THE EPA'S GREENHOUSE GAS REGULATION TAILORING RULE: ADMINISTRATIVE NECESSITY AVOIDING OR PURSUING ABSURD RESULTS?

I. INTRODUCTION

The past several years have seen a tremendous push to "go green." The advertisements of many companies boast of environmentally conscious production methods and products. Many of these advertisements are from entities that refine fossil fuels, consume fossil fuels at a high rate, or make products that consume fossil fuels at a high rate.[1] Examples include oil companies, electric companies, and automobile companies.

The motivation behind the "going green" movement is not a mystery. Over the past few decades, scientists and climate experts have noticed certain trends in the earth's climate, sparking a hypothesis of global warming.[2] As these hypotheses gained popularity among the scientific community, the public and the government subsequently grew aware of the dangers associated with global warming, such as the melting of polar ice caps, flooding, and loss of shoreline.[3] Furthermore, scientists and the

1. *See, e.g.*, *Audi 2010 Green Car Super Bowl Commercial*, *available at* http://www.youtube.com/watch?v=Wq58zS4_jvM (last visited Oct. 17, 2010); *Environment*, ENTERGY, http://entergy.com/our_community/environment/ (last visited Oct. 17, 2010); *Environment & Society*, SHELL, http://www.shell.us/home/content/usa/environment_society/ (last visited Oct. 17, 2010); *Green Campaigns*, YAHOO! FOR GOOD, http://forgood.yahoo.com/go_green/green_campaigns.html (last visited Oct. 17, 2010) (listing several hyperlinks and describing its various green campaigns); *IBM TV Commercials on Energy Efficiency/Green (Tree Huggers)*, *available at* http://www.youtube.com/watch?v=VSNFE6eUjfY (last visited Oct. 17, 2010); *Wal-Mart Earth Campaign Takes 'Going Green' Mainstream*, WALMART CORPORATE (Mar. 31, 2008), http://walmartstores.com/pressroom/news/8161.aspx.

2. *See Recent Climate Change*, U.S. EPA, http://www.epa.gov/climatechange/science/recentcc.html (last updated Aug. 19, 2010) (explaining that humans' have substantially increased the GHGs in the atmosphere since the industrial revolution, and that this change in the atmosphere has likely contributed to the rise in global temperature); *Temperature Changes*, U.S. EPA, http://www.epa.gov/climatechange/science/recenttc.html (last updated Sept. 15, 2010) (describing the gradual rise in temperature over recent decades).

3. *See, e.g.*, Mass. v. EPA, 549 U.S. 497, 507-10, 521-23 (2007); COMMITTEE ON THE SCIENCE OF CLIMATE CHANGE, NAT'L RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS 16 (2001), *available at* http://www.gcrio.org/NRC/NRCclimatechange.pdf. The *Massachusetts v. EPA* Court cited many sources that

Environmental Protection Agency (EPA) have identified certain "greenhouse gases" (GHGs) that they believe damage the ozone layer and contribute to global warming.[4] These include gases such as carbon dioxide, methane, nitrous oxide, and chlorofluorocarbons.[5]

Evidence exists, however, that both carbon dioxide and methane have been naturally emitted into the atmosphere at rather high rates for a long time.[6] Natural fluctuations in greenhouse gas levels are evident, and emissions of carbon dioxide and methane from natural sources continue to

suggested a correlation between the rise in global temperature and rise in carbon dioxide levels. *Mass.*, 549 U.S. at 507-10, 521-23. The Court cited a 1970 report from the Council for Environmental Quality, which said that "[man] may be changing his weather." *Id.* (citing Council for Environmental Quality, *Environmental Quality: The First Annual Report* 93 (1970)); *see also* 116 CONG. REC. 32914 (Sept. 21, 1970) (statement of Sen. Boggs) ("[a]ir pollution alters the climate and may produce global changes in temperature"). The Court also noted that 316 parts per million (ppm) mean of carbon dioxide levels observed in Hawaii were higher than the highest level revealed by the 420,000 year old ice core record. *Mass.*, 549 U.S. at 507-10, 521-23 (citing INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: SYNTHESIS REPORT 202-03 (2001)) (explaining that by drilling through thick ice in Antarctica, scientists can examine cores to determine the composition of ancient air). In 2006 and 2009, carbon dioxide levels reached 381.85 ppm and 387.35 ppm, respectively. *See Trends in Carbon Dioxide*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., www.esrl.noaa.gov/gmd/ccgg/trends/ (follow "Mauna Loa CO_2 Data" hyperlink, then follow "Mauna Loa CO_2 annual mean data" hyperlink) (last visited Oct. 18, 2010). The *Massachussetts v. EPA* Court noted that the 382 (the court presumably rounded up from 381.85) ppm level was "thought to exceed the concentration of carbon dioxide in the atmosphere at any point over the past 20 million years." *Mass.*, 549 U.S. at 507 (citing INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: SYNTHESIS REPORT 39 (2001)). The Court stated that the "harms associated with global climate change are serious and well recognized." *Mass.*, 549 U.S. at 521.

4. *Greenhouse Gas Emissions*, U.S. EPA, http://www.epa.gov/climatechange/emissions/index.html (last updated Oct. 19, 2010); Mass. v. EPA, 549 U.S. 497, 507-10 (2007).

5. *Greenhouse Gas Emissions*, *supra* note 4.

6. *See* Gary W. Harding, *How Much of Atmospheric Carbon Dioxide Accumulation is Anthropogenic?* (1998), http://www.strom.clemson.edu/becker/prtm320/commons/carbon3.html (asserting that those with economic concerns often argue that only about 5% carbon dioxide in the atmosphere is from human sources—the controversy arises because the earth has natural carbon cycles in which the levels fluctuate); *Recent Climate Change*, *supra* note 2; *Methane: Sources and Emissions*, U.S. EPA, http://www.epa.gov/methane/sources.html (last updated June 22, 2010) (explaining that the total estimated man-made methane emissions from the U.S. in 2008 was 576.6 $TgCO_2$; while the total estimated from natural sources globally is about 208 $TgCO_2$ per year ("However, the value is highly uncertain.")); *Natural Sources and Sinks of Carbon Dioxide*, U.S. EPA, http://www.epa.gov/climatechange/emissions/co2_natural.html (last updated Mar. 3, 2010) (explaining that natural carbon dioxide emissions are primarily from the respiratory functions of animals, ocean atmospheric exchange—the oceans emit and absorb carbon dioxide at the surface, and volcanic eruptions); *Methane: Sources and Emissions*, U.S. EPA Website, http://www.epa.gov/methane/sources.html (last updated June 22, 2010) (explaining that natural methane emissions are primarily from wetlands, termites' and other wild animals' digestive process, oceans, and wildfires).

dominate the overall emissions of these two gases.[7] Thus, it is uncertain whether the industry of humans contributes significantly to global warming through the emission of these gases. Moreover, uncertainty as to what levels of industrial carbon dioxide emissions are actually dangerous continues to fuel to the debate.

In an attempt to prevent further global warming, the EPA is currently in the process of implementing rules—and designing more for the future—to limit the emissions of GHGs. In June 2010, the EPA finalized the new regulation and permit requirements proposed in the fall of 2009 for stationary "major emitters."[8] The final rule is split into two phases. Phase one sets forth that a source will become subject to certain permit requirements for GHG emissions only if that source were otherwise subject to those permit requirements for non-GHG emissions, and in some cases, only if the GHG emissions were increased by 75,000 tons per year (tpy) of carbon dioxide equivalent (CO_2 e).[9] Phase two extends the regulation to major stationary emitters that are not already subject to permit requirements but emit or have the potential to emit 100,000 tpy CO_2 e.[10] However, the Clean Air Act (CAA), from which the EPA draws its authority to regulate air quality, specifically states that major emitters are considered to be any source that has the potential to produce 100 or 250 tpy of *any* air pollutant.[11] Therefore, pursuant to administrative law principles, the EPA must follow the clear meaning of the statute by applying the new permit regulation to any source that has the capacity to emit 100/250 tpy of GHGs, rather than only to those that have the capacity to emit 75,000/100,000 tpy CO_2 e and are otherwise subject to permit requirements for emissions of

7. COMMITTEE ON THE SCIENCE OF CLIMATE CHANGE, *supra* note 3, at 10.

8. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (codified at 40 CFR pts. 51, 52, 70, 71). The EPA first proposes a rule in the Federal Register and solicits public comments regarding the rule. After this comment period, the EPA considers these comments and publishes the final rule, which addresses the comments, in the Federal Register. The rule is then incorporated into the Code of Federal Regulations (C.F.R.).

9. 40 C.F.R. § 51.166(b)(48)(iv) (2010).

10. 40 C.F.R. § 51.166(b)(48)(v) (2010). Additionally, phase two extends these permit requirements to each source "that emits or has the potential to emit at least 100,000 tpy CO_2 e, when such stationary source undertakes physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy CO_2 e or more." *Id.* The statute calls for a mass-based emissions threshold (i.e., tons of a pollutant with no weighing values applied), rather than a metric (tpy CO_2 e) calculation—which multiplies the mass of the GHG by its global warming potential (GWP). 42 U.S.C. § 7479 (2006). This Comment does not examine this issue. For a detailed explanation and discussion regarding GWP and its applicability, see Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,518-19, 31,522, 31, 530-32.

11. 42 U.S.C. § 7479 (2006).

other gases.[12] The EPA, however, argues that if it were to set the threshold this low for such emissions, the permitting agencies would be so overwhelmed with permit requests that to follow the letter of the law would yield absurd results.[13] Therefore, under the doctrines of absurd results, administrative necessity, and "one-step-at-a-time," the EPA argues that it must set a higher threshold until administrative resources can be brought up to speed.[14]

This Comment asserts that the EPA lacks the authority to alter the commands of the CAA in the manner implemented in the Tailoring Rule. Section II contains background information on the EPA's proposal and final rule, along with the authority for its position and for contrary positions. This section explains in detail the layout of the CAA, the doctrines of absurd results, administrative necessity, and "one-step-at-a-time," and the EPA's finalized Tailoring Rule. Section II then describes how the EPA employs these doctrines to support the legitimacy of its Tailoring Rule, while presenting relevant case law on the doctrines. Section III analyzes the viability of both arguments and suggests the EPA's Tailoring Rule may not be the best response to the prospective strain on administrative resources. Section IV concludes that although the EPA presents impressive administrative necessity and absurd results arguments, the D.C. Circuit nonetheless would reject the Tailoring Rule's validity.

II. BACKGROUND

To analyze the strengths and weaknesses of the EPA's arguments, one must first become familiar with the relevant statutes and jurisprudence. Furthermore, the EPA's rule is quite extensive; therefore, it is necessary to present a summary of the pertinent parts.

A. THE EPA'S LEGAL AUTHORITY

The CAA creates broad authority for the EPA to regulate air pollution. It is broken down into six subchapters, commonly referred to as "titles." For the purposes of this Comment, the pertinent titles are I, II, and V.

Title I is entitled "Programs and Activities."[15] One relevant part of this subchapter is part C—"Prevention of Significant Deterioration of Air Quality" (PSD)—subpart i—"Clean Air." The Congressional declaration of

12. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

13. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (codified at 40 CFR pt. 51, 52, 70, 71).

14. *Id.*

15. 42 U.S.C. § 7470 (2006).

purpose for this subpart reads:

> (1) [T]o 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 . . . which pollutants originate as emissions to the ambient air . . . (3) To insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources . . . .[16]

The CAA defines an air pollutant as "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."[17] "Effects on welfare" is defined to include effects on such things as weather and climate.[18]

PSD is a permit program under this subpart designed to prevent the decline of air quality in certain qualifying areas. This goal is achieved through a categorical permit process implemented by the EPA and other permitting agencies. Under § 165, "major emitters" are required to pass a PSD review and to receive a permit before they may be constructed.[19] Specifically, this section provides:

> No major emitting facility . . . may be constructed in any area to which this part applies unless[:] (1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part . . . .[20]

"Major emitting facilities" are defined under § 169 as certain "stationary sources of air pollutants which emit, or have the potential to emit, [100 tpy] or more of any air pollutant[,]" and "any other stationary source with the potential to emit [250 tpy] or more of any air pollutant."[21] Hence, when one

16. 42 U.S.C. § 7470 (2006).

17. 42 U.S.C. § 7602(g) (2006).

18. 42 U.S.C. § 7602(h) (2006).

19. 42 U.S.C. § 7475 (2006).

20. 42 U.S.C. § 7475(a) (2006).

21. 42 U.S.C. § 7479 (2006). The section lists twenty-eight sources for which the 100 tpy threshold applies:

> [F]ossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input,

reads §§ 165 and 169 together, it is clear that before any new source with the potential to emit over 100 or 250 tpy of any air pollutant can be completed, it must obtain a permit under 42 U.S.C. § 7470.[22] The permitting agencies must then review these permit applications within one year of receipt.[23]

Furthermore, §§ 165 and 169 require that qualifying sources implement certain control practices to ensure limitation of air pollution.[24] Sections 165 and 169 apply these control technologies, which are called best available control technology (BACT), to "each pollutant subject to regulation" under the CAA.[25] The effect of BACT is to attain the maximum reduction in air pollution by changing facility practices and/or installing air pollution control equipment.[26] The permitting agency selects the best available control technology for a given source on a case-by-case basis taking into consideration "energy, environmental, and economic impacts, [as well as] other costs."[27] BACT is one of the principal requirements under PSD, but there are additional PSD requirements that apply to sources whose emissions exceed the National Ambient Air Quality Standards (NAAQS) or PSD increments.[28] However, because no NAAQS or PSD increments exist for GHGs, these additional PSD requirements will not regulate them.[29]

Additionally, PSD is part of an overall scheme frequently referred to as New Source Review (NSR).[30] Thus, PSD standards sometimes overlap with other standards within this framework. For instance, when PSD review is triggered for a certain source, PSD requirements will extend to regulated NSR pollutants emitted by that source.[31]

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petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities.

42 U.S.C. § 7479 (2006).

22. *See* 42 U.S.C. §§ 7475, 7479 (2006).

23. 42 U.S.C. § 7475(c) (2006).

24. 42 U.S.C. §§ 7475, 7479 (2006).

25. 42 U.S.C. § 7475(a)(4) (2006).

26. *See* 42 U.S.C. § 7479(3) (2006).

27. *Id.*

28. *See* 42 U.S.C. § 7475(a) (2006).

29. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,520 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

30. *Id.*

31. *Id.*; *see* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17004, 17005, 17007-08 (Apr. 2, 2010) [hereinafter Reconsideration of Interpretation] (codified at 40 C.F.R. pts. 50, 51, 70, 71).

Title II is entitled "Emission Standards for Moving Sources."[32] Pursuant to Part A of § 202(a)(1) of Title II, the EPA is required to prescribe standards for the regulation of air pollutants from new motor vehicles which, in the judgment of the EPA administrator, contribute to air pollution and "may reasonably be anticipated to" endanger public health or welfare.[33]

Title V, "Permits," provides the criteria pertinent to issuing operating permits.[34] These permits are issued to air pollution sources once operation commences.[35] Most Title V permits are issued through state implementation plans (SIP) by state and local permitting authorities.[36] These permitting authorities must review the permit applications and issue or deny the permit within eighteen months of receipt.[37] These permits are "designed to improve compliance by clarifying what [sources] must do to control air pollution."[38] They are issued to all "major sources": this includes any facility that has the potential to emit 100 tpy or more of any air pollutant, and to a limited number of designated smaller sources.[39] Sources that require Title V permits include any source with a PSD permit.[40] Thus, according to the EPA, Title V permits will be required for GHG emissions when PSD is triggered for GHG emissions.[41]

While, the CAA provides insight to the authority and obligations of the EPA to control air pollution, administrative case law provides a clearer picture of the practical implementation of the CAA. For example, *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*[42] sets forth the

32. 42 U.S.C. § 7521 (2006).

33. 42 U.S.C. § 7521(a)(1) (2006).

34. 42 U.S.C. § 7661 (2006).

35. *See* 42 U.S.C. § 7661a (2006); U.S. EPA, AIR POLLUTION OPERATING PERMIT PROGRAM UPDATE: KEY FEATURES AND BENEFITS 1 (1998), *available at* http://www.epa.gov/air/oaqps/permits/permitupdate/permits.pdf.

36. U.S. EPA, *supra* note 35, at 1, 2, 4; *Operating Permits*, U.S. EPA, http://www.epa.gov/air/oaqps/permits/basic.html (last updated July 10, 2009); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,520-21 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71). Under state implementation plans, the EPA will make a certain overall emission standard; it is left to the state to determine how they will achieve the emission standard. *See* U.S. EPA, *supra* note 35, at 2, 4.

37. 42 U.S.C. § 7661b(c) (2006).

38. *Operating Permits*, *supra* note 36.

39. *Id.*

40. 42 U.S.C. § 7661a(a) (2006).

41. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292, 55,294 (Oct. 27, 2009) [hereinafter Proposed Tailoring Rule] (proposal) (codified at 40 C.F.R. 51, 52, 70, 71).

42. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

proper method of administrative construction and interpretation of an authorizing statute.

In *Chevron*, the Supreme Court examined the EPA's construction of a CAA provision.[43] The Court formulated a rule for examining an agency's construction of a statute it administers.[44] The Court decided that if Congress has spoken directly on an issue, then that was the end of the matter and the court and agency must give effect to Congress's expressed intent.[45] The Court, however, noted that if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[46] Thus, the *Chevron* rule has two inquiries: (1) *has congress spoken directly on the issue*; and (2) if the statute is silent or ambiguous with respect to the specific issue, is the agency's answer based on a permissible construction of the statute.[47]

The Supreme Court subsequently applied the *Chevron* rule in *Massachusetts v. EPA*.[48] In *Massachusetts v. EPA*, several private organizations and states petitioned the EPA to make a rule regulating GHGs under § 202(a)(1) of the CAA.[49] Section 202(a)(1) requires the EPA to prescribe standards for the regulation of air pollutants from new motor vehicles which, in the judgment of the EPA administrator, contribute to air pollution in a manner that endangers public health or welfare.[50] When the EPA denied the rulemaking petition, the private organizations and states filed suit against the EPA claiming that the EPA had "abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases . . . ."[51] The case thus presented the issues of whether the EPA had authority under the CAA to regulate GHG emissions from new motor vehicles, and if so, whether the EPA's reasons for refusing to do so were a "permissible construction of the statute."[52]

The EPA argued that the CAA did not provide it with the authority to make mandatory regulations regarding climate change, and that even if it did, it was an unwise time to regulate GHGs because there is not an

43. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
44. *Id.* at 842.
45. *Id.* at 842-43.
46. *Id.* at 843.
47. *Id.* at 842-43.
48. Mass. v. EPA, 549 U.S. 497 (2007).
49. *Id.* at 510.
50. 42 U.S.C. § 7521(a)(1) (2006).
51. *Mass.*, 549 U.S. 497, 505 (2007).
52. *Id.*; *Chevron,* 467 U.S. at 843.

unequivocal causal link between GHG emissions and the rise in global surface temperatures.[53]

The Court was not satisfied with the EPA's second reason and provided several reliable sources supporting its assertion that carbon dioxide and other GHGs from man-made emissions were widely accepted as contributing to global climate change.[54] The Court was not ruling that carbon dioxide was a definite contributor to global warming.[55] Instead, it was insinuating that, in the face of such widespread acceptance of the relationship between global warming and carbon dioxide emissions, the EPA could not refuse to regulate carbon dioxide without a more in-depth analysis into whether it actually contributed to global warming.[56]

Accordingly, the Court looked to the language of the CAA and decided that it unambiguously conferred authority to the EPA to regulate GHG from automobiles under § 202, as the sweeping definition of "air pollutant" encompasses GHGs, and "effects on welfare" refers to the welfare of the climate.[57] Furthermore, the Court determined that under § 202, if the administrator found that GHGs contributed to air pollution that might reasonably be anticipated to endanger health and welfare, she *must* regulate that air pollutant.[58] The Court added that the administrator's "judgment" must relate to whether such emissions contribute to air pollution, and that such judgment is not free "roving license" for a "laundry list" of excuses.[59] The Court noted that it was not compelling the EPA to make an endangerment finding, but that the "EPA must ground its reasons for action or inaction in the statute."[60] Thus, *Massachusetts v. EPA* clarifies that the EPA has authority under the CAA to regulate automobile GHG emissions.

Following the Court's decision in *Massachusetts v. EPA*, the EPA made an endangerment finding of GHG emissions from automobiles and has since proposed and finalized the Light Duty Vehicle Rule (LDVR) to regulate these emissions.[61] The LDVR was finalized on May 7, 2010.

53. Mass. v. EPA, 549 U.S. 497, 511 (2007).

54. *Id.* at 507-10; *see supra* note 3.

55. *Mass.*, 549 U.S. at 534-35.

56. *Id.* at 534-35.

57. *Id.* at 528-30.

58. *Id* at 532-33.

59. *Id.*

60. *Id.* at 535. An endangerment finding is an EPA determination that a certain substance or gas threatens public health or welfare.

61. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009); Light-Duty Vehicle

Pursuant to this rule, GHG emissions will be "subject to regulation" for the first time when the rule actually takes effect on January 2, 2011.[62] As noted previously, the EPA interprets the CAA to read that once a pollutant is controlled by a particular regulation, it is subject to PSD and Title V requirements; hence, when the LDVR takes effect, GHGs will be subject to PSD and Title V requirements.[63] As a result, all stationary sources emitting 100/250 tpy or more of GHGs would be subject to the permit requirements previously discussed.

The EPA is concerned however that the prevalence of GHG emissions combined with such low thresholds would render the permit process impossible, thereby frustrating the purpose of the CAA.[64] Consequently, the EPA has decided to formulate and implement the Tailoring Rule, which raises the initial thresholds for emissions to 75,000/100,000 tpy CO_2 e and phases-in the regulation in several steps so that the permitting agencies will not be inundated with additional permit requests from the high volume of sources that emit a pollutant (GHG) at a rate of over 100/250 tpy.[65]

Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) [hereinafter Light Duty Vehicle Rule] (codified at 40 C.F.R. pts 85, 86, 600). For the actual technical terms of the Light Duty Vehicle regulation, see 40 C.F.R. §§ 85.1902(b),(d), 86.1(b)(2)(xxxix)-(xl), 86.111-94(b), 86.113-04(a)(1), 86.127-12, 86.135-12, 86.165-12, 86.166-12, 86.1801-12, 86.1803-01, 86.1806-05(a)(1), 86.1809-12, 86.1810-09(f), 86.1818-12, 86.1823-08(m), 86.1827-01(a)(5),(f), 86. 1829-01(b)(1)(i),(b)(1)(iii)(G), 86.1835-01, 86.1841-01(a)(3),(b), 86.1845-04(a)(1),(b)(5)(i),(c)(5)(i), 86.1846-01(a)(1),(b), 86.1848-10(c)(9), 86.1854-12, 86.1865-12-86.1867-12, 600.002-08, 600.006-08, 600.007-08(b)(4)-(b)(6),(c),(f), 600.008(a)(1), 600.010(d), 600.011-93, 600.101-12, 600.111-08, 600.113-12, 600.114-08, 600.201-12, 600.206-12, 600.208-12, 600.301-12, 600.501-12, 600.507-12, 600.509-12, 600.510-12, 600.512-12, 600.514-12 (2010).

62. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

63. *See id.* at 31,519-22; Reconsideration of Interpretation, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (codified at 40 C.F.R. pts. 50, 51, 70, 71). The EPA explained that under the Interpretive Memorandum, it has determined that "subject to regulation" should be interpreted as of the time the regulation actually begins controlling the emissions; therefore, GHGs would not be considered "subject to regulation" until January 2, 2011 as model year 2012 vehicles are the first to be effected by the LDVR and January 2, 2011 is the first day these models may enter into in commerce. *See* Reconsideration of Interpretation, 75 Fed. Reg. at 17,004-06; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,521-22. This Comment does not give Title V a specific name because scholars and courts refer to Title V simply as "Title V" or "Title V permits."

64. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,517. "Prevalence" refers to the great amount of significantly small emitters that release relatively large amounts of carbon dioxide into the atmosphere; thus, they would now be classified as major emitters when they were not before.

65. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,517 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71); 40 C.F.R. § 51.166(b)(48)(iv)-(b)(48)(v) (2010).

The Tailoring Rule is split into two initial phases. Under phase one, which begins on January 2, 2011, PSD applies to GHG emissions of stationary sources only if they are already subject to PSD for a significant increase in emissions of at least one non-GHG pollutant, and their GHG emissions (or net increase) are at least 75,000 tpy CO_2 e.[66] The Title V permit requirements under phase one set forth that "only sources required to have [T]itle V permits for non-GHG pollutants (i.e., "anyway" [T]itle V sources) will be required to address GHGs as part of their [T]itle V permitting."[67]

Under phase two, which commences on July 1, 2011, PSD will apply to GHG emissions regardless of whether the source was already subject to PSD for emissions of non-GHG pollutants.[68] The GHG threshold is 100,000 tpy CO_2 e or more for new construction and an increase of 75,000 tpy CO_2 e or more for modifications.[69] Additionally, "GHG emission

66. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,523.

> [E]xisting or newly-constructed sources that are determined to be major sources based on non-GHG emissions are required to conduct a BACT review for their GHG emissions (from new construction) or emissions increases (from modifications), if they are subject to PSD due to their non-GHG emissions from construction or modification actions and each of the following conditions is met:
>
> (1) The GHG emissions (or net emissions increase) due to the new construction (or modification) project, calculated as the sum of the six well-mixed GHGs on a mass basis (no GWPs applied) exceed a value of 0 tpy; and
>
> (2) The GHG emissions (or net emissions increase) due to the new construction (or modification) project, calculated as the sum of the six well-mixed GHGs on a CO_2 e basis (GWPs applied) equal or exceed a value of 75,000 tpy CO_2 e.

Id.

67. *Id.*

68. *Id.* at 31,523-24.

> [F]or purposes of determining whether a GHG emission source, resulting from either new construction or a physical or operational change at an existing source, is considered a major source under PSD, both of the following conditions must be met:
>
> (1) The GHG emission source, which is not major for another pollutant, emits or has the potential to emit GHG in amounts that equal or exceed the following, calculated as the sum-of-six well-mixed GHGs on a mass basis (no GWPs applied):
>
> • 100 tpy for sources in any of the 28 major emitting facility source categories listed under PSD, or
>
> • 250 tpy for any other stationary source.
>
> (2) The GHG emission source emits or has the potential to emit GHGs in amounts that equal or exceed 100,000 tpy CO_2 e basis.
>
> For determining whether a modification project at a major stationary source is subject to PSD review, both of the following conditions must be met:
>
> (1) The net GHG emissions increase resulting from the project, calculated as the sum-of-six well-mixed GHGs on a mass basis (no GWPs applied) equals or exceeds 0 tpy.
>
> (2) The net GHG emissions increase resulting from the project, calculated as the sum-of-six well-mixed GHGs on a CO_2 e basis (GWPs applied) equals or exceeds 75,000 tpy CO_2 e.

Id.

69. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75

sources that equal or exceed the 100,000 tpy CO_2 e threshold will be required to obtain a Title V permit if they do not already have one."[70]

At first glance, the disparity between the CAA and the Tailoring Rule suggests that the EPA is acting in an arbitrary and capricious manner when interpreting the authorizing statute. In fact, in its proposal to increase the thresholds, the EPA conceded that the pertinent provisions of the CAA unambiguously set the thresholds for major emitters at 100/250 tpy.[71] Thus, under the *Chevron* rule, the EPA would have to follow the clear command of the statute, which does not set forth grounds for phasing-in regulation or raising thresholds under the current circumstances. It quickly adds however that to follow the clear command of the statute would yield absurd results; it further argues that to avoid these absurd results, it is necessary to raise the thresholds, at least initially.[72] Thus, the EPA claims that the doctrines of absurd results, administrative necessity, and "one-step-at-a-time" support its decision to heighten the thresholds and phase-in the regulation.[73]

B. ABSURD RESULTS

Agencies may avoid the direct implementation of a statute if doing so would yield absurd results. The doctrine of absurd results is best described as follows:

> It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. . . . If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity.[74]

Fed. Reg. 31,514, 31,523-24 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

70. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,524 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

> [T]he following conditions need to be met in order for title V to apply under Step 2 to a GHG emission source:
>
> > (1) An existing or newly constructed source emits or has the potential to emit GHGs in amounts that equal or exceed 100 tpy calculated as the sum of the six well-mixed GHGs on a mass basis (no GWPs applied).
> >
> > (2) An existing or newly constructed source emits or has the potential to emit GHGs in amounts that equal or exceed 100,000 tpy calculated as the sum of the six well-mixed GHGs on a CO_2 e basis (GWPs applied).

Id.

71. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,306 (Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

72. *Id.*; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516-17.

73. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516-17.

74. Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (quoting Holy

Thus, this doctrine may enable the EPA to heighten the pertinent thresholds in an effort to avoid thwarting the intentions of the makers of the CAA. The EPA argues that it would be absurd to impose the costly and demanding regulations designed for large industrial emitters, on apartment complexes and restaurants, which would be regulated under PSD and Title V if the GHG thresholds were not raised.[75] The EPA's particular approach under this doctrine is crucial to the validity of its use. The absurd results case law provides insight into the valid practical application of this doctrine.

In *Environmental Defense Fund, Inc. v. EPA*, the D.C. Circuit applied the doctrine of absurd results to enable the EPA to apply a more flexible implementation of a provision than § 176 of the CAA commanded.[76] The court noted that § 176 required the EPA to set the air quality standards and required the individual states to decide, subject to the EPA's approval, how to achieve these standards by setting their own state implementation plans (SIP).[77] The court also noted that § 176(c)(1) stated that a federal action must conform with a SIP currently in place, not a revised SIP that has yet to be reviewed and approved by the EPA.[78] In the case at bar, however, the EPA conformity rule stated that a state agency can approve federal activity when it does not conform with the SIP currently in place. This approval was contingent on the federal activity conforming with the future revised SIP which the state made a commitment to actually revise.[79] Thus, the EPA's conformity rule did not follow the letter of the unambiguous language of § 176(c)(1). Instead, the EPA elected to follow the purpose of

Trinity Church v. United States, 143 U.S. 457, 459-60 (1892)); *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 68-69 (1994) (rejecting the "most natural grammatical reading" to avoid "not merely odd, but positively absurd" results); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-29 (1989) (Scalia, J., concurring); United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters[,]' . . . [in which case] the intention of the drafters, rather than the strict language, controls") (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)); In re Nofziger, 925 F.2d 428, 434 (D.C. Cir. 1991); Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in a Statutory Interpretation*, 44 AM. U. L. REV. 127, 128 (1994) ("[T]he absurd result principle poses intriguing challenges to literalism and to theories of interpretation generally.").

75. *See* Alexander Duncan, *EPA Wraps Up Comment Period on CO_2 Rules*, ELEC. POWER DAILY 4, Dec. 29, 2009; *see also* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516-17 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

76. Envtl. Def. Fund, Inc. v. EPA, 82 F.3d 451, 468-69 (D.C. Cir. 1996).

77. *Id.* at 454-55.

78. *Id.* at 468-69.

79. *Id.*

the overall statutory scheme.[80]

The court viewed § 176(c) as part of a larger regulatory scheme for states and the federal government to work together to limit air pollution.[81] It reasoned that Congress adopted the provision to prevent federal action from undermining the SIP, thereby preserving its integrity.[82] The court felt that it certainly was not made to inhibit federal and state government cooperation.[83] Thus, the court reasoned that when a state voluntarily accommodated federal action, the court should not rigidly prohibit that accommodation.[84] Rather, it should be permitted—subject to safeguards ensuring eventual conformity—because it would satisfy the congressional purposes of maintaining SIP integrity and promoting cooperation.[85] In other words, the court thought that if the statute was read literally, it would serve to prevent state and federal governments from working together efficiently to prevent air pollution—as is the purpose of the overall scheme—because states would be unable to account for federal actions until revisions to their SIP were completed, submitted, and approved.[86]

The court stated that such a literal reading would "frustrate the process of state and federal cooperation and the integrated planning that section 176(c)(1) was created to foster; this rigid application . . . would block a federal action that the state desires and promises to accommodate through the appropriate adjustments to levels of emissions from other sources."[87] As a result, the court decided that the EPA's interpretation of the statute embodied within its conformity rule was "reasonable, narrowly drawn, consistent with the purpose of the Act and therefore within the EPA's discretion."[88]

80. Envtl. Def. Fund, Inc. v. EPA, 82 F.3d 451, 468 (D.C. Cir. 1996).

81. *Id.* (citing Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 Fed. Reg. 63,214, 63,215 (Nov. 30, 1993) (codified at 40 C.F.R. pts. 6, 51, 93)).

82. *Id.*

83. *Id.*

84. *Id.* at 468.

85. *Id.* at 468-69. The underlying theme of the legislation was to facilitate cooperation between state and federal governments to split up the burden and better carry out air pollution control. *Id.* Section 176(c)(1) was merely a safeguard to prevent the federal government from bullying state governments (by saying federal actions cannot be outside of the current SIPs). *See id.* However, if a state voluntarily agrees to accommodate the federal action and later changes it's SIP, then this bullying concern is diminished and the concern of facilitating efficient cooperation succeeds. *See id.*

86. *Envtl. Def. Fund, Inc.*, 82 F.3d at 468.

87. *Id.* at 468-69.

88. *Id.* at 469.

However, the doctrine of absurd results does not give the agency license of interpretation anytime the literal reading of a statute would yield absurd results. There are limits. This is exemplified in *Mova Pharmaceutical Corp. v. Shalala* where the FDA attempted to avoid the literal reading of a statue[89] that set a 180-day market exclusivity period for first applicants seeking certification of a generic drug.[90]

In *Shalala*, "first applicant" refers to the first drug company to have completed a satisfactory application for the licensing of a generic drug to the FDA—after the pioneer drug company (e.g. Tylenol, Advil). The statute dictated that the market exclusivity period was triggered by a court decision for the first applicant or the commercial marketing of the drug by the first applicant.[91] However, the plaintiff and the FDA disagreed as to when the exclusivity period became effective. The plaintiff's interpretation that the exclusivity period should not begin until it had won its patent infringement suit was closer to the literal meaning of the statute.[92] But the FDA alleged that because the 180-day exclusivity period did not account for first applicants who were not sued or who lost patent infringement suits, a literal reading of the statute would yield absurd results.[93] The absurd results alleged were evident in two different types of scenarios.

The first problem was that those first applicants who were not sued could potentially choose not to market the drug, thereby never triggering the 180-day period.[94] The second problem was that the first applicants who lose their patent infringement suit will never start the countdown from 180 days because they will not be able to market the product, and the court-decision trigger would not be satisfied.[95] As a result, the introduction of generic drugs may be delayed until the expiration of the pioneer company's patent.[96]

89. 21 U.S.C. § 355(j)(5)(B)(iv) (2006).

90. Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1067-68 (D.C. Cir. 1998).

91. *Id.* at 1065. Market exclusivity means they are the only one who can market the generic version of the drug for 180 days. *Id.*

92. *See id.* at 1062-65.

93. *Id.* at 1069.

94. *Id.* at 1067. Because the 180-day countdown would never begin, all generic drug competition could be eliminated. *Id.* In other words, under a literal reading, pioneer drug manufacturers and generic first applicants could collude to eliminate generic competition entirely when the first applicant intentionally fails to commercially market the drug in return for some sort of kickback from the pioneer company, who in turn never sues them for patent-infringement. *Id.*

95. *Id.*

96. *Id.* The introduction of generic drugs would be delayed because other applicants would be unable to market the drug due to the indefinite suspension of the first applicant's exclusivity period. *Id.* Therefore, subsequent applicants would be deprived of the chance to prove that the pioneer company's patent is either invalid or that it has not been infringed upon. *Id.*

To remedy the potential absurdity, the FDA decided to require first applicants to carry out a "successful defense" against a claim for patent infringement in order to qualify for the 180-day exclusivity period.[97] Under this requirement, any first applicant who was not sued or who lost the suit would not qualify for the exclusivity period.[98]

To address the problem of first applicants who are sued but ultimately lose their suits, the FDA chose a sweeping approach by ruling that whenever one of these applicants became involved in litigation, it would begin to approve additional applicants immediately without waiting to see whether the first applicant won or lost the litigation.[99] The FDA defended its approach by arguing that a literal reading of the statute would thwart the congressional intent of the Hatch-Waxman Amendments which sought to bring generic drugs onto the market as quickly as possible.[100] The court countered this attempted use of the absurd results doctrine by stating that when a literal reading of a statute would undermine congressional intent, an agency may deviate from the literal reading no further than is necessary to maintain that intent.[101]

Consequently, the court ruled that the FDA's approach to protecting the congressional intent of the Hatch-Waxman Amendments deviated excessively from the letter of the statute.[102] The court further noted that the FDA had not offered a satisfactory explanation of how the successful defense approach advanced congressional intent underlying the statute.[103] Apparently, the court felt that the congressional concern of expediency in the generic drug market was not pressing enough to warrant revision of a statutory provision for such a remote prospect of delay.

The court criticized the successful defense approach as deviating too far from the statute.[104] As previously noted, the statute stated that later applications (after the first applicant) shall not be approved until 180 days after the commercial-market trigger and the court-decision trigger have been satisfied. The court noted that the successful defense requirement ignored both of these prerequisites by permitting the acceptance of later applications before the first applicant has commercially marketed the drug

97. Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1067 (D.C. Cir. 1998) (citations omitted).
98. *Id.*
99. *Id.* at 1069.
100. *Id.* at 1068. The statute was part of the Hatch-Waxman Amendments.
101. *Id.*
102. *Shalala*, 140 F.3d at 1069.
103. *Id.* at 1071-72.
104. *Id.* at 1069.

or before the court has made a decision.[105] Thus, the court decided that the FDA's successful defense rule was overcompensation for a minor problem within the provision.[106] Specifically, the court stated that "the FDA has embarked upon an adventurous transplant operation in response to blemishes in the statute that could have been alleviated with more modest corrective surgery."[107]

Environmental Defense Fund, Inc. and *Shalala* represent the doctrine of absurd results within the context of an administrative interpretation of a controlling statute.[108] A synthesis of *Environmental Defense Fund, Inc.* and *Shalala* provides that courts generally will apply the absurd results doctrine when: (1) the literal reading of the statute will produce absurd results on its face (e.g., a prisoner who escaped when the prison was on fire should not be punished for violating a criminal statute which forbids escaping from prison);[109] or (2) in the "rare instance" in which the literal application of the statute would thwart the intentions of the statute's makers, *provided that* the agency deviates from the literal reading no further than is necessary to maintain that intent.[110]

105. Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1069 (D.C. Cir. 1998).

106. *Id.*

107. *Id.*

108. *See generally* Nixon v. Mo. Mun. League, 541 U.S. 125, 132-33 (2004) ("We think that the strange and indeterminate results of using federal preemption to free public entities from state or local limitations is the key to understanding that Congress used 'any entity' with a limited reference to any private entity when it cast the preemption net."); Train v. Colo. Pub. Interest Research Group, Inc., 426 U.S. 1, 23-24 (1976). In *Train v. Colorado Public Interest Research Group, Inc.*, the Court reasoned:

> [R]eliance on the "plain meaning" of the words "radioactive materials" contained in the definition of "pollutant" in the [Federal Water Pollution Control Act] contributes little to our understanding of whether Congress intended the Act to encompass the regulation of source, byproduct, and special nuclear materials. To have included these materials under the FWPCA would have marked a significant alteration of the pervasive regulatory scheme embodied in the [Atomic Energy Act.]

Train, 426 U.S. at 23-24; Landstar Express Am. Inc. v. Fed. Maritime Comm'n, 569 F.3d 493, 498-500 (D.C. Cir. 2009) ("[E]ven if the plain language of § 19 were ambiguous on the question whether agents are subject to the Commission's licensing authority, . . . the agency cannot rewrite a statute just to serve a perceived statutory 'spirit.'"); Buffalo Crushed Stone, Inc. v. Surface Transp. Bd., 194 F.3d 125, 129-30 (D.C. Cir. 1999) (deciding that a regulation of Surface Transportation Board does not apply when the application in a particular circumstance would undermine the goals of the governing statute; "[w]here [literal application of statutory language would subvert regulatory scheme], it is appropriate to consider the purpose of the disputed provision and to construe the text accordingly.").

109. Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (quoting United States v. Kirby, 74 U.S. (7 Wall.) 482, 487 (1868)).

110. Envtl. Def. Fund, Inc. v. EPA, 82 F.3d 451, 468 (D.C. Cir. 1996) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989)); Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1068 (D.C. Cir. 1998).

Both *Environmental Defense Fund, Inc.* and *Shalala* shape the EPA's reliance on the absurd results doctrine. The EPA claims that allowing GHG thresholds to be set at 100/250 tpy would "contravene congressional intent and, in fact, undermine Congress's purposes for both [PSD and Title V] permitting programs."[111] The EPA claims that examples of the absurd results are evidenced by the impossibility to satisfy other provisions of the CAA while attempting to satisfy §§ 165 and 169.[112] For instance, § 165(c) calls for all permit applications to be processed within 12 months.[113] The EPA estimates that when GHGs become regulated, the amount of PSD permit applications will increase approximately 280 fold, rendering it impossible to satisfy the requirement of processing applications within one year.[114]

According to the EPA, the potential backlog of applications would affect not only GHG emitters, but also emitters of other pollutants as well, further undermining Congress's purposes for the provisions.[115] The EPA also asserts that by creating a backlog of other preconstruction permits the 100/250 tpy threshold rule would undermine § 160(3), which states that the purpose of the PSD program under the CAA is "to [e]nsure that *economic growth* will occur in a manner consistent with the preservation of existing clean air resources."[116] The EPA holds the view that the backlog would prolong the construction process, thereby stalling productivity, ultimately inhibiting economic growth.[117]

Moreover, the EPA asserts that Congress intended PSD to apply to large sources that could afford the requirements—evidenced by the fact that cost is a consideration in control technologies applicable to PSD.[118] The

111. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,303 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

112. *Id.*

113. 42 U.S.C. § 7475 (2006).

114. Proposed Tailoring Rule, 74 Fed. Reg. at 55,304; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,535, 31,540 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71). The proposal of this rule estimated that PSD permits would increase 140 fold; however, after conducting more research and examining public comments, the EPA revised their original estimate upwards to say that the PSD permits would increase by about twice as much. Proposed Tailoring Rule, 74 Fed. Reg. at 55,304; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,535, 31,540.

115. Proposed Tailoring Rule, 74 Fed. Reg. at 55,304; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,541-43.

116. Proposed Tailoring Rule, 74 Fed. Reg. at 55,304 (emphasis added); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,541-43.

117. Proposed Tailoring Rule, 74 Fed. Reg. at 55,304 ; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,541-43.

118. Proposed Tailoring Rule, 74 Fed. Reg. at 55,304. (emphasis added); Prevention of

EPA also contends that when Congress formulated the PSD provisions it was focused on conventional pollutants, and not on global warming pollutants that would necessarily require higher thresholds to avoid sweeping smaller sources into the same requirements as larger sources.[119] When defining a "major emitting facility" in § 169(1), "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."[120] Thus, according to the EPA, it was not Congress's intention to include smaller, less profitable sources under the PSD program merely because of their capacity to produce 100/250 tpy of GHGs.

The EPA further relies on Senate reports to support the assertion that Congress intended to exclude smaller sources from PSD review. More specifically the Senate reports provide:

> [The PSD] procedure . . . must include an effective review-and-permit process. Such a process is reasonable and necessary for very large sources, such as new electrical generating plants or new steel mills. But the procedure would prove costly and potentially unreasonable if imposed on construction of storage facilities for a small gasoline jobber or on the construction of a new heating plant at a junior college, each of which may have the potential to emit 100 tons of pollution annually.[121]

This statement shows that Congress did not intend to include small facilities under the regulation because it would be both unnecessary and infeasible for these facilities to participate in the permit process. If the GHG threshold were not raised, inclusion of these small facilities would subject them to regulation under PSD and Title V.[122] The EPA further asserts that PSD and Title V regulation of such facilities is absurd on its face (as well as in the consideration of congressional intent) because of these facilities' negligible contribution to air pollution.[123]

Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,541-43 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

119. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,304 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71) (citations omitted); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,541-43.

120. Ala. Power Co. v. Costle, 636 F.2d 323, 353 (D.C. Cir. 1979).

121. Proposed Tailoring Rule, 74 Fed. Reg. at 55,308-09 (citations omitted); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,550.

122. *See* Duncan, *supra* note 75.

123. *Id.*

The EPA argues that the effects on Title V would be similar. It reasons that the "literal" interpretation of §§ 502(a), 502(2)(b), and 302(j) will bring an estimated six million permit applications per year (up from 14,700), which the EPA considers impossible to handle with permitting agencies' current administrative resources.[124] The EPA acknowledges that even if the permitting agencies could eventually accommodate the increase, they would still be unable to satisfy the requirement under § 503(c) that Title V permit applications be processed within eighteen months.[125]

The EPA also asserts that if Title V were interpreted literally with regard to GHG emissions, the purpose of Title V would be undermined.[126] It claims that Title V permits were created to promote compliance with the CAA requirements by compiling all of the requirements into one document—a sort of streamlining technique.[127] However, the EPA argues that when six million additional applications are received, the streamlining efforts will be thwarted and the statutory purpose of compliance through ease will be lost.[128]

Thus, the EPA asserts that in lieu of absurd results, the Tailoring Rule should be adopted with thresholds heightened to 75,000/100,000 tpy CO_2 e; however, the Tailoring Rule may not be narrow enough. As a result, the EPA also asserts the simultaneously interdependent and independent argument of administrative necessity.

C. ADMINISTRATIVE NECESSITY

The EPA claims that administrative necessity allows it to interpret the CAA's requirements differently from the literal meaning of its provisions regarding GHG emissions.[129] It claims that neither it nor its affiliate agencies have the administrative resources to apply a literal reading of the CAA to GHG emissions.[130] Therefore, the EPA must phase-in regulation

124. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,308-09 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71); *see also* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,536 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

125. Proposed Tailoring Rule, 74 Fed. Reg. at 55,308-09; *see also* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,536 .

126. Proposed Tailoring Rule, 74 Fed. Reg. at 55,308-09; *see also* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,536 .

127. Proposed Tailoring Rule, 74 Fed. Reg. at 55,308-09; *see also* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,536, 31,551.

128. Proposed Tailoring Rule, 74 Fed. Reg. at 55,308-09; *see also* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,536, 31,551.

129. Proposed Tailoring Rule, 74 Fed. Reg. 55,292.

130. *Id.*

and initially set the thresholds for GHGs at 75,000/100,000 tpy Co_2 e until it can increase administrative resources and conduct further research to create and develop effective streamlining methods.[131]

The EPA also argues that when applying administrative necessity to the pertinent sections of the CAA, the otherwise clear congressional intent, which is ordinarily apparent through the direct, unambiguous statutory language, becomes ambiguous.[132] The agency presumes that Congress would not create a statute that is impossible to administer and claims that a literal application of the CAA to GHGs would be impossible.[133] Therefore, the EPA reasons that the congressional intent is ambiguous under both parts of *Chevron* and argues that the Tailoring Rule is a permissible construction of the statute.[134]

Perhaps the most prominent case contemplating the subject of administrative necessity is *Alabama Power Co. v. Costle*.[135] In *Alabama Power*, the EPA tried to remedy the burden placed on small sources through its interpretation of the phrase "potential to emit" by crafting an additional rule to exclude from PSD considerations those sources emitting less than 50 tpy of a pollutant.[136] Because "potential to emit" included facilities having the capabilities to emit 100/250 tpy but actually emitted far less, the EPA reasoned that it was unfair and unnecessary to regulate those that actually emitted less than 50 tpy.[137] The EPA conceded that its 50 tpy exemption was an expansion beyond the limited exemption in § 165(b) of the CAA. However, it contended that the expansion was within its discretion to limit the program's reach because regulating such sources would not be cost-effective and would strain the agency's resources.[138] The EPA determined that the cost to industry and permitting agencies would far outweigh the benefit of the "relatively insignificant" reduction in air pollution that would

131. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,308-09 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

132. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule 75 Fed. Reg. 31,514, 31,576-77 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

133. *Id.*

134. *Id.*

135. Ala. Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979). *Chevron* reiterated certain principles of *Alabama Power*, but highlighted the deference given to an agency's construction when a statute is silent on an issue. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 857 n.29 (1984).

136. *Ala. Power*, 636 F.2d at 355-56. The actual regulation set the amount at 50 tpy, 1,000 pounds per day, or 100 pounds per hour, whichever was most restrictive. *Id.* The amount was supposed to reflect the maximum capacity, including the consideration of air pollution control technology. *Id.*

137. *Id.* at 355-56.

138. *Id.* at 356.

result if sources emitting less than 50 tpy were required to meet the provisions of the PSD program.[139]

The D.C. Circuit, on the other hand, thought that this expansion went far beyond the agency's discretion.[140] The court noted that exemptions are inherent in the administrative process under limited circumstances.[141] The court concluded, however, that no administrative power exists to craft exemptions to statutory requirements based on the agency's own cost-benefit analysis.[142] Nevertheless, the court hinted that it might be more inclined to accept the exemption if it were a case-by-case exemption in which the agency studied the intricacies of a particular source and used its discretion to make an educated and particularized decision, rather than a blanket exemption affecting all small sources.[143]

As a separate issue, the court also conducted an academic discussion of three different types of administrative relief—not limited to exemptions from the requirements of a statute—that *may* be available to an agency: (1) categorical exemptions from clear commands of a regulatory statute, (2) streamlined administrative approaches not explicitly provided for in the statute, and (3) alternative implementations of a statute due to practical impossibility.[144] The court hinted that the second type of relief was most likely to be accepted, while categorical exemptions from clear commands were the least likely.[145]

First, the court recognized that "[c]ategorical exemptions from the clear commands of a regulatory statute, though sometimes permitted, are not favored."[146] The court stated that an agency should not be allowed to revise a statute in a manner that is inconsistent with the clear intent of the statute.[147] The court, however, noted that, although the court frowns upon these types of categorical exemptions, they are not impossible to carry out under the correct circumstances.[148] Thus, this first type of administrative relief was categorized as the most difficult for an agency to carry out successfully under judicial scrutiny, thereby implying that these types of

139. Ala. Power Co. v. Costle, 636 F.2d 323, 356 (D.C. Cir. 1979).

140. *Id.*

141. *Id.* at 357.

142. *Id.*

143. *Id.* at 357-58.

144. *Ala. Power Co.*, 636 F.2d at 358.

145. *Id.*

146. *Id.*

147. *Id.* (citing Nat'l Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1377 (D.C. Cir. 1977)).

148. Ala. Power Co. v. Costle, 636 F.2d 323, 358 (D.C. Cir. 1979). This refers to categorical exemptions that are contrary to clear commands of the relevant statute.

exemptions are rarely upheld.[149]

On the other hand, streamlined administrative approaches not explicit in the statute tend to be less sweeping, instead relating to more practical concerns of administrative procedure.[150] Therefore, as *Alabama Power* noted, courts uphold these approaches more often than they do outright exemptions.[151] The court explained that streamlined approaches by agencies are often upheld when the typical administrative approaches suggested by the statute would foil the objectives of a statue.[152] Thus, the court demonstrated that, in situations where an agency has a large number of entities to regulate, feasibility and practicality are important considerations when scrutinizing an agency's streamlining procedures.[153] For example, an agency has the authority to take appropriate action to address the administrative impossibility of applying a statute when there is a lack of time or personnel.[154]

Third, the court often allows alternative administrative approaches when practical considerations make it impossible for the agency to carry out its mandate.[155] The *Alabama Power* court emphasized that an agency carries a heavy burden to demonstrate impossibility.[156] The agency's burden would be "especially heavy" in cases where it argued impossibility before attempting to undertake the regulation.[157]

149. Ala. Power Co. v. Costle, 636 F.2d 323, 358 (D.C. Cir. 1979).

150. *Id.* This is the second approach discussed above.

151. *Id.* (noting that courts "*frequently* uphold streamlined agency approaches or procedures").

152. *Id.* at 359.

153. *Id.* (citing *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 777 (1968)).

154. *Ala. Power Co.*, 636 F.2d at 359 (citing Morton v. Ruiz, 415 U.S. 199, 230-31 (1973)). In *Morton*, the statute at issue provided for benefits to Native Americans living on or near reservations. *Morton*, 415 U.S. at 203-31. However, there were insufficient funds for all the Native Americans who qualified, so the Secretary of the Bureau of Indian Affairs decided to apply the benefits to the Native Americans living on reservations only. *Id.* The Court acknowledged the right of the secretary's authority but said that he would not be able to carry out the action until he followed the procedure for notice-and-comment rulemaking under the Administrative Procedure Act, 5 U.S.C. § 553. *Id.*

155. *Ala. Power Co.*, 636 F.2d at 359.

156. *Id.* at 359 (citing Nat'l Res. Def. Council, Inc. v. Train, 510 F.2d 692, 713 (D.C. Cir. 1974)). The court cited *Train*, in which the court considered the EPA's inability to meet certain statutory deadlines of the Clean Water Act. *Train*, 510 F.2d at 713. In *Train*, the court did not accept the EPA assertion that it would not be able to "publish the great majority of guidelines" by the date mandated under the statute. *Id.* Instead, the *Train* court recognized that while constraints on the EPA may have made the publication infeasible by the deadline, compliance with the statute was not impossible. *Id.* The *Train* court saw two constraints on the EPA: (1) budget and manpower beyond EPA's capacity needed to finish by deadline or take an undue toll on other important projects to finish on time; and (2) potential inability to conduct sufficient evaluation of which control technology is the most suitable for each source before the deadline. *Id.*

157. Ala. Power Co. v. Costle, 636 F.2d 323, 359 (D.C. Cir. 1979).

Though *Alabama Power* is probably the most important case regarding administrative necessity, subsequent cases have further clarified application of the doctrine. In *Sierra Club v. EPA*, the EPA defined "dispersion techniques" narrowly, effectively exempting many sources the petitioners thought should be included.[158] The court noted that § 123 of the CAA barred sources from receiving emission credits for tall stacks and "other dispersion techniques," and that the EPA's definition of "dispersion techniques" included intermittent control systems mentioned in the statute and the "addition of a fan or reheater to obtain a less stringent emission limitation."[159] The Sierra Club and the National Resources Defense Council believed that many more dispersion techniques should be included and thereby barred from receiving emission credit.[160] Relying on the doctrine of administrative necessity, the EPA argued that a broader definition of "dispersion techniques" would require difficult determinations of a source's subjective intent.[161] The court ruled that the EPA's justification for administrative necessity was insufficient.[162]

Instead, it determined that the EPA's definition did not encompass the full range of regulation required under the statute; thus, the regulations "effectively create[d] an exemption not indicated in the statute itself."[163] Consequently, the court found that the EPA had no authority to take feasibility into account when administering the statute.[164] Thus, the court's holding demonstrated that an agency may circumvent the proper implementation of the statute only when the agency proves that attainment of the statutory objective is impossible.[165] The court stated that because the EPA had never tried to implement the statute, its burden of proving impossibility was especially heavy, and its argument fell well short.[166] The

158. Sierra Club v. EPA, 719 F.2d 436, 461-62 (D.C. Cir. 1983) (exempting many sources from statutory requirements). The CAA regulates emissions based on the ground level concentrations of pollutants; therefore, sources can satisfy certain emission limitations by building taller smoke stacks (hence "dispersion techniques"). *Id.* at 439. This case considers regulations involving these dispersion techniques. *Id.*

159. *Id.* at 461-62.

160. *Id.* at 461-64.

161. *Id.* at 463. In other words, it would have to determine if the source was trying to build higher stacks or change other plant flow parameters in an effort to increase dispersion (while getting around emission standards) or for some other legitimate reason. *Id.*

162. *Id.* at 462.

163. *Id.* To make this determination the court looked to the statute and legislative history. *Id.*

164. *Sierra Club*, 719 F.2d at 463. The court thought that it was not impossible. *Id.* It asserted that the EPA could have made categories of stacks that could be preliminarily determined as being built for legitimate or illegitimate (increase dispersion) reasons. *Id.*

165. *Id.* at 461-62.

166. Sierra Club v. EPA, 719 F.2d 436, 461-62 (D.C. Cir. 1983) (citing Ala. Power Co. v. Costle, 636 F.2d 323, 358 (D.C. Cir. 1979)).

court added that even if the EPA would have been able to fulfill its burden of proving impossibility, its enforcement of the law was still too "taxing" to defend on administrative necessity grounds.[167] *Sierra Club v. EPA* reinforced the harshness with which courts scrutinize claims of impossibility in support of administrative necessity arguments.

In the event that an agency satisfies its heavy burden of proving impossibility, it must be sure to address the impossibility in a precise manner so that it may avoid covering circumstances that are not impossible. In *Public Citizen v. FTC*, the D.C. Circuit considered a blanket rule under the Smokeless Tobacco Act that required warning labels to accompany smokeless tobacco logos.[168] The Federal Trade Commission (FTC) issued an exception, which stated that the smokeless tobacco advertisements on utilitarian items did not require a warning.[169] The FTC attempted to justify the exception on the ground of administrative necessity, stating that it would be infeasible to place warnings on many of the utilitarian items such as golf balls.[170] The court was quick to point out, however, that although it might be practically impossible to fit warnings on small items such as golf balls, it is still possible to fit the warnings on t-shirts.[171] Therefore, the court ruled that practicality concerns did not warrant a blanket rule to exempt all utilitarian items from bearing warnings.[172] Instead, the court noted that a rule exempting all utilitarian items not large enough to bear both a visible advertisement and a visible warning may be acceptable.[173] The court further stated that according to *Alabama Power*, there existed no general administrative power to create exemptions to statutory requirements based on such a feasibility calculation.[174]

Based on these cases, the EPA has developed a three-step process under which an agency can revise statutory requirements demonstrated as being impossible to administer.[175] Under step one ("evaluation"), the agency must "evaluate how it could streamline administration as much as possible, while remaining within the confines of the statutory

167. Sierra Club v. EPA, 719 F.2d 436, 461-62 (D.C. Cir. 1983). For example, the EPA could have developed classes of sources that are clearly legitimate or clearly illegitimate—eliminating the need for the "impossible" determinations of subjective intent.

168. Public Citizen v. FTC, 869 F.2d 1541 (D.C. Cir. 1989).

169. *Id.*

170. *Id.* at 1556.

171. *Id.*

172. *Id.*

173. *Id.* at 1541.

174. *Public Citizen*, 869 F.2d 1541.

175. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,315 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

requirements."[176] Under step two ("inability determination"), the agency must "justifiably" determine that after streamlining administration, the remaining administrative tasks are still unable to be completed because of a lack of resources.[177] If the agency fulfills the requirements of step two, the agency must then "phase in or otherwise adjust requirements" so that they are administrable while continuing to implement congressional intent as fully as possible ("phase in").[178]

The first step is founded on the idea that "[c]ourts frequently uphold streamlined agency approaches or procedures where the conventional course, typically case-by-case determinations, would, as a practical matter, prevent the agency from carrying out the mission assigned to it by Congress."[179] Thus, an agency has the authority to adjust the administration of the statute when doing so by the letter of the law would frustrate its intended purpose. Nonetheless, the EPA recognizes that the agency must stay within the confines of the statute when adjusting its administration.[180] For example, the adjusted administration may be a matter about which the statute is silent, but it may not be something in direct conflict with a provision of the statute.[181] This notion is supported by the *Sierra Club* court's reasoning that the EPA could have developed a less taxing enforcement of the law to avoid creating a broad exemption that stretched so far beyond the confines of the statute.[182]

The EPA evaluates three major streamlining approaches for PSD under step one.[183] First, it could interpret the definition of "potential to emit" differently to reflect what the source emits when it is in operation, rather than what it would emit if it were operating continuously.[184] This would help many of the smaller sources drop below the "major emitter" threshold.[185] Second, it could develop a generalized permit program for certain categories of sources to promote economies of scale and reduce the

176. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,315 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

177. *Id.*

178. *Id.*

179. *Id.* (citing Ala. Power Co. v. Costle, 636 F.2d 323, 356 (D.C. Cir. 1979)).

180. *See id.*

181. *See Ala. Power Co.*, 636 F.2d at 358. This is acceptable when the agency's approach is not explicitly called for in the statute, as opposed to being in direct conflict with a provision of the statute. *Id.*

182. *See* Sierra Club v. EPA, 719 F.2d 436, 463-64 (D.C. Cir. 1983).

183. Proposed Tailoring Rule, 74 Fed. Reg. at 55,315.

184. *Id.*

185. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,315 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

administrative burden.[186] Third, the administrative burden associated with the PSD program's most time-consuming component—the determination of the control technology (BACT) for each source—can be reduced by developing presumptive BACTs for categories of similar sources.[187] Hence, instead of investigating every individual source to determine the appropriate control technology, the EPA could develop predetermined control technologies for particular categories of sources. The EPA further believes that it could make the same streamlining adjustments for Title V, with the exception of the presumptive BACT.[188]

These streamlining processes cannot be implemented when PSD and Title V are first triggered by the LDVR.[189] Instead, the EPA intends to develop them as quickly as possible,[190] and expects that a court will factor an agency's diligent, good faith efforts to discharge statutory requirements when considering an impossibility claim.[191] The agency claims that it is already thinking of ways to reduce the administrative burden so that it can carry out its statutory responsibilities.[192]

The second step of the EPA's revision process suggests that the administrative impossibility doctrine could apply in situations where the agency suffers from resource constraints, such as funds, time, or technical personnel.[193] The EPA noted, however, that a court would not accept such an administrative impossibility argument without ample evidence of such constraints.[194] The agency claims that relevant case precedent suggests a quantification of the resource constraints is generally required to substantiate an administrative impossibility argument.[195] The EPA alleges,

186. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,315 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 55,317 (citing Nat'l Res. Def. Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1974)).

192. Proposed Tailoring Rule, 74 Fed. Reg. at 55,317.

193. *Id.* (citing Ala. Power Co. v. Costle, 636 F.2d 323, 358 (D.C. Cir. 1979)).

194. *Id.* (citing Nat'l Res. Def. Council, Inc. v. Train, 510 F.2d 692, 712-13 (D.C. Cir. 1974)). The *Train* court inferred from an imminent deadline that the EPA's resources would be burdened when it published the guidelines for most of the sources; however, because the EPA failed to actually give any evidence, the court rejected the impossibility claim. Nat'l Res. Def. Council, Inc. v. Train, 510 F.2d 692, 712-13 (D.C. Cir. 1974). In *Environmental Defense Fund, Inc. v. EPA*, the EPA was unable to prove that enforcing statutory requirements from the categories it exempted would be impossible. *Envtl. Def. Fund, Inc.*, 636 F.2d at 1285.

195. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,317 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

however, that it has quantified the evidence of impossibility.[196] It asserts that there is no precedent in the "impossibility" case law to establish the quantifiable burden that a 100/250 tpy threshold for GHG would impose on the permitting agencies through the PSD and Title V permitting programs.[197] It argues that the closest precedent is *Alabama Power* where the court rejected the EPA's concern that the cost incurred in reviewing approximately 2,400 sources that emit less than 50 tpy would outweigh the benefit of the relatively insignificant decrease in air pollution that would result from reviewing them.[198] In contrast, the EPA estimates that a 100/250 tpy threshold for the emission of GHGs would impose the review of an additional 81,000 permit applications for PSD and 6.1 million for Title V.[199] There is no precedent containing such exorbitant numbers as relating to the consideration of impossibility in permit application review.

The third step of the revision process dictates that once the agency has shown that it still lacks the necessary resources to implement the statute after streamlining, it should pursue an alternative scheme that is administrable, departing from the statute as little as possible.[200] The Tailoring Rule and its 75,000/100,000 tpy CO_2 e thresholds are intended to suffice as the agency phases-in streamlining processes to make the statute administrable.[201] However, the EPA believes that it could take several years to implement any streamlining techniques or to provide adequate augmentation of permitting agencies.[202] Therefore, the Tailoring Rule will remain effective, and the administrative situation should be reassessed and further rulemaking conducted within six years.[203]

The EPA characterizes its raising of the thresholds as a disfavored

196. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,317 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

197. *Id.* at 55,318.

198. *Id.* at 55,316 (citing Alabama Power Co. v. Costle, 636 F.2d 323, 356 (D.C. Cir. 1979)).

199. *Id.* Currently, the total number of PSD applications per year is about 280, and the total number of Title V applications per year is 14,700. *Id.* at 55,316; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,576-78 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71). It appears impossible on its face that an infrastructure capable of reviewing 280/14,700 applications within 12/18 months would be able to review 81,000/6.1 million in the same amount of time. Proposed Tailoring Rule, 74 Fed. Reg. at 55,315; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,514, 31,576-78.

200. Proposed Tailoring Rule, 74 Fed. Reg. at 55,318.

201. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,576-78.

202. Proposed Tailoring Rule, 74 Fed. Reg. at 55,316-18. This estimate is based on the information the EPA currently has available.

203. *Id.*; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,576-79.

categorical exemption under *Alabama Power*, but asserts that these are sometimes permitted.[204] It argues that the categorical exemption is permissible because it is the only way to render the statue administrable and because it is a temporary solution.[205] *Alabama Power*'s second form of administrative relief—development of streamlining methods—will not be available at the outset of or any time soon after the PSD and Title V are triggered.[206] Thus, the agency claims that the Tailoring Rule is the narrowest departure it can manage until it makes a new rule on July 1, 2012.[207] Even though it claims it will phase-in narrower departures, the EPA has nevertheless refused to consider reducing the thresholds below 50,000 tpy CO_2 e until April 30, 2016.[208]

In addition to the doctrines of absurd results and administrative necessity, the EPA further asserts the relatively new theory of "one-step-at-a-time" to support its phase-in approach under the Tailoring Rule.

D. ONE-STEP-AT-A-TIME

One-step-at-a-time is a notion emanating from case law. It recognizes that agencies may implement statutory mandates incrementally.[209] "'Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop;' and instead they may permissibly implement such regulatory programs over time, 'refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.'"[210] In *National Ass'n of Broadcasters v. FCC*, the D.C. Circuit discussed the phase-in approach to regulatory implementation and developed a test for determining whether this type of implementation

204. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,316 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,576-78 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71). These categorical exemptions may be accepted in cases where the agency shows that a certain category of sources (or items) is impossible to regulate—as the *Public Citizen* court suggested that the FTC may be able to exempt utilitarian objects too small to display a visible logo and warning label from the warning regulation. Public Citizen v. FTC, 869 F.2d 1541, 1556 (D.C. Cir. 1989).

205. Proposed Tailoring Rule, 74 Fed. Reg. at 55,316; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,576-78.

206. Proposed Tailoring Rule, 74 Fed. Reg. at 55,318; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,577-78.

207. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,578.

208. *Id.*

209. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,544.

210. *Id.* (quoting Mass. v. EPA, 549 U.S. 497, 524 (2007)).

was permissible in individual circumstances.[211]

In *Broadcasters*, the court examined the FCC's interim regulations of new satellite broadcasting technology called "direct broadcast satellite service" (DBS).[212] Considering the nascent technology and the inherent unfamiliarity with appropriate regulation, the FCC declined to adopt permanent DBS regulations and instead opted to propose and adopt interim regulations so that it could avoid unnecessary delays while it "gain[ed] information that would aid in setting permanent regulatory policies."[213] "[T]he proposed interim regulations were designed to assure 'maximum flexibility'—and to impose minimum regulation—during the interim period."[214]

Several petitioners sought to overturn the interim regulation.[215] The court examined the validity of the interim regulation and it developed a general guideline for testing whether it was permissible.[216] First, it recognized that agencies often made calculations and predictions based on evolving economic and technological conditions, as well as the nature and magnitude of the issue, when determining whether to postpone permanent rulemaking.[217] It determined that when these predictions are "plausible and flow from the factual record compiled, the reviewing court should accept the agency's estimation."[218] The court should then determine whether the postponement was reasonable in the context of the decisions made.[219] The court explained:

> With respect to that question, postponement will be most easily justified when an agency acts against a background of rapid technical and social change and when the agency's initial decision as a practical matter is reversible should the future proceedings yield drastically unexpected results. In contrast, an incremental approach to agency decision making is least justified when small errors in predictive judgments can have catastrophic effects on the public welfare or when future proceedings are likely to be systemically defective in taking into account certain relevant interests.[220]

211. Nat'l Ass'n of Broadcasters v. FCC, 740 F.2d 1190 (D.C. Cir. 1984).
212. *Id.*
213. *Id.* at 1197.
214. *Id.*
215. *Id.*
216. *Id.* at 1209-14.
217. *Nat'l Ass'n of Broadcasters*, 740 F.2d at 1210.
218. *Id.*
219. *Id.* at 1211.
220. *Id.*

The court determined that part of the commission's rule was permissible because, among other reasons, the commission acted against an evolving background. [221]

After *Broadcasters* aided in setting the foundation for the one-step-at-a-time theory by presenting general guidelines for review of incremental rulemaking, *Las Vegas v. Lujan* suggested that an agency's progression towards full compliance with a statute is only one component of upholding partial compliance.[222] Later, *Grand Canyon Air Tour Coalition v. FAA* further developed the theory and tested its boundaries by adding that partial agency action may be upheld even when it is long-delayed.[223]

Grand Canyon dealt with Congress's enactment of the Overflights Act in 1987, which ultimately commanded the Federal Aviation Agency (FAA) to provide a final rule for the "substantial restoration of the natural quiet" to the Grand Canyon Park by reducing noise from overflying aircraft.[224] However, the FAA did not finalize a rule that would achieve "substantial restoration," i.e. full compliance, until ten years later, and that rule did not even purport to actually achieve substantial restoration.[225] In fact, after reevaluation of the finalized rule, the FAA determined that, with the addition of two more supplemental rules, the substantial restoration would be achieved in ten years.[226] One petitioner argued that it was too little, too late.[227] However, the court considered the various complexities of actual full compliance with the statute and deferred to the judgment of the agency and its technical expertise.[228]

The court reasoned that it knew nothing about the practicalities or consequences of mandating full and immediate compliance with the Act.[229] The court further considered that even though the FAA was delayed in making a rule, it was not as if the FAA was not working toward a finalized

221. Nat'l Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1211 (D.C. Cir. 1984).

222. Las Vegas v. Lujan, 891 F.2d 927, 935 (D.C. Cir 1989) ("Since agencies have great discretion to treat a problem partially, we would not strike down the listing if it were a first step toward a complete solution, even if we thought it 'should' have covered both the Mojave and Sonoran populations.").

223. Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 476 (D.C. Cir. 1998).

224. *Id.* at 460.

225. *Id.* at 460-63.

226. *Grand Canyon Air Tour Coal.*, 154 F.3d at 476-78.

227. *Id.* at 476.

228. *Id.*

229. *Id.* For instance, the court did not possess the expertise to know the unintended consequences of greatly expanding the park's flight-free zone and rerouting air traffic elsewhere. *Id.*

rule ad interim.[230] In the meantime, the FAA had developed another rule that was ultimately rejected, it had made some gross miscalculations in proposing the present rule, and it had experienced delays caused by the tardiness of cooperating agencies.[231] Additionally, the court found that the rule was not inherently unreasonable simply for failing to achieve compliance within ten years.[232] Instead, the court again considered the complexities of the coordination of air traffic, fly zones, and technological advancements in quieter aircraft, and recognized that such a complicated goal could not reasonably be achieved immediately.[233] As a result, the court upheld the FAA's finalized rule.[234]

The EPA interprets these cases and other related cases[235] as permitting a one-step-at-a-time approach under the following circumstances:

(1) The agency's ability to comply with a statutory directive depends on facts, policies, or future events that are uncertain;

(2) The agency has estimated the extent of its remaining obligation;

(3) The agency's incremental actions are structured in a manner that is reasonable in light of the uncertainties; and

(4) The agency is on track to full compliance with the statutory requirements.[236]

The EPA claims that the Tailoring Rule satisfies each of the four conditions.[237]

First, the EPA asserts that it is working within uncertain factual

230. Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 477 (D.C. Cir. 1998).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 478.

235. *See also* Ariz. Pub. Serv. Co. v. EPA, 562 F.3d 1116, 1125-26 (10th Cir. 2009); Gen. Am. Transp. Corp. v. ICC, 872 F.2d 1048, 1058 (D.C. Cir. 1989); Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 287 (D.C. Cir. 1988); ITT World Commc'ns, Inc. v. FCC, 725 F2d 732, 754 (D.C. Cir. 1984); U.S. Brewers Ass'n, Inc. v. EPA, 600 F.2d 974, 982 (D.C. Cir. 1979). *U.S. Brewers Ass'n, Inc. v. EPA* held:

> Under these circumstances we think the question of whether the Agency has fully satisfied the mandate of the statute is not fit for judicial review at this time, when the Agency, still well within the one-year period granted by statute, is deeply involved in the process of formulating rules designed to carry out the congressional mandate. The Agency might properly take one step at a time.

U.S. Brewers, 600 F.2d at 982.

236. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,578 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

237. *Id.*

circumstances and future events because the ability of the EPA to follow the statutory directive depends not only on the development of streamlining measures, but also on enhancing the resources of permitting agencies.[238]

Second, the EPA contends that it has estimated the extent of its remaining obligation because it has predicted "the number of PSD and Title V permits and the costs of issuing them, and has provided as much information as possible about the development of streamlining methods and permitting authority resources."[239]

Third, the agency claims that its incremental actions are reasonable within the context of the uncertainties regarding the permitting authorities' future resources and the effectiveness of future streamlining methods.[240] It reasons that the Tailoring Rule is made to lower thresholds and include more sources over time as future capacity of permitting authorities and efficacy of streamlining methods become apparent.[241]

Fourth, it argues that it is on track to reach full compliance with the statute by phasing-in more inclusive regulations of GHGs as the resources of permitting authorities increase and effective streamlining methods are developed.[242] Although the Tailoring Rule does not purport to achieve compliance with the literal reading of the statute (100/250 tpy threshold), the EPA argues that the application of the doctrines of absurd results and administrative necessity under part one of *Chevron* renders the otherwise clear language of the statute ambiguous as to Congress's intent.[243] Therefore, it claims that full compliance does not necessarily mean full

238. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,578 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71) (citing Nat'l Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1210 (D.C. Cir. 1984), which set forth that incremental actions are most justifiable when against a "shifting background in which facts, predictions, and policies are in flux").

239. *Id.* (citing *Broadcasters*, 740 F.2d at 1210, which recognized that an agency will usually make some sort of calculation based on the economic and technological conditions when assessing the nature of its obligations, and asserting that this estimation must be "plausible and flow from the factual record compiled").

240. *Id.*

241. *Id.* at 31,578 (citing *Broadcasters*, 740 F.2d at 1211). *Broadcasters* asserted:

> [The incremental action must be] reasonable, in the context of the decisions made in the proceeding under review, for the agency to have deferred the issue to the future. With respect to that question, postponement will be most easily justified when an agency acts against a background of rapid technical and social change and when the agency's initial decision as a practical matter is reversible should the future proceedings yield drastically unexpected results.

Broadcasters, 740 F.2d at 1210.

242. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,578 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

243. *Id.*

compliance with the literal language of the statute.[244]

The EPA presents compelling justifications for the validity of its Tailoring Rule. Naturally, however, the EPA's view is not without opposition. The next section examines the viability of the EPA's arguments when challenged by potential opposition.

III. ANALYSIS

This section examines the validity of the EPA's Tailoring Rule first within the context of the absurd results doctrine, administrative necessity, and one-step-at-a-time. It seems that the EPA might provide sufficient proof that absurd results and impossibility will ensue if the CAA is applied literally. However, the EPA has not offered such convincing evidence that the remedy should be to implement the Tailoring Rule and raise the threshold to 75,000/100,000 tpy CO_2 e. This section also questions the EPA's motives and its interpretation that automotive GHG regulations trigger certain provisions of the CAA for stationary sources. Although the interpretations may be correct, the effects are overstated in a manner that closes the door to alternative solutions. For this reason, the final section addresses alternative solutions and explores their viability.

A. VALIDITY OF THE EPA'S APPROACH UNDER THE ABSURD RESULTS DOCTRINE

Is the EPA's Tailoring Rule more comparable to the approach taken in *Environmental Defense Fund, Inc. v. EPA* or the approach in *Mova Pharmaceutical Corp. v. Shalala*? In particular, is its action to avoid absurd results "reasonable, narrowly drawn, consistent with the purpose of the Act, and therefore within the EPA's discretion?"[245] Or, has it "embarked upon an adventurous transplant operation in response to blemishes in the statute that could have been alleviated with more modest corrective surgery?"[246]

In *Environmental Defense Fund, Inc.*, the court expressed particular concern with following the statute too closely if it meant that doing so would frustrate congressional intent.[247] The *Shalala* court focused on limiting deviation from the literal reading of the statute just enough to maintain that intent.[248] Consequently, if the EPA's Tailoring Rule is

244. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,578 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

245. Envtl. Def. Fund, Inc. v. EPA, 82 F.3d 451, 469 (D.C. Cir. 1996).

246. Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1069 (D.C. Cir. 1998).

247. *See generally* Envtl. Def. Fund, Inc. v. EPA, 82 F.3d 451 (D.C. Cir. 1996).

248. *See generally* Mova Pharm. Corp. v. Shalala, 140 F.3d 1060 (D.C. Cir. 1998).

considered too broad a response to prospective absurdity, the *Shalala* precedent may serve to invalidate it. The Tailoring Rule resembles a blanket rule in that it purports to exempt from regulation all sources that emit GHGs under the threshold. However, because the exemption is limited to GHG emissions, it is not quite so broad.

The EPA has presented evidence of one of the overall purposes of the PSD program being the promotion of economic growth while limiting air pollution and the potential of this purpose being compromised if GHG regulation is applied literally.[249] This is similar to the overall purpose of the statutory scheme in *Environmental Defense Fund, Inc.*, which was to promote cooperation between state and federal governments. In that case, the EPA would have been unable to achieve harmony between state and federal governments if they did not allow states to informally accommodate certain federal actions.[250] In the current situation, there is a possibility of a great increase in CAA regulation applications. If a tremendous backlog of applications stalls the operation of sources, the EPA cannot support economic growth. In this respect, *Environmental Defense Fund, Inc.* supports the EPA's position.

Furthermore, the EPA has provided considerable evidence demonstrating that congressional intent may be undermined if the statute is applied literally to GHGs.[251] The legislative history seems to be direct evidence that the makers of the rule *specifically* did not want small, less profitable sources to be subject to costly and demanding PSD and Title V requirements.[252] Hence, it appears that the EPA has clearly shown that the result of a literal application will be at odds with the intentions of the makers of the statute. Consequently, all that remains is for the EPA to prove that its Tailoring Rule deviates from the literal reading no further than is necessary to maintain that intent.

The EPA, however, may still be threatened by the court's holding in *Shalala* because of the great disparity between the statutory thresholds and the Tailoring Rule thresholds. If the EPA fails to show substantial

249. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,304 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,541-43 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

250. *See* Envtl. Def. Fund, Inc. v. EPA, 82 F.3d 451, 468 (D.C. Cir. 1996).

251. *See, e.g.*, Proposed Tailoring Rule, 74 Fed. Reg. at 55,308-09. The EPA presented Senate reports that illustrate a desire to exclude small emitters—many of which would be included in regulation if the statute was applied literally to GHG. *Id.*

252. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,308-09 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

empirical evidence supporting the need for thresholds that are approximately 1,000 times greater than those set forth in the statute, the D.C. Circuit will probably conclude that the increase is greater than the protection of congressional intent warrants. Therefore, it is critical that the EPA provides detailed evidence of its methods for calculating the expected increase in permit applications—e.g., "x" number sources are capable of producing "y" number of GHG emissions, "z" number of these sources was never before regulated under the CAA, this is the increase in applications.[253] This information will help the EPA to assert the reasonableness of a heightened threshold.

Additionally, the EPA should provide evidence to show that the "major emitters" that Congress intended to regulate (that can afford the regulation, etc.) emit at or well above 75,000/100,000 tpy CO_2 e of GHG per year. However, if the agency cannot provide detailed accurate projections to any reasonable extent, considering the circumstances, it is unlikely that its Tailoring Rule will pass the judicial scrutiny of the D.C. Circuit. In this respect, the EPA has performed a considerable amount of research, calculations, and projections that show that the result of the literal application to GHG would likely be overwhelming;[254] however, the EPA has not clearly demonstrated that the Tailoring Rule thresholds are close enough under *Shalala* to the emissions of large emitters that Congress intended to regulate through the CAA.

Furthermore, under phase one of the Tailoring Rule, only sources that are already subject to PSD and Title V for non-GHG emissions ("anyway sources") are subject to these permit requirements for GHG emissions.[255] The CAA requires these permit requirements apply to emitters of over 100/250 tpy of GHGs once GHGs become subject to regulation—LDVR in the case of the Tailoring Rule.[256] Therefore, the EPA must establish that it is warranted in exempting sources that might emit over 100/250 tpy of GHGs, as long as these sources are not already subject to permitting under PSD or Title V for other pollutants. Under *Shalala*, the EPA's strongest argument is that Congress intended for the CAA to apply PSD and Title V to large industrial emitters that could afford the cost of permit requirements,

253. *See generally* Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,308-09 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

254. *See generally* Proposed Tailoring Rule, 74 Fed. Reg. 55,292; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514.

255. 40 C.F.R. § 51.166(b)(48)(iv) (2010).

256. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

and not to small, relatively insignificant sources. This rule serves that purpose by applying the permit requirements to GHG emissions for only those sources that would already have been subject to the permit requirements, thereby preventing any small sources from being considered "major sources" solely because of their GHG emissions. However, the rule also sets forth that these "anyway sources" will only be subject to PSD and Title V if they also emit GHGs at 75,000 tpy CO_2 e or more,[257] which certainly goes beyond the congressional intent that small sources should not be subject to PSD and Title V. By increasing the thresholds after eliminating the sources not otherwise subject to PSD or Title V, the EPA is exempting large sources that Congress intended to subject to the permit requirements. The EPA may however argue that Congress's intent is not clear, even after looking past the plain language, and therefore, under part two of *Chevron*, the court should defer to the EPA's Tailoring Rule as a permissible construction of the statute.

Because the doctrines of absurd results and administrative necessity are inherently similar, the EPA's dilemma with its administrative necessity overlaps with that of absurd results, as is demonstrated by the following section.

B. VALIDITY OF THE EPA'S APPROACH UNDER THE ADMINISTRATIVE NECESSITY DOCTRINE

The EPA's three-step administrative necessity process provides that when the agency is faced with prospective impossibility, it must first attempt to streamline administration while remaining within the statute.[258] Accordingly, the EPA "evaluated" streamlining techniques and determined that, while future options may exist, they are not presently viable because the EPA does not believe that it has enough time to organize an effective streamlining approach before PSD and Title V are triggered. [259] Thus, it moved to step two where it must prove remaining impossibility in spite of the attempted streamlining.[260]

Accordingly, the EPA offers some rather convincing evidence of

257. *See* 40 C.F.R. § 51.166(b)(48)(iv) (2010).

258. *See* Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,315 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

259. *See* Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,315-16 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,576-78 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71). The presumptive BACT is one of the streamlining techniques that the EPA believes it does not have sufficient time to implement.

260. *See* Proposed Tailoring Rule, 74 Fed. Reg. at 55,315-16; *see also* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,576-78.

impossibility. Some may argue that the EPA's heightened thresholds will not survive the judicial scrutiny exemplified in *Alabama Power*. Although the infeasibility argument from *Alabama Power* sounds similar to the claims in the Tailoring Rule, the two are actually different. In *Alabama Power*, the EPA claimed that it needed to exempt a certain category of sources from regulation because it was not *cost-effective*.[261] However, in the Tailoring Rule, the EPA claims that it needs to exempt a certain category of sources from regulation because it is *impossible* to regulate all of them.[262] Thus, as described above, it is important that the EPA provides sufficient evidence to support a claim that the exemption is necessitated by impossibility rather than infeasibility. Notably, the burden of proving impossibility is increased because the agency has not attempted to enforce the regulation before claiming that enforcement is impossible.[263]

However, the EPA has a fair chance of proving this impossibility by comparing its current resources to the estimated astronomical increase in application submissions brought about by GHG regulation. The fact that there is no precedent for a claim of impossibility with such high administrative burdens will probably figure favorably for the EPA's claim because it tends to show the excessiveness of the application request increase, which in turn reflects the probable impossibility. Thus, the EPA is likely to overcome the heightened burden associated with demonstrating impossibility before attempting implementation because handling such an excessive number of applications with the EPA's current administrative resources tends to prove impossibility on its face.

Although the EPA is probably capable of carrying its burden to prove impossibility, its Tailoring Rule may still be considered too "taxing" of a response to the prospective impossibility in light of *Sierra Club v. EPA*.[264] In other words, the EPA must also prove—similar to the absurd results requirement—that its response is no more than is necessary to remedy the prospective impossibility.[265] This is further demonstrated by *Public Citizen v. FTC*, in which the D.C. Circuit ruled that the remedy be narrow, including only those instances that are actually impossible, rather than be broad so as to include both impossible and infeasible instances.[266] Thus, the

261. Ala. Power Co. v. Costle, 636 F.2d 323, 355-56 (D.C. Cir. 1979).

262. *See* Proposed Tailoring Rule, 74 Fed. Reg. at 55,315-16; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,576-78.

263. *See Ala. Power Co.*, 636 F.2d at 359.

264. Sierra Club v. EPA, 719 F.2d 436, 463 (D.C. Cir. 1983).

265. *See, e.g.*, Public Citizen v. FTC, 869 F.2d 1541, 1556 (D.C. Cir. 1989). At times it may seem that this Comment conflates the doctrines of absurd results and administrative necessity. However, this is because the doctrines are inherently similar and naturally overlap.

266. *Public Citizen*, 869 F.2d at 1556.

EPA must show that its exemptions for sources not otherwise regulated and the 75,000/100,000 tpy CO_2 e thresholds do not include both impossible and infeasible instances.

Additionally, the EPA argues that when it applies administrative necessity to the pertinent sections of the CAA, the otherwise clear congressional intent becomes ambiguous.[267] The EPA presumes that Congress would not create a statute that is impossible to administer, yet it contends that a literal application of the CAA to GHGs is exactly that.[268] Therefore, the EPA reasons the congressional intent is ambiguous under part one of *Chevron*, and, under part two of *Chevron*, that the Tailoring Rule is a permissible construction of the statute.[269] However, this is merely the EPA's own interpretation. It is not rooted in any precedent. Although it is creative, it is doubtful that the court will accept this interpretation over the enormous body of case law analyzing the doctrine of administrative necessity.

Yet it would seem that the administrative necessity argument is actually stronger than the absurd results argument. The fact that it is actually impossible for the EPA to implement the allegedly obligatory regulation seems more influential than the fact that regulating certain small sources is absurd, especially when there is no concrete evidence demonstrating the point at which emissions of GHG become dangerous to human health.

C. THE VIABILITY OF THE TAILORING RULE UNDER ONE-STEP-AT-A-TIME

One-step-at-a-time supports the phase-in aspect of the Tailoring Rule. Application of this theory would allow the EPA to achieve full compliance with the congressional intent through incremental actions as more inclusive regulations become possible.[270] The EPA interprets the relevant case law as setting forth four requirements for the application of the one-step-at-a-time approach and asserts that it satisfies all four.[271]

267. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,576-77 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

268. *Id.*

269. *Id.*

270. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,544 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

271. *Id.* at 31,578. The four requirements are:

(1) The agency's ability to comply with a statutory directive depends on facts, policies, or future events that are uncertain;

(2) the agency has estimated the extent of its remaining obligation;

(3) the agency's incremental actions are structured in a manner that is reasonable in light

The four requirements are a product of the EPA's interpretation. Although they were developed in different cases, they are not necessarily recognized in the formulaic fashion advanced by the EPA. With this in mind, this section examines whether the EPA actually meets these four requirements. Even if the EPA does meet these requirements, the section will examine whether the theory applies to such a situation where full compliance is not reached until the distant future, if ever.

The EPA likely meets the first requirement because its ability to "comply with statutory directive depends on facts, policies, and future events that are uncertain."[272] Besides the fact that future events are never certain, the EPA does not yet know when or how the permitting authorities will gain the requisite increase in resources or when and how the streamlining methods will become effective and efficient.

The EPA may satisfy the second requirement because it conducted a considerable amount of research and analysis to estimate what its obligations would be under full compliance (e.g., an additional 81,000 PSD permits and six million Title V permits).[273] However, the EPA may not satisfy the third requirement because it may not have structured its incremental actions in a manner that is reasonable in light of the circumstances. The fact that the EPA has committed that no regulation will lower the thresholds below 50,000 tpy CO_2 e for at least six years seems indicate an unreasonable aspect of the incremental structure—what if some type of technology or streamlining method is developed in the next six years that enables a threshold reduction beyond this point? The EPA has already based part of its argument for one-step-at-a-time on the fact that the future events are uncertain, yet it made a rule that seems to predict the future by assuming that no event in the next six years will enable the thresholds to be reduced below 50,000 tpy CO_2 e.

Finally, it is doubtful the EPA meets the fourth requirement that the agency be on track to full compliance. Literal full compliance would be applying Title V and PSD to all sources that emit over 100/250 tpy of GHG. The EPA does not purport that it will apply Title V and PSD in that manner anytime in the future. Instead, the EPA argues that full compliance in this

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of the uncertainties; and

(4) the agency is on track to full compliance with the statutory requirements.

Id.

272. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,544 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

273. *See generally* Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,315 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,576.

situation does not actually mean meeting this threshold because such a threshold for GHG was not the intent of Congress when it enacted the CAA.[274] Even if the EPA is correct in this assertion, the Tailoring Rule does not clearly articulate what full compliance might be or how and when it might be achieved. The EPA cites *Grand Canyon* to support the fact that its full compliance—if ever really reached—may be far in the future.[275] However, in the twelve years since *Grand Canyon* was published, no other cases have cited it for this proposition. Also, in *Grand Canyon*, the rule in question purported to reach definite full compliance by a certain date.[276]

Even if the EPA's Tailoring Rule is invalid, perhaps the EPA can interpret the CAA differently to avoid the dilemma. Or perhaps it can employ alternative approaches that relieve the prospective burden on both the EPA and the sources that might be affected. The next several sections address these issues.

D. THE POSSIBILITY OF A PRESUMPTIVE BEST AVAILABLE CONTROL TECHNOLOGY PROGRAM: VIABILITY AND EFFECTS ON THE EPA'S ARGUMENTS FOR THE TAILORING RULE.

As noted above, the EPA believes that when the light-duty motor vehicle rule (LDVR) becomes effective, PSD and Title V will be triggered for GHGs.[277] Consequently, the EPA tends to characterize its sudden regulation of stationary source GHG emissions as obligatory.[278] However, some may argue that this interpretation of 42 U.S.C. § 7475 is incorrect.[279] If this was the case and the LDVR did not trigger PSD, then it would be unnecessary to raise major emitter thresholds because it would be unnecessary to begin regulating GHG emissions for stationary sources.

The PSD program is set forth under § 7470, et seq.[280] Section 7473 requires the PSD review of the emission of any pollutant for which a

274. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,578 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

275. *See id.* at 31,545.

276. Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 476-78 (D.C. Cir. 1998).

277. Proposed Tailoring Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514.

278. *See generally* Proposed Tailoring Rule, 74 Fed. Reg. 55,292; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514.

279. *See* Stephanie Seay, *Gas Industry Fears Impact of EPA Tailoring Rule*, ENERGY TRADER 12, Jan. 25, 2010; *NPRA Outlines Alternatives to EPA's GHG Regulations in Comments on PSD Rule*, CHEMWEEK'S BUSINESS DAILY, Dec. 28, 2009.

280. 42 U.S.C. § 7470 (2009).

National Ambient Air Quality Standard (NAAQS) has been set.[281] However, no NAAQS has been developed for GHGs. Therefore, they come under PSD review only through the BACT language in § 7475(a)(4): "No major emitting facility . . . shall be constructed . . . unless—(4) the proposed facility is subject to the best available control technology for *each pollutant subject to regulation under this chapter* emitted from, or which results from, such facility."[282] Hence, in regard to PSD requirements on GHGs, it is only the implementation of BACT that is triggered by the GHGs becoming subject to regulation under Title II. And because BACT is only one of four principal requirements under the PSD program, the entire PSD program is not triggered for GHGs by the mere finalization of the LDVR.[283]

Accordingly, one may propose that the permitting agencies simply enforce the rule that each applicable source has the best available control technology for GHGs.[284] The EPA could set a temporary, one-size-fits-all BACT (presumptive BACT) for different categories of GHG emissions under the doctrine of administrative necessity. For example, it could prescribe one type of control technology or practice for emitters of 250 to 1,000 tpy, and another for emitters of 1,000 to 5,000 tpy, et cetera. However, this approach would be side-stepping the clear description of BACT by § 169(3) as a case-by-case examination.[285] Nevertheless, courts would probably consider this a streamlining approach, taken when the typical approach would foil the objectives of the statute—which is the most often accepted form of administrative relief.[286] It seems that courts are more comfortable with a streamlining approach that differs slightly from the statutory command than they are with an approach that completely exempts certain regulation because, under the streamlining approach, the agency actually makes an attempt to regulate what the statute commands rather than electing to forgo regulation of a certain category altogether.[287] In other words, it seems that courts are more comfortable with the effectiveness for efficiency trade-off under a streamline approach than they are with the elimination of certain categories of sources.[288]

281. 42 U.S.C. § 7473 (2009).

282. 42 U.S.C. § 7475(a)(4) (2009) (emphasis added).

283. 42 U.S.C. § 7475. The other three requirements are an air analysis, an additional impacts analysis, and public involvement. *Id.*

284. *See* Seay, *supra* note 279; *NPRA Outlines*, *supra* note 279.

285. *See* 42 U.S.C. § 7479(3) (2006).

286. *See* Ala. Power Co. v. Costle, 636 F.2d 323, 358 (D.C. Cir. 1979). If the presumptive BACT is not considered a streamline approach, it is likely considered an approach necessitated by impossibility of implementation. Either way, it is certainly preferred over the categorical exemption that the EPA is currently proposing.

287. *See id.* at 357-59.

288. *See id.*

This presumptive BACT could also be tuned to address the absurd results concern of small emitters becoming subject to expensive regulations. The EPA could attempt to develop relatively inexpensive control technologies for such sources. The BACT could be something as simple as a work practice that the EPA determines will limit the maximum amount of pollution while remaining achievable to the average source in each category after considering energy, environmental, and economic impact common to each category. Courts may consider this approach to be within the confines of the statute because the statute requires the EPA to consider costs in determining whether the BACT is "achievable" for the source.[289]

If the EPA employed such a presumptive BACT program, then it could act accordingly while working with Congress to develop and pass an amendment to eliminate any interpretation that the GHG regulation of mobile sources triggers GHG regulation of stationary sources.[290] The agency could then avoid any challenges of attempting to impose a duty on the EPA to regulate GHG emissions of stationary sources through PSD and Title V permits. Many large industry participants expressed a desire for the EPA to act in such a manner.[291] However, the EPA instead interpreted the effect of Title II regulation in a manner that pushed the agency to stray considerably from the statute.

Although the presumptive BACT for GHGs may appear to be the solution, it does not address all of the absurd results and impossibility concerns. The EPA interprets the CAA in the following manner: when a PSD provision is triggered for a certain source, New Source Review pollutants, which the source emits at or above designated significance levels of a particular pollutant, become subject to PSD requirements for that source.[292] Hence, when the LDVR triggers BACT (a PSD requirement) for a certain source, that source becomes subject to PSD permit requirements for other non-GHG pollutants—NSR pollutants—to which it otherwise may not have been subject. In other words, the triggering of BACT for a source opens the door for imposition of additional PSD requirements of other pollutants on that source—the source may become subject to PSD permit requirements in addition to its NSR requirements.[293] Hence, in this manner,

289. *See* 42 U.S.C. § 7479(3).

290. *See* Seay, *supra* note 279; *NPRA Outlines*, *supra* note 279.

291. *See* Seay, *supra* note 279; *NPRA Outlines*, *supra* note 279.

292. Proposed Tailoring Rule, 74 Fed. Reg. 55,292, 55,298 (Oct. 27, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71). Significance levels are typically pollutant specific; for example, the significance level for nitrogen oxides are 40 tpy. Proposed Tailoring Rule, 74 Fed. Reg. at 55,298.

293. So although the LDVR may cause only BACT regulation on GHG for a source, it may cause the entire PSD to be effective on that source for other pollutants.

the GHG BACT trigger may indirectly affect the burden on that source. This interpretation is rather well settled.[294] Furthermore, because of the administrative deference set forth in *Chevron*, it is likely that the D.C. Circuit will accept such an interpretation. Thus, this interpretation weakens the assertion that a presumptive BACT program for GHGs will solve the absurd results and impossibility problems.

Nonetheless, the presumptive BACT program could still be employed to lessen the burden on emitters and the EPA. The fact remains that, although these sources may become subject to PSD requirements for other pollutants that are emitted in significant amounts, they do not have to fulfill all of the PSD requirements for GHGs. Furthermore, these other pollutants do not automatically come under PSD, but rather only when the source has the potential to emit the pollutants at or above their respective significance levels. Hence, instances may exist where BACT is triggered for GHGs emitted by a source, but other PSD requirements do not become effective on the non-GHG pollutants because that particular source does not have the potential to emit those pollutants at or above their respective significance levels. This shows that considerable uncertainty remains with regard to the actual increase on the demands of sources and the EPA's administrative resources.

Therefore, although the presumptive BACT solution may not remedy the issue, the possibility of its viability can serve to weaken the overall EPA argument that the Tailoring Rule is necessary, unless the EPA is able to convince the D.C. Circuit that the alternative presumptive BACT was impossible to effectuate before the PSD and Title V were triggered. The necessity of the tailoring is further examined in the next two sections, which discuss more alternatives.

E. DELAYING THE EFFECTIVE DATE OF THE LIGHT DUTY VEHICLE RULE

As certain industry leaders have asserted, even if the Title II regulation does trigger PSD, the EPA could have avoided considerable difficulty by simply waiting to finalize the LDVR until CAA amendments are passed, administrative resources are ramped up, or already circulating climate control legislation is passed.[295] Regulation of stationary emitters of GHGs may have a negative impact on the economy if many of these facilities will not be able to operate while awaiting permission to do so.

294. *See* Reconsideration of Interpretation, 75 Fed. Reg. 17004, 17017-19 (Apr. 2, 2010) (codified at 40 C.F.R. pts. 50, 51, 70, 71).

295. Dawn Reeves, *Industry Seeks Moderate Democrats' Support To Delay EPA Climate Rules*, INSIDE THE EPA, Dec. 18, 2009.

This problem is magnified by the current economic downturn that the country is experiencing. Consequently, pursuing such a rapid finalization of the Title II regulation, and thereby imposing a sudden triggering of PSD contravenes the purpose of the statute "to insure economic growth."[296] Therefore, the EPA should have reconsidered rushing into such a rule, especially because there did not appear to be any real obligation to finalize the Title II regulation within the next year.[297] However, the other side of this argument is advocated by environmentalists who place a premium on the protection of the environment to the detriment of economic concerns.[298] They would like the GHG regulation to begin sooner than later while it still has momentum because, presumably, if it were up to industry, they would never be prepared for regulation.[299]

Or, perhaps the EPA has an ulterior agenda to dig its heels into Congress to push the climate legislation through by showing how absurd the implementation of climate regulation would be under the authority of the CAA as it currently exists. If this is the case, it would be prudent for the EPA to interpret the CAA in a manner that would give it the best opportunity to show the impracticality of climate regulation under the present CAA. However, the EPA claims that it would prefer not to wait for Congress to pass climate legislation because it learned its lesson in the 1980s when Congress took many years to pass the 1990 amendments to the CAA.[300]

F. OTHER ALTERNATIVE APPROACHES AFTER PSD TRIGGER

At this point, it should be clear that the costs of regulating GHGs are enormous, but the benefit is largely unknown. Uncertainty remains regarding the levels at which GHG emissions truly impact global warming and how much global warming will truly affect us. However, this uncertainty does not support increasing thresholds by 1,000 times the amount clearly commanded in the statute. Thus, alternative approaches should be examined closely.

By regulating only those sources that have the potential to emit over 75,000/100,000 tpy CO_2 e, the EPA will have effectively exempted from regulation all emitters of GHGs below this threshold. Because courts disfavor this form of administrative relief, the EPA may want to consider

296. 42 U.S.C. § 7470(3) (2006).

297. Reeves, *supra* note 295.

298. *See Air Pollution Standards for Stationary Sources—Next Moves*, 40 ENVTL. L. REP. & NEWS ANALYSIS 10012, 10013 (Jan. 2010).

299. *See id.*

300. *See id.*

additional alternative approaches. One alternative approach would be to extend the time periods for which the EPA has to review permit applications so that it would be able to review the applications with its current administrative resources. In the meantime, the EPA could commence building its resources to a level capable of reviewing the increase in a manner consistent with the statute. Once the EPA has sufficiently increased its resources, it could then reduce the time period back to the duration provided in the statute. Courts would probably look more favorably on this approach because it would not be a categorical exemption from the clear command of the statute. Rather, it would likely be considered an alternative approach brought about by practical considerations rendering it impossible for the agency to carry out its statutory mandate, as discussed in *Natural Resources Defense Council, Inc. v. Train.*[301]

Though this approach is favored over categorical exemptions, the EPA would still have to overcome challenges. First, the EPA would have to prove that it would be impossible to review all permits within the statutory duration. It would carry an even heavier burden of proving the alleged impossibility because it has not yet attempted to implement what it claims to be "impossible." But the EPA has a fair chance of proving this because, as noted previously, the lack of impossibility precedent for such a prospective dramatic increase in regulations tends to show impossibility on its face.

Also, by extending the duration for review, the EPA may be in danger of undermining one of the purposes of the PSD program—to ensure economic growth while limiting air pollution. If the EPA extends the application review period, it will hinder the ability of stationary sources to begin or continue operation. If sources cannot operate, many jobs, businesses, and consumers who are dependent on the operation of the source are adversely affected. Thus, economic growth would be inhibited rather than ensured. Consequently, if the EPA took this approach, it should be conscious of this purpose when searching for a happy medium between the economic and impossibility concerns. Nevertheless, because extending the duration for review does not stray as far from the statute as a categorical exemption, the D.C. Circuit would probably be more accepting of this approach.

301. *See* Nat'l Res. Def. Council, Inc. v. Train, 510 F.2d 692, 713 (D.C. Cir. 1974). The court considered the EPA's inability to meet certain statutory deadlines of the Clean Water Act. *Id.* The EPA asserted that it would not be able to "publish the great majority of guidelines" by the date mandated under the statute, and the court did not accept this argument. *Id.* Instead, the *Train* court recognized that constraints on the EPA may have made the publication infeasible by the deadline, but not impossible. *Id.*

Another alternative approach would be to allow sources to operate or for construction to begin from the end of the period for review until the agency can completely review the application. This would not be a blanket approach; instead, it would be on an as-needed basis. As such, this method would likely be more readily accepted by the D.C. Circuit. Also, because the EPA would not give temporary permits until the review period has expired, it would limit the amount of time that these particular sources would emit unregulated pollution. However, considering the practical problems that would arise when significant construction is completed on a facility and the application is later rejected, this approach may not be so attractive.

IV. CONCLUSION

Strong arguments exist for and against the EPA's Tailoring Rule. The rule may eventually come under the scrutiny of the D.C. Circuit. Although it seems that the odds of the court accepting this rule are mostly unpredictable, it is slightly more likely that a court will reject the EPA's proposed rule.

As for the absurd results argument, the court will likely agree that the result of a literal reading of the CAA is impractical. However, the court will probably rule that such a large exemption is too drastic of a reaction to the blemishes in the statutory implementation. Additionally, the court will probably decide that the evidence of congressional intent behind the CAA, although strong enough to show a literal reading is demonstrably at odds with the congressional intent, is not strong enough to necessitate such a dramatic increase in thresholds as the Tailoring Rule sets forth.

Although the court will probably recognize and note the EPA's valiant effort with its administrative necessity argument, it is likely that it too will be rejected. Considering the less sweeping approaches explored above, as well as those the court may find, it is doubtful that the EPA's exemption could survive the scrutiny of the D.C. Circuit. Although the agency's intentions are commendable, the court is unlikely to cast aside established rules of statutory interpretation in favor of good, practical intentions alone.

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