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INTRODUCTION

Pursuant to 40 C.F.R. §§ 55.6(a)(3) and 124.19(a), the Center for Biological Diversity (“Petitioner”) hereby petitions for review of Permit Nos. R10OCS-AK-09-01 issued on March 31, 2010 to Shell Gulf of Mexico, Inc., and Permit No. R10OCS/PSD-AK-2010-01 issued on April 9, 2010 to Shell Offshore, Inc. (collectively, the two Shell entities are referred to as “Shell”) by the Environmental Protection Agency (the “Permits”). To avoid duplication, Petitioner is addressing both Permits in this combined petition as the issues raised by them are nearly identical.¹

The Permits would allow Shell to conduct an industrial operation causing massive greenhouse gas (“GHG”) pollution in pristine and environmentally highly sensitive areas of the Arctic, where the impacts of climate change are accelerating at an alarming pace. They would permit a multi-year exploratory oil and gas drilling program by the Frontier Discoverer drill ship and a vast support fleet on Shell’s current leases in Lease Sales 193, 195 and 202 in both the Chuchki and the Beaufort Seas on the outer continental shelf (“OCS”) more than 25 miles beyond the State of Alaska’s seaward boundary. Because these exploratory drilling operations would have the potential to emit in excess of 250 tons per year (tpy) of various air pollutants (including nitrogen oxides, sulfur dioxide and particulate matter), they would constitute a “major emitting facility” subject to regulation under the Clean Air Act (“CAA”) by the Environmental Protection Agency (“EPA”). 42 U.S.C. § 7479(a). EPA must therefore ensure that the operations meet the requirements of the Prevention of Significant Deterioration (“PSD”) permitting program under Section

¹ Petitioner is filing this combined Petition in each of the two dockets. In addition, Petitioner is joining a petition to be filed by Earthjustice and others in connection with each of the Permits, and hereby incorporates the Earthjustice petitions as if fully set forth herein.

328 of the CAA, 42 U.S.C. § 7627, and its implementing regulations governing OCS operations at 40 C.F.R. Part 55. Shell must use best available control technology (BACT) to limit emissions from the operations “*for each pollutant subject to regulation under [the CAA].*” CAA §§ 165(a)(4), 169(3), 42 U.S.C. §§ 7475(a)(4), 7479(3) (emphasis added).

It is undisputed that Shell’s drilling operations have the potential to emit 94,000 tons of carbon dioxide (CO₂), an amount far beyond the 250 tpy threshold for a “major emitting facility” of Sections 165 and 169(1) of the CAA, 42 U.S.C. §§ 7475, 7479(1) (and nearly four times greater than the PSD phase-in threshold of 25,000 tpy suggested by EPA’s draft Prevention of Significant Deterioration/Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (2009)). Because CO₂ is a pollutant “subject to regulation” under Section 165(a)(4) of the CAA, 42 U.S.C. § 7475(a)(4), Shell must apply BACT to limit these emissions. The Permits, however, unlawfully require no CO₂ emission controls.

EPA bases its decision not to require BACT for Shell’s CO₂ emissions on its current interpretation of the phrase “subject to regulation” in section 165(a)(4). Response to Comments for OCS PSD Permit No. R10OCS/PSD-AK-09-01, *available at* <http://yosemite.epa.gov/R10/airpage.nsf/Permits/chukchiap> at 132-133; Response to Comments for OCS PSD Permit No. R10OCS/PSD-AK-2010-01, *available at* <http://yosemite.epa.gov/R10/airpage.nsf/Permits/beaufortap> at 57-58. EPA’s current interpretation of this phrase was developed in the course of a recent reconsideration proceeding. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule, 75 Fed. Reg. 17004 (April 2,

2010) (the “Reconsideration”). Yet the Reconsideration is just the latest in a series of changing positions EPA has taken on what “subject to regulation” means. However, because that phrase is unambiguous and requires BACT to be applied to this pollutant, EPA has no discretion to give it different interpretations, chose among them, and delay regulation.

In its desire to continue to avoid regulating CO₂ emissions from stationary sources, EPA has clearly erred by creating ever more arbitrary explanations for its view that CO₂ is not yet “subject to regulation.” When EPA first addressed the meaning of the phrase decades ago, it concluded, correctly, that “regulation” included a range of rules for reporting and monitoring pollution. Thus, CO₂ became “subject to regulation” when Congress first specifically required monitoring and reporting of CO₂ emissions in 1990. Yet EPA abandoned this long-standing position by way of a 2008 memorandum issued by former EPA Administrator Stephen Johnson in which the agency concluded that CO₂ would be “subject to regulation” only after emissions had already been subjected to some other regulation that requires actual, physical emission controls, and that monitoring and reporting regulations did not suffice. *See* Stephen L. Johnson, *EPA’s Interpretation of Regulations That Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program*, 73 Fed. Reg. 80300 (Dec. 31, 2008) (the “Johnson Memo”). EPA then granted a petition for reconsideration of the Johnson Memo, but stated its preference for retaining the memo’s interpretation, and announced that, under the Johnson Memo interpretation, CO₂ would become “subject to regulation” upon promulgation of a then-proposed rule to reduce GHG emissions from cars and light trucks. *See* Prevention of Significant Deterioration (PSD): Reconsideration of

Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, 74 Fed. Reg. 51535 (Oct. 7, 2009). In the final Reconsideration, however, EPA changed its position yet again, determining that CO₂ would not become “subject to regulation” until January 2, 2011 at the earliest. The Reconsideration thus adopts and then exacerbates an earlier misreading of the statute, marking the latest in a series of shifting interpretations that run directly counter to the unambiguous language of the Clean Air Act.

Because CO₂ has been “subject to regulation” for some time, the Permits should have required the application of BACT to Shell’s permit for drill ship operations. The issue is an important one. Shell’s drilling operations, if allowed to proceed, would have the potential to emit annual amounts of CO₂ on a par with the largest industrial facilities. These emissions would occur in the Arctic, one of the areas most sensitive to global warming’s calamitous effects and capable of setting off tipping points that could accelerate these effects even beyond current predictions. Under the plain language of the Clean Air Act, and in light of the Supreme Court’s landmark decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA can and must regulate these emissions by requiring the Permits to apply BACT to the CO₂ emissions generated by Shell’s drilling operations. For these reasons, the Board should accept this appeal, consider full briefing, and vacate the Permits issued to Shell.

THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner is a non-profit environmental organization dedicated to the protection of imperiled species, their habitats, and the environment through science, policy, and environmental law. The Center has some 255,000 members and online activists throughout the United States with a vital interest in reducing greenhouse gases and other air pollutants

and an active interest in protecting the Alaskan Arctic and, in particular, the Chukchi and Beaufort Seas. Some of Petitioner's members use and enjoy the Chukchi and Beaufort Seas and the surrounding Arctic coastal plain for recreational, scientific, spiritual, and other uses. Petitioner has participated extensively in the public processes related to on- and offshore oil and gas exploration and activities. It has submitted comments in connection with these Permits.

This petition satisfies the threshold procedural requirements set out in 40 C.F.R. Part 124. It has been timely filed to be received by the Environmental Appeals Board ("EAB") within 30 days of EPA's issuance of the Permits. *See* 40 C.F.R. § 124.19(a). Petitioner submitted comments on the applications for these Permits during the public comment period, and thus has standing to seek EAB review. *See id.* The issues raised in this petition were raised either in those comment letters or in other comments submitted during the relevant time period. *See id.*; 40 C.F.R. § 124.13.

FACTUAL AND STATUTORY BACKGROUND

The Alaska Chukchi Sea is bounded on the west by the De Long Strait, off Wrangel Island, and in the east by Point Barrow, Alaska, and the Beaufort Sea. The Beaufort Sea stretches east to the Canadian border. Vast expanses of this area are pristine and untouched by any industrial activity. These areas provide important habitat for thousands of species of animals, birds, and fish, including endangered and threatened species such as polar bears, bowhead whales, beluga whales, walrus, seals, and spectacled and Steller's eiders. The area provides stunning scenery and significant opportunities for wilderness experience including solitude, recreation, and scientific study.

As EPA and other federal agencies have acknowledged, the Arctic is particularly vulnerable to the effects of climate change, and is warming faster and changing more precipitously than most other regions in the world. *See, e.g.*, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (December 15, 2009) (“Endangerment Finding”). The Arctic is warming so rapidly that the Department of Interior has found the polar bear threatened with extinction and listed it under the U.S. Endangered Species Act; the primary threat to the species is the climate-change induced melting of the Arctic sea ice. Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout its Range, 73 Fed. Reg. 28212 (May 15, 2008). In September 2007, the Arctic sea-ice extent hit a new record minimum that was 23% lower than the previous record low in 2005, 39% lower than the long term average from 1979-2000, and 50% below sea-ice conditions of the 1950s-1970s. *Id.* at 28220-21. The sea-ice extent in the winter is also declining, as is the age and thickness of the ice that remains, while the length of the sea ice melt season is increasing. *Id.* at 28222-23. The ice is melting far faster than projected by scientific models, with 2007 ice extent falling far below what any of the models projected for that year. *Id.* at 28233 (Figure 7). In fact—and most alarmingly—the extent of Arctic sea ice loss in 2007 had already exceeded average scientific projections for 2050. *Id.* (2007 ice extent below model “ensemble mean” for 2050).

Protection of the Arctic from pollution causing or contributing to global warming is therefore of the highest concern. Yet, Shell’s drilling operations would emit vast amounts of carbon dioxide and other pollution in the very heart of this territory.

Section 328 of the CAA mandates that EPA “control air pollution from [OCS] sources.” 42 U.S.C. §7627(a)(1). Section 328 also requires that OCS sources comply with the PSD provisions of the CAA. *Id.* § 7627(a)(1). Under the PSD program, prior to constructing any “major emitting facility,” an applicant must obtain a permit from EPA, 42 U.S.C. § 7475(a)(1), and must demonstrate that the proposed facility will be “subject to the best available control technology *for each pollutant subject to regulation under [the Act]* emitted from, or which results from, such facility.” *Id.* § 7475(a)(4) (emphasis added).

A “major emitting facility” includes “any . . . source with the potential to emit two hundred and fifty tons per year or more of any air pollutant.” 42. U.S.C. § 7479(1). Under Section 328 of the CAA, these provisions are applicable to OCS sources. *Id.* § 7627(a)(1). The “potential to emit” of an OCS source is defined as “the maximum emissions of a pollutant from an OCS source operating at its design capacity.” 40 C.F.R. § 55.2. Under Section 328, emissions are counted not only from an OCS source, but also from any vessel servicing or associated with that OCS source, including en route to or from the source within 25 miles of the OCS source. 42 U.S.C. § 7627(a)(4)(c).²

Shell’s proposed drilling program involves operations in both the Chukchi Sea and the Beaufort Sea. It would consist of a 514-foot long drill ship and fleet of ice-breakers and other support ships and aircraft traveling to and through the Arctic Ocean from July through October in a multi-year drilling program. It is undisputed that Shell’s

² Section 328 states: “The terms ‘Outer Continental Shelf source’ and ‘OCS’ source’ include any equipment, activity, or facility which (i) emits or has the potential to emit any air pollutant . . . and (iii) is located on the Outer Continental Shelf or in or on waters above the Outer Continental Shelf. Such activities include, but are not limited to, platform and drill ship exploration, . . . and transportation. For purposes of this subsection, emissions from any vessel servicing or associated with an OCS source, including emissions while at the OCS source or en route to or from the OCS source within 25 miles of the OCS source, shall be considered direct emissions from the OCS source.” 42 U.S.C. § 7627(4)(C).

drilling operations are subject to the PSD program because they have the potential to emit in excess of 250 tpy of nitrogen oxides, carbon monoxide and particulate matter, and will exceed significance thresholds for sulfur dioxide and volatile organic compounds. 42 U.S.C. § 7479(1); Statement of Basis for Proposed OCS Prevention of Significant Deterioration Permit at 15 (Aug. 14, 2009) (“Statement of Basis”). EPA must thus ensure that Shell applies BACT to limit emissions “for each pollutant subject to regulation under [the CAA] emitted from, or which result from, such facility.” 42 U.S.C. § 7475.

It is further undisputed that the drilling operations will also have the potential to emit approximately 94,000 tpy of CO₂: “Annual emissions of carbon dioxide from the Discoverer alone are estimated to be approximately 22,500 tons/year. Potential annual emissions of carbon dioxide from the Discoverer and its associated fleet are estimated to be approximately 94,000 tons/year.” Shell's Outer Continental Shelf Pre-Construction Air Permit Application, Frontier Discoverer Beaufort Sea Exploration Drilling Program, January 2010 at 98 (Air Permit Application).³ EPA has stated that, “[i]n determining the PTE for Shell’s Chukchi Sea Exploration drilling program, EPA included the potential emissions from the Discoverer while operating as an OCS source, as well as the potential emissions from the Associated Fleet—the ice breaker, the anchor handler/icebreaker, the supply ship, and the OSR fleet—when operating within 25 miles of the Discoverer while the Discoverer is an OCS source.” Statement of Basis at 22; *see* 40 C.F.R. § 55.2. Thus, EPA admits that a calculation of Shell’s drill ship operations’ potential to emit CO₂ must

³ Shell states that, except for an additional tug boat and barge and one slightly larger oil spill response work boat, the emission units addressed in its Beaufort application are the same as those proposed for operation in the Chukchi Sea. Shell’s January 2010 Beaufort PSD Permit Application at 1.

also include both the drill ship and its associated support vessels. As Shell has admitted, these potential emissions amount to 94,000 tpy of CO₂.

PROCEDURAL HISTORY

The procedural history of the Permits themselves is relatively straightforward. EPA released a revised proposed Chukchi permit on January 8, 2010 and a proposed Beaufort permit on February 17, 2010, and Petitioner submitted comments on the Permits on February 17, 2010 and March 22, 2010, respectively. EPA issued the final Permits on March 31 and April 9, 2010. EPA's decision not to impose BACT requirements for CO₂ in the Permits, however, has a more complex history—and in fact represents the culmination of a multi-year effort to avoid regulating greenhouse gas emissions from stationary sources under the CAA.

In 2007, the U.S. Supreme Court held that greenhouse gases, including CO₂, are “without a doubt” air pollutants as defined in the CAA. *Massachusetts v. EPA*, 549 U.S. at 529. The Court rejected EPA's assertion that the agency had discretion to decide whether to regulate this pollutant, and instead concluded that EPA was *required* to determine whether GHG emissions from vehicles endangered public health or welfare. *Id.* at 532.

Notwithstanding this ruling, EPA Region 8 issued a PSD permit later in 2007 for a proposed new power plant unit that contained no BACT limits for CO₂. Sierra Club appealed, pointing out that CO₂ already was subject to monitoring and reporting regulations contained in subchapter C of Title 40 of the Code of Federal Regulations, and thus was “subject to regulation” under the CAA within the plain and unambiguous meaning of sections 165 and 169. EPA thus had a present duty to regulate CO₂ emissions

from stationary sources. EPA, on the other hand, contended that the PSD program did not apply to CO₂ because, under a “historical interpretation” of the CAA, pollutants “subject to regulation” meant only those pollutants presently subject to actual control of emissions, not those (including CO₂) subject only to monitoring and reporting regulations contained in Subchapter C of Title 40 of the CFR. *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, slip op. at 1-2 (EAB, Nov. 13, 2008) (“*Deseret*”).

EAB rejected EPA’s argument: “[W]e conclude that the Region’s rationale for not imposing a CO₂ BACT limit in the Permit – that it lacked authority to do so because of an historical Agency interpretation of the phrase ‘subject to regulation under the Act’ as meaning ‘subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant’ – is not supported by the administrative record.” *Deseret*, slip op. at 54. Instead, the Board found that EPA’s 1978 PSD rulemaking “augers [sic] in favor of a finding” that “subject to regulation under this Act” encompasses “any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations,” *id.* at 3, and remanded the permit to EPA.

EPA responded to *Deseret* by issuing the Johnson Memo, which rejected EAB’s statutory reading. Instead, the Johnson Memo asserted that, “As of the date of this memorandum, EPA will interpret this definition of ‘regulated NSR pollutant’ to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision of the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant.” Johnson Memo, 73 Fed. Reg. at 80300. EPA also announced this to be “EPA’s ‘definitive interpretation’ of ‘regulated NSR pollutant.’” *Id.*

The Johnson Memo sparked a petition to EPA for reconsideration, *see* Petition for Reconsideration in The Matter of: EPA Final Action Published at 73 FR 80300 (Dec. 31, 2008), as well as litigation in *Sierra Club v. United States EPA*, Case No. 09-1018 (D.C. Cir., filed Jan. 15, 2009). EPA then granted the Petition for Reconsideration and commenced a rulemaking process seeking comments on five ways in which the phrase “subject to regulation” could allegedly be interpreted. Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, 74 Fed. Reg. 51535 (Oct. 7, 2009) (“Proposed Reconsideration”). In the Proposed Reconsideration, EPA stated a preference for the Johnson Memo interpretation,⁴ and announced that under this interpretation, GHGs “would . . . become ‘subject to regulation’ upon final promulgation of the GHG light duty Vehicle Rule.” Proposed Reconsideration, 74 Fed. Reg. 51547.

During the same period, EPA was taking steps to issue and finalize the “GHG light duty Vehicle Rule” discussed in the Proposed Reconsideration. In late 2008, EPA proposed GHG emission standards for passenger cars and light trucks under section 202(a) of the CAA; because these standards were proposed in conjunction with corporate average fuel efficiency standards mandated by the Energy Policy and Conservation Act, they had to be finalized no later than the end of March, 2010. Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Proposed Rule, 74 Fed. Reg. 49454 (Sept. 28, 2008)

⁴ In the Proposed Reconsideration, EPA again re-defined the interpretation of “subject to regulation under the Act,” this time as being “best interpreted as those pollutants subject to a nationwide standard, binding in all states, that EPA promulgates on the basis of its CAA rulemaking authority.” 74 Fed. Reg. at 51,543. The reason for these additional non-statutory preconditions is discussed below.

(the “Proposed GHG Vehicle Rule”). Responding to both the Supreme Court’s ruling in *Massachusetts v. EPA* and an overwhelming wealth of scientific evidence, EPA also formally found that CO₂ and other greenhouse gases endanger public health and welfare. Endangerment Finding, 74 Fed. Reg. 66496.

At the same time that it was preparing to reduce GHG emissions from automobiles, however, EPA was working to postpone the day when PSD permits and BACT measures would be required for stationary source emissions. In one such step, in an effort to delay regulation of smaller stationary sources, EPA proposed temporarily exempting sources emitting less than 25,000 tpy from permit requirements. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule, 74 Fed Reg. 55292, 55299 (October 27, 2009) (the “Tailoring Rule”). In this proposed rule, however, EPA reiterated its position that PSD permitting rules would be applicable *immediately upon promulgation of the final Vehicle GHG Rule*:

EPA expects to promulgate [the Vehicle GHG Rule] by the end of March 2010. . . . [I]t is EPA’s position that new pollutants become subject to PSD and title V when a rule controlling those pollutants is promulgated (and even before that rule takes effect). Accordingly, as soon as GHGs become regulated under the light-duty motor vehicle rule, GHG emissions will be considered pollutants “subject to regulation” under the CAA and will become subject to PSD and title V requirements.

Id. at 55300 (emphasis added).⁵

⁵ Other statements in the Tailoring Rule mirror this stance: “CAA section 165(a), by its terms, prohibits a source that is subject to PSD from constructing or modifying without a permit. As noted elsewhere, as a result of the proposed light-duty vehicle rule, expected to be promulgated at the end of March 2010, sources of GHG emissions in those States will be subject to the requirement of CAA section 165(a) to obtain a preconstruction PSD permit.” Tailoring Rule, 74 Fed. Reg. 55,344; *see also* 74 Fed. Reg. 55,292, 55,328, 55,449 and *passim*. In the Proposed Reconsideration, EPA also sought comment on delaying the trigger date from a rule’s promulgation date to the date described in the Congressional Review Act (“CRA”) (the later of 60 days after Congress’

As political pressure to abandon or at least further postpone GHG regulations for stationary sources mounted, EPA once again changed course. In its final Reconsideration of the Johnson Memo, EPA added several additional, non-statutory preconditions that a rule must satisfy before it renders a pollutant “subject to regulation”: the rule must exert some kind of physical control over emissions, must be nationally applicable, *and* must be actually in force in a way that restricts the behavior of regulated entities. EPA candidly admitted that it arrived at these conclusions because it needed “more time to ensure the orderly transition to the regulation of GHGs under [the CAA’s] permitting programs.” Reconsideration, 75 Fed. Reg. at 17007.

Armed with these new preconditions, EPA could now abandon its position that PSD permitting would commence upon promulgation of the GHG Vehicle Rule. Instead, it adopted January 2, 2011 as the new “trigger date.” The Reconsideration thus largely readopted the Johnson Memo interpretation, but also “refined” that interpretation to extend the effective date of a regulation that might trigger PSD permitting:

EPA will henceforth interpret the date that a pollutant becomes subject to regulation under the Act to be the point in time when a control or restriction that functions to limit pollutant emissions takes effect or becomes operative to control or restrict the regulated activity.

Reconsideration, 75 Fed. Reg. at 17016. EPA further pronounced that—contrary to all of its previous statements—such a “control or restriction” could “take effect” or “become operative” on some date long after the regulation containing the control or restriction was promulgated and finalized and even after regulated entities comply with it:

EPA construes the phrase “subject to regulation” in section 165(a)(4) and 169(3) of the Act to mean that the BACT requirement applies when controls on a

receipt of a report about the regulation from the agency or its publication in the Federal Register). Proposed Reconsideration, 74 Fed. Reg. 51,545-46.

pollutant first apply to a regulated activity, and not the point at which an entity first engages in the regulated activity. In this instance, the regulated activity is the introduction of model year 2012 vehicles into commerce. As of January 2, 2011, a manufacturer may not engage in this activity without complying with the applicable GHG standards.

Id. at 17020. In other words, EPA created yet another precondition to its duty to regulate stationary sources by delaying the effective date of the triggering regulation beyond the date of its promulgation, beyond the date of its publication in the Federal Register, beyond the date on which it becomes final for purposes of the Congressional Review Act, and even beyond the date when regulated entities comply and put the new regulation into practice.

EPA issued the Shell Permits within days after finalizing the Reconsideration (and one day before and eight days after finalizing the GHG Vehicle Rule, respectively). According to EPA, therefore, the CO₂ emitted by Shell's vast Arctic drilling operations is not subject to regulation. For the reasons set forth below, that conclusion is erroneous as a matter of law.

ARGUMENT

The EAB should review this petition because EPA's interpretation of CAA sections 165(a)(4) and 169(3)—upon which EPA relies in failing to require BACT for the drill ship operations' CO₂ emissions in this case—represents a “conclusion of law which is clearly erroneous.” 40 C.F.R. § 124.19(a). EPA's decision to forego control of GHG emissions from the Shell project also raises “important policy consideration[s]” warranting EAB review. *Id.* EPA has constructed a thicket of arbitrary preconditions to its obligation to regulate statutory source CO₂ emissions that are nowhere to be found in the statutory language.

In *Massachusetts v. EPA*, the Supreme Court condemned EPA's reliance on policy preferences that were not grounded in the statutory text to construct reasons why it need not regulate GHG emissions under the CAA. *See* 549 U.S. 497, 534-35 (2007). EPA has repeated this fundamental error here by once again willfully misinterpreting the CAA in order to achieve a policy preference for delayed GHG regulation. Because EPA has still not fulfilled its duty despite a clear statutory mandate, the Permits must be remanded for a CO₂ BACT analysis.

I. EPA Does Not Have Discretion to Decide When to Regulate Stationary Source GHG Emissions

At the outset, it must be noted that EPA's duty to require BACT for any pollutant emitted by a major emitting facility that is subject to regulation under the Act is mandatory, and *not* within EPA's discretion. Section 165 states:

- (a) *No major emitting facility* on which construction is commenced after August 7, 1977, *may be constructed* in any area to which this part applies *unless* . . . [¶¶]
- (4) the proposed facility is subject to the best available control technology *for each pollutant subject to regulation* under this chapter emitted from, or which results from, such facility . . .

42 U.S.C. § 7475(a)(4) (emphasis added). As pointed out by the EAB in *Deseret*, neither section 165 nor section 169 call for any judgment or any other discretionary act; rather “the statutory language *requires* BACT ‘for each pollutant subject to regulation under this Act.’” *Deseret* at 25 (emphasis added). In other words, EPA does *not* have discretion to forego, or to delay, stationary source regulations whenever it deems that course to be expedient. Nor may EPA take refuge in a perceived need to make judgments or consider policy preferences in order to gain additional time for implementation. *See Massachusetts v. EPA*, 549 U.S. at 534-35 (“EPA must ground its reasons for action or

inaction in the statute”). By repeatedly postponing implementation of BACT requirements for CO₂, EPA has improperly arrogated to itself a staggering degree of discretion that the statute simply does not confer. Administrative legerdemain often turns from benign neglect to lethal harm for those exposed to pollution and, in the case of GHGs, to potentially catastrophic consequences on a global scale. EPA’s redefinition of the phrase “subject to regulation” as requiring a host of ever lengthening preconditions is unsupported and contrary to the Act’s purpose and intent.

II. Because CO₂ is “Subject to Regulation” Under Sections 165(a)(4) and 169(3) of the Clean Air Act, EPA Erred in Issuing the Permits Without Applying BACT for the Drilling Operations’ CO₂ Emissions

A. CO₂ Is a “Pollutant”

It is beyond dispute that CO₂ is a “pollutant” under the CAA. The CAA defines “air pollutant” as “[a]ny air pollution agent or combination of such agents, including any physical, chemical, biological, [and] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.” CAA § 302(g), 42 U.S.C. § 7602(g). In *Massachusetts v. EPA*, the Supreme Court held that greenhouse gases, including CO₂, are “without a doubt” physical chemical substances emitted into the ambient air, and thus are pollutants. *Id.*, 549 U.S. at 529. EPA now agrees that GHGs are pollutants under the CAA. *See* Endangerment Finding, 74 Fed. Reg. at 66510. Because Shell’s planned drilling operations in the OCS have the potential to emit more than 250 tpy of CO₂, BACT must be applied to the Permits if CO₂ is “subject to regulation” under sections 165(a)(4) and 169(3) of the CAA. *See* 42 U.S.C. §§ 7475(a)(4), 7479(3).

B. CO₂ Is “Subject to Regulation”

1. The Phrase “Subject to Regulation” Is Not Ambiguous

EPA's justification for its series of re-interpretations of this phrase begins with the assertion that it is ambiguous. That claim is incorrect. The statute simply states that BACT must be applied to each pollutant subject to regulation under the Act. Neither the word "regulation" nor the phrase "subject to regulation" is ambiguous. It is a fundamental canon of construction that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Wilderness Soc'y v. United States Fish & Wildlife Service*, 2003 U.S. App. LEXIS 27248 (9th Cir. Alaska, Mar. 16, 2004), quoting *United States v. Smith*, 155 F.3d 1051, 1057 (9th Cir. 1998); see also *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (where Congress has directly spoken to the question at issue, the agency must give effect to the unambiguously expressed intent of Congress). Moreover, EPA is not entitled to deference concerning whether an ambiguity exists. *American Bar Ass'n v. F.T.C.*, 430 F.3d 457, 468 (D.C. Cir. 2005) (reviewing courts "owe the agency no deference on the existence of ambiguity").

In the Reconsideration, EPA cited the following dictionary definitions of "regulation" to support its claim of ambiguity: "a rule contained in a legal code;" "a rule or order, having legal force, [usually] issued by an administrative agency or local government;" "the act or process of controlling by rule or restriction;" "the act of regulating: The state of being regulated;" "an authoritative rule dealing with details of procedure;" "a rule or order issued by an executive authority or regulatory agency of a government and having the force of law;" and "to bring under the control of law or constituted authority." Reconsideration, 75 Fed. Reg. at 17007. Yet none of these

definitions demonstrates that the term “regulation” is ambiguous or susceptible to more than one meaning.

In the *Deseret* decision, EAB found that the dictionary definitions cited by the parties created sufficient ambiguity to prevent a determination of whether Congress intended the phrase “subject to regulation” to be applied narrowly, to mean actual control of emissions of a pollutant, or broadly, to mean monitoring and reporting of emissions. *Deseret* at 2. Petitioner respectfully suggests that this finding is erroneous because the term “regulation,” whether considered by itself or in the context of sections 165 and 169, still means a “regulation” regardless of how broad or narrow, how burdensome, how restrictive, or how controlling that regulation happens to be. Indeed, all of the dictionary definitions describe exactly the same thing: an authoritative rule that controls or restricts the activity it regulates. Any regulation EPA issues, regardless of its subject matter, degree of complexity or importance, or extent of control, restriction or burden on regulated entities, still is and remains a “regulation.” All of EPA’s regulations regarding pollutants are “contained in a legal code,” have “legal force,” and constitute the “act or process of controlling by rule or restriction.” All of these regulations bring entities, matters or activities “under the control of law or constituted authority” or otherwise control or restrict them. To put it differently, all regulations exercise *some* degree of control or restriction over their subject matter. This is the case whether the regulation controls or restricts the *amount* of pollutants emitted into the air (as does the GHG Vehicle Rule that restricts the amount of emissions) or whether it controls or restricts the *manner* in which pollutants are emitted into the air (as do the monitoring and reporting rules that restrict or control unmonitored and unreported emissions). Nothing in the word

or any of its definitions or usages suggests that regulations are regulations only if they require a *particularized degree or type* of control, restriction or burden. Indeed, it is absurd to argue otherwise. Each of the myriad of provisions of the Code of Federal Regulations is and remains a *regulation* regardless of its subject matter or degree of control or restrictiveness. The term simply is not subject to more than one meaning.

The statutory language is unambiguous. It does not permit EPA to insist that a regulation is sometimes a regulation, and sometimes something less, depending solely on whether EPA finds it presently expedient to require PSD permits and BACT demonstrations for a given pollutant. The supposed ambiguity is, simply stated, a *post hoc* rationalization intended to justify EPA's desire for additional delay.

2. CO₂ is "Subject To Regulation" Because EPA Has Promulgated Regulations Requiring Its Monitoring And Reporting

A monitoring and reporting regulation is as much a "regulation" as is an emissions limitation or reduction regulation, and each makes a pollutant "subject to regulation under the Act" if it is contained in the CAA. Decades ago, and essentially contemporaneously with the enactment of CAA sections 165 and 169, EPA itself concluded that "regulations" under these sections include regulations requiring monitoring and reporting of emissions. In the original Federal Register notice promulgating the definition of a "regulated pollutant," EPA stated that the phrase "means any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type." 43 Fed. Reg. 26388, 26397 (June 19, 1978). Subchapter C regulations specifically include those that require monitoring and reporting of CO₂ emissions. At the express direction of Congress, EPA issued monitoring and reporting

regulations for CO₂ in 40 C.F.R. Part 75, promulgated pursuant to CAA Section 821. *See* Acid Rain Program: General Provisions and Permits, Allowance System, Continuous Emissions Monitoring, Excess Emissions and Administrative Appeals, 58 Fed. Reg. 3590, 3706 (Jan. 11, 1993) (codifying rule at 40 C.F.R. § 75.13); *see also* 42 U.S.C. § 7651k note 3; Pub. L. 101-549; 104 Stat. 2699 (1990).⁶ Each of these monitoring and reporting requirements is as much a “regulation” as any other provision in the Code of Federal Regulations. *See* 40 C.F.R. §§ 75.1, 75.10(a)(3), 75.57, 75.60-64. Indeed, the regulations provide that a violation of any Part 75 requirement is a violation of the CAA. 40 C.F.R. § 75.5(a).

In *Deseret*, EAB undertook a careful review of EPA’s other rulemakings and pronouncements, including the 1993 implementation of section 821’s CO₂ monitoring and reporting requirements, EPA’s 2002 rulemaking, and various EPA memos. After that exhaustive review EAB held that there was no support for an interpretation applying “BACT only to pollutants that are ‘subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant.’” *Deseret* at 41. Rather, EAB determined that EPA’s 1978 PSD rulemaking “augers [sic] in favor of a finding” that “subject to regulation under this Act” means “‘any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulation.’” *Id.* at 3. In sum, then, a re-interpretation of sections 165 and 169, and the irrational exclusions of monitoring and reporting regulations from the definition of “regulations,” cannot be justified based on the existence of an ambiguity or the administrative or Congressional record.

⁶ The monitoring and reporting regulations have been amended and updated several times. EPA issued its most recent mandatory GHG monitoring and reporting rules in 2009. Mandatory Reporting of Greenhouse Gases, Final Rule, 74 Fed. Reg. 56250 (October 30, 2009) (the “GHG Reporting Rule”).

In any event, even assuming *arguendo* that there is an ambiguity, and even if EPA were correct that a regulation is only a regulation if it requires “actual control of emissions” of a pollutant, Reconsideration, 75 Fed. Reg. at 17004, EPA’s monitoring and reporting rules still amount to “regulations” as so redefined. Processes that must be used to monitor and report on CO₂ emissions require actual and physical “control” of them, as the amount of emissions cannot be determined unless the gases are first in some way restricted, directed, or captured—and thus in each case “controlled”—rather than allowed to escape unrestricted, or uncontrolled, into the air. In addition, EPA’s monitoring and reporting regulations prohibit operation of a facility that fails to comply. 40 C.F.R. §§ 75.10(a)(3), 75.5(d). A regulation that potentially prohibits operation of an entire facility emitting a pollutant exerts perhaps the ultimate level of physical control over those emissions. The failure to conduct required monitoring is also subject to criminal sanctions, and a person who knowingly submits false monitoring reports may be subject to a felony prosecution. *See, e.g.* 42 U.S.C. § 7413(c)(2), 18 U.S.C. § 1001. The outright prohibition of the operation of any facility that does not monitor and report its CO₂ emissions, and the threat of criminal sanctions, certainly “restrict” and “control” the pollutant, the facility, and even the emitting entity, and thus are “regulations” even under the narrow interpretation advanced by EPA.

In the Reconsideration, EPA argues that “subject to regulation” should not refer to monitoring and reporting regulations because it would “make the PSD program more difficult to administer,” leading to the “perverse result of requiring emissions limitations under the PSD program while the Agency is still gathering the information necessary to conduct research or evaluate whether to establish controls on the pollutant under other

parts of the Act. Such a result would frustrate the Agency’s ability to gather information using section 114 and other authority and make informed and reasoned judgment about the need to establish controls or limitations for particular pollutants.” Reconsideration, 75 Fed. Reg. 17009. This argument is flawed for a number of reasons.

First, as demonstrated above, EPA’s duties under Section 165(a)(4) are mandatory, not discretionary. Except for determining the requisite BACT, the statutory text contains grants EPA no discretion and requires no judgment. Nor does the statute contain any ambiguities that would enable EPA to construct a maze of impediments to its implementation. Yet, EPA claims to have an astonishingly broad degree of discretion, founded solely in an ambiguity that does not exist, to defer or forego regulation for policy reasons related to administrative convenience or the professed need for additional time. EPA’s contentions here are even more far-fetched than those which the Supreme Court in *Massachusetts v. EPA* dismissed even though the statute at issue there—section 202(a)—clearly *did* call for agency judgment:

EPA’s decision—that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time—rests on reasoning divorced from the statutory text. While the statute does condition the exercise of EPA’s authority on its formation of a “judgment,” . . . that judgment must relate to whether an air pollutant “cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare,” *ibid.* Put another way, the use of the word “judgment” is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.

Massachusetts v. EPA, 549 U.S. at 532-33. Plainly, the Supreme Court’s holding and admonition is even more applicable to the NSR program, in which no judgment is called for, and the only “condition [to] the exercise of EPA’s authority” is that the pollutant is subject to regulation – *not* that it would be less difficult to administer or that more time might be needed.

Second, a judgment about whether to regulate CO₂ (as EPA claims is required) has long since been made by Congress when it singled out CO₂ as a pollutant of concern and expressly directed EPA to promulgate reporting and monitoring regulations for this pollutant. 40 C.F.R. Part 75, promulgated pursuant to CAA Section 821; *see* 42 U.S.C. § 7651k note; Pub. L. 101-549; 104 Stat. 2699 (1990).⁷ Had Congress intended to exclude CO₂ from BACT requirements when it directed EPA to regulate it, Congress could have stated that intent, but it did not. Instead, EPA reads requirements for a whole host of additional “judgments” into a statute that precludes such a reading (e.g., that some other regulation must have concluded that the pollutant must be physically controlled other than by monitoring and reporting, that the control must be a cap, reduction or other limitation, that the limitation must be on a nationwide basis, and that this other regulation must not only be final but must “apply to a regulated activity”). To the contrary, the statute requires none of these judgments before EPA must implement it.

Third, EPA’s contention that it must first gather information about a pollutant through monitoring and reporting regulations before it can decide whether it should cap its emissions through some other part of the CAA ignores the fact that EPA can gather that information without the need to adopt specific regulations under section 114 or otherwise. Nothing in the CAA evinces any Congressional intent that EPA cannot require that emissions of a pollutant be subject to BACT unless it first conducts an unspecified amount of study, monitoring or reporting; similarly, nothing demonstrates that Congress intended EPA to attack the problem of environmental degradation only through a seriatim, step-by-step approach rather than through the contemporaneous

⁷ EPA made the same judgment by promulgating those monitoring and reporting rules, and again by imposing the GHG Reporting Rule in 2009.

application of many programs. EPA states or implies that BACT for stationary sources is impermissible unless the following steps have first been taken, in this or a similar sequence: extensive study; monitoring and reporting by means of a regulation or otherwise; capping or restricting emissions through mobile pollution source controls, setting national ambient air quality standards (“NAAQS”), or stationary source emission limitations through New Source Performance Standards; and, finally, using the PSD permitting program as a last resort. There is simply nothing in the Act that supports such an interpretation. As the Supreme Court stated when confronted with a similar EPA penchant for delay: “[U]nlike EPA, we have no difficulty reconciling Congress’ various efforts to promote research to better understand climate change with the agency’s pre-existing mandate to regulate ‘any air pollutant’ that may endanger the public welfare. Collaboration and research do not conflict with any thoughtful regulatory effort; they complement it.” *Massachusetts v. EPA*, 549 U.S. at 530. In the same manner, the CAA’s various programs complement one another, rather than act as preconditions to each other as EPA would have it.

In addition, EPA’s insistence that the only “regulation under the Act” that can trigger BACT for major stationary sources must be an emission reduction scheme in full swing under another part of the CAA would sharply increase the burden of proof as well as the requisite administrative hurdles to be overcome before BACT could go into effect, for a greenhouse gas pollutant or any other pollutant. For example, designation of a “criteria pollutant” under the National Ambient Air Quality Standards requires an endangerment finding, *see* section 108(a)(1)(A), 42 U.S.C. § 7408(a)(1)(A); so does the designation of a category of industrial facilities to which New Source Performance

Standards (“NSPS”) may be applied; *see* section 111(b)(1)(A), U.S.C. § 7411(b) (1)(A); and so do most of the sections dealing with mobile sources, *see, e.g.*, section 202(a)(1), U.S.C. § 7521(a)(1). No such finding is required for PSD permitting, indicating that Congress intended to establish a much lower threshold of applicability for PSD permitting than for other measures. By suggesting that these higher thresholds would first have to be met for each new pollutant before EPA could consider the pollutant “subject to regulation,” EPA would turn the intent and structure of the CAA on its head.

Lastly, EPA has failed to demonstrate that requiring BACT for pollutants subject to monitoring and reporting leads to “perverse results.” Certainly, it does not do so in the instant case, where CO₂ has been subject to an enormous amount of study and research both by EPA and the scientific community, where it has already been found to endanger public health and safety, where it is the subject of strenuous international reduction efforts under the United Nations Framework Convention on Climate Change, and where its immediate reduction from all sources is a matter of critical urgency. Instead, EPA seeks to demonstrate “perverse results” by citing to the fact that its GHG Reporting Rule also covers five other greenhouse gas pollutants in addition to CO₂. Reconsideration, 75 Fed. Reg. at 17010. That response is a *non sequitur*. Plainly, PSD permitting and BACT control for these other greenhouse gases are required by section 165 just as they are for CO₂. EPA also claims that it has promulgated regulations requiring monitoring of oxygen (O₂) in boiler stacks “under certain circumstances.” *Id.* This claim is an obvious red herring; the monitoring and reporting regulations EPA cites concern themselves not with oxygen, but with sulfur dioxide, nitrogen oxides, and other pollutants, and measures oxygen only as it relates to these pollutants under the CAA’s

acid rain program. *See* 40 C.F.R. 60.49Da(d). In sum, nothing whatever shows that application of BACT for pollutants subject to monitoring and reporting leads to perverse results, or conversely, that BACT may not be applied until pollutants have been subjected to an unspecified amount of study through monitoring and reporting regulations.

3. CO₂ is “Subject To Regulation” Because EPA Has Promulgated the Final Renewable Fuel Standards Rule

Even under EPA’s (incorrect) claim that “subject to regulation” means only the specific type of regulation that actually controls the emissions of a pollutant, CO₂ undoubtedly became “subject to regulation” on March 26, 2010, when EPA issued the final Renewable Fuel Standards. *See* Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program; Final Rule, 75 Fed. Reg. 14670 (March 26, 2010) (“RFS Regulation”). As EPA states in the RFS Regulation, “[t]his rulemaking marks the first time that greenhouse gas emission performance is being applied in a regulatory context for a nationwide program.” *Id.*, 75 Fed. Reg. 14670 (emphasis added). The RFS Regulation directly limits CO₂ and other greenhouse gas emissions associated with various renewable fuels by setting minimum performance measures, or “thresholds,” for those fuels’ lifecycle GHG emissions. *Id.* at 14687. These thresholds “represent the percent reduction in lifecycle GHGs that is estimated to occur when a renewable fuel displaces gasoline or diesel fuel.” *Id.* at 14687. The rule requires CO₂ reductions not only because renewable fuels must replace a given amount of gasoline, but also because the amount of CO₂ emitted by the various renewable fuels themselves is capped as measured against a gasoline or diesel fuel baseline. For example, “during 2010 advanced biofuels, on a lifecycle basis, must emit no more than 50% of the amount of greenhouse gases emitted by gasoline or diesel, based on a 2005 baseline.” *Id.* Plainly, then, EPA’s

RFS Regulation (a final, nationwide regulation under the CAA) actually controls and limits the emission of CO₂. Moreover, this regulation became final and was published in the Federal Register before either of the Shell Permits was issued. Accordingly, even as EPA defines it, CO₂ was “subject to regulation” at the time of Permit issuance, and a BACT analysis was required before the Permits could validly issue.

This conclusion pertains even if EPA’s further, arbitrary limitation concerning the “effective” date of the allegedly prerequisite regulation were adopted. Although the RFS Regulation gives an effective date of July 1, 2010, the rule’s GHG emission limitations apply to all fuels produced or imported *throughout* 2010: “[T]he percentage standards [including greenhouse gas standards] *apply to all gasoline and diesel produced or imported in 2010.*” *Id.* at 14670 (emphasis added). As EPA states even more explicitly, compliance is “calculated in part based on volumes of gasoline and diesel produced prior to the effective date of the [RFS Regulation] . . .” *Id.* at 14676 (emphasis added). Plainly, in the case of the RFS Regulation, actual controls and restrictions have effectively been imposed on emissions that occurred even *before* the regulation was promulgated.

In the Reconsideration, EPA stated that it “construes the phrase ‘subject to regulation’ in section 165(a)(4) and 169(3) of the Act to mean that the BACT requirement applies *when controls on a pollutant first apply to a regulated activity, and not the point at which an entity first engages in the regulated activity.*” Reconsideration, 75 Fed. Reg. at 17020 (emphasis added). Therefore, even assuming that fuel producers do not produce or import fuels that meet the RFS Regulation standard until July 1, 2010, the fact remains that CO₂ controls *apply for all of 2010*, as *all* renewable fuels produced

during that time must meet the GHG lifecycle limitations set forth in the RFS Regulation. If the Reconsideration's "refinement" of the Johnson Memo applies to define what triggers the GHG Vehicle Rule, it must also apply in the same manner to the RFS Regulation. EPA cannot have it both ways.

In sum, the RFS Regulation meets all of the tests and preconditions EPA added in the Reconsideration for a regulation that triggers the PSD permitting requirement: it actually controls and limits CO₂; it is issued by EPA under the CAA; it is nationwide in application; it was promulgated before the Permits were issued; and it operates to actually control and restrict CO₂ emissions throughout 2010. Even under EPA's arbitrary reinterpretation of the meaning of "subject to regulation," the PSD program has been triggered for CO₂. The Permits are therefore invalid.

4. CO₂ is "Subject to Regulation" For Other Reasons
 - a. EPA Has Approved a State Implementation Plan Regulating CO₂

Because CO₂ is subject to regulation under the Act as the result of the CO₂ monitoring and reporting regulations and the RFS Regulation, the EAB need not consider whether other regulatory action relating to CO₂ has rendered it subject to regulation under the Act. However, such action has taken place.

One such action occurred when EPA approved a State Implementation Plan ("SIP") revision submitted by the State of Delaware that directly establishes emissions limits for CO₂. Approval and Promulgation of Air Quality Implementation Plans; Delaware; Control of Stationary Generator Emissions, 73 Fed. Reg. 23101 (April 29, 2008). Specifically, Delaware's SIP revision imposed CO₂ limits on new and existing

distributed generation facilities. Delaware Department of Natural Resources and Environmental Control, Division of Air and Waste Management, Air Quality Management Section, Regulation No. 1144 (Jan. 11, 2006), at § 3.0. EPA issued a regulation that approved Delaware's SIP revision "in accordance with the Clean Air Act." 73 Fed. Reg. 23101. CAA section 110, 42 U.S.C. § 7410, mandates that EPA approve or disapprove SIPs; upon EPA's approval, these CO₂ emission control requirements became part of an "applicable implementation plan" under the Act, and thus enforceable "regulations" under the Act. *E.g.*, 42 U.S.C. §§ 7602(q), 7413 (a) (the violation of "any requirement" of an "applicable implementation plan" is enforceable by the EPA Administrator by compliance order, administrative penalty order, or civil action). In addition, a CO₂ emission limit in an approved SIP is enforceable under the CAA's citizen suit provisions. *See* 42 U.S.C. § 7604(a)(1), (f)(3). By approving the Delaware SIP, EPA has made CO₂ "subject to regulation" under the Act even under EPA's (incorrect) assertion that only a physical emission limitation suffices to constitute a regulation.⁸

Although EPA does not appear to dispute that its approval of a SIP reducing emissions of a pollutant indeed constitutes a "regulation" under the Act, EPA nonetheless contends that a SIP approval still does not trigger BACT requirements. EPA's position is based solely on an alleged policy concern relating to "cooperative federalism." The CAA's cooperative federalism approach permits individual States to apply more stringent pollution regulations than those called for by Federal law, without thereby imposing

⁸ Similarly, EPA has authorized California (and 10 other states) to implement CO₂ emissions limitations under section 209(b) of the Act, 42 U.S.C. § 7509(b). California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32744 (July 8, 2009).

those requirements on all States. EPA fears that, “[i]f EPA determined that a new pollutant becomes ‘subject to regulation’ nationally within the meaning of section 165 based on the provisions of an EPA-approved SIP, then all States would be required to subject the new pollutant to PSD permitting whether or not control of that air pollutant was relevant for improving that State’s air quality.” Reconsideration, 75 Fed. Reg. 17011.

These unsubstantiated forebodings lack merit. First and foremost, EPA’s policy concerns cannot trump the clear language of section 165. Second, the generalized fear that principles of cooperative federalism would be undermined is without basis. Initially, as EPA concedes, it must be noted that EPA approval of SIPs setting more stringent limitations for pollutants regulated less stringently by EPA does not turn the more stringent State regulations into a new national norm. That remains true regardless of whether the term “regulation” under section 165 and 169 includes an EPA approval of a SIP that regulates a pollutant not yet otherwise regulated under the CAA. Thus, the *only* instance where cooperative federalism policy considerations might be affected is where EPA approves a SIP that regulates a pollutant that EPA maintains should not become “subject to regulation” under the CAA. These concerns are inapplicable here because EPA has already decided, in the Endangerment Finding and elsewhere, that GHGs *must* be regulated under the CAA; moreover, CO₂ has been regulated through monitoring and reporting regulation for decades.

- b. EPA Has Found That CO₂ Endangers Public Health and Safety

EPA’s finding that greenhouse gases including CO₂ endanger public health and welfare also supports a determination that GHGs are “subject to regulation.” *See* Endangerment Finding, 74 Fed. Reg. 66496. As stated above, the NSR PSD program does not require a formal endangerment finding to become effective; rather, it seeks simply “to protect public health and welfare from any actual or *potential adverse effect* which in the Administrator’s judgment may reasonably be anticipated to occur” 42 U.S.C. § 7470(1) (emphasis added). Plainly, the threshold required for PSD implementation is far lower than is the standard that must be met for an endangerment finding. A pollutant that is reasonably anticipated to endanger public health and safety is, *ipso facto*, also one that has a “potential adverse effect” under the NSR program and thus subject to regulation thereunder.

In the Reconsideration, EPA characterizes an endangerment finding as a mere “prerequisite to issuing regulations that themselves impose control requirements,” 75 Fed. Reg. at 17012-13. EPA misses the key point: once it adopts an endangerment finding for a particular pollutant, EPA must as a matter of law adopt emissions limitations standards for that pollutant. *See, e.g., NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976). In other words, because the Endangerment Finding *compels* EPA to regulate this pollutant, it is now effectively “subject to regulation” under the Act. *See, e.g., CAA* §§ 108, 109, 111, 202; *Massachusetts v. EPA*, 549 U.S. at 533 (an endangerment finding requires action to limit emissions). Indeed, it is arbitrary on its face for EPA to insist that a pollutant it has found to *endanger* the public—a finding that has no purpose other than

to be part and parcel of the regulation of dangerous pollutants—is somehow *not* “subject to regulation under the Act.”⁹

C. EPA’s Arbitrary and Capricious Choice Of An “Effective Date” Further Demonstrates EPA’s Error

At the end of EPA’s tortuous path in redefining section 165 so that CO₂ stationary source regulation could be postponed until January 2011, EPA added yet another precondition to that regulatory duty. Contradicting its earlier pronouncements that stationary source permits for GHG emissions would be required by the end of March 2010 at the latest, it jettisoned the trigger date identified in the proposed Reconsideration (the promulgation of a final rule restricting CO₂ emissions from some other source), ignored the next possible clearly defined trigger event as well (the date on which a regulation becomes final for purposes of the Congressional Review Act), and instead concluded that another, only marginally related regulation requiring manufacturers to certify that their vehicles comply with GHG standards would define when the triggering regulation would be effective. Reconsideration, 75 Fed. Reg. at 17020.

⁹ In the Reconsideration, EPA seeks to bolster its position by pointing to its four-part definition of “regulated NSR pollutant” in 40 C.F.R. section 52.21(b)(50). It argues that any interpretation of the phrase that would include an endangerment finding would read all meaning out of the first parts of these definitions. See 40 C.F.R. section 52.21(b)(50)(i)-(iii) (stating that a regulated NSR pollutant includes any pollutant subject to a national ambient air quality standard, a new source performance standard or a standard under Title IV of the Act). The agency’s interpretation of its own implementing regulation, however, is not entitled to deference where the regulation simply parrots the language of the statute itself. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). In any event, holding that an endangerment finding renders a pollutant “subject to regulation” is entirely consistent with the last part of the implementing regulation (covering “[a]ny pollutant that is *otherwise* subject to *regulation* under the Act,” 40 C.F.R. 52.21(b)(50)(iv) (emphasis added) – i.e., a pollutant that is subject to a regulation, but *not* subject to a standard).

The arbitrary nature of this conclusion is self-evident. It was impossible for anyone to predict January 2, 2011 as the statutorily required trigger date based on anything that could be found in section 165, in the proposed Reconsideration, in any other part of the New Source Review program, in the mobile source vehicle regulations, or anything else in the CAA. In fact, EPA already had announced that PSD permitting would be required upon promulgation of the GHG Vehicle Rule, which had to be effective no later than the end of March 2010:

[I]t is EPA's position that new pollutants become subject to PSD and title V when a rule controlling those pollutants is promulgated (and even before that rule takes effect). Accordingly, as soon as GHGs become regulated under the light-duty motor vehicle rule, GHG emissions will be considered pollutants 'subject to regulation' under the CAA and will become subject to PSD and title V requirements.

Tailoring Rule, 74 Fed. Reg. 55,292, 55,299 (emphasis added).

Critical to being able to reach the January 2, 2010 date is EPA's novel claim that emission reduction regulations in a final rule "become effective" not "when an entity first engages in the regulated activity" but only when they "first apply to a regulated activity." This distinction was necessary to circumvent the undisputed fact that car manufacturers must actually "first engage in a regulated activity" much earlier than January 2, 2011 by designing and producing vehicles that comply with and incorporate the GHG Vehicle Rule's requirements.¹⁰ But to reach its desired postponement date, EPA had to ignore the

¹⁰ In addressing why the 2012-2016 model year GHG Vehicle Rule requires lead time for full implementation after its finalization, EPA stated: "Having sufficient lead time includes among other things, the time required to certify vehicles. For example, model year 2012 vehicles will be tested and certified for the EPA within a short time after the rule is finalized, *and this can start as early as calendar year 2010*, for MY 2012 vehicles that can be produced in calendar year 2011. In addition, *these 2012 MY vehicles have already been fully designed, with prototypes built several years earlier*. It takes several years to redesign a vehicle, and several more to design an entirely new vehicle not based

fact that the regulated parties' behavior is immediately dictated by the rule, and that the rule thus immediately becomes operational. Instead, EPA arbitrarily pointed to yet *another* regulation—rules requiring automakers to certify that their model year 2012 vehicles comply with GHG standards, 40 C.F.R. §§ 85.2302 through 85.2305—to determine when the final GHG Vehicle Rule will become “effective.” The earliest date on which a manufacturer can (but is not required to) certify compliance is January 2, 2011—thus providing EPA with its new “trigger date.”

As it stands today, then, EPA maintains that a pollutant is not “subject to regulation” within the meaning of Section 165 and 169 until a separate regulation meeting all of the following preconditions has been finalized under some other part of the CAA: (1) the underlying regulation is not a monitoring and reporting regulation, but rather one that actually restricts emissions of that pollutant; (2) the underlying regulation is contained in the CAA or promulgated directly by EPA; (3) the underlying regulation is nationally applicable; and (4) the underlying regulation has become “effective” by means of yet *another* regulation that renders the regulation “operational” by “first applying to a regulated activity.”

Even EPA tacitly recognizes that the mayhem done to the statutory text makes it difficult, if not impossible, to discern whether or when EPA will ever require PSD

on an existing platform.” Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, Final Rule, 75 Fed. Reg. __ (April 1, 2010), available at <http://epa.gov/otaq/climate/regulations.htm> (“Final GHG Vehicle Rule”) at 293-294. Thus, the “regulated activity”—the production and sale of cars complying with the rule—is in fact controlled by the GHG Vehicle Rule as soon as it is *issued* and the cars subject to the rule are being built, and not when those cars are presented for certification.

permitting for a newly recognized pollutant.¹¹ Given the creation of an overwhelming amount of uncertainty and guesswork where none existed before, EPA itself admitted that it has become “critically important at this time for the Agency to make clear when the requirements of the PSD permitting program for stationary sources will apply to GHG,” Reconsideration, 75 Fed. Reg. 17010, and therefore supplied the January 2, 2011 date to a hitherto unsuspecting public. EPA’s selection of the first date when a manufacturer can obtain a vehicle compliance certification as the trigger that renders CO₂ emissions “subject to regulation” lacks any support in the statute, is arbitrary, is an abuse of discretion, and is clearly erroneous.

D. Policy Concerns Do Not Support EPA’s Position

EPA’s decision to issue the Permits without BACT for CO₂ runs contrary to the CAA’s clear mandate and violates the Supreme Court’s direction that EPA must use its many programs to address new environmental threats such as climate change. *See Massachusetts v. EPA*, 549 U.S. at 530. The policy justifications EPA offers for its deviations from the statutory text do not withstand scrutiny. The judgment EPA claims it must make before requiring the application of BACT for a pollutant at major stationary sources is in fact made when the pollutant is regulated (and indeed, controlled and restricted) through monitoring and reporting regulations, as it was here at the express direction of Congress. Similarly, EPA’s claimed need for additional time to study and research pollutants before deciding to implement BACT can easily be met without grafting new limitations onto the plain text of section 165. EPA can (and does) conduct such study and research before EPA issues any monitoring and reporting regulations

¹¹ EPA’s interpretation of the statutory scheme would apply to any and all pollutants, not just CO₂ and other GHGs.

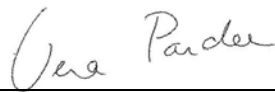
concerning a pollutant; where applicable, EPA can (and does) review and evaluate research conducted by States that have promulgated a SIP that regulates the pollutant; and EPA can (and does) further study and research the pollutant during the already lengthy process of determining BACT to be required under PSD permits. EPA is simply wrong in asserting that BACT cannot be applied to any pollutant unless standards for its emissions have first been set under NAAQS, NSPS, Title IV, or some other part of the Act. Nothing in the CAA, or anywhere else, supports that contention. To the contrary, Congress clearly commanded the EPA to act to protect our environment and to follow the plain language of the law.

CONCLUSION

EPA cannot lawfully rely on either nonexistent statutory ambiguities or extra-statutory policy concerns to obtain *de facto* extensions of time to fulfill its statutory obligations. Nor can the agency simply choose by fiat to implement mandatory CAA requirements in some preferred order—and ignore others altogether—when the statute requires that they be contemporaneous and complementary. Such actions raise unlawful and unnecessary obstacles to the regulation of CO₂, in violation of the plain language of the Act. EPA need look no further than its own Endangerment Finding for evidence of the urgency of implementing stationary source CO₂ permitting as the CAA requires; indeed, in the face of compelling evidence that ever-rising CO₂ pollution levels pose a serious risk to public health and welfare, sound public policy militates against further delay. In issuing the Shell Permits without BACT for carbon dioxide, EPA violated the clear language of sections 165 and 169, acted arbitrarily and capriciously, and abused its

discretion. Accordingly, the Environmental Appeals Board should accept this Petition, consider full briefing on these issues, and vacate the Permits subject to this appeal.

Respectfully submitted this 30th of April, 2010,

A handwritten signature in cursive script that reads "Vera Pardee". The signature is written in black ink and is positioned above a horizontal line.

Vera P. Pardee
Center for Biological Diversity
Petitioner

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **PETITION FOR REVIEW** in the matter of Shell Gulf of Mexico, Inc., Permit No. R10OCS/PSD-AK-09-01; and Shell Offshore, Inc., Permit No. R10OCS/PSD-AK-2010-01 were served by United States First Class Mail on the following persons, this 30th day of April, 2010.

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DATED: April 30, 2010