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The Future of the Greenhouse Gas Tailoring Rule

by James R. Farrell

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Editors' Summary

On January 2, 2011, EPA's much-anticipated prevention of significant deterioration and Title V Greenhouse Gas Tailoring Rule took effect, expanding the reach of the Clean Air Act and creating a phased-in approach to greenhouse gas regulation that initially targets the nation's largest emitters but will gradually encompass additional sources. Numerous challenges threaten the rule's long-term viability, including a regulatory alternative that could gain traction in the continued absence of a legislative response to the issue of climate change.

Many have questioned whether regulation of greenhouse gas (GHG) emissions in the United States would ever become a reality; now, the question is not whether but for how long. Although the U.S. Supreme Court's 2007 ruling in *Massachusetts v. U.S. Environmental Protection Agency (EPA)*[1] deserves much of the credit for EPA's aggressive response to global warming, congressional inaction on comprehensive climate change legislation ultimately set in motion the agency-driven agenda that has led our country to an historic yet extremely controversial crossroads in environmental regulation. The Supreme Court's conclusion that GHGs constitute air pollutants, as defined by the Clean Air Act (CAA),[2] required EPA to determine whether GHG emissions from motor vehicles cause or contribute to climate change that is reasonably anticipated to endanger the public health or welfare; however, the Court's requirement for regulatory action did not preclude the possibility of a legislative response.

Despite the dim prospects for comprehensive climate change legislation today in the wake of the turbulent 2010 mid-year elections, the political landscape appeared promising only months before the congressional balance of power shifted in early November. On June 26, 2009, the U.S. House of Representatives had narrowly passed the American Clean Energy and Security Act of 2009 (the Waxman-Markey Bill) by a vote of 219-212.[3] The Waxman-Markey Bill featured a cap-and-trade component to regulate GHG emissions, and the bill would have required a 17% reduction in GHG emissions from 2005 levels by 2020, and an 83% reduction by 2050.[4] In the U.S. Senate, Sens. John Kerry (D-Mass.), Joseph Lieberman (I-Conn.), and Lindsay Graham (R-S.C.) had been hard at work on a comparable climate change bill dubbed the American Power Act.[5] In early 2010, it appeared that the American Power Act would be able to attract bipartisan support, due in large part to its provision for expanded offshore drilling, an early and significant concession by the bill's sponsors. But on a crowded stage of competing political priorities, the American Power Act was never able to steal the spotlight. Shortly after the bill's introduction on May 12, it languished on the floor of the Senate, overshadowed by more urgent national headlines, ranging from issues related

1. 549 U.S. 497, 37 ELR 20075 (2007).
2. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
3. *See, e.g.*, John M. Broder, *House Passes Bill to Address Threat of Climate Change*, N.Y. Times, June 26, 2009, http://www.nytimes.com/2009/06/27/us/politics/27climate.html?scp=1&sq=house%20passes%20aces%202009&st=Search.
4. *Id.*
5. *See, e.g.*, Matthew Daly, *Bill Aimed at Stemming Global Warming, Create Jobs*, Bus.Wk., May 12, 2010, http://www.businessweek.com/ap/financialnews/D9FLI66O1.htm.

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to the lingering recession to public outrage over the Gulf oil spill.[6]

In the end, the legislative response to climate change that had once appeared likely—if not imminent—never materialized. In contrast, EPA has wasted no time since *Massachusetts* engaging in regulation-making intended to address climate change. The culmination and cornerstone of this fervent EPA activity is EPA's prevention of significant deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule (the Tailoring Rule),[7] which ushered in a new and hotly contested era of GHG regulation on January 2, 2011. The Tailoring Rule's phased-in approach to regulation means that the regulatory net it casts will gradually widen with time, initially targeting those stationary sources known to be the largest emitters of GHGs but eventually encompassing some smaller sources as well.

Part I of this Article provides a chronological summary of EPA's significant, post-*Massachusetts* regulatory activity that led to promulgation of the Tailoring Rule, and it includes important future dates upon which the Tailoring Rule's regulatory reach is expected to expand. Part II takes a closer look at the mechanics of the Tailoring Rule, focusing in particular on details of Steps 1 and 2 of the rule's phased-in implementation process. Because the Tailoring Rule's phased-in approach is intended not only to give regulated entities ample time to prepare for the rule's new requirements, but also to ease the administrative burden that would have otherwise resulted from an immediate, full-scale implementation of the rule, Part II also examines the progressive impact of Steps 1 and 2 on the state permitting authorities that will ultimately be responsible for implementing the Tailoring Rule. Part III briefly explores possible congressional activity that could threaten the Tailoring Rule, and it also reviews recent and ongoing litigation that intends to challenge not only the Tailoring Rule, but also several of the regulations and findings that preceded the rule. Finally, Part IV offers some additional thoughts about a more onerous regulatory alternative that could make the Tailoring Rule's current permitting burdens and compliance requirements appear benign in comparison.

I. Evolution of the Tailoring Rule

Before highlighting the history and prospective future of the Tailoring Rule, a cursory review of the PSD and Title V programs of the CAA is necessary, since both programs will play prominent roles during the Tailoring Rule's phased-in implementation, and they will eventually define the scope of the rule's overall impact.

A. PSD

The PSD and nonattainment new source review (NSR) programs of the CAA are preconstruction review and permitting programs, and they are collectively referred to as the major NSR program.[8] PSD applies to "major stationary sources"[9] and existing sources proposing a "major modification,"[10] and PSD requires these sources to apply best available control technology (BACT).[11] The Tailoring Rule triggers PSD but not the nonattainment NSR program, because the nonattainment NSR program only applies in nonattainment Air Quality Control Regions (AQCRs); since there are no national ambient air quality standards (NAAQS) for any of the six, well-mixed GHGs,[12] there are also no AQCRs classified as nonattainment for GHGs, and, therefore, the nonattainment NSR program (currently) has no application to GHG emissions.[13] On the other hand, because the PSD program applies in both "attainment"[14] and "unclassifiable"[15] AQCRs, and because all AQCRs are currently unclassifiable for GHGs on account of GHGs not having been listed by the EPA Administrator as criteria pollutants under the NAAQS program, the PSD program has broad application to GHGs.

B. Title V

Although "the [T]itle V program requires major sources (defined and interpreted by EPA to include sources that emit or have a PTE [potential to emit] of 100 tpy [tons per year] of any pollutant subject to regulation) and cer-

6. *Id.*
7. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514, 31520 (June 3, 2010) [hereinafter Tailoring Rule].
8. *See generally id.* (providing an overview of the PSD program).
9. *Id.* PSD defines a "major stationary source" as:
   > any source belonging to a specified list of 28 source categories which emits or has the potential to emit 100 tpy [tons per year] or more of any pollutant subject to regulation under the CAA, or any other source type which emits or has the potential to emit such pollutants in amounts equal to or greater than 250 tpy.

   Id.
10. *Id.* PSD defines a "major modification" as one
    > which occurs: (1) [w]hen there is a physical change in, or change in the method of operation of, a 'major stationary source;' (2) the change results in a 'significant' emission increase of a pollutant subject to regulation (equal to or above the significance level that EPA has set for the pollutant in 40 CFR 52.21(b)(23)); and (3) there is a 'significant net emissions increase' of a pollutant subject to regulation that is equal to or above the significance level (defined in 40 CFR 52.21(b)(23)).

    Id.
11. *Id.* ("BACT . . . is determined on a case-by-case basis taking into account, among other factors, the cost effectiveness of the control and energy and environmental impacts.").
12. *Id.* ("There is no NAAQS for CO_2 [carbon dioxide] or any of the other well-mixed GHGs, nor has EPA proposed any such NAAQS; therefore, unless and until we take further such action, we do not anticipate that the nonattainment NSR program will apply to GHGs."). The six well-mixed GHGs "are: CO_2, methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6)," and they constitute the air pollutant referred to in the Tailoring Rule as GHGs. *Id.* at 31519.
13. See Part IV of this Article, for a brief discussion of the potential future application of NAAQS to GHGs.
14. Tailoring Rule, *supra* note 7, at 31520.
15. *Id.*

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tain other sources to apply for operating permits,"[16] it does not impose any substantive requirements of its own; rather, it requires each source to include in its permit all "'applicable requirements'"[17] imposed by other CAA programs to which the source is subject. A source subject to Title V must apply for an operating permit within one year of first becoming subject to permitting,[18] and typical permitting requirements include the following: "(1) emissions limitations and standards to ensure compliance with all applicable requirements; (2) monitoring, recordkeeping, and reporting requirements, including submittal of a semiannual monitoring report and prompt reporting of deviations from permit terms; (3) fee payment; and (4) annual certification by a responsible official."[19]

C. Tailoring Rule Time Line: Origins and Outlook

The following time line depicts the dynamic nature of the Tailoring Rule, highlighting past events that played a key role in EPA's recent promulgation of the Tailoring Rule, as well as future dates upon which the regulation's reach will continue to expand.

April 2, 2007: *Massachusetts v. EPA*

- Concluding that "greenhouse gases fit well within the [Clean Air] Act's capacious definition of 'air pollutant,'" the Supreme Court held that "EPA has statutory authority to regulate emissions of such gases from new motor vehicles."[20]
- Having confirmed EPA's authority to regulate GHGs from new motor vehicles, the Court then instructed EPA to complete its statutorily required "endangerment" and "cause/contribute to" findings to determine whether GHG emissions from new motor vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare—findings which, if made in the affirmative, would transform EPA's authority to regulate GHGs from new motor vehicles into a duty to regulate those emissions.[21]

December 18, 2008: Johnson Memo/PSD Interpretive Memo

- In the final days of the Agency's leadership by then-Administrator Stephen L. Johnson, Johnson issued "The Johnson Memo," or "PSD Interpretive Memo," (EPA's Interpretation of Regulations That Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program).[22] Describing the process by which a previously unregulated pollutant can become "subject to regulation" and, consequently, subject to PSD and Title V permitting requirements, "[t]he [PSD] Interpretive Memo established that a pollutant is 'subject to regulation' only if it is subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant (referred to as the 'actual control interpretation')."[23] By issuing this interpretation, EPA clarified that "pollutants subject solely to monitoring or reporting requirements are not 'regulated NSR pollutants' that require emissions limitations based on levels that can be achieved using BACT."[24]

April 17, 2009: EPA publishes its proposed Endangerment and Cause or Contribute Findings (the Endangerment Finding).[25]

October 27, 2009: EPA publishes the proposed Tailoring Rule,[26] which includes a proposal to exclude small sources from GHG permitting for at least six years.

- The six-year exclusion period contemplates the following:
  - a five-year study of the "permitting burden" associated with subjecting smaller sources to GHG regulation as well as "the effect of streamlining measures or techniques in reducing this burden"[27]; and
  - one year to finalize another regulation that may, depending on the results of the five-year study, phase in smaller sources.[28]
- NOTE: EPA finalized this six-year exclusion for small sources in the final Tailoring Rule, which formally announces an exclusion period for small sources that ends on April 29, 2016.[29]

16. *Id.* at 31521.
17. *Id.*
18. *See id.* ("The application must include, among other things, identifying information, a description of emissions and other information necessary to determine applicability of requirements and information concerning compliance with those requirements.").
19. *Id.*
20. Massachusetts. v. EPA, 549 U.S. 497, 532, 37 ELR 20075 (2007).
21. *Id.* at 532-33 ("While the statute does condition the exercise of EPA's authority on its formation of a 'judgment,' that judgment must relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'") (citations omitted); *see also id.* at 533:

    > If EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles . . . EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.

22. Memorandum from Stephen L. Johnson, Adm'r, EPA, to EPA Reg'l Adm'rs (Dec. 18, 2008), *available at* http://www.epa.gov/region7/air/nsr/nsrmemos/co2_psd.pdf [hereinafter PSD Interpretive Memo].
23. *See* Tailoring Rule, *supra* note 7, at 31521.
24. PSD Interpretive Memo, *supra* note 22, at 2.
25. *See* Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886 (Apr. 24, 2009).
26. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule, 74 Fed. Reg. 55292 (Oct. 27, 2009).
27. Tailoring Rule, *supra* note 7, at 31524.
28. *See id.*
29. *See id.* at 31524-25.

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December 7, 2009: EPA Administrator signs the Endangerment Finding.[30]

- This finding, in which the Administrator confirmed greenhouse gas emissions from new motor vehicles cause or contribute to air pollution reasonably anticipated to endanger the public health or welfare, imposed no substantive requirements; however, the Endangerment Finding functioned as a vital prerequisite to EPA's finalizing the Light Duty Vehicle Rule (LDVR or the Tailpipe Rule) on April 1, 2010.[31]

December 28, 2009: Expiration of the 60-Day Comment Period for the Proposed Tailoring Rule

March 29, 2010: EPA clarifies the PSD Interpretive Memo, giving rise to the Triggering Rule or Timing Rule.

- In this notice, which was published on April 2, 2010, but made effective as of March 29, 2010, EPA expands upon the Agency's earlier "actual control interpretation" of the phrase "subject to regulation." (See December 18, 2008, time line entry.)
  - NOTE: Like PSD's permitting requirements, Title V's permitting requirements apply to pollutants "subject to regulation" (for major stationary sources or existing sources proposing major modifications).
- Explaining that the "actual control interpretation" is the most appropriate interpretation of the phrase "subject to regulation," EPA then clarifies that the actual control requirement is fulfilled, thereby triggering the applicability of CAA permitting requirements, when the CAA provision or regulation imposing that control "takes effect."[32]
  - In doing so, EPA effectively announced that its forthcoming Tailpipe Rule, which was finalized on April 1, 2010, and "t[ook] effect" on January 2, 2011,[33] would not only have the originally intended, direct effect of imposing on manufacturers of new motor vehicles tougher emissions and fuel economy standards, but it would also have, whether originally intended or not, an even greater indirect effect: it would, in conjunction with the Tailoring Rule's adoption of the "takes effect" interpretation and "actual control interpretation" of the phrase "subject to regulation," trigger and broaden the applicability of CAA permitting requirements to other sources of GHG emissions, including stationary sources.
  - EPA was able to make this leap from the relatively restricted regulation of GHG emissions from new motor vehicles to the far more expansive regulation of GHG emissions from other sources because the Tailpipe Rule, when it "t[ook] effect" on January 2, 2011, imposed actual control of GHG emissions, thereby causing GHGs to be "subject to regulation" and, by extension, subject to CAA permitting requirements.

April 1, 2010: EPA publishes the final Tailpipe Rule.

June 3, 2010: EPA publishes the final Tailoring Rule.

- The Tailoring Rule describes the phased-in approach to regulation of GHG emissions from stationary sources that will be gradually implemented through Step 1 (which commenced January 2, 2011, and extends through June 30, 2011; see Part II, for analysis of Step 1) and Step 2 (which will commence July 1, 2011, and extend through June 30, 2013; see Part II, for analysis of Step 2).
  - The Tailoring Rule also hints at the possibility of expanding the rule to smaller sources through a potential Step 3 and Step 4, both of which are described in greater detail beginning with the July 1, 2012, time line entry.
- The Tailoring Rule finalizes the six-year exclusion period for small sources that was originally announced in the proposed rule.[34] In the final rule, however, EPA narrows the rule's application to small sources by increasing the minimum threshold level, or floor, below which the rule does not apply. Whereas the proposed rule intended to regulate sources that emit or have the PTE ≥25,000 tpy carbon dioxide equivalent (CO_2e)[35] and also would have applied to modification projects that increased CO_2e emissions by 10,000-25,000 tpy CO_2e,[36] the final rule commits

30. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009).
31. *See supra* notes 21-22 and accompanying text (describing the Endangerment Finding's relevance to EPA's discretion to regulate GHGs from new motor vehicles); *see also infra* notes 32-33 and accompanying text (describing the Tailoring Rule's connection to and dependence upon the Tailpipe Rule).
32. *See* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule, 75 Fed. Reg. 17004, 17006 (Apr. 2, 2010):
    > EPA has concluded that the "actual control interpretation" is a permissible interpretation of the CAA and is the most appropriate interpretation to apply given the policy implications. However, EPA is refining its interpretation in one respect to establish that PSD permitting requirements apply to a newly regulated pollutant at the time a regulatory requirement to control emissions of that pollutant "takes effect" (rather than upon promulgation or the legal effective date of the regulation containing such a requirement).
33. The Tailpipe Rule "takes effect" on January 2, 2011, because that is the first date upon which a 2012 model-year vehicle may be sold in the United States, so long as that vehicle complies with the Tailpipe Rule's GHG emissions standards. In other words, the Tailpipe Rule "takes effect" on January 2, 2011, because, in recognition of EPA's "actual control interpretation" of "subject to regulation," January 2, 2011, is the date of the Tailpipe Rule's actual control of GHG emissions from new motor vehicles.
34. *See supra* notes 26-29 and accompanying text.
35. *See infra* note 56 (describing the Tailoring Rule's use of CO_2e as the common metric for GHG emissions).
36. *See* Tailoring Rule, *supra* note 7, at 31518.

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to a floor of 50,000 tpy CO_2e throughout this six-year period.[37]

August 2, 2010: By this date, states are required to notify EPA whether or not they will adopt EPA's implementation approach.[38]

- For a state choosing not to follow EPA's implementation approach, EPA explained that it would narrow federal approval of the state's program so that sources below the size thresholds specified in the Tailoring Rule would not be obligated to hold Title V or PSD permits until the state either adopted the Tailoring Rule or demonstrated how it could cover smaller GHG sources.[39]

January 2, 2011: The Tailpipe Rule "takes effect," triggering applicability of the PSD and Title V programs to GHG emissions.[40]

January 2, 2011-June 30, 2011: The phase-in process commences with Step 1 of the Tailoring Rule. (See Part II, for analysis of Step 1.)

July 1, 2011-June 30, 2013: The phase-in process continues and expands with Step 2 of the Tailoring Rule. (See Part II, for analysis of Step 2.)

July 1, 2012: On this date, EPA must publish a regulation, proposing or soliciting comment on a *potential* Step 3 of the Tailoring Rule.

- This regulation-making will not only define what a potential Step 3 might look like, it will, more importantly, announce whether or not there will even be a Step 3.
  - EPA may conclude it has, through Steps 1 and 2, already expanded the PSD and Title V programs sufficiently, i.e., applied the programs to the maximum number of sources necessary, to effectuate congressional intent, and, therefore, dispense with any requirement of phasing-in additional sources through subsequent steps; this would officially terminate the tailoring process.[41]
- As EPA contemplates the wisdom of expanding PSD and Title V applicability to additional sources through a potential Step 3, it will use the July 1, 2012, regulation-making to address concerns about the potential permitting burden that would result from an additional Step 3 phase-in.
  - In an attempt to identify ways to ease the administrative burden on permitting authorities, the rule will consider the effectiveness of the following: (1) streamlining procedures; (2) increased resources; and (3) experienced personnel who have worked through the challenges of implementing Steps 1 and 2 and may, therefore, be able to maximize existing resources for those permitting authorities lacking access to additional resources.[42]
- This regulation-making may result in the permanent exclusion of a category of sources from PSD or Title V requirements.[43]
- This regulation-making may propose lower thresholds for PSD and Title V applicability; however, EPA's discretion to lower the major source threshold and significance level for CO_2e will be limited by the 50,000 tpy CO_2e floor it established in the Tailoring Rule.[44]
- Assuming EPA eventually decides to implement a floor lower than 50,000 tpy CO_2e, it cannot do so before April 30, 2016.[45]

July 1, 2013-April 29, 2016: *Potential* Step 3 of the Tailoring Rule[46]

April 30, 2015: Conclusion of EPA's Five-Year Study of Smaller Sources; Possible Consideration of a *Potential* Step 4 of the Tailoring Rule

37. *See* Tailoring Rule, *supra* note 7, at 31524 ("We are finalizing the 6-year exclusion[ ] and . . . establishing that in no event will sources below 50,000 tpy CO_2e be subject to PSD or [T]itle V permitting during the 6-year period, nor will modifications be subject to PSD unless they increase emissions by 50,000 tpy CO_2e or more.").
38. *See, e.g.*, Letter from F. Allen Barnes, Dir., Envtl. Prot. Div. of the Ga. Dep't of Natural Res., to A. Stanley Meiburg, Acting Reg'l Adm'r, EPA, Region IV (Aug. 2, 2010), http://www.epa.gov/NSR/2010letters/ga.pdf (confirming the Georgia Environmental Protection Division's intent to take necessary action to adopt EPA's proposed implementation approach by January 1, 2011).
39. *See* Tailoring Rule, *supra* note 7, at 31518.
40. *See supra* notes 22-23, 32 and accompanying text (summarizing EPA's interpretation of the phrase "subject to regulation," which ultimately establishes January 2, 2011, as the date of applicability of PSD and Title V permitting requirements to GHGs).
41. *See, e.g.*, Tailoring Rule, *supra* note 7, at 31524:
    > If we promulgate a permanent exclusion, we may conclude that by that time, we will have brought into the PSD and [T]itle V programs the full set of sources that would be consistent with congressional intent . . . and, under those circumstances, we would find that such a rule brings the tailoring process to a close.
42. *See id.*
43. *Id.*:
    > [W]e may make a final determination that under the 'absurd results' doctrine, PSD and/or [T]itle V do not apply to a set of GHG sources . . . that are too small and relatively inconsequential in terms of GHG contribution. Another type of such exclusion for the [T]itle V program could be for sources that would otherwise be required to obtain an "empty permit," that is . . . one that would not contain any applicable requirements because there are none that apply to the source.
44. *See supra* note 37 and accompanying text.
45. *See* Tailoring Rule, *supra* note 7, at 31524 ("The exclusion will last until . . . April 30, 2016. This does not necessarily mean we will cover sources below this level on April 30, 2016. It simply means that the provision we are adopting would assure that EPA does not cover such sources any sooner than that.").
46. *See supra* notes 41-45 and accompanying text.

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- With another regulation-making on this date, EPA will formally conclude its five-year study of the permitting burdens associated with subjecting smaller sources to GHG regulation, as well as the effect of streamlining measures or techniques in reducing this burden.[47]
  - NOTE: This five-year study is part of the six-year period during which EPA has excluded small sources from GHG permitting.[48]
- This date also represents the start of a one-year period that will conclude with the final regulation-making that is required by April 30, 2016, for the potential phase-in of smaller sources (as appropriate based on the results of the five-year study).[49]

April 29, 2016: Final Day of the Tailoring Rule's Six-Year Exclusion Period for Small Sources[50]

April 30, 2016: *Potential* Step 4 of the Tailoring Rule
- This is the earliest date upon which small sources might become subject to GHG permitting.[51]
- This step is contingent upon the following:
  - the July 1, 2012, regulation-making, which may announce that Steps 1 and 2 were sufficiently broad to fulfill EPA's obligation to regulate GHGs under the CAA and, therefore, bring the tailoring process to a close, i.e., there would be no Step 4, because there will have been no Step 3[52]; and
  - the results of EPA's five-year study, which will have thoroughly assessed the need, or lack thereof, to subject smaller sources to CAA permitting.[53]
- This step could result in the implementation of an additional phase-in for smaller sources, i.e., upon the expiration of the six-year exclusion period for small sources, EPA would now have discretion to establish a major source threshold and significance level below the 50,000 tpy CO_2e floor that it had committed to uphold throughout the six-year exclusion period; on the other hand, it could announce a permanent exclusion for a category of sources based on *Chevron* analysis[54] in the context of the "absurd results" doctrine.[55]

As the previous time line confirms, the Tailoring Rule's brief history has been one of rapid evolution, and the regulation remains a work in progress. *Massachusetts* sparked a chain reaction of agency regulation-making that ultimately gave rise to the Tailoring Rule, and the momentum that produced the regulation will continue to redefine it as Step 1 gives way to a more expansive Step 2 on July 1, 2011, and as EPA considers applying the regulation to smaller stationary sources through potential but as-yet-undefined Steps 3 and 4.

II. Tests to Determine PSD and Title V Applicability Under Steps 1 and 2 of the Tailoring Rule

A. *PSD*

1. Step 1 (January 2, 2011-June 30, 2011)

1. Is the source already subject to PSD based on its emissions of another air pollutant?

47. *See* Tailoring Rule, *supra* note 7, at 31516 ("[W]e are establishing an enforceable commitment that we will . . . [c]omplete a study by April 30, 2015, to evaluate the status of PSD and [T]itle V permitting for GHG-emitting sources, including progress in developing streamlining techniques . . . .").
48. *See supra* notes 26-29 and accompanying text (explaining that this exclusion was first described in the proposed Tailoring Rule and later finalized in the final Tailoring Rule).
49. *See* Tailoring Rule, *supra* note 7, at 31524 ("The exclusion will last until we take the action . . . to address smaller sources, which is required by April 30, 2016."); *see also id.* at 31516 ("That rulemaking may also consider additional permanent exclusions based on the 'absurd results' doctrine, where applicable.").
50. *Id.* at 31524.
51. *See supra* note 49 and accompanying text.
52. *See supra* notes 41-45 and accompanying text.
53. *See supra* notes 48-49 and accompanying text.
54. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 14 ELR 20507 (1984):
> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, 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.

(Citations and footnotes omitted.)
55. Even if the CAA makes it clear that Congress intended to regulate GHG emissions from smaller sources, EPA can invoke the "absurd results" doctrine to avoid a literal interpretation of the statute, so long as EPA's interpretation mirrors congressional intent closely enough to avoid the absurd result that would otherwise have resulted from a strict literal interpretation. *See* Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1068 (D.C. Cir. 1998):
> The rule that statutes are to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not reflect the "unambiguously expressed intent of Congress," and thus to overcome the first step of the *Chevron* analysis. But the agency does not thereby obtain a license to rewrite the statute. When the agency concludes that a literal reading of a statute would thwart the purposes of Congress, it may deviate no further from the statute than is needed to protect congressional intent. Of course, the agency might be able to show that there are multiple ways of avoiding a statutory anomaly, all equally consistent with the intentions of the statute's drafters (and equally inconsistent with the statute's text). In such a case, we would move to the second stage of the *Chevron* analysis, and ask whether the agency's choice between these options was "based on a permissible construction of the statute." Otherwise, however, our review of the agency's deviation from the statutory text will occur under the first step of the *Chevron* analysis, in which we do not defer to the agency's interpretation of the statute.

(quoting Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 14 ELR 20507 (1984) (citations and footnotes omitted)).

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- If "no," the source is *not* subject to PSD for GHG emissions.[56]
- If "yes," then the source *may* now also be subject to PSD for its GHG emissions, but only if it is a newly constructed project that results in an increase in GHG emissions (or, in the case of modifications, a net increase) that is
  - ≥ 0 tpy (on a mass basis—no Global Warming Potentials (GWPs) applied); and
  - ≥ 75,000 tpy (on a CO_2e basis).

2. Step 2 (July 1, 2011-June 30, 2013)

1. All Step 1 sources are still covered.

+

2. "Major sources" of GHGs (a newly defined, Step 2-created category) are also covered.
   - Even if a source was not previously subject to PSD for GHG emissions under Step 1 based on its emissions of another pollutant, it will now be subject to PSD for GHG emissions based on its GHG emissions alone if the source qualifies as a "major source" of GHGs, meaning that it emits or has the PTE GHGs in quantities:
     - on a mass basis (no GWPs applied),
       - ≥ 100 tpy if it is 1 of the 28 major emitting facilities; or
       - ≥ 250 tpy for all other sources; and
     - on a CO_2e basis,
       - ≥ 100,000 tpy CO_2e.

Is the source a major source of GHGs?

- If "yes," the source is subject to PSD for GHG emissions and must conduct a BACT review for those emissions.
- If "no," the source may still be subject to PSD for GHG emissions. (See next step.)

+

3. Modification projects at major stationary sources (those major for non-GHG regulated pollutants) are covered *if* the net GHG emissions increase resulting from the project is
   - > 0 tpy (on a mass basis—no GWPs applied); and
   - ≥ 75,000 tpy (on a CO_2e basis).

Is the source a major stationary source whose modification project exceeds the GHG significance levels above?

- If "no," the source is *not* subject to PSD for GHG emissions.
- If "yes," the source is subject to PSD for GHG emissions and must conduct a BACT review for those emissions.

B. Title V

1. Step 1 (January 2, 2011-June 30, 2011)

1. Is the source already subject to Title V based on its emissions of another air pollutant?
   - If "no," the source is *not* subject to Title V for GHG emissions.
   - If "yes," the source is subject to Title V for GHG emissions and must now incorporate applicable requirements related to its GHG emissions into its Title V permit, e.g., GHG BACT requirements from a PSD process, and comply with associated monitoring, recordkeeping, and reporting.

2. Step 2 (July 1, 2011-June 30, 2013)

1. All Step 1 sources are still covered.

+

2. Even if a source was not previously subject to Title V for GHGs under Step 1 based on its emissions of another pollutant, it *may* now be subject to Title V for GHGs based on its GHG emissions alone, but only if the source emits or has the PTE GHG emissions
   - ≥ 100 tpy (on a mass basis—no GWPs applied); and
   - ≥ 100,000 tpy (on a CO_2e basis).

C. Steps 1 and 2: Analysis and Implications

1. Step 1 (January 2, 2011-June 30, 2011)

The key distinction between Step 1 and Step 2 is that, under Step 1, sources that were not already subject to PSD

56. *See generally* Tailoring Rule, *supra* note 7, at 31522 (defining each of the relevant GHGs and explaining the process by which their emissions are computed). The Tailoring Rule defines the GHG air pollutant as the aggregate sum of the six well-mixed GHGs (CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6), and it uses a common metric (CO_2e) for the emissions threshold, so that each of the six constituent gases can be evaluated on the same basis. *Id.*

> GHG emissions are calculated on a CO_2e basis by multiplying the mass emissions of any of the six GHGs . . . by that gas's [respective] GWP [Global Warming Potential—GWP values were codified in EPA's mandatory GHG reporting rule] and then summing the CO_2e for each GHG emitted by the source. This sum, expressed in terms of tpy CO_2e, is then compared to the applicable CO_2e-based permitting threshold [or significance level] to determine whether the source is subject to PSD and [T]itle V requirements. In addition . . . the statutory mass-based [*i.e.*, before applying GWP] thresholds [of the CAA] . . . continue to apply.

Id. Therefore, it is possible that a source could trigger permitting on a CO_2e basis but not on a mass basis. Finally, it is important to note that the entire "group of six constituent gases" are considered "for permitting applicability . . . because that is how the [GHG] air pollutant is defined" despite the fact that a particular source may not emit all six of the well-mixed GHGs, e.g., motor vehicles only emit four of the six; they do not emit PFCs or SF_6. *Id.*

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or Title V permitting requirements based on their emission of non-GHG pollutants did not, on January 2, 2011, also become subject to PSD or Title V based on their emissions of GHGs alone. In other words, the only way a source's GHG emissions could potentially have become subject to PSD or Title V permitting requirements on January 2, 2011, was if the source had already been subject to those permitting programs based on its emissions of another regulated pollutant. In that case, the source's GHG emissions would have been subject to Title V and might then also have become subject to PSD (but only if those GHG emissions met or exceeded the prescribed PSD threshold levels for GHGs). For those sources that were able to evade Step's 1 regulatory reach, they will have until July 1, 2011, to prepare for Step 2, the Tailoring Rule's next scheduled phase-in, which will cast a wider net of CAA permitting program applicability for GHGs.

a. Step 1's PSD Implications From the Permitting Authority's Perspective

The additional administrative burden attributable to GHG-related PSD permitting under Step 1 will be the product of "anyway" PSD sources,[57] but this does not mean the additional administrative burden will be insignificant. Although no additional PSD permitting actions will be necessary under Step 1 solely on account of a source's GHG emissions (for instance, the number of sources currently subject to PSD each year was not expected to increase on January 2, 2011, when Step 1 was implemented), "permitting authorities will need to address GHG emissions as part of those permitting actions each year and, to do so, will require, each year, 34,400 additional workload hours costing an additional $3 million."[58] This considerable increase in cost and workload to permitting authorities is due in large part to Step 1's requirement that "anyway" PSD sources conduct BACT review for their GHG emissions,[59] a requirement that means permitting authorities must

> train[ ] staff in the PSD-related areas of GHG emissions calculations and BACT evaluations. In addition, permitting staff will need to build staff expertise and capacity for addressing GHG requirements in preparation for Step 2 . . . and in communicating and providing outreach to sources addressing GHG emissions for the first time."[60]

In recognition of Step 1's increased administrative burden, EPA tempered Step 1's overall impact on both regulated entities and permitting authorities by building in some flexibility for "anyway" PSD sources that obtained permits prior to commencement of the Step 1 phase-in.[61]

b. Step 1's Title V Implications From the Permitting Authority's Perspective

As was the case for PSD applicability under Step 1, the additional administrative burden attributable to GHG-related Title V permitting under Step 1 will be the product of "anyway" Title V sources, which are defined more broadly than "anyway" PSD sources.[62] Although no additional Title V permitting actions will be necessary solely on account of a source's GHG emissions (for instance, the number of sources currently subject to Title V each year was not expected to increase on January 2, 2011, when Step 1 was implemented), "permitting authorities will need to address GHG requirements for some of them; as a result, permitting authorities will need, each year, 27,468 additional work hours costing $1 million in additional funding."[63]

Two categories of Title V permitting actions are likely to be triggered by Step 1: "[1] the need for updates or amendments to Title V permit applications that are pending when GHGs become subject to regulation in Step 1 of the phase-in"[64]; and "[2] the incorporation of new applicable requirements for GHGs[, e.g., the terms of an "anyway" PSD source's new PSD permit for GHG emissions,] into existing permits for sources currently subject to title V."[65] Sources with Title V permits must address GHG requirements when they apply for, renew, or revise their permits; these requirements include any GHG applicable requirements, e.g., GHG BACT requirements from a PSD process, and associated monitoring, recordkeeping, and reporting.

57. *Id.* at 31523. "Anyway" PSD sources are those sources that would be undergoing PSD permitting for new construction or modification anyway based on emissions of non-GHG pollutants, but which then become subject to PSD requirements for GHGs because they increase GHG emissions by 75,000 tpy CO_2e or more. *Id.*
58. *Id.* at 31541.
59. *Id.* at 31523. Although the Tailoring Rule includes no BACT guidance for GHGs, EPA assures permitting authorities in the Tailoring Rule that the necessary combination of technical and policy guidance "will be available to support permitting agencies in their BACT determinations at the time that the GHGs become a regulated NSR pollutant, once the Tailpipe Rule takes effect in January 2011." *Id.* at 31526.
60. *Id.* at 31568.
61. *See id.* at 31593 ("A major source that obtains a PSD permit prior to January 2, 2011, will not be required . . . to reopen or revise the PSD permit to address GHGs in order for such a source to begin or continue construction authorized under the permit."); *see also id.* ("[A] source that is authorized to construct under a PSD permit but has not yet begun actual construction on January 2, 2011[,] may still begin actual construction after that date without having to amend the previously-issued PSD permit to incorporate GHG requirements.").
62. *See id.* at 31523. "Anyway" Title V sources are similar to "anyway" PSD sources, in the sense that they are sources subject to CAA permitting requirements based on emissions of non-GHG pollutants; however, the ≥ 75,000 tpy CO_2e threshold for "anyway" PSD sources does not apply to Title V, so "anyway" Title V sources automatically become subject to Title V permitting requirements for their GHG emissions regardless of the level of those GHG emissions. *Id.*
63. *Id.* at 31541.
64. *Id.* at 31595 ("Where additional applicable requirements become applicable to a source after it submits its application, but prior to release of a draft permit, the source is obligated to supplement its permit application.").
65. *Id.*:

> [W]here a source becomes subject to additional applicable requirements, the permitting authority is required to reopen the permit to add those applicable requirements if the permit term has three or more years remaining and the applicable requirements will be in effect prior to the date the permit is due to expire.

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2. Step 2 (July 1, 2011-June 30, 2013)

If a source evades PSD or Title V permitting requirements under Step 1 because it was not already subject to those permitting programs based on its emissions of another regulated pollutant, the source may now, under Step 2, become subject to PSD or Title V permitting requirements based on its GHG emissions alone. Thus, Step 2 casts a significantly wider net of CAA permitting program applicability than Step 1 does.[66]

a. Step 2's PSD Implications From the Permitting Authority's Perspective

According to EPA, "permitting authorities will need to issue GHG permits to two additional sources that newly construct and to 915 additional sources that undertake modifications. Doing so will require 310,655 additional workload hours costing an additional $24 million . . . ."[67] These numbers could have been higher, but they were moderated by EPA's willingness to exempt from permitting those sources not previously subject to PSD that commenced actual construction prior to becoming subject to PSD GHG requirements on July 1, 2011—Step 2 will allow these sources to continue construction without having to obtain a PSD permit.[68] However, citing the substantial lead time between the Tailoring Rule's publication and Step 2's commencement date, EPA explains in the Tailoring Rule that it is justified in "expect[ing] Step 2 sources that begin actual construction in Step 2 . . . to do so only after obtaining a PSD permit . . . ."[69]

b. Step 2's Title V Implications From the Permitting Authority's Perspective

According to EPA, "an additional 190 sources will require new Title V permits each of the first three years, and the permitting authorities' associated costs will be 141,322 work hours and $7 million more than the current program."[70] A source not previously subject to Title V that becomes subject to Title V requirements in Step 2 of the phase-in will be applying for an operating permit for the first time and must, therefore, "submit its permit application within 12 months after [it] 'becomes subject to the [operating] permit program' or such earlier time that the permitting authority may require."[71] For those sources already subject to Title V prior to Step 2's commencement, both pending permits and existing permits may have to be revised to incorporate "additional GHG-related applicable requirements (such as the terms of a PSD permit)"[72] that were not previously in effect at the time a Title V permit application was submitted or at the time such permit was issued.

III. Legal Impediments to the Tailoring Rule's Implementation

A. EPA's Legal Justification for the Tailoring Rule

EPA's legal justification for the Tailoring Rule is based on its interpretation of PSD and Title V applicability provisions under the *Chevron* two-step analysis,[73] accounting for three legal doctrines, which, according to EPA, individually and collectively support the Agency's regulation-making[74]:

> (1) [t]he "absurd results" doctrine, which authorizes agencies to apply statutory requirements differently than a literal reading would indicate, as necessary to effectuate congressional intent and avoid absurd results; (2) the "administrative necessity" doctrine, which authorizes agencies to apply statutory requirements in a way that avoids impossible administrative burdens; and (3) the "one-step-at-a-time" doctrine, which authorizes agencies to implement statutory requirements a step at a time.[75]

The *Chevron* two-step analysis refers to the analysis a court must undertake when reviewing a challenged agency interpretation. Assuming (1) the agency has authority to issue its challenged interpretation, (2) the statute that is the basis of the challenged interpretation is within the agency's

66. *See generally id.* at 31540 (providing a chart of the coverage and burden associated with various steps of the phase-in process). Step 2, courtesy of its having coined and defined the new term "major source" of GHG emissions, is anticipated to subject to PSD permitting requirements for the first time 550 newly-minted, major sources of GHGs; under Step 1, no new sources were introduced to PSD permitting requirements—only sources that were already subject to PSD for emissions of a non-GHG pollutant risked having their GHG emissions subjected to PSD. In addition, Step 2 is estimated to require PSD permitting actions for 1,363 modifications at major stationary sources compared to only 448 modifications during Step 1. *Id.*
67. *Id.* at 31541.
68. *Id.* at 31594 ("PSD preconstruction permitting requirements do not generally preclude a source from continuing actual construction that began before the source was a source required to obtain a PSD permit."); *see also id.* ("EPA will not require any sources to which PSD permitting requirements begin to apply in Step 2 to obtain a PSD permit to continue construction that actually begins before Step 2 begins.").
69. *Id.*:
    > This approach for Step 2 sources . . . differs from the approach described . . . for source[s] that obtained a PSD permit prior to Step 1 . . . . [A] Step 1 source that is authorized to begin actual construction before January 2, 2011, under a previously-issued PSD permit may begin actual construction under that permit after January 2, 2011, without modifying the PSD permit to address GHGs. However, a Step 2 source that was not required to obtain a PSD permit before Step 2 begins would need to obtain a PSD permit addressing GHGs if it has not yet begun actual construction prior to Step 2 . . . .

    but see id.:
    > Nevertheless, we recognize that the transition to the increased coverage of new sources and modifications that occurs in July [2011] will represent an unusual occurrence that may have unanticipated impacts. For this reason it is important to note that nothing in this rule forecloses our ability to further address such impacts, as necessary, by adopting rule changes or using other available tools.
70. *Id.* at 31541.
71. *Id.* at 31595. If a permitting authority does not require a new Title V source to submit its permit application earlier than the one-year limit that otherwise applies, the application will be due July 1, 2012, since the source would have become subject to the operating program on July 1, 2011, the first day of the Step 2 phase-in. *Id.*
72. *Id.*
73. *See supra* note 54.
74. Tailoring Rule, *supra* note 7, at 31516.
75. *Id.*; *see also supra* note 55 (describing in greater detail the absurd results doctrine).

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sphere of expertise, and (3) the agency's interpretation is in a format such as a regulation that is sufficiently formal and binding to be eligible to receive deference, then the court must conduct the *Chevron* two-step analysis to determine whether or not the challenged interpretation is entitled to deference. Under Step 1 of the *Chevron* two-step analysis, the court will examine the statute forming the basis of the challenged agency interpretation. If the statute is clear, then the court will uphold the agency interpretation, so long as it effectuates the clearly expressed intent of the U.S. Congress; however, if the agency interpretation strays too far from a strict interpretation of the statute, then the court will strike down the agency interpretation. If, on the other hand, the statute is ambiguous, then the court will proceed to Step 2 of the *Chevron* two-step analysis, which significantly improves the likelihood that the court will uphold the agency interpretation. Under Step 2, the court will uphold the agency interpretation, so long as it is a reasonable interpretation of the ambiguously expressed intent of Congress. Even if the agency reached a conclusion that differs from one the court may have preferred, the court must focus exclusively on the reasonableness of the agency's interpretation, making Step 2 of the *Chevron* two-step analysis an extremely deferential step.

Each of the three legal doctrines previously mentioned, i.e., absurd results, administrative necessity, and one-step-at-a-time, apply only during Step 1 of the *Chevron* two-step analysis—in the case of an agency's interpretation of an unambiguous statute—and justify the agency's minor deviations from a strict statutory interpretation (though not providing the agency the same latitude or level of deference afforded an agency's *Chevron* Step 2, reasonable interpretation of an ambiguous statute).

EPA argues that congressional intent in the CAA to apply the PSD permitting program to GHG sources is clear and that the Tailoring Rule's phased-in approach to regulation of GHG emissions is entirely consistent with that clear congressional intent. Alternatively, EPA states that, even if the applicable PSD provisions were proven to be ambiguous, the Tailoring Rule would still withstand a challenge, because it would then be viewed as a reasonable interpretation of an ambiguous statute, and, therefore, it would be entitled to *Chevron* deference.[76]

Regarding congressional intent to apply the Title V permitting program to GHG sources, EPA argues the Title V statutory provisions lack the same clarity of congressional intent found in the PSD provisions; therefore, EPA insists the Tailoring Rule is entitled to *Chevron* deference, because it is a reasonable interpretation of the ambiguous Title V provisions.[77]

The CAA is clearly not the ideal vehicle for GHG regulation, and EPA's arguments in support of the Tailoring Rule, which rely heavily upon the reasonableness of the Agency's statutory interpretation, emphasize the creativity required to craft within the confines of the CAA's provisions a regulation capable of addressing pollutants as widespread and decentralized as GHGs. Despite its imperfections, however, the CAA remains an effective tool to combat climate change, and EPA has done a decent and defensible job of tailoring the CAA to the amorphous contours of and the unique challenges posed by global GHG emissions.

B. Litigation

Given the very recent implementation of Step 1 of the Tailoring Rule and the reality that an even more substantial Step 2 is now only months away, opponents of the Tailoring Rule will attempt to unravel the regulation before either its environmental or economic impact can be fully assessed. More than 80 cases have been filed against EPA, and these cases reveal that Tailoring Rule opponents are pursuing a multipronged attack, challenging not only the Tailoring Rule itself, but also the interrelated regulations from which the Tailoring Rule derives its authority to regulate GHG emissions from stationary sources.[78] Most recently, Tailoring Rule opponents suffered a temporary setback when the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit denied a motion to stay the Tailoring Rule,[79] thereby paving the way for Step 1's on-time implementation on January 2, 2011. In that same decision, however, the court agreed to coordinate the various pending cases, so that all future hearings in those cases will be heard on the same day before the same three-judge panel.[80] Given the interrelatedness of the challenged regulations, coordination of the cases makes sense for purposes of judicial economy. But the court's decision to coordinate the cases also represents a small victory for Tailoring Rule critics, who will now have an enhanced opportunity to highlight not only the interrelatedness of the regulations, but also their interdependence, as is further described below.

To appreciate the Tailoring Rule's dependence upon its regulatory predecessors, it may be instructive to picture EPA's GHG regulations as a regulatory pyramid in which the Tailoring Rule rests atop not only the intermediate-

76. Tailoring Rule, *supra* note 7, at 31517.
77. *Id.*

78. *See generally* Gregory E. Wannier, EPA's Impending Greenhouse Gas Regulations: Digging Through the Morass of Litigation 2 (2010), http://www.eenews.net/assets/2010/12/14/document_gw_01.pdf [hereinafter Digging Through the Morass of Litigation]:

> Four separate EPA rulemakings are under review: (1) the "Endangerment Finding," which says that carbon emissions from moving vehicles are "reasonably likely" to threaten public health and welfare; (2) the "Tailpipe Rule," which, based on the Endangerment Finding, sets GHG emission standards for Light Duty Vehicles; (3) the "Timing Rule," or "Reconsideration Decision," which builds off of the Tailpipe Rule, interpreting the Clean Air Act's . . . language to authorize regulation of stationary sources; and (4) the "Tailoring Rule," which exempts small emitters from stationary source regulations.

79. Order at 3, Coalition for Responsible Regulation, Inc. v. EPA, No. 10-1073 (D.C. Cir. Dec. 10, 2010), *available at* https://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=541780.
80. *Id.*; *see also* Lawrence Hurley, *Court Order on Greenhouse Gas Rules Provides Comfort to Industry Challengers*, N.Y. Times, Dec. 14, 2010, http://www.nytimes.com/gwire/2010/12/14/14greenwire-court-order-on-greenhouse-gas-rules-provides-co-4226.html?scp=2&sq=tailoring%20rule%20motion%20to%20stay&st=cse (presenting various perspectives on the implications of the court's decision to coordinate the cases).

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level Tailpipe and Triggering Rules, but also the foundation-level Endangerment Finding. Viewed in this context, it is possible to see how direct attacks on the Tailoring Rule, though a viable option that many of the rule's opponents are aggressively pursuing, may prove to be less effective than indirect attacks on the Tailpipe Rule, Triggering Rule, and/or Endangerment Finding, each of which contributes in varying degrees to the strength of the foundation upon which the Tailoring Rule has been constructed.

By successfully attacking the Triggering Rule, which gave rise to the Tailoring Rule's regulation of GHG emissions from stationary sources at the precise moment the Tailpipe Rule's regulations of GHG emissions from motor vehicles took effect on January 2, 2011, opponents can eliminate the Tailoring Rule's basis for regulation of GHG emissions from stationary sources. But the PSD Interpretive Memo[81] and its subsequent clarification,[82] each of which contributed to the concept of the Triggering Rule, represent attempts by EPA to resolve ambiguity in the CAA[83]; therefore, EPA will have a strong argument that the Triggering Rule, as a reasonable interpretation of an ambiguous statute, is entitled to *Chevron* deference. Even if the Triggering Rule is defeated, the Tailpipe Rule would continue to regulate emissions of GHG emissions from mobile sources.

Since the Tailpipe Rule's "tak[ing] effect" triggers the Tailoring Rule's implementation, a successful challenge[84] to the Tailpipe Rule could undermine the Tailoring Rule; however, because the Endangerment Finding, which serves as the legal basis of the Tailpipe Rule, would still remain intact, EPA would arguably retain authority to issue a new Tailpipe Rule that addresses the challenged deficiency in the original regulation.

By attacking the Endangerment Finding itself, opponents could potentially topple the entire regulatory pyramid. A successful challenge to the Endangerment Finding would erode not only the legal basis for EPA's regulation of GHG emissions from motor vehicles and, by extension, the Tailpipe Rule that was created in response to the Endangerment Finding, but it would prevent the Tailpipe Rule from taking effect and, thereby, permanently deprive the Tailoring Rule of the Triggering Rule prerequisite without which the Tailoring Rule would cease to exist. Fortunately for EPA and the Tailoring Rule, attacks on the Endangerment Finding "face an uphill climb."[85]

C. Legislation

Tailoring Rule critics argue that EPA, by finalizing the Tailoring Rule, has effectively usurped congressional authority since the rule, which represents a significant revision to the CAA, is more akin to new legislation than new regulation, i.e., EPA is no longer implementing law through regulation-making; instead, it is creating new legislation. But will congressional concerns about EPA's alleged overreaching be sufficient to revive discussion of comprehensive climate change legislation in the Senate?

In light of the Democrats' self-proclaimed "shellacking" in November 2010, the 112th Congress is unlikely to pick up the controversial climate change baton dropped by the 111th Congress and resume the race toward a legislative fix to the issue of GHG emissions. In the unlikely and unexpected event that climate change resurfaces in the Senate as a top priority and promising piece of legislation, it would clearly preempt EPA's arguably questionable legal authority to regulate GHG emissions under the CAA, but, on a more practical level, it would also eliminate the need to fit a square peg (regulation of GHG emissions) into a round hole (the CAA).

Given Congress' current aversion to comprehensive climate change legislation, legislators seeking to derail the Tailoring Rule's implementation are more likely to renew efforts to block or defund the rule. But at least one legislative weapon used to attack the Tailoring Rule as recently as June 2010 will now have diminished utility to the 112th Congress. In June 2010, a joint resolution of disapproval introduced by Sen. Lisa Murkowski (R-Alaska) pursuant to the Congressional Review Act sought to overrule EPA's Endangerment Finding and "thereby deprive EPA of authority to regulate GHG emissions, [b]ut the measure fell four votes short in the Senate and never had a serious chance of passing the House or of being signed into law by the president."[86] The Congressional Review Act, which gives Congress the power to block an agency regulation from taking effect, so long as both Houses of Congress pass a joint resolution that is either signed by the president or survives a presidential veto, is unlikely to be employed by the 112th Congress, since "the core EPA findings and rules [i.e., the Endangerment Finding, Tailpipe Rule, Triggering Rule, and Tailoring Rule] were published more than

81. *See supra* notes 22-24 and accompanying text.
82. *See supra* notes 32-33 and accompanying text.
83. *See* 42 U.S.C. §7475(a)(4) (requiring BACT "for each pollutant *subject to regulation* under this chapter," a requirement that had historically created confusion among regulated entities and permitting authorities as to whether or not pollutants subject only to monitoring or reporting requirements were also subject to PSD) (emphasis added); *see also* PSD Interpretive Memo, *supra* note 22, at 2.
84. Digging Through the Morass of Litigation, *supra* note 78, at 3:
> [P]rimary arguments against the Tailpipe Rule are that its benefits are too trivial to justify action, and that it is duplicative of already-existing Corporate Average Fuel Economy (CAFE) Standards under the National Highway Traffic Safety Administration (NHTSA). However, EPA responds by pointing out that carbon emissions are not redundant to the emissions of various ozone-causing gases (they impose a different type of obligation, which allows more nimble regulatory options), and that there is no mandate in the CAA that regulations meet any minimum effectiveness threshold so long as the benefits exceed the costs.
85. *Id.*:
> The major case against the Endangerment Finding rests on allegations that EPA illegally delegated its duties to unreliable outside parties (specifically the UN Intergovernmental Panel on Climate Change, or IPCC), and that it was impermissibly vague in its rulemakings. . . . [However,] EPA has a long history of relying on outside peer-reviewed scientific reports with strong judicial deference.
86. Jean Chemnick, *Congressional Review Act Might Not Be an Option to Fight EPA's Greenhouse Gas Regs*, N.Y. Times (Jan. 6, 2011), http://www.nytimes.com/cwire/2011/01/06/06climatewire-congressional-review-act-might-not-be-an-opti-3674.html.

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60 continuous legislative days ago, making it impossible to nullify them through a resolution of disapproval under the act."[87] The passage of time that has softened the blow that a joint resolution of disapproval might otherwise have imparted means the 112th Congress is more likely to challenge the Tailoring Rule either by denying appropriations or introducing new moratoria bills comparable to the one introduced by Sen. Jay Rockefeller (D-W. Va.) in March 2010. The Rockefeller Bill, which would have delayed for a period of two years EPA's authority to regulate GHG emissions from stationary sources, was never brought to the floor for a vote during the 111th Congress; however, Senator Rockefeller is expected to introduce a similar measure in early 2011.[88] But even if a moratorium bill eventually passes both Houses of Congress, it seems unlikely that the Democrat-controlled Senate would be able to muster 67 votes to override a likely presidential veto.

Although the moratoria bills will attract considerable attention, forthcoming spending bills will likely provide Congress with a more effective means of restricting EPA's regulatory reach. Congress will have two opportunities in 2011 to cut EPA's funding and/or build into budget bills language that expressly prohibits EPA's use of funds to regulate GHG emissions from stationary sources. Because Congress during the recent lame duck session succeeded only in passing a short-term spending bill that funds federal agencies through March 4, 2011, Congress will have its first opportunity to use a spending bill as an EPA restraining order when it passes additional spending legislation by March 4 to fund agencies through the end of fiscal 2011; spending bills for the 2012 budget, which must be passed by September 30, will give Congress another opportunity this year to limit EPA's GHG-related regulatory authority.[89]

IV. A More Potent Regulatory Alternative to the Tailoring Rule?

With all of the current focus on litigation targeting the Tailoring Rule and predictions about the probability of congressional action to pause or preempt it, a less mentioned but no less compelling EPA alternative to the Tailoring Rule has largely been ignored. The Tailoring Rule explains that the nonattainment NSR program does not apply to GHGs, since there are no NAAQS for any of the six well-mixed GHGs[90]; however, is it that unreasonable to contemplate a regulatory environment in which GHGs are listed as criteria pollutants and, therefore, subject to NAAQS?

Section 108 of the CAA outlines the elements required to list a new air pollutant as a criteria pollutant for purposes of establishing NAAQS for that air pollutant.[91] In *Natural Resources Defense Council, Inc., v. Train*,[92] the court held that the Administrator has a "mandatory duty"[93] to list a pollutant once he or she has determined that "[the pollutant] 'has an adverse effect on health' and comes from 'numerous or diverse mobile or stationary sources.'"[94] *Train* precedent coupled with (1) the Endangerment Finding and (2) the argument that GHG emissions are the product of "numerous or diverse mobile or stationary sources" could eventually deprive EPA of further discretion not to list GHGs as a criteria pollutant. In fact, the Center for Biological Diversity and 350.org petitioned EPA in December 2009 to designate as criteria pollutants the six well-mixed GHGs described in the Tailoring Rule, plus a seventh, nitrogen tetrafluoride (NF_3), and to establish individual national pollution limits for each of the seven GHGs.[95]

The Tailoring Rule may present a unique set of regulatory challenges, but imagine trying to achieve compliance in an AQCR classified as nonattainment for GHGs, which would subject a major stationary source of GHGs located in that AQCR to the more stringent nonattainment NSR program. Unlike the major NSR program, which requires individual emission sources to implement technology-based standards that account for compliance costs, NAAQS are established without regard to cost or the technological feasibility of compliance, focusing exclusively on the level of air quality that each state must achieve to ensure an "adequate margin of safety" for public health (primary standards) and public welfare (secondary standards). If GHGs are eventually listed as a criteria pollutant, NAAQS for GHG emissions would be established nationwide for all AQCRs, requiring states to revise their state implementation plans (SIPs) and, ultimately, achieve the level of air quality mandated by the new NAAQS for GHGs. Aside from the compliance challenges that NAAQS for GHGs would pose for the states, the administrative burden encountered by permitting authorities under Steps 1 and 2 of the Tailoring Rule would be compounded further by the requirement of preconstruction permitting under the

87. *Id.*
88. *See id.*
89. *See id.*
90. *See supra* notes 12-13 and accompanying text.
91. *See* 42 U.S.C. §7408(a)(1)(A)-(C), stating that the Administrator *shall* periodically revise the list of criteria pollutants to include[ ] each air pollutant—emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.
92. 411 F. Supp. 864, 6 ELR 20366 (S.D.N.Y. 1976), *aff'd*, 545 F.2d 320, 7 ELR 20004 (2d Cir. 1976) (addressing the Administrator's failure to list lead as one of the criteria pollutants pursuant to §108 of the CAA).
93. *Id.* at 867.
94. *Id.* at 871; *see also id.* at 868:
    While the Administrator is provided with much discretion to make the threshold determination of whether a pollutant has 'an adverse effect on health,' after that decision is made, and after it is determined that a pollutant comes from the necessary sources, there is no discretion provided by the statute not to list the pollutant.
95. *See generally* Center for Biological Diversity and 350.org, *Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act*, Dec. 2, 2009, http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf (discussing EPA's legal duty to designate the GHGs as criteria pollutants and providing recommended primary and secondary standards for each of the GHGs, including a primary and secondary limit of 350 ppm for CO_2).

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more onerous nonattainment NSR program for individual emissions sources located in AQCRs classified as nonattainment for GHGs.

As alarming and legally inevitable as the prospect of the nonattainment NSR program's application to GHGs might be, the program's severity and inflexibility—traits attributable to the program's disregard for the technological feasibility of compliance—would create significant practical challenges if applied to curtail a problem as prevalent and borderless as GHG emissions.[96] The practical challenges of making attainment something even remotely attainable would make it difficult for EPA to apply the nonattainment NSR program absent some modifications.[97] But difficult certainly doesn't mean impossible, and the Tailoring Rule is a constant reminder that EPA can and will continue to find creative ways to adapt aging environmental statutes of limited scope to address modern environmental issues of global proportions. One thing is for sure: if EPA eventually applies the nonattainment NSR program to GHG emissions, the Tailoring Rule will begin looking to its current critics like a long-lost friend.

V. Conclusion

Although only in its infancy, the Tailoring Rule is already testing the outer limits of EPA's regulatory authority and the CAA's intended reach. The Tailoring Rule's recent implementation represents a significant milestone in the history of the country's ongoing debate over climate change, but both the rule's immediate future and long-term prospects remain anything but certain. Legal challenges—both in Congress and in the courtroom—will continue to attack the rule and its underpinnings, and those challenges threaten to delay, redefine, or undermine the rule before it is fully deployed. In the meantime, however, permitting authorities and many stationary sources must confront the current and unprecedented reality of nationwide regulation of GHG emissions. For them, January 2, 2011, marked not only the start of yet another new year but, more importantly, a new era of environmental regulation.

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96. *See* Raymond B. Ludwiszewski & Charles H. Haake, *Comment on* Developing a Comprehensive Approach to Climate Change Mitigation Policy in the United States: Integrating Levels of Government and Economic Sectors, 39 ELR 10732, 10734 (Aug. 2009):

> Because greenhouse gases disperse globally, it would be impossible for EPA to distinguish attainment from nonattainment areas for any greenhouse gas NAAQS. If NAAQS for greenhouse gases is set at a level below the current global atmospheric concentration, then EPA would be required to list all states as nonattainment areas. Under this scenario, a state could never achieve attainment status with its own efforts; rather, the ability of states to reach attainment would depend on the willingness not only of other states, but also of nations around the globe, to reduce their greenhouse gas emissions. Alternatively, if EPA set the greenhouse gas NAAQS at the current atmospheric concentrations, states would have to offset all new emissions—both from within their own borders, as well as far away venues like India and China—in their SIPs. Neither of these scenarios makes much sense.

See also Robert D. Brenner & Anna Marie Wood, *Comment on* Developing a Comprehensive Approach to Climate Change Mitigation Policy in the United States: Integrating Levels of Government and Economic Sectors, 39 ELR 10723, 10725 (Aug. 2009):

> States use SIPs as the primary tool to attain, maintain and enforce NAAQSs. . . . SIPs are not typically designed to implement a national control program or strategy for global pollutants. Instead, SIPs are used to address criteria pollutants that are local or regional in nature. . . . [T]he ability of a state to meet or maintain a concentration-based NAAQS for GHGs is inextricably linked to contributions of GHGs from sources in other states and outside the United States for which the state has limited, if any, ability to control.

97. *See* Brenner & Wood, *supra* note 96, at 10725 (discussing several GHG-related considerations EPA would need to address prior to establishing NAAQS for GHGs, such as the concentration-based level at which a NAAQS for GHGs should be established, as well as the impact of foreign emissions on a given state's ability to achieve attainment and the possibility of allowing states to account for those foreign emissions).