ORAL ARGUMENT NOT YET SCHEDULED

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

No. 10-1092, and consolidated cases (Complex)

COALITION FOR RESPONSIBLE REGULATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
LISA P. JACKSON, ADMINISTRATOR, and
THE NATIONAL HIGHWAY AND TRAFFIC SAFETY ADMINISTRATION

Respondents.

ON CONSOLIDATED PETITIONS FOR REVIEW OF FINAL RULES
BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND
NATIONAL HIGHWAY AND TRAFFIC SAFETY ADMINISTRAITON

BRIEF FOR RESPONDENTS

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DATED: September 1, 2011 (Initial Brief)

RESPONDENTS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit R. 28(a)(1), Respondents United States Environmental Protection Agency ("EPA"), Lisa P. Jackson, Administrator of EPA, and the National highway Traffic Safety Administration ("NHTSA") submit this certificate as to parties, rulings and related cases.

(A) Parties and amici: With one exception, the parties and amici to this action are those set forth in the certificate filed with the Joint Opening Brief of Non-State Petitioners. The exception is on August 5, 2011, the Court granted the Commonwealth of Pennsylvania's motion to withdraw as an Intervenor.

(B) Ruling under review: This case is a set of consolidated petitions for review of EPA and NHTSA's final rules entitled "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards," 75 Fed. Reg. 25,324 (May 7, 2010).

(C) Related cases: Each of the petitions for review consolidated under No. 10-1092 is related. In addition, pursuant to this Court's prior orders, this case (No. 10-1092) will be argued before the same panel as the consolidated actions in Nos. 09-1322, 10-1167, and 10-1073.

DATED: September 1, 2011

/s/ Eric G. Hostetler
Counsel for Respondents

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GLOSSARY

BACT	Best Available Control Technology
CAA	Clean Air Act or the Act
CAFE	Corporate Average Fuel Economy
CH_4	Methane
CO_2e	Carbon dioxide equivalent
CO_2	Carbon dioxide
EPA	Environmental Protection Agency
EPCA	Energy Policy and Conservation Act
FLRA	Federal Labor Relations Authority
HFCs	Hydrofluorocarbons
MEMA	Motor & Equip. Mfrs. Ass'n
N_20	Nitrous oxide
NHTSA	National Highway Traffic Safety Administration
NRDC	Natural Resources Defense Council
OMB	Office of Management and Budget
PFCs	Perfluorocarbons
PRA	Paperwork Reduction Act
PSD	Prevention of significant deterioration
RFA	Regulatory Flexibility Act
RIA	Regulatory Impact Analysis

RTC	Response to Comments
SF_6	Sulfur hexafluoride
TSD	Technical Support Document
UMRA	Unfunded Mandates Reform Act

JURISDICTION

The consolidated petitions for review of the Clean Air Act regulations at issue were timely filed pursuant to 42 U.S.C. §7607(b). The Court does not need to scrutinize the standing of all Petitioners since at least some Petitioners appear to have adequately alleged standing based on asserted injuries as fleet purchasers of motor vehicles. *See* Ind. Br. at 10, State Br. at 13-14.

STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions are set forth in the addendum.

STATEMENT OF ISSUES

Section 202(a)(1) of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. § 7521(a)(1), provides that EPA "shall" promulgate standards for emissions of pollutants from new motor vehicles if the EPA Administrator finds that such emissions contribute to air pollution that may "reasonably be anticipated to endanger public health or welfare." EPA has found that emissions of greenhouse gases from new motor vehicles contribute to air pollution that may "reasonably be anticipated to endanger public health or welfare." *See generally* "Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act," 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Finding") [JA XX]. Against that background, this case raises the following issues:

1. Whether EPA appropriately prescribed standards for greenhouse gas

emissions from new motor vehicles following its Endangerment Finding, when Section 202(a) of the Act provides that EPA "shall" promulgate such standards if such a finding is made?

2. Whether EPA had discretion, based on the triggering of separate CAA programs (such as prevention-of-significant deterioration) that apply automatically to stationary sources of any pollutant subject to regulation under the Act, to refuse to comply with the CAA's requirement that the Agency promulgate standards for greenhouse gas emissions from new motor vehicles once endangerment was found?

3. Whether EPA had discretion, based on the relative *amount* of the endangerment that may be averted through promulgation of vehicle standards alone, to refuse to comply with the CAA's requirement to issue standards for greenhouse gas emissions from new motor vehicles once endangerment was found?

4. Whether EPA had discretion, based on the authority of the National Highway Traffic and Safety Administration ("NHTSA") to set fuel economy standards under the Energy Policy and Conservation Act ("EPCA"), to refuse to comply with the CAA's separate and independent direction to promulgate greenhouse gas emission standards for new motor vehicles once endangerment was

found?

5. Whether EPA reasonably promulgated greenhouse gas emission standards for new model year 2012-2016 light-duty vehicles in coordination with NHTSA's promulgation of fuel economy standards under EPCA, so as to ensure consistent federal and state requirements concerning light-duty vehicle greenhouse gas emissions and fuel economy?

STATEMENT OF THE CASE

I. Nature of the Case

This case concerns consolidated challenges to the first-ever national regulatory program to reduce greenhouse gas emissions from new motor vehicles. Elevated concentrations of greenhouse gases in the atmosphere are causing changes in the Earth's climate. Climate change is one of the most significant and profound threats to public health and the environment. *See generally* Endangerment Finding, 74 Fed. Reg. at 66,516-36 [JA XX-XX]. The key risks and effects of climate change projected to occur for current and future generations include, but are not limited to, more frequent and intense heat waves, degraded air quality, heavier and more intense storms and flooding, increased drought, greater sea level rise, ocean acidification, harm to agriculture, and harm to wildlife and ecosystems. *Id*.

Section 202 of the CAA *requires* EPA to prescribe standards for air pollutant emissions from new motor vehicles where EPA finds that such emissions contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. § 7521. Such a finding is commonly referred to as an "endangerment finding."

After EPA initially denied in 2003 a petition for rulemaking to regulate greenhouse gas emissions from new motor vehicles based on an alleged lack of statutory authority and various policy grounds, the Supreme Court ruled that EPA's denial of the petition was arbitrary and capricious. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("*Massachusetts*"). The Court held that greenhouse gases are air pollutants regulated by the Act and directed EPA to make an endangerment determination based on the available science or to explain why it could not do so. *Id*. at 533. The Court further affirmed that Section 202(a) imposes a nondiscretionary duty upon EPA to promulgate greenhouse gas emission standards for new motor vehicles should EPA make a positive endangerment finding. *Id*.

In response to *Massachusetts*, EPA determined, based on an exhaustive review and analysis of the science, that emissions of greenhouse gases from new motor vehicles do contribute to air pollution that is reasonably anticipated to endanger the public health and welfare of current and future generations in the

United States. *See* Endangerment Finding. After making its Endangerment Finding, EPA promulgated the emission standards at issue for new model year 2012-2016 light-duty vehicles (cars and light trucks). 75 Fed. Reg. 25,324 (May 7, 2010) ("the Vehicle Rule") [JA XX]. These standards will result in significant reductions in greenhouse gas emissions from these vehicles.

The light-duty vehicle standards were promulgated in coordination with NHTSA's promulgation of fuel economy standards under EPCA to ensure that the standards are consistent with one another, as well as consistent with a separate set of California standards previously adopted by 13 States and the District of Columbia.

EPA's Vehicle Rule is challenged by business interests, certain States, and some public interest groups.[1] Other business interests, States, and public interest groups have intervened in support of EPA. Not one vehicle manufacturer actually subject to the challenged standards has sought or supported judicial review of the Vehicle Rule. In fact, vehicle manufacturers who are subject to the challenged standards have intervened *in support* of EPA's Vehicle Rule. The petitioners do not contest the *content* of the vehicle emission standards in any respect, but instead

1 NHTSA has been identified as a Respondent in petitions for review, but Petitioners have made clear they do not challenge any aspect of NHTSA's fuel economy standards under EPCA. These standards should therefore be summarily affirmed.

seek to topple the Vehicle Rule solely to prevent regulation of *stationary sources* of greenhouse gases pursuant to separate CAA programs that automatically apply once greenhouse gases are regulated anywhere under the Act.

II. Statutory Background

A. The Clean Air Act

The purpose of the CAA, 42 U.S.C. §§ 7401-7671q, is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," 42 U.S.C. § 7401(b).

1. Regulation of Mobile Sources

Title II of the CAA, 42 U.S.C. §§ 7521-7590, establishes a regulatory framework for controlling air pollution from motor vehicles and other mobile sources. Under section 202(a), EPA "shall" prescribe regulations establishing standards for "the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a). Once EPA makes such an "endangerment finding," the Act *requires* EPA to issue emission standards for new motor vehicles and engines, after considering the time necessary to develop and apply the requisite technology to meet the standards, and the cost of

compliance with the standards within the set time period. *Id.* § 7521(a)(2).

States are generally preempted from adopting their own motor vehicle standards. CAA Section 209(a), 42 U.S.C. § 7543(a). However, Section 209(b) of the Act allows EPA to waive preemption for the State of California. 42 U.S.C. § 7543(b). In making a Section 209(b) waiver determination, EPA must consider whether California standards are in the aggregate at least as protective as federal standards, address extraordinary and compelling conditions in the State, and are otherwise consistent with the CAA. *Id*. Pursuant to Section 177 of the Act, other States may then adopt standards identical to California's standards. 42 U.S.C. § 7507.

2. Stationary Sources of Air Pollutants

Stationary sources of air pollutants – as opposed to mobile sources – are not regulated under CAA Title II, but are regulated through separate statutory programs. Among these programs, Congress added the prevention-of-significant-deterioration ("PSD") program to Title I of the Act when it amended the Act in 1977. 42 U.S.C. §§ 7470-92. The primary requirement of the PSD program is a pre-construction permit requirement for certain stationary sources of air pollutants, under which the source is obligated to install and operate pollution controls. 42 U.S.C. § 7475. Generally speaking, a "major emitting facility" may not be

constructed or modified without first obtaining a PSD permit. 42 U.S.C. § 7475(a). The Act defines a "major emitting facility" as a stationary source that emits or has the potential to emit more than 100 or 250 tons (depending on the type of source involved) per year of "any air pollutant." 42 U.S.C. § 7479(1). A modification of an existing major emitting facility is defined by statute as a physical change or change in the method of operation that results in an increase in the amount of any air pollutant. 42 U.S.C. §§ 7479(2)(C); 7411(a)(4).

Consistent with these statutory provisions and applicable case law (*see Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)), under longstanding EPA regulations the PSD permit requirement is triggered, *inter alia*, by greater-than-threshold emissions of "[a]ny pollutant that otherwise is subject to regulation under the Act." 40 C.F.R. §§ 52.21(b)(50)(iv); 52.21(a)(1)-(2); *see also id.* § 51.166(a)(49)(iv); 51.166(a)(1). Once the PSD permit requirement is triggered, the substantive requirements of the permitting program then apply to "*each* pollutant subject to regulation" under the Act. 42 U.S.C. § 7475(a)(4) (emphasis added) (facility must use "best available control technology" ("BACT") for "each pollutant subject to regulation under [the Act]").

Determinations as to what constitutes BACT for particular facilities are made by the relevant state or federal permitting authority on a case-by-case basis.

42 U.S.C. § 7475(a); 40 C.F.R. §§ 52.21(a)(2), (j). BACT determinations must take into account, among other things, economic impacts and other costs. 42 U.S.C. § 7479(3).

Title V of the Act, 42 U.S.C. §§ 7661-61f, establishes an operating permit program covering stationary sources of air pollution. Under this "Title V" permit program, all CAA requirements applicable to a particular source are consolidated in a single, comprehensive permit. The permit requirement applies to, among others, any "major source" within the meaning of section 501(2) of the Act, 42 U.S.C. § 7661(2), which includes, *inter alia*, stationary sources that emit or have the potential to emit 100 tons per year of any air pollutant. CAA § 302(j), 42 U.S.C. § 7602(j).

B. The Energy Policy and Conservation Act

The Energy Policy and Conservation Act ("EPCA") has different purposes than the CAA: while the CAA is directed at reducing air pollution, EPCA's purpose is conservation of fuel. EPCA as amended, among other things, directs the Secretary of Transportation to prescribe corporate average fuel economy ("CAFE") standards for new automobiles. 49 U.S.C. § 32902(a). The Secretary has delegated that authority to NHTSA.

NHTSA promulgates average fuel economy standards applicable to each

manufacturer's fleet of vehicles. CAFE standards "shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in [a] model year." 49 U.S.C. § 32902(a). Separate CAFE standards for passenger cars and light trucks must be set by regulation for each model year, and must be promulgated "[a]t least 18 months before the beginning of each model year." *Id*.

III. Regulatory Background

A. The Supreme Court's Decision in *Massachusetts*

In 1999, EPA received a petition for rulemaking which contended that EPA must regulate greenhouse gas emissions from new motor vehicles under CAA Section 202. *Massachusetts*, 549 U.S. at 510. EPA denied that request in 2003, concluding that the CAA did not authorize EPA to regulate greenhouse gases to address global climate change, and that even if it had the authority, it would be unwise for a variety of policy reasons to exercise that authority. *Id.* at 511. In *Massachusetts*, the Supreme Court rejected these arguments and concluded that EPA had improperly denied the petition. The Court held that greenhouse gases are air pollutants within the meaning of the Act and directed EPA to make an endangerment determination based on its consideration of the science or explain why it could not do so. 549 U.S. at 528-35. The Court explained that if EPA were

to make a finding of endangerment, then "the [CAA] *requires* the Agency to regulate emissions [of greenhouse gases] from new motor vehicles." 549 U.S. 533 (emphasis added).

In denying the petition for rulemaking, EPA had contended, among other things, that it should not regulate greenhouse gas emissions from motor vehicles because doing so would require it to tighten fuel economy standards, a task assigned to NHTSA pursuant to EPCA. *Id*. at 531-32. The Supreme Court rejected this basis for refusing to engage in section 202(a) rulemaking. The Court explained that NHTSA's authority under EPCA "in no way licenses EPA to shirk its environmental responsibilities," and that EPA's obligations under the CAA are "wholly independent of [NHTSA's] mandate to promote energy efficiency." *Id*. at 532. The Court noted that while "[t]he two obligations may overlap, there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." *Id.*

B. The Endangerment Finding

Acting in accordance with the Supreme Court's instructions, EPA conducted an exhaustive review of the relevant science and published findings concerning whether greenhouse gas emissions from motor vehicles contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. 74 Fed.

Reg. 66,496 [JA XX]. EPA began by defining the "air pollution" referenced in section 202(a) to be the atmospheric mix of six long-lived and directly-emitted greenhouse gases: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). *Id.* at 66,497, 66,516-22 [JA XX, XX-XX]. EPA then found that this air pollution may "reasonably be anticipated both to endanger public health and to endanger public welfare." *Id.* at 66,497 [JA XX]. EPA concluded, among other things, that anthropogenic emissions of greenhouse gases are causing atmospheric levels of greenhouse gases in our atmosphere to rise to levels essentially unprecedented in human history and that the accumulation of greenhouse gases in our atmosphere is unequivocally exerting a warming effect on the climate. *Id*. at 66,517 [JA XX]. EPA further concluded that the adverse risks and effects of climate change projected to occur for current and future generations include, but are not limited to, more frequent and intense heat waves, degraded air quality, more intense storms, increased drought, greater sea level rise, harm to agriculture, and harm to wildlife and ecosystems. *Id*. at 66,497-99, 66,516-36 [JA XX-XX, XX-XX].

EPA then made findings pertaining to the "cause or contribute" criterion in section 202(a). EPA defined the relevant "air pollutant" as "the aggregate group of

the same six long-lived and directly-emitted greenhouse gases . . . ." 74 Fed. Reg. at 66,536 [JA XX]. EPA found that emissions of this "air pollutant" from new motor vehicles and new motor vehicle engines "contribute" to the "air pollution" for which the endangerment finding was made. *Id.* at 66,499, 66,537-45 [JA XX, XX-XX]. Collectively, EPA's effects and contribution findings are referred to as the "Endangerment Finding." Numerous parties have challenged the Endangerment Finding. These challenges have been consolidated under Case No. 09-1322. They are the subject of separate briefing, but will be heard together with this case.

C. The Vehicle Rule

Once EPA makes a positive endangerment finding for particular pollutants, CAA sections 202(a)(1) and (2) *require* EPA to issue emission standards for motor vehicles addressing emissions of those pollutants. 42 U.S.C. § 7521(a)(1), (2). Having made its Endangerment Finding for greenhouse gases, EPA accordingly promulgated greenhouse gas emission standards for new light-duty vehicles for model years 2012–2016. 75 Fed. Reg. 25,324 (May 7, 2010) ("the Vehicle Rule") [JA XX]. EPA did so as part of a joint rulemaking with NHTSA, which simultaneously promulgated fuel economy standards under EPCA for the same vehicles. As part of that joint rulemaking, EPA and NHTSA developed a joint

technical analysis of (among other things) available technologies and their costs and effectiveness. *Id.* at 25,348-96 [JA XX-XX]; Joint Technical Support Document (JA XX). Each agency then developed final standards under its separate and independent statutory authority.

Promulgating the greenhouse gas standards as part of a joint rulemaking with NHTSA furthered a carefully designed federal policy of establishing consistent, harmonized, and streamlined federal and state requirements that will reduce greenhouse gas emissions and improve fuel economy for light-duty vehicles sold in the United States, while allowing automakers to sell a single fleet of light-duty vehicles nationally. 75 Fed. Reg. at 25,326/2 [JA XX]; 74 Fed. Reg. 24,007 (May 22, 2009) [JA XX]. This policy is commonly referred to as the "National Program."[2]

The National Program recognizes the close relationship between improving fuel economy and reducing greenhouse gas emissions. 75 Fed. Reg. at 25,327/1 [JA XX]. The amount of carbon dioxide tailpipe emissions is generally constant

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2 State Petitioners assert that the "reason EPA joined NHTSA in promulgating [the Vehicle Rule] was to trigger its authority to regulate stationary sources." *See* State Br. at 17. Their assertion, however, lacks any record foundation and grossly mischaracterizes the purpose of the National Program. As stated above, the sole intent and purpose of the National Program was to establish consistent, harmonized, and streamlined federal and state requirements related to *motor vehicle* fuel efficiency and greenhouse gas emissions and to allow automakers to produce one single fleet of light-duty vehicles nationally.

per gallon combusted of a given type of fuel. *Id.* Thus, the more fuel efficient a vehicle is, the less fuel it burns to travel a given distance. *Id.* The less fuel it burns, the less carbon dioxide it emits in traveling that distance. *Id.* Therefore, the same technologies that reduce fuel consumption also reduce tailpipe carbon dioxide emissions. *Id.*

The Vehicle Rule greenhouse gas emission standards are consistent with, but are separate from, NHTSA's fuel economy standards. As a result of certain differences between the CAA and EPCA, EPA's standards are projected to result in 47 percent greater overall greenhouse gas emission reductions over the lifetime of model year 2012-2016 vehicles compared with the corresponding NHTSA fuel economy standards. 75 Fed. Reg. at 25,490, Table III.F.1-2 [JA XX]; 75 Fed. Reg. at 25,636, Table IV.G.1-4 [JA XX]. One important difference is that the Vehicle Rule standards encompass reductions in greenhouse gases that can be achieved by air-conditioning system improvements, which NHTSA did not believe it had statutory authority to address in establishing fuel economy standards. *Id.* at 25,342/2 [JA XX]. In addition, the CAA allows various compliance flexibilities (among them certain credit generating and unlimited transferring mechanisms) not present in EPCA. *Id.* at 25,339-51 and 25,331. n.24 [JA XX-XX]. Conversely, EPCA allows a manufacturer to pay a defined civil penalty in lieu of meeting

CAFE standards, while the CAA does not allow similar departures from Section 202 emission standards. 75 Fed. Reg. at 25,342 [JA XX].

EPA's Vehicle Rule generally requires each manufacturer to meet its own fleet-wide emission standard for cars, and separately, for light trucks, based on the vehicles the manufacturer chooses to produce each year. *Id.* at 25,405 [JA XX]. These fleet-wide standards are based on a carbon dioxide ("CO_2") emissions target for each vehicle in a manufacturer's fleet, with the vehicle-specific targets calculated based on the size of each vehicle, and with larger vehicles having larger CO_2 targets. *Id*. at 25,336-37, 25,686 (40 C.F.R. § 86.1818-12) [JA XX-XX, XX]. The fleet-wide standard is then set as a production-weighted average of each manufacturer's vehicle fleet. The Rule also sets separate standards to cap tailpipe emissions of the potent greenhouse gases nitrous oxide and methane. *Id.* at 25,421-24 [JA XX-XX].

The standards provide a number of compliance flexibilities to manufacturers intended to reduce the overall cost of the program without compromising overall environmental objectives. 75 Fed. Reg. at 25,338-41 [JA XX-XX]. Manufacturers may earn credits toward meeting their fleet-wide standards by, among other things, improving air conditioning systems to increase system efficiency and reduce

hydrofluorocarbon[3] refrigerant leakages, utilizing certain innovative technologies, and generating early credits based on improved performance in model years 2009-2011 (the model years before the standards apply). *Id.* at 25,424-44 [JA XX-XX].

EPA expects that automobile manufacturers will be able to meet the light-duty vehicle greenhouse gas standards by utilizing already available technologies more broadly across the light-duty fleet. 75 Fed. Reg. at 25,328 [JA XX]. These technologies include improvements to engines, transmissions, and vehicles, including improvements in air conditioning systems, and increased use of hybrids. *Id.*

D. California Greenhouse Gas Standards and the Alternative Compliance Option

Prior to promulgation of EPA's Vehicle Rule, the State of California in 2004 approved greenhouse gas standards for new light-duty vehicles sold in California for model years 2009 through 2016. In July 2009, EPA granted California's request under CAA section 209(b), 42 U.S.C. § 7543(b), for a waiver of CAA preemption for these state standards. 74 Fed. Reg. 32,744 (July 8, 2009) [JA XX].[4]

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3 Hydrofluorocarbons are potent greenhouse gases that are used as a refrigerant in vehicle air conditioners. NHTSA had no authority to address them under EPCA. *See* 75 Fed. Reg. at 25,424-25 [JA XX-XX], 74 Fed. Reg. 49,454, 49,459/3 (Sept. 28, 2009) [JA XX].

4 Petitions for review of EPA's waiver decision were denied by this Court on standing and mootness grounds. *Chamber of Commerce v. EPA*, 642 F.3d 192 (D.C. Cir. 2011).

Thirteen States and the District of Columbia, comprising approximately 40 percent of the U.S. light-duty vehicle market, have adopted California's standards, as they are permitted to do by CAA section 177, 42 U.S.C. § 7507. 75 Fed. Reg. at 25,327 [JA XX].

In May 2009, California announced its commitment to take several actions in support of the National Program, including revising its program for model year 2012-2016 standards to provide that compliance with the EPA model year 2012-2016 greenhouse gas standards would be deemed compliance with California's corresponding greenhouse gas standards. *Id*. at 25,327-28 [JA XX-XX]. This "alternative compliance option" would allow automakers to meet the two Federal programs (EPA's greenhouse gas standards and NHTSA's fuel economy standards), and California's requirements as well, through a single national fleet of vehicles. California proceeded to revise its 2004 regulations in accordance with this commitment. Cal. Code Regs. Tit. 13, § 1961.1 [JA XX].

Without EPA's Vehicle Rule, California would not have offered this alternative compliance option. 75 Fed. Reg. at 25,402/1-2 [JA XX]; February 23, 2010 Letter, Docket No. EPA-HQ-OAR-2009-0472-11400 [JA XX]. Absent the alternative compliance option, each auto manufacturer would have been faced with the costly prospect of manufacturing at least two fleets of vehicles (and possibly

more) for domestic sale, one that met California's more stringent standards for sale in California and in each of the States that adopted California standards, and a national fleet that met the less stringent national CAFE standards. 75 Fed. Reg. at 25,326/2 [JA XX].[5]

E. Forthcoming EPA Section 202 Rulemakings Addressing Greenhouse Gas Emissions from New Motor Vehicles

Beyond the Vehicle Rule, EPA has been engaged in two additional Section 202(a)(1) rulemaking efforts addressing greenhouse gas emissions from new motor vehicles, consistent with its mandatory legal obligations having made the Endangerment Finding. In furtherance of the National Program, these rulemaking efforts have been conducted jointly with NHTSA's establishment of fuel economy standards.

First, on August 9, 2011, EPA and NHTSA signed final greenhouse gas emission and fuel economy standards for medium and heavy-duty vehicles for model years 2014 through 2018, and for new engines installed in those vehicles. [____] Fed. Reg. [____] [JA XX]. These medium and heavy-duty vehicles include the largest pickup trucks and vans, and all types of work trucks and buses. Second,

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5 Among other differences between California and CAFE standards, California standards are not expressed as attribute-based, manufacturer-specific standards determined by a manufacturer's fleet of vehicles, and do not recognize credits for use of flexible fuel vehicles that are available under EPCA and the CAFE standards. Cal. Code Regs. Tit. 13, § 1961.1 [JA XX]; 75 Fed. Reg. at 25,546/3, 25,665-66 [JA XX, XX-XX].

EPA and NHTSA have announced their intent to conduct a joint rulemaking to establish greenhouse gas emissions and fuel economy standards for light-duty vehicles for model years 2017 through 2025. 75 Fed. Reg. 62,739 (Oct. 13, 2010) [JA XX]; 76 Fed. Reg. 48,754 (Aug. 9, 2011) [JA XX]. The agencies intend to propose greenhouse gas emissions reductions and fuel economy improvements that go well beyond what is achieved by the model year 2012-2016 standards challenged here.[6] In other words, the Vehicle Rule represents only EPA's first step in reducing motor vehicle greenhouse gas emissions. Thus, the cumulative greenhouse gas emission reductions that will follow from EPA's positive Section 202(a) endangerment finding will ultimately be far greater than the reductions achieved just by the present Vehicle Rule.

F. EPA Actions Concerning the Stationary Source PSD Program

Once a pollutant becomes subject to regulation under any provision of the CAA (including the Act's mobile source provisions), the Act's PSD requirements become automatically applicable to stationary sources' emissions of those pollutants as well. 42 U.S.C. §§ 7475(a)(4), 7479(1); 67 Fed. Reg. 80,186, 80,240 (Dec. 31, 2002). Thus, promulgation of the Vehicle Rule indirectly triggered

6 EPA currently intends to propose standards that would be projected to achieve, on an average industry fleet-wide basis, greenhouse gas reductions that would be equivalent to 54.5 miles per gallon if all of the CO_2 emission reductions were achieved with fuel economy technology. 75 Fed. Reg. at 48,759/3 [JA XX].

regulation of greenhouse gas emissions by stationary sources under this separate statutory program, as it marked the first time that greenhouse gases became subject to regulation under the Act. *See* 75 Fed. Reg. 17,004, 17,019/3 [JA XX] (Apr. 2, 2010) ("the Timing Decision"). Likewise, once greenhouse gases became a pollutant subject to regulation under the Act, major sources of greenhouse gases became subject to CAA Title V. 42 U.S.C. §§ 7661(2), 7661a.

EPA has taken certain actions to address the general implementation of PSD and Title V requirements for greenhouse gases, once such regulation is triggered by operation of the statute. While these actions are independent of the Vehicle Rule itself, some understanding of these actions is useful for context.

First, in 2008, EPA issued an interpretive memorandum concerning *when* a pollutant is considered "subject to regulation" under the Act for purposes of determining when the PSD program applies to emissions of that pollutant.[7] Congress explicitly stated in the Act, and EPA regulations have accordingly long provided, that the PSD program and its provisions apply to emissions of "any air pollutant" that is subject to regulation under the Act. 42 U.S.C. §§ 7475(a), 7475(a)(4), 7479; 40 C.F.R. § 52.21(b)(1), (b)(2), (b)(50)(iv), (j)(2)-(3). In the

7 *See* Memorandum from Stephen L. Johnson, Administrator, EPA, dated December 18, 2008, entitled "EPA's Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program."

PSD Interpretive Memo, EPA explained that mere monitoring and reporting requirements under the Act were insufficient to make a pollutant "subject to regulation" and that a pollutant is not "regulated" within the meaning of the Act unless it is covered by an EPA regulation that requires *actual control* of emissions. The Agency ultimately concluded in a 2010 refinement of that interpretation, after reconsideration, that greenhouse gases will become "subject to regulation" under the Act for the first time when the limitations on greenhouse gas emissions adopted in the Vehicle Rule actually take effect on January 2, 2011. *See* Timing Decision, 75 Fed. Reg. 17,004 [JA XX]. Thus, pursuant to the Act and as explained in the Timing Decision, greenhouse gas emissions would be "subject to regulation" for purposes of PSD applicability on that date. 75 Fed. Reg. at 17,019/3 [JA XX].

EPA recognized that immediately implementing PSD (as well as Title V) permit requirements for all new or modified stationary sources emitting major amounts of greenhouse gases (at the statutory thresholds of 100 and 250 tons per year) would be administratively impracticable due to the enormous number of sources that emit more than the threshold volumes of greenhouse gases. Following consideration of extensive public comments, EPA thus promulgated the "Tailoring Rule" to establish an effective process by which permit requirements for greenhouse gases can be phased in over time. 75 Fed. Reg. 31,514 (June 3, 2010)

[JA XX]. Petitions for review challenging the Tailoring Rule and Timing Decision have been consolidated under No. 10-1073 and will be briefed separately but heard with this case.

Both the Tailoring Rule and the Timing Decision are palliative actions: they postpone regulatory burdens that would exist absent their promulgation. In the Tailoring Rule, EPA reduced the initial burdens on the regulated community that result from the statutorily-mandated application of PSD and Title V to greenhouse gases by administratively raising the thresholds at which these programs would otherwise apply to sources that emit greenhouse gases. In the Timing Decision, EPA interpreted the term "subject to regulation" conservatively, such that the PSD and Title V programs were not considered triggered by either longstanding reporting and monitoring requirements for greenhouse gases or immediately upon the promulgation of the Vehicle Rule; rather, EPA determined that greenhouse gases would not become "subject to regulation" until the date on which the first model year 2012 cars became subject to the standards in the Vehicle Rule – January 2, 2011.

STANDARD OF REVIEW

Challenged portions of a final rule under the CAA may not be set aside unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law" or are in excess of EPA's "statutory jurisdiction, authority, or limitations." 42 U.S.C. § 7607(d)(9).

This standard presumes the validity of agency action, and a reviewing court is to uphold an agency action if it satisfies minimum standards of rationality. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520-21 (D.C. Cir. 1983); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court is not "to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Judicial deference also extends to an agency's interpretation of a statute it administers. *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). Under *Chevron*, if Congress has "directly spoken to the precise question at issue," that intent must be given effect. 467 U.S. at 842-43. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Judicial review of certain CAA rules, including the one at issue, must be

premised "exclusively" on the administrative record underlying the rule. 42 U.S.C. § 7607(d)(7)(A).

SUMMARY OF ARGUMENT

EPA's greenhouse gas emission standards for light-duty vehicles fully comport with the requirements of Section 202 of the Clean Air Act and the Supreme Court's ruling in *Massachusetts*. These landmark standards will achieve significant greenhouse gas reductions from one of the largest domestic source categories for these pollutants. Atmospheric concentrations of greenhouse gases endanger public health and welfare by causing or contributing to climate change. EPA reasonably promulgated vehicle greenhouse gas emission standards in coordination with NHTSA's promulgation of fuel economy standards under EPCA to ensure consistent federal and state requirements for mobile sources relating to fuel economy and greenhouse gases.

Petitioners themselves are not subject to these standards and do not challenge any substantive aspect of them. Instead, they contend that EPA should have declined to promulgate *any* vehicle emission standards because separate statutory programs automatically impose permitting requirements on *stationary* sources once greenhouse gases are subject to regulation anywhere under the Act. This argument lacks merit and ignores that Section 202 unequivocally directs EPA

to set greenhouse gas vehicle emission standards following an endangerment finding.

EPA did consider, and appropriately rejected, Petitioners' suggestion that EPA conduct assessments, as part of the vehicle standard rulemaking, of the burdens on stationary sources associated with having to comply with separate statutory programs. As EPA explained, such analyses were not required by Section 202 and would not have provided EPA with any information relevant to the statutory criteria or applicable content of the vehicle emission standards that EPA had a nondiscretionary duty to promulgate. EPA further indicated that it would consider Petitioners' concerns related to burdens of complying with separate Clean Air Act programs in other administrative proceedings focused specifically on the implementation of those programs. EPA subsequently did just that in the Tailoring Rule.

Contrary to Petitioners' characterizations, EPA's vehicle standards will achieve significant and important reductions of greenhouse gas emissions. In any event, EPA did not have discretion to decline to promulgate any emission standards at all once it found endangerment. Likewise, EPA had no discretion to decline to promulgate standards based upon NHTSA's independent authority to set vehicle fuel economy standards under EPCA. Indeed, the Supreme Court made

this clear in *Massachusetts*.

Petitioners' brief also contains attacks on EPA's Endangerment Finding and EPA's separate actions implementing PSD program requirements. These challenges are not properly brought in this case. We address the substance of Petitioners' arguments with respect to these separate EPA actions in the appropriate cases, which have been procedurally coordinated with this one.

In short, Petitioners have identified no defect whatsoever in EPA's vehicle emission standards. These important and required standards should be upheld.

ARGUMENT

I. EPA's Vehicle Rule Comports With Congress' Direction.

CAA Section 202 establishes a two-step path governing regulation of emissions from new motor vehicles. 42 U.S.C. § 7521. In the first step, pursuant to Section 202(a)(1), EPA is to determine whether, in the Administrator's "judgment," emissions of "any air pollutant" from motor vehicles "cause or contribute" to "air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). In the second step, if the Administrator determines that such an endangerment to health or welfare exists, EPA is *required* to issue standards for such emissions, *id.*, taking into account the

cost and technological factors set forth separately in subsection 202(a)(2), 42 U.S.C. § 7521(a)(2).

Prior to promulgating the Vehicle Rule, EPA determined that greenhouse gases may "reasonably be anticipated both to endanger public health and to endanger public welfare," and that emissions of these greenhouse gases from new motor vehicles "contribute" to the air pollution that may be reasonably anticipated to endanger public health and welfare. 74 Fed. Reg. at 66,497-99, 66,523-45 [JA XX-XX, XX-XX].

Having made this positive Endangerment Finding, EPA had a nondiscretionary duty under Section 202(a) to promulgate standards for the vehicle emissions contributing to the endangerment. EPA's Vehicle Rule fulfills EPA's nondiscretionary duty to promulgate such standards with respect to model year 2012-2016 light-duty vehicles. These standards will provide significant cost-effective reductions in greenhouse gases, and automobile manufacturers will be able to meet these standards using already available technologies. 75 Fed. Reg. at 25,328, 25,535-36 [JA XX, XX-XX]. No automobile manufacturer has challenged the Vehicle Rule.

A. EPA Appropriately Promulgated Emission Standards That It Had a Nondiscretionary Duty to Promulgate.

Petitioners mount no challenge to any substantive aspect of the vehicle

emission standards EPA has promulgated. Instead, they contend that EPA should have declined to establish *any* emission standards for vehicles, because once greenhouse gas emissions from mobile sources are regulated under CAA Section 202, then stationary sources of greenhouse gases will automatically become subject to the Act's PSD and Title V permitting requirements by operation of statute. *See* Ind. Br. at 17.

Nothing in Section 202 of the Act, however, provides EPA with discretion to decline to set emission standards for mobile sources of air pollutants that EPA has found contribute to the air pollution that endangers public health and welfare, based on consequences for stationary sources under separate statutory programs also intended to protect public health and welfare. Congress' direction in Section 202 is unambiguous. Congress specified that EPA "*shall*" promulgate emission standards once it makes an Endangerment Finding. The word "shall" is a command that admits of no discretion. *Ass'n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994). Put simply, once a positive endangerment finding is made, EPA then has a nondiscretionary obligation to promulgate emission standards.

To the extent there was any doubt that Section 202 means what it says, the Supreme Court specifically addressed the scope of Section 202 in *Massachusetts*

and confirmed the nondiscretionary nature of EPA's duty to promulgate emission standards following an endangerment finding: "If EPA makes a finding of endangerment, the [CAA] *requires* the Agency to regulate emissions of the deleterious pollutant from new motor vehicles." 549 U.S. at 533 (emphasis added). In the Tailoring Rule case, State Petitioners themselves concede this point. *See* State Petitioners' Brief in Case Nos. 10-1073 et al. at 12-13 (quoting relevant passage in *Massachusetts* and conceding that "if EPA makes a finding of endangerment, the [CAA] *requires* the Agency to regulate emissions of the deleterious pollutant from new motor vehicles.") (emphasis added).

EPA did not "misunderstand" (Ind. Br. at 12) *Massachusetts* in promulgating emission standards that the Supreme Court confirmed EPA was "required" to promulgate. 549 U.S. at 533. Industry Petitioners emphasize that *Massachusetts* did leave open the possibility that EPA would be unable to make an endangerment finding for reasons grounded in the statute or based on scientific uncertainties. Ind. Br. at 13. But EPA has now made an endangerment finding for reasons grounded in the statute and the science. Having made its endangerment finding, EPA had no discretion to decline to promulgate emission standards.

In short, Section 202 unequivocally directs EPA to promulgate emissions standards following an endangerment finding. Petitioners' position that

promulgating Section 202 standards following an endangerment finding somehow "violates . . . statutory requirements" is nonsensical and stands Section 202 on its head. *See* Ind. Br. at 11.

B. CAA Section 202(a)(2) Does Not Require EPA to Assess Indirect Stationary Source Impacts Arising From the Automatic Implementation of Other Statutory Programs.

Petitioners contend that EPA should at least have assessed, prior to promulgating the Vehicle Rule, indirect burdens to stationary sources of air pollution or to permitting authorities that would arise in connection with the automatic application of separate PSD and Title V permitting requirements, once greenhouse gases became subject to regulation under the Act through promulgation of vehicle standards. State Br. at 15-18; Ind. Br. at 19. But nothing in the Act requires EPA to assess such costs as part of a Section 202 rulemaking.

Petitioners purport to find an obligation (s*ee* State Br. at 15-16) for EPA to assess indirect burdens on stationary sources in CAA section 202(a)(2), which provides in relevant part that vehicle emission standards shall take effect "after providing such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." As this Court has previously made clear, "the cost of compliance within such period" phrase in

section 202(a)(2), connected as it is with the requirement that EPA provide sufficient lead time to allow technological development, refers to the costs to *vehicle manufacturers* associated with implementing technology to meet vehicle standards within the period of compliance, and does not refer to indirect costs that might be incurred by other persons (such as stationary sources) as a result of required vehicle standards. *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1115-20 (D.C. Cir. 1979) ("*MEMA*").

In *MEMA*, associations representing automotive parts and services industries challenged EPA's decision under CAA Section 209, 42 U.S.C. § 7543, to waive federal preemption for California regulations limiting the amount of maintenance that a manufacturer can require of motor vehicle purchasers in the written instructions that accompany new motor vehicles sold in that State. The petitioners contended that EPA had a duty, arising in part out of CAA Section 202's requirement that EPA give appropriate consideration to the "cost of compliance," to consider petitioners' claims that California's regulations were anticompetitive because they were designed to reduce the business available to the automotive parts and services industry. This Court rejected petitioners' argument, explaining that "Section 202's cost of compliance concern, juxtaposed as it is with the requirement that the Administrator provide the lead time to allow technological

developments, refers to the economic costs of motor vehicle emission standards and accompanying enforcement procedures," and does not encompass indirect costs that might be incurred by the automotive parts and services industries as a result of such standards. 627 F.2d at 1118. The Court, citing pertinent legislative history, explained that:

> Congress wanted to avoid undue economic disruption to the *automotive manufacturing industry* and also sought to avoid doubling or tripling the cost of motor vehicles to purchasers. It therefore requires that [motor vehicle] emission regulations be technologically feasible within economic parameters. Therein lies the intent of the 'cost of compliance' requirement.

Id. (emphasis added). Thus, to the extent there was any doubt as to the proper scope of Section 202(a)(2), this Court's well-reasoned analysis of that subsection in *MEMA* removes it.

Indeed, the costs to stationary sources associated with PSD permitting requirements that are of concern to petitioners here are even *less* linked to the content of motor vehicle emission standards than were the indirect costs at issue in *MEMA*. There, the economic injury to the automotive parts and services industry at issue at least flowed from the content of the motor vehicle emission standards themselves. In contrast, Petitioners' alleged economic injury here does not turn *at all* on the content of the motor vehicle emission standards challenged.

Consistent with Section 202(a)(2), EPA *did* assess costs to vehicle manufacturers and the time necessary to permit the development and application of the requisite technology. 75 Fed. Reg. at 25,513-20 [JA XX]; Regulatory Impact Analysis ("RIA"), Chapters 1, 2, 4 and 6 [JA XX-XX, XX-XX]; Joint Technical Support Document ("TSD"), Chapter 3 [JA XX-XX]. Vehicle manufacturers have intervened in support of EPA's rule and have not contested this cost analysis.

C. EPA Addressed Petitioners' Comments Regarding Indirect Burdens to Stationary Sources.

Although Section 202(a)(2) does not direct EPA to consider the indirect burdens to stationary sources that would be triggered following promulgation of vehicle standards, EPA did respond to Petitioners' comments suggesting that EPA, within the vehicle rulemaking, conduct analyses of costs arising from implementation of the Act's PSD and Title V permitting programs once greenhouse gas emissions became subject to regulation. Response to Comments ("RTC") at 7-66 [JA XX]. As EPA explained, it appropriately declined to do so as part of the vehicle rulemaking because doing so would not have provided EPA with any relevant information related to the content of the required vehicle emission standards. *Id.* The indirect impacts on stationary sources that would ensue by operation of separate provisions of the statute simply bore no relevance to any of the issues EPA was directed by statute to consider in determining the content of the

required vehicle standards. *Id.*

EPA additionally explained that it intended to (and that it was appropriate to) address concerns about stationary source permitting requirements in separate administrative actions focused specifically on the implementation of the PSD program. RTC 7-66 [JA XX]; 75 Fed. Reg. at 25,402/1 [JA XX]. In fact, EPA did assess in the Tailoring Rule costs and burdens to both stationary sources and permitting authorities arising from the application of PSD and Title V programs to greenhouse gases. 75 Fed. Reg. at 31,533-41 [JA XX-XX], 31,595-602 [JA XX-XX]; Tailoring Rule Regulatory Impact Analysis [JA XX-XX].

Petitioners suggest that if EPA had conducted analyses of stationary source permitting costs as part of the vehicle rulemaking, as opposed to in a separate action focused on implementation of the PSD program, it could have used such analyses as an excuse for declining to comply with Congress' direction in Section 202 that EPA promulgate mobile source emission standards once it finds endangerment. Ind. Br. at 17, 19. But EPA had no such discretion. EPA instead had a clear nondiscretionary duty under Section 202 to promulgate vehicle emission standards in view of its Endangerment Determination. Moreover, the Supreme Court in *Massachusetts* had already directed EPA to comply with its obligations under Section 202 and rejected EPA's initial decision to decline to

promulgate standards on policy grounds such as those now advanced by Petitioners.

Petitioners' real complaint here, of course, is not with any aspect of EPA's Section 202 light-duty vehicle emission standards, but instead with the preconstruction permitting requirements that Congress itself imposed elsewhere in the Act on major stationary sources of pollution. *See* 42 U.S.C. § 7475(a). *Congress*, not EPA, elected to impose these obligations on stationary sources of pollutants to protect public health and welfare. Petitioners' dissatisfaction with statutory requirements may be genuine, but their dissatisfaction with the Act is not a basis for this Court to void Section 202 motor vehicle emission standards that have been properly promulgated by EPA.

While not material to resolution of Petitioners' argument, we note that Industry Petitioners mischaracterize EPA's Tailoring Rule in suggesting that EPA did not consider and address any stationary source permitting costs in that rulemaking. *See* State Br. at 11 (asserting that EPA "avoided considering stationary-source costs" in Tailoring Rule); Ind. Br. at 20 (asserting that EPA "refused to address" stationary source impacts in Tailoring Rule). EPA did evaluate and consider within the Tailoring Rule costs to both regulated sources and permitting authorities associated with obtaining and processing PSD and Title V

permits for greenhouse gas emissions. 75 Fed. Reg. at 31,533-41 [JA XX-XX], 31,595-602 [JA XX-XX]; Tailoring Rule RIA (JA XX-XX). EPA then tailored the applicability criteria for PSD and Title V permitting requirements, based in part on these cost analyses, to reduce the initial burdens to regulated sources and permitting authorities that otherwise would ensue immediately by operation of the statute.[8]

D. EPA Appropriately Promulgated Required Greenhouse Gas Standards in Conjunction With NHTSA's Fuel Economy Standards To Ensure a Consistent Set of Federal and State Standards.

EPA also considered and reasonably responded to comments in the vehicle rulemaking suggesting that EPA should indefinitely delay setting required greenhouse gas standards for new motor vehicles to avoid triggering any stationary source regulation under other provisions of the Act. To begin with, EPA noted that while it had some discretion over the *timing* of its regulations, its discretion even in that regard was not unlimited, and EPA had an ongoing duty to promulgate standards. RTC 7-67 [JA XX]. EPA pointed out that three years had

8 In the Tailoring Rule, EPA was unable to project the costs associated with implementing best available control technology (BACT) because of the difficulty of predicting the results of the BACT process as applied to new pollutants and classes of sources. 75 Fed. Reg. at 31,598 [JA XX]. BACT generally is decided for stationary sources by the permitting authority on a case-by-case basis taking into account, among other things, economic impacts and costs. 42 U.S.C. § 7479(3). Thus, BACT economic impacts and costs are considered prior to issuance of any permit.

already passed since the Supreme Court's decision in *Massachusetts*, so there had been considerable delay already.

EPA then explained that any additional delay in setting motor vehicle standards would thwart implementation of the carefully-crafted National Program for regulation of motor vehicles, resulting in substantial prejudice to vehicle manufacturers and consumers. 75 Fed. Reg. at 25,402 [JA XX]; RTC 7-67 to 7-68 [JA XX-XX]. In particular, California had indicated that it would support the National Program by accepting compliance with EPA's greenhouse gas standards as an alternative means of compliance with California's standards (adopted by 13 other States and the District of Columbia). However, California would not offer a compliance option based on federal CAFE standards in the absence of EPA's greenhouse gas standards. 75 Fed. Reg. at 25,402 [JA XX]; February 23, 2010 Letter, Docket No. EPA-HQ-OAR-2009-0472-11400 [JA XX]. Accordingly, if EPA had delayed setting national greenhouse gas emission standards until sometime after the CAFE standards were promulgated, vehicle manufacturers would then have been compelled to comply with three separate federal and state regulatory regimes: NHTSA's CAFE standards, California's greenhouse gas standards (in California and all States that have adopted California standards), and EPA's greenhouse gas standards (when later promulgated), as opposed to being

able to comply with one consistent set of federal greenhouse gas and fuel economy standards across the entire nation. For this reason, the automakers who are actually subject to EPA's greenhouse gas standards strongly *supported* EPA's decision to promulgate emission standards in conjunction with NHTSA's standards. *See*, *e.g.*, Comments of Alliance of Automobile Manufacturers, Docket No. EPA-HQ-OAR-2009-0472-6952.1 [JA XX], Comments of Association of International Automobile Manufacturers, Docket No. EPA-HQ-OAR-2009-0472-7123.1 [JA XX]. Automobile manufacturers commented that the absence of the National Program would "present a myriad of problems for the auto industry in terms of product planning, vehicle distribution, adverse economic impacts, and most importantly, adverse consequences for dealers and consumers." March 17, 2010 Letter, Docket No. EPA-HQ-OAR-2009-0472-11400 [JA XX].

EPA also noted in response to comments that additional delay in promulgating required greenhouse gas standards would result in a loss of some of the important environmental benefits associated with its standards.[9] EPA further explained that it intended to consider and address commenters' concerns about burdens associated with stationary source permitting in other EPA actions focused specifically on implementation of the PSD program. 75 Fed. Reg. at 25,402 [JA

9 EPA's standards achieve significant greenhouse gas reductions beyond those achieved by NHTSA fuel economy standards alone. *See* discussion, *infra*, at 58-61.

XX]. As discussed above, EPA did just that in the Tailoring Rule.

In short, EPA provided compelling reasons for electing to proceed to fulfill its nondiscretionary duty to promulgate Section 202 vehicle emission standards in conjunction with NHTSA's promulgation of fuel economy standards under EPCA. Regardless, EPA acted well within its discretion in promulgating emission standards that it was statutorily required to issue. An agency's compliance with a nondiscretionary statutory duty does not and cannot constitute an abuse of discretion.

E. EPA Complied with Applicable Procedural Requirements.

Industry Petitioners' scattershot and undeveloped arguments concerning compliance with the procedural requirements in various cited statutes and executive orders also lack merit. *See* Ind. Br. at 21-24. EPA fully complied with the requirements of all of the cited provisions, none of which imposes any duty upon EPA to assess stationary source compliance costs in the context of promulgating motor vehicle emission standards under Section 202. Furthermore, claims premised on most of the provisions cited are not even reviewable by this Court. We briefly address each of these provisions below.

CAA Section 317: CAA Section 317, 42 U.S.C. § 7617, directs EPA to prepare an economic impact assessment with respect to vehicle emission standards,

including assessment of a rule's compliance costs. Here, EPA prepared a Section 317 economic impact assessment, 75 Fed. Reg. at 25,509-38 [JA XX-XX], and RIA (assessing, among other things, costs of the vehicle program, impacts and assessments of standards both more and less stringent than those adopted, vehicle sales impacts, consumer lifetime savings on new vehicle purchases, energy use impacts, and small business impacts) [JA XX-XX]. *See also* RTC at 5-456 ("EPA believes that its RIA satisfies the requirements of section 317 of the Act, which calls for an analysis of the impacts of the requirements imposed by this rule, not indirect effects that flow from it") [JA XX].

In any event, EPA's compliance with Section 317 is not subject to judicial review. Section 317(e) provides:

> Nothing in this section shall be construed . . . to authorize or require any judicial review of any such standard or regulation; or any stay or injunction of the proposal, promulgation, or effectiveness of such standard or regulation on the basis of failure to comply with this section.

42 U.S.C. § 7617(e). Accordingly, by its plain terms Section 317 cannot be a basis for vacating the Vehicle Rule.

The Regulatory Flexibility Act ("RFA"): The RFA, 5 U.S.C. §§ 601-12, generally requires an agency to identify the potential economic impact of rules on small entities that will be subject to the rule's requirements, but a small entity

analysis is not required if the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. *Id.* §§ 603, 605(b). When considering whether a rule should be certified, the RFA requires an agency to look only at the "small entities to which the proposed rule will apply" and which will be "subject to the requirement" of the specific rule in question. *Id.*; *see also Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) ("Reading section 605 in light of section 603, we conclude that an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are *subject to the requirements of the rule*.") (emphasis added).

Here, EPA properly certified that the Vehicle Rule would not have a significant economic impact on a substantial number of small entities directly subject to the Rule. 75 Fed. Reg. at 25,540-41 [JA XX-XX]; RTC at 5-454 to 5-456 [JA XX-XX]. The Vehicle Rule regulates exclusively large motor vehicle manufacturers. Small vehicle manufacturers are specifically exempted from the standards. 75 Fed. Reg. at 25,540 [JA XX].

Contrary to Industry Petitioners' position (Ind. Br. at 23; State Br. at 16-17), this Court "has consistently rejected the contention that the RFA applies to small

businesses *indirectly* affected by the regulation of other entities." *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (emphasis added). Thus, EPA was not required to consider the indirect impact on stationary sources that would become subject to permitting requirements through the automatic application of separate statutory programs following promulgation of the Vehicle Rule. As this Court explained in *Cement Kiln*, even where a rule will "doubtless have economic impacts in many sectors of the economy," an agency is not required to assess the impact on small businesses not directly regulated by the rule because to do so would "convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected." 255 F.3d at 869. *See also Motor & Equip. Mfrs. Ass'n v. Nichols* ("*MEMA*"), 142 F.3d 449, 467 (D.C. Cir. 1998) (EPA only obliged to consider, in context of CAA regulation concerning on-board diagnostic devices, impact on small automobile manufacturers subject to rule); *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1043-45 (D.C. Cir. 1999) (finding EPA's conclusion that national ambient air quality standards do not impose any direct regulation upon small entities more persuasive than contrary interpretation of Small Business Administration).[10]

10 Although EPA properly certified that the Vehicle Rule would have no significant economic impact on a substantial number of small entities, EPA also recognized the concerns of small entities regarding the potential impacts of the statutory imposition of PSD requirements for greenhouse gas emissions. Thus, in

Unfunded Mandates Reform Act ("UMRA"): UMRA generally requires Federal agencies to assess the effects of their regulatory actions on state, local and tribal governments and the private sector. Under Section 202(a) of UMRA, 2 U.S.C. § 1532(a), EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to the private sector of $100 million or more. Here, EPA determined that the Vehicle Rule contains a Federal mandate that may result in expenditures of $100 million or more and prepared an UMRA cost-benefit analysis. 75 Fed. Reg. at 25,541 [JA XX], RIA, Chapters 5-8 [JA XX-XX]. In doing so, EPA properly focused its analysis on the direct impacts of the Vehicle Rule itself. RTC at 5-456 (JA XX) ("[C]ompliance with UMRA and Executive Order 13132 are properly focused on the impacts of this rule on States, not the impacts of indirect effects that flow from this rule.").

In any event, the Court lacks jurisdiction to consider any challenge to the Vehicle Rule based on the adequacy of the UMRA analysis. UMRA provides that the inadequacy of a required statement under UMRA "shall not be used as a basis

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the Vehicle Rule, EPA noted that in the proposed Tailoring Rule EPA used the discretion afforded to it under section 609(c) of the RFA to consult with the Small Business Administration, with input from outreach to small entities, regarding the potential impacts of statutorily imposed PSD requirements on small entities, and placed a summary of that consultation and outreach in the Tailoring Rule docket. 75 Fed. Reg. 25,541; RTC at 5-455 (JA XX, XX).

for staying, enjoining, invalidating, or otherwise affecting [an] agency rule," 2 U.S.C. § 1571(a)(3). *See also Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 81, n.22 (D.C. Cir. 2000) (failure to prepare UMRA cost-benefit analysis may not be a basis for invalidating rule).

The Paperwork Reduction Act ("PRA"): Pursuant to the PRA, federal agencies may not collect information unless the Office of Management and Budget ("OMB") has approved the collection and issued a control number. 44 U.S.C. § 3507(a)(2), (3). Here, EPA submitted the information collection requirements in the Vehicle Rule for approval to OMB, and these requirements were assigned an OMB control number. Thus, EPA complied with PRA procedural requirements. 75 Fed. Reg. at 25,539-40 [JA XX-XX]. Furthermore, an agency's failure to comply with procedural requirements of the PRA does not render a rule invalid, but can be raised only as a defense to an action seeking to enforce information collection requirements. 44 U.S.C. § 3512; *Dithiocarbamate Task Force v. EPA*, 98 F.3d 1394, 1405 (D.C. Cir. 1996). *See also Tozzi v. EPA*, 148 F. Supp. 2d 35, 43-48 (D.D.C. 2001) (holding court lacked subject matter jurisdiction to consider claim alleging EPA violation of procedural requirements of PRA).

Executive Order 12898: Executive Order 12898 directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental

justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their actions on minority populations and low-income populations. 59 Fed. Reg. 7629 (Feb. 11, 1994) [JA XX]. Here, EPA properly determined that the Vehicle Rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations. 75 Fed. Reg. at 25,542 [JA XX]. Moreover, compliance with Executive Order 12898 is not subject to judicial review. 59 Fed. Reg. 7629.

Executive Order 13211: Executive Order 13211 directs federal agencies to submit a statement of adverse effects for certain agency actions that are likely to have a significant adverse effect on energy supply, distribution, or use. 66 Fed. Reg. 28,355 (May 18, 2001) [JA XX]. Here, EPA assessed the energy effects of the vehicle greenhouse emission standards and concluded that they do not have any adverse energy effects as they result in significant fuel savings. 75 Fed. Reg. at 25,542 [JA XX]. Compliance with Executive Order 13211 is also not subject to judicial review. 66 Fed. Reg. at 28,356.

F. EPA's Standards Will Achieve Important Greenhouse Gas Emission Reductions, and EPA Lacked Discretion to Decline to Promulgate Standards Based Upon the Degree of Climate Change That Could Be Ameliorated or Based Upon NHTSA's Separate Authority Over Fuel Economy.

Industry Petitioners next contend that EPA should have declined to promulgate any greenhouse gas vehicle emission standards because, in Petitioners' view, such standards will not do *enough* to prevent global climate change. Ind. Br. at 14, 34-39. To begin with, Petitioners understate the significance of the emission reductions achieved by EPA's standards. In fact, as discussed below, EPA's light-duty vehicle emission standards will achieve very large and important emission reductions of greenhouse gases. Further, the degree to which the Vehicle Rule will, in and of itself, prevent or ameliorate climate change does not alter the scope of EPA's nondiscretionary duty under Section 202 to promulgate standards once endangerment is found. Section 202 *requires* EPA to promulgate emission standards for air pollutants that contribute to an endangerment, regardless of the degree to which the endangerment can be ameliorated through required standards.

1. EPA's Standards Will Materially Reduce Greenhouse Gas Emissions.

Contrary to Petitioners' characterizations, EPA's Vehicle Rule will achieve large and important reductions in greenhouse gases from one of the most significant source categories for these pollutants. Mobile sources emitted 31

percent of all greenhouse gas emissions in the United States in 2007 and have been the fastest-growing source of United States greenhouse gas emissions since 1990. RIA 5-1 [JA XX]. Light-duty vehicles are responsible for nearly 60 percent of all mobile source greenhouse gases. *Id.*

EPA projects that the Vehicle Rule standards will generate CO_2e reductions of 962 million metric tons over the lifetime of model year 2012-2016 vehicles. 75 Fed. Reg. at 25,490, Table III.F.1-2 [JA XX].[11] Assuming the standards continue through later model years, by 2050 the CO_2e reductions will constitute a 22.8 percent reduction from the levels of CO_2e estimated to be emitted from the U.S. transportation sector without the rule, a 6 percent reduction of CO_2e emitted from *all domestic activities* over the same period without the rule, and a 0.8 percent reduction of CO_2e emitted from the *entire world's activities* over the same period without the standards. 75 Fed. Reg. at 25,489, Table III F.1-1 [JA XX]. EPA further determined through modeling that the standards promulgated will themselves result in measurable reductions in global atmospheric CO_2

11 CO_2e is a metric that allows non-CO_2 greenhouse gases (such as hydrofluorocarbons) to be expressed as an equivalent mass (*i.e.*, corrected for relative global warming potency) of CO_2 emissions. 75 Fed. Reg. at 25,399 [JA XX].

concentrations, mean surface temperature, sea level rise, and ocean acidifying effects. 75 Fed. Reg. at 25,496, Table III.F.3-1 [JA XX].[12]

EPA also projected that the standards will result in significant reductions in emissions of many other air pollutants, due largely to refineries operating less due to reductions in gasoline demand as a result of the rule. 75 Fed. Reg. at 25,507/2 [JA XX]. For example, EPA estimated that by 2030, the Rule would result in reductions of 4,564 short tons of fine particulate matter, 27,443 short tons of sulfur dioxide, 115,542 short tons of volatile organic compounds, and 21,763 tons of nitrogen oxide. 75 Fed. Reg. at 25,497 (Table III.G-1) [JA XX].

EPA further determined that beyond reducing greenhouse gases and other air pollutants, the Vehicle Rule will provide significant benefits in the form of energy security. The Rule will significantly reduce petroleum imports, thus reducing financial and strategic risks caused by potential supply disruptions. 75 Fed. Reg. at 25,497, 25,531-34, Tables III.G-1, III.H.8-1-2 [JA XX, XX-XX].

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12 Industry Petitioners refer to a NHTSA analysis of proposed CAFE standards. *See* Ind. Br. 38 (citing NHTSA preamble discussion at 74 Fed. Reg. 49,744). But the cited NHTSA analysis does not support Petitioners' suggestion that vehicle emission standards will have no climate change benefits with respect to natural resources. In the passage cited, NHTSA listed a host of adverse effects on natural resources related to climate change and concluded that there were "enormous resource values at stake" that could be affected by its proposed CAFE standards, as "small percentages of huge numbers can still yield substantial results." 74 Fed. Reg. 49,744/2 [JA XX].

EPA quantitatively assessed the costs and benefits of the vehicle emission standards, including increased vehicle costs, fuel savings, and the benefits associated with reduced carbon dioxide emissions. 75 Fed. Reg. at 25,535-40 [JA XX-XX], RIA Chapters 6-8 [JA XX-XX]. EPA concluded that over the lifetime of 2012-2016 model year vehicles, the standards' net present value (*i.e.*, benefits minus costs) is over $643 billion and maybe as much as $2 trillion. 75 Fed. Reg. at 25,535-37 & Table III.H.10-3 [JA XX-XX]. In short, the record reflects that the 2012-2016 light-duty model year vehicle emission standards will produce meaningful and substantial reductions in greenhouse gas emissions along with other air pollutants, will result in significant energy security benefits, and will be highly cost-effective.

EPA certainly recognizes that climate change is a global phenomenon and that no single greenhouse gas mitigation action, such as the Vehicle Rule, will, in and of itself, eliminate climate change threats. RTC 5-390 [JA XX]. However, the vehicle standards at issue make a significant contribution towards addressing the challenge by producing substantial reductions in greenhouse gas emissions from a particularly large and important source of emissions. As the Supreme Court recognized in *Massachusetts*, "Agencies, like legislatures, do not generally resolve massive problems" like climate change "in one fell regulatory swoop." 549 U.S. at

524. They "instead whittle away at them over time." *Id.* The Supreme Court additionally emphasized that "reducing domestic automobile [greenhouse gas] emissions is hardly a tentative step" towards addressing climate change, inasmuch as "the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere." *Id*. Thus, "[j]udged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations." *Id* at 525.

Furthermore, the substantial greenhouse gas reductions achieved by the Vehicle Rule will hardly constitute the sole effort by this Nation to address climate change. For example, as discussed above, EPA has been engaged in two additional CAA Section 202 rulemakings, one addressing heavy-duty vehicles and one addressing model year 2017-2025 light-duty vehicles, both of which can be expected to lead to *additional* climate change benefits beyond those achieved by the Vehicle Rule. 75 Fed. Reg. 74,152 (Nov. 30, 2010) [JA XX]; 75 Fed. Reg. 62,739 (Oct. 13, 2010) [JA XX] . EPA has also commenced a rulemaking under Section 111 of the Act, 42 U.S.C. § 7411, to set limits on greenhouse gas emissions from new, modified, and existing fossil-fuel fired power plants – another particularly important source of emissions. See 75 Fed. Reg. 82,392 (Dec. 30,

2010). Implementation of automatic PSD permitting requirements will achieve additional greenhouse gas reductions.

2. Section 202 Required EPA to Promulgate Greenhouse Gas Emission Standards Regardless of the Degree of the Hazard That May Be Ameliorated.

Regardless of the degree to which EPA's Vehicle Rule will, in and of itself, ameliorate global climate change, EPA had a clear obligation under Section 202 to promulgate emission standards following its positive endangerment finding. Section 202 does not spell out any minimum level of effectiveness for standards. Section 202 instead directs EPA to set the standards at a level that is reasonable in light of applicable compliance cost and technology considerations, 42 U.S.C. § 7521(a)(2).

Petitioners contend that, beyond a positive endangerment finding, EPA must additionally make a determination that the endangerment is capable of being "meaningfully mitigated" by particular standards prior to their promulgation. Ind. Br. 35. But this argument amounts to nothing more than an effort to rewrite the statute.

Further, Petitioners are not suggesting that, given the profound magnitude of climate change threats, EPA should have set vehicle standards at some even more stringent level so as to achieve even greater greenhouse gas reductions. Petitioners

instead are contending that EPA should have thrown up its hands and declined to promulgate *any* emission standards in view of the magnitude of the threat and the inability to address it comprehensively through this single rule. But this position is entirely at odds with the statutory text and with the fundamental purpose of the CAA to protect public health and welfare. *See* 42 U.S.C. § 7401(b)(1). Moreover, in *Massachusetts* the Supreme Court rejected the proposition that the effectiveness (or lack thereof) of motor vehicle standards or other control measures could justify a decision not to regulate emissions under Section 202. 549 U.S. at 533 (characterizing whether curtailing motor vehicle emissions would reflect an "inefficient, piecemeal approach to address the climate change issue" as having "nothing to do with whether greenhouse gas emissions contribute to climate change").

Unable to find any statutory text that supports their position that EPA could have declined to promulgate standards, Industry Petitioners resort to relying on a footnote in *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), and construing that footnote as establishing that any EPA Section 202 standards must "fruitfully" attack a found endangerment. Ind. Br. 34. *Ethyl* does not establish any such limitation.

Ethyl generally addressed the scope of EPA's separate authority under a former version of CAA Section 211(c)(1)(A), 42 U.S.C. § 7545(c)(1)(A), to regulate fuel additives. The version of CAA Section 211(c)(1)(A) at issue in that case provided that EPA "may" promulgate regulations that control fuel additives for use in motor vehicles if such fuel additives "will endanger the public health or welfare." 541 F.2d at 11. Manufacturers of lead additives and refiners of gasoline challenged EPA's endangerment determination with respect to lead additives under Section 211(c)(1)(A), and the Court upheld EPA's determination. In the portion of *Ethyl* specifically cited by Petitioners, this Court upheld EPA's decision to consider the cumulative impact of lead automobile emissions and other sources of environmental lead in finding that lead additives "will endanger" the public health or welfare. 541 F.3d at 31 & n.62. That discussion of EPA's consideration of cumulative impacts in making a Section 211 endangerment determination has no bearing on the emission standards at issue here. EPA's threshold Section 202 Endangerment Determination is not at issue in this case, and, as we discuss in our brief in the Endangerment Finding case (*see* EPA Brief pages 30-34, 85-87), the analysis in *Ethyl* supports EPA's Endangerment Determination.

Further, Petitioners overlook important textual differences between Section 202 and former Section 211 with respect to the scope of EPA's discretion to

promulgate standards *following* an endangerment determination. Unlike former Section 211, Section 202 creates a two-step regulatory approach to regulation of motor vehicle emissions, and provides that once EPA makes a determination that motor vehicle emissions may reasonably be anticipated to cause or contribute to pollution which may reasonably be anticipated to endanger public health or welfare, EPA "*shall*" promulgate emission standards (emphasis added). Former Section 211 did not contain a similar two-step regulatory approach and provided only that EPA "*may*" regulate fuel additives that "*will* endanger" public health and welfare (emphasis added). Accordingly, EPA had some discretion under the version of Section 211 addressed in *Ethyl* to decline to regulate fuel additives notwithstanding even a definitively positive endangerment determination. EPA has no such discretion under Section 202.

Industry Petitioners' citation (Ind. Br. at 34) to *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983), is likewise unavailing. In *Small Refiner*, this Court upheld an EPA regulation setting Section 211 lead-content limits for leaded gasoline produced by small refiners. In so doing, this Court addressed the level of justification required to set one numerical standard level as opposed to another. This Court noted that EPA's choice of a particular numerical level is entitled to deference and should be upheld so long as it is

"within a zone of reasonableness." 705 F.2d at 525 (quotations omitted). Here, the particular emission standard level set by the Vehicle Rule falls within the zone of reasonableness and indeed is *uncontested* by anyone. Petitioners do not identify any different numerical standard level that they believe should have been set applying the applicable Section 202(a)(2) criteria. Indeed, they make clear that they believe NHTSA's fuel economy standards should be left in place, and those standards are premised on essentially the same technologies, cost-effectiveness, and compliance time frames as EPA's standards. Rather, Petitioners contend that EPA should have declined to promulgate any Section 202 greenhouse gas emission standards *at all* -- a position that cannot be reconciled with the statutory text or with the ultimate purpose of the statute to protect public health and welfare.[13]

3. EPA Cannot Decline to Promulgate Vehicle Emission Standards Based on NHTSA's Separate Authority to Set Fuel Economy Standards.

Petitioners' related argument – that EPA should have declined to regulate greenhouse gas emissions from motor vehicles in view of NHTSA's separate

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13 The two cases cited by Industry Petitioners at page 38 of their brief addressing EPA's implementation of the interstate pollutant transport provisions of CAA Title I are readily distinguishable. Those cases addressed different language in CAA Section 110 relating to transboundary air pollution and upheld EPA determinations concerning whether transboundary pollution at issue in those cases would "prevent attainment or maintenance of any . . . national ambient air quality standard in [any other State]." *See Connecticut v. EPA*, 696 F.2d 147, 156, 163-65 (2d Cir. 1982).

statutory authority under EPCA to set fuel economy standards – similarly is profoundly flawed. Ind. Br. at 33, 35-36; State Br. at 17. Indeed, this position has already been specifically considered and rejected by the Supreme Court in *Massachusetts*. EPA contended in *Massachusetts*, just as Petitioners now contend, that the Agency could properly decline to promulgate any greenhouse gas regulation under Section 202 in view of NHTSA's separate authority to adopt fuel economy standards under EPCA. The Supreme Court considered and squarely rejected this position, explaining:

> [T]hat [NHTSA] sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's "health" and "welfare," 42 U.S.C. § 7521(a)(1), a statutory obligation *wholly independent* of [NHTSA's] mandate to promote energy efficiency . . . . The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.

549 U.S. at 532 (emphasis added).

Thus, the Supreme Court has already considered the fact that EPA's authority to regulate mobile sources under CAA Section 202 overlaps with NHTSA's authority to regulate fuel economy under EPCA, and it has made clear that notwithstanding this overlap, EPA has a "wholly independent" obligation to promulgate vehicle emission standards for greenhouse gases if such emissions

cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Tellingly, Industry Petitioners do not even acknowledge, much less purport to distinguish, this controlling portion of the Supreme Court's decision in *Massachusetts*.

Although not material to the disposition of Petitioners' argument, EPA explained the benefits achieved by issuing greenhouse gas emission standards together with NHTSA CAFE standards. First, in the absence of EPA's greenhouse gas standards, California would not have offered the alternative compliance option to automakers, so the substantial benefits of harmonized federal and state standards would have been lost. *See* discussion, *supra*, at 38-40. In addition, EPA's Vehicle Rule will achieve significant greenhouse gas reductions *beyond* the reductions that would have been achieved solely through the CAFE standards. 75 Fed. Reg. at 25,402, 25,490, Table III.F.1-2, 25,636, Table IV.G.1-4 [JA XX, XX, XX].

Industry Petitioners ignore important differences between EPA's greenhouse gas standards and NHTSA's CAFE standards arising from the differences in the two agencies' respective authorities under the CAA and EPCA. One important difference is that EPA's greenhouse gas standards encompass reductions in greenhouse gases that can be achieved by improved fuel efficiency through air-conditioning system improvements and reductions in greenhouse gas emissions

attributable to air conditioning leakage. The 2012-2016 CAFE standards do not address these effects of vehicle air conditioners. 75 Fed. Reg. at 25,327/2 [JA XX]. EPA's standards under section 202(a) also control emissions of the potent greenhouse gases methane and nitrous oxide, comprising (along with hydrofluorocarbons) approximately five to eight percent of vehicle greenhouse gas emissions that are not CO_2, which NHTSA had no statutory authority to address under EPCA since they are not directly related to fuel economy. 74 Fed. Reg. at 49,458-59 [JA XX].

Another important difference is that various compliance flexibilities permitted by the CAA (among them certain credit generating and trading mechanisms) afforded EPA the opportunity to promulgate more stringent standards with lower overall compliance costs than would have been possible under EPCA alone. 75 Fed. Reg. at 25,339 and 25,331, n.24 [JA XX]; 74 Fed. Reg. at 49,465 [JA XX]. *See also* 49 U.S.C. § 32902(h), 49 U.S.C. § 32903(g) (NHTSA may allow averaging, banking and trading flexibilities but there are statutory limits on a manufacturer's ability to transfer credits between car and truck fleets, and NHTSA is prohibited from considering such averaging, banking and trading flexibilities when setting the standard). The CAA also allows EPA to consider and incentivize the most advanced technologies in setting future vehicle standards, such as electric

vehicles. By contrast, NHTSA is statutorily prohibited from considering the fuel economy benefits of electric vehicles and other dedicated alternative fuel vehicles when setting CAFE standards. 49 U.S.C. § 32902(h)(1).

Also significant is the fact that manufacturers may opt to pay a civil penalty in lieu of actually meeting CAFE standards, but they cannot pay a fine to avoid complying with EPA's greenhouse gas emission standards. 75 Fed. Reg. at 25,331, n.24; 25,342 [JA XX]. Some manufacturers have traditionally paid CAFE penalties instead of complying with the CAFE standards. 75 Fed. Reg. at 25,414/3; 25,666/2-3 [JA XX, XX].

The upshot of all the differences in the two programs is that EPA's vehicle greenhouse gas emission standards are projected to result in 47 percent greater greenhouse gas reductions over the lives of model year 2012-2016 vehicles than projected under the CAFE standards alone. Specifically, EPA's standards are projected to avoid the emission of 962 million metric tons of carbon dioxide over the lives of model year 2012-2016 vehicles, whereas CAFE standards are projected to avoid the emission of 655 million metric tons. 75 Fed. Reg. at 25,490, Table III.F.1-2 [JA XX]; 75 Fed. Reg. at 25,636, Table IV.G.1-4 [JA XX]. If the greenhouse gas standards were to be achieved by manufacturers through fuel efficiency improvements alone, then they would result in an average fuel

efficiency of 35.5 miles per gallon for model year 2016, compared to the 32.7 miles per gallon estimated achieved levels for the CAFE program. 75 Fed. Reg. at 25,330-31, Table I.B. 2-2 [JA XX-XX].[14]

In any event, EPA had a nondiscretionary obligation to promulgate greenhouse gas standards for light-duty vehicles following its Endangerment Finding, and EPA was not free to "shirk" this obligation based on NHTSA's separate legal authority to establish fuel economy standards. *Massachusetts*, 549 U.S. at 532. Just as NHTSA could not refuse to promulgate EPCA fuel economy standards based on EPA's CAA authority to issue greenhouse gas standards, EPA could not refuse to promulgate greenhouse gas emission standards based on NHTSA's EPCA authority. *See* Ind. Br. at 36 (conceding that "NHTSA had no option . . . but to issue new fuel-economy standards" but then failing to concede the similarly nondiscretionary nature of EPA's obligations). EPA did, however, carefully coordinate with NHTSA in promulgating standards so that the agencies' two sets of standards are consistent, and so that automakers could meet both

14 EPA recognizes that manufacturers are likely to achieve some of the additional reductions in greenhouse gases by reducing leakage of hydrofluorocarbons from air conditioners, rather than by increasing the vehicles' fuel efficiency, but the EPA standards will nonetheless result in substantial fuel efficiency improvements compared to the CAFE program. EPA's program, over the lives of model- year 2012-2016 vehicles is estimated to save approximately 77.7 billion gallons of fuel, whereas CAFE standards are projected to save 61 billion gallons. 75 Fed. Reg. at 25,490 Table III.F.1-2; 75 Fed. Reg. at 25,636, Table IV.G.1-3.

NHTSA and EPA requirements with a single national vehicle fleet, greatly simplifying the industry's technology, investment and compliance strategies. 75 Fed. Reg. at 25,329 [JA XX].

II. Petitioners' Challenges to EPA's Endangerment Finding and Actions Concerning Stationary Sources Are Not Properly Raised in This Case.

The remainder of Petitioners' arguments are devoted to challenges to other EPA actions beyond EPA's Vehicle Rule. State Br. at 19-20, Ind. Br. at 25-32. These claims are not properly raised in this case, and must instead be pursued in the appropriate cases challenging the actions at issue.

A. Challenges to EPA's Endangerment Finding Are Not Properly Brought in This Case.

First, State Petitioners contend that EPA did not make a proper endangerment finding and that, therefore, the Vehicle Rule is invalid. State Br. at 19-20. Although we agree that EPA's Vehicle Rule is dependent upon the validity of EPA's separate Endangerment Finding, challenges to the substance of that finding are not properly brought in the instant case, which solely addresses the Vehicle Rule. For the reasons set forth in our brief in Case No. 09-1322, EPA's Endangerment Finding is premised on a sound and appropriate construction of the CAA and a wealth of scientific information compellingly supports that Finding.

B. Challenges to EPA's Actions Concerning the PSD Program Are Not Properly Brought in This Case.

Next, Industry Petitioners expend a full seven pages of their brief contesting EPA actions or interpretations concerning the statutory PSD program. Ind. Br. at 25-32. To the extent Petitioners are challenging whether PSD requirements should, in general, be automatically triggered by emissions of any pollutant subject to regulation under the Act, that challenge contests the requirements of the statute itself and EPA's long-standing regulations enacted pursuant to those statutory provisions; accordingly, these claims can only be raised, if at all, in the context of Petitioners' "grounds arising after" challenge to EPA's PSD regulations in No. 10-1167. To the extent Petitioners are challenging precisely *when* this automatic triggering effect occurred, that claim may only be raised in No. 10-1073, the consolidated challenge to the Timing Decision and Tailoring Rule.

C. The Administrative Records Associated With Distinct EPA Actions under the CAA Are Not Interchangeable

Finally, we note that Industry Petitioners repeatedly endeavor in their brief to have the Court rely upon extra-record materials from EPA's separate actions concerning implementation of the PSD program (*see* Ind. Br. at 5, 8, 15, 16, 18, 20, 23, 26, 31). Petitioners overlook that the CAA's judicial review provision limits the record for judicial review in this case "exclusively" to the Vehicle Rule's

administrative record. 42 U.S.C. § 7607(d)(7)(A). *Id*. Making matters worse, Industry Petitioners often do not clarify for the Court when they are citing to a different administrative action and record, thereby creating the misleading impression that EPA made determinations or characterizations in connection with EPA's promulgation of the Vehicle Rule that EPA did not, in fact, make. *See, e.g.*, Ind. Br. at 8, 15, 16, 18, 26 (citing to either the Tailoring Rule or Timing Decision but implying cited findings were made by EPA in connection with promulgation of the Vehicle Rule). Petitioners' reliance on extra-record materials is clearly impermissible under the applicable CAA judicial review provision, but even should any of these extra-record materials be considered, Petitioners have identified nothing therein that undermines the Vehicle Rule.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

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