ORAL ARGUMENT HELD FEBRUARY 28 AND 29, 2012
PANEL DECISION ISSUED JUNE 26, 2012

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

COALITION FOR RESPONSIBLE REGULATION, et al.,	)	
Petitioners,	)	
v.	)	Nos. 09-1322; 10-1073; 10-1092; 10-1167 (and consolidated cases).
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

EPA'S MOTION TO GOVERN FURTHER PROCEEDINGS

Pursuant to this Court's Orders of August 25, 2014 and September 30, 2014, Respondent United States Environmental Protection Agency ("EPA") hereby submits this motion to govern further proceedings. Together, this Court's and the Supreme Court's decisions resolved all disputed legal issues in this case and upheld the vast majority of the EPA greenhouse gas regulations under review. All that remains is for this Court to determine an appropriate form of judgment. The relief proposed by EPA (set out specifically in the "Conclusion" to this motion) faithfully reflects the Supreme Court's guidance on the discrete issues it decided, and will provide a clear, functional, and common sense regulatory framework for

EPA, states, and other stakeholders to implement.

This Court's 2012 decision in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), arose out of four sets of consolidated cases. The first two involved Clean Air Act ("CAA" or the "Act") regulation of greenhouse gas emissions from motor vehicles – challenges to the "Endangerment Finding" that preceded such regulation (09-1322), and subsequent challenges to the mobile source standards themselves (10-1092) (the "Vehicle Rule"). This Court denied all of those challenges on the merits, 684 F.3d at 116-29, and the Supreme Court denied certiorari on all the issues raised in those cases. The challenges to the Endangerment Finding and Vehicle Rule have therefore been finally and completely resolved in EPA's favor.

All that is at issue at this juncture are two relatively narrow stationary source permitting issues that were part of the "Historic PSD [prevention-of-significant-deterioration] Regulations" challenge in No. 10-1167, and the "Timing Rule"[1] and "Tailoring Rule" challenges in No. 10-1073. On these issues, this Court had held that EPA correctly interpreted the Act as requiring that the regulation of

[1] We note that in the proceedings before this Court and the Supreme Court, the terms "Triggering Rule" or "Timing Decision" have occasionally been used instead of "Timing Rule." We use the term "Timing Rule" in this motion. While the Timing Rule is relevant for background purposes, neither the Supreme Court's decision nor the relief proposed in this motion affects the specific date when greenhouse gases became subject to best available control technology ("BACT") requirements under the PSD program.

greenhouse gases under the Vehicle Rule acted as a relatively broad "trigger" automatically subjecting certain stationary sources of such emissions to certain requirements (discussed more specifically herein) under the Act's PSD pre-construction permit and Title V operating permit programs. *Coalition*, 684 F.3d at 132-44. The Court then dismissed challenges to the Tailoring Rule -- which was designed to phase in these automatically-applicable PSD and Title V permit requirements starting with the largest sources – for lack of standing on the grounds that it was the statute, not the rule, that imposed these requirements, and that the Tailoring Rule only ameliorated their impact on Petitioners. *Id.* at 144-48.

This aspect of *Coalition for Responsible Regulation* was "affirmed in part and reversed in part" by the Supreme Court in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2449 (2014) ("*UARG*"). The Supreme Court held that "EPA exceeded its statutory authority when it interpreted the Clean Air Act to require PSD and Title V permitting for stationary sources based on their greenhouse-gas emissions." *Id.* at 2449. However, the Supreme Court also held that for sources subject to PSD permit requirements by virtue of their emissions of *other* pollutants (so-called "anyway" sources), the statute can be read to require application of "best available control technology," or "BACT," to emissions of greenhouse gases (and other regulated pollutants), and that EPA may therefore "continue" to apply its existing regulations implementing the PSD permit BACT requirement to those

sources' greenhouse gas emissions. *Id.* at 2447-49.

In conformance with the Supreme Court's decision, EPA is therefore proposing that this Court vacate in part and remand in part those portions of the Historic PSD Regulations and regulations adopted in the Tailoring Rule that treated greenhouse gases as a pollutant for purposes of defining a "major emitting facility" or "major source" (or a modification thereof) under the PSD and Title V permitting programs, as well as the related provisions of the Tailoring Rule that specified how these applicability requirements would be phased in for additional sources. Second, EPA is proposing that the Court otherwise leave undisturbed the existing EPA rules implementing PSD BACT permit requirements for greenhouse gas emissions from "anyway" sources, which is consistent with the Supreme Court's express holding that EPA may "continue" to apply such requirements.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

Under the PSD program, "[i]t is unlawful to construct or modify a 'major emitting facility' in 'any area to which [the PSD program] applies' without first obtaining a permit." *UARG*, 134 S. Ct. at 2435, *quoting* 42 U.S.C. §§ 7475(a)(1), 7479(2)(C). The PSD provisions define a "major emitting facility" as any stationary source that emits or has the potential to emit 100 or 250 (depending on the type of source) tons per year ("tpy") or more of "any air pollutant." 42 U.S.C. §

7479(1). PSD permit applicants must, among other things, apply the "best available control technology for each pollutant subject to regulation" under the Act. 42 U.S.C. § 7475(a)(4); *see also* 42 U.S.C. § 7479(3).

CAA Title V establishes an operating permit program covering stationary sources of air pollutants. 42 U.S.C. §§ 7661-61f. Similar to PSD, the program applies to, among others, any "major source" within the meaning of 42 U.S.C. § 7661(2), including stationary sources that emit or have the potential to emit 100 tpy or more of "any air pollutant." 42 U.S.C. § 7602(j); *see also id.* § 7661a(a).

Because the substantive requirements necessary to obtain a PSD permit (*e.g.*, BACT) apply for emissions of any pollutant "subject to regulation" under the CAA, EPA promulgated implementing regulations in 1978, 1980, and 2002, that clarified that PSD applies automatically to any pollutant "subject to regulation" once it becomes regulated under any provision of the CAA.[2] Similarly, EPA has applied Title V automatically to major sources of any pollutant once regulated under some provision of the CAA. 75 Fed. Reg. 31,514, 31,553-54 (June 3, 2010).

II. THE CHALLENGED GREENHOUSE GAS ACTIONS

As noted above, EPA established mobile source greenhouse gas emission standards through the Endangerment Finding and the Vehicle Rule. *See* 75 Fed.

[2] 43 Fed. Reg. 26,380, 26,382, 26,388, 26,403 (June 19, 1978); 45 Fed. Reg. 52,676, 52,710-11 (Aug. 7, 1980); 67 Fed. Reg. 80,186, 80,240/1 (Dec. 31, 2002) (collectively referred to as the "Historic PSD Regulations").

Reg. 25,324 (May 7, 2010); 74 Fed. Reg. 66,496 (Dec. 15, 2009). Under EPA's longstanding interpretation of the Act, PSD and Title V permit requirements automatically applied to greenhouse gas emissions once they became regulated through the Vehicle Rule. *See, e.g.*, 40 C.F.R. §§ 52.21(j)(2)-(3); 52.21(b)(50)(iv). To clarify for the public precisely *when* this would occur, the Agency issued the Timing Rule. *See* 75 Fed. Reg. 17,004 (Apr. 2, 2010). In addition, to address the burden of an immediate increase in the number of sources that would be classified as "major" based on their greenhouse gas emissions and required to obtain PSD and Title V permits, EPA issued the Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010), to phase in PSD and Title V requirements for these additional sources, starting with the largest.

Under the first step of the phase-in, a new or modified "anyway" source would only need to apply the BACT requirement to greenhouse gases if a new source emits, or the modification of an existing source increases, this pollutant in an amount equal to or greater than 75,000 tons per year (calculated as carbon dioxide equivalent, or "CO_2e"). *See* 40 C.F.R. §§ 51.166(b)(48)(iv), 52.21(b)(49)(iv). The second step of the phase-in expanded the category of "major" sources beyond "anyway" sources to include those emitting amounts of 100,000 tons per year CO_2e, and expanded the category of "major modifications" of existing sources that could trigger the requirement to obtain a PSD permit to

include modifications that increased greenhouse gases alone by 75,000 tons per year CO_2e or more. *See* 40 C.F.R. §§ 51.166(b)(48)(v); 52.21(b)(49)(v). In subsequent steps of the phase-in, reflected in 40 C.F.R. § 52.22, the Agency committed to a schedule for examining the feasibility of requiring additional sources to obtain permits by lowering the thresholds specified in 40 C.F.R. §§ 51.166(b)(48)(v) and 52.21(b)(49)(v). As discussed further below, the Court should vacate the latter two parts of this PSD phase-in, but not the first.

EPA phased in the application of Title V permitting requirements primarily through 40 C.F.R. §§ 70.2 and 71.2. Initially, EPA applied Title V requirements to sources' greenhouse gas emissions only if the sources were subject to Title V anyway due to their non-greenhouse gas emissions. EPA then expanded this category in Step 2 of the phase-in to include, as of July 1, 2011, sources that were not already subject to Title V and that emit or have the potential to emit greenhouse gas emissions in the amounts of 100,000 tons per year CO_2e or greater and above certain mass-based thresholds. As with the PSD permit program rules, EPA also committed itself to a schedule to examine the feasibility of lowering the CO_2e-based threshold. *See* 40 C.F.R. §§ 70.12, 71.13. As discussed herein, because of the structure of these Title V rules as presently drafted, the Court should issue a narrative vacatur (instead of vacating specific provisions), directing EPA to make the necessary revisions to the Code of Federal Regulations on remand.

III. THIS COURT'S AND THE SUPREME COURT'S DECISIONS

This Court's 2012 decision in *Coalition for Responsible Regulation* denied on the merits or dismissed for lack of standing all of the challenges to the Endangerment Finding, the Vehicle Rule, the Historic PSD Regulations, and the Timing and Tailoring rules. The *only* issue on which *certiorari* was granted was "whether it was permissible for EPA to determine that its motor-vehicle greenhouse-gas regulations automatically triggered permitting requirements under the Act for stationary sources that emit greenhouse gases." *UARG*, 134 S. Ct. at 2434. On this issue, the Supreme Court ultimately affirmed in part and reversed in part. The Court reversed only to the extent of holding that greenhouse gas emissions cannot by themselves cause a source or modification to be "major," and thus cannot trigger the obligation to obtain a PSD or Title V permit. *UARG*, 134 S. Ct. at 2449. The Court affirmed that EPA may "continue" to require PSD permits for "anyway" sources to address greenhouse gas emissions as part of the BACT analysis, *id.*, and did not disturb EPA's rules implementing that requirement.

IV. EPA'S RESPONSE TO THE *UARG* DECISION

On July 24, 2014, EPA issued a publicly-available memorandum describing its preliminary approach for implementing the permitting requirements in its regulations in light of the Supreme Court's decision pending the outcome of proceedings in this Court (*i.e.*, the proceedings related to these motions to govern).

See Ex. A hereto. First, EPA reported that it will no longer require PSD permits, either directly or through State Implementation Plans ("SIPs"), for sources emitting greenhouse gases at any level unless that source emits a regulated pollutant other than greenhouse gases above the statutory major source thresholds. *Id.* at 2. Similarly, EPA explained that it will no longer require a stationary source to obtain a Title V operating permit solely because the source emits or has the potential to emit greenhouse gases above the major source thresholds, under either the federal Title V program or EPA-approved Title V permit programs implemented by state, local or tribal permitting authorities. EPA also explained that the PSD BACT requirement continues to apply to greenhouse gas emissions from any new or modified source that is otherwise obligated to obtain a PSD permit as a result of its emissions of other regulated pollutants (*i.e.*, to "anyway" sources). EPA also said it would continue to apply existing regulations that limit application of the statutory BACT requirement to emissions of greenhouse gases from "anyway" sources that emit at or above a level of 75,000 tpy of CO_2e. *Id.* at 3.

ARGUMENT

I. THE COURT SHOULD VACATE CERTAIN DISCRETE PSD AND TITLE V APPLICABILITY REQUIREMENTS, BUT SHOULD LEAVE UNDISTURBED EPA'S REGULATIONS GOVERNING APPLICATION OF THE BACT REQUIREMENT TO GREENHOUSE GAS EMISSIONS FROM "ANYWAY" SOURCES.

The *UARG* decision stated two holdings. First, "the Agency may not treat

greenhouse gases as a pollutant" for purposes of "major" source determinations in the PSD and Title V contexts and "[t]o the extent [EPA's] regulations purport to do so they are invalid." 134 S. Ct. at 2449. Second, "EPA may, however, continue to treat greenhouse gas emissions as a 'pollutant subject to regulation under this chapter" for purposes of requiring BACT for 'anyway' sources." *Id.*

In EPA's July 24, 2014 memorandum, the Agency accordingly announced that it "will no longer apply or enforce federal regulatory provisions or the EPA-approved PSD State Implementation Plan (SIP) provisions that require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant net emissions increase from a modification (e.g., 40 CFR 52.21(b)(49)(v))." Ex A, at 2. Similarly, EPA also announced that it would not apply or enforce "[f]ederal regulations or provisions in the EPA-approved title V programs that require a stationary source to obtain a title V permit solely because the source emits or has the potential to emit [greenhouse gases] above the major source thresholds." *Id.*[3] However, consistent with the Supreme Court's holding that the application of BACT requirements for "anyway" sources may "continue," *UARG*, 134 S. Ct. at 2449, EPA confirmed that it would continue

[3] EPA made clear, however, that it did not read the Supreme Court's opinion as otherwise affecting Title V requirements (for example, to incorporate PSD BACT requirements applicable to "anyway" sources).

applying its regulations limiting application of BACT to greenhouse gas emissions in situations where an "anyway" source emits or increases emissions of greenhouse gases by 75,000 tons per year CO_2e or greater. *See* Ex. A, at 3.

The above-quoted commitments fairly and completely implement the substance of the Supreme Court's holding regarding the exclusion of greenhouse gases for purposes of determining whether a source is a major source that must obtain a PSD or Title V permit, as well as the continuation of BACT requirements for greenhouse gas emissions in PSD permits required for construction and modification of "anyway" sources. EPA has therefore used this phrasing as the basis for its proposed form of judgment in the "Conclusion" section to this motion.[4] Relatedly, EPA is also proposing vacatur of those portions of the

[4] With regard to the requirements to obtain permits based solely on the amount of greenhouse gas emissions, EPA specifically expects to effectuate the vacatur through rescission of 40 C.F.R. §§ 51.166(b)(48)(v) and 52.21(b)(49)(v) (addressing PSD) and narrowing revisions to certain provisions such as certain definitions in 40 C.F.R. §§ 70.2 and 71.2 (addressing Title V). With regard to Title V, revision of §§ 70.2 and 71.2 (such as the "subject to regulation" definitions), rather than vacatur or rescission of discrete sections, is necessary due to the differing structure of those provisions as drafted, although EPA intends the substantive result to be materially the same. As discussed in the text, with regard to BACT issues for "anyway" sources, EPA believes no change to the pertinent regulatory provisions is needed, since the existing requirement to obtain a PSD permit containing BACT limitations on greenhouse gases continues to apply under the Clean Air Act and the regulatory limitation of this requirement to sources emitting 75,000 tons per year CO2e should simply "continue" to apply until EPA has an opportunity to address the Court's instructions to provide proper justification for this level or an alternative.

Tailoring Rule that required EPA to study whether it was feasible to expand the phase-in of permitting obligations for those sources that triggered PSD and Title V permit requirements solely on the basis of greenhouse gas emissions, and complete related rulemakings on a specified schedule, as these requirements have obviously been rendered obsolete by the Supreme Court's holding on the core PSD and Title V applicability issues.[5] Relief from the existing greenhouse gas BACT requirements for "anyway" sources is not consistent with the Clean Air Act or otherwise justified on the basis of the Supreme Court decision.[6]

II. PETITIONERS' ANTICIPATED OBJECTIONS TO EPA'S APPROACH ARE MERITLESS

EPA does not anticipate that any party will raise any significant opposition to the relief requested by EPA to make clear that greenhouse gas emissions alone can no longer trigger the requirement for sources to obtain a PSD or Title V permit (by themselves defining the source as "major"), or to vacatur of the commitment to study the feasibility of expanding the phase-in of Title V and PSD permitting

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[5] EPA specifically expects to effectuate this aspect of the vacatur through rescission of 40 C.F.R. § 52.22 (regarding PSD) and 40 C.F.R. §§ 70.12, 71.13 (regarding Title V).

[6] As noted above, the Tailoring rule also created a 75,000 CO_2e threshold for BACT regulation of greenhouse gas emissions from "anyway" sources. As discussed in the next section below, EPA does not believe that there is any basis for vacatur of this provision. However, as EPA announced in the July 2014 memorandum, it does separately intend to consider, consistent with the Supreme Court's decision, "whether to promulgate a *de minimis* level and what level would be appropriate." Ex. A, at 4.

requirements. EPA instead anticipates, based on discussions with stakeholders to date and arguments raised in other cases before this Court, that some Petitioners will argue that BACT requirements cannot continue to be applied to greenhouse gas emissions from "anyway" sources until EPA conducts additional rulemaking. For the reasons discussed below, such claims, which would effectively vacate rules this Court and the Supreme Court found lawful, are meritless, and the Court should instead grant the relief outlined by EPA in the first section of this Argument without any further conditions or additional relief.

A. BACT Requirements for "Anyway" Sources "Continue" to Apply by Operation of the Statute, EPA's Regulations, and the Guidance Provided by the Supreme Court.

As described above, the PSD issues considered by this Court in *Coalition for Responsible Regulation* were focused on the use of the term "pollutant" in two sections of the Act. Considering CAA section 165(a)(4), 42 U.S.C. § 7475(a)(4), this Court concluded that "[b]ecause greenhouse gases are indisputably a pollutant subject to regulation under the Act, it is crystal clear that PSD permittees must install BACT for greenhouse gases." *Coalition for Responsible Regulation*, 684 F.3d at 137. Considering the definition of "major emitting facility" in section 169(1) of the Act, 42 U.S.C. § 7479(1), this Court concluded that "given both the statute's plain language and the Supreme Court's decision in *Massachussetts v. EPA*, we have little trouble concluding that the phrase 'any air pollutant' includes

all regulated air pollutants, including greenhouse gases." *Coalition for Responsible Regulation*, 684 F.3d at 134. This Court agreed with EPA that both of these provisions of the statute automatically applied to greenhouse gas emissions (once regulated by the Vehicle Rule), just like any other "pollutant." *Coalition for Responsible Regulation*, 684 F.3d at 132-44. While the Supreme Court in *UARG* "reversed" this Court's judgment about the scope of the term "air pollutant" in section 169(1) of the Act, 42 U.S.C. § 7479(1), it "affirmed" that judgment as to the scope of section 165(a)(4), 42 U.S.C. § 7475(a)(4).

In other words, with regard to PSD, the Supreme Court only reversed this Court's judgment insofar as EPA treated greenhouse gases, by themselves, as a potential trigger for PSD "major" source determinations. The Supreme Court expressly upheld this Court's view of the application of the BACT requirement to greenhouse gases in the case of "anyway" sources, as reflected in the provisions of EPA's regulations addressing such sources. *UARG*, 134 S. Ct. at 2449. Accordingly, the Supreme Court's decision simply cannot be read as anything other than an affirmation of this Court's determinations that the BACT requirement applies to greenhouse gases automatically by operation of the Clean Air Act and that EPA regulations implementing that requirement should continue in effect as they apply to the BACT requirement for "anyway" sources.

In this respect, it is important to bear in mind the oft-stated maxim that the

Supreme Court is a court of "final review, not of first view." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (citation omitted). On the BACT issue, all the Supreme Court had before it was a reading of the Clean Air Act that this Court had upheld, and on this issue, the Supreme Court "affirmed" that part of this Court's decision. To suppose that the Supreme Court nonetheless intended to bar or suspend operation of this fundamental aspect of the statute and EPA's implementing regulations *sub silentio*, on the basis of murky theories not previously presented to this Court, is wholly unjustified based on the record of these proceedings and inconsistent with the normal principles of appellate review.

B. Continued Application of the BACT Requirement Is Not Contingent on a New *De Minimis* Rulemaking.

One specific argument that certain Petitioners have indicated they may advance is a claim that EPA must undertake notice-and-comment rulemaking to determine a *de minimis* level for BACT regulation of greenhouse gas emissions from "anyway" sources before it may regulate *any* greenhouse gas emissions from such sources. This argument should be rejected because it would set aside parts of EPA's rules that both this Court and the Supreme Court found to be lawful and would delay EPA's ability to "continue" to require BACT for "anyway" sources. Further, any such holding would unjustifiably upset what is, at present, a predictable and functional permit process. It would also create unwarranted uncertainty as to the lawfulness of constructing or modifying an "anyway" source

without a PSD permit containing limitations on greenhouse gases, and uncertainty as to completed permit proceedings under the existing rules.

The Supreme Court took note (without any express objection) of the 75,000 tons per year CO_2e threshold for PSD regulation of greenhouse gas emissions from "anyway" sources reflected in EPA's regulations. *Id.* at 2438, n.3, 2449. In dicta, the Court observed that EPA had not characterized this threshold as a *de minimis* exemption and in fact had stated "that a truly *de minimis* level might be 'well below' 75,000 tons per year." 134 S. Ct. at 2438, n.3 (citation omitted).[7] Later in the decision, after upholding application of the BACT requirement to greenhouse gas emissions from "anyway" sources, the Court simply stated that EPA "may establish" a true *de minimis* exemption for this requirement. *Id.* at 2449.

The natural – indeed, the only plausible – reading of this passage is not that the Supreme Court intended to suspend any regulation of greenhouse gas emissions under section 165(a)(4) of the Clean Air Act (and EPA's continued implementation of rules this Court affirmed) pending additional rulemaking to establish a *de minimis* level, but rather, only that EPA "may" (but need not) elect to conduct a *de minimis* rulemaking in the future if it wishes to continue limiting the scope of this

[7] EPA described the threshold as the lowest level "that sources and permitting authorities can reasonably be expected to implement at the present time in light of the costs to the sources and the administrative burdens to the permitting authorities." 75 Fed. Reg. at 31,560.

provision of the Act to sources emitting more than a specified amount of greenhouse gases. *Id.* The Supreme Court's discussion of the *de minimis* issue cannot reasonably be construed to undermine one of the principal holdings of the case: that EPA may "continue" to require greenhouse gas emissions from "anyway" sources to be subject to the BACT requirement. 134 S. Ct. at 2449.

This understanding of the Supreme Court's treatment of these issues is reinforced by the record. Specifically, since no party challenged the 75,000 ton per year threshold for "anyway" sources in the proceedings before this Court, this Court never had a basis for reviewing this specific aspect of BACT regulation of "anyway" sources.[8] Therefore, the validity of the 75,000 ton threshold was not directly at issue before the Supreme Court either. *FCC v. Fox*, 556 U.S. at 529. Against this background, it is logical that the Supreme Court simply accepted (as unchallenged) the 75,000 ton threshold for present purposes, while also, in dicta, providing EPA with guidance on adopting an exemption threshold based on a true *de minimis* rationale. Accordingly, the Court stated that it was not holding that the present 75,000 ton threshold "necessarily exceeds a true *de minimis* level, only that EPA must justify its selection on proper grounds." 134 S. Ct. at 2449.

As noted above, Petitioners' potential arguments on the *de minimis* issue

[8] Nor would Industry and State petitioners have had standing to challenge the 75,000 ton threshold on the basis that it was not stringent enough. *See Coalition for Responsible Regulation*, 684 F.3d at 144-48.

would also lead to illogical and potentially disruptive results. For example, if this Court were to vacate the 75,000 ton threshold on a rationale that only the establishment of a true *de minimis* threshold could warrant deviation from the otherwise-applicable automatic BACT trigger for "anyway" sources, such a decision presumably would mean that *all* such sources emitting any amount of greenhouse gases must be subject to the BACT requirement unless and until EPA completes a *de minimis* rulemaking, not that *none* of them must be, as Petitioners likely will suggest.[9] There simply is no basis for the Court to sanction such a disruptive approach, when, as discussed above, the Supreme Court simply provided EPA with guidance for possible future rulemaking on the *de minimis* issue, which the Agency is taking steps to address. *See supra,* n.6.

C. Any SIP or FIP Implications Are Irrelevant to this Case

Finally, EPA anticipates that some petitioners may argue that any regulation of greenhouse gas emissions under the PSD program should be barred until applicable state or federal CAA implementation plans ("SIPs" or "FIPs") are updated to reflect the Supreme Court's holdings in *UARG*. However, this Court

[9] EPA's regulations provide that BACT applies to each pollutant emitted or increased in significant amounts. 40 C.F.R. §§ 51.166(j)(2)-(3), 52.21(j)(2)-(3). If sections 51.166(b)(48)(iv) and 52.21(b)(49)(iv) (which establish the 75,000 ton threshold for "anyway" sources) were to be vacated, then any amount or increase in greenhouse gas emissions would be considered significant under sections 51.166(b)(23)(ii) and 52.21(b)(23)(ii) of EPA's regulations.

has already rightly rejected functionally identical arguments earlier in this case. *Coalition for Responsible Regulation*, 684 F.3d at 148-49. As this Court said at that time, to the extent a party believes it has any meritorious challenges to individual SIP or FIP actions on these issues, those challenges are properly presented in petitions for review of those actions, which are distinct from the challenges to the EPA decisions at issue here. *Id.*[10] In any event, the relief sought by EPA in this case should, as a practical matter, largely if not entirely resolve any lingering legal uncertainties with regard to the obligations of regulated parties.

CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Court grant this motion to govern further proceedings, and issue a Judgment providing the following relief:[11]

(1) The regulations under review (including 40 C.F.R. §§ 51.166(b)(48)(v) and 52.21(b)(49)(v)) are vacated to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant net emissions increase from a modification;

(2) The regulations under review are further vacated to the extent they require a

[10] Certain petitioners are, in fact, presently seeking rehearing of this Court's dismissal of these SIP/FIP arguments in Case Nos. 10-1425 and 11-1037.

[11] While EPA believes that an order of vacatur tailored to the defects identified by the Supreme Court, as specified in subparts (1) to (3) below, is both justified and practical under the circumstances presented here, EPA would not object to a simple remand without vacatur, should the Court so prefer, with directions to the Agency to address these issues itself as expeditiously as practicable on remand.

stationary source to obtain a title V permit solely because the source emits or has the potential to emit greenhouse gases above the applicable major source thresholds;

(3) The regulations under review (in particular 40 C.F.R. § 52.22 and 40 C.F.R. §§ 70.12, 71.13) are further vacated to the extent they require EPA to consider further phasing-in the requirements identified in paragraphs (1) and (2) above at lower greenhouse gas emission thresholds;

(4) EPA shall take steps to rescind and/or revise the applicable provisions of the Code of Federal Regulations as expeditiously as is practicable to reflect the relief granted in paragraphs (1) to (3) above;

(5) EPA shall consider whether any further revisions to its regulations are appropriate in light of *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), and if so, it shall undertake to make such revisions; and

(6) The petitions for review in Nos. 09-1322, 10-1073; 10-1092; and 10-1167 (and consolidated actions) are otherwise denied in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Govern Further Proceedings was today filed, this 21st day of October, 2014, on all counsel of record registered through the Court's CM/ECF system.

/s/ Jon M. Lipshultz

Jon M. Lipshultz