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DECIDED JUNE 26, 2012

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

COALITION FOR RESPONSIBLE REGULATION, INC., *et al.*,, *Petitioners*, v. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 09-1322 (consolidated with Nos. 10-1024, 10-1025, 10-1026, 10-1030, 10-1035, 10-1036, 10-1037 10-1038, 10-1039, 10-1040, 10-1041, 10-1042, 10-1044, 10-1045, 10-1046, 10-1234, 10-1235, 10-1239, 10-1245, 10-1281, 10-1310, 10-1318, 10-1319, 10-1320, and 10-1321) **COMPLEX**
COALITION FOR RESPONSIBLE REGULATION, INC., *et al.*, *Petitioners*, v. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 10-1073 (consolidated with Nos. 10-1083, 10-1099, 10-1109, 10-1110, 10-1114, 10-1118, 10-1119, 10-1120, 10-1122, 10-1123, 10-1124, 10-1125, 10-1126, 10-1127, 10-1128, 10-1129, 10-1131, 10-1132, 10-1145, 10-1147, 10-1148, 10-1199, 10-1200, 10-1201, 10-1202, 10-1203, 10-1206, 10-1207, 10-1208, 10-1210, 10-1211, 10-1212, 10-1213, 10-1216, 10-1218, 10-1219, 10-1220, 10-1221, and 10-1222) **COMPLEX**

COALITION FOR RESPONSIBLE REGULATION, INC., *et al.*, *Petitioners*, v. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 10-1092 (consolidated with Nos. 10-1094, 10-1134 10-1143, 10-1144, 10-1152, 10-1156, 10-1158, 10-1159, 10-1160, 10-1161, 10-1162, 10-1163, 10-1164, 10-1166, and 10-1182) **COMPLEX**
AMERICAN CHEMISTRY COUNCIL, *et al.*, *Petitioners*, v. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents*.	No. 10-1167 (consolidated with Nos. 10-1168, 10-1169, 10-1170, 10-1173, 10-1174, 10-1175, 10-1176, 10-1177, 10-1178, 10-1179, and 10-1180) **COMPLEX**

STATE, INDUSTRY, AND PUBLIC INTEREST PARTIES'
JOINT MOTION TO GOVERN FUTURE PROCEEDINGS

On August 25, 2014, this Court ordered that, "in light of the Supreme Court's decision in *Utility Air Regulatory Group. v. EPA*, 134 S.Ct. 2427 (2014) ["*UARG*"], the parties file motions to govern future proceedings." The State of Texas, *et al.*, the States of Alabama, Florida, Georgia, Indiana, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, and South Dakota, the Louisiana Department of Environmental Quality, UARG, the American Chemistry Council, *et al.*, the Coalition for Responsible Regulation, Inc., the National Mining Association, the National Environmental Development Association's Clean Air Project, the Chamber of Commerce of the United States of America, and Southeastern Legal Foundation, Inc., *et al.* (collectively, "State, Industry, and Public Interest Parties"), respectfully submit the following response to the Court's August 25 Order.

INTRODUCTION

In the "Tailoring Rule" [1] and the "Timing/Triggering Rule,"[2] the U.S. Environmental Protection Agency ("EPA" or the "Agency") made a specific group of greenhouse gases ("GHGs") subject to the Prevention of Significant Deterioration ("PSD") preconstruction permitting program in Title I of the Clean Air Act ("CAA" or "the Act"), CAA §§ 160-169, 42 U.S.C. §§ 7470-7479, by promulgating new regulations under 40 C.F.R. Part 51 (EPA regulations that govern the content of state implementation plans ("SIPs")) and 40 C.F.R. Part 52 (EPA regulations that govern

[1] 75 Fed. Reg. 31,514 (June 3, 2010).

[2] 75 Fed. Reg. 17,004 (Apr. 2, 2010).

federal implementation plans ("FIPs") for states that have not submitted to EPA, or have not received EPA approval of, a SIP). EPA's new Part 51 and Part 52 regulations brought GHGs into the PSD program by defining the statutory term "subject to regulation." CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4). Under EPA's definition, "[g]reenhouse gases … *shall not* be subject to [PSD] regulation *except* as provided" in 40 C.F.R. §§ 51.166(b)(48)(iv) and (v) and 52.21(b)(49)(iv) and (v). 40 C.F.R. §§ 51.166(b)(48)(i), 52.21(b)(49)(i) (emphases added). Those provisions authorized regulation of GHGs under the PSD program only if, and only to the extent that, GHGs are emitted from a source in amounts equal to or more than 75,000 or 100,000 tons per year on a carbon dioxide-equivalent ("CO_2e") basis. 75 Fed. Reg. at 31,606-07. GHGs emitted below these thresholds "shall not be subject to [PSD] regulation." *Id.*[3]

The Tailoring and Timing/Triggering Rules also made GHGs subject to the operating permit program under Title V of the Act, CAA §§ 501-507, 42 U.S.C. §§ 7661-7661f, through new regulations under 40 C.F.R. Parts 70 and 71 (governing, respectively, state and federal operating permit programs). Those provisions authorized regulation of GHGs under the Title V program only if, and only to the

[3] Under EPA's GHG regulations, where, and to the extent that, GHGs were emitted in amounts at or above these EPA-established numerical thresholds, the "major emitting facility" or the "modification" of a facility would be subject to PSD for all purposes. Conversely, where GHGs were emitted in amounts below these thresholds, they would be excluded from the definition of a "regulated NSR pollutant," and thus excluded from PSD for all purposes. 40 C.F.R. §§ 51.166(b)(49)(iv), 52.21(b)(50)(iv).

extent that, GHGs are emitted from a source in amounts equal to or more than 100,000 tons per year on a CO_2e basis. 75 Fed. Reg. at 31,607-08.

These new regulations under Parts 51 and 52 and under Parts 70 and 71, which defined the categories of stationary sources to which GHG PSD and Title V permitting requirements applied, were based on (i) EPA's interpretation of the Act's PSD and Title V provisions as being self-executing once emissions of GHGs from mobile sources were regulated by EPA under Title II of the Act (as they were beginning on January 2, 2011, *see* 75 Fed. Reg. 25,324 (May 7, 2010)); and (ii) EPA's determination to regulate stationary sources' GHG emissions under the PSD and Title V programs not at the statutory 100- and 250-ton-per-year thresholds, *see* CAA § 169(1), 42 U.S.C. § 7479(1), but at EPA's newly created thresholds of 75,000 and 100,000 tons per year CO_2e.

In *UARG*, the Supreme Court rejected both EPA's interpretation of the Act's PSD and Title V requirements as being self-executing and EPA's regulations rewriting the statutory PSD applicability thresholds. The Supreme Court explained that a "brief review of the relevant statutory provisions leaves no doubt that the PSD program and Title V are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources." *UARG*, 134 S. Ct. at 2443. The Court held that, to the extent EPA's regulations "treat greenhouse gases as a pollutant for purposes of defining" PSD and Title V applicability, the regulations "are invalid." *Id.* at 2449.

As a result of the Supreme Court's decision, GHG emissions are not and cannot be subject to PSD or Title V requirements without future EPA rulemaking. This Court therefore should grant State, Industry, and Public Interest Parties' petitions for review and declare that the Tailoring Rule and the Timing/Triggering Rule (to the extent EPA relied on that rule to support PSD and Title V regulation of GHG emissions), and other challenged rules on which EPA has relied to support regulation of GHG emissions under the PSD and Title V programs, *e.g.*, 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980), have been vacated.

DISCUSSION

The Tailoring and Timing/Triggering Rules are predicated on EPA's interpretation that, upon regulation of motor vehicles' GHG emissions under Title II of the CAA, the Act automatically required regulation of GHG emissions from stationary sources under the Title I PSD and Title V permitting programs. In interpreting the Act as compelling automatic, immediate regulation, EPA rejected rulemaking comments arguing that the PSD and Title V programs, like other CAA programs, are *not* self-executing but, instead, must be implemented prospectively through legislative rules that, in turn, are the basis for states' revisions to their SIPs and Title V programs. This Court agreed with, and adopted, EPA's interpretation that the Act's PSD and Title V requirements are self-executing as to GHGs. The Supreme Court disagreed and reversed this Court on that central issue.

I. The PSD and Title V Requirements Are Not Self-Executing as to GHGs.

In *UARG*, the first issue the Supreme Court addressed was whether—as this Court held,[4] *see Coal. for Responsible Regulation*, 684 F.3d at 134—"the statute 'compelled' EPA's interpretation" that PSD and Title V requirements were automatically triggered once GHGs were regulated under CAA Title II motor vehicle standards. 134 S. Ct. at 2439. The Supreme Court rejected this Court's holding, concluding that "EPA was mistaken in thinking the Act compelled a greenhouse-gas-inclusive interpretation of the PSD and Title V triggers." *Id.* at 2442 (emphasis omitted). Having found that the statute does not *compel* GHG regulation under the PSD and Title V programs, the Supreme Court next addressed the question whether the Act could be interpreted to *allow* EPA, in subjecting GHG emissions to PSD and Title V requirements, to rewrite the statutory applicability thresholds. The Supreme Court concluded that the Act *precludes* that interpretation—holding that "EPA's interpretation is not permissible," *id.*—and thus forbids the Agency from adopting regulations that change those statutory thresholds.

In short, PSD and Title V requirements are not self-executing for GHGs, and the challenged EPA rules and interpretations holding that GHG emissions trigger

[4] This Court considered only the arguments Petitioners made concerning the Tailoring and Timing/Triggering Rules' invalidity with respect to PSD requirements and not their arguments concerning the rules' invalidity with respect to Title V; this Court held that Petitioners had "forfeited" their Title V arguments. *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 136 (D.C. Cir. 2012). The Supreme Court reversed; it held the Title V arguments were properly presented, preserved, and meritorious. *See UARG*, 134 S. Ct. at 2439 & n.4, 2449.

permitting requirements—including the EPA-established 75,000- and 100,000-ton-per-year CO_2e thresholds—are not permissible. *UARG* unequivocally holds that the PSD and Title V triggering provisions cannot be interpreted to apply to GHG emissions. *Id.* at 2449 ("We hold that EPA exceeded its statutory authority when it interpreted the Clean Air Act to require PSD and Title V permitting for … greenhouse-gas emissions."). Addressing the Tailoring Rule specifically, the Supreme Court explained that "EPA's rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency's interpretation of the triggering provisions." *Id.* at 2445. The Court's decision emphasizes further that, "[t]o the extent [EPA's] regulations purport" to "treat greenhouse gases as a pollutant for purposes of defining a 'major emitting facility' (or a 'modification' thereof) in the PSD context or a 'major source' in the Title V context, … they are invalid." *Id.* at 2449. Because EPA's challenged rules were based on the Agency's unlawful interpretations, thereby rendering them void and invalid, they have been vacated. *Id.*

II. The PSD Program's "Best Available Control Technology" ("BACT") Provision Is Not Self-Executing for GHG Emissions from "Anyway" Sources, and BACT Can Be Required for Those Emissions Only as a Result of Future EPA Rulemaking.

The Supreme Court next addressed a question of statutory interpretation that the Solicitor General raised: "[W]hether … requir[ing] BACT for greenhouse gases emitted by sources otherwise subject to PSD review [*i.e.*, "anyway" sources] is, *as a*

general matter, a permissible interpretation of the statute." *Id.* at 2448 (emphasis added). According to the Court, "it is." *Id.*

In resolving that issue, the Court cautioned that "our decision should not be taken … as a free rein for any *future* regulatory application of BACT in this distinct context." *Id.* at 2449 (emphasis added). To the contrary, the Court announced a "narrow holding … that nothing in the statute *categorically* prohibits EPA from interpreting the BACT provision to apply to greenhouse gases emitted by 'anyway' sources." *Id.* (emphasis added). What remains is for EPA to undertake—if it chooses to do so—rulemaking to promulgate new PSD rules applying the BACT provision to "anyway" sources.

In promulgating the Tailoring Rule, EPA rejected comments interpreting the Act as limiting PSD regulation of GHGs to cases involving application of BACT to GHG emissions from "anyway" sources where PSD obligations have been triggered due to emissions of non-GHG pollutants subject to national ambient air quality standards. *See* Tailoring Rule, 75 Fed. Reg. at 31,560-61; *id.* at 31,562 (explaining that "we [EPA] reject the argument"). Instead, EPA took an entirely different approach, adopting the Tailoring Rule's two-phased PSD GHG program based on the Agency's "automatic trigger" interpretation. 40 C.F.R. §§ 51.166(b)(48), 52.21(b)(49). As noted, however, the Supreme Court rejected EPA's interpretations that PSD GHG applicability was automatic and self-executing and that EPA had statutory authority to create the new PSD GHG triggering thresholds in the Tailoring Rule. *UARG*, 134 S.

Ct. at 2449. Because, as explained further below, EPA subjected both "anyway" sources and non-"anyway" sources to PSD regulation solely on the basis of its unlawful Tailoring Rule thresholds, no PSD regulation of GHGs survives the Supreme Court's invalidation of the Tailoring Rule.

In the Tailoring Rule, EPA defined the GHG emissions that were "subject to regulation" through two specific exceptions in a sentence that in all other respects *excluded* GHG emissions from PSD coverage. 40 C.F.R. §§ 51.166(b)(48)(i), 52.21(b)(49)(i) ("Greenhouse gases … *shall not* be subject to [PSD] regulation *except* as provided in [specific subsequent paragraphs] of this section.") (emphases added). The first exception ("Phase I"), which appeared in paragraph (iv) of section 51.166(b)(48) and paragraph (iv) of section 52.21(b)(49), became effective on January 2, 2011, and covered both new "anyway" sources whose GHG emissions equaled or exceeded EPA's 75,000-ton-per-year CO_2e applicability threshold and existing "anyway" sources "modified" as a result of GHG emission increases in amounts equaling or exceeding that threshold. The second exception ("Phase II"), which appeared in paragraph (v) of section 51.166(b)(48) and paragraph (v) of section 52.21(b)(49), became effective on July 1, 2011, and expanded PSD regulation of GHGs to include *all* new "major emitting facilit[ies]" (*i.e.*, "major stationary source[s]") and *all* existing major-emitting-facility "modifications," defined using the 100,000- and 75,000-ton-per-year CO_2e thresholds, as applicable. *Id.* §§ 51.166(b)(48)(iv), (v), 52.21(b)(49)(iv), (v).

Because EPA's PSD rules "treat greenhouse gases as a pollutant for purposes of defining a 'major emitting facility' … [and] a 'modification' thereof," the Supreme Court held that those rules "are invalid." *UARG*, 134 S. Ct. at 2449. Consequently, GHGs are no longer "subject to regulation" under EPA's definition of that term in 40 C.F.R. §§ 51.166(b)(48) and 52.21(b)(49), with the result that GHGs are no longer a "regulated NSR pollutant" under 40 C.F.R. §§ 51.166(b)(49)(iv) and 52.21(b)(50)(iv). To make GHGs a "regulated NSR pollutant" for the purpose of subjecting "anyway" sources to BACT for GHGs would necessitate new EPA rulemaking,[5] and, in light of the Supreme Court's decision, EPA would have to limit any new rule to requiring BACT at "anyway" sources, and only after establishing an "appropriate" *de minimis* emission level. *Id.*

EPA likely will invite this Court to construe the Phase II rule—which governed both "anyway" and non-"anyway" sources beginning July 1, 2011—to somehow authorize a BACT program for only "anyway" sources. Any such invitation should be declined. Writing new regulations is EPA's task—if the Agency chooses to undertake it—and not this Court's function. CAA § 161, 42 U.S.C. § 7471 (providing that states' PSD plans are to contain "such … measures as may be necessary, *as determined under regulations promulgated under this part* [*i.e.*, the Act's PSD provisions], to prevent significant deterioration of air quality") (emphasis added).

[5] Under 40 C.F.R. §§ 51.166(j)(2) & (3) and 52.21(j)(2) & (3), only "regulated NSR pollutants," as defined in 40 C.F.R. §§ 51.166(b)(49) and 52.21(b)(50), are subject to BACT.

Accordingly, if EPA wants to require GHG BACT for "anyway" sources, new rulemaking will be needed to amend the definition of "regulated NSR pollutant" to include GHGs and to define a GHG *de minimis* level for BACT purposes. As the Supreme Court held, "only if … [an "anyway"] source emits more than a *de minimis* amount of greenhouse gases" can that source be "require[d] … to comply with greenhouse-gas BACT," and EPA did not define that amount in the Tailoring Rule. *UARG*, 134 S. Ct. at 2449 ("… EPA did not arrive at … [the Tailoring Rule's threshold] number[s] by identifying the *de minimis* level. … EPA must justify its selection [of a *de minimis* level] on proper grounds."); *see id.* at 2435 n.1, 2437 n.3.[6]

In discussing the nature of EPA's GHG authority that may emerge from any future PSD rulemaking, the Supreme Court also recognized "the potential for

[6] In referring to what EPA would have to do to establish a *de minimis* level for GHGs, the Supreme Court referred to EPA's list of "*de minimis*" levels for other pollutants, codified at 40 C.F.R. §§ 51.166(b)(23) and 52.21(b)(23) (defining "significant"). *See UARG*, 134 S. Ct. at 2435 n.1, 2437 n.3, 2449 (explaining that EPA did not identify any *de minimis* level for GHGs and referring to EPA's prior exercise of authority to establish such levels for other pollutants). This list, which establishes for each pollutant the annual emission rate that is "significant" enough to warrant BACT review, *see* 40 C.F.R. §§ 51.166(j)(2), (3), 52.21(j)(2), (3) (BACT applies only where emissions, or emission increases, are "significant"), emerged after this Court in *Alabama Power Co. v. EPA*, 636 F.2d 323 (D.C. Cir. 1979), applied the principle of *de minimis non curat lex* to PSD requirements. EPA set almost all of the *de minimis* levels in a 1980 rulemaking in which it considered several factors in deciding, for each pollutant, the level below which PSD review would make no sense. *See* 45 Fed. Reg. at 52,705-09. A common consideration was to identify levels of emissions of a given pollutant that have a meaningful effect on ambient air. *See id.* Among the challenges EPA would face in establishing a *de minimis* PSD level for GHGs "on proper grounds," *UARG*, 134 S. Ct. at 2449, is that the Agency would need to determine what impact a single source's annual GHG emissions have on the quality of the ambient air.

greenhouse-gas BACT to lead to an unreasonable … degree of regulation." *Id.* at 2449. According to the Court, "important limitations on BACT" would play a role in determining whether and to what extent any future regulatory application is reasonable, including whether such an application (i) would prevent BACT from being "used to order a fundamental redesign of the facility," (ii) would limit BACT to "only … pollutants that the source itself emits," or (iii) would avoid any use of BACT that would "require 'reductions in a facility's demand for energy from the electric grid'" or "every conceivable change that could result in minor improvements in energy efficiency." *Id.* at 2448 (citing *Sierra Club v. EPA*, 499 F.3d 653, 654-55 (7th Cir. 2007); *In re Pennsauken Cty., N.J., Res. Recovery Facility*, 2 E.A.D. 667, 673, 1988 WL 249035 (EAB 1988), and citing and quoting a 2011 EPA guidance document). The reasonableness of any future BACT regulation of GHGs could also be affected by whether EPA limits "the pollutants encompassed by th[e] term [GHGs]." *Id.* at 2446 n.8 ("It is … incumbent on EPA to specify the pollutants encompassed by that term [GHGs] in the context of a particular program [*i.e.*, BACT], and to do so reasonably in light of that program's overall regulatory scheme.").

As the Court emphasized, its "*narrow holding*" on BACT is simply that "nothing in the statute *categorically prohibits* EPA from interpreting the BACT provision to apply to greenhouse gases emitted by 'anyway' sources." *Id.* at 2449 (emphases added).

Therefore, although the Supreme Court's decision does not deprive EPA of *Chevron*[7] Step 2 discretion to attempt to justify, through future rulemaking, the "treat[ment] [of] greenhouse gases as a 'pollutant subject to regulation under this chapter' for purposes of requiring BACT for 'anyway' sources," *id.*, EPA has not exercised that discretion.[8] Future EPA rulemaking is the only path available to requiring GHG BACT for "anyway" sources.[9]

In sum, as a result of *UARG*, EPA's 40 C.F.R. Part 51 rules addressing PSD GHG permitting in SIPs and its 40 C.F.R. Part 52 rules addressing PSD GHG permitting in FIPs have no legal effect. The Supreme Court did not "remand the cause … [for] further proceedings," 28 U.S.C. § 2106; rather, it declared current EPA regulations that treat GHGs as a "pollutant subject to regulation" for PSD purposes "invalid." 134 S. Ct. at 2449. EPA will have to undertake new rulemaking to amend 40 C.F.R. Parts 51 and 52 if the Agency wants to subject "anyway" sources to BACT for GHGs in future permitting.

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[7] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[8] As EPA explained, "[o]ur legal basis for this rule is our [automatic-trigger] interpretation of the PSD and title V applicability provisions [of the CAA]," 75 Fed. Reg. at 31,516, as opposed to any exercise of *Chevron* Step 2 discretion.

[9] In the Tailoring Rule rulemaking, as discussed above, EPA rejected comments arguing that PSD GHG regulation should be limited to BACT for "anyway" sources.

III. *Allied-Signal* Does Not Authorize This Court To Permit EPA To Continue PSD or Title V Regulation of GHG Emissions Through a "Remand Without Vacatur" Remedy.

In *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n*, this Court explained that "[a]n inadequately supported rule … need not necessarily be vacated." 988 F.2d 146, 150 (D.C. Cir. 1993). Rather, where "there is at least a serious possibility that the … [agency] will be able to substantiate its decision on remand," remand without vacatur is an option the Court may consider. *Id.* at 151. Even where there is "a serious possibility" that the agency might be able to substantiate its rule on remand, however, whether remand without vacatur is the correct option will "depend[ ] on 'the seriousness of the [rule's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Id.* at 150-51 (quoting *Int'l Union v. Fed. Mine Safety & Health Admin.* 920 F.2d 960, 967 (D.C. Cir. 1990)).

In *UARG,* the Supreme Court did not find that the Tailoring and Timing/Triggering Rules making GHGs "subject to [PSD and Title V] regulation" were "inadequately supported"; it found, rather, that EPA had exceeded its statutory authority when it promulgated those rules. Accordingly, it has already been established that the rules bringing GHGs within the scope of the PSD and Title V programs are invalid, and that new rulemaking—not more explanation to justify the "impermissible," *UARG*, 134 S. Ct. at 2445, 2446—will be required if GHGs are to be brought back into those programs. *Cf. Bluewater Network v. EPA*, 370 F.3d 1, 24

(D.C. Cir. 2004) (remanding for further Agency explanation emission standards for two pollutants as to which EPA had regulatory authority under the CAA provisions at issue, but as to which EPA had failed to provide an adequate explanation of its exercise of statutory discretion, while "vacat[ing]" a CAA emission standard for a third pollutant "on the ground that EPA lacks statutory authority to regulate … emissions" of that pollutant under the CAA provision at issue). In this setting, the Supreme Court has spoken; *Allied-Signal* is simply inapplicable.[10]

Even if the Supreme Court had not resolved the question (which it did), and even if this Court's conducting an *Allied-Signal* analysis in this case were necessary and appropriate (and it is neither), that analysis would compel vacatur of EPA's rules subjecting GHG emissions to the PSD and Title V programs. To begin, the "deficiencies" that caused the Supreme Court to invalidate the rules are indisputably "serious[ ]." *Allied-Signal*, 988 F.2d at 150. Not only did the Court categorically reject EPA's "automatic-trigger" interpretation; it held unequivocally that regulations that would apply PSD or Title V requirements to stationary sources based on their GHG

[10] This conclusion is particularly apt in the context of the CAA, which some members of this Court believe "authorize[s] us only to vacate" where EPA acted unlawfully. *Honeywell Int'l, Inc. v. EPA*, 374 F.3d 1363, 1373-74 (D.C. Cir. 2004) (per curiam), *opinion withdrawn in part*, *Honeywell Int'l, Inc. v. EPA*, 393 F.3d 1315, 1316 (D.C. Cir. 2005) (per curiam) ("[W]e find it unnecessary to decide whether § 307(d)(9) of the Clean Air Act, 42 U.S.C. § 7607(d)(9), requires a court to vacate erroneous action of the [EPA]."). In *Honeywell*, EPA's rule was vacated where EPA failed to provide a statutory interpretation under which its action might be justified. *Honeywell*, 374 F.3d at 1372-73. Here, EPA's error is more fundamental and egregious: EPA acted contrary to the limits of its statutory authority. *UARG*, 134 S. Ct. at 2449 ("EPA exceeded its statutory authority").

emissions are invalid, and specifically rejected the new PSD thresholds in the Tailoring Rule as an unlawful Agency attempt to "rewrite clear statutory terms to suit its own sense of how the statute should operate." *UARG*, 134 S. Ct. at 2446; *see Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001) (per curiam) (rejecting a request for remand without vacatur of CAA rules and holding that vacatur was appropriate where EPA, in promulgating the rules, "may have exceeded its statutory mandate").

Accordingly, in promulgating the Tailoring and Timing/Triggering Rules (and in applying other challenged rulemakings on which EPA has relied), EPA acted in excess of statutory authority and contrary to clear statutory terms. This is not a case in which there is any "doubt [about] whether the agency chose correctly." *Allied-Signal*, 988 F.2d at 150. And because, as discussed above, EPA in its rulemaking rejected a "BACT-only" regulatory program for GHG emissions from "anyway" sources, EPA must undertake new rulemaking if it wishes to exercise *Chevron* Step 2 discretion to adopt such regulations.

In light of the Supreme Court's "narrow holding … that nothing in the statute *categorically prohibits*" EPA's interpretation regarding applicability of BACT to "anyway" sources' GHG emissions, *UARG*, 134 S. Ct. at 2449 (emphasis added), any *Chevron* Step 2 rule that EPA may adopt must justify a GHG BACT requirement for such sources after the Agency has identified when, how, at what levels, and in what manner such a requirement will apply. *See id.* at 2435 n.1 (observing that the statute does not

define "how much of a given regulated pollutant a 'major emitting facility' must emit before it is subject to BACT for that pollutant"). In defining these program elements, EPA would need to engage, among other issues, whether "greenhouse gases" should be redefined to exclude any of the pollutants covered by EPA's regulatory aggregate definition of GHGs. *See id.* at 2444 n.7 (observing that "the Solicitor General suggests that the incompatibility of greenhouse gases with the PSD program and Title V results chiefly from the inclusion of carbon dioxide in the 'aggregate pollutant' defined by EPA"). In short, if EPA decides to undertake rulemaking consistent with *UARG*, any PSD rules that emerge will be completely new regulations that will not resemble the Tailoring Rule's GHG program invalidated by the Supreme Court.

To allow EPA to enforce an "anyway-source-only" BACT program absent further rulemaking would be not only extraordinary but also disruptive. Any GHG rules EPA might adopt as a result of such rulemaking would not—could not—resemble the GHG rules that the Supreme Court invalidated. Any "interim" GHG BACT program that EPA might be allowed to enforce would not be grounded in any regulatory text that defines the program's scope, content, and applicability. Rather, it would be an "interim" program that means only what EPA says it means—nothing more, nothing less—and that is announced permit, by permit, by permit. This would create exactly the kind of legal limbo that invites agency inaction and delay and creates paralyzing uncertainty for the regulated community. *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1264 (D.C. Cir. 2007) (Randolph, J., concurring) ("A remand-only

disposition is, in effect, an indefinite stay of the effectiveness of the court's decision and agencies naturally treat it as such.").

In *Allied-Signal*, this Court explained that "the disruptive consequences of an interim change that *may itself be changed*" must be considered in assessing whether to vacate an unlawful rule or, alternatively, to allow that rule to remain in effect pending further agency action. 988 F.2d at 150-51 (internal quotation marks omitted; emphasis added). While in *Allied-Signal* the "interim change" was a change that would result from vacating an ongoing regulatory program, here the "interim change" would be creation of a GHG BACT program that (i) is not grounded in the EPA rules and (ii) would inevitably change following any rulemaking that comported with *UARG*.

In this case, the potential for disruptive consequences from remand in the absence of vacatur is further emphasized by a recent EPA guidance document asserting—the Supreme Court's decision notwithstanding—that the Agency has authority under existing rules to "apply[ ] the PSD BACT requirement to GHG emissions" from both new and modified existing "anyway" sources, and that "EPA intends" to do so in the absence of any further rulemaking.[11] Because *UARG* makes

[11] "Next Steps and Preliminary Views on the Application of Clean Air Act Permitting Programs to Greenhouse Gases Following the Supreme Court's Decision in *Utility Air Regulatory Group v. Environmental Protection Agency*," Memorandum from Janet G. McCabe, Acting Assistant Administrator, EPA Office of Air and Radiation, and Cynthia Giles, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, to EPA Regional Administrators at 3 (July 24, 2014) ("EPA Guidance") (announcing that "EPA intends to continue applying the PSD BACT requirement to

clear that no valid rules authorize such a program, this guidance document signals EPA's apparent intent to regulate GHG emissions from "anyway" sources without public input on the nature of that regulation, perhaps indefinitely. Nothing is "interim" about the consequences that would flow from this Court allowing EPA to escape its obligation to use rulemaking if it wants any requirements for GHG BACT to apply at "anyway" sources.

EPA's guidance document is equally problematic with respect to Title V. For example, a number of applications for Title V permits for coal mines have been submitted based solely on these mines' GHG emissions. In its guidance document, EPA expresses only a "preliminary" view that it may no longer "apply or enforce" the Title V permit requirements that the Supreme Court invalidated in *UARG*. EPA Guidance at 2. In suggesting that these permitting requirements may remain in force, subject only to EPA's exercise of enforcement discretion, the Agency's guidance creates confusion regarding enforcement of rules clearly invalidated in *UARG*. This could lead to citizen groups suing facility owners and operators even after EPA exercised "enforcement discretion" not to enforce the rules, and those targeted would face the burden and expense of defending against meritless claims. Recognition that the Supreme Court invalidated the rules, and that those rules accordingly are no

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GHG emissions" from both new and modified existing "anyway" sources), *available at* http://www.epa.gov/region7/air/nsr/nsrindex.htm (last visited Oct. 21, 2014).

longer in effect, is necessary to avoid the disruptive consequences that likely will result from EPA's Title V guidance.

Finally, the reasoning in *Allied-Signal* is consistent with this Court giving effect to the holding in *UARG* that the Tailoring and Timing/Triggering Rules (and other challenged rulemakings on which EPA has relied) are invalid insofar as they purported to make GHGs subject to regulation under the PSD program. *UARG* does not impose any obligation to establish BACT requirements governing GHG emissions from "anyway" sources, but instead merely recognizes that EPA has some degree of *Chevron* Step 2 discretion to address that issue through future rulemaking. As a result, it would not be appropriate to simply remand for further rulemaking without declaring that the challenged rules have been vacated. Otherwise, EPA potentially could continue to administer and enforce its unlawful GHG BACT program indefinitely, in reliance on its prior invalid rulemakings. This Court should conclude that EPA's rules subjecting GHG emissions to PSD and Title V requirements have been vacated as a result of *UARG* and that EPA cannot regulate GHGs under the PSD and Title V programs without further rulemaking consistent with *UARG*.

CONCLUSION

For the foregoing reasons, and reasons presented in the Energy-Intensive Manufacturers Group's motion to govern future proceedings, this Court should grant State, Industry, and Public Interest Parties' petitions for review and declare that the Tailoring Rule and the Timing/Triggering Rule (to the extent EPA relied on that rule to support PSD and Title V regulation of GHG emissions), and other challenged rules on which EPA has relied to support regulation of GHG emissions under the PSD and Title V programs, have been vacated.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that, on this 21st day of October, 2014, I caused the foregoing document to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered CM/ECF users will be served by the Court's CM/ECF system.

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