

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 52, 70, and 71

[EPA-HQ-OAR-2009-0517; FRL - _____]

RIN 2060-AP86

Prevention of Significant Deterioration and Title V Greenhouse
Gas Tailoring Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: EPA is tailoring the applicability criteria that determine which stationary sources and modification projects become subject to permitting requirements for greenhouse gas (GHG) emissions under the Prevention of Significant Deterioration (PSD) and title V programs of the Clean Air Act (CAA or Act). This rulemaking is necessary because without it PSD and title V requirements would apply, as of January 2, 2011, at the 100 or 250 tons per year (tpy) levels provided under the CAA, greatly increasing the number of required permits, overwhelming the resources of permitting authorities, and severely impairing the functioning of the programs. EPA is relieving these resource burdens by phasing-in the applicability of these programs to GHG sources. This rule establishes two initial steps of the phase-in. Step 1 begins on January 2,

2011, and covers only sources and modifications that would otherwise undergo PSD or title V permitting based on emissions of non-GHG pollutants. Step 2 begins on July 1, 2011, and covers large sources of GHG emissions that emit or have the potential to emit 100,000 tpy carbon dioxide equivalent (CO₂e) or more, and modifications at those sources that increase net GHG emissions by 75,000 tpy CO₂e or more, provided those sources or modifications also have GHG mass emissions that exceed the relevant mass-based applicability thresholds. This rule also requires EPA to promulgate by July 1, 2012, a step 3 rule that will consider phasing-in additional sources. EPA excludes from PSD and title V permitting for GHG emissions, until at least April 30, 2016, sources that are not already subject and that emit less than 50,000 tpy of CO₂e, as well as modifications that do not increase net GHG emissions by 50,000 tpy CO₂e, or more. EPA will use this time to streamline the programs for those sources and must complete a study by April 30, 2015, to assess improvements in administrability of the programs for such sources, and must complete a rule by April 30, 2016, addressing additional such sources based on this study. EPA's legal basis for this tailoring rule is its interpretation of the PSD and title V applicability provisions under the familiar Chevron two-step framework for interpreting administrative statutes, taking

account of the legal doctrines authorizing agencies to apply statutory requirements in way that avoids absurd results or administrative impossibility and authorizing agencies to implement statutory requirements a step at a time.

DATES: This action is effective on [**INSERT 60 DAY FROM DATE OF PUBLICATION**].

ADDRESSES: EPA has established a docket for this rulemaking under Docket ID No. EPA-HQ-OAR-2009-0517. All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the EPA Docket Center EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue, Northwest, Washington, D.C. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Docket Center is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Mangino, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-03), Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541-9778; fax number: (919) 541-5509; e-mail address: mangino.joseph@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities affected by this action include sources in all sectors of the economy, including commercial and residential sources. Entities potentially affected by this action also include states, local permitting authorities, and tribal authorities. The majority of categories and entities potentially affected by this action are expected to be in the following groups:

Industry Group	NAICS ^a
Agriculture, fishing, and hunting.....	11
Mining.....	21
Utilities (electric, natural gas, other systems).....	2211, 2212, 2213
.....	

Manufacturing (food, beverages, tobacco, textiles, leather).....	311, 312, 313, 314, 315, 316
Wood product, paper manufacturing.....	321, 322
.....	
Petroleum and coal products manufacturing.....	32411, 32412, 32419
Chemical manufacturing.....	3251, 3252, 3253, 3254, 3255, 3256, 3259
Rubber product manufacturing.....	3261, 3262
Miscellaneous chemical products.....	32552, 32592, 32591, 325182, 32551
.....	
Nonmetallic mineral product manufacturing.....	3271, 3272, 3273, 3274, 3279
Primary and fabricated metal manufacturing.....	3311, 3312, 3313, 3314, 3315, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329
Machinery manufacturing.....	3331, 3332, 3333, 3334, 3335, 3336, 3339
Computer and electronic products manufacturing.....	3341, 3342, 3343, 3344, 3345, 4446
Electrical equipment, appliance, and component manufacturing.....	3351, 3352, 3353, 3359

Transportation equipment manufacturing.....	3361, 3362, 3363, 3364, 3365, 3366, 3366, 3369
Furniture and related product manufacturing.....	3371, 3372, 3379
Miscellaneous manufacturing.....	3391, 3399
Waste management and remediation.....	5622, 5629
Hospitals/Nursing and residential care facilities.....	6221, 6231, 6232,6233, 6239
Personal and laundry services.....	8122, 8123
Residential/private households.....	8141
Non-Residential (Commercial).....	Not available. Codes only exist for private households, construction, and leasing/sales industries.

^a North American Industry Classification System.

B. How is this preamble organized?

The information presented in this preamble is organized as follows:

Outline

- I. General Information
 - A. Does this action apply to me?
 - B. How is this preamble organized?
 - C. Preamble Acronyms and Abbreviations
- II. Overview of the Final Rule
- III. Background

- A. What are greenhouse gases and their sources?
 - B. Endangerment Finding and the Light-Duty Vehicle Rule
 - 1. Endangerment Finding
 - 2. Light-Duty Vehicle Rule
 - C. What are the General Requirements of the PSD Program?
 - 1. Overview of the PSD Program
 - 2. General Requirements for PSD
 - D. What are the general requirements of the title V operating permits program?
 - 1. Overview of Title V
 - 2. Title V Permit Requirements
 - E. The Interpretive Memorandum
- IV. Summary of Final Actions
- A. How do you define the GHG pollutant for PSD and title V purposes?
 - 1. GHG Pollutant Defined as the Sum-of-Six Well-Mixed GHGs
 - 2. What GWP values should be used for calculating CO₂e?
 - B. When will PSD and title V applicability begin for GHGs and emission sources?
 - 1. What are the Step 1 thresholds, timing and calculation methodology?
 - 2. What are the Step 2 thresholds, timing and calculation methodology?
 - 3. What about Step 3?
 - 4. What about the proposed 6 year exclusion for smaller sources?
 - 5. When and how will EPA take further action on smaller sources?
 - C. How do state, local and tribal area programs adopt the final GHG applicability thresholds?
 - D. How do you treat GHGs for title V permit fees?
 - E. Other Actions and Issues
 - 1. Timing for Permit Streamlining Techniques
 - 2. Guidance for Best Available Control Technology Determinations
 - 3. Requests for Higher Category-Specific Thresholds and Exemptions from Applicability
 - 4. Transitional Issues including Requests for Grandfathering
- V. What is the legal and policy rationale for the final actions?
- A. Rationale for our approach to calculating GHG emissions for PSD and title V applicability purposes
 - 1. Grouping of GHGs into a Single Pollutant
 - 2. Identifying Which GHGs are Included in the Group
 - 3. Determining What GWP Values are to be Used
 - 4. Use of Short Tons vs. Metric Tons

B. Rationale for Thresholds and Timing for PSD and Title V Applicability to GHG Emissions Sources

1. Overview
2. Data Concerning Costs to Sources and Administrative Burdens to Permitting Authorities
3. Legal Doctrines: "Absurd Results," "Administrative Necessity," and "Step-at-a-Time"
4. The PSD and Title V programs
5. Application of the "Absurd results" Doctrine for the PSD Program
6. Application of the "Absurd Results" Doctrine for the Title V Program
7. Additional Rulemaking for the PSD and Title V Programs
8. Rationale for the Phase-in Schedule for Applying PSD and Title V to GHG Sources
9. "Administrative Necessity" Basis for PSD and Title V Requirements in Tailoring Rule
10. "Step-at-a-Time" Basis for Tailoring Rule

C. Mechanisms for Implementing and Adopting the Tailoring Approach

1. PSD Approach: Background and Proposal
2. Rationale for Our Final Approach to Implementing PSD
3. Other Mechanisms
4. Codification of Interpretive Memo
5. Delaying Limited Approvals and Request for Submission of Information from States Implementing a SIP-Approved PSD Program
6. Title V Programs

D. Rationale for Treatment of GHGs for Title V Permit Fees

E. Other Actions and Issues

1. Permit Streamlining Techniques
2. Guidance for Best Available Control Technology Determinations
3. Requests for Higher Category-Specific Thresholds or Exemptions from Applicability
4. Transitional Issues Including Requests for Grandfathering

VI. What are the economic impacts of the final rule?

- A. What entities are affected by this final rule?
- B. What are the estimated annual benefits to sources due to regulatory relief from the statutory requirements?
 1. What are annual estimated benefits or avoided burden costs for title V permits?
 2. What are annual benefits or avoided costs associated with NSR permitting regulatory relief?
- C. What are the economic impacts of this rulemaking?

- D. What are the costs of the final rule for society?
- VII. Comments on Statutory and Executive Orders Reviews
- VIII. Statutory and Executive Orders Reviews
- XI. Statutory Language

C. Preamble Acronyms and Abbreviations

The following are abbreviations of terms used in the preamble.

BACT	Best Available Control Technology
CAA or Act	Clean Air Act
CO ₂ e	Carbon Dioxide Equivalent
GHG	Greenhouse Gases
PSD	Prevention of Significant Deterioration
SNPR	Supplemental Notice of Proposed Rulemaking
tpy	Tons Per Year

[COMPLETE LATER.]

II. Overview of the Final Rule

EPA is relieving overwhelming permitting burdens that would, in the absence of this rule, fall on permitting authorities and sources. We accomplish this by tailoring the applicability criteria that determine which GHG emission sources become subject to the PSD and title V programs of the CAA. In particular, EPA is establishing with this rulemaking a phase-in approach for PSD and title V applicability, and is establishing the first two steps of the phase-in for the largest emitters of GHGs. We also commit to certain follow-up actions regarding future steps beyond the first two, discussed in more detail below. Our legal basis for this rule is our interpretation of the PSD and title V applicability provisions under the familiar

Chevron two-step framework for interpreting administrative statutes, taking account of three legal doctrines, both separately and interdependently: they are what we will call (i) the "absurd results" doctrine, which authorizes agencies to apply statutory requirements in way that avoids absurd results, (ii) the "administrative necessity" doctrine, which authorizes agencies to apply statutory requirements in a way that avoids impossible administrative burdens; and (iii) the "step-at-a-time" doctrine, which authorizes agencies to implement statutory requirements a step at a time. This legal basis justifies each of the actions we take with this rule, both (i) as part of the overall tailoring approach and (ii) independently of the other actions.

For the first step, which will begin on January 2, 2011, PSD or title V requirements will apply to sources' GHG emissions only if the sources are subject to PSD or title V anyway due to their non-GHG conventional pollutants. Therefore, EPA will not require sources or modifications to evaluate whether they are subject to PSD or title V requirements solely on account of their GHG emissions. Specifically, for PSD, Step 1 requires that as of January 2, 2011, the applicable requirements of PSD, most notably, the best available control technology (BACT) requirement, will apply to projects that increase net GHG

emissions by at least 75,000 tpy CO₂e, but only if the project also significantly increases emissions of at least one non-GHG pollutant. For the title V program, only existing sources with, or new sources obtaining, title V permits for non-GHG pollutants will be required to address GHGs during this first step.

The second step of the tailoring rule, beginning on July 1, 2011, will phase-in additional large sources of GHG emissions. New sources as well as existing sources not already subject to title V that emit, or have the potential to emit, at least 100,000 tpy CO₂e will become subject to the PSD and title V requirements. In addition, sources that emit or have the potential to emit at least 100,000 tpy CO₂e and that undertake a modification that increases net emissions of GHGs by at least 75,000 tpy CO₂e will also be subject to PSD requirements. For both steps, we also note that if sources or modifications exceed these CO₂e-adjusted GHG triggers, they are not covered by permitting requirements unless their GHG emissions also exceed the corresponding mass-based triggers (i.e., unadjusted for CO₂e.)

EPA believes that the costs to the sources and the administrative burdens to the permitting authorities of PSD and title V permitting will be manageable at the levels in these initial two steps, and that it would be administratively

infeasible to subject additional sources to PSD and title V requirements at those times. However, we also intend to issue a supplemental notice of proposed rulemaking (SNPR) in 2011, in which we will propose or solicit comment on a third step of the phase-in that would include more sources, beginning by July 1, 2013. In the same rulemaking, we may propose or solicit comment on a permanent exclusion from permitting for some category of sources, based on the doctrine of "absurd results," within the Chevron framework. We are establishing an enforceable commitment that we will complete this rulemaking by July 1, 2012, which will allow for 1 year's notice before step 3 would take effect.

We are also including in this action a rule that no source with emissions below 50,000 tpy CO₂e, and no modification resulting in net GHG increases of less than 50,000 tpy CO₂e, will be subject to PSD or title V permitting before at least 6 years from now, April 30, 2016. This is because we are able to conclude at this time that the administrative burdens that would accompany permitting sources below this level will be so great that, absent significant streamlining actions that EPA will need time to develop and implement, or else absent significant resource constraints that the permitting authorities will need time to implement, it will be impossible to administer the

permit programs for these sources until at least 2016. We commit to explore streamlining techniques that may well make the permitting programs much more efficient to administer for GHGs, and that therefore may allow their expansion to smaller sources, but we expect that those techniques will take several years to develop and implement.

Further, we are establishing an enforceable commitment that we will (i) complete a study by April 30, 2015, to evaluate the status of PSD and title V permitting for GHG-emitting sources, including progress in developing streamlining techniques; and (ii) complete further rulemaking based on that study by April 30, 2016 to address the permitting of smaller sources. That rulemaking may also consider additional permanent exclusions based on the "absurd results" doctrine, where applicable.

This rulemaking is necessary because without it, PSD and title V would apply to all stationary sources that emit or have the potential to emit more than 100 or 250 tons of GHGs per year beginning on January 2, 2011. This is the date when EPA's recently promulgated Light Duty Vehicle Rule (LDVR) takes effect, imposing control requirements for the first time on CO₂ and other GHGs. If this January 2, 2011 date were to pass without this rule being in effect, PSD and title V requirements would apply at the 100/250 tpy applicability levels provided

under a literal reading of the CAA as of that date. From that point forward, a source owner proposing to construct any new major source that emits at or higher than the applicability levels (and which therefore may be referred to as a "major" source) or modify any existing major source in a way that would increase GHG emissions would need to obtain a permit under the PSD program that addresses these emissions before construction or modification could begin. Similarly, for title V, a new or existing source exceeding the 100 tpy applicability level in the Act would be required to get a title V permit, if it did not already have one.

Under these circumstances, many small sources would be burdened by the costs of the individualized PSD control technology requirements and permit applications that the PSD provisions, absent streamlining, require. Additionally, state and local permitting authorities would be burdened by the extraordinary number of these permit applications, which are orders of magnitude greater than the current inventory of permits and would vastly exceed the current administrative resources of the permitting authorities. Permit gridlock would result with the permitting authorities able to issue only a tiny fraction of the permits requested.

These impacts - the costs to sources and administrative burdens to permitting authorities - that would result from application of the PSD and title V programs for GHG emissions at the statutory levels as of January 2, 2011 are so severe that they bring the judicial doctrines of "absurd results," "administrative necessity," and "step-at-a-time" into the Chevron two-step analytical framework for statutes administered by agencies. Under Chevron, the agency must, at step 1, determine whether Congress's intent as to the specific matter at issue is clear, and, if so, the agency must give effect to that intent. If congressional intent is not clear, then, at step 2, the agency has discretion to fashion an interpretation that is a reasonable construction of the statute. To determine congressional intent, the agency must first consider the words of the statutory requirements, and if their plain meaning answers the question at hand, then, in most cases, the agency must implement those requirements by their terms. However, under the "absurd results" doctrine, the plain meaning of statutory requirements should not be considered to indicate congressional intent if the plain meaning would produce a result that is senseless or that is otherwise inconsistent with -- and especially one that undermines -- underlying congressional purpose. In these cases, if congressional intent is clear, the

agency should implement the statutory requirements not in accordance with their plain meaning, but rather in a manner that most closely effectuates congressional intent; and if congressional intent is not clear, then an agency may select an interpretation that is reasonable under the statute. Similarly, under the "administrative necessity" doctrine, Congress is presumed, at Chevron step 1, not to have intended to have written statutory requirements that are impossible to administer, but rather to have intended that requirements be implemented in manner that is administrable. Therefore, under this doctrine, an agency may depart from statutory requirements that, by their terms, are impossible to administer, but the agency may depart no more than necessary to render the requirements administrable. Under the "step-at-a-time" doctrine, Congress is presumed at Chevron step 1 to have intended to allow the agency to administer the statutory requirements on a step-by-step basis, as appropriate, when the agency remains on track to iComplement the requirements as a whole. Each of these doctrines supports our action separately, but the three also are intertwined and support our action in a comprehensive manner.

Here, we have determined, through analysis of burden and emissions data as well as consideration of extensive public

comment, that the costs to sources and administrative burdens to permitting authorities that would result from application of the PSD and title V programs for GHG emissions at the statutory levels as of January 2, 2011 should be considered "absurd results." Therefore, we conclude that under the "absurd results" doctrine, Congress could not have intended that the statutory levels apply as of that date, and instead that Congress intended some type of ameliorative alternative. The "administrative necessity" doctrine supports our conclusion as well because the administrative burdens of attempting to comply with the statutory thresholds as of January 2, 2011 would be impossible to bear, and for this reason, too, Congress could not have intended that the statutory levels apply as of that date.

Under these circumstances, congressional intent as to how to apply PSD and title V to GHG sources may be considered to be unclear. If so, EPA has authority to develop an interpretation that is reasonable under the statute, and the tailoring approach so qualifies. In the alternative, congressional intent may be considered to be clear - with the possible exceptions described below - that PSD and title V requirements should apply to GHG sources as closely to the statutory levels as possible, and as quickly as possible, while assuring that affected sources and permitting authorities can manage their permitting requirements.

The tailoring rule is the approach that best effectuates this intent. As a result, the tailoring rule is valid under Chevron step 1, as informed by the "absurd results," "administrative necessity," and "step-at-a-time" doctrines. Even so, we acknowledge that it may not be clear whether Congress would have intended that PSD and title V apply to the smallest GHG sources - those at or near the statutory levels -- and we intend to resolve this issue through future rulemaking. In addition, with respect to title V, we acknowledge that it may not be clear whether Congress intended that large numbers of GHG sources be required to hold permits that do not have applicable requirements - which we will call "empty permits" - and we intend to resolve this issue, too, in future rulemaking.

The legal analysis just describes justifies each of the actions in this rule. The first two steps that we promulgate in this rule, which take effect on January 2, 2011 and July 1, 2011, are constitute the most that permitting authorities can reasonably be expected to do by those times. Similarly, the 50,000 tpy floor that we promulgate through at least April 30, 2016 is reasonable because the information we have available now shows that it constitutes the most that permitting authorities can reasonably be expected to do by that date. Finally, the study and two additional rulemakings - to take effect by July 1,

2013 and April 30, 2016 -- to which we commit in this rule establish a track for acquiring additional information and for taking further steps to address the application of PSD and title V more closely to the literal statutory levels. We intend to apply them as closely to those levels as is consistent with congressional intent and administrative imperatives, in light of the "absurd results," "administrative necessity," and "step-at-a-time" doctrines, although, as noted above, we may consider in future rulemaking whether to conclude that Congress did not intend that the programs apply to the smallest sources or, for title V, sources with empty permits.

We are adopting regulatory language codifying our phase-in approach. As we will explain, many state, local and tribal area programs will likely be able to immediately implement our approach without rule or statutory changes for example, by, interpreting the term "subject to regulation" that is part of the applicability provisions for PSD and title V. We ask permitting authorities to confirm that they will follow this implementation approach for their programs, and if they cannot, then we will ask them to notify us so that we can take appropriate follow-up action to narrow our federal approval of their programs before GHGs become subject to regulation for PSD and title V programs on January 2, 2011. This will ensure that

our approvals do not federally obligate states to implement these programs for GHG until they demonstrate that they have adequate resources to do so by undertaking necessary programmatic, statutory, and/or regulatory changes at the state, local or tribal level.

The thresholds we are establishing are based on CO₂e for the aggregate sum of six greenhouse gases that constitute the pollutant that will be subject to regulation, which we refer to as GHGs.¹ These gases are: CO₂, methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆). Thus, in this rule, we provide that PSD and title V applicability is based on the quantity that results when the mass emissions of each of these gases is multiplied by the Global Warming Potential (GWP) of that gas, and then summed for all six gases. However, we further provide that in order for a source's GHG emissions to trigger PSD or title V requirements, the quantity of the GHGs must exceed both the applicability thresholds established in this rulemaking on a CO₂e basis and the statutory thresholds of 100 or 250 tpy on a

¹ The term "greenhouse gases" is commonly used to refer generally to gases that have heat-trapping properties. However, in this notice, unless noted otherwise, we use it to refer to specifically to the pollutant regulated in the LDVR.

mass basis.² Similarly, in order for a source to be subject to the PSD modification requirements, the source's net GHG emissions increase must exceed the applicable significance level on a CO₂e basis and must also result in a net mass increase of the constituent gases combined.

We are adopting this rule after careful consideration of numerous public comments. On October 27, 2009 (74 FR 55292), EPA proposed the GHG tailoring rule. EPA held two public hearings on the proposed rule, and received over 400,000 written public comments. The public comment period ended on December 28, 2009. The comments have provided detailed information that has helped EPA understand better the issues and potential impacts of this rule, and the final rule described in this preamble incorporates many of the suggestions we received. We respond to many of these comments in explaining our rationale for the final rule, which is described in section V. The final rule adopts many elements of the proposal but differs from the proposal in several important respects. We proposed to apply PSD and title V to GHG sources that emit or have the potential to emit at least 25,000 tpy CO₂e, and we proposed a PSD significance level in a range between 10,000 and 25,000 tpy CO₂e, but based on consideration of the additional information we

² The relevant thresholds are 100 tpy for title V, and 250 tpy for PSD except for 28 categories listed in EPA regulations for which the PSD threshold is 100 tpy.

received and our further analysis, we are finalizing the threshold levels on the schedule described previously. In addition, the mechanism for state, local and tribal program implementation has been significantly changed to reflect the comments received that we needed to develop an implementation approach that states could adopt under state law more expeditiously.

The remainder of this notice describes our approach and rationale in more detail. Following this overview, section III of this preamble provides background information on the nature of GHG emissions, recent regulatory developments that affect when and how GHG emissions are subject to stationary source permitting, and the general requirements of the PSD and title V programs. Section IV describes in detail the summary of the key actions being taken in this rule, including the determination of emissions, the thresholds and timing for the phase-in, our approach to implementing the phase-in, and the additional future actions we will take. Section V provides a more detailed description of each action, explaining the policy and legal rationale and responding to comments received, beginning with our decisions on how to calculate the mass-based and CO₂e-based emissions used in the phase-in, followed by our legal and policy rationale for the first two steps of the phase-in, the 50,000

typical floor, and the subsequent study and rulemakings to determine whether and how smaller sources should be subject to permitting. This section then describes key implementation issues including the approach to state adoption. After describing our plans for follow-up on title V fee programs, the section concludes by describing permit streamlining techniques; guidance on BACT for the GHG sources that are affected under the first two steps of the tailoring rule phase-in; requests for exemptions; and transitional issues, including grandfathering. Finally, section VI describes the expected impacts that will result from the phase-in approach (i.e., the narrower application of PSD and title V requirements during the phase-in period) and section VII addresses administrative requirements.

III. Background

A. What are greenhouse gases and their sources?

GHGs trap the Earth's heat that would otherwise escape from the atmosphere into space, and forms the greenhouse effect that helps keep the Earth warm enough for life. Greenhouse gases are naturally present in the atmosphere and are also emitted by human activities. Human activities are intensifying the naturally occurring greenhouse effect by increasing the amount of GHGs in the atmosphere, which is changing the climate in a

way that endangers human health, society, and the natural environment.

Some GHGs such as CO₂ are emitted to the atmosphere through natural processes as well as human activities. Other gases, such as fluorinated gases, are created and emitted solely through human activities. As previously noted, the well-mixed GHGs of concern directly emitted by human activities include CO₂, CH₄, N₂O, HFCs, PFCs, and SF₆. These six GHGs will, for the purposes of this final rule, be referred to collectively as "the six well-mixed GHGs," or, simply, GHGs. and together constitute the "air pollutant" upon which the GHG thresholds in this action are based. These six gases remain in the atmosphere for decades to centuries where they become well-mixed globally in the atmosphere. When they are emitted more quickly than natural processes can remove them from the atmosphere, their concentrations increase, thus increasing the greenhouse effect. The heating effect caused by the human-induced buildup of GHGs in the atmosphere is very likely the cause of most of the observed global warming over the last 50 years. A detailed explanation of climate change and its impact on health, society, and the environment is included in EPA's technical support document for the endangerment finding final rule (Docket ID No. EPA-HQ-OAR-2009-0472-11292).

In the United States, the combustion of fossil fuels (e.g., coal, oil, gas) is the largest source of CO₂ emissions and accounts for 80 percent of the total GHG emissions. More than half of the energy related emissions come from large stationary sources such as power plants, while about a third come from transportation. Of the six well-mixed GHGs, four (CO₂, CH₄, N₂O, and HFCs) are emitted by motor vehicles. In the United States industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management are also important sources of GHGs.

Different GHGs have different heat-trapping capacities. The concept of GWP was developed to compare the heat-trapping capacity and atmospheric lifetime of one GHG to another. The definition of a GWP for a particular GHG is the ratio of heat trapped by one unit mass of the GHG to that of one unit mass of CO₂ over a specified time period. When quantities of the different GHGs are multiplied by their GWPs, the different GHGs can be summed and compared on a CO₂e basis. For example, CH₄ has a GWP of 21, meaning each ton of CH₄ emissions would have 21 times as much impact on global warming over a 100-year time horizon as 1 ton of CO₂ emissions. Thus, on the basis of heat-trapping capability, 1 ton of CH₄ would equal 21 tons of CO₂e. The GWPs of the non CO₂ GHGs range from 21 (for CH₄) up to 23,900

(for SF₆). Aggregating all GHGs on a CO₂e basis at the source level allows a facility to evaluate its total GHG emissions contribution based on a single metric.

B. Endangerment Finding and the Light-Duty Vehicle Rule

1. Endangerment Finding

On April 2, 2007, the United States Supreme Court found that GHGs are air pollutants under CAA section 302(g). Massachusetts v. EPA, 549 U.S. 497 (2007). As a result, the Supreme Court found that EPA was required to determine, under CAA section 202(a), whether (a) GHGs from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or (b) the science is too uncertain to make a reasoned decision. After issuing a proposal and receiving comment, on December 7, 2009, the Administrator signed two distinct findings regarding GHGs under CAA section 202(a):

- **Endangerment Finding:** The Administrator found that the current and projected atmospheric concentrations of the mix of six long-lived and directly emitted GHGs—CO₂, CH₄, N₂O, HFCs, PFCs, and SF₆ (referred to as “well-mixed greenhouse gases” in the endangerment finding)—are reasonably anticipated to endanger the public health and welfare of current and future generations.

- Cause or Contribute Finding: The Administrator found that the emissions of the single air pollutant defined as the aggregate group of six well-mixed greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the GHG air pollution that threatens public health and welfare.

These findings, which were published December 15, 2009 (74 FR 66496), do not themselves impose any requirements on industry or other entities. However, they were a prerequisite to finalizing the GHG standards for light-duty vehicles, described next.

2. Light-Duty Vehicle Rule

The light-duty vehicle rule, signed on April 1, 2010³ is a joint rule between EPA and the Department of Transportation's National Highway Traffic Safety Administration (NHTSA) that establishes a national program consisting of new standards for light-duty vehicles that will reduce greenhouse gas emissions and improve fuel economy. EPA finalized the national GHG emissions standards under the Act, and NHTSA finalized Corporate Average Fuel Economy (CAFE) standards under the Energy Policy and Conservation Act, as amended. The new standards apply to new passenger cars, light-duty trucks, and medium-duty passenger

³ This rule has not yet been published in the Federal Register. The signed version of the rule is available at <http://epa.gov/otaq/climate/regulations.htm> [update when published]

vehicles, starting with model year 2012. The EPA GHG standards are projected to result in an estimated combined average emissions level of 250 grams of CO₂ per mile for model year 2016 vehicles. The standards begin with the 2012 model year, with standards increasing in stringency through model year 2016. The standards are a fleet average for each manufacturer, based on a footprint attribute curve, meaning that the actual target for a vehicle will vary depending on the size of the vehicle. Under the footprint-based standards, each manufacturer will have a GHG standard unique to its fleet, depending on the footprints of the vehicle models produced by that manufacturer. A manufacturer will have separate footprint-based standards for cars and for trucks

The endangerment and contribution findings described above require EPA to issue standards under section 202 (a) "applicable to emission" of the air pollutant that EPA found causes or contributes to the air pollution that endangers public health and welfare. The final emissions standards satisfy this requirement for GHGs from light-duty vehicles. Under section 202(a) the Administrator has significant discretion in how to structure the standards that apply to the emission of the air pollutant at issue here, the aggregate group of six GHGs. EPA has the discretion under section 202(a) to adopt separate

standards for each gas, a single composite standard covering various gases, or any combination of these. In the LDVR, EPA finalized separate standards for nitrous oxide and methane, and a CO₂ standard that provides for credits based on reductions of HFCs, as the appropriate way to issue standards applicable to emission of the single air pollutant, the aggregate group of six GHGs. EPA did not set any standards for PFCs or SF₆, as they are not emitted by motor vehicles.

C. What are the general requirements of the PSD program?

1. Overview of the PSD Program

The PSD program is a preconstruction review and permitting program applicable to new major stationary sources and major modifications at existing major stationary sources. The PSD program applies in areas that are designated "attainment" or "unclassifiable" for a National Ambient Air Quality Standard (NAAQS). The PSD program is contained in part C of title I of the CAA. The "nonattainment new source review (NSR)" program applies in areas not in attainment for a NAAQS or in the Ozone Transport Region and is implemented under the requirements of part D of title I of the CAA. Collectively, we commonly refer to these two programs as the major NSR program. The governing EPA rules are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51, appendices S and W. There is no NAAQS for CO₂ or

any of the other well-mixed GHGs, nor has EPA proposed any such NAAQS; therefore, unless and until we take further such action, we do not anticipate that the "nonattainment" major NSR program will apply to GHGs.

The applicability of PSD to a particular source must be determined in advance of construction or modification and is pollutant-specific. The primary criterion in determining PSD applicability for a proposed source is whether the source is a "major emitting facility," based on its predicted potential emissions of regulated pollutants, within the meaning of CAA section 169(1) and either constructs or undertakes a modification. EPA has implemented these requirements in its regulations, which use somewhat different terminology for determining PSD applicability, which is whether the source is a "major stationary source" or whether the proposed project is a "major modification."

a. Major Stationary Source

Under PSD, a "major stationary source" is any source belonging to a specified list of 28 source categories which emits or has a potential to emit (PTE) of 100 tpy or more of any pollutant subject to regulation under the CAA, or any other source type which emits or has the PTE such pollutants in amounts equal to or greater than 250 tpy. We refer to these

levels as the 100/250-tpy thresholds. A new source with a PTE at or above the applicable "major stationary source threshold" is subject to major source NSR. These limits originate from section 169 of the CAA, which applies PSD to any "major emitting facility" and defines the term to include any source that emits or has a PTE of 100 or 250 tpy, depending on the source category. Note that the major source definition incorporates the phrase "subject to regulation," which, as described later, will begin to include GHGs on January 2, 2011, under our interpretation of that phrase discussed in the recent Interpretive Memo notice. 75 FR 17004.

b. Major Modifications

PSD also applies to existing sources that undertake a "major modification," which occurs: (1) when there is a physical change in, or change in the method of operation of, a "major stationary source;" (2) the change results in a "significant" emission increase of a pollutant subject to regulation (equal to or above the significance level that EPA has set for the pollutant in 40 CFR 52.21(b)(23)); and (3) there is a "significant net emissions increase" of a pollutant subject to regulation that is equal to or above the significance level (defined in 40 CFR 52.21(b)(23)). Significance levels, which EPA has promulgated for criteria pollutants and certain other

pollutants, represent a de minimis contribution to air quality problems. When EPA has not set a significance level for a regulated NSR pollutant, PSD applies to an increase of the pollutant in any amount (that is, in effect, the significance level is treated as zero).

2. General Requirements for PSD

This section provides a very brief summary of the main requirements of the PSD program. One principal requirement is that a new major source or major modification must apply BACT, which is determined on a case-by-case basis taking into account, among other factors, the cost effectiveness of the control and energy and environmental impacts. EPA has developed a "top-down" approach for BACT review, which involves a decision process that includes identification of all available control technologies, elimination of technically infeasible options, ranking of remaining options by control and cost effectiveness, and then selection of BACT. Under PSD, once a source is determined to be major for any regulated NSR pollutant, a BACT review is performed for each attainment pollutant that exceeds its PSD significance level as part of new construction or for modification projects at the source, where there is a

significant increase and a significant net emissions increase of such pollutant⁴.

In addition to performing BACT, the source must analyze impacts on ambient air quality to assure that no violation of any NAAQS or PSD increments will result, and must analyze impacts on soil, vegetation, and visibility. In addition, sources or modifications that would impact Class I areas (e.g., national parks) may be subject to additional requirements to protect air quality related values (AQRVs) that have been identified for such areas. Under PSD, if a source proposes to locate within 100 kilometers of a Class I area, the Federal Land Manager is notified and is responsible for evaluating a source's projected impact on the AQRV's and recommending either approval or disapproval of the source's permit application based on anticipated impacts. There are currently no NAAQS or PSD increments established for GHGs, and therefore these PSD requirements would not apply for GHGs, even when PSD is triggered for GHGs. However, if PSD is triggered for a GHG emissions source, all regulated NSR pollutants which the new source emits in significant amounts would be subject to PSD requirements. Therefore, if a facility triggers review for

⁴ We note that the PSD program has historically operated in this fashion for all pollutants – when new sources or modifications are “major”, PSD applies to all pollutants that are emitted in significant quantities from the source or project. This rule does not alter that for sources or modifications that are major due to their GHG emissions.

regulated NSR pollutants that are non-GHG pollutants for which there are established NAAQS or increments, the air quality, additional impacts, and Class I requirements would apply to those pollutants.

The permitting authority must provide notice of its preliminary decision on a source's application for a PSD permit, and must provide an opportunity for comment by the public, industry, and other interested persons. After considering and responding to comments, the permitting authority must issue a final determination on the construction permit. Usually NSR permits are issued by state or local air pollution control agencies, which have their own permit programs approved by EPA in their SIP. In some cases, EPA has delegated its authority to issue PSD permits to the state or local agency. In other areas, EPA issues the permits under its own authority.

D. What are the general requirements of the Title V Operating Permits Program?

1. Overview of Title V

The operating permit requirements under title V are intended to improve sources' compliance with other CAA requirements. The title V program is implemented through regulations promulgated by EPA, 40 CFR part 70, for programs

implemented by state and local agencies and tribes, and 40 CFR part 71, for programs generally implemented by EPA.

In summary, the title V program requires major sources (defined and interpreted by EPA to include sources that emit or have PTE of 100 tpy of any pollutant subject to regulation) and certain other sources to obtain operating permits. Under EPA's long-standing interpretation, a pollutant, such as a GHG, is "subject to regulation" when it is subject to a CAA requirement establishing actual control of emissions. Title V generally does not add new pollution control requirements, but it does require that each permit contain all existing pollution control requirements or "applicable requirements" required by the CAA (e.g., New Source Performance Standard (NSPS), and State Implementation Plan (SIP) requirements, including PSD), and it requires that certain procedural requirements be followed, especially with respect to compliance with these requirements. "Applicable requirements" for title V purposes include stationary source requirements, but do not include mobile source requirements. Other procedural requirements include providing review of permits by EPA, states, and the public, and requiring permit holders to track, report, and annually certify their compliance status with respect to their permit requirements.

2. Title V Permit Requirements

This section provides a brief summary of the requirements of the title V program that are most relevant to this action. A source generally must apply for a title V permit within 1 year of first becoming subject to permitting - for new sources, this is usually within 1 year of commencing operation. The application must include identifying information, a description of emissions and other information necessary to determine applicability of requirements and information concerning compliance with those requirements. The permitting authority uses this information to develop the source's operating permit.

Title V permits generally contain the following elements: (1) emissions limitations and standards to assure compliance with all applicable requirements; (2) monitoring, recordkeeping, and reporting requirements, including submittal of a semiannual monitoring report and prompt reporting of deviations from permit terms; (3) fee payment; and (4) an annual certification of certification by a responsible official. The detailed requirements are set forth at 40 CFR 70.6.

In addition to the permit content requirements, there are procedural requirements that must be followed in issuing title V permits, including (1) application completeness determination; (2) public notice and a 30-day public comment period, including an opportunity for a public hearing, on draft permits; (3) EPA

and affected state review; and (4) a statement of the legal and factual basis of the draft permit. The permitting authority must take final action (issue or deny) on the permit applications within 18 months of receipt. EPA also has 45 days from receipt of a proposed permit to object to its issuance, and citizens have 60 days after that to petition EPA to object to a permit. Permits may also need to be revised or reopened if new requirements come into effect during the permit terms or if the source makes changes that conflict with, or necessitate changes to, the current permit. Permit revisions and re-openings follow procedural requirements which vary depending on the nature of the necessary change to the permit.

E. The Interpretive Memorandum

On December 18, 2008, EPA issued a memorandum, "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program" (known as the "Johnson Memo" or the "PSD Interpretive Memo," and referred to in this preamble as the "Interpretive Memo") that set forth EPA's interpretation regarding which EPA and state actions, with respect to a previously unregulated pollutant, cause that pollutant to become "subject to regulation" under the Act. Whether a pollutant is "subject to regulation" is important for the purposes of determining whether

it is covered under the federal PSD and title V permitting programs. The Interpretive Memo established that a pollutant is "subject to regulation" only if it is subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant (referred to as the "actual control interpretation"). On February 17, 2009, EPA granted a petition for reconsideration on the Interpretive Memo, and announced its intent to conduct a rulemaking to allow for public comment on the issues raised in the memorandum and on related issues. EPA also clarified that the Interpretive Memo would remain in effect pending reconsideration.

On March 29, 2010, EPA published a notice conveying its decision to continue applying (with one limited refinement) the Interpretive Memo's interpretation of "subject to regulation" ("Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs"). See 75 FR 17004. EPA concluded that the "actual control interpretation" is the most appropriate interpretation to apply given the policy implications. However, we refined our interpretation in one respect: we established that PSD permitting requirements apply to a newly regulated pollutant at the time a regulatory requirement to control emissions of that pollutant "takes

effect" (rather than upon promulgation or the legal effective date of the regulation containing such a requirement). In addition, based on the anticipated promulgation of the LDVR, we stated that the GHG requirements of the vehicle rule would take effect on January 2, 2011, because that is the earliest date that a 2012 model year vehicle may be introduced into commerce. In other words, the compliance obligation under the LDVR does not occur until a manufacturer may introduce into commerce vehicles that are required to comply with GHG standards, which will begin with model year 2012 and will not occur before January 2, 2011. We also reiterated EPA's interpretation that the 100 tpy major source threshold for title V is triggered only by pollutants "subject to regulation" under the Act, and we defined and applied that term for title V purposes in the same way that we did for PSD purposes. That is, we stated that a pollutant is "subject to regulation" if it is subject to a CAA requirement establishing "actual control of emissions;" that a pollutant is considered "subject to regulation" for title V purposes when such a requirement "takes effect.;" and, based on the anticipated promulgation of the LDVR, that the GHG requirements of the vehicle rule would take effect on January 2, 2011.

On April 1, 2010, we finalized the LDVR as anticipated, confirming that manufacturer certification can occur no earlier than January 2, 2011. Thus, under the terms of the final notice for the Interpretive Memo, GHGs become subject to regulation on that date, and PSD and title V program requirements will also begin to apply upon that date.

IV. Summary of Final Actions

This section describes the specific actions we are taking in this final rule. It describes the overall tailoring approach for NSR and title V applicability, the steps we are taking to put it into place, and future actions that we commit to take. The next section, V, provides the legal and policy rationale for these actions. In that section, we provide a description of our rationale and response to comments for each action, presented in the same order as we describe the actions below.

A. How do you define the GHG pollutant for PSD and title V purposes?

1. GHG Pollutant Defined as the Sum-of-Six Well-Mixed GHGs

We are identifying the air pollutant for purposes of PSD and title V applicability to be the pollutant subject to regulation, which is the air pollutant for GHGs identified in EPA's LDVR, as well as EPA's endangerment and contribution

findings⁵. In the LDVR, EPA set emissions standards under section 202(a) that were "applicable to emission" of a single air pollutant defined as the aggregate sum of six greenhouse gases. The six GHGs, which are well-mixed gases in the atmosphere, are: CO₂, CH₄, N₂O, HFCs, PFCs, and SF₆. Earlier, EPA made the contribution finding for this single air pollutant.

Furthermore, as proposed, we are using an emissions threshold that allows all six constituent gases to be evaluated using a common metric - CO₂e. Thus, to determine applicability, a source's GHG emissions are calculated on a CO₂e basis by multiplying the mass emissions of any of the six GHGs that the source emits by that gas's GWP and then summing the CO₂e for each GHG emitted by the source. This sum, expressed in terms of tpy CO₂e, is then compared to the applicable CO₂e-based permitting threshold to determine whether the source is subject to PSD and title V requirements.

In addition, because we are implementing this phase-in through the term "subject to regulation" the rule is structured such that the statutory mass-based thresholds (i.e. 100/250 tpy)⁶ and 0 tpy for modifications at a major stationary source apply and stationary sources or modifications that do not meet these

⁵See 74 FR 66496, 66499, 66536-7. December 15, 2009.

⁶ A source need not meet the 100/250 thresholds for GHGs if it is already a major stationary source as a result of emissions of another regulated NSR pollutant.

thresholds are not subject to permitting requirements. While technically evaluation of the mass-based thresholds is the second step in the applicability analysis, from a practical standpoint most source are likely to treat this as an initial screen and not evaluate emissions on a CO₂ e basis if they would not trigger PSD on a mass basis and we have treated it as such in our descriptions below. As applicable, a source would evaluate these mass-based thresholds by summing each of the six GHGs it emits on a mass basis (i.e., before applying GWP). We expect that it will be very rare for a new stationary source or modification to trigger permitting based on CO₂e and not also trigger based on mass alone.

Determining permit program applicability for the GHG "air pollutant" by using the sum-of-six GHGs is based on EPA's interpretation that the PSD and title V requirements apply to each "air pollutant" that is "subject to regulation" under another provision of the CAA. As discussed previously, the final LDVR for GHGs makes it clear that the emissions standards EPA adopted are standards applicable to emission of the single air pollutant defined as the aggregate mix of these six well-mixed greenhouse gases. See April 1, 2010 Preamble, II.A.2.c.,

pp 153-4., and 40 CFR §86.1818-12.⁷ For reasons explained in more detail in section V, we have determined it is legally required, and preferable from a policy standpoint, for EPA to use the same definition of the air pollutant for permitting purposes as that used in the rule that establishes the control requirements for the pollutant. We also believe there are implementation advantages for applying PSD and title V in this way. Thus, this rule establishes that a stationary source will use the group of six constituent gases for permitting applicability, rather than treating each gas individually. Similarly, you will include all six constituent gases because that is how the air pollutant is defined, even though motor vehicles only emit four of the six.

2. What GWP values should be used for calculating CO₂e?

We are requiring that wherever you perform an emissions calculations involving CO₂e for the purposes of determining the applicability of PSD or title V requirements, you use the GWP values codified in the EPA's GHG mandatory reporting rule [Reference: Table A-1 to Subpart A of Part 98 - Global Warming Potentials, FR, Vol.74, No. 209, p. 56395]. This approach will

⁷ §86.1818-12 (a) ("Applicability. This section contains standards and other regulations applicable to the emission of the air pollutant defined as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride").

assure consistency between the values required for calculations under the mandatory reporting rule and for PSD or title V. In addition, because any changes to Table A-1 of the mandatory GHG reporting rule regulatory text must go through a rulemaking, this approach will assure that the values used for the permitting programs will reflect the latest values adopted for usage by EPA after notice and comment.

B. When will PSD and title V applicability begin for GHGs and emission sources?

Overview

In this action, we establish the first two phases of our phase-in approach, which we refer to as steps 1 and 2. We also commit to a subsequent rulemaking in which we will propose or solicit comment on establishing a further phase-in, that is, a step 3, that would apply PSD and title V to additional sources, effective July 1, 2013, and on which we commit to take final action, as supported by the record,⁸ by no later than July 1, 2012.

We also commit to undertaking an assessment of sources' and permitting authorities' progress in implementing PSD and title V for GHG sources, and to complete this assessment by 2015. We

⁸ Although we commit to propose or solicit comment on lower thresholds and to take final action on that proposal by July 1, 2012, we cannot, at present, commit to promulgate lower thresholds. It will not be until the Step 3 rulemaking itself that we will gather and analyze data and receive comments that determine whether we have basis for promulgating lower thresholds.

further commit to completing another round of rulemaking addressing smaller sources by April 30, 2016. Our action in that rulemaking would address permitting requirements for smaller sources, taking into account the remaining problems concerning costs to sources and burdens to permitting authorities. Finally, we determine in this action that we will apply PSD or title V requirements to sources that emit GHGs, or that conduct modifications that result in increases in emissions of GHGs, in amounts of less than 50,000 tpy CO₂e any earlier than when we take the required further action to address smaller sources by April 30, 2016.

Through this process, we will implement the phase-in approach by applying PSD and title V at threshold levels that are as close to the statutory levels as possible, and do so as quickly as possible. The level and timing of the thresholds that we promulgate in future actions will be based on our assessment of the resulting costs to sources and burdens to permitting authorities, and that, in turn, will depend on such variables as our progress in developing streamlining approaches and on permitting authorities' progress in developing permitting expertise and acquiring more resources. At this time, we cannot foresee exactly when or in what manner those developments will occur. Therefore, we cannot promulgate more components of the

tailoring approach beyond what we promulgate in this action. We can say only that we may continue the phase-in process with further rulemaking after 2016. Alternatively, we may make a definitive determination in one of the future rulemaking actions that, under the "absurd results" doctrine, PSD or title V applies only to certain GHG sources, and does not apply to the remaining GHG sources, and with that rulemaking, bring this tailoring process to a close.

1. What are the Step 1 thresholds, timing and calculation methodology?

a. PSD Permitting

Step 1 of the tailoring rule phase-in will begin on January 2, 2011. With respect to the PSD program, GHG sources will become subject to PSD for their GHG emissions if they undergo PSD permitting anyway, either for new construction or for modification projects, based on emissions of non-GHG pollutants, in which case they will be subject to the PSD requirements for GHG if they increase GHG emissions by 75,000 tpy CO₂e or more. Under this step, only these sources, which we refer to as "anyway" PSD sources, will become subject to PSD; no sources will become major sources for PSD purposes or be treated as undertaking modifications that trigger PSD based solely on their GHG emissions. As a result, no additional PSD permitting

actions will be necessary solely due to GHG emissions. However, existing or newly-constructed sources that are determined to be major sources based on non-GHG emissions are required to conduct a BACT review for their GHG emissions (from new construction) or emissions increases (from modifications), if they are subject to PSD due to their non-GHG emissions from construction or modification actions and each of the following conditions is met:

1) The GHG emissions (or net emissions increase) due to the new construction (or modification) project, calculated as the sum of the six well-mixed GHGs on a mass basis (no GWPs applied) exceed a value of 0 tpy; and

2) The GHG emissions (or net emissions increase) due to the new construction (or modification) project, calculated as the sum of the six well-mixed GHGs on a CO₂e basis (GWPs applied) equal or exceed a value of 75,000 tpy CO₂e.

The purpose of the first condition is to determine whether the GHG emissions or net emissions increase has resulted in an "increase in the amount" of an air pollutant as required by the Act. Because EPA has not defined a mass-based regulatory significance level for GHGs, that level, in effect, is treated as zero. See 40 CFR §§ 52.21 (b)(23)(ii) and 51.166 (b)(23)(ii). In practice, this means any amount of new

emissions or an emission increase will exceed the mass-based limit. We are not, at this time, establishing a significance level based on mass emissions because we have established one based on CO₂e that addresses permitting burdens. Thus, the mass-based step will be used only to exclude sources that have no mass increase of GHGs. At this time, we are not establishing a significance level on a mass emissions basis.

b. Title V Permitting

Under step 1, only sources required to have title V permits for non-GHG pollutants (i.e., "anyway" title V sources) will be required to address GHGs as part of their title V permitting. That is, no sources will become major for title V based solely on their GHG emissions. Note further, however, that the 75,000 tpy CO₂e limit does not apply to title V, so that anyway title V sources must apply any title V requirements to their GHG emissions regardless of the amount of those emissions. Sources with title V permits must address GHG requirements when they apply for, renew, or revise their permits. These requirements will include any GHG applicable requirements (e.g., GHG BACT requirements from a PSD process) and associated monitoring, record-keeping and reporting. When a permit application is otherwise required, they will also need to identify GHG emissions and other information in that application to the

extent required under 40 CFR §§ 70.5(c) and 71.5(c), including information necessary to determine applicable requirements.⁹

2. What are the Step 2 thresholds, timing and calculation methodology?

a. PSD Permitting

Step 2 will begin July 1, 2011. Under step 2, anyway PSD sources - that is, sources already subject to PSD based on non-GHGs and covered under step 1 above - will remain subject to PSD. In addition, sources with the potential to emit 100,000 tpy CO₂e or more of GHG will be considered major sources for PSD permitting purposes (provided that they also emit GHGs or some other regulated NSR pollutant above the 100/250 tpy (mass based) statutory thresholds. Additionally, any physical change or change in the method of operation at a major source (including one that is only major due to GHGs) resulting in a net GHG emissions increase of 75,000 tpy CO₂e or more will be subject to PSD review and requirements with respect to GHGs (provided that it also results in an increase of GHG emissions on a mass basis).

⁹ EPA notes, however, that many sources subject to title V under steps 1 and 2 will also be subject to the GHG mandatory reporting rule. For these sources, the emissions description requirements in the title V regulations will generally be satisfied by referencing information provided under the reporting rule.

Specifically, for purposes of determining whether a GHG emission source undertaking construction is considered a major source under PSD, the following conditions must be met:

1) The GHG emissions at a newly constructed source which is not major for another pollutant, calculated as the sum-of-six well-mixed GHGs on a mass basis (no GWPs applied):

- equal or exceed 100 tpy (in actual emissions or potential to emit) for sources in any of the 28 major emitting facility source categories listed under PSD, or
- equal or exceed 250 tpy (in actual emissions or potential to emit) for any other stationary source.

2) The GHG emissions at a newly constructed source, calculated as the sum-of-six well-mixed GHGs on a mass basis (GWPs applied) equal or exceed 100,000 tpy CO₂e (on an actual or potential to emit basis).

For determining whether a modification project at a major stationary source is subject to PSD review, the following conditions must be met:

1) The net GHG emissions increase resulting from the project, calculated as the sum of-six well-mixed GHGs on a mass basis (no GWPs applied) equals or exceeds 0 tpy.

2) The net GHG emissions increase resulting from the project, calculated as the sum-of-six well-mixed GHGs on a CO₂e basis (GWPs applied) equals or exceeds 75,000 tpy CO₂e.

The purpose of the first condition in both determinations above is to confirm whether the GHG emissions or emissions increase have exceeded, on a mass-basis, the statutory major source thresholds (where the source is not otherwise major) and mass-based statutory significance level for GHGs, which, as noted above, is 0 tpy. See 40 CFR § 52.21 (b)(23)(ii) and 51.166 (b)(23)(ii).

As an example of how the mass-based test would apply, consider a modification project that results in a 5 tpy increase of GHG emissions on a mass basis, associated with a high-GWP GHG gas (for example, SF₆, with a GWP value of 23,900), but also results in a 100 tpy reduction in CO₂ emissions (assume no other contemporaneous increases or decreases of GHG). In this example, there would be a net decrease of GHG emissions on a mass basis (5 tpy - 100 tpy = -95 tpy). Because there is no mass-based increase of GHG, this project does not trigger PSD, despite the fact that the net GWP-adjusted emissions increase of SF₆ in this example would equal 119,500 tpy of CO₂e and the project would thus exceed 75,000 tpy CO₂e.

b. Title V Permitting

Under step 2, "anyway" title V sources - that is, sources already subject to title V based on non-GHGs and that are covered under step 1 above - will continue to be subject to title V. In addition, GHG emission sources that equal or exceed the 100,000 tpy CO₂e threshold will be required to obtain a title V permit if they do not already have one. It is important to note that the requirement to obtain a title V permit will not, by itself, result in the triggering of additional substantive requirements for control of GHG. Rather, these new title V permits will simply incorporate whatever applicable CAA requirements, if any, apply to the source being permitted. The following conditions need to be met in order for title V to apply under step 2 to a GHG emission source.

For determining whether a GHG emission source is subject to permitting under title V:

- 1) The GHG emissions at an existing or newly constructed source, calculated as the sum of the six well-mixed GHGs on a mass basis (no GWPs applied), equal or exceed 100 tpy (on an actual emission or PTE basis).

- 2) The GHG emissions at an existing or newly constructed source, calculated as the sum of the six well-mixed GHGs on a mass basis (GWPs applied), equal or exceed a value of 100,000 tpy CO₂e (on an actual emission or PTE basis)

3. What about Step 3?

In this rule, EPA establishes an enforceable commitment to complete another rulemaking no later than July 1, 2012, in which we will propose or solicit comment on a step 3 of the phase-in and may also consider other approaches that may result in the permanent exclusion of a category of sources from PSD or title V requirements, under the Chevron framework, taking account of the "absurd results" doctrine.

Consistent with our phase-in approach, it is important for us to consider whether, at some point during the implementation of step 2, it will become possible to administer GHG permitting programs for additional sources. For example, if EPA is able to promulgate measures that streamline programs to at least some extent, if permitting authorities increase their resources, or if implementation experience and more seasoned staff results in more effective use of scarce permitting resources, then we expect that we will be able to phase-in the application of PSD and title V to more sources by establishing step 3. We do not have enough information now to establish a final step 3, particularly because there will be significant transition occurring in the GHG permitting programs during steps 1 and 2. However, we believe that it will be possible to develop a record

on which to base step 3 sometime soon after we begin to implement step 2.

Therefore, we plan to propose a rule in which we solicit comment on or propose lower thresholds for PSD and title V applicability, and we establish an enforceable commitment to finalize a rule in which we address those matters by July 1, 2012. In order to provide a year for permitting authorities and sources to prepare for any additional GHG permitting action in Step 3, we will establish that Step 3 would take effect on July 1, 2013. We also commit to explore between now and the step 3 proposal, a wide range of streamlining options. In the proposal, we will take comment on streamlining approaches we think may be viable (except to the extent we will have already issued guidance documents concerning streamlining approaches), and we will address those options in the final rule.

In addition, as part of the step 3 action, we may solicit comment on a permanent exclusion of certain sources from PSD, title V or both, based on an "absurd results" rationale. For example, we may make a final determination that under the "absurd results" doctrine, PSD and/or title V do not apply to a set of GHG sources that, although above the statutory thresholds for those programs, are too small and relatively inconsequential in terms of GHG contribution. Another type of such exclusion

for the title V program could be for sources that would otherwise be required to obtain an "empty permit," that is, one that would not contain any applicable requirements because there are none that apply to the source or any applicable GHG requirements, depending on the approach taken. It is possible that in promulgating such an exclusion, we may conclude that it brings into the PSD and title V programs the full set of sources that would be consistent with congressional intent, and, if so, we would find that such a rule brings the tailoring process to a close. The application of the "absurd results" rationale for a permanent exclusion is discussed in more detail in the next section.

4. What about the proposed 6 year exclusion for smaller sources?

The tailoring proposal contemplated at least a six-year exclusion from permitting for small sources. This proposed exclusion was based on the overwhelming numbers of permitting actions at small sources and the need for time for permitting authorities to secure resources, hire and train staff, and gain experience with GHG permitting for new types of sources and technologies. It was also based on the time needed for EPA to develop, and for states to adopt, streamlining measures to reduce the permitting burden (e.g., concerning PTE, presumptive

BACT, or general permits,). We therefore proposed such an exclusion, and proposed that it would last 6 years - 5 years to complete a required study evaluating permitting burden and assessing the effect of streamlining measures or techniques in reducing this burden, plus an additional year to complete a final rulemaking that would phase in additional sources as appropriate based on the study.

We are finalizing the six-year exclusion, and for reasons described below, are establishing that in no event will sources below 50,000 tpy CO₂e be subject to PSD or title V permitting during the 6-year period, nor will modifications be subject to PSD unless they increase emissions by 50,000 tpy CO₂e or more. The exclusion will last until we take the action described later to address smaller sources, which is required by April 30, 2016. The exclusion provides certainty that, before this date, EPA will not act to cover sources and modifications below these thresholds, including during the required step 3 rulemaking that will occur in 2012. In effect, this means that step 3 will establish a major source threshold and significance level no lower than 50,000 tpy CO₂e. This does not necessarily mean we will cover sources below this level on April 30, 2016. It simply means that the provision we are adopting would assure that EPA does not cover such sources any sooner than that.

5. When and how will EPA take further action on smaller sources?

As we proposed, we are establishing an enforceable commitment to act within 5 years to complete a study projecting the administrative burdens that remain for small sources after permitting authorities have had time to secure resources, hire and train staff, and gain experience with GHG permitting for new types of sources and technologies, and after EPA has had time to develop (and states have had time to adopt) streamlining measures to reduce the permitting burden for such sources. We will use this study to serve as the basis for an additional rulemaking that would take further action to address small sources. Similar to the enforceable commitment to act on step 3, we are making an enforceable commitment to complete this rulemaking by April 30, 2016,

We cannot predict at this time what form that final action will take. It could function as a step 4, bringing in additional sources based on, for example, streamlining actions, increased permitting authority resources, and experienced and more efficient permitting staff; and it could further indicate that we intend to follow-up with a step 5 to bring in more sources. Alternatively, it could also function as a final step excluding certain sources permanently based on our application

of the Chevron framework, taking account of the "absurd results" doctrine, and subjecting the remaining sources to permitting. However, whatever final action we take would explain any necessary changes to the step 3 thresholds and would supersede the 6-year exclusion for sources and modifications below 50,000 tpy CO₂e.

C. How do state, local and tribal area programs adopt the final GHG applicability thresholds?

We are finalizing our proposed approach to change the definition of "major stationary source" in the PSD implementing regulations, and the "major source" definition in the title V implementing regulations to tailor the application of these permitting programs to GHG emissions. We also finalize a significance level for GHG emissions for purposes of defining a major modification under the PSD program, and add an exclusion from PSD and title V permitting for GHG emissions, until we complete a rulemaking required by April 30, 2016, for any sources that are not already subject to PSD and title V permitting and that emit less than 50,000 tpy of CO₂e.

As explained earlier, we are adopting thresholds that phase in the applicability of GHG permitting over a specified time period. In adopting regulatory changes to implement these thresholds, we follow an approach that is substantively the same

as the approach proposed, but takes a slightly different form. Specifically, we are explicitly codifying the phrase "subject to regulation" in our implementing regulations, instead of revising the "major stationary source" and "major source" definitions by incorporating the tailoring rules numerical thresholds directly into the definitions. Under this mechanism, we interpret the term "subject to regulation" so that GHG emissions from sources above the threshold are treated as subject to regulation, and therefore the sources that emit them are subject to PSD; while GHG emissions from sources below the threshold are not treated as subject to regulation, and therefore the sources that emit them are not subject to PSD. We are finalizing this alternative regulatory approach to facilitate rapid adoption and implementation of the final rules by states. These states would be able to establish their interpretation of "subject to regulation" by January 2, 2011, which is the date that the tailoring rule would take effect, and thereby, at that time, exempt sources below the threshold from PSD as a matter of both federal and state law. We are also finalizing this definition consistent with our statements in our recent action "Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs" (75 FR 17704) to better inform readers of our existing interpretation

of this phrase as it applies to all air pollutants. States may not need to undertake a regulatory or legislative action before implementing the final rule.

Because we finalize the rule in a manner that will allow most states to rapidly adopt and implement the final rule, and because our recent action on the Interpretive Memo allowed for a longer transition time than we anticipated at proposal, we are delaying final action on our proposal to issue limited approvals for SIP-approved PSD programs and part 70 operating permit programs.¹⁰ Instead, we are requesting that states submit information to the appropriate Regional Administrator by **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]** so that we may determine whether it is still necessary to finalize any of our proposed limited approvals for any SIP-approved PSD and Part 70 title V state programs. In that letter, states should explain whether they will adopt EPA's regulatory interpretation of the term "subject to regulation" in implementing both their PSD and part 70 title V permitting programs, and if so, whether the state intends to adopt the interpretation without undertaking a regulatory or legislative process. If a state must revise its statutes or regulations to implement the

¹⁰ In the alternative, we also proposed to use our 110(k)(6) error correction authority to revise SIP-approved PSD programs.

interpretation, we ask states to provide an estimate of the time to adopt final rules in its letter to the Regional Administrator. If a state chooses not to adopt our interpretation, the letter should address whether the state has alternative authority to implement the final rule's tailoring approach or some other approach that is at least as stringent, but which also addresses the expected shortfalls in personnel and funding that would exist if the state carried out permitting at thresholds lower than those in the final rules. For any state that is unable or unwilling to adopt the permitting thresholds in the final rules, and otherwise is unable to demonstrate adequate personnel and funding, or alternate authority to permit GHG emissions sources consistent with the final rules, EPA will move forward with finalizing a limited approval of the state's permitting program. By the same token, if we do not receive a letter from a state in response to this request by [date], we will be obliged to move forward with finalizing a narrowing of our approval of the existing SIP.

We also ask any state that currently lacks authority to issue PSD or title V permits to any GHG emissions sources to notify the Regional Administrator by letter as to whether the state intends to undertake rulemaking to revise their rules consistent with these applicability thresholds. For any state

that lacks the ability to issue PSD or title V permits for GHG emissions sources consistent with the final rule, we will undertake a separate action to call for revisions to these programs. We will also move quickly to impose a FIP for PSD through 40 CFR section 52.21, and use our federal title V authority to ensure that GHG sources will be permitted consistent with the final rules. Our request for information from states is discussed further in section V.C.

D. How do you treat GHGs for title V permit fees?

We are not amending the title V regulations for fees at this time, including any of the provisions specifying the presumptive minimum fee. We are also not, at this time, calling for each state, local or tribal program to submit new fee adequacy demonstrations as a result of increased GHG permitting workload during steps 1 and 2. However, as described in section VI.D the statutory and regulatory requirement to collect fees sufficient to cover all reasonable (direct and indirect) costs required to develop and administer title V programs still applies. Therefore we are recommending that each program review its resource needs for GHG-emitting sources and determine if the existing fee approaches will be adequate. If those approaches will not be adequate, we suggest that state, local and tribal agencies should be proactive in raising fees to cover the direct

and indirect costs of the program or develop other alternative approaches to meet the shortfall. We will closely monitor approved title V programs during the first two steps of the Tailoring Rule to ensure that the added workload from incorporating GHGs into the permit program does not result in fee shortfalls that imperil operating permit program implementation and enforcement. In developing alternative approaches, we note the value of approaches that do not require a per-ton fee for GHG and therefore do not require a GHG inventory to develop. Finally we offer to work with permitting authorities that request our assistance with developing fee approaches,

E. Other Actions and Issues

This section describes other actions we intend to take in the future related to GHG permitting in addition to the actions that we are promulgating with this final rule. This section also responds to commenters' suggestions that we undertake additional actions in this rule, which we decline to do.

1. Timing for Permit Streamlining Techniques

As described at proposal, we intend to develop a series of streamlining approaches as an integral part of our phase-in approach. The approaches we described at proposal included: (1) defining PTE for various source categories, (2) establishing

emission limits for various source categories that constitute presumptive BACT, (3) establishing procedures for use of general permits and permits-by-rule, (4) establishing procedures for electronic permitting, and (5) applying lean techniques to establish more efficient permitting processes. Taken as a whole, these techniques will obviate the applicability of PSD and title V requirements for some GHG-emitting sources; promote more efficient treatment of GHG-emitting sources that will already be subject to PSD and title V; and allow the expeditious expansion of PSD and title V applicability to more GHG-emitting sources while protecting those sources and the permitting authorities from undue expenses.

As a result, we fully intend to move forward expeditiously with these approaches. However, for reasons discussed in section VI.E, we do not expect to develop and implement any of these approaches before step 2 begins. Moreover, we generally expect that each of the first three - which are the most far-reaching -- will take several years to implement because we will need to undertake notice and comment rulemaking to develop them, and then the permitting authorities will need to adopt them through the appropriate state or local processes. We commit to explore a wide range of possible approaches before the step 3 rulemaking, and, in that rulemaking, to propose those that we

think may be viable once we have had time to gather and review key supporting data, and once the states and we have key implementation experience that can inform our thinking. Because the streamlining approaches generally carry uncertainty - as demonstrated by comments we received raising legal and policy concerns, as discussed below, that we will have to address - we are not committing with this action to adopt streamlining actions on any particular schedule. However, we intend to pursue all streamlining options as expeditiously as possible, beginning immediately and proceeding throughout the phase-in period, and we encourage permitting authorities to do the same.

2. Guidance for Best Available Control Technology

Determinations

Through this final rule we are not amending our regulations or issuing guidance on BACT for GHGs. As described in our proposal, we recognize the need to develop and issue technical and policy guidance for permitting of GHGs, and we plan to accomplish it through a separate effort that will involve stakeholder input. This effort is already underway; in addition to comments EPA received on the proposed Tailoring Rule related to GHG BACT guidance and information needs, EPA received a suite of recommendations from the Clean Air Act Advisory Committee (CAAAC) to which EPA is actively responding. This includes

technical guidance and database tools that EPA anticipates issuing by June 2010, and policy guidance that will be issued by the end of 2010. Thus, this important information will be available to support permitting agencies in their BACT determinations at the time that the GHGs become a regulated NSR pollutant, once the light-duty vehicle rule takes effect in January 2011. EPA is confident that these measures will help support a smooth transition to permitting emissions of GHGs.

3. Requests for Higher Category-Specific Thresholds and Exemptions from Applicability

EPA has decided not to provide exemptions from applicability determinations (major source and major modification) under title V and PSD for certain GHG emission sources, emission activities, or types of emissions at this time. Commenters requested several applicability exemptions with respect to GHGs from, for example, agricultural sources, residential sources, small businesses, energy-intensive industrial processes (e.g., aluminum, steel, cement, glass, and pulp and paper manufacturers), lime production, semiconductor production, poultry production, solid waste landfills, biomass combustion/biogenic emissions, fugitive emissions, and pollution control projects. For reasons explained in section VI.E, we have decided to address the need for tailoring through a uniform

threshold-based approach, rather than through a collection of various specific exclusions.

4. Transitional Issues including Requests for Grandfathering

For reasons explained in section V.E, EPA has determined that transitional issues for pending applications and permitted sources are adequately addressed by existing requirements and the amount of lead time provided before permitting requirements apply to GHGs under this rule and the April 2, 2010 final action regarding the Interpretive memo. This rule does not contain any additional exemptions or grandfathering provisions addressing the transition to PSD and title V permitting for GHGs.

We are not promulgating an exemption for PSD permit applications that are pending when step 1 of the permitting phase-in begins for those sources that would otherwise need to obtain a PSD permit based on emissions of pollutants other than greenhouse gases. Any PSD permits issued to Phase 1 sources on or after January 2, 2010 will need to address GHGs. This action makes no change to the position we expressed on this issue on April 2, 2010.

Final PSD permits issued before January 2, 2011 need not be reopened or amended to incorporate requirements for GHGs that take effect after the permit is issued. A source that is authorized to construct under a PSD permit but has not yet begun

actual construction on January 2, 2011 may begin actual construction after that date without having to amend the previously-issued PSD permit to incorporate GHG requirements, provided the permit has not expired.

Sources that are not subject to PSD permitting requirements until Step 2 need not obtain a PSD permit addressing GHGs in order to continue any actual construction that begins before July 1, 2011, when such a source was not a major stationary source required to obtain a PSD permit. However, Phase 2 sources that begin actual construction in phase 2 may do so only after obtaining a PSD permit.

The title V permitting regulations already include a robust set of provisions to address the incorporation of new applicable requirements and other transitional considerations. A title V source applying for the first time must submit its permit application within 12 months after the source becomes subject to the operating permit program or an earlier time at the discretion of the permitting authority. Where a source is required to obtain a PSD permit, the source must apply for a title V permit or permit revision within 12 months of commencing operation or on or before such earlier date as the permitting authority may establish. Where additional applicable requirements become applicable to a source after it submits its

permit application, but prior to release of a draft permit, the source is obligated to supplement its application. In addition, where a source that already has a title V permit becomes subject to additional applicable requirements, the permitting authority is required to reopen the permit to add those applicable requirements if the permit term has three or more years remaining and the applicable requirements will be in effect prior to the date the permit is due to expire.

V. What is the legal and policy rationale for the final actions?

In this section, we describe the legal and policy rationale for our action, including our rationale for the following: (A) our approach to calculating GHG emissions for PSD and title V applicability purposes, (B) our approach to establishing the thresholds and timing of PSD and title V applicability to GHG emissions sources; (C) how state, local, and tribal area programs adopt the final GHG applicability thresholds; (D) treatment of GHGs for title V permit fees; (E) future activities, including streamlining actions. We present the rationale description in five subsections below, corresponding to presentation of the approach in section V.

A. Rationale for Our Approach to Calculating GHG Emissions for PSD and Title V Applicability Purposes

1. Grouping of GHGs into a Single Pollutant

In this section, we explain our treatment of the air pollutant at issue for purposes of PSD and title V, such that sources that emit that pollutant in the requisite quantities become subject to PSD and/or title V requirements. We explain our rationale for treating the GHG air pollutant as a combined group of six greenhouse gases instead of six separate air pollutants defined by each individual greenhouse gas, and our rationale for including all six of the GHGs in that group. We also define the GHG metric to use for comparison to the applicability thresholds.

We proposed to identify the air pollutant as the aggregate group of these six GHGs, and to use a GHG metric for the applicability thresholds based on CO₂e. The summed CO₂e emissions would then be compared to the applicable permitting threshold to determine whether the source is subject to PSD and title V requirements. Historically, the PSD and title V regulatory provisions do not, in the first instance, define the "air pollutant" to which they apply, but rather rely for the definition of the pollutant on a cross-reference to the regulatory provision under another part of the Act that establishes the emission standards or limits for that pollutant that in turn causes the pollutant to be subject to regulation

under PSD and title V permitting. As an example, the pollutant 'total reduced sulfur' (TRS) is a pollutant comprised of the sum of multiple compounds that was originally defined under the NSPS, Subpart BB, Standards of Performance for Kraft Pulp Mills, which then caused it to be subject to regulation under the PSD program. The actual compounds that define the pollutant TRS are identified in the NSPS. The PSD program regulations did not introduce its own independent definition of TRS, but instead relied on the definition as contained in the Kraft Pulp Mills NSPS.

However, at the time of our proposal, the endangerment and cause or contribute findings had not been completed and the LDVR for GHGs, had not been finalized. Thus there was no final agency action defining how GHGs were to be considered "subject to regulation". Absent a definition of "greenhouse gases" under another regulatory provision that we could cross-reference, we proposed to define "greenhouse gases" for permitting purposes as "the single air pollutant that is comprised of the group of six GHGs, as proposed in the [CAA] section 202(a) endangerment and contribution findings." 74 FR 55,329, col. 1. The six well-mixed GHGs identified in the proposed contribution finding were: CO₂, CH₄, N₂O, SF₆, HFCs, and PFCs.

In the proposal, we further recognized that the LDVR for GHGs, as it was proposed, would result in reductions of only four of the gases, not all six, because only four are emitted by vehicles. However, we concluded that if the LDVR were finalized as proposed, then the air pollutant for purposes of PSD and title V applicability would be a single air pollutant that is the aggregate mix of the group of six GHGs because -

[t]hese six GHGs as a class comprise the air pollutant that is the subject of the endangerment finding and companion contribution finding and constitute the air pollutant that is regulated by the light-duty vehicle rule through measures that address the components of that air pollutant that are emitted from the mobile sources. Thus, although the CAA section 202(a) proposal establishes controls only with respect to four GHGs, as a legal matter, the proposal covers the entire set of GHGs that as a class are the single "air pollutant" in the proposed endangerment and contribution findings.

74 FR 55,329 col. 1.

We also solicited comment on whether we should identify the GHG metric in a different way, such as addressing each GHG constituent compound individually or including (whether individually or as a group) only those four GHG constituent compounds for which reductions would occur through the emission standards or limits proposed in the LDVR.

A majority of the proposal comments did not speak to or show a preference for or against grouping the six well-mixed GHGs for the purposes of determining applicability under the PSD

and title V programs. Of those commenters that specifically support the combining of the individual GHGs as one pollutant for purposes of determining permitting applicability, they stated that it is not uncommon for EPA to recognize 'collective' air pollutants comprised of many individual compounds based upon shared threats to health and welfare, including such EPA-created group pollutants as sulfur oxides, nitrogen oxides, volatile organic compounds (VOCs), and particulate matter (PM).

A smaller but significant number of commenters opposed the grouping of the individual GHGs into one metric. Some of these commenters argued that grouping GHGs is not appropriate because GHGs are not like other air pollutants that are comprised of numerous substances of concern (e.g., VOCs and PM), individual GHGs do not interact or combine to create a pollutant of concern, and EPA has not established a 'GHG' NAAQS that supports the definition of the pollutant as a group. Some were concerned that regulating as a group would increase the likelihood that a source will trigger permitting requirements, adding that this is unnecessary and would conflict with the "absurd results" and "administrative necessity" doctrines because it would lead to larger numbers of sources subject to permitting. Some commenters opposing grouping suggested that we should explore regulating each of the GHG pollutants on an individual mass

basis rather than collectively. One commenter added that, in their view, it is reasonable and feasible to regulate and control emissions of each of the listed pollutants, other than carbon dioxide, at the 100/250 tpy thresholds, or less if deemed necessary, in accordance with the established mechanisms of the Act. Finally, some commenters argued that disaggregating the pollutants would also allow for more appropriate technology review.

After considering these comments, and taking into account other related actions that have occurred since proposal, we have determined that PSD and title V permitting program requirements will apply, as proposed, to the "single air pollutant that is comprised of the group of six GHGs." 74 FR 55,329, col. 1. We believe that this approach is both compelled by the statute and reflects the preferable policy approach. As more fully discussed elsewhere in this package, under the plain language of section 169(1) PSD a major emitting facility is one that emits 100 or 250 tons of "any air pollutant." Through regulation we have reasonably limited the scope to this provision to those tonnages of any "regulated NSR pollutant," which includes any pollutant that is "subject to regulation under the Act." 40 CFR 52.21(b)(50)(iv). This same limitation exists in the definition of major modification and BACT. See 52.21.(b)(2), (). This

regulatory limitation reflects the statutory directive that BACT is required for "each pollutant subject to regulation under this chapter." 42 USC 7475 (a)(4).

Based on these provisions, the sole question in determining what a BACT analysis must cover is what pollutant is "subject to regulation." This phrase carries with it no suggestion that the Agency may subdivide or otherwise change a pollutant that is regulated elsewhere in the Act. Instead, it carries with it a dictate that BACT be applied to the air pollutant which the Administrator has determined elsewhere to regulate. As described below, this air pollutant, in the cases of GHGs, is the aggregate mix of the six constituent gases identified in the contribution finding, which led to the promulgation of the LDVR, and is the air pollutant that the various LDVR emission standards address. This same logic regarding the definition of a pollutant "subject to regulation" applies to the determination of whether a source is a major stationary source of a "regulated NSR pollutant." Thus, we also read the definition of major emitting facility at CAA 169 to be guided by the same requirement to defines the "regulated NSR pollutant" that is "otherwise subject to regulation" to be the same air pollutant that is actually regulated elsewhere under the Act. If, as here, that regulation considers the aggregate emissions of

several compounds to be a single air pollutant, the same single air pollutant is a regulated NSR pollutant. As noted above, the statutory definition of major emitting facility covers "any pollutant." As the LDVR and associated contribution finding have defined the aggregate group of the six greenhouse gases to be the single "air pollutant", they must be considered as such in determining if "any pollutant" is emitted above the provided thresholds.

Since the time of our proposal, both the contribution finding and the LDVR for GHGs have become final. The final LDVR for GHGs specifies, in the rule's applicability provisions, the air pollutant subject to control as the aggregate group of the six GHGs, including CO₂, CH₄, N₂O, SF₆, HFCs, and PFCs.¹¹ The applicability provision in the LDVR now provides us a clear reference to the definition of the single pollutant comprised of the aggregate group of the six well-mixed GHGs and affirms that PSD and title V applicability should use sum-of-6 GHG construct for applicability. Based upon the previous analysis, we must

¹¹ See §86.1818-12(a) Greenhouse gas emission standards for light-duty vehicles, light-duty trucks, and medium-duty passenger vehicles. ("Applicability. This section contains standards and other regulations applicable to the emission of the air pollutant defined as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.").

follow this construct of the aggregate group of the six gases and do not have discretion to interpret the GHG 'air pollutant' differently for the purposes of PSD permitting.

This construct of the pollutant as the aggregate group of the six gases is also consistent with the definition of the air pollutant in the final contribution finding for GHGs [see 74 FR 66496, 66499, 66536-7 (December 15, 2009)]. In the final contribution finding the Administrator defined the air pollutant for contribution finding as the "aggregate group of the same six... greenhouse gases" (see specifically, 74 FR 66536). The well-mixed greenhouse gases are defined under the final contribution finding as these six greenhouse gases: CO₂, CH₄, N₂O, SF₆, HFCs, and PFCs. Again, these six GHGs as a class comprise the air pollutant that is the subject of the contribution finding and therefore are the single air pollutant that is regulated by the LDVR through measures that address the components of that air pollutant that are emitted from the mobile sources. For these reasons, the pollutant "subject to regulation" is the aggregate group of the six and we feel compelled to use this combined pollutant for purposes of regulation under the PSD program.

Similarly, for title V, "major stationary source" status under CAA sections 501(2)(B) and 302(j) is triggered by the

emissions of the requisite amount of "any air pollutant
." Further, as discussed in more detail elsewhere in this
rulemaking, EPA interprets this trigger to apply to any air
pollutant "subject to regulation." See Johnson Memo
Reconsideration. As noted above, EPA has treated the aggregate
group of six greenhouse as the "air pollutant" regulated under
the Act. Thus, the aggregate group constitutes the "air
pollutant" for title V applicability purposes.

Moreover, even if we had discretion to approach the air
pollutant differently in the permitting programs, we would
choose not to, for the same reasons we adopted the single air
pollutant approach in the contribution finding, and for
additional considerations noted below specific to the permit
programs. Congress provided EPA broad discretion to determine,
as an initial matter, an appropriate combination of air
pollutant agents that should be treated as a single air
pollutant. As noted in the contribution findings, the important
common attributes shared by the six greenhouse gases are that
each (see 74 FR 66516-66518):

- Is directly emitted (not formed by secondary processes in
the atmosphere)
- Is long-lived in the atmosphere after they are emitted

- Is sufficiently long-lived the greenhouse gas that it becomes "well-mixed," which means that its concentration is essentially uniform in the atmosphere (as opposed to having significant local/regional variation)
- Has well understood atmospheric properties (e.g., radiative forcing)

In addition, grouping the six greenhouse gases is consistent with the focus of climate science—their effects are considered as a group in the Intergovernmental Panel on Climate Change (IPCC) reports (i.e., the IPCC reports assess the climate change effects on health, society, and the environment as a result of human-induced climate change driven by the group of GHGs). It is also consistent with the focus of climate policy—the United Nations Framework Convention on Climate Change (UNFCCC) requires reporting of these six gases; the commitments under the UNFCCC and Kyoto Protocol are based on the combined emissions of these six gases. Finally, it is standard practice to compute the "carbon dioxide (CO₂) equivalency" of aggregate emissions using GWPs. All of these common attributes and factors are relevant to the air pollution for which GHGs are agents—in other words, they are all related to increased atmospheric concentrations of the mix of six GHGs and climate change science and policy. Thus, they are a reasonable basis

upon which to decide that it is appropriate to define the air pollutant as the combination of these six GHGs that share these attributes.

We disagree with commenters who argued that grouping all six GHGs is not appropriate because GHGs are not like other air pollutants that are comprised of numerous substances of concern (e.g., VOCs and PM). First, as noted above, we are following the approach to a single air pollutant comprised of the aggregate of the six greenhouse gases initially adopted in the contribution finding and followed in the LDVR. Many of these same comments have already been addressed in the contribution finding and response to comments document, which is included in the RTC for this action, and those responses apply equally here.

In addition to the reasons described in the endangerment and contribution findings, there are CAA permitting programmatic and policy advantages to using the GHG air pollutant for permitting applicability. We believe now, as we did at proposal, that the benefits in using the cumulative group of GHGs outweigh any implementation advantages to using an individual-GHG-based metric. We recognize a number of advantages in the use of aggregate construction of the GHG metric, including that it: (1) could allow significantly more flexibility to sources for designing and implementing control

strategies that maximize reductions across multiple GHGs and would also likely align better with possible future regulations that allow for such flexibility; (2) could more effectively support possible future offsets or trading mechanisms that involve different source categories and different compositions of GHG emissions; and (3) could better accommodate and harmonize with future regulations by having one pollutant class that includes any of the components of which may become subject to specific emission standards under future regulatory efforts.

We disagree with commenters who believe that by aggregating the GHGs under one GHG metric for permitting applicability purposes would lead to an excessive amount of source permitting activity. This is because the phase-in approach addresses overwhelming permitting burdens associated with permitting of greenhouse gases. It does so by designing our applicability thresholds to allow for a manageable amount of new permitting actions based on the emissions from sources using the sum-of-6 metric. If we based it on individual gases, (assuming we were not compelled to follow the LDVR), we would still need to determine what level of permitting is manageable and appropriate based on thresholds on an individual gas basis and would expect that the final rule would result in the same levels of remaining burden based on the administrative necessity and the absurd

results concepts. Accordingly, unless the permitting program were being implemented at the statutory thresholds, the effect of a decision to aggregate or not aggregate would not reduce workload; it would simply shift work from permitting facilities that trigger based on combined GHGs to those that trigger based on individual GHGs. Although we acknowledge that this would affect applicability for a particular source, we disagree with the commenter that doing so would conflict with the absurd results or administrative necessity doctrines. In light of limited resources, by using a consolidated and weighted measurement we are able to direct these limited resources to those new sources and modifications with the greatest impact on GHG emissions.

We also believe that the additional flexibility resulting from the sum-of-six GHG metric will provide substantially more opportunities for sources to address emission increases of GHGs than they would have had under an individual gas based metric, possibly reducing their permitting burden through multi-gas mitigation strategies. We disagree with the comment that isolating control technology review on a single GHG leads to better results than a combined review for all six gases. To the contrary, given that Congress built in considerations of energy, environmental, and economic impacts into the BACT requirement,

we think that allowing consideration of those factors across six gases will likely result in decisions that more appropriately account for those impacts at the source.

2. Identifying Which GHGs are Included in the Group

Most commenters did not raise any issues or propose alternatives to the use of the proposed GHG metric as it relates to inclusion of all six well-mixed GHGs. We did receive some comments that explicitly supported the inclusion of all six of the well-mixed GHGs identified in the GHG metric for determining applicability. Those in support of including all six of the well-mixed GHGs in the threshold metric cite the same reasons they provided in support of grouping the individual GHGs together: namely, the final contribution findings that identify the pollutant as "the combined mix of six key, directly emitted, long-lived and well-mixed greenhouse gases". See 74 FR, 66496, 66516, 66,536 (Dec. 15, 1990). They also emphasize that EPA, in order to protect the public, has to control all the greenhouse gases it has regulated and reduce the overall impact of the mix of six greenhouse gases.

However, a substantial number of commenters, mainly from industry sectors who also disagreed with grouping the GHGs together, contend that only the constituent gases that are actually subject to controls under the LDVR should be included

in determining applicability under the Tailoring Rule. Some of these commenters believe that only the three compounds (CO₂, CH₄, N₂O) for which the LDVR contains emissions standards or caps should be considered in the GHG metric for permitting, while others would also add HFCs (which are included in a credit flexibility arrangement under the LDVR) for a total of four GHGs. Such commenters argued that PSD is not triggered for all six GHGs by the LDVR because under the proposed PSD interpretation in "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program", actual emission controls under the Act are required to trigger PSD obligations for a given pollutant. They also argued that including all six would conflict with the "absurd results" and "administrative necessity" doctrines because it would lead to larger numbers of sources subject to permitting, increasing the harm that EPA says it wants to avoid, and further asserted that the EPA cannot both widen the scope of the applicability to six GHGs at its discretion and rely on these judicial doctrines, which apply only where the EPA has availed itself of all reasonable discretion to minimize the harm

There were a few comments on whether to include specific gases as part of the sum-of-six grouping. Several commenters

representing sectors that have significant SF₆ usage specifically argue that SF₆ should not be included as a GHG, at least at this time, because there are no known SF₆ controls, it is not clear how PTE would be calculated from such facilities, and EPA has not addressed the economic burden that regulation of these facilities would create. A solid waste industry commenter asserts that the Tailoring Rule should confirm that CH₄ and N₂O will not be regulated under PSD or title V because these pollutants are only emitted in miniscule amounts from automobiles.

We disagree with commenters who suggest that the LDVR for GHGs constrains EPA's authority to regulate only the four individual GHGs emitted by motor vehicles. The fact that the LDVR standard for the single air pollutant that is comprised of the aggregate of six greenhouse gases consists of individual standards for particular constituents of the single air pollutant -- emissions limits or caps for three GHGs (CO₂, CH₄, and N₂O) and an emission crediting option for one GHG (HFCs) -- does not dictate that only those four compounds are subject to regulation for permitting purposes. Although the LDVR may result in reductions only with respect to four specific GHGs, as a legal matter the LDVR standard covers the entire set of GHGs that as a class are the single "air pollutant" in the

contribution finding. Similar to our rationale for addressing the group of six GHGs as one pollutant for PSD and title V applicability purposes, we must adhere to the definition of applicability, cited previously, in the final LDVR for GHGs and include CO₂, CH₄, N₂O, SF₆, HFCs, and PFCs. We do not have discretion to select only a subset of these gases in defining our GHG threshold metric for the permitting applicability purposes. Also, see discussion at III.B.2, and in EPA's LDVR concerning its exercise of discretion under section 202(a) in setting emissions standards applicable to emission of the single air pollutant. [April 1, 2010 Preamble, II.A.2.c, pp 153-4.]

For the same reasons we disagree that this approach is inconsistent with the Agency's final action in "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program." While it is the case, that only four constituent gasses are reduced by the LDVR, the pollutant that is controlled, and thus "subject to regulation" is the group of six.

We also disagree with commenters that suggested including all six GHGs in determining permitting applicability would conflict with our "absurd results" and "administrative necessity" bases for the phase-in periods and applicability

thresholds for GHGs. Even if we did have discretion to address a subset of the six well-mixed GHGs, we do not believe that the exclusion of some gases is necessary to address administrative necessity concerns or to avoid an absurd results scenario. For our final action, we are phasing-in applicability thresholds based on the sum of all six well-mixed GHGs that are fully consistent with both the administrative necessity and absurd results arguments that we base our tailoring action on. We have carefully developed these thresholds based on a consistent definition of the pollutant with the LDVR GHG and to avoid creating an overwhelming number of permitting actions that would be unmanageable for permitting authorities and sources. Moreover, the solution offered by commenters - regulating four rather than six gases - would make little difference in addressing overwhelming permitting burdens. The number of additional permitting actions and amount of additional permitting burden resulting from including all six GHGs, rather than four, in the definition is minimal. The administrative burden of GHG permitting is dominated by CO₂ and CH₄ emission sources. For example, with a major source threshold set at 100,000 tpy CO₂e, the combined population of sources that would be major for N₂O, HFCs, PFCs, and SF₆ accounts for fewer than two percent of the GHG sources that would remain covered.

For similar reasons, we disagree with commenters who specifically suggest SF6 emissions should not be included in the applicability metric for GHGs. As we have stated earlier in this section, our selection of the GHG metric is driven by the definition of the air pollutant as defined in the LDVR, and in consideration of the final GHG endangerment finding. SF6 is specifically included as one of the "well-mixed greenhouse gases" in the definition of air pollutant in the contribution finding, and is included in the definition of the air pollutant in the LDVR for which that rule is applicable. We cannot identify different subsets of individual GHGs for different source categories. Moreover, including SF6 emissions based on the thresholds finalized in this rulemaking does not add an excessive administrative burden for permitting authorities; based on our threshold evaluation study we estimate that less than 40 sources of SF6 nationwide would exceed the 100,000 tpy CO₂e threshold. Furthermore, specifically with respect to high GWP gases, as discussed elsewhere, we have included a mass-based trigger that will likely have the effect of further reducing this count. We believe that the inclusion of these SF₆ sources is entirely consistent with the definition of the air pollutant subject to regulation, as based on the LDVR definition for applicability and described above, and there is no basis for

exclusion of these sources due to administrative necessity concerns or absurd result arguments. Similarly, we disagree with the commenters who suggest we include black carbon and other short-lived climate forcers to the list of GHGs and those asking for an exclusion of CH₄ and N₂O. The definition of the air pollutant, as cited in the LDVR, includes CH₄ and N₂O and does not include black carbon or other short-lived gases.

3. Determining What GWP Values are to be Used

Numerous commenters expressed concerns about the proposal to link the calculation of CO₂e for GHGs to GWP values in (see, e.g., proposed 40 CFR 51.166(b)(58)) EPA's "Inventory of U.S. Greenhouse Gas Emissions and Sinks" because that document may change from year to year. Representative comments include the following:

- It is important to ensure that all permitting agencies are using the same calculations for the determination of CO₂e for GHGs. Use of EPA's document, which is updated annually, should address this issue, provided this information is provided in annual guidelines for permitting agencies.
- The EPA should follow the proper notice and comment procedures and the requirements of the Information Quality Act (IQA) for the relevant technical underpinnings of the

proposal. The EPA relies upon the GWPs of the IPCC without providing the supporting data for review, and it is inappropriate to use this as a basis for this rule without first making all the raw data available for public inspection and comment.

- The EPA cannot tie the definition of GWP to a non-regulatory document that may be changed without notice and comment rulemaking. Before EPA uses a new GWP, that GWP must be subject to notice and comment to comply with the requirements of CAA section 307 and the APA.
- An annual update of GWP would create a moving target for sources conducting applicability determinations and assessing compliance with minor NSR and PSD emission limits. The EPA needs to ensure that applicability and compliance with limits continue to be based on the GWP that existed when the determination was made or the limit was established.
- The EPA should freeze the GWP at the current values by incorporating those values into the regulation. The EPA could still revise the "NSR" GWP, but would have to revise the regulation to do so.

We agree with commenters who suggested we should codify, either in the tailoring rule or through reference to codified

values in another rulemaking, the GWP values to be used in permitting analyses so that there is certainty as to which GWP values need to be used and permitting authorities and sources can plan appropriately for possible changes in the GWP values. As mentioned in the comments, recommended GWP values from IPCC can change over time. While this is infrequent - the last such changes were in 2007-when it occurs, there are generally significant lag times in universal adoption of new values because of inconsistencies that could be created in national inventories and emission reporting mechanisms. In a regulatory setting, such as in the permitting programs, this could potentially create significant implementation issues, such as when a GWP change occurs while a permit is in progress.¹² EPA also recognized similar potential implementation issues in developing its final mandatory reporting rule for GHGs, and codified in the regulatory text the GWPs values to be used in reporting GHGs as part of that final rulemaking.

For this reason, we have decided to follow the approach in the mandatory reporting rule and require that for PSD and title V permitting requirements, wherever emissions calculations are performed, that permitting authorities and sources use GWP

¹² We note that our approach does not entirely avoid the possibility that a GWP change can occur while a permit is in progress although it will ensure advance notice of such a change. In the event that we plan to propose a change to GWP values, we will work with permitting authorities as necessary to provide guidance to sources on transitional issues.

values that are codified in EPA rules. For consistency with the mandatory reporting rule, we will establish the GWP values for PSD and title V rules based on a cross-reference to the values that are codified in the EPA's GHG mandatory reporting rule [Reference: Table A-1 to Subpart A of Part 98 - Global Warming Potentials, FR, Vol.74, No. 209, p. 56395]. Any changes to Table A-1 of the mandatory GHG reporting rule regulatory text must go through a proposal and comment regulatory process. In this manner, the values used for the permitting programs will reflect the latest values adopted for usage by EPA after a formal regulatory process and will be consistent with those values used in the EPA's GHG mandatory reporting rule. Furthermore, the lead time for adopting changes to that rule will provide a transition time to address implementation concerns raised by commenters.

4. Use of Short Tons vs. Metric Tons

We proposed that the GHG metric would be expressed in terms of English (or short) tons, rather than metric (or long) tons. Among those who commented specifically on this topic, a few commenters support using short tons for this purpose, but others prefer the use of metric tons. Most of the latter commenters note that the GHG Reporting Rule is based on metric tons and believe that the Tailoring Rule should be consistent. These

commenters believe that using different units in the two rules would be confusing and could result in sources that are not subject to the GHG Reporting Rule being subject to PSD. Some of the commenters add that various "cap and trade" legislative proposals also quantify GHGs in metric tons. A few other commenters recommend that EPA harmonize the applicability thresholds established under the Tailoring Rule and the GHG Reporting Rule without expressing a preference for short or metric tons.

Short tons are the standard unit of measure for both the PSD and title V permitting programs and the basis for the threshold evaluation to support this rulemaking. Calculation inputs for PSD are typically prepared in English units (e.g., lbs of fuel, MMBtu's, etc.) which is the common convention for all PSD analyses and the units of the statutory thresholds under the Act. We do recognize that the GHG mandatory reporting rule uses metric tons. However, we note that this does not create an inconsistency between permitting programs and the reporting rule, because the two rules already use different applicability approaches. Although we originally proposed 25,000 tpy as the major source level for permitting programs, which was similar to the threshold in the reporting rule, we decided to adopt substantially higher thresholds in the final rule. Furthermore,

even if the numbers were similar, the thresholds used for the permitting programs are based on actual emissions, while the PSD and title V programs are based on potential to emit. Therefore, we are less persuaded by arguments for consistency, and believe it is more important for ease of permit program implementation to ensure that GHG emissions calculations for PSD and title V will build on the same set of input variables used to develop short-ton based estimates for non-GHG pollutants. Thus, the use of short tons should actually facilitate the development of the GHG emission estimate. It would likely be more confusing to require a multi-pollutant PSD applicability analysis to present emissions information using different units for different pollutants, as would be the case if we required metric tons for GHG but continue to use short tons for every other pollutant. Finally, we do not expect this choice to introduce additional complexity because the conversion between short tons and metric tons is a very simple calculation. Therefore, based on these considerations we are requiring that short tons be used as the basis for emission calculations used to meet PSD and title V permitting requirements.

B. Rationale for Thresholds and Timing for PSD and Title V Applicability to GHG Emissions Sources

In this subsection, we describe our legal and policy rationale for our determinations concerning PSD and title V applicability to GHG emissions sources, including the following parts: (1) an overview of our rationale; (2) data concerning costs to sources and administrative burdens to permitting authorities; (3) a review of the Chevron legal framework and the "absurd results," "administrative necessity," and "step-at-a-time" doctrines, as well as a review of how those doctrines fit into the Chevron framework; (4) an overview of the relevant features of the PSD and title V programs; (5) our application of the "absurd results" doctrine for tailoring the PSD requirements; (6) our application of the "absurd results" doctrine for tailoring the title V requirements; (7) our plans to issue further rulemaking that will address the "absurd results" basis for both PSD and title V requirements; (8) our rationale for the phase-in schedule for applying PSD and title V to GHG sources; (9) our application of the "administrative necessity" basis for tailoring the PSD and title V requirements; and (10) our application of the "step-at-a-time" basis for tailoring the PSD and title V requirements.

1. Overview

Under the familiar Chevron two-step approach to construction of agency-administered statutes, the agency must

first, at step 1, determine whether Congress's intent in a particular provision on a specific question is clear; and if so, then the agency must follow that intent. If the intent of the provision is not clear, then the agency may, under step 2, fashion a reasonable interpretation of the provision. The best indicator of congressional intent is the plain meaning of the provision and generally, according to the caselaw, if the plain meaning addresses the specific question, then the agency must follow the plain meaning. ..

However, the courts have developed three doctrines relevant here that authorize departure from a literal application of statutory provisions. The first is the "absurd results" doctrine, which authorizes such a departure if it would produce a result that is inconsistent with congressional intent, and particularly if it would undermine congressional intent. The judicial doctrine of "administrative necessity" authorizes an agency to depart from statutory requirements if the agency can demonstrate that the statutory requirements, as written, are impossible to administer. The "step-at-a-time" doctrine authorizes an agency, under certain circumstances, to implement a statutory requirement through a phased approach.

Each of the three doctrines fits into the Chevron framework for statutory construction because each of the three is designed

to effectuate congressional intent. Moreover, each of the doctrines generally points to similar conclusions. For example, under the "absurd results" doctrine, the agency may vary from the statutory requirements only to the extent necessary, if congressional intent is clearly expressed, to adhere to that intent, or if congressional intent is not clearly expressed, to reasonably interpret the statute. In the case of the "administrative necessity" doctrine, the agency must first attempt to mitigate administrative problems through techniques consistent with the statutory requirements, and, if variance from the statutory requirements nevertheless is necessary to allow administrability, the variance must be limited as much as possible.

To apply the statutory PSD and title V applicability thresholds to sources of GHG emissions would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program. These extraordinary increases in the scope of the permitting programs, coupled with the resulting burdens on the small sources and on the permitting authorities, would be several hundred-fold more than what Congress contemplated in enacting the PSD and title V programs. Moreover, the great majority of additional sources brought into the PSD and title V

programs would be small sources that Congress did not expect would need to undergo permitting. Further, the administrative strains would lead to multi-year backlogs in the issuance of PSD and title V permits, which would undermine the purposes of those programs. Sources of all types - whether they emit GHGs or not - would face long delays in receiving PSD permits, which Congress intended to allow construction or expansion. Similarly, sources would face long delays in receiving title V permits, which Congress intended to promote enforceability. For both programs, the addition of enormous numbers of additional sources would provide little benefit. In the case of PSD, the large number of small sources that would be subject to control constitute a relatively small part of the environmental problem. In the case of title V, a great many of the sources that would be newly subject to permit requirements would have "empty" permits, that is, permits that do not include any applicable requirements, and that therefore serve little purpose. For these reasons, the "absurd results" doctrine applies to avoid a literal application of the thresholds. By the same token, the impossibility of administering the permit programs brings into play the "administrative necessity" doctrine. This doctrine also justifies EPA to avoid a literal application of the threshold provisions.

The situation presented here is exactly the kind that the "absurd results," "administrative necessity," and "step-at-a-time" doctrines have been developed to address. They authorize EPA to tailor the PSD and title V applicability provisions through a phased program as set forth in this rule, and to use the initial period of phase-in to develop streamlining measures that would facilitate applying PSD and title V on a broader scale without overburdening sources and permitting authorities. In this manner, the phased approach reconciles the language of the statutory provisions with the results of their application and with congressional intent.

2. Data Concerning Costs to Sources and Administrative Burdens to Permitting Authorities

This final action concerning applicability of PSD and title V to GHG-emitting sources, including the decisions on timing for the selected permitting thresholds, is based on our assessments of both the costs to the regulated sources to comply with PSD and title V permitting requirements and the administrative burdens to the permitting authorities to process PSD and title V permit actions for GHG-emitting sources. This section provides a summary of our cost and administrative burden assessments of permitting that would be required in the absence of any tailoring as well as under various tailoring options.

Our estimates of costs to the sources and administrative burdens to the permitting authorities from PSD and title V applicability for GHG emissions are based on labor and cost information from the existing Information Collection Requests (ICRs) for PSD and title V programs.¹³ We applied the same basic methodology used for the proposal, which incorporates information on numbers and types of affected sources and estimated permitting actions. We evaluate administrative burdens in terms of staffing needs, time for processing permits, and monetary costs, and we make some judgments about how those burdens would affect the permitting authorities' ability to effectively manage and administer their programs with the addition of GHG emission sources. We present the administrative burden data for applying PSD and title V requirements at the literal statutory thresholds -- that is, the 100/250 tpy levels for PSD and the 100 tpy level for title V - as well as at other thresholds, which range from 25,000 tpy CO₂e to 100,000 tpy CO₂e. We have significantly revised upwards our assessments of costs to sources and administrative burdens since proposal, and we summarize below our reasons for doing so. We also present significant comments concerning administrative burdens, and our

¹³ "Summary of ICR-based Data Used to Estimate Avoided Burden and Evaluate Resource Requirements at Alternative GHG Permitting Thresholds;" Prepared by EPA Staff; August 2009.

responses to those comments.

In the next section, concerning legal and policy rationale for our actions, we discuss how these data on costs to the sources and administrative burdens to the permitting authorities informed our decisions that PSD and title V requirements should not, at present, be applied to GHG-emitting sources under the literal terms of the statutory thresholds as well as our decisions concerning what thresholds to apply for Steps 1 and 2 of the applicability phase-in approach and the applicability floor of 50,000 tpy CO₂e.

a. Costs to sources

As we did at proposal, we have estimated costs to the sources of complying with PSD and title V starting from the data in the ICR. We recognize that the sizes of the sources, as measured by their emissions, that would be swept into the PSD and title V programs would vary greatly, and that their permitting costs would vary as well. For example, their PSD permitting costs would depend on the amount and types of their emissions and their control requirements. Accordingly, we have determined average costs, as described below.

For PSD, at proposal, we estimated that on average, an industrial source would incur costs of \$84,500 to prepare the PSD application and receive the permit, and on average, a

commercial or residential source would incur costs of 20 percent that amount, or \$16,900. 74 FR at 55,337 col. 3 to 55,339 col. 3. For this action, we retain the same burden estimates for an average industrial source: This type of source would need 866 hours, which would cost \$84,500, to prepare the application and the PSD permit. However, based on comments received, we have determined that a more accurate estimate for an average commercial or residential source is 70 percent of that amount of time that an industrial source would need, up from our proposal of 20 percent. Thus, an average commercial or residential source would need 606 hours, which would cost \$59,000, to prepare the PSD application and receive the permit. We are increasing this time over what we proposed because we now recognize that virtually all commercial and residential will have no experience with the PSD permitting process, and therefore will face a significant learning curve that will entail more time to complete the application, develop control recommendations, and take the other required steps. We believe this learning period could extend from two to possibly four years or more from the date that the sources become subject to PSD requirements, depending on the type and actual number of new sources that come in for permitting. In addition, we expect that in many cases, draft PSD permits for GHGs will receive

comments from various stakeholders, from citizens groups to equipment vendors, who will seek to participate in the permit process, and that all this could add to the hours that the permittee will need to invest in the process.¹⁴ The actual costs to sources to install BACT controls, while still uncertain at this point, would likely add additional costs across a variety of sources in a sector not traditionally subject to such permitting requirements.

For title V, at proposal, we estimated that on average, an industrial source would incur costs of approximately \$46,400 to prepare the title V application and receive the permit, and on average, a commercial or residential source would incur costs of 10 percent that amount, or almost \$5,000. 74 FR at 55,338 col. 1 to 55,339 col. 3. For this action, we retain the same burden estimates for an average industrial source: This type of source would need 350 hours, which would cost \$46,400, to prepare the application and the title V permit. However, we have determined that a more accurate estimate for an average commercial or residential source is 50 percent of that amount of time that an industrial source would need, up from our proposal of 10%. Thus, an average commercial or residential source would need

¹⁴ Summary of Methodology and Data Used to Estimate Burden Relief and Evaluate Resource Requirements at Alternative Greenhouse Gas (GHG) Permitting Thresholds;” Prepared by EPA Staff; March 2010

about 175 hours, which would cost \$23,200, to prepare the title V application and receive the permit. This increase is due to the same reasons as with the PSD program just discussed: we now recognize that virtually all commercial and residential sources will have no experience with the title V permitting process, and therefore will face a significant learning curve that will entail more time to, for the first time, assess their GHG emissions (because such sources are not covered by EPA's mandatory reporting rule) , complete the application, respond to permitting authority comments, meet other title V administrative requirements, and respond to interested stakeholders.¹⁵

b. Administrative Burdens to Permitting Authorities

(1) Estimated Permitting Authority Burden at Proposal

As at proposal, we estimated the administrative burdens to the permitting authorities at the various threshold levels for PSD or title V applicability as follows: First, for a particular threshold level, we estimated the number of GHG-emitting sources that would be subject to PSD requirements because they would undertake new construction or modification, and the number of existing sources that would be subject to title V requirements, Second, we estimated the average

¹⁵ "Summary of Methodology and Data Used to Estimate Burden Relief and Evaluate Resource Requirements at Alternative Greenhouse Gas (GHG) Permitting Thresholds;" Prepared by EPA Staff; March 2010

additional administrative burden and cost of each PSD permitting action and each title V permitting action for the GHG- emitting sources. Third, we multiplied those two estimates, and the product is the additional administrative burden at the particular threshold level. We employed the same methodology for this final rule, but, as discussed below, and described in more detail in our final burden analysis,¹⁶ we have updated several key assumptions since the proposal as a result of our consideration of comments received

First, we present the administrative burdens at the statutory levels for PSD and title V applicability. At proposal, for the PSD program, we estimated the administrative burdens that would result from applying PSD at the 100/250 tpy major emitting facility threshold levels in two ways, as described in this section. We stated that at present, 280 sources are subject to PSD each year, both for new construction and modifications. This figure served as the baseline from which to calculate increases in administrative burdens due to permitting GHG-emitting sources.

The first method that we used to calculate the administrative burdens to the permitting authorities was in

¹⁶“Summary of Methodology and Data Used to Estimate Burden Relief and Evaluate Resource Requirements at Alternative Greenhouse Gas (GHG) Permitting Thresholds;” Prepared by EPA Staff; March 2010.

terms of workload hours, which we then converted to monetary costs. To make the workload calculation, we first estimated the number of GHG-emitting sources that would become subject to PSD through new construction and modification. Based on our GHG threshold data analysis, we estimated that almost 41,000 new and modified sources per year would become subject to PSD review. We first calculated the number of new sources that would become subject to PSD. To do this, we estimated growth rates for the various sectors, and then applied those growth rates to the numbers of sources in those sectors. We then calculated the number of modifications. To do this, we first assumed that each year, two percent of sources that meet or exceed the threshold levels for PSD applicability due to their conventional pollutants undertake modifications. We then calculated the number of sources that would meet or exceed the threshold levels for PSD applicability due to their GHG emissions, and applied the same assumption that two percent of them would undertake modifications. In this manner, we estimated the number of modifications of GHG-emitting sources that would become subject to PSD.

We noted that currently, 280 PSD permits are issued each year, but that applying PSD to GHG-emitting sources at the 100/250 tpy statutory threshold levels would cause an increase

in permits of more than 140-fold. The reason for the extraordinary increase in PSD applicability lies simply in the fact that it takes a relatively large source to generate emissions of conventional pollutants in the amounts of 100/250 tpy or more, but many sources combust fossil fuels for heat or electricity, and the combustion process for even small quantities of fossil fuel produces quantities of CO₂ that are far in excess of the sources' quantities of conventional pollutants and that, for even small sources, equals or exceeds the 100/250 tpy levels.

Based on the 140-fold increase in permits, we then estimated the per-permit burden on permitting authorities. As we stated in the proposal:

We estimated the number of workload hours and cost a permitting authority would expend on each new source and each modification. We based these estimates on the workload hours and cost for processing permits for new sources of non-GHG emissions, which we derived from labor and cost information from the existing [Information Collection Requests ("ICRs")] for PSD programs. The ICRs show that permitting authorities expend 301 hours to permit a new or modified industrial source...

We then made assumptions for number of workload hours and costs for new sources of GHG emissions. We assumed that permitting new industrial GHG sources that emit in excess of the 250-tpy threshold would be of comparable complexity to permitting non-GHG emitting industrial sources that are subject to PSD. Thus, for these sources, we assumed that permitting authorities would expend the same number of workload hours and costs, on a per-permit basis, as they do for non-GHG emitting industrial sources. On the other

hand, for commercial and residential GHG sources that emit GHGs above the 250-tpy threshold (and as a result would be subject to the requirements of the PSD permitting program at this threshold level), we assumed that the workload hours and cost for permitting these sources would be significantly less than—only 20 percent of—the hours and cost necessary to prepare and issue initial PSD permits or permit modifications for industrial GHG sources. This 20-percent estimate amounts to 60 hours of permitting authority time per residential or commercial permit.

Based on these assumptions, the additional annual permitting burden for permitting authorities, on a national basis, is estimated to be 3.3 million hours at a cost of \$257 million to include all GHG emitters above the 250-tpy threshold.

74 FR at 55,301 col. 2. Note that at the proposal, in calculating the PSD administrative burdens that would occur each year due to GHG emissions, we did not undertake separate calculations for the administrative burdens associated with permitting obligations stemming from the GHG emissions of the 280 sources already subject to PSD permitting requirements due to their conventional pollutants. In effect, we treated these 280 sources as part of the over 40,000 sources that would become subject to PSD due to their GHG emissions.

The second way that we evaluated the burden on permitting authorities was by reviewing a study conducted by state and local air permitting agencies. As we said in the preamble:

In addition to conducting our burden analysis, we also reviewed summary information from state and local air permitting agencies regarding additional resources and burden considerations if GHG sources that emit above the 100/250-tpy thresholds were subjected to the

PSD and title V programs. This information covered 43 state and local permitting agencies, representing programs from different regions of the country and various permitting program sizes (in terms of geographic and source population coverage)... This information showed significant burdens projected by permitting agencies with adding sources of GHG emissions in terms of staffing, budget, and other associated resource needs. Importantly, the agencies based their analysis on the assumption that, for purposes of determining whether a source is major, its emissions would be calculated on an actual emissions ("actuals") basis, and not on a PTE basis. On an actuals basis, the agencies estimated a 10-fold increase in the number of permits.

Specifically, the agencies estimated that:

- Assuming, again, that number of permits was to increase by 10-fold (based on actual emissions), the resulting workload would require an average of 12 more FTEs per permitting authority at an estimated cost of \$1 million/year;
- Without the additional FTEs, the average processing time for a permit would increase to 3 years, which is three times the current average processing time;
- Permitting authorities would need 2 years on average to add the necessary staff;
- Permitting authorities would also need, on average, eight additional enforcement and judicial FTEs;
- Ninety percent of the permitting agencies indicated that their staff would need training in all aspects of permitting for sources of GHG emissions.
- A quarter of the permitting agencies reported that they were currently under a hiring freeze.

We went on to explain that this state survey significantly underestimated the administrative burdens:

It is important to reiterate that the state and local permitting information on burden was based on

the number of additional facilities subject to PSD because their emissions of GHGs exceed the 100/250-tpy thresholds at actual emissions rates, not PTE-based emissions rates. However, the PSD applicability requirements are based on PTE. By adjusting the increase in number of permits to account for GHG sources that exceed the 100/250-tpy applicability thresholds based on their PTE emissions, EPA estimated a 140-fold increase in numbers of PSD permits, much more than the 10-fold increase estimated by the states based on actual emissions.

74 FR at 55,301 col. 2-3.

In addition to PSD, we also estimated title V burdens at the statutory threshold. At proposal, for the title V program, we estimated the administrative burdens that would result from applying title V requirements at the 100 tpy major source threshold level in the same two ways as for PSD, as follows: The first method was to calculate the administrative burdens in terms of workload hours, which we then converted to monetary costs. To make the workload calculation, we first estimated the number of existing GHG-emitting sources that would become subject to title V. Based on our GHG threshold data analysis, we estimated that approximately 6 million sources would become subject to title V. Compared to the 14,700 title V permits currently issued per year, this would be an increase in permits of more than 400-fold. We noted, in addition, that most of the 14,700 sources already subject to title V also emit GHGs and may be affected as well.

We then described the type of work that the permitting authorities would need to do for these GHG-emitting sources - the six million that would become newly subject to title V and most of the 14,700 that are already subject to title V - as follows. Note at the outset that the permitting authorities' workload is greater for sources newly subject to title V than for existing sources that seek a revised or renewed permit. As EPA noted in the preamble:

[T]he[] permits [for the six million new sources] would need to include any requirements for non-GHGs that may apply to the source, such as provisions of an applicable State Implementation Plan (SIP). For any such requirements, permitting authorities would also need to develop terms addressing the various compliance assurance requirements of title V, including monitoring, deviation reporting, six-month monitoring reports, and annual compliance certifications.

Adding to the burden described above would be the burden to add GHG terms to the 14,700 existing title V permits. While, in general, existing title V permits would not immediately need to be revised or reopened to incorporate GHG (because as noted above, there are generally not applicable requirements for GHGs that apply to such sources), permitting authorities may face burdens to update existing title V permits for GHG under two possible scenarios: (1) EPA promulgates or approves any applicable requirements for GHGs that would apply to such a source, which would generally require a permit reopening or renewal application, or (2) the source makes a change that would result in an applicable requirement for GHGs to newly apply to the source, such as PSD review, which would generally require an application for a permit revision. Permitting authorities will also need to process permit renewal applications, generally on a five-year cycle, and such renewals would need to assure that the permit properly addresses GHG. Finally they would

have to process title V applications for new sources (including all the PSD sources previously discussed). 74 FR at 55,302 cols. 2-3.

In light of those demands, we estimated the per-permit burden on permitting authorities as follows. Note, at the outset, that as with PSD, we based the workload hours on information in ICRs for industrial sources, and we then assumed that the workload for commercial and residential sources would be the indicated percentage of the workload for industrial sources:

As with PSD, we have quantified the extent of the administrative problem that would result in workload hours and cost on the basis of information concerning hours and costs for processing existing title V permits that is indicated on ICRs. However, we recognize that more than 97 percent of these new sources would be commercial and residential sources. We estimate that for permitting authorities, the average new commercial or residential permit would require 43 hours to process, which is 10 percent of the time needed for the average new industrial permit. For an average existing permit, which permitting authorities would need to process through procedures for significant revisions and permit renewals, adding GHG emissions to the permit would result in, we estimate, 9 additional hours of processing time, which is 10 percent of the amount of time currently necessary for processing existing permits. We estimate that the total nationwide additional burden for permitting authorities for title V permits from adding GHG emissions at the 100-tpy threshold would be 340 million hours, which would cost over \$15 billion. 74 FR at 55,302 col. 3.

As with PSD, the second way that we evaluated the burden on permitting authorities at the statutory threshold was by

reviewing a study conducted by state and local air permitting agencies of the burden of applying title V to existing GHG-emitting sources at the 100 tpy statutory threshold level. As we said in the preamble to the proposed rule:

[W]e also reviewed summary information from state and local permitting agencies, which showed significant burdens associated with adding GHGs in their title V programs in terms of staffing, budget, and other associated resource needs.¹⁷ Again, note that the permitting agencies based their estimates on numbers of permits that would be required from sources subject to the 100-tpy title V applicability threshold on an actuals-not PTE-basis. Based on that level, the agencies assumed a 40-fold increase in numbers of permits, and estimated that:

- The resulting workload would require an average of 57 more FTEs per permitting agency at an estimated cost of \$4.6 million/year;
- Without the additional FTEs, the average processing time for a permit would increase to almost 10 years, which is 20 times the current average permit processing time;
- Permitting authorities would need 2 years on average to add the necessary staff;
- On average, permitting authorities would need 29 additional enforcement and judicial staff;
- Eighty percent of the permitting authorities indicated that their staff would need training in all aspects of permitting for sources of GHG emission.
- A quarter of the permitting agencies reported that they were currently under a hiring freeze.

As with PSD, we added that this state survey significantly underestimated the administrative burdens:

¹⁷ “NACAA Summary on Permitting GHGs Under the Clean Air Act”; Memorandum from Mary Stewart Douglas, National Association of Clean Air Agencies to Juan Santiago, EPA/OAQPS, September 3, 2009.

It is important to reiterate that, as with PSD, the state and local information on projected permitting burden is based on the number of additional facilities subject to title V because their emissions of GHGs exceed the 100-tpy thresholds at actual emissions rates, not the PTE-based emissions rates. However, the title V applicability requirements are based on PTE. As noted elsewhere in this preamble, the state and local agencies estimated a 40-fold increase in numbers of title V permits based on the amount of GHG sources' actual emissions. By adjusting the summary estimates provided by the state and local agencies to account for GHG sources that exceed the 100-tpy threshold based on their PTE emissions, EPA estimated that the average permitting authority would need 570 more FTEs to support its title V permitting program.

74 FR at 55,302 col. 3 - 55,303 col. 1.

(2) Revisions to Proposal Estimates of Permitting Authority Burden

We received numerous comments from state and local authorities pointing out how EPA had underestimated the administrative burden on the permitting authorities in the proposal. State and local authorities stated that in particular, EPA underestimated the number of modifications and the amount of time it would take permitting authorities to process permits, particularly for commercial and residential sources. Based on the comments and additional analysis that we have conducted, we are revising in several respects our estimates of the administrative burdens for applying PSD and title V at the statutory threshold levels.

First we present revisions to our analysis regarding the burdens at the statutory levels. Before we present those changes, we want to note a revision to our methodology that affected our estimate of the number of permits currently issued under existing programs. We are revising upwards the number of sources that are already subject to PSD permitting requirements anyway for their conventional pollutants ("anyway" sources). This revision has implications both for (i) the number of sources that would become subject to PSD due to their GHG emissions; and also (ii) the baseline number of sources already subject to PSD, which we use to compare the amount of increases in administrative burden due to permitting GHG sources. At proposal, we stated that 280 sources each year are subject to PSD due to their new construction or modifications. However, upon further analysis, we have realized that this figure is too low because it includes only sources that have emissions of one or more NAAQS pollutants at the 100/250 tpy thresholds and that are located in areas of the country that are designated attainment or unclassifiable for all of those pollutants, and thus are not designated nonattainment for any of those NAAQS pollutants. We estimate that another 520 sources have emissions of one or more NAAQS pollutants at the 100/250 tpy thresholds and are located in areas of the country that are nonattainment

for at least one of those NAAQS pollutants. Some of these 520 sources may also emit one or more pollutants at the 100/250 tpy level for which their area is designated attainment or unclassifiable, and therefore may be subject to PSD for those pollutants. Accordingly, the correct number of "anyway" sources subject to PSD each year is the 280 sources that are located in areas that are attainment or unclassifiable for each pollutant that the sources emit at the 100/250 tpy level, plus at least some of the 520 sources that are located in areas that are nonattainment for at least one of the NAAQS pollutants that the sources emit at or above the 100/250 tpy threshold. In the absence of data on the number of nonattainment NSR permits that do not have a PSD component, and because we expect this to be a small number, we have assumed for purposes of this action, that each of the 520 sources is subject to PSD for at least one pollutant, so that we will consider all 800 sources as subject to PSD. Of this number, we estimate that 80 percent, or 688 sources, would become subject to additional requirements due to their GHG emissions because those sources have combustion-related activities that would likely emit GHGs in the requisite quantities. Our estimate of 80 percent of permitting activities significantly involving combustion activities is based on a review of a random sample of PSD permits.

We should also note that in this rulemaking we are justifying our conclusions about permitting authority administrative burdens on the basis of their PSD and title V cost as calculated on both a separate basis and a combined basis. That is, we believe that the administrative burdens of the PSD program justify our tailoring approach for the PSD requirements, and the administrative burdens of the title V program justify our tailoring approach for the title V requirements, but addition, the administrative burdens of both programs on a combined basis justify the tailoring approaches. Viewing the administrative burdens on a combined basis provides a useful perspective because most permitting authorities have a single organizational unit that is responsible for both the PSD program and the title V program, and in many cases, the same employees work on both programs. In addition, in some jurisdictions, permitting authorities issue a single, merged permit that includes both PSD and title V requirements. For these reasons, considering administrative burdens on a combined PSD and title V basis, offers a more accurate picture of the issues these agencies will face in transitioning to GHG permitting.

Turning to the revisions to our burden estimates that we made as a result of public comment, we begin by noting that many

commenters believed that we significantly underestimated the administrative burdens associated with the proposed thresholds or that the administrative burden under the proposed thresholds would still overwhelm the states and result in significant permitting delays and uncertainty for sources. Many of these commenters indicate that our estimate of the number of sources that would be subject to permitting is too low, and some add that we have underestimated the per-permit effort required. (More detail on these comments is given elsewhere on the methodology used in the analysis.) Several state and local agencies provided estimates of the increased number of permits and/or staff that would be required under the thresholds we proposed that were higher than our original estimates. Specifically, commenters recommended that we increase the estimated administrative burdens for PSD permits from 100 percent to over 2,000 percent; and that we increase the burdens for title V permits from 29 percent to 240 percent. Many commenters indicated that EPA has not adequately accounted for "synthetic minor" sources or modification projects, stating that many such sources and projects will not be able to keep GHGs below the proposed thresholds, and those who could do so may not be able to establish enforceable synthetic minor limits. Numerous commenters also stated that the EPA has underestimated

the rate of major modifications for GHGs under PSD. Some commenters assert that we underestimated the number of permits required for specific industry sectors, including the oil and gas production industry, the natural gas transmission industry, the semiconductor industry, the wood products industry, the brick industry, and landfills. Some of the state and local commenters also believe that we have overestimated their ability to hire and train sufficient staff to administer GHG permitting.

We are persuaded by the data and arguments provided by the many commenters who believe EPA underestimated the number of permitting actions and the burdens of each action, and thus the overall administrative burdens associated with permitting GHG sources. Accordingly, we have reevaluated our assessment of these administrative burdens, for both the PSD and title V programs. In conducting this re-evaluation, we considered arguments made by the commenters, as well as any actual data they provided, and then we determined whether and how to modify various aspects of our detailed assessment of the burdens. Based on this consideration we have substantially revised upwards our estimate of administrative burdens, based on the analysis included in the final docket for this rulemaking,¹⁸ The

¹⁸ “Summary of Methodology and Data Used to Estimate Burden Relief and Evaluate Resource Requirements at Alternative Greenhouse Gas (GHG) Permitting Thresholds;” Prepared by EPA Staff; March 2010

revisions affect two elements of our analysis: (1) a substantial increase the number of PSD and title V permits that will occur at the statutory thresholds, and (2) an increase in the average burden estimate for each such permit.

Regarding the increase in our estimate of the number of projects that will occur, we estimated an increase in both PSD and title V permit actions, though the greatest changes were for PSD. At proposal, we estimated that, were PSD requirements to apply to GHG sources at the 100/250 tpy statutory levels, 40,496 projects -- consisting of 3,299 projects at industrial sources and 37,197 projects at commercial or residential sources -- would need PSD permits each year. Some of these projects involve the construction of an entirely new source, but the majority of these are modifications. We now estimate that at the 100/250 tpy levels, 81,598 projects would become subject to PSD each year. These projects include 26,089 actions at industrial sources and 55,509 at commercial and residential sources. We describe our calculation of this 81,598 amount in a technical support document.¹⁹ The great majority of these 81,598 projects that would become subject to PSD are modifications. We

¹⁹ “Summary of Methodology and Data Used to Estimate Burden Relief and Evaluate Resource Requirements at Alternative Greenhouse Gas (GHG) Permitting Thresholds;” Prepared by EPA Staff; March 2010

base these estimates on the assumption that the significance levels would be 100 tpy regardless of category.

Our estimate of the number of PSD modifications is where we made our most significant upward revisions from our proposal, based on comments. Our doubling of the estimated PSD permitting actions - from 40,496 at proposal to 81,598 -- results from three separate adjustments we made to our estimates at proposal of the number of permit actions that would result from applying PSD to GHG sources. Two of these increased the number of major modifications, and one of these increased the number of major sources and modifications. The most significant adjustment, and one that was raised by multiple commenters, was that we undercounted the number of major modification projects at existing major sources because we did not include the existing projects that avoid major PSD review by either taking "synthetic minor" limits or by netting out for conventional pollutants, but that would not be able to avoid PSD through those mechanisms for GHGs. The ability and procedures for sources to achieve reductions, or minimize increases, due to GHGs through adoption of enforceable limits or through netting out have not be well established at this point. We believe that there will numerous instances, particularly for combustion-related projects, where it will not be possible for sources to achieve the same level of

reductions for CO₂ emissions as they do for NO_x emissions, for example, simply because there are not as many proven control techniques that can reduce CO₂ emissions to the same degree as NO_x. Also, more research will be necessary in the type of emission units and processes resulting in GHG emissions, and how they operate over a wide range of utilization patterns at a variety of source categories, before permitting authorities will be able to establish procedures and rules for developing minor source permit limitations. Therefore, we adjusted our count of major modification permits under PSD upward to account for this.

The second change to the number of permits concerns the general modification rate of 2 percent that we applied at proposal, based on historical experience across all pollutant types. Commenters provided information [should cite RTC document in the docket that shows comments regarding modifications estimate)] that suggest that this 2 percent figure is an underestimate for GHG sources because their emissions of CO₂ are high and accumulate quickly from various changes involving combustion units. Therefore, a greater percentage of their physical or operational changes will result in GHG emissions in excess of the significance levels that we identified at proposal. In light of these comments, we reviewed the source populations and pollutant mix within the various

populations, and determined that we should revise our general modification rate to 4 percent for GHG sources. This 4% rate was obtained by dividing the current annual major NSR permit actions involving modifications by the 14,700 existing sources. We have revised our burden analysis accordingly. Again, the burden analysis in the docket describes our basis for these calculations in more detail.

The third adjustment to the number of permits involves our estimate of the number of sources with potential to emit that is greater than the various thresholds considered. This affects the number of major sources at the statutory thresholds, which we used to estimate the number of PSD and title V major sources, but also has an effect on the number of major modifications because the number of modifications depends on the size of the population of major sources. Commenters provided evidence that our estimates of capacity utilization (which, as described above, we use for estimating potential-to-emit based on data for actual emissions) for the general manufacturing source category (referred to as "unspecified stationary combustion" in our analysis) and for the oil and gas industry were not accurate. In our proposal, our estimated range for capacity utilization for "unspecified stationary combustion" varied from 70 to 90 percent depending on manufacturing category. For the oil and

gas industry, our estimate was 90 percent. We received comments indicating that these utilization rates are higher than what is normally achieved in real-world conditions, particularly for smaller manufacturing type facilities. Accordingly, in this action, we are using a 50 percent capacity utilization rate for both of these source categories, which better reflects what can be deemed reasonable operation under normal conditions for facilities in these source categories. This adjustment increased the overall number of affected facilities at various threshold levels and we have revised our burden analysis accordingly.

A few commenters asserted that we underestimated the number of residential homes, commercial buildings, and retail stores that would be subject to permitting requirements because these commenters believed the estimate in EPA's TSD was based on actual emissions from space heating equipment rather than PTE. We wish to clarify that our threshold analysis estimates for the number of residential and commercial sources (as well as all other sources) did use a PTE basis. To calculate the PTE amount for these sources, we extrapolated from the actual emissions data for the residential and commercial sources. Specifically, we assumed that a typical residential facility operates its fuel combustion sources at only 10 percent of its capacity and a

typical commercial facility operates at only 15 percent of its capacity. Based on these assumptions, we multiplied residential actual emissions by a factor of 10, and commercial actual emissions by a factor of 6.6 to obtain PTE-based estimates. There is very little information available on the capacity utilization rates of fuel combustion equipment at different types of residential and commercial facilities, but we believe our methodology was reasonable for these types of sources and we did not adjust it in response to this comment. Information on the development of these estimates is provided in our Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation.

The second source of upward revisions to our administrative burden estimate is that we are increasing the estimated average cost to permitting authorities of issuing each PSD and title V permit at the statutory thresholds. At proposal, we estimated that for PSD permits, permitting authorities would expend, on average, 301 hours to permit an industrial source of GHG emissions, and 20 percent of that time, or 60 hours to permit a commercial or residential source. After estimating that amount of workload, we went on to estimate the monetary cost to permitting authorities of that workload. Similarly, for title V permits, we estimated at proposal that

permitting authorities would expend 10 percent of the number of hours needed to process an industrial permit in order to process a commercial or residential permit for GHG sources.

We received comments from both permitting authorities and sources asserting that our methodology underestimated the administrative burden on grounds that (1) our methodology fails to recognize that when a source triggers PSD for conventional pollutants, additional labor hours would be required to issue BACT for GHGs; (2) our estimate of 60 hours (versus 301 hours) to issue PSD permits to commercial and residential sources of GHGs is unrealistically low; (3) our estimate failed to account for the increase in the complexity of permits for criteria pollutants due to (i) increases in criteria pollutant emissions becoming newly subject to BACT at sources that are major only for GHGs, which will result in increased permitting and (ii) BACT controls for criteria pollutants (e.g., an oxidizer for VOC) may result in significant GHG emissions, triggering an additional BACT determination.; and (4) our methodology failed to account for the significant additional PSD and title V burdens due to sources that obtain federally enforceable permit limits on GHGs in order to become "synthetic minors" and thereby avoid PSD (and possibly also title V).

Based on these comments and our own reassessment of permitting actions created by the addition of GHGs, we have revised upwards in several ways our estimate of the additional per-permit costs of applying PSD and title V to GHG sources, including the following: First we have added an estimate of the additional permitting cost for adding a GHG component to “anyway” PSD and title V permitting actions for conventional pollutants. We estimated this burden based on information in the comments together with our own judgment about how to adjust the burden numbers contained in the current supporting statements for our approved permitting Information Collection Requests (ICR’s). These adjustments are found in our revised burden estimate document ²⁰

Second, we have raised the per-permit burden hours for commercial and residential sources for PSD and title V. At proposal, our estimates were based on the fact that many of these permits will be technically simpler due to such factors as a lower number of emissions points, simpler processes, and less required modeling. However, commenters pointed out that, until EPA streamlines its permitting procedures, there are many permitting activities that represent a fixed cost, such as

²⁰ “Summary of Methodology and Data Used to Estimate Burden Relief and Evaluate Resource Requirements at Alternative Greenhouse Gas (GHG) Permitting Thresholds;” Prepared by EPA Staff; March 2010

public notice, hearing, and response to comment activities. In addition, we agree, as commenters pointed out, that many of these sources will need significantly more permitting-authority staff time to assist them in the permit application and preparation process because of their lack of experience with these requirements. In addition, permitting authorities will have little, if any, experience in permitting commercial and residential sources, and therefore will face a learning curve that will entail more time to take permitting action. In addition, we expect that in many cases PSD and title V permit applications for GHGs will receive comments from various stakeholders, from citizens groups to equipment vendors, who will seek to participate in the permit process, and responding and revising permits accordingly will add to the hours that the permitting authority will spend.

As a result, we raised the PSD per-permit hours for various steps in the permitting process, as described in the burden estimate document. While we continue to estimate that permitting authorities will expend, on average, 301 hours to issue a PSD permit to an industrial source, and that this would cost \$23,243, we now recognize that a permitting authority would expend 70 percent of that time or 210 hours, to permit a commercial or residential source, which would cost \$16,216.

Similarly, for title V, while we continue to estimate that permitting authorities will expend, on average, 428 hours to issue a title V permit to an industrial source, and that this would cost \$19,678, we now recognize that a permitting authority would expend 50 percent of the time, or 214 hours, to permit a commercial or residential source, which would cost \$9,839.

We disagree with commenters who suggested that by basing our estimates on the numbers of newly constructing and modifying sources with high enough emissions to qualify as major emitting facilities, we failed to account for the costs of sources that seek "synthetic minor" permits to avoid PSD, and possibly title V, requirements. In fact, our methodology includes sources that might take such limits as newly-major sources for their GHG emissions; and therefore we count the full administrative burden associated with a PSD permit and a title V permit for those sources. In effect, we assume that such sources would go through PSD or title V permitting, rather than take "synthetic minor" limits. We take this approach because although we suspect that there may, in fact, be significant synthetic minor activity, we do not have data that would allow us to determine whether, and how many of, these sources will be able to adopt "synthetic minor" limits or restrict their operations to obtain minor source permitting status. Nor do we have data on the

amount of the administrative burden that would fall on any particular permitting authority to establish a "synthetic minor" limit, except that we understand that the amount varies widely across states. As a result, we opted to include these sources in our analysis as sources receiving a PSD or title V permit. Therefore, to the extent that synthetic minor activity occurs, our estimate would already have included the burden for that activity. In fact, our estimate would have overestimated the burden to the extent that a permitting authority would have less administrative costs to issuing a "synthetic minor" permit, as compared to a PSD or title V permit.

(3) Revised Burden Estimates at Statutory Thresholds

Based on the revisions just described, we estimate that in all, if sources that emit GHGs become subject to PSD at the 100/250 tpy levels, permitting authorities across the country would face over \$1.5 billion in additional PSD permitting costs each year. This would represent an increase of 130 times the current annual burden hours under the NSR major source program for permitting authorities. The permitting authorities would need a total of almost 10,000 new full time employees (FTEs) to process PSD permits for GHG emissions.

In addition, we estimate that in all, if sources that emit GHGs become subject to title V at the 100 tpy level, permitting

authorities across the country would incur about 1.4 billion additional work hours, which would cost \$63 billion. We estimate that most of this work would be done over a three year period, which would amount to 458 million in additional work hours, and \$21 billion in additional costs, on an annual basis over that 3-year period.

We also note that the survey of state and local permitting authorities described in the proposed rulemaking continues to shed light on the extent of the administrative burdens, including staffing, budget, and other associated resource needs, as projected by the permitting authorities. As noted above, that survey concluded that application of the PSD requirements to GHG-emitting sources at the level of 100/250 tpy or more of actual emissions would, without additional FTEs, increase the average processing time for a PSD permit from one to three years. The survey further concluded that application of the title V requirements to GHG-emitting sources at the level of 100 tpy or more of actual emissions would, without additional FTEs, increase the average processing time for a title V permit from six months to 10 years. As we noted at proposal, this survey assumed a ten-fold increase in the number of PSD permits and a 40-fold increase in the number of title V permits due to GHG-emitting sources, but those assumptions were severely

underestimated because based on actual emissions. At proposal, our calculations, which were based on potential emissions, indicated a 140-fold increase in PSD permits and a more than 400-fold increase in title V permits. In this rulemaking, we recognize that even our estimates at proposal were severely underestimated. We now recognize that the number of PSD permits will be about twice what we estimated at proposal, and the average processing time for both PSD and title V permits will be two or three times greater than what we estimated at proposal. The survey of state and local permitting authorities provided other useful information as well, including the fact that it would take the permitting authorities two years, on average, to hire the staff necessary to handle a ten-fold increase in PSD permits and a 40-fold increase in title V permits, and that 90 percent of their staff would need additional training in all aspects of permitting for GHG sources.

(4) Revised Estimates of Administrative Burdens at Various Threshold Levels

In order to determine the appropriate PSD and title V applicability level for GHG sources, we not only estimated the burden at the statutory thresholds, as described above, but we also estimated the number of sources, number of permitting actions, and amount of administrative burden at various

applicability levels for both PSD and title V, based on the revised methodology described above, that we used to estimate the administrative burdens of applying PSD and title V at the statutory levels. This information is summarized in Table VI.-1, below. Note that Table VI-1 also includes, in the last column, the administrative burdens, described above, associated with the 100/250 tpy thresholds.

Table 1 Coverage and Burden Information

	Current program ²¹	"Anyway" Source Approach 75k Major Mod	100k Major Source 100k Major Mod.	100k Major Source 75k Major Mod	100k Major Source 50k Major Mod	50k Major Source 50k Major Mod	25k Major Source 25k Major Mod	100/250 Major, 100 Mod
Number of major sources	15,000	15,000	15,550	15,550	15,550	18,500	22,500	6,118,252
Number of newly major GHG sources	N/A	0	550	550	550	3,500	7,500	6,105,913
Number of PSD new construction actions	240	240	242	242	242	243	250	19,889
Number of PSD modification actions at covered major sources	448	448	468	1,363	2,257	2,354	9,645	62,284
Permitting Authority Cost to Run PSD programs	\$12M/yr.	\$15M/yr.	\$15M/yr.	\$36M/yr.	\$57M/yr.	\$59M/yr.	\$229M/yr.	\$1.5B/yr
Permitting Authority Work	150,795	185,195	192,055	461,450	730,544	764,781	2.97 M	19.7 M

²¹ As explained in the preamble, "current program" figures for PSD permits also reflect NSR permits in nonattainment areas that we assume include a PSD component for at least one pollutant.

Hours to Run PSD programs ²²								
Permitting Authority Cost to Run Title V Programs	\$62M/yr.	\$63M/yr.	\$67M/yr.	\$69M/yr.	\$70M/yr.	\$88M/yr.	\$126M/yr.	\$21 B/yr
Permitting Authority Work Hours to Run Title V Programs	1.35 M	1.38 M	1.46 M	1.49 M	1.53 M	1.92 M	2.74 M	460 M
Annual Total Cost to Run PSD and Title V Programs and % increase in cost over current program	\$74M/yr.	\$78M/yr. 5% increase (once states adopt)	\$82M/yr. 11% increase	\$105M/yr. 42% increase	\$127M/yr. 72% increase	\$147M/yr. 99% increase	\$355M/yr. 380% increase	\$22.5 B/yr. 28,278% increase
% GHG emissions covered	-0-	65%	67%	67%	67%	70%	75%	78%

As described in the [cite to TSD], we considered several different major source/major modification threshold combinations. We chose the combinations to reflect

²² Number of FTEs may be calculated as work hours divided by 2,000 hours.

representative, incremental steps along the possible range. Because it is time- and resource- intensive to develop estimates for a given step, we chose intervals that best reflect representative points within the range, given those time and resource constraints. Here, we discuss key observations about some of the combinations that we assessed. As the table indicates, under the current PSD and title V programs, approximately 15,000 sources qualify as major PSD sources for at least one pollutant and therefore meet the applicability thresholds. Of these, approximately 668 sources are subject to PSD requirements each year for at least one pollutant -- 240 because they undertake new construction, and 448 because they undertake modifications. The permitting authorities' administrative burdens for the NSR program are 153,795 work hours, and \$12 million. For the title V program, the 15,000 sources are, for the most part already permitted, and therefore need revised permits as required and renewal permits on a five-year schedule. The permitting authorities' title V administrative burdens on an annual basis are 1,349,659 work hours and \$62 million.

The first threshold Table 1 describes - and which, as discussed below, we are adopting for Step 1 - is the "anyway" source approach. Under this approach, (i) PSD applies to the

GHG emissions from projects that are subject to PSD anyway as new sources or major modifications due to their emissions of non-GHG pollutants and that result in an increase (or, in the case of modifications, a net increase) of at least 75,000 tpy CO₂e; and (ii) title V applies to what we will call "anyway" title V sources, that is, sources that are subject to title V anyway due to their emissions of non-GHG pollutants. Under this approach, the number of sources subject to PSD each year - including new construction and modifications -- is the same as under the current program, but the permitting authorities will need to address GHG emissions as part of those permitting actions each year and, to do so, will require, each year, 34,400 additional workload hours costing an additional \$3 million. For title V, we estimate that the number of title V sources that require permitting actions will, on average, be the same each year, but permitting authorities will need to address GHG requirements for some of them; as a result, permitting authorities will need, each year, 27,468 additional work hours costing \$1 million in additional funding.

Another threshold described in Table VI-1 is the one we are adopting under Step 2, as described below, under which (i) sources will be subject to PSD on account of their GHG emissions if they newly construct and emit at least 100,000 tpy CO₂e, or if

they are existing sources that emit at least 100,000 tpy CO₂e of GHGs and make a modification that results in a net emissions increase of at least 75,000 tpy CO₂e; and (ii) existing sources will be subject to title V due to their GHG emissions if they emit 100,000 tpy CO₂e in GHG emissions. Under this approach, which we will call the 100,000/75,000 approach, we estimate that each year, the permitting authorities will need to issue GHG permits to two additional sources that newly construct and 915 that undertake modifications above current permitting levels. Doing so will require 310,655 additional workload hours costing an additional \$24 million, compared to the current program. For title V, an additional 180 sources will require new title V permits each year, and the permitting authorities' associated costs will be 160,572 work hours and \$7 million more than the current program.

The last approach we will describe here may be called the 50,000/50,000 approach, which, as discussed below, we adopt as the floor for thresholds during the first 6 years after promulgation. Under this approach, (i) sources will be subject to PSD on account of their GHG emissions if they newly construct and emit at least 50,000 tpy CO₂e, or if they are existing sources that emit at least 50,000 tpy CO₂e of GHGs and make a modification that results in a net emissions increase of at

least 50,000 tpy CO₂e; and (ii) existing sources will be subject to title V on account of their GHG emissions if they emit 50,000 tpy CO₂e in GHG emissions. Under this approach, each year, the permitting authorities will need to issue GHG permits to 3 additional sources that newly construct and 1,900 that undertake modifications above current permitting levels. Doing so will require 613,986 additional workload hours costing \$47 million, compared to the current program. For title V, an additional 1,189 sources will require new title V permits each year and the permitting authorities' associated costs will be 568,017 work hours and \$26 million more than the current program.

We present the remaining entries in the table to illustrate how the cost and burden estimates vary with increasing or decreasing thresholds relative to those selected in this rule. These variations are important in understanding how alternative thresholds would compare to the ones selected. We also include entries reflecting the baseline (current program without GHG permitting) and the burdens if we immediately implemented the full statutory thresholds on January 2, 2011 without tailoring or streamlining.

3. The Chevron framework and the "absurd results," "administrative necessity," and "step-at-a-time" legal doctrines
 - a. Introduction and summary

Having described the factual underpinnings of our action, which are the costs to sources and administrative burdens to permitting authorities, we now describe the legal underpinnings, which are Chevron framework, taking account of the "absurd results," "administrative necessity," and "step-at-a-time" doctrines. We believe that each of these doctrines provides independent support for our action, but in addition, the three doctrines are directly intertwined and can be considered in a comprehensive and interconnected manner. Moreover, although the three doctrines may pre-date Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43 (1984), in which the U.S. Supreme Court established the framework for construing agency-administered statutes, each of the three doctrines fits appropriately into the Chevron framework.²³

To reiterate, for convenience, the statutory provisions at issue: Congress, through the definition of "major emitting facility," applied the PSD program to include "any ... source[that] emit[s], or ha[s] the potential to emit, one hundred [or, depending on the source category two hundred fifty] tons per year or more or more of any air pollutant." CAA §§ 165(a), 169(1). Similarly, Congress, through the definition of "major

²³ Although we set out an analysis of how the three doctrines fit into the Chevron framework, we note that even if the doctrines are viewed independently of the Chevron framework, they support our action today.

source," specified that the title V program includes "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." CAA §§ 502(a), 501(2)(B), 302(j). EPA, through long-established regulatory action, in the case of PSD, and long-established interpretation, in the case of title V, has narrowed these definitions so that they apply only with respect to air pollutants that are subject to regulation under the CAA.

Applying these definitions by their terms, as narrowed by EPA, to greenhouse gas sources at the present time would mean that the PSD and title V programs would apply to an extraordinarily large number of small sources, the sources would incur unduly high compliance costs, and permitting authorities would face overwhelming administrative burdens. As a result, we decline to follow this literal reading, and instead, with this action, we chart a course for tailoring the applicability provisions of the PSD program and the title V program by phasing them in over time to the prescribed extent.

For our authority to take this action, we rely on the "absurd results" doctrine, which applies because applying the PSD and title V requirements literally (as previously narrowed by EPA) would not only be inconsistent with congressional intent

concerning the applicability of the PSD and title V programs, but in fact would severely undermine congressional purpose for those programs. We also rely on the "administrative necessity" doctrine, which applies because construing the PSD and title V requirements literally (as previously narrowed by EPA) would render it impossible for permitting authorities to administer the PSD provisions. The tailoring approach we promulgate in this action is consistent with both doctrines. It is also consistent with a third doctrine, the "step-at-a-time" doctrine, which authorizes administrative agencies under certain circumstances to address mandates through phased action.

Our discussion of the legal bases for this rule is organized as follows: In this section V.B.3, we provide an overview of three doctrines and describe how they fit into the Chevron framework for statutory construction. In section V.B.4, we discuss the PSD and title V programs, including each program's relevant statutory provisions, legislative history, and regulatory history. In sections V.B.5 and V.B.6 we discuss the "absurd results" approach for PSD and title V, respectively, that we are finalizing in our action. In section V.B.7, we discuss the legal and policy rationale for the phase-in schedule that we are adopting for applying PSD and title V to GHG sources. In section V.B.8 we discuss the "administrative

necessity" approach for PSD and title V, respectively. In section V.B.9, we discuss the third legal basis for our action, the "step-at-a-time" doctrine.

a. The "absurd results" Doctrine

Turning first to the "absurd results" doctrine, we note at the outset that we discussed the doctrine at length in the notice of proposed rulemaking, and we incorporate by reference that discussion. The starting point for EPA's interpretation of the PSD and title V applicability provisions and reliance on the "absurd results" doctrine is the familiar Chevron two-step analysis. We discuss this analysis in greater detail below, but in brief, in interpreting a statutory provision, an agency must, under Chevron step 1, determine whether Congress's intent on a particular question is clear; if so, then the agency must follow that intent. If the intent of the provision is not clear, then the agency may, under step 2, fashion a reasonable interpretation of the provision. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43 (1984).

The courts consider the best indicator of congressional intent to be the plain meaning of the statute. However, the U.S. Supreme Court has held that the plain meaning of a statutory provision is not conclusive "in the 'rare cases [in which] the literal application of a statute will produce a

result demonstrably at odds with the intentions of the drafters' ... [in which case] the intention of the drafters, rather than the strict language, controls." United States v. Ron Pair Enterprises, 489 U.S. 235, 242 (1989). This doctrine of statutory interpretation may be termed the "absurd results" doctrine.

Although, as just noted, the U.S. Supreme Court has described the "absurd results" cases as "rare," in that case the Court seemed to be referring to the small percentage of statutory-construction cases that are decided on the basis of the doctrine. The D.C. Circuit, in surveying the doctrine over more than a century of jurisprudence, characterized the body of law in absolute numbers as comprising "legions of court decisions." In re Franklyn C. Nofziger, 925 F.2d 428, 434 (D.C. Cir. 1991). Indeed, there are dozens of cases, dating from within the past several years to well into the 19th century, in which the U.S. Supreme Court has applied the "absurd results" doctrine to avoid the literal application of a statute, or if not so holding, has nevertheless clearly acknowledged the validity of the doctrine. Some of the more recent of these cases include: Logan v. United States, 552 U.S. 23, 36-37 (2007) ("[s]tatutory terms, we have held, may be interpreted against their literal meaning where the words 'could not

conceivably have been intended to apply' to the case at hand [citation omitted]"); Nixon v. Missouri Municipal League, 541 U.S. 125, 132-33 (2004) ("any entity" includes private but not public entities); Raygor v. Regents of Univ. of Minn., 534 U.S. 533, 542-45 (2002) ("implying a narrow interpretation of ... 'any claim asserted' so as to exclude certain claims dismissed on Eleventh Amendment grounds"); United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994) (rejecting a literal interpretation of the statutory term "knowingly" on grounds that Congress could not have intended the "positively absurd" results that some applications of such an interpretation would produce, "[f]or instance, a retail druggist who returns an uninspected roll of developed film to a customer "knowingly distributes" a visual depiction and would be criminally liable if it were later discovered that the visual depiction contained images of children engaged in sexually explicit conduct"); and Rowland v. Cal. Men's Colony, 506 U.S. 194, 200 (1993) (finding that an artificial entity such as an association is not a "person" under the statute, and describing the absurdity doctrine as a "common mandate of statutory construction"). Other cases are included, for reference, in section V.B.10.

The D.C. Circuit has also handed down numerous decisions that applied the absurd results doctrine to avoid a literal

interpretation or application of statutory provisions, or that have acknowledged the doctrine. Some of the most recent ones include: Arkansas Dairy Cooperative Ass'n, Inc., v. U.S. Dep't of Agriculture, 573 F.3d 815 (D.C. Cir. 2009) (rejecting the canon of construction that presumes that Congress is aware of existing law pertinent to the legislation that it enacts, when in this case, the presumption that Congress was aware of the Department's definition of "hearing" would lead to "the absurd result that Congress intended to impose a requirement with which the Secretary could not comply;" stating: "Courts, 'in interpreting the words of a statute, [have] some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute'" (quoting In re Trans Alaska Pipeline Rate Cases, 436 U.S. 631, (1978)); Buffalo Crushed Stone, Inc. v. Surface Transportation Board, 194 F.3d 125, 129-30 (D.C. Cir. 1999) (regulation of Surface Transportation Board providing that if a notice of exemption "contains false or misleading information, the use of the exemption is void ab initio" does not apply to a notice containing false information when declaring the notice void ab initio would undermine the goals of the governing statute; a conflict between the "literal application of

statutory language" and maintaining the integrity of the regulatory scheme should be resolved by construing the text in accordance with its purpose); Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1068 (D.C. Cir. 1998); U.S. v. Stewart, 104 F.3d 1377, 1388 (D.C. Cir. 1997) Environmental Defense Fund v. EPA, 82 F.3d 451, 468-69 (D.C. Cir. 1996) (although Act requires that a federal action conform to the state implementation plan that is currently in place, EPA may instead require conformity to a revised implementation plan that state commits to develop; "[t]his is one of those rare cases * ** [that] requires a more flexible, purpose-oriented interpretation if we are to avoid 'absurd or futile results.'"); American Water Works Ass'n v. EPA, 40 F.3d 1266, 1271 (D.C. Cir. 1994) (holding that EPA's interpretation of the term "feasible" so as to require a treatment technique instead of an MCL for lead is reasonable; the court stated: "Indeed, where a literal reading of a statutory term would lead to absurd results, the term simply 'has no plain meaning . . . and is the proper subject of construction by the EPA and the courts.' If the meaning of 'feasible' suggested by the NRDC is indeed its plain meaning, then this is such a case; for it could lead to a result squarely at odds with the purpose of the Safe Drinking Water Act.") (quoting Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.,

470 U.S. 116, 126 (1985)) (citation omitted); In re Nofziger, 925 F.2d 428, 434-35 (D.C. Cir. 1991) (provision authorizing payment of attorney fees to the subject of an investigation conducted by an independent counsel of the Department of Justice only if "no indictment is brought" against such individual does not preclude payment of attorney fees when an indictment is brought but is determined to be invalid).

b. The "administrative necessity" doctrine

In the proposed rulemaking, we also described in detail the "administrative necessity" doctrine, 74 FR 55311 col. 3 to 55318 col. 3, and we incorporate that discussion by reference into this notice. Under this doctrine, if a statutory provision, however clear on its face, is impossible for the agency to administer, then the agency is not required to follow the literal requirements, and instead, the agency may adjust the requirements in as refined a manner as possible to assure that the requirements are administrable, while still achieving Congress's overall intent. The D.C. Circuit set out the doctrine of "administrative necessity" in a line of cases that most prominently includes Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1980). The Court cited the doctrine

most recently in New York v. EPA, 443 F.3d 880, 884, 888 (D.C. Cir. 2006).

In addition, as we stated in the proposed rulemaking, "We believe that the administrative necessity case law establishes a three-step process under which an administrative agency may, under the appropriate circumstances, in effect revise statutory requirements that the agency demonstrates are impossible to administer so that they are administrable." 74 FR 55315 col. 1. Specifically:

[T]he three steps are as follows: When an agency has identified what it believes may be insurmountable burdens in administering a statutory requirement, the first step the agency must take is to evaluate how it could streamline administration as much as possible, while remaining within the confines of the statutory requirements. The second step is that the agency must determine whether it can justifiably conclude that even after whatever streamlining of administration of statutory requirements (consistent with those statutory requirements) it conducts, the remaining administrative tasks are impossible for the agency because they are beyond its resources, e.g., beyond the capacities of its personnel and funding. If the agency concludes with justification that it would be impossible to administer the statutory requirements, as streamlined, then the agency may take the third step, which is to phase in or otherwise adjust the requirements so that they are administrable. However, the agency must do so in a manner that is as refined as possible so that the agency may continue to implement as fully as possible Congressional intent. 74 FR 55315 cols. 1-2.

It should also be noted that we believe the administrative burdens encountered by the state and local permitting

authorities are fully relevant under the "administrative necessity" doctrine. Although the caselaw that discusses the doctrine focuses on federal agencies, see 74 *FR* 55312-14, under the CAA, state and local agencies are EPA's partners in implementing provisions of the CAA, and have primary responsibility for implementing the PSD program. They generally adopt EPA's PSD requirements in their SIPs, which EPA approves. They generally adopt EPA's title V requirements in their title V programs, which EPA approves. They issue the PSD and title V permits and are responsible in the first instance for enforcing the terms of the permits. In all these respects, the law that the state and local permitting authorities administer is both federal and state law. Under certain circumstances, EPA may become responsible for permit issuance and enforcement in the first instance, but even then, EPA may, and frequently has, delegated those duties to a state, in which case, the state implements federal law directly. Thus, although the PSD and title V programs are federal requirements, for the most part, it is the states that implement those programs. For this reason, the administrative burdens that the states face in implementing the programs are relevant in determining the applicability of the "administrative necessity" doctrine.

c. "Step-at-a-time" doctrine

In addition to the “absurd results” and “administrative necessity” doctrines, another judicial doctrine supports at least part of EPA’s tailoring rule, and that is the doctrine that agencies may implement statutory mandates one step at a time, which we will call the “step-at-a-time” doctrine. In the notice of proposed rulemaking, we also described this doctrine and recent case law that set it forth. 74 FR 55,319 col. 1-3. There, we noted that the U.S. Supreme Court recently described the doctrine in Massachusetts v. EPA, 549 U.S. 497, 524 (2007), as follows: “Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop;” and instead they may permissibly implement such regulatory programs over time, “refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.” We also described two recent D.C. Circuit cases that upheld partial agency compliance with a statutory dictate “if [such partial compliance] were a first step towards a complete solution.” City of Las Vegas v. Nevada Dev. Comm’n, 891 F.3d 927, 935 (D.C. Cir. 1989); see Grand Canyon Air Tour Coalition v. F.A.A., 154 F.3d 455, 477-78 (D.C. Cir. 1998) (statute required agency to develop plan to implement statutory requirements within 120 days after enactment, and report to Congress within two years after the date of the plan as to the

plan's success; Court upheld partial agency plan promulgated 10 years after enactment when agency intended to develop rest of plan within another 10 years).

d. Consistency with Chevron Framework

Although the "absurd results," "administrative necessity," and "step-at-a-time" doctrines generally pre-date the Chevron two-step analysis for construing statutes that Congress has authorized an agency to administer, we believe that the doctrines can be considered very much a part of that analysis. Under Chevron step 1, an agency must determine whether "Congress has directly spoken to the precise question at issue." If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 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." Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-42 (1984).

Thus, step 1 under Chevron is to determine congressional intent for the relevant statutory directive on the specific issue presented. To determine Congress's intent, the agency must look first to the statutory terms in question, and generally interpret them according to their plain meaning, within the overall statutory context, and perhaps with reference

to the legislative history. If the plain meaning of the statutory requirements is clear then, absent indications to the contrary, the agency must take it to indicate congressional intent and must implement it. Even if the plain meaning of the statutory requirements is not clear, if the agency can otherwise find indications of clear congressional intent, such as in the legislative history, then the agency must implement that congressional intent.

The D.C. Circuit has indicated that the "absurd results" doctrine fits into the Chevron step 1 analysis in the following way: Recall that in the cases in which the courts have invoked this doctrine, the plain meaning of the statutory requirements has been clear, but has led to absurd results. This can occur when the plain meaning, when applied to the specific question, conflicts with other statutory provisions, contradicts congressional purpose as found in the legislative history - and, in particular, undermines congressional purpose - or otherwise produces results so illogical or otherwise contrary to sensible public policy as to be beyond anything Congress would reasonably have intended. See United States v. Ron Pair Enterprises, 489 U.S. 235, 242-43 (1989); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).

Under these circumstances, the agency must not take the plain meaning to indicate congressional intent. As the D.C. Circuit has explained, "where a literal reading of a statutory term would lead to absurd results, the term 'simply has no plain meaning . . . and is the proper subject of construction by the EPA and the court.'" American Water Works Assn v. EPA, 40 F.3d 1266, 1271 (D.C. Cir. 1994) (quoting Chemical Manufacturers' Association v. NRDC, 470 U.S. 116, 126 (1985)). Under these circumstances, if the agency can find other indications of clear congressional intent, then the agency must implement that intent. See United States v. Ron Pair Enterprises, 489 U.S. 235, 242-43 (1989). This may mean implementing the statutory terms, albeit not in accordance with their literal meaning, in a way that achieves a result that is as close as possible to congressional intent. As the D.C. Circuit said in Mova Pharm. Corp. v. Shalala, 140 F.3d 1060 (D.C. Cir. 1998):

The rule that statutes are to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not reflect the 'unambiguously expressed intent of Congress,' ... and thus to overcome the first step of the *Chevron* analysis. But the agency does not thereby obtain a license to rewrite the statute. When the agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no

further from the statute than is needed to protect congressional intent. . . . [T]he agency might be able to show that there are multiple ways of avoiding a statutory anomaly, all equally consistent with the intentions of the statute's drafters In such a case, we would move to the second stage of the *Chevron* analysis, and ask whether the agency's choice between these options was 'based on a permissible construction of the statute.' Otherwise, however, our review of the agency's deviation from the statutory text will occur under the first step of the *Chevron* analysis, in which we do not defer to the agency's interpretation of the statute."

Id. at 1068 (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842, 843 (1984) (citations omitted)).

The "administrative necessity" doctrine is not as well developed as the "absurd results" doctrine, so that the courts have not had occasion to explicitly describe how the doctrine fits into the *Chevron* analytical framework. However, we think that a reasonable approach, in line with the D.C. Circuit's approach to the "absurd results" doctrine as just described, is as follows: Recall that under the "administrative necessity" doctrine, a agency is not required to implement a statutory provision in accordance with the literal requirements when doing so would be impossible, but the agency must nevertheless implement the provision as fully as possible. Placed in the context of the *Chevron* framework, we think that that the "administrative necessity" doctrine is based on the premise that

inherent in the statutory design is the presumption that Congress does not intend to impose an impossible burden on an administrative agency. See *Alabama Power v. Costle*, 636 F.2d 323, 357 (D.C. Cir. 1980) (describing the "administrative necessity" approach as one of the "limited grounds for the creation of exemptions [that] are inherent in the administrative process, and their unavailability under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent to foreclose them").

Therefore, if the plain meaning of a statutory directive would impose on an agency an impossible administrative burden, then either the statutory directive should not be considered to have that plain meaning, or that plain meaning should not be considered to be indicative of congressional intent. Rather, in this case, congressional intent should be considered to be to achieve as much of the statutory directive as possible. As a result, the agency must adopt an approach that implements the statutory directive as fully as possible. This is consistent with the D.C. Circuit's holding in Mova Pharm. Corp that if congressional intent is clear, but the plain meaning of a statute does not express that intent, then the agency must, under Chevron step 1, select an interpretation that most closely

approximates congressional intent. Mova Pharm. Corp, 140 F.3d at 1068.

The "step-at-a-time" doctrine fits into the Chevron framework in much the same manner that the "administrative necessity" doctrine does. That is, inherent in the statutory design is the presumption that Congress intended an agency to implement that statutory requirements in a step-at-a-time fashion, as long as the agency stays on a path towards full implementation.

Under all of the circumstances described above, congressional intent is clear - whether it is indicated by the plain language or otherwise - and as a result, the agency must follow that intent under Chevron step 1. On the other hand, the agency may determine that congressional intent on the specific issue is not clear. In these cases, the agencies should proceed to Chevron step 2 and select an interpretation or an application that is a permissible construction of the statute. This situation generally occurs when the statutory provisions are ambiguous or silent as to the specific issue, and there are no other indications of clear congressional intent. Under these circumstances, the agency is authorized to develop and implement a construction of the statute that the courts will uphold as long as it is reasonable.

As noted above, the D.C. Circuit, has pointed out that this situation may also occur when the plain language leads to an absurd result, and, in attempting to implement congressional intent, the agency is "able to show that there are multiple ways of avoiding a statutory anomaly, all equally consistent with the intentions of the statute's drafters In such a case, we would move to the second stage of the Chevron analysis, and ask whether the agency's choice between these options was 'based on a permissible construction of the statute.'" Mova Pharm. Corp., 140 F.3d at 1068. As the U.S. Supreme Court has recently said, although in a context different than "absurd results," " In the end, the interpretation applied by EPA "governs if it is a reasonable interpretation of the statute -- not necessarily the only possible . . . interpretation, nor even the interpretation deemed most reasonable by the courts." Entergy Corp. v. Riverkeeper, Inc., 129 S.Ct. 1498. 1505 (2009).

e. Interconnectedness of the Legal Doctrines

Although we believe that each of the "absurd results," "administrative necessity," and "step-at-a-time" doctrine provides independent support for our action, we also believe that in this case, the three doctrines are intertwined and form a comprehensive basis for EPA's tailoring approach. As just discussed, each of the three doctrines is tied into *Chevron*

analytical framework because each is designed to give effect to underlying intent. Each of the three doctrines comes into play in this case because a literal reading of the PSD and title V applicability provisions results in insurmountable administrative burdens. Those administrative burdens -- along with the undue costs to sources -- must be considered "absurd results" that would undermine congressional purpose for the PSD and title V programs. Under the "absurd results" doctrine, EPA is authorized not to implement the applicability provisions literally, but instead to tailor them in a manner consistent with congressional intent. By the same token, the insurmountable administrative burdens bring into play the "administrative necessity" doctrine, which also supports the tailoring approach. Finally, the "step-at-a-time" doctrine provides further support for the tailoring approach.

f. Application of Chevron approach

The Chevron analytical approach, and the three legal doctrines at issue here, apply to this action in the following manner: To reiterate, for convenience, the statutory provisions at issue: Congress, through the definition of "major emitting facility," applied the PSD program to include "any ... stationary sources of air pollutants which emit or have the potential to emit, one hundred tons per year or more or more of any air

pollutant... [or] any other source with the potential to emit two hundred fifty tons per year or more of any air pollutant." CAA §§ 165(a), 169(1). Similarly, Congress, through the definition of "major source," specified that the title V program includes "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." CAA §§ 502(a), 501(2)(B), 302(j). EPA, through long-established regulatory action, in the case of PSD, and long-established interpretation, in the case of title V, has interpreted these definitions so that they apply only with respect to air pollutants that are subject to regulation under the CAA.

For each of these two applicability provisions, the approach under Chevron is as follows: Under Chevron step 1, we must determine whether Congress expressed an intention on the specific question, which is whether the PSD or T-V applicability provisions apply to GHG sources. Said differently, the specific question is whether, in the case of PSD, Congress intended that the definition of major emitting facility applies to GHG sources that emit at least 250 CO₂e; and, in the case of title V, whether, the definition of "major source" applies to GHG sources that emit at least 100 tpy or more CO₂e.

To determine intent, we must first examine the terms of the statute in light of their plain meaning. Here, the plain reading of each provision covers GHG sources. For PSD, a GHG source that emits at least 250 tpy CO₂e plainly qualifies as "any ... other source with the potential to emit two hundred fifty tons per year or more of any air pollutant [subject to regulation under the CAA]." CAA § 169(1). Similarly, for title V, a GHG source that emits at least 100 tpy CO₂e plainly qualifies as "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant [subject to regulation under the CAA]." CAA §§ 502(a), 501(2)(B), 302(j).

However, applying each definition in accordance with its plain meaning to GHG sources at the specified levels of emissions and at the present time (i) would produce absurd results, that is, results that are not consistent with other provisions of the PSD and title V requirements and that are inconsistent with - and, indeed, undermine - congressional purposes for the PSD and title V provisions; and (ii) would create impossible administrative burdens for the permitting authorities. Accordingly, under the "absurd results" doctrine, neither the PSD nor the title V definitions of "major emitting

facility" or "major source," should be considered to have a plain meaning with respect to their application to GHG sources.

In parsing the provisions of each definition more closely, we believe that each has three terms, any one of which could be considered not to have its plain meaning, in this respect. Specifically, each provision includes (i) the term "any ... source," and that term could be considered not to refer literally to all of the GHG sources; (ii) the term "two hundred fifty tons per year" or "100 tons per year," and those terms could be considered not to refer literally to the tonnage amount of emissions from all of the GHG sources; and (iii) the term "any air pollutant [subject to regulation under the CAA]," and that term could be considered not to refer literally to the emissions from all of the GHG sources. As long as any one of those three terms should be considered not to have its plain meaning as applied to GHG sources, then the definition as a whole - again, for PSD, the term "major emitting facility," and for title V, the term "major source" - cannot be considered to apply to GHG sources. Because we read the terms together, as integral parts of each definition as a whole, we do not think that the choice of which of those three terms within each definition cannot be considered to apply literally to GHG sources has substantive legal effect. In other words, we

believe that any one of the three terms, or all three together as part of each definition as a whole, should be considered not to apply literally in the case of GHG sources.

Having determined that each definition does not have a plain meaning on the specific question of whether PSD or title V applies to GHG sources, we must next inquire as to whether Congress has nevertheless expressed an intent on that question through other means. We believe that there are two possible views about congressional intent. The first is that Congress did express an intent, and that was that if a type of source - such as GHG sources - cannot be included in the PSD program or title V program in accordance with the literal terms of the applicability provisions, then, nevertheless, as many of those sources should be included in the programs at as close to the statutory thresholds as possible, and as quickly as possible. This view about congressional intent could be considered to be a logical inference from the fact that Congress wrote the applicability provisions broadly.

Under this first view, EPA would be required at Chevron step 1 to adopt the Tailoring Rule because it most closely gives effect to Congress's intent that PSD and title V each apply to GHG sources at emission levels as close to the statutory thresholds as possible and as quickly as possible. Even so, EPA

is authorized to exercise its expert judgment as to the best approach for phasing in the application of PSD and title V to GHG sources. In addition, even under this view, we believe there may be uncertainty as to whether congressional intent to apply PSD and title V to GHG sources extends to very small GHG sources, that is, those at or near the statutory thresholds or whether congressional intent to apply title V to GHG sources extends to GHG sources that would have empty permits.

The second possible view is that Congress did not express an intent as to the applicability of PSD and title V to GHG sources. The lack of plain meaning in the definitional provisions, and silence elsewhere in the statutory provisions and legislative history, could be considered to support this conclusion. Under this second view, EPA has the discretion at Chevron step 2 to adopt the Tailoring Rule because it is a reasonable interpretation of the statutory requirements. Here, too, EPA is authorized to exercise its expert judgment as to the best approach for phasing in the application of PSD and title V to GHG sources.

We do not believe it necessary to choose between these two differing views as to congressional intent. Although each leads to a different analytical approach under Chevron, each also supports the Tailoring Rule. It should also be noted that

although EPA has concluded that applying the PSD and title V applicability provisions literally in the case of GHG sources would produce "absurd results" and therefore is not required, this conclusion has no relevance for applying other CAA requirements - such as the requirements concerning endangerment and contribution findings under CAA section 202(a) (1) or emission standards for new motor vehicles or new motor vehicle engines under CAA section 202 -- to GHGs or GHG sources. EPA's conclusions with respect to the PSD and title V applicability requirements are based on the specific terms of those requirements, other relevant PSD and title V provisions, and the legislative history of the PSD and title V programs.

Within the context of the Chevron framework, the "administrative necessity" doctrine applies as follows: Under the doctrine, Congress is presumed to intend that the PSD and title V applicability requirements be administrable. Here, those applicability requirements, if applied to GHG sources in accordance with their plain meaning, would be impossible to administer. Accordingly, under Chevron step 1, it is consistent with congressional intent that EPA and the permitting authorities be authorized to implement the applicability requirements in a manner that is administrable, that is, through the tailoring approach. The "step-at-a-time" doctrine applies

within the Chevron framework in much the same manner as the “administrative necessity” doctrine. That is, Congress is presumed to intend that EPA and the permitting authorities may administer the PSD and title V applicability requirements to GHG sources on a step-by-step basis, as appropriate. .

4. The PSD and Title V programs

Having discussed both the factual underpinnings and, immediately above, the legal underpinnings for our tailoring approach, we now discuss the PSD and title V programs themselves, including, for each program, the key statutory provisions, their legislative history, and the relevant regulations and guidance documents through which EPA has implemented the provisions. We start with the PSD program.

a. The PSD program

(1) PSD provisions

Several PSD provisions are relevant for present purposes because of the specific requirements that they establish and the window that they provide into congressional intent. These provisions start with the applicability provisions, found in CAA sections 165(a) and 169(1), which identify the new sources subject to PSD, and CAA §111(a)(4), which describes the modifications of existing sources that are subject to PSD. CAA §165(a) provides:

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section * * *, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

* * *

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility * * * *.

The term "major emitting facility" is defined, under CAA §169(1) to include:

* * * stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from [28 listed] types of stationary sources. * * * Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

As for modification of existing sources, CAA section 169(1)(C) provides that the term "construction," as used in CAA section 165(a) (the PSD applicability section) "includes the modification (as defined in section 111(a)(4)) of any source or facility." Section 111(a)(4), in turn, provides:

The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

As interpreted by EPA regulations, these provisions, taken together, provide that new stationary sources are subject to PSD if they emit at the 100/250-tpy thresholds air pollutants that are subject to EPA regulation, and that existing stationary sources that emit such air pollutants at the 100/250-tpy thresholds are subject to PSD if they undertake a physical or operational change that increases their emissions of such air pollutants by any amount.

Other provisions of particular relevance are the requirements for timely issuance of permits. The permitting authority must "grant[] or den[y] [any completed permit application] not later than one year after the date of filing of such completed application." CAA §165(c).

In addition, the PSD provisions articulate "the purposes of [the PSD program]," which are to balance environmental protection and growth. CAA §160. One of the purposes, in subsection (1), is specifically "to protect public health and welfare," and another, in subsection (3), is "to insure that economic growth will occur in a manner consistent with the preservations of existing clean air resources."

The PSD provisions also include detailed procedures for implementation. Most relevant for sources of GHG are the provisions that the proposed permit for each source must be the subject of a public hearing with opportunity for interested persons to comment, CAA §165(a)(2), and each source must be subject to best available control technology, as determined by the permitting authority on a source-by-source basis, CAA §165(a)(4), 169(3).

(2) PSD legislative history

The legislative history of the PSD provisions, enacted in the 1977 Clean Air Act Amendments, makes clear that Congress was focused on sources of criteria pollutants: primarily sulfur dioxide (SO₂), particulate matter, nitrogen oxides (NO_x), and carbon monoxide (CO). This focus stems from the basic purpose of the PSD program, which is to safeguard maintenance of the national ambient air quality standards (NAAQS), combined with the limited awareness at that time of the problem of climate change. See S 95-127 (95th Cong., 1st Sess.), at 27.

Congress designed the PSD provisions to impose significant regulatory requirements, on a source-by-source basis, to identify and implement BACT and, for criteria pollutant, to also undertake certain studies. Congress was well aware that because these requirements are individualized to the source, they are

expensive. Accordingly, Congress designed the applicability provisions to apply these requirements to industrial sources of a certain type and a certain size - sources within 28 specified source categories and that emit at least 100 tpy -- as well as all other sources that emit at least 250 tpy, and, by the same token, to exempt other sources from these requirements.

Although Congress required that CAA requirements generally apply to "major emitting facilities," defined as any source that emits or has the potential to emit 100 tpy of any pollutant, Congress applied PSD to only sources at 100 tpy or higher in 28 specified industrial source categories, and at 250 tpy or more in all other source categories. This distinction was deliberate: According to Sen. McClure, Congress selected the 28 source categories after reviewing an EPA study describing 190 industrial source categories. 122 Cong. Rec. 24521 (July 29, 1976) (statement by Sen. McClure).

Congress also relied on an EPA memorandum that identified the range of industrial categories that EPA regulated under its regulations that constituted the precursor to the statutory PSD program, and listed both the estimated number of new sources constructing each year and the amount of pollution emitted by the "typical plant" in the category. The memorandum was prepared by B.J. Steigerwald, Director of the Office of Air

Quality Planning and Standards and Roger Strelow, EPA's Assistant Administrator for Air and Waste Management ("Steigerwald-Strelow memorandum). The Steigerwald-Strelow memorandum makes clear that the 100 tpy cut-off for the 28 listed sources categories, and the 250 tpy cut-off for all other sources, was meaningful; that is, there were a large number of sources below those cut-offs that Congress explicitly contemplated would not be included in PSD. Id. at 24548-50.

Consistent with this, the legislative history on the Senate side also specifically identified certain source categories that Senators believed should not be covered by PSD. The Senate bill language limited PSD to sources of 100 tpy or more in 28 listed source categories, and to any other categories that the Administrator might add. Sen. Muskie stated that the Senate bill excluded "houses, dairies, farms, highways, hospitals, schools, grocery stores, and other such sources." 123 *Cong. Rec.* 18021 (June 8, 1977) (statement of Sen. Muskie). Sen. McLure's list of excluded source categories were "[a] small gasoline jobber, or a heating plant at a community college, [which] could have the potential to emit 100 tons pf pollution annually." 122 *Cong. Rec.* 24548-49 (July 29, 1976) (statement of Sen. McClure). The Senate Committee Report included a comparable list, and in describing it, concisely articulated the

cost-conscious basis for the line-drawing: "[the PSD] procedure ... must include an effective review-and-permit process. Such a process is reasonable and necessary for very large sources, such as new electrical generating plants or new steel mills. But the procedure would prove costly and potentially unreasonable if imposed on construction of storage facilities for a small gasoline jobber or on the construction of a new heating plant at a junior college, each of which may have the potential to emit 100 tons of pollution annually." S. Rpt. 95-127 at 96-97.

The enacted legislation differs from the Senate bill by replacing the authorization to EPA to include by regulation source categories in addition to the listed 28 source categories with an inclusion of all other sources if they exceed 250 tpy, and with an authorization for the states to exempt hospitals and educational institutions. But Congress's overall intention remains clear, as the D.C. Circuit described in *Alabama Power*: "Congress's intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air...[With respect to] the heating plant operating in a large high school or in a small community college . . . [w]e have no reason to

believe that Congress intended to define such obviously minor sources as 'major' for the purposes of the PSD provision."²⁴ 636 F.2d at 353-54.

A particularly important indication of congressional intent to limit PSD to larger sources comes in considering the emissions profile of the small-sized boilers. Congress focused closely on identifying which sources with emissions in excess of 100 tpy should not be subject to PSD even though they are subject to Clean Air Act requirements generally. But Congress viewed a large set of sources as emitting below 100 tpy and therefore not included in the PSD program and, indeed, not even subject to debate as to whether they should be included in the PSD program. Chief among these sources, in terms of absolute numbers of sources, were small boilers. The Steigerwald-Strelow memorandum identified two categories of these boilers, differentiated by size. The first ranges in size from 10 to 250 x 10⁶ Btu/hr, and has a "typical plant" size of 10⁷ Btu/hr, with "BACT emissions from typical plant" of 53 tpy, and a total of 1,446 sources in the category. The second category ranges in size from 0.3 to 10 x 10⁶ Btu/hr, and has a "typical plant" size of 1.3 x x 10⁶ Btu/hr, with "BACT emissions from typical plant"

²⁴ Note that although Congress specifically authorized the states to exempt "nonprofit health or education institutions" from the definition of "major emitting facility," this statement by the D.C. Circuit should be taken as the Court's view that Congress did not design PSD to cover sources of the small size described.

of 2 tpy, and a total of 11,215 sources in the category. The memorandum discusses these two categories in the context of explaining which source categories exceed a size of 100 tpy -- and therefore would be subject to PSD if a 100 tpy threshold were set -- by stating, "Fortunately, most truly small boilers and typical space heating operations would not be covered." 122 *Cong. Rec.* 24549 (July 29, 1976).

The legislative history also provides a window into the scope of the program that Congress anticipated and related administrability concerns. According to the Steigerwald-Strelow memorandum, the number of new sources each year whose "BACT emissions from typical plant" exceed 100 for the 28 listed source categories and 250 for all other source categories is less than 100 per year. Although the Steigerwald-Strelow memorandum does not attempt to estimate the number of modifications, it appears that based on this information, Congress had reason to expect the total size of the PSD program to be measured in the hundreds of permits each year. A program of this size would be manageable by EPA and the permitting authorities.

For convenience, the Steigerwald-Strelow memorandum is included in the docket as docket number _____.

(3) PSD regulatory history: Regulations concerning the definition of "major stationary source"

EPA's initial rulemaking implementing the PSD program was proposed and finalized in 1977-1978, immediately after enactment of the PSD program. This rulemaking made explicit that the entire PSD program - including the permitting component (with air quality review) - applied to only pollutants regulated under the Act.²⁵ EPA accomplished this by requiring each "major stationary source" to obtain a PSD permit, and by defining a "major stationary source" as a source that is included in a specified source category or that is of a specified size and that emits at least a specified amount of "any air pollutant regulated under the Clean Air Act." 43 FR 26,380, 26,403/3, 26,406 (June 19, 1978) (promulgating 40 CFR 51.21(b)(1)(i)). See 42 FR 57,479, 57,480, 57,483 (Nov. 3, 1977) (proposing 40 CFR 51.21(b)(1)(i)). Similarly, the regulations required each "major stationary source" to apply "best available control

²⁵ The initial PSD program that EPA established in 1973-74, and which EPA built on in promulgating the PSD program necessary to implement the 1977 CAA Amendments had an even narrower focus. In that initial program, in response to a court order to ensure that state implementation plans (SIPs) prevent significant deterioration of air quality, EPA imposed both a technology-based requirement and an air-quality-review requirement, which, in keeping with the focus on SIPs, were both limited to national ambient air quality standards (NAAQS) pollutants. This program did not cover hazardous air pollutants that were regulated under CAA section 112, much less air pollutants not regulated under any CAA provision. See 38 FR 18,986 (July 16, 1973) (proposed rule), 39 FR 31,000 (Aug. 27, 1974) (proposed rule), 39 FR 42,510 (Dec. 5, 1974) (final rule).

technology" for "each pollutant subject to regulation under the act." 43 FR at 26,406 (promulgating 40 CFR 51.21(j), 52.21(b)(10)). EPA acknowledged that for regulatory purposes, it was replacing the term that appears in the statute - "major emitting facility," CAA § 169(l) - with the term "major stationary source," and explained that it was doing so in order "to reflect current EPA terminology." 42 FR at 57,480 (Nov. 3, 1977). EPA did not discuss that the statutory term "major emitting facility" - which refers to "any air pollutant" - differs from EPA's regulatory term "major stationary source" - which refers more narrowly to "any air pollutant regulated under the [CAA]." In the preamble to the final rule, EPA did not indicate that it had received any comments on the issue. See 43 FR 26,388 (June 19, 1978).

In 1979-1980, EPA revised the PSD program to conform to *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1980). 44 FR 51,924 (Sept. 5, 1979) (proposed rule); 45 FR 52,676 (Aug. 7, 1980) (final rule). In this rulemaking, EPA did not disturb the pre-existing provisions (including the definitions of "major stationary source" and BACT) that limited the applicability of the PSD program to regulated air pollutants. In addition, EPA did not discuss - or indicate that commenters had raised - any issues concerning the difference between the narrower definition

of "major stationary source" in the regulations and the statutory definition that could be broader under a literal reading.²⁶

In 1996 EPA proposed, and in 2002 finalized, a set of amendments to the PSD (and nonattainment NSR) provisions that included revisions to conform with the 1990 Act Amendments, which, in relevant part, exempted hazardous air pollutants from PSD, under CAA § 112(b)(6). See 61 FR 38,250 (July 23, 1996), 67 FR 80,186 (Dec. 31, 2002). In the preamble to the final rule, EPA noted that based on a request from a commenter, EPA was amending the regulations to "clarify which pollutants are covered under the PSD program." EPA accomplished this by promulgating a definition for "regulated NSR pollutant," which listed categories of pollutants regulated under the Act, and by substituting that defined term for the phrase "pollutants regulated under the Act" that was previously used in various parts of the PSD regulations. 67 FR at 80,240. The

²⁶ As noted elsewhere in today's notice, in *Alabama Power*, the D.C. Circuit noted that the definition of "major emitting facility" under CAA section 169(1) could apply to air pollutants not regulated under other provisions of the Act, and discussed the contrast of this broad definition to the narrower application of the BACT provisions. 636 F.2d at 352-53 & n. 60. In its rulemaking notices responding to *Alabama Power*, EPA discussed at length certain issues, such as the applicability of NSR to pollutants emitted below the "major" thresholds, that are based on the reference in "major emitting facility" to "any air pollutant." However, throughout its discussion, EPA interpreted that reference as "any *regulated* air pollutant," again without specifically acknowledging the difference or without acknowledging the above-noted statements in *Alabama Power*. See 45 FR at 52,710 – 52,711. EPA did not indicate that it had received comments on this issue.

definition of "regulated NSR pollutant" includes several categories of pollutants (including, in general, NAAQS pollutants and precursors, pollutants regulated under CAA §111 new source performance standards, Class I or II substances regulated under CAA title VI) and a catch-all category, "[a]ny pollutant that otherwise is subject to regulation under the Act." *E.g.*, 40 CFR 52.21(b)(50). EPA again did not address the difference between the definition of "major emitting facility" and its regulatory approach or indicate that it had received comments on this issue.

b. Title V program

Having reviewed the key statutory provisions, their legislative history, and the relevant administrative interpretations for the PSD program, we now do the same for the title V program.

i. Title V provisions

The key title V provisions for present purposes start with the applicability provisions, which are found in CAA §§502(a), 501(2)(B), and 302(j). These provisions provide that it is unlawful for any person to operate a "major source" without a title V permit, §502(a), and define a "major source" to include "any major stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons

per year or more of any air pollutant." CAA §501(2)(B) and §302(j). As noted elsewhere, these provisions, taken together and as interpreted by EPA, provide that stationary sources are subject to title V if they emit at the 100-tpy threshold air pollutants that are subject to EPA regulation.

In addition, although title V does not have a set of provisions describing its purpose, it is clear from its provisions and its legislative history, discussed below, that its key goal is to gather into one permitting mechanism the Clean Air Act requirements applicable to a source and impose conditions necessary to assure compliance with such requirements, and thereby promote the enforceability of CAA requirements applicable to the covered sources. CAA §503(b)(1) requires that the source's permit application contain a compliance plan describing how the source will "comply with all applicable requirements" of the CAA, and §504(a) requires that "[e]ach permit issued under [title V] shall include * * * such * * * conditions as are necessary to assure compliance with applicable requirements of [the Clean Air Act]." See H.R. Rep. No. 101-490, at 351 (1990) ("It should be emphasized that the operating permit to be issued under this title is intended by the Administration to be the single document or source of all of the requirements under the Act applicable to the source.').

Importantly, title V is replete with provisions designed to make the permitting process as efficient and smooth-running as possible, including the expeditious processing of permit applications and the timely issuance of permits. CAA §503(c) requires that "the permitting authority shall approve or disapprove a completed application * * * and shall issue or deny the permit, within 18 months after the date of receipt thereof * * *" CAA §502(b)(6) requires the permitting authority to develop "adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice * * * and for expeditious review of permit actions, including * * * judicial review in State court of the final permit action by [specified persons]." CAA §502(b)(7) includes a "hammer" provision designed to reinforce timely permit issuance, which is that the permitting authority's program must include:

To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such permitting authority to act on a permit application or permit renewal application (in accordance with the time periods specified in [CAA §503] * * *) shall be treated as a

final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay.

CAA §502(b)(8) requires the permit program to include “[a]uthority and reasonable procedures consistent with the need for expeditious action by the permitting authority on permit applications and related matters, to make available to the public [certain permit-related documents]”. CAA §502(b)(9) requires a permit revision to incorporate requirements promulgated after issuance of the permit, but only if the permit is for a major source and has a term of three or more years remaining. In addition, the revision must occur “as expeditiously as practicable.” CAA §502(b)(10) requires the permit program to include operational flexibility provisions that “allow changes within a permitted facility . . . without requiring a permit revision, if the changes are not modifications . . . and . . . do not exceed the emissions allowable under the permit. . . .”

In addition, title V includes a comprehensive and finely detailed implementation schedule that mandates timely issuance of permits while building in EPA and affected state review,

public participation, and timely compliance by the source with reporting requirements. Following the date that sources become subject to title V, they have one year to submit their permit applications. CAA §503(c). As noted above, the permitting authority then has 18 months to issue or deny the permit. CAA §503(c). Permitting authorities must provide an opportunity for public comment and a hearing. CAA §502(b)(6). If the permitting authority proposes to issue the permit, the permitting authority must submit the permit to EPA, and notify affected states, for review. CAA §505(a)(1). EPA then has 45 days to review the permit and, if EPA deems it appropriate, to object to the permit. CAA §505(b)(1). If EPA does object, then the permitting authority must, within 90 days, revise it to meet the objections, or else EPA becomes required to issue or deny the permit. CAA §505(c). If EPA does not object, then, within 60 days of the close of the 45-day review period, any person may petition EPA to object, and EPA must grant or deny the petition within 60 days. CAA §505(b)(2). If a permit is issued, it must include a permit compliance plan, under which the permittee must "submit progress reports to the permitting authority no less frequently than every 6 months," and must "periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and

[] promptly report any deviations from permit requirements to the permitting authority." CAA §503(b).

ii.. Title V legislative history

(I). Scope of title V

The legislative history of title V, enacted by Congress in the 1990 CAA Amendments, indicates the scope of the program that Congress expected: Congress expected the program to cover some tens of thousands of sources, which would approximate the scope of the permit program under the Clean Water Act. The Senate Committee on Environment and Public Works stated:

EPA estimates that the new permit requirements will cover about 8,200 major sources that emit 100 tons per year or more of criteria pollutants (which are regulated under SIPs). In addition, many smaller sources are (or, as EPA promulgates additional regulations, will be) covered by new source performance standards under section 111 of the Act, hazardous air pollutant standards under section 112 of Act, and nonattainment provisions of this legislation. By comparison, under the Clean Water Act, some 70,000 sources receive permits, including more than 16,000 major sources. Although many air pollution sources have more emission points than water pollution sources, the additional workload in managing the air pollution permit system is estimated to be roughly comparable to the burden that States and EPA have successfully managed under the Clean Water Act.

S. Rep. 101-228, at 353 (1990).²⁷ Sen. Mitchell, the Senate Majority Leader, stated that he expected "over 10,000 permits

²⁷ The House Committee on Energy and Commerce acknowledged that it was "uncertain about the magnitude of permit applications likely to be submitted under the bill initially and thereafter in each State or to EPA," H. Rep. 101-490 p. 346.

[to] . . . be issued under this program." 136 Cong. Rec. S3233-03 (March 27, 1990). Others in Congress had similar estimates. See, e.g., 136 Cong. Rec. S3162-04 ("thousands and thousands of permit applications ... will be required to be submitted") (statement of Sen. Nickles)..

Furthermore, the legislative history indicates that Congress did not contemplate that large numbers of very small sources would be subject to title V's requirements. This becomes clear by reviewing the legislative history of a companion piece of legislation to the operating permits provisions that Congress enacted into CAA section 507, which is the "Small business stationary source technical and environmental compliance assistance program." CAA section 507. Under this provision, sources that, among other things, "are not [] major stationary source[s]" and that emit less than 50 tpy of any regulated pollutant, as well as less than 75 tpy of all regulated pollutants, are eligible for assistance under CAA section 507. CAA section 507(c)(1). The House Committee Report described this provision - including what types of sources it expected this provision to benefit -- as follows:

New section [507] is a small source/small business provision added by the Committee. It seeks to help small businesses to comply with the problems that are likely to occur under the Act as amended by this bill. For purposes of this section, small businesses

or small emitters are defined as sources that are emitting 100 tons or less per year and that have a number of employees that would qualify them for assistance from the Small Business Administration (SBA). As we look to the future of environmental protection under the Act, we take special steps here to ensure that it is possible for these small businesses to comply with minimum hassle and in recognition of the problems that are unique to them. Such small businesses include printers, furniture makers, dry cleaners, and millions of other small businesses in this country.

House Committee Report, H.R. 101-590, at 354. In this manner, the House Committee Report made clear that it expected "millions of ... small businesses" -- including "furniture makers, dry cleaners" and many others -- to benefit from the CAA section 507 small source/small business program, but Congress did not expect them to become subject to the operating permit requirements of title V because their emissions fell below 100 tpy, which is, in general, the threshold for title V applicability.

The legislative history of title V confirms that Congress viewed a principal purpose of title V as providing a vehicle to compile the requirements applicable to the source. As the report of the House Committee on Energy and Commerce ("House Committee Report") stated, "It should be emphasized that the operating permit to be issued under this title is intended by the Administration to be the single document or source of all of

the requirements under the Act applicable to the source." H.R. Rep. No. 101-490, at 351 (1990). Combined with the source's reporting requirements, this compilation of applicable requirements would facilitate public awareness of a source's obligations and compliance and would facilitate compliance and enforcement.

On the Senate side, Sen. Chafee, one of the floor managers of the bill, made a similar point:

The permits will serve the very useful function of gathering and reciting in one place -- the permit document itself -- all of the duties imposed by the Clean Air Act upon the source that holds the permit. This would clearly be an improvement over the present system, where both the source and EPA must search through numerous provisions of state implementation plans and regulations to assemble a complete list of requirements that apply to any particular plant...

Once these permits are in place, plant managers will be better able to understand and to follow the requirements of the Clean Air Act. At the same time, EPA will be better able to monitor how well each plant is complying with those requirements. This is a highly sensible approach for all concerned.

136 Cong. Rec. S2030-02 (March 5, 1990) (statement of Sen. Chafee). Sen. Lieberman made a similar statement. 136 Cong. Rec. 3162-04 (March 26, 1990) (statement of Sen. Lieberman). Thus, a central purpose of the title V permit program is to compile all the requirements applicable to the source into a single place, the permit. Implicit in this purpose is that the

sources subject to title V will have applicable requirements to be compiled. As Sen. Chafee directly stated, "[T]he vast majority of these permit applications will ... , in all likelihood, only codify the existing requirements of the applicable State implementation plan." 136 Cong. Rec. S2715-04 (March 20, 1990) (statement of Sen. Chafee).

More broadly, the legislative history also indicates congressional concern about the costs of permitting for small businesses, and a determination to minimize those costs to the extent possible. This concern is reflected in several provisions of title V. For example, section 502(a) authorizes EPA to exempt all or part of a source category - except for any major source -- from the title V permit program if EPA "finds that compliance with [title V] requirements is impracticable, infeasible, or unnecessarily burdensome on such categories." Similarly, the permit fee provisions include a presumptive minimum fee amount, but authorize an exemption from that presumptive amount upon a showing that a lesser amount will meet overall fee requirements, CAA section 502(b)(3)(B)(iv). One of the drafters of this provision, Rep. Wyden, explained that its purpose was to preserve the flexibility of states to impose lower fees of small businesses:

I note that the provision on fees allows

reductions for small sources where appropriate. The state has some flexibility, under the general permit fee provisions, to adjust fee levels for any source so long as the average fee charged meets the statutory minimum.

136 Cong. Rec. H12883 (Oct. 26, 1990) (statement of Rep. Wyden). See e.g., 136 Cong. Rec. H2511-02 (May 212, 1990) (statement of Rep. Wyden) (discussing need to "help small businesses through the air permit labyrinth").

The legislative history also indicates that Congress was deeply concerned both about the need not to burden sources with undue costs and to assure the administrability of the title V program, and as a result, was determined to make the program as smooth-running as possible. These goals are reflected in many of the title V requirements, as discussed above. See, e.g., CAA §502(b)(6) (requiring "adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice * * * and for expeditious review of permit actions"); CAA §502(b)(7) (includes a "hammer" provision designed to reinforce timely permit issuance); CAA §502(b)(9)-(10) (limiting circumstances under which permit revision is required; requiring

revision to occur "as expeditiously as practicable;" including operational flexibility provisions).

The legislative history confirms that these provisions were designed to reduce costs to sources and promote administrability. The "Chafee-Baucus Statement of Senate Managers" for the bill explained the purpose of the CAA section 502(b)(6) requirement for "[a]dequate, streamlined, and reasonable procedures for expeditious[]" permit actions as follows:

[M]uch concern has been expressed that this new permitting process will unduly delay the proper functioning of many sources, and we intend to mitigate any delay by directing that the process be expeditious.

In addition to this general directive for expeditious processing, we mandate in new section 503 that permitting authorities approve or reject permit applications within certain specified time periods following filing. In this fashion, we have taken explicit steps to protect against undue delays.

136 Cong. Rec. S16895-01 [S16938?] (statement of Sen. Chafee).

The same statement explained that the permit revision procedures of CAA section 502(b)(9) reflect a -

careful effort to ensure that the permit program works effectively and efficiently. Succinctly, this provision accommodates two competing concerns. On the one hand, it is important to ensure that permit requirements remain up-to-date as the provisions of the Clean Air Act are developed and new requirements

are imposed. On the other hand, it also is important to be sure that we do not reduce the permit program to a shambles by requiring sources to engage in a continuous process of revising their permits as these new requirements are imposed.

136 Cong. Rec. 16895-01 (Oct. 27, 1990) (Chafee-Baucus statement of Senate Managers) (statement of Sen. Chafee).

In addition, these concerns were at the bottom of the following statement by Sen. Chafee, in which he described how the bill's drafters had revised it in response to a concern by industry that an earlier version of the bill would have put undue costs on industry:

We have also heard concerns from industry that S. 1630 would burden sources unduly by requiring them to submit-along with their permit applications-plans explaining how they intend to comply with all requirements of the Clean Air Act that apply to them.

But, Mr. President, we emphatically do not intend to burden industry with preparation and submission of unnecessary compliance plans. The substitute clarifies that any compliance plans would address only those matters by which the sources would comply with new requirements imposed by this act as it is finally signed into law. These plans would not need to address compliance with any existing Clean Air Act requirements, unless the source is in violation of those requirements.

136 Cong. Rec. S2030-02 (March 5, 1990) (statement of Sen. Chafee).

As another indication of congressional concern over administrability, Congress recognized that at the beginning of the program, large numbers of permit applications might overwhelm the permitting authorities. To protect against this, Congress included in CAA section 503(c) a phase-in schedule for permitting authorities to act on the initial set of permit applications. Under 503(c), permitting authorities were not required to act on the initial set of permit applications within 18 months after it received the application, but rather could act on one-third of them on an annual basis over a three-year period. Sen. Chafee, in describing an early version of this provision - which would have allowed permitting authorities to phase-in the submission of permit applications - explained that its purpose was "to avoid a logjam of permit applications[,] ... ensure that [regulatory] gridlock can be avoided, and [ensure] that the permitting process will work with a minimum of disruption and delay." 136 Cong. Rec., S2106 (March 5, 1990) (statement of Sen. Chafee).

(3) Title V regulatory history

Congress enacted title V as part of the 1990 Clean Air Act Amendments. Under its applicability provisions, as discussed above, title V applies to any "major source," defined, as relevant here, under CAA sections 501(2)(B) and 302(j), as "any

stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant...."

EPA's regulations mirror the CAA definitional provisions. The regulations provide that a title V program must provide for permitting "[a]ny major source," 40 CFR 70.3(a), defined, as relevant here, as "[a] major stationary source of air pollutants, as defined in section 302 of the Act, that directly emits or has the potential to emit, 100 tpy or more of any air pollutant..." 40 CFR 70.2.

However, since 1993, EPA has interpreted the applicability provisions more narrowly. At that time, shortly after title V was enacted, EPA issued a guidance document making clear that it interprets this requirement to apply to sources of pollutants "subject to regulation" under the Act. EPA previously articulated its interpretation that this title V permitting requirement applies to "pollutants subject to regulation" in a 1993 memorandum from EPA's air program. Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, "Definition of Regulated Air Pollutant for Purposes of Title V" (Apr. 26, 1993) (Wegman Memorandum). The interpretation in this memorandum was based on: (1) EPA's reading of the definitional chain for "major source" under title

V, including the definition of "air pollutant" under section 302(g) and the definition of "major source" under 302(j); (2) the view that Congress did not intend to require a variety of sources to obtain title V permits if they are not otherwise regulated under the Act (see also CAA section 504(a), providing that title V permits are to include and assure compliance with applicable requirements under the Act); and (3) consistency with the approach under the PSD program.

While the specific narrow interpretation in the Wegman Memorandum of the definition of "air pollutant" in CAA section 302(g) is in question in light of the holding in the *Massachusetts* case (finding this definition to be "sweeping"), EPA believes the core rationale for its interpretation of the applicability of title V remains sound. EPA continues to maintain its interpretation, consistent with CAA sections 302(j), 501, 502 and 504(a), that the provisions governing title V applicability for "a major stationary source" can only be triggered by emissions of pollutants subject to regulation. This interpretation is based primarily on the purpose of title V to collect all regulatory requirements applicable to a source and to assure compliance with such requirements, see, e.g., CAA section 504(a), and on the desire to promote consistency with the approach under the PSD program.

In the Tailoring Rule notice of proposed rulemaking, EPA acknowledged the Wegman Memorandum and affirmed the memorandum's continued viability, stating that "EPA continues to maintain this interpretation." 74 *Fed. Reg.* 55,300, col. 3, fn. 8; see also 75 *Fed. Reg.* at 17022-23 (Interpretive Memorandum Reconsideration).

5. Application of the "absurd results" doctrine for the PSD program

Having reviewed the factual background, legal doctrines, and the key components of the PSD and title V programs, we now turn towards interpreting the PSD and title V requirements in accordance with the Chevron framework, accounting for the applicable legal doctrines. We begin with the "absurd results" doctrine, and apply it first to the PSD requirements.

In this action, we finalize, with some refinements, the "absurd results" basis we proposed. Specifically, we are revising our regulations to limit PSD applicability to GHG emitting sources by revising the regulatory term, "major stationary source," and although our revised regulations do not accord with a literal reading of the statutory provisions for PSD applicability, which are incorporated into the definition of "major emitting facility," we have concluded that based on the "absurd results" doctrine, a literal adherence to the terms of

this definition is not required. A literal adherence would not reflect congressional intent for PSD applicability. Instead, we may limit PSD applicability for GHG emitting sources through the tailoring approach because that either best reflects or at least reasonably reflects congressional intent.

a. Congressional Intent for PSD Program

To reiterate, for convenience, CAA §169(1) defines a "major emitting facility" to include "any ... source[] [that] emit[s], or ha[s] the potential to emit, [depending on the source category], one hundred [or two hundred fifty] tons per year or more or more of any air pollutant." CAA § 169(1). We also reiterate that, as discussed above, beginning with our initial rulemaking in 1977-1978 to implement the PSD program we have narrowed this definition by reading into it the limitation that a source is subject to PSD only if the air pollutants in question are subject to regulation under another Clean Air Act provision. We have maintained this approach to the present time through several additional rulemaking actions, albeit with refinements not here relevant, and in all the various rulemakings, our approach has never been seriously questioned by stakeholders. As the U.S. Supreme Court recently stated in upholding an EPA approach in another context: "While not conclusive, it surely tends to show that the EPA's current practice is a reasonable

and hence legitimate exercise of its discretion . . . that the agency has been proceeding in essentially this fashion for over 30 years." *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498, 1509 (2009) (citations omitted). Under the current regulations, PSD applies to a "major stationary source" (a term that EPA employed as the regulatory implementation of the statutory term, "major emitting facility"), which is defined as a source that, in general "emits, or has the potential to emit, [depending on the source category], 100 [or 250] tons per year or more of any regulated NSR pollutant," 51.166(b)(1)(i)(a)-(b); and the term "regulated NSR pollutant" includes, in general, pollutants regulated under the NAAQS, the NSPS, and title VI, as well as "[a]ny pollutant that is ... subject to regulation under the Act." 51.166(b)(49)(iv). EPA is not re-opening this regulation or its interpretation in this action.

Under the current interpretation of the PSD applicability provision, EPA's recent promulgation of the light-duty vehicle rule will trigger the applicability of PSD for GHG sources at the 100/250 tpy threshold levels as of January 2, 2011. This is because PSD applicability hinges on the definition of "major emitting facility," which, under EPA's long-standing narrowing interpretation, but absent further tailoring, applies PSD to sources of any air pollutant subject that is subject to

regulation under another provision of the CAA.²⁸ EPA's promulgation of the light-duty vehicle rule means that GHGs will become subject to regulation on the date that the rule takes effect, which will be January 2, 2011.

But absent tailoring, the January 2, 2011 trigger date for GHG PSD applicability will subject an extraordinarily large number of sources, more than 81,000, to PSD each year, an increase of almost 300-fold. And the great majority of these new sources will be small commercial or residential sources. We believe that for many reasons, this result is anathema to congressional intent for the PSD program, and in fact would severely undermine what Congress sought to accomplish with the program. As a result, under our Chevron analysis, accounting for the "absurd results" doctrine, the statutory definition for "major emitting facility" (as narrowed to include "subject to regulation") should not be read to apply to all GHG sources at or above the 100/250 tpy threshold as of the January 2, 2011 date. Rather, the definition of "major emitting facility" should be tailored so that it applies to GHG sources on a phased-in basis, with the largest sources first, as we describe in this rule.

²⁸ That GHG will become subject to regulation moots, so far as GHGs are concerned, any issue as to the validity of EPA's narrowing the term "any air pollutant" in the definition of "major emitting facility" by reading into the term "subject to regulation under the Clean Air Act."

As explained above, Chevron step 1 calls for a determination of congressional intent, and the courts consider the best indicator of congressional intent to be the plain meaning of the statute. However, the U.S. Supreme Court has held that the plain meaning of a statutory provision is not conclusive "in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters' ... [in which case] the intention of the drafters, rather than the strict language, controls." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989). To determine whether "the intentions of the . . . drafters" differ from the result produced from "literal application" of the statutory provisions in question, the courts may examine the overall context of the statutory provisions, including whether there are related statutory provisions that either conflict or are consistent with that interpretation, and including whether there is legislative history that exposes what the legislature meant by the terms in question. In addition, the courts may examine whether a literal application of the provisions produces a result that the courts characterize variously as absurd, futile, strange, or indeterminate, and therefore so illogical or otherwise contrary to sensible public policy as to be beyond anything Congress would reasonably have

intended. In such cases, the literal language cannot be said to reflect the intention of the drafters, and therefore does not control. See *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242-43 (1989); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

Here, applying the definition of "major emitting facility" without tailoring - that is, applying PSD to GHG sources at the 100/250 tpy level without tailoring -- would be contrary to congressional intent as found in the statutory provisions and legislative history, especially as those provisions and history are viewed in light of the results that would occur from applying PSD to those sources. Congress established the PSD program in large measure because it was concerned that around the country, industrial development, which was confronting barriers locating in nonattainment areas (that is, areas that do not meet the NAAQS), would attempt to locate in clean air areas (that is, attainment areas or unclassifiable areas), but that as a consequence, the clean air areas would see their air quality deteriorate to the point where they, too, would no longer meet the NAAQS. The end result would be the spread of environmental and health problems to those formerly clean air areas, as well as more barriers to further industrial development. With these concerns in mind, Congress designed the

PSD program to have a primary focus of requiring newly constructing or modifying sources in areas with air quality that meets the NAAQS (or that is unclassifiable) to analyze their emissions of NAAQS pollutants and to implement controls as needed to assure that those emissions do not significantly deteriorate air quality. Many of the PSD requirements, and much of the discussion in the legislative history, reflect these aspects of the PSD program. *E.g.*, CAA sections 162, 163, 164, 165(a)(3), 165(d)(2), 165(e), 166; *see generally* H. Rep. 95-294, 95th Cong., 1st Sess. (1977) 103-78.

Congress also designed the PSD program to impose controls on non-NAAQS pollutants, through the requirement under CAA section 165(a)(4) that the source be "subject to the best available control technology [("BACT")]for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." For example, when Congress enacted the PSD provisions in 1977, sources emitting hazardous air pollutants ("HAPs") were required to implement BACT for those pollutants, although in the 1990 Clean Air Act Amendments, Congress redesigned CAA section 112, which includes the requirements for HAPs, and excluded HAPs from PSD. CAA § 112(b)(6).

Congress was keenly aware that the PSD program needed to serve two purposes: protect the environment and promote economic growth. Congress explicitly identified these two goals in the "purposes" section of the PSD provision, CAA § 160, and various PSD requirements clearly reflect them. For example, to protect economic growth, the PSD program includes a one-year limitation on the time that the permitting authority has act on permit applications. To protect the environment, in addition including many provisions that focus on NAAQS pollutants, the PSD program requires that the preconstruction permit impose emission limits that reflect best available control technology ("BACT") for each pollutant subject to regulation under another CAA provision implement. CAA section 165(a)(4). This BACT provision also makes clear, by its terms, that although Congress designed the PSD program primarily with NAAQS pollutants in mind, Congress also intended that sources subject to PSD to control the emissions of their other pollutants. The D.C. Circuit has recognized the twin goals of environmental protection and economic development that underlie PSD, and has upheld EPA interpretations of the PSD program that reflect a balancing of those goals. *See, e.g., New York v. EPA*, 413 F.3d 3, 27 (D.C. Cir.), *rehearing en banc den.* 2005 U.S. App. LEXIS 27103, (2005).

Congress was also keenly aware that the PSD analyses and controls that it was mandating had to be implemented on a source-by-source basis, and that this process would be expensive for sources. As a result, Congress intended to limit the PSD program to large industrial sources because it was those sources that were the primary cause of the pollution problems in question and because those sources would have the resources to comply with the PSD requirements. Congress's mechanism for limiting PSD was the 100/250 tpy threshold limitations. Focused as it was primarily on NAAQS pollutants, Congress considered sources that emit NAAQS pollutants in those quantities generally to be the large industrial sources to which it intended PSD be limited.

That Congress paid careful attention to the types and sizes of sources that would be subject to the PSD program and designed the thresholds deliberately to limit the program's scope is evident from the legislative history. The Senate side saw floor statements and discussion on several occasions, as well as discussion in the Committee Report, all of which were clear in their insistence that PSD should apply to small sources, particularly commercial and residential sources: As discussed below, Congress scrutinized information that EPA provided as to types and sizes of sources, found largely in the Steigerwald-

Strelow memorandum. Sen. Muskie stated that the Senate bill excluded "houses, dairies, farms, highways, hospitals, schools, grocery stores, and other such sources." 123 *Cong. Rec.* 18021 (June 8, 1977) (statement of Sen. Muskie). Sen. McLure stated that PSD should be limited to "industrial plants of significant impact," and should exclude "[a] small gasoline jobber, or a heating plant at a community college, [which] could have the potential to emit 100 tons pf pollution annually." 122 *Cong. Rec.* 24548-49 (July 29, 1976) (statement of Sen. McClure). The Senate Committee Report mirrored Sen. McClure's statement, and concisely articulated the cost-conscious basis for the line-drawing: "[the PSD] procedure ... must include an effective review-and-permit process. Such a process is reasonable and necessary for very large sources, such as new electrical generating plants or new steel mills. But the procedure would prove costly and potentially unreasonable if imposed on construction of storage facilities for a small gasoline jobber or on the construction of a new heating plant at a junior college, each of which may have the potential to emit 100 tons of pollution annually." S. Rpt. 95-127 at 96-97.

The D.C. Circuit had occasion, in *Alabama Power*, to acknowledge this legislative history: "Congress's intention was to identify facilities which, due to their size, are financially

able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air." *Alabama Power*, 636 F.2d at 353. The Court added, "Though the costs of compliance with [the PSD] requirements are substantial, they can reasonably be borne by facilities that actually emit, or would actually emit when operating at full capacity, the large tonnage thresholds specified in section 169(1)." *Id.* at 354.

It is not too much to say that applying PSD requirements to GHG sources without tailoring the definition of "major emitting facility" would result in a program that would have been unrecognizable to the Congress that designed PSD. Congress intended that PSD be limited to a relatively small number of large industrial sources. Without tailoring - that is, without phasing in PSD and title V applicability to GHG sources so as to allow the development of streamlining methods and increases in permitting authority resources -- the PSD program would expand by January 2, 2011 from the current 280 sources per year to almost 82,000 sources, all of which would be smaller than the sources currently in the PSD program and most of which would be small commercial and residential sources. Until EPA could develop streamlining methods, all of the sources that would

become newly subject to PSD - whether larger or smaller sources, whether industrial or commercial/residential sources -- would have to undergo source-specific BACT determinations for their GHG emissions, as well as their emissions of conventional pollutants in amounts in excess of the significance levels. We estimate that the commercial and residential sources would incur, on average, almost \$60,000 in PSD permitting expenses. This result would be anathema to Congress's careful efforts to confine PSD to large industrial sources.

A closer look at the legislative history confirms the view that sweeping in large numbers of small commercial and residential sources is precisely what Congress thought it was avoiding by establishing the 100/250 tpy thresholds. As noted above, Congress relied on an EPA memorandum - the Steigerwald-Strelow memorandum -- that identified the range of industrial categories that EPA regulated under its program that constituted the precursor to the statutory PSD program, and listed both the estimated number of new sources constructing each year and the amount of pollution emitted by the "typical plant" in the category. The Steigerwald-Strelow memorandum makes clear that the 100 tpy cut-off for the 28 listed sources categories, and the 250 tpy cut-off for all other sources, would exclude from PSD a large number of sources. 122 *Cong. Rec.* 24548-50 (July

29, 1976). However, virtually all of these sources in the 28 source categories emit carbon dioxide in quantities that equal or exceed the 100/250 tpy thresholds, and therefore would be swept into PSD through application of the "major emitting facility" definition, without tailoring. For example, we estimate that over 700,000 commercial facilities and 180,000 residential facilities would exceed a PTE emission level for CO₂ of 250 tpy.

Most telling, in this regard, is the small-sized boilers. The Steigerwald-Strelow memorandum identified two categories of these boilers, differentiated by size. The first ranges in size from 10 to 250 x 10⁶ Btu/hr, and has a "typical plant" size of 10⁷ Btu/hr, with "BACT emissions from typical plant" of 53 tpy, and a total of 1,446 sources in the category. The second category ranges in size from 0.3 to 10 x 10⁶ Btu/hr, and has a "typical plant" size of 1.3 x x 10⁶ Btu/hr, with "BACT emissions from typical plant" of 2 tpy, and a total of 11,215 sources in the category. The memorandum discusses these two categories in the context of explaining which source categories exceed a size of 100 tpy -- and therefore would be subject to PSD if a 100 tpy threshold were set -- by stating, "Fortunately, most truly small boilers and typical space heating operations would not be covered." 122 *Cong. Rec.* 24549 (July 29, 1976). However, these

data and conclusions were all based on emissions of NAAQS pollutants, the amounts of which placed these boilers well below the PSD threshold limitations. In general, most boilers of these small sizes are fired with natural gas, and a natural gas boiler greater than 0.5×10^6 Btu/hr emits at least 250 tpy CO₂. If the CO₂ emissions of these small boilers are considered - as would occur by applying the definition of "major emitting facility" without tailoring -- then most of them would in fact be subject to PSD. Again, this result would directly contravene Congress's intention to limit PSD to "industrial plants of significant impact." 122 *Cong. Rec.* 24548-49 (statement of Sen. McClure). Industry raised significant concerns about the cost of PSD permitting if the statutory threshold were to apply for GHG emissions. One commenter estimated a cost of over \$5 billion and the dedication of over 17,000 FTEs to this effort.

Perhaps the most compelling reason why applying the PSD program to GHG sources without tailoring, and before the development of streamlining methods, would be inconsistent with congressional intent, is that the resulting program would prove unadministrable. Although the legislative history of the PSD program does not reveal explicit congressional concern about administrability issues, the Steigerwald-Strelow Memorandum, which identifies the source categories and numbers of sources

that were before Congress as it considered PSD, suggests that the program that Congress fashioned could be expected to cover at most a few thousand sources each year. Moreover, the *Alabama Power* court acknowledged the importance of administrability concerns: The Court based its holding that potential-to-emit for purposes of the applicability thresholds should be defined as emissions at full capacity with implementation of control equipment, in part on its view that with this definition, the number of sources subject to PSD would be manageable:

Though the costs of compliance with section 165 requirements are substantial, they can reasonably be borne by facilities that actually emit, or would actually emit when operating at full capacity, the large tonnage thresholds specified in section 169(1). The numbers of sources that meet these criteria, as we delineate them, are reasonably in line with EPA's administrative capability.

Alabama Power, 636 F.2d at 354.

However, applying PSD to GHG sources without tailoring would increase the size of the PSD program at least an order of magnitude beyond what Congress could have had any reason to expect, which would have been far beyond the "administrative capability" that *Alabama Power* described EPA as having.

Beyond this disconnect with congressional expectations, what is most important is that the extraordinarily large number of permit applications would overwhelm permitting authorities and slow their ability to process permit applications to a crawl. Our best estimate at present is that permitting authorities would need to process almost 82,000 permit applications per year, compared to, at most, 800 in the current PSD program. The total additional workload, in workhours, for PSD permits would be more than 19.5 million more work hours, compared to 150,795 work hours for the current PSD program, and the total additional costs for would be over \$1.5 billion, compared with \$12 million for the current PSD program.

At proposal, we noted that the states had estimated that the influx of permit applications that would result from applying the 250 tpy threshold at actual emissions would, without additional resources, result in permitting delays of three years. In fact, as we noted at proposal, a literal reading of the PSD requirements would require their application at the 250 potential to emit level, which would result in ten times more permit applications than were assumed when the States made the three-year estimate. Further, our current estimates of the numbers of sources that would be subject to PSD requirements are about twice what we estimated at proposal, as described

elsewhere. Moreover, our estimate of the number of hours that permitting authorities would need to process a permit application from a source in the commercial or residential sector - which is, by far, the largest single sector - is three and one-half times as long as we estimated at proposal. And under a literal reading of the statutory provisions, the permitting authorities would be required to implement a program of this size beginning on January 2, 2011, less than nine months from now.

In light of these burdens, it is difficult to overstate the impact that applying PSD requirements literally to GHG sources as of January 2, 2011, without tailoring, would have on permitting authorities, on the PSD program, and, more broadly, on economic development. The number of permits that would be required from such an approach is so far beyond what has ever been seen that it is difficult to develop a meaningful picture of what the permitting program would look like, except to say that throughout the country, PSD permit issuance would be unable to keep up with the flood of incoming applications, resulting in delays that would only grow worse over time, as far into the future as the eye can see. Because PSD is a preconstruction program, during this time, tens of thousands of sources each year would be prevented from constructing or modifying. In

fact, it is reasonable to assume that many of those sources will be forced altogether to abandon plans to construct or modify. This can be expected to be true for virtually all PSD applicants, from the small commercial and residential sources to the large industrial sources. As a result, a literal application of the PSD applicability provisions to GHG sources would have the effect of a virtual nationwide construction ban extending for years, with all of the adverse effects that this would have on economic development.

The only possible remedies for this dismal scenario would be for permitting authorities to increase their PSD funding by over 100-fold, from \$12 million to over \$1.5 billion, or the development by EPA and the permitting authorities of streamlining techniques. But it is simply inconceivable that permitting authorities could increase their funding to those levels or anything close to them in the foreseeable future, partly because of the sheer magnitude of those levels and partly because of the financial challenges that States currently face. And, for the reasons discussed below, streamlining offers genuine promise to improve the manageability of the PSD workload, but not in the very near term and not to an extent that has yet come into focus.

So clear are at least the broad outlines of this picture that EPA did not receive any substantive comments arguing that permitting authorities could in fact administer the PSD program with the applicability requirements applied literally to GHG sources beginning in the very near future.²⁹ Every permitting authority that addressed this issue in their comments on the proposed GHG Tailoring Rule stated unequivocally that it could not administer the PSD program at the statutory levels. For example, NACAA, which represents air pollution control agencies in 53 states and territories, provided comments on the proposed GHG tailoring rule that stated it "...agrees with the EPA that immediately attempting to implement the PSD and title V programs using the statutory thresholds meets the test for invoking the administrative necessity and absurd results doctrines." Similarly, the California Air Resources Board in their comments on the proposed tailoring rule stated that it "...concurs with the U.S. EPA that if more appropriate applicability thresholds [as opposed to the statutory thresholds] are not set for GHG it will not be administratively possible to implement these [the PSD and tile V] permitting programs". All other state and local permitting agencies that commented on the proposed tailoring provided similar comments that they would not have the

²⁹ EPA did receive comments that asserted in conclusory fashion that permitting authorities could administer the 100/250 tpy levels.

adequate staff capacity or resources to be able to successively administer their permitting programs with the addition of GHG emission sources at the statutory thresholds for PSD and title V.

It is the many-year delays in permit issuance and the consequent chilling of economic development that provide perhaps the clearest indication that applying the PSD applicability provisions to GHG sources without tailoring produces absurd results. These effects would undermine one of Congress's central purposes in establishing the PSD program, which was to promote development in clean air areas by large industrial sources (as long as they included environmental safeguards). As discussed above, this goal is manifest in the structure of the PSD provisions, and Congress even went so far as to make this goal explicit in the purposes section of the PSD provisions. But even if Congress had not been so clear, it is simply inconceivable that Congress could have intended the PSD program to be applied in a way that would cause such damage to the national economy.

Moreover, at the present time, there is little environmental benefit in subjecting large numbers of small GHG sources to PSD permitting requirements. They represent a relatively small share of the GHG inventory and the control

options available to them, at present, are limited. As a result, approaches other than source-by-source permitting presently offer more promise for generating emissions reductions in an efficient manner. These approaches, which ,may be developed through both Federal and State efforts, include requirements, incentives, and educational outreach to promote efficiency improvements to boilers and furnaces and energy efficient operations, including, for example, weatherization programs.

For all these reasons, interpreting the definition of "major emitting facility" literally -- that is, as EPA has narrowed it, but without tailoring - would produce results that are not be consonant with, and, in fact, would severely undermine, congressional intent for the PSD program. These results may fairly be characterized as the type of absurd results that supports our view that the literal terms of the PSD applicability provisions do not indicate congressional intent for how those provisions should applied to GHG sources.

b. EPA's reconciliation of applicability provisions with congressional intent

EPA may tailor the definition of "major emitting facility" as applied to GHG sources because doing so best effectuates congressional intent, or at least, constitutes a reasonable

construct of the statutory provisions.³⁰ This tailoring will allow a window of time for EPA and the permitting authorities to develop methods to streamline PSD requirements and to ramp up permitting authority resources, which will allow for an orderly expansion of the PSD program to cover more GHG sources over time in a way that is manageable for both source and permitting authority.

(1) Congressional intent as applied to PSD applicability to GHG sources

To determine how the PSD program should apply to GHG sources, it is important first to ascertain what would be congressional intent for applying the program to GHG sources. Congress wrote the applicability provisions broadly,³¹ so that by their terms they would sweep in sources of many types of pollutants, but most of the PSD provisions and the legislative history indicate that Congress was primarily focused on NAAQS pollutants. Even so, nothing in statutory provisions provide conclusively that GHG emissions -- or other non-NAAQS pollutants -- when emitted in the appropriate quantity may never trigger PSD applicability, and nothing in the legislative history indicates

³⁰ This tailoring, which is the subject of today's rulemaking, is in effect a further narrowing of the definition, as applied to GHG sources, beyond what EPA accomplished in promulgating the regulatory definition that includes the "subject to regulation" limitation.

³¹ Indeed, as discussed elsewhere, by not limiting the applicability provisions to pollutants subject to regulation, Congress wrote them overly broadly.

that Congress intended such a result. In addition, it is clear that Congress expected PSD to be limited to large industrial sources - which are the sources whose emissions are most important for air quality purposes -- but no provision explicitly imposes that limitation. Congress's reasoning was that large industrial sources are best suited to handle the resource-intensive analyses required by the PSD program, but it is conceivable that under certain circumstances, other sources could manage the PSD requirements as well. Finally, it is reasonable to read into Congress's intent that the PSD program be limited to a size that permitting authorities would be able to administer, but the permitting authorities could take certain steps - including adoption of streamlining measures and ramping up resources - that would allow them to handle a higher volume of permitting.

Accordingly, at present, we believe that congressional intent may be characterized as applying PSD to sources of any pollutants that are subject to regulation as long as those sources can reasonably be expected to manage PSD's requirements and as long as the resulting numbers of permits can be reasonably accommodated by permitting authorities. As a result, for reasons described above, we believe that it is not consonant with congressional intent to apply the PSD program to GHG

sources at the 100/250 tpy level as soon as January 2, 2011, when GHGs become subject to regulation through the light-duty vehicle rule. However, it is consonant with congressional intent to apply the PSD program to GHG sources on a schedule that begins with the largest GHG sources and gradually includes smaller sources over time. Thus, under this view, the tailoring approach is justified under Chevron step 1. However, even under this view of congressional intent, we are not certain at present whether congressional intent can be said to be clear that the smallest of the GHG sources - those emitting at or near the statutory thresholds - should be included in the PSD program. As noted elsewhere, we may explore this issue further in subsequent rulemaking.

On the other hand, we recognize that it may also be concluded that congressional intent with respect to applying PSD to the entire universe of GHG sources is unclear. Under these circumstances, the tailoring approach is justifiable under Chevron step 2 as a reasonable interpretation of the statutory requirements.

(2) Criteria for establishing phase-in schedule

The phase-in schedule will depend on several things. The first is our progress in developing streamlining methods that will render the permitting authority workload more manageable by

taking some sources off the table (through regulations or guidance interpreting "potential to emit"), and by allowing for more efficient permit processing (through general permits and presumptive BACT). At the same time, streamlining techniques will lower permitting costs to sources or even eliminate some sources' obligations to obtain permits altogether. The second is the time that permitting authorities need to ramp up their resources in an orderly and efficient manner to manage the additional workload. The third is information we have as to the sources' abilities to meet the requirements of the PSD program and the permitting authorities' ability to process permits in a timely fashion. That information will be based on the real-world experience the permitting authorities will accumulate as they proceed to process permit application for the larger GHG sources.

Thus, under our present approach, we will develop streamlining techniques, we expect the permitting authorities to ramp up resources, and we will gather real world- information about the GHG permitting process; and based on all that, we will expand the PSD program in a step-by-step fashion to include more sources over time. We intend to follow this process to establish both the PSD applicability thresholds and, as we describe next, the significance levels.

(3) Criteria for establishing significance levels

The criteria for establishing the significance levels are the same as for establishing the major emitting facility thresholds. As noted above, under the applicable CAA sections, any physical or operational change at a stationary source that "increases the amount of any air pollutant emitted by such source" or that results in the emission of a new pollutant is treated as a "modification" that is subject to PSD requirements. Although the CAA, by its terms, treats as an "increase[]" any amount of emissions that is greater than zero, the D.C. Circuit held in Alabama Power v. Costle that EPA may establish a threshold - called the significance level - on de minimis grounds for the amount of any particular pollutant that may be increased. 636 F.2d at 400. EPA has established significance levels for various pollutants and has generally established a de minimis basis for them. See, e.g., 45 Fed. Reg. 52,676, 52,705 - 52,710 (August 7, 1980) In addition, the Court in *Alabama Power* authorized EPA to use an "administrative necessity" basis for establishing significance levels. 636 F.2d. at 400.

To this point, we have not attempted to determine de minimis levels for GHGs. Instead, in today's rulemaking, EPA is establishing a phase-in schedule for significance levels based on the "absurd results" doctrine or, alternatively, as discussed

below, the "administrative necessity" doctrine. It is not necessary to establish a permanent de minimis level in today's rulemaking, and attempting to do so would give rise to administrability problems. This is because we are considering establishing the major emitting facility threshold for step 3 as low as the 50,000 tpy CO₂e level, as discussed elsewhere, and of course, we could eventually establish a lower level. Our present view is that we do not have the authority to establish the de minimis level higher than the major emitting facility threshold. Accordingly, at present if we were to establish a permanent significance level on a de minimis basis, that level would be relatively low and would result in too many small sources submitting permit applications while the phase-in is occurring. This would give rise to the same problems concerning undue costs to the sources and administrative burdens for the permitting authorities for which we are fashioning a remedy. Accordingly, the significance levels we establish with this action are the lowest levels that sources and permitting authorities can reasonably be expected to implement at the present time in light of the costs to the sources and the administrative burdens to the permitting authorities.

Our rationale for the implementation schedule is based on the combined burdens for both PSD and Title permitting purposes.

As a result, we discuss our rationale below, after first describing the "absurd results" basis for our action concerning title V applicability to GHG sources.

c. Other possible approaches to reconciling literal reading of PSD applicability provisions and congressional intent

In addition, we recognize that commenters have suggested other approaches to reconciling the inconsistency between the definition of "major emitting facility" and congressional intent. For example, some commenters urged that the "major emitting facility" definition should be applied so that only sources that emit NAAQS pollutants in the requisite quantities would be subject to PSD, and sources would not be subject to PSD based solely on their emissions of non-NAAQS pollutants. Some commenters argue that this approach is mandated by several of the PSD provisions, read together, or at least that the relevant statutory provisions are ambiguous and that this approach is a reasonable reading of them. Under this approach, we would not need to phase in the application of PSD by lowering the applicability threshold for GHG emitters.

Specifically, many commenters questioned whether EPA has the authority to regulate GHGs under the PSD provisions. Although the specific lines of reasoning varied somewhat from

one commenter to another, in general, they based their arguments largely on CAA sections 161 and 165(a)³². Under CAA section 161:

In accordance with the policy of section 101(b)(1), each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 107 as attainment or unclassifiable.

Commenters point out that section 107 applies only to NAAQS pollutants and directs that areas be designated as attainment, nonattainment, or unclassifiable on a pollutant-by-pollutant basis.

Under CAA section 165(a), a "major emitting facility" cannot be constructed "in any area to which this part applies" unless it meets certain requirements. According to some commenters, these provisions, read together, limit PSD to being triggered only for NAAQS pollutants that are emitted from sources in areas that are designated attainment or unclassifiable for those pollutants.

Some commenters go on to take the position that NAAQS pollutants for which the area is designated attainment or unclassifiable are the only pollutants that can be regulated under any provision of PSD; while others take the position that once PSD is triggered for a source, then other, non-NAAQS,

³² Commenters raise additional arguments, including that PSD is limited to pollutants (1) that cause only local effects, or (2) for which a source has been subject to an NSPS. We address these arguments in the RTC.

pollutants may be regulated under other PSD provisions, in particular, the BACT provision under CAA section 165(a)(4). These commenters agree, however, that emissions of GHGs, by themselves, cannot trigger PSD applicability. Finally, some commenters state that even if the PSD provisions cannot be read by their terms to preclude GHGs from triggering PSD, then they can be read to authorize EPA to determine that GHG emissions should not trigger PSD.

We recognize, as we have said elsewhere, that a primary purpose of the PSD provisions is to regulate emissions of NAAQS pollutants in an area that is designated attainment or unclassifiable for those pollutants. However, we do not read CAA sections 161 and 165(a), read in context with the PSD applicability provisions, as limiting PSD applicability to those pollutants. The key PSD applicability provision is found in section 165(a), which states, "No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless [certain requirements are met]. A "major emitting facility" is defined, under CAA section 169()(1), as "any ... stationary source[] which emit[s], or ha[s] the potential to emit, one hundred [or, depending on the source category, 250] tons per year or more of any air pollutant." As discussed elsewhere, EPA

has long interpreted the term "any air pollutant" to refer to "any air pollutant subject to regulation under the CAA," and for present purposes, will continue to read the "subject to regulation" phrase into that term.

Although section 165(a) makes clear that the PSD requirements apply only to sources located in areas designated attainment or unclassifiable, it does not, by its terms, state that the PSD requirements apply only to pollutants for which the area is designated attainment or unclassifiable. Rather, 165(a) applies, by its terms, more broadly to any pollutant that is subject to regulation. Moreover, two other requirements in CAA section 165(a) apply to pollutants broadly. Under CAA section 165(a)(3), one of the requirements for securing a preconstruction permit is to demonstrate that the source's emissions "will not cause, or contribute to, air pollution in excess of any (A) [NAAQS increment to which the PSD requirements apply], (B) [NAAQS] in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter." Subparagraph (B), by its terms, applies to NAAQS pollutants for which the area is designated nonattainment, and therefore are outside of the PSD program. Most importantly, subparagraph (C), by its terms and its differentiation from NAAQS pollutants under subparagraph

(C), clearly applies to non-NAAQS pollutants. For example, by its terms this provision requires a demonstration that a landfill seeking a PSD permit will comply with emission limitations for "municipal solid waste landfill emissions."

In addition, CAA section 163(a)(4) includes as a PSD requirement that "the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility. Section 163(a)(4)'s broad reference to "each pollutant subject to regulation under this chapter" strongly indicates that it applies to non-NAAQS pollutants, as long as they are regulated under other provisions of the Act.³³ Indeed, the very existence of this provision makes clear that Congress knew how to limited the scope of "any air pollutant" when it intended to do so.

To return to sections 161 and 165(a), which commenters rely on as the cornerstone of their argument, commenters in effect take the position that Congress intended the geographic references in these provisions - that is, the references to areas designated as attainment or unclassifiable - to limit the

³³ We find no support for the proposition raised by some commenters that this provision is limited to "NAAQS" pollutants. To the contrary, "under this chapter" unambiguous signals an intent to cover any pollutant regulated under the Act. Had Congress intended a narrower focus, they would have specified "any NAAQS pollutant" or any pollutant subject to regulation under this Part (PSD)"

scope of the permitting provisions. We think it unpersuasive that Congress would have taken such an indirect, and silently implied, route to limit the scope of the permitting provisions, which, as noted above, apply broadly by their terms. Had Congress intended to limit PSD permitting in the manner urged by commenters, it certainly could have done so directly, such as by limiting PSD permitting to "any pollutant for which an area is designated attainment or unclassifiable." Indeed, in other sections of the CAA, Congress did directly limit the scope of pollutant applicability by specifying which pollutants are or are not subject to the provision. See, e.g., 111(d) (performance standards for existing sources apply only to pollutants other than NAAQs or hazardous air pollutants), 112(a)(1) (applying air toxics requirements in section 112 to sources that emit above the specified tonnage thresholds of "hazardous air pollutants").

In addition, although section 161 requires that SIPs contain emission limitations and other measures as necessary to prevent significant deterioration in areas designated as attainment or unclassifiable, it does not limit SIPs to only those measures. Moreover, section 161 should be read in conjunction with section 110(a)(2)(C), which establishes the

basic requirement that SIPs include PSD requirements. Section 110(a)(2)(C) provides that each SIP shall --

Include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that [NAAQS] are achieved, including a permit program as required in parts C and D of this subchapter.

Subparagraph (A), in turn, requires SIPs to include "enforceable emission limitations and other control measures, means, or techniques ... as may be necessary or appropriate to meet the applicable requirements of this chapter". It is clear from subparagraph (C) of section 110(a)(2), read in conjunction with subparagraph (A), that SIPs may contain provisions to meet requirements other than those related to the NAAQS (that is, subparagraph (A) requires control measures "to meet the applicable requirements of this chapter"), and that SIPs must include "a permit program as required in part[] C." That permit program, in turn, must include the requirements in section 165(a)(3)(C) and (4) that, by their terms, apply to non-NAAQS pollutants.

A further indication that the PSD requirements apply to non-NAAQS pollutants may be found in Congress's addition in the 1990 CAA Amendments of the limitation in section 112(b)(6) that "The provisions of part C of this subchapter (prevention of

significant deterioration) shall not apply to pollutants listed under this section," that is, hazardous air pollutants. By adding this provision, Congress clearly recognized that hazardous air pollutants had been subject to the PSD provisions. The D.C. Circuit, in *Alabama Power v. Costle*, 636 F.2d 323, 361 n.90 (D.C. Cir. 1980) indicated that PSD applies to hazardous air pollutants.

In addition, it should not be overlooked that we have applied PSD to non-NAAQS pollutants since the inception of the program over 30 years ago. For example, prior to the 1990 CAA Amendments, PSD applied to hazardous air pollutants regulated under CAA section 112; and over the years, EPA has established significance levels for fluorides, sulfuric acid mist, hydrogen sulfide, total reduced sulfur, reduced sulfur compounds, municipal waste combustor organics, municipal waste combustor metals, municipal waste combustor acid gases, and municipal solid waste landfill emissions, see 40 CFR 51.166(b)(23)(i); and EPA has proposed a significance level for ozone depleting substances. See 61 *Fed. Reg.* 38,307/2 (July 23, 1996). Of course, the basis for all these actions is PSD's applicability to these non-NAAQS air pollutants. We are not aware that EPA's actions in establishing significance levels for these pollutants

gave rise to challenges on grounds that the PSD provisions do not apply to them.

Accordingly, we reject the argument that section 165 must be, or may reasonably be, limited in scope to pollutants for which an area has been designated as attainment or unclassifiable. Rather, the PSD applicability provision - the definition of "major emitting facility" in CAA section 169(1) - applies by its terms (as we have narrowed them through regulation) to sources emitting any air pollutant subject to regulation, and is not limited to any NAAQS air pollutant. Our research has not disclosed any explicit statements in the legislative history that Congress intended to limit PSD applicability to sources of NAAQS pollutants.

We recognize, as we discuss at length elsewhere in today's notice, that applying the PSD applicability provisions literally to GHG sources is not consistent with, and in fact would undermine, congressional intent. We further believe that the tailoring approach we adopt in this rulemaking most closely gives effect to congressional intent and therefore best reconciles the statutory provisions with congressional intent.

In any event, we did not include the NAAQS approach as advocated by commenters in our notice of proposed rulemaking, and so we could not proceed to adopt it in today's final action.

However, we are not inclined to reject the possibility that some approach other than the phase-in approach that we adopt today could merit further exploration under the "absurd results" doctrine. Therefore, while we will proceed to implement the approach described in today's rulemaking, we intend to publish a supplemental notice of proposed rulemaking in the near future, in which we solicit additional comment on whether we have authority to adopt some other approach under the "absurd results" doctrine on grounds of consistency with congressional intent. If we decide to change our approach, that could have important ramifications for whether we will promulgate lower thresholds in step 3 or subsequently.

6. Application of the "absurd results" doctrine for the title V program

Having discussed the application of the Chevron framework, taking account of the "absurd results" doctrine, for the PSD applicability requirements, we now turn towards applying the same approach to the title V applicability requirements. Because of the parallels between the PSD and Title applicability provisions, much of the discussion below parallels the discussion above of PSD. As with PSD, we finalize, with some refinements, the "absurd results" basis we proposed. Specifically, we are revising our regulations to limit title V

applicability to GHG emitting sources by revising the regulatory term, "major source," and although our revised regulations do not accord with a literal reading of the statutory provisions for title V applicability, which are incorporated into the statutory definition of "major source," we have concluded that based on the "absurd results" doctrine, a literal adherence to the terms of this definition is not required. A literal adherence would not reflect congressional intent for title V applicability. Instead, we may limit title V applicability for GHG emitting sources in a way that is reasonably reflective of congressional intent.

To reiterate, for convenience, the title V applicability provisions provide that after the effective date of a title V program, it is unlawful for any person to operate a "major source" without a title V permit, §502(a), and define a "major source" to include "any major stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." CAA §501(2)(B) and §302(j).

Under the current interpretation of the title V applicability provision, EPA's recent promulgation of the light-duty vehicle rule will trigger the applicability of title V for GHG sources at the 100 tpy threshold levels as of Jan. 2, 2011.

This is because title V applicability hinges on the definition of "major source," which, under EPA's long-standing narrowing interpretation, but absent further tailoring, applies title V to sources of any air pollutant that is subject to regulation under another provision of the CAA.³⁴ EPA's promulgation of the light-duty vehicle rule means that GHGs will become subject to regulation on the date that the rule takes effect, which will be January 2, 2011.

But absent tailoring, the January 2, 2011 trigger date for GHG PSD applicability will see an extraordinarily large number of sources -- some 6.1 million -- become subject to title V, an increase of over 400-fold over the 14,700 sources that currently are subject to title V each year. The great majority of these new sources will be small commercial or residential sources.

We believe that for many reasons, this result is anathema to congressional intent for the title V program, and in fact would severely undermine what Congress sought to accomplish with the program. As a result, under Chevron, accounting for the "absurd results" doctrine, the statutory definition for "major source" (as EPA has already narrowed it to refer to any air pollutant "subject to regulation") should not be read to apply

³⁴ That GHG will become subject to regulation moots, so far as GHGs are concerned, any issue as to the validity of EPA's narrowing the term "any air pollutant" in the definition of "major source" by reading into the term "subject to regulation" under the Clean Air Act.

to all GHG sources at or above the 100 tpy threshold as of the January 2, 2011 date. Rather, the definition of "major source" should be tailored so that it applies to GHG sources on a phased-in basis, with the largest sources first, as we describe in today's rule.

a. Congressional Intent for Title V Program

Applying the definition of "major source" without tailoring - that is, applying title V to GHG sources at the 100 tpy level without tailoring -- would be contrary to congressional intent as found in the statutory provisions and legislative history, especially as those provisions and history are viewed in light of the results that would occur from applying title V to those sources.

As we said, above, in a similar circumstance involving the PSD program, applying title V requirements to GHG sources without tailoring the definition of "major source" - and, as discussed below, without streamlining the title V requirements or allowing for time for permitting authorities to ramp up resources -- would result in a program unrecognizable to the program that Congress intended, and one that would be flatly unadministrable. Without tailoring, the PSD program would expand from the current 14,700 sources to some 6.1 million, with the great majority of the sources being small commercial and

residential sources that not only have never been permitted before, but that in many cases have no applicable requirements under the Clean Air Act to include in the permit. In the next several sections, we will walk through some of the specific ways that this literal application of title V would not only differ from, but would undermine, congressional intent. But the big picture is readily drawn: The influx of millions of permit applications would do nothing less than overwhelm the program Congress finely crafted for thousands of sources, with its multi-step deadlines measured in days and months, its multiple mandates for expeditious permit processing, its nuanced limitations on the need for permit revisions, its efforts to save smaller sources permit fees. Regulatory gridlock, precisely what Congress strove to avoid, would result.

Most visibly, interpreting the applicability provisions literally to include GHG sources at the 100/250 tpy levels would revise the program from what Congress envisioned in three major ways, each of which was discussed above:

- It would expand the program to cover several-hundred-fold more sources than Congress anticipated
- It would expand the program to cover very small sources that Congress expected would not be included in the program

- It would expand the program so that the large majority of sources have empty permits, that is, permits without applicable requirements.

Revising the program in this way through a literal interpretation of the applicability provisions - without tailoring the applicability requirements and without streamlining of program requirements -- is clearly inconsistent with Congress's conception of the program's scope, and these inconsistencies are nothing less than foundational. Most importantly, the program that would result would be unduly costly to sources and impossible for permitting authorities to implement, and therefore would frustrate the purposes that Congress intended to achieve with the program that it did design.

As discussed above, Congress was fully aware that with the title V program, it was subjecting sources and permitting authorities to additional costs and administrative burdens, and it was fully aware of concerns that absent careful design, the program could become a formula for regulatory gridlock. Determined to make the program workable, Congress crafted the provisions to be efficient and workable.

However, if title V were to apply to GHG sources at the 100 tpy level, until EPA could develop streamlining methods, all of

these sources newly subject to title V would need to apply for permits. We estimate that the commercial and residential sources would incur, on average, expenses of \$23,370, while an industrial source would incur expenses of \$46,350, to prepare a permit application and receive a permit. The great majority of these sources would be small commercial and residential sources of the type that Congress did not expect would be included in title V, and we estimate that the great majority of them would not have applicable Clean Air Act requirements to include in their permits. The overall cost to all 6.1 million sources would be a staggering \$49 billion. Imposing burdens of this magnitude on these sources - individually and in total - would of course be contrary to Congress's efforts to minimize the expenses of title V, especially to small sources. The magnitude of the costs is, in a sense, heightened because a great many of these sources will not have applicable requirements to include in their permits; therefore, much of the costs will produce little benefit.

Yet, the most important reason why applying the title V program to GHG sources without tailoring, and before the development of streamlining methods, would be inconsistent with congressional intent, is that the resulting program would prove unadministrable. Adding some 6.1 million permit applications to

the 14,700 that permitting authorities now handle would completely overwhelm permitting authorities, and for all practical purposes, bring the title V permitting process to a standstill.

The costs to permitting authorities of this multi-million-source program would again be staggering. On average, and without streamlining, a permitting authority would expend 214 hours, which would cost \$9,844, to issue a permit to a commercial or residential source; and 428 hours, which would cost \$19,688, to issue a permit to an industrial source. In all, permitting authorities would face over \$21 billion in additional permitting costs each year due to GHGs, compared to the current program cost of \$62 million each year.

Beyond this disconnect with congressional expectations as to scope of the program, what is most important is that the extraordinarily large number of permit applications would overwhelm permitting authorities and slow their ability to process permit applications to a crawl. As described at proposal, the survey of permitting authorities found that a literal application of the title V applicability provisions to GHG sources would result in permitting delays of some ten years. However, as we further noted at proposal, this estimate was based on the assumption that the applicability threshold would

be 100 tpy actual emissions; in fact, the applicability threshold would be 100 tpy in potential to emit, which would sweep in many more sources. Moreover, as stated elsewhere, we currently estimate the amount of per-permit work hours for permitting authorities in processing title V permit applications to be several times higher than what we estimated at proposal. As with PSD, such a program is so far beyond anything within our experience that it is difficult to give a meaningful estimate for how long the permitting process would take for each permit on average, but it is clear that the period would be many years.

More specifically, applying title V to GHG sources without tailoring would be in tension with a specific CAA requirement, that of CAA § 503(c), which imposes a time limit of 18 months from the date of receipt of the completed permit application for the permitting authority to issue or deny the permit. It would be flatly impossible for permitting authorities to meet this statutory requirement if their workload increases from some 14,700 permits to 6.1 million. Instead, as just noted, permit applications would face multi-year delays in obtaining their permits.

Moreover, these delays would undermine the overall statutory design that promotes the smooth-running of the permitting process, and the very purpose of the title V program

itself. As noted elsewhere, Congress intended through title V to facilitate compliance by establishing an operating permit program that requires the source to combine all of its CAA requirements, and explain how it will assure compliance with such requirements. Congress established a comprehensive process to implement the operating permit program. Through this process, following the date that sources become subject to title V, they have one year to submit their permit applications. CAA §503(c). As noted, the permitting authority then has 18 months to issue or deny the permit. CAA §503(c). Permitting authorities must provide an opportunity for public comment and a hearing. CAA §502(b)(6). If the permitting authority proposes to issue the permit, the permitting authority must submit the permit to EPA, and notify affected states, for review. CAA §505(a)(1). EPA then has 45 days to review the permit and, if EPA deems it appropriate, to object to the permit. CAA §503(b)(1). If EPA does object, then the permitting authority must, within 90 days, revise it to meet the objections, or else EPA becomes required to issue or deny the permit. CAA §503(c). If EPA does not object, then, within 60 days of the close of the 45-day review period, any person may petition EPA to object, and EPA must grant or deny the petition within 60 days. CAA §505(b)(2). This set of applicant, permitting authority, and EPA actions and

deadlines establishes the process for the prompt and efficient issuance of operating permits for the appropriate universe of sources.

In addition, only a small fraction of these millions of sources will be subject to any CAA requirements due to their GHG emissions, and we suspect that the majority will not be subject to any CAA requirements at all, so that although they would need to apply for and receive a permit, there would be no applicable requirements to include in the permit and thus the exercise would not improve compliance. But at least for an initial period, until resources could be ramped up and streamlining methods could be developed, the extraordinary numbers of these sources would sweep aside Congress's carefully constructed program, and instead, backlog the permit authorities. The large numbers involved mean that this initial period would last for many years because it would take that long to raise the requisite funds and hire and train the necessary employees, as well as, as discussed elsewhere, develop and apply streamlining measures. Therefore, multi-year delays in issuance of all permits would ensue, for both the sources that have applicable requirements and that Congress clearly intended the program to cover, and for the millions of sources that may not be subject to any applicable requirements. Thus, a literal interpretation

of the title V threshold provisions would apply title V to millions of sources that Congress did not intend be covered, and the ensuing administrative burdens - at least initially -- would impede the issuance of permits to the thousands of sources that Congress did intend be covered. This result is the type of "absurd results" from a literal application of statutory provisions that the courts have held should be avoided. And even beyond all that, the sheer magnitude of the numbers involved- millions of permits requiring thousands of FTEs at a cost to the permitting authorities of billions of dollars, all occurring at the time that GHGs become subject to regulation - makes clear that this, the result of a literal application of the PSD provisions to GHG sources is not what Congress in fact intended or could conceivably have intended.

b. EPA's reconciliation of applicability provisions with congressional intent

EPA has concluded that the impacts of applying the literal definition of "major source" to GHG sources are inconsistent with, and in fact undermine, congressional intent for the applicability of the title V program. Therefore, under the Chevron framework, accounting for the "absurd results" doctrine, EPA may tailor the definition of the program to be more consistent with congressional intent. This section explains the

principles and approach EPA is using to accomplish that tailoring so as to be consistent with congressional intent and to respond to other approaches to reconciling that were suggested by commenters.

This final rule reconciles the definition of "major source" - as narrowed through EPA interpretation -- with congressional intent by applying the definition to include as many of the sources that would be included under the terms of the definition as promptly as possible, consistent with the intent of the statute as illuminated by the legislative history. This means that we intend to phase in title V applicability to sources, based on their size, over time. The specific schedule will depend on information we have as to the permitting authorities' ability to process permits in a timely fashion. That information will be based on the real-world experience the permitting authorities will accumulate as they proceed to process permit application for the larger GHG sources, coupled with the size of their resources. In addition, we intend to vigorously pursue streamlining methods, so as to make title V more accessible for more sources moving down the size scale.

Thus, under our present approach, we will gather information about the permitting authorities' ability to process permits, and we will develop streamlining techniques, and, based

on that information, expand the title V program in a step-by-step fashion to include more sources over time. Each step will be based on our assessment of the permitting authorities' and sources' ability to comply with their respective obligations under the title V program.

We recognize that the availability of permit fees to support title V permit actions creates a potentially important source of resources, and that this has implications for the permitting authorities' ability to implement the title V program for sources of GHGs. At least in theory, permitting authorities could assess and collect sufficient fees to support hiring and training sufficient personnel so that they could expand their programs to match the expansion in the number of sources covered by the program.

Even so, title V fees cannot be considered a panacea that will resolve all resource problems that permitting authorities will have, for several reasons. Permitting authorities will likely be constrained as to the rate in which they can increase fees in light of the costs to sources. As indicated elsewhere, at least at the outset of the program before streamlining techniques have been developed, a literal application of the title V applicability provisions to GHG sources would, on average, cost each industrial source \$46,400 and each commercial

or residential source \$23,200 to complete the permit application and take other associated actions, and it would cost each permitting authority, on average, \$19,678 to process the industrial source permit and \$9,839 to process the commercial or residential source permit. Particularly in light of the high costs to sources of applying for a permit, it is not likely that permitting authorities would be able to pass on to the sources in the form of fees the permitting authorities' own high costs for processing those permits, at least not right away. Even if it were possible to raise permit fees, permitting authorities would have to undergo a process to assess and impose those fees, then collection of those fees, and then the hiring and training of personnel. The survey from the state and local agencies described above forecast a two-year period for hiring and training, without counting time for the process of assessing and imposing fees. For these reasons, we do not believe that the authorization for fees will allow the permitting authorities either to accelerate Steps 1 or 2 of the tailoring schedule or to permit a larger number of sources at those steps. Step 1 will take effect on January 2, 2011, step 2 will take effect on July 1, 2011, and the process for determining and collecting fees, and then hiring and training personnel will take at least several years after July 1, 2011.

Moreover, we do not believe that the authorization for fees means that permitting authorities can reasonably be expected to permit title V sources at levels below 50,000 tpy CO₂e before 2016. The next level below 50,000 tpy CO₂e for which we have data is 25,000 tpy CO₂e, and the costs to permitting authorities to run their programs at that level (\$126 million) is more than double their current costs (\$62 million). We do not consider it reasonable to expect permitting authorities to more than double their program within the first six years of title V applicability to GHG sources. That it is not reasonable to expect that is made even clearer when the permitting authorities' burdens in implementing their PSD programs are considered. The ability of permitting authorities to impose fees may have more important implications for subsequent steps, and as we address those subsequent steps, we will consider the fees. EPA's approach to fees in this rulemaking is discussed elsewhere.

c. Other possible approaches to reconciling literal reading of title V applicability provisions and congressional intent

Having described how the Chevron framework, accounting for the "absurd results" doctrine applies to title V requirements in this case and why it supports this tailoring rule -- under which we expect to apply title V to more sources, in a step-by-step

fashion, over time -- we turn to the last part of our discussion of this doctrine. Here, we address other possible approaches that commenters have suggested for reconciling the inconsistency between a literal reading of the applicability provisions and congressional intent.

In particular, commenters have argued that EPA should apply the title V program only to sources that are subject to applicable requirements, so that sources should not be required to hold empty permits (i.e., permits issued to a source that is not subject to any applicable requirement for any pollutant). To the extent that commenters argue that the statute requires EPA to adopt a "no-empty -permits" theory, we disagree. We believe that although various provisions of title V indicate that one of title V's purposes is to gather a source's applicable requirements into a single permit, see CAA §§ 503(b)(1), 504(a), we do not read those provisions as expressly limiting title V to sources with applicable requirements. We also note that to date, we have issued permits to sources without applicable requirements, albeit on rare occasions. We believe that the tailoring approach we adopt in this rulemaking best reconciles the statutory provisions with congressional intent.

7. Additional rulemaking for the PSD and title V programs

The previous sections 5 and 6 discussed our application of the Chevron framework, accounting for the the "absurd results" doctrine, to the PSD and title V applicability requirements, respectively. As another point in this regard, which is relevant for both PSD and title V purposes, we also commit to subsequent rulemakings in which we may further address the "absurd results" doctrine.

Specifically, we will propose or solicit comment on establishing a further phase-in, that is, a step 3, that would apply PSD and title V to additional sources, effective July 1, 2013, and on which we commit to take final action, as supported by the record, by no later than July 1, 2012.

We further commit to completing another round of rulemaking addressing smaller sources by April 30, 2016. Our action in that rulemaking would address permitting requirements for smaller sources, taking into account the severity of the remaining problems associated with permitting authority burden and source costs.

While committing to future action, we do not decide in this rule when the phase-in process will ultimately end, or at what threshold level, because all that depends on uncertain variables such as our progress in developing streamlining approaches and on permitting authorities' progress in developing permitting

expertise and acquiring more resources. . We may continue the phase-in process with further rulemaking(s) after 2016.

Alternatively, we may make a final determination through future rulemaking that, under the "absurd results" doctrine, PSD and/or title V do not apply to GHG sources that, while small and relatively inconsequential in terms of GHG contribution, are above the statutory tonnage thresholds for these programs., and thereby end the phase-in process. In addition, we may consider whether to limit title V applicability to GHG sources in order to minimize the number of GHG sources with "empty" permits.

8. Rationale for the phase-in schedule for applying PSD and Title V to GHG sources.

Having discussed in sections V.B.5, V.B.6, and V.B.7 above the compelling reasons for tailoring the PSD and title V programs, we now describe our rationale for selecting the phase-in schedule in today's rule for applying PSD and title V to GHG-emitting sources. To reiterate for convenience, under Step 1 of this schedule, which begins on January 2, 2011, (i) PSD applies to the GHG emissions of "anyway" PSD sources, that is, sources that are subject to PSD anyway due to their emissions of conventional pollutants and that undertake a modification that results in an increase of at least 75,000 tpy CO₂e; and (ii) title V applies to "anyway" title V sources, that is, sources

that are subject to title V anyway due to their emissions of conventional pollutants. Under Step 2, which begins on July 1, 2011, (a) sources will be subject to PSD on account of their GHG emissions if they newly construct and emit at least 100,000 tpy CO₂e, or if they are existing sources that emit at least 100,000 tpy CO₂e of GHGs and make a modification that results in the emission of at least 75,000 tpy CO₂e; and (b) existing and new sources will be subject to title V on account of their GHG emissions if they emit 100,000 tpy CO₂e in GHG emissions. In addition, EPA intends to begin another round of rulemaking - Step 3 - in 2011 and commits to complete it by July 1, 2012. In that rulemaking, we will propose or solicit comment on a further phase-in of GHG sources for PSD and title V applicability, and we may propose or solicit comment on another application of the "absurd results" doctrine that excludes categories of sources from PSD or title V. However, under today's rule, in no event will EPA apply PSD or title V to sources below the 50,000 tpy CO₂e levels in step 3, or any other step we might promulgate prior to April 2016. In addition, EPA commits to conduct a study, to be concluded by April 30, 2015, evaluating the status of PSD and title V applicability to GHG sources, and, based on the study, complete a rulemaking by April 30, 2016 that promulgates another round of a phase-in.

a. Rationale for Step 1

In Step 1 of our tailoring approach, which begins on January 2, 2011, PSD and title V requirements will apply to only those sources that are subject to PSD or title V requirements anyway due to their conventional pollutants ("anyway" sources) and that, in the case of PSD, make modifications that result in an increase in GHG emissions of at least 75,000 tpy CO₂e. No sources would become major for PSD or title V under this step based on their GHG emissions alone. This section describes our proposal, comments on the proposal and our response to those comments, and our rationale for Step 1.

(1) Proposal

In our proposal, we proposed (i) the application of PSD and title V requirements to sources that emit at least 25,000 tpy CO₂e, (ii) a PSD significance level of between 10,000 and 25,000 tpy CO₂e, and (iii) a commitment to undertake a study to be following by further rulemaking after six years. In addition we solicited comment on the alternative of limiting PSD and title V applicability to "anyway" sources for at least the first six years. Under this approach, PSD and title V applicability would be determined based on non-GHG pollutants without regard to GHGs, but those sources subject to PSD would also be subject to BACT requirements for GHGs if their GHG emissions exceeded the

significance level established in the final rule, and those sources subject to title V would be required to include any applicable requirements for GHGs in their permits.

(2) Comments

Many commenters supported this "anyway"-source approach, and offered a variety of reasons: According to the commenters, (i) this approach is a better reading of Congress's intent in the Act and is consistent with Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1980); (ii) this approach would reduce the permitting workload on sources currently considered minor and focus PSD and title V requirements on large sources of non-GHG pollutants, as intended by Congress; (iii) it is appropriate to base PSD and title V applicability on non-GHG emissions until data on GHG emissions are available from the GHG Reporting Rule; (iv) in the initial phase, this approach would be more straightforward to administer, would provide a more predictable permitting workload, and would prevent a flood of newly regulated sources from overburdening state agencies; (v) this approach would provide permitting agencies time to develop experience handling GHG sources and requirements under the PSD and title V programs; (vi) this approach would provide EPA and the permitting agencies the time needed to develop streamlining techniques; (vii) this approach is consistent with the "absurd

results" and "administrative necessity" doctrines because the scope of the permitting programs would remain consistent with both Congressional intent and current administrative practice, but EPA and State agencies would still be allowed to begin regulating GHG emissions from existing PSD and title V sources; and (viii) sources already required to obtain PSD permits are best equipped to work through BACT issues with permitting authorities.

Commenters added that if BACT is applied for GHG due to permit actions involving non-GHG pollutants, EPA would need to set a significance threshold for the application of BACT, without which BACT could apply to very small (e.g., 1 ton) GHG increases associated with project that otherwise triggered PSD for increases of non-GHG.

(3) Determination as to Step 1, PSD and title V applicability and PSD significance level

After considering the administrative burdens from increased permitting actions and the need for permitting authorities to have sufficient time to develop necessary expertise and staffing resources to address that burden, we have decided in this final action to establish the "anyway" source approach as Step 1. Beginning on January 2, 2011, sources subject to PSD requirements for their conventional pollutants anyway will be

required to apply BACT to their GHG emissions if they construct or modify and in so doing, emit at least 75,000 tpy CO₂e in GHGs. Similarly, sources subject to title V requirements anyway due to their conventional pollutants will be required to meet certain requirements for their GHGs, as described elsewhere. These requirements at Step 1 for PSD and title V will not expire. On July 1, 2011, a further phase-in of PSD and title V applicability - Step 2 - will kick in.

The "anyway" source approach has particular appeal during this, the first step of the phase-in approach because it begins to apply key PSD and title V program requirements as soon as January 2, 2011 to large sources of emissions, but because it applies only to sources that are already regulated under the CAA for other pollutants, it can be implemented efficiently and with an administrative burden that is manageable in the next eight months. Under this approach, the sources and permitting authorities will still face substantial additional work due to the GHG emissions. In addition to the activities discussed elsewhere, there are significant and complex policy questions about how BACT will be implemented for GHGs that must be resolved. These issues include how to determine BACT for GHGs, how to do netting, and other similar issues. Even with EPA guidance, many case-specific policy issues arise and must be

resolved by the permitting authority in the context of a specific permit application. Nevertheless, with the "anyway" source approach, this work will be manageable because the associated permitting burden will be limited to adding a GHG component to each existing permit action for which it will be required, and will avoid the significantly greater burdens associated with large numbers of new permit actions that would be required for sources and modifications that would be subject to PSD for the first time. Instead, this approach allows permitting authorities sufficient time to develop necessary expertise and staffing resources to address GHG BACT.

We agree with commenters that the establishment of a significance level - which, in effect, is a BACT threshold -- is appropriate, and we have decided to establish this level at 75,000 tpy CO₂e because, for reasons discussed below, that is the level that will apply during step 2. At this level, the administrative burdens, described below, will be manageable. Importantly, we believe a consistent significance level between Steps 1 and 2, as opposed to a lower significance level in Step 1, will provide for a smoother transition and avoid the problems that would arise if PSD applied to modifications during Step 1 that PSD would not apply to in Step 2. Otherwise, we would

create a perverse incentive for companies to delay such projects until Step 2 to avoid BACT.

We estimate that Step 1 will result in a 23% increase in permitting authority work hours and a \$3 million increase - which amounts to a 25% increase from the current program cost of \$12 million -- in their annual costs for running PSD programs. This is primarily due to the BACT review requirements. For title V programs, we estimate a 2% increase in permitting authority work hours and a \$1 million increase in the title V annual program costs for permitting authorities under Step 1 as compared to the current program cost of \$62 million for the title V program. These work hours and costs will be needed primarily to review GHG emissions information, add any GHG-related requirements to title V revisions and renewal actions that would otherwise be occurring, respond to comments and petitions from the public, as well as develop fee requirements and make fee determinations associated with issuing new or revised title V permits that add GHG-related information. For both the PSD and title V programs on a combined basis, the additional costs for Step 1 will be \$4 million, which amounts to a 5% increase in the current combined program cost of \$74 million.

During Step 1, in addition to these workload and monetary costs, permitting authorities will confront additional burdens before and during Step 1 and that we have not attempted to quantify. One of the most significant of these is training staff in the PSD-related areas of GHG emissions calculations and BACT evaluations. In addition, permitting staff will need to build staff expertise and capacity for addressing GHG requirements in preparation for Step 2, which will begin only six months after Step 1; and in communicating and providing outreach to sources addressing GHG emissions for the first time. Based on comments we received on the proposal from permitting authorities, we believe these additional training and outreach requirements - for both the PSD and title V programs -- will add significantly to the permitting authorities' burden during the initial six-month period under Step 1.

We believe that these administrative burdens are substantial but manageable. Following today's action, permitting authorities will have only eight months to prepare for Step 1, when they will need to increase their resources by 5% for both the PSD and title V programs combined, and be able to implement BACT requirements for GHG sources. During Step 1, they will need to prepare for Step 2, when, as discussed below, they will need to process over 900 additional PSD permits each

year and begin to process over 2,600 additional title V permit actions.

We have decided to limit Step 1 to the "anyway" source approach, and not apply PSD or title V to sources based on their GHG emissions, for several reasons. First, we believe that the administrative burdens described above are the most that the permitting authorities can reasonably be expected to manage before and during Step 1. Tighter PSD and title V applicability requirements would mean greater administrative burdens.

Second, we believe that the costs of GHG permitting to the sources, as described above, are substantial and as a result, necessitate that we wait for the permitting authorities to develop the PSD and title V programs for GHG sources during the first six months of 2011 before subjecting sources to PSD and title V requirements on account of their GHG emissions. By July 1, 2011, when Step 2 takes effect, the PSD and title V programs will be better developed. For example, the permitting authorities will have more experience making BACT determinations. In addition, by that time, sources will have had more time to prepare for the permitting processes. In addition, as suggested by one commenter, the additional time will allow sources and permitting authorities to address the current uncertainty surrounding how to measure high-GWP gases.

Third, we estimate that "anyway" sources account for approximately 65 percent of total national stationary source GHG emissions. As a result, limiting Step 1 to these sources will still capture a large portion of the GHG inventory.

A large number of commenters urged us to leave this "anyway" source approach in place until such time as we complete an assessment and conduct further rulemaking, which we proposed would be six years from now. We are not taking this action; rather, for the reasons discussed next, we believe it is reasonable to use GHG thresholds to begin to phase in PSD and title V applicability to additional sources in Step 2.

b. Rationale for Step 2

(1) Proposal

We proposed to establish the applicability level for PSD and title V to GHG sources at 25,000 tpy CO₂e, and we proposed a PSD significance level in the range of 10,000 to 25,000 tpy CO₂e. Our burden estimates at proposal led us to conclude that at those threshold levels, for the PSD program, "approximately 400 additional new or modified facilities would be subject to PSD review in a given year. These include approximately 130 new facilities and approximately 270 modifications..." 74 FR 55,331, col. 1. We estimated that processing these numbers of additional permits, along with doing the additional work

associated with GHG emissions from sources subject to PSD anyway due to their conventional emissions, would increase permitting authority burdens by "approximately 112,000 staff hours at an additional cost of approximately \$8 million. This workload amount represents an increase of about 1.3 times, or 32 percent, in the current burden for permitting authorities on a nationwide basis." *Id.* col. 3. We concluded that "this additional burden is manageable," but that "any threshold lower than 25,000 tpy CO₂e, would create undue administrative burdens." *Id.*

For the title V program, we estimated at a 25,000-tpy CO₂e permitting threshold, "about 13,600 existing facilities" would become subject to title V, and that to manage the additional workload associated with permitting those sources and with the other permit revisions and modifications that would result from the 25,000 tpy CO₂e threshold, permitting authorities would require an additional 492 FTEs, which would be an estimated 50 percent increase over current title V staffing levels. 74 *Fed. Reg.* 55,335, cols. 1-2.

(2) Comments

We received a significant number of comments from both permitting authorities and industry representatives that our proposed GHG threshold of 25,000 tpy CO₂e for major source applicability was too low and would result in an unmanageable

amount of permitting actions in the near term. Many offered evidence that we severely underestimated both the number of permitting actions and the per-permit administrative burden, for both PSD and title V programs.

Commenters also asserted that the proposed 25,000 tpy threshold is too low because it will subject small sources (including many small businesses) to PSD and title V, which is not in keeping with Congress's intent to limit PSD and title V to large sources when Congress set the 100/250 tpy thresholds for the permitting programs. EPA, in collaboration with the Small Business Administration (SBA), conducted an outreach meeting designed to exchange information with small entities that may be interested in these regulations. The EPA took this small business outreach effort into account when finalizing this rule. Many commenters from this outreach effort said that there were many more small businesses that would subject to PSD and title V due to the proposed permitting thresholds than EPA estimated at proposal.

Many commenters recommended specific major source thresholds for PSD and title V, including levels of 25,000 (as proposed), 40,000, 50,000, 100,000, 150,000, 250,000, and 1,000,000 tpy CO₂e. A majority of the commenters recommended major source thresholds of 100,000 tpy CO₂e, including both

industry and state agency commenters. However, several state agency commenters recommended thresholds of 50,000 tpy CO₂e. Other commenters recommended sector-specific thresholds. For example, solid waste industry commenters suggested thresholds of 820,000 tpy CO₂e for PSD (which they calculate to be equivalent to the existing PSD threshold for "municipal solid waste landfill emissions," i.e., 250 tpy NMOC) and 320,000 tpy CO₂e for title V (calculated to be equivalent to the existing major source applicability threshold of 100 tpy NMOC). Other commenters urged EPA to set the GHG thresholds at levels that correspond to emissions of conventional pollutants at the 100/250 tpy level.

Many of the commenters that recommended increasing the thresholds cited EPA's estimates that a particular threshold would significantly reduce the number of sources subject to the rule while causing only a slight reduction in the percentage of GHGs captured. Several of these commenters noted that Table VIII-2 in the proposal preamble indicates that shifting the major source threshold for PSD from 25,000 to 100,000 tpy CO₂e would reduce the number of major sources from 13,661 to 4,850 while reducing the coverage of U.S. stationary source GHG emissions by only about 4 percent. Other commenters referred to the RIA for the GHG Reporting Rule to conclude that raising the

threshold from 25,000 to 100,000 tpy CO₂e would exclude thousands of entities that, on a combined basis, emit only one percent of the nation's GHG emissions. See the Response to Comments document for this final rulemaking for more detailed description of comments received on our proposed burden assessment.

Many commenters also recommended specific PSD GHG significance thresholds, including levels of 10,000 (as proposed), 15,000 (within the proposed range), 25,000 (also as proposed), 40,000, 50,000, and 100,000, and 150,000 tpy CO₂e, as well as suggesting sector-specific thresholds. These recommendations were based on the view that we had underestimated the number of modifications and that the burden of permitting at the proposed levels would therefore be much worse than we projected. A number of the commenters argued that the significance threshold should be no less than the major source threshold, at whatever level that is set. The largest number of commenters recommended a PSD significance threshold of 100,000 tpy CO₂e, although significant numbers also support 25,000 and 50,000 tpy CO₂e.

iii. Rationale for step 2

Based on these comments, we reassessed our original burden estimates from our proposal. This reassessment is discussed at the beginning of this section. We decided that, once this

adjustment is taken into account, the burdens at the proposed 25,000 threshold and the proposed 10,000-25,000 significance levels would be unmanageable. We therefore evaluated higher thresholds ranging from a 25,000 tpy CO₂e major source applicability level for PSD and title V to a 50,000, 75,000, or 100,000 tpy CO₂e level, with associated PSD GHG significance levels of equal or lesser magnitude; and we selected the 100,000/75,000 tpy CO₂e level. Central to our decision to promulgate higher thresholds than what we proposed is our recognition, based on comments and further analysis, that applying PSD to GHG sources at the statutory or any other threshold level or significance level that we have considered would result in (i) a greater number of sources, and significantly greater number of modifications than we first estimated becoming subject to those programs; and (ii) a greater per-permit cost than we first estimated to the permitting authority of processing those permit actions. We discussed our revised estimates and reasoning at the beginning of this section.

We now estimate that the 25,000/25,000 tpy level would result in 250 additional PSD permit actions for new construction (either for GHG-only sources or additions to otherwise occurring permits) and an additional 9,200 PSD permits for modifications

each year (compared to our estimate at proposal of 130 for new construction and 270 for modifications). This level of permitting would require an additional 2,815,927 work hours, or 1,400 FTEs (compared to our estimate at proposal of 112,000 [additional?] work hours, or 57 FTEs); and would cost an additional \$217 million each year (compared to our estimate at proposal of an additional \$8 million). See 74 FR 55,331 (proposal). This \$217 amount represents approximately a 1,800% increase over current permitting authority annual cost of \$12 million for the major NSR programs

For title V, under our final burden analysis at a 25,000 tpy CO₂e threshold, we estimate a \$64 million annual increase in program costs to permitting authorities to add GHG emission sources, which reflects a greater than 100% increase over current programs costs of \$62 million. We estimate that this increased burden would result in the need for almost 700 new FTEs nationwide at permitting authorities (compared to our estimate at proposal of 492 additional FTEs, or about a 50% increase in existing program size). This increase in burden is due to an estimated annual increase of 2,500 new title V permits, over 9,500 permit revisions, and over 2,500 permit renewal actions due to GHG emission sources. These additional title V actions compare to current annual program actions of

approximately 50 new title V permits, 1,394 significant revisions, and 3,267 permit renewals.

Based on this information, we have decided not to finalize our proposal to apply a 25,000 tpy CO₂e applicability threshold to GHG sources at the time that PSD and title V take effect. At that level, too many sources - many more than we thought at proposal - would be subject to high permitting costs. In addition, permitting at that level and at that time would not be administratively feasible. The resulting increase in the number of PSD and title V permitting actions and workload would create insurmountable resource demands for permitting agencies in the near term, which would jeopardize the functioning of these permitting programs. We are mindful that not only would the permitting programs have to bear the costs that our estimates are able to monetize, but they would also incur burdens associated with hiring and training staff to make and implement GHG BACT determinations, GHG emissions evaluations, and other evaluations required under the PSD program for a wide variety of formerly unpermitted sources, including significant numbers and types of small manufacturing and commercial or residential establishments. They would also incur burdens associated with reviewing applications, citizen comment and petitions, and the need to communicate and provide outreach to new categories of

sources, including, again, significant numbers and types of small manufacturing and commercial or residential sources. Thus, the increased administrative burdens at the 25,000/25,000 tpy CO₂e levels are so great that we have concluded that they would not be consistent with the goals of avoiding absurd results that contravene Congressional intent or avoiding a permitting burden that would overwhelm the capacity of permitting authorities to effectively implement their programs.

Based on our revised burden analysis, in today's final action, we have decided to establish a multi-step, phase-in approach that contains a significantly higher initial threshold level: We have determined that a 100,000 tpy CO₂e major source threshold level for PSD and title V purposes, and a 75,000 tpy CO₂ significance level, produce a level of permitting activity that would certainly be an increase over current workload, but that would be administratively feasible by July 1, 2011. As a result, we have decided to finalize these thresholds as Step 2.

In reaching this conclusion, we needed to consider the permitting authorities' capacity to address newly-major sources as expeditiously as possible. Note that our Step 1 approach does not cover newly-major sources, so the step 2 threshold and timing has to be established in a way that takes into account permitting authority challenges in addressing many sources and

categories that would be subject to major source permitting for the first time.

We considered the various PSD and title V threshold applicability and significance level options in our final burden analysis, summarized in Table VI-1, including levels at 50,000 CO₂e, and 100,000 CO₂e. As Table VI-1 indicates, we estimate that a 100,000 tpy CO₂e major source applicability threshold would result in approximately 550 sources becoming newly classified as major sources for PSD based on their GHG emissions, while a 50,000 tpy CO₂e threshold would result in 3,500 newly classified major sources.

We then considered the impact on both PSD and title V programs of different PSD significance level options for GHGs. The choice of a PSD significance level has a direct impact on title V burdens because PSD permit requirements resulting from modification activities will result in a required title V permit revisions. We developed PSD and title V burden estimates based on significance levels of 50,000 tpy, 75,000 tpy and 100,000 tpy CO₂e, combined with a major source applicability level of 100,000 tpy CO₂e. At a 50,000 tpy CO₂e significance level, we estimated an annual increase of approximately 1,800 PSD permitting actions and almost 2,000 additional title V permitting actions, as compared to Step 1. At a 75,000 tpy CO₂e

significance level, we estimated an annual increase of approximately 900 PSD permitting actions and just over 1,000 additional title V permitting actions as compared to Step 1. At a 100,000 tpy CO₂e significance level we estimated an annual increase of approximately 25 PSD permitting actions and 210 additional title V permitting actions as compared to Step 1. For title V, under these different scenarios, the major source applicability level of 100,000 tpy CO₂e results in approximately 200 new permits annually, but, as noted, the choice of significance levels affects the number of required permit revisions.

Based on this information, we have decided to set our final Step 2 thresholds at 100,000 tpy CO₂e for major source applicability under PSD and title V and at a 75,000 tpy CO₂ significance level for PSD. Overall, we estimate that the almost 900 additional PSD permitting actions (virtually all of which would be modifications) per year at these levels will result in an approximately \$21 million increase (from Step 1) in states' annual costs for running PSD programs. In addition, we estimate that the 1,000 additional title V permit actions will cause the total title V burden for permitting authorities to increase by \$6 million annually from Step 1. This total increase in permit program burdens of \$27 million represents a

34% increase over the \$78 million in total cost of PSD and title V programs at Step 1. We consider this a substantial increase, particularly because Step 2's start date of July 1, 2011 is only six months after Step 1's start date of January 2, 2011. What's more, Step 1 will entail a substantial increase in permitting authority obligations, so that adding the costs of Step 1 and Step 2 together -- \$31 million - means that permitting authorities will be required to increase their permitting resources by approximately 42% between now and Step 2. In addition to the administrative burdens we have been able to monetize, we must be mindful that permitting authorities will incur other burdens, including the significant support and outreach activities by permitting staff for the many newly permitted sources. We believe that any lower thresholds in this timeframe, whether in the PSD and title V applicability levels or in the significance level, would give rise to administrative burdens that are not manageable by the permitting authorities.

Although the burdens at the 100,000 tpy CO₂e/75,000 tpy CO₂e levels are steep, we consider them manageable. Step 2 permitting for GHGs will mostly involve source categories in which some sources have traditionally been subject to permitting, which should render applying even the new GHG requirements more manageable. These source categories include fossil fuel-fired

power plants, petroleum refineries, cement plants, iron and steel plants, and petroleum refineries, in addition to other large industrial type source categories. A full description of the type of sources that we expect will have GHG emissions that exceed the 100,000 tpy CO₂ threshold is provided in the "Technical Support Document for Greenhouse Gas Emissions Thresholds Evaluation" located in the public docket for this rulemaking. In addition, because Step 2 does not begin until July 1, 2011, permitting authorities have about 14 months to prepare for it.

In addition, we believe that the sources that will become subject to PSD and title V requirements at the 100,000/75,000 tpy CO₂ levels will be able to accommodate the additional costs of permitting. For the most part, these sources will be of a comparable size and activity level as those sources that are already subject to those requirements.

Because the administrative burdens at the 100,000/75,000 level are as heavy as the permitting authorities can reasonably be expected to carry, adopting these threshold levels is consistent with our legal basis under the "absurd results" doctrine. Under this basis, we are reconciling the statutory levels with congressional intent by requiring that the PSD and title V requirements be applied to GHG sources at levels as

close as possible to the statutory thresholds, and as quickly as possible, in light of costs to sources and administrative burdens.

Because the administrative burdens at the 100,000/75,000 level are manageable, we do not believe that higher threshold levels are justifiable for Step 2. Specifically, at the 100,000/100,000 level - which would entail a 100,000 tpy CO₂e significance level, rather than a 75,000 tpy CO₂e level - permitting sources would need to handle only 20 additional modifications beyond current levels, and thus would not incur substantial additional costs. By the same token, we disagree with commenters who suggested that we needed to set permanent GHG permitting thresholds for major sources at a rate equivalent to the amount of GHG that would be emitted by conventional pollutants at the 100 and 250 tpy level in order to meet the legal bases of the "absurd results" and "administrative necessity" doctrines. These levels would likely be well above 300,000 tpy CO₂e, depending on fuel types and assumptions regarding the relative emissions of GHGs compared to the conventional pollutants. Our data show that none of the levels above 100,000/75,000 would result in significant increases in administrative burdens. As a result, establishing these levels would not apply PSD or title V requirements to GHG sources as

quickly as possible, and thus would not be consistent with the "absurd results" doctrine.

We estimate that facilities meeting the Step 2 major source applicability thresholds account for approximately 67 percent of total national stationary source GHG emissions. Many commenters felt that this should be an important basis for our selection of a threshold, stating that there is no significant loss in GHG emissions coverage of source categories at the 100,000 tpy CO₂ threshold, and in some cases arguing that as a result, we should set the level even higher. We agree that it is important that the coverage in step 2 represents 86 percent of the coverage at full implementation of the statutory 100/250 thresholds.

c. Rationale for EPA's plan beyond Step 2

EPA commits that after Step 2, EPA will begin another rulemaking in 2011 and complete it by July 1, 2012, and in that rulemaking take comment on a further phase-in of GHG sources for PSD and title V applicability (Step 3). However, under today's rule, in no event will EPA apply PSD or title V to sources below the 50,000 tpy CO₂e levels prior to 2016. In addition, EPA commits to conduct a study, to be concluded by April 30, 2015, evaluating the status of PSD and title V applicability to GHG sources, and, based on the study, complete a rulemaking by April 30, 2016 that promulgates another round of a phase-in.

(1) Proposal

In our proposal, we noted that following implementation of the first phase of PSD and title V applicability to GHG sources, generally at the 25,000 tpy CO₂e threshold, additional action would be required over time to assure full compliance with the statute. We did not establish more steps in the schedule, but we did commit to conduct a study, to be completed by five years after promulgation, evaluating the status of PSD and title V applicability to GHG sources, and, based on the study, complete a rulemaking by six years after promulgation that established an additional step of the phase-in.

(2) Comments

A number of commenters supported the proposal's overall approach to phase in the permitting of GHGs, mainly because this approach will allow permitting of the largest sources of GHGs immediately while collecting more information about smaller sources and more fully considering streamlining options for subsequent phases. Many of these commenters made clear that they do not support implementation of the statutory 100/250 tpy thresholds, even through a phase-in approach. On the other hand, one commenter asserted that EPA has failed to demonstrate that it needs six years to study and implement NSR and title V for sources emitting less than 25,000 tpy. The commenter contends

that EPA has not analyzed, among other things, what combined effect the full implementation of its streamlining proposals in the 15 months before the due-date for title V permit applications would do to reduce the cost, complexity, and number of title V permit applications that would have to be submitted.

(3) Rationale for further steps

We agree with commenters who support a phased-in approach to the GHG tailoring rule. Our final action reflects a multi-step process that we believe will create a manageable expansion of PSD and title V applicability to GHG-emitting sources. In our final action, we have established the initial two steps of a multi-step phase-in of lower threshold applicability with a commitment to take further regulatory activity to consider adopting lower thresholds. We believe this process will provide substantial opportunity for permitting authorities and sources to establish enough experience and information, and to provide significant real-world feedback to EPA, so as to better inform decisions on future phase-in steps.

With this overall phase-in approach in mind, in today's final rule, EPA includes an enforceable commitment to undertake a notice-and-comment rulemaking that would begin with a supplemental notice of proposed rulemaking that we expect to be issued in 2011 and that we commit will be finalized in 2012.

The notice will propose or solicit comment on further reductions in the applicability levels. This rulemaking will take effect by July 1, 2013 and therefore, in effect, constitute Step 3. In today's action, we are committing to a rulemaking for Step 3, but are not promulgating Step 3, is because it is important to allow EPA and the permitting authorities to gain experience permitting sources under Steps 1 and 2, and to allow time to develop streamlining methods, before attempting to determine what would be the next phase-in levels for PSD and title V applicability. While committing to future action, we do not decide in this rule when the phase-in process will ultimately end, or at what threshold level, because all that depends on uncertain variables such as our progress in developing streamlining approaches and on permitting authorities' progress in developing permitting expertise and acquiring more resources. . We may continue the phase-in process with further rulemaking(s) after 2016. Alternatively, we may make a final determination through future rulemaking that, under the "absurd results" doctrine, PSD and/or title V do not apply to GHG sources that, while small and relatively inconsequential in terms of GHG contribution, are above the statutory tonnage thresholds for these programs., and thereby end the phase-in process.

In addition, in today's action, we are determining that in no event - whether through Step 3 or a subsequent step - will we apply PSD or title V to sources at the 50,000/50,000 level or lower prior to May 1, 2016. We have several reasons for making this determination at this time. Most importantly, our examination of the expected burdens to the permitting authorities of applying PSD and title V to GHG sources convinces us that extending the permitting programs to sources at or below the 50,000/50,000 level within six years of promulgation would result in prohibitively heavy burdens. This threshold option would result in close to 2,000 additional annual PSD permitting actions per year over the current program and more than 1,000 over Step 2, including both new construction and modifications. For title V, we estimated an increase of over 1,000 new title V permits (all newly permitted sources because of GHG emissions) and over 2,000 permit revisions per year over the current program, and about 980 new title V permits and 900 permit revisions more than the Step 2 amounts.

These increases, which could occur between 2013 and 2016 under our approach depending on the outcome of the step 3 rulemaking, represent very substantial additions to the permitting program. In terms of cost, we estimate that these additional actions would result in a \$73 million per year

increase in joint PSD and title V program costs over the current programs - which is almost a doubling of costs - and \$42 million annual cost increase over Step 2 for the current programs. We believe that it would take permitting authorities some time to adjust to this workload. This is particularly true because at the 50,000/50,000 tpy CO₂e level, smaller sources - including ones not previously subject to permitting requirements - will become subject to PSD and title V. It will take some time for both the permitting authorities and the sources to absorb these new obligations.

Importantly, the next lower cut-off - below 50,000 for the major threshold level - is the 25,000/25,000 level. For the reasons discussed above, this level is clearly not manageable within the first six years after today's action. This applicability level would bring in over 7,000 sources that would be newly subject to title V permitting and result in close to 10,000 new PSD permitting actions. This would result in a 380% increase over current program costs for PSD and title V to run these programs. Based on comments we received from state and local permitting agencies on our proposed tailoring rule, these levels of permitting activities would far exceed the administrative capabilities of the permitting agencies for at least the near future. Thus, the six year exclusion is

necessary to provide these agencies and their permittees certainty that this will not occur.

We recognize that at present, we do not have data that would allow us to compile administrative burden estimates for specific levels between the 50,000/50,000 and 25,000/25,000 tpy CO₂e levels we assessed. However, it is clear that the burdens begin to rise sharply below the 50,000/50,000 level. To reiterate, the combined PSD and title V administrative burdens at the 50,000/50,000 tpy CO₂e level cost almost twice as much as the current programs, but the burdens at the 25,000/25,000 level cost almost four times as much as the current programs. As a result, we conclude that dropping the level below 50,000/50,000 too soon would quickly expose the permitting authorities to unacceptably high burdens.

As a further reason for concluding that we will not reduce thresholds beyond 50,000/50,000 tpy CO₂e during the first six years, we recognize that the PSD permitting process in particular is a high stakes endeavor for the permitting authorities and the affected sources, and we wish to tread cautiously as a result. If we have underestimated the permitting burden or the ability of states to respond to their additional workload, then permitting backlogs will result, and PSD permit issuance will be delayed. Because PSD is a

preconstruction program, during this time sources seeking a PSD permit could not construct or modify. If this were to happen on a large enough scale, it could have potentially serious consequences for the national economy.

Moreover, we need to be mindful that the best information we currently have as to permitting authority burdens represents a national average, as described above. Our information at the individual state and level, which is where the hard work of permitting occurs, is not as robust. Accordingly, we recognize that a particular State may encounter permitting costs that are higher than average, and this may result in permitting backlogs in that State, with the consequence that sources in that State will face long delays in constructing or modifying. Similarly, even if a particular State's costs are in line with the national average, that State may not be able to find the additional resources to cover those costs as readily as other States. For this reason, too, sources in that State could face long delays in constructing or modifying.

Beyond the administrative burdens to permitting authorities, we recognize that the costs of PSD and title V permitting to sources may be high, and we are not inclined to impose them at this time on sources smaller than the 50,000/50,000 tpy CO₂e threshold. At that level, the permitting

programs will apply to a significant number of newly permitted sources, including a variety of small manufacturing, commercial and residential categories. The next level that we have analyzed is the 25,000/25,00 tpy CO₂e threshold. At that level, more than 7,000 more sources would become subject to PSD each year - almost all due to modifications - and another 4,000 sources would become subject to title V each year. These sources would be even smaller than those that already will have become subject to PSD and title V due to their GHG emissions. We do not think it reasonable to subject more of those types of sources, and smaller ones, to permitting costs within the next six years.

Finally, we note that moving from a 50,000 tpy CO₂e threshold to 25,000 tpy CO₂e will increase the emissions coverage of GHG stationary sources from 70% to 75% nationwide, which we consider to be a relatively small amount.

We recognize that our progress in developing streamlining methods will be a key determinant to the ability of permitting authorities to administer, and sources to comply with, PSD and title V at GHG emission levels below 50,000/50,000. Although we commit to pursue streamlining, we cannot predict our progress. This uncertainty may be problematic for stakeholders, primarily permitting authorities and industry. That is, permitting

authorities will face uncertainty in planning the scope of their programs over the next few years, and industry will face uncertainty as to what new construction projects and modifications will be subject to PSD for GHGs. By determining now that for the next six years we will not impose PSD requirements below a floor at the 50,000/50,000 level, we add a measure of needed certainty.

We also recognize that selecting a level that is too low or keeping a level for too long means that some sources may construct or modify without implementing BACT level controls, and this could result in additional emissions of GHGs. We need to be vigilant and to protect against this outcome. Even so, all things considered, we believe that our determination not to apply the PSD or title V permitting requirements to sources below the 50,000/50,000 tpy CO₂e level for the first six years also represents a reasonable balancing of protection of the environment with promotion of economic development. This type of balancing is consistent with our authority under the PSD provisions.

We also raised the issue of "hollow" or "empty" permits in discussing our rationale for why it may make sense to delay title V permitting under our proposal. We were concerned that many title V permits for GHG sources would contain no applicable

requirements, and their issuance would therefore be of little value and would not be the best use of scarce resources. Several commenters agreed that implementing title V for GHG will, at least initially, require empty permits to be issued to GHG sources because such sources will not be subject to "substantive" requirements, and that this would not be the best use of scarce resources.

In the proposal, we noted that the "absurd results" doctrine does not directly consider whether the statutory requirements lead to actions that agencies or commenters may consider wasteful. However, we do believe that the amount of resources that would be spent and the limited value that would result does warrant consideration under an absurd results rationale. Therefore, we are still actively considering the role of empty permits as we apply the absurd results rationale to GHG permitting in future steps. However we believe it has limited relevance to the first two steps of the phase in that we are promulgating today. During step 1, permitting for GHGs is only required if the source is otherwise subject to permitting for its emissions of non-GHGs, meaning that those sources will be subject to existing substantive applicable requirements for non-GHG (e.g., NSPS, MACT, and SIP requirements, including PSD). Thus, there should be few, if any, empty permits, at least with

respect to applicable requirements for non-GHG during step 1. For step 2, it is possible that sources that become subject to title V requirements for GHG emissions may not be subject to other requirements, but our assessment suggests that this will be rare. We estimate that virtually all of the 550 newly-major sources in step 2 will be subject to applicable requirements under the CAA because they are from categories that have been traditionally subject to regulations, such as smaller industrial sources from already regulated categories, large landfills, and oil/gas/coal production. Even the approximately 50 newly-subject commercial sources in step 2, which we estimate to be comprised of very large hospitals, are likely to be covered by standards for medical waste incinerators. Thus, we project few, if any, empty permits during step 2.

In later stages of implementation (e.g., prospective step 3) or in the event that we permit smaller, non-traditional sources of GHGs that have never otherwise been subject to major source permitting, there would be a greater potential for empty permits to be issued under title V. Cognizant of this, we intend to further explore in the SNPR empty permit theories under the absurd results rationale that may serve to permanently narrow the scope of title V to exclude sources that would

potentially be required to obtain an empty permit due to GHG emissions.

In today's action, EPA is also finalizing its proposal to commit to conduct an assessment of the threshold levels - to be completed in 2015, five years after today's action -- that will examine the permitting authorities' progress in implementing the PSD and title V programs for GHG sources as well as EPA's and the permitting authorities' progress in developing streamlining methods. We further commit to undertake another round of rulemaking -- beginning after the assessment is done, and to be completed by April 30, 2016 - to address smaller sources.

We disagree with the commenter who asserted that we do not need six years to study and implement NSR and title V for smaller sources. As we discussed in the proposal, and reiterate in this final action, we do not have sufficient information at this time to determine the applicability and effectiveness of the various permitting streamlining techniques. For reasons discussed in more detail in section V.E.1 regarding streamlining, we are not now able to determine how such techniques will be implemented or whether they will prove viable or effective. We agree with the commenter that these measures may reduce the scope, cost, and complexity of these programs, but there is considerable uncertainty as to the extent of this

effect. We do commit in this action to fully investigate, propose, and evaluate these permit streamlining techniques to determine where they may have applications, how they would be applied, and whether they can withstand legal challenge. Even for those techniques that may ultimately be deemed viable there is a significant time period necessary for rulemaking on these techniques and state adoption, which could take up to three years or more. We also note that we will be required to complete our study of the effectiveness of these techniques within 5 years, meaning that, in order to complete it in time, we will essentially need to begin the study as soon as relevant data are starting to become available. Finally, the sixth year, in which EPA must complete rulemaking, requires proposal and promulgation of a rule within one year, which is an ambitious schedule. Therefore we believe that 6 years is an ambitious schedule, and appropriate for this type of effort. We also have received a substantial number of comments from permitting authorities that agreed with our 5-year timeframe, or a greater timeframe, to get more prepared for permitting smaller sources.

d. Other comments on "absurd results" doctrine.

We received other comments on our application of the "absurd results" doctrine, which we respond to in the Response to Comments document. One comment was overarching, and so we

respond to it here: Some commenters argued that the “absurd results” doctrine could not be applied because EPA had other approaches for resolving the problems raised by applying PSD to GHG sources. In particular, the commenters insisted that we were not obligated to issue the light-duty vehicle rule, and had we not done so, we would not have triggered PSD; or at the least, we could have delayed issuing the light-duty vehicle rule for some period of time, during which we could develop streamlining measures and permitting authorities could ramp up resources and thereby minimize the need for tailoring when we did promulgate the light-duty vehicle rule.

These commenters also commented during the light-duty vehicle rulemaking that we were not obligated to conduct that rulemaking, or to conduct it at the time that we did. We believe that our response there suffices for here, as well:

Some of the comments relating to the stationary source permitting issues suggested that EPA should defer setting GHG standards for new motor vehicles to avoid ... [adverse] stationary source permitting impacts. EPA is issuing these final GHG standards for light-duty vehicles as part of its efforts to expeditiously respond to the Supreme Court’s nearly three year old ruling in *Massachusetts v. EPA*, 549 U.S. 497 (2007). In that case, the Court held that greenhouse gases fit within the definition of air pollutant in the Clean Air Act, and that EPA is therefore compelled to respond to the rulemaking petition under section 202(a) by determining whether or not emissions from new motor vehicles cause or contribute to air pollution which may reasonably be

anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision.

The Court further ruled that, in making these decisions, the EPA Administrator is required to follow the language of section 202(a) of the CAA. The Court stated that under section 202(a), "[i]f EPA makes [the endangerment and cause or contribute findings], the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant." 549 U.S. at 534. As discussed above, EPA has made the two findings on contribution and endangerment. 74 FR 66496 (December 15, 2009). Thus, EPA is required to issue standards applicable to emissions of this air pollutant from new motor vehicles.

The Court properly noted that EPA retained "significant latitude" as to the "timing ... and coordination of its regulations with those of other agencies" (id.). However it has now been nearly three years since the Court issued its opinion, and the time for delay has passed. In the absence of these final standards, there would be three separate federal and state regimes independently regulating light-duty vehicles to increase fuel economy and reduce GHG emissions: NHTSA's CAFE standards, EPA's GHG standards, and the GHG standards applicable in California and other states adopting the California standards. This joint EPA-NHTSA program will allow automakers to meet all of these requirements with a single national fleet because California has indicated that it will accept compliance with EPA's GHG standards as compliance with California's GHG standards. 74 FR at 49460. California has not indicated that it would accept NHTSA's CAFE standards by themselves. Without EPA's vehicle GHG standards, the states will not offer the federal program as an alternative compliance option to automakers and the benefits of a harmonized national program will be lost. California and several other states have expressed strong concern that, without comparable federal vehicle GHG standards, the states will not offer the federal program as an alternative compliance option to automakers. Letter dated February 23, 2010 from Commissioners of California, Maine, New Mexico, Oregon and Washington to Senators Harry Reid and Mitch McConnell (Docket EPA-HQ-OAR-2009-0472-11400). The

automobile industry also strongly supports issuance of these rules to allow implementation of the national program and avoid "a myriad of problems for the auto industry in terms of product planning, vehicle distribution, adverse economic impacts and, most importantly, adverse consequences for their dealers and customers." Letter dated March 17, 2010 from Alliance of Automobile Manufacturers to Senators Harry Reid and Mitch McConnell, and Representatives Nancy Pelosi and John Boehner (Docket EPA-HQ-OAR-2009-0472-11368). Thus, without EPA's GHG standards as part of a federal harmonized program, important GHG reductions as well as benefits to the automakers and to consumers would be lost.¹⁶⁵ In addition, delaying the rule would impose significant burdens and uncertainty on automakers, who are already well into planning for production of MY 2012 vehicles, relying on the ability to produce a single national fleet. Delaying the issuance of this final rule would very seriously disrupt the industry's plans. Instead of delaying the LDV rule and losing the benefits of this rule and the harmonized national program, EPA is directly addressing concerns about stationary source permitting in other actions that EPA is taking with regard to such permitting. That is the proper approach to address the issue of stationary source permitting, as compared to delaying the issuance of this rule for some undefined, indefinite time period.

75 FR____ (April__, 2010) (footnote omitted).

9. "Administrative necessity" basis for PSD and Title V requirements in Tailoring Rule

EPA believes that the "administrative necessity" doctrine, within the Chevron framework, also justifies today's rulemaking. Applying the applicability requirements of the PSD and title V programs according to a literal reading of their terms (as EPA has narrowed them in the past through

interpretation) to GHG sources beginning on the January 2, 2011 date that regulation of GHGs takes effect would sweep so many sources into those programs as to render the programs impossible for the permitting authorities to administer. Although streamlining the PSD and title V programs offers some promise to improve the administrability of the programs, given the time needed to implement such streamlining, the step-by-step expansion of PSD and title V requirements to GHG sources that we are promulgating today is the most that the permitting authorities can reasonably be expected to administer.

This section discusses the application of the "administrative necessity" doctrine. Our views concerning this doctrine remain similar to what we said at proposal, with adjustments for the new analysis we have conducted and information we have received since proposal, as well as the revisions we made to the tailoring approach. This analysis and information have already been presented above, in the discussion of the "absurd results" basis. It is not necessary to reiterate the lengthy discussion of the doctrine that we included in the proposal or the factual data presented above; as a result, this section is briefer and highlights the conclusions we have reached about the application of this doctrine..

As noted above, under the current interpretation of the PSD applicability provision, EPA's recent promulgation of the light-duty vehicle rule will trigger the applicability of PSD for GHG sources at the 100/250 tpy threshold levels as of January 2, 2011. This is because PSD applicability hinges on the definition of "major emitting facility," which, under EPA's long-standing narrowing interpretation, and absent further tailoring, applies PSD to sources of any air pollutant that is subject to regulation under another provision of the CAA. EPA's promulgation of the light-duty vehicle rule means that GHGs will become subject to regulation on the date that the rule takes effect, which will be January 2, 2011.

Absent tailoring, the January 2, 2011 trigger date for GHG PSD applicability will see an extraordinarily large number of PSD permitting actions - we estimate more than 81,000 per year - representing an increase of almost 300-fold over the current 280 PSD permitting actions each year. In addition, over 6 million sources will become subject to title V, an increase of more than 400-fold over the 14,700 sources that currently are subject to title V.

Under the three-step approach that we read the caselaw to establish for implementing the "administrative necessity" doctrine, as described above, see 74 *Fed. Reg.* 55,315 col. 1 to

55,316 col. 3, an agency is not required to adhere to literal statutory requirements if the agency, as the first step, makes every effort to adjust the requirements within the statutory constraints, but concludes with justification - at the second step - that it would be impossible to comply with the literal reading of the statute. Under those circumstances, the agency may - at the third step - develop what is in effect a compliance schedule with the statutory requirements, under which the agency will implement the statute as much as administratively possible and as quickly as administratively possible.

a. First step of the "administrative necessity" analysis:
streamlining

In the proposed rulemaking, EPA discussed at length the prospect of streamlining both PSD and title V. EPA described "several potentially useful tools available in the streamlining toolbox for the PSD permitting threshold level, the PSD significance level, and the title V permitting threshold," specifically -

For the PSD permitting threshold level and significance level, there are at least three such tools: The first is interpreting the definition of "potential to emit" so that the amount of a source's emissions that counts in determining whether it qualifies as a major source and therefore is above the permitting threshold requirements is closer to the amount of its emissions when it is in actual operation, rather than the amount of emissions that the source would emit if it were operating

continuously. Narrowing the definition of PTE is a potentially extremely important tool in this context because identifying the amount of a source's emissions as closer to its actual emissions in this manner would mean that very large numbers of residential and commercial sources would have significantly lower emissions and would fall below the statutory threshold requirements for triggering PSD. Second, EPA believes it may be able to develop programs involving general permits, under which large numbers of similarly situated sources would each be covered by essentially the same permit established through a regulatory action by the permitting authority. This approach could achieve economies of scale and thereby reduce administrative burden. Third, EPA believes it may be able to streamline the single most time-consuming element of the PSD permit program, which is the determination of BACT as required under CAA §165(a)(4), by establishing presumptive BACT levels for certain source categories that comprise large numbers of sources. As for title V, as discussed below in detail, EPA believes that defining "potential to emit" to reflect more closely a source's actual operation and developing a program of general permits could streamline the administration of title V permits.

74 FR 55,315 col. 2-3.

At proposal we stated that we would, and we still commit to, vigorously pursue development of these streamlining measures, and, as indicated in our discussion of streamlining methods in section V.E.1 and in response to comments, we have already begun developing those measures. For example, as described elsewhere, we have done much work - both with stakeholders and in-house -- to begin to develop recommendations for what controls would qualify as BACT for various industries. This work is important as a foundation for developing

presumptive BACT, which is a potentially quite efficient streamlining measure.

However, it is not possible for us or the State and local permitting authorities to develop and implement streamlining techniques by the time that PSD and title V are triggered for sources emitting GHGs - January 2, 2011 -- or shortly thereafter. Developing streamlining methods would entail acquiring more information about the affected industry, may entail rulemaking, and would likely entail some type of public review of proposals for streamlining even if not done through rulemaking. As discussed in section VI.E, we do not expect that we could complete all those steps for meaningful streamlining measures within two years.

b. Second step of the "administrative necessity" analysis: demonstration of administrative impossibility.

With no streamlining measures available at the time that PSD and title V would apply to sources of GHGs or shortly thereafter, under the second step of the "administrative necessity" analysis, we must determine whether implementation of the statutory requirements at that time would be administratively impossible for the permitting authorities. We are mindful that the D.C. Circuit has cautioned that this showing is a high hurdle, and that in none of the

"administrative necessity" decisions was an administrative agency successful in making such a showing, as we recognized in the proposal. See 74 *Fed. Reg.* at ___.

Even so, we believe there is no question that a literal application of the PSD and title V programs to GHG sources as of January 2, 2011 would be flatly impossible for the State and local permitting authorities to administer for at least an initial period of time.³⁵ The key facts have been recounted above, and no more than a brief recitation is necessary here. Although the PSD and title V programs are best seen as a joint program, it is useful to separate them to show how stark the administrative problems are: On the PSD side, annual permit applications would increase by over 300-fold, from 280 to 80,000; costs to the permitting authorities would increase more than 100-fold, from \$12 million to \$1.5 billion; and the permitting authorities would need to hire, train, and manage 9,772 FTEs . For title V, total permit applications would increase by over 400-fold, from 14,700 to 6.1 million; costs to the permitting authorities would increase by about the same

³⁵ We recognize that in a few states, we are the permitting authority. We do not think that this changes the calculation of administrative burdens. We do not believe that we could reasonably be expected to adjust our budget to accommodate the large new permitting burdens, and even if we could, the administrative burdens would remain in most of the rest of the nation where it is the state or local agencies that bear permitting responsibility.

amount, from \$62 million to \$21 billion; and the permitting authorities would need to hire, train, and manage 229,118 FTEs.

We have elaborated upon these burdens elsewhere in today's notice. It is clear that they justify our conclusion that they bespeak an impossible administrative task. It is not hyperbole to say that if these administrative responsibilities are not considered impossible within the meaning of the "administrative necessity" doctrine, then it is difficult to imagine what would be considered impossible.

c. Third step of the "administrative necessity" analysis:
tailoring

Under the third step of the "administrative necessity" analysis, we must demonstrate that the steps we intend to take towards implementation of the statutory requirements are the most that can be done during the indicated time frames, in light of administrative resources. See 74 FR _____. This amounts to establishing a schedule for phasing in PSD and title V applicability to GHG sources.

Because this step is based on the administrative resources of the permitting authorities, our analysis is similar, and leads to the same conclusions, as we described under the "absurd results" basis.

10. "Step-at-a-time" basis for tailoring rule

In addition to the “absurd results” and “administrative necessity” doctrines, the “step-at-a-time” judicial doctrine, within the Chevron framework, supports at least part of EPA’s tailoring rule. The caselaw, described above, indicates that courts will accept an initial step towards full compliance with a statutory mandate, as long as the agency is headed towards full compliance, and we believe that the doctrine is applicable here. EPA intends to require full compliance with the CAA applicability provisions of the PSD and title V programs, but we believe that in the case of GHG-emitting sources, by application of the “absurd results” doctrine or the “administrative necessity” doctrine, full compliance with the applicability provisions does not necessarily mean full compliance with the literal terms of those provisions.³⁶ Rather, as we have explained elsewhere, in the case of GHG sources, full compliance may mean compliance with higher levels that are consistent with congressional intent, under the “absurd results” doctrine, or that are within the reach of permitting authorities in light of their administrative constraints, under the “administrative necessity” doctrine. Today’s rulemaking constitutes a package

³⁶ For reasons explained elsewhere, our reference to the literal terms of the applicability provisions means the literal terms of the definition of “major emitting facility” for PSD and “major source” for title V, as EPA has narrowed those definitions to refer to “any pollutant” that is subject to regulation under the CAA.

of initial steps towards that full compliance, and, seen in that light, is supported by the "step-at-a-time" doctrine.

Even if the doctrine were found to apply only when an agency is committed to fully implementing statutory requirements according to their literal terms, we believe that the steps we promulgate today would be considered valid under the step-at-a-time doctrine. This is because even if we are incorrect about the applicability of the "absurd results" and "administrative necessity" doctrines, so that GHG sources are required to comply with the literal terms of the PSD and title V applicability provisions, the "step-at-a-time" doctrine would allow PSD and title V applicability to be phased in, and the steps we promulgate today would be upheld as reasonable initial steps toward full compliance with the literal terms of the CAA. As we have described elsewhere, there is little question but that sources and permitting authorities cannot reasonably be expected to comply with or implement PSD and title V applicability requirements in the near term - by January 2, 2011 and July 1, 2011 -- except to the limited extent described under steps 1 and 2. Nor is applicability of the PSD and title V requirements at levels below 50,000 tpy CO₂e reasonable before six years from promulgation of today's rule, as discussed elsewhere. If further steps resulting in full compliance with the literal

terms of the applicability provisions of PSD and title V were required, it would be reasonable for those steps to occur in the future, as part of the rulemaking to be completed by the sixth year after promulgation, to which EPA commits itself as part of today's action, or as part of subsequent actions. *See id.*

(upholding agency action as a step towards full compliance with statutory mandate when the agency expected full compliance to occur some 20 years after the deadline in the statute).

C. Mechanisms for implementing and adopting the tailoring approach

In this section, we discuss three issues related to adoption of the tailoring approach within our regulations and by permitting agencies. The first is the regulatory mechanism for implementing the tailoring approach, and our rationale for the specific way we are revising the PSD and title V applicability provisions to incorporate the tailoring approach. The second is the process by which state or local permitting authorities may incorporate the tailoring approach into their PSD SIP and title V permit programs. Finally, we discuss our reasons for delaying action on our limited approval of both SIP-approved PSD programs and title V programs, and request further information from States on both programs.

In brief, we proposed to exempt sources emitting GHGs below certain threshold levels from the definition of "major stationary source" and "major modification" in PSD programs and the definition of "major source" in title V programs. We further proposed to effectuate this change in SIP-approved PSD programs and Part 70 title V programs by limiting our prior approval of those programs to the revised applicability thresholds for GHGs.³⁷ While these changes would have the effect of putting the lower thresholds in place in states as a matter of federal law, state commenters expressed concern that they would not be able to adopt the tailoring rule under state laws on an expeditious basis. To address this, our final action differs from our proposed rule in the way we incorporate the limitations promulgated in this tailoring rule into the "major stationary source," "major modification" and "major source" definitions. This approach relies on further defining the term "subject to regulation" and is not substantively different in effect from the proposed rule, but this mechanism will facilitate more rapid adoption and implementation of the limitations in this final rule by states through interpretation of language in existing state regulations. We are also delaying action on our proposed

³⁷ In the alternative, we also proposed to use our 110(k)(6) error correction authority to revise SIP-approved PSD program. We are also delaying action on this proposal.

limited approval of SIP-approved PSD programs and Part 70 title programs to determine how each State will implement the final rules.

1. PSD Approach: Background and Proposal

Under CAA §165(a), no "major emitting facility" may construct or modify unless it receives a preconstruction permit that meets the requirements of the PSD program. CAA §169(1) defines a major emitting facility as "any ... source[]" in one of 28 specified source categories that "emit[s], or ha[s] the potential to emit, one hundred tons per year or more of any air pollutant;" or "any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant." EPA's regulations replace the term "major emitting facility" with the term "major stationary source," and defines the term as "[a]ny of ... [28 types of] stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant" or "any stationary source which emits, or has the potential to emit 250 tons per year or more of a regulated NSR pollutant." 40 CFR 51.166(b)(1)(i)(a)-(b). The term "regulated NSR pollutant" is defined to include, among other things, "any ... air pollutant that otherwise is subject to regulation under the Clean Air Act." 40 CFR 51.166(b)(50). Note that the regulatory definition in effect

narrows the statutory definition to read "one hundred tons per year or more" or "two hundred and fifty tons per year or more of any air pollutant *subject to regulation under the Clean Air Act*" (emphasis added).

Similarly, under the statute, a modification occurs if there is a physical change or change in the method of operation "which increases the amount of any air pollutant emitted" Section 111(a)(4). As with the major stationary source definition, we have limited coverage of the modification provision to physical changes or changes in the method of operation that result in a significant increase, and a significant net emissions increase of a "regulated NSR pollutant." 40 CFR 51.166(b)(2)(i).

Our proposed rule revised the definition of "major stationary source to 1) exempt GHG from the regulated NSR pollutants that, if emitted by a source in the 100 or 250 tpy quantities, would cause the source to qualify as a "major stationary source;" and 2) add a specific threshold at which a source that emits a specified quantity of GHGs (at proposal, that quantity was 25,000 tpy CO₂e) would qualify as a "major stationary source." 74 FR 55,351, proposed 40 CFR 51.166(b)(1)(i)(a), (b), (d). We also proposed a significance threshold, the amount of an increase needed to trigger PSD for a

modifications or require BACT for a new source, of 25,000 tpy CO₂e. 74 FR 55351 40 C.F.R 51.166(b)(23)(i). Additionally, we recognized that it may take some time before States could change their SIP-approved PSD programs and that, absent additional action on our part, GHG-emitting sources would remain subject to the 100 or 250 tpy thresholds, and subject to a zero significance threshold for major modifications as a matter of Federal law. To address this issue, we proposed to narrow our previous approval of those SIPs, under the authority of the Administrative Procedures Act and the general authority of CAA section 301. Our limited approval would revise existing SIP-approved programs to authorize permitting under the Clean Air Act only for GHG sources at the appropriate levels.

In response to our proposed approach, we received numerous comments from State and local permitting agencies expressing concern that our proposed approach in the Tailoring Rule could meet its objectives to avoid applying PSD requirements to small sources under *federal* law, but would not succeed in avoiding the application of PSD requirements to those small sources under *state* law. The commenters explained that, although EPA was changing federal PSD applicability thresholds for GHG-emitting sources to incorporate the tailoring approach, and limiting the scope of SIPs consistent with these thresholds state rules

containing the originally- approved SIP thresholds would continue to apply as a matter of state law. As a result, states would be faced with the same administrative difficulties recognized in the proposed rule in implementing existing State law. Rather, as commenters explained, for the most part, the laws and regulations states adopt to implement federal PSD programs mirror EPA's regulations, so that the state laws, in addition to the federally approved SIPs, apply PSD to sources that emit air pollutants subject to regulation at the 100/250 tpy threshold. Commenters reasoned that, until the States can change their state laws, the 100/250 tpy thresholds will continue to apply as a matter of state law, even though the higher thresholds apply as a matter of federal law. Importantly, these commenters emphasized that their State process requires that they incorporate the higher thresholds for GHG sources in their SIPs only through a rulemaking or, in some cases, through a legislative change. These processes would require many months and in some cases as long as two years. As a result, sources that emit GHGs below the federally established levels in the final rule, but above the 100/250 tpy levels in state laws and rules, would still be required to obtain PSD permits under state law. Commenters emphasized that this situation was untenable.

In addition to the State comments just described, we received comments that took issue with our description of our legal mechanism as an application of the numerical thresholds. They asserted that in fact, our mechanism consisted of interpreting the term "any source" to exclude small GHG-emitting sources. Other commenters objected to our proposed mechanism of narrowing our previous SIP approval, arguing that this mechanism was without legal basis.

2. Rationale for Our Final Approach to Implementing PSD

In response to these concerns, we are adding another mechanism to implement the tailoring approach for PSD by interpreting the phrase "subject to regulation" that is used within the phrase "any regulated NSR pollutant " that is part of the definitions of "major stationary source" and "major modification." To implement this mechanism, we are codifying an interpretation of "subject to regulation" so that the GHGs emitted by sources that fall below the thresholds or scope established in Steps 1 and 2 are not treated as "subject to regulation," and therefore do not trigger PSD for the sources that emit them. .

To understand this approach, it is useful to return to the definition of "major stationary source," which, again, is central to PSD applicability. The definition, quoted above,

employs the term "regulated NSR pollutant," which is a defined term. The definition incorporates many other elements as well (e.g., the 100/250 threshold requirements), but for convenience, we shorthand it as follows: a "major stationary source" is "[a]ny ... source[] of air pollutants, which emits, or has the potential to emit, [depending on the source category, either] 100 [or 250] tons per year or more of any air pollutant that is subject to regulation under the Clean Air Act." A similar construct exists for the "major modification" definition. Returning to our shorthand above and applying our definition of "subject to regulation, the definition would now read A "major stationary source" is "[a]ny ... source[] of air pollutants, which emits, or has the potential to emit, [depending on the source category, either] 100 [or 250] tons per year or more of any air pollutant subject to regulation under the Clean Air Act, [but GHGs are not subject to regulation under the Clean Air Act if emitted by sources below the thresholds established in steps 1 and 2 .]" Similarly, major modification now means "any physical change or change in the method of operation that would result in: a significant emissions increase of a regulated NSR pollutant . . . but GHG are not subject to regulation under the Clean Air Act if emitted by sources below

the thresholds established in steps 1 and 2 and result in an increase less than the amounts specified therein.”

Although EPA is codifying its interpretation of “subject to regulation”, states may be able to follow EPA’s approach to tailoring for GHG permitting without having to undertake a rulemaking action to revise regulations that are included in their SIPs or without requiring an act of the State legislature. EPA believes this can be accomplished through interpretation by the states if the state has taken the position, or determines now, that the state’s definition of “subject to regulation,” “regulated NSR pollutant” and/or “major stationary source” is intended to be interpreted in a way that tracks the meanings that EPA has assigned to these phrases. As a result, these States can adopt the meaning of subject to regulation established by EPA and apply it by interpretation before January 2, 2011, and thereby avoid the situation in which, as a matter of State law, GHG-emitting sources above the 100 or 250 tpy thresholds become subject to PSD by that date. We believe that States can adopt this regulatory approach through an interpretation, rather than by a rulemaking action or state legislative process, because we view the phrase “regulated NSR pollutant” as open-ended, and therefore subject to interpretation, as the following discussion demonstrates.

On December 18, 2008, EPA issued an interpretive memorandum establishing EPA's interpretation of the definition "regulated NSR pollutant" found at 40 C.F.R. 52.21(b)(50)). *Id.* EPA intended this memo to resolve any ambiguity in subpart (vi) of this definition which includes "any pollutant that otherwise is subject to regulation under the Act." Specifically, the memo stated that EPA will interpret the definition of "regulated NSR pollutant" to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant.

After reconsidering this interpretation through a formal notice and comment process, EPA refined its interpretation to establish that the PSD permitting requirements will not apply to a newly regulated pollutant until a regulatory requirement to control emissions of that pollutant "takes effect." 75 FR 17704. Importantly, as stated above, since the term "regulated NSR pollutant" is embedded within the definition of "major stationary source" this interpretation effectively defines which major stationary sources are subject to PSD permitting. As a result, for example, EPA explained that PSD and title V permitting requirements for GHGs will not apply to GHGs until at

least January 2, 2011 - following the anticipated promulgation of EPA regulations requiring control of GHG emissions under Title II of the CAA. Id. Nonetheless, because this final rule tailors the application of GHG permitting, GHG emissions at certain thresholds will not be "subject to regulation" as we interpret that term within the "regulated NSR pollutant" definition.

In the Response to Comment document for EPA's reconsideration of the PSD interpretative memorandum, we stated that,

Absent a unique requirement of state law, EPA believes that state laws that use the same language that is contained in EPA's PSD program regulations at 52.21(b)(50) and 51.166(b)(50) are sufficiently open-ended to incorporate greenhouse gases as a regulated NSR pollutant at the appropriate time consistent with EPA's interpretation of these regulations (cite docket #).

Historically, EPA has interpreted certain state approved-SIP programs as sufficiently open-ended such that the rules provide for the "automatic assumption for the responsibility for review" of new pollutants before the general deadline for states to revise their PSD programs. See e.g. 52 FR at 24682. Conversely, we have also read federal rules and state SIPs to

provide for the automatic removal of a pollutant when such pollutant is no longer "subject to regulation." For example, the 1990 CAA amendments exempted hazardous air pollutants listed in Section 112(b)(1) from the PSD requirements. See CAA Section 112(b)(6). Following passage of the amendments, EPA issued "New Source Review (NSR) Program Transitional Guidance",, a memorandum from John S. Seitz, Director Office of Air Quality Planning and Standards to Regional Air Division Directors on March 11, 1991. In that guidance, EPA interpreted its regulations to automatically cease to apply to listed HAPs (with some noted exceptions.), and implicitly stated that a State with an open-ended SIP-approved rule could also automatically cease to regulate HAPs.

After reviewing these past practices in the PSD permitting program, and EPA's prior statements regarding pollutants subject to the PSD program, we conclude that State rules that contain the same language as used in the 40 C.F.R. Section 52.21(b)(50) or 40 C.F.R. Section 51.166(b)(49), or who otherwise have sufficiently open-ended NSR regulations, would be able to implement our tailoring rule approach to permitting of GHG sources without the need for a SIP revision if they establish that the state intended to apply the same meaning as EPA when it incorporated the term "subject to regulation" in its PSD program

regulations. If states adopt this reading of their regulations, GHG sources falling below the specified cutoffs would not be emitting pollutants "subject to regulation" within the definition of "regulated NSR pollutant" and therefore would not be subject to PSD permitting as a major stationary source.

During our consideration of this action, we participated in teleconferences with several permitting authorities (6 states and 1 local agency) to discuss this issue of whether they could implement the proposed rule without the need for state law or regulations changes or a revision of the provisions of state law that are a part of the SIP. [Placeholder: docket # for meeting summary] We specifically discussed whether defining the phrase "subject to regulation" would better facilitate state incorporation of the limitations in this final rule. The state and local agencies participating in the calls generally agreed that defining the phrase "subject to regulation" that is used within the definition of "regulated NSR pollutant" would, compared to our proposed approach, better facilitate state incorporation of the limitations in the final rule in states with regulations that mirror the existing federal rules, or in states whose rules are otherwise sufficiently open-ended to incorporate the limitations in the final rule by interpretation. Participants from each agency also indicated that it is likely

that their rules were sufficiently open-ended to do so because they contain the term "subject to regulation" and that term has not been previously interpreted in ways that would preclude adoption of EPA's meaning of the term by interpretation (although some indicated they may elect to pursue rulemaking in addition to interpretation). Accordingly, we selected the "subject to regulation" regulatory approach as the mechanism for codifying the final rule.

3. Other mechanisms

The mechanism for implementing the terms of this tailoring rule described above has the same substantive effect as the mechanism we considered in the proposed rule. Defining the term "subject to regulation", has the effect of modifying the meaning of the regulatory terms "major stationary source" and "major modification" - again, the keys to PSD applicability - to exclude GHG-emitting sources below the thresholds established in Steps 1 and 2, and our action should be interpreted to rely on any of several legal mechanisms to accomplish this interpretation. The thrust of this rulemaking is to apply the PSD definition of "major stationary source" - which embodies the statutory term, "major emitting facility" -- to GHG sources by treating only GHG sources that emit at levels above the steps 1 and 2 thresholds as meeting that definition. Our action may

reasonably be construed to have the effect of revising the meaning of several terms in these definitions, including: (i) the numerical thresholds, as we proposed; (ii) the term, "any source," which some commenters identified as the most relevant term for purposes of our proposal; or (iii) the term, "subject to regulation," which, as discussed above, our regulations attach to the definition of "major stationary source" and "major modification." The specific choice of which term constitutes the mechanism does not have a substantive legal effect because each mechanism involves one or another of the components of the regulatory term "major stationary source" and it is that term that we are defining to exclude the indicated GHG-emitting sources. Thus, while the "subject to regulation" mechanism facilitates expeditious implementation by states, and we are therefore revising our regulations to adopt this approach, there is no substantive difference in effect between the alternative mechanisms we may use to finalize the proposed rule.³⁸

Similarly, with respect to "major modification" although our final action revises our regulations to incorporate the

³⁸ We also think that this approach better clarifies our long standing practice of interpreting open-ended SIP regulations to automatically adjust for changes in the regulatory status of an air pollutant, because it appropriately assures that the tailoring rule applies to both the definition of "major stationary source" and "regulated NSR pollutant."

"subject to regulation" mechanism, we believe that our final action should be construed as interpreting the definition of the regulatory term "major modification"—which embodies the statutory term "modification"—to exclude GHG-emitting sources below the thresholds established in Steps 1 and 2, and that our action should be interpreted to rely on any of the several mechanisms noted above to accomplish this interpretation. Further, we believe that our action may reasonably be construed to revise any of several terms in that definition, - including (i) the numerical thresholds (zero for modifications under the statute), as we proposed; (ii) the term, "a stationary source," which parallels the "any source" theory identified by commenters with respect to "major stationary source"; or (iii) the term, "subject to regulation," which, as discussed above, that our regulations attach to the definition of "major modification." We believe that the specific choice of which term constitutes the mechanism does not have a substantive legal effect because each mechanism involves one or another of the components of the regulatory term "major modification" and it is that term that we are interpreting to exclude the indicated GHG-emitting sources. Thus, while the "subject to regulation" mechanism facilitates expeditious implementation by states, and we are therefore revising our regulations to adopt this approach, we otherwise

find no substantive difference between the alternative mechanisms we may use to finalize the proposed rule.³⁹

4. Codification of Interpretive Memo

Notably, we recently affirmed our interpretation of the term "subject to regulation" as it applies broadly to the PSD program through a formal notice and comment process. [placeholder cite Johnson}. In the response to comments for that action, we indicated that we may opt to codify our interpretation of the term in the GHG final tailoring rule. Accordingly, our final rule adopts this interpretation to bring additional clarity to our rules. Specifically, we add a new paragraph to the definitions "subject to regulation" that contains our existing interpretation of that term. We also moved existing exceptions (e.g. Section 112 hazardous air pollutants) to a new paragraph with in the definition of "subject to regulation". Movement of these regulations is not intended to effect any change in how those regulations are implemented, but merely simplify the regulations clearly delineating different terms and concepts.

We do not believe that codification of this interpretation from the Interpretive Memo is necessary to continue the

³⁹ We also think that this approach better clarifies our long standing practice of interpreting open-ended SIP regulations to automatically adjust for changes in the regulatory status of an air pollutant, because it appropriately assures that the tailoring rule applies to both the definition of "major stationary source" and "regulated NSR pollutant."

effectiveness of the interpretation, nor do we believe that our action disturbs States' existing authority to adopt the definition through interpretation of their existing rules. Our decision to codify our existing interpretation is based solely on a desire to better inform readers of the existing interpretation.

5. Delaying Limited Approvals and Request for Submission of Information from States implementing a SIP-approved PSD program

Because we now anticipate that many states will be able to implement the final rules through interpretation without the need to revise their SIPs, we are delaying further action on our proposal to limit approved SIPs until we better understand how permitting authorities will implement our final rule. For this purpose, we ask each State to submit a letter to the appropriate Regional Administrator no later than [insert date 60 days after promulgation]. In that letter, states should explain whether they will apply EPA's meaning of the term "subject to regulation" and if so, whether the state intends to incorporate that meaning of the term without undertaking a regulatory or legislative process. If a State must revise its regulations to apply EPA's meaning of the term "subject to regulation" we ask States to provide an estimate of the time to adopt final rules

in its letter to the Regional Administrator. If a state chooses not to adopt EPA's meaning by interpretation, the letter should address whether the State has alternative authority to implement today's phase-in approach or some other approach that is at least as stringent, but which also addresses the expected shortfalls in personnel and funding that would exist if the state to carried out PSD permitting under its existing program thresholds.

For any State that is unable or unwilling to adopt the limitations in the final rules by January 2, 2011, and who otherwise are unable to demonstrate adequate personnel and funding, EPA will move forward with finalizing a limited approval of the existing SIP. Although we received comments questioning EPA's authority to undertake a limited approval using our general rulemaking and 110(k)(6) authorities, we are not responding to those comments at this time. We will address these comments in any final action we take to implement a limited approval.

In our proposed rule, we also noted that a handful of EPA-approved SIPs fail to include provisions that would subject GHG emissions to their PSD requirements when regulations that EPA promulgates to regulate GHGs take effect and thereby trigger the applicability of PSD for sources that remain covered under

today's rule. This is generally because these SIPs specifically list the pollutants subject to the SIP program requirements, rather than including a definition of NSR regulated pollutant that mirrors the federal rule, or because a state otherwise interprets its regulations to limit which pollutants the state may regulate. At proposal, we indicated that we intended to take separate action to identify these SIPs, and to take regulatory action to correct this SIP deficiency. We ask any state or local permitting agency that does not believe its existing SIP provides authority to issue PSD permits to GHG sources consistent with the final rule to notify the Regional Administrator by letter (which should be done no later than the previously described letter regarding adoption of the tailoring rule). This letter should inform the Regional Administrator whether the state intends to undertake rulemaking to revise their rules to the handle GHG sources that will be covered under the applicability thresholds in this rulemaking, or alternatively, whether the state believes it has adequate authority through other means to issue federally-enforceable PSD permits to GHG sources consistent with the final rule. For any State that lacks the ability to issue PSD permits for GHGs consistent with the final rule, we will undertake a separate action to call the SIP. As appropriate, we will also move

quickly to impose a FIP through 40 C.F.R. Section 52.21 to ensure that GHG sources will be regulated consistent with the final rule.

6. Title V programs

Our final action also differs from the proposal in the specific regulatory mechanism by which we tailor the definition of "major source" for title V permit programs, but is a logical outgrowth of our proposed rule. EPA proposed to implement tailoring for GHGs under title V by excluding sources of GHGs from the general definition of "major source" under 40 C.F.R. sections 70.2 and 71.2, and adding a separate definition of "major source" with tailored thresholds for sources of GHGs. In response to comments, particularly from states concerned with implementation of the proposed approach under state law, EPA is adopting an approach in the final rule that 1) amends the definition of "major source" by codifying EPA's long-standing interpretation that applicability for a "major stationary source" under CAA sections 501(2)(B), and 302(j) and 40 C.F.R. section 70.2 and 71.2 is triggered by sources of pollutants "subject to regulation," and 2) adding a definition of "subject to regulation." Further, we are delaying our action to move forward with a limited approval of existing state Part 70 programs.

We finalize this alternative approach to address concerns similar to those we received with respect to State implementation of SIP-approved PSD programs. Specifically, we received comments that the mechanism we proposed would not address the significant administrative and programmatic considerations associated with permitting GHGs under title V, because the 100 tpy threshold would continue to apply as a matter of State law. Commenters stated that states would need to undertake a regulatory and/or legislative process to change the threshold in their state laws which they could not complete before the laws would otherwise require issuance of operating permits to GHGs sources. After considering the commenters' concerns, we are finalizing an approach designed to address the state law concerns for states, and also now find that it may be unnecessary to move forward with our proposed approach to limit approval of existing Part 70 programs in many States.

EPA's approach involves the interrelationship of terms within the Part 70 definition of "major source" in title V and EPA's implementing regulations, and EPA's historical practice of interpreting the term "any air pollutant" in the "major stationary source" component of that definition. EPA believes the approach in the final rule will allow many states to adopt the final rule through interpretation of existing state laws.

Specifically, paragraph (3) within the definition of "major source" found in 40 CFR sections 70.2 and 71.2 defines a major source as a "a major stationary source of air pollutants, as defined in section 302 of the Act, that directly emits or has the potential to emit, 100 tpy or more of any air pollutant..." The EPA previously articulated the Agency's interpretation that the regulatory and statutory definitions of "major source" under title V, including the term "any air pollutant, applies to pollutants "subject to regulation." Memorandum from Lydia N.Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, to Air Division Directors, "Definition of Regulated Air Pollutant for Purposes of Title V" (Apr.26, 1993)(Wegman Memo). EPA recently re-affirmed this position in EPA's Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs. 75 FR 17704, 17022-23 (April 2, 2010)(Interpretive Memorandum Reconsideration Final Action).

Accordingly, under our long-established policy, States historically have interpreted the term "any air pollutant" under the title V definition of "major source," to mean any pollutant "subject to regulation" under the Act. Thus, as a matter of established interpretation, EPA and States effectively read the definition of "major source" under title V to include a source

"...that directly emits or has the potential to emit, 100 tpy or more of any air pollutant *subject to regulation under the Act.*" [emphasis added]. By amending our regulations to expressly include and define "subject to regulation" to implement our tailoring for GHGs under title V, we are seeking to enable States to adopt and implement this approach through a continued interpretation of the phrase "any air pollutant" within the "major source" definition, without the need for changes to state regulations or statutes. States may be able to track EPA's approach to tailoring for GHG permitting without regulatory or statutory changes, for example, where a state has taken the position, or determines now, that the state's interpretation of "major source," "subject to regulation" and/or "any air pollutant" is intended to track EPA's interpretation.

Thus, EPA is adding the phrase "subject to regulation" to the definition of "major source" under 40 C.F.R section 70.2 and 71.2. EPA is also adding to these regulations a definition of "subject to regulation." Under the part 70 and part 71 regulatory changes adopted today, the term "subject to regulation," for purposes of the definition of "major source," has two components. The first component codifies the general approach EPA recently articulated in the "Reconsideration of Interpretation of Regulations That Determine Pollutants Covered

by Clean Air Act Permitting." 75 FR 17704. Under this first component, a pollutant "subject to regulation" is defined to mean a pollutant subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant and that has taken effect under the CAA. See *id.* at 17022-23; Wegman Memo at 4-5. To address tailoring for GHGs, EPA includes a second component of the definition of "subject to regulation," specifying that GHGs, are not subject to regulation for purposes of defining a major source, unless as of July 1, 2011, the emissions of GHGs are from a source emitting or having the potential to emit 100,000 tpy of GHGs on a CO₂e basis.

As explained above, we find no substantive difference between the alternative mechanisms for implementing GHG tailoring in the final rule. Whether we add GHG thresholds directly to the definition of "major source," (as we proposed), or alternatively, expressly add and define the term "subject to regulation," both approaches revise the definition of "major source" to implement the GHG tailoring rule. Accordingly, we adopt the later approach to facilitate State implementation of the final rule through an interpretation of existing State Part 70 programs. Similar to our explanation above for PSD, while we adopt the "subject to regulation" mechanism for implementing GHG

tailoring in the final rule, the thrust of our rulemaking today is to apply the title V definition of "major source" - which includes the statutory term, "major stationary source" -- to GHG sources by treating only GHG sources that emit at levels above the steps 1 and 2 thresholds as meeting that definition.

Further, we believe that our action may reasonably be construed to revise any of several terms in that definition, including (i) the numerical thresholds, as we proposed; (ii) the term "any air pollutant," or (iii) the term "subject to regulation," which, as discussed above, our regulations graft into the definition of "major source." We believe that the specific choice of which term constitutes the legal mechanism does not have a substantive legal effect because each mechanism involves one of the components of the regulatory term "major source," and it is that term that we are interpreting to tailor title V applicability for GHG-emitting sources. Thus, while the "subject to regulation" mechanism facilitates expeditious implementation by states, and we are therefore revising our regulations to adopt this approach, we otherwise find no substantive difference between the alternative mechanisms we may use to finalize the proposed rule.

Further, similar to our revised approach for addressing State SIP-approved PSD programs, we are delaying our action to

issue limited approvals for State part 70 operating permit programs. In our proposed rule, we explained our concern that states lack adequate personnel and resources to carry out part 70 operating permit programs for GHG sources that emit or have the potential to emit 100 tpy of GHGs. Accordingly, we proposed to use our general rulemaking authority under Section 301(a) of the CAA and APA section 553 to limit our prior approval of State operating permit programs. This limited approval action would have had the effect of applying Clean Air Act permitting requirements only to sources that exceed the permitting thresholds established in this rule for the phase in, because only those sources would be covered by the federally approved part 70 programs. 74 FR at 55345. As discussed above, we are proceeding with a slightly revised approach to address concerns similar to those raised with our proposed approach for addressing SIP-approved PSD permit programs. Because we now recognize that, like the PSD program, many States will be able to implement the final rules without the need to revise their existing Part 70 operating permit programs, we are delaying further action on our proposal to limit approval of existing Part 70 programs until we better understand how permitting authorities will implement our final rule. In addition to the information requested above on SIP-approved PSD permit programs,

we ask each State to submit a letter to the appropriate Regional Administrator no later than [insert date 60 days after promulgation] detailing the state's plan for permitting of GHG sources under the state's part 70 program. In that letter, states should explain whether they will adopt an interpretation of the terms "major source," "any air pollutant" or "subject to regulation" that is consistent with EPA's regulatory interpretation of the these terms as codified at 40 C.F.R. section 70.2, and whether the State intends to adopt the interpretation without undertaking a regulatory or legislative process. This approach may be available, for example, where a state has taken the position, or determines now, that the state's interpretation of "major source," "subject to regulation" and/or "any air pollutant" is intended to track EPA's interpretation, resulting in title V permitting for sources of GHGs as described in EPA's regulations adopted today. If a State must revise its title V regulations or statutes to implement the interpretation, we ask States to provide an estimate of the time to adopt final rules or statutes in its letter to the Regional Administrator. If a State chooses not to (or cannot) adopt our interpretation, the letter should address whether the State has alternative authority to implement the GHG tailoring approach or some other approach that is at least as

stringent, but which also addresses the expected shortfalls in personnel and funding that would exist if the state to carried out permitting under Part 70 program thresholds lower than those adopted by EPA in this final rule. For any State that is unable or unwilling to adopt the permitting thresholds in the final rules, and otherwise is unable to demonstrate adequate personnel and funding, EPA will move forward with finalizing a limited approval of the state's existing part 70 program.

In our proposed rule, we also noted that a handful of Part 70 operating permit programs may include provisions that would not require operating permits for any source of GHG emissions because, for example, the programs may apply only to pollutants specifically identified in the program provisions. States may be unable to interpret their regulatory provisions to interpret the term "any pollutant" to include pollutants "subject to regulation." We indicated that we intended to take separate action to identify these programs, and to take regulatory action to correct this deficiency. Accordingly, we ask any State or local permitting agency that does not believe its existing part 70 regulations convey authority to issue title V permits to GHG sources consistent with the final rule to notify the Regional Administrator by letter as to whether the state intends to undertake rulemaking to revise their rules consistent with

today's applicability thresholds. This notification should be done no later than the previously described letter regarding adoption of the tailoring rule, and could be combined with similar notifications we request regarding the PSD program. We will undertake a separate regulatory action to address part 70 programs that lack the ability to issue operating permits for GHG sources consistent with the final rule. We will use our federal title V authority to ensure that GHG sources will be permitted consistent with the final rule.

D. Rationale for Treatment of GHGs for Title V Permit Fees

The title V program requires permitting authorities to collect fees "sufficient to cover all reasonable (direct and indirect) costs required to develop and administer [title V] programs." ⁴⁰ To meet this requirement, permitting authorities either collect an amount not less than a minimum amount specified in our rules (known as the "presumptive minimum"), or may collect a different amount (usually less than the presumptive minimum). We did not propose to change the title V fee regulations in our notice of proposed rulemaking for this action, nor did we propose to require new fee demonstrations when title V programs begin to address GHGs. However, we did recommend that each state, local or tribal program review its

⁴⁰ The fee provisions are set forth in CAA Section 502(b)(3) and in our regulations at 40 CFR 70.9 and 71.9

resource needs for GHG and determine if the existing fee approaches will be adequate. If those approaches will not be adequate, we suggested that states should be proactive in raising fees to cover the direct and indirect costs of the program or develop other alternative approaches to meet the shortfall. We are retaining this proposed approach, and are not changing our fee regulations as part of today's final action establishing steps 1 and 2 of the phase-in. However, we are offering some additional clarification of our fee approach during these steps in response to comments we received on this issue. Additional discussion of fees will be included as part of subsequent actions establishing step 3 and beyond.

A few state commenters suggested that EPA should modify part 70 to adopt a presumptive minimum fee (or range for such fee) for GHGs, some of whom suggested that current fees may be insufficient to cover the costs of their program. It is important to clarify that altering the presumptive minimum would only affect those states that chose to charge the presumptive minimum fee to sources. Most states - including some of the commenters asking EPA to raise the presumptive minimum -- collect a lower amount that is not based on the presumptive minimum, but rather, relies on another fee schedule that it developed and EPA approved as adequate to cover costs.

Therefore, it is useful to first discuss our approach to programs that have fee schedules resulting in a different amount before discussing our approach to the presumptive minimum.

Because of the added GHG title V permitting workload described elsewhere in this notice, any state that will not, under its current fee structure, collect fees adequate to fund the permitting of GHG sources must alter its fee structure in order to meet the requirement that fees be adequate to cover costs. Changes may not be required in every instance; circumstances will vary from state to state. For example a state may see increases in revenue from newly-covered sources (based on emissions of pollutants already subject to fees) that fully cover the state's increased costs, or a state may be over-collecting fees now and could use the surplus to offset the increased costs. Nonetheless, in many cases, we think states will need to adjust their fee structures to cover the costs of GHG permitting in order to meet the requirements of the Act and our regulations.

For this reason, although we are not calling for new fee demonstrations at this time, we plan to closely monitor state title V programs during the first two steps of the Tailoring Rule to ensure that the added workload from incorporating GHGs into the permit program does not result in fee shortfalls that

imperil operating permit program implementation and enforcement, whatever the basis of the states' fee schedule. As described in the proposal, such fee oversight by EPA may involve fee audits under the authority of §70.9(b)(5) to ensure that adequate fees are collected in the aggregate to cover program costs, with emphasis on whether the additional GHG workload is being appropriately funded. Also, EPA retains the ability to initiate a program revision under §70.4(i)(3) or issue a notice of deficiency under the process described in §70.10(b) to address fee adequacy issues, which may be uncovered during a fee audit. By relying on existing oversight measures, we are ensuring that the fee requirements are met with a minimum of disruption to existing programs at a time when they will already be facing significant challenges related to GHG permitting.

Turning to the minority of states that do use the presumptive minimum, we did not propose to change the presumptive minimum calculation method to account for GHG. Currently under the statute and our rules, the presumptive minimum is based on a subset of air pollutants (i.e., VOC, NAAQS pollutants except for CO, and pollutants regulated under the NSPS and MACT standards promulgated under sections 111 and 112 of the Act, respectively) that does not include GHGs. The amount is specified on a per-ton basis and changes with

inflation (it is currently set at \$43.75/ton), but does not apply to emissions over 4,000 tpy of a given pollutant from a given source. We noted several difficulties in applying the presumptive minimum to GHG, including the large amounts of GHG emissions relative to other pollutants and the need for better data to establish a GHG-specific amount. Noting that GHGs are not currently included in the Act's list of pollutants to which the presumptive fee applies, we also invited comment on whether we should raise the fee for listed pollutants to cover the added cost of GHG permitting.

A few state commenters asked us to set a presumptive fee for GHGs, which we take to mean we should add GHGs to the list of pollutants to which a presumptive fee would apply. However, many commenters noted that the current presumptive minimum fee is unreasonable for GHGs because GHGs are emitted in greater quantities than the pollutants currently subject to presumptive fees, which would result in excessive fees. These commenters believe that EPA needs to limit the fees that states can charge for GHGs. Moreover, one commenter read the statute to prohibit us from listing GHGs in the presumptive fee calculation in the first place. Several commenters disagreed with the idea of instead increasing the presumptive fee for other pollutants to cover the cost of regulating GHGs, some of whom believed that

this would unfairly punish existing sources or would bring in no new revenue from sources triggering title V for the first time.

After considering these comments, we remain disinclined, as we were at proposal, to change the presumptive fee calculation regulations. While there is some support for changing the regulations, the comments confirm the challenges in doing so. While we expressly rejected charging the full presumptive cost per ton amount for GHG, we also did not propose language to establish a different amount just for GHG, to establish whether a different tpy cap would apply, or to assess whether GHGs could even be added to the list. Thus, many commenters were very concerned about whether the full \$43.75 or the 4000 tpy cap would apply to GHG if we listed it as a regulated pollutant for fee purposes. Furthermore, we noted at proposal, and commenters did not disagree, that more data would be needed to establish the appropriate basis for the GHG presumptive minimum. We are not taking a final position today on whether the statute is amenable to including GHG in the presumptive fee calculation currently, but these comments illustrate some of the difficulties of such an approach.

At the same time, we are not increasing the presumptive minimum for other pollutants already included in the fee calculation. We disagree with the commenter who said such an

approach would bring in no new revenue from newly-subject sources. Many of the newly subject sources would emit already-included pollutants. If new revenue from these pollutants were insufficient, and because the Act does not specify how the shortfall must be addressed, the amount of any projected shortfall could be made up by increasing fees on these pollutants. In fact, the projected shortfall could be addressed without having to inventory GHG emissions from title V sources, since the emissions of already-included pollutants are well-known. We also note that, although some commenters are concerned that failing to assess fees for GHGs directly would be unfair, the statute does not provide that the presumptive fee be proportional to each type of pollutant or be proportionally allocated to all sources. Rather, the presumptive fee approach provides a backstop for states that do not wish to adopt a more tailored approach. Nonetheless, we have decided not to increase the presumptive fee amounts for other pollutants because we lack information about the extent to which shortfalls exist due to GHG permitting, and which mix of sources and fees is appropriate for addressing any such shortfall in a state. This approach also provides greater flexibility to states and minimizes disruption to existing programs.

We note that, contrary to the statements of some commenters, the CAA provisions allowing for a presumptive fee calculation do not override the basic requirement that fees be adequate to cover costs. As noted above, we expect states to see a revenue increase from emissions of listed pollutants at newly-major sources for GHG, and it is also possible that the presumptive minimum may currently be resulting in over-collection of fees in a state. Thus, a state continuing to use the presumptive minimum may not have a shortfall. However, if states using the presumptive minimum approach do have a revenue shortfall due to GHG permitting, the statute requires the shortfall to be addressed. The EPA has had, and will continue to have, the ability to require states that use the presumptive minimum to increase their fees if the presumptive minimum results in a revenue shortfall that imperils operating permit program implementation and enforcement. Thus, although we are not changing the presumptive minimum in our regulations, we plan to follow the same oversight approach for states using the presumptive minimum as for those collecting less based on a resource demonstration. As described above, this approach may involve fee audits with emphasis on whether the additional GHG workload is being appropriately funded, and other appropriate follow-up.

Consistent with our proposal, EPA is not modifying its own part 71 fee structure (which closely mirrors the presumptive minimum) in order to charge an additional fee for GHG. EPA must revise its fee schedule if the schedule does not reflect the costs of program administration. We have not determined that the existing fee structure will be inadequate to fund the part 71 programs costs during the first two phases of permitting GHGs as set forth in this action. However, we are required to review the fee schedule every two years, and make changes to the fee schedule as necessary to reflect permit program costs. 40 CFR section 71.9(n)(2). Thus we will continue to examine the increases in part 71 burden due to GHG permitting, the current revenue collection, and the increases in revenue from newly-subject part 71 sources, and will adjust the part 71 fee approach accordingly.

Finally, several state and industry commenters asked EPA to provide guidance and recommendations for an appropriate GHG fee structure. We note that title V grants permitting authorities considerable discretion in charging fees to sources for title V purposes and does not require or prohibit fees specifically for GHGs, provided the states collect fees in the aggregate that are sufficient to cover all the direct and indirect program costs. In responding to requests for guidance, we do not wish to limit

state discretion. For example, some commenters suggest that EPA prohibit emissions-based fees for GHG or cap the amount that can be collected, while others suggest we provide a range of acceptable fees. We are concerned that, given the wide variety of fee approaches that states now take, providing specific guidance may be disruptive, rather than helpful, to states.

On the other hand, we recognize that it will initially be difficult for states to establish an appropriate emissions fee for GHG. As noted above, there are currently limited data available for establishing such a fee, and, due to the large quantities of GHG emissions, such a fee may only amount to a few cents per ton. At the same time, as noted in the proposal, a number similar to that used for other pollutants (e.g., the presumptive minimum of \$45/ton of GHG) would be inappropriate because it would likely result in huge over-collection. Because of this challenge, we note that §70.9(b)(3) allows the state to charge fees to individual sources on any basis (e.g., emission fee, application fee, service-based fees, or others, in any combination). While most states use emissions-based fees, there is merit to considering all the available fee bases to address increased GHG workload, including approaches that do not require a GHG emissions inventory for fee purposes. For example, where it is possible to estimate a revenue shortfall as a percentage

of fee revenue, it may be appropriate to simply attach a percentage-based surcharge to each source's fee to match that shortfall. Similarly, where the shortfall could be estimated as a total dollar amount, a flat surcharge could be added to each source's fee to address the shortfall.

These suggestions should not be read to indicate that EPA prefers any particular approach, or that EPA rejects a cost per ton approach. Rather, they illustrate that it is possible to address a revenue shortfall without establishing a GHG per-ton fee. While the EPA is declining to recommend specific approaches in this preamble, we are committed to assisting states in implementing the fee requirements for GHG. Therefore, we will work with any state that requests assistance from EPA in developing a workable fee approach.

E. Other Actions and Issues

1. Permit Streamlining Techniques

In our proposal, we stated that while we were phasing-in permitting requirements, we would make a concerted effort to assess and implement streamlining options, tools, and guidance to reduce the costs to sources and permitting authorities of GHG permitting. We recognized that the development and implementation of these techniques should be an integral part of our strategy during the phase-in period, and we stated that we

would undertake as many of these streamlining actions as possible as quickly as possible. We discussed several streamlining techniques in particular, including (1) defining potential to emit ("PTE") for various source categories, (2) establishing emission limits for various source categories that constitute presumptive BACT, (3) establishing procedures for use of general permits and permits-by-rule, (4) establishing procedures for electronic permitting, and (5) establishing "lean" techniques for permit process improvements. The first three of these approaches have the potential to have the greatest impact in reducing the numbers of sources subject to PSD or title V (the definition of PTE) or of reducing permitting costs (presumptive BACT and general permits or permits-by-rule).

In our proposal, we also described the timing for development and implementation of these streamlining techniques. We explained that each of the first three techniques would generally take 3-4 years to develop and implement, and therefore would be of limited use in the near-term. This time frame is necessary because EPA will first need to collect and analyze small source data that we do not currently have - because these are sources that EPA has not traditionally regulated -- in order to assess which of these techniques are viable or effective for such sources. In general, EPA will then need to

conduct notice-and-comment rulemaking to establish the approaches, and that rulemaking will need to address various legal and policy aspects of these approaches. After that, the permitting authorities will need some time to adopt the streamlining techniques as part of their permitting programs.

We received several comments on streamlining techniques. In general, the comments indicate widespread support for our pursuit of streamlining approaches, but some commenters were concerned that one or more of EPA's identified streamlining options were complex, vague, ineffective, and questionable legally. Noting our proposal to phase-in permitting, in part to allow more time to develop streamlining options for smaller sources, some commenters suggested that we should delay permitting for larger sources for the same reasons. We disagree. Such a delay is not justified under the legal doctrines of "absurd results" and "administrative necessity." While implementation of steps 1 and 2 - which will cover larger sources -- will pose implementation challenges, and some of the streamlining tools could assist with meeting these challenges, we have assessed the burdens associated with GHG permitting and have established a phase-in schedule that represents a manageable workload, even in the absence of streamlining techniques. On the other hand, we do agree with these

commenters that, absent streamlining, applying PSD and title V requirements to the much large number of small sources would lead to absurd results and administrative impossibility. The sources for whom the phase-in delays applicability are precisely the sources that have the greatest need for streamlining measures, and thus the greatest need for a deferral while we develop and implement streamlining options.

In addition, commenters generally echoed many of our concerns about why it will take time to put these measures in place, and no commenter presented any information to suggest that our 3-4 year estimate for the PTE, presumptive BACT, and general permit measures was invalid.

For these three techniques, we continue to believe that as we noted at proposal, we will require collection of significant category-specific data for source and emission unit types that have heretofore generally not been regulated by the CAA (e.g., furnaces, water heaters, etc.), which could take up to one year. Moreover, commenters had differences of opinion as to whether and how we should move forward on these approaches, and some raised policy and legal issues that we would likely want to

explore through a notice and comment process.⁴¹ Even if a rulemaking were done expeditiously, it would likely require one year. Finally, unlike lean and electronic permitting, these approaches, once finalized by EPA, will likely require additional time of up to two years for states to adopt. Thus, it is clear that these approaches will not be in place in time to ease any burden prior to the planned rulemaking for step 3.

Some commenters did observe that the fourth and fifth techniques, lean and electronic permitting, could, at least theoretically, become available sooner. However, these commenters also noted that successful design and implementation of these approaches will require implementation experience with GHG permitting that is not now available. We expect that for the lean and electronic permitting techniques, at least one year of implementation experience (of the type that we will gain starting in 2011) would be required, plus at least an additional year to extrapolate that experience to small sources and put these approaches into effect for small source permitting. Thus, we do not think the lean and electronic permitting would be in place before the beginning of 2013. Moreover, a handful of

⁴¹ We do not attempt to address or resolve the various opinions about what legal or policy direction we must take regarding any of these streamlining options. The proper forum for doing that will be in the action(s) where we apply a given option. Nonetheless, our response to comments document provides additional detail about the options we described and what commenters said about our proposed options. In addition, the comments themselves can be accessed in the docket for this action.

commenters questioned whether lean and/or electronic permitting would alleviate significant burden. Thus we are not able, at this time, to presume that these approaches will ease any burden prior to the planned rulemaking for step 3.

It is also important to note that, as a practical matter, while these efforts to streamline the program for small sources are underway, EPA and states will also be devoting a significant amount of their permitting resources and expertise to implementing the PSD and title V programs for the GHG-emitting sources covered under Steps 1 and 2. We have established these steps in a manner that they will be feasible for EPA and state/local/tribal authorities, but even so, they will not only consume current permitting authority resources, but they will also require substantial additional resources. As a result, the efforts to develop and implement streamlining techniques will have to compete with the work necessary to administer existing programs. For example, during the remainder of 2010, as described elsewhere in this notice, EPA permitting program resources will, in addition to continuing to administer programs for non-GHG pollutants, be used to conduct at least the following GHG-related activities in addition to streamlining:

- (1) develop BACT and other information and guidance for implementing programs for sources covered by Step 1, followed by

additional guidance and information for sources covered by Step 2; (2) review and act on information we receive regarding state adoption of GHG permitting requirements, which may entail narrowing of previous SIP approvals or processing of other programmatic revisions; and (3) propose and finalize measures to address programs with deficiencies in GHG coverage. As the beginning of step 2 nears, we will also begin to receive and process the first applications for permits that will incorporate GHG requirements (i.e., those that will be issued after January 2, 2011). States seeking to implement streamlining approaches will face similar competition for permitting resources.

These time frames and resource considerations for streamlining confirm the approach to phase-in that we are taking in today's rule. First and foremost, they make clear that it will not be possible to have streamlining measures in place in time for either Step 1 or Step 2. Therefore our selection of threshold for those steps is not built on assumptions that streamlining will remove some or all of the burden during those steps.

Second, they make clear that, while no significant streamlining can be in place by the time we must begin to develop the step 3 rule (i.e., latter half of 2011, to promulgate by July 2012, effective July 2013), it is likely that

by that time EPA and states will have had an opportunity to gain implementation experience that could serve as the basis for beginning to implement streamlining techniques that do not require rulemaking or state adoption (e.g., lean and electronic permitting). It is also likely that we will have had an opportunity to gather technical information - which we have already begun to gather --for certain source and emissions unit categories that would be necessary to support proposal of PTE or presumptive BACT approaches for those categories. We expect that the step 3 rulemaking will provide an opportunity for us to use that experience and data to begin to propose streamlining approaches that need notice and comment rulemaking. We can also begin to take into account any burden reductions from possible early streamlining efforts - that is, through lean and electronic permitting -- in the establishment of step 3.

Third, it is clear that the potential availability of streamlining measures does not call into question our decision today that in no event will we broaden PSD and title V applicability to cover GHG-emitting sources below the 50,000 tpy CO₂e level prior to July 2016, as discussed elsewhere. EPA cannot now predict the resources that will be required to implement PSD and title V programs for GHG-emitting sources once various streamlining techniques are ultimately completed. This

is uncertain not only because we need data and implementation experience with GHG permitting during steps 1, 2, and 3 that we can apply to estimates for small sources, but also because, as comments indicate, there is a broad range of legal and policy issues to consider in crafting the streamlining approaches we ultimately adopt. We have presented an initial assessment of options and obtained views of commenters both supporting and opposing them, and it is the result of these future actions, whose outcomes are uncertain at this time, that will ultimately determine the extent to which streamlining approaches will allow for the administration of PSD and title V programs for numerous small sources. Thus, while we are optimistic that we can craft workable, common-sense solutions, we nonetheless, believe it is important to preserve our small source exclusion until we have not only had time to put the streamlining approaches in place, but also have had time to assess the burdens that remain, before we bring in additional sources below the 50,000 tpy levels. We believe that the six-year timeframe will require a sustained intensive effort by EPA and states to develop, adopt, and implement streamlining techniques, and will require EPA to then evaluate those techniques and complete a rulemaking concerning PSD and title V applicability to small-sources based on that evaluation. In this manner, the six-year period will give us

the necessary time to make the best decisions about the actions we should take beyond step 3.

While comments make clear that there are issues to be addressed, nothing in the comments has persuaded us that we should abandon our streamlining efforts. To the contrary, the strong support for these efforts shown by many commenters reinforces our intention, as stated at proposal, to move forward with these approaches as an integral part of our phase-in approach. Moreover, notwithstanding the competition for GHG permitting resources and expertise, we believe it is critical that we move forward expeditiously. As noted above, we are already taking a first step by initiating permitting for larger sources, beginning January 2011, that will begin to provide valuable implementation experience. This experience can be useful in allowing states to begin implementing early streamlining measures, like lean and electronic permitting, which do not require EPA action. We have also already begun, and will continue, developing data necessary to support rulemakings addressing approaches such as PTE, presumptive BACT, and general permits. We expect to be able to use these data to support rulemakings on these topics, as appropriate, at about the same time as our step 3 rulemaking. Because of the uncertainty surrounding such approaches, we are not today

committing to finalize rules on any particular approach, but we do plan to pursue all streamlining options as expeditiously as possible, beginning immediately and proceeding throughout the phase-in period, and we encourage permitting authorities to do the same. We commit to consider a wide array of possible streamlining measures, and we commit to propose and take comment on, in the step 3 rulemaking, a set of those measures that we determine are viable to pursue further.

2. Guidance for Best Available Control Technology

Determinations

The CAA requires that a PSD permit contain, among other things, emissions limits based on the best available control technology (BACT) for each pollutant subject to regulation under the Act emitted from the source that triggers PSD. 42 U.S.C. § 7475(a)(4); 42 U.S.C. § 7479(3). BACT is defined as follows:

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the

emissions allowed by any applicable standard established pursuant to section 111 or 112 of this Act. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to enactment of the Clean Air Act Amendments of 1990.
42 U.S.C. § 7479(3).

Thus, the BACT process is designed to determine the most effective control strategies achievable in each instance, considering energy, environmental, and economic impacts. However, the case-by-case nature of BACT, together with the range of factors and technologies that must be considered, presents a challenge in determining BACT for newly regulated pollutants. When a new pollutant is regulated, the first permit applicants and permitting authorities that are faced with determining BACT for a new pollutant will likely need to invest more time and resources in gathering and analyzing information necessary to make an assessment of BACT under the statutory criteria. Once the PSD permitting program matures with respect to the new pollutant, successive BACT analyses will establish precedents that can inform subsequent BACT determinations. While the BACT provisions clearly contemplate that the permitting authority evaluate control strategies on a case-by-case basis, EPA recognizes the need to develop and share policy guidance and technical information for sources and permitting

authorities as they begin to permit sources for newly regulated pollutants, such as of GHGs. When applied in a practical manner, this additional EPA guidance and technical information should reduce time and resource needs when evaluating BACT for newly regulated pollutants.

As described in the proposed GHG Tailoring Rule, EPA intends to compile and make available technical and background information on GHG emission factors, control technologies and measures, and measurement and monitoring methodologies for key GHG source categories. We expressed our intent to work closely with stakeholders in developing this supporting information and to ensure this information is available in sufficient time to assist permitting agencies in their BACT determinations. The proposal took comment on what other types of support or assistance EPA can provide to initially help air pollution control agencies with the permitting of GHGs.

Commenters on the proposed GHG Tailoring Rule generally supported EPA providing technical information and policy guidance for sources of GHGs. Several commenters specifically requested guidance to clarify GHG-related issues, such as how to compute CO₂eq emissions, how to evaluate emissions of CO₂ from biomass fuel, and whether an air quality analysis will be required for GHGs. Additionally, commenters requested that EPA

issue "white papers" and other tools that would provide information on a range of control technologies and measures for major stationary source categories, such as power plants, cement kilns, glass furnaces, and other sources. Many of these commenters further requested that EPA provide an opportunity for stakeholder input on the guidance, and a few commenters insisted that permitting for sources of GHGs should not begin prior to issuing final guidance.

Consistent with our commitment at proposal to involve all stakeholders in our guidance development, EPA called upon the CAAAC in September 2009, to provide assistance and recommendations for what types of guidance and technical information would be helpful.⁴² Specifically, our charge to the CAAAC was "... to discuss and identify the major issues and potential barriers to implementing the PSD Program under the CAA for greenhouse gases ... [and] focus initially on the BACT requirement, including information and guidance that would be useful for EPA to provide concerning the technical, economic,

⁴² The CAAAC is a senior-level policy committee established in 1990 to advise the U.S. EPA on issues related to implementing the Clean Air Act Amendments of 1990. The committee is chartered under the Federal Advisory Committee Act and has been renewed every two years since its creation. The membership is approximately 40 members and experts representing state and local government, environmental and public interest groups, academic institutions, unions, trade associations, utilities, industry, and other experts. The CAAAC meets three times a year, normally in Washington, D.C. It provides advice and counsel to EPA on a variety of important air quality policy issues. The committee has formed several subcommittees to provide more detailed discussion and advice on many technical issues.

and environmental performance characteristics of potential BACT options." This charge also requested the CAAAC to "identify and discuss approaches to enable state and local permitting authorities to apply the BACT criteria in a consistent, practical and efficient manner."

At its October 6, 2009, meeting, the CAAAC established a Climate Change Work Group, made up of 35 representatives from a variety of industries, state and local governments, and environmental and public health non-profit organizations, organized under CAAAC's Permits, New Source Review and Toxics Subcommittee. The Work Group initially focused its attention on the procedure for evaluating BACT and decided that the process and criteria for determining BACT for criteria pollutants represented a workable and acceptable framework for GHGs. The Work Group also recommended a second phase, in which the Work Group would consider member proposals regarding possible alternative or supplementary approaches to applying the PSD program to GHG sources.

In February 2010, the CAAAC completed work on the first phase of their effort and sent EPA a list of recommendations that highlighted areas of the BACT determination process that are in need of technical and policy guidance. For more information, see the Interim Phase I Report on Issues related to

Best Available Control Technology (BACT) for Greenhouse Gases (GHGs), February 3, 2010 that is located in the public docket for this rulemaking and at http://www.epa.gov/air/caaac/climate/2010_02_InterimPhaseIReport.pdf. In response we are working on a number of fronts to develop technical information, guidance and training to assist states in permitting large stationary sources of GHGs, including identifying GHG control measures for different industries. EPA is currently working with States on technical information and data needs related to BACT determinations for GHGs. This includes developing the EPA Office of Research and Development GHG Mitigation Strategies Database, enhancing the RACT/BACT/LAER Clearinghouse to include GHG-specific fields, and preparing technical information on sector-based GHG control measures. Also, EPA is actively developing BACT policy guidance for GHGs that will undergo notice and comment and will culminate in training courses for State, local and tribal permitting authorities. The results of all of these efforts will roll out over the remainder of 2010. EPA currently awaits the Work Group's recommendations from its second phase of deliberations, which is underway as of the date of this notice.

EPA does not agree with some commenters' suggestion that EPA should delay permitting any sources until final BACT

guidance is issued. As discussed in the final action on reconsideration of the Interpretive Memo, delaying the application of BACT to enable the development of guidance or control strategies is not consistent with the BACT requirements. 63 FR at 17008. Furthermore, as just described, EPA expects such a delay to be unnecessary because EPA will soon begin providing technical information to inform BACT decisions, and will continue to provide additional guidance prior to the date that GHG permitting begins. However, even in the absence of such guidance, a delay would not be justified under the legal doctrines of absurd results and administrative necessity. While implementation of the BACT requirement during steps 1 and 2 will pose implementation challenges, EPA has assessed the burden associated with GHG permitting with consideration given to these challenges, and has established a phase-in schedule that represents a manageable workload.

Thus, while BACT will remain a case-by-case assessment, as it always has been under the PSD program, EPA is confident that this guidance development effort will help support a smooth transition to permitting emissions of GHGs. Furthermore, EPA will continue to work to provide the most updated information and support tools to allow permitting authorities to share and access the most updated information on GHG BACT determinations

as they are made once permitting of GHGs begins. EPA remains committed to involving stakeholders in the upcoming efforts to develop guidance to help to permitting authorities in making BACT determinations for sources of GHGs.

3. Requests for Higher Category-Specific Thresholds or Exemptions from Applicability

Although we did not propose any categorical exemptions, many commenters requested exemptions from major source and major modification applicability determinations under title V and PSD for certain types of GHG-emitting sources or certain types of GHG emissions as follows:

Source Categories. Many also commenters requested various exemptions or exclusions from source applicability for GHGs under both PSD and title V permitting, either during the phase-in period or permanently, citing anticipated burdens, societal costs, and differences in emission characteristics. Many non-traditional sources or source categories (sources that have not historically been required to get permits) requested exemptions from permitting based on GHG emissions, including agricultural, residential, and small businesses. In general, these non-traditional sources sometimes, but not always cited absurd results and administrative necessity arguments in their exemption requests.

Several commenters from sectors that consume a great deal of energy in their industrial processes and that are subject to international competitiveness, such as aluminum, steel, cement, glass, pulp and paper, and other manufacturers, requested that they be exempt from permitting under this final rule. These commenters opine that EPA has not carefully considered the environmental and economic consequences of this action because if we had, we would have exempted them for several reasons, including that other countries typically exempt similar sources from GHG cap and trade programs because the industries are making significant energy efficiency improvements absent GHG regulation, and because permitting such sources may cause many facilities to move to countries that have less regulation or no regulation for GHGs.

Other industry groups cited unique characteristics of their emissions, or the quantities in which they are emitted, that they argued should justify exclusion or unique thresholds. Semiconductor production facilities asked for exemptions, arguing that combustion-related GHG emissions are different from their GHG emissions, which result from the use of high-GWP industrial gases, such as PFCs, with higher GWP values that are more likely to trigger permitting requirements at relatively low tpy values. One lime production commenter stated that EPA could

encourage energy efficiency projects at their plants by excluding calcination and other process emissions, arguing that these emissions are a relatively small portion of the national inventory that will have no material effect on air quality and global warming. Another commenter requested that EPA exclude emissions from poultry production (natural bird respiration) from permitting consideration because the IPCC excludes them from their GHG emission estimates. Representatives of the landfill industry pointed to the relationship between current statutory thresholds that apply to their regulated emissions, primarily non-methane organic emissions (NMOC), and the equivalent amount of GHG emissions this corresponds to. They argued for a source-category specific threshold that is at least equivalent to their current NMOC threshold, or roughly 750,000 tpy CO₂e according to their estimate.

Although the proposal for the tailoring rule did generally discuss how the statutory requirements for major source applicability (100/250 thresholds) could be phased-in in ways that would offer relief to traditional and non-traditional sources, such as residences, farms, small business, and semiconductor manufacturers, it did so through the proposed establishment of relatively high CO₂e thresholds during the early implementation period and lowering the thresholds over time as

streamlining mechanisms become available to reduce administrative burdens. We did not propose any permanent exemptions of any kind. Also note that the proposal discussed energy efficiency, process efficiency improvements, recovery and beneficial use of process gasses, and certain raw material and product changes in the context of short-term, low-cost means of achieving GHG emission reductions for small-scale stationary sources, but not in the context of exemptions.

As discussed above, we are still considering whether permanent exemptions from the statute are justified for GHG permitting based on an absurd results theory. However, similar to our conclusion for the suggested biomass exclusion below, we have determined that we do not have sufficient basis to create any of the suggested exclusions. We did not propose any sort of permanent exclusion based on an interpretation of the statutory provisions of PSD or title V. Regardless of any arguments about the legality and advisability from a policy or economic standpoint of such exclusions, we would need to propose a PSD and/or title V specific legal and policy rationale that fits within the Clean Air Act, to specify details regarding our implementation approach, and to provide an opportunity for public comment before adopting any such exclusion. Therefore we are not doing so here. We note, however, that nothing in

today's rule forecloses the opportunities we may have to explore such options in the future.

The remaining option for creating such exclusions in this rule is to find that such an exclusion is necessary to avoid administrative necessity or absurd results. We did solicit comment on alternative approaches to the proposed phase-in for permitting. Some commenters suggested that the administrative necessity or absurd results rationale could be used to create at least temporary exclusions that would allow more sources to escape permitting than would already be excluded under step 1, step 2, and the small source exclusion until 2016. We considered each of these requests in the context of the overwhelming permitting burdens and the options for reducing such burdens, and ultimately decided that, given our threshold-based approach to the phase in, it is not appropriate to also adopt such exclusions to address the same burdens. We have finalized steps 1 and 2 using the threshold-based approach, which applies administrative necessity and absurd results arguments in a way that effectively exempts all small sources during this part of the phase-in. The suggested exclusions alone would not address the overwhelming permitting burdens, and the threshold-based approach would still be necessary. Moreover, once the threshold approach is applied as described,

we do not see that the remaining burdens would be so overwhelming as to lead to absurd results or administrative impossibility. While we could have crafted specific exemptions of the kind suggested as an alternative means of tailoring the programs, our approach achieves the same result and does so in a way that will be simpler to administer. Furthermore, specifically with respect to high GWP, gases as discussed above, we have included a mass-based trigger that addresses comments regarding the inclusion of those gases. Therefore, we are not finalizing any such exclusions in today's rule.

Concerning the comment that we did not take appropriate economic and environmental considerations into account for this rulemaking action, we disagree. The approach we finalize today for steps 1 and 2 minimizes economic burdens by limiting permitting to the largest GHG emission sources. We further note that the PSD program as applied to the sources that are covered in steps 1 and 2 contains an express requirement to take energy, environmental, and economic considerations into account when making control technology (i.e., BACT) decisions and accordingly many of the concerns about control costs will be able to be accounted for in that analysis.

Biomass Combustion/Biogenic Emissions. Several commenters request that EPA exempt emissions from biogenic activities or

biomass combustion or oxidation activities, including solid waste landfills, waste-to-energy projects, fermentation processes, combustion of renewable fuels, ethanol manufacturing, biodiesel production, and other alternative energy production that use biomass feedstocks (e.g., crops, or trees). For example, commenters urged that EPA exclude emissions from biomass combustion in determining the applicability of PSD to GHGs based on the notion that such combustion is "carbon neutral" (i.e., that combustion or oxidation of such materials would cause no net increase in GHG emissions on a lifecycle basis). Other commenters oppose the exemption of biogenic activities because they opine that carbon neutrality of biomass combustion is an incorrect assumption that stems from a "critical accounting error" in the Kyoto protocols. These commenters oppose the exemption of biogenic/biomass activities, citing the lack of a valid scientific basis for treating these GHG emissions differently than other GHG emissions.

The proposed Tailoring Rule did not address this issue of exemptions for biomass combustion or biogenic emissions. We discussed biogenic emissions in the context of discussing voluntary efforts underway for emission reduction of certain high-GWP gasses but there was no discussion of any exemptions from applicability for GHGs derived from biogenic activities or

biofuels combustion. We are mindful of the role that biomass or biogenic fuels and feedstocks could play in reducing GHG, and we do not dispute the commenters' observations that state, federal, and international rules and policies recognize carbon-neutrality in various ways. However, we have determined that we do not have sufficient basis to create an exclusion from the permitting applicability provisions for biomass combustion or biogenic fuels and feedstocks. Such an exclusion alone while reducing burdens for some sources, would not address the overwhelming permitting burdens described above, and a threshold-based approach would still be needed. Once we adopt a threshold-based approach, we do not have information regarding the administrative burden of permitting projects that specifically involve these source types, nor did the commenters provide any that demonstrate an overwhelming permitting burden would still exist that justifies a temporary exclusion for biomass sources.

At the same time, we did not propose any sort of permanent exclusion basis based on an interpretation of the statutory provisions of PSD or title V. Regardless of any arguments about the legality and advisability of such an exclusion, we would need to propose a PSD and/or title V specific legal and policy rationale and specify details regarding our implementation approach (e.g. an approach to carbon accounting), and would need

to provide an opportunity for public comment before adopting any such exclusion. Therefore we are not able to finalize such an approach here. We note, however, that nothing in today's rule forecloses the opportunities we may have to explore such options in the future.

We further note that, while we are not promulgating an applicability exclusion for biogenic emissions and biomass fuels or feedstocks, there is flexibility to apply the existing regulations and policies regarding BACT in ways that take into account their lifecycle effects on GHG concentrations. This topic has already been explored by the CAAAC workgroup on BACT issues related to GHGs that recently provided recommendations to EPA [DAVE S. provide a reference to report and docket it] While that group was unable to come to a consensus on how biomass-based emissions should be treated, it provided us with information that we will consider as we issue guidance on BACT. As previously discussed, we plan to issue BACT guidance later this year, but are not doing so as part of this rulemaking. This issue warrants further exploration in that context, and we plan to fully explore it and take action as appropriate.

Fugitive Emissions. Numerous commenters believe that fugitive GHG emissions should be excluded from major source determinations, citing difficulties in measuring or estimating

such emissions. Others believe EPA did not address fugitive emissions in the proposal and they ask for clarification of the treatment of fugitive GHGs in applicability determinations under PSD and title V. Some of these commenters state that EPA has not undertaken a rulemaking under section 302(j) for any source category of fugitive GHGs, so they should not be included. Several commenters representing the solid waste disposal industry requested exemptions for fugitive emissions for landfills and waste-to-energy projects, pointing out that current practice under PSD is for fugitive emissions from certain landfills to not be counted toward major source determinations.

In the proposal, EPA did not offer any specific guidance or discuss exemptions for fugitive emissions of GHGs. Commenters did not suggest that a fugitive exemption would address the overwhelming permitting burdens described above, or that it was necessary to specifically tailor GHG applicability through the use of a fugitive emissions exclusion for categories that would otherwise be required to include them. We do agree with commenters' stating that we should clarify how to count fugitives in determining applicability under this rule. In response, we note that we are not finalizing any special rules for fugitive emissions related to GHG. Thus, EPA's rules

related to the treatment of fugitives would apply. Regarding the comment that a 302(j) rulemaking is required before fugitive emissions may be counted, we disagree. As we read 302(j), once EPA has established by rule that fugitive emissions are to be counted for a specific source category, nothing in section 302(j) requires EPA to conduct new rulemaking to allow for the counting of additional pollutants from that category. We read 302(j) as imposing an obligation to determine if fugitive emission generally should be counted from a source or source category and not requiring that EPA list both source categories and relevant pollutants. Indeed, our practice in listing categories has not been to limit the pollutants to which the listing applies. Therefore, we are applying our existing rules and policies for fugitive emissions for GHG as we would any other pollutant.

Pollution Control Projects. Other commenters request exemptions for pollution control projects from PSD major modification requirements, particularly projects that increase the efficiency or thermal performance of a unit or facility, resulting in emission reductions on a pounds/megawatt-hour or production basis. The current PSD rules do not exclude pollution control projects from being considered a physical change or change in the method of operation that would - if it

resulted in a significant net emissions increase -- constitute a major modification, nor does case law suggest that we could adopt a permanent exclusion in the future⁴³. We also do not believe we should adopt an exclusion for pollution control projects that relies solely on absurd results or administrative necessity for reasons similar to those described above for other requested exclusions. Although such an exclusion may have positive features, it would not address the overwhelming permitting burdens that justify the tailoring approach.

4. Transitional Issues including Requests for Grandfathering

In the tailoring rule proposal, we did not discuss or specifically ask for comment on any provisions to address the transition from a permitting regime that does not incorporate greenhouse gases to one that does, such as "grandfathering" provisions or similar approaches that would exempt previously issued permits or pending applications from having to incorporate requirements for greenhouse gases. We nonetheless received several public comments that addressed a variety of transitional issues. One group of comments addresses

⁴³ On June 24, 2005, the United States Court of Appeals for the District of Columbia Circuit vacated the portions of the 2002 and 1992 NSR rules that pertained to PCP, among other provisions. In response to this Court action, on June 5, 2007, EPA removed these provisions from the NSR regulations. (See 72 FR 32526). These provisions were added as part of EPA's NSR improvement rule that was issued on December 31, 2002.

situations prior to permit issuance where a PSD or title V application is either administratively complete or more generally being processed prior to the trigger date for GHG permitting ("in process" applications). Another group of comments addresses situations where a PSD or title V permit is issued prior to the GHG trigger date and the commenters request that the application and/or permit be exempt from any requirements for updates related to GHGs after permit issuance.

With respect to PSD, many commenters requested that we adopt a "grandfathering" approach to applicability to exempt projects that have administratively complete PSD or minor NSR permit applications pending when the GHG permitting requirements go into effect. Several commenters urged us to promulgate transition provisions (without specifically using the term "grandfathering"), pointing out that we have provided transition periods for revising pending PSD permits, in the past, when new PSD rules were issued (e.g., in late 1970s and 1980). These commenters assert that GHG requirements will cause more disruption than those previous rule changes. Several commenters asked that PSD applications be evaluated on the basis of the PSD requirements effective when the application is submitted and if submitted prior to the trigger date, then the application and permit would not need to address GHGs. Several commenters also

asked that PSD sources with a valid permit that commences construction within 18 months of the trigger date not be required to seek a revised PSD permit for GHGs. Similarly, several commenters asked that PSD permits issued prior to the GHG trigger date not be required to be reopened only for the purpose of addressing GHG emissions. Additional commenters asked that we clarify that sources or projects not be required to obtain PSD permits if they obtained a determination that PSD did not apply (a "non-applicability" determination) prior to the GHG trigger date. Finally, many commenters also requested "grandfathering" for title V so that existing title V applications and permits do not need to be amended, revised, or resubmitted to address GHGs after they become "subject to regulation". Other commenters asked that transition provisions for title V be provided in the final action that would be similar to those requested for PSD.

We partially addressed transitional issues for PSD permitting in our April 2, 2010 final action on reconsideration of the Interpretive Memo. 75 Fed. Reg. at 17021. This action addressed the applicability of PSD permitting requirements for greenhouse gases to pending PSD permit applications that were (or will be) submitted prior to January 2, 2011 based on emissions of pollutants other than greenhouse gases. However,

we have not yet addressed the questions raised by public comments concerning sources that obtain PSD permits, minor NSR permits, or determinations that no such permits are needed prior to the step 1 period set forth in this rule. We have also not yet addressed questions about the applicability of PSD permitting requirements for sources that are not currently required to submit an application for a PSD permit but that could be required to do so in step 2 of the phase-in established in this action. In addition, our April 2, 2010 action did not address transitional issues concerning the application of the title V provisions to greenhouse gases.

a. Transition for PSD Permit Applications Pending When Step 1 Begins

In its action on April 2, 2010, EPA explained that the Agency did not see grounds to establish a transition provision for pending PSD permit applications because we had determined that PSD permitting requirements would not apply the greenhouse gases for another nine months. We explained that permit applications submitted prior to April 2, 2010 should in most cases be issued prior to January 2, 2011 and, thus, effectively have a transition period of nine months to complete processing before PSD requirements become applicable to greenhouse gases. We also observed that, in the case of any PSD permit application

review that cannot otherwise be completed within the next nine months based on the requirements for pollutants other than GHGs, it should be feasible for permitting authorities to begin incorporating GHG considerations into permit reviews in parallel with the completion of work on other pollutants without adding delay to permit processing. Additional discussion of EPA's reasons for not developing transition provisions for PSD permit applications that are pending on January 2, 2011 are provided in the April 2, 2010 notice. 75 FR 17021-22.

For these same reasons, we continue to feel that a transition period is not warranted to incorporate GHG requirements into any PSD permit applications that are pending when step 1 of the permitting phase-in begins for those sources that would otherwise need to obtain a PSD permit based on emissions of pollutants other than greenhouse gases. Thus, this action makes no change to the position we expressed on this particular issue in the April 2, 2010 notice. In this final rule on tailoring the PSD program to address GHGs, we have determined that the additional burden of incorporating GHG requirements into PSD permits for the sources already required to obtain such permits is manageable in the step 1 period. Thus, this rule has added no additional requirements or limitations that would justify deferring the establishment of

pollution controls for this category of GHG sources once PSD permitting requirements are initially triggered for GHGs.

b. PSD Permits Issued Prior to Step 1

EPA has not historically required PSD permits to be updated or reopened after they are issued in the absence of an action by the applicant to change the physical or operational characteristics of the source described in the permit application. EPA's PSD permitting regulations contain no provisions that address the modification or amendment of a PSD permit or require a PSD permit to be reopened or modified on the basis of new PSD permitting requirements that take effect after the final permit is issued. Since PSD permits are construction permits, EPA has not required updates to PSD permits in the same manner as is typically required for operating permits that incorporate a variety of applicable requirements (such as title V permits and NDPES permits under the Clean Water Act). In addition, unlike operating permits, PSD permits are not required to be renewed. However, if construction under a PSD permit is not commenced in a timely manner or is discontinued for an extended period, a PSD permit may expire if an extension is not requested or justified. See, 40 C.F.R. 52.21(r)(2); 40 C.F.R. 124.5(g)

With respect to the application of PSD permitting requirements for GHGs beginning on January 2, 2011, we do not see any cause to deviate from our historical practice of not requiring PSD permits to be reopened or amended to incorporate requirements that take effect after the permit is issued. Thus, we are not promulgating any new rules or requirements pertaining to PSD permits issued prior to Step 1 of the phase-in described in this rule. There is no mandatory requirement to reopen a previously issued PSD permit to incorporate GHG requirements that were not applicable at the time the permit was issued.

A major source that obtains a PSD permit prior to January 2, 2011 will not be required under EPA regulations to reopen or revise the PSD permit to address greenhouse gases in order for such a source to begin or continue construction authorized under the permit. Our current PSD permitting regulations provide that "[n]o new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states the major stationary source or major modification will meet those requirements." 40 C.F.R. § 51.166(a)(7)(iii); 40 C.F.R. § 52.21(a)(2)(iii). The term "begin actual construction" generally means "initiation of physical onsite

construction activities on an emissions unit which are of a permanent nature" and includes activities such as "installation of building supports and foundations, laying underground pipework and construction of permanent storage structures." 40 C.F.R. § 51.166(b)(11); 40 C.F.R. § 52.21(b)(11). A source that begins actual construction authorized under a PSD permit prior to January 2, 2011 will not be in violation of the prohibition described above if it continues construction after that date. This portion of the regulation precludes only beginning construction without the appropriate preconstruction permit and does not require a permit to be updated to continue actual construction that has already begun.

Furthermore, a source that is authorized to construct under a PSD permit but has not yet begun actual construction on January 2, 2011 may still begin actual construction after that date without having to amend the previously-issued PSD permit to incorporate GHG requirements. Sections 51.166(a)(7)(iii) and 52.21(a)(2)(iii) require "a permit that states the major stationary source or major modification will meet those requirement," which refers to the "requirements in paragraphs (j) through (r)(5)" referenced earlier in those provisions. EPA construes this language to describe a permit that meets the requirements of paragraph (j) through (r)(5) that are in effect

at the time the permit is issued. Permitting and licensing decisions of regulatory agencies must generally reflect the law in effect at the time the agency makes a final determination on a pending application. See Ziffrin v. United States, 318 U.S. 73, 78 (1943); State of Alabama v. EPA, 557 F.2d 1101, 1110 (5th Cir. 1977); In re: Dominion Energy Brayton Point, LLC, 12 E.A.D. 490, 614-616 (EAB 2006); In re Phelps Dodge Corp., 10 E.A.D. 460, 478 n. 10 (EAB 2002).

Thus, a source may begin actual construction on or after January 2, 2011 under a PSD permit that authorized construction to begin prior to January 2, 2011 because such a permit states that the source will meet the requirements of paragraphs (j) through (r)(5) of these regulations (or state equivalents) that were in effect at the time the permit was issued. However, this would not be the case if the permit has expired because the applicant has discontinued construction or failed to commence construction by the necessary date. See, 40 C.F.R. 52.21(r)(2).

This approach is consistent with EPA's practice when the preconstruction permitting requirements change by virtue of the designation of an area as a nonattainment area after a PSD permit is issued. In transitional guidance issued by EPA in 1991, EPA explained that "the area designation in effect on the

date of permit issuance by the reviewing agency determines which regulations (Part C or D) apply to that permit." Memorandum from John S. Seitz, Director OAQPS, New Source Review (NSR) Program Transitional Guidance, page 6 (Mar. 11, 1991). This memorandum explained further that "where a source receives a PSD or other permit prior to the date the area is designated as nonattainment, the permit remains in effect" as long as the sources meets the conditions necessary to prevent the permit from expiring. Id. at 6.

This approach does not apply if the source engages in a major modification after January 2, 2011 that is not authorized by the previously issued permit. Once step 1 of the phase-in begins, if the PSD requirements for GHGs are applicable to a previously-permitted source that engages in a major modification not covered by the permit, such a source will need obtain a new PSD permit to authorize the modification and that permit may need to include GHG requirements depending on the level of increase in GHGs that results from the modification.

c. Additional Sources for Which PSD Applies in Step 2

In light of the terms of existing PSD regulations and the lead time provided in this action for sources that will first become subject to PSD permitting in Step 2, we do not believe there is presently a need to establish transition provisions for

sources that will be required to obtain PSD permits for the first time in Step 2 of the phase-in. As described above, under our current PSD permitting regulations, a new major stationary source or major modification may not begin actual construction without a PSD permit that meets the applicable preconstruction permitting requirements. 40 C.F.R. § 51.166(a)(7)(iii); 40 C.F.R. § 52.21(a)(2)(iii).

Since a permit must be obtained before a major source may begin actual construction, the major source preconstruction permitting requirements in sections 51.166 and 52.21 of the regulation do not generally apply to sources that begins actual construction at a time when it was not a major source required to obtain a PSD permit. One exception, however, is the unique circumstance when a source becomes a major source solely by virtue of the relaxation of an enforceable limitation on the source's potential to emit. 40 C.F.R. §51.166(r)(2); 40 C.F.R. § 52.21(r)(4). But absent these circumstances, PSD preconstruction permitting requirements do not generally preclude a source from continuing actual construction that began before the source was a source required to obtain a PSD permit. Thus, a source that began actual construction under the authorization of any previously required minor source or state construction permit is not required to meet any PSD

preconstruction permitting requirement that becomes applicable after actual construction begins unless the source engages in a major modification after PSD permitting requirements are applicable. Likewise, a PSD permit is not required after a source begins actual construction based on a valid determination (by the source or the permitting authority) that the source need not obtain either a major PSD permitting requirements or and minor NSR permit. Based on these provisions in existing regulations, EPA will not require any sources to which PSD permitting requirements begin to apply in step 2 to obtain a PSD permit to continue construction that actually begins before step 2 begins.

However, we will expect Phase 2 sources that begin actual construction in phase 2 (i.e., beginning July 1, 2011) to do so only after obtaining a PSD permit in accordance with sections 52.21, 51.166, or any applicable state regulation that meets the requirements of section 51.166. We recognize the potential for the triggering of step 2 to result in a change in status where a project may legally have begun actual construction before step 2 but did not do so and would then need a PSD permit. However we also note that we are providing over a year of lead time before PSD permitting requirements become applicable to step 2 sources. If projects would be adversely affected by this change in

status, this lead time affords an opportunity for sources planning such projects to secure appropriate minor NSR permits (which generally take less than a year to issue), non-applicability determinations, etc in time to avoid such a change in status. If a new or modified source that would become newly subject to PSD in step 2 plans to begin actual construction before step 2, it has more than a year to obtain the applicable preconstruction approvals and begin actual construction. Likewise, a step 2 source that does not anticipate the ability to begin actual construction before step 2 begins should have enough lead time to submit a PSD permit application and obtain the necessary permit without significantly delaying the project further. Therefore, we do not think it is necessary or appropriate to promulgate a transition provision that would exempt step 2 sources from PSD permitting requirements that will apply based on construction that begins after step 2 takes effect.

This approach for Step 2 sources that have obtained a minor source construction permit or non-applicability determination differs from the approach described above for source that obtained a PSD permit prior to Step 1. As described above, a Step 1 source that is authorized to begin actual construction before January 2, 2011 under a previously-issued PSD permit may

begin actual construction under that permit after January 2, 2011 without modifying the PSD permit to address GHGs.

However, a Step 2 source that was not required to obtain a PSD permit before Step 2 begins would need to obtain a PSD permit addressing GHGs if it has not yet begun actual construction prior to Step 2, even if the source had obtained any preconstruction approvals that were necessary to authorize construction prior to Step 2. This is because such a Step 2 source that begins actual construction after Step 2 would likely be doing so without having any permit meeting the requirements of paragraphs (j) through (r)(5) of section 52.21, 51.166, or a state equivalent. A source that has obtained only a minor source permit prior to Step 2 but that begins actual construction after July 1, 2011 would violate the requirements of section 52.21(a)(2)(iii), 51.166(a)(7)(iii), or a state equivalent, unless the source took care to ensure that it was authorized to construct under a PSD permit or could demonstrate that the source's minor source construction permit makes clear that requirement of paragraphs (j) through (r)(5) of sections 52.21, 51.166, or a state equivalent would be met by the source even though such a permit was not nominally a PSD permit. This difference in approach for non-PSD sources is driven by the terms of sections 52.21(a)(2)(iii) and 51.166(a)(7)(iii). Since

we have not provided any prior notice that we might be considering revisions to sections 52.21 and 51.166 to address this topic, we are unable to revise the regulations in this action to achieve the same result for non-PSD sources as for PSD sources. Furthermore, this difference in approach is not unreasonable since non-PSD sources will not trigger permitting for GHG until step 2 (only anyway PSD source trigger in step 1). Thus sources will have until July 1, 2010, an additional 6 months of lead time, to prepare for the transition described here.

EPA has previously promulgated exemptions that have authorized some sources that were not previously subject to the PSD regulations to commence construction on the basis of minor source permits after the date new PSD requirements have took effect in 1978 and 1980. See e.g. 40 C.F.R. 52.21(i)(1)(iv)-(v). There is a notable distinction between these provisions, which use the term "commence construction," and the terms of sections 52.21(a)(2)(iii) and 51.166(a)(7)(iii), which use the term "begin actual construction." Commerce construction is defined more broadly than begin actual construction to include obtaining all necessarily preconstruction approvals and either beginning actual on-site construction or entering into binding contracts to undertake a program of actual construction. 40

C.F.R. 52.21(b)(9); 40 C.F.R. 51.166(b)(9). The term commence construction is also defined in the Clean Air Act. 42 U.S.C. 7479(2)(A). Among other purposes, the term "commence construction" is generally used in the Act and EPA regulations to distinguish construction activities that are exempt from new PSD permitting requirements from those that are not. See e.g. 42 U.S.C. 7475(a); 40 C.F.R. 52.21(i)(1)(i)-(v). In the absence an explicit exemption in the Clean Air Act or the PSD regulations that uses the term "commence construction," we do not believe we can use the date a source "commences construction" under a minor source construction permit approval as a demarcation point for Step 2 sources that may continue ongoing construction activities without having to obtain a PSD permit based on emissions of GHGs. Since we did not provide prior notice of an intention to adopt transition provisions applicable to this situation, we are unable to adopt such an exemption in this action that applies the term commence construction in this context. Consequently, the approach described above applies the term "begin actual construction" based on the language in sections 52.21(a)(2)(iii) and 51.166(a)(7)(iii).

d. Transitional Issues for Title V Permitting

Since the title V permitting regulations already include a robust set of provisions to address the incorporation of new applicable requirements and other transitional considerations, we do not see grounds to establish unique transition or grandfathering provisions for GHGs in this action. Furthermore, since the purpose of title V is to collect all regulatory requirements applicable to a source and ensure compliance, we do not believe special exemptions for GHG requirements are likely to be justified. The existing title V rules do not provide any exemptions that relieve the obligation to incorporate all applicable requirements into a title V permit. However, the title V regulations contain numerous provisions that allow a reasonable period of time for incorporating new applicable requirements or applying for a title V permit that was not previously required. Transitional issues for incorporation of GHG requirements into title V permitting generally involve questions in the following categories: (1) permit application requirements for sources not previously subject to title V that will become subject to title V requirements in step 2 of the phase-in; (2) the need for updates or amendments to title V permit applications that are pending when GHGs become subject to regulation in Step 1 of the phase-in; and (3) the incorporation

of new applicable requirements for GHGs into existing permits for sources currently subject to title V.

With respect to the first category, a title V source applying for the first time must submit its permit application within 12 months after the source "becomes subject to the [operating] permit program" or such earlier time that the permitting authority may require (see §70.5(a)(1)). Sources not otherwise subject to title V can become major sources subject to title V due to emissions of GHG no sooner than July 1, 2011. If a source becomes "subject to the [operating] permit program" on July 1, 2011, then its permit application under the title V operating permit program would typically have to be submitted no later than July 1, 2012.

There are also existing regulations relevant for the second category of GHG transition issues, where sources currently subject to title V have title V permit applications pending with a permitting authority as of January 2, 2011. Where additional applicable requirements become applicable to a source after it submits its application, but prior to release of a draft permit, the source is obligated to supplement its permit application. See 40 CFR §§ 70.5(b); 71.5(b). Furthermore, title V permits are generally required to contain provisions to assure compliance with all applicable requirements at the time of

permit issuance. See CAA section 504(a); 40 CFR §§ 70.6(a)(1); 71.6(a)(1).__If a permitting authority determines that additional information is necessary to evaluate or take final action on an application (e.g. because of uncertainty over whether a draft permit assures compliance with all applicable requirements), it may, and should, request additional information from the source in writing and set a reasonable deadline for a response. See 40 CFR §§ 70.5(a)(2); 71.5(a)(2).

Likewise, the existing title V regulations provide sufficient transition for the third category of issues, where a source has additional GHG-related applicable requirements (such as the terms of a PSD permit) that must be incorporated into its existing title V permit. Where a source is required to obtain a PSD permit, the source must apply for a title V permit or permit revision within 12 months of commencing operation or on or before such earlier date as the permitting authority may establish (or prior to commencing operation if an existing title V permit would prohibit the construction or change in operation). See 40 C.F.R. §§ 70.5(a)(1)(ii); 71.5(a)(1)(ii); see also §§70.7(d) and (e); 71.7(d) and (e) (permit modifications). In addition, where a source becomes subject to additional applicable requirements, the permitting authority is required to reopen the permit to add those applicable

requirements if the permit term has three or more years remaining and the applicable requirements will be in effect prior to the date the permit is due to expire. See 40 C.F.R. §§ 70.7(f)(1)(i); 71.7(f)(1)(i).

Finally, EPA notes that the existing title V regulations require sources to furnish permitting authorities, within a reasonable time, any information the permitting authority may request in writing to determine whether cause exists for modifying, revoking, and reissuing, or terminating the permit, and for other reasons, and further provide that permitting authorities shall reopen and revise permits if EPA or the permitting authority determine that the permit must be revised or revoked to assure compliance with applicable requirements. See §§70.6(a)(6)(v);71.6(a)(6)(v) and §§ 70.7(f)(1)(iv); 71.7(f)(1)(iv).

Thus, EPA believes that the existing title V regulations provide an adequate regulatory framework for managing the transition to incorporating GHG requirements in title V permits and additional specific exemptions or transition rules for title V are not currently warranted.

VI. What are the economic impacts of the final rule?

This section of the preamble examines the economic impacts of the final rule including the expected benefits and costs for

affected sources and permitting authorities. The final rule uses a stepped phased-in approach for sources of GHG emissions to comply with title V operating permit and PSD statutory requirements, essentially lifting this burden for a period of at least six years for a large number of smaller sources of GHG. Thus, this rule provides regulatory relief rather than regulatory requirements for these smaller GHG sources. For larger sources of GHG that will be required to obtain title V permits and/or comply on PSD requirements, there are no direct economic burdens or costs as a result of this final rule, because these requirements are not imposed as a result of this rulemaking. Statutory requirements to obtain a title V operating permit or to adhere to PSD requirements are already mandated by the CAA and by existing rules, not by this rule. Similarly, this rule will impose costs to society in the form of foregone environmental benefits resulting from GHG emission reductions that, absent this rule, might otherwise have occurred at sources deferred from permitting during the phase-in period.

The regulatory impact analysis (RIA) conducted for this final rule provides details of the benefits or regulatory relief that smaller GHG sources will experience in terms of costs avoided as a result of this final rule and the potential for social costs in terms of foregone environmental benefits during

this 6-year period. Complete details of the regulatory impact analysis conducted for this final rule may be found in the document "Regulatory Impact Analysis for the Final Greenhouse Gas Tailoring Rule," in the docket for this rulemaking.

This rulemaking provides permitting thresholds for sources of GHG that exceed levels contained in the CAA and these levels are phased in steps based upon application of the administrative necessity and absurd results doctrines as explained in section V.B. For step 1 that is effective from January 2, 2011 through June 30, 2011, only sources required to undergo title V or PSD permitting based upon non-GHG air pollutants are required to obtain an operating permit or PSD permit to include GHG emissions. Step 2, effective from July 1, 2011 until such time as EPA acts on a rule to amend it (which for reasons described above, we assume is June 30, 2013 for the purposes of this analysis), requires larger sources emitting GHG above 100,000 CO₂e tpy to obtain a title V permit (if they do not already have one) and to comply with PSD requirements when they are newly constructed or modify in a way that increases emissions by more than a 75,000 CO₂e tpy significance level. Thereafter, EPA makes an enforceable commitment to consider a possible step 3 to further lower thresholds below 100,000 CO₂e tpy and/or permanently exclude some sources from the program(s), but only

after a regulatory process is conducted addressing administrative necessity and absurd results considerations based upon the actual permitting experiences in the first two steps of the phase-in. In addition, EPA provides a deferral of permitting until we take required action in April 2016 for sources and modifications that emit below 50,000 CO₂e tpy. The deferral will end when a required study is conducted of the permitting process for sources of GHG and EPA acts, based on the study, to promulgate a rule that describes the additional GHG permitting requirements beyond 2016. In the 6 years following promulgation of this rule, the EPA estimates that compared to baseline estimates that do not include the effects of this rule, over six million sources of GHG emissions in total will be allowed to continue to operate without a title V operating permit. During this period, tens of thousands of new sources or modifying sources each year will not be subject to PSD requirements for GHG. For this large number of smaller sources, this rule alleviates the regulatory burden associated with obtaining an operating or PSD permit or complying with NSR BACT requirements. Therefore, this final action may be considered beneficial to these small sources because it provides relief from regulation that would otherwise be required.

This decision does potentially have environmental

consequences in the form of higher emissions during the 6-year period of time (generally because emissions increases would have been lower if BACT were applied). These consequences are limited due to the fact that sources between 100/250 and 100,000 CO₂e tpy account for an estimated 11 percent of the six directly emitted GHG nationally from industrial, commercial, and residential source categories, while representing over 95 percent of the total number of sources potentially requiring an operating or PSD permit for GHG under current permitting thresholds in the CAA. Moreover, requiring such a large number of small sources to obtain permits for the first time would overtax the permitting authorities' abilities to process new permits and would therefore interfere with any such benefits actually being achieved. Moreover, reductions from these small sources will still be occurring, notwithstanding the fact that permitting requirements would not apply to them. These smaller sources of GHG will be the focus of voluntary emission reduction programs and energy efficiency measures that lead to reductions in GHG. We will also reevaluate this decision after a 6-year period and complete a study of the implications for those sources and permitting authorities of permitting smaller GHG sources beyond 2016.

In reaching the preceding decisions for this final rule, we carefully considered comments received on the tailoring rule proposal. We received several comments specifically on our description of the impacts of this rule. Most of these comments disagreed with our assertion that the rule is a "relief" rule. Others assert that we should have prepared a more comprehensive RIA than prepared for the rule proposal. Those commenting contend: (1) we understated the burdens of the rule while overstating its relief at proposal; (2) we erroneously omitted the impacts for "larger sources" of GHG from the proposal RIA and should have recognized the burden to "larger sources" due to other GHG actions; (3) the economic impacts the rule will have on industry and the U.S. economy society in general will be burdensome, especially given the current state of the economy; and (4) we need to propose a full RIA or a complete estimation of impacts to comply with CAA section 307(d) and the Administrative Procedure Act.

EPA has carefully considered the comments addressing the issue of whether the tailoring rule is a regulatory "relief rule", and we are not persuaded that we erred in concluding that the effect of the tailoring rule is to provide regulatory relief to a large number of sources of GHG for a period of up to six years. This final rule will provide relief from title V

permitting to over 6 million sources of GHG in this country. Likewise tens of thousands of sources potentially subject to PSD permitting requirements annually for GHG will have regulation postponed for a period of up to 6 years under this rule, followed by an additional required rule addressing the period beyond 6 years. While larger sources of GHG may be required to obtain title V permits or modify existing permits and to comply with PSD requirements, these burdens result not from the tailoring rule but rather from the CAA requirement to apply PSD to each pollutant subject to regulation, which is triggered when the LDVR takes effect. To clearly illustrate this, consider what would occur if EPA did not complete the tailoring rule. Sources would not be relieved of the requirement to obtain permits addressing each pollutant subject to regulation when they construct or modify, nor would they be relieved of their obligation to obtain title V permits. Instead, these requirements would simply apply to a much larger population of sources and modifications, and would lead to the absurd results and severe impairment to program implementation that this rule is designed to address.

In response to comments asserting that the RIA completed for proposal of this rulemaking: (1) understated the burdens of the rule and overstated the benefits, (2) did not fully

recognize the rule will be burdensome, especially given the current state of the economy; and (3) does not consider a complete estimation of impacts to comply with the Administrative Procedure Act and CAA section 307(d) and needs to correct flawed or erroneous assumptions, EPA did make improvements and modifications to the RIA completed for this final rule. Based upon comments, EPA modified estimates of the number of sources affected at various threshold levels upward. EPA also improved the burden estimates associated with obtaining permits for sources and permitting authorities. After consideration of the burden imposed by the proposed rule with these improved estimates for affected sources, the EPA modified the steps of the phase-in period to include two initial steps, described in section V, that are higher, and therefore cover fewer sources and are less burdensome than the proposal threshold of 25,000 CO₂e tpy emissions. EPA also increased the threshold below which permitting would not apply for six years from 25,000 to 50,000 tpy CO₂e. After the initial two step period, EPA has committed to consider lower thresholds but only down to 50,000 tpy CO₂e, and only after a regulatory process that uses information gathered on actual permitting activity during the first two steps of the phase-in period. The RIA conducted for the final rule also incorporates improvements in our estimates of the

number of sources affected at alternative thresholds and improved estimates of the costs of obtaining permits by sources and processing permits by permitting authorities. The EPA acknowledges that the regulatory relief associated with the control costs due to BACT requirements for PSD new and modifying sources is not included in the RIA for the final rule due to the lack of sufficient data about the nature of those requirements. However, it is the case that, as it relates to burden, those estimates would simply increase the amount of regulatory relief associated with this final rule.

Finally, with regard to comments that the RIA should have been a more comprehensive analysis to include the larger sources of GHG that will be required to obtain permits when GHG are regulated, the EPA maintains as previously explained that there are no direct economic burdens or costs as a result of this rule for these sources. Requirements for larger GHG sources to obtain title V or PSD permits are already mandated by the Act and by existing rules and are not imposed as a result of the tailoring rule. Thus the economic impacts for larger sources of GHG do not occur because of this tailoring rule. To include these larger sources in the RIA would actually be an inaccurate assessment of how this rule affects sources and would ignore the fact that this rule is regulatory relief.

A. What entities are affected by this final rule?

As previously stated, this final rule does not itself result in the application of permitting requirements to any industrial, commercial, or residential entities. Entities affected by this rule are those who experience regulatory relief due to the higher thresholds and deferred applicability set forth in this rule. This action increases the threshold to obtain a title V and PSD permitting from statutory CAA levels using a phased-in step process as previously discussed. As table VI-1 shows, this action lifts permitting requirements for over six million potential title V sources in total and tens of thousands of potential PSD new sources annually that would be otherwise required by the CAA to obtain permits. Under step 1, over six million title V sources in total and approximately 20 thousand new PSD sources per year will not be required to obtain permits. Under step 2, requiring sources over a 100,000 tpy CO₂e to obtain a permit, over six million title V sources in total and approximately 19.9 thousand new PSD sources per year will obtain regulatory relief. While the threshold approach differs for steps 1 and 2 of the phase-in plan, the estimated number of sources affected does not differ greatly as shown in Table VI-1. Sectors experiencing this regulatory relief include electricity, industrial, energy, waste treatment, agriculture, commercial and

residential.

Table VI-1. Estimated Number of Affected Sources Experiencing Regulatory Relief^{1,2}

Sector	Number of Sources Experiencing Regulatory Relief			
	Non-GHG Based		<100,000 tpy	
	Title V	New PSD	Title V	New PSD
Electricity	285	93	285	33
Industrial	170,910	604	170,654	599
Energy	2,588	48	2,536	44
Waste Treatment	3,358	2	3,165	1
Agriculture	37,351	299	37,351	299
Commercial	1,355,921	12,041	1,355,870	12,039
Residential	4,535,500	6,915	4,535,500	6,915
Totals	6,105,913	20,002	6,105,361	19,930
% Emissions Covered ³	13%		11%	

Notes: (1) Number of sources is determined on a potential to emit basis. Estimates for title V are the total number of sources expected to experience regulatory relief. PSD sources are annual estimates of newly constructed facilities and do not include modifications at existing facilities that may also be subject to PSD requirements. (2) See Appendices to 'Regulatory Impact Analysis of the Final Greenhouse Gas Tailoring Rule' for more details of how thresholds and sources affected are developed. (3) Percentage of emissions covered represent estimated actual emissions from sources expected to experience regulatory relief as a percentage of total stationary source GHG emissions.

B. What are the estimated annual benefits to sources due to regulatory relief from the statutory requirements?

EPA estimated the annual benefits (avoided costs) to sources of GHG emissions and permitting authorities anticipated

from this final rule. In addition, an accounting of the benefits from this action as measured by avoided permit processing costs for state, local, and tribal permitting authorities is provided. These benefits or avoided costs relate specifically to information collection costs or burden costs postponed for smaller sources of GHG emissions otherwise required to obtain an operating permit under title V or required to modify an existing permit to address GHG emissions. Avoided costs shown also include information collection requirements for additional PSD permits postponed for new or modifying smaller sources of GHG, as well as the avoided costs to state, local and tribal permitting authorities. These estimates do not consider avoided emission control costs associated with PSD requirements for potential BACT requirements. Estimates for BACT are unavailable at this time because of the difficulty predicting the results of the BACT process as it would be applied to new pollutants and classes of sources for which there is no previous BACT experience on which to rely.

1. What are annual estimated benefits or avoided burden costs for title V permits?

Table VI-2 shows that the estimated annual title V benefits to sources and to permitting authorities in terms of avoided information collection cost resulting from this final action to be approximately \$70,524.3 million under step 1 of the phase-in,

the non-GHG based requirements threshold. These avoided costs become \$70,517.1 million annually under step 2 of the phase-in where permitting is required for sources at or above the 100,000 tpy CO₂e threshold. Under the non-GHG based phase-in step 1, approximately \$49,457.3 million in regulatory relief will accrue to sources and approximately \$21,067 million to permitting authorities annually in the form of avoided permit processing costs. With the <100,000 tpy CO₂e threshold for phase-in step 2, these annual regulatory relief benefits are expected to be quite similar at \$49,455.4 million for sources of GHG emissions and \$21,061.7 million for permitting authorities. Industrial sources permitting costs are estimated to be \$46.4 thousand per permit for a new permit and \$1.7 thousand for a permit revision. The EPA estimates that over tens of thousands of industrial sources per year will avoid incurring these permitting costs under steps 1 and 2 of the phase-in period. The cost for a permit for new commercial and residential sources is estimated to be \$23.2 thousand per permit with approximately 2 million of these permits avoided annually.

State, local, and tribal permitting authorities will also benefit in terms of avoided permitting administrative costs of over \$21 billion as a result of the decisions final in this action. For industrial sources, the cost for permitting authorities to process a new industrial title V

Table VI-2. Annual Title V Regulatory Relief for Sources and Permitting Authorities^{1, 2}

Activity	Cost per Permit (2007\$)	Step One Non-GHG Based		Step Two <100,000 tpy CO ₂ e	
		Number of Permits	Avoided Costs (millions 2007\$)	Number of Permits	Avoided Costs (millions 2007\$)
Sources					
New Industrial	\$46,350	71,829	\$3,329.3	71,829	\$3,329.3
New Commercial/Residential	\$23,175	1,985,948	\$46,024.3	1,985,930	\$46,023.9
Permit revisions due to GHG	\$1,677	61,836	\$103.7	60,921	\$102.2
Source Total		2,119,613	\$49,457.3	2,118,508	\$49,455.4
Permitting Authority					
New Industrial	\$19,678	71,829	\$1,413.5	71,829	\$1,410.1
New Commercial/Residential	\$9,839	1,985,948	\$19,539.7	1,985,930	\$19,539.6
Permit revisions due to GHG	\$1,840	61,836	\$113.8	60,921	\$112.1
Permitting Authority Total		2,119,613	\$21,067.0	2,118,508	\$21,061.7
Total Title V Regulatory Relief			\$70,524.3		\$70,517.1

Note (1) Annual title V avoided costs estimates represent information collection costs for one third of the total number of title V sources obtaining regulatory relief shown in Table VI-1 potentially requiring permits or permit revisions for GHG.

(2) More details on these estimated regulatory relief benefits are available in the Appendices to the "Regulatory Impact Analysis for the Final Greenhouse Gas Tailoring Rule".

permit is approximately \$19.7 thousand per permit and \$1.8 thousand for a permit revision. Similar permitting authority avoided permit processing costs are approximately \$9.8 thousand per permit for a new commercial or residential title V permit. All estimates are stated in 2007 dollars.

2. What are annual benefits or avoided costs associated with NSR permitting regulatory relief?

Table VI-3 summarizes the estimated annual information collection costs avoided by sources and permitting authorities for PSD permitting due to this tailoring rule. The benefits associated with avoided cost of compliance for BACT for these sources is not included in these estimates due to a lack of available data. The estimated avoided burden or reporting and recordkeeping cost that would occur absent this rule for new industrial sources to obtain permits is estimated to be \$84.5 thousand for a modifying PSD industrial source and \$59.2 thousand for a modifying commercial or multi-family residential source. New PSD sources will also be required to obtain a title V permit increasing these costs to \$130.9 thousand per permit for new industrial sources and to \$82.3 thousand per permit for new commercial or multi-family residential sources. (Note the title V costs for these new PSD sources have been included in title V estimates shown in Table VI-2.) New and modifying sources avoid approximately \$5.5 billion annually in PSD permitting costs with this rule under the phase-in step 1, non-GHG based threshold. Under the phase-in step 2, <100,000 CO₂e tpy threshold and <75,000 tpy CO₂e significance level, this avoided PSD permitting cost estimate becomes \$5.4 billion annually. State, local, and tribal permitting authorities are

expected to avoid about \$1.51 billion annually in administrative expenditures associated with postponing PSD program requirements for these GHG sources under step 1 and \$1.49 billion under step 2. All estimates are shown in 2007 dollars.

Table VI-3. Annual PSD Regulatory Relief for Sources and Permitting Authorities^{1,2}

Activity	Cost per Permit (2007\$)	Step One Non-GHG Based		Step Two <100,000 tpy Threshold, <75,000 Significance Level	
		Number of Permits	Avoided Costs (millions 2007\$)	Number of Permits	Avoided Costs (millions 2007\$)
Sources					
New Industrial	\$84,530	26,089	\$2,205.3	25174	\$2,128.0
New Commercial/Residential	\$59,152	55,509	\$3,283.5	55505	\$3,283.2
Source Total		81,598	\$5,488.8	80679	\$5,411.2
Permitting Authority					0
New Industrial	\$23,243	26,089	\$606.4	25174	\$585.1
New Commercial/Residential	\$16,216	55,509	\$900.1	55505	\$900.1
Permitting Authority Total		81,598	\$1,506.5	80679	\$1,485.2
Total Title V Regulatory Relief			\$6,995.3		\$6,896.4

Note: (1) All estimates are based upon potential to emit. Regulatory relief shown represents annual estimates of PSD permitting costs avoided under steps 1 and 2 of the phase-in period.

(2) More details on these estimated regulatory relief benefits are available in the Appendices to the "Regulatory Impact Analysis for the Final Greenhouse Gas Tailoring Rule".

C. What are the economic impacts of this rulemaking?

This final rulemaking does not impose economic burdens or costs on any sources or permitting authorities, but should be viewed as regulatory relief for smaller GHG emission sources and for permitting authorities. Although sources above the thresholds set in this rule will become subject to permitting on January 2, 2011, those impacts are not attributable to the present rulemaking. Rather they are mandated by the CAA and existing regulations and automatically take effect independent of this action.

In addition to considering the regulatory relief expected for affected entities as a result of this final rule, the EPA considered the impact of this rulemaking to small entities (small businesses, governments and non-profit organizations) as required by RFA and SBREFA. For informational purposes, the RIA includes the Small Business Administration (SBA) definition of small entities by industry categories for stationary sources of GHG and potential regulatory relief from title V and NSR permitting programs for small sources of GHG. Since this rule does not impose regulatory requirements but rather lessens the regulatory burden of the CAA requirements to smaller sources of

GHG, no economic costs are imposed upon small sources of GHG as a result of this final rule. Rather this action provides regulatory relief for small sources. These avoided costs or benefits accrue because small sources of GHG are not required to obtain a title V permit and new or modifying small sources of GHG are not required to meet PSD requirements. Some of the small sources benefitting from this action are small entities, and these entities will benefit from the regulatory relief finalized by this rule. For discussion of comments received and EPA responses regarding small entities impacts, see section VIII. of this preamble.

D. What are the costs of the final rule for society?

EPA examined the social costs of this final rule. These social costs represent the foregone environmental benefits that will occur as a result of the regulatory relief offered to sources of GHG emissions. This action is one of regulatory relief since it increases the emissions thresholds for the title V and PSD programs, as they apply to sources of GHG emissions, to levels above those in the CAA. In this preamble section, the benefits or avoided regulatory costs of such relief are discussed, but there is also a social cost imposed by such relief, because this rule may forego some of the possible benefits associated with title V and PSD programs for sources of GHG emissions below the permitting thresholds established.

These benefits are those attributed to title V and PSD permitting programs in general. These benefits are based upon the relevance of these programs to policymaking, transparency issues, and market efficiency, and therefore are very difficult to quantify and monetize. For title V, they include the benefits of improved compliance with CAA requirements that stem from (1) improved clarity regarding applicability of requirements, (2) discovery and required correction of noncompliance prior to receiving a permit, (3) improving monitoring, recordkeeping, and reporting concerning compliance status, (4) self-certification of compliance with applicable requirements initially and annually, and prompt reporting of deviations from permit requirements, (5) enhanced opportunity for the public to understand and monitor sources' compliance obligations, and (6) improved ability of EPA, permitting authorities, and the public to enforce CAA requirements. However, it is important to remember that a title V permit does not add new requirements for pollution control itself, but rather collects all of a facility's applicable requirements under the CAA in one permit. Therefore, the compliance benefits above are less when title V permits contains few or no CAA applicable requirements. During the initial steps of the phase-in plan established under this action, we expect that the vast majority of sources excluded from title V would be sources that

have no CAA applicable requirements for GHG emissions and few or no requirements for other pollutants because their emissions of those pollutants are so small. For this reason while it is extremely difficult to measure the degree of improved compliance, if any, that would be foregone, or to quantify the social costs that would be imposed, we expect that they would be negligible.

For PSD, the primary social cost imposed by the tailoring rule stems from the foregone benefit of applying BACT to the tens of thousands of small new sources and modifications that will be below our final thresholds during the first steps of the phase-in. This social cost potentially weighs against the cost savings described above that stem (in part) from avoiding the administrative and control costs of applying BACT to these sources. The BACT requirement assures that new and modified sources, when they increase their emissions are using state-of-the-art emission controls and affords the public an opportunity to comment on the control decision. It does not prohibit increases but it assures that such controls are applied.

Delaying the BACT requirement for numerous small sources during the first steps of the phase-in for this final rule could allow increases from these smaller sources that are greater than they would be if BACT were applied. A detailed analysis of this difference is beyond the scope of this rule, because we do not

have detailed information on the universe of these tens of thousands of small PSD actions, the candidate BACT technologies for each of them, how permitting authorities would make the BACT decisions, and how the BACT limit would compare to what would otherwise be installed absent BACT.

It is not possible at this time to quantify the social costs of avoided BACT. However we note that the universe of possible emissions that would be regulated by sources excluded under the tailoring rule is small compared to those that would remain subject to PSD. The sources excluded in these first two steps of the phase-in plan of this action comprise only 11 percent of total stationary source GHG emissions, while 67 percent remain subject to regulation. Furthermore, we expect the emissions differences due to BACT controls for such sources to be relatively small due to the lack of available capture and control technologies for GHG at such sources that are akin to those that exist for conventional pollutants and sources, as well as the likelihood that even in the absence of BACT such sources would already be installing relatively efficient GHG technologies to save on fuel costs. Thus, while potential benefits would be foregone by excluding smaller sources from the permitting programs, these benefits are likely to be small. Under the tailoring rule, we will be working during the 6-year period to greatly improve our understanding of both the

administrative costs of regulating and the social costs of not regulating smaller sources under PSD and title V, and we will be relying on that information to support our future threshold analyses called for under the action.

In reaching the decisions for this GHG tailoring rule, the EPA recognizes that GHG emissions can remain in the atmosphere for decades to centuries, meaning that their concentrations become well-mixed throughout the global atmosphere regardless of emission origin, and their effects on climate are long lasting and significant. A detailed explanation of climate change and its impact on health, society, and the environment is included in EPA's technical support document for the endangerment finding action (Docket ID No. EPA-HQ-OAR-2009-0171). The EPA recognizes the importance of reducing climate change emissions for all sources of GHG emissions including those sources afforded regulatory relief in this rule and plans to address potential emission reductions from these small sources using voluntary and energy efficiency approaches. Elsewhere, we have discussed EPA's interest in continuing to use regulatory and/or non-regulatory tools for reducing emissions from smaller GHG sources because we believe that these tools will likely result in more efficient and cost-effective regulation than would case-by-case permitting.

VII. Comments on Statutory and Executive Orders Reviews

A. Comments and Response on Statutory and Executive Orders

Section in the Proposed Rule

In this section, we provide responses to comments we received for various Executive Orders.

A. Comments on Executive Order 12866 - Regulatory Planning and Review

At proposal, EPA prepared an analysis of the potential costs and benefits associated with EPA's tailoring rule proposal in an RIA. Several commenters state that EPA's failure to estimate the full costs of the effects of its interpretation of PSD applicability in the proposed Tailoring Rule violates EO 12866. Some of these commenters maintain that EO 12866 directs EPA to submit to OMB new significant regulations under consideration by the EPA. These commenters assert that, in the section 202 rule, EPA failed to analyze the effect on stationary sources in the cost benefit analysis and there is no indication that EPA included these impacts in its submission to OMB. According to the commenters, in EPA's proposal for this rulemaking, EPA has similarly failed to analyze the costs and benefits of triggering PSD for stationary sources. The commenters assert that without this key information, OMB could not fully review the impacts of the proposed rule. The commenters believe that EPA's failure to account for known costs

that will occur as a direct result of the promulgation of the proposed rule in conjunction with the section 202 rule violates several applicable requirements of EO 12866, including sections 6(B)(ii) and 6(C)(iii), which require assessments of the potential costs and benefits of the regulatory action and "reasonably feasible alternatives to the planned regulation, identified by the Agencies or the public . . ." thereby violating both the Administrative Procedures Act and CAA section 307(d) because they deprive businesses and permitting authorities alike of a meaningful opportunity to comment on the rule.

The EPA has prepared a revised RIA assessing the benefits and costs of the final tailoring rule to support this rulemaking in accordance with E.O. 12866 as was done with the proposal for this rulemaking. Similarly the RIA completed for this action is subject to review by an Inter-agency review panel that includes the President's Office of Management and Budget as was the case with the proposal RIA. Further, the RIA completed for this final rule fully assesses the known benefits and costs associated with the tailoring rulemaking. This final rule is one of regulatory relief from statutory requirements in which a large number of sources of GHGs will be relieved of the burden of title V and PSD permitting for a period of at least six years. This final rule will provide relief from title V

permitting to over 6 million sources of GHG in this country. Likewise tens of thousands of sources potentially subject to PSD permitting requirements for GHGs will have regulation postponed for a period of at least 6 years. While larger sources of GHG may still be required to obtain title V permits or modify existing permits and to comply with PSD requirements, these burdens result from existing statutory requirements, not from this final tailoring rule.

B. Comments on Paperwork Reduction Act

At proposal, we stated in the preamble that we did not believe that the proposal would impose any new information collection burden. We concluded that the proposed action would reduce costs incurred by sources and permitting authorities relative to the costs that would be incurred if EPA did not revise the rule and provided estimates of those reduced costs. Further, we stated that, despite our estimated burden reductions, it was unnecessary for us to submit a new ICR to the OMB because the ICR contained in the existing regulations for PSD (see, e.g., 40 CFR 52.21) and title V (see 40 CFR parts 70 and 71) had already been approved under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060-0003 and OMB control number 2060-0336, respectively.

However, several commenters disagree that it was unnecessary for us to submit a new ICR for the proposed action. These commenters believe that (1) prior approval of an ICR for the PSD and title V programs ignores the fact that there would be an increase in the paperwork burden as a result of applying PSD and title V permitting requirements; and (2) unless EPA resubmits the information collection approval request to OMB with a proper and fully-inclusive analysis, EPA will lack authority to collect information from stationary sources for PSD and title V GHG emissions permitting.

As we stated in the proposal, this is a burden relief rule and as such it does not impose any new requirements for the NSR or title V programs that are not currently required. For that reason, we concluded that for purposes of this rule it was unnecessary for us to submit a new ICR to the OMB and that the ICR contained in the existing regulations for PSD (see, e.g., 40 CFR 52.21) and title V (see 40 CFR parts 70 and 71) that had already been approved under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and was assigned OMB control number 2060-0003 and OMB control number 2060-0336, respectively, still applies.

Nevertheless, we understand that once GHGs are regulated under the PSD and title V programs, there might be an increase in the paperwork burden and EPA will have to access this

possible burden. We plan to do so once the 3 year review period of the current ICR expires, which will be in early 2011.

C. Comments on Regulatory Flexibility Act

At proposal, EPA certified that the proposed rule would not have a significant impact on a substantial number of small entities and therefore we are not obligated to convene a formal Small Business Advocacy Review (SBAR) panel. This certification was based upon the fact that the proposed action would relieve the regulatory burden associated with the major PSD and title V operating permits programs for new or modified major sources that emit GHGs, including small businesses. Nevertheless, EPA was aware at proposal that many small entities would be interested in the various GHG rulemakings currently under development and might have concerns about the potential impacts of the statutory imposition of PSD requirements that may occur as a result of the group of EPA actions, notwithstanding the relief provided to small businesses by the tailoring rule. For these reasons, and in collaboration with the Small Business Administration (SBA), EPA conducted an outreach meeting designed to exchange information with small entities that may be interested in these regulations. The outreach effort was organized and led by representatives from EPA's Office of Air Quality Planning and Standards within the Office of Air and Radiation, EPA's Office of Policy Economics and Innovation, the

Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB), and the Office of Advocacy of the Small Business Administration. This meeting was conducted on November 17, 2009 in Arlington, VA and documentation of this meeting, which includes a summary of the advice and recommendations received from the small entity representatives (SERs) identified for the purposes of this process, can be obtained in the docket for this rulemaking. (See Docket No. EPA-HQ-OAR-2009-0517-19130).

During the comment period, several commenters alleged that EPA inappropriately limited its RIA and RFA/SBREFEA analysis, and that had we done a comprehensive analysis, we would not have been able to certify that any of the proposed rules will not have a significant economic impact on a "substantial number of small entities." Thus they conclude that EPA failed to prepare and publicize an initial regulatory flexibility analysis (IRFA). Additional commenters stated that EPA's failure to conduct an IRFA to assess the full costs of the effects of its interpretation of PSD applicability in the Proposed Tailoring Rule violates a host of statutes and Executive Orders requiring analysis and public review of regulatory burdens. These commenters conclude that EPA should have convened one or more Small Business Advocacy Review (SBAR) Panels.

EPA is not persuaded that EPA should have taken into

account effects beyond those caused by the tailoring rule when we made our certification of no significant economic impact on a substantial number of small entities for this rule. No permitting requirements are imposed by this final tailoring rule. Instead, this final tailoring rule offers regulatory relief to over an estimated six million sources of GHG emissions that would otherwise be required to obtain a title V permit and tens of thousands of sources of GHG emissions subject to PSD permitting requirements that would otherwise be required statutorily to obtain permit. The RFA does not require that an agency complete a regulatory flexibility analysis or conduct an SBAR panel where the rule does not have any negative impact on small entities. For more discussion of RFA issues, please see the RTC document.

The EPA completed an RIA to assess the economic benefits of regulatory relief and the environmental benefits afforded by this final rule. The EPA believes that the RIA completed for this final rule adequately addresses economic issues associated with this tailoring rule.

D. Comments on Unfunded Mandates Reform Act

At proposal, EPA asserted that the tailoring rule does not impose unfunded mandates on any entities including sources and permitting authorities. Since the proposed tailoring rule is one of regulatory relief, it alleviates the burden of adhering

to statutorily required permitting thresholds and does not impose regulatory requirements.

Some commenters on the proposed rule assert that EPA has failed to comply with the requirements of UMRA, pursuant to which EPA must assess the effects of the Proposed Rule on state, local, and tribal governments and the private sector. Specifically, these commenters state that section 202 of the UMRA requires EPA to prepare a written statement, including a cost-benefit analysis, for proposed rules with "federal mandates" that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. According to the commenters, in concluding that "the revisions would ultimately reduce the PSD and title V program administrative burden that would otherwise occur in the absence of this rulemaking," EPA did not account for the billions of dollars that permitting authorities and stationary sources will soon be required to spend once PSD is triggered for GHGs. Additionally, a few commenters contend that the EPA underestimated the impacts to public utilities which are owned/operated by local governments and also to state regulatory agencies.

The EPA has carefully considered the comments on unfunded mandates expressed by commenters to the proposed rule. The EPA did complete a RIA for the final rule assessing the benefits and

costs of the tailoring rule, including any unfunded mandates. As previously discussed, the tailoring rule is one of regulatory relief because it increases the GHG emissions threshold for NSR and title V permitting substantially above otherwise statutory requirements. As such, the EPA asserts this tailoring rule does not impose unfunded mandates on any entities. This RIA of the final rule incorporates the extensive changes made in this final rule, including increased threshold levels for title V and PSD above those contained in the proposed rule. While we also incorporated improved estimates of the costs for sources to obtain permits and for permitting authorities to process permits, they do not change our conclusion that this final rule does not impose unfunded mandates on any entities.

E. Comments on Executive Order 13132 - Federalism

Some comments received on the proposed rule assert that federalism concerns were ignored, in violation of Executive Order No. 13132. According to the commenters, EPA cannot maintain that the Tailoring Rule "will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities between various levels of government," such that Executive Order No. 13132 does not apply. Some of these commenters assert that the proposed rulemaking would require radical changes in state laws, interjects GHGs

into permit programs never once conceived for that purpose (any more than was EPA's), requires massive staff hiring at state agencies, and rewrites SIPs in place for years or even decades.

As we stated previously, this is a burden relief rule and as such it does not impose any requirements for the NSR or title V programs that are not currently required. In addition, this action does not interject GHGs into the permit programs, nor does it change state laws or SIPs to impose any new permitting requirements. Instead, this action will significantly reduce the burden and costs incurred by sources and permitting authorities relative to the burden and costs that would be incurred if EPA did not revise the permitting provisions to account for higher applicability thresholds for GHG emissions.

However, since this rule finalizes burden reducing thresholds that will not otherwise apply to the PSD and title V programs, we are aware that a few states will have to amend their SIPs to incorporate these new thresholds. These states will be the ones whose permitting authorities do not implement the Federal PSD and title V rules by reference in their SIPs.

F. Comments on Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments

The National Tribal Air Association (NTAA) supports EPA's proposed rule but requests that tribal air grant funding be increased to reflect the air quality-related needs of tribes

across the nation, and to allow these tribes the opportunity to implement the CAA's PSD and title V programs. The NTAA states that, not only are Tribes eligible for section 103 grant funding to conduct air quality monitoring, emissions inventories, and other studies and assessments, but they may also obtain section 105 grant funding to implement CAA regulatory programs.

According to the NTAA, Tribes are facing many of the same air-related issues that neighboring state and local jurisdictions are facing, but are significantly underfunded to address such issues.

The Agency is aware and concerned about the resource needs for the Tribal air program and we are working to see how grant funding might be increased in the future. Nevertheless and for the purpose of the permitting programs, we want to clarify that tribes that develop Tribal Implementation Plans (TIPs) can charge for permits and Tribes with delegation can develop permit fee programs under their authority (e.g., Navajo's permit fee program for their delegated title V permit program) to fund both the NSR and title V programs. For these reasons, there are a number of ways we would like to work to address the funding concern, including encouraging delegation of permitting programs and having model codes available for Tribes that want to do TIPs for NSR and title V permitting.

G. Executive Order 13211 - Actions That Significantly Affect Energy Supply, Distribution, or Use

Other commenters assert that EPA's analysis under Executive Order 13211 is insufficient because it addresses only smaller sources. These commenters contend that EPA has not meaningfully examined the energy implications of its proposed actions and interpretations of the CAA. The commenters disagree with EPA's conclusion that the imposition of costly PSD obligations on power plants would have no impact on power supply, distribution, or use, when those plants will have had no time to prepare for compliance and no idea what BACT may be for GHG emissions. Other commenters opine that the adoption of BACT for some industries newly-subject to PSD permitting requirements for GHGs could involve fuel-switching, and increased energy costs (due to the need for a source to convert from coal to natural gas to meet BACT).

Again, this action is a burden relief rule and as such it does not create any new requirements for sources in the energy supply, distribution, or use sectors. For the purpose of the BACT determinations for GHGs, the long-standing top-down BACT selection process still applies. Under the CAA and EPA's implementing regulations, BACT is still an emission limitation based on the maximum degree of emission reduction achievable through application of production processes and available

methods, systems, and techniques that considers energy, environmental, and economic impacts. In other words, BACT determinations for GHGs will still have to consider energy, environmental and economic feasibility for the various control technologies under consideration before selecting a particular technology as BACT for a particular source. For that reason, what BACT may be for GHG emissions will vary by source, and the technology that is ultimately selected has to be one that is feasible based on the current energy, environmental and economic impacts that the planned technology might have. Thus, we do not believe that this action is likely to have a significant adverse effect on the supply, distribution, or use of energy.

VIII. Statutory and Executive Orders Reviews

A. Executive Order 12866 - Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in the RIA for this final rule. A copy of the

analysis is available in the docket for this action and the analysis is briefly summarized in section VIII of this preamble.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. Instead, this action will significantly reduce costs incurred by sources and permitting authorities relative to the costs that would be incurred if EPA did not revise the rule. Based on our revised GHG threshold data analysis, we estimate that over 80,000 new and modified facilities per year would be subject to PSD review based on applying a GHG emissions threshold of 100/250 tpy using a CO₂e metric. This is compared to 280 PSD permits currently issued per year, which is an increase of more than 280-fold. Similarly, for title V, we estimate that over six million new sources would be affected at the 100-tpy threshold for GHGs using the CO₂e metric. By increasing the volume of permits by over 400 times, the administrative burden would be unmanageable without this rule.

However, OMB has previously approved the information collection requirements contained in the existing regulations for PSD (see, e.g., 40 CFR 52.21) and title V (see 40 CFR parts 70 and 71) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and has assigned OMB control number 2060-0003 and OMB control number 2060-0336. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act (APA) or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this final action on small entities, small entity is defined as: (1) a small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (see 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this final action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the

impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 USC 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

We have therefore concluded that this final rule will relieve the regulatory burden for most affected small entities associated with the major PSD and title V operating permits programs for new or modified major sources that emit GHGs, including small businesses. This is because this rule raises the major source applicability thresholds for these programs for the sources that emit GHGs. As a result, the program changes provided in this rule are not expected to result in a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

This rule does not contain a federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any 1 year. Only those few states whose permitting

authorities do not implement the Federal PSD and title V rules by reference in their SIPs will have a small increase in burden. These states will have to amend their corresponding SIPs to incorporate the new applicability thresholds, since the burden reducing thresholds that we are finalizing with this rule will not otherwise apply to the PSD and title V programs. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As discussed earlier, this rule is expected to result in cost savings and an administrative burden reduction for all permitting authorities and permittees, including small governments.

E. Executive Order 13132 - Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. These final amendments will ultimately simplify and reduce the burden on state and local agencies associated with implementing the PSD and title V operating permits programs, by

providing that a source whose GHG emissions are below the proposed levels will not have to obtain a PSD permit or title V permit. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicited comment on the proposed rule from state and local officials.

F. Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA has concluded that this action may have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law. There are no tribal authorities currently issuing

major NSR permits; therefore, it will not currently impose direct compliance costs on tribal governments.

EPA consulted with tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development by publishing an ANPR that included PSD GHG tailoring options for regulating GHGs under the CAA. (73 FR 44354, July 30, 2008) As a result of the ANPR, EPA received several comments from tribal officials on differing PSD GHG tailoring options presented in the ANPR which were considered in the proposal and this final rule. Additionally, we also specifically solicited comment from tribal officials on the proposed rule (74 FR 55292, October 27, 2009).

As required by section 7(a) of Executive Order 13175, EPA's Tribal Consultation Official has certified that the requirements of the Executive Order have been met in a meaningful and timely manner. A copy of the certification is included in the docket for this action.

G. Executive Order 13045 - Protection of Children from Environmental Health and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the EO has the potential to influence the regulation. This action is not subject to EO

13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211 - Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211(66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects because this action would not create any new requirements for sources in the energy supply, distribution, or use sectors.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision 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 programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final 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 without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. Any impact that this final rule will have will be global in nature

and will increase the level of protection provided to all human health and the environment.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A Major rule cannot take effect until 60 days after it is published in the Federal Register. This action is a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective [INSERT DATE 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

L. Judicial Review

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments.

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Under section 307(b)(2) of the Act, the requirements of this final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements. Pursuant to section 307(d)(1)(V) of the Act, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to "such other actions as the Administrator may determine." This action finalizes some, but not all, elements of a previous proposed action - the Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Proposed Rule (74 FR 55292, October 27, 2009).

IX. Statutory Authority

The statutory authority for this action is provided by sections 307(d)(7)(B), 101, 111, 114, 116, and 301 of the CAA as amended (42 U.S.C. 7401, 7411, 7414, 7416, and 7601). This action is also subject to section 307(d) of the CAA (42 U.S.C. 7407(d)).

List of Subjects

40 CFR Part 51

Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

40 CFR Part 52

Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

40 CFR Part 70

Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

40 CFR Part 71

Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Environmental protection, Greenhouse gases, Hydrofluorocarbons, Methane, Nitrous oxide, Perfluorocarbons, Reporting and recordkeeping requirements, Sulfur hexafluoride.

Dated:

Lisa P. Jackson,
Administrator.