Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272

In the Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, ET AL., PETITIONERS
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR RESPONDENTS COALITION FOR RESPONSIBLE REGULATION, INC., ALPHA NATURAL RESOURCES, INC., GREAT NORTHERN PROJECT DEVELOPMENT, L.P., AND NATIONAL CATTLEMEN'S BEEF ASSOCIATION IN SUPPORT OF PETITIONERS

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ARGUMENT

In their brief supporting petitioners, Respondents Coalition for Responsible Regulation, Inc., Alpha Natural Resources, Inc., Great Northern Project Development, L.P., and National Cattlemen's Beef Association ("Coalition") explained that EPA's application of the Clean Air Act's prevention of significant deterioration ("PSD") program to greenhouse gases ("GHG") cannot be reconciled with Section 166, 42 U.S.C. § 7476, which addresses how EPA may add "other pollutants" to the PSD program. Neither EPA nor its supporters meaningfully rebut this straightforward textual argument, or the Coalition's exposition of error in EPA's interpretation of Title V.

I. Section 166 Confirms The PSD Program's Limited Role In Controlling Air Pollution

EPA views PSD as a generalized mandate for new or modified sources of *any* regulated pollutant to obtain a permit, so that the permitting authority may undertake case-by-case judgments about best available control technology ("BACT"). See Br. for Federal Respondents ("U.S. Br.") 21. EPA justifies applying that view to GHG emissions "given the substantial harms that large-scale [GHG] emissions can cause, [so] application of BACT requirements to those emissions directly serves the [Act's] purpose." *Ibid.*; accord Br. of Envtl. Orgs. ("NRDC Br.") 23. Missing from that justification is citation to anything in the record showing reduced emissions or harms, or to the enumerated purposes of PSD in Section 160 of the Clean Air Act ("Act"), 42 U.S.C. § 7470.

Over the past 44 years, Congress has enacted six different titles, forging an array of tools, to accomplish the Act's general goal of "enhanc[ing] the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1). For PSD, Congress specified the purpose of protecting "the ambient air" (*id.* § 7470(1)) from increasing concentrations of criteria pollutants, i.e., those pollutants for which Congress established increments of acceptable deterioration (*id.* § 7473), and those for which EPA might do so in the future after following specific statutory procedures (*id.* § 7476). The Act includes other provisions (*e.g.*, Section 111's new source performance standards ("NSPS"), *id.* § 7411, and Section 112's hazardous air pollutant program, *id.* § 7412) authorizing EPA to set emission limits for entire categories of new sources, based on "best" or "maximum achievable" technologies. See *N. Plains Res. Council* v. *EPA*, 645 F.2d 1349, 1356 (9th Cir. 1981).

Precisely because time- and labor-intensive case-by-case PSD permitting is reserved to provide "added protection to air quality in certain parts of the country" beyond that achieved under Section 111 (*Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 567 (2007); 42 U.S.C. § 7475(a)), Part C should not be construed, as EPA and aligned respondents suggest, to apply PSD to effectively all sources of any pollutant.[1]

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[1] Various respondents and *amici* claim that because permits are being issued, concerns about program burdens are overstated. See Br. of New York et al. ("States Br.") 35-39; Br. of Calpine Corp. as *Amicus Curiae* in Support of Respondent. But a few swallows do not make a summer: Since early 2011, EPA's Region 6 has received 81 PSD applications for GHG-emitting projects in Texas, but issued only 27 permits. See EPA Region 6

PSD's numeric applicability thresholds, 42 U.S.C. § 7479(1), and geographic limitations, *id.* § 7475(a), deserve attention not solely because EPA has treated them as optional, but because they inform the appropriate construction of Part C. The thresholds sensibly define the "major sources" of the few pollutants intended to be covered by the Act as amended in 1977, with any coverage expansion contingent on EPA complying with Section 166, which authorizes EPA to develop thresholds ("numerical measures") appropriate to those other pollutants. *Id.* § 7476. The geographic limitations confirm that only sources with significant potential to cause significant deterioration would undergo site-specific impact assessments and technology reviews. See Br. of Am. Chem. Council et al. 19.

In disclaiming any obligation to comply with Section 166, EPA and the panel draw precisely the wrong conclusion from the statutory text, which contemplates "regulations" adapting PSD to pollutants "for which national ambient air quality standards are promulgated." 42 U.S.C. § 7476(a); U.S. Br. 30 n.7; J.A. 256. Neither the panel nor EPA and aligned respondents explain why Congress would have intended the PSD program to apply instantly and woodenly to *non*-criteria pollutants, while requiring thoughtful federal and state rulemakings for the criteria pollutants at the heart of Part C.

PSD Permitting Process for Greenhouse Gases, http://yosemite.epa.gov/r6/Apermit.nsf/AirP (last visited Feb. 12, 2014). Some applications have been pending for nearly two years, twice the statutory limit. 42 U.S.C §7475(c). These projects represent tens of billions in capital investment, held up by a process for which EPA documents no benefit.

EPA characterizes the Coalition's interpretation as "deeply flawed" (U.S. Br. 29) without identifying any flaw. Rather, EPA conflates what it has done with what it may or must do under the statute. EPA contends that its 2002 regulation applying PSD to certain other non-criteria pollutants (*e.g.*, hydrogen sulfide) somehow compels the Agency to apply PSD to GHG (*id.*), despite all evidence that Congress enacted Part C to address only a limited set of pollutants. See Coalition Br. 16-19.

EPA and its respondents imply that limiting PSD to criteria pollutants would undo important environmental protections, but PSD is not the Act's only tool. Compare U.S. Br. 29; States Br. 32-35 & n.17; NRDC Br. 22, with 42 U.S.C. § 7411 (NSPS); *id.* § 7412 (hazardous air pollutants). The Coalition's interpretation of PSD will not prevent EPA from using these other tools to impose technology-based limits on, or protect the public from excessive exposure to, any non-criteria pollutant, whether hydrogen sulfide or GHGs.

EPA and aligned respondents also note that Congress amended the Act in 1990 to eliminate any suggestion that PSD applies to hazardous air pollutants. U.S. Br. 28; States Br. 18; NRDC Br. 26. That amendment, however, is consistent with and confirms the Coalition's view that Congress intended PSD to apply only to criteria pollutants. Coalition Br. 22.

EPA argues that Congress intended PSD as an omnibus tool to minimize "air pollution" from any pollutant EPA regulates under any part of the Act. The flaws in that reading are exposed not only by the extreme over-inclusion of sources that emit GHGs (see Br. for State Pet'rs 3-4), but also by the significant *under*-inclusion of sources of other pollutants. A 249-

ton source of hydrogen sulfide, for example, could have significant air-quality consequences, but remain outside PSD's scope. See 42 U.S.C. § 7479(1) (250-ton threshold). Under EPA's reading, the more dangerous the pollutant, the less likely it is to face PSD review.

The thresholds' specificity confirms Congress's intent that PSD applies only to those pollutants enumerated in Part C at its enactment, with any additions made pursuant to Section 166. Coalition Br. 16-21. Other tools remain to accomplish the Act's goals with respect to other pollutants.

EPA's main textual defense is that "[s]ome PSD program requirements * * * focus specifically on *non*-criteria pollutants," citing Section 165(a)(3)(C) for "imposing, in addition to requirements relevant to criteria pollutants, requirements related to 'any *other* applicable emissions standard * * * under th[e] [Act].'" U.S. Br. 30 (quoting 42 U.S.C. § 7475(a)(3)(C)); accord States Br. 13. But the cited section merely requires that a permit applicant show its project also complies with otherwise applicable law, not that PSD is triggered by any pollutant. The weakness of EPA's textual evidence damns its case with faint proof.

II. The Government And Aligned Respondents Ignore Flaws In EPA's Approach To Title V

As for Title V, no responsive brief meaningfully addresses either of the Coalition's arguments. Compare Coalition Br. 25, with U.S. Br. 56; NRDC Br. 37-38; States Br. 2-3 n.1. While EPA acknowledges that Title V's entire purpose is to codify requirements otherwise applicable to large and complex stationary sources (U.S. Br. 10), it does not explain why EPA's

adoption of mobile-source rules should require a stationary source to obtain a Title V permit. EPA's sole defense to its violation of 42 U.S.C. § 7661a(a), which expressly prohibits "exempt[ing] any major source" from Title V, is that EPA may eventually (but likely will not, see J.A. 310-311, 421-422, 498) comply with that mandate. U.S. Br. 16.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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