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,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

and five related cases.

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

BRIEF OF RESPONDENTS THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, AND THE CITY OF NEW YORK

ERIC T. SCHNEIDERMAN
Attorney General of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
BETHANY A. DAVIS NOLL
Assistant Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020
barbara.underwood@ag.ny.gov

*Counsel of Record

MONICA WAGNER
Deputy Bureau Chief
MICHAEL J. MYERS
MORGAN A. COSTELLO
Assistant Attorneys General
Environmental Protection Bureau

(Additional Counsel Listed on Signature Pages)

QUESTION PRESENTED

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Laws **Page(s)**

Federal Statutes

Federal Regulations

State Regulations

Administrative Sources **Page(s)**

Miscellaneous Authorities

Page(s)

Pages(s)

Pages(s)

Pages(s)

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and relevant regulations of the U.S. Environmental Protection Agency (EPA) are reprinted in an appendix to the Federal Respondents' brief.

STATEMENT OF THE CASE

1. In 2007, this Court held in *Massachusetts v. EPA* that the Clean Air Act's broad definition of "air pollutant" unambiguously covers greenhouse gases, and that EPA was obliged "to regulate emissions of the deleterious pollutant" if it found that greenhouse-gas emissions posed a threat to public health or welfare. 549 U.S. 497, 528-29, 533 (2007). Following that decision, EPA determined in the Endangerment Finding that six greenhouse gases (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride) endanger public health and welfare. 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (J.A. 692). Citing a "very large and comprehensive base of scientific information," *id.* at 66,506 (J.A. 824), EPA found that the increase in solar energy trapped inside the Earth's atmosphere by these gases causes serious harms that are felt on a local level, including more intense, frequent, and long-lasting heat waves; exacerbated smog in cities; longer and more severe droughts; more intense storms; the spread of disease; and a dramatic rise in sea levels. *Id.* at 66,524-25, 66,532-33 (J.A. 902, 905-915). The agency further found that emissions of greenhouse gases from the burning of fossil fuels have already led to structural, permanent changes in

the Earth's weather patterns, including extreme temperatures and erratic precipitation patterns that have led to deforestation, melting snowpacks and glaciers, rising seas, and resulting land use changes. *See id.* at 66,517-18, 66,531-32 (J.A. 873-74, 898-99, 932-44).

2. The Endangerment Finding formed the basis for EPA's subsequent regulation of greenhouse-gas emissions from mobile sources. Title II of the Act obligates EPA to establish motor-vehicle emissions standards for "any air pollutant" that endangers public health or welfare. 42 U.S.C. § 7521(a)(1). Pursuant to that mandate, EPA promulgated the Tailpipe Rule, which establishes greenhouse-gas emissions standards for cars and light trucks for certain model years. *See* 75 Fed. Reg. 25,324 (May 7, 2010) (J.A. 683).

The Tailpipe Rule's regulation of motor vehicles led in turn to regulation by EPA of greenhouse-gas emissions from stationary sources under Title I of the Act.[1] Part C of Title I establishes a permitting

---

[1] The Tailpipe Rule also operated to extend the distinct permitting program of Title V of the Clean Air Act to stationary sources emitting greenhouse gases. Title V collects all requirements applicable to a source—including the requirements of the PSD program—in one operating permit. 42 U.S.C. § 7661a(a). The court of appeals found that petitioners had forfeited their arguments against Title V's applicability by focusing solely on the language, structure, and purpose of the PSD program. J.A. 241. Accordingly, although petitioners' arguments here might alter the PSD obligations that Title V incorporates, petitioners have waived any challenge to EPA's determination that Title V may be extended to stationary

(*continues on next page*)

program that requires new and modified construction to employ emission controls to "prevent significant deterioration of air quality." 42 U.S.C. § 7471. This program, known as the PSD program, applies to "any area" of the country that is designated as in "attainment" because it is in compliance with at least one of the EPA-promulgated national ambient air-quality standards (NAAQS) for six defined pollutants, or in "any area" that is "unclassifiable" because it "cannot be classified on the basis of available information as meeting or not meeting" the NAAQS. 42 U.S.C. §§ 7407(d)(1), 7471, 7475(a); 40 C.F.R. §§ 50.4–50.18. In covered areas, PSD permitting requirements extend to all "major emitting facilities," *id.* § 7475(a), defined as either specific types of stationary sources emitting more than 100 tons per year (tpy) of "any air pollutant," or "any other source" emitting more than 250 tpy of "any air pollutant," *id.* § 7479(1).

Because the statute broadly extends the program to major sources of "any air pollutant," for more than three decades EPA has required PSD permits for major emitters of *any* air pollutant regulated by the Act, in any area that has reached attainment for any NAAQS pollutant.[2] Accordingly, once greenhouse-gas emissions became regulated under Title II, major emitters of greenhouse gases became subject to the PSD program's permitting requirements in all such

---

sources based on their greenhouse-gas emissions. *See United States v. Jones*, 132 S. Ct. 945, 954 (2012).

[2] *See* 67 Fed. Reg. 80,186, 80,240 (Dec. 31, 2002) (J.A. 1388-89); 45 Fed. Reg. 52,676, 52,710-11 (Aug. 7, 1980) (J.A. 1404-05); 43 Fed. Reg. 26,380, 26,382 (June 19, 1978) (J.A. 1422).

areas. *See* 75 Fed. Reg. 17,004 (Apr. 2, 2010) (J.A. 705).

3. The PSD program is administered largely by the States, and in a few States by EPA itself. Before any facility subject to the program can engage in new construction or modification, it must obtain a PSD permit from the designated state or federal permitting authority. A permit may be issued only if a covered source shows that it has applied the "best available control technology [BACT] for each pollutant subject to regulation" under the Clean Air Act, and demonstrated that the facility complies with emissions standards throughout the Act. 42 U.S.C. § 7475(a)(3),(4). An issued permit authorizes the construction or modification and prescribes, *inter alia*, an emission limit for the amount of air pollution that the source may emit once it begins or resumes operations. *See id.* § 7475(a).

4. Regulating greenhouse-gas emissions under the PSD permitting regime gave rise to certain practical challenges for permitting authorities. Because stationary sources typically emit greenhouse gases (especially carbon dioxide) in greater quantities than other pollutants previously regulated under the Act, traditional methods for calculating emissions for purposes of the PSD provision's 100/250-tpy thresholds would have resulted in large numbers of greenhouse-gas emitters being added to the PSD program (and the Title V program). But neither the States nor EPA had had sufficient time to develop appropriate approaches to address and alleviate the burdens that these increased numbers would have created. *See* 74 Fed. Reg. 55,292, 55,320-21 (Oct. 27, 2009); 75 Fed. Reg. 31,514, 31,540, 31,577 (June 3,

2010) (J.A. 386-390, 549). EPA therefore promulgated the Tailoring Rule to phase in permitting obligations for stationary-source greenhouse-gas emitters under the PSD program over several defined stages. 75 Fed. Reg. at 31,540, 31,522-25 (J.A. 309-319, 549).

The purpose of the Tailoring Rule was to immediately begin regulating greenhouse-gas emissions from the largest stationary sources, while giving the States and EPA additional time to study the practical effects of applying the PSD program (and Title V) to smaller sources' greenhouse-gas emissions. *Id.* at 31,516 (J.A. 283-84); 74 Fed. Reg. at 55,321. Under the Tailoring Rule, EPA began by requiring sources already covered by the PSD program as well as newly built sources that have the potential to emit 100,000 tpy of greenhouse gases and modifications that would increase greenhouse-gas emissions by 75,000 tpy to comply with the PSD requirements for greenhouse gas emissions. 75 Fed. Reg. at 31,523-24 (J.A. 313-315). These large sources produce eighty-six percent of greenhouse-gas emissions from stationary sources above the statutory thresholds. *Id.* at 31,571 (J.A. 523).

At the same time, EPA committed to reassessing this greenhouse-gas permitting approach as States and EPA gain experience regulating larger numbers of greenhouse-gas-emitting sources, and to evaluating the use of streamlining tools to aid in applying the permit program to smaller sources. *Id.* at 31,572-73 (J.A. 525-530). EPA committed to complete a study by April 30, 2015, addressing the permitting obligations of smaller stationary sources, including whether regulatory changes—such as streamlined permitting—might prove successful in

reducing permitting workloads. EPA has stated that it will issue a final rule regarding these sources by April 30, 2016. *Id.* at 31,525, 31,571-72, 31,608 (J.A. 319, 523-525); 40 C.F.R. §§ 52.22(b)(2), 70.12(b)(2).

5. EPA's role in regulating stationary sources of greenhouse gases formed a critical part of this Court's analysis in *AEP v. Connecticut*, 131 S. Ct. 2527 (2009). In *Connecticut*, the plaintiff States and others had sought relief from the harms caused by stationary-source greenhouse-gas emissions by bringing federal common-law nuisance claims for injunctive relief against the owners of several power plants. At the time the suit was brought, EPA had expressed the view that greenhouse gases were not subject to its regulation under the Clean Air Act. By the time *Connecticut* reached this Court, *Massachusetts* had held that greenhouse gases are subject to EPA regulation, and EPA had made the Endangerment Finding and finalized the Tailpipe and Tailoring Rules. Relying on *Massachusetts*, this Court held that the Clean Air Act "directly" authorizes EPA regulation of greenhouse gases from stationary sources and that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Connecticut*, 131 S. Ct. at 2537.

6. Meanwhile, petitioners had filed multiple petitions for review challenging the Endangerment Finding, the Tailpipe Rule, the Tailoring Rule, and the application of the Clean Air Act's PSD permitting requirements to sources that emit substantial amounts of greenhouse-gas pollutants. Respondent States and the City of New York intervened in

support of EPA in these cases because they have a compelling interest in reducing emissions of greenhouse gases that are harming the health and welfare of their residents. In addition, as permitting authorities, respondents are directly affected by EPA's decisions to regulate mobile and stationary sources of greenhouse-gas emissions and to gradually phase in the application of the PSD permitting program to stationary sources.

The court of appeals issued a lengthy *per curiam* decision denying or dismissing all the petitions, and denied a subsequent petition for en banc review. J.A. 191-267, 139-145. The court concluded that the PSD program unambiguously applies to stationary sources that emit greenhouse gases. J.A. 232-241. The court's decision was based on the plain language of 42 U.S.C. § 7479(1), which extends the PSD program to emitters of "any air pollutant" over the statutory threshold of 100/250 tpy, as well as the plain language of § 7475(a)(4), which requires major emitting facilities to apply BACT for "each pollutant subject to regulation" under the Act. J.A. 238-239. The court held that the language in both of these provisions clearly included greenhouse gases in light of this Court's holding in *Massachusetts* that the statutory term "'air pollutant' . . . unambiguously encompasses greenhouse gases." J.A. 237.

Petitioners filed nine petitions for certiorari raising a host of challenges to EPA's findings and regulations. This Court granted certiorari limited to the single question whether EPA permissibly determined that its regulation of greenhouse-gas emissions from new motor vehicles triggered permitting require-

ments under the Clean Air Act for stationary sources that emit greenhouse gases.

SUMMARY OF ARGUMENT

By its plain terms, the Clean Air Act's provisions for preventing the significant deterioration of air quality apply to major stationary emitters of "any air pollutant," 42 U.S.C. § 7479(1). This Court has twice held, in *Massachusetts* and *Connecticut*, that the phrase "air pollutant" in the Act encompasses greenhouse gases, thereby authorizing EPA to regulate emissions of those air pollutants from both motor vehicles and stationary sources. The identical use of this broad language in the PSD program thus compels its application to major emitters of greenhouse gases.

The PSD program's substantive requirements reinforce its broad scope. In particular, stationary sources subject to PSD permitting must apply the best available control technology for "each pollutant subject to regulation" under the Act—language that unambiguously encompasses greenhouse gases. The PSD program's regulation of greenhouse gases at the back end, when imposing actual emissions controls, necessarily requires that greenhouse-gas emissions be taken into account at the front end, when determining which stationary sources should be subject to the PSD program at all. That interpretation of the statute is the most natural reading of its plain language, and it conforms the sources the program covers to the pollution controls it imposes.

Petitioners' contrary arguments engraft limitations found nowhere in the statute to the

sweeping language defining the PSD program's scope. For example, certain petitioners argue (as the losing parties did in *Massachusetts*) that greenhouse gases are somehow unique among air pollutants, and that the PSD program should not be extended to these unusual pollutants. But this Court has already rejected previous attempts to segregate greenhouse gases from the types of pollutants regulated under the Act. Other petitioners assert that the PSD program should apply only to major emitters of one of the six pollutants for which EPA has promulgated a NAAQS. But when Congress intended such a specific limitation, it said so explicitly—as it did with the Clean Air Act's Nonattainment New Source Review program. By contrast, Congress deliberately extended the PSD program to major emitters of "any air pollutant," without limiting that sweeping phrase to the six NAAQS pollutants. Thus, nothing in the statutory language supports petitioners' various attempts to cast greenhouse gases as uniquely exempt from regulation under the PSD program.

EPA's decision to implement PSD permitting for greenhouse-gas emitters through a gradual transition provides no basis for limiting the scope of the PSD program. EPA's transitional approach properly alleviates the burdens that state authorities would face if PSD permitting were precipitously expanded to large numbers of additional sources, while at the same time ensuring that the vast majority of greenhouse-gas emissions will immediately be covered by the PSD program. Moreover, in conjunction with the States, EPA has committed to studying further methods to extend permitting to smaller sources according to a defined

timetable. EPA's transitional approach is thus a reasonable and temporary accommodation to certain practical implementation problems, not a concession that the PSD program is categorically incapable of applying to greenhouse-gas emissions.

Although petitioners assert otherwise, EPA's treatment of greenhouse gases under the PSD program is far from unusual. For decades, EPA has extended PSD permitting to a wide variety of additional pollutants whenever they became newly regulated under the Act. Petitioners' challenge to this long-standing framework would undermine not only the regulation of greenhouse gases but also the regulation of many other dangerous pollutants from which EPA and the States protect the public health and welfare under the PSD program.

ARGUMENT

I. The PSD Program Unambiguously Covers Greenhouse Gases.

When Congress enacted the Clean Air Act's PSD provisions in 1977, it deliberately used sweeping language to describe both the stationary sources covered by the PSD program, and the substantive requirements that the program places on those sources. The court of appeals correctly held that this broad language unambiguously includes greenhouse gases. J.A. 144, 237-38.

1. Congress defined the stationary sources regulated by the PSD program using language that this Court has already held encompasses greenhouse gases. The PSD program applies to all stationary

sources in attainment areas (or unclassified areas) that emit or have the potential to emit "any air pollutant" above certain threshold amounts. 42 U.S.C. §§ 7475(a), 7479(1). In *Massachusetts*, this Court held that the Act's general definition of "air pollutant" in Title III encompasses greenhouse gases because those airborne compounds "are without a doubt 'physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air.'" 549 U.S. at 529 (quoting 42 U.S.C. § 7602(g)). That definition applies "when used in this chapter"—*i.e.*, throughout the Act. 42 U.S.C. § 7602(g). The Court thus unsurprisingly concluded that this "sweeping definition of 'air pollutant'" applies to Title II, *Massachusetts*, 549 U.S. at 529, which requires EPA to prescribe standards for motor vehicles' emissions of "any air pollutant" that "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1).

Four years later, in *Connecticut*, this Court confirmed that *Massachusetts*' interpretation of the Clean Air Act's term "air pollutant" to include greenhouse gases extended not only to motor vehicles, but also to stationary sources. *See* 131 S. Ct. at 2537. The issue in *Connecticut* was whether a group of States could bring federal common-law nuisance claims against large power plants to abate their greenhouse-gas emissions. This Court held that Congress had displaced any such claims by "delegat[ing] to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants." *Id.* at 2538. As evidence of that delegation, the Court pointed to EPA's authority under the PSD program, including a specific citation to the Tailoring

Rule's "phasing in" of permitting requirements. *Id.* at 2533. And the Court further relied on Title I's New Source Performance Standards (NSPS) program—which, in language analogous to the PSD provisions', applies to stationary sources emitting "any air pollutant," 42 U.S.C. § 7411(a)(3). *See* 131 S. Ct. at 2537-38.[3]

Massachusetts and *Connecticut* thus confirm that Congress's use of the phrase "air pollutant" in the Clean Air Act unambiguously encompasses greenhouse gases—whether in the Act's general definition of "air pollutant," in the Act's provisions requiring regulation of mobile-source emissions of "any air pollutant," 42 U.S.C. § 7521(a)(1), or in the Act's program to set standards for new stationary sources of "any air pollutant," *id.* § 7411(a)(3), (4). The same inclusive language exists in the PSD provision defining the sources covered by that program as sources of "any air pollutant," *id.* § 7479(1), and it

---

[3] Petitioner American Chemistry Council (ACC), appearing as amicus curiae in *Connecticut*, specifically relied on the PSD program as an example of the Clean Air Act's regulation of greenhouse gases, arguing that the PSD and NSPS programs were part of a "comprehensive framework for regulating air pollution" that displaced the States' federal common-law nuisance claims. ACC et al., as Amici Curiae in Support of Pets. at 27-28 & n.9, *Connecticut*, 131 S. Ct. 2527 (No. 10-174). The United States also relied on the PSD program to support displacement. *See* Reply Brief for Tennessee Valley Authority as Resp. Supporting Pets. 17-18, *Connecticut*, 131 S. Ct. 2527 (No. 10-174).

should be interpreted the same way. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994).[4]

2. The conclusion that *emitters* of greenhouse gases are covered by the PSD program is reinforced by the statutory language concerning the *emissions* covered by the program. Two substantive requirements in particular can only be read to include greenhouse gases. First, to obtain a preconstruction permit, sources subject to the PSD program must apply the best available control technology (BACT) for "each pollutant subject to regulation" under the Act that the source emits (or has the potential to emit) in sufficient quantities. 42 U.S.C. § 7475(a)(4); *see also id.* § 7479(3). Second, the statute requires new or modified facilities to comply with "any other applicable emission standard or standard of performance" under the Act, *id.* § 7475(a)(3)(C), an express reference to standards imposed outside of the PSD program itself.[5]

---

[4] Some petitioners rely on *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), to contest a plain reading of the PSD program's statutory language. *See* Brief for the State Petitioners (Texas Br.) 5; Brief for Petitioners Southeastern Legal Foundation, Inc., et al, No. 12-1268 (SLF Br.), 7. But as this Court squarely recognized in *Massachusetts* when rejecting a near-identical argument, *Brown* is inapplicable because petitioners have "not identified any congressional action that conflicts in any way with the regulation of greenhouse gases" emitted from stationary sources. 549 U.S. at 531.

[5] Petitioners suggest (*see, e.g.*, Brief of Petitioners American Chemistry Council, et al, No. 12-1248 (ACC Br.) 26) that EPA's decision to construe PSD as applicable to emitters of regulated pollutants rather than all pollutants shows that EPA is not bound by the plain text of the statute, but they are mistaken. The substantive requirements of the PSD program

(*continues on next page*)

Both of these substantive obligations require stationary sources to control greenhouse-gas emissions. For the BACT requirement, greenhouse gases indisputably became "subject to regulation" under the Act when EPA promulgated the Tailpipe Rule. *See* 75 Fed. Reg. at 17,007 (J.A. 720). As acknowledged by petitioner ACC (Br. 29 n.12) and one of the judges dissenting from denial of en banc review below (J.A. 177), the Tailpipe Rule thus triggered the PSD program's BACT provision, requiring stationary sources subject to PSD to limit greenhouse-gas emissions from new or modified construction to "the maximum degree" that a permitting authority "determines is achievable." 42 U.S.C. § 7479(3).

Likewise, the requirement that sources subject to PSD permitting comply with "any other . . . standard" under the Act encompasses the standards imposed by the Act's NSPS program, which this Court in *Connecticut* specifically recognized as authorizing EPA to regulate greenhouse-gas emissions from stationary sources. 131 S. Ct. at 2537. EPA has already proposed minimum performance standards for greenhouse-gas emissions from one major source category, power plants, under the NSPS program. 79 Fed. Reg. 1,430 (January 8, 2014). When those standards come into effect, power plants in the PSD program will be required to limit greenhouse-gas emissions in compliance with those NSPS standards.

---

confirm that the program is specifically aimed at pollutants that are "subject to regulation" under the Act.

These two substantive provisions thus unambiguously require that stationary sources in the PSD program control their emissions of greenhouse gases. And by extending these control measures to major emitters of "any air pollutant," broadly defined, the PSD program applies its remedies to the harms that it addresses—*i.e.*, the stationary sources of the very air pollutants that PSD permitting is meant to regulate. By contrast, petitioners' attempts to narrow the scope of the PSD program would lead to a mismatch between remedy and harm: major emitters of *other* pollutants would be subject to greenhouse-gas emissions controls, but major emitters only of greenhouse gases would not be. Nothing in the statute suggests that Congress imposed a regulatory regime with such anomalous results.

3. Another indication that PSD applies to sources of greenhouse-gas emissions is that the parallel but less stringent NSPS program also regulates those pollutants. The NSPS program, which predates the PSD program, sets emissions limitations for new and modified stationary sources that operate as a "floor" limitation. *See* S. Rep. No. 95-127, at 31 (1977). But Congress recognized that NSPS "did too little to 'achiev[e] the ambitious goals of the 1970 Amendments.'" *Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 567 (2007) (quoting Roy S. Belden, *Clean Air Act* 7 (2001)). Congress thus enacted the PSD program in 1977 to both preserve and expand the NSPS program's protection of air quality. *Id.* at 567-68. Because the PSD program was intended to improve on the NSPS program, it would make little sense to give PSD a narrower scope than NSPS, which

this Court has already found extends to greenhouse-gas emissions. *See Connecticut*, 131 S. Ct. at 2537-38.

Excluding greenhouse gases from the PSD program would also be inconsistent with this Court's conclusion in *Connecticut*, 131 S. Ct. at 2537, that EPA's authority to regulate greenhouse-gas emissions from stationary sources displaces the States' ability to pursue their own remedies against those sources under federal common law. If, as petitioners contend, EPA had only limited authority to regulate greenhouse-gas emissions from stationary sources under the Clean Air Act, then States would retain federal common-law remedies for global-warming harms in order to fill any gap created by those limits.[6]

4. The history of the PSD provision confirms that Congress meant what it said when it extended PSD permitting broadly to sources of *any* regulated air pollutants, now including greenhouse gases. Congress deliberately chose the sweeping language that defines both the PSD program's scope and its substantive requirements because it determined that preexisting controls were insufficient to limit dangerous emissions from stationary sources. Those preexisting controls included not only the NSPS program, see *supra* at 15, but also the NAAQS program and EPA's then-extant regulatory program

---

[6] Moreover, if, as Texas urges (Br. 24-29), this Court were to overrule *Massachusetts* and preclude EPA from addressing greenhouse-gas emissions altogether, it would be necessary to reconsider *Connecticut* as well and revisit the States' historic federal common-law nuisance claims against stationary sources of greenhouse gases.

to prevent significant deterioration, *see* 39 Fed. Reg. 42,510 (Dec. 5, 1974), which was limited to two NAAQS pollutants, sulfur dioxide and particulate matter. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 347 (D.C. Cir. 1980).

Congress enacted the statutory PSD program in a deliberate effort to broaden the pollution controls that would apply to stationary sources. In debate, it noted the health and welfare effects of non-NAAQS pollutants, including carbon dioxide's effect on climate change. *See* 122 Cong. Rec. S25194 (daily ed. Aug. 3, 1976) (statement of Sen. Bumpers) (referencing "trace pollutants" and discussing carbon dioxide and its impact on climate change); S. Rep. No. 95-127, at 30 (directing EPA to "study strategies to prevent significant deterioration for other regulated pollutants" besides sulfur dioxide and particulate matter). And Congress rejected proposed language that would have limited the PSD program solely to major emitters of NAAQS pollutants,[7] adopting instead the unrestricted language in the current statute that extends PSD permitting to major emitters of "any air pollutant." 42 U.S.C. § 7479(1). Congress further adopted the broad language requiring stationary sources to adopt best available control technologies for "each pollutant subject to regulation" under the Act, 42 U.S.C. § 7475(a)(4), reflecting its view "that the best available control technology requirements should be applicable to all pollutants emitted from any new major emitting

---

[7] *See* H.R. 6161, 95th Cong., at 33 (as passed by Senate, June 10, 1977) (rejecting House provision); H.R. Rep. No. 95-564, at 149-52 (Aug. 3, 1977) (Conf. Rep.).

facility so that the maximum degree of emission reduction would be achieved in order to minimize potential deterioration." 123 Cong. Rec. at S18,021 (daily ed. June 8, 1977) (statement of Sen. Muskie).

Subsequent amendments to the Act confirm that Congress understood the PSD program broadly to encompass sources of any regulated air pollutant. In 1990, after a decade during which EPA and the States had consistently applied PSD permitting to stationary-source emitters of any regulated air pollutant, including "hazardous air pollutants," Congress amended the Act specifically to remove those "hazardous air pollutants" from the PSD program without otherwise limiting EPA's and the States' approach to determining the sources covered by the program.[8] That amendment highlights the PSD program's initial breadth—and demonstrates that, when Congress intended to exempt specific air pollutants from PSD permitting, it knew how to do so and did so expressly.

The PSD provisions' broadly worded language thus shows that Congress was addressing the effects of all air pollutants that EPA has deemed harmful enough to regulate. By extending PSD permitting to major emitters of "any air pollutant," by requiring that new and modified construction use the best available control technology for each such pollutant, and by mandating that such construction comply

---

[8] *See* S. Rep. 101-228, at 150-51 (1989); 42 U.S.C. § 7412(b)(6). *Compare* 45 Fed. Reg. 52,676, 52, 708-09 (including asbestos in the initial list of regulated pollutant covered by the PSD program), *with* 42 U.S.C. § 7412(b)(1) (listing asbestos as a hazardous pollutant).

with every other applicable standard under the Act, Congress ensured that the PSD program would prevent the deterioration of air quality caused by emissions of any harmful pollutants, preserving the gains achieved by the Act's panoply of pollution-control measures. *See* 42 U.S.C. § 7470(1) (declaring that the purpose of PSD is to "protect public health and welfare from any actual or potential adverse effect[s] . . . from air pollution"). Including greenhouse gases in the PSD program's regulatory sweep is thus consistent with both the text of the program and the statute's declaration of purpose.

II. Petitioners' Alternative Interpretations Find No Support in the PSD Program's Statutory Language.

Petitioners offer various reasons that the Clean Air Act's PSD permitting program should be interpreted to exclude greenhouse gases, but neither the text nor purpose of the PSD provisions supports petitioners' claims.

A. EPA's Decision to Phase in PSD Emissions Thresholds for Greenhouse Gases Does Not Compel the Conclusion that Those Pollutants Should Be Excluded from the PSD Program.

Petitioners argue that because EPA found it prudent to phase in PSD permitting requirements gradually for greenhouse-gas emissions, it follows that greenhouse-gas emissions are categorically

unsuited to regulation under the PSD program.[9] That argument confuses temporary implementation problems with irreconcilable statutory conflict.

EPA promulgated the Tailoring Rule to address a practical timing problem with the immediate administrative implementation of PSD permitting to greenhouse-gas emissions.[10] Because greenhouse-gas pollutants are emitted in higher quantities than the pollutants previously covered by the PSD program, EPA's initial analysis concluded that the program's 100/250-tpy thresholds would bring greenhouse-gas emitters into the program in greater numbers than emitters of other regulated pollutants. EPA determined that the immediate application of current PSD requirements to all such stationary sources would be unworkably burdensome on those sources and on the States that issue PSD permits. *See* 75 Fed. Reg. at 31,572 (J.A. 562). EPA thus adopted a provisional, step-by-step approach that limited the initial application of PSD permitting to the largest emitters—a limitation that EPA determined (and no party disputes) was necessary to mitigate significant burdens on state permitting agencies, yet still encompasses eighty-six percent of stationary-source

---

[9] *See e.g.*, ACC Br. 27; Brief of Petitioners in No. 12-1254, the Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation and the Glass Packaging Institute (EIM Br.) 20; Brief of Petitioners Chamber of Commerce of the United States of America, et al, (Chamber Br.) 30-31; Brief of Petitioner Utility Air Regulatory Group (UARG Br.) at 22-23.

[10] The validity of the Tailoring Rule is not at issue here. The court of appeals held that petitioners had no standing to challenge the rule (J.A. 261-262), and this Court did not grant review of that holding.

greenhouse-gas emissions. *Id.* at 31,567-72 (J.A. 503-523).

Contrary to petitioners' characterizations, the impetus for the Tailoring Rule was not an inherent absurdity or permanent conflict between the statute's emissions thresholds and an interpretation of "any air pollutant" that includes greenhouse gases. Rather, the difficulty of immediate application resulted from the particular, preexisting administrative approaches that EPA and the States had adopted for PSD permitting before greenhouse gases became a regulated air pollutant. In the Tailoring Rule, EPA delayed application of the PSD program to smaller emitters in order to consider more streamlined and cost-effective permitting processes for those sources. *Id.* at 31,525, 31,573, 31,608 (J.A. 319-20, 529-532, 675-76); 40 C.F.R. §§ 52.22(b)(2), 70.12(b)(2).

The specific streamlining options discussed in the Tailoring Rule confirm that the issues that led EPA to make this temporary accommodation are administrative rather than statutory in nature, and subject to administrative solutions. For example, state permitting authorities currently evaluate most PSD permits on a case-by-case basis—a process that can be both labor- and time-intensive, and is therefore difficult to extend to large numbers of additional sources. EPA is considering whether, consistent with the statute, such a case-by-case evaluation is required for every application, or whether it may, be equally effective to use general permits to streamline the process for "sources that are similar in terms of operations, emissions units, and applicable requirements," 74 Fed. Reg. at 55,322;

see also 75 Fed. Reg. at 31,524 (J.A. 318-19); 77 Fed. Reg. 41,051, 41,053 (July 12, 2012). General permits have facilitated large-scale permitting in other environmental regulatory schemes, such as the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, *see Dupont v. Train*, 430 U.S. 112, 122-24 (1977), while significantly alleviating the administrative burdens of evaluating large numbers of applications.

Similarly, EPA and the States determine whether a stationary source meets the PSD provision's emissions thresholds under a long-standing methodology that calculates a source's "potential to emit" on the assumption that the source will operate at maximum capacity to the full legal extent possible. *See, e.g.*, 45 Fed. Reg. 52,676, 52,677; 74 Fed. Reg. at 55,320. EPA is considering alternative methods of calculating "potential to emit" under the Act to account for differences in sources and in the maximum use of smaller sources of greenhouse-gas emissions, such as furnaces that only operate on cold days. 74 Fed. Reg. at 55,321. Such approaches could in theory "significantly reduce the number of sources subject to PSD and Title V and thereby significantly ease administrability of those programs." *Id.*; *see also* 75 Fed. Reg. at 31,517.

Thus, the decision by EPA to apply the PSD program first to the largest sources before applying it to all sources covered by the statute is merely a provisional administrative accommodation to the practical need for additional time and study to adapt existing regulatory schemes to newly regulated pollutants. It is far from unusual for an administrative agency to adopt such a step-by-step approach to the transitional task of applying a

complex program to new areas. As this Court recognized in *Massachusetts*, EPA need not "resolve massive problems" such as greenhouse-gas emissions "in one fell regulatory swoop," and may "instead whittle away at them over time, refining [its] preferred approach as circumstances change and as [the agency] develop[s] a more nuanced understanding of how best to proceed." 549 U.S. at 524.

The justification for a step-by-step approach is particularly compelling here because the costs of immediately extending the PSD program to all emitters of greenhouse gases would have fallen heavily on the States. The PSD program is implemented in large part by state permitting authorities, and EPA correctly recognized that immediately extending the permitting process to all major sources of greenhouse gases would overtax the States. EPA's decision to phase in PSD permitting for greenhouse-gas emissions appropriately respects the States' distinct sovereign interest in the proper functioning of their environmental oversight role.

Petitioners in effect contend that greenhouse-gas emitters must either be fully covered immediately or permanently excluded from the PSD program. *See, e.g.*, Texas Br. 8. But EPA has the authority to determine how best to protect public health and welfare while devising mechanisms to ease the regulatory burden on the states. *See Massachusetts*, 549 U.S. at 524. As part of that authority, EPA necessarily has the time to consider its approach and the authority to take interim steps before completing that task. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 1002 (2005). EPA's transitional approach here properly advances

the PSD program's core purpose of "protect[ing] public health and welfare from *any* actual or potential adverse effect" from air pollution, 42 U.S.C. § 7470(1) (emphasis added), while at the same time reasonably reducing the burdens on both sources and permitting authorities. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968); *Alabama Power Co.*, 636 F.2d at 358. That approach in no way supports petitioners' claim[11] that greenhouse gases should be permanently exempted from the PSD program.

B. The Differences Between Greenhouse Gases and Other Air Pollutants Do Not Support a Blanket Exclusion of Greenhouse Gases from the PSD Program.

Petitioners argue that certain unique features of greenhouse gases preclude the regulation of those air pollutants under the PSD program. Although most petitioners do not seriously contest that the PSD program applies to a broad range of air pollutants extending well beyond the six pollutants for which EPA has established a NAAQS, they nonetheless assert that greenhouse gases are so different from regulated pollutants that they must be excluded from the statute entirely.[12] But petitioners' arguments for excluding greenhouse gases rely on distinctions that cannot be reconciled with the statute.

1. Several petitioners argue that the phrase "air pollutant" in the PSD program is restricted to pollutants that cause local harms through direct

---

[11] *See, e.g.*, ACC Br. 24-25; Chamber Br. 31; Texas Br. 21.

[12] *See* EIM Br. 28; UARG Br. 28; SLF Br. 10, 20.

exposure (*e.g.*, Chamber Br. 15; EIM Br. 6; SLF Br. 9-10), rather than pollutants such as greenhouse gases that cause world-wide harm "due to their uniform presence throughout the global atmosphere" (UARG Br. 28). Nothing in the PSD provision affords a principled basis for setting up such a test, for drawing a line between pollutants that cause local harms and those that do not, or for deciding that greenhouse gases do not cause such local harms.

Petitioners' attempts to construct this distinction only highlight the conceptual difficulty of segregating greenhouse gases from other pollutants that are indisputably subject to regulation under the PSD program. Petitioners argue specifically that the PSD program focuses on air pollutants that affect the "ambient air" that people breathe and thus does not apply to greenhouse gases. UARG Br. 28. But this Court recognized in *Massachusetts* that greenhouse gases, like other pollutants, enter the ambient air. *See* 549 U.S. at 529 n.26. And EPA determined in the Endangerment Finding that greenhouse-gas emissions have severe effects felt at the local level: for example, greenhouse gases exacerbate ground-level ozone and smog, which cause "respiratory illnesses and premature death" and have "significant adverse effects on crop yields, pasture and forest growth, and species composition." 74 Fed. Reg. at 66,525 (J.A. 907).

In any event, both the statute's facial command to regulate "any" air pollutant and the legislative history of the PSD provision indicate that Congress was not narrowly concerned only with the local effects of air pollutants. Congress made clear that PSD permitting should protect against the

"[w]orldwide weather modification" that certain pollutants threatened. H.R. Rep. No. 95-294, at 138 (J.A. 1554). And it emphasized the importance of adopting a permitting program that would "help reduce possible major weather modifications such as increased acidity of rainfall, changes in amounts of rainfall and temperature changes." *Id.* at 141 (J.A. 1555). Given the PSD program's global rather than purely parochial outlook on the one hand, and greenhouse gases' harmful local effects on the other, there is no principled basis under the statute for distinguishing greenhouse gases from the pollutants that petitioners would consider local enough to be regulated under the PSD program.

2. Several petitioners also argue that the PSD program is limited to those pollutants that are emitted above the statutory thresholds solely by "large industrial facilities" that are "relatively few in number." UARG Br. 15. Petitioners thus contend that greenhouse gases fall outside of the PSD permitting process because they are emitted by many smaller, nonindustrial facilities as well, "such as hospitals [and] universities." ACC Br. 1-2.

Nothing in the PSD provision itself supports petitioners' attempts to distinguish between air pollutants based upon the industrial character of their emitters. When Congress intended to limit the application of a program to certain types of industry, it did so expressly. Indeed, the PSD provision itself contains an example of such a limitation: the lower, 100-tpy emissions threshold applies to a discrete list of large industrial facilities, such as "iron and steel mill plants" and "fossil-fuel fired steam electric plants" above a certain size. 42 U.S.C. § 7479(1).

No similar industrial-character criterion restricts the application of the PSD provision's 250-tpy threshold, which applies by its terms to any emitters of "any air pollutant" above that threshold. *Id.* Rather than categorically exempting sources "which are small and relatively insignificant with respect to air quality," *see* S. Rep. No. 95-127, at 33, Congress instead provided other avenues to relieve such sources from the potential burdens of PSD compliance. In particular, States may exempt "nonprofit health or education institutions" from PSD permitting, 42 U.S.C. § 7479(1). That exemption authority necessarily presupposes that the PSD program could apply to such smaller, non-industrial sources, belying petitioners' incorrect assumption that PSD permitting was never intended to apply to "hospitals [and] universities" at all. ACC Br. 1. In addition, as petitioners have acknowledged (EIM Br. 23), the Act specifically authorizes EPA to "tak[e] into account energy . . . and economic impacts and other costs" in interpreting the PSD program's substantive requirements, 42 U.S.C. § 7479(3), a built-in protection against particularly onerous burdens, if any, that specific smaller sources might face in the future.

The statutory language thus does not support petitioners' attempt to narrow the scope of the PSD program to pollutants uniquely emitted by large industrial sources. To be sure, Congress may not have understood in 1977 the degree to which smaller sources can emit greenhouse gases—just as Congress "might not have appreciated the possibility that burning fossil fuels could lead to global warming." *Massachusetts*, 549 U.S. at 532. But in the PSD provision, as in the Clean Air Act writ large,

Congress chose language sufficiently broad "to confer the flexibility necessary to forestall . . . obsolescence." *Id*. It is that language that now governs the scope of the PSD program, not Congress's unenacted expectations about the facilities likely to be regulated by the program. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (finding "irrelevant" the contention that "Congress did not envision that the [statute in question] would be applied to state prisoners" (quotation marks omitted)); *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.").

C. The Absence of a NAAQS for Greenhouse Gases Does Not Exclude Emitters of Greenhouse Gases from the PSD Program.

Petitioner ACC argues that a facility can be brought into the PSD permitting program only by the emission of a pollutant subject to a NAAQS, and not by the emission of greenhouse gases, which are not subject to a NAAQS. ACC acknowledges that once a facility is covered, its greenhouse-gas emissions may be regulated under the PSD program (Br. 28-29 & n.12), but contends that it is not covered at all unless it emits a pollutant subject to a NAAQS above the statutory thresholds in an area that is in attainment for that specific pollutant. ACC Br. 3, 13; *see also* Brief for Respondents Coalition for Responsible Regulation, Inc., et al (CRR Br.), at 16-18.

That argument is flatly inconsistent with the PSD provision's broad application to all major emitters of "any air pollutant," 42 U.S.C. §§ 7479(1);

7474(a). *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). Nothing in this sweeping language suggests that, when Congress said "any air pollutant," it actually meant "any air pollutant subject to a NAAQS in an attainment area for that pollutant."

When Congress intended to limit a program to emitters of NAAQS pollutants, it knew how to do so—and said so explicitly. For example, the Nonattainment New Source Review (NNSR) program establishes stringent permitting rules for new or modified construction in areas designated by EPA as nonattainment with a NAAQS. *See* 42 U.S.C. §§ 7501-7509. Because the NNSR program is specifically aimed at achieving the NAAQS, the language defining its scope and substantive requirements is expressly aimed at helping to achieve the NAAQS. Thus, NNSR permitting obligations apply to emissions of a particular pollutant only when "an area . . . is designated 'nonattainment' *with respect to that pollutant*." *Id.* § 7501(2) (emphasis added); *id.* § 7502(c)(5). And the NNSR statute requires sources in nonattainment areas to obtain emission offsets only "of the relevant air pollutant," and specifically to "ensur[e] attainment of the applicable" NAAQS. *Id.* § 7501(1). The absence of any similar narrowing language in the PSD program forecloses ACC's attempt to limit the program to major emitters of NAAQS pollutants.

ACC claims to find support for its interpretation in the language of § 7475(a), which provides that PSD permitting applies only to a "major emitting

facility . . . in any area to which this part applies . . . ." ACC argues that the PSD provision "'applies' to an area *only* with respect to those pollutants subject to a NAAQS that the area is attaining." ACC Br. 13. But the words of the statute cannot plausibly be read to bear that meaning. Under the plain terms of the PSD program, it applies to "each region" that is "designated pursuant to section 107 [42 U.S.C. § 7407] as attainment or unclassifiable," without reference to any particular pollutant. 42 U.S.C. § 7471. That language unequivocally means that PSD permitting is required in all areas designated as attainment or unclassifiable for any pollutant under the PSD provision.[13] *See* 45 Fed. Reg. 52,676, 52,710-11 (J.A. 1403).

---

[13] ACC argues that this straightforward interpretation of "to which this part applies" makes that phrase superfluous because all areas of the country are currently and have always been in attainment for at least one NAAQS. ACC Br. 19. But Congress plainly foresaw that every area of the country would eventually meet all of the NAAQS, and it just as plainly intended for the PSD program to continue notwithstanding such universal attainment. *See* Pub. L. No. 95-95, § 129(b), 91 Stat. 685, 746-47 (1977) (imposing deadlines of 1982 and 1987 for achieving attainment of all NAAQS) (codified as amended in 42 U.S.C. § 7502(a)). In any event, the statutory language does serve a distinct purpose by emphasizing the breadth of the PSD permitting requirement, notwithstanding other PSD provisions that might apply more narrowly. For example, the PSD program allows for classification of three different categories of attainment areas and imposes somewhat distinct requirements for each category. *See* 42 U.S.C. §§ 7472-7476. Section 7475(a)'s language makes clear that the PSD permitting requirement is applicable to all three classes of attainment areas (as well as areas that have not been classified), notwithstanding any other differences between those areas.

III. Petitioners' Proposed Narrowing Interpretations are Inconsistent with the Experience of the States and EPA in Administering the PSD Program Over Many Decades.

For decades, the States and EPA have applied PSD permitting to sources of any air pollutant regulated under the Act. *See Alabama Power Co.*, 636 F.2d at 351-52; 45 Fed. Reg. at 52,710-12. The inclusion of greenhouse gases among the air pollutants regulated under the PSD program is merely the most recent application of this well-understood paradigm. And the States' recent experience with PSD permitting for greenhouse gases has proven to be far from "unworkable" or intrusive in practice, as petitioners incorrectly assert. Chamber Br. 15.

Petitioners' challenge to the inclusion of greenhouse gases does not merely threaten to exclude those specific air pollutants from regulation; it also threatens to upend long-standing programs that have proven important and effective for controlling other serious and dangerous pollutants for years. Petitioners' proposed reworking of the statutory command to regulate "any air pollutant" would far more radically change the PSD program than does EPA's phased approach to implementing the statute.

1. Petitioners' attempts (see *supra* at 24-30) to limit the plain meaning of "any air pollutant" and "each pollutant subject to regulation under [the Act]," 42 U.S.C. § 7479(1), (3), would not only prohibit EPA from regulating greenhouse gases under the PSD program, but also threaten to undermine many other

actions that EPA and the States have taken to regulate a host of other dangerous pollutants through PSD permitting. In particular, both EPA and the States have long followed the statute's unambiguous command that stationary sources in the PSD program apply the best available control technology for *every* pollutant regulated under the Act, including many that are not subject to a NAAQS. Thus, States have required application of BACT to limit emissions of ozone-depleting substances, *see* 53 Fed. Reg. 30,566 (Aug. 12, 1988), as well as fluorides, hydrogen sulfide, metals, municipal-waste combustor organics, solid-waste landfill emissions, sulfuric-acid mist, and total-reduced sulfur, *see* 40 C.F.R. § 52.21(b)(23)(i).

These non-NAAQS pollutants can be acutely harmful. Hydrogen sulfide and sulfuric acid mist, for example, are emitted by a wide range of sources and can rapidly cause serious respiratory or neurological problems or death, even in vanishingly small quantities.[14] The States' application of BACT to just these two non-NAAQS pollutants has been both extensive and crucial to limiting their harmful effects. A review of EPA's PSD-permitting database shows that States have applied BACT to limit emissions of hydrogen sulfide on at least 129 occasions, and to limit emissions of sulfuric acid mist

---

[14] *See* Agency for Toxic Substances & Disease Registry, U.S. Dep't of HHS, Toxicological Profile for Hydrogen Sulfide, at 10-15 (2006), *available at* http://www.atsdr.cdc.gov/toxprofiles/tp114.pdf; Agency for Toxic Substances & Disease Registry, U.S. Dep't of HHS, Sulfur Trioxide and Sulfuric Acid § 1.5 (Dec. 1998), *available at* http://www.atsdr.cdc.gov/ToxProfiles/tp117-c1-b.pdf.

on at least 439 occasions.[15] Examples from across the States demonstrate that sources have been required to apply BACT to their emissions of these pollutants, leading to emissions reductions as high as ninety-nine percent.[16] Limiting the PSD statute's BACT requirement to NAAQS pollutants, as several petitioners urge here, threatens the continuing validity of these essential pollution controls.

Petitioner ACC acknowledges that the BACT requirement should apply to all pollutants regulated under the Act—including greenhouse gases and non-

---

[15] *See* EPA, RACT-BACT-LAER Clearinghouse, *available at* cfpub.epa.gov/rblc/. This database contains permitting information, voluntarily provided to EPA by the States.

[16] Air Contaminant Discharge Permit Review Report 8-9, *for* Portland Ore. General Electric Co., Carty Plant, Permit No. 25-0016-ST-02 (H2SO4 (sulfuric acid) mist), *available at* http://www.deq.state.or.us/aq/permit/tv/er/250016PGEBoardman_STD_RR.pdf; Permit-to-Install Application, vol. 2, at 5, 31-33, *for* American Municipal Power Generating Station (sulfuric acid emissions reduced by about 90 percent), *available at* http://epa.ohio.gov/portals/27/transfer/ptiApplication/amp/VolumeII.pdf; Santa Barbara County (Cal.) Air Pollution Control Dist., Permit No. 5651-R5, at 166, *for* Exxon Las Flores Canyon Oil & Gas Plant (hydrogen sulfide emissions reduced by 99.9 percent), *available at* http://www.sbcapcd.org/eng/titlev/permits/p5651r5.pdf; *see also* Minn. Pollution Control Agency, Permit No. 06100067-004, at att. 1, tbl. 1-7, *for* Essar Steel Minnesota LLC (BACT for emissions of flourides), *available at* http://www.pca.state.mn.us/index.php/view-document.html?gid=17628; Ky. Dep't of Envt'l Protection, Permit No. VF-002-004R1, for Atofina Chemicals, Inc. (hydrochloroflourocarbons (HCFCs), an ozone-depleting substance), *available at*: http://cfpub.epa.gov/rblc/index.cfm?action=PermitDetail.PollutantInfo&Facility_ID=26009&Process_ID=103744&Pollutant_ID=95&Per_Control_Equipment_Id=138272 (database summary).

NAAQS pollutants such as hydrogen sulfide and sulfuric acid mist—but urges this Court to limit the application of PSD permitting in the first instance only to emitters of NAAQS pollutants (ACC Br. 3, 29 n.12; *see also* CRR Br. 18). That limitation would still keep the States from preventing emissions of severely harmful pollutants that have long been subject to PSD permitting. Permitting authorities have consistently required PSD permits when sources emit non-NAAQS pollutants above the statutory thresholds. *See*, *e.g.*, Ala. Admin. Code § 335-3-14-.04(2)(w), (ww) (sources of *any* regulated pollutant are subject to PSD permitting); 6 N.Y.C.R.R. § 231-4.1(b)(44) (sources of "any contaminant that otherwise is subject to regulation under the Clean Air Act" are subject to PSD permitting). Exempting such sources from the PSD program's requirements would call into question a broad range of permits that currently prevent harmful emissions of non-NAAQS pollutants.[17]

---

[17] US EPA Permit No. NSR 4-4-2 (SPB 81-03), *for* Pacific Gas & Elec. Co. Geysers Plant (permit required because of hydrogen sulfide), *available at* http://cfpub.epa.gov/rblc/index.cfm?action=PermitDetail.ProcessInfo&facility_id=1&PROCESS_ID=1 (database summary); La. Dep't of Envt'l Quality, Permit No. PSD-LA-722, E.I. DuPont de Nemours & Co., Burnside Plant (permit required because of sulfuric acid mist), *available at* http://cfpub.epa.gov/rblc/index.cfm?action=PermitDetail.FacilityInfo&facility_ID=26707 (database summary); Ill. Envtl. Prot. Agency, Permit No. 201030AXM, Owens Corning Plant, *available at* http://yosemite.epa.gov/r5/in_permt.nsf/6f1ebc583aad45448625763f0053e08e/7cb5609c389f47d686257c6000549e92/$FILE/ATTX4Z9G/01030029.pdf; Permit No. A859, Universal Urethane, Inc. (permit required because of ozone-depleting substances),
(*continues on next page*)

As a practical matter, the States currently rely on the PSD program in substantial part for essential controls over NAAQS and non-NAAQS pollutants alike. Absent coverage by the PSD statute and the state programs that implement federal requirements, regulation of these dangerous pollutants would rely on a patchwork of state and local regulations, or on individual common-law nuisance actions against particular sources, see *supra* at 16. Substituting state regulation for the PSD program's current requirements could also potentially lead to inconsistent regulatory regimes across different States—contravening Congress's intent that a more uniform PSD program would protect States from "economic-environmental blackmail" resulting from differing state regulation of major air pollution. H.R. Rep. No. 95-294, at 134; *Alaska Dep't of Envtl. Conserv. v. EPA*, 540 U.S. 461, 486 (2004).

2. The States have been administering the PSD permitting program for stationary sources of greenhouse-gas emissions under the Tailoring Rule without substantial difficulties. Greenhouse gases are not the first newly regulated pollutant that States have incorporated into their existing PSD permitting processes. When a new pollutant is regulated under the Act, typically EPA and the state permitting authorities take steps to adjust, as necessary, their respective implementation plans to ensure that they can issue permits for sources of the new pollutant. For example, when EPA issued

---

available at http://cfpub.epa.gov/rblc/index.cfm?action=PermitDetail.ProcessInfo&facility_id=3397&PROCESS_ID=1 (database summary).

standards of performance for new municipal solid-waste landfills and emission guidelines for existing landfills, it explained that "PSD rules now apply" to sources of those landfill emissions and set out guidance for permitting those sources. *See* 61 Fed. Reg. 9,905, 9,912 (Mar. 12, 1996). And when ozone-depleting substances were first regulated under the Act, EPA proposed how to calculate the emissions and set the "significance" levels for determining applicability of PSD-permitting requirements, including BACT review. *See e.g.*, 61 Fed. Reg. 38,250, 38,307-08 (Jul. 3, 1996).

When greenhouse gases became regulated pollutants for purposes of the PSD program, EPA and state permitting authorities followed their past practice to adapt permitting processes for greenhouse gases where necessary. States thus promptly amended their regulations and submitted revised state implementation plans to ensure that emitters of greenhouse gases could obtain the appropriate permits.[18] 75 Fed. Reg. 77,698 (Dec. 13, 2010) (SIP Call); 78 Fed. Reg. 63,383 (Oct. 24, 2013) (Rhode Island); Or. Admin. R. 340-224-0010(5) (Oregon); 77 Fed. Reg. 60,907 (Oct. 5, 2012) (Vermont). And States have been working with EPA to ensure that PSD permitting of sources of greenhouse gas emissions proceeds in an orderly fashion, just as they previously have done for the other pollutants covered

---

[18] Many States' PSD programs automatically update to include newly regulated pollutants, and did so for greenhouse gases. *See* 75 Fed. Reg. at 77,702.

by the PSD program.[19] *See, e.g.*, 75 Fed. Reg. at 77,710. The States' collective experience demonstrates that permitting of greenhouse-gas emitters (including BACT review) has proceeded without any systemic disruptions or unwarranted delays to permitting.[20]

The pollution control measures that have been required by the States' greenhouse-gas PSD permits have also not been unduly disruptive, contrary to petitioners' characterizations (*see, e.g.*, EIM Br. 11-12). Because many pollution controls simultaneously reduce both greenhouse-gas emissions as well as other pollutants already regulated by the PSD program, emitters of greenhouse gases are often able to satisfy their new PSD obligations by applying or strengthening control measures that they would have been required to adopt in any event. For example, in Iowa, a nitric acid plant received a PSD permit after installing a pollution-control system that allowed it to reduce emissions of both nitrous oxide (one of the greenhouse gases) and nitrogen oxide (a NAAQS pollutant).[21]

---

[19] *See also* 77 Fed. Reg. at 41,058 (44 PSD permits filed as of May 2012); Office of Air Quality Planning & Stds., U.S. EPA, Greenhouse Gas Permitting Update at 5 (Dec. 12, 2012) (fewer than 200 GHG PSD permits in first two years of program), *available at* http://www.4cleanair.org/Documents/NACAADecember12MeetingGHGPermittingUpdate.pdf.

[20] *See, e.g.*, Nat'l Ass'n of Clean Air Agencies, States Moving Full Speed Ahead on Greenhouse Gas Permitting (Sept. 15, 2010), *available at* http://www.4cleanair.org/Documents/NACAAGHGpermittingimplementationsummarySep2010.pdf.

[21] Ia. Dep't of Natural Res., Envtl. Servs. Div., PSD Permit Review 73, *for* Iowa Fertilizer Co., *available at* https://aqbweb.iowadnr.gov/psd/5610001/PSD_PN_12-219/12-219_fact_sheet.pdf

In addition, the PSD permits issued have focused not on transforming facilities altogether, but rather on improving their efficiency, such as through better quality of combustion or fuel selection.[22] For example, a new natural-gas-fired power plant in Maryland will meet BACT requirement for greenhouse gases by using high-efficiency combined cycle turbines that also reduce the facility's costs.[23] Similarly, two natural-gas-fired steam generators in California will meet BACT for greenhouse gases by installing technology that will improve efficiency up to eighty-eight percent.[24] And the PSD permit for a

---

[22] *See* EPA, *Clean Air Act Permitting for Greenhouse Gases*, http://www.epa.gov/nsr/ghgpermitting.html (collecting white papers that describe "readily available information on control techniques and measures to reduce GHG emissions from specific industrial sectors"). Energy efficiency is a long-standing and familiar component of PSD permitting for pollutants other than greenhouse gases. *See, e.g.*, Wash. Dep't of Ecology, Permit No. 2001-01, amend. 3, *for* Grays Harbor Satsop Turbine Combustion Project (new energy-efficient generation of burners installed for carbon monoxide), *available at* http://www.efsec.wa.gov/Satsop/PSD2005/Satsop%20amd%203%20final.pdf; Ore. Dep't of Envtl. Quality, Permit No. 11-0001-ST-02, Standard Air Contaminant Discharge Permit Review Report 14, *for* Columbia Ridge Landfill & Recycling Ctr. (combustion efficiency controls installed for nitrogen oxide emissions), *available at* http://www.deq.state.or.us/aq/permit/tv/er/110001ColumbiaRidgeLandfill_ST_RR.pdf.

[23] *See* Md. Pub. Serv. Comm'n, Envtl. Review of the Proposed Modification to the CPV St. Charles Project (Draft), Case No. 9280, Item 39 (9280-CPVERD) (July 9, 2012), *available at* http://webapp.psc.state.md.us/Intranet/casenum/caseform_new.cfm (search case number).

[24] San Joaquin Valley Air (Calif.) Pollution Control Dist., Notice of Preliminary Decision for the Issuance of Authority to

(*continues on next page*)

replacement cement kiln in New York requires the facility to optimize the design of the kiln for energy efficiency, cutting greenhouse-gas pollution by forty percent while reducing the facility's cost of energy.[25]

Thus, the States' recent practical experience in applying PSD-permitting requirements to greenhouse-gas emissions belies petitioners' assertions that the extension of the PSD program to greenhouse gases will radically alter the operation of the Act and lead to pollution-control measures "so intrusive . . . [as to] impose almost unlimited costs." EIM Br. 30; *see also* SLF Br. 26. In fact, greenhouse-gas permitting has, like the rest of the PSD program, resulted in more efficient and less polluting industrial processes, delivered at reasonable costs. By contrast, limiting the PSD program to cut out greenhouse gases altogether not only risks disrupting controls for other dangerous pollutants; it also forfeits the public health and welfare benefits associated with applying this well-tested program to greenhouse-gas pollution.

Construct to Berry Petroleum Co. (Midway Sunset oilfield), 59-60, 68-71 (Fed. 26, 2013), *available at* http://www.valleyair.org/notices/Docs/2013/02-26-13%20(S-1111128)/Public%20Notice%20Package.pdf (pdf images 104-105, 113-115); San Joaquin Valley (Calif.) Air Pollution Control Dist., Notice of Preliminary Decision for the Issuance of Authority to Construct to MacPherson Oil Co., (Midway Sunset oilfield) 26, *available at* http://www.valleyair.org/notices/Docs/2013/02-26-13%20(S-1124232)/Public%20Notice%20Package.pdf.

[25] N.Y. State Dep't of Envtl. Conserv., State Environmental Quality Review (SEQR) Findings Statement 13-14, *for* Lafarge Ravena Plant Modernization, *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/laffindings.pdf.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
BETHANY A. DAVIS NOLL
Assistant Solicitor General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8020
barbara.underwood@ag.ny.gov

MONICA WAGNER
Deputy Bureau Chief
MICHAEL J. MYERS
MORGAN A. COSTELLO
Assistant Attorneys General
Environmental Protection Bureau

Dated: January 2014

* *Counsel of Record*

(*list of counsel continues on next page*)

KAMALA D. HARRIS
Attorney General
State of California
455 Golden Gate Ave.
Suite 11000
San Francisco, CA 94102

JANET T. MILLS
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

GEORGE JEPSEN
Attorney General
State of Connecticut
55 Elm St.
Hartford, CT 06141

DOUGLAS F. GANSLER
Attorney General
State of Maryland
200 Saint Paul Pl. 20th Fl.
Baltimore, MD 21202

JOSEPH R. BIDEN, III
Attorney General
State of Delaware
820 N. French Street
Wilmington, DE 19801

MARTHA COAKLEY
Attorney General
State of Massachusetts
One Ashburton Pl. 18th Fl.
Boston, MA 02108

LISA MADIGAN
Attorney General
State of Illinois
100 W. Randolph St.
12th Floor
Chicago, IL 60601

JOSEPH A. FOSTER
Attorney General
State of New Hampshire
33 Capitol St.
Concord, NH 03301

THOMAS J. MILLER
Attorney General
State of Iowa
321 East 12th St.
Des Moines, IA 50319

GARY KING
Attorney General
State of New Mexico
P.O. Box 1508
Santa Fe, NM 87504

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court St. NE
Salem, OR 97301

ROBERT W. FERGUSON
Attorney General
State of Washington
1125 Washington St. SE
Olympia, WA 98504

PETER F. KILMARTIN
Attorney General
State of Rhode Island
150 South Main St.
Providence, RI 02903

JEFFREY D. FRIEDLANDER
Acting Corporation Counsel
City of New York
100 Church St.
New York, NY 10007

WILLIAM H. SORRELL
Attorney General
State of Vermont
109 State St.
Montpelier, VT 05609