



National Petrochemical & Refiners Association

1667 K Street, NW
Suite 700
Washington, DC
20006

202.457.0480 voice
202.457.0486 fax
cdrevna@npra.org

December 22, 2009

Filed Electronically

Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Attention Docket ID No. OAR-2009-0517

Subject: Comments on the Environmental Protection Agency's Proposed Rulemaking: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (October 27, 2009).

Dear Sir/Madame:

National Petrochemical & Refiners Association ("NPRA") is pleased to provide comments on the Proposed Rulemaking on Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule ("Tailoring Rule") referenced above. NPRA's members comprise more than 450 companies, including virtually all U.S. refiners and petrochemical manufacturers. Our members supply consumers with a wide variety of products and services that are used daily in homes and businesses. These products include gasoline, diesel, fuel, home heating oil, jet fuel, asphalt products, and the chemicals that serve as "building blocks" in making plastics, clothing, medicine, and computers.

Like virtually every other industrial sector, NPRA's members emit greenhouse gases ("GHGs") as a result of their manufacturing activities. They also manufacture and refine products that release GHGs when used or combusted by downstream users. NPRA's members therefore have a great interest in the current rulemaking as well as other pending GHG decisions and rulemakings that EPA is considering.

I. Introduction

EPA has proposed several concurrent actions to address the issue of GHG regulation under the Clean Air Act ("CAA"): the Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average

Fuel Economy Standards (“Section 202 Rule”);¹ the Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program (“Johnson Memorandum”);² and this proposed rule. In addition, EPA recently promulgated a final rule, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act (“Endangerment Determination”).³ By moving several separate, near-simultaneous packages to initiate and define the regulation of GHGs under authority of the CAA, EPA has obscured fundamental issues of how and when EPA should proceed to respond to the Supreme Court’s decision in *Massachusetts v. EPA*.⁴ No one rulemaking proceeding cited above is identified as addressing the issue of *when* EPA should initiate the GHG regulation of stationary sources under authority of the CAA, nor do any of them analyze the enormous costs of controlling GHGs from stationary sources under authority of the CAA or define the costs and benefits of available alternatives to this action. Yet, according to the Agency’s analyses, regulation of GHG emissions from stationary sources is precisely the effect of these multiple rulemakings.

The path to CAA GHG regulation that EPA has chosen is difficult, uncertain, and unnecessarily risky in these troubling economic times. The Tailoring Rule that is the subject of these comments is doomed to failure, for one or more of the following principal reasons:

- The proposed tailoring approach for the PSD program conflicts too directly with clear and unambiguous statutory language, and cannot be justified by the limited and narrow doctrines of "absurd results" and "administrative necessity."
- EPA has failed to account for issues with state laws and regulations related to the PSD program, which will continue to reflect lower thresholds even after the Tailoring Rule is promulgated. These state law issues will render the Tailoring Rule ineffective and cause the permit gridlock that EPA has recognized is unacceptable to the country. Not only do these state law issues make the Tailoring Rule ineffective practically; they also render it legally vulnerable because it cannot be justified by "administrative necessity" if it is ineffective.

¹ 74 Fed. Reg. 49,454 (September 28, 2009).

² 74 Fed. Reg. 51,535 (October 7, 2009).

³ 74 Fed. Reg. 66,496 (December 15, 2009).

⁴ 127 S.Ct. 1438 (2007).

- EPA's own discretionary action is creating the "absurd results" that the agency then seeks to fix through the "administrative necessity" doctrine. There is no requirement that EPA promulgate the 202 Rule now, and virtually all of the benefits that EPA attributes to that rule actually flow from the DOT CAFE rule that is being promulgated simultaneously. Because the 202 rule is both discretionary and unnecessary, EPA cannot claim "administrative necessity" to address its fallout through the Tailoring Rule.

Fortunately, the timing, manner, and content of EPA's overall approach to regulating GHGs under the CAA is firmly with the Agency's control. Our comments below outline ways in which EPA could proceed down alternative pathways that provide more sensible regulation without resort to extraordinary administrative law principles that cannot be applied in these circumstances. Specifically:

- EPA could interpret the CAA to trigger PSD only once a NAAQS has been established for a pollutant. Under this interpretation, which is fully consistent with the CAA and EPA's regulations, the 202 Rule would result in GHGs only being subject to Best Available Control Technology ("BACT") requirements if a source otherwise triggers PSD for a criteria pollutant.
- EPA could delay issuance of the 202 Rule until the agency and the states are better prepared to address GHG permitting. EPA could use this time to pursue streamlining of PSD and Title V requirements on an aggressive timescale to avert the large economic impacts that the Agency indicates Congress did not intend.
- EPA can specify that under the 202 Rule the date when GHGs are considered subject to "actual control" is when vehicle manufacturers must comply with an attribute-based standard for Model Year 2012. This will avoid an imminent PSD trigger for stationary sources and give states and EPA more time to address GHG permitting issues.

For these and the reasons discussed below, we urge EPA to reconsider its approach to regulating GHGs under the CAA and adopt one of the preferable approaches described herein.

II. The CAA Can Only Be Interpreted to Apply PSD to NAAQS Pollutants.

EPA asserts that the Tailoring Rule is necessary to mitigate the "absurd" results that will flow from GHGs becoming "subject to regulation" and hence subject to PSD and Title V permitting. NPRA agrees with EPA that it would be absurd to subject all sources that exceed 100/250 tons per year of GHGs to PSD and Title V permitting. However, the absurdity (at least in the case of PSD) does not result

from the CAA itself, but rather from EPA's erroneous interpretation of the statute, specifically section 165. Were EPA to interpret PSD correctly as discussed below, most of the absurd results identified by EPA would be avoided, thereby largely obviating the need for the Tailoring Rule.

In our comments filed with respect to the Section 202 Rule, we indicated that the CAA clearly provides that PSD should not apply to a source based solely on the emission of GHGs. These comments take on additional importance in the context of this proposed rulemaking, since EPA has continued to improperly interpret the CAA and the vital matter of what actions "trigger" PSD. EPA takes the position that once it finalizes the section 202 tailpipe standards next March, GHGs will become "subject to regulation" under the Act and subject to CAA permitting. Thereafter, EPA argues, any source with the potential to emit more than 100/250 tons per year of regulated GHGs must obtain a PSD permit before undertaking a project that would increase net GHG emissions.⁵ This interpretation is simply wrong and contrary to the plain meaning of the CAA. GHGs emissions alone cannot trigger PSD.

The CAA clearly requires EPA to first establish a National Ambient Air Quality Standard ("NAAQS") for GHGs before the Agency has the legal ability under the CAA to require PSD solely on the basis of increases in GHG emissions. CAA section 161 requires that state implementation plans ("SIPs") contain emission limitations and necessary measures "in each region (or portion thereof) designated pursuant to section 107 of this title as attainment or unclassifiable"⁶ to prevent significant deterioration of air quality, as determined under regulations promulgated under this part, or Part C – Prevention of Significant Deterioration of Air Quality. Section 165(a) establishes permitting requirements for sources "constructed in *any area to which this part applies.*" (Emphasis added). Section 165(a)(3) further indicates that owners or operators of facilities need to demonstrate that construction and operation of facilities to which PSD applies "will not cause or contribute to air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant *in any area to which this part applies* more than one time per year . . . (B) national ambient air quality standard . . ." (Emphasis added). Given the reference in these sections to the location of the source (*i.e.*, the location of the source in areas that are either considered to be in attainment with a NAAQS or unclassifiable),⁷ the natural reading of these

⁵ We also recognize, as does EPA, that significance levels have not been established for GHGs.

⁶ Section 107 designations are determined as the Administrator "deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. (Emphasis added.)

⁷ An unclassifiable designation is itself made only with respect to the existence or lack of existence of information in relationship to a NAAQS standard. Section 107(d)(1)(A)(iii) of the CAA specifies

(continued...)

provisions is aligned with reference to the NAAQS. In other words, areas to which “this part” applies are defined on the basis of NAAQS pollutants. Therefore, EPA must interpret PSD applicability to be linked to the existence of NAAQS for particular air pollutants.

This interpretation is further supported by CAA section 166. This section of the CAA mandates the promulgation of PSD regulations within two years of establishing a new NAAQS and provides that the effective date for such regulations is to occur within one year later. Under Section 166, EPA is also required to approve plan revisions for the new regulations within 25 months of their promulgation. Thus, under section 166, PSD control is triggered upon adoption of a NAAQS, not a pollutant becoming subject to regulation.

The existence and statutory language of section 166 therefore reinforces several conclusions about the PSD program. First, the existence of section 166 supports the conclusion that the applicability of PSD under the CAA is based on NAAQS. The first sentence of section 166(a) addresses pollutant that either are NAAQS or NAAQS precursors, the prime focus of air pollution control efforts at the time of the 1977 Clean Air Act Amendments (“1977 Amendments”). The second sentence of section 166(a) indicates that in the case of a future NAAQS (a NAAQS promulgated after the date of enactment of the 1977 Amendments) EPA is to promulgate regulations to prevent the significant deterioration of air quality within two years of the date the new NAAQS are promulgated. Clearly, then, although the section title refers to “Other pollutants,” the pollutants for which new PSD regulations are required are either NAAQS or NAAQS precursors.

Second, it is clear that Congress recognized it was necessary to establish a regulatory framework for the incorporation of new pollutants (*i.e.*, NAAQS and certain NAAQS precursors of concern at that particular time) into the PSD program. Section 166(c) provides that the new regulations are to provide “specific numerical measures” for the application of PSD to the new pollutant and specifies other requirements. The existence of these provisions lies in stark contrast to EPA’s interpretation of how GHGs might be incorporated into the PSD program where case-by-case determinations would be required for BACT under section 165(a)(4) without reference to any metric for calculating the impact of GHGs on local air quality.

Finally, it seems inconceivable that the statutory structure of the PSD program could be interpreted to provide for near-immediate triggering of PSD applicability for GHGs (or any other non-criteria pollutant under EPA’s current interpretation of the Act) when section 166 provides for two years to promulgate

(continued)

that such areas are to be designated on the basis of “available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.”

new PSD regulations for new NAAQS and another 25 months for EPA to act on plan submissions related to the new NAAQS. Instead, interplay of sections 166 and 165 of the CAA bespeak of a clear statutory scheme that PSD applicability is never “triggered” by a new pollutant becoming “subject to regulation” under the CAA, only by the establishment of a new NAAQS pursuant to sections 108 and 109 of the CAA and the designation of new areas for that NAAQS under section 107.

NPRA thus urges EPA to correctly interpret PSD as being triggered only upon a significant net emissions increase of a criteria pollutant. Under this interpretation, only those major sources that otherwise trigger PSD for a criteria pollutant would have to comply with BACT for GHGs. Sources that are major only for GHGs, or that undergo a change that increases only GHG emissions should not be subject to PSD. This proper interpretation of PSD would largely eliminate the absurd results EPA cites as justification for the Tailoring Rule.

III. EPA Proposed Rule is Illegal and Arbitrary and Capricious.

As indicated above, the CAA is clearly links the applicability of PSD to the existence of NAAQS and attainment and unclassified areas for a NAAQS. First and foremost, then, we would argue that EPA must adopt this interpretation of the Act. The logical result of this course of action would be for EPA to withdraw the proposed rule since it is based on flawed interpretation of the CAA.

Should the Agency continue to interpret the requirements of the PSD program in a different manner, however, EPA lacks authority to proceed with the Tailoring Rule as proposed. First, the proposed rule and its departure from statutorily-defined thresholds of 100 tpy and 250 tpy cannot be justified. Second, as indicated in detail below, EPA has misinterpreted and misapplied the administrative law doctrines it cites as legal authority. Therefore, the proposed Tailoring Rule is arbitrary, capricious, and contrary to the CAA.

A. EPA Cannot Create its Own Administrative Necessity and Absurd Results.

We agree with EPA that it would be absurd to immediately apply PSD and title V requirements on the basis of GHG emissions. While we certainly have criticisms of the analysis that EPA claims supports this proposed rule, we agree that it would be absurd to subject millions of sources to CAA permitting based exclusively on their GHG emissions.

We depart from the Agency’s legal view of this matter, however, because the permitting quagmire it projects is not a required result of implementing the CAA. Instead, the regulatory morass projected is of EPA’s own making. In the proposed

rulemaking, EPA indicates that the 25,000 tpy and 10,000 to 25,000 tpy thresholds proposed in this rulemaking are borne of necessity. That is, the Agency indicates it is undertaking a departure from statutory text because applying the literal terms of the CAA will create “impossible burdens.” EPA, however, does not identify within this proposed rulemaking that the Agency has several other readily-available alternatives that could avoid the “impossible” results it posits will flow from imposing 100 tpy and 250 tpy thresholds for applicability of PSD requirements to stationary sources. EPA cannot create its own “absurd” or “impossible” results and thereafter justify reliance on extraordinary administrative law doctrines to support this rulemaking.

Furthermore, it is EPA alone that will decide, in the context of the Section 202 Rule, whether to proceed to finalize that rule by next March. As pointed out in our comments to the Section 202 Rule, EPA is not compelled by statute or court order to promulgate a final Section 202 Rule in March, 2010 or indeed at any other specific point in time. In fact, EPA has several available options. For example, EPA may alternatively withdraw the rule (and perhaps take further comment on issues engendered by that rulemaking or conduct further analysis) or to simply defer taking further action to promulgate final GHG standards for light duty vehicles. Since EPA has this inherent flexibility afforded by the CAA, it cannot therefore claim that conditions of “administrative necessity” and “absurd results” are anything other than conditions of its own making.

Indeed, it is significant to note the fact the “relief” that EPA projects will flow from this proposed rulemaking is merely temporal; the Agency does not indicate that it will never lower PSD and title V thresholds down to the range provided within section 169(1), only that it will not do so right now. EPA has explicitly sought in this proposed rulemaking to retain full authority to study administrative burdens “within” five years and to propose and promulgate another rulemaking “within” six years. Thus, the Agency is seeking specifically to reserve and retain full ability to reconsider its actions in this rulemaking and to act on a schedule conceivably prior to five or six years hence. Since the EPA remains in full control of the timing of creating “administrative necessity” and also seeks to remain in full control of the timing of when these conditions may be considered to no longer exist, it is clear that these conditions are not an automatic outflow of the operation of the CAA or a matter that happens simply by operation of law. Instead, EPA has clearly placed these outcomes within the context of this proposed notice and comment rulemaking and within the context of the Section 202 rulemaking. The outcomes are not external or inevitable, they are instead fully within EPA’s control.

In sum, in the near-term, EPA can effectively control the timing of when the Agency (under its expressed legal theory) considers PSD to be “triggered” and EPA can effectively control, in the longer-run, when the Agency might consider lower thresholds for PSD and title V to be capable of being implemented. By seeking to retain its legal ability to act at any time, to determine when and how much to

adjust PSD and title V thresholds, EPA cannot claim that “administrative necessity” exists at all.

B. EPA Is Not Required to Promulgate the Section 202 Rule Now.

While EPA is now required to set standards for vehicles under CAA section 202 by virtue of its December 6, 2009 final Endangerment Determination, the Supreme Court’s opinion in *Massachusetts v. EPA* indicated clearly that EPA has significant discretion with regard to the time, manner, and form of its regulations. In comments filed with respect to the Section 202 Rule, NPRA argued that nothing in section 202(a) of the CAA required EPA to finalize its proposed GHG standards for light duty vehicles by March 2010 or any other particularized point in time. We reiterate and incorporate these comments by reference here.

First, EPA has described Title II of the CAA as providing the Agency with “sweeping grants of authority” and it has indicated that “EPA is afforded considerable discretion under section 202(a) when assessing issues of technical feasibility and availability of lead time to implement new technology.”⁸ In past rulemakings utilizing section 202 of the CAA, EPA has sought to regulate only certain types of vehicles at one time and has staggered requirements for different types of vehicles emitting the same pollutants. In addition, EPA has often sought to account for the time required for vehicle manufacturers to change production lines and develop the necessary technology to control tailpipe emissions. The need for such a period of repose from application of PSD requirements is no less clear in this proposed rulemaking. Indeed, the policy arguments for delaying application of PSD for GHG emissions from stationary sources are, if anything, far more compelling than comparable analogues in the automobile industry. EPA should therefore utilize its discretion under section 202 of the CAA either to withdraw its portion of the joint EPA/DOT rulemaking package or to take no further action to finalize its proposed section 202(a) rules.

C. Public Health and the Environment Will Be Protected If EPA Does Not Promulgate the Section 202 Rule Now.

EPA has good reason to delay promulgation of new light duty GHG standards especially since the National Highway Traffic Safety Administration (“NHTSA”) can utilize separate statutory authority to promulgate regulations achieving effectively the same level of health and environmental benefits that EPA projects from its own

⁸ 74 Fed. Reg. 40,454, 49,464.

rulemaking under section 202. As indicated in our comments to the Section 202 Rule, EPA has proposed section 202 standards as part of a “joint rulemaking” with the NHTSA. If EPA were to withdraw its proposed regulations under section 202 or delay finalization of such standards, NHTSA has separate legal authority to establish Corporate Average Fuel Economy standards that will provide the vast majority of benefits projected to occur under EPA’s proposed section 202 rules.⁹

While EPA proposes to establish standards for three GHGs (carbon dioxide (“CO₂”), nitrous oxides (“N₂O”), and methane) and provide for a crediting mechanism for a fourth GHG (hydrofluorocarbons (“HFCs”)), NHTSA is proposing to increase the stringency of vehicle mileage standards. The overall effect on CO₂ of the proposed NHTSA standards will closely replicate the effects projected by EPA. Both standards also derive most of the projected benefits by acting to reduce emissions of CO₂, by far the predominant GHG emitted by vehicles. As noted in the preamble for the Section 202 Rule, “Carbon dioxide emissions account for nearly 95% of total GHG emissions that result from fuel combustion during vehicle use.”¹⁰ Therefore, the EPA and NHTSA regulatory programs and the standards produced under the CAA and EPCA would achieve roughly the same level of projected benefits.¹¹ If EPA were to withdraw its proposed regulations or delay the finalization of its proposed rule, there would be little or no impact on the light duty vehicles that travel our nation’s roads or any significant impact on associated environmental or public health benefits.

D. EPA May Delay the Effective Date of the Section 202 Rule; “Actual Control” of GHGs Occurs Much Later Than EPA Indicates.

Even if EPA is not willing to delay promulgation of the Section 202 rule, then the Agency retains the ability to change the effective date of its regulations to a time later than 60 days following publication of the regulations in the Federal

⁹ NHTSA authority derives from provisions of the Energy Policy and Conservation Act, which address calculation of average fuel economy (49 U.S.C. 32904). These provisions were recently amended by the Energy Independence and Security Act (P.L. 110-140).

¹⁰ 74 Fed. Reg. at 49,454, 49,675. As EPA additionally notes, “CO₂ is the primary pollutant resulting from the combustion of vehicular fuels, and the amount of CO₂ emitted is directly correlated to the amount of fuel consumed.” *Id.* at 49,513.

¹¹ The Regulatory Impact Analysis notes differences in the calculation of million metric ton reductions in carbon dioxide equivalent amounts (CO₂e) between EPA and NHTSA standards. As noted in the preamble, “The differences regarding the treatment of air conditioning improvements (related to CO₂ and HFC reductions) affect the relative stringency of the EPA standard and the NHTSA standard.” 74 Fed. Reg. 49,454, 49,468. However, the preamble also indicates that such differences are not large. “It should also be expected that overall EPA’s estimates of GHG reductions and fuel savings achieved by the proposed GHG standards *will be slightly higher* than those projected by NHTSA only for the CAFÉ standards because of the reasons described above.” (Emphasis added). *Id.* at 49,477.

Register. For example, EPA could affirmatively state its interpretation that “actual control” of GHGs under the Section 202 rule does not occur until the date when manufacturer fleets must comply with the attribute-based standard created by the regulation for the control of CO₂, or the point in time at which other compliance with Model Year 2012 GHG standards is considered to occur. In either event, EPA has the legal ability to adopt a PSD “trigger” well beyond the “effective” date of the Section 202 Rule.

In the Section 202 Rule, NPRA submitted comments with respect to when GHGs may be considered to be subject to “actual control” under the regulations that EPA has proposed for light duty vehicles. We are attaching a copy of these comments. In effect, those who manufacture vehicles do not need to comply with regulations established by the Section 202 rule until a time far later than the date of promulgation or the effective date proposed by EPA in that rulemaking. “Actual control” of carbon dioxide (“CO₂”), methane and nitrous oxide (“N₂O”) from vehicles does not occur until vehicle manufacturers must comply with the attribute-based standards the EPA has proposed for CO₂ and the separate standards it proposed for methane and N₂O.

E. EPA’s Proposed Rule Does Not Comply With Established Administrative Law Doctrines

1. EPA must attempt to streamline the PSD and title V programs.

In the July 2008 Advance Notice of Proposed Rulemaking Regarding Regulating Greenhouse Gas Emissions Under the Clean Air Act (“ANPR”),¹² EPA discussed options to change the definition of potential to emit (“PTE”)¹³ as well as other actions for streamlining” the PSD program. Therefore, EPA has been aware of the availability of such options for a substantial amount of time and should realistically be in the position to at least propose some options prior to seeking this current rulemaking. For example, EPA could propose options to narrow the PTE definition, at least for some sources.

Under the legal theories posited in the preamble for this proposed rule, EPA is required to pursue such streamlining options prior to claiming that the Tailoring Rule is necessary.¹⁴ It cannot be impossible for EPA to narrow the PTE definition,

¹² 73 Fed. Reg. 44,354 (July 30, 2008).

¹³ *Id.* at 44,497–44,510.

¹⁴ E.g., EPA has indicated that *Sierra Club v. EPA* stands for the proposition that the Agency can avail itself of administrative necessity in situations where it attempts to reduce administrative burdens “as much as legally permissible.” 74 Fed. Reg. 55,315. While we will not offer a comment on

(continued...)

at least for some larger sources that would potentially be exposed to relatively more costs if PSD is triggered. Nor has EPA presented other evidence into the record for this rulemaking that it has aggressively explored other streamlining options. At a minimum, EPA should take such steps before seeking to finalize this rulemaking. The fact that EPA has not taken further action beyond “evaluating what streamlining options may be feasible”¹⁵ in the two-and-one-half years subsequent to the *Massachusetts v. EPA* decision demonstrates that the Agency has not met its own criteria for claiming administrative necessity.

Section 502(b)(6) requires EPA to develop “adequate, streamlined, and reasonable procedures” for completeness determinations, application processing, public notice and permit review. EPA is also attempting in the proposed rulemaking to ignore this statutory requirement. No evidence in the record demonstrates actual good faith efforts by EPA in pursuit of title V streamlining techniques. Instead, the record for this rulemaking only contains general assertions and broad unsupported predictions of the time EPA thinks will be necessary for the Agency to undertake such actions.

2. EPA cannot claim “administrative necessity” for a discretionary rulemaking.

The main argument that EPA presents in support of its reliance on administrative necessity is not that implementing statutory levels of 100 tpy and 250 tpy are intrinsically impossible – but that there is not sufficient time to comply with the CAA tonnage thresholds established by Congress in Section 169. EPA does not claim that the task can never be accomplished or that it will not eventually require sources to meet the 100 tpy and 250 tpy thresholds¹⁶ – only that impossibility lies in the time period created by the Agency’s intended finalization of section 202 GHG standards in March 2010. EPA indicates that the PSD and title V permitting burden created by changing the status of GHGs from unregulated to air pollutant(s) “subject to regulation” under the CAA, would “*immediately* and

(continued)

whether this is an accurate interpretation of the case law involved, we would note that EPA considers this to be an affirmative obligation of an Agency seeking to avail itself of the relief offered by invoking administrative necessity.

¹⁵ 74. Fed. Reg. 55,317.

¹⁶ In the preamble to the proposed rule, EPA indicates that it is committed to proposing and promulgate another rulemaking within 6 years “which would either reaffirm the GHG permitting thresholds, promulgate alternative thresholds, adopt other streamlining techniques, and/or take other action consistent with the goal of *expeditiously meeting* CAA requirements in light of the administrative burden that remains at the time.” (Emphasis added). 74 Fed. Reg. 55,296. EPA further takes comment on its ability to stagger PSD requirements, perhaps over several time periods and rulemakings. 74 Fed. Reg. 55,337.

completely overwhelm the permitting authorities.”¹⁷ In addition, EPA claims that a literal interpretation of the CAA that imposed statutory 100 tpy and 250 tpy thresholds “would render compliance with this provision impossible by requiring far more permit applications than permitting authorities could process under this 12-month deadline, *at least for an initial period of time* until streamlining methods are developed.”¹⁸ The Agency further states “these streamlining methods cannot be implemented *as soon as PSD and title V are triggered, or even shortly thereafter.*”¹⁹

In all the above quoted assessments, EPA completely ignores the fact that the timing of this proposed rule and its proposed light duty vehicle rule is fundamentally of its own making. Both this proposed rulemaking and the GHG light duty vehicle rulemaking are discretionary with respect to the timeframe in which they are either required or necessary to avert the permitting catastrophe EPA predicts in its preamble. The Supreme Court explicitly recognized in *Massachusetts v. EPA* that EPA could control the timing of its actions to regulate GHGs under the CAA and no lower court has imposed any deadline for action by the Agency. However, as noted above, the Agency cannot exercise its discretion under the CAA to create impossible conditions flowing from implementation of CAA programs, and then further justify the exertion of more discretion under the CAA to “solve” the conditions it created for itself.

3. EPA has not met the “heavy burden” necessary for administrative necessity.

Although administrative necessity is recognized by the D.C. Circuit, relevant case law provides that EPA bears a “heavy burden” in establishing the conditions that warrant reliance on the doctrine.²⁰ EPA must be able to demonstrate true necessity and “impossibility.” In addition, courts require the EPA to act with due diligence. In the currently proposed rulemaking, EPA has not met these tests.²¹

¹⁷ *Id.* at 55,295. Emphasis added.

¹⁸ *Id.* at 55,308. Emphasis added.

¹⁹ *Id.* at 55,315. Emphasis added.

²⁰ *NRDC v. Train* 510 F. 2d 692 (1974) at 713.

²¹ E.g., see: *Public Citizen v. Shalala*, 932 F.Supp. 13 (DDC 1996) court rejected FDA decision to exempt restaurant menus from certain nutritional labeling requirements, FDA did not satisfy heavy burden of establishing impossibility; *New York v. Ruckelshaus*, 1984 WL 13953 (DDC 1984): court rejected EPA “administrative necessity” justification for (two-year) failure to respond, within 60-day statutory deadline, to petition under CAA section 126 for finding that emissions from another state were causing pollution within petitioning states; EPA did not meet heavy burden of showing impossibility; *Sierra Club v. Gorsuch*, 551 F.Supp. 785 (ND Cal. 1982) court concluded EPA had not met its heavy burden of demonstrating impossibility where the Agency claimed it needed more time

(continued...)

a. EPA cannot establish shortage of funds, time, or technical personnel.

An Agency may seek to justify administrative necessity on the need for an Agency to adjust to available resources imposed by shortage of funds, time, or technical personnel needed to administer a program. However, practical considerations must make it impossible for the agency to carry out its mandate.²² Such conditions might exist here, but EPA has not provided adequate evidence to support its proposed rulemaking.

In *NRDC v. Train*²³, the Court appeared convinced the agency was making sincere and diligent effort to fulfill statutory duties and was committed to development of sound guidelines.²⁴ Such conditions do not exist in relation to the proposed Tailoring Rule. EPA has provided the barest of details as to its own efforts to actually implement the statutory requirements of 250 tpy and 100 tpy thresholds in the two and one-half years following *Massachusetts v. EPA* or efforts by the Agency to explore alternatives to implement clear statutory language despite having discussed and received comment on such alternatives in the July 2008 ANPR.

Altogether, EPA provided no estimate or budget projection as to how the Agency's available funding will fall short of its required duties under the CAA. The docket for this rulemaking is largely limited to information on EPA's attempt to assess burden on sources and agencies related to permitting alone (and not resulting compliance costs). Thus, EPA has not assessed what are undoubtedly the far greater costs that would be borne by stationary sources in complying with new GHG requirements, costs which would dwarf the costs imposed by the permitting program alone. Therefore, the Agency has not substantiated its own efforts to implement the statute as written and has provided no empirical evidence with regard to the extremely general time estimates the Agency puts forward in the preamble for exploring and assessing various alternatives.

(continued)

to study, and was constrained by staff and budget limitations, in order to issue emissions standards for radionuclides.

²² E.g., *Alabama Power*, 636 F.2d at 359 (citing *NRDC v. Train*). See also: *Public Citizen v. Shalala*, 932 F.Supp. 13 (DDC 1996); *New York v. Ruckelshaus*, 1984 WL 13953 (DDC 1984); *Sierra Club v. Gorsuch*, 551 F.Supp. 785 (ND Cal. 1982).

²³ 510 F.2d 692 (1975).

²⁴ *Id.* at 712 n.105.

b. There is higher burden for prospective exemptions.

Agencies face an especially heavy burden to justify and gain approval of a prospective exemption of certain categories from a statutory command based upon the agency's prediction of the difficulties of undertaking regulation.²⁵ The record for this rulemaking is striking in its lack of detail concerning what efforts EPA has undertaken since April 2, 2007, the date of the Supreme Court's decision in *Massachusetts v. EPA*. While the Agency discussed various options, including streamlining PSD requirements and using general permits in the PSD program²⁶ and options such as general permits for the title V permitting program²⁷ and received public comment on such issues in its July 2008 ANPR, the record for this rulemaking is devoid of information on precisely what actions EPA has taken to further assess these alternatives and/or actively pursue these regulatory options. Indeed, very little new information is contained within this proposed rulemaking on streamlining options beyond what was iterated by the EPA nearly one and one-half years ago. Therefore, EPA has not met the considerable burdens placed on the Agency to support prospective exemptions.

c. Information contained in preamble/docket is insufficient.

Most of the costs cited in EPA's draft RIA are associated with the title V program and the sheer numbers of presumably "empty" permits that may have to be filed and processed (about \$54 billion combined yearly costs). Far lesser costs are projected for the PSD program (about \$1.1 billion in combined yearly costs). Since the RIA estimated what it considered to be "cost savings" to sources and permitting authorities affected by the proposed rulemaking (measured in terms of estimated permitting costs and not the costs of compliance), the RIA is insufficient to support the conclusions drawn in this rulemaking. Moreover, as noted, the RIA did not include an estimation of *any costs* for sources that would be subject to PSD and/or title V requirements on the theory that such sources would be affected with or without promulgation of a final Tailoring Rule. This theory is fatally flawed since EPA can act to apply the CAA in the manner it was written and avoid permitting costs and compliance costs for stationary sources that would "trigger" PSD solely on the basis of GHG emissions. We believe EPA must complete such relevant and legally required analysis before moving forward with this proposed rule or the Section 202 Rule. As noted in our comments filed with respect to the Section 202 Rule and as indicated below in section IV of our comments with respect to this

²⁵ *Alabama Power*, 636 F.2d at 359-60. Also applicable: *Sierra Club v. EPA*, 719 F.2d 426 (1983).

²⁶ 73 Fed. Reg. 44,503-44,510.

²⁷ *Id.* at 44,513.

proposed rule, we believe that this analysis is required under a number of different statutes and Executive Orders.

In sum, EPA mischaracterizes this rule as a regulatory “relief” measure when the accurate description of the Agency’s efforts with regard to this proposed rule, the Endangerment Determination and the Section 202 Rule is that EPA is attempting to aggressively move forward regulation of GHGs under the CAA for both mobile and stationary sources within an extremely short timeframe. The net effect of EPA’s rulemaking activity is to create new burdens that the Agency has estimated (only in part) will cost over \$50 billion per year. Nothing in this docket or the other dockets for the Endangerment Determination or the Section 202 Rule address the full costs of the Agency’s discretionary action to move forward at this point in time.

4. Thresholds proposed in this rulemaking are arbitrary and capricious.

While categorical exemptions from the clear commands of a regulatory statute are sometimes permitted, they are not favored by the courts.²⁸ We would note that *Alabama Power*, the precedent on which EPA copiously relies, cites *NRDC v. Costle*,²⁹ where the District of Columbia Circuit held that EPA lacked authority to exempt categories of point sources from Clean Water Act section 402 permit requirements.

EPA has performed no analysis to justify the type and kind of sources that would be affected by the categorical exemption created by imposing new source PSD applicability level of 25,000 tpy and a significance level of 10,000 to 25,000 tpy. EPA provides no analysis indicating that all, or even most sources that emit over 25,000 tpy of GHGs are in fact more financially able to address such emissions or that sources below such a threshold level are in fact less financially able to address GHG emissions. Neither has the Agency analyzed whether sources over 25,000 tpy are technically capable of emission reductions and those under this limit are not technically capable -- or that certain technologies are or are not more available at various threshold levels. Instead, fully two-and-one-half years following *Massachusetts v. EPA*, the best analysis EPA offers into the record is a better definition of the number of sources that may be affected at various threshold levels and a finer grain estimate of the financial burden imposed on permitting authorities than it presented in the ANPR nearly 18 months ago. EPA’s action in proposing such levels is arbitrary and capricious.

²⁸ 636 F.2d at 358.

²⁹ 568 F.2d 1369 (D.C. Cir. 1972).

5. EPA cannot establish implied authority for special administrative approaches.

Streamlined agency approaches and procedures may be allowed where more conventional approaches and procedures would practically prevent an agency from carrying out Congress's assigned mission.³⁰ However, EPA has demonstratively not pursued such approaches in the two-and-one-half years since *Massachusetts v. EPA*. The preamble contains unsupported assertions that additional time, measured in years, is required for EPA to evaluate streamlined approaches that it has, in other contexts, utilized for many years.

Those seeking to comment on this rulemaking are confronted with statements that, at best, must be taken at face value. For example, with reference to the time and effort required to issue PSD permits for GHGs, EPA cites to estimates by permitting authorities that were provided to the EPA on September 3, 2009 in summary form.³¹ While there is no detailed information in the record on the data underlying these estimates, we would initially note that they are described as “average” processing times and the “average” time needed to add staff, indicating that they do not represent absolute, fine-line estimates related to whether an endeavor is “impossible” (or perhaps possible for some, but not possible for all). EPA otherwise indicates that based on experience it will take “*approximately* 1 year” to issue guidance for a source category that would allow calculation of Potential To Emit (“PTE”).³² (Emphasis added) Although the EPA “believes” many states would adopt guidance, it notes that *some* states may need to adopt such guidance through a State Implementation Plan “a process that could take *approximately* 3 years.”³³ (Emphasis added). Again, given the vital role EPA cites for this rulemaking – to avoid grinding the facility permitting process to a halt – the lack of empirical support for its assertions is not only notable, but raises questions concerning the level of effort which preceded this proposal.

With regard to the time necessary for EPA to pursue alternative approaches to permitting, even less information is provided in support of the Agency's time and

³⁰ E.g., *Alabama Power*, 636 F.2d at 358.

³¹ An untitled 5 page document submitted to the docket indicates that, “The following is summary of the response provided by state and local permitting agencies to a survey conducted by NACCA regarding additional resource and burden considerations if EPA were to include GHGs as a “regulated pollutant” that is subject to PSD and Title V permitting.” Email from Mary Stewart Douglas to Juan Santiago/RTP/USEPA, September 3, 2009.

³² 74 Fed. Reg. 55,321.

³³ *Id.*

burden estimates. With respect to development and deployment of general permits and permits-by-rule, EPA estimates this process will take “more than 3 years.”³⁴ The Agency does not cite the source of information for its time estimate and no corresponding information could be found in the docket. Instead the preamble includes a litany of tasks and the bold assertion that it would take more than three years. This may well be the case. However, in a notice and comment proceeding, without further information, those seeking to comment are unable to assess the reasonableness of EPA’s estimate.

6. Agency cannot rely on its own perception of costs and benefits; the RIA is arbitrary and capricious.

There is no general administrative power to create exemptions to statutory requirements based upon the Agency’s perceptions of costs and benefits.³⁵ In the proposed rulemaking, EPA issued a final Regulatory Impact Analysis (“RIA”) in September 2009.³⁶ This analysis estimated the number of sources “experiencing regulatory relief,” that is, the number of sources thought to fall below various tonnage per year thresholds. Since this analysis is the main analysis supporting the proposed rule and the only analysis in the docket that contains underlying data on which it is based, this information is legally insufficient to establish conditions of “administrative necessity.”

Moreover, while the RIA indicates EPA considered “a number of factors involving administrative burden and necessity,” clearly the RIA analyzed arbitrary threshold levels for GHG emissions (i.e., 10,000, 25,000 and 50,000 tpy). The RIA does not offer a detailed explanation as to why the specific levels were chosen but simply indicates that the “primary basis for choosing the 25,000 tpy CO₂e threshold was to ensure consistency with the legal doctrines set forth in the proposed tailoring rule.”³⁷ This is completely circular logic. The use of administrative necessity is exceptional and borne of circumstances that exist apart from Agency action. Yet, the RIA indicates that levels were chosen simply to be “consistent” with the legal

³⁴74 Fed. Reg. 55,323.

³⁵ *Alabama Power*, 636 F.2d at 357. See also: *Public Citizen v. FTC*, 869 F.2d 1541, 1556 (DC Cir. 1989) where court cited *Alabama Power* prohibition of exemptions based on agency’s perceptions of costs/benefits and rejected attempt by FTC to “hack out” broad exemption from tobacco warning label requirements for, based on “practical impossibility” of placing warning on things too small, from covering t-shirts, beach blankets, and other items; *Sierra Club v. EPA*, 719 F.2d 426, 462 (DC Cir. 1983) where court concluded EPA had created an exemption from CAA based on its own perceptions of the costs and benefits of enforcing the law.

³⁶ Regulatory Impact Analysis for the Proposed Greenhouse Gas Tailoring Rule, Office of Air Quality Planning and Standards, September 2009.

³⁷ RIA at 11.

theories that EPA expounds in the preamble. These same levels, and the projected outputs from these arbitrary levels contained in the RIA, were then utilized in determining the thresholds EPA chose to propose in this rulemaking.³⁸ In effect, arbitrary levels analyzed formed the basis of arbitrary information that EPA uses to underpin the legal justification for the proposed rule.

IV. EPA Cannot Promulgate the Tailoring Rule Without Conducting Analysis of Burdens Imposed on Stationary Sources.

In the suite of rulemakings that EPA has proposed or finalized in the last several months, the Agency has apparently adopted the view that the CAA acts, in and of itself, to impose costs directly on sources. Therefore, as in the Section 202 Rule, EPA has not accounted for the cost of applying PSD and title V requirements to stationary sources in this proposed rulemaking. Instead, EPA claims that this rulemaking would serve to alleviate costs otherwise borne by some stationary sources. This view both presumes the validity of the current rulemaking as well as ignores the fact that applying requirements for GHGs for larger stationary sources (who do not receive any regulatory “relief” on account of this rulemaking) imposes substantial costs. Therefore, EPA’s approach to this rulemaking violates several statutes and Executive Orders as detailed below.

A. Violates the Paperwork Reduction Act.³⁹

Since the proposed rule fails to account for information collection requirements that will be required in association with the permitting of stationary sources under the CAA triggered by the finalization of this rule, EPA should resubmit an information collection approval request to the Office of Management and Budget.

³⁸ As noted in the RIA, “The rationale for proposing the 25,000 tpy CO₂e threshold in the proposed tailoring rule is based in part on our review of the costs and benefits associated with different thresholds evaluated and described in this RIA.” RIA at 11. While EPA indicates that the “primary basis” for choosing the 25,000 tpy CO₂e threshold was to ensure consistency with the legal doctrines outlined in the preamble, it is clear that the RIA was integral to this process. For example, EPA cites differences between different estimated levels of sources affected as detailed in charts utilized in the RIA and notes, “When comparing the regulatory alternatives discussed above, there is a non-trivial difference between them.” RIA at 13.

³⁹ 44 U.S.C. 3501-3521.

B. Violates the Regulatory Flexibility Act.⁴⁰

EPA did not conduct a regulatory flexibility analysis for small entities. Instead, since the Agency indicated that the proposal would relieve the regulatory burden associated with CAA permitting programs, the EPA certified that the proposed action would not have a significant economic impact on a substantial number of small entities. Since EPA fails to account for any impacts from compliance on businesses, large or small, within this proposed rule, the Section 202 Rule or other pending proposals (aside from estimating the possible permitting costs in this proposed rule), EPA must meet relevant Regulatory Flexibility Act requirements. This would include an assessment of the impact of GHG regulations on small entities.

C. Violates Executive Order 12866.

The EPA's failure to account for known costs that will occur as a direct result of the promulgation of this proposed rule in conjunction with the Section 202 Rule violates several applicable requirements of this order, including Sections 6(B)(ii) and 6(C)(iii), which require assessments of the potential costs and benefits of the regulatory action and "reasonably feasible alternatives to the planned regulation, identified by the Agencies or the public . . ." EPA's assessment of this rulemaking fails to address requirements in Section 1 indicating that Federal agencies are to "assess all costs and benefits of regulatory alternatives, including the alternative of not regulating [and that] . . . Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits."⁴¹ As pointed out elsewhere in our comments, EPA has the ability to defer or avoid altogether the "triggering" event it indicates will occur as a result of finalization of the Section 202 Rule. Moreover, in the context of this rulemaking, EPA has failed to define the costs and benefits of pursuing streamlining actions that it has long identified as possible methods to avoid imposing large costs on the regulated community.

D. Violates Executive Orders 13132 and 13175.

In its discussion of Statutory and Executive Order Reviews, EPA indicates that this rulemaking does not have federalism implications. EPA indicates the rule "will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and

⁴⁰ 5 U.S.C. §601.

⁴¹ 58 Fed. Reg. 51,735 (October 4, 1993).

responsibilities between various levels of government.”⁴² This assessment is contrary to the effects on state and local governments projected to occur as a result of this rulemaking in the proposed Tailoring Rule. In specific, EPA indicates that state governments will need to change multiple laws and regulations in order to bring state laws into line with the tonnage thresholds it proposes in this rulemaking. EPA also indicates it will take actions that will change the legal status of existing SIPs. Thus, this action will have substantial direct effects on the states and their relationship with the national government. In the alternative, if this proposed rulemaking does not have this effect, then as indicated elsewhere in our comments, the rulemaking is ineffective in its stated purpose. That is, if the proposed rulemaking does not affect states and state permitting agencies, then it does not act to alleviate any “impossible burdens” the Agency predicts would flow from implementing the statutory 100 tpy and 250 tpy thresholds in section 169. Moreover, EPA has indicated that “impossible” burdens would be established if state and local governments effectively returned CAA permitting responsibilities to the Agency under a scenario in which EPA approval of state programs is withdrawn.⁴³ This event would surely affect the relationship between the national government and the States.

E. Violates Executive Order 13211.

EPA estimates that this rule will not have a significant adverse effect on energy supply, thereby obviating the need for analysis of such effects under Executive Order 13211. As NPRA indicated in its comments on the Section 202 Rule, the Agency must consider the broader impact of the “triggering” action for PSD on the country’s use of energy, including effects on fuels with different carbon content. The EPA cannot continue to ignore this impact in all rulemaking actions affecting GHGs.

EPA cannot lawfully promulgate this Tailoring Rule, or the Section 202 Rule, without complying with the above statutes and orders.

V. The Tailoring Rule Is Ineffective and Legally Invalid Because of State Implementation Plan (“SIP”) and State Law Issues.

A. EPA’s Lacks Authority For Proposed Actions on SIPs.

EPA is proposing several actions with respect to SIPs to address the prospect that finalization of higher tonnage thresholds in this rulemaking will not be

⁴² *Id.*

⁴³ 74 Fed. Reg. at 55,301.

reflected, much less incorporated into, existing SIPs that implement CAA programs. In this regard, EPA first proposes to “limit previous approvals of State Implementation Plans in part”⁴⁴ to the higher thresholds and significance levels it proposes in this rulemaking. Although various SIPs and individual SIP provisions have been in existence and approved by EPA for many years, even decades, EPA would retroactively condition its approval of SIP elements “to the extent those provisions require permits for sources whose GHG emissions equal or exceed”⁴⁵ CAA statutory thresholds but are less than the new thresholds sought to be adopted in the current rulemaking. EPA considers this action to constitute a reconsideration of the SIPs involved and cites section 301(a) of the CAA as legal authority. EPA also proposes in the alternative to effectively accomplish the same purpose as above through utilizing section 100(k)(6) of the CAA. In this alternative, EPA would effectively consider its action to limit current SIP approvals as described above to constitute the correction of a previous error. In other words, EPA posits that it was in error for years, even decades, to have SIPs in existence which did not have 10,000-25,000 tpy significance and 25,000 tpy major source PSD applicability thresholds for GHGs.

EPA has not cited adequate statutory authority for these proposed actions. The preamble contains no cited instance in which the Agency has interpreted the statutory provisions referenced in this manner, but instead cites certain court opinions involving the reconsideration of previous Agency actions. In this proposal, EPA is not reconsidering any measure or SIP element related to the control levels for GHGs. In effect, the Agency is indicating that it would “pre-approve” SIP thresholds that conform to its final rulemaking. Such approvals must traverse the long-established process for amending SIP provisions.

B. EPA’s Proposed SIP Provisions Are Ineffective; Small Sources Will Still Be Subject to PSD and Title V Requirements.

Despite the intent of these proposed actions, it also must be seen that both alternatives are deficient and wholly ineffective. First, as EPA notes, “lower thresholds remain on the books under state law and therefore remain subject to them as a matter of state law.”⁴⁶ This means that despite any action by EPA to finalize this rulemaking, in many states for a source seeking a PSD permit this will constitute a difference without an effective distinction in the burden that may be applied with respect to the consideration and possible control of GHGs. It also means that the disruption and delay EPA indicates it wants to avoid in this

⁴⁴ *Id.* at 55,342.

⁴⁵ *Id.*

⁴⁶ *Id.* at 55,343.

rulemaking (and which constitute the basis of its claims of administrative necessity) will, in fact, occur. As noted by the State of South Carolina in a letter submitted to the docket for the EPA's reconsideration of the Johnson Memorandum,⁴⁷ "Like many states across the country, South Carolina needs time to adjust our regulations to increase the major source thresholds for Title V and PSD to be consistent with the federal Tailoring Rule, if finalized. Without these adjustments, the very chaos EPA intends to avoid through the proposed tailoring rule will ensue In South Carolina, most regulatory changes require a lengthy stakeholder involvement process, agency Board review and approval and legislative approval. This process normally takes about 18 months."

Moreover, EPA indicates that "if a state wants to implement PSD permitting requirements at a threshold level lower than 25,000 tpy CO₂e [or implement the proposed significance levels] . . . the state may submit a SIP revision that identifies the lower thresholds and provides the necessary assurances, under CAA section 110(a)(2)(E), that it has adequate personnel and funding to permit at this level."⁴⁸ While EPA indicates that it will require a state demonstration before approving lower PSD and Title V thresholds as part of a SIP, the possibility that lower levels may be implemented undercuts EPA's claims that this proposed rule acts to alleviate the burdens it has identified. Since there is the distinct possibility that varying threshold levels will be implemented in different states this rule is ineffective for its state purpose while other options available to the Agency, including withdrawal of this rule and the Section 202 Rule could directly address the conditions of administrative necessity claimed.

Altogether, EPA has presented the proposed rule as an action that will serve to alleviate burdens on state and local permitting authorities and sources to comply with PSD requirements and title V of the CAA. The legal structure of the CAA and EPA's proposed methodology for implementing new "major emitting facility" and significance thresholds for GHGs, however, thoroughly undercuts this claim. By EPA's own account, states have latitude to adopt lower GHG thresholds on their own initiative. States could also be further limited by "antibacksliding" provisions of the CAA or implementation of antibacksliding policies in various states. This would render EPA's projected relief not only ineffective, but ethereal. Thus, the proposed rule is fundamentally ineffective in its intended purpose – it cannot bring about the results it posits – thresholds up to 100 to 250 times the statutory limits prescribed by the CAA.

⁴⁷ Letter to Docket ID No. EPA-HQ-OAR-2009-0597 from Mrya Reece, Chief, Bureau of Air Quality, South Carolina Department of Health and Environmental Control, December 7, 2009.

⁴⁸ 74 Fed.Reg. at 55,343.

This hard reality undermines the legal theories EPA uses to support the proposed rulemaking. The rulemaking will not avoid the “impossible” conditions EPA predicts will occur if it proceeds to finalize the Section 202 rule and apply CAA PSD and title V provisions on the date of promulgation or the effective date of the Section 202 Rule. These hard realities also undercut the validity of the RIA conducted for this rulemaking. The RIA mistakenly states that “The proposed rule lifts, for a period of six years, the burden to obtain a title V operating permit required by the CAA for smaller existing sources of GHGs and the burden of NSR requirements for smaller new or modifying sources of GHGs.”⁴⁹ By EPA’s own statements in the preamble, this proposed rule does nothing of the sort. The proposed rule does not ensure when, or if, state laws will be changed; the proposed rule additionally cannot, on an a priori basis, determine whether states will submit valid SIP revisions to impose different GHG threshold levels than proposed in this rulemaking. In short, the CAA does not allow EPA to deliver the regulatory relief it theorizes will occur and EPA’s underlying analysis in the RIA fails as a result.

VI. Miscellaneous Issues

A. Air Pollutants Must Be Subject to “Actual Control”; EPA Cannot Apply PSD and Title V to All Six GHGs.

EPA is proposing to consider all six GHGs “subject to regulation” under the Clean Air Act even before final standards are promulgated for at least three GHGs – HFCs, sulfur hexafluoride (“SF₆”) perfluorocarbons (“PFCs”). While the section 202 light duty rulemaking proposes to regulate at most three GHGs (CO₂, methane and N₂O) individually, EPA is proposing in this rulemaking to consider all six GHGs for purposes of sections 165(a), 169(1), 501(2) and 302(j) to be the “air pollutant” “subject to regulation.” Neither the Section 202 Rule itself or the associated RIA for this proposed rulemaking discusses or analyzes the impacts of regulating six GHGs. EPA also does not perform any analysis in this rulemaking which assesses the costs and benefits of imposing regulations on any GHGs.

EPA’s attempt to “cross-reference” the Section 202 Rule as establishing that six GHGs are now “subject to regulation” therefore violates the Administrative Procedure Act for failure to both reference the correct legal authority or describe accurately the substance of the proposed rule. EPA cannot cure any defect in the section 202 rulemaking through this rulemaking proceeding. EPA’s Section 202 Rule clearly states it is proposing three separate standards for emissions of GHGs (e.g., in statements made in Section III.A of the proposed rule).⁵⁰ Furthermore, the

⁴⁹ RIA at 8.

⁵⁰ 74 Fed. Reg. 49,454, 49,507.

preamble to the Section 202 Rule does not discuss in any manner the regulation of six different GHGs but describes proposed standards that would *control* the emissions of CO₂, N₂O and methane. Finally, neither previous rulemakings under Title II of the CAA or the Section 202 Rule contain any measure that requires vehicle manufacturers to directly limit the emission of HFCs, PFCs or SF₆ and no engine or vehicle regulated under section 202(a) will be subject to any compliance requirements or enforcement action based solely on the emission of these three substances. Therefore, at most, only three GHGs, specifically CO₂, methane and N₂O will, at some point in the future should EPA finalize the Section 202 Rule, be considered to be “subject to regulation” under the CAA.

B. Section 821 Is Not Part of the CAA.

In the preamble to this proposed rule, EPA wrongly indicates that sources have been required to monitor and report CO₂ emissions “pursuant to the CAA.”⁵¹ While this reference may have been unintentional, the inference of this statement is that section 821 is part of the CAA. As referenced in many comments the Agency has received on this matter in other rulemaking actions⁵² section 821 was part of the 1990 Clean Air Act Amendments. However, section 821 did not amend or supplement the CAA. The CAA clearly encompasses only sections 101 through section 618; Title VIII of the Clean Air Act Amendments of 1990 was not incorporated into the CAA. There is no statutory history of section 821 which can be cited for the proposition that this section is part of the CAA; arguments that later interpretations of the section by EPA or implementation of the section are unavailing. EPA cannot rewrite the laws under its jurisdiction. EPA should confirm in this rulemaking as well as other pending rulemakings that section 821 is not part of the CAA.

C. EPA May Apply a “Mass Basis” for GHGs.

EPA indicates that since the CAA applies PSD and Title V on a mass basis, applying the programs on a CO₂e basis might result in relative small amounts of some GHGs triggering PSD and Title V. For example, methane is considered to be 25 times more potent than CO₂ on a mass basis, nitrous oxide 298 times more potent. This would mean that whatever threshold levels applies (whether 100, 250 or 25,000) this tonnage increase would be divided by 25 for methane or 298 for N₂O for determining applicability. EPA seeks comment in this rulemaking whether it

⁵¹ 74 Fed.Reg. 55,300.

⁵² E.g., “Comments of the Utility Air Regulatory Group on Prevention of Significant Deterioration (PSD): Proposed Reconsideration of Interpretation Of Regulations That Determine Pollutants Covered By the Federal PSD Permit Program,” submitted to Docket ID No. EPA-HQ-OAR-2009-0597, December 7, 2009.

should refine the CO_{2e} metric to add a mass-based metric and consider that PSD and title V would apply only if GHG emissions exceed statutory threshold levels on a tonnage basis.

EPA should adopt a mass basis for GHGs and that the CAA clearly indicates that PSD thresholds are to apply in this manner. Section 169 explicitly states that the definition of a major emitting facility is contingent on the emission or potential to emit “one hundred tons per year of any air pollutant” for certain defined stationary sources and “two hundred and fifty tons per year or more of any pollutant.” We do not believe EPA has any discretion to ignore the metric for regulation established by Congress.

Any attempt by EPA to create different application of the law based on relative warming values with reference to a single GHG would be arbitrary and capricious. While CO₂ may be the most abundant GHG and may be associated with the majority of climatic effects, this fact does not form a legal basis for the substance to redefine specific statutory levels created by Congress. That the international community may also discuss climate change with reference to CO_{2e} is also not probative for how EPA must interpret the provisions of the CAA. In theory, all GHGs could be measured as against any one GHG. Finally, given that EPA has not previously implemented section 169 tonnage thresholds on anything other than a mass basis, the Agency cannot point to any previous interpretations that would vary from a mass-based standard.

D. EPA Reached Predetermined Result.

In our comments filed with respect to the Section 202 Rule, we indicated that the “joint rulemaking” between EPA and NHTSA was unprecedented and called into serious question the Agency’s ability to exert independent judgment in its exercise of CAA authority. We also cited agreements between the Administration, EPA, the Department of Transportation and the State of California with regard to the outcome of the Section 202 Rule. These agreements involved actions concerning pending litigation, the consideration of the California waiver request for GHG emission standards for light-duty vehicles and the determination by EPA and DOT to adopt “the same rule” for federal GHG light-duty vehicle standards and to provide for a predetermined minimum level of stringency.

In the Endangerment Determination, EPA responded to comments it received with regard to the President’s announced policy for a “National Program” for new GHG standards for vehicles. Responding to comments that the President’s policy prejudged the outcome of the finding of endangerment, EPA indicated that the Section 202 Rule was contingent on the Endangerment Determination and that the Agency was merely pursuing the normal process for public notice and comment on new GHG light duty standards. As indicated above, the nexus between the

Tailoring Rule and the Section 202 Rule is clear. EPA has indicated the Agency is only pursuing this rulemaking because it intends to finalize the Section 202 Rule in March 2010. Therefore, our detailed comments with respect to the predetermined result of the Section 202 Rule are directly relevant to the Tailoring Rule. These comments also contradict EPA's response to comments contained in the Endangerment Determination. We attach and incorporate these comments by reference.

VII. Conclusion

In sum, EPA is not required to follow the regulatory pathway the Agency has chosen to pursue in this proposed rulemaking or in the Section 202 rulemaking proposed in late September. The regulation of GHGs under authority of the Clean Air Act, as this course of action is being currently defined by EPA, undoubtedly represents the largest expansion of the Agency's CAA authority since the enactment of the "modern" CAA in 1970. Yet EPA has failed to provide the public with anything approaching a complete economic analysis of this seminal event. Instead, the Agency has ignored statutory obligations to conduct required and appropriate regulatory analysis, analysis that could outline alternatives to the course of regulation that EPA has chosen or demonstrate less costly approaches to any regulations that may ultimately be required.

In addition, in this proposed rule, the Section 202 Rule, the 2008 ANPR and other documents, EPA posits deeply flawed legal theories for GHG regulation under the CAA. These legal theories could send the Agency down a path of applying GHG command and control technology to thousands of individual sources in the near-term and millions of individual sources in the longer run. The Agency must stop this rush to judgment and its headlong plunge into increasing the burdens on our economy. With regard to this specific proposal:

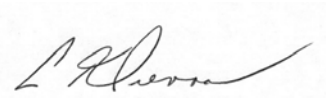
- EPA can alleviate many of the ills it seeks to address with the Tailoring Rule by properly interpreting PSD applicability to be based exclusively on emissions of criteria pollutants. In other words, PSD cannot be triggered based on GHGs alone. The absurd results that EPA cites do not spring from literal words of the statute, but rather EPA's erroneous construction.
- Even accepting EPA's conclusion as to results that would flow from immediately applying PSD to millions of individual permits, EPA cannot create its own "absurd results." The CAA does not require this proposed rule to be promulgated at this time, nor is this rule or the Section 202 Rule required by court order. Therefore, this proposed rule is discretionary, EPA has multiple options to avoid the consequences it

predicts, and EPA cannot avail itself of extraordinary administrative law doctrines it cites as legal support for the rule.

- EPA has also not complied with the requirements of the administrative law doctrines the Agency cites as authority for this rulemaking. The record of this proposed rule lacks detailed information as to what actions EPA has taken since the Massachusetts v. EPA decision to pursue other legal options under the Clean Air Act or to aggressively attempt to streamline PSD and title V permitting programs. Without such efforts, EPA cannot rely on “administrative necessity.”
- The proposed rule is legally invalid and ineffective since it cannot serve to change state laws and provide the regulatory “relief” EPA projects. State laws containing lower thresholds than the proposed thresholds of 25,000 tpy and 10,000 to 25,000 tpy can and will continue to be applied if this rule were finalized. The RIA is therefore also deeply flawed even as to the limited impacts it seeks to address.

NPRA appreciates the opportunity to comment on the proposed Tailoring Rule and looks forward to working with EPA to address the important issue of GHG regulation. If you would like to discuss these comments or need additional information, please do not hesitate to contact me at cdrevna@npra.org or 202-457-0480.

Sincerely,



Charles T. Drevna
President, NPRA



National Petrochemical & Refiners Association

1667 K Street, NW
Suite 700
Washington, DC
20006

202.457.0480 voice
202.457.0486 fax
gscott@npra.org

Filed Electronically

November 25, 2009

Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Attention Docket ID No. OAR-2009-0472

Subject: National Petrochemical & Refiners Association's Comments on the Environmental Protection Agency's Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49454 (September 28, 2009).

Dear Sir/Madame:

National Petrochemical & Refiners Association ("NPRA") is pleased to provide comments on the Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards ("Section 202 Rule") referenced above. NPRA's members comprise more than 450 companies, including virtually all U.S. refiners and petrochemical manufacturers. Our members supply consumers with a wide variety of products and services that are used daily in homes and businesses. These products include gasoline, diesel, fuel, home heating oil, jet fuel, asphalt products, and the chemicals that serve as "building blocks" in making plastics, clothing, medicine and computers.

Like virtually every other industrial sector, NPRA's members emit greenhouse gases ("GHGs") as a result of their manufacturing activities. They also manufacture and/or refine products that release GHGs when used or combusted by downstream users. As defined below in our specific comments, NPRA's members therefore have a great interest in the current rulemaking as well as other pending decisions and rulemakings that EPA is considering with respect to GHGs.

I. Introduction

EPA is not undertaking this proposed rulemaking, which would establish the first-ever greenhouse gas ("GHG") standards utilizing the authority of the Clean Air Act ("CAA"), in a



legal or regulatory vacuum. Instead, as the Agency explicitly notes in the preamble, “this proposal is an important first step in responding to the Supreme Court’s ruling in *Massachusetts v. EPA*.”¹ Indeed, this proposed rule more appropriately should be considered one of several far-reaching actions EPA has or will soon take to move forward with a new era of GHG regulations promulgated under the authority of the CAA. In other several determinations and rulemaking packages put forward since April of this year, EPA is proposing to make affirmative endangerment and cause and contribute findings for GHGs under CAA section 202 (“endangerment finding”),² to raise major source applicability thresholds for the Prevention of Significant Deterioration (“PSD”) and Title V permitting programs (“Tailoring Rule”),³ and to reconsider the Agency’s position on when a pollutant becomes “subject to regulation” for PSD purposes (the “Johnson Memorandum”).⁴ EPA has additionally proposed and finalized the Mandatory Reporting of Greenhouse Gases relying on existing CAA authority in sections 114 and 208 of the Act.⁵

EPA acknowledges that the combined effect of these rulemakings on the regulation of air pollution in this country is enormous. But under EPA’s legal theories, it is this proposed rule, following a positive endangerment determination, that is the lynchpin of GHG regulation under the CAA. EPA must appreciate the fact that, based on its own interpretations and analysis of the CAA, finalization of this proposed rule will have economic effects many orders of magnitude greater than projected impact of mandating new GHG standards for five model years of light duty vehicles. This has been the Agency’s considered opinion for some time. For example, EPA acknowledged the legal and regulatory context of this rulemaking 16 months ago when it noted that “EPA is also faced with the broader ramifications of any regulation of motor vehicle emissions under the CAA in response to the Supreme Court’s decision [in *Massachusetts v. EPA*] . . . Since regulation of one source of GHG emissions would or could lead to regulation of other sources of GHG emissions, the Agency should be prepared to manage the consequences of CAA regulation of GHGs in the most effective and efficient manner possible.”⁶ In the same notice, the Agency explicitly indicated that principles for GHG regulation should include “addressing GHG emission in a manner that does not harm the U.S. economy . . . U.S. efforts to reduce GHG emissions could be undermined if other countries with significant GHG emissions fail to control their emissions and U.S. businesses are put at a competitive disadvantage.”⁷

In the time period since the Supreme Court’s decision in *Massachusetts v. EPA*,⁸ EPA has not taken sufficient steps to address what it knows will be the immense financial and regulatory consequences that could flow from this rulemaking. NPRA believes that the Agency has a

¹ 74 Fed. Reg. 49,454, 49,507. (September 28, 2009).

² 74 Fed. Reg. 18,886 (April 24, 2009).

³ 74 Fed. Reg. 55,292 (October 27, 2009).

⁴ 74 Fed. Reg. 51,535 (October 7, 2009).

⁵ 74 Fed. Reg. 56,260 (October 30, 2009).

⁶ 73 Fed. Reg. 44,354, 44,398 (July 30, 2008).

⁷ *Ibid.*

⁸ 127 S. Ct. 1438 (2007).



responsibility not only to the considered administration of laws under its jurisdiction, but to the nation as a whole and its economic well-being, to step back from its current course of action better manage the consequences it knows will occur and has already predicted.

As detailed more fully below, NPRA believes that EPA must take previously stated principles of GHG regulation under the CAA seriously and:

- Undertake a correct analysis of the burdens imposed by the Section 202 Rule in accordance with relevant statutory and Executive Order requirements, including the burdens on stationary sources from triggering PSD. Based on this analysis, repropose the rule and give the public an adequate opportunity for notice and comment.

OR

- Delay promulgating the Section 202 Rule in order to provide the opportunity for EPA to address consequences it has predicted will occur in the Tailoring Rule as well as any effect on stationary sources. This would allow the Department of Transportation to proceed with its proposed Corporate Average Fuel Economy (CAFE) standards and recognize that virtually all of the benefit claimed for the rule can be derived from such standards.

AND/OR

- Interpret the Prevention of Significant Deterioration (“PSD”) program to require PSD review for GHGs only in cases where non-GHG air pollutants from new sources will exceed applicable thresholds of 100 or 250 tons or where existing sources would trigger PSD due to their emission of non-GHG pollutants above significance levels. This approach is consistent with the statute and avoids the “absurd results” and “impossible burdens” predicted in EPA’s proposed Tailoring Rule. This approach would also allow the regulatory analysis to accompany the section 202 rule to more closely approximate the actual burdens imposed by this rulemaking.

II. Specific Comments

A. EPA’s Section 202 Rule Should Be Withdrawn or Reproposed Since It Violates Several Statutes and Executive Orders.

In the proposed rulemaking, EPA has completely failed to take into account the enormous economic and regulatory consequences of this rulemaking on stationary sources. Even though the Agency’s current interpretation of the CAA considers a final section 202 rule to constitute a “triggering” event that would require CAA permitting actions either at the time of promulgation of the rule or upon the effective date of the rule, the proposed rule and its associated “Regulatory



Impact Analysis” (“RIA”) thoroughly ignore this consequence, a consequence that the Agency considers to be legally inevitable. Specifically, this proposed rule:

1. Violates the Paperwork Reduction Act.⁹

Since the proposed rule fails to account for information collection requirements that will be required in association with the permitting of stationary sources under the CAA triggered by the finalization of this rule, EPA should resubmit an information collection approval request to the Office of Management and Budget.

2. Violates the Regulatory Flexibility Act.¹⁰

EPA did not conduct a regulatory flexibility analysis for small entities. Instead, the Agency indicated that the proposal would affect only two small domestic automotive manufacturers who fell below relevant Small Business Administration guidelines. Given the broad effect of this rulemaking in “triggering” permitting requirements for millions of small sources,¹¹ EPA must assess the enormous impact of CAA requirements on various small entities spread across the economy. Since EPA fails to account for this effect within the Tailoring Rule or other pending proposals – while indicating repeatedly that this effect will occur as a result of the Agency’s actions -- EPA must meet relevant Regulatory Flexibility Act requirements in this rule.

3. Violates Executive Order 12866.

The EPA’s failure to account for known costs that will occur as a direct result of the promulgation of a final rule violates several applicable requirements of this order, including Sections 6(B)(ii) and 6(C)(iii), which require assessments of the potential costs and benefits of the regulatory action and “reasonably feasible alternatives to the planned regulation, identified by the Agencies or the public . . .” EPA’s assessment of this rulemaking also fails to address requirements in Section 1 indicating that Federal agencies are to “assess all costs and benefits of regulatory alternatives, including the alternative of not regulating [and that] . . . Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits.”¹²

⁹ 44 U.S.C. 3501-3521.

¹⁰ 5 U.S.C. §601.

¹¹ EPA estimates that over 6,000,000 Title V permits could be required under CAA statutory thresholds. *See*: Regulatory Impact Analysis for the Proposed Greenhouse Gas Tailoring Rule, Final Report, September 2009, Table 2-2.

¹² 58 Fed. Reg. 51735 (October 4, 1993).



4. Violates the Unfunded Mandates Reform Act.

EPA correctly indicates that this law requires Federal Agencies to prepare a written assessment of the costs, benefits and other effects of a proposed or final rule that includes a Federal mandate that is likely to result in expenditures exceeding \$100 million by state, local or tribal governments in any one year. EPA incorrectly indicates, however, that the proposal contains no federal mandates and does not impose enforceable duties on states, localities and tribes. EPA has indicated that finalization of this rule will result in CAA permitting requirements under programs largely implemented by state, local, and tribal governments.¹³ EPA cannot simply ignore this direct effect, or in the alternative, simply *assume* that it will act to finalize the Tailoring Rule (theoretically obviating at least part of this burden). In the proposed Tailoring Rule, the Agency projects over \$50 billion in costs to state, local, and tribal governments from PSD and Title V permitting activity, far exceeding the statutory thresholds in the Unfunded Mandates Reform Act.

5. Violates Executive Orders 13132 and 13175.

In its discussion of Statutory and Executive Order Reviews, EPA indicates that this rulemaking does not have federalism implications. EPA indicates the rule “will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities between various levels of government.”¹⁴ Again this assessment is contrary to the effects on state and local governments projected to occur as a result of this rulemaking in the proposed Tailoring Rule. In specific, EPA also indicates that “impossible” burdens would be established if state and local governments effectively returned CAA permitting responsibilities to the Agency under a scenario in which EPA approval of state programs is withdrawn.¹⁵

6. Violates Executive Order 13211.

EPA estimates that this rule will have a net positive impact on energy supply, thereby obviating the need for analysis of such effects under this Executive Order 13211. While EPA may be correct with respect to the rule’s impact on vehicle fuels, the Agency must consider the broader impact of this “triggering” action on the country’s use of energy, including effects on fuels with different carbon content.

A failure by EPA to comply with the above statutes and orders would fatally flaw the final rule.

¹³ 74 Fed. Reg. 55292.

¹⁴ *Id.*

¹⁵ 74 Fed. Reg. at 55,301.



B. EPA Is Not Required Either to Propose or Finalize the Section 202 Rulemaking At This Time.

1. There is no statutory schedule or judicial order applicable to this rulemaking.

EPA is proposing to regulate GHG emissions from individual manufacturer fleets sold in each model year. EPA relies on CAA section 202(a) to establish an attribute-based approach for a CO₂ fleet-wide standard based on the footprint of the vehicle. EPA separately relies on section 202(a) to propose per-vehicle standards for nitrous oxide and methane emissions. In addition, EPA cites several other sections of Title II of the CAA that are relevant to the standards, including provisions affecting Agency discretion with regard to useful life, certificates of conformity, testing requirements, and warranties.¹⁶

While CAA section 202(a) requires the Administrator to set standards “which in [her] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,” the section does not contain a specific timeframe for the Administrator to act with respect to the emission of an air pollutant. Section 202(a) authority therefore stands apart from other provisions within Title II of the Act that either mandate specific timeframes or model years in which the Administrator is to act to establish new standards. For example, section 202(g) specifically mandates standards for nonmethane hydrocarbons, carbon monoxide and oxides of nitrogen for light-duty trucks under 6,000 GVWR for model years after 1993, as well as requires standards for particulate matter for model years 1994 and 1995 for light duty vehicles along with specific phase-in schedules for implementing the standards. Other subsections of section 202 are equally as specific (*e.g.*, the Phase II standards for certain light duty vehicles and trucks in section 202(i), cold carbon monoxide standards in section 202(j)). These precise schedules and timeframes stand in stark contrast with the general duties in section 202(a) to establish standards and to “from time to time revise” such standards. Therefore, the EPA Administrator has inherent discretion under section 202(a) to defer either the proposal or finalization of new GHG standards.

Nor does the proposed rulemaking cite a specific judicial order mandating that EPA act within its intended timeframe to promulgate GHG standards under section 202. While the preamble discusses the Supreme Court’s opinion in *Massachusetts v. EPA*,¹⁷ this decision does not mandate a time and manner in which EPA must act with regard to the emission of GHGs from new vehicles. In *Massachusetts*, the Court vacated EPA’s decision to deny a petition for rulemaking and remanded the case back to the Agency for reconsideration consistent with its opinion. But the Court’s decision does not require EPA either to propose a section 202 rulemaking (at least until after such time that an endangerment determination is made) or finalize the pending proposal at any particular moment in time. Instead, as noted in the Advance Notice

¹⁶ 74 Fed. Reg. at 49,507.

¹⁷ 127 S. Ct. 1438 (2007).



of Proposed Rulemaking Regarding Regulating Greenhouse Gas Emissions Under the Clean Air Act ¹⁸(“ANPR”), “(t)he Court remanded the decision to EPA but was careful to note that is was not dictating EPA’s action on remand, and was not deciding whether EPA must find there is endangerment. Nor did the Court rule on ‘whether policy concerns can inform EPA’s actions in the event that it makes such a finding.’”¹⁹ Instead, as noted in the ANPR, “The Court also observed that under CAA section 202(a), ‘EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies.’”²⁰

As discussed in greater detail below, EPA could avoid or at least delay the many negative ramifications of regulating GHGs under section 202 by withdrawing or delaying final promulgation of the tailpipe rule. Importantly, a delay would not compromise the environmental benefits predicted to result from EPA’s and the National Highway Traffic Safety Administration (“NHTSA”) joint rulemaking, but would allow the agency time to develop a strategy to deal with the significant CAA permitting ramifications of GHGs becoming “regulated air pollutants” under the CAA.

2. There would not be a significant public health or environmental impact if EPA withdraws the proposed section 202 standards or delays finalization of such standards.

EPA has proposed section 202 standards as part of a “joint rulemaking” with the NHTSA. If EPA were to withdraw its proposed regulations under section 202 or delay finalization of such standards, NHTSA has separate legal authority to establish CAFE standards that will provide the vast majority of benefits projected to occur under EPA’s proposed section 202 rules.²¹ While EPA proposes to establish standards for three GHGs (CO₂, nitrous oxides, and methane) and provide for a crediting mechanism for a fourth GHG (hydrofluorocarbons), NHTSA is proposing to increase the stringency of vehicle mileage standards. The overall effect on carbon dioxide of the proposed NHTSA standards will closely replicate the effects projected by EPA. Both standards derive most of the projected benefits by acting to reduce emissions of CO₂, by far the predominant GHG emitted by vehicles. As noted in the Preamble for the joint rulemaking, “Carbon dioxide emissions account for nearly 95% of total GHG emissions that result from fuel combustion during vehicle use.”²² Therefore, the EPA and NHTSA regulatory programs and the

¹⁸ 73 Fed.Reg. 44,354 (July 30, 2008).

¹⁹ *Id.* at 44398.

²⁰ *Id.*

²¹ NHTSA authority derives from provisions of the Energy Policy and Conservation Act, which address calculation of average fuel economy (49 U.S.C. 32904). These provisions were recently amended by the Energy Independence and Security Act (P.L. 110-140).

²² 74 Fed. Reg. at 49,675. As EPA additionally notes, “CO₂ is the primary pollutant resulting from the combustion of vehicular fuels, and the amount of CO₂ emitted is directly correlated to the amount of fuel consumed.” 74 Fed. Reg. t 49,513.



standards produced under the CAA and “Energy Policy and Conservation Act” (“EPCA”) would achieve roughly the same level of CO₂ benefits.²³

Other regulatory impacts of the EPA and NHTSA standards are also virtually the same. EPA has essentially proposed to regulate the same vehicles as would be affected by the CAFE standards.²⁴ EPA is also proposing to utilize similar methodologies as NHTSA to calculate GHG emissions from the fleets that will be subject to regulation.²⁵ And EPA has harmonized both the timeframe for its section 202 regulations (*i.e.*, Model Years 2012 to 2016) and the overall stringency of the standards in each model year with NHTSA. This close coordination of the two agencies’ standards was deliberate and the agencies utilized a joint technical basis to address issues in the program to allow auto manufacturers to build a “single national fleet” that would comply with both the GHG and CAFE standards.²⁶ Thus, if EPA were to withdraw its proposed regulations or delay the finalization of its proposed rule, there would be little or no impact on the light duty vehicles that travel our nation’s roads or any significant impact on associated environmental or public health benefits.

3. EPA proposes to regulate only three GHGs.

As part of the calculation of GHG benefits between the EPA and NHTSA standards noted above, EPA has included benefits it attributes to reductions in HFC emissions. The effect of this inclusion in the regulatory analysis is noted above. However, there is also a broader context within the CAA. That is, while EPA proposes to establish specific regulatory standards for CO₂, methane and nitrous oxides from light duty vehicles in this rulemaking, EPA has not proposed regulatory standards for HFCs. Instead, EPA effectively allows such emissions to provide a voluntary method to comply with the CO₂ g/mile standard. Since this treatment of HFCs affects not only GHG calculations in the RIA for this rulemaking, but also the determination of what GHGs are “subject to regulation” under the CAA, we note this disparate treatment. In this proposal, EPA does not propose to regulate all GHGs or even all GHGs emitted from vehicles,

²³ The Regulatory Impact Analysis notes differences in the calculation of million metric ton reductions in carbon dioxide equivalent amounts (CO₂e) between EPA and NHTSA standards. As noted in the preamble, “The differences regarding the treatment of air conditioning improvements (related to CO₂ and HFC reductions) affect the relative stringency of the EPA standard and the NHTSA standard.” 74 Fed. Reg. 49468. However, the preamble also indicates that such differences are not large. “It should also be expected that overall EPA’s estimates of GHG reductions and fuel savings achieved by the proposed GHG standards *will be slightly higher* than those projected by NHTSA only for the CAFÉ standards because of the reasons described above.” (Emphasis added). *Id.* at 49477.

²⁴ EPA proposed to use the same vehicle category definitions that were utilized in the CAFÉ program for the 2011 model years and indicates that “the proposed approach of using CAFÉ definitions allows EPA’s proposed CO₂ standards and the proposed CAFÉ standards to be harmonized across all vehicles. In other words, vehicles would be subject to either car standards or truck standards under both programs, and not car standards under one program and truck standards under another.” 74 Fed. Reg. at 49516.

²⁵ For example, EPA indicates that its calculations for CO₂ equivalency will include hydrocarbons and carbon monoxide and that this “will ensure consistency with CAFÉ calculations since HC and CO are included in the “carbon balance” methodology that EPA uses to determine fuel usage as part of calculating vehicle fuel economy levels.” *Ibid.*

²⁶ 74 Fed. Reg. 49454 at 49468.



only certain GHGs for which it has proposed standards and which would subject those GHGs to actual control.

4. If EPA were to withdraw or delay finalization of the proposed rules, regulatory delay and uncertainty would not result.

If EPA were to withdraw this rulemaking or postpone finalization of the proposed rule, there would be no delay in promulgation of regulations that would impose national standards. If EPA were not to proceed with section 202 standards, a fundamental stated purpose of the proposed rulemaking would still be accomplished -- vehicle makers would be subject to one national standard and able to build a single light-duty national fleet. The only difference would be that the singular national program would be promulgated by NHTSA solely under their Energy Policy and Conservation Act (“EPCA”) authority. Moreover, any separate GHG standards that would be applicable to such vehicles in California and other states that adopted California standards pursuant to section 177 of the CAA would also apply in the same manner and same form as they would if EPA proceeded to finalize its proposed standards. These actions, though highly coordinated with EPA and the Administration, have already been approved under independent statutory authority.²⁷ Indeed, according to letters sent by the State of California to EPA and the Department of Transportation and a separate letter from automobile manufacturers, any uncertainty lies only in the event that EPA were to promulgate standards at variance with the standards it indicated earlier this year that it intended to propose.²⁸

In addition, withdrawing or not finalizing the proposed rulemaking does not foreclose options for EPA to later take action under the CAA. Unlike NHTSA, EPA is not constrained to act in five year increments or to finalize standards 18 months prior to the start of a model year in which such standards are to be effective.²⁹ At a latter point in time, EPA could

²⁷ 74 Fed. Reg. 32744 (July 8, 2009).

²⁸ Virtually concurrent with the President’s announced decision to coordinate CAA and EPCA vehicle standards and promote a “National Program” for vehicle standards on May 19, 2009 (cited below), California Governor Arnold Schwarzenegger sent a letter to Administrator Jackson and Secretary LaHood indicating that the State’s commitments were contingent on EPA completing its pending reconsideration of the waiver request. (Letter from Governor Arnold Schwarzenegger to Administrator Lisa Jackson and Secretary Ray LaHood, May 18, 2009). EPA subsequently granted the California waiver on July 8, 2009. Among the understandings California cited in the May 18th letter were that EPA adopts “national GHG standards substantially the same as those proposed” in the May 2009 Joint Notice of Intent to conduct rulemaking. Parallel statements were made in a letter from the Alliance of Automobile Manufacturers to Administrator Jackson and Secretary LaHood conditioning their commitment to not contest a final decision granting the California waiver and to not pursue certain other litigation if California took actions such as those described in Governor Schwarzenegger’s May 18, 2009 letter cited above (Letter from Dave McCurdy to Administrator Jackson and Secretary La Hood, May 18, 2009).

²⁹ 49 U.S.C. 32902(a) requires the Secretary of Transportation to promulgate final standards no later than 18 months prior to the start of the MY in which they apply, and 49 U.S.C. 32902 (b)(3)(B) limits standards to five MYs. Section 202(a)(2) of the CAA, by contrast provides that any regulation prescribed under Section 202(a)(1) take effect after there is sufficient time for the development and application of technology and after the Administrator gives “appropriate consideration to the cost of compliance within such period.” Thus, EPA is not limited to the specific time periods that are applicable to the promulgation of CAFÉ standards.



promulgate standards to cover only some of the model years (“MYs”) in the MY 2012 to MY 2016 period. Under section 202(a), EPA could also act independently of NHTSA constraints and promulgate future standards beyond MY 2016 to which NHTSA later could conform any EPCA MY 2017 to MY 2021 “follow-on” standards.³⁰ EPA could also theoretically decide to promulgate more stringent or less stringent standards than NHTSA and not violate any policy perspectives that there be one “national” standard to which a single light-duty national fleet can comply as long as either the EPA or NHTSA standard was “controlling” for purposes of compliance. In sum, EPA has numerous options available to it under the CAA to address vehicle emissions at a future time if it proceeds to withdraw or not finalize the pending rulemaking.

C. EPA May Avoid “Impossible” Results By Redefining PSD Applicability.

As indicated above, EPA is not compelled to finalize the Section 202 rulemaking at this time, but has significant discretion as to the manner, timing and content of any action that it takes to respond to *Massachusetts v. EPA*. In addition, however, EPA can avoid “impossible burdens” the Agency identified in the Tailoring Rule (e.g., the near-immediate expansion of state and local permitting programs to include assessments of GHG emissions) and at the same time properly confine the effects of this rulemaking to light duty vehicle manufacturers.³¹ As detailed below, the Agency should redefine PSD applicability to follow the clear language and structure of the CAA. By doing so, EPA could proceed to finalize the section 202 rulemaking while not imposing “impossible burdens” it has projected will result from this rulemaking. EPA could also avoid unnecessary and unsupported reliance on administrative law doctrines in the Tailoring Rule and comply with the CAA in the manner in which it is plainly written

EPA has interpreted the CAA PSD provisions to require a “major for one, major for all” policy. Under one interpretation of this policy, applying this policy to GHGs would mean that any increase in GHGs above PSD threshold levels for a new source or above significance levels for an existing source³² would trigger PSD for all pollutants subject to regulation under the CAA. Consequently, the inverse would also be true; increases above threshold or significance levels for non-GHGs would trigger PSD review for GHGs once GHGs are considered to be “subject to regulation” under the CAA.

In the Tailoring Rule, EPA has requested comment on whether the Agency can restrict current interpretations of PSD requirements to require PSD review for GHGs only in cases where

³⁰ As cited in the Preamble, “EPCA calls for NHTSA to take into consideration the effects of EPA’s emission standards on fuel economy capability (see 49 U.S.C. 32902(f)) . . .” 74 Fed. Reg. at 49466.

³¹ EPA claims, in multiple places in the Tailoring Rule that the number of permit actions will overwhelm the current system. For example, EPA states that the “literal application [of statutory applicability thresholds] would render it impossible for permitting authorities to meet the requirement in CAA section 165(c) to process permit applications within 12 months . . . The extraordinary number of permit applications would render it impossible for permitting authorities to meet the requirements of section 503(c) to process title V permit applications within 18 months.” 74 Fed. Reg. 55304.

³² PSD threshold levels for new sources of GHGs are currently either 100 or 250 tons depending on the source; since no significance level for GHGs has been established by EPA, the significance level for GHG emissions is zero.



non-GHG air pollutants from new sources will exceed applicable thresholds of 100 or 250 tons or where existing sources would trigger PSD due to their emission of non-GHG pollutants above significance levels. That is, increases in GHG emissions alone would not be sufficient to trigger PSD.³³

NPRA believes that EPA can adopt this position under the CAA; indeed, NPRA believes that this policy is more closely aligned with the clear statutory provisions of the CAA on which EPA's current regulations rely. NPRA would also note that it is offering this comment in connection with this proposed rule precisely because of the larger issues noted above that are at the heart of this rulemaking. That is, since EPA considers this proposed rule to be the "triggering" event for application of PSD requirements to GHGs, NPRA believes that it is proper, indeed necessary, to comment on this matter in the instant proceeding.

The CAA can clearly be read to require that EPA must act first to establish a National Ambient Air Quality Standard ("NAAQS") for GHGs before the Agency has the legal ability under the CAA to require PSD solely on the basis of increases in GHG emissions. Section 161 of the CAA requires that State implementation plans "shall contain" emission limitations and necessary measures "in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable." Under this section, EPA is to promulgate regulations "under this part" of the CAA, or Part C – Prevention of Significant Deterioration of Air Quality. Section 165(a)(3) of the CAA further indicates that owners or operators of facilities need to demonstrate that construction and operation of facilities to which PSD applies "will not cause or contribute to air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for (any pollutant) *in any area to which this part applies* more than one time per year . . ." (Emphasis added). Given the reference in these sections to the location of the source (the location of the source in areas that are either considered to be in attainment with a NAAQS or unclassifiable³⁴), the natural reading of these provisions is aligned with reference to the NAAQS. In other words, areas to which "this part" applies are defined on the basis of NAAQS pollutants. Therefore, EPA may properly interpret PSD applicability to be linked to the existence of NAAQS for particular air pollutants.

In the case of GHGs, section 202 does not operate to establish a separate NAAQS for which areas may be classified under section 107 of the CAA. Instead, at most, section 202 regulations may be considered to establish that some GHGs (*i.e.*, the three GHGs³⁵ that may be considered to be subject to actual controls pursuant to finalization of the regulations) are at some point in time "subject to regulation" under the CAA. Once the GHGs are considered to be

³³ 74 Fed. Reg. 55292 at 55327 (October 27, 2009).

³⁴ An unclassifiable designation is itself made only with respect to the existence or lack of existence of information in relationship to a NAAQS standard. Section 107(d)(1)(A)(iii) of the CAA specifies that such areas are to be designated on the basis of "available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant."

³⁵ Section 202 would serve to establish limitations on the emissions of carbon dioxide, nitrous oxides and methane from light duty vehicles.



subject to regulation, section 165(a)(4) may be interpreted to require facilities that otherwise trigger PSD for a criteria pollutant to comply with best available control technology (“BACT”) for GHGs.. Section 165 does not, however, mandate that BACT apply solely based on GHG emissions.

As noted copiously in many forums, GHGs are unique since they do not affect local or regional air quality and are not emitted at levels which pose a direct impact on public health through inhalation. Thus, triggering BACT review for an “area” on the basis of GHGs alone is illogical and contrary to the history and development of the CAA which began as a series of air pollution laws aimed at localized and regional pollution. To satisfy these broader CAA purposes and to minimize confusion to state and local air permitting authorities and within the regulated community, NPRA therefore encourages EPA to adopt this interpretation concurrent with the promulgation of any final section 202 rulemaking for light duty vehicles.

D. EPA Has Not Properly Analyzed the Burdens Caused by Issuing the Section 202 Rule; the Rule Cannot Be Justified Given Limited Benefits.

EPA has indicated that it is taking several coordinated actions to address GHG emissions under the CAA.³⁶ Yet, even though the Agency believes that, as a result of a final endangerment determination and final effective regulations promulgated under section 202, CAA PSD and Title V permitting programs are automatically “triggered,” EPA completely fails to analyze the burdens imposed by the Agency’s decision to proceed with this rulemaking. The Draft Regulatory Impact Analysis (“Draft RIA”) that accompanied this rulemaking³⁷ analyzes the GHG emission impacts of the proposed vehicle standards as well as the impact of the standards on criteria pollutants. The Draft RIA also examines the costs associated with various engine technologies and technology packages as well as the impact on fuel consumption and other social impacts. However, neither the Draft RIA or the Preamble to the proposed rulemaking acknowledges, much less comprehensively analyzes and assesses, the impact of the section 202 light duty rulemaking on stationary sources.

³⁶ The proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (74 Fed. Reg. 55293, October 27, 2009) indicates that “This proposal is necessary because EPA expects soon to promulgate regulations under the CAA to control GHG emissions, and as a result, trigger PSD and title V applicability requirements for GHG emissions.” (74 Fed. Reg. 55293). EPA has additionally indicated that the Greenhouse Gas Emission Reporting Rule was being “promulgat[ed] . . . to gather information to assist EPA in assessing how to address GHG emissions and climate change under the Clean Air Act.” (74 Fed. Reg. 56265) (October 30, 2009). The Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act (74 Fed.Reg. 18886, April 24, 2009) while not proposing regulatory standards serves as the condition precedent for the Section 202 light duty vehicle rule. Indeed, EPA describes the section 202 proposal as “the second-phase of EPA’s response to the Supreme Court’s decision in Massachusetts v. EPA.” (74 Fed. Reg. 49507).

³⁷ Draft Regulatory Impact Analysis, Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, U.S. Environmental Protection Agency, September 2009, EPA-420-D-09-003.



NPRA

1. EPA has not properly accounted for costs.

The economic impacts of triggering PSD and title V requirements as a direct result of this rulemaking package are nowhere to be found within the “suite” of GHG rulemakings EPA is currently undertaking. EPA classifies the effects of the PSD and Title V Tailoring Rule as “cost savings” assuming the triggered PSD and Title V requirements outlined in the Regulatory Impact Analysis (“RIA”).³⁸ The RIA for the Tailoring Rule indicates that, “For larger sources of GHGs, there are no direct economic burdens or costs as a result of the proposed rule, because requirements to obtain title V operating permits or to adhere to NSR requirements of the CAA are already mandated by the Act and by existing rules and are not imposed as a result of this proposed rulemaking.”³⁹ While the proposed endangerment finding has yet to be finalized, EPA also considers that action to also carry with it no economic consequences. The proposed endangerment finding was considered to be a “significant regulatory action” under Executive Order 12866 because of novel policy issues, not cost impacts. EPA also notes with regard to the Regulatory Flexibility Act analysis that “Because this proposed action will not impose any requirements, the Administrator certifies that this proposed action will not have a significant economic impact on a substantial number of small entities.”⁴⁰ Thus, as a general matter, EPA has failed to account for the direct economic consequences of its action in proposing and potentially finalizing this rulemaking.

EPA has not sought to estimate the resulting costs on sources who are at the other end of the permitting process – those who must apply for PSD and title V permits and bear the direct costs of the application process and the incremental costs of requirements that may flow from imposing restraints on the emission of GHGs.

2. EPA has not properly accounted for the costs and effects of the section 202 rulemaking on state permitting programs.

In the proposed Tailoring Rule, EPA projects that economic burdens could be enormous for state and local permitting sources and potentially for EPA if EPA “takes back” state permitting programs. EPA indicates that “Without the tailoring rule, permitting authorities would receive approximately 40,000 PSD permit applications each year – currently, they receive approximately 300 – and they would be required to issue title V permits for approximately some six million sources – currently their title V inventory is some 15,000 sources.”⁴¹ EPA then calculated, based on data obtained from existing Information Collection Requests (“ICRs”), that permitting authorities expend an average of 301 hours to permit a new or modified industrial

³⁸ Regulatory Impact Analysis for the Proposed Greenhouse Gas Tailoring Rule, Final Report, Office of Air Quality Planning and Standards (September 2009).

³⁹ *Id.* at 8.

⁴⁰ 74 Fed. Reg. 18909.

⁴¹ 74 Fed. Reg. 55,295. EPA estimates that this would constitute an increase of more than 140-fold, based on issuing approximately 280 PSD permits per year. 74 Fed. Reg. at 55,301.



source and extrapolated from this data an estimate of 60 hours required to issue permits for residential or commercial sources.⁴² These calculations resulted in an estimate of \$257 million to include all GHG emitters above a 250 ton threshold.⁴³ With respect to the title V permitting program, EPA estimated that applying such requirements to GHG emissions would require 340 million hours of work at a cost of \$15 billion. EPA estimated the number of additional new title V permits at 6,000,000, with 97 percent of the permits in the commercial and residential sector.⁴⁴

Whatever the validity of such estimates and the degree of uncertainty that is involved in their calculation, EPA has also not accounted for the very real possibility that state and local governments may not take action to conform permitting programs to the levels contained in the Tailoring Rule. While EPA is proposing to limit its approval of State Implementation Plans (“SIPs”) to state permitting requirements that apply PSD to sources of GHGs above 25,000 tpy and 10,000 to 25,000 tpy for significance levels, as noted in the preamble to the Tailoring Rule, EPA is not proposing to take action to disapprove State Implementation Plan provisions which would impose CAA permitting thresholds of 100 and 250 tpy. EPA simply states that “States may wish to consider revising those State law provisions.”⁴⁵ As EPA notes, lower thresholds for PSD and significance thresholds “remain on the books” and have often been adopted directly by state legislatures. Sources therefore would remain subject to lower state limitations awaiting the possibility that state legislatures, at some point in the future, decide to take affirmative action to change such levels to the levels that EPA promulgates in its final Tailoring Rule. Yet, EPA does not account for this known fact in its economic analysis of either this rule or the proposed Tailoring Rule. EPA knows this condition to exist, yet has not made an attempt to quantify its effects on the costs that will be engendered due to this rulemaking.⁴⁶

Moreover, we would note that in taking this action, EPA is effectively *presuming* the legality of the underlying Tailoring Rule prior to its finalization. As the Agency notes, section

⁴² *Id.*

⁴³ *Id.*. In contrast, State and local air pollution officials estimated that the burden might be less for PSD (roughly 4,000 PSD permits per year) and that estimated cost increases would be approximately \$1 million/year per permitting authority. In the preamble to the Tailoring Rule, however, EPA took issue with this analysis and attributed the substantial differential in cost estimates to methodology in calculating what facilities would be subject to PSD, indicating that state and local air pollution officials had used an “actual to actual” comparison of emission increases versus an estimation of the number of PSD permits based on changes with reference to the facility’s potential-to-emit (“PTE”).

⁴⁴ 74 Fed. Reg. at 55302. Similar to its estimates for PSD, state and local permitting authority estimates were considerably lower than EPA estimates, resulting in an estimate of a 40 fold increase in title V permits at a cost of \$4.6 million/year per permitting authority. EPA stated that with adjustment of the state and local estimates for PTE, additional staff resources required for each permitting agency would be approximately ten times the number of Full-Time-Equivalents (“FTEs”) projected under the air pollution officials’ study.

⁴⁵ 74 Fed. Reg. at 55,343.

⁴⁶ While the National Association of Clean Air Agencies (NACAA) survey cited in the Tailoring Rule assessed such matters as the time required to hire more staff and time to issue new permits, the survey apparently did not request an estimate of how long it would take for various states to change relevant state laws and regulations to adopt higher threshold and significance levels for GHGs.



110(a)(2)(E) requires that SIPs provide necessary assurances of adequate personnel and funding. If projections of the burden on state and local permitting agencies that EPA posits are valid, it is entirely likely that the underlying SIPs do not now contain such assurances and most probably, would not be in position to provide such assurances in the near future⁴⁷ Therefore, if the Tailoring Rule is not upheld in the courts, neither would EPA's attempt to limit its approval of SIPs (or alternative to revise its approval of SIP threshold and significance levels through error correction under CAA section 110(k)(6)) be valid.

3. Benefits of the proposed rule are not properly weighed against costs.

Most of the economic benefits assigned to the proposed rule are attributable to fuel savings because of increased miles per gallon experienced and relatively small economic benefits are assigned to the reduction in GHG emissions.⁴⁸ When reference is made to the effect of avoided GHG emissions on resulting global temperatures, however, benefits appear to be exceedingly small. The rulemaking package predicts that the various regulatory alternatives analyzed in the rulemaking would produce a reduction of temperature increases from 0.01⁰ C to 0.02⁰ C in the year 2100.⁴⁹ Even if these benefits were considerably larger, however, the Agency has tipped the cost/benefit scale by not including the costs imposed on stationary sources by virtue of "triggering" PSD and Title V requirements. The net effect of EPA actions with regard to finalization of the endangerment determination and the section 202 light duty vehicle rule are permanent and potentially enormous for stationary sources. Yet EPA fails to provide an assessment of these costs in any of the thousands of pages of rulemaking documents associated with its decision to pursue regulation of GHGs under the CAA within the next four months.⁵⁰

E. EPA Should Withdraw Its Proposed Section 202 Rules or Delay Finalization of the Rules In Order to Avoid "Impossible" Burdens That Could Result from Other CAA Provisions. EPA's Legal Theories For Reducing the Burdens of the PSD and Title V programs in the Proposed Tailoring Rule Do Not Relieve the Agency of the Requirement to Analyze the Burdens That the Section 202 Rule Imposes.

Under EPA's current interpretation of the CAA and associated regulations, PSD, and Title V permitting requirements⁵¹ will apply to new, modified and operating sources of GHGs as of 60

⁴⁷ The NACAA survey cited in the Tailoring Rule indicated that it would take 2 years to add necessary staff to address increased permitting and that processing time would increase on average to 993 days, approximately 3 times the average current processing time.

⁴⁸ EPA projects a total benefit of \$158,012 million for lifetime fuel expenditures out of a total benefit estimate of \$201,676 million using a 3% discount rate. Projected benefits from CO₂ reduction, at \$16,446 million, constitute a relatively small part of EPA's projected benefits at this discount rate. 74 Fed. Reg. 49,717.

⁴⁹ 74 Fed. Reg. 49,743.

⁵⁰ EPA has indicated that it will issue a final section 202 regulation by March 2010. As indicated below, in the reconsideration of the Johnson Memorandum, EPA has presented two theories for when GHGs will be considered "subject to regulation" under the CAA. These comments do not address the validity of either legal view expressed by EPA, but simply note the date at which EPA considers the "triggering event" for regulation to occur.

⁵¹ Under sections 165 and 169 of the CAA, PSD applies to newly constructed sources which emit or have the



days following the Federal Register publication of this rulemaking.⁵² Since EPA expects to finalize the light duty vehicle rulemaking by the end of March 2010, this would mean that EPA would seek to apply permitting requirements to new sources and sources undergoing a major modification which increased emissions by late May/June of 2010 and require various state and local permitting agencies to also apply these requirements. Under EPA's current interpretation of the relevant law and regulations, existing sources could be required to apply for Title V operating permits covering GHG emissions one year later.

To address this situation, EPA has proposed the Tailoring Rule.⁵³ In this rulemaking, EPA is proposing to establish PSD and Title V applicability thresholds of 25,000 tons per year ("tpy") for greenhouse gas emissions (measured on a carbon dioxide equivalent basis) and PSD significance levels for GHGs of between 10,000 and 25,000 tpy. The rule proposes to establish the thresholds for 6 years and to thereafter promulgate a "second phase" with revised thresholds "as appropriate." Since neither the tonnage levels or the ability to establish temporary thresholds are found within the statutory provisions of the CAA, EPA has based this rulemaking on administrative law doctrines of "administrative necessity" and "absurd results." The Agency contends that because administrative burdens of implementing the PSD and Title V programs for all sources subject to CAA "major source" thresholds of 100 and 250 tpy would be immense – it would be impossible for the Agency to proceed under CAA statutory provisions. EPA also argues that this action is justified since the large increases in permitting actions, and resulting burden on small sources, was not contemplated by Congress in enacting the PSD and Title V programs.

1. EPA has the ability to avoid "impossible" results of this rulemaking.

The Tailoring Rule indicates in its initial summary that the proposal is "necessary" because of EPA's expectation that it will finalize this rulemaking. The Tailoring Rule then indicates that if PSD and Title V requirements are triggered by the Tailoring Rule at levels required under the CAA (*i.e.*, 100 and 250 tons per year) "an enormous influx of permits would occur-tens of thousands of PSD permits and millions of title V permits-which would create enormous administrative burdens for permitting authorities . . ." ⁵⁴ EPA then states that "literal application" of CAA permitting levels would render it impossible for permitting authorities to meet the requirements in CAA section 165 and Title V to process permit applications within required statutory periods and that such results are contrary to Congressional intent. EPA argues

potential to emit over 100 and 250 tons per year of any air pollutant. PSD also applies to existing sources that undergo a major modification that increases emissions above significance levels. Title V applies to any new or existing source that exceeds the major source applicability level.

⁵² EPA has, in fact, shifted its interpretation from considering PSD and Title V requirements to apply upon promulgation of a regulation which imposes actual control on GHGs (*i.e.*, the view taken in the December 18, 2008 "Johnson Memorandum") to the view that PSD and Title V will be considered to apply as of the effective date of the section 202 rulemaking (*i.e.*, view expressed in the proposal to reconsider the Johnson memorandum) 74 Fed. Reg. 51,546.

⁵³ 74 Fed. Reg. 55,292 (October 27, 2009).

⁵⁴ *Id.*



that these conditions constitute an “absurd result” allowing the Agency to depart from statutory permitting thresholds. EPA also argues that since the influx of permits occasioned by triggering PSD and Title V requirements would make it “impossible for state and federal authorities to administer” the programs, the Agency can also rely on the “administrative necessity doctrine.”⁵⁵

As noted in our comments in sections III and IV, EPA clearly has the ability to avoid these “impossible” results. No CAA statutory deadline requires EPA either to propose or finalize a section 202 rulemaking at this point in time. Neither is the Agency currently compelled by judicial order to issue a final endangerment determination or a final section 202 rulemaking. EPA cannot create its own “impossible” conditions to justify reliance on exceptional and extraordinary administrative law doctrines. The docket for this rulemaking is devoid of any information detailing what actions EPA has explored to either avoid the “impossible” results it projects in the Tailoring Rule or to take other actions that would avoid the near-term promulgation of a regulation is considers to “trigger” requirements for over 6 million permits and \$50 billion in regulatory costs⁵⁶ without accounting for or referring to the even greater burdens and costs that will be placed on stationary sources for compliance with new CAA GHG requirements. Neither can EPA rely on a National Fuel Efficiency Policy⁵⁷ to establish either a basis for this rulemaking or the relevant conditions of “administrative necessity” and “absurd results” on which EPA justifies its proposed Tailoring Rule. Instead, EPA must avail itself of the readily available alternative to withdraw or delay the finalization of this proposed rule.

2. EPA must take the time and effort to analyze the full burden of this rulemaking.

Instead of the course the Agency has set with respect to the Tailoring Rule and this proposed rulemaking, EPA may properly take sufficient time to ensure that any “triggering” action it might take with regard to the regulation of GHGs within the CAA promote the efficient operation of CAA programs, consistent with the literal requirements of the statute. For example, in this rulemaking, EPA could properly consider recent analysis that it has filed in the docket for the PSD Tailoring Rule⁵⁸ that estimates certain costs to sources and permitting authorities.⁵⁹ In addition, as noted above, EPA must also analyze the much larger burdens on stationary sources imposed by the “triggering” event. Possessing discretion to avoid “pulling the trigger,” EPA cannot claim that it does not have sufficient time to undertake the analysis of all the costs imposed by the “triggering event.” EPA properly recognized these potential effects at least as early as mid-2008 as well as the Agency’s duty to prepare for the extremely large economic and regulatory consequences of acting to regulate GHGs under the authority of the CAA.⁶⁰ EPA should utilize its

⁵⁵ 74 Fed. Reg. 55,311.

⁵⁶ 74 Fed.Reg. 55339, Table IX-2.

⁵⁷ 74 Fed. Reg. 49454.

⁵⁸ Summary of ICR-based Data Used to Estimate Avoided Burden and Evaluate Resource Requirements at Alternative GHG Permitting Thresholds, EPA Staff, August 2009.

⁵⁹ 73 Fed. Reg. 44398.

⁶⁰ *Ibid.*



discretion to not finalize this rulemaking but embark on a fulsome analysis of the matters it recognized as key principles in the regulation of GHGs under CAA authority.

F. The Rulemaking Process Is Unprecedented and Designed to Reach a Predetermined Result and Therefore Violates the Requirements of the Clean Air Act and the Administrative Procedure Act.

The “joint rulemaking” between EPA and NHTSA is unprecedented and calls into serious question how each Agency exerted independent judgment in fulfilling their separate statutory responsibilities under the CAA and EPCA. Moreover, the history of this rulemaking indicates that EPA and other Administration officials engaged in a series of meetings which predated this proposal and predetermined the end result of the rulemaking process either directly or through impermissible incentives to promulgate a final rule within certain parameters. Therefore, the rulemaking violates sections 202(a) and 307(d) of the CAA and requirements of the Administrative Procedure Act. Since the issues involve the timing, stringency and final form of the promulgated standards, they are of central relevance to the rule.

1. This “joint rulemaking” is unprecedented and prevents EPA from exercising independent judgment.

We are not aware of similar rulemaking documents or proceedings by EPA or other parts of government wherein two independent agencies of the federal government have utilized two separate statutory authorities to jointly propose two different standards which are deliberately aligned to produce a nearly-identical result. Given the structure of the proposed standards, EPA and NHTSA have apparently agreed not only on the overall stringency of the Model 2012-2016 requirements, but have agreed with respect to the stringency of the five separate Model Years in which different standards apply. In effect, each Agency has nearly-identically decided, on five separate occasions, what the regulatory requirements will be for particular years in which compliance is required.

A quick comparison of statutory authority demonstrates basic differences in the authority that Congress granted each agency and why such nearly-identical results are implausible if the EPA Administrator truly exercised the independent judgment that section 202 of the CAA requires. As noted by NHTSA in the Preamble, EPCA requires a specific form of standard (CAFÉ) which must be based on “technological feasibility,” “economic practicability,” “the effect of other motor vehicle standards of the Government on fuel economy” and “the need of the United States to conserve energy.”⁶¹ Section 202(a) of the CAA, however, provides that the Administrator shall prescribe “standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or may reasonably be anticipated to endanger public health or welfare.” While EPA attempts to

⁶¹ 74 Fed. Reg. 49,454, 49,460-462.



NPRA

describe in the Preamble how CAA is comparable to EPCA requirements, the plain language of the statutes varies considerably. Given that EPA and NHTSA have proposed nearly identical standards based on different statutes which have different statutory purposes and different historical interpretations by each Agency – and repeated this exercise five times -- this fact alone is indicative that EPA did not exercise the independent judgment of the Administrator explicitly required by section 202(a).⁶²

2. Agreements between the Administration, EPA, the Department of Transportation (“DOT”), the State of California and auto manufacturers have predetermined the content and overall result of this rulemaking.

An undetermined number of meetings and negotiations between various federal and California state officials and vehicle manufacturers preceded this proposed rulemaking. Press reports and direct statements to the press have indicated that White House officials orchestrated private discussions with federal officials, auto industry representatives, and the State of California concerning the form and content of the proposed light duty GHG standards. These meetings were described in one press report as reaching a “structured deal” that would work out differences between EPA’s CAA authority and NHTSA’s EPCA authority. In one report, Mary Nichols, Chairman of the California Air Resources Board was quoted as saying, “That was a big issue to try and work out . . . The structure of the CAFÉ [corporate average fuel economy] program . . . and the Clean Air Act were on a collision course. . . The most difficult piece of this was figuring out how to make it happen.”⁶³ Concerning how these discussions were conducted, Chairman Nichols was further quoted as, “We put nothing in writing, ever . . . That was one of the ways we made sure that everyone’s ability to talk freely was protected . . . It’s an astonishing thing that on something of this magnitude there were no leaks.”⁶⁴

It was also widely reported⁶⁵ that Carol Browner, Director of the White House Office of Energy and Climate Change Policy, was a prime organizer and participant in the meetings. Within the public domain, however, the conduct of these meetings has only been very generally described by the governmental participants.⁶⁶ A review of the docket for this rulemaking did not uncover specific materials, notes, presentations or reports from these meetings although the conduct of these meetings has been described as resulting in a “structured deal” as to outcome of this rulemaking. Such activities raise issues central to this rulemaking and questions as to whether

⁶² EPA additionally appears to have considered California state standards directly in this proposed rule and explicitly sought to achieve a “national” program. However, the structure of the Clean Air Act explicitly provides for the ability of having two sets of vehicle standards applicable at once by “grandfathering” the ability of California to set separate standards subject only to a waiver approved on the basis of three criteria under Section 209 of the CAA.

⁶³ “Vow of silence key to White-House-Calif. Fuel economy talks,” Collin Sullivan, May 20, 2009, Greenwire and New York Times website.

⁶⁴ *Ibid.*

⁶⁵ “Auto emissions deal: behind the scenes,” Los Angeles Times, May 20, 2009.

⁶⁶ Director Browner was quoted as saying, “We were able to convince everybody to keep their eye on the ball – a national standard – and work on the way we get there.” *Id.*



other requirements such as the Federal Advisory Committee Act⁶⁷ were properly considered and addressed. Such requirements include filing a charter, public announcement of meetings and detailed minutes.

Putting aside concerns over the transparency of such a process, elements of the May 20, 2009 press report cited above concerning a “structured deal” were substantially confirmed by remarks delivered by President Obama on May 19, 2009. In announcing an “historic agreement” on fuel economy standards that involved the EPA, DOT and the White House office of Energy and Climate Change, the President noted that various entities (including apparently industry representatives) had “worked around the clock” on this matter. The essence of this agreement was apparently to decide, prior to the publication of this proposed rulemaking in the Federal Register, not only the content of the proposed rulemaking but the final result of the rulemaking process. After mentioning fuel economy standards administered by the DOT, EPA authority under the CAA and the fact that California was seeking a waiver of federal preemption for its own State standards, the President indicated that:

Car companies might then face three different sets of overlapping requirements, one administered by the Department of Transportation, one administered by the EPA, and still a third administered by California and 13 other states. This proposed national policy, under the leadership of two agencies – and bringing together 14 states, 10 companies, as well as auto workers and environmental groups – changes all that. The goal is to set one national standard that will rapidly increase fuel efficiency – without compromising safety – by an average of 5 percent each year between 2012 and 2016, building on the 2011 standard my administration set shortly after taking office.

A series of major lawsuits will be dropped in support of this new national standard. The state of California has also agreed to support this standard – and I want to applaud California and Governor Schwarzenegger and the entire California delegation for their extraordinary leadership. They have led the way on this as they have in some many other efforts to protect our environment. In addition, *because the Department of Transportation and EPA will adopt the same rule*, we will avoid an inefficient and ineffective system of regulations that separately govern the fuel economy of autos and the carbon emissions they produce.⁶⁸ (Emphasis added).

This agreement is also memorialized in an exchange of letters between EPA, DOT and the State of California. As indicated in a May 18, 2009 letter from Governor Schwarzenegger to Administrator Jackson, California committed to take certain actions “subject to the understandings described below”⁶⁹ California commitment’s to revise its motor vehicle standards such that “standards adopted by EPA shall be deemed compliance with the California GHG standards” and

⁶⁷ Pub.L. 92-463.

⁶⁸ Remarks By The President On National Fuel Economy Standards, The White House, May 19, 2009.

⁶⁹ Letter from Governor Arnold Schwarzenegger to The Honorable Lisa Jackson and The Honorable Raymond H. LaHood, May 18, 2009.



other actions are conditioned on future actions by EPA, including that “EPA proposes national GHG standards substantially as described in the May, 2009 Joint Notice of Intent to conduct rulemaking . . . [and that] . . . EPA adopts national GHG standards substantially the same as those proposed in the Joint Notice.”⁷⁰ This letter also presented a specific sequence for future actions by California, EPA and DOT regarding the then-pending California waiver, private party litigation, and EPA and DOT rulemaking actions. EPA has, to date, followed this overall plan.

California’s understanding of this agreement was further outlined in a Notice of Public Hearing issued by the State of California Air Resources Board. This document indicates that “On May 19, 2009, challenging parties, automakers, California, and the federal government reached agreement on a series of actions that would resolve all of these current and potential future disputes over the standards through model year 2016. In summary, the U.S. Environmental Protection Agency and the U.S. Department of Transportation *agreed to adopt a federal program to reduce greenhouse gases and improve fuel economy, respectively, from passenger vehicles, to achieve equivalent or greater greenhouse gas benefits as the Palvey regulations for the 2012 – 2016 model years.* Manufacturers agreed to ultimately drop current, and forego similar future legal challenges, including challenging a waiver grant, which occurred June 30, 2009.” (Emphasis added).

These events, quotations, and documents clearly indicate that the final result of this proposed rulemaking has been preordained in violation of the Administrative Procedure Act and separate CAA requirements regarding the rulemaking process. At a minimum, they indicate a minimum level of stringency for this rulemaking as been agreed to prior to either the issuance of the proposed rule or the opening of the comment period for this rulemaking. EPA should therefore withdraw this rulemaking and instead conduct an unbiased review of its statutory authority and options for proceeding with a section 202 regulation.

3. EPA’s consideration and approval of the California waiver request under section 209 of the CAA improperly influenced the Agency’s actions in this rulemaking.

As indicated above, agreements between the federal government and the State of California with respect to this rulemaking included the implicit if not explicit agreement that a request by California to waive federal preemption be granted. The May 18, 2009 letter from Governor Schwarzenegger explicitly refers to this then-pending matter. In addition, the basic structure of the agreement itself in which California standards (which would later be approved by EPA) would be aligned with federal standards indicates that an affirmative decision on the waiver was necessary in order to effectuate the understandings in the agreement. EPA must promulgate this rulemaking on the basis of statutory authority contained in section 202(a) of the Act, not wholly independent provisions of the CAA contained in section 209. Thus, EPA’s consideration of the California waiver as part of its decisions on a final rule is impermissible.

⁷⁰ *Ibid.*



NPRA

G. The Proposed Rule Violates the Administrative Procedure Act since EPA Did Not Seek Comment on *When* the Agency Should Act, By Virtue of this Rulemaking, to Make GHGs “Regulated Air Pollutants” Under the Clean Air Act.

In its proposed endangerment determination, EPA took comment on the question of whether the Agency should regulate GHGs individually, or as a group.⁷¹ EPA has otherwise indicated that finalization of the endangerment determination itself will not make any GHG a “regulated air pollutant” under the CAA.⁷² Therefore, if EPA considers this rulemaking to have the effect of making several GHGs “regulated air pollutants,” the Agency must take comment on the question of *when the Agency should take action to affect the regulatory status of various GHGs* by making them a “regulated air pollutants” subject to “actual control” under the Clean Air Act.⁷³ As demonstrated in this rulemaking and in the proposed Tailoring Rule and proposed endangerment determination, EPA fully understands its actions to have enormous consequences under the CAA. This notice, by not taking comment on *when* EPA should take action to impose actual controls on emissions of GHGs under the CAA is deficient under 5 U.S.C. 553(b)(3). In effect, the proposed rulemaking ignores the elephant in the room.

If, per current Agency interpretation, the Tailoring Rule is needed because this rulemaking acts to trigger or apply other requirements in other sections of the CAA (e.g., PSD in section 165), then the section 202 rulemaking must logically be the context in which parties comment on *when* EPA should be acting to regulate four or more GHGs under the CAA. EPA has not provided sufficient opportunity to comment in this proceeding on this essential question of when the EPA should move forward with stationary source regulations even though the Agency has known of this impact for a considerable period of time.⁷⁴

It also is entirely possible that EPA might consider other forums for comment to be unavailable. For example, if EPA anticipates that affected sources might comment on when stationary sources should be subject to PSD and Title V permitting requirements in any proposed

⁷¹ 74 Fed. Reg. 18886, 18904-18905.

⁷² Johnson Memorandum at 14.

⁷³ EPA is taking comment on whether GHGs should be considered “subject to regulation” as of the promulgation of CAA standards for GHGs or the effective date of such standards (74 Fed. Reg. 51535, 51546). However, this comment effectively addresses a period of a mere 60 days following Federal Register publication (or a slightly greater period of time if measured from the date of the Administrator’s signature). Thus, this opportunity for comment is insufficient to address the large policy concerns of when stationary sources generally may be subject to regulation, especially given the EPA’s projection of “impossible” conditions being created as a result of their prospective near-term regulation.

⁷⁴ Indeed, EPA has recognized this very need for a substantial amount of time. The July 30, 2008 ANPR noted that “The interrelationship of CAA authorities and the broad array of pending and potential CAA actions concerning GHGs make it prudent to thoroughly consider how the various CAA authorities would or could work together if GHG controls were established under any provision of the Act. Since regulation of one source of GHG emissions would or could lead to regulation of other sources of GHG emissions, the Agency should be prepared to manage the consequences of CAA regulation of GHGs in the most effective and efficient manner possible under the Act.” 73 Fed. Reg. at 44,397.



new source performance standards for GHGs under section 111 of the CAA, the Agency might later decide that such comments had been filed “after the fact” of the CAA triggering event. This level of uncertainty is clearly unacceptable. Put in its best light, the regulated community should not be put in a position of guessing where to comment on when stationary sources should be subject to regulation under the CAA or whether comments could be considered to be late filed in other rulemakings. In a less charitable interpretation, the lack of opportunity for comment on when stationary sources should be subject to regulate could lead one to conclude that the Agency does not intend to specifically identify or allow any opportunity for public comment on this pivotal CAA issue in any pending regulatory measure.

We would finally note that the entire schedule for this vital question of regulation under the CAA is not being driven by requirements of the CAA, but rather, by EPA’s unnecessary subservience and deference to the operation of another statute – EPCA and the requirement for NHTSA to finalize standards by March 30, 2010 if that Agency wishes to control CAFÉ for MY2012. As indicated above in citation to section 202(a) of the CAA, EPA is not bound to promulgate final standards by March 2010 for such standards to have an effect on vehicles produced for MY 2012.

H. EPA Inappropriately Considers Global Impacts Under Authority of the CAA.

1. EPA does not have discretion under the Clean Air Act to utilize a global Social Cost of Carbon (SCC) estimate

In this proposed rule, EPA states that the CAA is “ambiguous” as to whether global or domestic values are permissible⁷⁵. As a first matter, the CAA is not ambiguous. The CAA is clearly a domestic statute and EPA can cite no statutory purpose that indicates any intent for the statute to be one of generalized global application or effect. The Findings of the Clean Air Act⁷⁶ indicate an overriding Congressional concern for the “Nation’s population” and that “air pollution control at its source is the primary responsibility of States and local governments” and make no mention of cross-border, international or global pollution. In addition, the Declaration of the CAA clearly indicates that the purposes of the CAA are “to protect and enhance the quality of the Nation’s air resources” and to address other national research and development needs as well as the provide assistance to State and local governments.”⁷⁷

⁷⁵ 74 Fed. Reg. 49,454, 49,612. EPA indicates that “As a matter of law, both global and domestic values [for the social cost of carbon] are permissible; the relevant statutory provisions are ambiguous and allow selection of either measure.” While a footnote to this passage indicates that federal statutes like the Clean Air Act are presumed not to have extraterritorial effect, EPA claims that use of a global measure for the SCC does not give extraterritorial effect to federal law and hence, “does not intrude on such interests.” The EPA, however, fails to acknowledge that the effect of utilizing SCC estimates is to give the effect of laws and policies outside of the United States effect within the United States by virtue of the impact of utilizing global values in the operation of a domestic statute.

⁷⁶ 42 USC 7401.

⁷⁷ *Id.*



Second, the CAA clearly contains specific and limited provisions addressing the international effect of various air pollutants. Therefore, since the CAA speaks specifically as to the matter of air pollution originating inside the United States and having effect outside the United States and global pollutants that may have effects within the United States, the EPA does not have discretion to imply that there is a broad, unconstrained authority to consider global effects elsewhere in the statute. For example, section 614 of the CAA specifically indicates the interaction of provisions contained in that Title (as added by the 1990 Clean Air Act Amendments) and the provisions of the Montreal Protocol. Other sections of Title VI address individual provisions of the Montreal Protocol affecting methyl bromide and production of ozone-depleting substances for use in other developing countries. Section 115 separately requires reciprocity before the Administrator can take action with respect to U.S. emissions that may endanger public health or welfare in a foreign country. These provisions reflect an explicit Congressional scheme for the statute regarding how specific international or global air pollution issues are to be addressed. In the face of such provisions, EPA cannot simply claim broad authority under the CAA to address the global effects of domestic GHGs or to utilize values, such as a SCC, that includes global benefits in the assessment and/or determination of CAA standards.

2. EPA's use of a SCC estimate in this rulemaking is arbitrary and capricious

In the current rulemaking, EPA utilizes an SCC estimate to calculate the total amount of economic benefits that flow from the rulemaking. While EPA emphasizes the (a) widespread uncertainties underlying the estimate; (b) indicates the SCC number it utilizes is “emphatically interim SCC value”; (c) indicates that the estimate is subject to ongoing, non-public interagency discussions; and (d) concedes that the calculation of the SCC involves controversial “ethical considerations,”⁷⁸ the EPA nonetheless proceeds to utilize SCC values in calculating the rule’s benefits. In many other rulemakings, when faced with such broad uncertainties and possible ranges of calculating values, the EPA has not utilized inherently uncertain figures but either left such possible benefits as unquantified values or otherwise discussed such benefits qualitatively. EPA should do so here.

EPA’s persistence in calculating and then picking one number in an uncertain range of \$5 to \$56 for the SCC is arbitrary and capricious.⁷⁹ Indeed, the fact that EPA relies on an average rate of \$20 associated with different discount rates for the range of values does not give this estimate any greater weight or probability. The average of uncertain estimates is still uncertain. In addition, the conclusion⁸⁰ that global marginal benefit is the correct domestic benefit is a judgment that itself is without support and at variance with previous rulemakings of other agencies that calculated a separate domestic SCC versus global SCC. EPA does not detail,

⁷⁸ 74 Fed. Reg. 49,454, 49,611-612.

⁷⁹ *Id.* at 49,615.

⁸⁰ *Id.* at 49,612.



indeed cannot detail, how 100% of the value of global benefits is conferred domestically and should abandon this practice in any final rulemaking.

I. Fuel Requirements

NPRA also notes and would incorporate by reference comments filed by the American Petroleum concerning proposed fuel requirements in the Section 202 Rule. Fuel specification changes have not been proposed in this rulemaking, however the proposed rule and Draft Technical Support Document describe vehicle engine and equipment options that EPA believes will require lowering current sulfur requirements. NPRA believes there is inadequate lead time for such an action which would require considerable analysis and assessment for its impact on refineries. NPRA also supports API comments with respect to ethanol blended certification fuel, flexible fuel vehicle credits and dedicated alternative fuel vehicles.

III. Conclusion

In summary, NPRA believes that EPA is not required to follow the regulatory pathway it has designed to address GHGs under authority of the CAA. Instead, EPA has three options for proceeding lawfully at this point in the rulemaking process for the Section 202 Rule. As noted in the introduction, EPA can: (1) conduct a correct regulatory analysis of the proposed rulemaking and comply with the Executive Orders and statutes cited in section II.A. of these comments and then repropose the Section 202 Rule; or (2) delay promulgating the Section 202 Rule until EPA can better address the numerous effects on the PSD and title V permitting program the Agency has outlined in the Tailoring Rule; and/or (3) reinterpret the PSD program in line with CAA statutory requirements so that increases in GHG emissions alone do not result in PSD permitting requirements. Each alternative is far preferable to the course of action EPA has so far chosen and we respectfully request the Agency to aggressively pursue these options.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gregory M. Scott", is written over a light blue horizontal line.

Gregory M. Scott
Executive Vice President and General Counsel