

STATE OF NORTH CAROLINA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES  
DIVISION OF AIR QUALITY

REPORT OF PROCEEDINGS OF PUBLIC HEARING  
ON PROPOSED AMENDMENTS TO  
15A NCAC 02D .0544, PREVENTION OF SIGNIFICANT  
DETERIORATION REQUIREMENTS FOR GREENHOUSE GASES,  
AND  
15A NCAC 02Q .0502, APPLICABILITY

JUNE 9, 2015  
RALEIGH, NC

ENVIRONMENTAL MANAGEMENT COMMISSION

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## CHAPTER I

**Summaries and Recommendations**

Proposed amendments to Rule 15A NCAC 02D .0544, Prevention of Significant Deterioration Requirements for Greenhouse Gases and Rule 15A NCAC 02Q .0502, Applicability.

**BACKGROUND AND SUMMARY**

A public hearing was held in Raleigh, North Carolina on June 9, 2015, to take public comments on amendments to Rule 15A NCAC 02D .0544, Prevention of Significant Deterioration Requirements for Greenhouse Gases and Rule 15A NCAC 02Q .0502, Applicability. Mr. Ray Stewart, Winston-Salem Regional Office Compliance Supervisor, was appointed and acted as the hearing officer during the hearing. These rules were adopted as temporary amendments that became effective on December 2, 2014.

On June 23, 2014, the United States Supreme Court issued a decision in Utility Air Regulatory Group (UARG) v. Environmental Protection Agency (EPA) addressing the application of stationary source permitting requirements to greenhouse gas (GHG) emissions. In its decision, the Supreme Court said that the EPA may not treat greenhouse gases as an air pollutant for the purposes of determining whether a source is a major source required to obtain a Prevention of Significant Deterioration (PSD) or Title V permit.

Currently, sources are required to obtain a PSD permit as follows:

- new facilities emitting GHGs in excess of 100,000 tons per year (TPY) carbon dioxide equivalent (CO<sub>2</sub>e)
- existing sources that are minor for PSD (including GHGs) before the modification and actual or potential emissions of GHGs from the modification alone would be equal to or greater than 100,000 TPY on a CO<sub>2</sub>e basis and equal to or greater than 100/250 TPY on a mass basis
- existing sources whose potential to emit (PTE) for GHGs is equal to or greater than 100,000 TPY on a CO<sub>2</sub>e basis and is equal to or greater than 100/250 TPY (depending on the source category) on a mass basis emissions increase and the net emissions increase of GHGs from the modification would be equal to or greater than 75,000 TPY on a CO<sub>2</sub>e basis and greater than zero TPY on a mass basis.

Title V permits are required for all sources that emit at least 100,000 tons of GHG per year on a CO<sub>2</sub>e basis.

15A NCAC 02D .0544, Prevention of Significant Deterioration Requirements for Greenhouse Gases, is proposed for amendment to remove the requirement that major stationary sources obtain a PSD permit on the sole basis of its GHG emissions. The rule is also proposed for amendment to update the global warming potentials for GHGs.

15A NCAC 02Q .0502, Applicability, is proposed for amendment to remove the requirement that facilities obtain a Title V permit on the sole basis of its GHG emissions

On July 24, 2014, Janet G. McCabe, Acting Assistant Administrator, EPA Office of Air and Radiation, and Cynthia Giles, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, issued a memo outlining EPA's next steps for the agency's GHG permit program. In the memo, they wrote that the EPA will not apply or enforce the following regulatory requirements:

- Federal regulations or the EPA-approved PSD State Implementation Plan (SIP) provisions that require a stationary source to obtain a PSD permit if GHG are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification (e.g., 40 CFR 52.21 (b)(49)(v)).
- Federal regulations or provisions in the EPA-approved Title V programs that require a stationary source to obtain a Title V permit solely because the source emits or has the potential to emit GHG above the major source thresholds.

The EPA does not interpret the Supreme Court decision to preclude states from retaining permitting requirements for sources of GHG emissions that apply independently under state law even where those requirements are no longer required under federal law.

However, under North Carolina G.S. 150B-19.3(a), an agency may not adopt a rule that imposes a more restrictive standard, limitation or requirement than those imposed by federal law or rule. Under G.S. 150B-19.1(a)(2), an agency shall seek to reduce the burden upon those persons or entities who must comply with the rule. Under G.S. 150B-19.1(a)(6), rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.

The fiscal note was approved by the Office of State Budget and Management (OSBM) on March 13, 2015. The fiscal note estimates fiscal impacts of approximately \$46,000 annually starting in 2015 and increasing with inflation each following year. An affected facility's annual cost savings would be the difference between that year's Title V permit fee and the \$1,500 annual synthetic minor permit fee. The fiscal impact to the State would be the equivalent loss of those annual Title V permit fees for the facilities that were required to submit a Title V application under the current rule. The approved fiscal note can be found in Chapter VI of this hearing record.

### **PUBLIC COMMENTS AND RESPONSES THERETO**

**Comment:** R. Scott Davis of the U.S. EPA comments that based on a preliminary review by EPA, most of North Carolina's proposed revisions to its state regulations appear consistent with the D.C. Circuit's amended judgment and the EPA's interpretation of the Supreme Court's decision as articulated in the EPA's July 24, 2014, memorandum. However, the EPA has not yet completed its intended revisions to the PSD rules at 40 CFR 52.21 and 40 CFR 51.166 and the appropriate Title V rules to reflect the UARG decision and the D.C. Circuit's amended judgment.

Thus, the EPA cannot confirm at this point that any of the rule changes reflected in North Carolina's prehearing package ultimately will be sufficient to obtain the EPA's approval. The EPA supports North Carolina taking immediate steps to implement the PSD and Title V permitting program in a manner that is consistent with the U.S. Supreme Court decision and the D.C. Circuit's amended judgment. The EPA understands North Carolina's desire to quickly update its state PSD and Title V regulations to ensure that the State's regulations are consistent with the U.S. Supreme Court's decision and the D.C. Circuit's amended judgment. However, we caution North Carolina to be cognizant that there is presently uncertainty regarding the form of revisions to the federal PSD and Title V regulations that the EPA anticipates undertaking to address the Supreme Court's decision and the amended judgment of the D.C. Circuit. These revisions to the EPA's rules may result in the need for additional revisions to North Carolina's permitting regulations.

**Response:** North Carolina Division of Air Quality (DAQ) is amending its rules to be consistent with the U.S. Supreme Court decision and the D.C. Circuit's amended judgment. The DAQ will review future federal PSD and Title V regulations as EPA amends them and revise its rules as needed.

### **CONCLUSION**

One comment was received on the proposed rule amendments during the public comment period. The commenter commented that North Carolina's revisions to its rules appear consistent with the U.S. Supreme Court decision but cannot confirm DAQ's rule revisions will be sufficient to obtain EPA's approval until EPA undertakes its own revisions to federal regulations to address the Supreme Court's decision. No changes were made to the proposed amendments as published in the North Carolina State Register and as presented in Chapter IV of this hearing record.

### **HEARING OFFICER'S RECOMMENDATION**

The Hearing Officer recommends that the proposed amendments as presented in Chapter II of this hearing report be adopted by the Environmental Management Commission.

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**CHAPTER II**

## Rule Change Formatting Key

Chapter IV of this hearing record represents the proposed rules as noticed in the *North Carolina Register* for public comment.

Chapter II represents the proposed rules as published with changes made in response to comments received during the public comment period incorporated.

For Rule Amendments:

~~Text~~ = deleted text

Text = added text

~~Text~~ = existing text in what was published in the *North Carolina Register* (NCR) that is proposed to be deleted following the comment period

Text = text proposed to be added to what was published in the NCR following the comment period

Text = text initially proposed in the NCR to be deleted that is restored following the comment period

~~Text~~ = text proposed in the NCR to be added that is deleted following the comment period

Note: For new rules proposed for adoption, all text is initially underlined. If there are changes to the proposed new rule following publication in the NCR, the underlining is removed, deleted text is struck through, added text is underlined, and there is no highlighting.

15A NCAC 02D .0544 is amended as published in 29:20 NCR 2338-2340 as follows:

**15A NCAC 02D .0544 PREVENTION OF SIGNIFICANT DETERIORATION REQUIREMENTS FOR GREENHOUSE GASES**

(a) The purpose of this Rule is to implement a program for the prevention of significant deterioration of air quality for greenhouse gases as required by 40 CFR 51.166. For purposes of greenhouse gases, the provisions of this Rule shall apply rather than the provisions of Rule .0530 of this Section. A major stationary source or major modification shall not be required to obtain a prevention of significant deterioration (PSD) permit on the sole basis of its greenhouse gases emissions. For all other regulated new source review (NSR) pollutants, the provisions of Rule .0530 of this Section apply.

(b) For the purposes of this Rule, the definitions contained in 40 CFR 51.166(b) and 40 CFR 51.301 shall apply except the definition of "baseline actual emissions." "Baseline actual emissions" means the rate of emissions, in tons per year, of a regulated NSR pollutant, as determined in accordance with Subparagraphs (1) through (3) of this Paragraph:

- (1) For an existing emissions unit, baseline actual emissions means the average rate, in tons per year, at which the emissions unit ~~actually~~ emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 5-year period ~~immediately~~ preceding the date that a complete permit application is received by the Division for a permit required under this Rule. The Director shall allow a different time period, not to exceed 10 years ~~immediately~~ preceding the date that a complete permit application is received by the Division, if the owner or operator demonstrates that it is more representative of normal source operation. For the purpose of determining baseline actual emissions, the following shall apply:
  - (A) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions;
  - (B) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above any emission limitation that was legally enforceable during the consecutive 24-month period;
  - (C) For an existing emission unit (other than an electric utility steam generating unit), the average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source ~~must~~ shall currently comply. However, if the State has taken credit in an attainment demonstration or maintenance plan consistent with the requirements of 40 CFR 51.165(a)(3)(ii)(G) for an emission limitation that is part of a maximum achievable control technology standard that the Administrator proposed or promulgated under part 63 of the Code of Federal Regulations, the baseline actual emissions shall be adjusted to account for such emission reductions;

- (D) For an electric utility steam generating unit, the average rate shall be adjusted downward to reflect any emissions reductions under G.S. 143-215.107D and for which cost recovery is sought pursuant to G.S. 62-133.6;
  - (E) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period shall be used to determine the baseline actual emissions for all the emissions units being changed. A different consecutive 24-month period for each regulated NSR pollutant can be used for each regulated NSR pollutant; and
  - (F) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by Parts (B) and (C) of this Subparagraph;
- (2) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit; and
  - (3) For a plantwide applicability limit (PAL) for a stationary source, the baseline actual emissions shall be calculated for existing emissions units in accordance with the procedures contained in Subparagraph (1) of this Paragraph and for a new emissions unit in accordance with the procedures contained in Subparagraph (2) of this Paragraph.

(c) In the definition of "net emissions increase," the reasonable period specified in 40 CFR 51.166(b)(3)(ii) shall be seven years.

(d) In the definition of "subject to regulation", a greenhouse gas's global warming potential is the global warming potential published at Table A-1 of Subpart A of 40 CFR Part 98 and shall include subsequent amendments and editions.

~~(e)~~ The limitation specified in 40 CFR 51.166(b)(15)(ii) shall not apply.

~~(f)~~ Major stationary sources and major modifications shall comply with the requirements contained in 40 CFR 51.166(i) and (a)(7) and by extension in 40 CFR 51.166(j) through (o) and (w). The transition provisions allowed by 40 CFR 52.21 (i)(11)(i) and (ii) and (m)(1)(vii) and (viii) are hereby adopted under this Rule. The minimum requirements described in the portions of 40 CFR 51.166 referenced in this Paragraph are hereby adopted as the requirements to be used under this Rule, except as otherwise provided in this Rule. Wherever the language of the portions of 40 CFR 51.166 referenced in this Paragraph speaks of the "plan," the requirements described therein shall apply to the source to which they pertain, except as otherwise provided in this Rule. Whenever the portions of 40 CFR 51.166 referenced in this Paragraph provide that the State plan may exempt or not apply certain requirements in certain circumstances, those exemptions and provisions of nonapplicability are also hereby adopted under this Rule. However, this provision shall not be interpreted so as to limit information that may be requested from the owner or operator by the Director as specified in 40 CFR 51.166(n)(2).

~~(g)~~ 40 CFR 51.166(w)(10)(iv)(a) is changed to read: "If the emissions level calculated in accordance with Paragraph (w)(6) of this Section is equal to or greater than 80 percent of the PAL [plant wide applicability limit]"

level, the Director shall renew the PAL at the same level." 40 CFR 51.166(w)(10)(iv)(b) is not incorporated by reference.

~~(g)~~(h) 15A NCAC 02Q .0102 and .0302 are not applicable to any source to which this Rule applies. The owner or operator of the sources to which this Rule applies shall apply for and receive a permit as required in 15A NCAC 02Q .0300 or .0500.

~~(h)~~(i) When a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation ~~which~~ that was established after August 7, 1980, on the capacity of the source or modification to emit a pollutant, such as a restriction on hours of operation, then the provisions of this Rule shall apply to the source or modification as though construction had not yet begun on the source or modification.

~~(i)~~(j) The provisions of 40 CFR 52.21(r)(2) regarding the period of validity of approval to construct are incorporated by reference except that the term "Administrator" is replaced with "Director".

~~(j)~~(k) Permits may be issued based on innovative control technology as set forth in 40 CFR 51.166(s)(1) if the requirements of 40 CFR 51.166(s)(2) have been met, subject to the condition of 40 CFR 51.166(s)(3), and with the allowance set forth in 40 CFR 51.166(s)(4).

~~(k)~~(l) A permit application subject to this Rule shall be processed in accordance with the procedures and requirements of 40 CFR 51.166(q). Within 30 days of receipt of the application, applicants shall be notified if the application is complete as to initial information submitted. Commencement of construction before full prevention of significant deterioration approval is obtained constitutes a violation of this Rule.

~~(l)~~(m) Approval of an application with regard to the requirements of this Rule shall not relieve the owner or operator of the responsibility to comply ~~fully~~ with applicable provisions of other rules of this Subchapter or Subchapter 02Q of this Title and any other requirements under local, state, or federal law.

~~(m)~~(n) If the owner or operator of a source is using projected actual emissions to avoid applicability of prevention of significant deterioration requirements, the owner or operator shall notify the Director of the modification before beginning actual construction. The notification shall include:

- (1) a description of the project;
- (2) identification of sources whose emissions could be affected by the project;
- (3) the calculated projected actual emissions and an explanation of how the projected actual emissions were calculated, including identification of emissions excluded by 40 CFR 51.166(b)(40)(ii)(c);
- (4) the calculated baseline actual emissions and an explanation of how the baseline actual emissions were calculated; and
- (5) any netting ~~calculations~~ calculations, if applicable.

If upon reviewing the notification, the Director finds that the project will cause a prevention of significant deterioration evaluation, then the Director shall notify the owner or operator of his or her findings. The owner or operator shall not make the modification until the owner or operator has received a permit issued pursuant to this Rule. If a permit revision is not required pursuant to this Rule, the owner or operator shall maintain records of annual emissions in tons per year, on a calendar year basis related to the modifications for 10 years following

resumption of regular operations after the change if the project involves increasing the emissions unit's design capacity or its potential to emit the regulated NSR pollutant; otherwise these records shall be maintained for five years following resumption of regular operations after the change. The owner or operator shall submit a report to the Director within 60 days after the end of each year during which these records must be generated. The report shall contain the items listed in 40 CFR 51.166(r)(6)(v)(a) through (c). The owner or operator shall make the information documented and maintained under this Paragraph available to the Director or the general public pursuant to the requirements in 40 CFR 70.4(b)(3)(viii).

~~(a)~~(o) The references to the Code of Federal Regulations (CFR) in this Rule are incorporated by reference unless a specific reference states otherwise. The version of the CFR incorporated in this Rule is that as of July 20, 2011 as set forth here <http://www.gpo.gov/fdsys/pkg/CFR-2011-title40-vol2/pdf/CFR-2011-title40-vol2-sec51-166.pdf>, <http://www.gpo.gov/fdsys/pkg/CFR-2011-title40-vol3/pdf/CFR-2011-title40-vol3-sec52-21.pdf>, and with the amendment set forth on 76 FR 43507 at <http://www.gpo.gov/fdsys/pkg/FR-2011-07-20/pdf/2011-17256.pdf> and does not include any subsequent amendments or editions to the referenced material. This Rule is applicable in accordance with 40 CFR 51.166(b)(48) and (b)(49)(iv) and (v).

*History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(3); 143-215.107(a)(5); 143-215.107(a)(7); 143-215.108(b); 150B-21.6;*  
*Eff. January 28, 2011 pursuant to E.O. 81, Beverly E. Perdue;*  
*Pursuant to G.S. 150B-21.3(c), a bill was not ratified by the General Assembly to disapprove this rule;*  
*Temporary Amendment Eff. December 23, 2011;*  
*Amended Eff. July 1, ~~2012~~ 2012;*  
*Temporary Amendment Eff. December 2, ~~2014~~ 2014;*  
*Amended Eff. September 1, 2015.*

15A NCAC 02Q .0502 is amended as published in 29:20 NCR 2341-2342 as follows:

### **15A NCAC 02Q .0502 APPLICABILITY**

(a) Except as provided in Paragraph (b) or (c) of this Rule, the following facilities are required to obtain a permit under this Section:

- (1) major facilities;
- (2) facilities with a source subject to 15A NCAC 2D .0524 or 40 CFR Part 60, except new residential wood heaters;
- (3) facilities with a source subject to 15A NCAC 2D .1110 or 40 CFR Part 61, except asbestos demolition and renovation activities;
- (4) facilities with a source subject to 15A NCAC 2D .1111 or 40 CFR Part 63 or any other standard or other requirement under Section 112 of the federal Clean Air Act, except that a source is not

required to obtain a permit solely because it is subject to rules or requirements under Section 112(r) of the federal Clean Air Act;

- (5) facilities to which 15A NCAC 2D .0517(2), .0528, .0529, or .0534 applies;
- (6) facilities with a source subject to Title IV or 40 CFR Part 72; or
- (7) facilities in a source category designated by EPA as subject to the requirements of 40 CFR Part 70.

(b) This Section does not apply to minor facilities with sources subject to requirements of 15A NCAC 2D .0524, .1110, or .1111 or 40 CFR Part 60, 61, or 63 until EPA requires these facilities to have a permit under 40 CFR Part 70.

(c) A facility shall not be required to obtain a permit under this Section on the sole basis of its greenhouse gas emissions.

~~(d)~~ Once a facility is subject to this Section because of emissions of one pollutant, the owner or operator of that facility shall submit an application that includes all sources of all regulated air pollutants located at the facility except for insignificant activities because of category.

*History Note: Filed as a Temporary Adoption Eff. March 8, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;*

*Authority G.S. 143-215.3(a)(1); 143-215.107(a)(10); 143-215.108;*

*Eff. July 1, 1994;*

*Amended Eff. July 1, 1996;*

*Temporary Amendment Eff. December 1, 1999;*

*Amended Eff. July 1, ~~2000~~-2000;*

*Temporary Amendment Eff. December 2, ~~2014~~-2014;*

*Amended Eff. September 1, 2015.*

CHAPTER III  
REPORT OF PROCEEDINGS

**Introduction**

The Department of Environment and Natural Resources, Division of Air Quality, held a public hearing on June 9, 2015 at 3:00 pm in Raleigh, NC.

The hearing considered the proposed amendments to Rules 15A NCAC 02D .0544, Prevention of Significant Deterioration Requirements for Greenhouse Gases and 15A NCAC 02Q .0502, Applicability.

The proposed effective date for this rule is projected to September 1, 2015.

A public notice announcing this hearing was emailed to each person on the interested party email distribution list. The public notice was also published in the North Carolina Register at least 15 days before the public hearing and posted on the North Carolina Division of Air Quality website at least 30 days prior to the public hearing.



## ENVIRONMENTAL MANAGEMENT COMMISSION

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Julie A. Wilsey

May 14, 2015

## MEMORANDUM

To: Ray Stewart

From: Gerard Carroll

Subject: Hearing Officer Appointment

Public hearings have been scheduled for June 9, 2015, at 3:00 p.m. at the Division of Air Quality central office in Raleigh, Room 1210, to receive public comments on permanent amendments to the Prevention of Significant Deterioration for Greenhouse Gases and Title V Permit Applicability rules to remove the requirement that sources obtain permits solely on the basis of their greenhouse gas emissions and update global warming potentials, incorporation of the 2012 PM2.5 National Ambient Air Quality Standards into the state rule, and removal of the source reduction and recycling reporting requirements repealed by Session Law 2014-120. The attached public notice describes the hearings' purpose.

I am hereby appointing you to serve as hearing officer for these hearings. Please receive all relevant public comment and report your findings and recommendations to the Environmental Management Commission. Ms. Joelle Burleson will provide staff support for you.

If you have any questions, please feel free to contact Joelle Burleson at (919) 707-8720, or me.

SCH/jb

Attachment

cc: Sheila Holman  
Lois Thomas  
Hearing Record File

## NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION

## PUBLIC NOTICE

Notice is hereby given for one public hearing to be heard by the North Carolina Department of Environment and Natural Resources, Division of Air Quality concerning the proposed amendments to air quality rules.

## PURPOSE:

Hearing 1: To receive comments on amendments to Rule 15A NCAC 02D .0544 to remove the requirement that major stationary sources obtain a Prevention of Significant Deterioration permit on the sole basis of its greenhouse gas (GHG) emissions and update the global warming potentials for GHGs, and to Rule 15A NCAC 02Q .0502, Applicability, to remove the requirement that facilities obtain a Title V permit on the sole basis of its GHG emissions.

Hearing 2: To receive comments on amendment to Rule 15A NCAC 02D .0410, PM<sub>2.5</sub> Particulate Matter, which reflects more stringent National Ambient Air Quality Standards.

Hearing 3: To receive comments on amendment to Rules 15A NCAC 02Q .0206, Payment of Fees; .0304, Applications; and .0507, Application, which reflect the repeal of source reduction and recycling reporting requirements under Session Law 2014-120.

NOTE: The proposed amendments considered in these hearings, if adopted, will be effective statewide and submitted to the United States Environmental Protection Agency to be included in the North Carolina State Implementation Plan (SIP); if they are later adopted by a local air pollution control agency, then that agency will enforce them in its area of jurisdiction.

## DATES AND LOCATION:

June 9, 2015, 3:00 P.M.  
Training Room (#1210), DENR Green Square Office  
Building, 217 West Jones Street, Raleigh, NC 27603

COMMENT PROCEDURES: All persons interested in these matters are invited to attend the public hearings. **Any person desiring to comment on the rules or fiscal analyses is requested to submit a written statement for inclusion in the record of proceedings at the public hearing.** The hearing officer may limit oral presentation lengths if many people want to speak. The hearing record will remain open until June 15, 2015 to receive additional written statements. To be included, the statement must be received by the Division of Air Quality by June 15, 2015.

INFORMATION: Copies of the proposed rule changes may be downloaded at <http://daq.state.nc.us/Rules/Hearing/>. Copies of the proposals may also be reviewed at the regional offices of the North Carolina Department of Environment and Natural Resources, Division of Air Quality, located at the following cities:

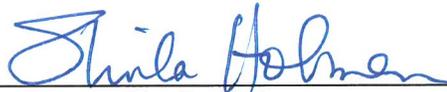
Asheville	828/296-4500
Fayetteville	910/433-3300
Mooresville	704/663-1699
Raleigh	919/791-4200
Washington	252/946-6481
Wilmington	910/796-7215
Winston-Salem	336/776-9800

Comments should be sent to and additional information concerning the hearings or the proposals may be obtained by contacting:

Ms. Joelle Burlison  
 Division of Air Quality  
 1641 Mail Service Center  
 Raleigh, North Carolina 27699-1641  
 (919) 707-8720 Phone/Fax  
[daq.publiccomments@ncdenr.gov](mailto:daq.publiccomments@ncdenr.gov)  
 (please type June 9, 2015 Hearing Comments  
 in subject line)

DATE: \_\_\_\_\_

4/14/15



\_\_\_\_\_  
 Sheila Holman,  
 DAQ Director

Transcript

A transcript of the June 9, 2015 hearing has not been prepared; however, an audio recording of the proceeding will be kept on file with the Division of Air Quality for one year from the date of the final actions by the Environmental Management Commission.

A list of those attending the hearing as follows:

Hearing Officer:

Mr. Ray Stewart, Winston-Salem Regional Office Compliance Supervisor

Staff Members of the Division of Air Quality or other state employees at the Raleigh hearing:

Ms. Joelle Burlison, DAQ, DENR

Mr. Patrick Knowlson, DAQ, DENR

Mr. Glenn Sappie, DAQ, DENR

Mr. Vladimir Zaytsev, DAQ, DENR

Mr. Tony Pendola, DEACS Small Business Environmental Assistance, DENR

Members of the General Public:

Mr. Jasper G. Stem, Jr., Executive Director, North Carolina Aggregates Association

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## CHAPTER IV

## EXHIBITS

<u>EXHIBIT</u>	<u>PAGE</u>
Proposed Regulations as Published in the North Carolina Register and Presented at the Hearing	IV-2
Hearing Officer comments at the public hearing	IV- 9

Notice of **Note from the Codifier:** The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days.

Statutory reference: G.S. 150B-21.2.

## TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rules cited as 15A NCAC 02D .0410, .0544; 02Q .0206, .0304, .0502, .0507.*

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
<http://ncair.org/rules/hearing/>

**Proposed Effective Date:** September 1, 2015

### Public Hearing:

**Date:** June 9, 2015

**Time:** 3:00 p.m.

**Location:** Training Room (#1210), DENR Green Square Office Building, 217 West Jones St., Raleigh, NC 27603

**Reason for Proposed Action:** On June 23, 2014, the United States Supreme Court issued a decision in *Utility Air Regulatory Group (UARG) v. Environmental Protection Agency (EPA)* that the EPA may not treat greenhouse gases as an air pollutant for the purposes of determining whether a source is a major source required to obtain a PSD or Title V permit. Rule 15A NCAC 02D .0544, Prevention of Significant Deterioration (PSD) Requirements for Greenhouse Gases (GHG), is proposed for amendment to remove the requirement that major stationary sources obtain a PSD permit on the sole basis of its GHG emissions. The rule is also proposed for amendment to update the global warming potentials for GHGs. Rule 15A NCAC 02Q .0502, Applicability, is proposed for amendment to remove the requirement that facilities obtain a Title V permit on the sole basis of its GHG emissions.

The US EPA strengthened its National Ambient Air Quality Standards (NAAQS) for particulate matter, also known as PM<sub>2.5</sub>, on December 14, 2012. 15A NCAC 02D .0410 is proposed to be amended to reflect the revised standard.

In response to statutory revisions in North Carolina Session Law 2014-120, the Division of Air Quality (DAQ) is proposing changes to its source reduction and recycling reporting requirement Rules 15A NCAC 02Q .0206, Payment of Fees; .0304, Applications; and .0507, Application. In the existing rules, facilities holding permits are required to submit a written description of current and projected plans to reduce air contaminant emissions by source reduction and recycling. The revised statute reflects repeal of the three source reduction and recycling reporting requirement.

**Comments may be submitted to:** Joelle Burlison, 1641 Mail Service Center, Raleigh, NC 27699-1641, phone (919) 707-8720,

fax (919) 707-8720, or email [daq.publiccomments@ncdenr.gov](mailto:daq.publiccomments@ncdenr.gov) (please type June 9, 2015 Hearing Comments in the subject line)

**Comment period ends:** June 15, 2015

**Procedure for Subjecting a Proposed Rule to Legislative Review:** If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

### Fiscal impact (check all that apply).

- State funds affected 15A NCAC 02D .0544; 02Q .0502
- Environmental permitting of DOT affected
- Analysis submitted to Board of Transportation
- Local funds affected
- Substantial economic impact (≥\$1,000,000)
- Approved by OSBM 15A NCAC 02D .0544, 02Q .0502
- No fiscal note required by G.S. 150B-21.4 15A NCAC 02D .0410; 02Q .0206, .0304, .0507

## CHAPTER 02 – ENVIRONMENTAL MANAGEMENT

### SUBCHAPTER 02D – AIR POLLUTION CONTROL REQUIREMENTS

#### SECTION .0400 – AMBIENT AIR QUALITY STANDARDS

#### 15A NCAC 02D .0410 PM<sub>2.5</sub> PARTICULATE MATTER

(a) The national primary ambient air quality standards for PM<sub>2.5</sub> particulate matter are:

- (1) ~~15.0 micrograms per cubic meter (ug/m<sup>3</sup>), annual arithmetic mean concentration; and~~
- (2) ~~35 micrograms per cubic meter (ug/m<sup>3</sup>), 24-hour average concentration.~~

PM<sub>2.5</sub> are 12.0 micrograms per cubic meter (ug/m<sup>3</sup>) annual arithmetic mean concentration and 35 ug/m<sup>3</sup> 24-hour average Concentration measured in the ambient air as PM<sub>2.5</sub> (particles

with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) by either:

- (1) A reference method based on appendix L to 40 C.F.R. Part 50 and designated in accordance with 40 C.F.R. Part 53; or
- (2) An equivalent method designated in accordance with 40 C.F.R. Part 53.

~~These standards are attained when the annual arithmetic mean concentration is less than or equal to 15.0 ug/m<sup>3</sup> and when the 98<sup>th</sup> percentile 24-hour concentration is less than or equal to 35 ug/m<sup>3</sup>, as determined according to Appendix N of 40 CFR Part 50.~~

(b) The primary annual PM<sub>2.5</sub> standard is met when the annual arithmetic mean concentration, as determined in accordance with appendix N of 40 C.F.R. Part 50, is less than or equal to 12.0 ug/m<sup>3</sup>.

~~(b) For the purpose of determining attainment of the standards in Paragraph (a) of this Rule, particulate matter shall be measured in the ambient air as PM<sub>2.5</sub> (particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) by either:~~

- ~~(1) a reference method based on Appendix L of 40 CFR Part 50 and designed according to 40 CFR Part 53; or~~
- ~~(2) an equivalent method designed according to 40 CFR Part 53.~~

(c) The primary 24-hour PM<sub>2.5</sub> standard is met when the 98<sup>th</sup> percentile 24-hour concentration, as determined in accordance with appendix N of 40 C.F.R. Part 50, is less than or equal to 35 ug/m<sup>3</sup>.

*Authority G.S. 143-215.3(a)(1); 143-215.107(a)(3).*

## SECTION .0500 – EMISSION CONTROL STANDARDS

### 15A NCAC 02D .0544 PREVENTION OF SIGNIFICANT DETERIORATION REQUIREMENTS FOR GREENHOUSE GASES

(a) The purpose of this Rule is to implement a program for the prevention of significant deterioration of air quality for greenhouse gases as required by 40 CFR 51.166. For purposes of greenhouse gases, the provisions of this Rule shall apply rather than the provisions of Rule .0530 of this Section. A major stationary source or major modification shall not be required to obtain a prevention of significant deterioration (PSD) permit on the sole basis of its greenhouse gases emissions. For all other regulated new source review (NSR) pollutants, the provisions of Rule .0530 of this Section apply.

(b) For the purposes of this Rule, the definitions contained in 40 CFR 51.166(b) and 40 CFR 51.301 shall apply except the definition of "baseline actual emissions." "Baseline actual emissions" means the rate of emissions, in tons per year, of a regulated NSR pollutant, as determined in accordance with Subparagraphs (1) through (3) of this Paragraph:

- (1) For an existing emissions unit, baseline actual emissions means the average rate, in tons per year, at which the emissions unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 5-year period ~~immediately~~

preceding the date that a complete permit application is received by the Division for a permit required under this Rule. The Director shall allow a different time period, not to exceed 10 years ~~immediately~~ preceding the date that a complete permit application is received by the Division, if the owner or operator demonstrates that it is more representative of normal source operation. For the purpose of determining baseline actual emissions, the following shall apply:

- (A) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions;
- (B) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above any emission limitation that was legally enforceable during the consecutive 24-month period;
- (C) For an existing emission unit (other than an electric utility steam generating unit), the average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source ~~must~~ shall currently comply. However, if the State has taken credit in an attainment demonstration or maintenance plan consistent with the requirements of 40 CFR 51.165(a)(3)(ii)(G) for an emission limitation that is part of a maximum achievable control technology standard that the Administrator proposed or promulgated under part 63 of the Code of Federal Regulations, the baseline actual emissions shall be adjusted to account for such emission reductions;
- (D) For an electric utility steam generating unit, the average rate shall be adjusted downward to reflect any emissions reductions under G.S. 143-215.107D and for which cost recovery is sought pursuant to G.S. 62-133.6;
- (E) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period shall be used to determine the baseline actual emissions for all the emissions units being changed. A different consecutive 24-month period for each regulated NSR pollutant can be used for each regulated NSR pollutant; and

(F) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by Parts (B) and (C) of this Subparagraph;

(2) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit; and

(3) For a plantwide applicability limit (PAL) for a stationary source, the baseline actual emissions shall be calculated for existing emissions units in accordance with the procedures contained in Subparagraph (1) of this Paragraph and for a new emissions unit in accordance with the procedures contained in Subparagraph (2) of this Paragraph.

(c) In the definition of "net emissions increase," the reasonable period specified in 40 CFR 51.166(b)(3)(ii) shall be seven years.

(d) In the definition of "subject to regulation", a greenhouse gas's global warming potential is the global warming potential published at Table A-1 of Subpart A of 40 CFR Part 98 and shall include subsequent amendments and editions.

~~(e)~~ The limitation specified in 40 CFR 51.166(b)(15)(ii) shall not apply.

~~(f)~~ Major stationary sources and major modifications shall comply with the requirements contained in 40 CFR 51.166(i) and (a)(7) and by extension in 40 CFR 51.166(j) through (o) and (w). The transition provisions allowed by 40 CFR 52.21 (i)(11)(i) and (ii) and (m)(1)(vii) and (viii) are hereby adopted under this Rule. The minimum requirements described in the portions of 40 CFR 51.166 referenced in this Paragraph are hereby adopted as the requirements to be used under this Rule, except as otherwise provided in this Rule. Wherever the language of the portions of 40 CFR 51.166 referenced in this Paragraph speaks of the "plan," the requirements described therein shall apply to the source to which they pertain, except as otherwise provided in this Rule. Whenever the portions of 40 CFR 51.166 referenced in this Paragraph provide that the State plan may exempt or not apply certain requirements in certain circumstances, those exemptions and provisions of nonapplicability are also hereby adopted under this Rule. However, this provision shall not be interpreted so as to limit information that may be requested from the owner or operator by the Director as specified in 40 CFR 51.166(n)(2).

~~(g)~~ 40 CFR 51.166(w)(10)(iv)(a) is changed to read: "If the emissions level calculated in accordance with Paragraph (w)(6) of this Section is equal to or greater than 80 percent of the PAL [plant wide applicability limit] level, the Director shall renew the PAL at the same level." 40 CFR 51.166(w)(10)(iv)(b) is not incorporated by reference.

~~(h)~~ 15A NCAC 02Q .0102 and .0302 are not applicable to any source to which this Rule applies. The owner or operator of the sources to which this Rule applies shall apply for and receive a permit as required in 15A NCAC 02Q .0300 or .0500.

~~(i)~~ When a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation ~~which—that~~ was established after August 7, 1980, on the capacity of the source or modification to emit a pollutant, such as a restriction on hours of operation, then the provisions of this Rule shall apply to the source or modification as though construction had not yet begun on the source or modification.

~~(j)~~ The provisions of 40 CFR 52.21(r)(2) regarding the period of validity of approval to construct are incorporated by reference except that the term "Administrator" is replaced with "Director".

~~(k)~~ Permits may be issued based on innovative control technology as set forth in 40 CFR 51.166(s)(1) if the requirements of 40 CFR 51.166(s)(2) have been met, subject to the condition of 40 CFR 51.166(s)(3), and with the allowance set forth in 40 CFR 51.166(s)(4).

~~(l)~~ A permit application subject to this Rule shall be processed in accordance with the procedures and requirements of 40 CFR 51.166(q). Within 30 days of receipt of the application, applicants shall be notified if the application is complete as to initial information submitted. Commencement of construction before full prevention of significant deterioration approval is obtained constitutes a violation of this Rule.

~~(m)~~ Approval of an application with regard to the requirements of this Rule shall not relieve the owner or operator of the responsibility to comply fully with applicable provisions of other rules of this Subchapter or Subchapter 02Q of this Title and any other requirements under local, state, or federal law.

~~(n)~~ If the owner or operator of a source is using projected actual emissions to avoid applicability of prevention of significant deterioration requirements, the owner or operator shall notify the Director of the modification before beginning actual construction. The notification shall include:

- (1) a description of the project;
- (2) identification of sources whose emissions could be affected by the project;
- (3) the calculated projected actual emissions and an explanation of how the projected actual emissions were calculated, including identification of emissions excluded by 40 CFR 51.166(b)(40)(ii)(c);
- (4) the calculated baseline actual emissions and an explanation of how the baseline actual emissions were calculated; and
- (5) any netting ~~calculations~~ calculations, if applicable.

If upon reviewing the notification, the Director finds that the project will cause a prevention of significant deterioration evaluation, then the Director shall notify the owner or operator of his or her findings. The owner or operator shall not make the modification until the owner or operator has received a permit issued pursuant to this Rule. If a permit revision is not required pursuant to this Rule, the owner or operator shall maintain records of annual emissions in tons per year, on a calendar year basis related to the modifications for 10 years following resumption of regular operations after the change if the project involves increasing the emissions unit's design capacity or its potential to emit the regulated NSR pollutant; otherwise these records shall be maintained for five years following resumption of regular

operations after the change. The owner or operator shall submit a report to the Director within 60 days after the end of each year during which these records must be generated. The report shall contain the items listed in 40 CFR 51.166(r)(6)(v)(a) through (c). The owner or operator shall make the information documented and maintained under this Paragraph available to the Director or the general public pursuant to the requirements in 40 CFR 70.4(b)(3)(viii).

~~(a)(o)~~ The references to the Code of Federal Regulations (CFR) in this Rule are incorporated by reference unless a specific reference states otherwise. The version of the CFR incorporated in this Rule is that as of July 20, 2011 as set forth here <http://www.gpo.gov/fdsys/pkg/CFR-2011-title40-vol2/pdf/CFR-2011-title40-vol2-sec51-166.pdf>, <http://www.gpo.gov/fdsys/pkg/CFR-2011-title40-vol3/pdf/CFR-2011-title40-vol3-sec52-21.pdf>, and with the amendment set forth on 76 FR 43507 at <http://www.gpo.gov/fdsys/pkg/FR-2011-07-20/pdf/2011-17256.pdf> and does not include any subsequent amendments or editions to the referenced material. This Rule is applicable in accordance with 40 CFR 51.166(b)(48) and (b)(49)(iv) and (v).

*Authority G.S. 143-215.3(a)(1); 143-215.107(a)(3); 143-215.107(a)(5); 143-215.107(a)(7); 143-215.108(b); 150B-21.6.*

## SUBCHAPTER 02Q – AIR QUALITY PERMITS PROCEDURES

### SECTION .0200 – PERMIT FEES

#### 15A NCAC 02Q .0206 PAYMENT OF FEES

(a) Payment of fees required under this Section may be by check or money order made payable to the N.C. Department of ~~Environment, Health Environment~~ and Natural Resources. Annual permit fee payments shall refer to the permit number.

(b) If, within 30 days after being billed, the permit holder fails to pay an annual fee required under this Section, the Director may initiate action to terminate the permit under Rule .0309 or .0519 of this Subchapter, as appropriate.

(c) A holder of multiple permits may arrange to consolidate the payment of annual fees into one annual payment.

~~(d) The permit holder shall submit a written description of current and projected plans to reduce the emissions of air contaminants by source reduction and recycling in accordance with G.S. 143-215.108(g) along with the annual permit fee payment. The description shall include a summary of activities related to source reduction and recycling and a quantification of air emissions reduced and material recycled during the previous year and a summary of plans for further source reduction and recycling.~~

~~(e)(d)~~ The payment of the permit application fee required by this Section shall accompany the application and is non-refundable.

~~(f)(e)~~ The Division shall annually prepare and make publicly available an accounting showing aggregate fee payments collected under this Section from facilities which have obtained or will obtain permits under Section .0500 of this Subchapter except synthetic minor facilities and showing a summary of reasonable direct and indirect expenditures required to develop and administer the Title V permit program.

*Authority G.S. 143-215.3(a)(1),(1a),(1b),(1d); 150B-21.6.*

### SECTION .0300 – CONSTRUCTION AND OPERATION PERMITS

#### 15A NCAC 02Q .0304 APPLICATIONS

(a) Obtaining and filing application. Permit, permit modification, or permit renewal applications may be obtained and shall be filed in writing according to Rule .0104 of this Subchapter.

(b) Information to accompany application. Along with filing a complete application form, the applicant shall also file the following:

- (1) for a new facility or an expansion of existing facility, a consistency determination according to G.S. 143-215.108(f) that:
  - (A) bears the date of receipt entered by the clerk of the local government, or
  - (B) consists of a letter from the local government indicating that all zoning ordinances are met by the facility;
- (2) for a new facility or an expansion of existing facility in an area without zoning, an affidavit and proof of publication of a legal notice as required under Rule .0113 of this Subchapter;
- ~~(3) for a new facility or modification of an existing facility, a written description of current and projected plans to reduce the emissions of air contaminants by source reduction and recycling according to G.S. 143-215.108(g); the description shall include:
 
  - ~~(A) for an existing facility, a summary of activities related to source reduction and recycling and a quantification of air emissions reduced and material recycled during the previous year and a summary of plans for further source reduction and recycling; or~~
  - ~~(B) for a new facility, a summary of activities related to and plans for source reduction and recycling; and~~~~
- ~~(4)~~(3) for permit renewal, an emissions inventory that contains the information specified under 15A NCAC 02D .0202, Registration of Air Pollution Sources (the applicant may use emission inventory forms provided by the Division to satisfy this requirement); and
- ~~(5)~~(4) documentation showing the applicant complies with Parts (A) or (B) of this Subparagraph if the Director finds this information necessary to evaluate the source, its air pollution abatement equipment, or the facility:
  - (A) The applicant is financially qualified to carry out the permitted activities, or
  - (B) The applicant has substantially complied with the air quality and emissions standards applicable to any activity in which the applicant has previously been engaged, and has been

in substantial compliance with federal and state environmental laws and rules.

(c) When to file application. For sources subject to the requirements of 15A NCAC 02D .0530 (prevention of significant deterioration) or .0531 (new source review for sources in nonattainment areas), applicants shall file air permit applications at least 180 days before the projected construction date. For all other sources, applicants shall file air permit applications at least 90 days before the projected date of construction of a new source or modification of an existing source.

(d) Permit renewal, name, or ownership changes with no modifications. If no modification has been made to the originally permitted source, application for permit change may be made by letter to the Director at the address specified in Rule .0104 of this Subchapter. The permit renewal, name, or ownership change letter must state that there have been no changes in the permitted facility since the permit was last issued. However, the Director may require the applicant for ownership change to submit additional information, if the Director finds the following information necessary to evaluate the applicant for ownership change, showing that:

- (1) The applicant is financially qualified to carry out the permitted activities, or
- (2) The applicant has substantially complied with the air quality and emissions standards applicable to any activity in which the applicant has previously been engaged, and has been in substantial compliance with federal and state environmental laws and rules.

To make a name or ownership change, the applicant shall send the Director the number of copies of letters specified in Rule .0305(a)(3) or (4) of this Section signed by a person specified in Paragraph (j) of this Rule.

(e) Applications for date and reporting changes. Application for changes in construction or test dates or reporting procedures may be made by letter to the Director at the address specified in Rule .0104 of this Subchapter. To make changes in construction or test dates or reporting procedures, the applicant shall send the Director the number of copies of letters specified in Rule .0305(a)(5) of this Section signed by a person specified in Paragraph (j) of this Rule.

(f) When to file applications for permit renewal. Applicants shall file applications for renewals such that they are mailed to the Director at the address specified in Rule .0104 of this Subchapter and postmarked at least 90 days before expiration of the permit.

(g) Name, or ownership change. The permittee shall file requests for permit name or ownership changes as soon as the permittee is aware of the imminent name or ownership change.

(h) Number of copies of additional information. The applicant shall submit the same number of copies of additional information as required for the application package.

(i) Requesting additional information. Whenever the information provided on the permit application forms does not adequately describe the source and its air cleaning device, the Director may request that the applicant provide any other information that the Director considers necessary to evaluate the source and its air cleaning device. Before acting on any permit application, the Director may request any information from an applicant and

conduct any inquiry or investigation that he considers necessary to determine compliance with applicable standards.

(j) Signature on application. Permit applications submitted pursuant to this Rule shall be signed as follows:

- (1) for corporations, by a principal executive officer of at least the level of vice-president, or his duly authorized representative, if such representative is responsible for the overall operation of the facility from which the emissions described in the permit application form originates;
- (2) for partnership or limited partnership, by a general partner;
- (3) for a sole proprietorship, by the proprietor;
- (4) for municipal, state, federal, or other public entity, by a principal executive officer, ranking elected official, or other duly authorized employee.

(k) Application fee. With the exceptions specified in Rule .0203(i) of this Subchapter, a non-refundable permit application processing fee shall accompany each application. The permit application processing fees are defined in Section .0200 of this Subchapter. A permit application is incomplete until the permit application processing fee is received.

(l) Correcting submittals of incorrect information. An applicant has a continuing obligation to submit relevant facts pertaining to his permit application and to correct incorrect information on his permit application.

(m) Retaining copy of permit application package. The applicant shall retain for the duration of the permit term one complete copy of the application package and any information submitted in support of the application package.

*Authority G.S. 143-215.3(a)(1); 143-215.108.*

## SECTION .0500 – TITLE V PROCEDURES

### 15A NCAC 02Q .0502 APPLICABILITY

(a) Except as provided in Paragraph (b) or (c) of this Rule, the following facilities are required to obtain a permit under this Section:

- (1) major facilities;
- (2) facilities with a source subject to 15A NCAC 02D .0524 or 40 CFR Part 60, except new residential wood heaters;
- (3) facilities with a source subject to 15A NCAC 02D .1110 or 40 CFR Part 61, except asbestos demolition and renovation activities;
- (4) facilities with a source subject to 15A NCAC 02D .1111 or 40 CFR Part 63 or any other standard or other requirement under Section 112 of the federal Clean Air Act, except that a source is not required to obtain a permit solely because it is subject to rules or requirements under Section 112(r) of the federal Clean Air Act;
- (5) facilities to which 15A NCAC 02D .0517(2), .0528, .0529, or .0534 applies;

- (6) facilities with a source subject to Title IV or 40 CFR Part 72; or
- (7) facilities in a source category designated by EPA as subject to the requirements of 40 CFR Part 70.

(b) This Section does not apply to minor facilities with sources subject to requirements of 15A NCAC 02D .0524, .1110, or .1111 or 40 CFR Part 60, 61, or 63 until EPA requires these facilities to have a permit under 40 CFR Part 70.

(c) A facility shall not be required to obtain a permit under this Section on the sole basis of its greenhouse gas emissions.

~~(d)~~ Once a facility is subject to this Section because of emissions of one pollutant, the owner or operator of that facility shall submit an application that includes all sources of all regulated air pollutants located at the facility except for insignificant activities because of category.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(10); 143-215.108.

### 15A NCAC 02Q .0507 APPLICATION

(a) Except for:

- (1) minor permit modifications covered under Rule .0515 of this Section,
- (2) significant modifications covered under Rule .0516(c) of this Section, or
- (3) permit applications submitted under Rule .0506 of this Section,

the owner or operator of a source shall have one year from the date of beginning of operation of the source to file a complete application for a permit or permit revision. However, the owner or operator of the source shall not begin construction or operation until he has obtained a construction and operation permit pursuant to Rule .0501(c) or (d) and Rule .0504 of this Section.

(b) The application shall include all the information described in 40 CFR 70.3(d) and 70.5(c), including a list of insignificant activities because of size or production rate; but not including insignificant activities because of category. The application form shall be certified by a responsible official for truth, accuracy, and completeness. In the application submitted pursuant to this Rule, the applicant may attach copies of applications submitted pursuant to Section .0400 of this Subchapter or 15A NCAC 02D .0530 or .0531, provided the information in those applications contains information required in this Section and is current, valid, and complete.

(c) Application for a permit, permit revision, or permit renewal shall be made in accordance with Rule .0104 of this Subchapter on forms of the Division and shall include plans and specifications giving all necessary data and information as required by this Rule. Whenever the information provided on these forms does not describe the source or its air pollution abatement equipment to the extent necessary to evaluate the application, the Director may request that the applicant provide any other information that the Director considers necessary to evaluate the source and its air pollution abatement equipment.

(d) Along with filing a complete application form, the applicant shall also file the following:

- (1) for a new facility or an expansion of existing facility, a consistency determination in accordance with G.S. 143-215.108(f) that:
  - (A) bears the date of receipt entered by the clerk of the local government, or
  - (B) consists of a letter from the local government indicating that all zoning or subdivision ordinances are met by the facility;

- (2) for a new facility or an expansion of an existing facility in an area without zoning, an affidavit and proof of publication of a legal notice as required under Rule .0113 of this Subchapter; and

- ~~(3) for a new facility or modification of an existing facility, a written description of current and projected plans to reduce the emissions of air contaminants by source reduction and recycling in accordance with G.S. 143-215.108(g); the description shall include:~~

- ~~(A) for an existing facility, a summary of activities related to source reduction and recycling and a quantification of air emissions reduced and material recycled during the previous year and a summary of plans for further source reduction and recycling; or~~

- ~~(B) for a new facility, a summary of activities related to and plans for source reduction and recycling; and~~

- ~~(4)~~(3) if required by the Director, information showing that:

- (A) The applicant is financially qualified to carry out the permitted activities, or
- (B) The applicant has substantially complied with the air quality and emissions standards applicable to any activity in which the applicant has previously been engaged, and has been in substantial compliance with federal and state environmental laws and rules.

(e) The applicant shall submit copies of the application package as follows:

- (1) for sources subject to the requirements of 15A NCAC 02D .0530, .0531, or .1200, six copies plus one additional copy for each affected state that the Director has to notify;
- (2) for sources not subject to the requirements of 15A NCAC 02D .0530, .0531, or .1200, four copies plus one additional copy for each affected state that the Director has to notify.

The Director may at any time during the application process request additional copies of the complete application package from the applicant.

(f) Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, submit, as soon as possible, such supplementary facts or corrected

information. In addition, an applicant shall provide additional information as necessary to address any requirements that become applicable to the source after the date he filed a complete application but prior to release of a draft permit.

(g) The applicant shall submit the same number of copies of additional information as required for the application package.

(h) The submittal of a complete permit application shall not affect the requirement that any facility have a preconstruction permit under 15A NCAC 02D .0530, .0531, or .0532 or under Section .0400 of this Subchapter.

(i) The Director shall give priority to permit applications containing early reduction demonstrations under Section 112(i)(5) of the federal Clean Air Act. The Director shall take final action on such permit applications as soon as practicable after receipt of the complete permit application.

(j) With the exceptions specified in Rule .0203(i) of this Subchapter, a non-refundable permit application processing fee shall accompany each application. The permit application processing fees are defined in Section .0200 of this Subchapter. Each permit or renewal application is incomplete until the permit application processing fee is received.

(k) The applicant shall retain for the duration of the permit term one complete copy of the application package and any information submitted in support of the application package.

*Authority G.S. 143-215.3(a)(1); 143-215.107(a)(10); 143-215.108.*

## TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

### CHAPTER 46 – BOARD OF PHARMACY

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Pharmacy intends to amend the rule cited as 21 NCAC 46 .1801.*

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
[www.ncbop.org/lawandrules.htm](http://www.ncbop.org/lawandrules.htm)

**Proposed Effective Date:** August 1, 2015

#### Public Hearing:

**Date:** June 16, 2015

**Time:** 9:00 a.m.

**Location:** North Carolina Board of Pharmacy, 6015 Farrington Rd., Suite 201, Chapel Hill, NC 27517

**Reason for Proposed Action:** *The Board proposes amending the rule regarding refusal of a prescription in order to judge the validity of prescriptions by reference to the standards set by the occupational licensing boards of the prescribers, rather than by attempting to enumerate those standards in the rule, in light of changing standards set by other boards for those prescribers.*

**Comments may be submitted to:** Jay Campbell, 6015 Farrington Rd., Suite 201, Chapel Hill, NC 27517, fax (919) 246-1056, or email [jcampbell@ncbop.org](mailto:jcampbell@ncbop.org)

**Comment period ends:** 9:00 a.m., June 16, 2015

#### Procedure for Subjecting a Proposed Rule to Legislative

**Review:** If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

#### Fiscal impact (check all that apply).

- State funds affected
- Environmental permitting of DOT affected  
Analysis submitted to Board of Transportation
- Local funds affected
- Substantial economic impact (≥\$1,000,000)
- Approved by OSBM
- No fiscal note required by G.S. 150B-21.4

## SECTION .1800 – PRESCRIPTIONS

### 21 NCAC 46 .1801 RIGHT TO REFUSE A PRESCRIPTION

(a) A pharmacist or device and medical equipment dispenser ~~may~~ has a right to refuse to fill or refill a prescription order ~~order, if, if doing so would be contrary to his or her in his professional judgment, judgment, it would be harmful to the recipient, is not in the recipient's best interest or if there is a question as to its validity.~~

(b) A pharmacist or device and medical equipment dispenser shall not fill or refill a prescription order if, in the exercise of professional judgment, there is or reasonably should be a question regarding the order's accuracy, validity, authenticity, or safety for the patient. ~~the order was issued without a physical examination of the patient and in the absence of a prior prescriber patient relationship, unless:~~

- (1) ~~the prescription order was issued for the patient by a psychiatrist;~~
- (2) ~~the prescription order was issued for the patient after discussion of the patient status with a treating psychologist, therapist, or physician;~~
- (3) ~~the prescription order was ordered by a physician for flu vaccinations for groups of patients or members of the public;~~
- (4) ~~the prescription order was for prophylactic purposes, such as the ordering of antibiotics by a pediatrician for members of a child's family when the child has a positive strep test;~~

Hearing Officer's Suggested Hearing Comments  
Raleigh, NC -- June 9, 2015

INTRODUCTION

[Ray Stewart, Hearing officer]:

Good evening ladies and gentlemen. My name is Ray Stewart. I am the Compliance Supervisor of the Division of Air Quality's Winston-Salem Regional Office. My role as hearing officer is to listen to all relevant comment on these proceedings and report them to the full commission. Sitting with me is Ms. Joelle Burleson. She is with the North Carolina Division of Air Quality, Planning Section.

Some of the staff from the Division of Air Quality are here to assist. Ms. Burleson, please introduce the staff present.

[Ms. Burleson] (Introduces staff)

[Ray Stewart]:

This afternoon we are conducting three hearings. During Hearing 1, we will take comments concerning the amendments to Rules 15A NCAC 02D .0544, Prevention of Significant Deterioration (PSD) Requirements for Greenhouse Gases and 15A NCAC 02Q .0502, Applicability. During Hearing 2, we will take comments on amendment to Rule 15A NCAC 02D .0410, PM<sub>2.5</sub> Particulate Matter, which reflects more stringent National Ambient Air Quality Standards. During Hearing 3, we will take comments on amendments to rules concerning Source Reduction and Recycling Reporting Requirements in 15A NCAC 02Q Section .0200, Section .0300, and Section .0500. These hearings will be held according to the North Carolina Administrative Procedures Act. The public notice for these hearings has been published in the *North Carolina Register* and on the Division of Air Quality website. Notice also has been emailed to those on the DAQ email distribution list. I will enter the public notice and the proposed amendment into the hearing record without reading them at this time.

It would be helpful if any person desiring to comment would also submit a written statement for inclusion into the hearing record. Once called to speak, please come to the podium and state your name clearly, identify the rule or rules you are commenting on, and whom you represent.

**[Hearing 1]:**

I will now open the first hearing and take relevant comments on the rule amendments to the PSD rule for greenhouse gases (GHG) and Title V permit applicability rule.

On June 23, 2014, the United States Supreme Court issued a decision in *Utility Air Regulatory Group (UARG) v. Environmental Protection Agency (EPA)* addressing the application of stationary source permitting requirements to GHG emissions. In its decision, the Supreme Court said that the EPA may not treat greenhouse gases as an air pollutant for the purposes of determining whether a source is a major source required to obtain a PSD or Title V permit.

On July 24, 2014, Janet G. McCabe, Acting Assistant Administrator, EPA Office of Air and Radiation, and Cynthia Giles, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, wrote a memo outlining EPA's next steps for the agency's GHG permit program. In the memo, they wrote that the EPA will not apply or enforce the following regulatory requirements:

- Federal regulations or the EPA-approved PSD SIP provisions that require a stationary source to obtain a PSD permit if GHG are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification (e.g., 40 CFR 52.21(b)(49)(v)).
- Federal regulations or provisions in the EPA-approved Title V programs that require a stationary source to obtain a Title V permit solely because the source emits or has the potential to emit GHG above the major source thresholds.

To align the state rules with the Court decision, 15A NCAC 02D .0544, Prevention of Significant Deterioration Requirements for Greenhouse Gases, is proposed for amendment to remove the requirement that major stationary sources obtain a PSD permit on the sole basis of its GHG emissions and to update the reference to the global warming potentials for GHGs.

15A NCAC 02Q .0502, Applicability, is proposed for amendment to remove the requirement that facilities obtain a Title V permit on the sole basis of its GHG emissions.

Temporary rule amendments to 15A NCAC 02D .0544 and 15A NCAC 02Q .0502 were adopted on December 2, 2014 and these same rules under consideration are to make these amendments permanent.

{ optional script if there are a large number of speakers }

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 [Ray Stewart]:            Optional Time Limit

Many people have requested to speak at this hearing. Due to time constraints, speakers' presentations will be limited to \_\_\_ minutes. It would be helpful if speakers would also submit a written statement by the close of the comment period for inclusion into the hearing record.

-----

[Ray Stewart]:

I will now take any comments that you may have.

[SPEAKERS]

[Ray Stewart]:

Is there anyone else who would like to comment? If there are no more comments, then this hearing is closed. The hearing record will remain open until June 15, 2015, for additional written comments.

**[Hearing 2]:**

I will now open the second hearing and take relevant comments on amendment to Rule 15A NCAC 02D .0410, PM2.5 Particulate Matter, which reflects more stringent National Ambient Air Quality Standards or NAAQS. A regulatory analysis was prepared for the rule amendments presented in the hearing today and was approved by the OSBM.

On Dec. 14, 2012, EPA strengthened the PM2.5 (particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) NAAQS by revising the level of the annual arithmetic mean concentration from 15.0  $\mu\text{g}/\text{m}^3$  to 12.0  $\mu\text{g}/\text{m}^3$  while maintaining the current 24-hour average concentration of 35.0  $\mu\text{g}/\text{m}^3$ .

The proposed rule amendments update the state rule to reflect the current NAAQS value. Based on the 2010 – 2012 and subsequent ambient monitoring data, all counties in North Carolina are below the newly established 12  $\mu\text{g}/\text{m}^3$  national annual standard and the established daily 35  $\mu\text{g}/\text{m}^3$  standard<sup>1</sup>. On December 18, 2014, EPA determined that no area within North Carolina violates the 2012 standard or contributes to a nearby violation of the standard and designated all counties in North Carolina unclassifiable/attainment for the 2012 PM2.5 NAAQS as published in the *Federal Register* January 15, 2015 effective April 1, 2015.

{ optional script if there are a large number of speakers }

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[Ray Stewart]:            Optional Time Limit: Many people have requested to speak at this hearing. Due to time constraints, speakers' presentations will be limited to \_\_\_\_ minutes.

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<sup>1</sup> NCDENR. Division of Air Quality. PM2.5 Design Values for 2010-2012 in NC Counties.  
<http://daq.state.nc.us/monitor/data/pm2pt5/10-12.shtml>

[Ray Stewart]:

I will now take any comments you may have.

[SPEAKERS]

Is there anyone else who would like to comment? If there are no more comments, then this hearing is closed. The hearing record will remain open until June 15, 2015 for additional written comments.

**[Hearing 3]:**

I will now open the third hearing and take relevant comments on amendments to the Air Quality Permit Procedures rules to eliminate outdated air quality reporting requirements that pertain to source reduction and recycling. A regulatory impact analysis was developed for the rule amendments presented in the hearing today and was approved by the OSBM.

Section 38.(c) of the Session Law repealed G.S. 143-215.108(g) which was the underlying requirement that sources submit a written description of their current and projected plans to reduce emissions of air contaminants by source reduction and recycling with their air permit applications for new facilities and for modifications. This requirement was determined to be unnecessary and its repeal reduces burden on permit applicants. Three air quality rules are proposed to be amended to reflect the session law repeal of the outdated requirement by removing related language and involve paragraph renumbering: namely, 15A NCAC 02Q .0206 Payment of Fee; .0304, Applications; and .0507, Application.

{ optional script if there are a large number of speakers }

---

[Ray Stewart]:            Optional Time Limit: Many people have requested to speak at this hearing. Due to time constraints, speakers' presentations will be limited to \_\_\_\_ minutes.

---

[Ray Stewart]:

I will now take any comments you may have.

[SPEAKERS]

Is there anyone else who would like to comment? If there are no more comments, then this hearing is closed. The hearing record will remain open until June 15, 2015 for additional written comments.

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That concludes this afternoon's hearings. Thank you for your participation.

CHAPTER V

COMMENTS DURING THE COMMENT PERIOD

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

JUN 15 2015

Ms. Sheila C. Holman  
Director  
North Carolina Department of Environment  
and Natural Resources  
Division of Air Quality  
1641 Mail Service Center  
Raleigh, North Carolina 27699-1641

Dear Ms. Holman:

Thank you for your letter dated April 14, 2015, transmitting a prehearing package regarding amendments to the New Source Review (NSR), Prevention of Significant Deterioration (PSD) and title V permitting regulations in rules 15A NCAC 02D .0544, *Prevention of Significant Deterioration Requirements for Greenhouse Gases*, 15A NCAC 02Q .0502, *Applicability*, respectively. Revisions to these regulations are the subject of Hearing 1 of this package and seek to respond to the United States Supreme Court's June 23, 2014 decision addressing the application of stationary source permitting requirements to greenhouse gases (GHGs). *Utility Air Regulatory Group (UARG) v. Environmental Protection Agency*, 134 S. Ct. 2427 (2014). The amendments in North Carolina's prehearing submittal revise NSR PSD and title V permitting regulations to remove the obligations for a major stationary source or major modification to obtain a permit on the sole basis of GHG emissions. Additionally, this prehearing package proposes revisions to incorporate by reference the global warming potential (GWP) values included in the Table A-1 of Subpart A of 40 CFR Part 98 and proposes revisions to rule 02D .0410, *PM2.5 Particulate Matter* regarding the recent changes to the 2012 PM<sub>2.5</sub> national ambient air quality standards.

We have completed our preliminary review and have no specific comments regarding the incorporation by reference of the GWP values and the revisions to the rule 02D .0410, *PM2.5 Particulate Matter*. We do have comments we are able to provide at this time, in light of ongoing actions, concerning North Carolina's proposed revisions to alter permitting obligations triggered by GHG emissions.

In its June 23, 2014, decision, the U.S. Supreme Court held that the EPA may not treat GHGs as an air pollutant for purposes of determining whether a source is a major source (or a modification thereof) required to obtain a PSD or title V permit. However, the Court also held that the EPA could continue to require that PSD permits contain limitations on GHG emissions based on the application of Best Available Control Technology (BACT) for new and modified sources that trigger PSD permitting obligations based on emissions of air pollutants other than GHGs. In accordance with the Supreme Court decision, on April 10, 2015, the U.S. Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) issued an amended judgment: 1) vacating the EPA regulations at issue in the litigation, including 40 CFR 51.166(b)(48)(v) and 40 CFR 52.21(b)(49)(v), "to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant

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emissions increase from a modification” and applicable title V regulations “to the extent that they require a stationary source to obtain a title V permit solely because the source emits or has the potential to emit greenhouse gases above the applicable major source thresholds”; 2) ordering that EPA take steps to rescind or revise the applicable provisions of the CFR as expeditiously as practicable; and 3) ordering that EPA consider whether any further revisions are appropriate considering the Supreme Court’s decision. *Coalition for Responsible Regulation v. EPA*, No. 09–1322, (D.C. Cir. April 10, 2015) (Amended Judgment).

In order to act consistently with the U.S. Supreme Court’s decision and the D.C. Circuit’s amended judgment, the EPA will no longer require states to include in their SIP a requirement that sources obtain PSD permits when GHGs are the only pollutant: (i) that the source emits or has the potential to emit above the major source thresholds; or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification. The EPA addressed this topic and provided its preliminary views on other questions raised by the Supreme Court’s decision in a July 24, 2014, Memorandum entitled “*Next Steps and Preliminary Views on the Application of Clean Air Act Permitting Programs to Greenhouse Gases Following the Supreme Court’s Decision in Utility Air Regulatory Group v. Environmental Protection Agency*” (Memorandum from Janet McCabe, Acting Assistant Administrator of the Office of Air and Radiation, and Cynthia Giles, Assistant Administrator of the Office of Enforcement and Compliance Assurance, to EPA Regions 1 through 10).

Based on a preliminary review by EPA, most of North Carolina’s proposed revisions to its state regulations appear consistent with the D.C. Circuit’s amended judgment and the EPA’s interpretation of the Supreme Court’s decision as articulated in the EPA’s July 24, 2014, memorandum. However, the EPA has not yet completed its intended revisions to the PSD rules at 40 CFR 52.21 and 40 CFR 51.166 and the appropriate title V rules to reflect the *UARG* decision and the D.C. Circuit’s amended judgment. Thus, the EPA cannot confirm at this point that any of the rule changes reflected in North Carolina’s prehearing package ultimately will be sufficient to obtain the EPA’s approval.

The EPA supports North Carolina taking immediate steps to implement the PSD and title V permitting program in a manner that is consistent with the U.S. Supreme Court decision and the D.C. Circuit’s amended judgment. The EPA understands North Carolina’s desire to quickly update its state PSD and title V regulations to ensure that the State’s regulations are consistent with the U.S. Supreme Court’s decision and the D.C. Circuit’s amended judgment. However, we caution North Carolina to be cognizant that there is presently uncertainty regarding the form of revisions to the federal PSD and title V regulations that the EPA anticipates undertaking to address the Supreme Court’s decision and the amended judgment of the D.C. Circuit. These revisions to the EPA’s rules may result in the need for additional revisions to North Carolina’s permitting regulations. As new information is available regarding the need for such revisions, we will communicate this to you and your staff.

We appreciate your transmittal of this package for our consideration. If you have any questions, please contact Ms. Lynorae Benjamin, Chief, Air Regulatory Management Section at (404) 562-9040, or have your staff contact Mr. Brad Akers at (404) 562-9089.

Sincerely,

A handwritten signature in blue ink, appearing to read "R. Scott Davis". The signature is fluid and cursive, with a large loop at the end.

R. Scott Davis

Chief

Air Planning and Implementation Branch

## CHAPTER VI

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(Slip Opinion)

OCTOBER TERM, 2013

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## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

**SUPREME COURT OF THE UNITED STATES**

## Syllabus

**UTILITY AIR REGULATORY GROUP *v.*  
ENVIRONMENTAL PROTECTION AGENCY ET AL.**

**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT**

No. 12–1146. Argued February 24, 2014—Decided June 23, 2014 \*

The Clean Air Act imposes permitting requirements on stationary sources, such as factories and powerplants. The Act’s “Prevention of Significant Deterioration” (PSD) provisions make it unlawful to construct or modify a “major emitting facility” in “any area to which [the PSD program] applies” without a permit. §§7475(a)(1), 7479(2)(C). A “major emitting facility” is a stationary source with the potential to emit 250 tons per year of “any air pollutant” (or 100 tons per year for certain types of sources). §7479(1). Facilities seeking to qualify for a PSD permit must, *inter alia*, comply with emissions limitations that reflect the “best available control technology” (BACT) for “each pollutant subject to regulation under” the Act. §7475(a)(4). In addition, Title V of the Act makes it unlawful to operate any “major source,” wherever located, without a permit. §7661a(a). A “major source” is a stationary source with the potential to emit 100 tons per year of “any air pollutant.” §§7661(2)(B), 7602(j).

In response to *Massachusetts v. EPA*, 549 U. S. 497, EPA promulgated greenhouse-gas emission standards for new motor vehicles, and

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\*Together with No. 12–1248, *American Chemistry Council et al. v. Environmental Protection Agency et al.*, No. 12–1254, *Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation et al. v. Environmental Protection Agency et al.*, No. 12–1268, *Southeastern Legal Foundation, Inc., et al. v. Environmental Protection Agency et al.*, No. 12–1269, *Texas et al. v. Environmental Protection Agency et al.*, and No. 12–1272, *Chamber of Commerce of United States States et al. v. Environmental Protection Agency et al.*, also on certiorari to the same court.

## Syllabus

made stationary sources subject to the PSD program and Title V on the basis of their potential to emit greenhouse gases. It recognized, however, that requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs and render them unadministrable. So EPA purported to “tailor” the programs to accommodate greenhouse gases by providing, among other things, that sources would not become newly subject to PSD or Title V permitting on the basis of their potential to emit greenhouse gases in amounts less than 100,000 tons per year.

Numerous parties, including several States, challenged EPA’s actions in the D. C. Circuit, which dismissed some of the petitions for lack of jurisdiction and denied the remainder.

*Held:* The judgment is affirmed in part and reversed in part.

684 F. 3d 102, affirmed in part and reversed in part.

JUSTICE SCALIA delivered the opinion of the Court with respect to Parts I and II, concluding:

1. The Act neither compels nor permits EPA to adopt an interpretation of the Act requiring a source to obtain a PSD or Title V permit on the sole basis of its potential greenhouse-gas emissions. Pp. 10–24.

(a) The Act does not compel EPA’s interpretation. *Massachusetts* held that the Act-wide definition of “air pollutant” includes greenhouse gases, 549 U. S., at 529, but where the term “air pollutant” appears in the Act’s operative provisions, including the PSD and Title V permitting provisions, EPA has routinely given it a narrower, context-appropriate meaning. *Massachusetts* did not invalidate those longstanding constructions. The Act-wide definition is not a command to regulate, but a description of the universe of substances EPA may consider regulating under the Act’s operative provisions. Though Congress’s profligate use of “air pollutant” is not conducive to clarity, the presumption of consistent usage “readily yields” to context, and a statutory term “may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.” *Environmental Defense v. Duke Energy Corp.*, 549 U. S. 561, 574. Pp. 10–16.

(b) Nor does the Act permit EPA’s interpretation. Agencies empowered to resolve statutory ambiguities must operate “within the bounds of reasonable interpretation,” *Arlington v. FCC*, 569 U. S. \_\_\_, \_\_\_. EPA has repeatedly acknowledged that applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with the Act’s structure and design. A review of the relevant statutory provisions leaves no doubt that the PSD program and Title V are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy sub-

Cite as: 573 U. S. \_\_\_\_ (2014)

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## Syllabus

stantive and procedural burdens. EPA’s interpretation would also bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 160. Pp. 16–20.

(c) EPA lacked authority to “tailor” the Act’s unambiguous numerical thresholds of 100 or 250 tons per year to accommodate its greenhouse-gas-inclusive interpretation of the permitting triggers. Agencies must always “give effect to the unambiguously expressed intent of Congress.” *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U. S. 644, 665. The power to execute the laws does not include a power to revise clear statutory terms that turn out not to work in practice. Pp. 20–24.

2. EPA reasonably interpreted the Act to require sources that would need permits based on their emission of conventional pollutants to comply with BACT for greenhouse gases. Pp. 24–29.

(a) Concerns that BACT, which has traditionally been about end-of-stack controls, is fundamentally unsuited to greenhouse-gas regulation, which is more about energy use, are not unfounded. But an EPA guidance document states that BACT analysis should consider options other than energy efficiency, including “carbon capture and storage,” which EPA contends is reasonably comparable to more traditional, end-of-stack BACT technologies. Moreover, assuming that BACT may be used to force improvements in energy efficiency, important limitations on BACT may work to mitigate concerns about “unbounded” regulatory authority. Pp. 24–27.

(b) EPA’s decision to require BACT for greenhouse gases emitted by sources otherwise subject to PSD review is, as a general matter, a permissible interpretation of the statute under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837. The specific phrasing of the BACT provision—which requires BACT “for each pollutant subject to regulation under” the Act, §7475(a)(4)—does not suggest that the provision can bear a narrowing construction. And even if the text were not clear, applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority, as to make EPA’s interpretation unreasonable. Pp. 27–29.

SCALIA, J., announced the judgment of the Court and delivered an opinion, Parts I and II of which were for the Court. ROBERTS, C. J., and KENNEDY, J., joined that opinion in full; THOMAS and ALITO, JJ., joined as to Parts I, II–A, and II–B–1; and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined as to Part II–B–2. BREYER J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined.

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## Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

**SUPREME COURT OF THE UNITED STATES**

Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, and 12–1272

UTILITY AIR REGULATORY GROUP,  
PETITIONER

12–1146

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

AMERICAN CHEMISTRY COUNCIL, ET AL.,  
PETITIONERS

12–1248

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

ENERGY-INTENSIVE MANUFACTURERS WORKING  
GROUP ON GREENHOUSE GAS REGULATION,  
ET AL., PETITIONERS

12–1254

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

SOUTHEASTERN LEGAL FOUNDATION, INC.,  
ET AL., PETITIONERS

12–1268

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

## TEXAS, ET AL., PETITIONERS

12–1269

*v.*ENVIRONMENTAL PROTECTION AGENCY,  
ET AL.; AND

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UTILITY AIR REGULATORY GROUP *v.* EPA

Opinion of the Court

CHAMBER OF COMMERCE OF THE UNITED  
STATES, ET AL., PETITIONERS

12–1272

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 23, 2014]

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II.

Acting pursuant to the Clean Air Act, 69 Stat. 322, as amended, 42 U. S. C. §§7401–7671q, the Environmental Protection Agency recently set standards for emissions of “greenhouse gases” (substances it believes contribute to “global climate change”) from new motor vehicles. We must decide whether it was permissible for EPA to determine that its motor-vehicle greenhouse-gas regulations automatically triggered permitting requirements under the Act for stationary sources that emit greenhouse gases.

## I. Background

## A. Stationary-Source Permitting

The Clean Air Act regulates pollution-generating emissions from both stationary sources, such as factories and powerplants, and moving sources, such as cars, trucks, and aircraft. This litigation concerns permitting obligations imposed on stationary sources under Titles I and V of the Act.

Title I charges EPA with formulating national ambient air quality standards (NAAQS) for air pollutants. §§7408–7409. To date, EPA has issued NAAQS for six pollutants: sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead. Clean Air Act Handbook 125 (J. Domike & A. Zacaroli eds., 3d ed. 2011); see generally 40 CFR pt. 50 (2013). States have primary responsibility

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## Opinion of the Court

for implementing the NAAQS by developing “State implementation plans.” 42 U. S. C. §7410. A State must designate every area within its borders as “attainment,” “non-attainment,” or “unclassifiable” with respect to each NAAQS, §7407(d), and the State’s implementation plan must include permitting programs for stationary sources that vary according to the classification of the area where the source is or is proposed to be located. §7410(a)(2)(C), (I).

Stationary sources in areas designated attainment or unclassifiable are subject to the Act’s provisions relating to “Prevention of Significant Deterioration” (PSD). §§7470–7492. EPA interprets the PSD provisions to apply to sources located in areas that are designated attainment or unclassifiable for *any* NAAQS pollutant, regardless of whether the source emits that specific pollutant. Since the inception of the PSD program, every area of the country has been designated attainment or unclassifiable for at least one NAAQS pollutant; thus, on EPA’s view, all stationary sources are potentially subject to PSD review.

It is unlawful to construct or modify a “major emitting facility” in “any area to which [the PSD program] applies” without first obtaining a permit. §§7475(a)(1), 7479(2)(C). To qualify for a permit, the facility must not cause or contribute to the violation of any applicable air-quality standard, §7475(a)(3), and it must comply with emissions limitations that reflect the “best available control technology” (or BACT) for “each pollutant subject to regulation under” the Act. §7475(a)(4). The Act defines a “major emitting facility” as any stationary source with the potential to emit 250 tons per year of “any air pollutant” (or 100 tons per year for certain types of sources). §7479(1). It defines “modification” as a physical or operational change that causes the facility to emit more of “any air pollutant.”

## Opinion of the Court

§7411(a)(4).<sup>1</sup>

In addition to the PSD permitting requirements for construction and modification, Title V of the Act makes it unlawful to *operate* any “major source,” wherever located, without a comprehensive operating permit. §7661a(a). Unlike the PSD program, Title V generally does not impose any substantive pollution-control requirements. Instead, it is designed to facilitate compliance and enforcement by consolidating into a single document all of a facility’s obligations under the Act. The permit must include all “emissions limitations and standards” that apply to the source, as well as associated inspection, monitoring, and reporting requirements. §7661c(a)–(c). Title V defines a “major source” by reference to the Act-wide definition of “major stationary source,” which in turn means any stationary source with the potential to emit 100 tons per year of “any air pollutant.” §§7661(2)(B), 7602(j).

## B. EPA’s Greenhouse-Gas Regulations

In 2007, the Court held that Title II of the Act “authorize[d] EPA to regulate greenhouse gas emissions from new motor vehicles” if the Agency “form[ed] a ‘judgment’ that

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<sup>1</sup>Although the statute sets numerical thresholds (100 or 250 tons per year) for emissions that will make a facility “major,” it does not specify by how much a physical or operational change must increase emissions to constitute a permit-requiring “modification.” Nor does it say how much of a given regulated pollutant a “major emitting facility” must emit before it is subject to BACT for that pollutant. EPA, however, has established pollutant-specific numerical thresholds below which a facility’s emissions of a pollutant, and increases therein, are considered *de minimis* for those purposes. See 40 CFR §§51.166(b)(2)(i), (23), (39), (j)(2)–(3), 52.21(b)(2)(i), (23), (40), (j)(2)–(3); see also *Alabama Power Co. v. Costle*, 636 F. 2d 323, 360–361, 400, 405 (CA DC 1979) (recognizing this authority in EPA); cf. *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U. S. 214, 231 (1992) (“[D]e minimis non curat lex . . . is part of the established background of legal principles against which all enactments are adopted”).

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such emissions contribute to climate change.” *Massachusetts v. EPA*, 549 U. S. 497, 528 (quoting §7521(a)(1)). In response to that decision, EPA embarked on a course of regulation resulting in “the single largest expansion in the scope of the [Act] in its history.” Clean Air Act Handbook, at xxi.

EPA first asked the public, in a notice of proposed rulemaking, to comment on how the Agency should respond to *Massachusetts*. In doing so, it explained that regulating greenhouse-gas emissions from motor vehicles could have far-reaching consequences for stationary sources. Under EPA’s view, once greenhouse gases became regulated under any part of the Act, the PSD and Title V permitting requirements would apply to all stationary sources with the potential to emit greenhouse gases in excess of the statutory thresholds: 100 tons per year under Title V, and 100 or 250 tons per year under the PSD program depending on the type of source. 73 Fed. Reg. 44420, 44498, 44511 (2008). Because greenhouse-gas emissions tend to be “orders of magnitude greater” than emissions of conventional pollutants, EPA projected that numerous small sources not previously regulated under the Act would be swept into the PSD program and Title V, including “smaller industrial sources,” “large office and residential buildings, hotels, large retail establishments, and similar facilities.” *Id.*, at 44498–44499. The Agency warned that this would constitute an “unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land,” yet still be “relatively ineffective at reducing greenhouse gas concentrations.” *Id.*, at 44355.<sup>2</sup>

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<sup>2</sup>Comments from other Executive Branch agencies reprinted in the notice echoed those concerns. See, e.g., 73 Fed. Reg. 44360 (Departments of Agriculture, Commerce, Transportation, and Energy noting EPA would “exercis[e] de facto zoning authority through control over thousands of what formerly were local or private decisions, impacting

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In 2009, EPA announced its determination regarding the danger posed by motor-vehicle greenhouse-gas emissions. EPA found that greenhouse-gas emissions from new motor vehicles contribute to elevated atmospheric concentrations of greenhouse gases, which endanger public health and welfare by fostering global “climate change.” 74 Fed. Reg. 66523, 66537 (hereinafter Endangerment Finding). It denominated a “single air pollutant” the “combined mix” of six greenhouse gases that it identified as “the root cause of human-induced climate change”: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. *Id.*, at 66516, 66537. A source’s greenhouse-gas emissions would be measured in “carbon dioxide equivalent units” (CO<sub>2</sub>e), which would be calculated based on each gas’s “global warming potential.” *Id.*, at 66499, n. 4.

Next, EPA issued its “final decision” regarding the prospect that motor-vehicle greenhouse-gas standards would trigger stationary-source permitting requirements. 75 Fed. Reg. 17004 (2010) (hereinafter Triggering Rule). EPA announced that beginning on the effective date of its greenhouse-gas standards for motor vehicles, stationary sources would be subject to the PSD program and Title V on the basis of their potential to emit greenhouse gases. As expected, EPA in short order promulgated greenhouse-gas emission standards for passenger cars, light-duty

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the construction of schools, hospitals, and commercial and residential development”); *id.*, at 44383 (Council of Economic Advisers and Office of Science and Technology Policy stating that “[s]mall manufacturing facilities, schools, and shopping centers” would be subject to “full major source permitting”); *id.*, at 44385 (Council on Environmental Quality noting “the prospect of essentially automatic and immediate regulation over a vast range of community and business activity”); *id.*, at 44391 (Small Business Administration finding it “difficult to overemphasize how potentially disruptive and burdensome such a new regulatory regime would be to small entities” such as “office buildings, retail establishments, hotels, . . . schools, prisons, and private hospitals”).

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trucks, and medium-duty passenger vehicles to take effect on January 2, 2011. 75 Fed. Reg. 25324 (hereinafter Tailpipe Rule).

EPA then announced steps it was taking to “tailor” the PSD program and Title V to greenhouse gases. 75 Fed. Reg. 31514 (hereinafter Tailoring Rule). Those steps were necessary, it said, because the PSD program and Title V were designed to regulate “a relatively small number of large industrial sources,” and requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs, making them both unadministrable and “unrecognizable to the Congress that designed” them. *Id.*, at 31555, 31562. EPA nonetheless rejected calls to exclude greenhouse gases entirely from those programs, asserting that the Act is not “ambiguous with respect to the need to cover [greenhouse-gas] sources under either the PSD or title V program.” *Id.*, at 31548, n. 31. Instead, EPA adopted a “phase-in approach” that it said would “appl[y] PSD and title V at threshold levels that are as close to the statutory levels as possible, and do so as quickly as possible, at least to a certain point.” *Id.*, at 31523.

The phase-in, EPA said, would consist of at least three steps. During Step 1, from January 2 through June 30, 2011, no source would become newly subject to the PSD program or Title V solely on the basis of its greenhouse-gas emissions; however, sources required to obtain permits anyway because of their emission of conventional pollutants (so-called “anyway” sources) would need to comply with BACT for greenhouse gases if they emitted those gases in significant amounts, defined as at least 75,000 tons per year CO<sub>2</sub>e. *Ibid.* During Step 2, from July 1, 2011, through June 30, 2012, sources with the potential to emit at least 100,000 tons per year CO<sub>2</sub>e of greenhouse gases would be subject to PSD and Title V permitting for their construction and operation and to PSD permitting

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for modifications that would increase their greenhouse-gas emissions by at least 75,000 tons per year CO<sub>2</sub>e. *Id.*, at 31523–31524.<sup>3</sup> At Step 3, beginning on July 1, 2013, EPA said it might (or might not) further reduce the permitting thresholds (though not below 50,000 tons per year CO<sub>2</sub>e), and it might (or might not) establish permanent exemptions for some sources. *Id.*, at 31524. Beyond Step 3, EPA promised to complete another round of rulemaking by April 30, 2016, in which it would “take further action to address small sources,” which might (or might not) include establishing permanent exemptions. *Id.*, at 31525.

EPA codified Steps 1 and 2 at 40 CFR §§51.166(b)(48) and 52.21(b)(49) for PSD and at §§70.2 and 71.2 for Title V, and it codified its commitments regarding Step 3 and beyond at §§52.22, 70.12, and 71.13. See Tailoring Rule 31606–31608. After the decision below, EPA issued its final Step 3 rule, in which it decided not to lower the thresholds it had established at Step 2 until at least 2016. 77 Fed. Reg. 41051 (2012).

## C. Decision Below

Numerous parties, including several States, filed petitions for review in the D. C. Circuit under 42 U. S. C. §7607(b), challenging EPA’s greenhouse-gas-related actions. The Court of Appeals dismissed some of the petitions for lack of jurisdiction and denied the remainder. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F. 3d 102 (2012) (*per curiam*). First, it upheld the Endangerment Finding and Tailpipe Rule. *Id.*, at 119, 126. Next, it held that EPA’s interpretation of the PSD permitting requirement as applying to “any regulated air pollu-

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<sup>3</sup>EPA stated that its adoption of a 75,000-tons-per-year threshold for emissions requiring BACT and modifications requiring permits was not an exercise of its authority to establish *de minimis* exceptions and that a truly *de minimis* level might be “well below” 75,000 tons per year. Tailoring Rule 31560; cf. n. 1, *supra*.

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tant,” including greenhouse gases, was “compelled by the statute.” *Id.*, at 133–134. The court also found it “crystal clear that PSD permittees must install BACT for greenhouse gases.” *Id.*, at 137. Because it deemed petitioners’ arguments about the PSD program insufficiently applicable to Title V, it held they had “forfeited any challenges to EPA’s greenhouse gas-inclusive interpretation of Title V.” *Id.*, at 136. Finally, it held that petitioners were without Article III standing to challenge EPA’s efforts to limit the reach of the PSD program and Title V through the Triggering and Tailoring Rules. *Id.*, at 146. The court denied rehearing en banc, with Judges Brown and Kavanaugh each dissenting. No. 09–1322 etc. (Dec. 20, 2012), App. 139, 2012 WL 6621785.

We granted six petitions for certiorari but agreed to decide only one question: “Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.” 571 U. S. \_\_\_\_ (2013).

## II. Analysis

This litigation presents two distinct challenges to EPA’s stance on greenhouse-gas permitting for stationary sources. First, we must decide whether EPA permissibly determined that a source may be subject to the PSD and Title V permitting requirements on the sole basis of the source’s potential to emit greenhouse gases. Second, we must decide whether EPA permissibly determined that a source already subject to the PSD program because of its emission of conventional pollutants (an “anyway” source) may be required to limit its greenhouse-gas emissions by employing the “best available control technology” for greenhouse gases. The Solicitor General joins issue on both points but evidently regards the second as more important; he informs us that “anyway” sources account

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for roughly 83% of American stationary-source greenhouse-gas emissions, compared to just 3% for the additional, non-“anyway” sources EPA sought to regulate at Steps 2 and 3 of the Tailoring Rule. Tr. of Oral Arg. 52.

We review EPA’s interpretations of the Clean Air Act using the standard set forth in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). Under *Chevron*, we presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity. The question for a reviewing court is whether in doing so the agency has acted reasonably and thus has “stayed within the bounds of its statutory authority.” *Arlington v. FCC*, 569 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 5) (emphasis deleted).

## A. The PSD and Title V Triggers

We first decide whether EPA permissibly interpreted the statute to provide that a source may be required to obtain a PSD or Title V permit on the sole basis of its potential greenhouse-gas emissions.

## 1

EPA thought its conclusion that a source’s greenhouse-gas emissions may necessitate a PSD or Title V permit followed from the Act’s unambiguous language. The Court of Appeals agreed and held that the statute “compelled” EPA’s interpretation. 684 F. 3d, at 134. We disagree. The statute compelled EPA’s greenhouse-gas-inclusive interpretation with respect to neither the PSD program nor Title V.<sup>4</sup>

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<sup>4</sup>The Court of Appeals held that petitioners’ arguments applied only to the PSD program and that petitioners had therefore “forfeited any challenges to EPA’s greenhouse gas-inclusive interpretation of Title V.” 684 F. 3d, at 136. The Solicitor General does not defend the Court of Appeals’ ruling on forfeiture, and he concedes that some of the argu-

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The Court of Appeals reasoned by way of a flawed syllogism: Under *Massachusetts*, the general, Act-wide definition of “air pollutant” includes greenhouse gases; the Act requires permits for major emitters of “any air pollutant”; therefore, the Act requires permits for major emitters of greenhouse gases. The conclusion follows from the premises only if the air pollutants referred to in the permit-requiring provisions (the minor premise) are the same air pollutants encompassed by the Act-wide definition as interpreted in *Massachusetts* (the major premise). Yet no one—least of all EPA—endorses that proposition, and it is obviously untenable.

The Act-wide definition says that an air pollutant is “any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.” §7602(g). In *Massachusetts*, the Court held that the Act-wide definition includes greenhouse gases because it is all-encompassing; it “embraces all airborne compounds of whatever stripe.” 549 U. S., at 529. But where the term “air pollutant” appears in the Act’s operative provisions, EPA has routinely given it a narrower, context-appropriate meaning.

That is certainly true of the provisions that require PSD and Title V permitting for major emitters of “any air pollutant.” Since 1978, EPA’s regulations have interpreted “air pollutant” in the PSD permitting trigger as limited to *regulated* air pollutants, 43 Fed. Reg. 26403, codified, as amended, 40 CFR §52.21(b)(1)–(2), (50)—a class much narrower than *Massachusetts*’ “all airborne compounds of

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ments petitioners have made before this Court apply to Title V as well as the PSD program. See Brief for Federal Respondents 56. We agree, and we are satisfied that those arguments were also made below. See, e.g., Brief for State Petitioners et al. in No. 10–1073 etc. (CADDC), pp. 59–73; Brief for Non-State Petitioners et al. in No. 10–1073 etc. (CADDC), pp. 46–47.

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whatever stripe,” 549 U. S., at 529. And since 1993 EPA has informally taken the same position with regard to the Title V permitting trigger, a position the Agency ultimately incorporated into some of the regulations at issue here. See Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, to Air Division Director, Regions I–X, pp. 4–5 (Apr. 26, 1993); Tailoring Rule 31607–31608 (amending 40 CFR §§70.2, 71.2). Those interpretations were appropriate: It is plain as day that the Act does not envision an elaborate, burdensome permitting process for major emitters of steam, oxygen, or other harmless airborne substances. It takes some cheek for EPA to insist that it cannot possibly give “air pollutant” a reasonable, context-appropriate meaning in the PSD and Title V contexts when it has been doing precisely that for decades.

Nor are those the only places in the Act where EPA has inferred from statutory context that a generic reference to air pollutants does not encompass every substance falling within the Act-wide definition. Other examples abound:

- The Act authorizes EPA to enforce new source performance standards (NSPS) against a pre-existing source if, after promulgation of the standards, the source undergoes a physical or operational change that increases its emission of “any air pollutant.” §7411(a)(2), (4), (b)(1)(B). EPA interprets that provision as limited to air pollutants *for which EPA has promulgated new source performance standards*. 36 Fed. Reg. 24877 (1971), codified, as amended, 40 CFR §60.2; 40 Fed. Reg. 58419 (1975), codified, as amended, 40 CFR §60.14(a).
- The Act requires a permit for the construction or operation in a nonattainment area of a source with the potential to emit 100 tons per year of “any air

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pollutant.” §§7502(c)(5), 7602(j). EPA interprets that provision as limited to pollutants *for which the area is designated nonattainment*. 45 Fed. Reg. 52745 (1980), promulgating 40 CFR §51.18(j)(2), as amended, §51.165(a)(2).

- The Act directs EPA to require “enhanced monitoring and submission of compliance certifications” for any source with the potential to emit 100 tons per year of “any air pollutant.” §§7414(a)(3), 7602(j). EPA interprets that provision as limited to *regulated* pollutants. 62 Fed. Reg. 54941 (1997), codified at 40 CFR §§64.1, 64.2.
- The Act requires certain sources of air pollutants that interfere with visibility to undergo retrofitting if they have the potential to emit 250 tons per year of “any pollutant.” §7491(b)(2)(A), (g)(7). EPA interprets that provision as limited to *visibility-impairing* air pollutants. 70 Fed. Reg. 39160 (2005), codified at 40 CFR pt. 51, App. Y, §II.A.3.

Although these limitations are nowhere to be found in the Act-wide definition, in each instance EPA has concluded—as it has in the PSD and Title V context—that the statute is not using “air pollutant” in *Massachusetts*’ broad sense to mean any airborne substance whatsoever.

*Massachusetts* did not invalidate all these longstanding constructions. That case did not hold that EPA must always regulate greenhouse gases as an “air pollutant” everywhere that term appears in the statute, but only that EPA must “ground its reasons for action *or* inaction in the statute,” 549 U. S., at 535 (emphasis added), rather than on “reasoning divorced from the statutory text,” *id.*, at 532. EPA’s inaction with regard to Title II was not sufficiently grounded in the statute, the Court said, in part

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because nothing in the Act suggested that regulating greenhouse gases under that Title would conflict with the statutory design. Title II would not compel EPA to regulate in any way that would be “extreme,” “counterintuitive,” or contrary to “common sense.” *Id.*, at 531. At most, it would require EPA to take the modest step of adding greenhouse-gas standards to the roster of new-motor-vehicle emission regulations. *Ibid.*

*Massachusetts* does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme. The Act-wide definition to which the Court gave a “sweeping” and “capacious” interpretation, *id.*, at 528, 532, is not a command to regulate, but a description of the universe of substances EPA may *consider* regulating under the Act’s operative provisions. *Massachusetts* does not foreclose the Agency’s use of statutory context to infer that certain of the Act’s provisions use “air pollutant” to denote not every conceivable airborne substance, but only those that may sensibly be encompassed within the particular regulatory program. As certain *amici* felicitously put it, while *Massachusetts* “rejected EPA’s categorical contention that greenhouse gases *could not* be ‘air pollutants’ for any purposes of the Act,” it did not “embrace EPA’s current, equally categorical position that greenhouse gases *must* be air pollutants for all purposes” regardless of the statutory context. Brief for Administrative Law Professors et al. as *Amici Curiae* 17.<sup>5</sup>

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<sup>5</sup>Our decision in *American Elec. Power Co. v. Connecticut*, 564 U. S. \_\_\_\_ (2011), does not suggest otherwise. We there held that the Act’s authorization for EPA to establish performance standards for power-plant greenhouse-gas emissions displaced any federal-common-law right that might otherwise have existed to seek abatement of those emissions. *Id.*, at \_\_\_\_ (slip op., at 10). The authorization to which we referred was that given in the NSPS program of §7411, a part of the Act

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To be sure, Congress’s profligate use of “air pollutant” where what is meant is obviously narrower than the Act-wide definition is not conducive to clarity. One ordinarily assumes “that identical words used in different parts of the same act are intended to have the same meaning.” *Environmental Defense v. Duke Energy Corp.*, 549 U. S. 561, 574 (2007). In this respect (as in countless others), the Act is far from a *chef d’oeuvre* of legislative draftsmanship. But we, and EPA, must do our best, bearing in mind the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000). As we reiterated the same day we decided *Massachusetts*, the presumption of consistent usage “readily yields” to context, and a statutory term—even one defined in the statute—“may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.” *Duke Energy, supra*, at 574.

We need not, and do not, pass on the validity of all the limiting constructions EPA has given the term “air pollutant” throughout the Act. We merely observe that taken together, they belie EPA’s rigid insistence that when interpreting the PSD and Title V permitting requirements it is bound by the Act-wide definition’s inclusion of greenhouse gases, no matter how incompatible that inclusion is with those programs’ regulatory structure.

In sum, there is no insuperable textual barrier to EPA’s interpreting “any air pollutant” in the permitting triggers of PSD and Title V to encompass only pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds, and to exclude those atypical

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not at issue here and one that no party in *American Electric Power* argued was ill suited to accommodating greenhouse gases.

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pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written.<sup>6</sup>

## 2

Having determined that EPA was mistaken in thinking the Act *compelled* a greenhouse-gas-inclusive interpretation of the PSD and Title V triggers, we next consider the Agency’s alternative position that its interpretation was justified as an exercise of its “discretion” to adopt “a reasonable construction of the statute.” Tailoring Rule 31517. We conclude that EPA’s interpretation is not permissible.

Even under *Chevron*’s deferential framework, agencies must operate “within the bounds of reasonable interpretation.” *Arlington*, 569 U. S., at \_\_\_ (slip op., at 5). And reasonable statutory interpretation must account for both “the specific context in which . . . language is used” and “the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U. S. 337, 341 (1997). A statutory

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<sup>6</sup>During the course of this litigation, several possible limiting constructions for the PSD trigger have been proposed. Judge Kavanaugh argued below that it would be plausible for EPA to read “any air pollutant” in the PSD context as limited to the six NAAQS pollutants. See *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09–1322 etc. (CADC, Dec. 20, 2012), App. 171–180, 2012 WL 6621785, \*15–\*18 (opinion dissenting from denial of rehearing en banc). Some petitioners make a slightly different argument: that because PSD permitting is required only for major emitting facilities “in any area to which [the PSD program] applies,” §7475(a), the relevant pollutants are only those NAAQS pollutants for which the area in question is designated attainment or unclassifiable. That approach would bring EPA’s interpretation of the PSD trigger in line with its longstanding interpretation of the permitting requirements for nonattainment areas. Others maintain that “any air pollutant” in the PSD provision should be limited to air pollutants with localized effects on air quality. We do not foreclose EPA or the courts from considering those constructions in the future, but we need not do so today.

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“provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988). Thus, an agency interpretation that is “inconsisten[t] with the design and structure of the statute as a whole,” *University of Tex. Southwestern Medical Center v. Nassar*, 570 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 13), does not merit deference.

EPA itself has repeatedly acknowledged that applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with—in fact, would overthrow—the Act’s structure and design. In the Tailoring Rule, EPA described the calamitous consequences of interpreting the Act in that way. Under the PSD program, annual permit applications would jump from about 800 to nearly 82,000; annual administrative costs would swell from \$12 million to over \$1.5 billion; and decade-long delays in issuing permits would become common, causing construction projects to grind to a halt nationwide. Tailoring Rule 31557. The picture under Title V was equally bleak: The number of sources required to have permits would jump from fewer than 15,000 to about 6.1 million; annual administrative costs would balloon from \$62 million to \$21 billion; and collectively the newly covered sources would face permitting costs of \$147 billion. *Id.*, at 31562–31563. 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.” *Id.*, at 31533. EPA stated that these results would be so “contrary to congressional intent,” and would so “severely undermine what Congress sought to accomplish,” that they necessitated as much as a 1,000-fold increase in the permitting thresholds set forth in the statute. *Id.*, at 31554, 31562.

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Like EPA, we think it beyond reasonable debate that requiring permits for sources based solely on their emission of greenhouse gases at the 100- and 250-tons-per-year levels set forth in the statute would be “incompatible” with “the substance of Congress’ regulatory scheme.” *Brown & Williamson*, 529 U. S., at 156. A brief review of the relevant statutory provisions leaves no doubt that the PSD program and Title V are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens.

Start with the PSD program, which imposes numerous and costly requirements on those sources that are required to apply for permits. Among other things, the applicant must make available a detailed scientific analysis of the source’s potential pollution-related impacts, demonstrate that the source will not contribute to the violation of any applicable pollution standard, and identify and use the “best available control technology” for each regulated pollutant it emits. §7475(a)(3), (4), (6), (e). The permitting authority (the State, usually) also bears its share of the burden: It must grant or deny a permit within a year, during which time it must hold a public hearing on the application. §7475(a)(2), (c). Not surprisingly, EPA acknowledges that PSD review is a “complicated, resource-intensive, time-consuming, and sometimes contentious process” suitable for “hundreds of larger sources,” not “tens of thousands of smaller sources.” 74 Fed. Reg. 55304, 55321–55322.

Title V contains no comparable substantive requirements but imposes elaborate procedural mandates. It requires the applicant to submit, within a year of becoming subject to Title V, a permit application and a “compliance plan” describing how it will comply with “all applicable requirements” under the Act; to certify its compliance annually; and to submit to “inspection, entry, monitoring,

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... and reporting requirements.” §§7661b(b)–(c), 7661c(a)–(c). The procedural burdens on the permitting authority and EPA are also significant. The permitting authority must hold a public hearing on the application, §7661a(b)(6), and it must forward the application and any proposed permit to EPA and neighboring States and respond in writing to their comments, §7661d(a), (b)(1). If it fails to issue or deny the permit within 18 months, any interested party can sue to require a decision “without additional delay.” §§7661a(b)(7), 7661b(c). An interested party also can petition EPA to block issuance of the permit; EPA must grant or deny the petition within 60 days, and its decision may be challenged in federal court. §7661d(b)(2)–(3). As EPA wrote, Title V is “finely crafted for thousands,” not millions, of sources. Tailoring Rule 31563.

The fact that EPA’s greenhouse-gas-inclusive interpretation of the PSD and Title V triggers would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it; but that is not the only reason. EPA’s interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” *Brown & Williamson*, 529 U. S., at 159, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.” *Id.*, at 160; see also *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994); *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U. S. 607, 645–646 (1980) (plurality opinion). The power to require permits for the construction and modification of tens of thousands,

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and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text. Moreover, in EPA's assertion of that authority, we confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute "unrecognizable to the Congress that designed" it. Tailoring Rule 31555. Since, as we hold above, the statute does not compel EPA's interpretation, it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.<sup>7</sup>

## 3

EPA thought that despite the foregoing problems, it could make its interpretation reasonable by adjusting the levels at which a source's greenhouse-gas emissions would

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<sup>7</sup>A few additional points bear mentioning. The Solicitor General conjectures that EPA might eventually alter its longstanding interpretation of "potential to emit" in order to reduce the number of sources required to have permits at the statutory thresholds. But neither he nor the Agency has given us any reason to believe that there exists a plausible reading of "potential to emit" that EPA would willingly adopt and that would eliminate the unreasonableness of EPA's interpretation. Nor have we been given any information about the ability of other possible "streamlining" techniques alluded to by EPA—such as "general" or "electronic" permitting—to reduce the administrability problems identified above; and in any event, none of those techniques would address the more fundamental problem of EPA's claiming regulatory authority over millions of small entities that it acknowledges the Act does not seek to regulate. Finally, the Solicitor General suggests that the incompatibility of greenhouse gases with the PSD program and Title V results chiefly from the inclusion of carbon dioxide in the "aggregate pollutant" defined by EPA. We decide these cases on the basis of the pollutant "greenhouse gases" as EPA has defined and regulated it, and we express no view on how our analysis might change were EPA to define it differently.

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oblige it to undergo PSD and Title V permitting. Although the Act, in no uncertain terms, requires permits for sources with the potential to emit more than 100 or 250 tons per year of a relevant pollutant, EPA in its Tailoring Rule wrote a new threshold of *100,000* tons per year for greenhouse gases. Since the Court of Appeals thought the statute unambiguously made greenhouse gases capable of triggering PSD and Title V, it held that petitioners lacked Article III standing to challenge the Tailoring Rule because that rule did not injure petitioners but merely relaxed the pre-existing statutory requirements. Because we, however, hold that EPA's greenhouse-gas-inclusive interpretation of the triggers was *not* compelled, and because EPA has essentially admitted that its interpretation would be unreasonable without "tailoring," we consider the validity of the Tailoring Rule.

We conclude that EPA's rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency's interpretation of the triggering provisions. An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always "give effect to the unambiguously expressed intent of Congress." *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U. S. 644, 665 (2007) (quoting *Chevron*, 467 U. S., at 843). It is hard to imagine a statutory term less ambiguous than the precise numerical thresholds at which the Act requires PSD and Title V permitting. When EPA replaced those numbers with others of its own choosing, it went well beyond the "bounds of its statutory authority." *Arlington*, 569 U. S., at \_\_\_\_ (slip op., at 5) (emphasis deleted).

The Solicitor General does not, and cannot, defend the Tailoring Rule as an exercise of EPA's enforcement discretion. The Tailoring Rule is not just an announcement of

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EPA’s refusal to enforce the statutory permitting requirements; it purports to *alter* those requirements and to establish with the force of law that otherwise-prohibited conduct will not violate the Act. This alteration of the statutory requirements was crucial to EPA’s “tailoring” efforts. Without it, small entities with the potential to emit greenhouse gases in amounts exceeding the statutory thresholds would have remained subject to citizen suits—authorized by the Act—to enjoin their construction, modification, or operation and to impose civil penalties of up to \$37,500 per day of violation. §§7413(b), 7604(a), (f)(4); 40 CFR §19.4. EPA itself has recently affirmed that the “independent enforcement authority” furnished by the citizen-suit provision cannot be displaced by a permitting authority’s decision not to pursue enforcement. 78 Fed. Reg. 12477, 12486–12487 (2013). The Solicitor General is therefore quite right to acknowledge that the availability of citizen suits made it necessary for EPA, in seeking to mitigate the unreasonableness of its greenhouse-gas-inclusive interpretation, to go beyond merely exercising its enforcement discretion. See Tr. of Oral Arg. 87–88.

For similar reasons, *Morton v. Ruiz*, 415 U. S. 199 (1974)—to which the Solicitor General points as the best case supporting the Tailoring Rule, see Tr. of Oral Arg. 71, 80–81—is irrelevant. In *Ruiz*, Congress had appropriated funds for the Bureau of Indian Affairs to spend on providing assistance to “Indians throughout the United States” and had not “impose[d] any geographical limitation on the availability of general assistance benefits.” *Id.*, at 206–207, and n. 7. Although we held the Bureau could not deny benefits to off-reservation Indians because it had not published its eligibility criteria, we stated in dictum that the Bureau could, if it followed proper administrative procedures, “create reasonable classifications and eligibility requirements in order to allocate the limited funds available.” *Id.*, at 230–231. That dictum stands only for

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the unremarkable proposition that an agency may adopt policies to prioritize its expenditures *within the bounds established by Congress*. See also *Lincoln v. Vigil*, 508 U. S. 182, 192–193 (1993). Nothing in *Ruiz* remotely authorizes an agency to modify unambiguous requirements imposed by a federal statute. An agency confronting resource constraints may change its own conduct, but it cannot change the law.

Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution’s separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, “faithfully execute[s]” them. U. S. Const., Art. II, §3; see *Medellín v. Texas*, 552 U. S. 491, 526–527 (2008). The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law’s administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice. See, e.g., *Barnhart v. Sigmon Coal Co.*, 534 U. S. 438, 462 (2002) (agency lacked authority “to develop new guidelines or to assign liability in a manner inconsistent with” an “unambiguous statute”).

In the Tailoring Rule, EPA asserts newfound authority to regulate millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches—and to decide, on an ongoing basis and without regard for the thresholds prescribed by Congress, how many of those sources to regulate. We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery. We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate. EPA therefore lacked authority to “tailor” the Act’s unambiguous numerical

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thresholds to accommodate its greenhouse-gas-inclusive interpretation of the permitting triggers. Instead, the need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn. Agencies are not free to “adopt . . . unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.” App. 175, 2012 WL 6621785, \*16 (Kavanaugh, J., dissenting from denial of rehearing en banc). Because the Tailoring Rule cannot save EPA’s interpretation of the triggers, that interpretation was impermissible under *Chevron*.<sup>8</sup>

## B. BACT for “Anyway” Sources

For the reasons we have given, EPA overstepped its statutory authority when it decided that a source could

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<sup>8</sup>JUSTICE BREYER argues, *post*, at 10 (opinion concurring in part and dissenting in part), that when the statutory permitting thresholds of 100 or 250 tons per year do not provide a “sensible regulatory line,” EPA is entitled to “read an unwritten exception” into “the particular number used by the statute”—by which he apparently means that the Agency is entitled to substitute a dramatically higher number, such as 100,000. We are aware of no principle of administrative law that would allow an agency to rewrite such a clear statutory term, and we shudder to contemplate the effect that such a principle would have on democratic governance.

JUSTICE BREYER, however, claims to perceive no difference between (a) reading the statute to exclude greenhouse gases from the term “any air pollutant” in the permitting triggers, and (b) reading the statute to exclude sources emitting less than 100,000 tons per year from the statutory phrase “any . . . source with the potential to emit two hundred and fifty tons per year or more.” See *post*, at 7. The two could scarcely be further apart. As we have explained (and as EPA agrees), statutory context makes plain that the Act’s operative provisions use “air pollutant” to denote less than the full range of pollutants covered by the Act-wide definition. See Part II–A–1, *supra*. It is therefore incumbent on EPA to specify the pollutants encompassed by that term in the context of a particular program, and to do so reasonably in light of that program’s overall regulatory scheme. But there is no ambiguity whatsoever in the specific, numerical permitting thresholds, and thus no room for EPA to exercise discretion in selecting a different threshold.

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become subject to PSD or Title V permitting by reason of its greenhouse-gas emissions. But what about “anyway” sources, those that would need permits based on their emissions of more conventional pollutants (such as particulate matter)? We now consider whether EPA reasonably interpreted the Act to require those sources to comply with “best available control technology” emission standards for greenhouse gases.

## 1

To obtain a PSD permit, a source must be “subject to the best available control technology” for “each pollutant subject to regulation under [the Act]” that it emits. §7475(a)(4). The Act defines BACT as “an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation” that is “achievable . . . through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques.” §7479(3). BACT is determined “on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs.” *Ibid.*

Some petitioners urge us to hold that EPA may never require BACT for greenhouse gases—even when a source must undergo PSD review based on its emissions of conventional pollutants—because BACT is fundamentally unsuited to greenhouse-gas regulation. BACT, they say, has traditionally been about end-of-stack controls “such as catalytic converters or particle collectors”; but applying it to greenhouse gases will make it more about regulating energy use, which will enable regulators to control “every aspect of a facility’s operation and design,” right down to the “light bulbs in the factory cafeteria.” Brief for Petitioner Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation et al. in No. 12–1254, p. 7; see Joint Reply Brief for Petitioners in No. 12–1248 etc., pp.

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14–15 (“BACT for [greenhouse gases] becomes an unbounded exercise in command-and-control regulation” of everything from “efficient light bulbs” to “basic industrial processes”). But see Brief for Calpine Corp. as *Amicus Curiae* 10 (“[I]n Calpine’s experience with ‘anyway’ sources, the [greenhouse-gas] analysis was only a small part of the overall permitting process”).

EPA has published a guidance document that lends some credence to petitioners’ fears. It states that at least initially, compulsory improvements in energy efficiency will be the “foundation” of greenhouse-gas BACT, with more traditional end-of-stack controls either not used or “added as they become more available.” PSD and Title V Permitting Guidance for Greenhouse Gases 29 (Mar. 2011) (hereinafter Guidance); see Peloso & Dobbins, Greenhouse Gas PSD Permitting: The Year in Review, 42 *Tex. Env. L. J.* 233, 247 (2012) (“Because [other controls] tend to prove infeasible, energy efficiency measures dominate the [greenhouse-gas] BACT controls approved by the states and EPA”). But EPA’s guidance also states that BACT analysis should consider options *other than* energy efficiency, such as “carbon capture and storage.” Guidance 29, 32, 35–36, 42–43. EPA argues that carbon capture is reasonably comparable to more traditional, end-of-stack BACT technologies, *id.*, at 32, n. 86, and petitioners do not dispute that.

Moreover, assuming without deciding that BACT may be used to force some improvements in energy efficiency, there are important limitations on BACT that may work to mitigate petitioners’ concerns about “unbounded” regulatory authority. For one, BACT is based on “control technology” for the applicant’s “proposed facility,” §7475(a)(4); therefore, it has long been held that BACT cannot be used to order a fundamental redesign of the facility. See, *e.g.*, *Sierra Club v. EPA*, 499 F. 3d 653, 654–655 (CA7 2007); *In re Pennsauken Cty., N. J., Resource*

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*Recovery Facility*, 2 E. A. D. 667, 673 (EAB 1988). For another, EPA has long interpreted BACT as required only for pollutants that the source itself emits, see 44 Fed. Reg. 51947 (1979); accordingly, EPA acknowledges that BACT may not be used to require “reductions in a facility’s demand for energy from the electric grid.” Guidance 24. Finally, EPA’s guidance suggests that BACT should not require every conceivable change that could result in minor improvements in energy efficiency, such as the aforementioned light bulbs. *Id.*, at 31. The guidance explains that permitting authorities should instead consider whether a proposed regulatory burden outweighs any reduction in emissions to be achieved, and should concentrate on the facility’s equipment that uses the largest amounts of energy. *Ibid.*

## 2

The question before us is whether EPA’s decision to require BACT for greenhouse gases emitted by sources otherwise subject to PSD review is, as a general matter, a permissible interpretation of the statute under *Chevron*. We conclude that it is.

The text of the BACT provision is far less open-ended than the text of the PSD and Title V permitting triggers. It states that BACT is required “for each pollutant subject to regulation under this chapter” (*i.e.*, the entire Act), §7475(a)(4), a phrase that—as the D. C. Circuit wrote 35 years ago—“would not seem readily susceptible [of] misinterpretation.” *Alabama Power Co. v. Costle*, 636 F. 2d 323, 404 (1979). Whereas the dubious breadth of “any air pollutant” in the permitting triggers suggests a role for agency judgment in identifying the subset of pollutants covered by the particular regulatory program at issue, the more specific phrasing of the BACT provision suggests that the necessary judgment has already been made by Congress. The wider statutory context likewise does not

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suggest that the BACT provision can bear a narrowing construction: There is no indication that the Act elsewhere uses, or that EPA has interpreted, “each pollutant subject to regulation under this chapter” to mean anything other than what it says.

Even if the text were not clear, applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority, as to convince us that EPA’s interpretation is unreasonable. We are not talking about extending EPA jurisdiction over millions of previously unregulated entities, but about moderately increasing the demands EPA (or a state permitting authority) can make of entities already subject to its regulation. And it is not yet clear that EPA’s demands will be of a significantly different character from those traditionally associated with PSD review. In short, the record before us does not establish that the BACT provision as written is incapable of being sensibly applied to greenhouse gases.

We acknowledge the potential for greenhouse-gas BACT to lead to an unreasonable and unanticipated degree of regulation, and our decision should not be taken as an endorsement of all aspects of EPA’s current approach, nor as a free rein for any future regulatory application of BACT in this distinct context. Our narrow holding is that nothing in the statute categorically prohibits EPA from interpreting the BACT provision to apply to greenhouse gases emitted by “anyway” sources.

However, EPA may require an “anyway” source to comply with greenhouse-gas BACT only if the source emits more than a *de minimis* amount of greenhouse gases. As noted above, the Tailoring Rule applies BACT only if a source emits greenhouse gases in excess of 75,000 tons per year CO<sub>2</sub>e, but the Rule makes clear that EPA did not arrive at that number by identifying the *de minimis* level. See nn. 1, 3, *supra*. EPA may establish an appropriate *de*

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*minimis* threshold below which BACT is not required for a source’s greenhouse-gas emissions. We do not hold that 75,000 tons per year CO<sub>2</sub>e necessarily exceeds a true *de minimis* level, only that EPA must justify its selection on proper grounds. Cf. *Alabama Power, supra*, at 405.<sup>9</sup>

\* \* \*

To sum up: We hold that EPA exceeded its statutory authority when it interpreted the Clean Air Act to require PSD and Title V permitting for stationary sources based on their greenhouse-gas emissions. Specifically, the Agency may not treat greenhouse gases as a pollutant for purposes of defining a “major emitting facility” (or a “modification” thereof) in the PSD context or a “major source” in the Title V context. To the extent its regulations purport to do so, they are invalid. EPA may, however, continue to treat greenhouse gases as a “pollutant subject to regulation under this chapter” for purposes of requiring BACT for “anyway” sources. The judgment of the Court of Appeals is affirmed in part and reversed in part.

*It is so ordered.*

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<sup>9</sup>JUSTICE ALITO argues that BACT is “fundamentally incompatible” with greenhouse gases for two reasons. *Post*, at 4 (opinion concurring in part and dissenting in part). First, BACT requires consideration of “ambient air quality at the proposed site and in areas which may be affected by emissions from [the proposed] facility for each pollutant subject to regulation under this chapter,” §7475(e)(1); see also §7475(e)(3)(B); and it is not obvious how that requirement should apply, or even whether it can apply, to greenhouse gases. *Post*, at 4–5. But the possibility that that requirement may be inoperative as to greenhouse gases does not convince us that they must be categorically excluded from BACT even though they are indisputably a “pollutant subject to regulation.” Second, JUSTICE ALITO argues that EPA’s guidance on how to implement greenhouse-gas BACT is a recipe for “arbitrary and inconsistent decisionmaking.” *Post*, at 8. But we are not reviewing EPA’s guidance in these cases, and we cannot say that it is impossible for EPA and state permitting authorities to devise rational ways of complying with the statute’s directive to determine BACT for greenhouse gases “on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs.” §7479(3).

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Opinion of BREYER, J.

**SUPREME COURT OF THE UNITED STATES**

Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, and 12–1272

UTILITY AIR REGULATORY GROUP,  
PETITIONER

12–1146

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

AMERICAN CHEMISTRY COUNCIL, ET AL.,  
PETITIONERS

12–1248

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

ENERGY-INTENSIVE MANUFACTURERS WORKING  
GROUP ON GREENHOUSE GAS REGULATION,  
ET AL., PETITIONERS

12–1254

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

SOUTHEASTERN LEGAL FOUNDATION, INC.,  
ET AL., PETITIONERS

12–1268

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

TEXAS, ET AL., PETITIONERS

12–1269

*v.*

ENVIRONMENTAL PROTECTION AGENCY,  
ET AL.; AND

CHAMBER OF COMMERCE OF THE UNITED  
STATES, ET AL., PETITIONERS

12–1272

*v.*

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ENVIRONMENTAL PROTECTION AGENCY, ET AL.;  
ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 23, 2014]

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in part and dissenting in part.

In *Massachusetts v. EPA*, 549 U. S. 497 (2007), we held that greenhouse gases fall within the Clean Air Act’s general definition of the term “air pollutant,” 42 U. S. C. §7602(g). 549 U. S., at 528–529. We also held, consequently, that the Environmental Protection Agency is empowered and required by Title II of the Act to regulate greenhouse gas emissions from mobile sources (such as cars and trucks) if it decides that greenhouse gases “contribute to . . . air pollution which may reasonably be anticipated to endanger public health or welfare,” §7521(a)(1). 549 U. S., at 532–533. The EPA determined that greenhouse gases endanger human health and welfare, 74 Fed. Reg. 66496 (2009) (Endangerment Finding), and so it issued regulations for mobile emissions, 75 Fed. Reg. 25324 (2010) (Tailpipe Rule).

These cases take as a given our decision in *Massachusetts* that the Act’s *general definition* of “air pollutant” includes greenhouse gases. One of the questions posed by these cases is whether those gases fall within the scope of the phrase “any air pollutant” as that phrase is used in the more specific provisions of the Act here at issue. The Court’s answer is “no.” *Ante*, at 10–24. I disagree.

The Clean Air Act provisions at issue here are Title I’s Prevention of Significant Deterioration (PSD) program, §7470 *et seq.*, and Title V’s permitting regime, §7661 *et seq.* By contrast to Title II, Titles I and V apply to stationary sources, such as power plants and factories. Un-

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der the PSD program, “major emitting facilities” constructed in the United States must meet certain requirements, including obtaining a permit that imposes emissions limitations, §7475(a)(1), and using “the best available control technology for each pollutant subject to regulation under [the Act] emitted from” the facility, §7475(a)(4). Title V requires each “major source” to obtain an operating permit. §7661a(a).

These cases concern the definitions of “major emitting facility” and “major source,” each of which is defined to mean any stationary source that emits more than a threshold quantity of “any air pollutant.” See §7479(1) (“major emitting facility”); §§7602(j), 7661(2)(B) (“major source”). To simplify the exposition, I will refer only to the PSD program and its definition of “major emitting facility”; a parallel analysis applies to Title V.

As it is used in the PSD provisions,

“[t]he term ‘major emitting facility’ means any of [a list of specific categories of] stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant . . . . 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.” §7479(1).

To simplify further, I will ignore the reference to specific types of source that emit at least 100 tons per year (tpy) of any air pollutant. In effect, we are dealing with a statute that says that the PSD program’s regulatory requirements must be applied to

“any stationary source that has the potential to emit two hundred fifty tons per year or more of any air pollutant.”

The interpretive difficulty in these cases arises out of the definition’s use of the phrase “two hundred fifty tons

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per year or more,” which I will call the “250 tpy threshold.” When applied to greenhouse gases, 250 tpy is far too low a threshold. As the Court explains, tens of thousands of stationary sources emit large quantities of one greenhouse gas, carbon dioxide. See *ante*, at 17–20, and n. 7. To apply the programs at issue here to all those sources would be extremely expensive and burdensome, counterproductive, and perhaps impossible; it would also contravene Congress’s intent that the programs’ coverage be limited to those large sources whose emissions are substantial enough to justify the regulatory burdens. *Ibid.* The EPA recognized as much, and it addressed the problem by issuing a regulation—the Tailoring Rule—that purports to raise the coverage threshold for greenhouse gases from the statutory figure of 250 tpy to 100,000 tpy in order to keep the programs’ coverage limited to “a relatively small number of large industrial sources.” 75 Fed. Reg. 31514, 31555 (2010); see *id.*, at 31523–31524.

The Tailoring Rule solves the practical problems that would have been caused by the 250 tpy threshold. But what are we to do about the statute’s language? The statute specifies a definite number—250, not 100,000—and it says that facilities that are covered by that number must meet the program’s requirements. The statute says nothing about agency discretion to change that number. What is to be done? How, given the statute’s language, can the EPA exempt from regulation sources that emit more than 250 but less than 100,000 tpy of greenhouse gases (and that also do not emit other regulated pollutants at threshold levels)?

The Court answers by (1) pointing out that regulation at the 250 tpy threshold would produce absurd results, (2) refusing to read the statute as compelling such results, and (3) consequently interpreting the phrase “*any* air pollutant” as containing an implicit exception for greenhouse gases. (Emphasis added.) Put differently, the

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Court reads the statute as defining “major emitting facility” to mean “stationary sources that have the potential to emit two hundred fifty tons per year or more of any air pollutant *except for those air pollutants, such as carbon dioxide, with respect to which regulation at that threshold would be impractical or absurd or would sweep in smaller sources that Congress did not mean to cover.*” See *ante*, at 15–16 (“[T]here is no insuperable textual barrier to EPA’s interpreting ‘any air pollutant’ in the permitting triggers of PSD and Title V to encompass only pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds, and to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written”).

I agree with the Court that the word “any,” when used in a statute, does not normally mean “any in the universe.” Cf. *FCC v. NextWave Personal Communications Inc.*, 537 U. S. 293, 311 (2003) (BREYER, J., dissenting) (“‘Tell all customers that . . .’ does not refer to every customer of every business in the world”). Rather, “[g]eneral terms as used on particular occasions often carry with them implied restrictions as to scope,” *ibid.*, and so courts must interpret the word “any,” like all other words, in context. As Judge Learned Hand pointed out when interpreting another statute many years ago, “[w]e can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time.” *Borella v. Borden Co.*, 145 F. 2d 63, 64 (CA2 1944). The pursuit of that underlying purpose may sometimes require us to “abandon” a “literal interpretation” of a word like “any.” *Id.*, at 64–65.

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The law has long recognized that terms such as “any” admit of unwritten limitations and exceptions. Legal philosophers like to point out that a statute providing that “[w]hoever shall willfully take the life of another shall be punished by death” need not encompass a man who kills in self-defense; nor must an ordinance imposing fines upon those who occupy a public parking spot for more than two hours penalize a driver who is unable to move because of a parade. See Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616, 619, 624 (1949); see also *United States v. Kirby*, 7 Wall. 482, 485–487 (1869) (holding that a statute forbidding knowing and willful obstruction of the mail contains an implicit exception permitting a local sheriff to arrest a mail carrier). The maxim *cessante ratione legis cessat ipse lex*—where a law’s rationale ceases to apply, so does the law itself—is not of recent origin. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (citing 1 E. Coke, *Institutes* \*70b); *Green v. Litter*, 8 Cranch 229, 249 (1814) (Story, J.) (“*cessante ratione, cessat ipsa lex*”).

I also agree with the Court’s point that “a generic reference to air pollutants” in the Clean Air Act need not “encompass every substance falling within the Act-wide definition” that we construed in *Massachusetts*, §7602(g). See *ante*, at 12–13. As the Court notes, the EPA has interpreted the phrase “any air pollutant,” which is used several times in the Act, as limited to “air pollutants *for which EPA has promulgated [new source performance standards]*” in the portion of the Act dealing with those standards, as limited to “*visibility-impairing* air pollutants” in the part of the Act concerned with deleterious effects on visibility, and as limited to “pollutants *for which the area is designated nonattainment*” in the part of the Act aimed at regions that fail to attain air quality standards. *Ibid.*

But I do not agree with the Court that the only way to

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avoid an absurd or otherwise impermissible result in these cases is to create an atextual greenhouse gas exception to the phrase “any air pollutant.” After all, the word “any” makes an earlier appearance in the definitional provision, which defines “major emitting facility” to mean “*any . . . source with the potential to emit two hundred and fifty tons per year or more of any air pollutant.*” §7479(1) (emphasis added). As a linguistic matter, one can just as easily read an implicit exception for small-scale greenhouse gas emissions into the phrase “any source” as into the phrase “any air pollutant.” And given the purposes of the PSD program and the Act as a whole, as well as the specific roles of the different parts of the statutory definition, finding flexibility in “any source” is far more sensible than the Court’s route of finding it in “any air pollutant.”

The implicit exception I propose reads almost word for word the same as the Court’s, except that the location of the exception has shifted. To repeat, the Court reads the definition of “major emitting facility” as if it referred to “any source with the potential to emit two hundred fifty tons per year or more of any air pollutant *except for those air pollutants, such as carbon dioxide, with respect to which regulation at that threshold would be impractical or absurd or would sweep in smaller sources that Congress did not mean to cover.*” I would simply move the implicit exception, which I’ve italicized, so that it applies to “source” rather than “air pollutant”: “any *source* with the potential to emit two hundred fifty tons per year or more of any air pollutant *except for those sources, such as those emitting unmanageably small amounts of greenhouse gases, with respect to which regulation at that threshold would be impractical or absurd or would sweep in smaller sources that Congress did not mean to cover.*”

From a legal, administrative, and functional perspective—that is, from a perspective that assumes that Congress was not merely trying to arrange words on paper but

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was seeking to achieve a real-world *purpose*—my way of reading the statute is the more sensible one. For one thing, my reading is consistent with the specific purpose underlying the 250 tpy threshold specified by the statute. The purpose of that number was not to prevent the regulation of dangerous air pollutants that cannot be sensibly regulated at that particular threshold, though that is the effect that the Court’s reading gives the threshold. Rather, the purpose was to limit the PSD program’s obligations to larger sources while exempting the many small sources whose emissions are low enough that imposing burdensome regulatory requirements on them would be senseless.

Thus, the accompanying Senate Report explains that the PSD program “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.” S. Rep. No. 95–127, p. 96 (1977). And the principal sponsor of the Clean Air Act amendments at issue here, Senator Edmund Muskie, told the Senate that the program would not cover “houses, dairies, farms, highways, hospitals, schools, grocery stores, and other such sources.” 123 Cong. Rec. 18013, 18021 (1977).

The EPA, exercising the legal authority to which it is entitled under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), understood the threshold’s purpose in the same light. It explained that Congress’s objective was

“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 com-

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ply 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 [that is, those air pollutants for which the EPA has issued a national ambient air quality standard under Title I of the Act, see *EPA v. EME Homer City Generation, L. P.*, 572 U. S. \_\_\_, \_\_\_ (2014) (slip op., at 4)], Congress considered sources that emit NAAQS pollutants in those quantities generally to be the large industrial sources to which it intended PSD to be limited.” Tailoring Rule, 75 Fed. Reg. 31555.

The Court similarly acknowledges that “the PSD program and Title V are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens.” *Ante*, at 18; see also *Alabama Power Co. v. Costle*, 636 F. 2d 323, 353 (CADDC 1979) (“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 emission of the deleterious pollutants that befoul our nation’s air”).

An implicit source-related exception would serve this statutory purpose while going no further. The implicit exception that the Court reads into the phrase “any air pollutant,” by contrast, goes well beyond the limited congressional objective. Nothing in the statutory text, the legislative history, or common sense suggests that Congress, when it imposed the 250 tpy threshold, was trying to undermine its own deliberate decision to use the broad language “any air pollutant” by removing some substances (rather than some facilities) from the PSD program’s coverage.

For another thing, a source-related exception serves the flexible nature of the Clean Air Act. We observed in *Mas-*

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*sachusetts* that “[w]hile the Congresses that drafted” the Act “might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete.” 549 U. S., at 532. We recognized that “[t]he broad language of” the Act-wide definition of “air pollutant” “reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.” *Ibid.*

The Court’s decision to read greenhouse gases out of the PSD program drains the Act of its flexibility and chips away at our decision in *Massachusetts*. What sense does it make to read the Act as generally granting the EPA the authority to regulate greenhouse gas emissions and then to read it as denying that power with respect to the programs for large stationary sources at issue here? It is anomalous to read the Act to require the EPA to regulate air pollutants that pose previously unforeseen threats to human health and welfare where “250 tons per year” is a sensible regulatory line but not where, by chemical or regulatory happenstance, a higher line must be drawn. And it is anomalous to read an unwritten exception into the more important phrase of the statutory definition (“any air pollutant”) when a similar unwritten exception to less important language (the particular number used by the statute) will do just as well. The implicit exception preferred by the Court produces all of these anomalies, while the source-related exception I propose creates none of them.

In addition, the interpretation I propose leaves the EPA with the sort of discretion as to interstitial matters that Congress likely intended it to retain. My interpretation gives the EPA nothing more than the authority to *exempt* sources from regulation insofar as the Agency reasonably determines that applying the PSD program to them would

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expand the program so much as to contravene Congress's intent. That sort of decision, which involves the Agency's technical expertise and administrative experience, is the kind of decision that Congress typically leaves to the agencies to make. Cf. *Barnhart v. Walton*, 535 U. S. 212, 222 (2002) (enumerating factors that we take to indicate that Congress intends the agency to exercise the discretion provided by *Chevron*). To read the Act to grant that discretion here is to read it as furthering Congress's (and the public's) interest in more effective, less wasteful regulation.

Last, but by no means least, a source-related exception advances the Act's overall purpose. That broad purpose, as set forth at the beginning of the statute, is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." §7401(b)(1); see also §7470(1) (A purpose of the PSD program in particular is "to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution"); §7602(h) ("All language [in the Act] referring to effects on welfare includes . . . effects on . . . weather . . . and climate"). The expert agency charged with administering the Act has determined in its Endangerment Finding that greenhouse gases endanger human health and welfare, and so sensible regulation of industrial emissions of those pollutants is at the core of the purpose behind the Act. The broad "no greenhouse gases" exception that the Court reads into the statute unnecessarily undercuts that purpose, while my narrow source-related exception would leave the Agency with the tools it needs to further it.

\* \* \*

I agree with the Court's holding that stationary sources

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that are subject to the PSD program because they emit other (non-greenhouse-gas) pollutants in quantities above the statutory threshold—those facilities that the Court refers to as “anyway” sources—must meet the “best available control technology” requirement of §7475(a)(4) with respect to greenhouse gas emissions. I therefore join Part II–B–2 of the Court’s opinion. But as for the Court’s holding that the EPA cannot interpret the language at issue here to cover facilities that emit more than 100,000 tpy of greenhouse gases by virtue of those emissions, I respectfully dissent.

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**SUPREME COURT OF THE UNITED STATES**

Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, and 12–1272

UTILITY AIR REGULATORY GROUP,  
PETITIONER12–1146 *v.*  
ENVIRONMENTAL PROTECTION AGENCY, ET AL.;AMERICAN CHEMISTRY COUNCIL, ET AL.,  
PETITIONERS12–1248 *v.*  
ENVIRONMENTAL PROTECTION AGENCY, ET AL.;ENERGY-INTENSIVE MANUFACTURERS WORKING  
GROUP ON GREENHOUSE GAS REGULATION,  
ET AL., PETITIONERS12–1254 *v.*  
ENVIRONMENTAL PROTECTION AGENCY, ET AL.;SOUTHEASTERN LEGAL FOUNDATION, INC.,  
ET AL., PETITIONERS12–1268 *v.*  
ENVIRONMENTAL PROTECTION AGENCY, ET AL.;

TEXAS, ET AL., PETITIONERS

12–1269 *v.*  
ENVIRONMENTAL PROTECTION AGENCY,  
ET AL.; ANDCHAMBER OF COMMERCE OF THE UNITED  
STATES, ET AL., PETITIONERS12–1272 *v.*

Opinion of ALITO, J.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.;  
ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT  
[June 23, 2014]

JUSTICE ALITO, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

In *Massachusetts v. EPA*, 549 U. S. 497 (2007), this Court considered whether greenhouse gases fall within the Clean Air Act’s general definition of an air “pollutant.” *Id.*, at 528–529. The Environmental Protection Agency cautioned us that “key provisions of the [Act] cannot coherently be applied to [greenhouse gas] emissions,” Brief for Federal Respondent in *Massachusetts v. EPA*, O. T. 2006, No. 05–1120, p. 22, but the Court brushed the warning aside and had “little trouble” concluding that the Act’s “sweeping definition” of a pollutant encompasses greenhouse gases. 549 U. S., at 528–529. I believed *Massachusetts v. EPA* was wrongly decided at the time, and these cases further expose the flaws with that decision.

I

As the present cases now show, trying to fit greenhouse gases into “key provisions” of the Clean Air Act involves more than a “little trouble.” These cases concern the provisions of the Act relating to the “Prevention of Significant Deterioration” (PSD), 42 U. S. C. §§7470–7492, as well as Title V of the Act, §7661. And in order to make those provisions apply to greenhouse gases in a way that does not produce absurd results, the EPA effectively amended the Act. The Act contains specific emissions thresholds that trigger PSD and Title V coverage, but the EPA crossed out the figures enacted by Congress and substituted figures of its own.

I agree with the Court that the EPA is neither required nor permitted to take this extraordinary step, and I there-

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fore join Parts I and II–A of the Court’s opinion.

## II

I do not agree, however, with the Court’s conclusion that what it terms “anyway sources,” *i.e.*, sources that are subject to PSD and Title V permitting as the result of the emission of conventional pollutants, must install “best available control technology” (BACT) for greenhouse gases. As is the case with the PSD and Title V thresholds, trying to fit greenhouse gases into the BACT analysis badly distorts the scheme that Congress adopted.

The Court gives two main reasons for concluding that BACT applies to “anyway” sources, one based on text and one based on practical considerations. Neither is convincing.

### A

With respect to the text, it is curious that the Court, having departed from a literal interpretation of the term “pollutant” in Part II–A, turns on its heels and adopts a literal interpretation in Part II–B. The coverage thresholds at issue in Part II–A apply to any “pollutant.” The Act’s general definition of this term is broad, and in *Massachusetts v. EPA*, *supra*, the Court held that this definition covers greenhouse gases. The Court does not disturb that holding, but it nevertheless concludes that, as used in the provision triggering PSD coverage, the term “pollutant” actually means “pollutant, other than a greenhouse gas.”

In Part II–B, the relevant statutory provision says that BACT must be installed for any “pollutant subject to regulation under [the Act].” §7475(a)(4). If the term “pollutant” means “pollutant, other than a greenhouse gas,” as the Court effectively concludes in Part II–A, the term “pollutant subject to regulation under [the Act]” in §7475(a)(4) should mean “pollutant, other than a green-

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house gas, subject to regulation under [the Act], and that is subject to regulation under [the Act].” The Court’s literalism is selective, and it results in a strange and disjointed regulatory scheme.

Under the Court’s interpretation, a source can emit an unlimited quantity of greenhouse gases without triggering the need for a PSD permit. Why might Congress have wanted to allow this? The most likely explanation is that the PSD permitting process is simply not suited for use in regulating this particular pollutant. And if that is so, it makes little sense to require the installation of BACT for greenhouse gases in those instances in which a source happens to be required to obtain a permit due to the emission of a qualifying quantity of some other pollutant that is regulated under the Act.

## B

The Court’s second reason for holding that BACT applies to “anyway” sources is its belief that this can be done without disastrous consequences. Only time will tell whether this hope is well founded, but it seems clear that BACT analysis is fundamentally incompatible with the regulation of greenhouse-gas emissions for at least two important reasons.

### 1

First, BACT looks to the effects of covered pollutants in the area in which a source is located. The PSD program is implemented through “emission limitations and such other measures” as are “necessary . . . to prevent significant deterioration of air quality *in each region.*” §7471 (emphasis added). The Clean Air Act provides that BACT must be identified “on a case-by-case basis,” §7479(3), and this necessarily means that local conditions must be taken into account. For this reason, the Act instructs the EPA to issue regulations requiring an analysis of “the ambient air

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quality . . . *at the site of the proposed major emitting facility and in the area potentially affected* by the emissions from such facility for each pollutant regulated under [the Act].” §7475(e)(3)(B) (emphasis added). The Act also requires a public hearing on “the air quality *at the proposed site and in areas which may be affected* by emissions from such facility for each pollutant subject to regulation under [the Act] which will be emitted from such facility.” §§7475(a)(2), (e)(1) (emphasis added). Accordingly, if BACT is required for greenhouse gases, the Act demands that the impact of these gases in the area surrounding a site must be monitored, explored at a public hearing, and considered as part of the permitting process. The effects of greenhouse gases, however, are global, not local. See PSD and Title V Permitting Guidance for Greenhouse Gases 41–42 (Mar. 2011) (hereinafter Guidance). As a result, the EPA has declared that PSD permit applicants and permitting officials may disregard these provisions of the Act. 75 Fed. Reg. 31520 (2010).

2

Second, as part of the case-by-case analysis required by BACT, a permitting authority must balance the environmental benefit expected to result from the installation of an available control measure against adverse consequences that may result, including any negative impact on the environment, energy conservation, and the economy. And the EPA itself has admitted that this cannot be done on a case-by-case basis with respect to greenhouse gases.

The Clean Air Act makes it clear that BACT must be determined on a “case-by-case basis, taking into account energy, environmental, and economic impacts and other costs.” §7479(3). To implement this directive, the EPA adopted a five-step framework for making a BACT determination. See New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattain-

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ment Area Permitting (Oct. 1990).<sup>1</sup> Under the fourth step of this analysis, potentially applicable and feasible control technologies that are candidates for selection as BACT for a particular source are eliminated from consideration based on their “collateral impacts,” such as any adverse environmental effects or adverse effects on energy consumption or the economy.

More recently, the EPA provided guidance to permitting authorities regarding the treatment of greenhouse-gas emissions under this framework, and the EPA’s guidance demonstrates the insuperable problem that results when an attempt is made to apply this framework to greenhouse gas emissions. As noted above, at step 4 of the framework, a permitting authority must balance the positive effect likely to result from requiring a particular source to install a particular technology against a variety of negative effects that are likely to occur if that step is taken. But in the case of greenhouse gases, how can a permitting authority make this individualized, source-specific determination?

The EPA instructs permitting authorities to take into

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<sup>1</sup>The EPA describes these steps as follows:

(1) The applicant must identify all available control options that are potentially applicable by consulting EPA’s BACT clearinghouse along with other reliable sources.

(2) The technical feasibility of the control options identified in step 1 are eliminated based on technical infeasibility.

(3) The control technologies are ranked based on control effectiveness, by considering: the percentage of the pollutant removed; expected emission rate for each new source review (NSR) pollutant; expected emission reduction for each regulated NSR pollutant; and output based emissions limit.

(4) Control technologies are eliminated based on collateral impacts, such as: energy impacts; other environmental impacts; solid or hazardous waste; water discharge from control device; emissions of air toxics and other non-NSR regulated pollutants; and economic impacts.

(5) The most effective control option not eliminated in step 4 is proposed as BACT for the pollutant and emission unit under review.

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consideration all the adverse effects that the EPA has found to result from *the overall increase* in greenhouse gases in the atmosphere. These include an increased risk of dangerous heat waves, hurricanes, floods, wildfires, and drought, as well as risks to agriculture, forestry, and water resources. Guidance 40–41. But the EPA admits that it is simply not possible for a permitting authority to calculate in any meaningful way the degree to which any potential reduction in greenhouse gas emissions from any individual source might reduce these risks. And without making such a calculation in even a very rough way, a permitting authority cannot do what the Clean Air Act and the EPA’s framework demand—compare the benefits of some specified reduction in the emission of greenhouse gases from a particular source with any adverse environmental or economic effects that might result from mandating such a reduction.

Suppose, for example, that a permitting authority must decide whether to mandate a change that both decreases a source’s emission of greenhouse gases and increases its emission of a conventional pollutant that has a negative effect on public health. How should a permitting authority decide whether to require this change? Here is the EPA’s advice:

“[W]hen considering the trade-offs between the environmental impacts of a particular level of GHG [greenhouse gas] reduction and a collateral increase in another regulated NSR pollutant,<sup>2</sup> rather than attempting to determine or characterize specific environmental impacts from GHGs emitted at particular locations, EPA recommends that permitting authorities focus on the amount of GHG emission reductions

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<sup>2</sup>“New source review pollutants” are those pollutants for which a National Ambient Air Quality standard has been set and a few others, such as sulphur dioxide. See 40 CFR 51.165(a)(1)(xxxvii) (2013).

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that may be gained or lost by employing a particular control strategy and how that compares to the environmental or other impacts resulting from the collateral emissions increase of other regulated NSR pollutants.” Guidance 42.

As best I can make out, what this means is that permitting authorities should not even try to assess the net impact on public health. Instead of comparing the positive and negative public health effects of a particular option, permitting authorities are instructed to compare the adverse public health effects of increasing the emissions of the conventional pollutants with the amount of the reduction of the source’s emissions of greenhouse gases. But without knowing the positive effects of the latter, this is a meaningless comparison.

The EPA tries to ameliorate this problem by noting that permitting authorities are entitled to “a great deal of discretion,” Guidance 41, but without a comprehensible standard, what this will mean is arbitrary and inconsistent decisionmaking. That is not what the Clean Air Act contemplates.<sup>3</sup>

\* \* \*

BACT analysis, like the rest of the Clean Air Act, was developed for use in regulating the emission of conventional pollutants and is simply not suited for use with respect to greenhouse gases. I therefore respectfully dissent from Part II–B–2 of the opinion of the Court.

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<sup>3</sup>While I do not think that BACT applies at all to “anyway sources,” if it is to apply, the limitations suggested in Part II–B–1 might lessen the inconsistencies highlighted in Part II of this opinion, and on that understanding I join Part II–B–1.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUL 24 2014

OFFICE OF  
AIR AND RADIATION

**MEMORANDUM**

**SUBJECT:** Next Steps and Preliminary Views on the Application of Clean Air Act Permitting Programs to Greenhouse Gases Following the Supreme Court's Decision in *Utility Air Regulatory Group v. Environmental Protection Agency*

**FROM:** Janet G. McCabe, Acting Assistant Administrator   
Office of Air and Radiation

Cynthia Giles, Assistant Administrator   
Office of Enforcement and Compliance Assurance

**TO:** Regional Administrators, Regions 1-10

On June 23, 2014, the United States Supreme Court issued a decision addressing the application of stationary source permitting requirements to greenhouse gases (GHG). *Utility Air Regulatory Group (UARG) v. Environmental Protection Agency (EPA)* (No. 12-1146). The EPA actions at issue in the case included those generally known as the "Tailoring Rule" and the "Timing Decision." In very brief summary, the Supreme Court said that the EPA may not treat greenhouse gases as an air pollutant for purposes of determining whether a source is a major source required to obtain a Prevention of Significant Deterioration (PSD) or title V permit. The Supreme Court also said that the EPA could continue to require that PSD permits, otherwise required based on emissions of conventional pollutants, contain limitations on GHG emissions based on the application of Best Available Control Technology (BACT). The EPA is continuing to examine the implications of the Supreme Court's decision, including how the EPA will need to revise its permitting regulations and related impacts to state programs.

There will be further federal court action to apply the decision, but we know that you, as well as our partner agencies in state, local and tribal governments, have questions regarding how the decision affects PSD and title V permitting requirements in the meantime. Some of these questions have near term implications, in particular those related to pending PSD and title V permitting actions. The EPA intends to actively engage with stakeholders on time-sensitive actions, such as permit applications, state program submissions, and stationary source construction that may no longer need to meet certain permitting requirements. The EPA is likely to take other steps in the longer term and to respond to further court action in this case as needed.

Pending further EPA engagement in the ongoing judicial process before the District of Columbia Circuit Court of Appeals (D.C. Circuit), the EPA plans to act consistent with its understanding of the Supreme Court's decision. This memorandum has two parts. First, it explains how the EPA intends to proceed at this point with respect to permit applications for Tailoring Rule "Step 2" sources and PSD modifications that were previously classified as major based solely on GHG emissions (thus requiring that the sources get permits). Second, this memorandum provides preliminary guidance in response to several questions regarding ongoing permitting requirements for "anyway sources" and some additional issues pertaining to permitting requirements for "Step 2" sources. We believe that the status of pending permit applications and whether certain projects need to apply for PSD and title V permits in light of the Supreme Court decision may be the most immediate questions.

### **1. Permit Applications for Sources and Modifications Previously Classified as "Major" Based Solely on Greenhouse Gas Emissions ("Step 2" Sources)**

In order to act consistent with its understanding of the Supreme Court's decision pending judicial action to effectuate the final decision, the EPA will no longer require PSD or title V permits for Step 2 sources. More specifically, the EPA will no longer apply or enforce federal regulatory provisions or the EPA-approved PSD State Implementation Plan (SIP) provisions that require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification (e.g., 40 CFR 52.21(b)(49)(v)). Nor does the EPA intend to continue applying regulations that would require that states include in their SIP a requirement that such sources obtain PSD permits.

Similarly, the EPA will no longer apply or enforce federal regulatory provisions or provisions of the EPA-approved title V programs that require a stationary source to obtain a title V permit solely because the source emits or has the potential to emit greenhouse gases above the major source thresholds (e.g., the regulatory provision relating to GHG under the definition of "subject to regulation" in 40 CFR 71.2). The EPA also does not intend to continue applying regulations that would require title V programs submitted for approval by the EPA to require that such sources obtain title V permits.

Thus, the EPA does not intend to continue processing PSD or Title V permit applications for Step 2 sources or require new applications for such permits in cases where the EPA is the permitting authority.

In summary, in order to act consistently with its understanding of the Supreme Court's decision pending judicial action to effectuate the final decision, the EPA will not apply or enforce the following regulatory requirements:

- Federal regulations or the EPA-approved PSD SIP provisions that require a stationary source to obtain a PSD permit if GHG are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification (e.g., 40 CFR 52.21(b)(49)(v)).
- Federal regulations or provisions in the EPA-approved title V programs that require a stationary source to obtain a title V permit solely because the source emits or has the potential to emit GHG above the major source thresholds.

As discussed further below, we recommend that Regional Offices confer with state, local and tribal permitting authorities and permit applicants to discuss how to handle permit applications pending with those agencies.

## **2. Preliminary EPA Views Regarding Other Questions Raised by Supreme Court Decision**

The remainder of this memorandum is intended simply to provide a clear statement of the EPA's present understanding of the implications of the Supreme Court's decision on additional subjects regarding permitting requirements. The following is not intended to represent a definitive or final statement by the agency on these issues. In fact, the EPA expects that some changes or refinements to the following guidance may result as the EPA examines these matters further in the course of judicial proceedings, discussions with stakeholders, and forthcoming action with respect to permit applications, issued permits, and approval of state programs.<sup>1</sup>

### Next Steps in the Legal Process Following the Supreme Court's Decision

Additional steps have yet to occur in the U.S. Courts to implement the Supreme Court decision. Since no party requested reconsideration of the Supreme Court decision by the applicable deadline under Supreme Court rules, the EPA expects that the Supreme Court's decision will become final shortly. This will be the case as soon as the Supreme Court sends its decision down to the D.C. Circuit for further proceedings. After this occurs, we expect that the D.C. Circuit will issue an order that leads to a process that identifies particular parts of the regulations adopted in the Tailoring Rule and earlier EPA regulations that the EPA must revise (remanding the regulations) or that are struck down (vacating the regulations). The EPA and the Department of Justice expect to soon begin a process of consulting with the parties to the litigation regarding this step of the court process.

### PSD Construction Permit Requirements

#### *Sources Triggering PSD Based on Pollutants Other Than GHG*

The Supreme Court upheld application of the BACT requirement to greenhouse gas emissions from new and modified sources that trigger PSD permitting obligations on the basis of their emissions of air pollutants other than GHG (also known as "Step 1" or "anyway sources"). In the EPA's current view, Step 1 sources remain subject to the PSD BACT requirement for GHG, as well as other pollutants, if they emit those pollutants at or above certain thresholds. With respect to new "anyway sources," the EPA intends to continue applying the PSD BACT requirement to GHG emissions if the source emits or has the potential to emit 75,000 tons per year (tpy) or more of GHG on a carbon dioxide equivalent (CO<sub>2</sub>e) basis. With respect to modified "anyway sources," the EPA intends to continue applying the PSD BACT requirements to GHG if both of the following circumstances are present: (1) the modification is otherwise subject to PSD for a pollutant other than GHG; (2) the modification results in a GHG emissions increase and a net GHG emissions increase equal to or greater than 75,000 tpy CO<sub>2</sub>e and greater than zero on a mass basis.

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<sup>1</sup> Since it provides general guidance on these issues, the remainder of this memorandum does not itself create any rights or impose any new obligations or prohibitions, and is not intended to be a basis for enforcement actions. The guidance that follows from this point may not be appropriate for all situations, and EPA retains the discretion to approach issues differently than recommended here in specific situations that may arise.

The part of the Supreme Court opinion that affirmed application of BACT to greenhouse gases at “anyway sources” also noted that the EPA may limit application of BACT to greenhouse gases to those situations where a permit applicant’s source has the potential to emit GHG above a specified threshold (or *de minimis*) level. The Supreme Court explained that the EPA would need to justify its *de minimis* threshold on proper grounds. In the meantime, to ensure compliance with the Clean Air Act at present, the EPA intends to continue applying BACT to GHG at “anyway sources” and processing PSD permit applications for “anyway sources” using a 75,000 tpy CO<sub>2e</sub> threshold to determine whether a permit must include a BACT limitation for greenhouse gases, pending further developments. Such further developments may include action by the D.C. Circuit, input received by the EPA from stakeholders in connection with the court process, experience applying this approach in individual permitting actions, and further EPA action to consider whether to promulgate a *de minimis* level and what level would be appropriate. Thus, for now, the EPA believes the best course of action with respect to “anyway sources” is to continue applying existing regulations.

#### *Sources Triggering PSD Solely Based on GHG Emissions*

Subject to the considerations discussed below, headquarters recommends that Regional Offices confer with state, local, and tribal permitting authorities and permit applicants to explore their plans to respond to the Supreme Court’s decision. These conversations should examine whether, in light of the Supreme Court decision, there is flexibility under state, local and tribal laws to determine that Step 2 sources no longer are required to obtain PSD permits prior to the completion of any actions to repeal or revise such regulations to in light of the Supreme Court decision. The EPA understands that some states have provisions in their laws that may automatically modify state-law permitting requirements based on the Supreme Court’s decision. To the extent such provisions were approved by the EPA as part of a SIP, Regional Offices should encourage such states to contact the EPA to discuss implementation of those provisions. We do not read the Supreme Court decision to preclude states from retaining permitting requirements for sources of GHG emissions that apply independently under state law even where those requirements are no longer required under federal law.

Regional Offices should be mindful that even if the EPA is not requiring Step 2 sources to obtain a PSD permit under federal law, such sources likely have a continuing obligation to obtain minor source construction permits under the applicable SIP as a result of their emissions of non-GHG pollutants. Thus, we recommend discussing with state, local, and tribal permitting authorities and permit applicants, the feasibility of converting pending permit applications into minor source permit applications and proceeding on that basis where appropriate.

We plan to provide additional views in the future with respect to Step 2 sources that have already obtained a PSD permit, but our general thinking at this time is that it may be appropriate to ultimately remove GHG BACT limitations from such permits and to convert such permits into minor source permits where this is feasible and minor source requirements remain applicable. We encourage Regional Offices to contact states to discuss their ability to proceed consistent with the outcome of the Supreme Court decision on individual permitting matters.

### Title V Operating Permits

While the EPA will no longer apply or enforce the requirement that a source obtain a title V permit solely because it emits or has the potential to emit greenhouse gases above major source thresholds, the agency does not read the Supreme Court decision to affect other grounds on which a title V permit may be required or the applicable requirements that must be addressed in title V permits. For example, the EPA currently believes it is still appropriate for a title V permit to incorporate and assure compliance with greenhouse gas BACT limits that remain applicable requirements under a PSD permit issued to a Step 1 “anyway source.”

We recommend that Regional Offices confer with state, local, and tribal permitting authorities and permit applicants regarding their plans to respond to the Supreme Court’s decision. These conversations should examine whether, in light of the Supreme Court decision, there is flexibility under state, local, and tribal laws to determine that Step 2 sources are no longer required to obtain title V permits prior to the completion of any actions to repeal or revise such regulations in light of the Supreme Court decision. To the extent that any approved state, local or tribal title V programs have provisions in their laws that may automatically modify state, local or tribal-law permitting requirements based on the Supreme Court’s decision, Regional Offices should encourage such permitting authorities to contact the EPA to discuss implementation of those provisions. Similar to state-law construction permitting requirements, the Supreme Court decision does not preclude states from continuing to require that certain types of sources obtain operating permits meeting requirements that apply independently under state law. Thus, we recommend that Regional Offices advise sources to consult with their individual permitting authorities regarding operating permit requirements after the Supreme Court’s decision.

With respect to title V permits that have already been issued to Step 2 sources, we recommend that such sources consult with their title V permitting authority to determine the appropriate next steps based on the source’s specific permitting situation.

### Federal PSD and Title V Rules, SIP and State Title V Programs

The Office of Air and Radiation (OAR) anticipates a need for the EPA to revise federal PSD and title V rules<sup>2</sup> in light of the Supreme Court opinion. In addition, OAR anticipates that many SIPs and approved title V programs will be revised to effectuate the Supreme Court’s decision. The timing and content of the EPA’s actions with respect to the EPA regulations and state program approvals are expected to be informed by the forthcoming legal process before the D.C. Circuit. The EPA plans to consult with permitting authorities to determine the most efficient and least burdensome ways to accomplish any such revisions to state or tribal programs.

### GHG 5-Year Study

In the Tailoring Rule, the EPA described next steps to include a study by April 2015, referred to as the “5-year study,” and a possible further regulatory action, referred to as “Step 4.” OAR believes the results of the Supreme Court decision eliminate the need for the 5-year study. Thus, at this time, OAR is no longer working on the study, and we intend to inform states collecting data requested by the EPA for

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<sup>2</sup> The EPA is still evaluating the implications of the Supreme Court’s decision, if any, on GHG Plantwide Applicability Limitations which were finalized under Step 3 of the Tailoring Rule.

that study that this data collection is no longer necessary. In addition, the EPA does not intend to take further action on Step 4. The EPA is, however, continuing to evaluate GHG permitting data as appropriate with regard to the possible development and justification of an appropriate GHG significance (or “*de minimis*”) level for determining the application of PSD BACT requirements to GHG in permitting of “anyway sources.” We expect that the information that states have submitted for the 5-year study will be useful in that effort.

#### Assessment of Biogenic Carbon Dioxide (CO<sub>2</sub>) Emissions

The Supreme Court’s decision did not directly address the application of PSD and title V permitting requirements to biogenic CO<sub>2</sub> emissions. On July 12, 2013, the D.C. Circuit issued a decision (the Deferral decision) overturning the EPA regulation that deferred application of these permitting programs to biogenic CO<sub>2</sub> emissions (the Deferral Rule). *Center for Biological Diversity v. EPA*, 722 F.3d 421 (D.C. Cir. 2013). However, the Deferral decision has not yet taken effect because some parties have been waiting for the Supreme Court decision to determine whether to ask the D.C. Circuit to reconsider its ruling on the Deferral Rule. Furthermore, court actions against the Tailoring Rule remain pending by parties that contend that the Tailoring Rule caused PSD and title V programs to apply to biogenic greenhouse gas emissions. Notwithstanding these matters still pending in the courts, the Deferral Rule itself expired on its own terms on July 21, 2014. The EPA’s work regarding the biogenic CO<sub>2</sub> assessment framework remains ongoing and is not directly impacted by the Supreme Court’s decision. Nonetheless, the EPA’s current view is that the Supreme Court’s decision effectively narrows the scope of the biogenic CO<sub>2</sub> permitting issues that remain for the EPA to address. This is because, as described above, the EPA will no longer apply or enforce regulatory provisions requiring PSD or title V permits for sources solely on the basis of their GHG emissions. Continuing our current approach, OAR recommends that Regional Offices consult with sources and permitting authorities on biomass related permitting questions as they arise.

#### Conclusion

We trust this information will be helpful as the EPA pursues next steps and await further developments before the U.S. Courts. Should you have questions generally concerning this memorandum, please contact Juan Santiago, Associate Division Director of the Air Quality Policy Division, Office of Air Quality Planning and Standards at [santiago.juan@epa.gov](mailto:santiago.juan@epa.gov) or 919-541-1084. Should you have questions generally concerning the enforcement specific aspects of this memorandum, please contact Apple Chapman, Associate Division Director, Air Enforcement Division, Office of Civil Enforcement at [chapman.apple@epa.gov](mailto:chapman.apple@epa.gov) or 202-564-5666.

**ENVIRONMENTAL MANAGEMENT COMMISSION  
FISCAL NOTE FOR PROPOSED AMENDMENTS TO GREENHOUSE GAS  
PERMITTING**

<b>Rule Amendments:</b>	15A NCAC 02D .0544, Prevention of Significant Deterioration Requirements for Greenhouse Gases 15A NCAC 02Q .0502, Applicability
<b>Rule Topic:</b>	Amendments to Clarify Applicability of Prevention of Significant Deterioration (PSD) Rule for Greenhouse Gases and Title V Applicability Rule
<b>DENR Division:</b>	Division of Air Quality
<b>Agency Contact:</b>	Joelle Burlison, Rule Development Branch Supervisor Division of Air Quality (DAQ) (919) 707-8720 <a href="mailto:Joelle.Burlison@ncdenr.gov">Joelle.Burlison@ncdenr.gov</a>
<b>Analyst:</b>	Patrick Knowlson, DAQ (919) 707-8711 <a href="mailto:Patrick.Knowlson@ncdenr.gov">Patrick.Knowlson@ncdenr.gov</a>
<b>Impact Summary:</b>	State government: Yes Local government: No Substantial impact: No
<b>Statutory Authority:</b>	G.S. 143-215.3(a)(1); 143-215.107(a)(1), (3), (4), (5); 143-215.108; 143B-282; S.L. 2012-91.
<b>Necessity:</b>	To revise the North Carolina Prevention of Significant Deterioration and Title V Rules to Address Supreme Court Decision.

## **I. Executive Summary**

On June 23, 2014, the United States Supreme Court issued a decision in Utility Air Regulatory Group (UARG) v. Environmental Protection Agency (EPA) addressing the application of stationary source permitting requirements to greenhouse gas (GHG) emissions. In its decision, the Supreme Court said that the EPA may not treat greenhouse gases as an air pollutant for the purposes of determining whether a source is a major source required to obtain a Prevention of Significant Deterioration (PSD) or Title V permit.

The EPA does not interpret the Supreme Court decision to preclude states from retaining permitting requirements for sources of GHG emissions that apply independently under state law even where those requirements are no longer required under federal law.

However, under North Carolina G.S. 150B-19.3(a), an agency may not adopt a rule that imposes a more restrictive standard, limitation or requirement than those imposed by federal law or rule. Under G.S. 150B-19.1(a)(2), an agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.

15A NCAC 02D .0544, Prevention of Significant Deterioration Requirements for Greenhouse Gases, and 15A NCAC 02Q .0502, Applicability, are proposed for amendment to remove the requirement that facilities obtain a PSD or Title V permit on the sole basis of its GHG emissions.

Table 1. Fiscal Impact Summary, estimates fiscal impacts to affected facilities and state and local governments due to these rule amendments. A facility's annual cost savings would be the difference between that year's Title V permit fee and the \$1,500 annual synthetic minor permit fee. For the facility previously unpermitted, its annual cost savings would be the full amount of the annual Title V permit fee. The fiscal impact to the State would be the equivalent loss of those annual Title V permit fees for the facilities that were required to submit a Title V application under the current rule. The three local programs, Mecklenburg County Air Quality, Western NC Regional Air Quality Agency, and Forsyth County Office of Environmental Assistance and Protection, do not have any facilities with Title V permits issued on the sole basis of its GHG emissions so there are not any fiscal impacts to local programs.

**Table 1. Fiscal Impact Summary**

	2015	2016	2017	2018	2019
Local Government	\$0	\$0	\$0	\$0	\$0
State Government (Loss)	(\$23,052)	(\$23,604)	(\$24,164)	(\$24,740)	(\$25,324)
Private Industry (Saving)	\$23,052	\$23,604	\$24,164	\$24,740	\$25,324
<b>Total Impact (absolute value)</b>	\$46,104	\$47,208	\$48,328	\$49,480	\$50,648

## II. Background

On June 3, 2010, EPA published the final Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule (herein referred to as the Tailoring Rule; 75 FR 31514), setting thresholds for GHG emissions that define when permits under these programs are required for new and existing industrial facilities.

The Tailoring Rule addresses emissions of a group of six GHGs:

1. Carbon dioxide (CO<sub>2</sub>)
2. Methane (CH<sub>4</sub>)
3. Nitrous oxide (N<sub>2</sub>O)
4. Hydrofluorocarbons (HFCs)
5. Perfluorocarbons (PFCs)
6. Sulfur hexafluoride (SF<sub>6</sub>)

Some of these GHGs have a higher global warming potential than others. To address these differences, the international standard practice is to express GHGs in carbon dioxide equivalents (CO<sub>2</sub>e). Emissions of gases other than CO<sub>2</sub> are translated into CO<sub>2</sub>e by using the gases' global warming potentials. Under the Tailoring, EPA is using CO<sub>2</sub>e as the metric for determining whether sources are covered by permitting programs. Total GHG emissions are calculated by summing the CO<sub>2</sub>e emissions of all of the six constituent GHGs.

On November 18, 2010, the Environmental Management Commission adopted 15A NCAC 02D .0544, Prevention of Significant Deterioration for Greenhouse Gases, which incorporated the requirements in the federal Tailoring Rule. The rule became effective on January 28, 2011 pursuant to Executive Order 81 signed by Governor Beverly E. Perdue.

The state rule essentially exempted from the permitting requirements most sources of GHGs, except the major ones. Beginning in July 1, 2011, the PSD permitting requirements cover new construction projects that emit at least 100,000 tons per year of GHGs on a CO<sub>2</sub>e basis even if they do not exceed the permitting thresholds for any other pollutant. Modifications at existing facilities that increase GHG emissions by at least 75,000 tons per year are subject to permitting requirements, even if they do not significantly increase emissions of any other pollutant. Operating permit requirements apply to sources based on their GHG emissions even if they would not apply based on emissions of any other pollutant. Facilities that emit at least 100,000 tons per year CO<sub>2</sub>e are subject to Title V permitting requirements. EPA labelled this Step 2 of the Tailoring Rule. Affected facilities were required to submit a permit application by June 30, 2012.

On June 23, 2014, the United States Supreme Court issued a decision in *Utility Air Regulatory Group (UARG) v. Environmental Protection Agency (EPA)* addressing the application of stationary source permitting requirements to GHG emissions. In its decision, the Supreme Court said that the EPA may not treat greenhouse gases as an air pollutant for the purposes of determining whether a source is a major source required to obtain a PSD or Title V permit.

On July 24, 2014, Janet G. McCabe, Acting Assistant Administrator, EPA Office of Air and Radiation, and Cynthia Giles, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, wrote a memo outlining EPA's next steps for the agency's GHG permit program. In the memo, they wrote that the EPA will not apply or enforce the following regulatory requirements:

- “Federal regulations or the EPA-approved PSD SIP provisions that require a stationary source to obtain a PSD permit if GHG are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification (e.g., 40 CFR52.21 (b)(49)(v)).
- Federal regulations or provisions in the EPA-approved Title V programs that require a stationary source to obtain a Title V permit solely because the source emits or has the potential to emit GHG above the major source thresholds.”

### **III. Reason for Rule Change**

The EPA does not interpret the Supreme Court decision to preclude states from retaining permitting requirements for sources of GHG emissions that apply independently under state law even where those requirements are no longer required under federal law.

However, under North Carolina G.S. 150B-19.3(a), an agency may not adopt a rule that imposes a more restrictive standard, limitation or requirement than those imposed by federal law or rule. Under G.S. 150B-19.1(a)(2), an agency shall seek to reduce the burden upon those persons or entities who must comply with the rule. Under G.S. 150B-19.1(a)(6), rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner. Therefore, it is necessary to amend North Carolina's prevention of significant deterioration rule for greenhouse gases and Title V permit applicability rule to be consistent with the Supreme Court rule and EPA's implementation of their permitting program.

### **IV. Proposed Rule Changes**

The agency is proposing to amend rule 15A NCAC 02D .0544, Prevention of Significant Deterioration Requirements for Greenhouse Gases, to exempt major stationary sources from the requirement to obtain a PSD permit on the sole basis of their GHG emissions. The agency is also proposing to update the global warming potentials for the GHGs.

Additionally, the proposed amendment to 15A NCAC 02Q .0502, Applicability, would exempt facilities from obtaining a Title V permit on the sole basis of their GHG emissions.

### **V. Changes from the Regulatory Baseline**

The current PSD permitting requirements in Rule 15A NCAC 02D .0544 and the current Title V permit applicability requirements in 15A NCAC 02Q .0502 forms the basis of the regulatory baseline.

#### **Title V permitting**

Under the current Title V permitting applicability rule, facilities that emit at least 100,000 tons per year of GHG are subject to Title V permitting requirements even if they do not apply based on emissions of any other pollutant. The rule amendment would exempt facilities from obtaining a Title V permit on the sole basis of their GHG emissions.

The Division of Air Quality (DAQ) received four Title V permit applications by the Tailoring Rule Step 2 deadline of June 30, 2012 for permit application submittals. Three of those facilities have had their Title V permits issued by the DAQ and one facility that submitted a Title V permit application but withdrew their application due to the Supreme Court decision. The three local programs, Mecklenburg County Air Quality, Western NC Regional Air Quality Agency, and Forsyth County Office of Environmental Assistance and Protection, do not have any facilities with Title V permits issued on the sole basis of its GHG emissions.

## **PSD permitting**

Under the current PSD permitting requirement for GHG in 15A NCAC 02D .0544, new facilities that emit GHG emissions of at least 100,000 tons per year are subject to PSD permitting requirements even if they do not exceed the permitting thresholds for any other pollutant. Modifications at existing facilities that increase their GHG emissions by at least 75,000 tons per year are also subject to PSD permitting requirements, even if they do not significantly increase emissions of any other pollutant.

The DAQ and three local programs have not issued any PSD permits for facilities on the sole basis of their GHG emissions. The DAQ did receive one permit application with a PSD avoidance condition in it to avoid PSD permitting. An avoidance condition is a limit in the permit, such as a production limit or number of hours of operation, to avoid exceeding the PSD emissions threshold where a permit would be required.

## **Global Warming Potentials**

The current rule, 15A NCAC 02D .0544, incorporates the July 20, 2011(76 FR 43507) version of the Code of Federal Regulations (CFR). The global warming potentials are included in the definition of “Subject to regulation” in 40 CFR 51.166(b)(48)(ii)(a). EPA updated the global warming potentials on December 11, 2014 in 73 FR 73750. The numerical values are contained in Table A-1 to Subpart A of Part 98 that starts on page 73779.

The agency is amending the current rule to incorporate the current global warming potentials by reference and incorporate any subsequent changes to the potentials.

## **VI. Estimating the Fiscal Impacts to Affected Sources**

A facility that is required to submit a Title V or PSD permit for GHG emissions may incur significant costs to gather data and prepare the permit application. The DAQ prepared a fiscal note for the initial Tailoring Rule requirements (*Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*) that the NC Office of State Budget and Management approved on July 29, 2010. In that fiscal note, the DAQ estimated that the average cost savings per Title V permit for new industrial sources was \$53,160 and for commercial/residential sources was \$26,300. The DAQ also estimated the average cost savings per PSD permit was for new industrial sources was \$96,600 and for commercial/residential sources was \$67,500. The agency updated all estimates from the 2010 fiscal note from 2007 to 2015 dollars using an inflation factor of 1.1432.<sup>1</sup>

Based on a query of the iBeam database maintained by the DAQ, there are 2,251 existing non-Title V permitted facilities – 651 synthetic minor and 1,600 small permitted facilities – that form the pool of facilities with potential to require a Title V permit under the current rules. Synthetic minor facilities are facilities that have taken a limitation in their permit to avoid Title V permitting. Three of the four permit applications received by the DAQ since 2011 held synthetic

<sup>1</sup> IHS Global Insight, DataInsight -Web Imports, U.S. Regional Database, NC Consumer Price Index, Annual 30 Year State Forecast.

minor permits. Therefore, 0.13% (3 out of 2,251) of the existing facilities submitted permit applications by the Step 2 deadline date. For this analysis, the DAQ is assuming that all facilities that were required to submit a permit application by the Step 2 deadline did meet the submission requirement (i.e., 100% compliance rate). The fourth Title V application came from a previously unpermitted facility. Since June 30, 2012, the DAQ has not received any additional permit applications from new sources or sources that made modification since the Step 2 deadline date. Based on the low percentage of existing facilities needing a Title V permit for GHG emissions and the DAQ receiving no new applications since the Step 2 deadline date, the DAQ assumes that it is very unlikely that there will be any new Title V permit applications received during the next five years.

The DAQ has not issued any PSD permits for facilities on the sole basis of their GHG emissions. Therefore, the DAQ assumes that it is very unlikely that there will be any new PSD permit applications received during the next five years. There is little indication that the Supreme Court case and decision have delayed or deterred any facility in submitting a permit application. The case was docketed on March 21, 2013 and decided July 25, 2014; and DAQ has received no new application since June 30, 2012.

For the four Title V permit applications that the DAQ received, the costs to the facilities associated with submitting their application are sunk costs and are not included in this fiscal note. However, these facilities would incur a cost saving related to the annual permit fee as specified in Rule 15A NCAC 02Q .0203. The 2015 annual permit fee for Title V facilities is \$6,888 and \$1,500 for synthetic minor permits. There is an inflation adjustment to the permit fees in this rule based on the methodology contained in Rule 15A NCAC 02Q .0204.<sup>2</sup> Synthetic minor permit fees are fixed and not adjusted for inflation. DAQ has posted the current permit fees on its website at [http://www.ncair.org/permits/Fee Table and Guide.pdf](http://www.ncair.org/permits/Fee_Table_and_Guide.pdf).

Three of the four facilities that submitted Title V permit applications were synthetic minor facilities. Their annual cost savings would be the difference between that year's Title V permit fee and the \$1,500 annual synthetic minor permit fee. For the facility previously unpermitted, it will have its permit rescinded and its annual cost savings would be the full amount of the annual Title V permit fee. There is not an annual permit fee for PSD permits.

For the purposes of this fiscal note, the agency assumes that inflation is approximately 2% per year. Therefore, the annual Title V permit fee would be as shown in Table 2.

**Table 2. Estimated Annual Permit Fees**

	2015	2016	2017	2018	2019
Title V Annual Fee	\$6,888	\$7,026	\$7,166	\$7,310	\$7,456
Synthetic Minor Annual Fee	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500

<sup>2</sup> The inflation adjustments to the permit fees were 1.48%, 2.41%, 2.59%, 1.70% and 1.58% for years 2011 through 2015, respectively.

The proposed rulemaking could impact State expenditures and funds through the staff time saved in processing a permit application and issuing the final permit and the loss of annual Title V permit fees. In the 2010 fiscal note for the Tailoring Rule amendments, the State and local permitting authorities were estimated to expend about \$22,900 per permit to process a new GHG industrial Title V permit and \$11,400 per permit for a new commercial or residential Title V permit. Also, the agency estimated State and local permitting authorities to expend about \$27,400 per permit to process a new GHG industrial PSD permit and \$18,500 per permit for a new commercial or residential PSD permit. The agency updated all estimates from the 2010 fiscal note from 2007 to 2015 dollars using an inflation factor of 1.1432.

The loss of annual Title V permit fees to the State would be equal to the annual cost savings to the facilities for their reduced annual permit fees. For this fiscal note, the agency assumed that it is unlikely that there will be any new Title V or PSD permits on the sole basis of a facility's GHG emissions. Therefore, the agency estimated that the State would not have any cost savings from the regulatory burden relief of processing any permits. The total fiscal impact to the State would be the loss of annual Title V permit fees for the four facilities that were required to submit a Title V application under the current rule. The four affected facilities are the three facilities that had already submitted applications and the fourth facility that withdrew its application in light of the Supreme Court decision before the DAQ was able to process and issue the permit. The three local programs do not have any facilities with Title V permits issued on the sole basis of its GHG emissions so there are not any fiscal impacts to local programs.

Because of the low number of facilities, the agency estimates that the proposed change may affect, there is no expectation that the amendments would negatively affect air quality.

The agency does not expect any additional impact from the proposed changes. Some numerical values for the GHGs' global warming potential that EPA updated on December 11, 2014 increased and some numerical values decreased. The change in the values could affect the calculation of total GHGs emitted from a facility. Based on the extensive experience by the DAQ permit engineers since the federal Tailoring requirements went in effect, the DAQ permitting section does not expect the proposed amendment to incorporate the latest global warming potentials to change the permitting status of any facility in regards to total calculated GHG emissions. Therefore, there is no estimated impact from this amendment.

Table 3 summarizes the impacts from the proposed rule change based on the assumptions noted above.

**Table 3. Fiscal Impact Summary**

	2015	2016	2017	2018	2019
Local Government	\$0	\$0	\$0	\$0	\$0
State Government (Loss)	(\$23,052)	(\$23,604)	(\$24,164)	(\$24,740)	(\$25,324)
Private Industry (Saving)	\$23,052	\$23,604	\$24,164	\$24,740	25,324
<b>Total Impact (absolute value)</b>	\$46,104	\$47,208	\$48,328	\$49,480	\$50,648

## Appendix A

15A NCAC 02D .0544 is proposed amendment as follows:

**15A NCAC 02D .0544 PREVENTION OF SIGNIFICANT DETERIORATION REQUIREMENTS FOR GREENHOUSE GASES**

(a) The purpose of this Rule is to implement a program for the prevention of significant deterioration of air quality for greenhouse gases as required by 40 CFR 51.166. For purposes of greenhouse gases, the provisions of this Rule shall apply rather than the provisions of Rule .0530 of this Section. A major stationary source or major modification shall not be required to obtain a prevention of significant deterioration (PSD) permit on the sole basis of its greenhouse gases emissions. For all other regulated new source review (NSR) pollutants, the provisions of Rule .0530 of this Section apply.

(b) For the purposes of this Rule, the definitions contained in 40 CFR 51.166(b) and 40 CFR 51.301 shall apply except the definition of "baseline actual emissions." "Baseline actual emissions" means the rate of emissions, in tons per year, of a regulated NSR pollutant, as determined in accordance with Subparagraphs (1) through (3) of this Paragraph:

- (1) For an existing emissions unit, baseline actual emissions means the average rate, in tons per year, at which the emissions unit ~~actually~~ emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 5-year period ~~immediately~~ preceding the date that a complete permit application is received by the Division for a permit required under this Rule. The Director shall allow a different time period, not to exceed 10 years ~~immediately~~ preceding the date that a complete permit application is received by the Division, if the owner or operator demonstrates that it is more representative of normal source operation. For the purpose of determining baseline actual emissions, the following shall apply:
  - (A) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions;
  - (B) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above any emission limitation that was legally enforceable during the consecutive 24-month period;
  - (C) For an existing emission unit (other than an electric utility steam generating unit), the average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source ~~must~~ shall currently comply. However, if the State has taken credit in an attainment demonstration or maintenance plan consistent with the requirements of 40 CFR 51.165(a)(3)(ii)(G) for an emission limitation that is part of a maximum achievable control technology standard that the Administrator proposed or promulgated under part 63 of the Code of Federal Regulations, the baseline actual emissions shall be adjusted to account for such emission reductions;

- (D) For an electric utility steam generating unit, the average rate shall be adjusted downward to reflect any emissions reductions under G.S. 143-215.107D and for which cost recovery is sought pursuant to G.S. 62-133.6;
  - (E) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period shall be used to determine the baseline actual emissions for all the emissions units being changed. A different consecutive 24-month period for each regulated NSR pollutant can be used for each regulated NSR pollutant; and
  - (F) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by Parts (B) and (C) of this Subparagraph;
- (2) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit; and
  - (3) For a plantwide applicability limit (PAL) for a stationary source, the baseline actual emissions shall be calculated for existing emissions units in accordance with the procedures contained in Subparagraph (1) of this Paragraph and for a new emissions unit in accordance with the procedures contained in Subparagraph (2) of this Paragraph.
- (c) In the definition of "net emissions increase," the reasonable period specified in 40 CFR 51.166(b)(3)(ii) shall be seven years.
- (d) In the definition of "subject to regulation", a greenhouse gas's global warming potential is the global warming potential published at Table A-1 of Subpart A of 40 CFR Part 98 and shall include subsequent amendments and editions.
- (d) The limitation specified in 40 CFR 51.166(b)(15)(ii) shall not apply.
- (e) Major stationary sources and major modifications shall comply with the requirements contained in 40 CFR 51.166(i) and (a)(7) and by extension in 40 CFR 51.166(j) through (o) and (w). The transition provisions allowed by 40 CFR 52.21 (i)(11)(i) and (ii) and (m)(1)(vii) and (viii) are hereby adopted under this Rule. The minimum requirements described in the portions of 40 CFR 51.166 referenced in this Paragraph are hereby adopted as the requirements to be used under this Rule, except as otherwise provided in this Rule. Wherever the language of the portions of 40 CFR 51.166 referenced in this Paragraph speaks of the "plan," the requirements described therein shall apply to the source to which they pertain, except as otherwise provided in this Rule. Whenever the portions of 40 CFR 51.166 referenced in this Paragraph provide that the State plan may exempt or not apply certain requirements in certain circumstances, those exemptions and provisions of nonapplicability are also hereby adopted under this Rule. However, this provision shall not be interpreted so as to limit information that may be requested from the owner or operator by the Director as specified in 40 CFR 51.166(n)(2).
- (f) 40 CFR 51.166(w)(10)(iv)(a) is changed to read: "If the emissions level calculated in accordance with Paragraph (w)(6) of this Section is equal to or greater than 80 percent of the PAL [plant wide applicability limit] level, the Director shall renew the PAL at the same level." 40 CFR 51.166(w)(10)(iv)(b) is not incorporated by reference.

(g) 15A NCAC 02Q .0102 and .0302 are not applicable to any source to which this Rule applies. The owner or operator of the sources to which this Rule applies shall apply for and receive a permit as required in 15A NCAC 02Q .0300 or .0500.

(h) When a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation ~~which~~ that was established after August 7, 1980, on the capacity of the source or modification to emit a pollutant, such as a restriction on hours of operation, then the provisions of this Rule shall apply to the source or modification as though construction had not yet begun on the source or modification.

(i) The provisions of 40 CFR 52.21(r)(2) regarding the period of validity of approval to construct are incorporated by reference except that the term "Administrator" is replaced with "Director".

(j) Permits may be issued based on innovative control technology as set forth in 40 CFR 51.166(s)(1) if the requirements of 40 CFR 51.166(s)(2) have been met, subject to the condition of 40 CFR 51.166(s)(3), and with the allowance set forth in 40 CFR 51.166(s)(4).

(k) A permit application subject to this Rule shall be processed in accordance with the procedures and requirements of 40 CFR 51.166(q). Within 30 days of receipt of the application, applicants shall be notified if the application is complete as to initial information submitted. Commencement of construction before full prevention of significant deterioration approval is obtained constitutes a violation of this Rule.

(l) Approval of an application with regard to the requirements of this Rule shall not relieve the owner or operator of the responsibility to comply ~~fully~~ with applicable provisions of other rules of this Subchapter or Subchapter 02Q of this Title and any other requirements under local, state, or federal law.

(m) If the owner or operator of a source is using projected actual emissions to avoid applicability of prevention of significant deterioration requirements, the owner or operator shall notify the Director of the modification before beginning actual construction. The notification shall include:

- (1) a description of the project;
- (2) identification of sources whose emissions could be affected by the project;
- (3) the calculated projected actual emissions and an explanation of how the projected actual emissions were calculated, including identification of emissions excluded by 40 CFR 51.166(b)(40)(ii)(c);
- (4) the calculated baseline actual emissions and an explanation of how the baseline actual emissions were calculated; and
- (5) any netting ~~calculations~~ calculations, if applicable.

If upon reviewing the notification, the Director finds that the project will cause a prevention of significant deterioration evaluation, then the Director shall notify the owner or operator of his or her findings. The owner or operator shall not make the modification until the owner or operator has received a permit issued pursuant to this Rule. If a permit revision is not required pursuant to this Rule, the owner or operator shall maintain records of annual emissions in tons per year, on a calendar year basis related to the modifications for 10 years following resumption of regular operations after the change if the project involves increasing the emissions unit's design capacity or its potential to emit the regulated NSR pollutant; otherwise these records shall be maintained for five years following resumption of regular operations after the change. The owner or operator shall submit a report to the Director within 60 days after the end

of each year during which these records must be generated. The report shall contain the items listed in 40 CFR 51.166(r)(6)(v)(a) through (c). The owner or operator shall make the information documented and maintained under this Paragraph available to the Director or the general public pursuant to the requirements in 40 CFR 70.4(b)(3)(viii).

(n) The references to the Code of Federal Regulations (CFR) in this Rule are incorporated by reference unless a specific reference states otherwise. The version of the CFR incorporated in this Rule is that as of July 20, 2011 as set forth here <http://www.gpo.gov/fdsys/pkg/CFR-2011-title40-vol2/pdf/CFR-2011-title40-vol2-sec51-166.pdf>, <http://www.gpo.gov/fdsys/pkg/CFR-2011-title40-vol3/pdf/CFR-2011-title40-vol3-sec52-21.pdf>, and with the amendment set forth on 76 FR 43507 at <http://www.gpo.gov/fdsys/pkg/FR-2011-07-20/pdf/2011-17256.pdf> and does not include any subsequent amendments or editions to the referenced material. This Rule is applicable in accordance with 40 CFR 51.166(b)(48) and (b)(49)(iv) and (v).

*History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(3); 143-215.107(a)(5); 143-215.107(a)(7); 143-215.108(b); 150B-21.6;*  
*Eff. January 28, 2011 pursuant to E.O. 81, Beverly E. Perdue;*  
*Pursuant to G.S. 150B-21.3(c), a bill was not ratified by the General Assembly to disapprove this rule;*  
*Temporary Amendment Eff. December 23, 2011;*  
*Amended Eff. July 1, ~~2012-2012~~;*  
*Temporary Amendment Eff. December 2, ~~2014~~ 2014;*  
*Amended Eff. \_\_\_\_\_.*

15A NCAC 02Q .0502 is proposed for amendment as follows:

**15A NCAC 02Q .0502 APPLICABILITY**

(a) Except as provided in Paragraph (b) or (c) of this Rule, the following facilities are required to obtain a permit under this Section:

- (1) major facilities;
- (2) facilities with a source subject to 15A NCAC 2D .0524 or 40 CFR Part 60, except new residential wood heaters;
- (3) facilities with a source subject to 15A NCAC 2D .1110 or 40 CFR Part 61, except asbestos demolition and renovation activities;
- (4) facilities with a source subject to 15A NCAC 2D .1111 or 40 CFR Part 63 or any other standard or other requirement under Section 112 of the federal Clean Air Act, except that a source is not required to obtain a permit solely because it is subject to rules or requirements under Section 112(r) of the federal Clean Air Act;
- (5) facilities to which 15A NCAC 2D .0517(2), .0528, .0529, or .0534 applies;
- (6) facilities with a source subject to Title IV or 40 CFR Part 72; or
- (7) facilities in a source category designated by EPA as subject to the requirements of 40 CFR Part 70.

(b) This Section does not apply to minor facilities with sources subject to requirements of 15A NCAC 2D .0524, .1110, or .1111 or 40 CFR Part 60, 61, or 63 until EPA requires these facilities to have a permit under 40 CFR Part 70.

(c) A facility shall not be required to obtain a permit under this Section on the sole basis of its greenhouse gas emissions.

~~(e)~~(d) Once a facility is subject to this Section because of emissions of one pollutant, the owner or operator of that facility shall submit an application that includes all sources of all regulated air pollutants located at the facility except for insignificant activities because of category.

*History Note: Filed as a Temporary Adoption Eff. March 8, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;*

*Authority G.S. 143-215.3(a)(1); 143-215.107(a)(10); 143-215.108;*

*Eff. July 1, 1994;*

*Amended Eff. July 1, 1996;*

*Temporary Amendment Eff. December 1, 1999;*

*Amended Eff. July 1, ~~2000~~-2000;*

*Temporary Amendment Eff. December 2, ~~2014~~, 2014;*

*Amended Eff. \_\_\_\_\_.*

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## VII-1

## Chapter VII

The following documentation of filing and notification is incorporated as part of this hearing record and is maintained on file:

1. ENR 101 Internal Approval Form.
2. Submission for Notice Form and material submitted to the Office of Administrative Hearings.
3. The public notice as it appears in *The North Carolina Register* Volume 29, Issue 20, pages 2337-2342.
4. Memorandum transmitting hearing notice and proposal to regional offices for public inspection.
5. Memorandum transmitting hearing notice and proposal to local programs.
6. Submission of Filing Forms and material filed with Office of Administrative Hearings.
7. Executive Order No. 70 Certification Form
8. Letter notifying EPA of hearing.
9. Letter transmitting hearing record to EPA.

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