ORAL ARGUMENT HELD ON FEBRUARY 28 & 29, 2012
DECIDED JUNE 26, 2012

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

Nos. 09-1322 and consolidated cases
Nos. 10-1073 and consolidated cases
Nos. 10-1092 and consolidated cases
Nos. 10-1167 and consolidated cases

COALITION FOR RESPONSIBLE REGULATION, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

MOTION TO GOVERN OF ENVIRONMENTAL RESPONDENT-INTERVENORS

In response to this Court's order of August 25, 2014, the environmental organization respondent-intervenors[*] respectfully submit this motion to govern in the above cases.

[*] Conservation Law Foundation, Inc.; Environmental Defense Fund; Georgia Forestwatch; Indiana Wildlife Federation; Michigan Environmental Council; National Wildlife Federation; Natural Resources Council of Maine; Natural Resources Defense Council; Ohio Environmental Council; Sierra Club; Wetlands Watch; and Wild Virginia.

These cases concern actions of the Environmental Protection Agency relating to the regulation of greenhouse gases under the Clean Air Act. See 74 Fed. Reg. 66,946 (Dec. 15, 2015) (Endangerment Finding); 75 Fed. Reg. 25,234 (May 7, 2010) (Vehicle Rule); 75 Fed. Reg. 17,004 (April 2, 2010) (Timing Decision); and 75 Fed. Reg. 31,514 (June 3, 2010) (Tailoring Rule). In its June 2012 decision, this Court upheld the Endangerment Finding and the Vehicle Rule, rejecting a variety of statutory and record-based challenges on their merits. *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 116–29 (D.C. Cir. 2012). After agreeing with EPA that, under the Act's unambiguous language, the Prevention of Significant Deterioration (PSD) and Title V permitting programs apply to sources of greenhouse gases, *id*. at 133–44, the Court further held that petitioners lacked standing to challenge the Timing Decision or Tailoring Rule, *id*. at 146–48.

Petitions for certiorari were filed challenging numerous aspects of this Court's decision. The Supreme Court denied review of the rulings upholding the Endangerment Finding and the Vehicle Rule, *e.g.*, *Virginia v. EPA*, 134 S. Ct. 418, *Coalition for Responsible Regulation v. EPA*, 134 S. Ct. 468 (2013), and granted certiorari limited to a single question: "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." 134 S. Ct. 418 (2013).

The Court affirmed in part and reversed in part. *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). The majority disagreed with this Court's ruling that the "any air pollutant" language in statutory provisions defining the sources required to obtain permits under the PSD and Title V programs unambiguously subjected sources of greenhouse gas emissions to these permit programs. *Id*. at 2439–42. The Court ruled that "EPA was mistaken in thinking the Act *compelled* a greenhouse-gas-inclusive interpretation of the PSD and Title V triggers," *id*. at 2342, and that the large expansion of program coverage of sources emitting greenhouse gases in amounts above the statutory thresholds, and attendant administrative burdens that had prompted EPA to adopt the Tailoring Rule, rendered EPA's reading of the PSD and Title V permit triggers unreasonable, *id*. at 2442–44. The Court also concluded that EPA lacked authority to adopt regulations departing from the unambiguous tonnage thresholds in the statutory source definitions for the two permitting programs. *Id*. at 2444–46.

The Court next held, by 7-2 vote, that EPA had reasonably concluded that the "best available control technology" (BACT) requirement in 42 U.S.C. 7475(a)(4)—the central substantive obligation in the PSD program—applies to the greenhouse gas emissions of "anyway" sources, *i.e.*, those that are subject to the PSD permitting program by virtue of their emissions of other pollutants. 134 S. Ct. at 2447–49. The Court concluded that the statutory text specifying that BACT apply to "each air

pollutant subject to regulation under [the Act]" clearly embraces all regulated air pollutants, and "'would not seem readily susceptible [of] misinterpretation,'" *Id*. at 2448 (quoting *Alabama Power Co. v. Costle*, 636 F.2d 323, 404 (D.C. Cir. 1979)), and that nothing in the statute suggested "that the BACT provision can bear a narrowing construction," or could be read "to mean anything other than what it says." *Id*. at 2448. The Court found that applying BACT to "anyway" sources' greenhouse gas emissions would not lead to greatly expanded program coverage or intractable administrative problems. 134 S. Ct. at 2448–49.

ARGUMENT

The Supreme Court set out a straightforward map for navigating what remains of these cases. The majority summarized its two holdings as follows (*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 stationary sources based on their greenhouse-gas emissions. Specifically, the Agency may not 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. To the extent its regulations purport to do so, they are invalid. EPA may, however, continue to treat greenhouse gases as a "pollutant subject to regulation under this chapter" for purposes of requiring BACT for "anyway" sources.

Under the Court's first holding, the PSD and Title V programs cannot be applied to sources based upon emissions of greenhouse gases alone, and "to the extent" EPA regulations do so, they are "invalid" and should be set aside. *See* Janet G. McCabe, 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*, at 2 (July 24, 2014) (agency guidance "pending judicial action to effectuate" the *UARG* decision, announcing that EPA would not enforce regulations that subject sources to PSD or Title V permitting on the basis of greenhouse gas emissions alone).

Under the Court's second holding, the BACT requirement continues to apply to each pollutant subject to regulation under the Act, including greenhouse gases, emitted by "anyway" sources. As the Supreme Court recognized, the Act's plain language mandates that for sources subject to the PSD permit obligation, the BACT requirement applies to "each pollutant subject to regulation" under the Act that the source emits. In concluding that the BACT requirement applies to greenhouse gas emissions, the Supreme Court noted that the "specific phrasing of the BACT provisions suggests that the necessary judgment has already been made by Congress," and that "[t]he wider statutory context likewise does not suggest that the BACT provision can bear a narrowing construction." *Id.* at 2448. Recognizing that the BACT requirement has been in effect for greenhouse gases for a considerable time, see *id*. at 2447 (quoting Calpine amicus brief describing company's experience with application of BACT to greenhouse gas emissions), the Court held that EPA "may … continue to treat greenhouse gases as a 'pollutant subject to regulation under this chapter' for purposes of requiring BACT for 'anyway' sources," *id*. at 2449.

The *UARG* decision provides no basis for setting aside, or interrupting, the "continued" application of BACT to "anyway" sources' greenhouse gas emissions, which has been proceeding smoothly for nearly four years now. Insofar as the petitions for review challenge the application of BACT, they must be denied.

CONCLUSION

This Court should set aside the Tailoring Rule to the extent that it rests upon the statutory interpretation that greenhouse gas emissions alone trigger the obligation to obtain a PSD or Title V permit. In all other respects, the petitions for review should be denied or dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION TO GOVERN OF ENVIRONMENTAL RESPONDENT-INTERVENORS was served, this 21st day of October, 2014, on all registered counsel, through the Court's CM/ECF system.

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