ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COALITION FOR RESPONSIBLE REGULATION, INC., ET AL., **Petitioners,** **v.** **UNITED STATES ENVIRONMENTAL PROTECION AGENCY,** **Respondent.**	**No. 09-1322 (filing in consolidated case 10-1041)**
COALITION FOR RESPONSIBLE REGULATION, INC., ET AL., **Petitioners,** **v.** **UNITED STATES ENVIRONMENTAL PROTECION AGENCY,** **Respondent.**	**No. 10-1073 (filing in consolidated case 10-1128)**
COALITION FOR RESPONSIBLE REGULATION, INC., ET AL., **Petitioners,** **v.** **UNITED STATES ENVIRONMENTAL PROTECION AGENCY,** **Respondent.**	**No. 10-1092 (filing in consolidated case 10-1182)**

STATE OF TEXAS'S MOTION FOR STAY OF EPA'S ENDANGERMENT FINDING, TIMING RULE AND TAILPIPE RULE

The State of Texas ("Texas" or the "State") hereby moves this Court, pursuant to Federal Rule of Appellate Procedure 18, to stay implementation by respondent United States Environmental Protection Agency ("EPA") of its *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Finding"), *Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010) ("Timing Rule"), and *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010) ("Tailpipe Rule"). The Endangerment Finding, Timing Rule, and Tailpipe Rule (collectively, the "GHG Rules") are unlawful. If they are allowed to take effect, they will cause Texas immediate and irreparable harm, without countervailing benefit to third parties or to the public interest.

I. INTRODUCTION

The three interlocking GHG Rules purport to trigger regulation of greenhouse gases ("GHGs") at stationary sources. But the three rules—separately and together—suffer from serious legal infirmities and will not

survive judicial review. And taken together, this regulatory leviathan imposes immediate, serious, and irreparable harm on Texas and its co-petitioners and does so with little benefit to third-parties or the public interest. A stay is proper because this Court has the power to craft relief that preserves what little benefit flows from these rules, while avoiding the serious and irreparable harm resulting to the State. Texas requested that EPA stay the implementation of the GHG Rules pending judicial review. Letter from J. Reed Clay Jr., Special Assistant and Senior Counsel to the Attorney General, to Hon. Lisa Jackson, Administrator, EPA, Aug. 30, 2010 (Attachment 1). However, EPA has not acted on the request. Accordingly, the Court should stay the GHG Rules pending its review on the merits.

II. BACKGROUND

A. The CAA's Title I PSD and Title V Permitting Programs

EPA regulates emissions from stationary sources under Titles I and V of the federal Clean Air Act ("CAA" or the "Act"). Title I of the Act requires preconstruction permits for any new major source of, or major modification of an existing source of, certain air pollutants. Title V of the Act requires that major sources of specific air pollutants obtain operating permits.

The Title I preconstruction permitting program is known as the New Source Review ("NSR") program. In areas that have attained the national ambient air quality standard ("NAAQS") for a subject pollutant, or for which there is no standard, the NSR permitting requirements are known as the prevention of significant deterioration ("PSD") program. Although there is no NAAQS for GHGs, preconstruction permitting for GHGs would—according to EPA's interpretation—still fall under the PSD program. To obtain a PSD permit, a source must comply with the applicable PSD requirements that are set forth in Texas's state implementation plan ("SIP"), including employing the "best available control technology" ("BACT") for the subject air pollutant.

Unlike NSR preconstruction permits, which impose emission control requirements for PSD sources, Title V operating permits generally impose no additional substantive requirements on the permittee. Instead, the Title V permits are intended to collect all regulatory requirements relating to air emissions at the site. The Texas Commission on Environmental Quality (TCEQ) issues two types of Title V permits: site operating permits ("SOPs"), which are tailored to a particular site, and general operating permits ("GOPs"), which contain uniform conditions that cover all sites in a

defined class. Processing applications for SOPs is far more labor intensive than for GOPs.

B. EPA's Greenhouse Gas Regulations

EPA has recently undertaken rulemaking that would vastly expand existing air permitting programs to control GHGs at stationary sources. In its Endangerment Finding, EPA determined that motor vehicle emissions "contribute" to what it has defined as a single air pollutant—the aggregate group of "six-well mixed greenhouse gases" (CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6)—and that this pollutant endangers public health and welfare. Endangerment Finding, 74 Fed. Reg. 66,496.

Following the Endangerment Finding, EPA and the National Highway Traffic Safety Administration (NHTSA) issued a joint final rule that requires motor vehicle manufacturers to meet a combined average fuel economy (CAFE) level in order to satisfy both EPA's emissions standards and NHTSA's economy standards. Tailpipe Rule, 75 Fed. Reg. 25,324, 25,330.

EPA's Timing Rule (also known as the PSD Triggering Rule) provides that a pollutant becomes "subject to regulation" for purposes of federal PSD and Title V permitting programs when it is subject to control under the CAA or its implementing regulations. 75 Fed. Reg. 17,004. This includes, for example, GHGs regulated under the Tailpipe Rule. *Id.* at

17,007. The GHG control requirements in the Tailpipe Rule take effect on January 2, 2011. Therefore, EPA has concluded that stationary sources of GHGs become subject to regulation under the PSD and Title V permitting programs on January 2, 2011. *Id*.

The CAA's PSD and Title V permitting requirements are only triggered for stationary sources that emit more than 100 or 250 tons per year of *any* air pollutant. *See* 42 U.S.C. §§ 7475(a), 7479(1), 7602(j), 7661(2) & 7661a(a). Consequently, EPA's erroneous interpretation of the CAA under the Timing Rule would lead to millions of small sources becoming subject to the burdensome and costly PSD and Title V permitting programs, at a cost to local and state permitting authorities nationwide in excess of $20 billion per year. *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31.540, Table V-1 (June 3, 2010) (the Tailoring Rule). Even the EPA admits this result is absurd. *Id*. at 31,541.

But rather than opt for another more reasonable interpretation of "subject to regulation"—and one that both is true the CAA and avoids these absurd results—EPA instead sought to bypass a democratically elected Congress and administratively amend the CAA when it finalized its *Prevention of Significant Deterioration and Title V Greenhouse Gas*

Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) ("Tailoring Rule"). But, this proposed "solution" to a problem of EPA's own creation affirmatively contradicts the plain language of the CAA and is thus unlikely to survive judicial review.

Specifically, the Tailoring Rule would raise the PSD and Title V applicability thresholds for GHG sources to 100,000 tpy or, for purposes of PSD, modifications with net increases of 75,000 tpy. Under the Tailoring Rule, sources already subject to the PSD and Title V programs for other pollutants would become subject to GHG regulation on January 2, 2011. This would include GHG BACT requirements for projects that increase net emissions of GHGs by 75,000 tpy or more. All other sources that exceed the GHG thresholds would become regulated on July 1, 2011. 75 Fed. Reg. at 31,516.

In its double-time march to regulate GHGs, EPA has recently proposed two additional rules relating to state and federal implementation plans for the four GHG rules. *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 (September 2, 2010) (the "SIP Call"); *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 (September 2, 2010) (the "FIP Rule").

The proposed SIP Call identifies thirteen states, including Texas, that lack authority to issue PSD permits in conformance with the Tailoring Rule's requirements. 75 Fed. Reg. 53,892. It finds their respective SIPs "substantially inadequate" and calls on those states to submit SIP revisions to correct the inadequacy within 12 months of the rule becoming final. *Id*. at 53,901-02. Absent such revisions, EPA will impose a federal implementation plan ("FIP") (such as the one proposed in the FIP Rule) and will assume permitting authority for GHGs in those states. *Id*. at 53,896.

Under the proposed SIP Call, a state may elect a deadline for submitting corrective SIP revisions that is shorter than the full 12 months. *Id*. at 53,901-02. The proposal contemplates deadlines as short as three weeks. *Id*. at 53,896. EPA explains that the purpose of establishing a shorter deadline is to ensure that a FIP is available to prevent a gap in PSD permitting. *Id*. at 53,901. For example, rather than waiting a full year before EPA undertakes to federalize the GHG permitting program, it may do so in a matter of weeks for those states that elect a shorter deadline. *Id*.

III. ARGUMENT

In deciding whether to grant Texas's motion for a stay of EPA's GHG rules, this Court must weigh the following factors: (1) whether Texas has demonstrated a substantial likelihood of success on the merits, (2) whether Texas would suffer irreparable harm if a stay is not granted, (3) the potential harm to other parties if a stay is granted, and (4) the public interest. D.C. Cir. R. 18(a). As shown below, each of these factors weighs heavily in favor of a stay.

A. Texas Will Prevail on the Merits

Under the CAA, the Court may reverse any EPA rule that is found to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, limitations, or short of statutory right; or (D) without observance of procedure required by law if (i) such failure to observe such procedure is arbitrary and capricious," the objection to the procedural error was raised with reasonable specificity during the public comment period, and if it there is a substantial likelihood the rule would have been significantly changed if the procedural errors had not been made. 42 U.S.C. § 7607(d)(9). As

described below, each of EPA's GHG rules will be struck down under that standard. *Id*.[1]

1. The Endangerment Finding Violates the CAA

EPA initiated its endangerment finding pursuant to CAA § 202(a), which concerns emissions standards for new motor vehicles. 42 U.S.C. § 7521(a). Under § 202(a), EPA must prescribe standards for "the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [its] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id*. Thus, if EPA determines that it is reasonably likely that a pollutant from new motor vehicles will endanger public health or welfare, it must prescribe emission standards for that pollutant. *Id*.

EPA's Endangerment Finding is legally flawed in at least three ways. First, the endangerment finding was arbitrary because EPA did not define or apply any standards or criteria by which to judge endangerment. Second, EPA did not exercise its own judgment regarding the danger of GHGs and climate change, but rather relied on the judgment and conclusions of outside,

[1] This motion addresses three of EPA's GHG regulations—the Endangerment Finding, Tailpipe Rule, and Timing Rule. The Tailoring Rule is addressed in a separate, concurrent motion. Texas's Motion for a Stay of Greenhouse Gas Tailoring Rule, *Texas v. EPA*, No. 10-1222, consolidated with No. 10-1200 (September 15, 2010).

unaccountable groups. Finally, EPA's Endangerment Finding under CAA § 202(a)—which the CAA intends to concern new motor vehicle emissions—primarily includes gases that are either not emitted *at all* from motor vehicles, or emitted only in insignificant amounts.

a. EPA's Endangerment Finding Is Arbitrary Because It Does Not Identify or Apply Any Standards by Which to Judge EndangermentBy GHGs Emissions or Climate Change.

In its finding that "elevated atmospheric concentrations of the well-mixed greenhouse gases may be reasonably anticipated to endanger the public health and welfare," Endangerment Finding, 74 Fed. Reg. 66,496, 66,523, EPA specifically avoided determining what "atmospheric concentrations" of GHGs endanger public health or welfare. *See id.* at 66,523 (claiming that EPA is not required to "identify a bright line, quantitative threshold above which a positive endangerment finding can be made"); *id*. at 66,524 (explaining that EPA "has not established a specific threshold metric for each category of risk and impacts"). EPA also based its endangerment determination on the risks of climate change without specifying what rate or type of climate change endangers public health or welfare. *See id.* at 66,518 (asserting that absent "substantial and near-term efforts to significantly reduce emissions, atmospheric levels of greenhouse gases will [] continue to climb, and thus lead to ever greater rates of climate

change"). Nor did EPA even attempt to determine whether reducing GHG emissions would have any impact on climate change. *Id.* at 66,515 (explaining that "this action does not attempt to assess the impacts of any future regulation"). At bottom, EPA's endangerment finding is no more than an amorphous conclusion that anthropogenic GHG emissions lead to dangerous climate change.

EPA's judgment in making endangerment determinations is bound by "reasonable limits." *Ethyl Corp. v. EPA*, 541 F.2d 1, 18 and n.32 (D.C. Cir. 1976). Without scientifically grounded standards, like acceptable atmospheric GHG thresholds and climate-change rates, any endangerment finding is arbitrary and therefore unreasonable, except perhaps a determination that *all* GHG emissions and *all* climate change endangers public health or welfare. EPA did not reach that extreme conclusion, and for good reason: GHGs are emitted by humans, and global cooling is a form climate change that EPA apparently supports.

Judgment without standards is no more than preference, and that is precisely the approach the Supreme Court rejected in *Massachusetts v. EPA*. The Court explained that EPA's preferences regarding GHGs are "irrelevant" because the "statutory question is whether sufficient information exists to make an endangerment finding." *Massachusetts v. EPA*, 549 U.S.

497, 534 (2007). Failing to define standards or thresholds by which to judge whether GHG emissions or climate change endanger public health or welfare reduced EPA's judgment on endangerment to simply a preference. Once again, EPA has not answered the statutory question of whether sufficient information—in this case, specific thresholds of GHG emissions and/or climate change above which health or welfare are endangered—exists to make an endangerment finding. Accordingly, the Endangerment Finding was arbitrary. *Id*.; *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (explaining that an agency decision is arbitrary when it "entirely failed to consider an important aspect of the problem").

b. EPA Impermissibly Delegated Its Statutory Authority to Outside Entities.

EPA also violated the CAA when it delegated its judgment regarding GHGs and climate change to outside groups, which also might explain EPA's failure to determine endangerment thresholds for GHGs and climate change. Congress empowered EPA to decide whether, *in its judgment*, pollutants emitted from motor vehicles endanger public health and welfare. 42 U.S.C. § 7521(a)(1). But rather than independently assess the data on GHGs and climate change, as required by the CAA, EPA impermissibly delegated its judgment to outside organizations.

By its own admission EPA placed "primary and significant weight on the[] assessment reports" of the Intergovernmental Panel on Climate Change ("IPCC"), the U.S. Global Change Research Program ("USGCRP"), and the National Research Council ("NRC") in making the endangerment finding. *Endangerment* Finding, 74 Fed. Reg. at 66,511. And rather than assessing the actual scientific data, these reports served as EPA's "primary scientific and technical basis" for its endangerment decision. *Id.* at 66,510; *see also* EPA Technical Support Document for Endangerment Finding (TSD) (Dec. 7, 2009), available at http://www.epa.gov/climatechange/endangerment/downloads/Endangerment%20TSD.pdf (explaining that the document's data and conclusions "are primarily drawn from the assessment reports of the Intergovernmental Panel on Climate Change (IPCC), the U.S. Climate Change Science Program (CCSP), the U.S. Global Change Research Program (USGCRP), and the National Research Council (NRC)") (last visited Sept. 9, 2010). However, to avoid an arbitrary decision, "*the agency* must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)) (emphasis added). EPA failed to do so here.

Federal administrative agencies generally may not delegate their authority to outside parties. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004). An agency may look to outside groups for advice and policy recommendations, as EPA does in proposed rulemakings, *e.g*. Advanced Notice of Proposed Rulemaking for Endangerment Finding, 73 Fed. Reg. 44,354 (July 30, 2008), but delegation is improper because "lines of accountability may blur, undermining an important democratic check on government decision-making." *U.S. Telecom* Ass'n, 359 F.3d at 565-56, 58. Because outside sources do not necessarily "share the agency's 'national vision and perspective,'" the goals of the outside parties may be "inconsistent with those of the agency and the underlying statutory scheme." *Id*.

EPA's wrongful delegation in this case powerfully illustrates those dangers. EPA relied on the judgment of a number of outside groups, but the Intergovernmental Panel on Climate Change's Fourth Assessment Report: Climate Change 2007 ("IPCC Report") was accorded special weight. Not only did EPA cite it more often than the others, but the USGCRP—another of EPA's major sources—also relied heavily on the IPCC Report for its "own" findings. *See Endangerment* Finding. 74 Fed. Reg. at 66,511 (noting that the "USGCRP incorporates a number of key findings from the [IPCC

Report]" including "the attribution of observed climate change to human emissions of greenhouse gases, and the future projected scenarios of climate change for the global and regional scales"). The InterAcademy Council ("IAC") explained the IPCC's assessment and reporting process in a recent review, noting that over "a thousand volunteer scientists from around the world . . . evaluate the available information on climate change and draft and review the assessment reports." INTERACADEMY COUNCIL, CLIMATE CHANGE ASSESSMENTS, REVIEW OF THE PROCESSES AND PROCEDURES OF THE IPCC, at 7 (Aug. 30, 2010), available at http://reviewipcc.interacademycouncil.net/report.html (visited Sept. 1, 2010). As the IAC Report explained, the "IPCC authors must rely on their subjective assessments of the available literature to construct a best estimate and associated confidence levels" with respect to climate change predictions. IAC Report at 27. Thus, EPA delegated its statutory judgment on GHGs and climate change to unaccountable volunteer scientists spread across the globe and unchecked by the American electorate.

EPA justified its delegation of its endangerment judgment primarily on the basis that the research in the assessment reports adhered to "high and exacting standard of peer review, and synthesizes the resulting consensus view of a large body of scientific experts across the world." Endangerment

Finding, 74 Fed. Reg. at 66,511. However, the IAC's independent study concluded that the IPCC did not live up to those high standards. *See also*, *e.g.*, Jeffrey Ball, *Climate Panel Faces Heat*, THE WALL STREET JOURNAL, Aug. 31, 2010, at A1 (explaining that "[a]n independent investigation called for 'fundamental reform'" of the IPCC because its 2007 report—upon which EPA heavily relied—"played down uncertainty about some aspects of global warming," among other things).[2]

Due to the flaws and weaknesses it discovered, the IAC Report calls for "fundamental changes" in the IPCC's processes and management structure. IAC Report at 51. In particular, the IAC Report noted that the review process for ensuring the quality of the IPCC's assessment reports needed strengthening, and that work was needed to ensure that "controversial issues are reflected adequately in the report." *Id.* at 52.

One of the most important revelations of the IAC Report was its finding that the IPCC failed to adequately convey the uncertainty in climate change, which resulted in some statements "that are assigned high

[2] Among the most glaring errors in the IPCC Report was its prediction that the Himalayan glaciers could disappear by 2035, IPCC Report, Working Group II, ch. 10.6.2 (2007). That assessment was exposed as scientifically unfounded, and was included in the IPCC Report for the purpose of influencing policy. David Rose, *Glacier scientist: I knew data hadn't been verified*, DAILY MAIL (London), Jan. 24, 2010, http://www.dailymail.co.uk/news/article-1245636/Glacier-scientists-says-knew-data-verified.html (last visited Sept. 1, 2010).

confidence, but are based on little evidence." *Id*. Specifically, the IAC Report noted that the certainty expressed in the IPCC Report for the impact of rising sea levels did not reflect "the weak evidentiary basis for these statements." *Id.* at 33. This is especially problematic in this case because for EPA, the "evidence concerning *adverse impacts* in the areas of water resources and *sea level rise* and coastal areas provides the clearest and *strongest support for an endangerment finding*." Endangerment Finding, 74 Fed. Reg. at 66,498 (emphasis added). By delegating its judgment on climate science to the IPCC and others, EPA exposed its conclusions to the errors and biases of unaccountable volunteer scientists, and undermined the validity of the Endangerment Finding.

Another problematic consequence of EPA's unlawful delegation is that the underlying scientific data regarding GHGs and climate change is not in the administrative record, in violation of the CAA. *See* 42 U.S.C. § 7607(d)(3) ("All data, information, and documents . . . on which the proposed rule relies shall be included" in the rulemaking docket.). Moreover, EPA's omission deprives the court of its ability to meaningfully review the process and the data underlying the Endangerment Finding. 42 U.S.C. § 7607(d)(7)(A) (limiting the "record for judicial review" to a narrow set of information, including the information in the rulemaking docket). "All

data, information, and documents . . . on which the proposed rule relies shall be included" in the rulemaking docket.); *see also Nat'l Welfare Rights Org. v. Mathews*, 533 F.2d 637, 648 (D.C. Cir. 1976) (explaining that "judicial review is meaningless where the administrative record is insufficient to determine whether the action is arbitrary and capricious"). In sum, EPA's delegation was not only illegal, it was unreasonable, too.

c. EPA's Endangerment Finding Primarily Included Gases Which Are Not Emitted by Motor Vehicles in Any Significant Amount.

The Endangerment Finding is also arbitrary, and EPA failed to abide by the CAA, because four of the six gases it deemed to endanger public health or welfare under § 202(a) are not emitted by new motor vehicle emissions in any significant amount. Two of the gases (hydrofluorocarbons and hexafluoride) are not emitted *at all* by new motor vehicles. Endangerment Finding, 74 Fed. Reg. at 66,538 (acknowledging that "Section 202(a) source categories emit" only four of the six GHGs in the Endangerment Finding). Two others (nitrous oxide and methane) "represent less than one percent of overall vehicle greenhouse gas emissions from new vehicles." Tailpipe Rule, 75 Fed. Reg. at 25,396. Paradoxically, EPA even acknowledged in the Endangerment Finding that emissions of these two

gases do not endanger the public health or welfare, but still decided to subject them to regulation. *Id.* at 25,421.

EPA justified its inclusion of these four gases in its Endangerment Finding based on their shared attributes, 74 Fed. Reg. at 66,516-17, baldly asserting that "it is not necessarily the source category being evaluated for contribution that determines the reasonableness of defining a group of air pollutant based on the shared attributes of the group," *id.* at 66541. EPA's reasoning elevates a "shared attributes" determination above the plain text and structure of CAA § 202(a), which limits consideration of endangerment—and regulation—to emissions from new motor vehicles. 42 U.S.C. § 7521(a)(1) (requiring regulation of motor vehicle emissions that EPA determines endanger public health or welfare). Accordingly, EPA's inclusion of four of the six gases in its endangerment finding violated the CAA.

2. The Tailpipe Rule Is Unlawful.

The Tailpipe also violates the CAA, and will be struck down when reviewed on the merits. Not only does the Tailpipe Rule rest upon a legally flawed Endangerment Finding—and without a proper endangerment finding there is no legal basis for the regulation of motor vehicles under CAA § 202(a)—but it also suffers from to other, independent legal defects.

a. EPA Failed to Consider the Impact of the Tailpipe Rule.

EPA failed to comply with the CAA when it refused to consider the compliance costs and other impacts of the Tailpipe Rule and the Endangerment Finding, upon which the Tailpipe Rule depends. Congress intended EPA to consider the costs of compliance when making endangerment and subsequent regulation decisions under § 202(a), as is evident in § 202(a)(2), which declares that any "regulation prescribed under [§ 202(a)(1)]" shall take effect only after the EPA gives "appropriate consideration to the cost of compliance," among other things. 42 U.S.C. § 7521(a)(2); *see also id.* § 7521(b)(1)(C) (permitting EPA to promulgate regulations under § 202(a)(1) to revise emissions standards after "*taking costs, energy, and safety into account*") (emphasis added). But EPA ignored these legal mandates.[3]

[3] EPA avoided consideration of costs or any other impact that would result from its Endangerment Finding by characterizing it as a "stand-alone" set of findings that "does not contain any regulatory requirements." Endangerment Finding, 74 Fed. Reg. at 66,515. That argument is contradicted by the plain language of § 202(a)(1), which *requires* EPA to establish regulations for pollutants that it determines to be an endangerment. 42 U.S.C. § 7521(a)(1). An endangerment finding automatically triggers regulation; the Endangerment Finding was never a "stand-alone" decision, it was the fountainhead of cascading GHG regulation. EPA also claimed that the Supreme Court's decision in *Massachusetts v. EPA*, prevented it from weighing "policy considerations about the repercussions or impact of such a finding." Endangerment Finding, 74 Fed. Reg. at 66,515. That is not

In the Tailpipe Rule, EPA certified that the Rule "will not have a significant economic impact on a substantial number of small entities," and that it "will not have substantial direct effects on the States." 75 Fed. Reg. at 25,541. That contradicts EPA's own admission that, absent the Tailoring Rule, the Tailpipe Rule would cause "extraordinary increases in the scope of the permitting programs" that would cause "unduly high permitting costs," and the "administrative strains would lead to multi-year" permitting backlogs "which would undermine the purposes of those programs." Tailoring Rule, 75 Fed. Reg. at 31,533. EPA also acknowledged in the Endangerment Finding that it intended the Tailoring Rule to soften the imminent impact of the Endangerment Finding and resultant regulation on permitting authorities and stationary sources. 74 Fed. Reg. at 66.515-16, and n.17.

EPA should have considered the impact on stationary sources in the Tailpipe Rule because it had already concluded that GHG regulation of light-duty vehicle emissions would automatically trigger stationary-source regulation of GHG emissions. Timing Rule, 75 Fed. Reg. at 17,023. This is especially true in light of EPA's determination in the Timing Rule that it

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correct. In fact, the Court specifically declined to address the issue. *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007).

need not comply with the "notice and comment rulemaking process" on the grounds that it was "not a substantive rule" but rather merely "an interpretive document." *Id.* at 17,005. There is no question that the Tailpipe Rule is a substantive rule, and thus EPA has no excuse for refusing to consider the massive repercussions that flow from it.

Furthermore, by failing to analyze the impact of the Tailpipe Rule on stationary sources, EPA denied the public the opportunity to comment on those aspects of the Rule, in violation of the CAA and the APA. 42 U.S.C. §7607(d)(3); 5 U.S.C. §553(b)(3). Thus, the Tailpipe Rule not only violates the CAA, it is also arbitrary because EPA "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

b. The Tailpipe Rule Achieves Nothing.

The Tailpipe Rule also achieves nothing, and therefore is irrational.[4] Following the Endangerment Finding, EPA and NHTSA issued a joint final rule that requires vehicle manufacturers to meet certain CAFE standards in order to satisfy both EPA's emissions standards and NHTSA's economy standards. Tailpipe Rule, 75 Fed. Reg. at 25,330. As such, the Tailpipe

[4] Texas does not challenge or seek a stay of NHTSA's CAFE standards, and therefore the implementation of the CAFE standards will not be affected by Texas's challenge to the Tailpipe Rule, and a stay should be limited to cover only EPA's regulations.

Rule achieves little if any independent benefit from the NHTSA CAFE standard but imposes a huge new regulatory burden on stationary sources due to EPA's interpretation that the Tailpipe Rule triggers stationary-source regulation.

Even setting aside the regulatory redundancy, the Tailpipe Rule will have only a negligible effect on climate change reduction. EPA estimates that as a result of the Tailpipe Rule "global mean temperature is estimated to be reduced by 0.006 to 0.015 °C [0.0108 to 0.027° F] by 2100 and sea-level rise is projected to be reduced by approximately 0.06–0.14cm by 2100." 75 Fed. Reg. 25,495. EPA admits these changes "are small," but contends that they are still "meaningful." *Id*. But it is simply not rational to conclude that such a tiny estimated effect—less than one tenth of one degree over 100 years—is meaningful. Regulatory action must "fruitfully" attack the problem being addressed, *Ethyl Corp. v. EPA*, 541 F.2d 1, 31 and n.62 (D.C. Cir. 1976), but even EPA admits that the Tailpipe Rule will have almost no impact on the aim of the regulation, which is to reduce anthropogenic climate change. *See* Endangerment Finding, 74 Fed. Reg. at 66,517 (concluding that the emission of the six GHGs "constitute the root cause of human-induced climate change and the resulting impacts on public health and welfare"). As such, the Tailpipe Rule does not meet "'minimal

standards of rationality,'" and is invalid. *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 559 (D.C. Cir. 2002) (citation omitted).

3. The Timing Rule Is Unlawful.

In its Timing Rule, EPA erroneously interpreted that regulation of a pollutant from vehicle emissions under CAA § 202 automatically triggers stationary-source PSD and Title V permitting for that pollutant. 75 Fed. Reg. 17,004. That approach cannot be squared with the text of the CAA, and it also produces absurd results. As such, the Timing Rule—like the others—is invalid and will not survive this Court's review.

Under the CAA, construction of new facilities that are subject to PSD permitting may not commence unless, among other things, "the proposed facility is subject to the best available control technology for each *pollutant subject to regulation* under this chapter emitted from, or which results from, such facility." 42 U.S.C. § 7475(a)(4) (emphasis added). EPA interpreted the phrase "pollutant subject to regulation," to mean "a pollutant subject to a provision in the CAA or a regulation issued by EPA under the Act that requires actual control of emissions of that pollutant." 75 Fed. Reg. at 17,007. Under that interpretation, EPA determined that GHGs become "subject to regulation" with respect to PSD permitting on January 2, 2011 when the Tailpipe Rule becomes effective. *Id.* EPA also interpreted Title V

permits to include GHGs under its "subject to regulation" approach. *Id*. at 17022-23. The effect of the Timing Rule is that "PSD and title V would apply to all stationary sources that emit or have the potential to emit more than 100 or 250 tons of GHGs per year beginning on January 2, 2011." Tailoring Rule, 75 Fed. Reg. at 31,516. Even EPA admits this is an absurd outcome.

a. The Timing Rule Is Inconsistent with the Text of the CAA.

EPA's conclusion that its regulation of GHG emissions from new motor vehicles automatically triggers stationary-source PSD and Title V permitting runs contrary to the text and structure of the CAA. Pollutants for which there are no NAAQS cannot become "subject to regulation" for purposes of triggering permitting requirements under the CAA's PSD program.

The CAA limits applicability of the PSD permitting program to those areas (or regions) designated as "attainment" or "unclassifiable" for a NAAQS. *See* 42 U.S.C. § 7407(d) (CAA § 107) (providing for designation of areas and regions upon EPA's promulgation of a NAAQS). Specifically, the CAA calls for EPA to promulgate regulations "to prevent significant deterioration of air quality in each region . . . designated pursuant to section 107 [NAAQS designations] as attainment or unclassifiable." *Id*. § 7471.

Additionally, the CAA prohibits construction of a major emitting facility "in any area to which this part [PSD] applies" unless the PSD permit requirements are met. *Id*. § 7475(a). An area is in "attainment" if it "meets the national primary or secondary ambient air quality standard [NAAQS] for the pollutant" 42 U.S.C. § 7407(d)(1)(A). Similarly, an area is "unclassifiable" if it "cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant" 42 U.S.C. § 7407(d)(1)(A). In either case, the CAA clearly requires PSD permitting only in areas defined pursuant to a NAAQS.

Location (as opposed to source) is the primary determinant for PSD applicability. "The plain meaning of the inclusion in [42 U.S.C. § 7475] of the words 'any area to which this part applies' is that Congress intended location to be the key determinant of the applicability of the PSD review requirements." *Alabama Power Co. v. Costle*, 636 F.2d 323, 365 (D.C. Cir. 1979). In contravention of Congress's intent, EPA employed the phrase "subject to regulation" in § 7475 to justify a *non*location-based PSD permitting scheme for GHGs. Timing Rule, 75 Fed. Reg. at 17,007. Unless and until EPA completes a NAAQS for GHGs, *no* area or region can be

designated "attainment" or "unclassifiable," and therefore no PSD permitting for GHGs can properly commence under the CAA.[5]

EPA's Timing Rule thus violates the CAA. Moreover its interpretation of the CAA is not entitled to deference because the text of the statute is unambiguous. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984) (the Agency must give effect to the unambiguously expressed intent of Congress). Accordingly, EPA's attempt to short cut the CAA's NAAQS process in order to regulate GHG emissions from stationary sources through PSD and Title V must fail.

b. The Timing Rule Produces Absurd Results.

Not only does EPA's Timing Rule contravene the text of the CAA, its interpretation of the CAA yields results that EPA itself admits would be "inconsistent with congressional intent concerning the applicability of the PSD and title V programs" and "would severely undermine congressional purpose for those programs." Tailoring Rule, 75 Fed. Reg. 31,514, 31,541-42. In other words, the Timing Rule, in concert with the Endangerment Finding and the Tailpipe Rule, produces "absurd results." *Id*. at 31,554-55.

[5] The Center for Biological Diversity and 350.org have already petitioned EPA to complete a NAAQS for GHGs. *See Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act*. Dec. 2, 2009. <http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf> (accessed Sept. 14, 2010).

EPA admitted that under the Timing Rule, "many small sources would be burdened by the costs of the individualized PSD control technology requirements and permit applications that the PSD provisions" require. *Id.* at 31,516-17. Plus, "state and local permitting authorities would be burdened by the extraordinary number of these permit applications, which are orders of magnitude greater than the current inventory of permits and would vastly exceed the current administrative resources of the permitting authorities." *Id*. The overwhelming number of new permits required would burden state authorities to the point of "permit gridlock." *Id*. Even so, EPA clung to its absurd interpretation of the CAA and justified it by issuing another regulation (the Tailoring Rule) that revises the CAA's statutory emissions thresholds for stationary sources in order to avoid the unworkable result of the Timing Rule. Timing Rule, 75 Fed. Reg. at 17,007 (promising to relieve the "significant administrative challenges presented by the application of the PSD and Title V requirements for GHGs" with the Tailoring Rule); *see also* Tailoring Rule, 75 Fed. Reg. 31,514.

The Timing Rule leads to absurd results and is therefore invalid because "absurd results are to be avoided." *United States v. Turkette*, 452 U.S. 576, 580 (1981); *see also United States v. Haggar Apparel Co*., 526 U.S. 380, 392 (1999) (explaining that a regulation that is an "unreasonable

implementation" of a statute "will not control"). *United States v. X-Citement Video*, 513 U.S. 64, 69 (1994) (rejecting interpretation of a statute that would yield an absurd result). EPA's discretion does not stretch so far that it can adopt an unworkable interpretation of a statute. *Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837, 843-44 (1984) (explaining that an agency's interpretation of a statute must be reasonable). Because EPA's interpretation in the Timing Rule is both contrary to the text of the CAA and absurd, it will be struck down.

B. Texas Will Suffer Irreparable Harm Without a Stay.

Second, Texas will suffer irreparable harm unless the Court stays the GHG Rules pending its final decisions on the numerous appeals of those rules. A stay is particularly appropriate because, as discussed above, EPA seeks to implement its GHG Rules on a schedule that is so aggressive that it is unlawful under the CAA and because a stay would begin to correct the problems caused by EPA's haste.

EPA uses the hairtrigger of its Timing Rule to compel Texas to act on deadlines that are not only unlawful under the CAA but impossible for Texas to meet. This spawns a host of problems that are a source of immediate and irreparable harm to Texas. Specifically, EPA's GHG Rules deprive Texas of its right to manage its own air permitting program; demand

time-consuming, burdensome and ultimately unnecessary SIP revisions; cause expensive and unnecessary hiring and training of personnel to implement the requirements; and result in an effective ban on the construction of new projects.

1. EPA's GHG Rules Irreparably Harm Texas by Robbing Texas of Its Right to Manage Its Own Air Permitting Program.

Allowing the GHG Rules to take effect will upend the partnership between the federal and state governments as envisioned in the CAA. The CAA expressly provides that states shall have "primary responsibility" for "air pollution prevention . . . and air pollution control at its source." 42 U.S.C. § 7401(a)(3). State primacy is more than aspirational under the Act; it is fundamental to its architecture. This includes, for instance, a state's right to develop its own SIP to meet federal air quality standards. *See, e.g.*, 42 U.S.C. § 7410 (pertaining to adoption and submission of SIPs). While EPA has a right to call for revisions to SIPs it finds inadequate, it must allow the states a "reasonable" time in which to comply. 42 U.S.C. § 7410(k)(5).

EPA intends to impose new GHG controls on stationary sources beginning January 2, 2011, despite having not yet issued a final SIP call or finding of substantial inadequacy. In fact, EPA only recently *proposed* a SIP call. *See* 75 Fed. Reg. 53,892 (Sept. 2, 2010) (the "SIP Call"). Because

of EPA's aggressive schedule, many states will not have adequate time in which to revise their SIPs. Under EPA's scheme, states will face one of three situations on January 2 with regard to the legal authority to issue GHG permits. They will have authority under an EPA-authorized SIP or they will have authority under a federal implementation plan ("FIP") or they will have no authority at all.

EPA's proposed SIP Call purports to allow states a "reasonable" time to amend their SIPs to conform to EPA's GHG Rules. In fact, the SIP Call proposes to allow states up to twelve months to submit their SIP revisions following an EPA finding of substantial inadequacy. 75 Fed. Reg. at 53,901. However, because EPA plans to finalize its SIP Call and findings of substantial inadequacy on December 1, 2010, approximately eleven of those twelve months would be *after* the GHG requirements are to take effect. *See id.*

In Texas, this would mean that there would likely be no authority under the SIP to issue GHG permits for months after such permits would be required. EPA proposes to cure this problem by allowing states to volunteer for a shorter deadline for submitting their SIP revisions, even as short as three weeks. 75 Fed. Reg. at 53,901. This would enable EPA to federalize the states' GHG permitting programs "to ensure that there is no gap in PSD

permitting." *Id.* So, for states that cannot revise their SIPs in time to meet EPA's unreasonable January 2 deadline, EPA presents a stark choice: (1) do without preconstruction permitting or (2) surrender to a FIP.

Whatever Texas's choice, the result is that EPA would impose new permitting requirements on Texas industry while stripping Texas of the authority to issue conforming permits. Not only is this contrary to the Act, but it would cause irreparable harm to Texas by robbing Texas of its right to manage its own air permitting program. This Court has recognized the importance and value of the states' authority to control their own programs. It has observed that a FIP, even if lawfully imposed, "rescinds state authority to make the many sensitive technical and political choices that a pollution control regime demands." *Natural Res. Def. Council, Inc. v. Browner,* 57 F.3d 1122, 1124 (D.C.Cir.1995) (hereinafter, "*NRDC*"). Robbing Texas of this right, particularly while it is challenging the validity of EPA's GHG scheme, causes harm to Texas that cannot be repaired.

2. EPA's GHG Rules Irreparably Harm Texas by Requiring Texas to Revise Its SIP Prematurely.

Unless the Court grants a stay, Texas will have to begin to revise its SIP before the Court rules on the validity of EPA's GHG Rules. This could involve the Texas Legislature enacting new statutes and certainly would require that TCEQ amend its regulations. What is amply clear is that Texas

cannot conform its programs to EPA's GHG scheme simply by declaring it so or interpreting the term "subject to regulation" as used in TCEQ's rules to be consistent with EPA's new definition of the term. This would run counter to Texas law regarding delegation of legislative or rulemaking authority, *see Trimmer v. Carlton*, 296 S.W. 1070 (Tex. 1927), as well as the notice and comment requirement for rulemaking, *see* Tex. Gov't Code § 2001.023; 30 Tex. Admin. Code § 20.3.

The problems of regulating GHGs under the federal CAA reverberate under the Texas Clean Air Act ("TCAA"). For instance, Texas's fee system was not designed with GHGs in mind. Fees for Title V permits are based on annual emission rates (*i.e.*, dollars per ton per year) without regard to the type of air pollutant. Moreover, the TCAA prohibits TCEQ from imposing fees for emissions above 4,000 tpy. Tex. Health & Safety Code § 382.0621(d). Because this is a small fraction of the Tailoring Rule thresholds, the TCAA would require every GHG source to be charged the same amount. The current fee per ton of emissions is $33.71 per year. At 4,000 tons, this amounts to $134,840 annually. *See* 30 Tex. Admin. Code § 101.27(f)(1); Declaration of Steve Hagle, p. 7 (Attachment 2).

The Texas Legislature (which convenes its 82nd legislative session on January 11, 2011—after EPA's GHG Rules would be effective), may want

to give TCEQ the flexibility to "tailor" its fee system so that GHG sources are not all charged the same fee. This would require a statutory change. And Texas may want to charge GHG sources less than $134,840 per year, that is, a lower rate per ton of CO_2e than for other pollutants. This would require at least a rule amendment, and possibly a new statute, not to mention the legislation or rulemaking necessary to allow fees to be imposed on GHGs in the first instance. These are good examples of the types of "sensitive technical and political choices" this Court referenced in *NRDC*. The Texas Legislature would likely consider others.

If the Texas Legislature enacts GHG statutes, TCEQ would likely have to promulgate implementing regulations that would become part of its SIP revisions. Even without new legislation, TCEQ would have to amend its rules to conform to EPA's GHG Rules. This would include TCEQ's definition of federally regulated NSR pollutants, at 30 Tex. Admin. Code § 116.12(14)(D), which references pollutants "subject to regulation" under the CAA and TCEQ's definition of "unauthorized emissions" at 30 Tex. Admin. Code § 101.1(107), which expressly excludes carbon monoxide and methane.

While there is uncertainty about what the Texas Legislature might do this coming session with regard to GHGs, TCEQ would—at a minimum—

have to amend numerous rules to conform its SIP to EPA's requirements. This will require TCEQ to prepare a regulatory analysis, draft and publish the proposed rules, allow for public comment, draft a response to the comments, draft the final rules, and, finally, adopt the rules. The process typically takes approximately 12 months for rule amendments such as the ones that would be required here. It also takes significant effort on the part of TCEQ. Declaration of Steve Hagle, p. 8.

Without a stay, TCEQ will have to begin its SIP revisions before the Court determines the validity of EPA's GHG Rules. If the rule amendments were to become final and this Court later determined EPA's GHG scheme to be invalid, TCEQ would have to dismantle its new rules by the same process. And if EPA had approved TCEQ's SIP revisions, TCEQ would be forced to obtain EPA's approval for dismantling of the rules, a process which could foreseeably involve additional court intervention.

3. EPA's GHG Rules Irreparably Harm Texas by Requiring It to Hire Personnel to Administer the GHG Permitting Program.

If Texas is forced to implement EPA's GHG Rules, it will need not only the legal authority to do so but also the capacity to manage significantly expanded PSD and Title V permitting programs. TCEQ has undertaken a careful sector-by-sector and industry-by-industry analysis of regulated

sources, examining air permitting information dating back a decade, to determine the increased demand for air permits for GHGs under the Tailoring Rule thresholds. Declaration of Steve Hagle, p. 10. Based on its analysis, TCEQ projects that it would receive—each year—150 additional PSD permitting applications, 250 additional Title V site operating permit ("SOP") applications, and 523 Title V general operating permit ("GOP") applications. Declaration of Steve Hagle, p. 11.

To meet the increased demand, TCEQ would have to significantly expand its capacity across several different divisions. Specifically, TCEQ has projected that it would need 46 additional full-time employees ("FTEs") in its Air Permits Division, including 4 supervisors. TCEQ would have to similarly expand its Field Operations Division to meet the increased demand for inspections and investigations relating to the GHG requirements. Of the 37 new Field Operations FTEs that would be required, which includes 3 supervisors, all but 2 would be dedicated to Title V inspections and investigations. The remaining 2 would be dedicated to monitoring of PSD permits. Declaration of Steve Hagle, p.12.

In addition, TCEQ would have to hire approximately 5 Enforcement Division FTEs and 1 Litigation Division FTE to handle the increased enforcement workload, as well as 2 Environmental Law Division FTEs to

handle GHG permitting and rulemaking. In total, TCEQ has projected that it would have to hire approximately 91 new FTEs to handle the workload that would result from the number of additional PSD and Title V permitting actions estimated to result from EPA's GHG Rules. Although it is impossible to definitively determine the number of FTEs that would be necessary to administer the proposed GHG permitting requirements, these projections are consistent with TCEQ's course of business in its hiring practice and would serve as the basis for hiring planning. Declaration of Steve Hagle, p. 12.

Based on standard personnel costs, which include the costs of salaries, training, and travel, TCEQ has determined that the 91 new FTEs would cost TCEQ approximately $4.1million each year. In addition, TCEQ would spend $933,750 for startup costs and $1,092,631 each year for benefits costs. Declaration of Elizabeth Sifuentez, pp. 1-2 (Attachment 3). Hiring and the costs associated with it would accelerate quickly. The program would be at 75% of full capacity (69 employees) within 6 months of the effective date of the new requirements and at full capacity (91 employees) within 12 months. Declaration of Steve Hagle, p. 13; Declaration of Elizabeth Sifuentez, p. 2. Again, these numbers assume that the Tailoring Rule thresholds would pertain.

If the Court were to find the Tailoring Rule to be invalid and that the CAA's statutory thresholds applied to GHGs, the burden would leap by orders of magnitude. EPA has estimated that under the statutory thresholds, the cost to run PSD and Title V programs nationwide would exceed $22 billion each year. 75 Fed. Reg. 31,514, 31,540 (June 3, 2010). EPA has stated that this would create "impossible administrative burdens for permitting authorities" and has characterized the results as "absurd." 75 Fed. Reg. at 31,547.

Of course TCEQ's efforts to build capacity will become futile if the Court later finds EPA's GHG scheme to be invalid. Without a stay, TCEQ would have to unwind the GHG permitting program and terminate those employees who had been hired to meet the short-lived demands of the GHG program. In addition to the personal harm this would inflict on the people who are terminated, it could cost TCEQ additional monies for payment of unemployment benefits. Declaration of Elizabeth Sifuentez, p. 2.

TCEQ has no discretionary funds that could be diverted to meet the demand of a new GHG permitting program. Its budget as well as any funds required to meet the demands of a new GHG program are dependent on appropriations by the Texas Legislature. So the cost of the program will have an immediate and direct impact on Texas's budget. The harm is

compounded by the fact that Texas faces significant budget shortfalls and has already called on its State agencies, including TCEQ, to cut their budgets by 5 percent for the years 2010 and 2011 and by an additional 10 percent for the years 2012 and 2013. Declaration of Elizabeth Sifuentez, pp. 2-3.

In addition, if the court ultimately finds EPA's GHG Rules to be invalid, Texas would be stuck with the costs of creating and unwinding the staffing capacity. The costs cannot be recovered from EPA nor transferred to industry. EPA is protected by sovereign immunity, and, because of EPA's aggressive timeline, TCEQ has insufficient time to revise its fee system to transfer the costs to industry. Declaration of Steve Hagle, p. 13. Costs stranded with TCEQ constitute irreparable harm. *See, e.g., Smoking Everywhere, Inc. v. U.S. Food and Drug Admin.*, 680 F.Supp.2d 62, 77 n. 19 (D.D.C. 2010) (finding damages barred by sovereign immunity to be irreparable per se).

4. EPA's GHG Rules Irreparably Harm Texas by Effectively Imposing a Construction Ban on GHG Projects.

EPA's GHG scheme deprives Texas of the time it would require to assemble the appropriate legal authority and the staffing capacity necessary to issue GHG permits. Even if Texas were to allow EPA to federalize its air

program such that there would be interim legal authority for EPA to issue GHG permits in Texas (and EPA could FIP the program before January 2, 2011), this would not solve the staffing issue. Texas would have already needed to begun to hire and train the required personnel if it were to have sufficient capacity to handle GHG permits beginning January 2, 2011. But as a result of EPA's overly aggressive implementation schedule and the uncertainty created by EPA's unlawful GHG scheme, TCEQ has not yet begun to hire nor have funds been made available to do so. *See* Declaration of Steve Hagle, pp. 3 & 13. Moreover, EPA's invitation to affected states to accept a delegation of authority to implement the FIP—so that the state would still process permit applications—indicates that EPA lacks such capacity. *See* 75 Fed. Reg. 53,883, 53,890 (Sept. 2, 2010) (preamble to proposed FIP Rule).

Accordingly, EPA's GHG scheme causes a construction ban on any project in Texas that would exceed the Tailoring Rule's GHG thresholds until such time that (1) EPA approves Texas's revised SIP *or* is able to fulfill the statutory requirements to impose a FIP, *and* (2) either EPA or TCEQ can assemble the staff necessary to review applications and issue permits. Indeed the ban has effectively already begun. Because of the 10 to 12 month *minimum* lead time for PSD permits, *see* Declaration of Steve Hagle, p. 2,

applications for projects with GHG emissions that exceed the thresholds would have to have been completed and filed with TCEQ no later than later than February of 2010, and in many cases much earlier, to be approved under the current rules. Of course this was months before EPA promulgated its rules aimed at regulating GHG emissions from stationary sources.

Based on the information presented above, the construction ban could affect as many as 167 projects within the first year—some of which would be built outside of Texas and some not at all. This would deprive Texans of jobs constructing or operating new industrial projects, deprive Texas industry of business opportunities, deprive the State of tax revenues associated with projects, and place Texas at a competitive disadvantage to states that have the legal authority to issue GHG permits. Declaration of Steve Hagle, p. 14.

The threat of an unmanageable backlog of permit applications, questions about the legality of the GHG Rules, and uncertainty even about what constitutes GHG BACT—all of which flow from EPA's GHG Rules—only exacerbate the problems that a functional construction ban would cause. Setting aside the harm to Texas industry and Texans who rely on it, this deprives TCEQ of the ability to fulfill its obligation to provide regulatory certainty and air permitting services to Texas industry. This constitutes

harm that is not only significant in its scale and reach, but also harm that cannot be repaired.

* * *

If EPA's GHG Rules are not stayed during the pendency of Texas's appeals, they threaten to rob Texas of its right to manage its own air permitting program, they will cause TCEQ to expend significant resources to revise its SIP and to prepare a workforce to meet the demands of a new and potentially short-lived GHG program, and they will result in a construction ban unless or until Texas can marshal the legal authority and staffing resources to meet the demand for GHG permits. This amounts to significant, certain, and irreparable harm.

C. A Stay Will Not Harm Any Other Party.

Third, there is no prospect that others will be harmed by the stay. Because Texas seeks a carefully crafted stay that preserves the NHTSA CAFE standards set forth in the Tailpipe Rule, the requested stay will not harm EPA (or any other party). EPA and NHTSA carefully constructed the Tailpipe Rule such that auto manufacturers, by complying with the CAFE standards, will also achieve the GHG-emission reductions sought by EPA. *See* Tailpipe Rule, 75 Fed. Reg. at 25,330. Moreover, EPA cannot seriously contend that it (or any other party) is harmed by a stay of the regulation of

GHGs at stationary sources because it has failed to conduct any analysis that substantiates or quantifies any benefit that may flow from regulating GHGs at stationary sources. Indeed, any such analysis can hardly take place without first identifying or providing some sort of guidance regarding what constitutes BACT. Even if EPA had undertaken (as it was required to do) the task of quantifying the reduction in GHG emissions due to some identified BACT, it still would not have substantiated or quantified the effect those reductions would have on climate change and the public health.

D. A Stay Is in the Public Interest.

Finally, a stay will serve the public interest in several ways. A stay will help maintain regulatory and economic certainty during the pendency of these numerous appeals. EPA's crusade to regulate GHGs at any cost—and at break-neck speed—have created an environment of regulatory and economic uncertainty at precisely the wrong moment. Cash-strapped states (including Texas) lack the fiscal flexibility to comply with EPA's draconian regulatory scheme in a timely fashion. Even to try would require Texas to divert its limited human and economic resources from other programs and projects made even more necessary during the current economic environment.

In addition, because EPA's GHG regulatory scheme is the most draconian of its kind of any advanced economy in the world, the scheme will surely shift industrial production away from the United States and into countries with more favorable regulatory environments. This unconsidered and—presumably—unintended consequence will put further substantial pressure on the fragile U.S. economy.[6]

Finally, as explained above, a carefully crafted stay pending resolution of these appeals is likely to have no noticeable negative impact on climate change.

IV. CONCLUSION

Texas respectfully requests that this court stay EPA's implementation of its Endangerment Finding, Tailpipe Rule, and Timing Rule.

[6] In addition to the negative impact such an exodus will have on the U.S. economy, it also will likely trigger another, more perverse consequence. New capital investments in the developed countries likely to benefit from this industrial exodus are more energy intensive. Thus, EPA's rules may actually indirectly increase GHG emissions rather than reduce them. *See*

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