consolidated -- with other cases pending before this Court relating to *mobile sources* of greenhouse gases. Coordination Motion at 1 & Attach. A.[1] While the Mobile Source Rule cases also

[1] These other cases consist of 17 petitions consolidated under Case No. 09-1322 (challenging EPA's "Endangerment Finding") and 17 petitions consolidated under

pertain to the general issue of greenhouse gas regulation, they involve agency actions that are separate and distinct – in terms of the statutory provisions that govern, the types of sources regulated, the administrative records supporting EPA's actions, and even the agencies involved – from the Stationary Source Actions being challenged in Case Nos. 10-1131 and 10-1073.

EPA agrees with *some* of the proposals in Movant Petitioners' Coordination Motion. First, EPA does not oppose the designation of Case Nos. 10-1131 and 10-1073 as "complex." Furthermore, EPA agrees that the Tailoring Rule and PSD Reconsideration Decision are *directly* related to one another. Because of this relationship, EPA cross-moves to consolidate Nos. 10-1131 and 10-1073, not coordinate them as Petitioners suggest. Finally, EPA *opposes* Movant Petitioners' request to coordinate the Stationary Source cases with the cases challenging the Mobile Source Rules. Movant Petitioners contend that combining all of these challenges to different EPA actions, each of which is admittedly complex by itself, will promote judicial economy. In fact, quite the opposite is true.

Combining the challenges to the two Mobile Source Rules with the challenges to the Stationary Source Actions, each with its individual and extensive

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Case No. 10-1092 (challenging the Greenhouse Gas Motor "Vehicle Rule"). Although EPA is today filing briefs in those cases explaining the differences between those actions which demonstrate that they need *not* be coordinated even with *each other*, for ease of reference EPA refers to them herein collectively as the "Mobile Source Rules."

administrative record, differing issues, different petitioners, and each governed by unique statutory regimes, all before a single panel with overlapping briefing as Movant Petitioners suggest, would create an unworkable morass that will almost certainly impair, rather than promote, judicial economy. For example, Movant Petitioners argue that their approach will allow them to file a single brief, spanning *all the EPA actions* they challenge, in which they will address what they claim to be "the core questions of EPA's legal authority and record support for that authority." Coordination Motion at 16. Yet, they also intend to submit "*separate* briefing for other issues" unique to each rule. Id. at 19 (emphasis in original). Thus, Movant Petitioners' approach would result in more – not less – briefing.[2]

Movant Petitioners' approach would also potentially overwhelm the Court by requiring review of massive, irrelevant records. For instance, Petitioners' approach would require the proposed single panel tasked with reviewing EPA's scientific conclusion that greenhouse gases emitted by motor vehicles endangers human health and welfare, a finding supported by its own substantial administrative record, to also master the massive factual record of the Tailoring Rule, which concerns the wholly separate issue of how to manage the significant

[2] This multi-brief proposal may reveal why Movant Petitioners seek "coordination" but disavow interest in consolidation. If all the cases were consolidated, the petitioners would be encouraged to make their arguments in a single (and likely shorter) joint brief. See D.C. Cir. Handbook at 23.

administrative burdens associated with application of EPA's PSD and Title V permitting programs to stationary sources of greenhouse gases.

The proposed single panel of this Court would be so burdened despite the fact that there is almost no overlap between the legal issues addressed in the Stationary Source Actions, which involves application of the statute that governs the PSD program and Title V permits, and the very separate provisions that govern regulation of mobile sources. For example, the Vehicle Rule cases include challenges to a separate fuel economy standard promulgated by a separate agency (Department of Transportation) under a wholly different statute, which have nothing to do with stationary source requirements under the CAA.

Notwithstanding these burdens, Movant Petitioners insist that coordinated briefing before a single panel is necessary to allow them to argue that EPA should have accounted for issues addressed in the Stationary Source Actions when making some of the other challenged decisions, and vice versa. However, nothing prevents Petitioners from making those arguments *without* any coordination of cases, so long as those issues were addressed in public comments during the rulemaking process of the challenged action. See e.g., 42 U.S.C. § 7607(d)(4)(7)(B). Coordinating all these cases in the manner sought by Movant Petitioners would provide no cure for arguments that were not properly raised and thus preserved during the administrative process.

Similarly, Movant Petitioners' concern about establishing their standing to bring these actions, Coordination Motion at 16-19, also does not justify coordination of all these cases. The evidentiary showing on standing that a petitioner is required to make -- unlike the petitioners' substantive challenge on the merits -- is *not* limited to the administrative record for the particular agency action being challenged. D.C. Cir. R. 28(a)(7). Accordingly, with *or without* coordination, Petitioners will have ample opportunity to support their basis for standing to challenge each of the challenged actions.

BACKGROUND

I. Statutory Background

The PSD program requires pre-construction permitting of new or modified stationary sources of air pollutants as well as implementation of best available control technology ("BACT") when covered stationary sources have the potential to emit pollutants in excess of specific thresholds. 42 U.S.C. §§ 7470-7492. Generally, a "major emitting facility" may not be constructed or modified without first obtaining a permit under the PSD program. 42 U.S.C. § 7475(a). The Act defines a "major emitting facility" as a stationary source that emits or has the potential to emit more than 100 or 250 tons per year ("tpy") (depending on the type of source) of any air pollutant. 42 U.S.C. § 7479(1). The PSD permit requirement can be triggered, inter alia, by emissions of "[a]ny pollutant that otherwise is

subject to regulation under the Act." 40 C.F.R. §§ 52.21(b)(50) (iv). See also id. § 51.166(b)(49)(iv). EPA's "tailoring" of the 100/250 tpy threshold for greenhouse gases through its regulatory definitions is the subject of the Tailoring Rule.

In contrast to the pre-construction permitting of the PSD program, Title V of the Act, 42 U.S.C. §§ 7661-7661f, establishes an *operating* permit program covering stationary sources of air pollutants. Under Title V, all CAA requirements applicable to a particular stationary source are contained in a comprehensive operating permit. The permit requirement applies to, among other sources, any "major source" within the meaning of section 501(2) of the Act, 42 U.S.C. § 7661(2), which includes, inter alia, stationary sources that emit or have the potential to emit 100 tpy of any air pollutant. CAA § 302(j), 42 U.S.C. § 7602(j). The "tailoring" of this 100 tpy threshold through refinement of regulatory definitions also is the subject of the Tailoring Rule.

In a wholly separate Title of the CAA, Congress established a regulatory framework for controlling pollution from *mobile* sources. 42 U.S.C. §§ 7521-7590. Section 202(a)(1), 42 U.S.C. § 7521(a)(1) (emphasis added), authorizes EPA to prescribe regulations establishing standards for "the emission of any air *pollutant* from any class or classes of new motor vehicles or new motor vehicle engines, which in [EPA's] judgment cause, or contribute to, air pollution which

may reasonably be anticipated to *endanger public health or welfare*."[3] Once EPA makes an "endangerment finding," the Act requires EPA to issue corresponding emission standards for new motor vehicles, taking into account specified technological and cost considerations. 42 U.S.C. § 7521(a)(1)&(2).

II. Actions Related to Greenhouse Gases

On October 20, 1999, the International Center for Technology Assessment ("ICTA") filed a petition with EPA seeking regulation of greenhouse gas emissions from motor vehicles. EPA denied the ICTA petition in September 2003, finding that the Agency did not have authority to regulate greenhouse gases to address global climate change, and that even if it did have such authority, the petition still should be denied for a variety of policy reasons. See 68 Fed. Reg. 52,922, 52,923 (Sept. 8, 2003). That decision was eventually overturned by the Supreme Court in Massachusetts v. EPA, 549 U.S. 497 (2007), which ruled that greenhouse gases fit within the definition of "air pollutant" under the Act.

In 2008, EPA published an advanced notice of proposed rulemaking ("ANPR"), laying out a wide variety of issues and options for comment in

[3] The CAA defines "air pollutant" as "any pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air[,]" including any precursors to the formation of such air pollutant. 42 U.S.C. § 7602(g). "Effects on welfare" is defined to include "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to . . . property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being . . . ." 42 U.S.C. § 7602(h).

response to the Supreme Court's decision. 73 Fed. Reg. 44,354 (July 30, 2008). Contrary to Movant Petitioners' contention, see Coordination Motion at 4, this ANPR made no attempt to determine what future rulemakings the Agency would undertake on the wide variety of issues the ANPR raised. In 2009, EPA issued a finding that greenhouse gas emissions from new motor vehicles and engines contribute to air pollution (elevated atmospheric concentrations of greenhouse gases) that may reasonably be anticipated to endanger public health and welfare. 74 Fed. Reg. 66,496 (Dec. 15, 2009) (the "Endangerment Finding").[4]

Because CAA sections 202(a)(1) & (2) require EPA to issue motor vehicle regulations once it makes an endangerment finding as to an air pollutant, in 2010 EPA issued greenhouse gas emission standards for new motor vehicles for model years 2010-2016. 75 Fed. Reg. 25,324 (May 7, 2010) (the "Vehicle Rule"). The Vehicle Rule was promulgated as part of a joint rulemaking with the National Highway Transportation Safety Administration ("NHTSA"), which promulgated corporate average fuel economy ("CAFE") standards as part of the same rulemaking. CAFE standards are promulgated by NHTSA under separate statutory authority in the Energy Policy and Conservation Act of 1975.

[4] Last month, EPA denied petitions seeking reconsideration of the Endangerment Finding. 75 Fed. Reg. 49,556 (Aug. 13, 2010) ("Endangerment Finding Denial of Reconsideration").

Regulation of greenhouse gases emanating from *stationary* sources took a different path. In 2008, EPA issued an interpretive memorandum specifying when air pollutants such as greenhouse gases become "subject to regulation under the Act" for purposes of triggering the PSD program. The Agency ultimately concluded in a 2010 reconsideration of that interpretation that greenhouse gases would become "subject to regulation" under the Act on January 2, 2011, when the limitations on greenhouse gas emissions adopted in the Vehicle Rule actually take effect. 75 Fed. Reg. 17,004 (April 2, 2010) (the "PSD Reconsideration Decision").

With it now clear that greenhouse gases emitted by stationary sources would be regulated under the PSD program and Title V of the CAA as of January 2, 2011, EPA issued the Tailoring Rule. 75 Fed. Reg. at 31,516. As noted, that rule establishes how PSD and Title V permitting and BACT requirements relating to greenhouse gas emissions will be phased in over time and how they will be implemented through state implementation plans ("SIPs") and Title V programs.

III. Challenges to EPA's Greenhouse Gas Actions Pending Before the Court

There are four sets of consolidated cases pending before the Court challenging EPA actions relating generally to greenhouse gases. These include challenges to EPA's: (a) Endangerment Finding -- 17 petitions for review consolidated under Coalition for Responsible Regulation v. EPA, No. 09-1322, and 4 petitions for review of the Endangerment Finding Denial of Reconsideration

consolidated under Coalition for Responsible Regulation v. EPA, No. 10-1234; (b) Vehicle Rule -- 17 petitions for review consolidated under Coalition for Responsible Regulation v. EPA, No. 10-1092; (c) PSD Reconsideration Decision -- 18 petitions for review consolidated under Coalition for Responsible Regulation v. EPA, No. 10-1073; and (d) Tailoring Rule -- 26 petitions of review consolidated under Southeastern Legal Foundation v. EPA, No. 10-1131.

ARGUMENT

I. COORDINATION OF THE CHALLENGES TO EPA'S STATIONARY SOURCE ACTIONS, WITH THE CHALLENGES TO ITS MOBILE SOURCE RULES, IS UNWARRANTED

Although each of the EPA actions that is the subject of Movant Petitioners' coordination motion involves *some* aspect of EPA's efforts to address greenhouse gas emissions under the CAA, such a broad relationship does not form a basis for coordination before a single panel of the Tailoring Rule and Reconsideration Decision cases with the challenges to the Endangerment Finding, the Endangerment Finding Denial of Reconsideration, or the Vehicle Rule.

A. Petitioners' Coordination Proposal Will Impair, Rather Than Promote, Judicial Economy

Given that each of the challenged EPA actions is already complex in its own right, it is hard to see how coordination as Movant Petitioners propose could do anything but make the Court's (and the parties') task markedly *less* efficient. First, should the common briefing desired by Movant Petitioners be allowed, there will

be a significant risk of inappropriate confusion of issues, legal arguments, and record citations. Significant portions of opposition briefs (and even motions to strike) are likely to be devoted to identification of improper record citations from other rulemakings, misapplied to support arguments made for a case to which that record does not even apply. Indeed, allowing common briefing on all four sets of cases is inconsistent with the express direction in the CAA that judicial review for any agency action is to be based "exclusively" on the administrative record for that particular action. 42 U.S.C. § 7607(d)(7)(A). This is true regardless of whether the challenged action is a rule subject to review under 42 U.S.C. § 7607, like the Tailoring Rule, or a non-rulemaking, like the PSD Reconsideration Decision. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985).

Second, the logistical burden that Movant Petitioners' proposal would impose on the panel selected to oversee all four sets of cases would be enormous. There presently are 82 petitions for review collectively in these four sets of cases, with more petitions likely to be filed in the coming weeks challenging EPA's Endangerment Finding Denial of Reconsideration, and there are numerous intervenors and amici in each set of cases. Merely keeping the parties and issues straight will be a monumental task.[5] Moreover, as outlined supra, Petitioners'

[5] For instance, the Tailoring Rule case involves at least eight more petitions than any of the other three consolidated cases and hence more (and different) parties. Additionally, some petitioners have intervened on behalf of EPA to simultaneously

expression of the need for both coordinated *and* separate briefing likely will increase, not decrease, briefing to the Court.

Finally, the administrative records *and* legal issues presented in each of these challenges are almost wholly separate and distinct from one another. For instance, the Tailoring Rule does not concern application of the Endangerment Finding or the Vehicle Rule to stationary sources. It is about the manner in which the PSD and Title V permitting and technology requirements for stationary sources are phased-in, pursuant to independent provisions of the Act. See 75 Fed. Reg. at 31,516-518 ("Overview of the Final Rule"). The massive record of the Tailoring Rule, which includes over 400,000 written comments, id. at 31,518, involves primarily detailed analyses of the administrative burdens and absurd results that would occur for stationary sources and permitting authorities under the PSD and Title V programs if the application of these programs is not tailored to address the unique qualities of greenhouse gases -- wholly different from the science-based record of the Endangerment Finding or the emission-standard-based record of the Vehicle Rule. The record of the PSD Reconsideration Decision is equally dissimilar from the records of the Endangerment Finding and Vehicle Rule.

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support certain EPA findings. Coordination with the Mobile Source cases thus is likely to lead to confusion and complication merely just to assess which petitioners, challenge which parts, of which rules.

Similarly, the legal issues raised in the challenges to the Tailoring Rule and PSD Reconsideration Decision involve application of congressional intent and regulatory authority relating to statutory provisions applicable strictly to stationary sources. Indeed, Petitioners' Non-binding Statements of Issues reveal that the bulk of the issues to be addressed in the Tailoring Rule case are based solely on the record and statutory analysis unique to the Tailoring Rule and the PSD and Title V programs applicable only to stationary source programs. A small sampling of these issues includes: whether PSD applies to pollutants for which there are no National Ambient Air Quality Standards ("NAAQS"), Dkt. No. 12633323 at 3 (Issue Statement of Chamber of Commerce of the United States of America, Case No. 10-1199); whether EPA's reliance on the "absurd results" and "administrative necessity" doctrines in the Tailoring Rule is unlawful, Dkt. No. 1263261 at 2 (Issue Statement of Landmark Legal Foundation, Case No. 10-1208); whether requiring States to revise SIPs to conform to the Tailoring Rule in the timeframes contemplated is unlawful, Dkt. No. 1263238 at 2 (Issue Statement of Alabama, North Dakota, South Dakota, Mississippi, South Carolina and Nebraska, Case No. 10-1211); whether EPA erred by failing to produce studies of the economic consequences of regulation of stationary source greenhouse gas emissions under the PSD and Title V permit programs, Dkt. No. 1263194 at 2 (Issue Statement of National Mining Association, Case No. 10-1201); whether EPA's determinations

as to the timing of PSD and Title V requirements for greenhouse gases was unlawful, Dkt. No. 1263183 at 4 (Issue Statement of Utility Air Regulatory Group, Case No. 10-1212); and whether EPA's Tailoring Rule unlawfully subjects stationary greenhouse gas sources to preconstruction PSD permits regardless of whether State SIPs define greenhouse gases as a regulated pollutant, Dkt. 1263070 at 3 (Issue Statement of Coalition for Responsible Regulation, et al., Case No. 10-1132).[6] Asking the same panel that deals with these PSD, Title V, SIP, and NAAQS issues – all dealing with stationary sources – to also consider the separate records and legal issues dealing with the science-based Endangerment Finding and the Vehicle Rule emission standards, would lead to significant confusion and considerable judicial inefficiencies.

B. Petitioners Will Not be Precluded From Making Legal Arguments Absent Coordination of the Cases

As noted, the Endangerment Finding is primarily a science-based decision focused generally on the question of whether emissions of greenhouse gases from motor vehicles contribute to air pollution which may reasonably be anticipated to

[6] This is undoubtedly why a number of Petitioners believe that the issues raised in the Mobile Source cases are *not* substantially related to the issues in the Stationary Source cases. See, e.g., Docketing Statements of Clean Air Implementation Project (Case No. 10-1216), Energy-Intensive Manufacturers' Working Group (Case No. 10-1206), Landmark Legal Foundation (Case No. 10-1208), and National Alliance of Forest Owners (Case No. 10-1209), all answering "No" to the question of whether the Tailoring Rule case – the last of the cases filed – "involve[s] *substantially the same issues* as" any case pending before the Court.

endanger public health or welfare. Legally, this inquiry is based on the express standards set forth in section 202(a)(1) of the Act, 42 U.S.C. § 7521(a)(1), and the guidance provided by the Supreme Court in Massachusetts. See Massachusetts, 549 U.S. at 533-35. Although promulgation of the Endangerment Finding created a duty on EPA's part to issue greenhouse gas emission standards, as EPA did in the Vehicle Rule, the substance of the Vehicle Rule addresses an entirely different set of issues than the Endangerment Finding, i.e., the question of the appropriate emission standards to set for motor vehicle greenhouse gas emissions given the environmental, cost, and technological factors set forth in the statute. See CAA § 202(a)(2), 42 U.S.C. § 7521(a)(2). As EPA explains in separate filings today in those cases, the Endangerment Finding and Vehicle Rule cases are distinct, separate actions that should not be coordinated with each other, let alone with the wholly distinct challenges to the Stationary Source Actions.

As a general matter, *any* rule establishing emission control requirements for an air pollutant means that the air pollutant would become "subject to regulation" for purposes of the PSD and Title V programs at the time the control requirement takes effect. The PSD Reconsideration Decision provided EPA's view as to whether the Vehicle Rule had this legal effect for greenhouse gases and *precisely* when the Vehicle Rule would take effect. The Tailoring Rule establishes rules for phasing-in PSD and Title V permitting requirements related to greenhouse gas

emissions in a manner that is administratively feasible and consistent with Congress' intent. 75 Fed. Reg. at 31,549-50.

Based almost solely on the automatic, statutory "triggering" effect of the first greenhouse gas control requirements – here effectuated through the Vehicle Rule -- on PSD and Title V permit requirements, Petitioners argue that the Stationary Source cases must be coordinated and briefed together with their challenges to the Endangerment Finding and Vehicle Rule cases. However, aside from the above-described "triggering" effect, which arises by independent and automatic operation of the Act, the challenged Stationary Source Actions address an *entirely* separate set of issues than the Endangerment Finding and the Vehicle Rule.

Movant Petitioners nevertheless argue that because the Supreme Court's decision in Massachusetts purportedly required EPA to take into account collateral legal and regulatory implications when, for instance, making the Endangerment Finding (a substantive claim that EPA disputes), all these cases need to be coordinated for Petitioners to establish how EPA failed to satisfy this supposed requirement. Nothing, however, prevents Petitioners from making this argument *without* any coordination of the cases, to the extent they raised these issues in public comments on the Endangerment Finding. Indeed, allowing Petitioners to file coordinated briefs that cite to multiple administrative records, would allow

them to impermissibly sidestep deficiencies in the record for a specific rule that would otherwise preclude them from asserting certain arguments under these provisions. See p. 11 supra.

Finally, the lack of coordination will not hinder any Petitioners' ability to establish standing, as Movant Petitioners assert. Coordination Motion at 16-19. This Court's rules make clear that a petitioner is not limited to the administrative record in making its required evidentiary showing to support its standing. D.C. Cir. R. 15(c)(2), 28(a)(7). With or without coordination, Movant Petitioners not only are allowed to, but are *required* to, present whatever evidence they believe supports their standing, whether or not that evidence is present in the record for the rule being challenged.

II. THE COURT SHOULD CONSOLIDATE THE TWO SETS OF STATIONARY SOURCES CASES

While there is no justification for coordination of the Mobile Source cases with the Stationary Source cases or even with each other, there is ample reason to *consolidate* – not merely coordinate – the Tailoring Rule and PSD Reconsideration Decision cases. These two sets of cases should be consolidated because: (1) the Tailoring Rule promulgates regulatory language codifying the specific interpretation adopted by EPA in the PSD Reconsideration Decision; (2) the Petitioners in both sets of cases are expected to make the same primary statutory arguments; and (3) each action addresses separate but corresponding bases for

rejecting the imposition of grandfathering provisions, which according to Petitioners' Non-binding Statements of Issues, they intend to challenge.

The PSD Reconsideration Decision is an interpretive document. As discussed above, it describes EPA's interpretation of applicable regulations and the Clean Air Act on the question of when any air pollutant, and greenhouse gases in particular, becomes "subject to regulation" under the Act, and therefore subject to PSD and Title V permit requirements. 75 Fed. Reg. at 17,006-09. The Tailoring Rule builds on the foundation of the Reconsideration Decision by establishing a schedule for phasing in PSD and Title V permit requirements for greenhouse gases once they are triggered. Most importantly, the Tailoring Rule expressly codifies the principal EPA interpretation of the Clean Air Act announced in the PSD Reconsideration Decision. 75 Fed. Reg. at 31,582 & 31,606.

Additionally, based on their comments on EPA's actions, Petitioners are expected to emphasize the same statutory arguments in each of the two sets of cases, including challenges based exclusively on the application of certain PSD provisions to stationary sources. See, e.g., 75 Fed. Reg. at 31,560-62, describing multiple petitioners' argument that the CAA requires EPA to base applicability of the PSD permitting requirements on the level of emissions of pollutants for which EPA has promulgated NAAQS and designated the area where the source is located as in attainment with that standard or "unclassifiable." Indeed, because the

Tailoring Rule codifies the final determination of the PSD Reconsideration Decision, it is not surprising that many of Petitioners' objections to the PSD Reconsideration Decision are repeated in the Tailoring Rule case. See Non-binding Statements of Issues of all Petitioners in both sets of cases, many raising identical challenges to both EPA actions.

Finally, in both the PSD Reconsideration Decision and the Tailoring Rule, EPA responded to public comments that requested that EPA promulgate transition or grandfathering provisions that would allow sources with pending applications or certain types of existing permits to avoid having to address the greenhouse gas requirements after they take effect. 75 Fed. Reg. at 17,021-22; 75 Fed. Reg. at 31,592-95. The PSD Reconsideration Decision addressed one aspect of this overall issue and the Tailoring Rule addressed the same and additional related aspects of this question that were raised by additional public comments on that action. Since Petitioners are expected to attack EPA's decision not to promulgate transition provisions of this nature in both actions, judicial economy would be best served by the Court hearing these argument in a single, consolidated case.[7]

[7] The necessity for the Court to consider this PSD grandfathering issue is but one final example of why, although the Stationary Source actions should be consolidated, they should not be coordinated with cases dealing with vehicle regulations and the scientifically based Endangerment Finding.

CONCLUSION

For the foregoing reasons, EPA: (1) does not oppose designation of Case Nos. 10-1131 or 10-1073 (or Nos. 09-1322, 10-1092 and 10-1234), each individually as "complex;" (2) opposes the remainder of the relief sought in the Coordination Motion; and (3) cross-moves for consolidation of the two consolidated sets of greenhouse gas stationary source cases, No. 10-1131 (the Tailoring Rule) and 10-1073 (the PSD Reconsideration Decision).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENT'S OPPOSITION TO MOTION FOR COORDINATION OF CASES AND CROSS-MOTION FOR CONSOLIDATION OF CONSOLIDATED CASE NO. 10-1131 WITH CONSOLIDATED CASE NO. 10-1073, 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 for petitioners, who have registered with the Court's CM/ECF system.

Date: September 10, 2010

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