

Comments of the Louisiana Association of Business and Industry, the Louisiana Chemical Association, the Louisiana Mid-Continent Oil and Gas Association, the Louisiana Pulp & Paper Association

On

**EPA's Proposed Greenhouse Gas Tailoring Rule for the Clean Air Act
Title V Operating Permit and Prevention of Significant Deterioration Permit Programs
Docket ID No. EPA-HQ-OAR-2009-0517**

The Louisiana Association of Business and Industry, the Louisiana Chemical Association, the Louisiana Mid-Continent Oil & Gas Association, the Louisiana Oil and Gas Association and the Louisiana Pulp & Paper Association (collectively the "Associations") submit the comments below on the proposed Greenhouse Gas Tailoring Rule (the "GHG Tailoring Rule") proposed by the Environmental Protection Agency ("EPA") on October 27, 2009 at 74 Fed.Reg. 55291. These Associations represent the leaders of business and industry from the major economic sectors in Louisiana. More detailed information on each of these organizations is included in Exhibit 1.

The Associations' comments on the GHG Tailoring Rule are set forth in detail below. The Associations request that these comments also be considered by EPA in making any final determination on the proposed rules jointly developed by EPA and the National Highway Traffic Safety Administration ("NHTSA") for regulation of fuel efficiency standards and emissions of some greenhouse gases from motor vehicles ("the Motor Vehicle GHG Rule") proposed at 74 Fed. Reg. 49454 on September 28, 2009 (Docket EPA-HQ-OAR-2009-0472; FRL-8959-4; NHTSA-2009-0059). These two rulemaking actions are interdependent as the latter is the trigger for applicability of the former, according to EPA. Because EPA did not consider the impacts to stationary sources of the Title V and PSD rules that are allegedly triggered by EPA's promulgation of the Motor Vehicle GHG rule in the docket for the Motor Vehicle GHG rule, EPA must consider such impacts, as discussed in these comments, prior to enactment of either rule.

I. EPA Should Delay Regulation of GHG Motor Vehicle Emissions under Section 202(a) of the Clean Air Act and Allow NHTSA to Proceed Independently With CAFÉ Standards for MY 2012-2016 Vehicles

The Associations request that EPA delay regulation of greenhouse gases ("GHGs") from light duty vehicles pursuant to the Clean Air Act until Congress had had sufficient time to enact legislation that is specifically designed to address GHG and climate change issues. EPA has interpreted the Clean Air Act as meaning that regulation of GHGs for motor vehicles will automatically, instantly, make such GHGs regulated pollutants subject to the Title V Operating Permit and the Prevention of Significant Deterioration ("PSD") Permit Programs for stationary sources. If EPA forbears to regulate GHGs under the motor vehicle programs, EPA will obviate the need for this proposed GHG Tailoring Rule, and all of the adverse consequences that EPA has identified as flowing from regulation of GHGs under the Clean Air Act in the near term. At the same time, allowing the National Highway Transportation Safety Administration

(“NHTSA”) to proceed with the CAFÉ standards will result in significant GHG reductions that will further the goals of EPA.

National response to the challenges of global warming calls for a considerate and comprehensive approach that should be enacted by elected representatives through legislation designed to most effectively attack the problem. Regulation of GHGs should not be shoe-horned in to the ill-fitting programs of the Clean Air Act that were developed for completely different purposes. EPA has recognized the staggeringly adverse consequences of triggering the Title V and PSD Permit programs for GHGs, from both an economic perspective to regulated entities and from the perspective of creating an overwhelming administrative burden to the local, state and federal agencies administering such programs.¹ EPA should consider as well the more intangible adverse consequence of promoting a fundamental disrespect for the rule of law which is bound to occur through EPA’s decision to regulate GHGs through such imprudent regulatory means when EPA itself acknowledges that this is not the way climate change regulation should be accomplished.

A. Regulation of GHGs Under the Title V and PSD Permit Programs Makes No Sense Given the Statutory Purposes of Such Programs

The Clean Air Act Title V Operating Permit and PSD Permit Programs are not designed nor suited for regulation of GHGs. The Title V program was designed to capture all federally applicable control requirements for a major stationary source into one common permit for ease of enforcement, compliance enhancement, and transparency to the public. Because there are no federally applicable control requirements for GHGs yet developed for stationary sources, automatically triggering this Title V permit program through EPA’s decision to regulate GHGs for mobile sources makes no sense. *Due solely to the decision to presently regulate GHGs from motor vehicles, EPA estimates that 6 million stationary sources, many of which are small businesses, medical facilities, schools and even residential buildings, would fall under the requirement to obtain a Title V permit even though they have no federally applicable requirements.* EPA’s proposed solution, to rely on the “absurd results” and the “administrative necessity” doctrines in order to raise the threshold by rule to 25,000 TPY of GHGs² for a period of six years, in the face of a statutory provision establishing the 100 TPY threshold for regulated pollutants, lies on a shaky foundation. The Associations fear that a federal court will find that the absurd results and administrative necessity are not created by the statutory terms themselves (a prerequisite for application of the doctrine), but rather by EPA’s *discretionary* decision to regulate GHGs under the Clean Air Act at this time when EPA is not required by law to do so. As stated by Justice Scalia in a concurring opinion involving the “absurd results” doctrine in *Nixon v. Missouri Municipal League*: “I do not think...that the avoidance of unhappy consequences is adequate basis for interpreting a text.”³

¹ In the Preamble to the proposed GHG Tailoring Rule, EPA stated: “If PSD and title V requirements apply at the applicability levels provided under the CAA, State permitting authorities would be paralyzed by permit applications in numbers that are orders of magnitude greater than their current administrative resources could accommodate.”

² The 25,000 TPY level would be established as carbon dioxide equivalents (CO₂e).

³ 541 U.S. 125, at 141 (2004).

The PSD Permit Program was designed to assure that areas that were already meeting National Ambient Air Quality Standards (“NAAQS”) would not experience significant deterioration of their air quality through new major sources being constructed within the area or existing major sources undergoing a major modification. Thus, the statutory provisions for the PSD program were fashioned specifically to address this purpose by requiring that such new sources conduct an air quality review to ensure that the NAAQS, or increments of such NAAQS pollutants established to allow growth, were not exceeded, and to install up-to-date technology - Best Available Control Technology – when embarking on such construction or modernization projects. But, there is no NAAQS for GHGs. There have been no areas designated as attainment or nonattainment for GHGs. Application of the PSD program to GHGs also makes no sense. As with the Title V program, EPA seeks to avoid, in part, the nonsensical approach of regulation of GHGs under the PSD program by a rule establishing the threshold for applicability of the PSD program to 25,000 TPY for new sources and either 10,000 TPY CO₂e or 25,000 TPY for major modifications to existing sources. Such a rule is directly contrary to statutory provisions establishing the PSD major source threshold at either 100 or 250 TPY of PSD regulated pollutants, depending upon the type of source.

As with the Title V program, EPA justifies this proposed “tailoring” approach for the PSD program by arguing that a literal interpretation of the statute would result in absurd consequences and unbearable administrative burdens, thus freeing EPA to alter the statutory thresholds by orders of magnitude. Again, the Associations fear that a federal court will find that the absurd results and attendant unbearable administrative burdens are not created by the statutory terms, but rather EPA’s nonobligatory decision to regulate GHGs under the Clean Air Act at this time.

B. EPA Is Not Required by the Clean Air Act or Judicial Decisions to Regulate GHGs from Motor Vehicles Under Clean Air Act Section 202 By a Particular Deadline

EPA’s proposal to regulate GHGs under the Motor Vehicle GHG Rule is based on Section 202(a) of the Clean Air Act. This section is the basis for both EPA’s proposal to establish a fleet-wide CO₂ standard as well as its proposal for individual vehicle standards for nitrous oxide (“N₂O”) and methane emissions.⁴ Section 202(a) plainly does not establish a statutory deadline for EPA action, but rather indicates that EPA should “from time-to-time” review and enact or revise standards to control motor vehicle air pollutant emissions.

And, although EPA suggests to the contrary in the Preamble to the GHG Tailoring Rule, EPA is not compelled by the Supreme Court’s decision in *Massachusetts v. EPA*⁵ to enact standards under Section 202(a) by a particular deadline. The Court’s decision in *Massachusetts v. EPA* plainly gave EPA substantial discretion regarding the timing of any GHG motor vehicle rules.⁶ The Court stated: “If EPA makes a finding of endangerment, the Clean Air Act requires

⁴ 74 Fed. Reg. 49,454 (September 28, 2009).

⁵ *Commonwealth of Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438 (2007).

⁶ *See* 549 U.S. 497, 533 (2007).

the agency to regulate emissions of the deleterious pollutant from new motor vehicles. *Ibid.* (stating that “[EPA] shall by regulation prescribe ... standards applicable to the emission of any air pollutant from any class of new motor vehicles”). **EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies.**⁷ Thus, EPA’s decision as to the timing of regulation of GHGs from motor vehicles is discretionary, and a delay to allow Congressional action, or to otherwise mitigate the significant adverse consequences associated with the concomitant triggering of Title V and PSD programs is permissible.

C. Congress Is Moving Forward to Enact Comprehensive GHG Legislation That Is Likely to Supplant the Clean Air Act

Congress is moving forward and is likely to enact comprehensive GHG legislation during 2010 under new legal provisions are designed to combat climate change in the most cost-effective way to avoid unnecessary and adverse impacts to the national economy. The U.S. House of Representatives passed the American Clean Energy and Security Act of 2009 (ACES Act), H.R. 2454, on June 26, 2009. This is a comprehensive national climate and energy legislation would establish an economy-wide, greenhouse gas (GHG) cap-and-trade system and supplemental measures to address climate change and to promote national security by building a clean energy economy that relies less on foreign fuels. This draft cap and trade system, while far from perfect in its current form, establishes a platform for debate by the Senate and/or coordination with Senate legislative proposals.

The Senate Committee on Environment and Public Works, approved The Clean Energy Jobs and American Power Act (S. 1733) on November 5, 2009. This proposed legislation limits the scope of EPA’s authority to regulate GHGs under the Clean Air Act in certain areas. In addition, on December 11, 2009, a bi-partisan group consisting of Senators John Kerry (D-MA), Joe Lieberman (ID-CT), and Lindsey Graham (R-SC) sent a letter to President Obama outlining a climate bill they will introduce that provides compromises between Democrats and Republicans on some key issues, including some market mechanisms to provide for flexibility and some support for nuclear power, and oil and gas development, and clean coal measures, and incentives for manufacturers become more energy-efficient.

The Associations take no position on these legislative efforts at this time, except to the extent that the Associations firmly believe that the legislative process is the appropriate avenue for development of national climate change laws – not makeshift regulation by EPA under the Clean Air Act with potentially devastating economic consequences.

D. The NHTSA CAFÉ Standards Will Achieve Substantial GHG Reductions Without EPA Regulation Under the Clean Air Act

EPA should allow the National Highway Transportation Safety Administration (“NHTSA”), to move forward with its proposal to adopt the vehicle Corporate Average Fuel Economy (“CAFÉ”) standards. EPA should forego further EPA action for a sufficient period of

⁷ *Id.* (emphasis added).

time to allow Congressional action. Under the joint Motor Vehicle GHG Rule proposal, NHTSA proposed CAFE standards for Model Year 2012-2016 passenger cars and light trucks, and EPA is proposed national GHG emissions standards under the Clean Air Act. The primary driving force for the timing of this proposed rule is NHTSA's need to establish the CAFE standards in time for vehicle manufacturers to meet the requirements for manufacturing 2012 Model Year vehicles.⁸ As articulated in the Technical Support Document, Regulatory Impact Analysis and Preamble to the Proposed Motor Vehicle GHG Rule,⁹ the adoption of the CAFE standards by NHTSA alone would result in significant GHG emissions reductions, even if that is not the primary purpose of the CAFE standards. Thus, the bulk of the benefits sought by EPA with respect to decreases in GHGs from motor vehicles will occur simply through relying upon the DOT standards as a first phase.

EPA regulation need not be undertaken jointly with NHTSA, but could allow the NHTSA rules to be first phase, with additional EPA regulation to follow, if necessary. This phased approach would entirely avoid the multitude of absurd consequences and administrative burdens EPA has projected for stationary sources. The Court in *Massachusetts v. EPA* recognized the overlap between EPA's mission to protect the environment and DOT's¹⁰ mission to establish fuel efficiency standards. However, the Court concluded that "there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."¹¹

EPA could avoid the detrimental consequences of regulating GHGs under Section 202 by withdrawing or delaying final promulgation of the GHG Motor Vehicle Rule. EPA frequently relies upon regulation by another agency in determining the necessity of its own regulations. The Supreme Court's decision did not preclude such an approach – provided EPA analyzes the impact of the NHTSA standards in terms of their impact on GHGs and does not solely rely on a generalized concept of fuel efficiency.

Notably, the majority of the GHG reduction benefits predicted to result from the joint NHTSA and EPA proposal would be realized even if only the CAFE standards, and not the

⁸ 49 U.S.C. 32902(a) requires the Secretary of Transportation to promulgate final standards no later than 18 months prior to the start of the Model Year in which they apply, and 49 U.S.C. 32902 (b)(3)(B) limits standards to five Model Years.

⁹ See <http://www.epa.gov/oms/climate/regulations.htm> for the Preamble and links to the draft and final technical support documents and regulatory impact analysis.

¹⁰ NHTSA is an agency within the umbrella of the U.S. Department of Transportation.

¹¹ The Regulatory Impact Analysis for the Motor Vehicle GHG rule indicates a joint rule by NHTSA and EPA will provide additional flexibility to auto manufacturers due to the CAA's more flexible regulatory provisions; however, NHTSA and EPA did not include in their economic analysis the corresponding adverse impacts that EPA regulation of motor vehicle GHGs would trigger for stationary sources. If EPA had appropriately considered the economic impacts to permitting agencies and regulated stationary sources, as required by law, a different conclusion may well have been reached. As noted in the Preamble to the GHG Tailoring Rule, EPA estimates that the additional cost to permitting agencies for the Title V program alone will be over \$15 billion, even with the "tailoring" proposed by EPA. 74 Fed. Reg. at 55302. The EPA cost estimate for the additional burden to permitting agencies resulting from triggering the PSD program was \$257 million annually. 74 Fed. Reg. at 55301. The Associations believe that the PSD estimate is grossly underestimated.

additional Clean Air Act Section 202 provisions, were to be enacted. While the CAFÉ standards would primarily be directed at CO₂ and the EPA Section 202 proposal would regulate CO₂, N₂O and methane, CO₂ emissions account for nearly 95% of total GHG emissions that result from fuel combustion during vehicle use.¹² Thus, while the EPA reductions of N₂O and methane would be delayed if EPA foregoes promulgation of the proposed Motor Vehicle GHG Rule for a time, most of the reductions of CO₂ would still occur. The Preamble to the Motor Vehicle GHG rule recognized that the differences in CO₂ reductions as a result of EPA joint regulation was only slightly greater than with CAFÉ standards alone.¹³ Further, due to the close cooperation of the agencies during regulatory development, the types of vehicles and metrics of the CAFÉ standards will achieve the vast majority of EPA’s environmental protection goals, even if EPA does not move forward with the Section 202(a) standards.

E. Summary

Action by EPA *at this time* to regulate GHG emissions from motor vehicles would be an abuse of EPA’s discretion given that EPA is not under a legal deadline for action per Section 202(a) of the Clean Air Act, substantial GHG reductions will still occur through implementation of the CAFÉ standards, and failure to delay promulgation of the Motor Vehicle GHG Rule would cause potentially catastrophic economic impacts by imposing Title V and PSD burdens on stationary sources. EPA should not risk the possibility that American businesses will bear the full brunt of these adverse impacts by relying on the absurd results and/or administrative necessity doctrines. Such an approach is reckless and should be avoided.

II. Economic and Fiscal Impact to Louisiana

A. Impact of EPA Decision to Regulate GHGs Under Clean Air Act if Tailoring Rule is Invalid.

The Associations agree with EPA that triggering the Clean Air Act Title V and PSD Permit programs for GHGs **at the current statutorily imposed levels** would be absurd and would result in untenable burdens on the United States economy. Such an interpretation of the Clean Air Act would essentially cause the collapse of major sectors of the Louisiana economy, in particular. Although the proposed GHG Tailoring Rule purports to substantially mitigate these consequences, the proposed rule is directly contrary to the statutory terms of the Clean Air Act (as interpreted by EPA). The proposed rule rests on EPA’s belief that it can enact regulatory that go well beyond the statute on the basis of the absurd results or administrative necessity doctrines. The Associations believe that EPA should evaluate both the proposed Motor Vehicle GHG Rule and the proposed GHG Tailoring Rule together and conduct an analysis of the economic risks should EPA’s legal premises prove incorrect. The Associations believe that it is

¹² 74 Fed. Reg. at 49,675.

¹³ The Regulatory Impact Analysis for the Motor Vehicle GHG rule indicates that the rule as a whole is more flexible and less stringent due to the “differences regarding the treatment of air conditioning improvements (related to CO₂ and HFC reductions)” 74 Fed. Reg. 49468. But., the Preamble also indicates that the difference in CO₂ reduction with the EPA proposal versus the CAFÉ standards alone is only “slight.” *Id.*, at 49477.

not only prudent, but mandatory, that EPA consider these substantial legal uncertainties.¹⁴ The Associations believe that a risk-benefit analysis will clearly show that the risks are not worth the minimal benefits that EPA gains by moving forward with the Motor Vehicle GHG rule.

In so doing, the Associations request that EPA consider the following potential consequences that are unique to Louisiana:

- Louisiana has its own federally-delegated Title V program. The Louisiana Department of Environmental Quality currently administers 761 Title V permits in Louisiana. It took the state nearly ten years to issue the initial Title V permits to these facilities, and many are now undergoing the renewal process and/or modifications. If the Title V program is triggered at a 100 TPY level CO₂e, that number would be anticipated to rise to 90,000.¹⁵ The administrative burden of issuing Title V permits would quickly overwhelm the entire LDEQ permitting system.
- Louisiana has its own federally-delegated PSD program. The Louisiana Department of Environmental Quality currently issues an average of 7 initial PSD permits per year, 4 PSD permits for major modifications, and 3 PSD minor modifications each year (2007-2009 year average).¹⁶ Such permits require a significant amount of time and resources. LDEQ currently employs only one full-time air quality modeling expert and is under a state-wide hiring freeze. If PSD permits are triggered for sources at the statutory 100/250 TPY level, then thousands of PSD permit actions would be filed each year. The PSD permit program simply could not function.
- Note that Louisiana has a pre-construction Title V program wherein a source cannot commence construction or modification until it obtains a Title V permit or permit revision, even where PSD is not triggered. See LAC 33:III.501. For example, small boilers in the 5 MMBtu/hr range that are common in commercial buildings, hospitals and light industry emit approximately 2500 TPY CO₂e if fired with natural gas (more if fired

¹⁴ Indeed, EPA commonly includes an uncertainty analysis in developing most of its proposed rules where scientific uncertainty or incomplete information is available. No less should be required in the face of such legal uncertainty. As stated by EPA Region 8: “A well-performed uncertainty analysis helps decision-makers and the public place the risk estimates in the proper perspective and facilitates informed decision-making.” http://www.epa.gov/region8/r8risk/hh_uncertainty.html.

¹⁵ EPA estimated the number of such sources in the United States as 6 million. If the number of such sources is roughly equivalent to the ratio of Louisiana’s population to the United States population, then 90,000 such sources are located in Louisiana. Source: U.S. Census Bureau State and County Quick Facts. The 2008 population for Louisiana and the United States were projected to be 4.4 million and 304 million, respectively. Louisiana hosts approximately 1.5% of the U.S. population.

¹⁶ EPA estimated that about 50 PSD permits are issued each year in the United States. The Associations believe this is a gross underestimation. The states within EPA Region 6 alone are likely to issue this many. A review of publicly available news notifications and TCEQ records show that Texas typically issues over 40 PSD permits per year and Louisiana issues over 11. The Louisiana public records database is available electronically at: <http://www.deq.louisiana.gov/apps/pubNotice/>. A search for “PSD” in the “Search All Public Notices” blank will show all PSD permit actions in a given year.

with fuel oil or coal). These would have to obtain both Title V and PSD permits prior to commencement of construction. The delays attendant with such a system would effectively kill the projects.

- Many hurricane recovery projects involving reconstruction to address the devastation caused by Hurricanes Katrina, Rita, Ike and Gustave would trigger PSD and Title V permits and would be so effectively delayed that they may not occur. Prime among these would be the construction of a new Charity Hospital in Orleans Parish to replace the currently damaged Charity Hospital.¹⁷ The new hospital would be a 424-bed teaching hospital, with affiliations to both LSU and Tulane University medical schools that would sit adjacent to a new Veterans Affairs hospital. The projected cost of the new hospital is \$1.2 billion. This important project could be delayed through the need to obtain a pre-construction PSD permit. PSD could be triggered under either the 250 TPY statutory trigger or 10,000 TPY proposed GHG Tailoring Rule thresholds.
- Flood control projects for the New Orleans area and all of South Louisiana will be prevented or significantly delayed due to the necessity to permit the pump engines under PSD and Title V. PSD review typically takes from 6 to 12 months, but would likely take much longer given the additional permitting burdens imposed on the Louisiana DEQ by having so many sources that would now be required to go through the PSD process.
- New or modified public wastewater treatment plants throughout the state, such as the planned improvements to the plant for the Lower Ninth Ward in New Orleans, will be significantly delayed due to the necessity to obtain PSD and Title V permits for both methane and CO₂ emissions associated with the facilities and with any non-electric pumps associated with the systems.¹⁸
- Landfill gas projects that will reduce GHGs will be significantly delayed and perhaps abandoned due to financing issues because the boilers or other combustion sources that will burn the captured landfill gases and/or other aspects of construction or reconstruction of the project will first have to obtain PSD and Title V permits. Note that it takes only about 1100 TPY of methane to be equivalent to 25,000 TPY CO₂e, so many landfills may be affected. Such projects will be slowed for years by this process given the overwhelming permitting burdens placed on the agencies by EPA's proposed actions. Such delay may very well mean that the projects are not built at all. This is directly contrary to the goals of reducing GHGs. Such a project has been authorized by the Metro

¹⁷ See Times-Picayune, August 28, 2009, "Jindal, Tulane and LSU leaders sign new hospital deal," http://www.nola.com/politics/index.ssf/2009/08/jindal_tulane_and_lsu_leaders.html and Times-Picayune, September 29, 2009, "State Panel Endorses Plan to Rebuild Charity Hospital," http://www.nola.com/politics/index.ssf/2009/09/state_panel_endorses_plan_to_r.html

¹⁸ For a description of on-going sewerage improvement projects in the Lower Ninth Ward that have not yet started construction and would be subject to Title V and PSD permitting, see: <http://www.swbno.org/documents%5Cpress%20releases%5C082909%20katrina%209th%20ward%20recovery%20projects.pdf>.

Council for the City of Baton Rouge for a municipal landfill.¹⁹ This project is estimated to reduce GHGs by the equivalent of 59,000 vehicles annual emissions; however, it involves construction of a new system at the landfill which would trigger such permitting.²⁰ Adverse impacts of this type will also stymie the goals of the federal American Recovery and Reinvestment Act of 2009, signed into law on February 17, 2009, which included an extension until December 31, 2012 for the production tax credit for renewable energy, including waste-to-energy and landfill gas combustion.

- Development of natural gas resources in the Haynesville Shale and other areas of the state will grind to a halt due to the necessity to obtain PSD and Title V permits for the compressor engines and other equipment needed for bringing new wells on-line. Such compressor engines can typically be permitted in less than 1 month under current Louisiana standardized oil and gas permits, but would trigger both Title V and PSD if the threshold is 100 TPY. The Secretary of the Louisiana Department of Natural Resources Scott Angelle recently announced that activity in the Haynesville Shale accounts for nearly 10.4 % of all of the current oil and gas exploration in the United States.²¹ Requiring Title V and PSD permits prior to construction or modification where such process could take over a year or more to obtain is counter-productive to an overall greenhouse gas emission reduction strategy. Natural gas emits only about 55% of the CO₂e emissions emitted by burning coal and about 75 % of those emitted by burning fuel oil, on a Btu equivalent basis. Moreover, the uncertainty created by litigation over the PSD Tailoring Rule and what BACT may be required for such compressor engines will harm investment in Haynesville Shale and similar deposits of natural gas within the nation. This would artificially prop up the price of natural gas, causing economic problems for existing natural gas fired utilities and their customers as well as industrial concerns that use natural gas for feedstock and energy purposes.

In an article about the Haynesville Shale on April 13, 2009, titled “U.S. Gas Fields Go From Bust to Boom,” the Wall Street Journal quotes Jason Grumet, executive director of the National Commission on Energy Policy, and former senior adviser to President Obama during his campaign, as stating: ““The availability of natural-gas generation enables us to be much more courageous in charting a transition to a low-carbon economy.”²² Any risk of preventing or slowing the development of the Louisiana natural

¹⁹ EPA has identified candidate landfill gas projects in 7 other parishes – Ascension, St. Mary, Ouachita, Pointe Coupee, St. Landry, Tangipahoa, and Livingston. In addition, EPA has identified potential projects in 20 other parishes. See: <http://www.epa.gov/lmop/proj/xls/lmopdata.xls>.

²⁰ <http://brgov.com/pressdet.asp?gID=1496>

²¹ <http://www.shreveporttimes.com/article/20091215/NEWS01/912150310/1060>. See also “US Gas Fields Go From Bust to Boom” Wall Street Journal, April 13, 2009, at <http://online.wsj.com/article/SB124104549891270585.html>, which quotes Jason Grumet, executive director of the National Commission on Energy Policy, and former senior adviser to President Obama during his campaign: ““The availability of natural-gas generation enables us to be much more courageous in charting a transition to a low-carbon economy,”

²² <http://online.wsj.com/article/SB124104549891270585.html>.

gas deposits in the Haynesville Shale and elsewhere should be consciously avoided by EPA as an integral part of its strategy to combat global warming.²³

- For pulp and paper mills, even a small increase of speed on a paper machine could trigger applicability of a Title V revision or PSD permit. For mills with surface impoundments – periodic dredging and a clean-out of the impoundment for necessary maintenance could trigger the requirement for permitting action. This could cause work stoppages if the capacity of the wastewater treatment facilities is jeopardized.
- A number of projects for the improvement and construction of new technical and community college facilities in Louisiana could be delayed and/or require redesign. For example, the following projects with a PTE for GHGs above 100 TPY are anticipated to begin construction in 2010 or 2011:
 - Construction of a new Fletcher Technical Community College in Houma ~\$18 million
 - River Parishes Community College, New Campus (Sorrento) ~\$17.8 million
 - Delgado Community College, Improvements to Hurricane Damaged Bldgs. (New Orleans) ~\$14.,6 million
 - Sidney N. Collier Campus, Delgado, New Campus (New Orleans) ~ \$12.5 million

These community colleges are essential to development of an educated workforce for the business and industries within Louisiana.

EPA is gambling on the use of seldom successful legal theories to uphold the PSD Tailoring Rule. The likelihood of litigation concerning this approach is high as a number of citizen groups have already raised legal challenges in permitting processes to assert that the Title V and PSD programs should be applicable to GHGs at the current 100 TPY and 250 TPY significance levels. Given the magnitude of the adverse consequences in the event these theories are not upheld in court, EPA would be reckless should it determine to continue on this risky course of action. Instead, EPA should defer regulation of GHGs under the motor vehicle programs to allow time for Congress to craft a comprehensive and well-designed approach to regulation of GHGs.

B. Impact of EPA Regulation of GHGs Under the GHG Tailoring Rule – If Upheld

Significant adverse economic consequences to the Associations members and the economy of Louisiana will result from EPA’s proposed GHG Tailoring Rule, even if upheld. Many sources within Louisiana will still be subject to the Title V and PSD programs even if the major source threshold is increased to 25,000 TPY CO₂e. The following table shows typical emission sources that would be major under the proposed Title V and PSD thresholds. Many small sources within Louisiana, particularly in the oil and gas industry, have a small boiler and/or multiple several gasoline or diesel engines that together would result in the facility being classified as a major source. Some small businesses, shopping centers, apartment complexes,

²³ Further information on the Haynesville Shale is available at <http://dnr.louisiana.gov/haynesvilleshale/>.

and hospitals within Louisiana may also qualify as major sources due to these thresholds and EPA’s definitions of common control and “adjacent or contiguous” properties.

Emission Source Type	PTE* for Major Source Threshold (25,000 TPY CO2e)**	PTE for Major Modification Under PSD (10,000 TPY CO2e)**
Gasoline Engine	5,284 Hp	2,114 Hp
Diesel Engine	4,963 Hp	1,985 Hp
Natural Gas Fired Engine	7,412 Hp	2,965 Hp
Natural Gas Fired Boiler	47.6 MMBtu/Hr	19 MM Btu/hr
Wood Fired Boiler	29.2 MMBtu/Hr	12 MM Btu/hr

*PTE = Potential to Emit, assumes 8760 hours per year operation, unless permit action to limit PTE below threshold is obtained.

** Values are given for individual equipment; however, the Title V and PSD programs require aggregation of all equipment at an individual facility when determining the total aggregate emissions. Thus a source may be a major source by having a number of pieces of equipment of smaller size than shown above.

The Preamble indicates that approximately 14,000 sources nationwide would need to obtain operating permits for GHG emissions under the Title V program (versus 6 million if the Tailoring Rule is not upheld). This estimate is based on the proposed GHG Tailoring Rule, “major source” threshold being 25,000 TPY CO2e. According to EPA, about 20% of these sources are expected to be municipal landfills due to the regulation of methane. Even if these values are accurate, these figures still represent a significantly increased permitting burden for the states, in particular Louisiana. As noted above, Louisiana currently manages 761 Title V permits and is in the process of renewing and modifying a substantial fraction of these. Such renewals involve determinations of Compliance Assurance Monitoring (“CAM”) for many sources, which is a labor intensive process.²⁴ In addition, many of these existing permits also include minor modifications necessary for operation of the facilities permitted. If an additional 14,000 sources would enter the Title V program nationwide, one would expect between 210 and 280 of these to be within Louisiana. This would represent nearly a 30% increase in the workload for the Louisiana Department of Environmental Quality.

EPA believes that a 30% increase in the Title V permitting workload is manageable. The Associations respectfully disagree. Louisiana, like many states, is currently cutting its state budgets due to the economic conditions in the nation. Louisiana’s revenue estimating conference has projected a \$1.1 Billion shortfall in revenues to meet budget obligations for 2010; thus,

²⁴ The CAM rule under 40 C.F.R. Part 64, was not applicable to the initial Title V permits, but instead was phased-in through the first renewal. Many of the initial Title V permits in Louisiana have CAM plans in pending renewal applications that must be reviewed. The EPA did not adequately consider that states like Louisiana are presently overburdened by the Title V permit renewal/CAM issues, thereby exacerbating the adverse impact of adding additional Title V and PSD sources to the permitting program through the GHG Tailoring Rule.

cutting the budget will be required.²⁵ Thus, the budget for the Louisiana Department of Environmental Quality will likely see additional cuts, not increases. Moreover, the Louisiana Department of Environmental Quality is currently under a hiring freeze.²⁶

Even if the Title V applications are not required for 12 months, and even if the Department had the necessary economic resources to hire more staff, it would be a monumental effort to enact additional fees to cover the program, obtain increases to the state budget, authorization to hire more personnel, then to hire and train sufficient permit writers and technical experts to process these permits within a reasonable period of time. The result would be either that such newly required GHG permits would be ignored, or that the system for processing non-GHG related permits would be so overburdened that these could not be timely issued, or both.

Additional burdens would be imposed through the impact on the PSD permitting program. EPA estimates that only about 400 projects per year would trigger PSD permitting if the significance threshold is established at 25,000 TPY CO₂e. This is less than 8 per state, on the average. The Associations believe that EPA's estimate is considerably underestimated particularly for Louisiana which has a heavy concentration of oil and gas development and industry. However, even if the estimate is reasonably accurate, an additional 8 PSD permits to issue on a timely basis during a year is a significant burden on the agencies. This will cause the existing PSD program to slow to the point that projects cannot be undertaken within a time period necessary to the economics of the project. EPA's assumption that processing a PSD permit for GHGs would be of similar complexity compared to processing a permit for existing PSD pollutants is unfounded. There is no current database for BACT determinations or guidance for the air quality evaluation portion of the program. Thus, additional work on the part of permit writers to complete the case-by-case BACT review will be necessary.

Louisiana DEQ already issues an average of 11 PSD permits per year (7 for new facilities, plus 4 major modifications), each of these entailing extensive BACT and air quality review.²⁷ The addition of 8 full PSD actions on top of this will nearly double the workload and will result in delays in processing PSD permits. Because construction cannot commence until the permit is issued, any delay is of great concern to the regulated community. Often the amount of time that a PSD permit will take to process is one of the make or break factors for obtaining financing for the project. Such projects need to be developed, financed and permitted within narrow time windows in order to be viable in competitive markets. Increasingly, the permitting burden, and even uncertainties surrounding the permitting burden, are driving projects out of the United States.

²⁵ See "State must cut \$197 million more to balance budget," The Baton Rouge Advocate, December 18, 2009 at <http://www.theadvocate.com/news/politics/79590392.html>.

²⁶ The Governor's Executive Order of July 24, 2009 instituting the hiring freeze is available at <http://www.gov.state.la.us/assets/docs/OfficialDocuments/2009/2009EOExecutiveDepartmentLimitedHiringFreeze.pdf>.

²⁷ Data obtained from review of LDEQ's public notices for 2007-2009, using search "PSD" at this database:

Further, in Louisiana, triggering a PSD permit or new Title V permit also triggers a state requirement for an Environmental Assessment under La.R.S. 30:2018. This process is much like the Environmental Impact Statement process under the National Environmental Policy Act and requires an extensive review of the social and economic factors of a project, alternatives, and mitigating measures that go beyond PSD compliance equipments. This factor alone will add multiple additional issues for both permit applicants and the permitting agency that should be taken into consideration by EPA before EPA imposes such requirements on Louisiana. Because this is a statutory provision, only the Louisiana Legislature could make revisions to exempt GHG emissions. Such could not occur until at least 2011.

EPA has never promulgated a rule with such a significant impact on state permitting resources with such a short time period for effectiveness and implementation. The Associations urge EPA not to do so now. As indicated above, these consequences can be completely avoided by EPA delay of the Motor Vehicle GHG Rule. This would be the rational approach.

II. Even if EPA Adopts the Proposed Motor Vehicle GHG Rule Under the CAA, Such Does Not Trigger Regulation Under the Title V and PSD Programs

A. Pollutants Regulated Under Title V

The Title V definition of “regulated pollutant” should extend only to pollutants regulated from stationary sources, not motor vehicles. The primary purpose of the Title V program is to collect all applicable federal rules for major stationary sources under one document to enhance compliance and enforcement for stationary sources. If there are no substantive federal rules for GHGs from such stationary sources – the pollutant should not be considered to be “regulated” for the purposes of Title V. If there are no federally applicable requirements, it is a pointless exercise to issue a Title V permit for the source. EPA could very well use the absurd results doctrine to support this interpretation. This is a much more natural and palatable use of the absurd results doctrine than justifying an arbitrary major source threshold to trigger a permit requirement when the permit itself will be meaningless.

B. Pollutants Regulated Under PSD

The Associations believe the EPA is improperly interpreting the Clean Air Act statutory provisions that collectively establish the PSD program. These consist of Sections 160-169b, 42 U.S.C. §§ 7470-7492. As noted above, EPA has stated in the PSD Tailoring Rule that PSD requirements will be triggered when the Motor Vehicle GHG Rule becomes final because the GHGs will become “regulated” pollutants under the Act at that time.²⁸ However, this interpretation ignores the purposes of the PSD program and also would effectively read out portions of the governing statutes for the PSD program found in Sections 160-169 of the Clean Air Act. The appropriate role of the PSD program is inextricably linked to the establishment and maintenance of National Ambient Air Quality Standards. A reading of the Act as a whole, and the PSD provisions in particular, clearly shows that EPA is to first establish NAAQS for a pollutant, then designate areas of the nation as being in attainment or nonattainment of those

²⁸ 74 Fed. Reg. 51,545.

NAAQS, and finally, requiring states to adopt State Implementation Plans applying PSD requirements to areas that are in attainment or unclassifiable, and Nonattainment New Source Review for areas that are not in NAAQS attainment. As indicated in *Alabama Power v. Costle*,²⁹ the PSD program is not to be triggered by an increase in pollutants for which there is no NAAQS.

In particular under Sections 161 and 165 of the Clean Air Act it is clear that location within an area designated as NAAQS attainment (or unclassifiable) for a particular pollutant is a prerequisite for applicability of the PSD program. to those areas designated as attainment or unclassifiable under Section 107.³⁰ Section 161 directs EPA is to promulgate regulations “to prevent significant deterioration of air quality in each region . . . **designated pursuant to section 107 [NAAQS designations] as attainment or unclassifiable.**” (42 U.S.C. 7471, emphasis added.) Further, Clean Air Act Section 165(a) prohibits construction of a major emitting facility only within “**any area to which this part applies**” if the facility has not first obtained a PSD permit. Thus, it is evident that if there is no NAAQS for a GHG, there can be no attainment status under Section 107, and the PSD program under 161 and 165(a) is simply not triggered.

EPA’s conclusion that major source and major modification triggers for GHGs under the PSD program for stationary sources apply immediately upon regulation of GHGs from motor vehicles is based solely upon a provision of the PSD statutory program governing the requirements for BACT.³¹ This provision, in Section 165(a)(4) states that BACT is required for any pollutant “subject to regulation” under the Clean Air Act. Contrary to EPA’s interpretation, this statute simply does not say that just because BACT is required for a non-NAAQS pollutant such as GHGs that the trigger for PSD in the first place – related to NAAQS regulated pollutants, must change. A more natural reading of the statute that gives meaning to all of the provisions would be that PSD is triggered only where a source makes a modification that increases emissions significantly of a NAAQS pollutant or constructs a new source of a NAAQS pollutant, then under PSD all pollutants “subject to regulation” must be controlled to BACT levels. Thus, if a facility triggers PSD for a non-GHG NAAQS pollutant, it would also have to implement BACT for GHGs if a significant increase in GHG emissions occurs.

The above interpretation would still result in implementation of GHG measures in an ad hoc manner that is less-desirable than implementation through a more specifically designed Congressional program. The PSD program does not allow off-sets, which are a central feature of the ACES legislation and the currently pending Senate GHG legislation. Such off-sets could allow greater GHG reductions at less cost and without as much harm to the economy. Further,

²⁹ 636 F.2d 323 (D.C. Cir. 1979).

³⁰ To the best of our knowledge, there are no judicial decisions concerning EPA’s interpretation of PSD as being applicable to non-NAAQS pollutants. Since the Clean Air Act was amended to add the PSD program in 1977, the only newly regulated pollutants have been stratospheric ozone depleting substances regulated under 40 C.F.R. Part 82 and Hazardous Air Pollutants (“HAPs”) regulated under Section 112 of the Act. HAPs were specifically excluded from PSD under Section 112 as part of the 1990 Clean Air Act Amendments. To the best of the Association’s knowledge, EPA has never applied PSD to stratospheric ozone depleting substances. Thus, there is no long, consistent EPA interpretation of the PSD program becoming automatically applicable to non-NAAQS pollutants upon their regulation under one facet of the Clean Air Act program.

³¹ 42 U.S.C. § 7475(a)(4).

from a purely environmental point of view, because BACT determinations are a one-time determination during the PSD program, accelerating the BACT decisions under PSD at this time may well result in a determination that BACT is “no control.” The source would then be built with no controls and would become an existing source. This would effectively prevent or may prevent EPA from requiring additional controls on GHGs that may be developed for existing sources within a few years. The Associations request that EPA consider a better approach than the GHG Tailoring Rule— make a determination that regulation under the PSD program would lead to absurd results such that the PSD program must be delayed for a sufficient time period to allow a comprehensive and considered approach – through legislation or regulation. If the absurd results doctrine applies, it should support this analysis rather than establishing artificial PSD major source and major modification thresholds.

C. Regulation of GHGs as a Single Group

The EPA’s proposed Motor Vehicle GHG rule involves regulation of only 3 GHGs – CO₂, N₂O, and methane. EPA requested comment on whether EPA should group all GHGs as a single “pollutant”. This approach would mean that Title V and PSD requirements would be triggered for all 6 identified GHG pollutants -- the 3 GHGs regulated under the proposed Motor Vehicle Rule plus Hydrofluorocarbons (“HFCs”), Perfluorocarbons (“PFCs”), and Sulfur Hexafluoride (“SF₆”)-- under the PSD Tailoring Rule. EPA does not provide a substantial reason for determining to regulate all 6 compounds under the Title V and PSD programs even where 3 of these are not proposed to be regulated under the motor vehicle standards.

The Associations believe that EPA cannot rely on the example of regulation of VOCs under the PSD program as support for this approach. The actual PSD pollutant is ozone and VOCs are regulated as a surrogate for ozone because they are precursors to ozone formation. The situation is not the same with respect to the individual GHGs.

Exhibit 1 – Information Concerning Commenters

All of the commenters below have members who either emit greenhouse gases, manufacture and/or refine products that release GHGs when used or combusted by downstream users, or have business operations that are dependent upon entities that would be regulated by EPA's proposed Motor Vehicle GHG Rule and the GHG Tailoring Rule. The members of these Associations thus have significant interest in the current rulemaking as well as other pending decisions and rulemakings that EPA is considering with respect to GHGs.

The Louisiana Association of Business and Industry ("LABI") is a statewide association that advocates for an improved business climate in Louisiana. LABI represents its members in connection with legislation, rules and issues pertaining to environmental matters related to business. LABI's goal is to seek a balance between economic development and environmental protection. LABI is member-supported, with a membership of approximately 5,000 business owners and operators located throughout the state. Comprised primarily of small businessmen and women, LABI members share the common goals of promoting economic development and bringing strategic focus to business issues before the state's legislative, judicial and regulatory bodies. LABI's members can be found in the following economic sectors: accounting; banking and financial services; chemical manufacturing; communications; construction; energy, oil & gas; engineering services; food and beverage production and marketing; health care; hotels and restaurants; legal services; manufacturing; retail and wholesale businesses; tourism and transportation.

The Louisiana Chemical Association ("LCA") is a nonprofit Louisiana corporation composed of 66 member companies with over 94 chemical manufacturing plant sites in Louisiana. LCA members manufacture basic and specialty chemicals, pharmaceuticals, fertilizers and other products essential to the modern economy. LCA members are vital to the Louisiana economy. LCA members provide support to the Louisiana economy by providing nearly 24,000 jobs. In addition, LCA member companies bring over \$800 million annually to the state treasury and local governments through household earnings generated directly and indirectly by the chemical industry. LCA members commitment to economic growth also recognizes the need for careful environmental stewardship. LCA members spend one out of every four dollars on pollution abatement measures.

The Louisiana Mid-Continent Oil and Gas Association ("LMOGA") is a state-wide industry trade association representing members who together produce, refine, market and transport crude oil, natural gas, and petroleum products originating in Louisiana. Louisiana is the third leading producer of natural gas and the fourth leading producer of crude oil in the country. When including the oil and gas production in the Gulf of Mexico, Louisiana becomes the second leading natural gas producer in the country and the third leading crude oil producer. The active refineries in the State of Louisiana account for 15 percent of the total refining capacity in the country. There are thousands of miles of pipelines in the state, safely carrying crude oil from the Gulf of Mexico to refineries in Louisiana and other states as well as carrying natural gas to all parts of the country. In addition there are pipelines carrying refined products such as gasoline from and through Louisiana to other states. LMOGA members include 16

refineries and numerous production facilities, natural gas plants, compressor stations, and product terminals.

The Louisiana Oil and Gas Association (“LOGA” known before 2006 as “LIOGA”) was organized in 1992 to represent the independent and service sectors of the oil and gas industry in Louisiana. Members of LOGA include exploration, production and oilfield services businesses. The primary goal of LOGA is to provide the industry with a working environment that will enhance the industry. LOGA services its membership by creating incentives for Louisiana's oil and gas industry, preventing undue tax impacts, participating in regulatory development to ensure that regulatory actions are not so burdensome that they will prevent legitimate business operations, and educating the public and government concerning the importance of the oil and gas industry in the state of Louisiana. LOGA has a membership base of over 940 companies specifically doing business in Louisiana.

The Louisiana Pulp and Paper Association (“LPPA”) is a nonprofit Louisiana corporation, composed of 8 member companies and several wood products manufacturing businesses. LPPA’s member companies collectively operate over 30 pulp, paper, and wood products facilities throughout Louisiana. Forest industries are the second largest manufacturing employer in Louisiana, providing over 18,000 manufacturing jobs with an annual payroll in excess of \$764 million dollars. Another 8,000 individuals are employed in harvesting and transportation of timber. In 2003, the timber crop generated a value added of over \$2.7 billion, accounting for roughly 61% of the value added by all agricultural crops. The annual economic impact of forestry and forest products on Louisiana’s economy is over \$3 billion dollars.

The Baton Rouge Area Chamber (“BRAC”) is a nonprofit organization dedicated to fostering a strong, growing economy throughout the nine parish Baton Rouge region by serving as the primary advocate and change agent for the region's business community. BRAC is the voice for business and other entities concerned with economic development within the region. BRAC members include large multi-national corporations, medium sized businesses, small businesses and educational institutions, such as Louisiana State University and Southern University. BRAC has over 1404 members, and its members, by type of business, include: auto body and repair, bakeries, chemical manufacturers, contractors, convenience stores, delivery services, dry cleaners, florists, hospitals, industrial repair, marine transport, oil companies, port authorities, staffing companies, tour bus charters, utility companies, wholesalers, and wrecker services.