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Re: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule

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The Competitive Enterprise Institute (CEI), a non-profit free-market public policy group specializing in regulatory issues, is pleased to submit this comment on the Environmental Protection Agency's (EPA's) proposed *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*.¹

Abstract: In *Massachusetts v. EPA*, the Supreme Court legislated from the bench, authorizing and indeed pushing EPA to control emissions of greenhouse gases (GHGs) for climate change purposes. This is a policy decision of immense economic and political magnitude that Congress never intended or approved when it enacted and amended the Clean Air Act (CAA or Act). Regulating GHGs under the CAA leads inexorably to "absurd results," including an

¹ EPA, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule, October 27, 2009, 74 FR, 55292-55365; hereafter cited as Tailoring Rule.

economically-chilling administrative quagmire. To prevent GHG regulation from overwhelming agency administrative resources and stifling economic development, EPA proposes to suspend, for six years, the "major" source applicability thresholds for the CAA pre-construction and operating permits programs. That is, EPA proposes to amend the Act. This violation of the separation of powers compounds the constitutional crisis inherent in the Court's substitution of its will for that of the people's elected representatives. The small-business protections proposed in the Tailoring Rule are temporary, legally dubious, and incomplete. Even if courts uphold the Tailoring Rule, despite its flouting of clear statutory language, it will not avert the most absurd result of the Court's misreading of the CAA: regulation of carbon dioxide (CO₂) and other greenhouse gases under the National Ambient Air Quality Standards (NAAQS) program. EPA runs enormous political risks leading the charge for GHG regulations not approved by Congress. It is in the Agency's best interest not to oppose legislative action to overturn the endangerment finding and *Mass. v. EPA*.

I. Introduction

The Tailoring Rule "will relieve the regulatory burden" associated with the Clean Air Act's (CAA) Prevention of Significant Deterioration (PSD) pre-construction permitting program and title V operating permits program "for a substantial number of small entities."² However, the burdens to be relieved are a consequence of EPA's motor vehicle greenhouse gas (GHG) emissions rule,³ which in turn is a consequence of EPA's endangerment finding for GHG-related "air pollution."⁴ On both legal and scientific grounds, EPA should not have made the endangerment finding in the first place.⁵

² Tailoring Rule, 74 FR, 55349.

³ EPA, National Highway Traffic Safety Administration, Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Proposed Rule,

⁴ EPA, Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, December 15, 2009, 74 FR 66496-66546.

⁵ Marlo Lewis, Competitive Enterprise Institute Comment on EPA Endangerment Proposal, June 15, 2009, http://cei.org/cei_files/fm/active/0/Marlo%20Lewis,%20Competitive%20Enterprise%20Institute,%20Comment%20on%20Endangerment%20Proposal,%20June%2015,%202009.pdf; Sam Kazman and Hans Bader, Supplement to the October 5th Petition of the Competitive Enterprise Institute to Reopen This Proceeding In Light of Newly Released Information, December 2, 2009, <http://cei.org/rcandtestimony/2009/12/02/amended-petition-epa-proposed-endangerment-finding-greenhouse-gases>; Patrick J. Michaels and Paul C. Knappenberger, Scientific Shortcomings in the EPA's Endangerment Finding from Greenhouse Gases, *Cato Journal*, Vol. 29, No. 3 (Fall 2009), <http://www.cato.org/pubs/journal/cj29n3/cj29n3-8.pdf>; U.S. Chamber of Commerce, Petition for EPA to Conduct Its Endangerment Finding Proceeding On The Record, June 23, 2009, <http://www.uschamber.com/NR/rdonlyres/ekngxi7x62z4t4cmyi3abtysipk5a4tcnde4kbcaeovqmb4pywfc2wq5vfyaybgdu3hmkazghand2phuhxyetqane/USCOPetitionJune232009.pdf>.

The relief proposed by the Tailoring Rule is temporary, phasing down after six years.⁶ The proposed relief is also legally dubious, because it flouts clear statutory language. Moreover, even if upheld by courts, the Tailoring Rule provides no protection from the compliance burdens and market impacts of carbon dioxide (CO₂) regulation under the National Ambient Air Quality Standards (NAAQS) program -- a regulatory action logically required by EPA's endangerment finding.

EPA is taking an enormous gamble, betting that it can control the regulatory cascade triggered by its endangerment finding and motor vehicle emissions rule. EPA risks launching a major regulatory assault on an economy already in severe distress. Having sown the wind, EPA would then reap the whirlwind -- a political backlash against the Agency and the Obama administration. Rep. Joe Barton (R-TX) plans to introduce a resolution of disapproval to overturn the endangerment finding.⁷ Rep. Marsha Blackburn (R-TN) has introduced H.R. 391,⁸ a bill with over 90 co-sponsors, to overturn *Massachusetts v. EPA*.⁹ It would be in EPA's best interest not to oppose these congressional initiatives.

II. *Massachusetts v. EPA*: Tailoring Disaster

Why is EPA inaugurating a regime of global warming regulations that Congress never voted for or approved? Because the Supreme Court, in *Mass. v. EPA*, decided to legislate global warming policy from the bench.

In *Mass. v. EPA*, eco-litigation groups, led by a dozen state attorneys general, attempted to do an end run around Congress and impose Kyoto-like policies on the U.S. economy through judicial fiat. They found five willing accomplices on the Court, who essentially ruled that Congress authorized EPA to regulate GHGs for climate change purposes when it enacted CAA Sec. 202 in 1970 — decades before global warming became a public concern. The Court's decision — an

⁶ Tailoring Rule, 74 FR 55294-55295.

⁷ House Energy and Commerce Committee Republicans, Press Release: Republicans to Introduce Disapproval Resolution on EPA Endangerment Finding, December 17, 2009, <http://republicans.energycommerce.house.gov/news/PRArticle.aspx?NewsID=7603>.

⁸ Rep. Marsha Blackburn's (R-TN) H.R. 391, "To amend the Clean Air Act to ensure that greenhouse gases are not subject to the Act, and for other purposes."

⁹ *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

affront to common sense — all but ensured that EPA would issue an endangerment finding for greenhouse gases. That, in turn, compels EPA, under CAA Sec. 202, to establish first-ever GHG emission standards for new motor vehicles.

However, what none of the principals in the case bothered to mention, is that once EPA adopts GHG motor vehicle standards, CO₂ becomes a "regulated air pollutant" and, as such, automatically "subject to regulation" under the Act's PSD and Title V permit programs. Under the CAA, firms must obtain a PSD permit in order to construct or modify a "major" stationary source of regulated air pollutants, and a Title V permit in order to operate such a facility. A facility is major under PSD if it is in one of 28 categories and has a potential to emit 100 tons per year (TPY) of a regulated pollutant, or 250 TPY if it is any other type of establishment. A facility is major under Title V if it has the potential to emit 100 TPY of a regulated pollutant. As it happens, millions of previously unregulated buildings and facilities — office buildings, apartment complexes, big box stores, enclosed malls, heated agricultural facilities, small manufacturing firms, even commercial kitchens — emit enough CO₂ to meet these thresholds.

The Court majority, whether naively or disingenuously, rejected respondent EPA's argument, based on *FDA v. Brown & Williamson Tobacco Corp.*,¹⁰ that regulating the carbon content of fuels or emissions was a decision of great "economic and political significance" that Congress would not delegate it to an administrative agency in "so cryptic a fashion." The majority held that an endangerment finding would not lead EPA to undertake "extreme measures," only to regulate GHG emissions from new motor vehicles, and only after giving "appropriate consideration" to compliance costs and technological feasibility, as required by Sec. 202.¹¹ A cost-constrained boost in new-car fuel economy -- less pain at the pump! -- was the only practical consequence of a decision in favor of plaintiffs, the majority suggested.

That this was a stupendously false characterization of the real issues and implications of the case has been clear for some time.¹² The Court majority completely ignored the interconnected nature

¹⁰ *FDA v Brown & Williamson Tobacco Corp*, 529 U.S. 120, 123 (2001)

¹¹ *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 531 (2007).

¹² Testimony of Peter Glaser and John Cline on EPA's Approach to Addressing Greenhouse Gas Emissions in the Wake of the Supreme Court's Decision in *Massachusetts v. EPA*, House Committee on Oversight and Government Reform, November 8, 2007; Testimony of Peter Glaser on the U.S. Environmental Protection Agency's Response to

of the CAA. The majority thus turned a blind eye to the "extreme measures" EPA would have to take under the PSD, Title V, and NAAQS programs if it finds endangerment and adopts motor vehicle GHG emission standards.

EPA's July 2008 Advanced Notice of Proposed Rulemaking (ANPR) estimated that if CO₂ becomes a CAA-regulated air pollutant, PSD permit applications would increase by an "order of magnitude" – from 200-300 to 2,000-3,000 per year – and that Title V permit applications could increase from 15,000 to 550,000 per year.¹³ The ANPR cautioned that even a ten-fold increase in PSD permit applications could "overwhelm permitting authorities," creating backlogs and uncertainties that delay large numbers of construction projects.¹⁴

The Tailoring Rule reveals that the actual threat to economic development is much greater: "If PSD and Title V requirements apply [to CO₂] at the applicability levels provided under the CAA, state permitting authorities would be paralyzed by permit applications in numbers that are *orders of magnitude* greater than their current administrative resources could accommodate."¹⁵ EPA now estimates that PSD permit applications could jump from roughly 280 to 41,000 per year – more than a 140-fold increase. In addition, Title V permit applications would grow from 14,700 to 6.1 million per year – a 400-fold increase.¹⁶ The "enormous numbers of permit applications" would "vastly exceed the current administrative resources of permitting authorities."¹⁷ Permitting agencies would have to expend almost 44 times the current labor-hour allocation for PSD programs and almost 250 times the current labor hour allocation for Title V programs.¹⁸

the Supreme Court's Decision in *Massachusetts v. EPA*, House Select Committee on Energy Independence and Global Warming, March 13, 2008; Testimony of Peter Glaser on Strengths and Weaknesses of Regulating Greenhouse Gases under the Clean Air Act, Subcommittee on Energy and Air Quality of the House Committee on Energy and Commerce, April 10, 2008; Peter Glaser, Responses to Questions of the House Select Committee on Energy Independence and Global Warming, September 4, 2008; Portia Mills & Mark Mills, *A Regulatory Burden: The Compliance Dimension of Regulating CO₂ as a Pollutant*, U.S. Chamber of Commerce, September 2008; EPA, 73 FR, Advanced Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions under the Clean Air Act; Proposed Rule, July 30, 2008; hereafter cited as ANPR.

¹³ ANPR, 73 FR, 44499, 44511.

¹⁴ ANPR, 73 FR, 44507.

¹⁵ Tailoring Rule, 74 FR, 55292 (emphasis added).

¹⁶ Tailoring Rule, 74 FR, 55301, 55304.

¹⁷ Tailoring Rule, 74, FR, 55294.

¹⁸ Tailoring Rule, 74, FR, 55319.

The CAA permitting programs would crash under their own weight, putting a freeze on new construction, and thrusting millions of firms into legal limbo. Thanks to *Mass. v. EPA*, the Clean Air Act is about to become an economic wrecking ball aimed straight at small business.

To obtain a PSD permit, firms must undertake a complex, technical investigation¹⁹ to determine how they will comply with “best available control technology” (BACT) standards. Even apart from any investments required to install BACT-compliant technology, the PSD permitting process is costly and time-consuming. In a recent year, each permit on average cost \$125,120 and 866 burden hours for sources to obtain, and \$23,280 and 301 hours for EPA or a state agency to process.²⁰ The PSD administrative burden would be lethal to most small businesses.

Assuming that permitting agencies would have to spend 43 hours to process the average new Title V permit for commercial or residential CO₂ sources (or 10% of the time needed for the average industrial permit), EPA estimates that the “total nationwide additional burden for permitting authorities for Title V permits from adding GHG emissions at the 100-TPY threshold would be 340 million hours, which would cost over \$15 billion.”²¹

Note that permitting agencies would spend all that time and money to process the permits of applicants who have essentially nothing to report, because they have no other obligations under the CAA. Almost 98% of the 6.1 million entities that would need Title V permits for CO₂ would be filing “empty” or “hollow” permits.²² For their trouble, they would also have to pay emission fees to help cover the estimated \$15 billion in Title V administrative costs (CAA Sec. 502). The going rate for Title V emission fees is \$43.75 per ton.²³ A small business emitting 100 TPY of CO₂ might have to pay annual fees of \$4,375 or more in addition to whatever resources it spent on record keeping and paperwork. *It would get nothing of value in return.* Title V for CO₂ would arguably set a new record for government waste.

¹⁹ EPA, New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting, October 1999, <http://www.epa.gov/ttn/nsr/gen/wkshpman.pdf>.

²⁰ Carrie Wheeler, Operating Permits Group (C504-03), Air Quality Policy Division, Office of Air Quality Policy and Standards, Office of Air and Radiation, United States Environmental Protection Agency, RTP, North Carolina 27711, <http://www.uschamber.com/assets/env/supportingreport.pdf>.

²¹ Tailoring Rule, 74 FR, 55302.

²² Tailoring Rule, 74 FR, 55304, 55336.

²³ Tailoring Rule, 74 FR, 55346.

III. *Massachusetts v. EPA*: Tailoring Absurdity

The Tailoring Rule proposes to suspend, over a six-year period, the PSD pre-construction permitting program and Title V operating permits program for entities emitting less than 25,000 TPY of carbon dioxide-equivalent (CO₂-e) GHGs, and to phase in "streamlined" permitting procedures for smaller and smaller entities after the end of the six-year period.²⁴

In effect, EPA proposes to re-write portions of the Act. Nothing in the Act authorizes EPA to suspend the PSD and Title V provisions for six years for sources exceeding the 100/250 TPY thresholds. Nor does the Act authorize the "streamlined" procedures EPA outlines in the Tailoring Rule (except for the use of general permits in the Title V program). The Tailoring Rule is actually an Amending Rule. As such, it is *prima facie* illegal -- an unconstitutional breach of the separation of powers.

An obvious question arises: Under what authority may EPA deviate so blatantly from the text of the statute? In *Chevron v. Natural Resources Defense Council*, the Supreme Court held that administrative agencies have considerable discretion to interpret statutes where the text is "silent or ambiguous with respect to the specific issue."²⁵ However, there is nothing ambiguous about 100 tons or 250 tons.

EPA repeatedly asserts that it must depart from a "literal" application of the PSD and Title V regulatory thresholds. But "literal" is just a sanitized synonym for "legal," "lawful," or "statutory." To justify this assumption of legislative power, EPA invokes the judicial doctrines of "absurd results" and "administrative necessity."

EPA argues that applying the law as written to CO₂ sources would produce two kinds of absurd results. First, EPA would be forced to violate other statutory requirements. Specifically:

²⁴ Tailoring Rule, 74 FR, 55294-54295.

²⁵ *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

- CAA Sec. 165(c) requires that the permitting authority grant or deny any completed permit application for a major emitting facility not later than one year after the date of filing the application. “A literal interpretation of CAA sections 165(a)(1) and 169(1) to apply at the 100/250 TPY levels would render compliance with this provision impossible by requiring far more permit applications than permitting authorities could process under the 12-month deadline.”²⁶
- Similarly, a lawful application of the Title V 100 TPY threshold in CAA sections 502(a), 501(2)(B), and 302(j) would clash with CAA Sec. 503(c), which imposes a time limit of 18 months after a permit application is filed for permitting authorities to issue or deny the permit. “It would be flatly impossible for permitting authorities to meet this statutory requirement if their workload increases from 14,000 permits to 6.1 million. Instead, permit applications would face multi-year delays in obtaining their permits.”²⁷

Applying the PSD and Title V regulatory thresholds to CO₂ would also be absurd in the sense that the consequences would undermine congressional intent. The Tailoring Rule provides several examples:

- The PSD program (CAA Sec. 160) is supposed to “insure that economic growth will occur,” albeit in a manner consistent with preservation of clean air resources. However, because PSD is a preconstruction requirement, “increasing permitting authorities’ workload from 300 to 41,000 permits would severely undermine this purpose of facilitating economic growth . . . Each year, many thousands of sources would face multi-year delays in receiving their permits, and as a result, for all practical purposes, they would be forced to place on hold their plans to construct or modify.”²⁸ More fundamentally, applying PSD to CO₂ would undermine a core purpose of the Act -- to protect the “productive capacity” of the U.S. population (CAA Sec. 101).
- Congress designed PSD to apply to large industrial facilities, “which due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious

²⁶ Tailoring Rule, 74 FR, 55308.

²⁷ Tailoring Rule, 74 FR, 55310.

²⁸ Tailoring Rule, 55308.

pollutants that befoul the nation's air" [quoting *Alabama Power v. Costle*, 636 F.2d at 353]. Congress wanted to exclude small entities from PSD regulation.²⁹

- Congress intended through Title V to improve CAA compliance by compiling in a single document all of a major source's regulatory requirements. However, the vast majority of the 6.1 million CO₂ sources that would have to apply for Title V permits have no existing CAA requirements. Compelling them to apply for operating permits "would not improve compliance."³⁰
- Indeed, applying Title V to CO₂ would undermine compliance. Many sources that Congress did intend for EPA to regulate would not be regulated due to the enormous backlogs resulting from the application of PSD and Title V to myriad sources Congress did not intend for EPA to regulate.³¹
- In sum, the immense volume of permit applications would overload and crash both programs. Clearly, Congress did not intend for the PSD and Title V programs to self-destruct.

EPA reviews several court cases in which EPA, the Federal Trade Commission, and the Federal Energy Regulation Commission invoked "administrative necessity" to set aside clear statutory language.³² In each of these cases, courts rejected the agencies' attempts to depart from the statute. But, pleads EPA, the "situation we confront is unprecedented"; the burdens EPA would encounter in administering PSD and Title V for CO₂ "have no precedent in case law."³³

There is no question that applying the CAA permitting programs to CO₂ – the automatic consequence of establishing GHG standards for new motor vehicles – would produce a morass of unprecedented absurdity and administrative impossibility. However, EPA tippy toes around the root of the problem: *Mass. v. EPA*.

²⁹ Tailoring Rule, 74 FR, 55308-09.

³⁰ Tailoring Rule, 74 FR, 55311.

³¹ Tailoring Rule, 74 FR, 55311.

³² Tailoring Rule, 74 FR, 55312-55314.

³³ Tailoring Rule, 74 FR, 55337, 55318.

EPA is entirely correct: Congress did not intend to apply PSD and Title V to small entities, did not intend for those programs to implode under their own weight, and did not intend for PSD to sabotage the economy. However, those are the inexorable consequences of an endangerment finding for greenhouse gases under CAA Sec. 202, which in turn is powerful evidence that Congress did not intend for EPA to regulate GHGs under that provision.

Common sense leads to the same conclusion. Congressional support for regulatory climate policy is far stronger today than it was in 1970 and 1977, when Congress enacted and amended CAA Sec. 202. Yet even today, the prospects for cap-and-trade legislation and for U.S. ratification of a legally-binding emission-reduction treaty remain in doubt. The notion that Congress, in 1970 or 1977, implicitly authorized EPA to implement climate policies that recent Congresses have rejected or declined to enact is ludicrous.

Only once has Congress enacted legislation directing EPA to reduce GHG emissions – the renewable fuel standard (RFS) established by the Energy Independence and Security Act (EISA). However, this is the exception that proves the rule. Enacted months after *Mass v. EPA* was decided, the RFS mandates the sale of renewable fuels, which must achieve specified percentage reductions in GHG emissions, based on a life-cycle analysis, compared to petroleum-based fuels. Importantly, EISA Sec. 210(b)(12) clarifies that the RFS does not establish precedent for any additional regulation of CO₂ or other greenhouse gases under other CAA provisions:

Nothing in this subsection, or regulations issued pursuant to this subsection, shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas, for purposes of other provisions (including section 165 [i.e., the PSD program] of this Act [i.e., the Clean Air Act]).

In the Tailoring Rule, EPA writes as if Congress, when it enacted or amended the CAA in 1970 or 1977, somehow inserted malicious code -- the regulatory equivalent of a computer virus -- into the text of the statute. This self-destruct program, we are to suppose, was lurking in there all this time. Then all of a sudden, the dormant bug became active, and now the CAA is going haywire, working at cross purposes with itself, subverting congressional intent, and imperiling

the nation's economic future. Therefore, EPA must step in, play lawmaker, and amend the Act. And if anybody at EPA really believes that, I've got a bridge I'd like to sell him.

When a court decision leads to absurd results and administrative paralysis, there are only two possibilities. Either (1) absurdity and administrative impossibility were embedded in the statute from the beginning, and the court just brought the statute's flaws to light. Or (2) the court manufactured the bizarre malfunctioning of the statute by misreading it.

The impending PSD/Title V regulatory nightmare is entirely a product of the *Massachusetts* Court's agenda-driven decision. The core issue in *Mass. v. EPA*, which the Court never addressed, is whether Congress, when it enacted and amended CAA Sec. 202 in 1970 and 1977, intended for EPA to apply the Act *as a whole*, including PSD and Title V and the NAAQS program, to CO₂ for global warming purposes. To ask this question is to answer it.

To justify the Amending Rule, EPA quotes Judge Learned Hand's famous injunction "not to make a fortress out of the dictionary"³⁴ when interpreting a statute. But that is what the Court majority did in *Mass. v. EPA*. More precisely, the majority made a fortress out of their own *bowdlerized version* of the CAA definition of "air pollutant."

To reach the conclusion that CO₂ is an "air pollutant" for regulatory purposes, the Court majority had to withhold *Chevron* deference from respondent EPA's reasonable reading of CAA Sec. 302(g). EPA argued that emitted substances are "air pollutants" only if they are "air pollution agents." The majority, following petitioners, held that anything emitted per se is an "air pollutant." This was in fact the lynchpin of petitioners' argument and the majority's conclusion. Obviously, if *anything* "emitted into" the ambient air is ipso facto an "air pollutant," then GHGs are within EPA's regulatory reach. But to affirm this conclusion, the majority had to read Sec. 302(g) selectively -- no mean feat, since the provision is only two sentences long. Here it is, in full:

The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, or radioactive (including source material,

³⁴ Tailoring Rule, 74 FR 55306.

special nuclear material, and by-product material) substance or matter, which is emitted into, or otherwise enters, the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent that the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

If Congress had meant that any substance emitted into or otherwise entering the ambient air is an "air pollutant," it could have easily said so. Instead, the text says that any "air pollution agent" or "combination of such agents" emitted into or otherwise entering is an "air pollutant." An air pollution "agent" is something that causes "air pollution" -- something that dirties, fouls, or contaminates the air. Carbon dioxide does not fit that description.

The Court majority read "air pollution agent" as a synonym for "air pollutant" rather than as a criterion for distinguishing pollutants from non-pollutants. This reading makes the first sentence of Sec. 302(g) hopelessly circular. It might as well say: "The term 'air pollutant' means any air pollutant or combination of such pollutants..." This is not what Congress wrote and is not likely what Congress meant, because circular definitions define nothing.

Worse, treating "air pollutant" and "air pollution agent" as interchangeable terms turns the first sentence into a formalism whereby a thing can be an "air pollutant" even if it does cause air pollution. As Justice Scalia quipped in dissent, the majority effectively held that "*anything airborne*, from Frisbees to flatulence, qualifies as an 'air pollutant.'"³⁵ Indeed, under the majority's reading, even completely clean air -- air that is 100% pollution-free -- is an "air pollutant" if it is "emitted" into or "otherwise enters" the air. That is absurd. From absurd premises come "absurd results."

The majority not only gave short shrift to "air pollution agent" and "combination of such agents" -- key terms in the first sentence -- they totally ignored the second sentence. The second sentence of Sec. 302(g) says that a "precursor" of a previously designated air pollutant is also an air pollutant. This sentence would be utterly superfluous if, as the majority held, *anything* emitted into or otherwise entering the air is automatically an "air pollutant," because precursors form air

³⁵ Massachusetts v. EPA, 549 U.S. 497, 558 (2007).

pollutants only by being emitted into or otherwise entering the air. Courts are not supposed to assume that lawmakers pad statutes with superfluous verbiage. Rather, they are supposed to make a good faith effort to determine the meaning and implications of each sentence of each provision bearing on the case. Ignoring half the provision in dispute without explanation is not kosher.

Making a "fortress of the dictionary" is bound to lead to absurd results, especially when judges bowdlerize the dictionary.

IV. Tailoring Rule Protection for Small Business Is Dubious, Temporary, and Incomplete

Small businesses are unlikely to challenge the Tailoring Rule, since it aims to shield them from PSD and Title V regulation of CO₂ for a period of six years. However, small businesses would be unwise to rely on the Tailoring Rule as protection from the regulatory fallout of *Mass v. EPA*.

First, as noted earlier, the Tailoring Rule is actually an Amending Rule and, hence, is legally dubious. The Tailoring Rule proposes sweeping "categorical exemptions" from the PSD and Title V programs, and, as EPA acknowledges, courts generally have looked with disfavor upon such broad carve-outs in previous administrative necessity cases.³⁶

Second, the "categorical exemptions" proposed in the Tailoring Rule are by design temporary, expiring after six years. EPA envisions the Tailoring Rule as phase one of a "step-by-step process" whereby PSD and Title V apply to smaller and smaller entities.³⁷ EPA picked 25,000 TPY to be the "major" source applicability threshold for CO₂ regulation under PSD and Title V, because any lower threshold would overwhelm the administrative resources of permitting agencies.³⁸ But over the next five years, EPA proposes to develop "streamlined" permitting

³⁶ Tailoring Rule, 74 FR, 55313.

³⁷ Tailoring Rule, 74 FR, 55319; "As discussed in detail elsewhere in this notice, EPA proposes a phased plan designed to achieve *full compliance* with the PSD and Title V requirements (emphasis added)," 55305.

³⁸ Tailoring Rule, 74 FR, 55330.

procedures, expanding the number of firms permitting agencies can regulate. Moreover, agencies will lobby for additional staff and other resources to accommodate larger and larger workloads.³⁹

Even during the initial six-year period, the Tailoring Rule would not shield small entities from other types of CO₂ regulation EPA is contemplating:

While EPA is proposing that during the first phase, GHG sources less than 25,000 TPY of CO₂e will not be subject to PSD and Title V requirements for purposes of applicability, there are feasible, cost-effective opportunities for reductions from these sources through means other than PSD and Title V during the first phase. The tailoring proposal does not restrict our ability to explore these opportunities during the first phase. EPA has strong interest in pursuing such opportunities and therefore requests your comments on the practicability of near-term regulatory and non-regulatory programs to address smaller sources.⁴⁰

Third, most of the "streamlining" procedures EPA is considering after the six-year exemption expires are of questionable legality and effectiveness. Redefining "potential to emit" (PTE) to mean actual emissions would allow many sources to avoid the classification as "major" emitting facilities.⁴¹ But the statute specifically defines the PSD and Title V applicability thresholds in terms of PTE. Moreover, as the U.S. Chamber of Commerce study shows, approximately 1.2 million small entities *actually emit* 250 TPY of CO₂.⁴² All would be vulnerable to new PSD-related regulation, paperwork, penalties, and litigation. There is no explicit authority in the Act's PSD provisions for "general permits" or "presumptive BACT" determinations. In fact, as EPA acknowledges, these options would appear to conflict with the CAA Sec. 165, which requires a "public hearing" on each PSD permit, and Sec. 169, which requires BACT to be determined for each major source on a "case-by-case" basis.⁴³ At best, these makeshifts would reduce irrational regulatory burden on small entities, not eliminate them.

³⁹ Tailoring Rule, 74 FR, 55296.

⁴⁰ Tailoring Rule, 74 FR 55325.

⁴¹ Tailoring Rule, 74 FR 55320.

⁴² Portia Mills & Mark Mills, A Regulatory Burden: The Compliance Dimension of Regulating CO₂ as a Pollutant, U.S. Chamber of Commerce, September 2008.

⁴³ Tailoring Rule, 74 FR, 55321-55323.

Fourth, the Tailoring Rule and the future streamlined permitting procedures, even if upheld by courts, would do nothing to shield the U.S. economy from compliance burdens and market impacts of a NAAQS rulemaking for CO₂ and other GHGs. The next section explores this key issue.

V. NAAQS for CO₂: *Mass v. EPA*'s Most Absurd Result

Plaintiffs in *Mass v. EPA* claimed the case dealt solely with emissions from new motor vehicles, arguing, for example, that, “The NAAQS [National Ambient Air Quality Standards] program is entirely separate from the mobile source program at issue in this case.”⁴⁴ That is incorrect.

GHG regulation of motor vehicles would trigger PSD regulation of CO₂, and PSD is an essential adjunct of the NAAQS program. The PSD program’s basic purpose is to prevent “significant deterioration” of air quality in areas that comply with NAAQS (CAA Sec. 160).

More importantly, the endangerment finding prerequisite to establishing GHG emissions standards for new motor vehicles would set a precedent for similar endangerment findings under other CAA provisions, including CAA Sec. 108, which governs the first phase of a NAAQS rulemaking.

CAA Sec. 108 requires EPA to establish NAAQS if emissions of an air pollutant from “numerous or diverse mobile or stationary sources” cause or contribute to “air pollution” that “may reasonably be anticipated to endanger public health or welfare.” New motor vehicles – the emission sources at issue in *Mass. v. EPA* – obviously qualify as numerous mobile sources for purposes of CAA Sec. 108. In addition, EPA’s endangerment proposal argues that GHG emissions *as such*, whether from mobile or stationary sources, endanger public health and welfare. Logically, EPA has already made the substantive case for economy-wide GHG regulation under the NAAQS program.

⁴⁴ No. 05-1020, In the Supreme Court of the United States, *Massachusetts v. EPA*, Brief for Petitioners, p. 28, <http://www.cleancarscampaign.org/web-content/legal/docs/PetitionersOpeningBriefAug312006.pdf>.

A NAAQS is an allowable pollution concentration standard. It determines how many parts per million (ppm) or billion of a targeted pollutant are permissible in the ambient air. Petitioners in *Mass v. EPA* asserted that current GHG levels already harm public health and welfare. Similarly, several endangerment petitions filed since *Mass v. EPA* (to regulate GHG emissions from aircraft, marine vessels, off-road engines, and heavy-duty trucks) claim that GHG emissions already harm public health and welfare.⁴⁵

More importantly, EPA is now on record affirming that "elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and to endanger the public welfare of current and future generations."⁴⁶ By "elevated concentrations," EPA means *elevated above pre-industrial concentrations*, which includes current concentrations. Moreover, EPA says elevated concentrations endanger "current" as well as "future" generations. To repeat, EPA has already affirmed the substance of a CAA Sec. 108 endangerment determination.

Numerous environmental organizations and activists now argue that climate policy in general and NAAQS regulation in particular should aim to lower CO₂ concentrations from today's level (roughly 387 ppm) to 350 ppm.⁴⁷ Earlier this month two eco-litigation groups, the Center for Biological Diversity and 350.org, petitioned EPA to initiate a rulemaking to establish NAAQS for CO₂ at 350 ppm and NAAQS for methane and nitrous oxides at pre-industrial levels.⁴⁸

Attaining a CO₂ NAAQS set at 350 ppm would definitely require "extreme measures." Even stabilization at 450 ppm may not be attainable at an acceptable cost, as *Newsweek* reporter Sharon Begley learned when she interviewed Cal Tech chemist Nathan Lewis:

⁴⁵ ANPR, 73 FR, 44399.

⁴⁶ EPA, Endangerment and Cause or Contribute Finding for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 FR, 66516.

⁴⁷ The Center for Biological Diversity, for example, heads a "350 or Bust" coalition; http://www.biologicaldiversity.org/programs/climate_law_institute/350_or_bust/index.html

⁴⁸ Center for Biological Diversity, 350.org, Petition to Establish National Pollution Limits for Greenhouse Gases Under the Clean Air Act, December 2, 2009, <http://www.openmarket.org/wp-content/uploads/2009/12/cbd-350org-petition.pdf>.

Lewis's numbers show the enormous challenge we face. The world used 14 trillion watts (14 terawatts) of power in 2006. Assuming minimal population growth (to 9 billion people), slow economic growth (1.6 percent a year, practically recession level) and—this is key—unprecedented energy efficiency (improvements of 500 percent relative to current U.S. levels, worldwide), it will use 28 terawatts in 2050. (In a business-as-usual scenario, we would need 45 terawatts.) Simple physics shows that in order to keep CO₂ to 450 ppm, 26.5 of those terawatts must be zero-carbon. That's a lot of solar, wind, hydro, biofuels and nuclear, especially since renewables kicked in a measly 0.2 terawatts in 2006 and nuclear provided 0.9 terawatts. Are you a fan of nuclear? To get 10 terawatts, less than half of what we'll need in 2050, Lewis calculates, we'd have to build 10,000 reactors, or one every other day starting now. Do you like wind? If you use every single breeze that blows on land, you'll get 10 or 15 terawatts. Since it's impossible to capture all the wind, a more realistic number is 3 terawatts, or 1 million state-of-the-art turbines, and even that requires storing the energy — something we don't know how to do — for when the wind doesn't blow. Solar? To get 10 terawatts by 2050, Lewis calculates, we'd need to cover 1 million roofs with panels *every day* from now until then. "It would take an army," he says. Obama promised green jobs, but still.⁴⁹

Note also that under the CAA, states could not wait until 2050 to attain a NAAQS for CO₂. Rather, all areas in non-attainment with a “primary” or health-based CO₂ NAAQS must come into attainment within five years, or at most 10 years if EPA grants an extension (CAA Sec. 192). Because GHGs tend to be long-lived in the global atmosphere, even if the entire world somehow magically reduced *annual emissions* to the level prevailing in 1970, when the global economy was only one-third its current size,⁵⁰ global CO₂ concentrations would still increase to 483 ppm by 2100.⁵¹ Not even complete collapse of the global economy would be enough to lower CO₂ concentrations to 350 ppm in ten years.

⁴⁹ Sharon Begley, “We Can’t Get There from Here: Political will and a price on CO₂ won’t be enough to bring about low-carbon energy sources,” *Newsweek*, March 14, 2009, <http://www.newsweek.com/id/189293>

⁵⁰ USDA, Real Historical Gross Domestic Product (GDP) and Growth Rates of GDP, Updated 11/02/09, www.ers.usda.gov/Data/.../Data/HistoricalRealGDPValues.xls.

⁵¹ Patrick Michaels, *Dialing in Your Own Climate*, World Climate Report, April 10, 2006, <http://www.worldclimatereport.com/index.php/2006/04/10/dialing-in-your-own-climate/>.

If courts agree with CBD and 350.org that EPA's endangerment finding under CAA Sec. 202 substantively satisfies the Sec. 108 endangerment test that triggers a NAAQS rulemaking, what will EPA do? Will the Agency propose another Tailoring Rule to re-imagine the five- and 10-year NAAQS deadlines to mean 50 or 100 years?

One consequence of the nation's non-attainment with NAAQS for CO₂ is that EPA would have to regulate major stationary CO₂ sources under the Non-Attainment New Source Review (NNSR) pre-construction permitting program, which is more restrictive than PSD. The NNSR cutoff for regulation as a major source is 100 TYP, not 250 TPY as would be the case for most PSD-regulated CO₂ sources. NNSR-regulated entities must comply with Lowest Achievable Emission Rate (LAER) standards, which are more stringent than BACT because EPA may not take compliance costs into account. Moreover, major sources would have to "offset" any emissions increase from a new or modified source by reducing emissions from an existing source somewhere else (CAA Sec. 173). Roughly speaking, no facilities could be built or expanded anywhere in the nation unless something else shuts down. NNSR would become a de-facto moratorium on growth.

Although states may take costs into account when developing their plans to implement NAAQS, EPA may not consider costs when setting NAAQS.⁵² Establishing NAAQS for CO₂ would turn the CAA into an economy-killer and EPA into a rogue agency. Public outrage would be intense, and pleas that "The Court made us do it!" would likely fall on deaf ears.

VI. Conclusion

EPA is taking an enormous gamble. The Agency is betting that, through the Tailoring Rule, it can control the regulatory cascade set in motion by its endangerment finding. But the Tailoring Rule is legally dubious, and even if courts allow EPA to amend the PSD and Title V permitting programs, the endangerment finding is precedent for a NAAQS rulemaking, which could damage the economy even more than would a PSD/Title V administrative morass.

⁵² Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 465 (2001)

Having sown the wind, EPA risks reaping a whirlwind of angry opposition from governors, mayors, congressional appropriators, small business, unions, talk radio, etc. No agency likes to surrender power, and for EPA there is no power more seductive than the power to regulate CO₂, because it is a power that effectively expands EPA's reach to every nook and cranny in the economy. Once unleashed, however, that power is subject to the vagaries of litigation. Thus, to some still unknown degree, it is a power beyond EPA's control. EPA should recognize that the road it has made for itself is fraught with political peril. It is in the Agency's best interest not to oppose congressional actions to overturn the endangerment finding and *Mass. v. EPA*.